NO. 10-15649

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUALITY CALIFORNIA, et al.,
Petitioners-Appellees,

v.

DENNIS HOLLINGSWORTH, et al.,
Respondents-Appellees.

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

BRIEF OF RESPONDENTS-APPELLEES IN RESPONSE TO ORDER OF MARCH 31, 2010

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 608-3065
Fax: (916) 608-3066

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
Fax: (480) 444-0028

Charles J. Cooper
Michael W. Kirk
David H. Thompson
Howard C. Nielson, Jr.
Jesse Panuccio
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
Fax: (202) 220-9601

Counsel for Respondents-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Other

CORPORATE DISCLOSURE STATEMENT

Fed. R. App. P. 26.1

Respondent ProtectMarriage.com is not a corporation but a primarily formed ballot committee under California Law. *See* CAL. GOV. CODE. §§ 82013 & 82047.5. Its "sponsor" under California law is California Renewal, a California nonprofit corporation, recognized as a public welfare organization under 26 U.S.C. § 501(c)(4).

INTRODUCTION

The instant petition represents the second time the Proposition 8 litigation has necessitated an emergency trip to this Court so that it might review critical issues arising under the First Amendment. The question presented here is the same as the question presented last time: Has the district court erred by compelling production of documents revealing internal, nonpublic political campaign speech and associational activity? The answer to that question, under this Court's prior decision in the case is, seemingly, both yes and no. Nineteen pages of the opinion set out in clear terms that the type of information at issue is core political speech entitled to the utmost protection under the First Amendment. Courts can compel disclosure of such information, the bulk of the opinion makes plain, only upon a showing of a compelling need and that such compulsion is the least restrictive means of obtaining it. A single footnote in the opinion, however, states that the "holding is … limited to communications among the core group of *persons* engaged in the formulation of campaign strategy and messages." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1165 n.12 (9th Cir. 2010) (emphasis in original). On its face, this footnote would appear to peg First Amendment protection to the status of an individual within a campaign, rather than to the political nature of the speech and associational activity. The district court certainly read the footnote that way and, on that ground, has since ordered organizations that campaigned in favor of

Proposition 8, and organizations that campaigned in opposition to Proposition 8, to disgorge highly sensitive, nonpublic documents. Although the instant petition concerns the orders compelling disclosure by the No-on-8 groups, the legal theories undergirding both sets of production orders are the same: they stand or fall together.

The Court has asked the parties to submit briefs addressing whether it has jurisdiction over the appeal and whether mandamus is appropriate. There is no question, we submit, that the district court's rulings run afoul of the First Amendment. There is, however, a substantial question as to whether the source of that error is to be found in the district court's application of footnote 12 or in footnote 12 itself. If it is the former, then this court may exercise jurisdiction now to enforce its previous mandate; if it is the latter, then Petitioners will have no choice but to place themselves in contempt and then seek further appellate review. Thus, the answer to the jurisdictional question before the Court depends on the answer to the First Amendment question before the Court. To the extent, however, that the district court's post-remand rulings with respect to Proponents' nonpublic documents faithfully adhered to this Court's mandate, Proponents are no less entitled to discovery of like materials from Petitioners.

STATEMENT OF JURISDICTION

The district court has subject matter jurisdiction over this case pursuant to

28 U.S.C. § 1331. If this Court concludes that the district court departed from or misinterpreted the mandate in Case Nos. 09-17241 and 09-17551, then jurisdiction lies under the All Writs Act, 28 U.S.C. § 1651(a). *See Vizcaino v. United States Dist. Court*, 173 F.3d 713 (9th Cir. 1999). The orders under review are dated March 5 and March 22, 2010, and the Petitioners filed notice of their petition, or in the alternative appeal, on March 24, 2010. The notice was timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In a post-election challenge to a law enacted by ballot initiative, does the First Amendment protect against compelled disclosure, through discovery, of nonpublic campaign speech and associational activities without regard to the speaker's organizational affiliation or role in the campaign?

2. If the First Amendment's protection does not turn on organizational affiliation or campaign status, then did the district court violate this Court's prior mandate in Case Nos. 09-17241 and 09-17551, such that this Court may exercise jurisdiction to now enforce the mandate?

3. If the First Amendment's protection does turn on organizational affiliation or role within a campaign, then did the district court properly apply to third-party discovery the privilege rules it had established for parties to the litigation?

STATEMENT OF THE CASE

Petitioners—Equality California ("EQCA") and No on Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union of Northern California ("ACLU")—seek review of the district court's orders compelling production, pursuant to nonparty document subpoenas, of nonpublic political campaign documents. The magistrate judge entered the original order on March 5, 2010. AA 53-66.[1] The ACLU and EQCA filed objections, which the district court denied on March 22, 2010. AA 104-127. The orders had established March 31, 2010, as the deadline for production, but Petitioners filed a petition for a writ of mandamus (or, in the alternative, an appeal) and sought a stay of the orders pending further appellate review, which this Court granted. Petitioners contend that the orders violate the First Amendment. This Court has ordered the parties to "file simultaneous briefs addressing solely the issues of whether this court has jurisdiction over this appeal and whether mandamus is appropriate." DktEntry 9, Order of Mar. 31, 2010.

[1] Citations to Respondents' Supplemental Excerpts of Record are designated herein as "SER __." District court docket entries not appearing in either the previously filed Petitioners/Appellants' Appendix of Relevant Documents ("AA") or the SER are designated herein as "D.E. __," refer to the docket entry number in *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal.), and are available through the PACER system. Page citations are to the pagination affixed by the PACER system.

