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BY ECF FILING

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: *Perry v. Hollingsworth*, Nos. 09-17241 & 09-17551 (9th Cir.)

Dear Ms. Dwyer:

I write on behalf of Intervenor-Defendants-Appellees ("Proponents") in response to the letter submitted by Plaintiffs-Appellees concerning the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, No. 08-678 (Dec. 8, 2009).

In holding that the collateral order doctrine does not extend to disclosure orders adverse to a claim of attorney-client privilege, the Court emphasized that "immediate review of some of the more consequential attorney-client privilege rulings" (slip op. at 11) would still be available through the "established mechanisms for appellate review" of mandamus, Section 1292(b) appeals, and even appeals from criminal contempt. *Id.* at 10. The Court specifically noted that mandamus review is available "when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice." *Id.* at 9 (citation omitted). This standard is plainly satisfied here, as this Court's December 3 stay order demonstrates.

Thus, because this case presents precisely the sort of "particularly injurious or novel privilege ruling" that warrants mandamus review (slip op. at 9), this Court need not address whether the reasoning of *Mohawk* extends to the very different context of a First Amendment privilege claim arising from a referendum election. With respect to this issue, however, "the decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.' " *Id.* at 6 (citation omitted). Here, in contrast to the mine run of

attorney-client communications, compelled disclosure of confidential campaign strategy communications among political associates in the midst of a referendum election will surely cast "a discernible chill," *id*. at 8, on core political speech and associational activity in future referendum campaigns. And the "institutional costs" to the judiciary referenced by the Court are not remotely implicated in the context of the rarely invoked First Amendment privilege. *See id.* at 11-12. Especially here, in a case of first impression in which the district court has rejected application of the First Amendment privilege entirely, immediate appellate review is critical.

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper