No. 10-15649

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EQUALITY CALIFORNIA AND NO ON PROPOSITION 8, CAMPAIGN FOR MARRIAGE EQUALITY: A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

Petitioners/Appellants

v.

KRISTIN M. PERRY, *et al.*,

Respondents/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
C 09-2292 VRW

BRIEF OF APPELLANTS REGARDING JURISDICTION

Stephen V. Bomse (State Bar No. 40686)
Justin M. Aragon (State Bar No. 241592)
ORRICK, HERRINGTON & SUTCLIFFE
The Orrick Building
405 Howard Street
San Francisco, CA 94105
Telephone: (415) 773-5700
Facsimile: (415) 773-5759

Alan L. Schlosser (State Bar No. 49957)
Elizabeth O. Gill (State Bar No. 218311)
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-1478

Attorneys for Petitioners/Appellants
NO ON PROPOSITION 8, CAMPAIGN FOR MARRIAGE EQUALITY: A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

Lynn H. Pasahow (State Bar No. 054283)
Carolyn Chang (State Bar No. 217933)
Leslie Kramer (State Bar No. 253313)
Lauren Whittemore (State Bar No. 255432)
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, CA 94104
Telephone: (415) 875-2300
Facsimile: (415) 281-1350

Attorneys for EQUALITY CALIFORNIA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

DOCKETED CASES

OTHER AUTHORITIES

By Order dated March 31, 2010, the Court has directed the parties to address "whether this Court has jurisdiction over this appeal and whether mandamus is appropriate." For the reasons set forth below, Appellants answer both questions in the affirmative and respectfully urge the Court to proceed to consideration of the merits of their appeal on an expedited schedule satisfactory to the Court.

I. THIS COURT HAS APPELLATE JURISDICTION UNDER 28 U.S.C. § 1291

The matter which gives rise to this appeal is an order directing Appellants, non-parties in the underlying action, to produce documents notwithstanding their claim that that order violates their First Amendment rights as articulated in an earlier appeal in this litigation, *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). There is no dispute that if Appellants decline to produce those documents and are cited for contempt as a consequence, they will have an appealable order. *See, e.g.*, *In re Subpoena Served on Cal. Pub. Util. Comm'n*, 813 F.2d 1473, 1476 (9th Cir. 1987)("*CPUC*"). *See also Cobbledick v. United States*, 309 U.S. 323, 328 (1940). Should this Court conclude that it has no basis for exercising appellate jurisdiction in advance of those further proceedings, then that is what will occur and the parties will find themselves back before this Court asserting the same claims as they assert now, except with the issue of jurisdiction no longer in question.

Appellants do not denigrate the significance of disobeying an order of a United States district court. However, the main consequence of requiring that additional step is that there will be a delay in resolving a case that involves a vitally-important constitutional issue affecting the rights of same-sex couples in California. That case has been tried and, but for the separate, and similarly-important, constitutional issues created by Proponents' belated demand for the production of documents from Appellants (and the ensuing proceedings which that effort has given rise to), would be ready for argument and final disposition in the district court.[1] Given these unique facts, it seems plainly desirable for the issues raised by this appeal to be disposed of as expeditiously as possible and imposing an additional formal step in the nature of "execution" of an order that is otherwise fully ripe for appeal does not further the efficient administration of justice. The question remains, however, whether this additional step, nonetheless, is required

[1] Although Proponents initially served a subpoena seeking the documents in question last summer, they continued to defer pursuing their request for production while they were litigating their own First Amendment privilege objections—a matter which this Court is familiar with as a result of the earlier appeal which led to the decision in *Perry*. In fact, it was not until after a January 8, 2010 Order from Magistrate Judge Spero that Proponents finally demanded production of documents from Appellants and it was not until early March, after the taking of testimony in the case had concluded, that Proponents' motion to compel was ruled upon. *See generally* Appellants' Motion for an Emergency Stay Pending Appeal at 3-7. (Appellants objected to the Proponents' motion on timeliness grounds, but that objection was rejected. *See* AA 0056).

— at least as a matter of section 1291 "finality" jurisdiction.[2] Appellants submit that the answer is "No".

