No. 10-15649

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Petitioners/Appellants

v.

KRISTIN M. PERRY, *et al.*,

Respondents/Appellees

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

EMERGENCY MOTION FOR STAY PENDING APPEAL

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

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

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

Lynn H. Pasahow (State Bar No. 054283)
Carolyn Chang (State Bar No. 217933)
Leslie Kramer (State Bar No. 253313)
Lauren Whittemore (State Bar No. 255432)
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, CA 94104
Telephone: 415.875.2300
Facsimile: 415.281.1350

Attorneys for EQUALITY CALIFORNIA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

Cases

FEDERAL RULES

Rules

Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Appellants and Petitioners Nonparties Equality California ("EQCA") and No on Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union of Northern California ("ACLU") (collectively, "Appellants") respectfully seek a stay of the discovery compelled by an order entered by the district court, dated March 22, 2010 (AA 0104 (Doc # 623)), affirming a prior order of Magistrate Judge Joseph Spero dated March 5, 2010 (AA 0053 (Doc # 610)) pending resolution of their appeal or, in the alternative, petition for writ of mandamus.

INTRODUCTION

This appeal, or, in the alternative, petition for writ of mandamus, presents a narrow, yet immensely important, question under the First Amendment: whether non-public campaign communications should be protected as privileged in the civil discovery context to further "[t]he freedom to associate with others for the common advancement of political beliefs and ideas"—a question answered in the affirmative by this Court in an earlier appeal in the same underlying litigation, *Perry v. Schwarzenegger,* 591 F.3d 1147,1152 (9th Cir. 2010). In fact, the current appeal directly involves the interpretation of a footnote in that opinion, which the district court relied upon as the basis for compelling Appellants, who are non-parties in the underlying litigation, to produce documents containing non-public strategy and messages from their campaign against passage of the California

initiative amendment Proposition 8. The discovery at issue was sought by Defendant-Intervenors in the case, the proponents of Proposition 8 ("Proponents"), in reaction to an earlier order by the district court compelling them to produce—over their First Amendment objections—certain of their own internal documents containing campaign strategy and messages in support of Proposition 8.

This Court's opinion in *Perry* in general affirmed that the First Amendment protects as privileged non-public communications within political campaigns, and the footnote in question simply explained that there are limits to the privilege—a point that Appellants did not dispute in the district court and do not dispute here. Rather than interpreting those limits "in light of the First Amendment associational interests" recognized in the body of the Court's opinion, however, the district court interpreted it as, effectively, a retraction of the Court's essential holding by denying the privilege (1) to all communications among individuals *associated with different organizations or groups* who were working together to defeat Proposition 8 (with one limited exception), and (2) to communications between numerous individuals who—on the basis of an undisputed evidentiary record—were directly involved in the formulation of campaign strategy and messages within the various organizations opposed to the passage of Proposition 8.

This interpretation of the First Amendment privilege at issue is untenable. Not only can it not be squared with this Court's decision in *Perry* (including, as we

explain hereafter, footnote 12, itself), but it also would have a broad and chilling effect upon the conduct of future political campaigns—precisely the opposite of the result which this Court held "the [First Amendment] privilege is intended to protect." 591 F.3d at 1165.

Appellants have been ordered to produce their responsive documents not later than March 31, 2010, and the district court has agreed to stay its order only seven days to allow a further request for stay by this Court. A stay pending appeal, therefore, is urgently needed both to preserve this Court's ability to review the critical issue presented by this appeal and to prevent irreparable harm to Appellants' core political freedoms. Given the fact that this Court regarded the issues raised by *Perry* to have been of sufficient importance to justify invocation of the Court's extraordinary mandamus jurisdiction and that this appeal relates to the proper interpretation and application of that opinion, Appellants submit that the interests of justice require that a stay issue as respectfully requested.

