No. 10-15649

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, et al.,

Defendant-Intervenors-Appellees.

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

APPELLEES' RESPONSE TO ACLU'S AND EQUALITY CALIFORNIA'S MOTION TO EXPEDITE

THEODORE J. BOUTROUS, JR.
CHRISTOPHER D. DUSSEAULT
THEANE EVANGELIS KAPUR
ENRIQUE A. MONAGAS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Plaintiffs-Appellees Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

Plaintiffs respectfully request that the Court significantly expedite the appeal from the district court's discovery order filed by No on Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union of California and Equality California (collectively "ACLU"). Plaintiffs will be irreparably harmed by any further delay in this case—which was tried over two months ago but has yet to be decided because of this discovery dispute—because they are being denied the fundamental right to marry. *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008) ("constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm").

The district court denied Plaintiffs' motion for a preliminary injunction primarily because the parties committed to bringing this case to trial on a most expeditious basis. In a matter of months, Plaintiffs completed all necessary fact and expert discovery and prepared for and conducted a three-week trial in an effort to reach a speedy resolution of their claims. Yet now, more than two months since trial, closing arguments have not been scheduled because of the delay caused by Proponents' belated discovery requests. Indeed, the two months that this discovery dispute has consumed since trial is approaching nearly 25% of the *entire time* that elapsed between the district court's denial of Plaintiffs' preliminary injunction motion and the commencement of trial. Because the State of California has admitted that Proposition 8 continues to violate the constitutional rights of tens of

thousands of Californians every day, it is critical that this appeal respect the expedited schedule set forth by the district court.

Plaintiffs therefore request that the Court significantly expedite the appeal, as it did in connection with Proponents' appeal in November. *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). On Friday, November 20, 2009, the Court ordered Plaintiffs to respond to Proponents' motion to stay pending appeal by 12 noon on Monday, November 23, 2009. Proponents were then given until 5:00 p.m. on November 23, 2009 to file a reply. Oral argument was held only five business days after briefing was completed. The Court should implement a similarly expedited briefing schedule here, which would respect the schedule set by the district court.

Alternatively, the Court could resolve this appeal on the basis of the well-established contempt rule, which holds that, to obtain appellate jurisdiction, nonparties who seek review of a discovery order must first refuse to comply with that order, be sanctioned for contempt, and then appeal from the contempt citation. *In re Subpoena served on Cal. Pub. Util. Comm'n*, 813 F.2d 1473, 1476 (9th Cir. 1987) ("[I]f the district court denied a nonparty's motion to quash, the nonparty could obtain review only by electing to ignore the subpoena and appeal the ensuing contempt citation. Until a contempt citation is issued as a final judgment in the contempt proceeding, we lack jurisdiction to review the order."); *Belfer v. Pence*, 435 F.2d 121, 123 (9th Cir. 1970) ("Here there is no evil which cannot be

corrected on a later appeal. The rights of the [nonparty] petitioners are protected sufficiently by their ability to disobey and test the Hawaii court's discovery order on appeal from a subsequent citation for contempt."). The contempt rule applies with equal force when a third party resisting discovery petitions for mandamus. *Belfer*, 435 F.2d at 123 (denying mandamus because nonparties could protect their interests on appeal from a contempt order); *see also* William W. Schwarzer et al., California Practice Guide: Federal Civil Procedure Before Trial § 13:68 (The Rutter Group 2009) ("A discovery order directed at a *nonparty* is not reviewable by mandamus because the nonparty can refuse to comply and appeal from a contempt order.").

Although ACLU does not mention the contempt rule or any basis for this Court's jurisdiction over the appeal, it is clear that ACLU must first refuse to comply with the district court's discovery order and be held in contempt before it may pursue an appeal. *See In re Subpoena*, 813 F.2d at 1476 n.1 ("The requirement that a nonparty must be in contempt of court in this situation is a serious matter and serves to illustrate the strictness in applying the final judgment rule."); *see also Burden-Meeks v. Welch*, 319 F.3d 897, 900 (7th Cir. 2003) ("When documents are sought from the entity that claims the privilege, there is every reason to insist that it go through the contempt process, which by raising the stakes helps the court winnow strong claims from delaying tactics that, like

other interlocutory appeals, threaten to complicate and prolong litigation unduly.").[1]

Respectfully submitted.

Dated: March 26, 2010

By /s/ Theodore B. Olson

GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson
Matthew D. McGill
Amir C. Tayrani
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8668
Facsimile: (202) 467-0539

Theodore J. Boutrous, Jr.
Christopher D. Dusseault
Theane Evangelis Kapur
Enrique A. Monagas
333 S. Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7804
Facsimile: (213) 229-7520

Attorneys for Plaintiffs-Appellees
KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO

[1] Likewise, ACLU cannot invoke the "narrow and selective" collateral order doctrine. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009) (internal quotation marks omitted). Indeed, the U.S. Supreme Court recently held in *Mohawk* that discovery orders denying claims of privilege are not appealable under the collateral order doctrine. *Id*. at 603; *see also Perry*, 591 F.3d at 1154-56.

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 819 words.

Dated: March 26, 2010

By /s/ Theodore B. Olson

9th Circuit Case Number(s) No. 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) [ ].

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) [ ]

****

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) [03/26/2010].

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:

Please see attached service list.

Signature (use "s/" format) /s/Theodore B. Olson

SERVICE LIST

Alan L. Schlosser
ACLU FOUNDATION OF NORTHERN CALIFORNIA INC.
39 Drumm St.
San Francisco, CA 94111

Judy Whitehurst
OFFICE OF THE COUNTY COUNSEL
Kenneth Hahn Hall of Administration, Room 648
500 W. Temple Ave.
Los Angeles, CA 90012

Andrew P. Pugno
LAW OFFICES
101 Parkshore Drive, Suite 100
Folsom, CA 95630

Carolyn Chang
FENWICK & WEST, LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041-1990

David H. Thompson
Howard C. Neilson, Jr.
Nicole Moss
Peter A. Patterson
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, DC 20036

Leslie Kramer
Lauren Whittemore
FENWICK & WEST, LLP
555 California Street
San Francisco, CA 94104