We begin with the indisputable proposition that a basic principle of appellate jurisdiction is that, with the exception of certain statutorily enumerated exceptions, appeals ordinarily may be taken only from "final decisions" of the district court. *See* 28 U.S.C. § 1291. That rule, which has been a cardinal principle of appellate review from the inception of our judicial system, is not open to dispute. Nor is the wisdom of its rationale in question. "Piecemeal" appeals interfere with and, frequently, retard the efficient disposition of litigation. Further, allowing an appeal before entry of judgment adjudicating the rights of the litigants often will lead to consideration of matters that might never need to be decided on appeal as a result of settlement or other, later developments in the underlying case.

Nonetheless, as innumerable cases attest, the rule of "finality" is not capable of mindless application or inflexible definition and it is well-understood that "finality" cannot, in all circumstances, "mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). To the contrary, limited classes of "exceptions" to the final decision rule have been recognized, such as the "collateral order" and "death knell" doctrines. *See*

[2] There is no question that the Court has the power to adjudicate the matter under its mandamus jurisdiction. *See* Section II, *infra*. *See also Perry*, 591 F.3d at 1156-59.

generally 15A Wright, Miller & Cooper, *Federal Practice and Procedure* Jurisdiction 2d ("Wright & Miller") at §§ 1311-12. At an even broader level of generality, the Supreme Court has observed that "our cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases . . .Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction….'" *Gillespie*, 379 U.S. at 152, (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). *See also Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

Perhaps the most obvious situation in which the rule of finality cannot be inflexibly employed is where the order at issue affects the rights of non-parties — as in the present case. Where the rights of a person or entity not otherwise before the Court are adjudicated, the "final decision" rule cannot be invoked in the interest of avoiding piecemeal or unnecessary appeals for the simple reason that the rights that have been adjudicated necessarily are independent of the matters in issue between the litigants. It is for that reason that there is no question that the Appellants here have a right to appeal the district court's production orders that is

independent of the rights enjoyed by the litigants in the underlying case and that this right may be exercised prior to entry of a final judgment in that litigation. The sole question is whether, in order to perfect that right, they first must subject themselves to a citation for contempt.

As a general matter, it would appear that they should do so. *See, e.g.*, *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992); *United States v. Ryan*, 402 U.S. 530 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940); *Alexander v. United States*, 201 U.S. 117 (1906). The reason for the requirement, on the other hand, is less clear. In the earliest cases which adopted this approach, *Alexander* and *Nelson v. United States*, 201 U.S. 92 (1906), the suggested rationale was that the requirement exists in order to create a separate controversy between the recalcitrant party "on the one hand, and the government, as a sovereign vindicating the dignity and authority of one of its courts,…on the other hand." *Alexander*, 201 U.S. at 122. As thus understood, the rule requiring a contempt citation should be limited to cases in which the party seeking to compel evidence is the government and that, most often, has been the situation in which the Supreme Court has invoked the requirement. However, Appellants do not deny that it has been applied in other situations as well,[3] though mostly without any

[3] *See, e.g., In re Flat Glass Antitrust Litig.*, 288 F.3d 83, 87-88 (3d Cir. 2002).

analysis and not in all cases.[4] It is possible to posit that one purpose served by the requirement is to insure both that the court is serious about demanding compliance even if the cost will be a potentially delaying appeal, and that the party refusing discovery is equally resolute. That explanation was offered in *Burden-Meeks v. Welch*, 319 F.3d 897, 900 (7th Cir. 2003), in which the court observed that "by raising the stakes" the requirement of a contempt citation "helps the court winnow strong claims from delaying tactics that, like other interlocutory appeals, threaten to complicate and prolong litigation."

