

Nos. 09-17241 & 09-17551

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

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS

DENNIS HOLLINGSWORTH, et al.,

Defendant-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW
Honorable Vaughn R. Walker

DECLARATION OF MATTHEW D. MCGILL

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DECLARATION OF MATTHEW D. MCGILL

I, Matthew D. McGill, declare as follows:

1. I am a partner at the law firm of Gibson, Dunn & Crutcher LLP, and I am one of the attorneys of record for Plaintiffs–Appellees Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo (“Appellees”) in this action. I make this declaration in support of Appellees’ Opposition to Appellants’ Emergency Motion for Stay. I have personal knowledge of the facts set forth herein and if called as a witness, I could and would competently testify hereto.

2. On October 1, 2009, the district court granted Proponents’ motion for a protective order in part and denied it in part. The court held that Appellees’ request for all communications relating to Prop. 8 between the Proponents and any third party was “overly broad” and directed Appellees to “revise th[at] request and tailor it to relevant factual issues.” But the district court rejected Proponents’ contention that the First Amendment precluded any discovery into the Proponents’ nonpublic communications. Proponents noticed an interlocutory appeal of the district court’s October 1 discovery order and also moved the district court to stay its October 1 discovery order pending appeal.

3. To advance the resolution of the case while the question of a stay was pending, and to minimize the adverse impact of Proponents’ position on Appellees’ ability to prepare this case for trial, Appellees’ asked Proponents to agree to

the district court's standard stipulated confidentiality order, and to begin producing the contested documents on a provisional "attorneys' eyes only" basis. Proponents refused to do so.

4. On November 19, 2009, Magistrate Judge Joseph C. Spero ordered the parties to meet and confer on the terms of a protective order. Spero further ordered that if the parties could not agree upon stipulated order by November 23, the district court "would enter an appropriate order based on the standard protective order that can be viewed on the court's website."

5. On November 20, 2009, Nicole Moss, counsel for Proponents, and I commenced negotiations on a stipulated protective order. By the close of business on November 20, Ms. Moss and I had reached an agreement on most of the terms of that stipulated order. The only substantial term on which Ms. Moss and I had not reached agreement was a provision that would bar certain attorneys, employees and experts from having access to documents designated "Attorneys Eyes Only."

6. Proponents, sought a provision that would bar any counsel or employee who has "previously been involved [or] has [] intention in the future of being involved in any organization, association, campaign, group, coalition, or other entity that advocated for or against Proposition 8 or for or against any other ballot initiative, constitutional amendment, or state law (regardless of the state) that advocated for or against same-sex marriage" from reviewing documents produced in

this matter. Proponents further defined “involved” as “holding or having held any official or unofficial position in the organization, campaign, etc.; volunteering or having volunteered for any organization, campaign, etc.; hosting or having hosted a fundraiser for any organization, campaign, etc; speaking or having spoken on behalf of any organization, campaign, etc. in a non-legal capacity; writing or having written news articles, editorials, blogs, research papers, white papers on behalf of any organization, campaign etc. Involvement in this context does not include paid legal work that was done on behalf of an organization, campaign, etc., or having signed a petition on behalf of such organization, campaign, etc.”

7. Appellees objected to Proponents’ broad exclusion, but to answer Proponents’ concern that their strategic plans could be divulged to their “political enemies,” the Appellees offered to exclude “any Counsel or employee who held an official position in any primarily formed ballot committee related to Proposition 8” or a similar organization circulating petitions to repeal Prop. 8 in 2010. Appellees proposed to define and “official position” as one which one which authorizes its holder to contractually bind (either solely or in conjunction with others) the primarily formed ballot committee with respect to matters relating to communications disseminated by the committee or otherwise to spend funds exceeding \$10,000 on behalf of the committee.

8. On the evening on November 20, this Court granted a “temporary stay of the district court’s October 1 and November 11, 2009 orders pending consideration of the merits of appellants’ motion for stay.”

9. Proponents construed this Court’s November 20 temporary stay of the district court’s October 1 and November 11, 2009 orders as also staying Judge Spero’s November 19 directive that the parties agree upon a protective order and, on November 21, terminated discussions relating to the protective order.

I declare, under penalty of perjury under the laws of the United States, that these facts are true and correct and that this Declaration is executed this 23rd day of November 2009 at Washington, DC.



Matthew D. McGill