STATEMENT OF THE CASE[1]

In connection with an earlier request from plaintiffs to Proponents for the production of non-public campaign communications, this Court held, on January 4, 2010, that there is a First Amendment privilege for non-public communications

[1] In view of the page limits applicable to motions, we recite only those facts directly pertinent to the current appeal. A fuller statement of background and context can be found in *Perry*, 591 F.3d at 1152-54

within a political campaign to protect both vigorous political debate and the vital associational interests of individuals who choose to come together to pursue common political goals. Without holding that such communications could never be subject to production in litigation, the Court observed that "[t]he freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment" (531 F.3d at 1152) and concluded that a heightened standard of relevance therefore must apply to requests seeking such communications. *Id.* at 1160-61.

At the conclusion of its analysis, the Court added a footnote which stated that the right it had recognized applied only to documents involving "campaign strategy and messages" of a non-public nature. The Court, therefore, remanded the case to the district court "which is best acquainted with 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*." 531 F.3d at 1165 n.12 (emphasis added). On remand, Magistrate Judge Spero ruled that, under footnote 12, the only documents subject to privilege were those involving campaign strategy among a "core group" of individuals involved in the "Yes on 8" campaign. AA 0010 (Doc # 372). The district judge overruled Proponents' objections to that decision. AA 0025 (Doc # 496).

Almost immediately after that ruling, Proponents sent a letter to Appellants directing them to identify their "core group" of individuals responsible for campaign messaging and strategy and demanding that Appellants begin a rolling production of all campaign communications *regarding strategy or messages* that involved people other than those in the identified "core group." AA 0021(Doc # 472). Failing compliance with these demands, Proponents stated that they would file motions to compel production on subpoenas they previously had issued. When Appellants declined, Proponents made good on their announced intention and moved to compel production against EQCA, the ACLU and one other "No on 8" group that asserted that it had no additional non-privileged materials to produce. AA 0016 (Doc # 472).

The district court referred Proponents' motion to Magistrate Judge Spero for resolution. Appellants submitted legal memoranda in which they reiterated their objections on grounds, *inter alia,* of relevance, burden and, most important, privilege. Appellants also submitted separate declarations from the Executive Directors of EQCA and an ACLU attorney in which they explained the "structure of the '[No] on 8' campaign," including the roles played by various groups and individuals in the formulation and implementation of campaign strategy and messaging; the identity of the people so involved; and the burden involved in complying with Proponents' subpoena. AA 0034 (Doc # 598); AA 0028 (Doc #

597). In response to a request during argument on the motion, the Executive Director of EQCA also submitted an additional declaration identifying particular individuals who were involved in particular aspects of campaign strategy and messaging. AA 0042 (Doc # 609).

On March 5, Judge Spero granted, in large part, Proponents' motion to compel. AA 0053 (Doc # 610). He held that, under the broad standards of Rule 26, information from the No on 8 campaign was part of the "mix of information" that would (or at least might) have been considered by a "Yes on 8" voter and, hence, that such information might help to explain the "intent" of those voters as well as the legitimacy of the asserted state interests behind the initiative. AA 0058 (Doc # 610). He further held that although this Court had recognized a privilege for non-public campaign communications regarding the formulation of campaign strategy and messaging, footnote 12 of the opinion limited that privilege to communications between a "core group" of people within *each* separate group seeking to defeat Proposition 8. Thus, even though the order explicitly stated that the court had "credited" (without limitation) Appellants' evidentiary declarations, Judge Spero declined to recognize a privilege for a large number of individuals who had been identified as persons involved in the formulation of campaign strategy and messaging. AA 0062-63 (Doc # 610). Moreover, with the exception of a small group of people associated with a formal campaign coordinating

committee, Judge Spero held that there was no privilege at all for communications between individuals affiliated with *different* groups who were working together to oppose the initiative. AA 0064 (Doc # 610).