In truth, the most accurate explanation for the contempt requirement would appear to be that the rule was enunciated a century ago and that is how most courts have proceeded since — although, as we say, not always. Thus, for example, under the so-called *Perlman* exception, where a non-party has been subpoenaed to produce documents belonging to some other person that happen to be in the subpoenaed party's possession, the document's "owner" is allowed to appeal without first placing herself in the shoes of the subpoenaed party and being held in

---

[4] *See, e.g.*, *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997). Whether that case was correctly decided was questioned by a later Seventh Circuit opinion, *Burden-Meeks v. Welch*, 319 F.3d 897, 900-01 (7th Cir. 2003), and the abiding disagreement over that issue in the Seventh Circuit was noted as recently as March 30th, in *Sandra T.E. v. South Berwyn School Dist.* ___ F.3d ___, 2010 WL 1191170 (7th Cir. 2010). A similar debate exists within the Tenth Circuit. *Compare Covey Oil Co. v. Cont'l Oil Co.*, 340 F.2d 993, 997 (10th Cir. 1965) (allowing appeal) *with Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993) (questioning, but not deciding, whether *Covey* remains good law following *United States v. Ryan*, 402 U.S. 530 (1971)).

contempt. *Perlman v. United States*, 247 U.S. 7 (1918). Moreover, as noted (*see* footnote 4, *supra*), a few third-party discovery cases have allowed an appeal without even acknowledging the existence of a contempt requirement.

Despite plaintiffs' seeming suggestion to the contrary in their Response to ACLU and Equality California's Motion to Expedite, at 2-3, the issue has not actually been decided in this Circuit. Plaintiffs cite the court to two cases, *CPUC* and *Belfer v. Pence*, 435 F.2d 121 (9th Cir. 1970). However, in neither case was that issue before the court or decided. *CPUC* involved an appeal by *a party* in the underlying litigation from an order denying its motion to compel production of documents from the third-party Commission. The Court, thus, posed the jurisdictional issue as involving the same question that this Court considered in *Perry*, to wit: whether "Westinghouse…has any other means of obtaining review." 813 F.2d at 1476. Since the court which issued the subpoena to the Public Utilities Commission was located in the same circuit as the court in which the "main action" was pending, this Court held that Westinghouse could seek review of the order regarding the third-party subpoena as part of its appeal from a final judgment. *Id*. In the course of its discussion, the court did state that the mechanism for a non-party to seek review of an order compelling discovery is to submit to contempt and then appeal from that order. *Id*. However, that was not the issue before the Court and its statement is simply *dicta*.

Belfer is even more readily distinguishable. In that case, a corporate employee sought to invoke mandamus jurisdiction to prevent imposition of discovery obligations upon him which might, then, have led to sanctions in the event of his refusal to comply. Without ever discussing the issue presented here, the Court merely – and properly – observed that it was "not inclined to anticipate action by the District Court which may never be forthcoming." 435 F.2d at 122. Although the court, as in *CPUC*, assumed that the route to review involved a prior contempt citation, that issue, again, was neither discussed nor necessary to disposition of the mandamus petition.

In short, as far as Appellants can determine, the application of a contempt requirement as a precondition to appeal by a non-party in a civil case is an open issue in this Circuit. More important, we believe that this Court both can, and should, assert section 1291 jurisdiction over this appeal without rejecting the application of a contempt precondition as a general proposition. Whatever the state of the law regarding the need for a contempt citation generally, there can be no doubt that the Court possesses the "power" to exercise jurisdiction over this appeal. This is not a case in which there is no Article III case or controversy, nor is there any statute that, in Draconian terms, precludes recognition of limited exceptions. If that were the case, there would be no room for judicially-created

exceptions, such as "collateral order" or "death knell" appeals, let alone for the creation of situational exceptions, as in cases such as *Dickinson* or *Gillespie*.

Appellants accept the proposition that courts of appeal should be reluctant to allow collateral appeals for reasons that have been well-articulated and that further sensible policies. Perhaps it even makes sense to continue to impose a precondition of contempt, in most cases, before allowing third parties to appeal discovery orders—although the reasons for doing so are, as we say, obscure to say the least. However, exceptions are permitted and there are cases where a different outcome is called for. This is such a case.

This appeal arises in the unique circumstance of being, in effect, a post-trial discovery dispute[5] in a case where there is a strong public interest in prompt resolution of the underlying constitutional controversy over Proposition 8. Appellants are in no sense seeking to delay resolution of that controversy.[6] However, they feel compelled to seek review of orders which, they strongly believe, are improper under the First Amendment. In fact, as the record reflects, the ACLU went so far as to submit a brief in support of Proponents in their earlier appeal of the privilege issue in this case, even though they could not be more

[5] *See* footnote 1, *supra*.