STATEMENT OF FACTS

I. THE UNDERLYING LITIGATION AND PLAINTIFFS' DISCOVERY REQUESTS.

The permissible scope of discovery in the case has been an issue from the outset. In an early filing, Plaintiffs alleged that the electorate was "driven by irrational considerations, including but not limited to misconceptions, animus and moral disapproval," and stated that they would seek discovery into "Prop 8's genesis, drafting, strategy, objectives, advertising, campaign literature, and [Proponents'] communications with each other, supporters, and donors." D.E. 157 at 12. Proponents objected on relevance, burden, and First Amendment grounds and urged the court to hear argument on the issue in advance of any such discovery. SER 304-05. The court refused, and Plaintiffs promptly propounded discovery requests that sought virtually all of Proponents' internal communications relating to Proposition 8 among themselves and with any "third party," whether created before or after the election, as well as wholly internal drafts of, and private editorial comment on, political messaging and strategy communications, and other private political speech that Proponents had chosen to withhold from public dissemination. *See* D.E. 187-3. Plaintiffs further sought to probe into these areas in day-long depositions of the individual proponents and of the executive committee and campaign consultants of ProtectMarriage.com.

II. THE FIRST PHASE OF DISTRICT COURT LITIGATION OVER THE SCOPE OF DISCOVERY.

Proponents agreed to produce (while denying their relevance) all public, nonanonymous materials—*e.g.*, television and radio ads, mailings, "robo" calls—disseminated to the electorate, including materials disseminated to "target" voter groups. Proponents, however, moved for a protective order barring discovery of nonpublic campaign documents and communications on the grounds that such information was both irrelevant and privileged under the First Amendment. *See* D.E. 187, 197.[2]

On October 1, 2009, the district court granted the motion in part and denied it in part. With respect to relevance, the court held that nonpublic "information about the strategy and communications of the Prop 8 campaign," even though never disseminated to the electorate, is relevant to the electorate's intent. SER 297. Thus, "communications considered but not sent [to voters were] … fair subjects for discovery, as the revision or rejection of a contemplated campaign message may well illuminate what information was actually conveyed to voters." *Id.* at 298.

[2] Proponents submitted evidence of the harassment, economic reprisal, loss of employment, blacklisting, verbal abuse, racial and religious scapegoating, vandalism, threats of physical violence, actual physical violence, death threats, and other manifestations of public and private hostility that had resulted as a consequence of prior compelled disclosure of the political beliefs and associations of ProtectMarriage.com and its supporters. *See* D.E. 187-2, 187-9, 187-10, 187-11, 187-13. *See also Hollingsworth v. Perry*, 130 S. Ct. 705, 707, 713 (2010); *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (citing these examples as "cause for concern"); *id.* at 979-82 (Thomas, J., concurring in part and dissenting in part).

The court also held that "some 'non-public' communications from proponents to those who assumed a large role in the Prop 8 campaign could be relevant to the voters' understanding of Prop 8 and to the ultimate determination of intent." *Id.* at 297.

The district court rejected Petitioners' First Amendment argument outright, holding that the Constitution does not afford *any* protection from compelled disclosure of internal campaign documents or private expressions of political belief. *See id.* at 286-87, 299. The court thus ordered Petitioners to produce: "communications by and among proponents and their agents … concerning campaign strategy" or "messages to be conveyed to voters, … without regard to whether the messages were actually disseminated or merely contemplated"; "communications by and among proponents with those who assumed a directorial or managerial role in the Prop 8 campaign, like political consultants or ProtectMarriage.com's treasurer and executive committee, among others"; and "[c]ommunications that took place after the election … if they are connected in some way to the pre-election messages conveyed to the voters." *Id.* at 298-99.

The district court then denied Proponents stay application but suggested that, despite its prior rulings, it "might yet" find specific documents privileged after *in camera* review. SER 276. Accordingly, on November 6 Proponents submitted for *in camera* review a sampling of 60 documents drawn from the thousands of docu-

ments implicated by the October 1 order. D.E. 251. Because the court found "troubling" the notion that "individuals who have management responsibility for a political campaign" could remain anonymous to the public, the court requested "an *in camera* disclosure of those individuals." SER 267-68. Proponents filed such a disclosure in the form of declaration from ProtectMarriage.com's chairman, Ronald Prentice. *See* D.E. 251. In that declaration, Mr. Prentice explained that ProtectMarriage.com associated with other organizations for purposes of passing Proposition 8. *See* Sealed Decl. of R. Prentice (Nov. 5, 2009) at ¶ 9.[3]

With respect to relevance, the court found that 39 of the documents were "either not responsive to plaintiffs' request or are so attenuated from the themes or messages conveyed to voters that they are, for practical purposes, not responsive." SER 256. The court deemed nondiscoverable documents that "say nothing about campaign messages or themes to be conveyed to the voters," including documents that "discuss topics that might relate to messages ultimately adopted or considered by the campaign" but do not "discuss voters or their potential reactions." *Id.* at 258, 260.[4] The Court stated that it "hope[d]" its descriptions of the documents that

[3] A sealed copy of Mr. Prentice's November 5 declaration was provided to this panel during the course of proceedings in Case No. 09-17241. *See* Order, *Perry v. Schwarzenegger*, No. 09-17241 (Nov. 25, 2009).

