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Ms. Molly C. Dwyer
Clerk of the Court
United States Court of Appeals for the
Ninth Circuit
James Browning Courthouse
San Francisco, CA 94103

Re: In re: Perry v. Hollingsworth,
Nos. 09-17241, 09-17551

Dear Ms. Dwyer:

The American Civil Liberties Union of Northern California ("ACLU-NC") respectfully seeks leave to submit this letter as *amicus curiae* to address the First Amendment issues presented by Proponents[1] in their appeals from certain discovery orders dated October 1, 2009 and November 11, 2009 in a lawsuit challenging the constitutionality of California Proposition 8, which prospectively prevents same-sex couples from marrying in California.[2] The ACLU-NC seeks to proceed in this fashion in light of the unusually expedited schedule that the Court has established for briefing and argument of this matter. We respectfully ask you to transmit this letter immediately to Judges Fisher, Berzon and Wardlaw for their consideration. For the reasons set forth below, ACLU-NC believes that the First Amendment issues presented by the district court's orders involve a matter of great significance because of their potential effect upon the conduct of election campaigns. In particular, ACLU-NC believes that the district court erred in its opinions dated October 1, 2009 and November 11, 2009 by failing to give adequate consideration or weight to Proponents' First Amendment interests.

[1] In the interests of clarity and consistency with the briefs of the parties, we refer to the Appellants as "Proponents" and the Appellees as "Plaintiffs".

[2] ACLU-NC, of course, understands that there is a threshold issue regarding whether the orders in question are subject to interlocutory appeal. Although ACLU-NC does not intend to address that issue at any length, we do wish to point out that where the basis for an objection to discovery is a non-frivolous claim of privilege under the constitution, there would appear to be particularly strong reasons to permit interlocutory review, whatever the rule may be in other circumstances involving objections to discovery. In all events, as Proponents point out, this Court may treat the present appeals as petitions for a writ of mandamus.

In addition, and by way of full disclosure, a Political Action Committee ("PAC") of ACLU-NC that was involved in the campaign against Proposition 8[3] has been served by Proponents with a subpoena that, *inter alia,* seeks the same types of internal campaign documents that Plaintiffs seek from Proponents.[4] Therefore, were this Court to affirm the orders entered by the district court in the present proceedings, it is highly likely that the First Amendment issue presented here would be raised before the district court by ACLU-NC's PAC and, if necessary, by means of a subsequent appeal to this Court.[5]

INTEREST OF AMICI

Amicus curiae American Civil Liberties Union of Northern California is the regional affiliate of the American Civil Liberties Union, a non-profit, non-partisan membership organization with over 550,000 members nationwide, and over 55,000 members in Northern California. ACLU-NC seeks to protect and defend the guarantees of individual liberty that are secured by the United States constitution. Among those rights are the rights of free expression, privacy, and association that are at issue in the present appeals. ACLU-NC also has been active in opposing or supporting numerous California ballot initiative measures, often on controversial issues such as abortion, affirmative action, and criminal justice reform. As a consequence, ACLU-NC has a direct interest in assuring that election campaigns are not subject to the chilling effect that is almost certain to result from civil discovery orders of the type entered by the district court in this case.

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[3] The full name of the PAC is "No on Proposition 8, Campaign for Marriage Equality, a Project of the American Civil Liberties Union of Northern California".

[4] In fairness, Proponents served their subpoenas only after they received requests for production from Plaintiffs. Proponents further advised the subpoenaed parties that Proponents were seeking internal campaign communications only in the event that they were obliged to produce such documents. Following the district court's orders and this Court's Order to Show Cause, a new subpoena was served on the relevant ACLU-NC entity seeking its internal campaign documents. Objections, including on First Amendment grounds, have been asserted to the new subpoena and no further proceedings in respect to that subpoena, or ACLU-NC's objections to it, currently are pending.

[5] In noting that analogous First Amendment issues would be raised by ACLU-NC's PAC in resisting the subpoena served on it, we do not mean to suggest that the issues presented by the discovery served on Proponents and the subpoena served on ACLU-NC's PAC are identical. There are additional important reasons why the subpoena served on a group that *opposed* Proposition 8 and is not a party to the underlying case is inappropriate and should be quashed, both on First Amendment and other grounds, without regard to the Court's disposition of the present appeals. We further believe that there would be no question regarding the right of ACLU-NC to take such an appeal since any order refusing to quash the subpoena against it, or compelling production, unquestionably would be both final as to it and would be independent of the merits of the underlying case between Plaintiffs and Proponents.

