

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

**APPELLANTS/PETITIONERS' CERTIFICATE DESIGNATING
MOTION FOR STAY AS AN EMERGENCY MOTION
UNDER NINTH CIRCUIT RULE 27-3**

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

Pursuant to Ninth Circuit Rule 27.3, Appellants/Petitioners (“Appellants”) in the above-entitled case, respectfully certify that their Emergency Motion for Stay Pending Appeal constitutes an “Emergency Motion” in that it pertains to an order requiring the production, no later than March 31, 2010, of documents that are subject to a privilege under the First Amendment to the United States Constitution by non-parties to the underlying litigation in which production has been ordered. The district court has granted a stay of that order for 7 days, until March 29, so that emergency relief could be sought from this Court. Action by this Court is required to “avoid irreparable harm” as set forth below and more fully explained in the accompanying Motion. Counsel for all interested parties have been notified of the Emergency Motion for Stay, and of this motion by telephone and electronic mail, and the Clerk of the Court also has been notified by telephone.

In seeking the interim stay referred to above, Appellants represented to the Court that they would request that their appeal be expedited to the greatest possible extent so as not to delay unnecessarily disposition of the underlying case which already has been tried by the Court. That representation is recited by the Court in its Order of March 22, 2010 granting the requested interim stay. Appellants, therefore, are filing herewith a Motion to Expedite Appeal seeking such expedited consideration and to treat this case as a Comeback Appeal pursuant to General Order 3.7.

REASONS WHY THIS IS AN EMERGENCY MOTION

The underlying appeal in which an emergency stay is sought arises out of a lawsuit challenging the constitutionality of Proposition 8, an initiative amendment to the California Constitution which prevents same-sex couples from marrying in California. Even more directly, it arises out of the decision of this Court in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) which recognized a First Amendment associational privilege that limits discovery of non-public documents associated with a political campaign. Notwithstanding that decision, a Magistrate Judge of the district court has directed Appellants to produce documents that should be protected under the privilege not later than March 31, 2010, relying exclusively upon its interpretation of a footnote in that opinion. *See* 591 F.3d at 1165 n.12; Doc # 610 (Exhibit 1 hereto). The district court, on March 22, overruled Appellants' objections to that order (Doc # 623 (Exhibit 2)), although it subsequently stayed its order for 7 days to allow Appellants an opportunity to seek a further stay from this Court based upon the representation of Appellants that they would seek expedition of their appeal to the greatest extent consistent with the convenience of this Court. Doc # 625 (Exhibit 3). *See also* Motion to Expedite Appeal, filed herewith.

As more fully set forth in Appellants' Motion for Emergency Stay, Appellants submit that the orders appealed from contradict the Court's decision in

Perry by mis-reading footnote 12 in that opinion to deny (1) that there is any privilege for communications among individuals associated with different organizations who were working together in pursuit of their common interest to attempt to defeat Proposition 8 under the aegis of an “umbrella” campaign organization known as Equality for All and (2) the existence of a First Amendment privilege to documents sent by or to individuals directly associated with the campaign whose functions in the campaign involved “strategy and messages” of the campaign.

Appellants submit that the orders appealed from misinterpret, and materially undermine, the intent of the Court in recognizing a privilege for internal campaign communications in its decision in *Perry*, and that the misinterpretation and misapplication of that decision not only will cause irreparable harm to Appellants, but will have a seriously chilling effect upon the conduct of future political campaigns. Since Appellants have been directed to produce documents in the near future, and since the production of such documents would constitute irreparable injury in that it would violate their rights under the First Amendment, an Emergency Stay is required.

As more fully set forth in the Motion to Expedite Appeal, it is our respectful recommendation that this matter be referred immediately to the Panel that decided

Perry both because of its obvious familiarity with the background and issues in the case as well as its ability to address the meaning of its own opinion.

Pursuant to 9th Cir. R. 27-3(a)(3)(i), the telephone numbers and addresses of the attorneys for the relevant parties are as follows:

Attorneys for Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarillo:	Attorneys for Defendant-Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, A Project of California Renewal:
Theodore B. Olson Matthew C. McGill Amir C. Tayrani GIBSON DUNN & CRUTCHER, LLP 1050 Connecticut Avenues, N.W. Washington, D.C. 20036 (202) 955-8668 Fax: (202) 467-0539	Andrew P. Pugno LAW OFFICES OF ANDREW P. PUGNO 101 Parkshore Drive, Suite 100 Folsom, CA 95630 (916) 608-3065 Fax: (916) 608-3066
Theodore J. Boutrous, Jr. Christopher D. Dusseault Ethan D. Dettmer Theane Evangelis Kapur Enrique A. Monagas GIBSON DUNN & CRUTCHER, LLP 333 S. Grand Avenue Los Angeles, CA 90071 (213) 229-7804 Fax: (213) 229-7520	Brian W. Raum James A. Campbell ALLIANCE DEFENSE FUND 15100 North 90th Street Scottsdale, AZ 85260 (480) 444-0020 Fax: (480) 444-0028
David Boies Theodore H. Uno BOIES, SCHILLER & FLEXNER, LLP 333 Main Street Armonk, NY 10504 (914) 749-8200	Charles J. Cooper David H. Thompson Howard C. Nielson, Jr. Nicole J. Moss Jesse Panuccio Peter A. Patterson

Fax: (914) 749-8300	COOPER AND KIRK, PLLC 1523 New Hampshire Ave., N.W. Washington, D.C. 20036 (202) 220-9600 Fax: (202) 220-9601
---------------------	---------------------------------------------------------------------------------------------------------------------------

WHEREFORE, Appellants' motion pursuant to Ninth Circuit Rule 27.3 should be granted.

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