[4] For example, the court held that Proponents did not have to produce "a fund-raising letter seeking money to help qualify Prop 8 for the ballot" or documents discussing: "mechanics of the campaign's internal structure"; "polling numbers"; "musing regarding poll results"; "volunteer coordination and organization"; "the

had to be produced, and those that did not, would "afford[] proponents sufficient and specific enough guidance to cull their inventory of documents and other materials in order to respond to plaintiffs' document request." *Id.* 261. With respect to privilege, the court again flatly concluded that the First Amendment does not "protect the disclosure of campaign communications." *Id.* at 255. The court thus found that 21 internal campaign documents were relevant and had to be produced because they "discuss[ed] campaign messaging or advertising strategy." *Id.*

III. THIS COURT'S FIRST OPINION.

This Court reversed in an opinion and order filed December 11, 2009. *See Perry v. Schwarzenegger*, No. 09-17241 (Dec. 11, 2009). This Court declined to reach the district court's relevance determinations, *id.* at 12, 34 n.11, but with respect to the First Amendment issue concluded that the district court had committed "clear error" that threatened to work a "substantial" "chilling effect on political participation and debate." *Id.* at 20. The opinion explained that under the district court's "unduly narrow conception of First Amendment privilege," political "associations that support or oppose initiatives face the risk that they will be compelled to disclose their internal campaign communications"—a risk that applies both to

---

campaign's structure and arrangements with other entities"; "draft poll questions"; "strategy to obtain volunteers"; "recruitment of a staff member"; "meetings with major donors"; "recent articles about gay marriage and its effects"; "strategy for disseminating a message but … not … the message itself"; and "a targeted fundraising drive." *Id.* at 259.

"the official proponents of initiatives and referendums" and also to "the myriad social, economic, religious and political organizations that publicly support or oppose ballot measures." Dec. 11 Op. at 19-20. This Court stated that: "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private." *Id.* at 30. *See also id.* at 30 n.9 ("The freedom of members of a political association to deliberate internally over strategy and messaging is an incident of associational autonomy."). The Court held that Proponents had demonstrated that the compelled disclosure ordered by the district court would result in "consequences which objectively suggest an impact on, or 'chilling' of, . . . associational rights"—a holding supported by the declaration of a ProtectMarriage.com executive committee member and the "self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery request." *Id.* at 32-34 (quotation marks omitted).

On the other side of the ledger, the Plaintiffs had not identified any interest in obtaining the information sufficient to justify the First Amendment burden. This panel concluded that the information sought was "attenuated from the issue of voter intent, while the intrusion on First Amendment interests [wa]s substantial." *Id.* at 37. In footnote 12, the Court made clear that its opinion was addressing "private, internal campaign communications concerning the formulation of campaign

strategy and messages" and that "broadly disseminated materials" communicated to "large swaths of the electorate" were not protected by the First Amendment from compelled disclosure. *Id.* at 36 n.12.

IV. THE SECOND PHASE OF DISTRICT COURT LITIGATION OVER THE SCOPE OF DISCOVERY.

On remand, just three weeks before trial, the district court held a hearing on the meaning and implications of this Court's December 11 opinion for further discovery.[5] The district court did not decide the issue, but instead ordered Proponents to produce a privilege log of all responsive documents they claimed were privileged in light of the December 11 opinion. Proponents made clear that any such log would reflect only those documents sorted pursuant to the relevance "guidance" provided in the November 11 order. *See* SER at 229-30, 244. After Proponents produced the log, D.E. 314, at extraordinary burden and expense, the district

[5] Plaintiffs argued, among other things, that "we can prevail and will prevail … even if we don't have these documents" and that "there would be a way to ensure that any ruling that was favorable to [Plaintiffs] did not rise or fall on those documents." *Id.* at 218. Additionally, the district court asked Plaintiffs' counsel: "Would it not be a fair interpretation of the Ninth Circuit Panel decision that a communication from protectmarriage.com to a church organization or some other group that is supporting the passage of Proposition 8 is one of these internal communications that the First Amendment privilege … implicates?" SER 211. Plaintiffs' counsel answered "no," that compelled disclosure of such documents raised no First Amendment concerns and that in addition to such documents Plaintiffs also wanted the court to compel disclosure of communications from "one neighbor to … another neighbor." *Id.* at 250-51.

court, on December 30, referred the discovery dispute to the magistrate judge. *See* SER 198-99.

V. THIS COURT'S AMENDED OPINION: REVISED FOOTNOTE 12.

In the meantime, on January 4, 2010, this panel issued an amended opinion that substantially revised footnote 12. *See Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). The amended footnote 12 no longer contained the previous statement that the First Amendment privilege did not extend to communications disseminated to "large swaths of the electorate," and stated instead that this Court's holding was "limited to communications among the core group of *persons* engaged in the formulation of campaign strategy and messages." *Id.* at 1165 n.12 (emphasis in original). This panel left it to the district court "to determine the persons who logically should be included [in this core group] in light of the First Amendment associational interests the privilege is intended to protect." *Id.*

On April 5, 2010, Proponents filed in the Supreme Court a petition for a writ of certiorari, contending that amended footnote 12's "core group" limitation runs afoul of the First Amendment. Proponents requested that the Supreme Court hold the petition pending outcome of the instant proceedings in this Court.

VI. THE THIRD PHASE OF DISTRICT COURT LITIGATION OVER THE SCOPE OF DISCOVERY.

Back before the magistrate judge on January 6, Plaintiffs argued that the "core group" to which Proponents could apply a First Amendment privilege consisted only of ProtectMarriage.com's executive committee, the campaign manager, and the campaign general counsel. SER 93-94. In response, Proponents argued (i) that this was a vastly underinclusive definition with respect to ProtectMarriage.com and (ii) that there were many other groups, both formal and informal, closely allied with ProtectMarriage.com or the individual proponents in campaigning for Proposition 8, and that confidential communications involving members of those groups were equally entitled to privilege. *Id.* at 98-147.

