

Nos. 09-17241, 09-17551

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

v.

DENNIS HOLLINGSWORTH, et al.
Defendant-Intervenors-Appellees.

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

**DEFENDANT-INTERVENORS-APPELLANTS'
MOTION TO CONSOLIDATE**

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Appellants respectfully move this Court to consolidate Case No. 09-17241 and Case No. 09-17551.

BACKGROUND

This motion concerns two appeals (or, in the alternative, petitions for writs of mandamus) arising from related discovery orders in a case challenging the constitutionality of Proposition 8 (“Prop 8”), an 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. Appellants/Petitioners in both appeals are a “primarily formed ballot committee” and the “official proponents” of Prop 8 (collectively, “Proponents”).

In Appeal No. 09-17241, Proponents seek review of the district court’s order of October 1, 2009, which denied Proponents’ motion for a protective order based on a claim that a First Amendment privilege bars discovery into certain categories of nonpublic, confidential campaign communications and documents. After filing notice of that appeal, Proponents moved the district court for a stay of Proponents’ obligation to produce the disputed materials pending appeal to this Court. In denying the stay motion, the district court noted that while “Proponents’ blanket assertion of privilege was unsuccessful,” the court “might apply” the privilege to “specific document[s] or information.” Doc. 237 at 4. Consistent with this suggestion, and with further instructions from the Court issued during a hearing on November

2, 2009, Proponents submitted a sample of documents for *in camera* review. Doc. 251. On November 11, 2009, the district court held that the First Amendment privilege did not apply to the documents submitted for review and that all documents that “deal directly with [Proponents’] advertising or messaging strategy and themes” in the Prop 8 campaign must be produced to Plaintiffs. Doc. 252. On November 13, 2009, Proponents noticed an appeal of (or, in the alternative, petition for writ of mandamus with respect to) that order (as well as the October 1 and October 23 orders, to the extent they were merged into the November 11 order). That appeal has been docketed as No. 09-17551.

ARGUMENT

As the procedural history recounted above amply demonstrates, the two interlocutory appeals now before this Court relate to the same discovery dispute: whether Proponents have a First Amendment privilege that bars discovery of their nonpublic, confidential political speech during the Prop 8 referendum campaign. Proponents filed the original appeal believing that the district court would not give any further consideration to the issue after its October 1 order. When the district court instead invited an *in camera* review process on October 23, Proponents submitted a representative sample of sixty documents (drawn from thousands of internal, confidential campaign documents) to the court under seal. Proponents now also appeal the district court’s order rejecting Proponents’ claim of privilege and

requiring production of documents to Plaintiffs. Both in terms of logic and efficiency, Proponents respectfully submit that the two appeals should be consolidated.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court consolidate Case No. 09-17241 and Case No. 09-17551.

Dated: November 17, 2009

Respectfully submitted,

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

9th Circuit Case Number(s) 09-17551

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s/ Jesse Panuccio

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