[6] To the contrary, they have urged expedition to an extraordinary extent. *See* Appellants' Motion for Expedited Appeal and for Designation as "Comeback Appeal" at 2.

strongly opposed to Proponents' position on the merits of the underlying Proposition 8 litigation.

There, also, is nothing more to be done by the district court that will further define or develop the appellate issues — let alone avoid the need for review. The only thing that remains to be done is to "execute" upon the orders that already have been entered — a term that has been used to describe the type of orders that are considered final for purposes of appeal. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).[7]

Allowing an appeal here, in short, not only is consistent with the reasons for having a "final decision" rule (indeed, it will further judicial efficiency as opposed to interfering with it), it also is supported by the notion that "finality" must be viewed in "practical" and "pragmatic" terms.[8] As the Supreme Court observed in

---

[7] Appellants also note that this Court did not consider the absence of disobedience or the imposition of sanctions a bar to appeal when Proponents were the parties seeking review in *Perry*. To the contrary, in observing that the question of appellate jurisdiction remained a "close question" even in the wake of *Mohawk Industries v. Carpenter*, 558 U.S. ___, 130 S. Ct. 599 (2009), the only issue that the Court focused on was the availability of review following the entry of final judgment. *See Perry*, 591 F.3d at 1155-56.

[8] To deepen the procedural quagmire surrounding this issue still further, earlier this week Proponents filed a petition for a writ of certiorari in the Supreme Court seeking review of this Court's decision in *Perry* on the ground that footnote 12 of that decision, itself, violates the First Amendment. *Hollingsworth v. Perry*, No. 09-1210 (April 5, 2010). However, in their petition Proponents advise the Court of the present appeal and say that if relief is granted by this Court as requested by the Appellants, that most likely will moot their petition. Petition at 4, 19. Therefore,

Brown Shoe Co. v. United States, 370 U.S. at 306: "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action' the touchstones of federal procedure." While it may be appropriate for such observations to be invoked only rarely, as Gilbert and Sullivan famously observed, "never" is not the same as "hardly ever."[9] Moreover, rules exist for a reason that ought to guide their application. No decision of the Supreme Court or of this Court has stated that the animating principle behind decisions urging a "practical" or "pragmatic" approach to finality is unsound when applied in the type of unique circumstances presented by this case.

No disapproval, nor even a material limitation, of the rules governing finality is required for this Court to hold that this is one of those rare cases in which practicality and pragmatism in the approach to appellate jurisdiction are appropriate in order to consider an appeal that raises a narrow but important question. That question can and should be expeditiously resolved by this Court, thereby severing the increasingly complex[10] Gordian knot of objections and procedural issues surrounding application of the First Amendment privilege in

---

they say, disposition of their petition should be deferred pending resolution of the present proceedings. *Id*. at 38.

[9] W.S. Gilbert & A. Sullivan, *HMS Pinafore*.

[10] *See* footnote 8, *supra*.

political campaigns and paving the way for determination of the merits of the underlying action.[11] Appellants urge the Court to exercise jurisdiction here for that reason.

---

[11] In urging this Court to take a "pragmatic" or "practical" approach to the issue of finality, based upon the Supreme Court cases cited in the text, we do not overlook the fact that those cases — most particularly including *Gillespie* — have had what one court has described as a "checkered life" in both the courts of appeal and the Supreme Court. *Utah State Dep't of Health v. Kennecott Corp.*, 14 F.3d 1489, 1495 (10th Cir. 1994). In fact, while the Supreme Court (in *Coopers & Lybrand*, *supra*, 437 U.S. at 477 n.30) asserted that *Gillespie* should be narrowly construed — an assertion referred to by this Court in *CPUC*, 813 F.2d at 1479-80 — two years later, in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 279 (1980), the Supreme Court quoted and relied upon *Gillespie* as a basis for asserting jurisdiction which, according to Wright & Miller, "seemed to stretch finality doctrine to the limit." 15A Wright & Miller § 3913 at 479 n.42. In fact, a review of the cases collected in the aforementioned section of the Wright & Miller treatise shows that there remains considerable authority acknowledging and applying case-specific exceptions to the "finality" rule based upon considerations of both pragmatism and practicality.

