NOS. 09-17241, 09-17551

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENNEGGER, in his official capacity as Governor of California, et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.
Defendant-Intervenors-Appellants/Petitioners.

Appeal/Mandamus Petition from United States District Court
for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

APPELLANTS'/PETITIONERS' BRIEF IN RESPONSE TO CALL FOR EN BANC RECONSIDERATION

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En banc review is not warranted in this case. The panel's holdings—both on jurisdiction and the merits—followed directly from, and were entirely consistent with, this Court's precedent, precedent from other circuits, and precedent from the Supreme Court. In particular, the panel carefully considered the Supreme Court's recent decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. __, No. 08-678 (Dec. 8, 2009), but ultimately concluded that it need not definitively resolve the question of whether *Mohawk*'s holding should be extended to the First Amendment privilege at issue because this Court's precedents make clear that mandamus jurisdiction is appropriate in these circumstances if jurisdiction does not exist under the collateral order doctrine.

BACKGROUND

The panel opinion reversed the district court's discovery orders in this suit challenging the constitutionality of Proposition 8 ("Prop 8"), a California initiative amendment providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. The Appellants/Petitioners are the "official proponents" and a "primarily formed ballot committee" that supported Prop 8 (collectively, Proponents). Plaintiffs sought, and the district court ordered Proponents to produce, internal and confidential communications (from one-on-one emails to drafts of campaign ads) relating to Proponents' "advertising or messaging strategies and themes," material that Plaintiffs admitted

is "core political speech and undeniably entitled to broad First Amendment protection." RR 4, 222.[1] The district court deemed this nonpublic material relevant to the intent of the electorate in passing Prop 8, even though the information, by definition, was never seen by the electorate. The panel reversed, finding that Plaintiffs had not satisfied the heightened burden that attends compelled disclosure of core political speech and associational activities.

A Judge of this Court has called for a vote to determine whether the case will be reheard en banc. The order requiring briefing in response to the call asks the parties to address whether rehearing "is warranted in light of *Mohawk* …." Order, *Perry v. Schwarzenegger*, No. 09-17241 (9th Cir. Dec. 16, 2009). The answer is no.

ARGUMENT

I. THE PANEL PRUDENTLY LEFT OPEN THE COLLATERAL ORDER DOCTRINE QUESTION RAISED BY *MOHAWK*

As the panel recognized, *Mohawk* held that "discovery orders concerning the attorney-client privilege are not appealable under the collateral order doctrine." *Perry v. Schwarzenegger*, No. 09-17241, slip op. at 10 (9th Cir. Dec. 11, 2009). The panel observed that this Court "*may* have collateral order jurisdiction" even

[1] The "relevant parts of the record," FED. R. APP. P. 8(2)(B)(iii), were submitted to the panel in four volumes of exhibits ("RR") and citations in this brief continue to refer to those volumes. Pursuant to advice from the Office of the Clerk of Court, Proponents are conforming this brief to the page limits set out in 9th Cir. R. 40-1.

after *Mohawk* because "the First Amendment privilege differs in ways that matter to a collateral order appeal analysis from those involving the attorney-client privilege." *Id.* at 10, 13 (emphasis added). But although the panel was "inclined to conclude that [the Court has] jurisdiction under the collateral order doctrine," *id.* at 15, it ultimately did not find it necessary definitively to resolve this question. Rather, the panel rested its jurisdictional holding squarely on the ground that the Court has mandamus jurisdiction if the collateral order doctrine does not apply, *id.* at 10, 15-22. Accordingly, the question of *Mohawk*'s application to privileges other than the attorney-client privilege remains open, and there is no need for the en banc Court to take the extraordinary and unnecessary step of addressing this issue. *See, e.g.*, *Lehner v. United States*, 685 F.2d 1187, 1189 (9th Cir. 1982) (avoiding difficult jurisdictional question where alternative basis for jurisdiction exists); *United States v. Hardesty*, 958 F.2d 910, 912 (9th Cir. 1992) (en banc review is not required when a conflict can be resolved or avoided).

In *Mohawk*, the Supreme Court explained that denying collateral order review to attorney-client privilege rulings did not foreclose appellate review of such orders where "litigants [are] confronted with a particularly injurious or novel privilege ruling." *Mohawk*, 558 U.S. __, slip op. at 9. The Court identified mandamus review as one such "avenue" for correcting "serious errors," "clear abuse[s] of discretion," and "manifest injustice[s]." *Id.* at 9-10. Here, the district

court's privilege ruling was a "serious" and "novel" error that worked a "manifest injustice" on Proponents by abrogating core First Amendment rights. In short, this is precisely the type of extraordinary case that the Supreme Court left open for immediate appellate review in the wake of *Mohawk*.

