No. 10-15649

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

DENNIS HOLLINGSWORTH, et al.,

Intervenor-Defendants-Appellees,

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

Third Parties-Appellants.

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

PLAINTIFFS-APPELLEES' BRIEF IN RESPONSE TO THE COURT'S MARCH 31, 2010 ORDER

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INTRODUCTION AND SUMMARY OF ARGUMENT

In its March 31, 2010 Order, the Court directed Equality California and No on Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union of Northern California (collectively, "the ACLU") and the parties to file briefs addressing whether this Court has jurisdiction over the ACLU's interlocutory appeal of the district court's discovery order under the contempt rule explained in *In re Subpoena Served on California Public Utilities Commission*, 813 F.2d 1473, 1476 (9th Cir. 1987), and whether mandamus is appropriate under the mandate rule articulated in *Vizcaino v. United States District Court*, 173 F.3d 713 (9th Cir. 1999). Plaintiffs respectfully submit that no jurisdiction exists and, in any event, mandamus is inappropriate because the district court fully comported with this Court's January 13, 2010 mandate.

This Court lacks jurisdiction over the ACLU's premature appeal because the contempt rule—which governs precisely these circumstances—bars nonparties such as the ACLU from filing disruptive interlocutory appeals and mandamus petitions challenging a district court's discovery order. *Belfer v. Pence*, 435 F.2d 121, 123 (9th Cir. 1970). If the ACLU disagrees with the district court's discovery order, the procedurally proper course of action is for it to disobey that order and appeal from a contempt ruling. *In re Subpoena*, 813 F.2d at 1476.

The ACLU cannot invoke the mandate rule—which applies only in extraordinary circumstances where a party seeks mandamus of a district court decision that "*obstructs*" an earlier appellate ruling in the case, *Vizcaino*, 173 F.3d at 719 (emphasis added)—for two reasons. First, this Court's mandate in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), does not apply to the ACLU because it was not a party to that appeal. Second, in any event, Chief Judge Walker and Magistrate Judge Spero carefully and faithfully applied *Perry* both to Plaintiffs' discovery of Proponents and Proponents' discovery of the ACLU. Indeed, it would be fundamentally unfair to Chief Judge Walker and Magistrate Judge Spero, who have worked tirelessly to conduct a fair and expedited trial, to even suggest that they somehow "obstructed" the mandate in *Perry*. Proponents' gratuitous and baseless attacks on Chief Judge Walker and Magistrate Judge Spero have nothing to do with the issues presented by the ACLU, but rather are just their latest salvos in an overarching strategy that attempts to obscure the weakness of their case on the merits by attacking the decision-makers.

Regardless of how the ACLU's appeal is resolved, Plaintiffs respectfully request that the Court resolve it as swiftly as possible. Plaintiffs are suffering irreparable harm every day because Proposition 8 ("Prop. 8") prevents them from exercising their fundamental right to marry. Indeed, more than two months have passed since the final witness testified at trial, but because of Proponents' belated

discovery motion, the district court has not yet heard closing arguments or issued its ruling. Since July 2009, the parties have moved quickly and efficiently toward trial and a final ruling on the merits. Although the district court and the parties have spent considerable resources to achieve a "just, speedy and inexpensive determination of these issues," AA 9, Proponents' untimely motion to compel and the ACLU's objections to the district court's order are impeding the trial process.[1] Indeed, Proponents did not move to compel the production of documents by the ACLU until halfway through trial and well after the close of fact discovery. And at the March 16, 2010 hearing before Chief Judge Walker, Proponents even suggested that they may attempt to call additional witnesses in a subsequent "phase" of the trial. SRR 489.[2]

Proponents' belated discovery dispute is nothing more than a distraction from the real harms caused to Plaintiffs by the ballot measure that Proponents sponsored. In light of the great effort exerted to achieve a timely resolution of the underlying merits, justice requires a prompt resolution of this post-trial, pre-judgment discovery appeal. Plaintiffs therefore respectfully request that the Court bring this irrelevant sideshow to an end.

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1 "AA" refers to Appellant's Appendix of Relevant Documents filed on March 25, 2010.

2 "SRR" refers to Appellee's Supplemental Relevant Parts of the Record filed contemporaneously with this Brief.

