

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER,
PAUL T KATAMI and JEFFREY J
ZARRILLO,

No C 09-2292 VRW
ORDER

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his
official capacity as governor of
California; EDMUND G BROWN JR, in
his official capacity as attorney
general of California; MARK B
HORTON, in his official capacity
as director of the California
Department of Public Health and
state registrar of vital
statistics; LINETTE SCOTT, in her
official capacity as deputy
director of health information &
strategic planning for the
California Department of Public
Health; PATRICK O'CONNELL, in his
official capacity as clerk-
recorder of the County of
Alameda; and DEAN C LOGAN, in his
official capacity as registrar-
recorder/county clerk for the
County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J
KNIGHT, MARTIN F GUTIERREZ,
HAKSHING WILLIAM TAM, MARK A
JANSSON and PROTECTMARRIAGE.COM -
YES ON 8, A PROJECT OF
CALIOFORNIA RENEWAL, as official
proponents of Proposition 8,

Defendant-Intervenors.

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United States District Court
For the Northern District of California

1 Defendant-intervenors, the official proponents of
2 Proposition 8 ("proponents") move for a limited stay of discovery
3 pending resolution of a purported appeal or mandamus petition in
4 the alternative. Doc #220. Plaintiffs oppose any delay in
5 discovery in light of the upcoming trial date and ask the court to
6 compel proponents to respond to their discovery requests in seven
7 days. Doc #225.

8 To obtain a stay, proponents "must establish that [they
9 are] likely to succeed on the merits, that [they are] likely to
10 suffer irreparable harm in the absence of preliminary relief, that
11 the balance of equities tips in [their] favor, and that an
12 injunction is in the public interest." Winter v Natural Resources
13 Defense Council, Inc, -- US --, 129 Sct 365, 374 (2008). A
14 "possibility" of success is "too lenient." Id at 375; see also
15 American Trucking Associations, Inc v City of Los Angeles, 559 F3d
16 1046, 1052 (9th Cir 2009). Because, for the reasons explained
17 below, proponents have met no part of this test, proponents' motion
18 for a stay is DENIED.

20 I

21 Proponents are unlikely to succeed on their appeal or
22 mandamus petition because (1) the court of appeals lacks
23 jurisdiction over the appeal and mandamus petition and (2) the
24 appeal lacks merit.

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2 Proponents have noticed an appeal of the court's October
3 1 order, Doc #214, "to the extent it denies [proponents'] Motion
4 for a Protective Order (Doc #187)." Doc #222. The motion for a
5 protective order cites to National Ass'n for the A of C P v
6 Alabama, 357 US 449 (1958) ("NAACP") (invoking a qualified First
7 Amendment privilege to protect NAACP rank-and-file membership lists
8 against disclosure), and its progeny to claim a qualified First
9 Amendment privilege against discovery of any of proponents'
10 communications with third parties. Doc #187. Proponents'
11 docketing statement in the Ninth Circuit describes the October 1
12 order as an "INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT." Id at
13 5. However proponents may characterize the October 1 order, it is
14 manifestly not a final judgment appealable as of right under 28 USC
15 § 1291, nor did proponents seek, or the court find suitable, an
16 interlocutory appeal under 28 USC § 1292(b). Proponents' right to
17 seek review of the October 1 order must therefore rest on the
18 collateral order doctrine or on grounds warranting mandamus by the
19 court of appeals. Neither of these, however, provides an adequate
20 foundation for the instant appeal or mandamus petition.

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23 The collateral order doctrine allows appeal under section
24 1291 of "a narrow class of decisions that do not terminate the
25 litigation but must, in the interest of achieving a healthy legal
26 system, nonetheless be treated as final." Digital Equipment Corp v
27 Desktop Direct, Inc, 511 US 863, 867 (1994). The October 1 order
28 was not such a decision.

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1 Ordinarily, of course, the court of appeals lacks
2 jurisdiction to review discovery orders before entry of judgment.
3 Truckstop.net, LLC v Sprint Corp, 547 F3d 1065, 1067 (9th Cir
4 2008). As interpreted by the Ninth Circuit, the collateral order
5 doctrine allows the court of appeals to exercise jurisdiction over
6 interlocutory appeals of certain orders denying application of a
7 discovery privilege, but only when the order: "(1) conclusively
8 determine[s] the disputed question; (2) resolve[s] an important
9 issue completely separate from the merits of the action; and (3)
10 [is] effectively unreviewable on appeal from final judgment."
11 United States v Austin, 416 F3d 1016, 1020 (9th Cir 2005)
12 (citations omitted). As long as the question remains "tentative,
13 informal or incomplete, there may be no intrusion by appeal." *Id*
14 (citing Cohen v Beneficial Loan Corp, 337 US 541, 546 (1949)).