In concluding that mandamus jurisdiction was available even if the collateral order review doctrine does not apply, the panel followed a well-trod path forged by this Court's precedents As the panel explained, this Court has frequently exercised mandamus jurisdiction to review discovery orders in closely analogous cases. *See Perry*, slip op. at 17 (citing *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486 (9th Cir. 1989); *Taiwan v. United States Dist. Court*, 128 F.3d 712 (9th Cir. 1997)). Indeed, "[m]andamus is appropriate to review discovery orders 'when particularly important interests are at stake.' " *Id.* at 16 (quoting 16C WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3935.3 (2d ed. 2009)). Here, as in *Foley*, *Admiral*, and *Taiwan*, the interest implicated by the discovery order—the right to engage in private and/or anonymous core political speech and association—is particularly important. *See, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341, 347-48 (1995). Accordingly, the panel's jurisdictional ruling is in line with this Court's precedent and there is no need for

the en banc Court "to secure or maintain uniformity of the court's decisions." FED. R. APP. P. 35.

II. THE PANEL'S DECISION ON THE MERITS ADHERES TO NINTH CIRCUIT, SISTER-CIRCUIT, AND SUPREME COURT PRECEDENT

In deciding the merits, the panel faithfully applied Ninth Circuit and Supreme Court precedent to conclude that compelled disclosure of core political speech and associational activity in this case would run afoul of the First Amendment. Further review is unwarranted.

First, the panel reversed the district court's ruling that the First Amendment privilege from compelled disclosure applies only to "the identities of rank-and-file volunteers and similarly situated individuals." RR 3. The panel's holding is correct, flowing directly from prior Ninth Circuit and Supreme Court precedent. *See DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825 (1966) (First Amendment privilege shields disclosure of "information relating to [DeGregory's] political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings"); *Dole v. Services Employees Union, AFL-CIO*, 950 F.2d 1456, 1459-60 (9th Cir. 1991) (prima facie case of First Amendment privilege had been made with respect to union meeting minutes that "record discussions of a highly sensitive and political character"). The panel's holding is also consistent with the Supreme Court's holding in *McIntyre* that, under the First Amendment, a speaker in a referendum campaign

cannot be compelled to disclose her identity, which is "*no different from other components of the document's content that the author is free to include or exclude*." 514 U.S. at 348 (emphasis added). This Court has forcefully reaffirmed that holding, explaining that *McIntyre* applies to associations no less than to individuals. *See ACLU of Nevada v. Heller*, 378 F.3d 979, 989-90 (9th Cir. 2004) ("The anonymity protected by *McIntyre* is not that of a single cloak …. Like other choice-of-word and format decisions, the presence or absence of information identifying the speaker is no less a content choice for a group or an individual cooperating with a group than it is for an individual speaking alone.").[2]

The panel's decision follows this Court's longstanding precedent recognizing—in the specific context of a challenge to a referendum—that compelled disclosure "of the private attitudes of the voters … would entail an

[2] The right recognized in *DeGregory* and these other cases—the right to be one's own editor and censor, with free choice of when to speak and not speak publicly—is firmly established in the Supreme Court's jurisprudence. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.") (citation omitted); *PG&E Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 9 (1986) (conditioning speech on publication of unwanted additional speech unconstitutionally "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("[A]ny such a compulsion to publish that which reason tells them should not be published is unconstitutional.") (quotation marks omitted); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment … includes … the right to refrain from speaking at all.").

intolerable invasion of the privacy that must protect an exercise of the franchise." *SASSO v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970); *see also McIntyre*, 514 U.S. at 343 (the protected "tradition of anonymity" in speech "is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation").

Second, the panel faithfully applied the two-part framework this Court has previously established for testing claims of First Amendment privilege. *See Perry*, slip op. at 23-28, 32-37. As the panel explained, under *Brock v. Local 375, Plumbers International Union of America*, 860 F.2d 346 (9th Cir. 1988), and *Dole v. Service Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456 (9th Cir. 1991), the party resisting disclosure " 'must demonstrate … a prima facie showing of arguable first amendment infringement' " and, if the prima facie case is made, the burden shifts to the requesting party to demonstrate (i) a " 'compelling' " need for the information and (ii) that compelled disclosure is the " 'least restrictive means' " of obtaining it. *Perry*, slip op. at 25-26 (quoting *Brock*, 860 F.2d at 349-50).