Appellants' objections were rejected by the district court on March 22, 2010. AA 0104 (Doc # 623). Despite acknowledging that "proponents' showing of relevance is minimal," the court nonetheless held that it was not clear error for the Magistrate Judge to have ordered production of these documents of "marginal relevance" under the broad discovery standards of Rule 26. AA 0110-11 (Doc # 623). On the constitutional issue, the court concluded that Appellants' argument that footnote 12 requires a functional approach to defining the limits of the First Amendment privilege provides no "comprehensible limiting principle" to define the scope of the privilege (AA 0117 (Doc # 623)) and that the reference to "internal" non-public communications meant, "by definition," that the privilege does not cover communications among different organizations working together in a political campaign. AA 0113 (Doc # 623).

Appellants' motion for a stay pending appeal was granted for seven days, until March 29, so that Appellants could seek a further stay from this Court. AA 0128 (Doc # 625).

ARGUMENT

In deciding whether to issue a stay pending appeal or a writ of mandamus, the Court considers: (1) Appellants' likelihood of success on the merits; (2) the possibility of irreparable harm absent a stay; (3) the possibility of substantial injury to other parties if a stay is issued; and (4) the public interest. *See, e.g. Golden Gate Rest. Ass'n v. City of San Francisco,* 512 F.3d 1112, 1115 (9th Cir. 2008).

A. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS.

The error committed below is not only manifest but of great significance. In purporting to apply a footnote in this Court's January 4 opinion, the decisions appealed from undermine both the holding and the rationale of that opinion in a way that has broad implications for future political campaigns.

That footnote, which appears on page 36 of the slip opinion, follows 16 pages of text under the heading "First Amendment Privilege," in which this Court, in clear terms, announced and explained that there is a "freedom to associate with others for the common advancement of political beliefs and ideas [that] is…protected by the First…Amendment[ ]" (591 F.3d at 1159); that "the disclosure of [internal campaign documents] can have a deterrent effect on participation in campaigns" (*id*. at 1162); 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*.); and that "there

must be a right not only to form political associations but to organize and direct them in the way that will make them most effective." *Id*. at 1163 (citation omitted).

Having acknowledged the existence, and explained the rationale, for this First Amendment right (as well as the consequences where compelled disclosure of campaign documents are sought), the Court then added a footnote, not to retract or limit what it had said in text, but simply to "emphasize" that the right it had enumerated must be applied in a manner consistent with its purpose. 591 F.3d at 1165 n.12. Specifically, the Court observed that the privilege extended only to communications among people whose function in the campaign involved the "formulation of campaign strategy and messages"—a category which the Court denominated as the "core group". *Id*. Even as to those people, the privilege applied only to "internal" communications involving strategy or messages, as opposed to public documents, or documents created for some other purpose, such as "persuasion, recruitment or motivation." *Id*. Since the inquiry as to which people were part of the core group of the "Yes on 8" campaign was fact specific and the "district court…[was] best acquainted with…the structure of the 'Yes on 8' campaign," the Court remanded the case so that that court could "determine the persons who logically should be included *in light of the First Amendment associational interests the privilege is intended to protect*." *Id*. (emphasis added).

Appellants have no quarrel with any of these limitations, properly applied. However, both Judge Spero and the district court read the Court's footnote—and, in particular, the reference to a "core group" and mention of the word "internal"—as if they were intended: (1) to deny virtually any privilege for communications among individuals affiliated with different organizations working together to defeat Proposition 8 and (2) to establish a wholesale and arbitrary limitation on who is entitled to assert the protections of the First Amendments based on numbers and formalities of title and affiliation, as opposed to function within the campaign. Both of those rulings are demonstrably mistaken and materially undermine the essential holdings of this Court's January 4 opinion in a way that has profound consequences for political campaigns generally.