On the ground that Proponents had not previously submitted evidence about other organizations' "core groups," the magistrate judge refused to consider a claim of privilege with respect to any document that was originated by or communicated to even a single person outside the "core group" of ProtectMarriage.com and the individual proponents. The magistrate judge rejected Proponents' argument that prior to January 4—just two days earlier—when this Court issued its revised decision, there had been no indication that the privilege would turn on the

concept of a "core group" and thus Proponents had not had any reason or opportunity to introduce such evidence. *Id.* at 134-137, 160-162, 174.[6] The magistrate

[6] The magistrate judge's statements in this regard were, at best, inconsistent. For example, at the start of the hearing, the magistrate judge stated that: "the scope of [the First Amendment] privilege" had "been largely answered by the footnote in the amended [opinion]," but that " regarding the core group … there needs to be some discussion about … how far does the protection go that the Ninth Circuit has laid down. Is it limited to internal communications among the core group? And in this context, who would be the core group? We are going to need to actually air that question." *Id.* at 78. Yet when Proponents' counsel suggested that it would be, at that point, "much more reasonable to lay out the Court's ruling conceptually" before ruling on a particular list of names for "core group" status, the magistrate judge refused, stating "I won't do that." *Id.* at 116. Soon thereafter, however, the magistrate judge stated that whether he would afford Proponents additional time to submit evidence regarding the "core group" concept would "depend[] [on] what the concept ends up being." *Id.* at 119.

Much of the hearing focused on whether the November 5 Prentice declaration and the December 21 privilege log contained evidence sufficient to allow the court to render definitive "core group" rulings, both of which were submitted well before the issuance of amended footnote 12 on January 4. At certain points, the magistrate judge acknowledged this point. For example, in addressing Proponents' counsel, the magistrate judge stated: "I take it from the papers that [] were filed before the amended Ninth Circuit decision that the test you appl[ied] to your privilege log was not precisely the test that the Circuit came up with in footnote [12]." *Id.* at 97. *See also id.* at 148 (stating to Plaintiffs' counsel: "I mean [Proponents' counsel] has a good point, that the core group … came out on Monday …. He doesn't have to identify a core group just because you argue it. He has to do it when a Court says or when he has notice or when he thinks the law supports it."). More often, however, the magistrate judge suggested that Proponents should have submitted all arguments and evidence regarding the "core group" either before, or in the 48 hours following, the issuance of the January 4 opinion. *See id.* at 111 ("I think you have had plenty of time to come to identify exactly what … the Ninth Circuit told you on Monday …. because today is Wednesday."); *id.* at 118 (magistrate judge stating that he would have thought Proponents "would have already gone on record in deciding who was in the core group."); *id.* at 130 (responding to Proponents' counsel's objection that "be-

judge thus ruled that Petitioners could claim First Amendment protection only over political communications exclusively between a limited number of ProtectMarriage.com's leaders and consultants. *See* AA 10-15. Excluded from this "core group," for example, was a media production company centrally involved in the creation and distribution of television advertisements, which necessarily was privy to communications reflecting the most sensitive internal drafts and editorial comments. *See* D.E. 364-1 at ¶ 7.vii; AA 10-15; D.E. 474-1 at ¶¶ 3-7; D.E. 499.

The magistrate judge ruled that Proponents must produce confidential communications with any individual or association outside the ProtectMarriage.com "core group," including communications with members of religious and political groups and other organizations allied with ProtectMarriage.com in the larger Yes-on-8 political coalition. AA 11-12. In effect, the magistrate judge held that citi-

---

fore having footnote 12, we wouldn't have been in a position to set out the metes and bounds of something that didn't exist yet," by stating that "I'm not entirely sure that's right."); *id.* at 161 ("everybody has known we have been on a fast time frame for the past month and could have readily, at least, come to the Court with appropriate argument and evidence of who might be the organizations whose other associational rights were implicated").

And even with respect to the evidence the magistrate judge was willing to look at—the November 5 Prentice declaration—the court wrongly opined that "[t]here has never previously been any assertion that there were groups other than the campaign as defined in the Prentice declaration who might have associational rights that are implicated by this." *Id.* at 161. As noted above, the November 5 Prentice declaration itself makes that point, and Proponents' counsel also repeatedly made that point at the December 16 hearing before the district court. *See, e.g.* SER 127, 131-32, 140, 151, 152-53.

zens enjoy First Amendment protection only if they are members of a campaign's "core group" responsible for formulating campaign messaging and strategies, that they retain that protection only with respect to political communications exclusively with other members of the same "core group," that any given individual may be a member of one and only one "core group," and that such an individual must make his or her choice of one such group only and forfeits his or her First Amendment rights to communicate confidentially with members of any other such group.[7] Under the magistrate judge's definition of "core group," Proponents could claim no protection over nearly one-fourth of the 21 *in camera* documents that this Court specifically had before it when it rendered its opinion on the First Amendment privilege (because those documents included at least one recipient or sender who was not part of the "core group").