Here, the panel correctly concluded that disclosure of Proponents' nonpublic political communications made during a controversial referendum campaign would "have a deterrent effect on the exercise of protected activities." *Id*. at 29. The Court identified at least two chilling effects that would arise from such discovery in cases like this one: deterrence from participation in campaigns and deterrence

of the "free flow of information within campaigns." *Id.* at 29-32. These conclusions are well-grounded in controlling precedent. *See Dole*, 950 F.2d at 1459-61 (deterrent effect on participation in union meetings was sufficient to establish prima facie case of First Amendment privilege and group members "no longer feel free to express their views … is precisely the sort of 'chilling' " the First Amendment privilege is meant to protect against); *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) (compelled disclosure violated the First Amendment where it "may induce members to withdraw from the Association and dissuade others from joining it"); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 556-57 (1963) (compelled disclosure violated the First Amendment where "the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is … immediate and substantial"); *see also Perry*, slip op. at 30-31 n.9 (cataloguing cases establishing the First Amendment "right of associations to be free of infringements in their internal affairs").

Citing to the ACLU's amicus brief supporting Proponents (despite the ACLU's support for Plaintiffs on the merits of their constitutional challenge to Proposition 8), the panel correctly pointed out that "the threat that internal campaign communications will be disclosed in civil litigation can discourage organizations from joining the public debate over an initiative." Slip op. at 30 n.8.

This observation is more than speculation in this case, as Plaintiffs have recently admitted that they served third-party subpoenas on "some church organizations, other advocacy groups or other organizations that were supporting Proposition 8." Tr. of Hr'g, *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. Dec. 16, 2009), at 43:15-19 (attached as Ex. 1).

The panel found that the record below amply established a prima facie case of First Amendment infringement. Specifically, the panel credited the declaration of Mark Jansson, who stated that if his "personal, non-public communications … regarding this ballot initiative … are ordered to be disclosed," he will "drastically alter how [he] communicate[s] in the future," he "will be less willing to engage in such communications," and would "seriously consider whether to even become an official proponent again." Slip op. at 32-33. Other evidence in the record is to the same effect.[3] Indeed, here the chill would arise not only from the fear of unwanted disclosure of confidential political expressions and associations, but also from the severe, extensive, and undisputed harassment and reprisals that have attended

[3] *See, e.g.*, RR 259-60 (declaration of Ronald Prentice, volunteer campaign chairman) (explaining that "[w]idespread retaliation and harassment against donors and volunteers had a negative effect on participation in the campaign in favor of Proposition 8" and that if he had known "non-public communications … would be subject to disclosure, [he] would have communicated differently … [and] been more guarded, and fearful"); RR 309 (declaration of Frank Schubert, campaign manager) (stating that "if the broad discovery in this case is permitted" to go forward "it will significantly suppress the future participation in, and course of, initiative and referendum campaigns and that he "and [his] firm will change the way [they] engage in political speech and campaigning").

public disclosure of the identities of supporters of Proposition 8. *See* RR 229-60, 302-586; Thomas M. Messner, *The Price of Prop 8*, THE HERITAGE FOUNDATION, *available at* www.heritage.org/Research/Family/bg2328.cfm. The Supreme Court has repeatedly held that evidence of such harassment supports application of the First Amendment privilege. *See NAACP*, 357 U.S. at 462 (privilege applies where there is evidence that "on past occasions" disclosure has exposed "members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (crediting evidence that past disclosure "had been followed by harassment and threats of bodily harm" and evidence of "fear of community hostility and economic reprisals that would follow public disclosure").[4]

On the Plaintiffs' side of the scale, the panel rightly found that no showing of compelling need has been made in this case. The panel observed that

[4] The panel also reversed the district court's conclusion that an attorneys-eyes-only protective order would entirely ameliorate any chilling effect compelled disclosure will have in this case. *Perry*, slip op. at 26 n.6. This holding, too, was consistent with controlling precedent, for if such protective orders were always sufficient to protect First Amendment freedoms, then the Supreme Court and other federal courts would always impose such remedies in First Amendment privilege cases. Yet in *NAACP*, *Bates*, and *DeGregory*, the Supreme Court recognized a privilege protecting against *any* disclosure of the disputed material. And in *Dole*, this Court credited evidence that chill of protected First Amendment activity arose from union members' fear of "*any* disclosure of the contents of [meeting] minutes," not just from fear of "unlimited disclosure." *Dole*, 950 F.2d at 1461. The *Dole* Court allowed limited disclosure only because, unlike Plaintiffs here, the party seeking disclosure demonstrated a compelling need for the material sought. *Id.* at 1461-62.