FACTUAL AND PROCEDURAL BACKGROUND

I. PROPONENTS' OBJECTIONS TO PLAINTIFFS' DISCOVERY REQUESTS

On July 2, 2009, the district court denied Plaintiffs' motion for a preliminary injunction on the ground that further factual development was necessary to determine the constitutionality of Prop. 8. One of the factual issues that the district court identified as relevant to that question was "whether Prop 8 was passed with a discriminatory intent," which, the court explained, "may require the record to establish . . . the voters' motivation or motivations for supporting Prop 8." AA 8-9. Recognizing the "serious" constitutional questions raised by Plaintiffs' claims, *see* SRR 216, the district court set an expedited trial schedule that provided the parties three months of fact discovery. SRR 2; *see also* AA 9 ("The just, speedy and inexpensive determination of these issues would appear to call for proceeding promptly to trial.").

On August 21, 2009, Plaintiffs promptly propounded discovery intended to determine whether the passage of Prop. 8 was motivated by discriminatory animus toward gay and lesbian individuals. In response to Plaintiffs' document requests, Proponents asserted a blanket, absolute First Amendment privilege that went far beyond any privilege recognized by any court in these circumstances. Based on this assertion, they sought a protective order prohibiting ***any*** discovery into documents or communications concerning Prop. 8, except to the extent Proponents

themselves had chosen to make a communication available to the general public, on the ground that the documents Plaintiffs sought were both irrelevant and protected against disclosure by the First Amendment. SRR 120-21. Before the hearing on their motion for a protective order, Proponents relented and agreed to produce communications targeted to certain discrete voter groups, but not any group with which Proponents maintained they had formed an "associational bond." *Perry v. Schwarzenegger*, No. 09-17241, slip op. at 16628 & n.12 (9th Cir. Dec. 11, 2009), *amended by Perry*, 591 F.3d 1147; *see also* SRR 123. The district court denied, in part, Proponents' motion for a protective order—rejecting Proponents' blanket First Amendment privilege claim in its entirety. SRR 122-55. On appeal, this Court exercised mandamus jurisdiction and reversed, in part. *Perry*, 591 F.3d 1147. The ACLU—a nonparty to this case—was not a party to that appeal because Proponents, a month before trial, had not yet sought to compel discovery from the ACLU.

This Court issued its initial opinion on December 11, 2009, and Plaintiffs immediately sought discovery that was clearly appropriate based on the Court's ruling. But Proponents stonewalled, claiming that under this Court's decision, *no discovery whatsoever was permissible.* SRR 156-72. Indeed, in their brief in response to this Court's December 16, 2009 order directing the parties to file briefs regarding whether the case should be reheard en banc, Plaintiffs recounted Propo-

nents' unreasonable refusal to produce any documents in light of this Court's decision. *See* SRR 572 n.2 (explaining that, after this Court's original opinion, Proponents took the position that "private, internal campaign communications," which this Court held were privileged, included ***any*** communications concerning Prop. 8 to or from Proponents' "political associates") (quoting SRR 170).

Shortly thereafter, on January 4, 2010, this Court issued an amended opinion emphasizing that its holding concerning the First Amendment privilege is "limited to *private, internal* campaign communications concerning the *formulation of campaign strategy and messages*" and "therefore limited to communications among the core group of *persons* engaged in the formulation of campaign strategy and messages." *Perry*, 591 F.3d at 1165 n.12. In contrast, and over Proponents' objections, the Court held that the First Amendment protection "certainly does not apply to documents or messages conveyed to the electorate at large, discrete groups of voters or individual voters for purposes such as persuasion, recruitment or motivation—activities beyond the formulation of strategy and messages." *Id*. Nor are *external* communications *between* different organizations protected. *Id*. (citing *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 415 (D. Kan. 2009)). And, in case the language of the opinion were not clear, the Court cited as an example of a document "far afield from the kinds of communications the First Amendment privilege protects," Proponent Tam's now-infamous letter "urging

'friends' to 'really work to pass Prop 8.'" *Id.*

The Court credited the district court's conclusion that Plaintiffs' discovery requests satisfied the Rule 26 standard in that they were "reasonably calculated to lead to the discovery of admissible evidence on the issues of voter intent and the existence of a legitimate state interest." *Id.* at 1164. But the Court held that the district court should have applied the heightened relevance test in light of the First Amendment protection afforded to "private, internal campaign communications." *Id*. at 1164-65 & n.12. Based on the record before it, the Court concluded that Plaintiffs had not met this heightened burden. *Id*. at 1164-65. It therefore directed the district court to fashion a protective order that would prevent the compelled disclosure of "communications among the core group of *persons* engaged in the formulation of campaign strategy and messages." *Id*. at 1165 & n.12. With respect to defining the "core group," the Court purposefully left "it to the district court, which is best acquainted with the facts of this case and the structure of the 'Yes on 8' campaign, to determine the persons who logically should be included in light of the First Amendment associational interests the privilege is intended to protect." *Id*. at 1165 n.12.