With respect to relevance, Plaintiffs argued that all of the district court's prior rulings on that question—for example, all of the court's detailed guidance in the November 11 opinion about the 60 *in camera* documents—had been restricted

[7] Likewise, during trial the district court held that leaders of ProtectMarriage.com who were also leaders of other political and religious organizations could not claim any First Amendment protection over internal communications and documents produced by, for, and within those other organizations. *See* SER 19-26 (rejecting privilege objection asserted by member of ProtectMarriage.com executive committee made over document shared solely among the leadership of a separate religious group of which he was also a leader); *id.* at 33-38 (overruling First Amendment objection regarding internal church document that was in possession of church member who was also a member of ProtectMarriage.com executive committee).

only to a single document request seeking communications with "third parties" and that other document requests seeking, for example, all communications "to voters" and the "public[]" were unaffected by any prior relevance rulings of the district court. According to Plaintiffs, "voters" meant all "people outside the core group essentially." SER 165. Proponents pointed out that this definition of "voters" simply converted the request into a request for all communications with "third parties"—precisely the request that the district court had previously held was overbroad on October 1 and November 11. *Id.* at 83-84. The magistrate judge held that Proponents could no longer rely on the district court's earlier guidance, explaining to Proponents' counsel: "I was hoping … you would all look at it and say, this is a reasonable way to proceed and we're going to all do this. You didn't like it. You appealed. We're going back." *Id.* at 159.[8] Thus eschewing the prior relevance restrictions and document sorting that Proponents had already done, the magistrate judge—on January 8, just three days before commencement of trial—ordered Proponents to re-sort tens of thousands of internal documents and to produce (by January 17) according to an entirely new relevance standard: "all docu-

[8] Yet the magistrate judge held that Proponents *could* rely on the district court's prior relevance rulings with respect *only* to the 39 documents that the district court specifically held in its November 11 order did not have to be produced on relevance grounds. *Id.* at 158. When Proponents' counsel asked if, pursuant to the November 11 order, that could be extended to "like documents," the magistrate judge responded "[n]o, you can't." *Id.*

ments … that contain, refer or relate to any arguments for or against Proposition 8 other than communications solely among the core group." AA 14.

The district court upheld the magistrate judge *in toto*. *See* D.E. 446; AA 25-27. Over the next week, as the trial went forward, Proponents reviewed tens of thousands of internal campaign documents and produced over 12,000 nonpublic documents (many on an attorneys-eyes-only basis) revealing private political speech and association. These documents included private communications among the leaders of ProtectMarriage.com and political associates (including vendors, volunteers, donors, leaders of allied Yes-on-8 groups, religious associates, family, and friends) and disclosed confidential discussions of campaign strategy, analyses of draft ads and potential messages, the results of focus groups and polling, and other sensitive and confidential campaign information.[9]

VII. THE FOURTH PHASE OF DISTRICT COURT LITIGATION OVER THE SCOPE OF DISCOVERY: THIRD-PARTY SUBPOENAS.

From the outset of the discovery dispute, Proponents repeatedly maintained that, to the extent the court deemed internal and nonpublic campaign information

[9] The court also held, over Proponents' objection, that these documents had to be produced not just to Plaintiffs, but also to Plaintiff-Intervenor City and County of San Francisco, whose intervention was limited to issues relating to any costs to the government flowing from Proposition 8, and whose lead attorney also served on the boards of several of the groups that campaigned against Proposition 8. *See* D.E. 197 at 15; SER 171; AA 60, 63. In other words, the court compelled ProtectMarriage.com to turn over its internal strategy documents directly to its political opponents.

relevant and nonprivileged, Proponents would have no choice but to seek reciprocal discovery from the groups and persons who had campaigned against Proposition 8. *See, e.g.*, D.E. 187 at 8-9. To that end, Proponents had served subpoenas *duces tecum* on several organizations that mounted major campaigns in opposition to Proposition 8, including the ACLU and EQCA. The subpoenas mirrored Plaintiffs' document requests to Proponents. *See* SER 54-61, 62-70, 40-46, 47-53.

Like Proponents, the ACLU and EQCA interposed burden, relevance, and First Amendment objections and refused to produce any nonpublic documents. *See* D.E. 472-4. Once this Court and the district court ruled on the permissible bounds of such objections, Proponents moved, on January 15, to compel production from the ACLU and EQCA. AA 16-24; D.E. 584. Although Proponents had requested expedited treatment of the motion in light of the ongoing trial, the district court did not call for responses until the end of trial, SER 15-16, and then referred the issue to the magistrate judge, SER 13-14, who did not hold a hearing until February 25, D.E. 589. In advance of, and after, that hearing the ACLU and EQCA were afforded repeated opportunities to gather and submit evidence regarding the persons who made up their "core groups" and the "core groups" of other organizations they were affiliated with—opportunities that, as noted above, were not afforded to Proponents just weeks before. *See, e.g.*, SER 11-12, 10.

On March 5, the magistrate judge issued an order granting in significant part Proponents' motion to compel. AA 53-66. In essence, the March 5 order requires the ACLU and EQCA (1) to search their electronic documents using six search terms that they had hand-picked (and EQCA has to search only one of its many databases), and (2) to produce any and "all documents in its possession that contain, refer or relate to arguments for or against Proposition 8, except those communications solely among members of its core group." *Id.*[10]

The ACLU and EQCA jointly filed objections to the March 5 order. AA 67-82. Proponents likewise filed objections to certain aspects of the order. D.E. 619. For example, Proponents objected that the magistrate judge did not require the ACLU to produce a privilege log despite the fact that the district court had previously held that "if there is anything crystal clear in the Ninth Circuit panel's