Proponents have already produced "communications actually disseminated to voters" and that other public information is readily available from other sources. Slip op. at 35. *See also FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) (where a court must determine the intent behind a campaign advertisement, only an objective test is permissible under the First Amendment because a subjective test focused "on the speaker's intent" would "chill core political speech," "offer[] no security for free discussion," and lead to "bizarre result[s]."). The panel's conclusion that Plaintiffs have shown no compelling need for the nonpublic information at issue was effectively *conceded* by Plaintiffs in the district court. At the final pre-trial conference, Plaintiffs' counsel candidly admitted that Plaintiffs "can prevail … ultimately … even if [they] don't have these documents" and that "there would be a way to ensure that any ruling that was favorable to [Plaintiffs] did not rise or fall on those documents. And the fact that they had been produced or compelled to be produced would not affect the judgment." Tr. of Hr'g, *Perry*, No. 09-2292 (N.D. Cal. Dec. 16, 2009), at 51:6-21 (Ex. 1).

Third, the panel's ultimate conclusion in this case—that Plaintiffs are not entitled to the discovery at issue—is entirely consistent with all controlling and persuasive authority regarding what is relevant to the question of voter intent. The *nonpublic* information sought by Plaintiffs is utterly irrelevant to their constitutional challenge to Proposition 8. When rational basis scrutiny applies (as

it does here, *see High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990)), the inquiry is whether the challenged measure rationally serves any conceivable state interest, and "it is entirely irrelevant … whether the conceived reason for the challenged distinction actually motivated the [electorate]." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *see also Perry*, slip op. at 36 ("Whether Proposition 8 bears a rational relationship to a legitimate state interest is primarily an objective inquiry."). Accordingly, Plaintiffs have *no* need even for publicly-disseminated information, let alone the *nonpublic* information at issue here, and they cannot possibly satisfy their burden of showing a *compelling* need.

And even if the Court ignored controlling precedent and assumed that strict scrutiny applied, the Supreme Court, in cases involving discrimination claims in the referendum context, has *never* looked to the type of information at issue here, regardless of the applicable level of scrutiny. *See Hunter v. Erickson*, 393 U.S. 385 (1969); *James v. Valtierra*, 402 U.S. 137 (1971); *Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982); *Romer v. Evans*, 517 U.S. 620 (1996). Notably, the Sixth Circuit has interpreted the Supreme Court's referendum cases (correctly) to mean that a reviewing court "may not even inquire into the electorate's possible actual motivations for adopting a measure via initiative or referendum." *Equality Found.*

of Greater Cincinnati v. Cincinnati, 128 F.3d 289, 293 n.4 (6th Cir. 1997); *see also Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986); *SASSO*, 424 F.2d at 295 ("[W]e do not believe that the question of motivation for the referendum (apart from a consideration of its effect) is an appropriate one for judicial inquiry.").

And where voter intent is relevant—for example when interpreting ambiguous referendum text—this Court has not considered nonpublic materials such as those at issue here. Thus, in *Jones v. Bates*, 127 F.3d 839, 860 (9th Cir. 1997), a panel held that "[t]here is nothing, other than the … initiative, the official ballot arguments and the state-prepared materials, to look to in order to discern the people's intent in passing the measure." And while the en banc Court disagreed with the panel's reading of the electorate's intent, every Judge on that Court looked *only* to publicly disclosed materials. *Bates v. Jones*, 131 F.3d 843, 846 (9th Cir. 1997) (en banc).[5]

Following the panel's decision, one commentator noted that "the opinion's arguments are quite persuasive, especially given the [Supreme] Court's

[5] Accordingly, although it is unnecessary for the en banc Court to reconsider this case, if reconsideration is granted, then the Court should uphold the panel's decision not only on First Amendment grounds but also on relevance grounds. *See, e.g.*, *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984) (issuing writ of mandamus to block depositions of city officials regarding motivation in passing a law because such testimony is irrelevant to underlying merits of constitutional claim); *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 454 (9th Cir. 1983) (protective order appropriate where requested discovery was "irrelevant and immaterial").

