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,
Petitioners/Appellants,
v.

DENNIS HOLLINGSWORTH, et al.,
Respondents-Appellees.

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

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

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Respondents-Appellees Dennis Hollingsworth, Gail Knight, Martin Gutierrez, Mark Jansson, and ProtectMarriage.com—Yes on 8, A Project of California Renewal (hereinafter "Proponents") respectfully submit this response to Petitioner-Appellants' Motion for Expedited Appeal.[1]

BACKGROUND

The procedural background to this case is lengthy and quite significant to the issues Appellants now ask this Court to review. Proponents will provide that background in detail in their merits brief, but for purposes of responding to Appellants' motion to expedite, a partial account should suffice.

This appeal (or, in the alternative, petition for writ of mandamus) arises out of discovery orders in a case challenging the constitutionality of Proposition 8 ("Prop 8"), an initiative amendment providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. Appellants are organizations that campaigned against Proposition 8. Proponents are a "primarily formed ballot committee" and the individual "official proponents" of Prop 8, who were permitted to intervene in this case to defend the initiative after the Governor and the Attorney General declined to do so.

[1] References to the docket below are designated "D.E." unless they are included in Petitioners/Appellants' Appendix of Relevant Documents, in which case a cross-citation is provided. Because Proponents have endeavored to submit this response within twenty-four hours of receiving Appellants' motions, we have been unable to compile a supplemental appendix of relevant documents. We will submit a supplemental appendix, if necessary, with our merits brief.

Plaintiffs filed this suit on May 22, 2009, claiming that Prop 8 violates the Fourteenth Amendment. While the underlying merits present important constitutional questions, discovery en route to disposition of those merits took on a constitutional life of its own when Plaintiffs requested—and the district court compelled production of—the entirety of Proponents' internal, confidential documents relating to campaign strategy and message formulation.

Proponents immediately took the issue to this Court on an emergency basis. After granting a stay of the district court's discovery orders, Order, *Perry v. Hollingsworth*, No. 09-17241 (Nov. 20, 2009), this Court held that the district court had committed "clear error" that threatened to work a "substantial" "chilling effect on political participation and debate." *Perry v. Hollingsworth*, No. 09-17241, slip op. at 20 (9th Cir. Dec. 11, 2009). The Court 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 "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." *Id.* at 19-20. The Court held 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. In a footnote, 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's privilege against compelled disclosure. *Id.* at 36 n.12.

On remand, the parties disputed the meaning and implications of the opinion for further discovery, *see* Hr'g of Dec. 16, 2009 (D.E. 315), and the district court, on December 30, referred the issue to the Magistrate Judge, *see* D.E. 332. Before the Magistrate Judge set a hearing on the issue, and just days before trial was set to commence, this Court issued, on January 4, 2010, an amended opinion. *See Perry*, 591 F.3d 1147 (9th Cir. 2010). Although the Court did not alter the bulk of its First Amendment holdings, it did substantially revise footnote 12; it deleted its statement that the First Amendment privilege did not extend to communications disseminated to "large swaths of the electorate," and stated instead that:

> Our holding is therefore limited to communications among the core group of *persons* engaged in the formulation of campaign strategy and messages. We leave it to the district court, which is best acquainted with the facts of this case and the structure of the "Yes on 8" campaign, to determine the persons who logically should be included in light of the First Amendment associational interests the privilege is intended to protect.

Id. at 1165 n.12.

This footnote then became the tail that wagged the discovery dog. On January 6, two days after the amended opinion issued, the Magistrate Judge held a hearing at which Proponents made and lost nearly every argument that Appellants will now make to this Court. *See* Hr'g of Jan. 6, 2010 (D.E. 362). *See also* Hr'g of Dec. 16, 2009 (D.E. 315); Jan. 20, 2010 Trial Tr. at 1614:11-1621:22, 1628-33 (D.E. 507). Indeed, while Appellants were granted repeated and ample opportunity to build a record on the "core group" concept (particularly with respect to "core groups" of multiple organizations), Proponents were denied that opportunity. *See* Hr'g of Jan. 6, 2010 (D.E. 362). Instead, Plaintiffs argued before the Magistrate Judge that the "core group" of the ProtectMarriage.com campaign included only ProtectMarriage.com's executive committee, the campaign manager, and the campaign general counsel. Hr'g of Jan. 6, 2010 (D.E. 366), Tr. at 23:21-24:2. Resolving the issue on January 8 (3 days before trial), the district court ruled that the Defendant-Intervenors—that is, *both* ProtectMarriage.com and the individual proponents—could claim First Amendment protection only over communications between a limited number of ProtectMarriage.com's leaders and consultants. *See* D.E. 372 (AA 10); D.E. 496 (AA 25).