First, Judge Spero and the district court erred when they held that the First Amendment privilege does not apply at all to communications among people affiliated with different organizations who work collectively on a common political cause. *See* AA 0064-65 (Doc # 610) ("[T]he court finds that the First Amendment privilege covers communications regarding strategy and messages within *each* No on 8 group's core group…*The First Amendment privilege does not cover communications between separate organizations.*" (Emphasis added). According to the district court, the reference in footnote 12 to "internal" communications means that "[a]communication 'internal' to an organization is by definition wholly

within that organization." AA 0116 (Doc # 623). That interpretation, however, is not what the text of footnote 12 says, nor can it be squared with any sensible interpretation of this Court's opinion.

The reference to "internal" communications in footnote 12 makes no reference to "an organization." It refers, instead, to communications "concerning the *formulation of campaign strategy and messages*." 591 F.3d at 1165 n.12 (emphasis in original). The limitation that phrase was intended to impose was that the communication not be "public" and that it be related to the specific subject matter of a campaign's strategy or messages.[2] Nor does the word "internal" carry an inherent delineation of its scope. A communication within a particular judge's chambers can be "internal," but so can a communication among members of an appellate Panel or, for that matter, within the judicial branch as a whole. In each case, what matters is whether the communication was intended to be "private" to the group of addressees. Where a privilege is asserted as to such "internal" communications, there is, then, a separate question as to whether the purpose of the internal communication falls within the protected class—here, communications involving campaign strategy and messaging. That is the proper inquiry here in light

[2] In fact, the direction for this court on remand to define a "core group" based on "the structure of the 'Yes on 8' campaign" is wholly irreconcilable with the notion that there is a privilege only for communications "internal" to some particular group involved in the campaign.

of the reasons why there is, or is not, a right to keep certain communications private.[3]

Footnote 12's statement that the First Amendment protects "private, internal" communications" was no more than a restatement of its recognition that people and groups have a First Amendment right to associate together for a common political end. When they do so, and when they are communicating privately *within a political campaign* about matters of campaign "strategy or messages," those constitute "internal" communications and are privileged to the extent explained in the text in *Perry*.

This point has profound implications for political campaigns generally. Campaigns often are comprised of separate organizations working together toward a common political end: A coalition of labor unions would have every incentive to work together to formulate an effective campaign strategy to support a pro-labor initiative, just as oil companies might wish to work in concert to resist an initiative intended to impose a windfall profits tax on their earnings. In particular, non-profit organizations with limited individual means such as the ACLU and EQCA often

[3] The need for a functional—as opposed to a formalistic—analysis is why the Supreme Court in *Upjohn Company v. United States*, 449 U.S. 383 (1981) rejected the so-called "control group" approach to the attorney-client privilege in favor of an approach that focused on the role played by various individuals in relation to the reason why the privilege for attorney-client communications exists. *See* 449 U.S. at 390-93.

find that political success turns on their ability to work in coalition with other groups dedicated to the same issues. While Judge Spero recognized a privilege for communications within the highest formal level of Equality for All (an umbrella anti-Prop 8 campaign that both the ACLU and EQCA joined as members), this limited recognition materially fails to safeguard a privilege which protects not only the right "to form political associations," but to "organize and direct them in the way that will make them most effective." 591 F.3d at 1163 n.9 (citation omitted).

Second, Judge Spero and the district court erred in defining the nature and scope of the "core group" whose communications regarding campaign strategy and message are entitled to First Amendment protection. Despite a record which clearly (and without contradiction) explained the structure of the Equality for All campaign, including the involvement of various enumerated members of the campaign and campaign staff in "the formulation of strategy and messages," Judge Spero held that they were not part of the "core group" and, hence, that their communications were not entitled to constitutional protection. That conclusion not only is contrary to the evidence, but it also lacks any principle that can be reconciled with this Court's decision in *Perry*.