longstanding recognition of a presumptive First Amendment right to confidential association." Posting of Professor Eugene Volokh to The Volokh Conspiracy, http://volokh.com/2009/12/13/ninth-circuit-panel-rejects-attempt-to-discover-internal-prop-8-campaign-documents/#more-23281 (Dec. 22, 2009). Professor Volokh criticized the panel, however, for failing to address two Supreme Court decisions that he thought were relevant, *Herbert v. Lando*, 441 U.S. 153 (1979), and *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). This criticism was unwarranted: neither case was cited to the panel, and both cases are entirely consistent with the panel's ruling.

Herbert refused to extend "an *absolute* privilege to the editorial process of a media defendant in a libel case." 441 U.S. at 169. Instead, the Court considered whether the Plaintiffs' need for the information outweighed the First Amendment interests at stake. The Court repeatedly stressed that in a libel case, the information at issue was "essential" and "necessary … to prove the critical elements" of the case. *Id.* at 160; *see also id.* at 157, 169-70. Although the Court refused to hold that "the editorial process is immune from any inquiry whatsoever," *id.* at 168, it stressed that "casual inquiry" "subject[ing] the editorial process to private or official examination merely to satisfy curiosity or to serve some general end … would not survive constitutional scrutiny," *id.* at 174. In other words, like the panel in this case, *Herbert* recognized that the First

Amendment demands a balancing inquiry when civil discovery threatens compelled disclosure of core First Amendment activities. In *Herbert*, the balance tipped in favor of disclosure of "essential" and "necessary information" to the requesting party; here, where the information sought bears, at best, an "attenuated" relationship to any issue in the case, slip op. at 37, the panel correctly struck the First Amendment balance in Proponents' favor.

The *University of Pennsylvania* Court rejected a First Amendment claim that "academic freedom" barred disclosure of tenure review materials in an employment discrimination suit. Unlike this case—where core First Amendment protections are at issue—the Court there addressed a much more nebulous claim deriving from "the so-called academic-freedom cases." 493 U.S. at 197. The Court found the University's claim to be outside any First Amendment concept previously recognized in those cases. Indeed, the Court found that the University's claimed harm was "extremely attenuated" from the claimed "right to determine 'who may teach' " and that any "chilling effect" on that right was "speculative." *Id.* at 199-200. In this case, even Plaintiffs recognize that the contemplated disclosure strikes at "core political speech … undeniably entitled to broad First Amendment protection." RR 222. The panel rightly concluded (i) that far from being attenuated, the complained of harm—disclosure—violates the core First Amendment rights to anonymity and privacy in speech and association, and (ii)

that the potential for chilling of these rights was both "self evident" and amply proved in the record below. Slip op. 33. Finally, as in *Herbert*, the information sought from the tenure committee in *University of Pennsylvania* went to the heart of the merits of the employment discrimination suit; again, the information sought by Plaintiffs here has very little, if any, bearing on the merits of their challenge to Proposition 8.

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While it is true that this case involves a new and important question, the panel's decision comports with prior precedent from both this Circuit and the Supreme Court, and rehearing is not necessary to "secure or maintain uniformity." FED. R. APP. P. 35. Nor have Plaintiffs identified a decision from another Circuit that conflicts with the panel's decision. *See* 9th Cir. R. 35-1. Indeed, ample precedent from other Circuits supports the panel's judgment.[6]

[6] *See AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) (noting that the "Supreme Court has long recognized that compelled disclosure of political affiliations and activities" can violate the First Amendment and striking down FEC regulation requiring public disclosure of investigatory files because such disclosure would chill political participation); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 384, 388 (D.C. Cir. 1981) (where "sweeping" subpoena served on political association called for "internal communications" relating to a campaign, "heightened judicial concern" is warranted because the "release of such information … carries with it a real potential for chilling the free exercise of political speech and association"); *Equality Found. of Greater Cincinnati v. Cincinnati*, 128 F.3d 289, 293 n.4 (6th Cir. 1997) (holding that a court "may not even inquire into the electorate's possible actual motivations for adopting a

CONCLUSION

En banc review should be denied.

Dated: December 24, 2009

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
Attorney for Appellants/Petitioners

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measure via initiative and referendum") (citing *Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986)).

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9th Circuit Case Number(s) 09-17241; 09-17551

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