The Court also held that Defendant-Intervenors must produce confidential communications with any individual or association outside the ProtectMarriage.com "core group," including those from and between religious

and political groups and leaders allied in the larger Yes-on-8 political coalition. D.E. 372 at 2-3 (AA 11-12). In other words, according to the district court, if a member of ProtectMarriage.com "core group" communicated with a single member of any other Yes-on-8 "core group"—such as a church or a public interest organization—about overall campaign strategy and messaging, no First Amendment protection could be claimed. Likewise, the 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* Jan. 20, 2010 Trial Tr. 1614:11-1621:22 (D.E. 507) (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). In other words, citizens enjoy First Amendment protection for one and only one "core group," and they must make their choice of one at the peril of the other.

In sum, the court ordered Proponents to produce "all documents … that contain, refer or relate to any arguments for or against Proposition 8 other than communications solely among the core group." D.E. 372 at 5 (AA 14). Thus, over the next week, while the trial was proceeding, Proponents were forced to commit vast resources to review tens of thousands of internal campaign documents and to

produce over 12,000 internal campaign or nonpublic documents revealing private political speech and association. At trial, over Proponents' standing First Amendment and relevance objections, many such nonpublic documents were introduced into evidence.

After the district court—in reliance on this Court's footnote 12—laid down the rules with respect to relevance and privilege on the eve of trial, Proponents moved to compel from Appellants the very types of the documents that the district court insisted were relevant to its consideration of this case and not privileged under the First Amendment. *See* D.E. 472 (AA 16); D.E. 584. The Magistrate Judge granted the motion in large part (with a few notable, and objectionable, exceptions) and the district court affirmed that ruling in full. *See* D.E. 610 (AA 53); D.E. 623 (AA 104).

ARGUMENT

Proponents are quite familiar with Appellants' First Amendment arguments, for we made them, repeatedly, to the district court. The same holds true for relevance: Proponents repeatedly argued in the district court that the information that has been the subject of discovery in this case is utterly irrelevant to the intent of the electorate in enacting a ballot measure. But we lost. The rules having been established, Proponents have had no choice but to play by them (while preserving their objections) and to seek from Appellants what the district court has deemed

relevant to its consideration of this case: "the mix of information before and available to the voters," Doc # 214 at 14, which includes any document that "contain[s], refer[s], or relate[s] to arguments for or against Proposition 8," D.E. 372 at 5 (AA 14). We agree with Appellants that the district court has erred and that either this Court or the Supreme Court should correct it.

The current orders under review stand or fall with the district court's prior orders establishing relevance rules and applying footnote 12—orders that Proponents objected to at the time and still object to today. Accordingly, Proponents welcome the stay of proceedings below pending resolution of this appeal. Nor will we oppose further elaboration by this Court of the proper application of the First Amendment privilege in this case, so long as this Court directs the district court to apply those rules even-handedly and consistently, regardless of the party claiming their benefit. But if the district court's earlier relevance and privilege determinations are to stand, and if the lower court and Plaintiffs are permitted to make use of the privileged documents compelled from Proponents' on the eve of, and during, trial—then Proponents respectfully submit that no greater protection can be afforded Appellants' internal documents, which are no less relevant and no more privileged than Proponents' internal documents. Proponents will make these arguments more fully in the merits briefing to come.