In Appellants' view, the cases that are critical of an overly expansive reading of the "pragmatic" and "practical" approach of decisions such as *Gillespie*, *Dickinson* and *Brown Shoe*, involve efforts to use those cases as a way to create a wholesale exception to the "finality" doctrine—in effect an exception that would have the potential to swallow the "finality" rule. *See, e.g.*, *Coopers & Lybrand*, *supra*. Here, by contrast, as in other cases where such an approach has been approved, Appellants urge no more than that the principles expressed in these cases support the availability of a "circumstances-based" exception where "the eventual costs…will certainly be less if [the Court] pass[es] on the questions presented here rather than send[ing] the case back with those issues undecided." *Gillespie*, 379 U.S. at 153. That narrow approach is consistent with cases in this Circuit, and elsewhere, recognizing the viability of a pragmatic approach to finality where holding otherwise would undermine the efficient and sensible administration of appellate review. *See SEIU Local 102 v. County of San Diego*, 60 F.3d 1346, 1349-50 (9th Cir. 1995); *Stone v. Heckler*, 722 F.2d 464, 465-68 (9th Cir. 1983); *see also United States v. Legal Servs. for New York City*, 249 F.3d 1077, 1080-81 (D.C. Cir. 2001).

II. IN THE ALTERNATIVE, THE COURT SHOULD EXERCISE ITS MANDAMUS JURISDICTION

In the alternative, the Court has the unquestioned authority to decide the issues presented here through its power of mandamus – the route that it chose to follow in its January 4 decision in *Perry*. *See* 591 F.3d at 1156. That is true both for the reasons that were articulated by the Court in that decision and in light of the doctrinally separate principle – noted in the Court's March 31 Order – that "this court may exercise mandamus jurisdiction when a district court does not comply with [its] mandate" (citing *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713 (9th Cir. 1999)).

A. Mandamus Is Appropriate for the Reasons Articulated by This Court in *Perry*.

While the question that is presented on this "comeback" appeal is narrower than the overall existence of a First Amendment privilege for non-public campaign communications that was at issue in *Perry*, it is no less important in terms of safeguarding the First Amendment rights recognized in that decision but, then, largely thwarted by the district court's decisions following remand. It is, thus, as true here as it was when the earlier appeal was before the Court that "[t]he right at issue here – freedom of political association – is of a high order." 591 F.3d at 1155. Under the orders appealed from, a large number of private communications regarding sensitive campaign strategy and messaging have been ordered to be

produced notwithstanding the fact that "[c]ompelled disclosures concerning protected First Amendment political associations have a profound chilling effect on the exercise of political rights." *Id*. at 1156. Although the Court ultimately concluded that, in light of the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, *supra*, it would not resolve those issues under the collateral order doctrine, it nonetheless invoked its mandamus jurisdiction in order to reach the merits of the First Amendment issues presented. In doing so, the Court noted that "'[m]andamus is appropriate to review discovery orders 'when particularly important interests are at stake'." *Perry*, 591 F.3d at 1156-57, (quoting 16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3935.3 (2d ed. 2009)).

Those same considerations apply here and, although Appellants cannot say that they literally meet each of the *Bauman*[12] factors, since they have a right of appeal either now (*see* Section I) or once they have been cited for contempt, those factors are only "guidelines" that need not all be "present at once," save for the existence of "clear error" which is considered "dispositive." *Perry*, 591 F.3d at 1156.

That "dispositive" factor is present here. For reasons that are explained at greater length in Appellants' Emergency Motion for Stay Pending Appeal (at 8-16), the orders at issue not only deny protection to the very same rights as those

[12] *See Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977).

recognized in *Perry*, but have vital implications for future elections. To cite but one obvious example, the district court's holding that there is no constitutional protection at all for communications between individuals working for different groups as part of a common and coordinated effort to achieve a particular political result is, we suggest, both wholly indefensible and vast in its implications for the conduct of future elections.