15 In Austin, the Ninth Circuit found that it lacked
16 jurisdiction to review the district court's order that "statements
17 made during discussions between inmates in their cells with no
18 lawyers present are not covered as confidential communications
19 under the joint defense privilege." 416 F3d at 1019. The court
20 held that the third prong of the jurisdictional test was not
21 satisfied because defendants had not "raised any specific privilege
22 claims" over specific communications. *Id* at 1023.

23 Here, the October 1 order was not a conclusive
24 determination because proponents had not asserted the First
25 Amendment privilege over any specific document or communication.
26 Proponents' blanket assertion of privilege was unsuccessful, but
27 whether the privilege might apply to any specific document or
28 information was not finally determined in the October 1 order.

1 Moreover, because the First Amendment qualified privilege that
2 proponents seek to invoke requires the court to balance the harm of
3 disclosure against the relevance of the information sought, the
4 applicability of the qualified privilege cannot be determined in a
5 vacuum but only with reference to a specific document or particular
6 information.

7 Proponents have made no effort to identify specific
8 documents or particular information to which the claim of qualified
9 privilege may apply. Notably, proponents have failed to serve and
10 file a privilege log, a prerequisite to the assertion of any
11 privilege. See Burlington North & Santa Fe Ry Co v United States
12 Dist Court for Dist of Mont, 408 F3d 1142, 1149 (9th Cir 2005).
13 Furthermore, the balancing required to apply the qualified
14 privilege must consider whether any injury or risk to the producing
15 party can be eliminated or mitigated by a protective order. The
16 October 1 order directed the parties to discuss the terms of a
17 protective order and expressed the court's willingness to assist
18 the parties in fashioning such an order. Doc #214 at 17.

19 The cases proponents cite to support appellate
20 jurisdiction under the collateral order doctrine deal with absolute
21 privileges, like the attorney-client privilege. See Doc #220 at 5
22 n3 (citing In re Napster, Inc Copyright Litigation, 479 F3d 1078
23 (9th Cir 2007) (attorney-client privilege); Bittaker v Woodford,
24 331 F3d 715 (9th Cir 2003) (attorney-client privilege); United
25 States v Griffin, 440 F3d 1138 (9th Cir 2006) (marital privilege)).
26 These cases allow a collateral appeal at least in part because an
27 order denying a claim of absolute privilege usually resolves a
28 question independent from the merits of the underlying case. See

1 In re Napster, 479 F3d at 1088-89.

2 An order denying a claim of qualified privilege, which
3 balances the harm of production against the relevance of the
4 discovery sought, is not so easily divorced from the merits of the
5 underlying proceeding. The question whether discovery is relevant
6 is necessarily enmeshed in the merits, as it involves questions
7 concerning "the substance of the dispute between the parties." Van
8 Cauwenberghe v Biard, 486 US 517, 528 (1988). Here, for example,
9 the question of relevance is related to the merits of plaintiffs'
10 claims, as the relevance of the information sought would be greater
11 were the court to apply an exacting level of scrutiny to
12 plaintiffs' Equal Protection claims. Doc #214 at 12-13.

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15 Proponents also apparently seek mandamus if the appellate
16 court does not accept their interlocutory appeal. Mandamus is a
17 "drastic" remedy that is appropriately exercised only when the
18 district court has failed to act within the confines of its
19 jurisdiction, amounting to a "judicial 'usurpation of power.'" Kerr v United States District Court, 426 US 394, 402 (1976) (citing
20 Will v United States, 389 US 90, 95-96 (1967)). A party seeking
21 mandamus must show that he has "no other adequate means to attain
22 the relief he desires" and that "his right to issuance of the writ
23 is clear and indisputable." Kerr, 426 US at 403 (citations
24 omitted).
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26 In Kerr, petitioners sought a writ of mandamus to vacate
27 the district court's order that petitioners produce personnel files
28 and prisoner files after plaintiffs sought the discovery as part of

1 their class action against the California Department of
2 Corrections. 426 US at 396-97. Petitioners had asserted that the
3 discovery sought was both irrelevant and privileged. Id. The
4 Court denied mandamus at least in part because petitioners'
5 privilege claim had not been asserted with "requisite specificity."
6 Id at 404.¹ Petitioners therefore had a remedy remaining in the
7 district court: petitioners could assert their privilege claim
8 over a specific document or set of documents and allow the district
9 court to make the privilege determination in the first instance.
10 Id.