To cite only a small part of the undisputed record evidence, Geoff Kors, the Executive Director of EQCA and an Executive Committee member of the Equality for All campaign, explained that members of the Equality for All "Campaign

Committee" as well as its "campaign staff" were actively involved in the formulation of campaign strategy and messaging. These individuals were not extraneous outsiders to the strategic operations of the campaign, but were essential participants in it. While "[t]he Executive Committee of Equality for All was responsible for managing the umbrella campaign organization" (AA 0036 (Doc # 598)), "[k]ey campaign decisions made by the Executive Committee were ratified by [the] Campaign Committee." *Id*. Thus, Mr. Kors "communicated regularly with other members of the Executive Committee, with members of the Campaign Committee, with consultants hired by Equality for All and with staff of both Equality for All and of the Equality for All member organizations regarding the formulating of campaign strategy and messaging." AA 0037 (Doc # 598).

Notwithstanding Judge Spero's "credit[ing]" (AA 0060 (Doc # 610)) of the undisputed record, he and the district court drew an arbitrary circle around the Equality for All "Executive Committee" in order to limit the people "inside" the core group. But that is reasoning backwards from a conclusion—that "core group" was meant to be defined by reference to numbers or titles, as opposed to function. Simply declaring that certain people who the record shows had functions related to the formulation of campaign strategy or messages have no First Amendment associational rights not only is not required by anything this Court said in footnote 12, but also is analytically indefensible when considered in light of the Court's

opinion as a whole. Instead of drawing lines, the district court needed to do what this Court directed: figure out who "logically" is entitled to claim First Amendment privilege for his or her strategy or message communications "in light of the First Amendment associational interests the privilege is *intended to protect.*"

In reaching their conclusions, as described above, both Judge Spero and the district court appear to have been concerned that to recognize the privilege claimed by Appellants would cast too broad a net or be impossible to define or limit. These concerns are simply misplaced. The limits established by this Court—and not questioned by Appellants—are the limits of the privilege to communications involving "strategy and messages" themselves. So long as it is only those types of communications (among people whose function involves sending or receiving them) that are protected, and so long as even that protection allows for production upon a showing of heightened relevance and the unavailability of the information from alternative sources, there is no cause for concern either about the breadth or the application of the appropriate analysis. Moreover, the fact that in a state with almost thirty-seven million people, in one of the most extensive and expensive initiative campaign in its history, a couple of hundred people are entitled to assert a privilege for communications involving the strategy and messages of the campaign (or particular parts of it) is neither surprising nor a cause for alarm—let alone

justification for interpreting this Court's opinion in a manner so plainly at odds with its holding and rationale.

Finally, not only are the errors in the orders appealed from clear, but the "fix" is narrow and straightforward. Appellants do not ask the Court to reconsider or reinterpret any portion of its opinion in *Perry*, nor do they suggest that it needs to revisit the limitations it imposed. To the contrary, this Court need only declare that the privilege recognized in that 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. Based on the undisputed record, application of that standard requires reversal of the orders appealed from and a direction to include the individuals identified in paragraphs 6 and 7 of the March 3, 2010 Kors declaration (AA 0043-47 (Doc # 609) as members of the "core group" of the Equality for All campaign and to hold that their communications, as well as communications between members of different organizations, are privileged to the extent they involve the formulation of campaign strategy or messages.[4]

[4] Although this motion stresses the constitutional argument, Appellants also will present non-constitutional grounds for reversal in their appeal—in particular, relevance. As noted above, even the district court found it hard to determine how

B. IRREPARABLE HARM IS CERTAIN WITHOUT A STAY.

There can be no serious issue as to the existence of irreparable harm to Appellants if a stay does not issue. As the United States Supreme Court has declared, the infringement of "First Amendment freedoms…unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion). Similarly, the Ninth Circuit repeatedly has observed that the "fact that the [party seeking a stay has] raised serious First Amendment questions *compels* a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in favor [of a stay]." *Cmty. House, Inc. v. City of Boise,* 490 F.3d 1041, 1059 (9th Cir. 2007) (emphasis added). *See also Gentala v. City of Tucson,* 213 F.3d 1055, 1061 (9th Cir. 2000) (same).