On January 6, 2010, two days after this Court's amended opinion and five days before the commencement of trial, Magistrate Judge Spero presided over a lengthy hearing to settle Plaintiffs' outstanding discovery requests. Proponents

made a succession of "outrageous" and "frivolous" arguments designed to avoid their duty to produce documents pursuant to this Court's amended opinion. *See, e.g.*, SRR 357 (magistrate judge's response to Proponents' argument that they did not have the resources to produce the required documents in time for trial: "I think it is outrageous that you are playing this trump card and I actually can't believe you are doing it."); SRR 359. For example, Proponents took the untenable position that somehow Chief Judge Walker's earlier ruling required them to produce only internal documents, and because this Court's decision held that internal communications were privileged, Proponents were not required to produce *any* documents. SRR 163-65. In addition, Proponents continued to argue that the documents sought were irrelevant and that production five days before trial was too burdensome, even though Proponents' largely unfounded objections were the root cause of this "burden." SRR 170-71. Proponents even argued that the district court did not have jurisdiction to apply this Court's amended opinion because a mandate had yet to be issued. SRR 275-77. The magistrate judge denied their objections and dutifully applied this Court's mandate.

To determine who from the "Yes on 8" campaign constituted the core group of persons engaged in the formulation of campaign strategy and messages, the magistrate judge consulted various sources, including the parties' previous declarations, briefing and oral arguments. AA 11-14. The magistrate judge credited a

November 2009 declaration filed by Proponents "explain[ing] the structure of the 'Yes on 8' campaign and identif[ying] by name the individuals with decision-making authority over campaign strategy and messaging." AA 12-13. When Proponents then argued at the hearing that their November declaration identifying those persons engaged in the formulation of campaign strategy and messages was incomplete, the magistrate judge granted their request for an additional 24 hours to supplement their filing. AA 13.

After reviewing Proponents' submissions and Plaintiffs' opposition, the magistrate judge identified a broad and over-inclusive core group that listed 25 individuals and their assistants, employees from ten consulting firms, and any and all "volunteers who had significant roles in formulating strategy and messaging." AA 13. Indeed, Proponents' core group even included individuals who Proponents had previously argued did not participate in the formulation of campaign strategy and messages. SRR 168 (arguing that Proponents Knight and Tam "had virtually nothing to do with Protectmarriage.com's [sic] campaign"). But the magistrate judge declined to deem privileged communications between Proponents and organizations other than ProtectMarriage.com on the ground that "[P]roponents have never asserted a First Amendment privilege over communications to other organizations." AA 11-12.

On January 8, 2010, Magistrate Judge Spero ordered Proponents to produce

all non-privileged documents responsive to Plaintiffs' requests. AA 14-15. Chief Judge Walker denied Proponents' objections to the magistrate judge's order in their entirety. AA 25-27. Proponents elected not to seek mandamus review of the district court's order. Four months after Plaintiffs first requested these documents, and just hours before trial, Proponents began the production of long-withheld documents responsive to Plaintiffs' August 21, 2009 request on a rolling basis. Proponents made their final production on the last day of trial, January 27, 2010.

II. THE ACLU'S OBJECTIONS TO PROPONENTS' DISCOVERY REQUESTS

On January 15, 2010, halfway through trial, over a month after the December 7, 2009 deadline by which to file a motion to compel, five weeks after this Court's initial opinion, and 11 days after the Court's amended opinion, Proponents finally moved to compel the production of documents from the ACLU. AA 116-24, 56. The ACLU opposed the motion to compel on the grounds that it was untimely and that the documents sought were irrelevant and privileged. SRR 190-93.

Magistrate Judge Spero granted the motion to compel, finding that "the mix of information available to voters who supported Proposition 8 is relevant." AA 58. The magistrate judge relied on three declarations filed by the ACLU to define the core groups of the different organizations implicated, including a supplemental declaration filed after the matter was heard and submitted. AA 61-62. The magistrate judge credited the vast majority of the declarations, but found that the

ACLU's declarations were defective with respect to the Equality California Institute Board of Directors, the Equality for All Campaign Committee and Equality for All campaign staff. AA 61-63. Because the ACLU did not present the magistrate judge with any evidence demonstrating that these persons were among the core group, they were not included. AA 61-63. Having defined the core groups, the magistrate judge observed that the ACLU had not made a showing to support a First Amendment privilege for communications between the separate organizations. *See* AA 64-65, 116. Lastly, the magistrate judge addressed the ACLU's burden objections and provided the ACLU with substantial relief: The magistrate judge limited the search terms to six key terms, reduced the pool of documents to be reviewed, and relieved the ACLU of its duty to provide a privilege log. AA 65-66. After a hearing on March 16, 2010, Chief Judge Walker denied the ACLU's and Proponents' objections to the magistrate judge's order in their entirety on March 22, 2010. AA 104-27. Chief Judge Walker found that Proponents' "showing of relevance [was] minimal." AA 110. He noted that, despite Proponents' assertions that the documents they sought were "highly relevant," Proponents "do not appear to have made use of publicly available documents in this regard during trial." AA 110-11.