11 Here, the court might yet apply proponents' purported
12 privilege in the manner described in Kerr. Proponents have not
13 identified specific documents they claim are privileged and have
14 not given the court an opportunity to determine whether any claim
15 of privilege might apply to a specific document. Additionally, as
16 the court explained in its October 1 order, it is not "clear and
17 indisputable" that proponents should succeed on their First
18 Amendment claim of privilege. Doc #214 at 4-11. Proponents, as
19 the official supporters of a California ballot initiative, are
20 situated differently from private citizen advocates. Cf McIntyre v
21 Ohio Elections Comm'n, 514 US 334, 351 (1995) (distinguishing
22 between "individuals acting independently and using only their own
23 modest resources" and official campaigns). McIntyre determined
24 whether an individual who distributed leaflets in opposition to a

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26 ¹Under quite different, and indeed rather unique, circumstances,
27 the Court has directed an appellate court to consider a writ of
28 mandamus even when petitioners had not asserted privilege claims over
specific discovery. See Cheney v United States Dist Court for D C,
542 US 367, 390-391 (2004).

1 local tax levy could be forced to disclose her identity on the
2 leaflet pursuant to an Ohio statute. Id at 338. In this case,
3 plaintiffs' discovery requests do not appear to call for disclosure
4 of identities of persons "acting independently and using their own
5 modest resources," but simply the individuals acting as, or in
6 coordination with, the official sponsors of the Yes on 8 campaign.
7 Plainly, there is a difference between individuals or groups who
8 have assumed the privilege of enacting legislation or
9 constitutional provisions and individuals who merely favor or
10 oppose the enactment. To the extent that plaintiffs' discovery
11 might disclose the identity of individuals entitled to some form of
12 anonymity, an appropriate protective order can be fashioned. A
13 blanket bar against plaintiffs' discovery is unwarranted.
14 Proponents case for mandamus relief is therefore tenuous at best.

B

17 Having determined that the court of appeals is unlikely
18 to accept proponents' appeal² or order mandamus relief, the court
19 turns more specifically to the merits of proponents' motion to stay
20 discovery pending the court of appeals' consideration of
21 proponents' proceedings in that court. For the reasons previously
22 noted and discussed further below, proponents are unlikely to
23 succeed on the merits of their resort to the court of appeals, and
24 their case for irreparable harm is weak.

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28 ²The court of appeals has issued an order to show cause why the
appeal should not be dismissed. Ct Appls Docket #09-17241, Doc #8.

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In its October 1 order, the court declined proponents' invitation to impose a blanket bar against plaintiffs' discovery of proponents' communications with third parties. Doc #214 at 4-11. Proponents contend that a blanket bar against such discovery was required by the First Amendment. Doc #187 at 15 (citing NAACP, 357 US at 460; Bates v City of Little Rock, 361 US 516, 523 (1960); Gibson v Florida Legislative Comm, 372 US 539 (1963)). Proponents misread the October 1 order as foreclosing any application of a First Amendment qualified privilege to the discovery plaintiffs seek. The court simply decided that proponents had not established the grounds necessary to invoke the First Amendment qualified privilege while also sustaining in part proponents' objection to the scope of plaintiffs' eighth document request.

At the risk of repetition, proponents are not likely to succeed on the merits of their appeal for the following reasons: (1) proponents have not put forth a strong case that the entirety of discovery sought by plaintiffs in the eighth document request is protected by a qualified First Amendment privilege when plaintiffs do not seek disclosure of ProtectMarriage.com's rank-and-file membership lists, Doc #214 at 4-11; (2) McIntyre, 514 US 334 (1995), does not support the application of a First Amendment qualified privilege because McIntyre was acting independently, not legislating, and because McIntyre dealt with the constitutionality of an Ohio statute, not the application of a qualified privilege in the context of civil discovery, Doc #214 at 8-9; and (3) proponents have not properly preserved their privilege claim in light of both the numerous disclosures already made surrounding the Yes on 8

1 campaign and of proponents' failure to produce a privilege log.
2 Doc #214 at 10-11.