In addition, and as noted above, ACLU-NC has a direct, although contingent, interest in the issues raised by this appeal in that Proponents have served a subpoena that seeks production of internal campaign documents from ACLU-NC's PAC that was involved in the campaign to defeat Proposition 8.

DISCUSSION

Elections are the defining characteristic of a democracy. Usually they are about (and between) individuals who hope to be chosen to make or enforce laws, although sometimes—as in the present case—they are about legislation itself. In either instance, however, they implicate core principles of free speech, association, and privacy that need, and are entitled to, the full measure of protection that the First Amendment guarantees[6].

Elections also sometimes give rise to litigation and that is important, too, because it is the duty of the judicial branch to make sure that we keep democracy honest and assure that the rights of minorities are protected—which is what the plaintiffs' present lawsuit laudably seeks to accomplish. Indeed, ACLU-NC believes that the result of this litigation should be the vindication of the right of lesbians and gay men to marry.

But not at all costs. There is a tension here, as there is in many cases, between one set of concerns—one group of rights—and another. In those cases the competing interests need to be balanced. The critical issue is how that balance is to be struck; that is, how the interests at stake are articulated and how much weight is placed on each side of the scale.

ACLU-NC submits that the decisions appealed from here failed to give appropriate weight to the pertinent First Amendment concerns and applied a traditional standard of "discovery" relevance that is wholly inappropriate and would far too easily allow intrusion into the inner workings of a political campaign.[7] Although the district court stated that it was "balancing" the First Amendment-protected interest of Proponents against the discovery interest of Plaintiffs, it in fact

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[6] There is no question that issues as well as candidates implicate these constitutional considerations. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351-52 (1995).

[7] It is unclear to ACLU-NC from this Court's November 25 Order whether it intends to rule definitively on the merits of the First Amendment issue or merely to decide whether the district court's orders are appealable and whether a stay should issue pending further consideration of the merits. Given the schedule established by the district court for trial of the underlying case, as well as the extensive briefing that already has taken place, we believe that it would be appropriate for the Panel to address and resolve with certainty the relevant constitutional issues. In any event, however, since those issues will remain the same assuming the Court concludes that the orders in issue are subject to interlocutory appeal, we address the First Amendment issues as we would in the event of a merits appeal—albeit limited to some extent by the exigencies of time.

concluded that the First Amendment has a limited application in the context of civil discovery, protecting only membership lists and certain individual actors. The court, then, went on to apply the usual relevance standard to Plaintiffs' discovery requests—to wit, whether they were calculated to lead to the discovery of admissible evidence. *See* Fed. R. Civ. P. 26(b)(1). *Amicus* submits that that view of the First Amendment in the civil discovery context is far too limited. The interests at stake warrant application of a significantly more demanding standard than the traditional test of discovery relevance under the federal rules.

It is ACLU-NC's position that a request which seeks discovery of internal campaign documents reflecting private communications and election strategy implicates core First Amendment interests. As a consequence, where such documents are sought, the proponent of discovery must demonstrate that the materials requested are highly pertinent to issues that are central to the controversy—not merely that they may lead to the discovery of admissible evidence—and that there is no less intrusive way of obtaining such information. Such a demanding standard ensures that people are able to come together for a common political purpose without fear that their internal discussions will become public at the drop of a lawsuit. At the same time, it recognizes that such privileged communications can be disclosed if they are truly central to a legal dispute.