In *Perry*, this Court held that an order which improperly "limit[ed] the First Amendment privilege" for internal campaign communications regarding the formulation of campaign "strategy and messages" represented "clear error". 591 F.3d at 1158. The district court's refusal to provide any First Amendment privilege for communications to or from numerous people in the No on 8 campaign whose functions included the formulation of strategy and messages violates their constitutional rights to the same extent, and for the same reasons, as the order compelling discovery that was at issue in *Perry*. Equally clearly, the refusal to recognize essentially any privilege at all for inter-organizational communications is not only erroneous but has even more obvious implications for elections generally. As the Court noted in *Perry*, "[t]he potential chilling effect on political participation and debate" from such an erroneous order "is therefore substantial." *Id*. Being compelled to "disclose . . . internal campaign communications in civil discovery" implicates the interests of "the myriad social, economic, religious and

political organizations that publicly support or oppose ballot measures." *Id*. In sum, Appellants submit that the same considerations that led this Court to invoke its mandamus jurisdiction in the prior appellate proceedings in this case are present here and should lead to a similar conclusion regarding the appropriateness of mandamus.

B. The Court Also Should Exercise Its Mandamus Jurisdiction Because the Orders Appealed from Do Not Comply with the Mandate of This Court.

The Court also should exercise its supervisory power to prevent disregard of the directions provided by the Court in *Perry*. That is a well-recognized basis for the exercise of the Court's mandamus power[13] and is an independent basis for invocation of that authority here. *Vizcaino, supra*. Moreover, such authority may be exercised without regard to the *Bauman* factors. *See id*. at 719.[14]

---

[13] As the Seventh Circuit observed in *In the Matter of Continental Illinois Securities Litigation*, 985 F.2d 867, 869 (7th Cir. 1993), "[o]ne of the less controversial functions of mandamus is to assure that a lower court complies with the spirit as well as the letter of the mandate issued to that court." *See also United States v. United States Dist. Ct.*, 334 U.S. 258, 263-64 (1948); *In re Chambers Dev. Co.*, 148 F.3d 214, 224 (3d Cir. 1998); *In re General Motors Corp.*, 3 F.3d 980, 983 (6th Cir. 1993). *See generally* 16 Wright & Miller § 3932 at 474 ("If an appeal is pending…the court of appeals…may issue such writs as may be needed to prevent action by the district court that threatens to disrupt appellate determination. *Little more difficulty is presented by cases that authorize issuance of a writ to enforce compliance with the mandate rendered on a prior appeal or writ proceeding*" [emphasis added]).

[14] The fact that the petition here, in one sense, involves an indirect "remand" does not affect the applicability of the rule discussed in text. In directing Appellants to produce documents based upon its interpretation of *Perry*, the district court

Once again, the nature of the district court's failure is explained more fully in Appellants' emergency stay motion. *See* Stay Motion at 8-16. The essence of that failure is reflected in the Court's demonstrably over-broad reading of the limitations contemplated by footnote 12 in the *Perry* decision, while essentially disregarding the decision as a whole. *Id.* Applying that footnote in a wholly wooden fashion to deny virtually any privilege for inter-organizational communications and to disregard uncontradicted (and supposedly "credited") evidence regarding the role played by various individuals involved in the formulation of strategy and messaging plainly fails to fulfill the mandate of this Court's decision. What is fatally missing from the district court's orders is any apparent appreciation of *why* the privilege exists, *i.e.* what is its *function*. *See* Stay Motion at 11-12, n.3, 15-16. While the Court remanded the case to the district court to implement its January 4 decision, that direction was not open-ended nor was it to be implemented without regard to the analysis in the opinion as a whole.