[10] Thus, by way of example, so long as a document meets the relevance standard, the following must be produced: documents distributed solely within a single No-on-8 group, so long as one person outside the "core group" sent or received it within the organization; documents sent by an employee or member or volunteer of one No-on-8 group (say EQCA) to an employee, member, or volunteer of another group (say the ACLU or any of the other dozens of organizations involved in the No-on-8 campaign); documents sent by a member of one group's "core group" (say the ACLU's) to another group's "core group" (say Equality California's); documents sent by a No-on-8 group (say the ACLU) to a single donor or voter, including friends, family, colleagues, and others that members of the group may have associated with for political purposes; documents constituting drafts of what would later become public advertisements, so long as one person outside the "core group" sent or received them; and documents containing internal discussion about media and public-relations strategy, proposed talking points, polling analysis, focus-group research, and the like, so long as one person outside the "core group" sent or received them.

opinion … it is that the preservation of this First Amendment privilege requires the production of a privilege log," SER 243. *See also Perry*, 591 F.3d at 1153 n.1. Proponents also objected to the court's adoption of six search terms hand-picked by EQCA. D.E. 619 at 15.[11]

The district court held a hearing on the objections on March 16, 2010. During argument, the district court noted that "[e]verything that's really the meat in [the Ninth Circuit's January 4] opinion is all in that footnote [12]." SER 3. The court stated that the privilege recognized in the opinion was "[c]onfined to a narrow group of people," and "appropriately so" because "this [was] a political campaign." *Id.* at 5. "Political speech," according to the court, "is inherently not private. It's public." *Id.* at 8.

On March 22, the district court issued an order denying all objections to the March 5 order. AA 107. Among other things, the district court emphasized that "as a matter of law ... the First Amendment privilege does not cover communications between (or among) separate organizations" because "[a] communication 'internal' to an organization is by definition wholly within that organization."

[11] On March 9, Proponents had moved the magistrate judge to reconsider the list of six search terms set out in the March 5 order. *See* D.E. 611. Proponents explained that those terms had been hand-picked by the searching party and that Proponents did not have opportunity to respond to those terms after they were suggested and before the March 5 order issued. *See id.* at 3-4. Proponents explained that the search terms adopted would result in the likely sorting out of thousands of documents highly relevant under this Court's orders. *Id.* at 4. The magistrate judge rejected the motion the next day. *See* D.E. 612.

Id. at 116.

SUMMARY OF ARGUMENT

The First Amendment creates no castes. Its protection is not doled out based on some perceived rank within a political campaign or organization. Instead, the First Amendment protects the rank-and-file campaign volunteer no less than the campaign manager, the reticent or fleeting speaker no less than the campaign press secretary, the individual on a soapbox no less than the campaign executive committee. Footnote 12 on its face appears to violate these principles and, if so, is in deep conflict with Supreme Court precedent. If this is wrong—if footnote 12 does not peg First Amendment protection to an individual's status—then the district court has misinterpreted or otherwise failed to follow the prior mandate, and this Court may exercise jurisdiction to correct the error. But if this is right, then jurisdiction is not yet perfected and the ACLU and EQCA must take a contempt citation and then seek further relief from the en banc Court or the Supreme Court. In all events, Proponents welcome further elaboration by this Court of the proper application of the First Amendment privilege in this case.

ARGUMENT

Normally, when a nonparty desires appellate review of a district court's discovery order it must refuse to comply with the order, take a contempt citation, and then appeal from the final judgment of contempt. *See In re Subpoena served on*

Cal. Pub. Util. Comm'n, 813 F.2d 1473, 1476 (9th Cir. 1987). *See also Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989) ("Typically, a nonparty aggrieved by a discovery order must subject himself to civil contempt to gain appellate review."). Because that avenue of appellate review is immediately available to nonparties—unlike parties, who may not obtain interlocutory review of contempt citations, *id.*—mandamus is usually not an available avenue of relief because the nonparty cannot meet the first factor for such relief, *viz.*, that "the petitioner has no other means such as an appeal, to obtain the desired relief." *Id.*

As this Court explained in *Vizcaino v. United States District Court*, 173 F.3d 713 (9th Cir. 1999), however, "when a lower court obstructs the mandate of an appellate court, mandamus is the appropriate remedy" because "[d]istrict courts must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.* at 719 (quotation marks omitted).[12] Accordingly, when "mandamus is sought on the ground that the district court failed to follow the appellate court's mandate," "reliance on the so-

[12] *See also, e.g.*, *United States v. Kellington*, 217 F.3d 1084, 1095 n.12 (9th Cir. 2000) ("A party who believes the district court has misconstrued or failed to execute the mandate is not without a remedy. As the Supreme Court made clear in *Sanford Fork*, 'either upon an application for a writ of mandamus or upon a new appeal, it is for [the appellate] court to construe its mandate, and to act accordingly.'") (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895)).

called *Bauman* factors is misplaced." *Vizcaino*, 173 F.3d at 719 (citing *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)).

The question, then, is: Has the district court misinterpreted or otherwise failed to follow the mandate? If so, then Petitioners are entitled to relief here and now. If not, then Petitioners must go back to the district court, take a contempt citation and seek en banc or Supreme Court review.

I. THE FIRST AMENDMENT'S PROTECTION AGAINST COMPELLED DISCLOSURE OF PRIVATE POLITICAL SPEECH AND ASSOCIATIONAL ACTIVITIES DOES NOT TURN ON AN INDIVIDUAL'S STATUS, BUT RATHER ON THE TYPE OF SPEECH AT ISSUE.