On March 23, 2010, the ACLU sought and was granted a stay of the district court's order pending appeal. SRR 200-07; AA 128-29. On March 25, 2010, the

ACLU filed an emergency motion to stay pending appeal, which this Court granted on March 26, 2010. On March 31, 2010, this Court issued an order directing the ACLU and the parties to file briefs addressing solely the issues of whether this Court has jurisdiction over this appeal and whether mandamus is appropriate.[3]

ARGUMENT

I. THE CONTEMPT RULE FORECLOSES BOTH THE ACLU'S INTERLOCUTORY APPEAL AND ITS REQUEST FOR MANDAMUS

This Court lacks jurisdiction over the ACLU's interlocutory appeal because the well-established contempt rule requires nonparties who seek appellate review of a discovery order to first refuse to comply with that order, be sanctioned for contempt, and then appeal from the contempt citation. *See In re Subpoena*, 813 F.2d at 1476 ("[I]f the district court denied a nonparty's motion to quash, the nonparty could obtain review only by electing to ignore the subpoena and appeal the ensuing contempt citation. Until a contempt citation is issued as a final judgment in the contempt proceeding, we lack jurisdiction to review the order."); *Belfer*, 435 F.2d at 123 ("Here there is no evil which cannot be corrected on a later appeal. The rights of the [nonparty] petitioners are protected sufficiently by their

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[3] Proponents filed a petition for a writ of certioriari in the U.S. Supreme Court on April 6, 2010, seeking review of this Court's *Perry* decision. Notably, they state in their petition that they "agree[] wholeheartedly with the ACLU's substantive objections to [*their own*] discovery requests." SRR 601.

ability to disobey and test the Hawaii court's discovery order on appeal from a subsequent citation for contempt.").

The contempt rule also bars petitions for writs of mandamus filed by third parties resisting discovery. Indeed, in *Belfer* this Court denied mandamus because the nonparty seeking review of the district court's discovery order could protect its interest through an appeal from a contempt order. 435 F.2d at 123; *see also* Christopher A. Goelz & Meredith J. Watts, *California Practice Guide: Federal Ninth Circuit Civil Appellate Practice* § 13:68 (2009) ("A discovery order directed at a *nonparty* is not reviewable by mandamus because the nonparty can refuse to comply and appeal from a contempt order.").

As this very appeal demonstrates, requiring nonparties who claim a privilege to "go through the contempt process" serves a crucial purpose "by raising the stakes [and] help[ing] the court winnow strong claims from delaying tactics that, like other interlocutory appeals [and mandamus requests], threaten to complicate and prolong litigation unduly." *Burden-Meeks v. Welch*, 319 F.3d 897, 900 (7th Cir. 2003); *see also In re Subpoena*, 813 F.2d at 1476 n.1 ("The requirement that a nonparty must be in contempt of court in this situation is a serious matter and serves to illustrate the strictness in applying the final judgment rule.").[4]

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[4] The ACLU also cannot invoke the "narrow and selective" collateral order doctrine. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009)

II. MANDAMUS IS INAPPROPRIATE BECAUSE THE DISTRICT COURT FULLY COMPLIED WITH THIS COURT'S MANDATE

Even if the contempt rule did not conclusively foreclose the ACLU's mandamus request, mandamus would not be warranted to enforce this Court's prior mandate in *Perry*, 591 F.3d 1147.

This Court has held that mandamus is appropriate in the extraordinary circumstance where "a lower court *obstructs* the mandate of an appellate court." *Vizcaino*, 173 F.3d at 719 (emphasis added). The mandate rule exists because lower courts' disregard of appellate mandates "'would severely jeopardize the supervisory role of the courts of appeals within the federal judicial system'" and "litigants who have proceeded to judgment in higher courts 'should not be required to go through that entire process again to obtain execution of the judgment.'" *Id.* (quoting *In re Chambers Dev. Co.*, 148 F.3d 214, 224 (3d Cir. 1998), and *Gen. Atomic Co. v. Feller*, 436 U.S. 493, 497 (1978)).