But while Proponents welcome further consideration of these issues by this Court, and are amenable to a reasonably expedited briefing and argument schedule, Proponents do oppose the extraordinarily rushed briefing schedule suggested by Appellants. Appellants claim that "[e]xpedition is necessary because the underlying case, involving the constitutionality of Proposition 8, has been tried and is awaiting final argument and disposition. … [and Appellants] have no desire to delay disposition of the underlying case in the district court beyond the time necessary to resolve the instant appeal on an extremely expeditious schedule." Mot. for Expedited Appeal at 2. But the supposed need for extraordinary expedition is utterly inconsistent with the unhurried pace with which the Appellants and the district court approached Proponents' motion to compel *before* it was granted.

Proponents filed their motion on January 15, 2010. *See* D.E. 472 (AA 16). And because trial was already underway, Proponents moved the district court for expedited consideration of the motion. *See* D.E. 473. The district court did nothing in response to this request for expedition (while at the same time, however, it granted, with great haste and urgency, Plaintiffs' motion to compel production of similar documents from Proponents, *see* D.E. 372 (AA 10); D.E. 496 (AA 25)). Instead, at the very end of trial, the district court finally called for responses from Appellants to Proponents' motion to compel, to be filed February 2. *See* D.E. 526.

Once those responses were filed, the district court then referred the matter to the Magistrate Judge, thus ensuring that the issue would require the attendant delay of an extra round of briefing of objections to the Magistrate Judge's eventual order. *See* D.E. 572. At Appellants' request, the Magistrate Judge then put off a hearing on the motion until February 25. *See* D.E. 586, D.E. 588, D.E. 589. In the meantime, Appellants were granted leave to submit numerous declarations in support of their opposition to the Proponents' motion—the time period for which routinely exceeded that which Appellants now say should constitute Proponents' opportunity to brief this entire appeal. *See, e.g.*, D.E. 589 (granting Appellants eleven days to file additional declarations in support of their opposition). Following the February 25 hearing, the Magistrate Judge then waited until March 5 to issue an order compelling compliance with the subpoenas, with a final production set for nearly a month later, on March 31. *See* D.E. 610 (AA 53). Appellants then waited seven days—until March 11 (again exceeding the time they now say is sufficient for Proponents to brief this appeal)—to submit their objections to the order. *See* D.E. 614 (AA 67). The district court held a hearing on March 16, and then issued its order a week later affirming the Magistrate Judge, including the March 31 production deadline. *See* D.E. 623 (AA 104).

In sum, then, Appellants and the district court—and Plaintiffs for that matter[2]—were fully content to wait nearly *three months* for resolution of Proponents' motion, even though Proponents asked for expedited consideration in January so that the resources already committed to San Francisco for the trial could be marshaled to review and make use of the documents produced at that time. Now, all of a sudden, Appellants claim (and the district court implies through its limited stay) that time is of the essence. Things are so urgent, they say, that this entire appeal must be briefed and argued in less than two weeks, and that Proponents ought to be afforded only five calendar days to submit their entire merits briefing—as noted, a period far shorter than those periods Appellants were routinely granted by the district court to submit their many declarations in support of their opposition.

Without doubt, the underlying case here presents important questions of constitutional law that require just and speedy resolution. But as Appellants attest, the First Amendment issues that have permeated this case are no less weighty, and no less deserving of full and measured consideration. The parties deserve an opportunity to fully brief them with the benefit of reasonable time to prepare those briefs. Thus, while Proponents do not oppose an expedited schedule for briefing,

[2] *See* Hr'g of March 16, 2010, Tr. at 62:1-13 (D.E. 621) (counsel for Plaintiffs stating that "if, in fact, documents are produced by the deadline set by Magistrate Judge Spero, that would accomplish th[e] objectives" of "find[ing] some way to bring this to closure").

we submit that five calendar days is both unwarranted and untenable in light of the critical issues at stake and the press of other business that Proponents' counsel is currently contending with, including several other appeals that are due to be argued soon. Proponents thus propose that Appellants be afforded two weeks from the date of entry of the stay to submit their opening brief, that Proponents be afforded two weeks from that date to submit our response brief, and that Appellants be afforded a week from that date to submit a reply brief. By any standard, this would be an extraordinarily expedited schedule for an appeal, but would allow for the preparation of more studied, deliberative papers for the Court's consideration.

Dated: March 26, 2010

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
Attorney for Respondents-Appellees

9th Circuit Case Number(s) 10-15649

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