Proponents have sought production of the documents in question because the district court has determined such information is nonprivileged and relevant to its consideration of the constitutionality of Proposition 8. Nonetheless, as this Court well knows, we disagree with both of those rulings and have argued as much repeatedly. As an initial matter here, we must again stress that Petitioners are right about the ultimate legal question: the district court's orders (all of them) compelling production, and allowing introduction into evidence, of nonpublic political campaign speech violated the First Amendment.

"The Constitution protects against the compelled disclosure of political associations and beliefs." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982). The Supreme Court has thus repeatedly recognized, in a vari-

ety of contexts, that the First Amendment prohibits compelled disclosure of a speaker's identity or a citizen's political beliefs, activities, and associations.[13]

A test that pegs First Amendment protection to an individual's status within a campaign cannot be squared with these precedents, which extend the First Amendment's protections to all manner of persons who engage in political association and campaigning. The scope of the privilege is determined by the political nature of the speech and activity at issue, not by the campaign role of the speaker or

---

[13] *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) ("the vital relationship between freedom to associate and privacy in one's associations" bars compelled disclosure of group's membership list); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (same); *Talley v. California*, 362 U.S. 60 (1960) (invalidating ordinance requiring disclosure of handbill author's identity); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963) (state cannot compel membership list disclosure because "guarantee [of free association] encompasses protection of privacy of association in organizations"); *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 828 (1966) (First Amendment bars compelled disclosure of "information relating to [a person's] political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings"); *Socialist Workers*, 459 U.S. at 100-01 (contribution and expenditure disclosure requirements unconstitutional as applied to minor political party); *Dawson v. Delaware*, 503 U.S. 159 (1992) (introduction of criminal defendant's political association violated First Amendment associational rights); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995) (embracing a "respected tradition of anonymity in the advocacy of political causes" in striking down law requiring identification of author of political handbills); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199 (1999) ("*Buckley II*") (striking down state law requiring petition circulator to disclose identity by wearing name badge); *Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002) (striking down "requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection" because it results in a "surrender of that anonymity").

the associate in whom he confides. Indeed, as the Supreme Court has recently explained, "[p]rohibited … are restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, 130 S. Ct. at 898. "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id. at* 899.[14]

The foundational *NAACP* case, for example, was concerned with the rights not only of the leadership of the organization, but with its entire membership. *See* 357 U.S. 462-63 ("we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner *and its members* to pursue their *collective effort* to foster beliefs which they admittedly have the right to advocate, in that it may induce *members* to withdraw from the Association and dissuade others from joining") (emphasis added).[15] And in *DeGregory*, the protection the First Amendment afforded Mr. DeGregory flowed not from

[14] *See also id.* at 895 (noting the problematic nature of "regulating political speech" because "*any speech* within [rules'] reach is chilled"); *id.* at 904 ("the worth of speech 'does not depend upon the identity of its source' ") (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)); *id.* at 905 ("the First Amendment generally prohibits the suppression of political speech based on the speaker's identity").

[15] *See also Bates*, 361 U.S. at 519 (protection for "the names of the organizations' members and contributors"); *Socialist Workers*, 459 U.S. at 88, 97-98 (protecting the First Amendment privacy rights of "campaign contributors and recipients of campaign disbursements," including "party members, campaign workers, and supporters" and those who "enter[] into a transaction with a minor party for purely commercial reasons").

his particular status or role in political associations—indeed, he refused to disclose that information—but from the nature of the speech and associations at issue. *See* 383 U.S. at 827-28.

Cases arising specifically in the referendum context are to the same effect. *McIntyre v. Ohio Elections Commission*, for example, confirms that the First Amendment's protection from compelled disclosure turns not on the speaker's status, but on the political content of the speech and the potentially chilling effects of disclosure. There, the Court noted that the law at issue, which required disclosure of the identity of the sponsors of campaign messages, warranted "exacting scrutiny" because it targeted "only those publications containing speech designed to influence the voters in an election," a "category of speech … [that] occupies the core of the protection afforded by the First Amendment." 514 U.S. 343, 345-46 (1995). Moreover, Ms. McIntyre was not required to show that she was a key figure in the organized campaigns surrounding the upcoming referendum election on a school tax levy. Indeed, she acted on her own, assisted only "by her son and a friend." *Id.* at 337. All that mattered was that Ms. McIntyre desired to speak during a political campaign and that the state sought to force her to disclose more political speech than she thought appropriate. As no compelling governmental interest could justify such disclosure, Ms. McIntyre was protected from such intrusion, regardless of her importance, or lack thereof, in the official campaign.

Similarly, *Buckley II* held that the First Amendment barred compelled disclosure of the identities of petition circulators in a ballot-measure campaign, most of whom presumably were not sitting atop the organizational chart of the campaign in favor of the ballot measure. *See* 525 U.S. at 192 n.11 ("circulators act on behalf of themselves or the proponents of ballot initiatives"). What was critical was the political nature of the speech at issue, not the campaign role of the speaker. *See id.* at 199 (speech protected because it "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change") (quotation marks omitted).

The error of a status-based test becomes manifest upon consideration of how a campaign volunteer, ex ante, might ensure that he and those in whom he wishes to confide qualify as "core" so that he and they will, in turn, qualify for First Amendment protection. Is there a specific threshold of internal campaign speech and associational activity that one must engage in to qualify? Is that quantum absolute or measured relative to the activities of others? Does "core group" status depend on the opinions of others in the campaign organization as to whether an individual is core? Is core group status permanent or fleeting—can an individual fall in and out of the "core group" as his role in the campaign fluctuates? Such an "'open-ended'" standard, requiring "'complex argument in a trial court,'" is not permissible under the First Amendment. *Citizens United*, 130 S. Ct. at 896 (quot-

ing *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.)).