This general rule does not apply here for two reasons. *First*, the mandate in *Perry* does not affect the ACLU because the ACLU *is not a party* to the lower court action and *was not a party* to the appeal in *Perry*. Instead, the contempt rule—which is designed for precisely these circumstances—applies. *Second*, in

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(internal quotation marks omitted). Indeed, the U.S. Supreme Court recently held in *Mohawk* that discovery orders denying claims of privilege are not appealable under the collateral order doctrine. *Id*. at 603; *see also Perry*, 591 F.3d at 1154-56.

any event, the district court painstakingly applied the legal standard articulated by this Court on remand, both to Proponents and the ACLU.

A. THIS COURT'S MANDATE DOES NOT APPLY TO THE ACLU

A trial court may properly consider on remand "any issue not expressly or impliedly disposed of on appeal." *Vizcaino*, 173 F.3d at 719 (quoting *Firth v. United States*, 554 F.2d 990, 993 (9th Cir. 1977)). "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)); *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986). The "ultimate task" is therefore "to distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not." *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000).

The mandate rule thus does not apply to nonparties, because the judgment in any earlier appeal does not affect them. *See Gen. Atomic Co.*, 436 U.S. at 497 ("A *litigant who . . . has obtained judgment* . . . after a lengthy process of litigation . . . should not be required to go through that entire process again to obtain execution of the judgment") (emphasis added); *Vizcaino*, 173 F.3d at 719 (mandate rule exists because "litigants who have proceeded to judgment in higher courts should not be required to go through that entire process again to obtain execution of the

judgment") (internal quotation marks omitted). Plaintiffs are not aware of a single case in which a nonparty has been permitted to seek mandamus review of a district court's ruling on grounds that it disregards an appellate court's mandate in an earlier appeal that did not involve the nonparty. *See, e.g.*, *Vizcaino*, 173 F.3d at 720-22, 725 (granting party's mandamus petition where the district court flouted the mandate of an earlier appellate proceeding involving the party seeking mandamus); *ATSA of Cal., Inc. v. Continental Ins. Co.*, 754 F.2d 1394 (9th Cir. 1985) (same); *In re Midamerican Energy Co.*, 286 F.3d 483 (8th Cir. 2002) (same); *In re Dow Corning Corp*., 113 F.3d 565 (6th Cir. 1997) (same). This is unsurprising because the form of mandamus relief described in *Vizcaino* is "closely related to the doctrine of law of the case." 173 F.3d at 719. And the law of the case generally does not apply to nonparties. *See Hamilton v. Leavy*, 322 F.3d 776, 787 (3d Cir. 2003) (refusing to apply the law of the case doctrine to defendants who had not yet been added to the case when earlier ruling was issued); *United States v. Dexter*, 165 F.3d 1120, 1124 (7th Cir. 1999) (refusing to apply law of the case to bar same argument that co-defendant made unsuccessfully in same case); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478.5 (2d ed. 2002) ("[A] party joined in an action after a ruling has been made should be free to reargue the matter without the constraints of law-of-the-case analysis."); *cf. Hydrick v. Hunter*, 500 F.3d 978, 986

(9th Cir. 2007) (recognizing that district court might have found law of the case doctrine inapplicable because there was a new party to the suit), *vacated on other grounds*, 129 S. Ct. 2431 (2009).

Because the ACLU was not a party to the *Perry* appeal, this Court did not—and could not—previously rule on discovery of ACLU communications, either directly or impliedly. The ACLU therefore cannot seek mandamus on the ground that the district court "obstructed" this Court's mandate. The ACLU's claim of privilege indisputably involves different entities with a different role in the campaign surrounding Prop. 8 and different documents from those at issue in Proponents' appeal. *See, e.g.*, *Perry*, 591 F.3d at 1163 (discussing "the evidence presented *by Proponents*" to determine whether *Proponents* had made "a prima facie showing of arguable first amendment infringement") (emphasis added and internal quotation marks omitted). In fact, the ACLU has already admitted that this Court's mandate does not apply to it.[5] Mandamus jurisdiction is therefore inappropriate.

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[5] *See* SRR 191 ("The ACLU does not question that limitation [this Court's *Perry* decision] here, any more than it questions the application of it *to Proponents* by Magistrate Judge Spero in his January 8 Order. Neither of those decisions, however, resolves the particular issues of privilege that remain to be considered with respect to the documents of nonparty ACLU. Footnote 12 was a footnote for good reason. It was intended to apply to the specific circumstances of the requests served by plaintiffs on Proponents and to the structure of the Yes on 8 campaign.").