3 It simply does not appear likely that proponents will
4 prevail on the merits of their appeal.

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7 The question whether proponents are likely to suffer
8 irreparable harm if a stay is not entered is difficult to answer in
9 a vacuum. The court does not know at this juncture exactly what
10 documents or information would be disclosed in the absence of a
11 stay. Generally, the threat of a constitutional violation suggests
12 the likelihood of irreparable harm. Community House, Inc v City of
13 Boise, 490 F3d 1041 (9th Cir 2007). But it does not appear that
14 the entirety of communications responsive to plaintiffs' eighth
15 document request is covered by the First Amendment qualified
16 privilege. Doc #214 at 4-11.

17 As the court explained in its October 1 order, Prop 8
18 supporters claim to have faced threats, harassment and boycotts
19 when their identities were revealed; however, proponents have not
20 made a showing that the discovery sought in this case would lead to
21 further harm to any Prop 8 supporter. Doc #214 at 6. Proponents
22 offer nothing new in the instant motion to support their claim that
23 disclosure would lead to irreparable harm. See Doc #220 at 5.

24 A protective order provides a means by which discovery
25 could continue without the threat of harm proponents seek to avoid.
26 But proponents have not sought a protective order directed to
27 specific disclosures. The possibility that harm could be
28 eliminated or substantially minimized through a protective order

1 suggests that a stay of discovery is not required.

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4 In light of the court's determination that proponents
5 have neither demonstrated a likelihood of success on the merits nor
6 shown that they are likely to suffer irreparable harm if the stay
7 is not issued, it is unnecessary to address the remaining factors
8 required for proponents to obtain a stay. Nevertheless, the court
9 will touch on them briefly.

10 Whether the balance of equities tips in proponents' favor
11 depends upon a comparison of the harm proponents claim they would
12 face if a stay were not granted with the harm plaintiffs would face
13 if a stay were granted. Winter, 129 S Ct at 376. As just
14 explained, proponents' projected harm could be remedied through a
15 protective order. Plaintiffs assert they too face harm as they
16 seek to vindicate what they claim is a violation of their
17 constitutional rights. Doc #225 at 13. A stay would serve to
18 delay discovery and potentially postpone the scheduled January 2010
19 trial. A "mere assertion of delay does not constitute substantial
20 harm." United States v Phillip Morris Inc, 314 F3d 612, 622 (9th
21 Cir 2003). But because proponents have not articulated any
22 meaningful harm, the balance of equities nevertheless tips in
23 plaintiffs' favor in light of the potential for delay.

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26 Finally, the court must determine whether a stay is in
27 the public interest. Proponents assert that the denial of a stay
28 will "curtail the First Amendment freedoms surrounding voter-

1 initiated measures." Doc #220 at 7. Plaintiffs counter that
2 citizens have an interest in seeing plaintiffs' constitutional
3 claims determined on the merits as quickly as possible. Doc #225
4 at 14. It appears that a protective order would likely remedy any
5 harm to the public identified by proponents. It also appears that
6 a limited discovery stay would not significantly affect the public
7 interest in a prompt resolution of plaintiffs' claims. Thus, the
8 public interest does not appear to weigh strongly in favor of any
9 party's position.

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11 II

12 Even in the unlikely event that the court of appeals
13 exercises jurisdiction over proponents' appeal or mandamus
14 petition, a discovery stay is inappropriate. Proponents have not
15 demonstrated that they are likely to succeed on the merits of their
16 claims or that they face irreparable harm in the absence of a stay.
17 The balance of equities appears to tip in favor of denying a stay,
18 and the public interest does not point clearly one way or another.
19 Accordingly, proponents' motion to stay discovery is DENIED.

20 Plaintiffs seek an order compelling discovery within
21 seven days. Doc #225. But it is not clear whether the discovery
22 sought can practically be produced within the next seven days.
23 While it is imperative to proceed promptly with discovery to keep
24 these proceedings on schedule, the court prefers to look to the
25 good faith and professionalism of proponents' able counsel to
26 respond to plaintiffs' modified eighth document request in a timely
27 manner. The court stands ready to assist the parties.

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1 Accordingly, the parties are directed to contact the
2 clerk within five days to schedule a telephone conference to
3 discuss the progress of their efforts.

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5 IT IS SO ORDERED.

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8 VAUGHN R WALKER
9 United States District Chief Judge