---

purported to be implementing the mandate of that decision as much it did in the orders directed to Proponents. In all events, it is well settled that the mandamus power is sufficiently broad to apply even where a case no longer is, or could be, within the jurisdiction of the court that is asked to enforce its earlier mandate. *United States v. United States Dist. Ct.*, 334 U.S. at 263-64. Indeed, the fact that a court of appeals would have jurisdiction to consider an appeal at some time *in the future* has been deemed sufficient to support review of a discovery order in aid of such future jurisdiction. *See, e.g., Westinghouse Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1422 (3d Cir. 1991). *See also Am. Fid. Fire Ins. Co. v. United States Dist. Ct.*, 538 F.2d 1371, 1373 (9th Cir. 1976); *Taiwan v. United States Dist. Ct.*, 128 F.3d 712, 717 (9th Cir. 1997).

To the contrary, the express direction in footnote 12 was for the court to implement this Court's opinion "in light of the First Amendment associational interests the privilege is intended to protect." *Perry*, 591 F.3d at 1165 n.12. That is not what the Magistrate Judge or the district court judge did.

Appellants do not claim that either Magistrate Judge Spero or Chief Judge Walker claimed to be acting in defiance or disregard of this Court's directions. However, the same thing will be true in virtually every case in which a court has been directed to implement a directive from a higher court and, then, does otherwise. The basis for exercising mandamus jurisdiction is not the existence of a contumacious intent, but an erroneous act. *In the Matter of Cont'l Illinois Sec. Litig.*, *supra*, 985 F.2d at 869 ("Although we have no reason to suppose that Judge Grady is acting otherwise than in the utmost good faith in seeking to carry out our mandate…we do not think that [his order] can reasonably be thought to comply…."). In fact, as this Court noted in *Vizcaino*, supervisory mandamus may be appropriate even with respect to "discretionary matters". *See* 173 F.3d at 720 (citing *Brown v. Baden*, 815 F.2d 575, 576 (9th Cir. 1987)).

The whole point of supervisory mandamus is to consider and, where necessary, correct the misapplication of an appellate court's directions – here, to protect the First Amendment rights of people involved in political associations by preventing disclosure of their non-public communications regarding the

formulation of campaign strategy and messages except upon a showing of heightened relevance and the absence of alternative sources of evidence pertinent to the highly relevant issue. *See* 591 F.3d at 1160-61. The district court has violated that direction in this case, thereby requiring correction by this Court through exercise of its mandamus jurisdiction.

III. CONCLUSION

For the foregoing reasons, this Court possesses appellate jurisdiction over this appeal. In the alternative, it should address the merits of the appeal pursuant to its mandamus authority. An expedited schedule for briefing and argument of the merits should be established.

Dated: April 9, 2010

Stephen V. Bomse (State Bar No. 40686)
Justin M. Aragon (State Bar No. 241592)
ORRICK, HERRINGTON & SUTCLIFFE

Alan L. Schlosser (State Bar No. 49957)
Elizabeth O. Gill (State Bar No. 218311)
ACLU FOUNDATION OF NORTHERN CALIFORNIA

By: /s/ Stephen V. Bomse

Attorneys for Petitioners/Appellants
NO ON PROPOSITION 8, CAMPAIGN FOR MARRIAGE EQUALITY: A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

Lynn H. Pasahow (State Bar No. 054283)
Carolyn Chang (State Bar No. 217933)
Leslie Kramer (State Bar No. 253313)
Lauren Whittemore (State Bar No. 255432)
FENWICK & WEST LLP

Attorneys for EQUALITY CALIFORNIA

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,176 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word version 2003 with 14 point font in Times New Roman type style.

Dated: April 9, 2010

Stephen V. Bomse (State Bar No. 40686)
Justin M. Aragon (State Bar No. 241592)
ORRICK, HERRINGTON & SUTCLIFFE

Alan L. Schlosser (State Bar No. 49957)
Elizabeth O. Gill (State Bar No. 218311)
ACLU FOUNDATION OF NORTHERN CALIFORNIA

By: /s/ Stephen V. Bomse

Attorneys for Petitioners/Appellants
NO ON PROPOSITION 8, CAMPAIGN FOR MARRIAGE EQUALITY: A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

Lynn H. Pasahow (State Bar No. 054283)
Carolyn Chang (State Bar No. 217933)
Leslie Kramer (State Bar No. 253313)
Lauren Whittemore (State Bar No. 255432)
FENWICK & WEST LLP

Attorneys for EQUALITY CALIFORNIA