B. THE DISTRICT COURT METICULOUSLY APPLIED THIS COURT'S DECISION IN *PERRY* TO THE FACTS BEFORE IT

Even if a nonparty like the ACLU could invoke the mandate rule—which it cannot—mandamus is inappropriate because the district court did not disobey this Court's mandate. Rather, it scrupulously applied this Court's decision in *Perry* to the specific issues raised by both Proponents and the ACLU. Given the exhaustive efforts by Chief Judge Walker and Magistrate Judge Spero to implement and apply this Court's ruling to the specific facts at hand, it is not surprising that Proponents elected not to seek a writ of mandamus following Magistrate Judge Spero's January 8, 2010 order on the ground that it disobeyed this Court's mandate.

This Court's decision in *Perry* makes clear that while it articulated the legal standard for discovery of the "Yes on 8" campaign, it expressly reserved *application* of that standard to the district court. The Court allowed the district court to determine in the first instance the persons included among the core group who formulated campaign strategy and messages and whose internal communications were therefore within the scope of the privilege. Specifically, the Court held that Proponents' "*private, internal* campaign communications concerning the *formulation of campaign strategy and messages*" were privileged, but other communications to, from, or within ProtectMarriage.com or other groups were not. *Perry*, 591 F.3d at 1165 n.12 (citing *In re Motor Fuel*, 258 F.R.D. at 415). But the Court stopped short of deciding which individuals were or were not

covered by the privilege at issue: "We leave it to the district court, which is best acquainted with the facts of this case and the structure of the 'Yes on 8' campaign, to determine the persons who logically should be included in light of the First Amendment associational interests the privilege is intended to protect." *Id.* *Perry* therefore does not even decide the precise scope of the privilege for communications within ProtectMarrriage.com, let alone the broader privilege claim now asserted by the ACLU and other groups involved in the "No on 8" campaign.

Moreover, despite the many mischaracterizations and misrepresentations in Proponents' Response to the ACLU's Motion to Expedite, the district court painstakingly followed this Court's instruction "to determine the persons who logically should be included" in the protected core group of the "Yes on 8" campaign and went to great lengths to safeguard Proponents' rights in that process. *Id*. Magistrate Judge Spero carefully combed various sources, including the parties' previous briefing and oral arguments. AA 11-14. He credited a November 2009 declaration filed by Proponents "explain[ing] the structure of the 'Yes on 8' campaign and identif[ying] by name the individuals with decision-making authority over campaign strategy and messaging." AA 12-13. And he granted Proponents additional time to supplement that declaration when Proponents later claimed that it was incomplete, even though the additional delay, just days before trial commenced,

prejudiced Plaintiffs' ability to prepare and present their case. AA 13.

On January 8, 2010, after carefully reviewing Proponents' submissions and Plaintiffs' opposition, Magistrate Judge Spero identified a broad protected core group that included 25 individuals and their assistants, employees from ten consulting firms, and any and all "volunteers who had significant roles in formulating strategy and messaging." AA 13.[6] Despite Proponents' baseless assertions to the contrary, *see* SRR 524-25, their core group was vast and over-inclusive. All but

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[6] In particular, the magistrate judge found that the following individuals and groups were members of the protected "core group":

> Dennis Hollingsworth, Gail J Knight, Martin F Gutierrez, Hak-Shing William Tam and Mark A Jansson (The official proponents of Proposition 8); Ron Prentice, Mark A Jansson, Ned Dolejsi and Doug Swardstrom (the members of ProtectMarriage.com's executive committee); David Bauer (the treasurer of ProtectMarriage.com); Andrew Pugno, Joe Infranco and Glen Lavy (ProtectMarriage.com's attorneys); Mike Spence and Gary Lawrence (individuals who provided significant advice and assistance to the campaign); Sonja Eddings Brown, Chip White and Jennifer Kerns (spokespersons for ProtectMarriage.com); Meg Waters and the individuals listed in ¶6(i)-(iii) and ¶6(v)-(vii) of the Second Prentice Declaration (volunteers who had significant roles in formulating strategy and messaging); employees of Schubert Flint Public Affairs, Lawrence Research, Sterling Corporation, Bieber Communications, Candidates Outdoor Graphics, The Monaco Group, Infusion PR, Connell Dontatelli, JRM Enterprises and K Street Communications (consulting firms who had significant input on strategic decisions); and assistants to the named individuals acting on the named individuals' behalf.