To the extent that it is at issue in these appeals, Plaintiffs' request for production seeks to compel disclosure of speech by an advocacy association during a referendum election—speech that "is at the heart of the First Amendment protection" and "the type of speech indispensable to decision making in a democracy." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). There should be little debate over that point. As the Supreme Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971): "It can hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. at 347 (1995); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). The reasons for this rule are equally plain and beyond dispute: "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people'." *McIntyre*, 424 U.S. at 347 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) ("[T]he right of individuals to associate for the advancement of political beliefs…rank[s] among our most precious freedoms."); *ACLU of Nevada v. Heller,* 378 F.3d 979, 988 (9th Cir. 2004). These (and numerous other similarly pertinent observations)[8] are not merely examples of judicial exuberance in defense of one of our most cherished liberties. They are articulations of the reasons that speech and other activities incident to the political process are so vital to that process. They are also part of a strong line of cases that has

[8] *See*, *e.g.*, *Brown v. Hartlage,* 456 U.S. 45, 55 (1982); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Stromberg v. California*, 283 U.S. 359, 369 (1931).

invoked these principles to reject discovery requests that intrude into the associational and expressive interests that unmistakably are put in issue by the district court's orders in this case. *See*, *e.g.*, *McIntyre*, 514 U.S. at 344-47 (anonymous leafleting in issues campaign protected); *In re: Motor Fuel Temperature Sales Practices Litigation*, 2009 U.S. Dist LEXIS 66005 at *43-47 (D. Kan. 2009); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 U.S. Dist LEXIS 19475 (D. Kan. 2007); *Beinin v. The Center for the Study of Popular Culture*, 2007 U.S. Dist. LEXIS 47546 (N.D. Cal. 2007); *Wyoming v. USDA*, 208 F.R.D. 449, 454 (D.D.C 2002).

The very recent decision by a district court in *In re: Motor Fuel*, *supra*, at *43-47, is particularly instructive. In that case, the court broadly shielded from discovery "documents related to lobbying and legislative affairs," including "internal communications and evaluations about advocacy of their members' positions on contested political issues, as well as their actual lobbying on such issues." *Motor Fuel* involved an attempt to discover into internal lobbying communications and other strategic discussions of a private nature within associations formed for political advocacy purposes. The court, relying on both Supreme Court and other lower court decisions, concluded that these activities directly implicated core First Amendment associational and petitioning rights and that the compelled disclosure of strategy discussions "related to the lobbying and legislative affairs" of non-party trade associations and their members would have a "chilling effect"[9] on the "internal organization" as well as the "activities" of the associations and their members. *Motor Fuel* at 46 ("[T]he trade associations' internal communications and evaluations about advocacy … on contested political issues, as well as their actual lobbying on such issues, 'would appear to be a type of political or economic association that would … be protected by the First Amendment privilege" against discovery.) In the court's view, allowing such discovery not only would have "interfere[d] with the core of the associations' activities by inducing members to withdraw from the associations," but "certainly could be used … to gain an unfair advantage over defendants in the political arena." *See also Heartland,* 2007 U.S. Dist LEXIS 19475 at *4 ("evaluations of … legislative strategy" protected because it would interfere with lobbying activities of non-party association); *Wyoming v. U.S.D.A.,*, 208 F.R.D. at 454 ("internal communications and strategic communications on policy issues" subject to associational privilege).

The district court's October 1st and November 11th opinions did not focus significantly on those concerns, yet they are the essence of the issue presented here. Rather, the Court viewed the matter presented by Proponents as an issue largely analogous to the question of "membership disclosure" that was presented in *NAACP v. Alabama*, 357 U.S. 449 (1958). While ACLU-NC

[9] The phrase traces its origin to *Dombrowski v. Pfister*, 380 U.S. 479 (1965) and *Lamont v. Postmaster General*, 381 U.S. 301 (1965), although its usage in legal literature pre-dates that decision. *See* Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 539 (1950). The term has become virtually a constitutional "brand" unto itself. It refers to the Court's recognition that restrictions that inhibit the willingness to engage in protected First Amendment activities are, for that reason alone, constitutionally illicit.

obviously agrees that *NAACP* is an important decision in the sense that it recognized that First Amendment concerns can bear materially upon requests for discovery, the controversy here is not concerned with the disclosure of the identity of individuals. In fact, it appears that Plaintiffs have no interest in obtaining such information. What Plaintiffs want are Proponents' internal strategy documents—private e-mails from those who were central to the campaign, strategy plans, and "brainstorming" sessions with campaign consultants and pollsters about arguments that should and should not be advanced.