In this case, Appellants have been directed to produce documents on a rolling basis and to complete their full production by the end of this month. Leaving aside the difficulty of meeting that schedule simply as a logistical matter,

---

the documents sought here are relevant. *See* AA 0110-11 (Doc # 623). Yet the district court purported to defer to the Magistrate Judge's relevance determination and he, in turn, claims to have relied on this Court's analysis in *Perry*. That is, with all respect, circular and mystifying. Defining the issues for trial is a task to be performed by *the trial judge,* as opposed to either this Court or a magistrate judge. In fact, this Court in *Perry* expressly declined to pass on the issue of relevance, simply accepting the district court's determination. *See* 591 F.3d at 1164 n.11. Given that fact, Judge Spero's suggestion that "Perry…provides the best authority to determine whether the communications sought by proponents are relevant," is not only mistaken but renders the entire relevance analysis wholly circular.

the denial of a stay would prevent resolution of the important constitutional issues presented here. As explained above, the constitutional issues raised by this appeal involve matters of great moment, not simply for the instant case, but for future political campaigns generally. A stay also is needed in that once privileged materials have been disclosed, it is impossible to "undisclose" them. *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989); *United States v. Alanii*, 169 F.3d 1189, 1193 n.4 (9th Cir. 1999).

C. A STAY WILL NOT SUBSTANTIALLY INJURE OTHER PARTIES.

Plainly there is no harm to Proponents if a stay is granted. In fact, given their repeated statements that Appellants' arguments actually are correct and should have been accepted (*see* AA 0100-101 and n.9 (Doc # 620)) and that Judge Spero's and the district court's orders with respect to Appellants should be followed only "until a higher court reverses those decisions" (AA 0100 (Doc # 620)), it is not at all clear that they will, or can, oppose Appellants' First Amendment arguments. Plaintiffs have avoided taking any position with respect to the merits of the issue, and have expressed only their concern that the issue of the nonparty, No on 8 discovery be resolved as expeditiously as possible. Appellants are very mindful of this concern, but believe that it can be accommodated by their expressed willingness to move forward on an extremely expedited basis and have proposed a briefing schedule that would conclude less than two weeks after entry

of a stay. *See* Appellants' Motion to Expedite, filed herewith. In all events, there is no question that a delay resulting from Appellants' seeking of appellate review cannot outweigh Appellants' right to protection of their First Amendment rights.

D. THE PUBLIC INTEREST STRONGLY FAVORS A STAY.

"Courts . . . have consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano v. First Judicial Dist. Court for the County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002) (listing cases). This Court already has held that "discovery would likely have a chilling effect on political association and the formulation of political expression." *Perry*, 591 F.3d at 1165. This is particularly significant here, where third party non-profit advocacy groups are subjected to burdensome and invasive discovery as a result of their efforts to protect civil rights for a politically unpopular group. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 71 (1976) (noting that "the public interest . . . suffers" from chilled political participation).

CONCLUSION

For the foregoing reasons, Appellants respectfully ask this Court to issue a stay pending resolution of their appeal and/or petition for a writ of mandamus.

Dated: March 25, 2010

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

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

By: /s/ Stephen V. Bomse

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

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

Attorneys for EQUALITY CALIFORNIA

NOTICE OF RELATED CASE

Pursuant to Ninth Circuit Rule 28-2.6 and General Order 3.7, Appellants hereby respectfully advise the Court that the present appeal is related to Appeal Nos. 09-17241;09-17551 decided *sub. nom. Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) , and satisfies the conditions of a "Comeback Appeal," in that the issue presented by this appeal relates exclusively to the meaning of *Perry* and, in particular, footnote 12 thereof.

Dated: March 25, 2010

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

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

By: /s/ Stephen V. Bomse

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

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

Attorneys for EQUALITY CALIFORNIA