AA 13.

one individual listed in Proponents' declarations were included in their core group.[7] In fact, the core group even included individuals, such as Proponents Knight and Tam, who Proponents had previously claimed did not participate in the formulation of campaign strategy and messages. SRR 168 (arguing that Knight and Tam "had virtually nothing to do with Protectmarriage.com's [sic] campaign"). And Magistrate Judge Spero entered a broad protective order that enabled Proponents to withhold well over 6,000 separate documents.

Magistrate Judge Spero did not deem privileged communications between Proponents and groups other than ProtectMarriage.com because Proponents had not asserted and properly preserved any such privilege: "[P]roponents have never asserted a First Amendment privilege over communications to other organizations." AA 11-12.[8] This was consistent with *Perry*, which held that Proponents

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[7] The single excluded person, Bill Criswell, had previously declared that he did not "develop or assist in the development of the message(s) or theme(s) conveyed by the campaign to the voting populace." *See* SRR 174.

[8] The magistrate judge further noted that "[e]ven if the Court were to conclude that the First Amendment privilege had been properly preserved as to the communication among the members of core groups other than the Yes on 8 and ProtectMarriage.com campaign," nonetheless, "proponents have failed to meet their burden of proving that the privilege applies to any documents in proponents' possession, custody or control." AA 11-12. The magistrate judge explained that "[t]here is no evidence before the Court regarding any other campaign organization, let alone the existence of a core group within such an organization," and "no evidence before the Court that any of the documents at issue are private internal communications of such a core group

had not demonstrated a privilege for communications among different groups. *See* 591 F.3d at 1165 n.12 (citing *In re Motor Fuel*, 258 F.R.D. at 415). Indeed, at trial, counsel for Proponents (Mr. Pugno) admitted that *Perry* did not resolve whether groups other than ProtectMarriage.com were entitled to any First Amendment privilege. He conceded that the "First Amendment privilege articulated by the Ninth Circuit was with regard to *the campaign's internal formulation of messaging strategy*. We are on a *completely different field here*," because "[w]e're dealing with the religious association of a religious denomination and their ability to communicate with one another within the walls of the church." SRR 387 (emphasis added). Thus, to assert a privilege over communications from another alleged "core group" or between different organizations supporting Prop. 8, Proponents were required first to make a *prima facie* showing of an arguable First Amendment protection and to have properly preserved any such objection. *Perry*, 591 F.3d at 1160-61. But they failed to do so. AA 11-12. And when Chief Judge Walker denied Proponents' objections to Magistrate Judge Spero's order, Proponents did not seek mandamus in this Court. Rather, they complied and, in the middle of trial, produced non-privileged documents that were relevant to Plaintiffs' claims. And the documents produced unequivocally demonstrated that, contrary to their repeated denials, Proponents in fact devised, encouraged, approved, and/or

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regarding formulation of strategy and messages." AA 12.

funded campaign messages filled with discriminatory animus toward gay and lesbian individuals.[9] *See, e.g.*, SRR 113 (Proponents labeled as "false, reckless, and regrettable" Plaintiffs' argument that the enactment of Prop. 8 was motivated by animus against gays and lesbians).

Similarly, the district court faithfully applied *Perry* to the ACLU's privilege claims. After carefully reviewing three declarations filed by the ACLU, Magistrate

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[9] For example, the non-privileged documents produced by Proponents included a "Statement of Unity" executed by Proponent Tam and ProtectMarriage.com, whereby Tam agreed that "communications by coalition partners in support of [Prop. 8] must be approved by the Campaign Manager for strategic message discipline." PX2633. This document, among others admitted into evidence at trial, thus powerfully linked ProtectMarriage.com to Tam. It provides direct evidence that the "What If We Lose" letter authored by Tam and appended to this Court's *Perry* decision, which urged "friends" to "really work to pass Prop 8" because otherwise "homosexuals" will next "legalize having sex with children" and "[o]ne by one, other states would fall into Satan's hand," was a message *approved* by Prop. 8's campaign manager and *not* a message authored by someone who "had virtually nothing to do with Protectmarriage.com's campaign," as Proponents claimed in briefs filed with the district court. SRR 168. Similarly, documents produced by Proponents identified the hate-filled website www.1man1woman.net as part of their "grassroots" campaign in support of Prop. 8. PX2599. This website communicated to voters various virulent lies about gay and lesbian individuals, including that "[h]omosexuals are 12 times more likely to molest children" and the suggestion that "pedophilia [is] becoming a protected class." PX2199. Additionally, the documents produced proved that Proponents funded and supported a series of simulcasts in support of Prop. 8 that linked marriage equality to bestiality, incest, polygamy, pedophilia and even the terrorist attacks of 9/11. *See* PX0421 ("ProtectMarriage.com presents Protecting Marriage: Vote Yes On Prop 8 Rallies -- Three Simulcast Events for Church Leaders, Young People, and Congregations"); PX2075 (e-mail from the Yes on 8 campaign managers discussing same); PX0504A (excerpts of simulcast video).