But that is all core First Amendment information. Those are precisely the kinds of documents that quintessentially should not become the subject of discovery, or public disclosure, because they will not so much chill as freeze the conduct of political campaigns in their tracks. That is not because political and legislative efforts are sausage-like.[10] It is because political advocacy and strategizing is inherently rough-and-tumble, and ought to be. Campaigns need to think and re-think, test and re-test, and, ultimately, make judgments about what to say and not say. The people charged with running those campaigns cannot do so effectively while fearing that every proposal they float, every crazy idea they shoot down, every campaign plan that ultimately is not implemented will become fodder for discovery by their campaign opponents in the event of subsequent litigation, not to mention a blueprint for those opponents to use in future electoral battles. A rule that would open internal campaign communications to compelled disclosure upon a simple showing of ordinary litigation relevance would not breathe fresh air into the electoral process so much as flatten it like a house of straw.[11]

In light of the foregoing principles, ACLU-NC respectfully submits that the district court's discovery rulings incorrectly applied a standard test of "litigation" relevance to the plaintiff's discovery request. A much more stringent test is applicable.

In *Motor Fuel*, the court expressly held that the "relevancy standard" for evaluating efforts to obtain non-public political advocacy information "is more exacting than the general relevancy standard for discovery under Fed. R. Civ. P. 26(b)(1)." 2009 U.S. Dist. LEXIS 66005 at *53. Judge Ware of the Northern District of California similarly observed, in a case also seeking non-public communications about a political issue, that "the First Amendment privacy interest is overridden

[10] *See* Otto von Bismarck, "To retain respect for laws and sausages, one must not watch them in the making." Whether Bismarck deserves credit for this (or much else), is unclear. See the *McKean Miner* (Smethport, PA, Apr. 22, 1869), "Saxe says in his new lecture: 'Laws, like sausages, cease to inspire respect in proportion as we know how they are made."

[11] A close analogue can be found in the "legislative" privilege reflected in the so-called "speech and debate" clause of the Constitution. *See*, *e.g.*, *United States v. Johnson*, 383 U.S. 169 (1966); *Miller v. Transamerica Press, Inc*., 709 F.2d 524 (9th Cir. 1983).

only when the party seeking the information asserts a compelling interest." *Beinin,* 2007 U.S. Dist. LEXIS 47546 at *9 (citing *Buckley* and *NAACP v. Alabama*). Under this stringent test, the party seeking discovery must establish not only a "compelling need" for the information but must have no less restrictive alternative method of obtaining the information that it seeks. *See, e.g., Dole v. Service Employees Union,* 950 F. 2d 1456, 1461(9th Cir. 1991);*Wyoming v. USDA*, 208 F.R.D. 449, 454-55 (D.D.C. 2002). The test is analogous to the strict standard applied in testing the validity of legislation that infringes on protected political activity. *See McIntyre, supra*, 514 U.S. at 347 ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest").[12]

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For the foregoing reasons, ACLU-NC submits that the district court's opinions and orders of October 1, 2009 and November 11, 2009 should be vacated and the case remanded for further proceedings in which the importance of the First Amendment issues raised by Proponents are recognized and given effect in accordance with the standard set forth above.

Dated: November 27, 2009

Respectfully submitted,

s/Stephen V. Bomse
Orrick, Herrington & Sutcliffe, LLP

Attorneys for *Amicus Curiae*
American Civil Liberties Union of
Northern California

[12] In its discovery orders, the district court observed several times that the privilege here—unlike, say, the attorney-client privilege—is only a "qualified" one. While that statement may be literally correct, it materially understates the importance of the First Amendment considerations that are at issue here and misapprehends the nature of the applicable analysis. It is correct to say that the First Amendment interests asserted in cases like this are "qualified" in the sense that they must be "balanced" against allegedly competing interests. However, that does not mean that the interests are of only limited importance. Many vital constitutional rights could be described as "qualified" in the sense that they can be overcome by a very strong countervailing showing ("compelling interest"; "strict scrutiny") or by a showing that there are other conflicting constitutional principles that are entitled to even greater weight in particular circumstances. That is why the principles discussed in text have been developed and why the stringent test we outline is applicable here.

Of Counsel:

Allan L. Schlosser
Elizabeth O. Gill
ACLU Foundation of Northern California

cc: All Counsel

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2009, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF Users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 27, 2009 s/ Stephen V. Bomse