As applied by the district court, the "core group" test does not protect campaign communications, for example, with an advertising vendor who, according to the ProtectMarriage.com, was "routinely and necessarily included in email communications … that contained the most sensitive, internal discussion of campaign strategy and messaging." D.E. 474-1 at 4. Nor does it protect, according to the district court, campaign communications between or among persons in different "core groups," even if those "core groups" were closely allied in a common campaign effort. Nor does it provide any protection to the internal campaign communications of the many rank-and-file supporters, donors, volunteers, and associates of a political organization.

This is grave First Amendment error worthy of mandamus review.

II. IF FOOTNOTE 12 DOES NOT LINK FIRST AMENDMENT PROTECTION TO AN INDIVIDUAL'S STATUS WITHIN A CAMPAIGN, THEN THIS COURT HAS JURISDICTION TO, AND SHOULD, ISSUE A WRIT OF MANDAMUS; IF NOT, THEN THIS COURT DOES NOT YET HAVE JURISDICTION.

The harder question is whether the error lies in the district court's application of footnote 12 or in footnote 12 itself, the answer to which, in turn, determines when, and by which tribunal, the overall constitutional error may be corrected.

On the one hand, the Court's amended January 4 opinion holds that "compelled … disclos[ure] [of] … internal campaign communications in civil discov-

ery" would violate the First Amendment rights of "the myriad social, economic, religious and political organizations that publicly support ballot measures." *Perry*, 591 F.3d at 1158. It also holds that "[i]mplicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private," *id.* at 1162, and that "[d]isclosures of political affiliations and activities that have a deterrent effect on the exercise of First Amendment rights are therefore subject to … exacting scrutiny," *id.* at 1160 (quotations marks omitted). The types of documents and information that the district court has ordered both Proponents and Petitioners to disclose—confidential political speech shared among associates in a campaign—fall right in the teeth of these holdings.

On the other hand, revised footnote 12 (the most substantial revision to the merits portion of the December 11 opinion) states: "Our holding is therefore limited to communications among the core group of *persons* engaged in the formulation of campaign strategy and messages." *Id.* at 1165 n.12. Again, on its face, this language appears to limit the individuals who may qualify for First Amendment protection based not on the type of speech they engaged in but on their status or importance within a campaign.[16] Petitioners argue that this panel "need only de-

[16] Revised footnote 12 also twice stresses that the "holding is limited to *private, internal communications regarding formulation of strategy and messages.*" *Id.* This language makes perfect sense for a cautionary footnote, of course, be-

clare that the privilege recognized in [the January 4] decision (including footnote 12) is to be applied on a functional basis, to wit: that it extends to people involved in the task of 'formulat[ing] campaign strategy and messages,' and that it applies without regard to formal limitations of numbers or title and to communications among, as well as within, groups working together in pursuit of a common goal." Petitioners' Emergency Mot. for a Stay Pending Appeal at 16. Again, Petitioners are right about what the *First Amendment* dictates, but it is not so clear from its language that this is what *footnote 12* dictates.

If Petitioners are correct, and the district court has improperly read and applied footnote 12, then Proponents welcome immediate clarification from this panel. Proponents have preserved their First Amendment objections and, upon clarification, would immediately seek to have the district court correct all the prior orders and rulings that violate the mandate.

---

cause that was the question presented by the district court's orders, which at that point had directed Proponents to turn over only nonpublic "communications discussing campaign messaging or advertising strategy." SER 255. *See also* SER 299 (requiring production of "communications by and among proponents and their agents … concerning campaign strategy … [and] messages to be conveyed to voters").

If the district court has correctly interpreted and applied footnote 12, then Petitioners must return to the district court, place themselves in contempt, and then seek initial en banc review from this Court.[17]

CONCLUSION

For the foregoing reasons, if this Court concludes that the district court misinterpreted or otherwise failed to implement the mandate, it should issue a writ of mandamus instructing the district court to correct all prior rulings accordingly.

Dated: April 9, 2010

Respectfully submitted,

s/Charles J. Cooper
Charles J. Cooper

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 608-3065; Fax: (916) 608-3066

Charles J. Cooper
Michael W. Kirk
David H. Thompson
Howard C. Nielson, Jr.
Jesse Panuccio
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600; Fax: (202) 220-9601

[17] There is also another avenue for this Court to put a stop to the First Amendment harm that is being done in this case. As we have argued to this panel previously, the type of information at issue in the earlier mandamus petition, and now in this petition, is utterly irrelevant to the motivations of the electorate in passing Proposition 8. *See* Mot. for a Stay at 19-22, *Perry*, No. 09-17241. Because federal courts should "avoid the unnecessary resolution of constitutional questions," *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508 (2009), it would be appropriate for this Court to definitively decide the relevance question and avoid any further elaboration of the First Amendment issue.

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020; Fax: (480) 444-0028

Attorneys for Respondents-Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6 and General Order 3.7, Respondents hereby respectfully advise the Court that the present appeal is related to Case Nos. 09-17241 and 09-17551, decided *sub nom. Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010).

s/Charles J. Cooper
Charles J. Cooper

CERTIFICATE OF COMPLIANCE

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 8,353 words.

Dated: April 9, 2010

By: s/ Charles J. Cooper

9th Circuit Case Number(s) 10-15649

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Apr 9, 2010 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/Jesse Panuccio

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)