Judge Spero identified expansive core groups for the ACLU (11 persons), Equality California (55 persons), and Equality for All (60 persons and the employees of 13 different companies). AA 53-66. The magistrate judge afforded the ACLU an opportunity to correct the deficiencies he identified in their declarations, thereby allowing the ACLU to expand its core group *after* the motion was heard and submitted. SRR 434-36. But Chief Judge Walker and Magistrate Judge Spero found that the ACLU did not heed the magistrate judge's instruction. AA 62-63, 104-27. With respect to communications between separate organizations, Magistrate Judge Spero found that the ACLU never made the required showing to support their claim that communications between separate organizations should be protected. *See* SRR 176-99; AA 28-52. Thus, the magistrate judge's conclusion that, based on the facts before him, "[t]he First Amendment privilege does not cover communications between separate organizations," AA 65, tracked this Court's decision exactly. *Perry*, 591 F.3d at 1165 n.12 (citing *In re Motor Fuel*, 258 F.R.D. at 415). Quite clearly, Chief Judge Walker and Magistrate Judge Spero were not flouting this Court's mandate, but rather were working hard to apply *Perry* to the new set of facts and record before them.

This case is therefore a far cry from those in which appellate courts have held that mandamus jurisdiction is appropriate because the district court "obstructed" or disobeyed the mandate and a party sought review of the district court's

decision. For example, in *Vizcaino*, this Court granted the plaintiffs' mandamus petition after the district court blatantly disregarded its mandate. This Court had held that all Microsoft employees, based on the common law definition of an "employee," were entitled to participate in a stock purchase plan. 173 F.3d at 716. But on remand, the district court precluded recovery for a subclass of those common law employees by redefining the class. *Id.* at 716, 720-21. Likewise, in *ATSA of California, Inc.*, this Court held that the arbitrator had authority to determine the applicable law, but on remand the district court directly disobeyed that mandate and decided that the arbitrator must apply Egyptian law. 754 F.2d at 1396 (granting plaintiff's mandamus petition). And in *In re Midamerican Energy Co.*, the court of appeals granted the defendant's mandamus petition because the district court allowed a plaintiff to add a new cause of action that was clearly foreclosed by an earlier circuit court holding. 286 F.3d at 486-87. Similarly, in *In re Dow Corning Corp*., the district court disregarded the court of appeals' order to assess each case individually to determine whether abstention was appropriate under the bankruptcy laws. 113 F.3d at 568-69. Instead, the court made a broad determination that abstention was appropriate in all cases. *Id.* Because the district court "clearly erred" in failing to adhere to the court of appeals' mandate, mandamus was appropriate. *Id.* at 571-72.

Here, in determining whether the ACLU was entitled to a First Amendment

privilege, the district court was asked to decide a different issue from the one addressed by this Court in *Perry*. Moreover, unlike the district court in *Vizcaino* or *In re Dow Corning*, the district court embraced this Court's instruction and meticulously applied the standard articulated in *Perry*, both with respect to Proponents and the ACLU in light of the specific facts and record before it. Although the ACLU and Proponents disagree with the district court's application of that standard to the particular facts of their dispute, it is indisputable that the district court faithfully adhered to and applied this Court's earlier mandate, and mandamus is therefore inappropriate.

CONCLUSION

This Court lacks jurisdiction over the ACLU's appeal because nonparties must first go through the contempt process before appealing from a district court's discovery order. Mandamus is inappropriate for the same reason. Mandamus is also inappropriate because this Court's mandate in *Perry* does not apply to the ACLU, which was not a party to that appeal. Moreover, the district court carefully followed this Court's instruction and applied the legal standard articulated in *Perry* to Proponents' and the ACLU's privilege claims. Regardless of how the Court resolves this appeal, Plaintiffs respectfully request that it do so expeditiously, because Plaintiffs continue to suffer irreparable harm each day that Prop. 8 prevents them from exercising their fundamental right to marry.

Dated: April 9, 2010

Respectfully submitted.

By /s/ Theodore B. Olson

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I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points, and contains 6,458 words.

Dated: April 9, 2010

By /s/ Theodore B. Olson

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