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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

ARNORLD 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 and MARK A  
JANSSON, as official proponents  
of Proposition 8,

Defendant-Intervenors.

\_\_\_\_\_ /

United States District Court  
For the Northern District of California

United States District Court  
For the Northern District of California

1           The defendant-intervenors, who are the official  
2 proponents of Proposition 8 ("proponents") move for a protective  
3 order against the requests contained in one of plaintiffs' first  
4 set of document requests. Doc #187. Proponents object to  
5 plaintiffs' request no 8, which seeks "[a]ll versions of any  
6 documents that constitute communications relating to Proposition 8,  
7 between you and any third party, including, without limitation,  
8 members of the public or the media." Doc #187 at 8. Proponents  
9 also object to all other "similarly sweeping" requests. Id at 8 n  
10 1. Proponents argue the discovery sought: (1) is privileged under  
11 the First Amendment; (2) is not relevant; and (3) places an undue  
12 burden on proponents. Doc #187 at 9. Plaintiffs counter that the  
13 discovery sought is relevant and not privileged. Doc #191.

14           During the course of briefing the dispute for the court,  
15 the parties appear to have resolved at least one issue, as  
16 proponents now agree to produce communications targeted to discrete  
17 voter groups. Doc #197 at 6. The agreement appears only partially  
18 to resolve the parties' differences. Because of the broad reach of  
19 request no 8 and the generality of proponents' objections, the  
20 unresolved issues will almost certainly arise in other discovery,  
21 as well as to require resolution of the parties' differences with  
22 respect to request no 8. Accordingly, the court held a lengthy  
23 hearing on September 25, 2009 and seeks by this order not only to  
24 address the parties' remaining dispute with respect to request no 8  
25 but also provide guidance that will enable them to complete  
26 discovery and pretrial preparation expeditiously.

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1  
2 As an initial matter, and because plaintiffs' request no  
3 8 is quite broad, the court must determine what discovery remains  
4 disputed. Proponents object to disclosing documents that fall into  
5 five categories: "(i) communications between and among  
6 [d]efendant-[i]ntervenors, campaign donors, volunteers, and agents;  
7 (ii) draft versions of communications never actually distributed to  
8 the electorate at large; (iii) the identity of affiliated persons  
9 and organizations not already publicly disclosed; (iv) post-  
10 election information; and (v) the subjective and/or private  
11 motivations of a voter or campaign participant." Doc #187 at 9.  
12 But in their reply memorandum, proponents explain that they only  
13 object to "nonpublic and/or anonymous communications" (emphasis in  
14 original), "drafts of documents that were never intended to, and  
15 never did, see public light" and "documents created after the Prop  
16 8 election." Doc #197. Plaintiffs have stated they "do not seek  
17 ProtectMarriage.com's membership list or a list of donors to the  
18 'Yes on 8' cause." Doc #191 at 13.

19 Plaintiffs have told proponents that they are seeking  
20 communications between proponents and "their agents, contractors,  
21 attorneys, donors or others" to the extent the communications are  
22 responsive and not otherwise privileged. Doc #187-6 at 2.  
23 Plaintiffs argue that the election materials put before the voters  
24 are insufficient to discern the intent or purpose of Prop 8. The  
25 questions whether Prop 8 was passed with discriminatory intent and  
26 whether any claimed state interest in fact supports Prop 8 underlie  
27 plaintiffs' Equal Protection challenge, at least in part. See,  
28 e g, Doc #157 at 12. Proponents assert that Prop 8 was intended

1 simply to preserve the traditional characteristic of marriage as an  
2 opposite-sex union. See, e g, Doc #159 at 5. As a result of these  
3 conflicting positions, the intent or purpose of Prop 8 is central  
4 to this litigation. The issue on which resolution of the present  
5 discovery dispute turns is whether that intent should be divined  
6 solely from proponents' public or widely circulated communications  
7 or disseminations or whether their communications with third  
8 parties not intended for widespread dissemination may also  
9 illuminate that intent. Before deciding that issue, the court  
10 first addresses the grounds on which proponents seek a protective  
11 order.

## 12 II

13  
14 Proponents seek to invoke the First Amendment qualified  
15 privilege to refrain from responding to any discovery that would  
16 reveal political communications as well as identities of  
17 individuals affiliated with the Prop 8 campaign whose names have  
18 not already been disclosed. Doc #197 at 14. The free  
19 associational prong of the First Amendment has been held to provide  
20 a qualified privilege against disclosure of all rank-and-file  
21 members of an organization upon a showing that compelled disclosure  
22 likely will adversely affect the ability of the organization to  
23 foster its beliefs. National Ass'n for A of C P v Alabama, 357 US  
24 449, 460-63 (1958) ("NAACP"); see also Adolph Coors Co v Wallace,  
25 570 F Supp 202, 205 (ND Cal 1983). This qualified privilege has  
26 been found especially important if the disclosures would subject  
27 members to reprisals for the exercise of their associational rights  
28 under the First Amendment or otherwise deter exercise of those

1 rights. Here, however, plaintiffs are not seeking disclosure of  
2 membership lists. Doc #191 at 13. Indeed, many names associated  
3 with ProtectMarriage.com and the Yes on 8 campaign have already  
4 been disclosed. See ProtectMarriage.com v Bowen, 09-0058-MCE Doc  
5 #88 (ED Cal Jan 30, 2009).

6 The California Political Reform Act of 1974 requires  
7 disclosure of a great deal of information surrounding the Prop 8  
8 campaign, including the identity of, and specific information  
9 about, financial supporters. Cal Govt Code § 81000 et seq.  
10 Proponents have not shown that responding to plaintiffs' discovery  
11 would intrude further on proponents' First Amendment associational  
12 rights beyond the intrusion by the numerous disclosures required  
13 under California law – disclosures that have already been widely  
14 disseminated. Proponents asserted at the September 25 hearing that  
15 these California state law disclosure requirements extend to the  
16 outer boundaries of what can be required of political actors to  
17 reveal their activities. But the information plaintiffs seek  
18 differs from that which is regulated by these state disclosure  
19 requirements.

20 The First Amendment qualified privilege proponents seek  
21 to invoke, unlike the attorney-client privilege, for example, is  
22 not an absolute bar against disclosure. Rather, the First  
23 Amendment qualified privilege requires a balancing of the  
24 plaintiffs' need for the information sought against proponents'  
25 constitutional interests in claiming the privilege. See Adolph  
26 Coors, 570 F Supp at 208. In this dispute, the interests the  
27 parties claim are fundamental constitutional rights. Proponents  
28 argue that their First Amendment associational rights are at stake

1 while plaintiffs contend that Prop 8 violates their Equal  
2 Protection and Due Process rights and that denial of their  
3 discovery request jeopardizes the vindication of those rights. The  
4 claimed rights at issue thus appear to be of similar importance.

5 One tangible harm that proponents have claimed, and  
6 events made known to the court substantiate, lies in threats and  
7 harassment proponents claim have been suffered by known supporters  
8 of Prop 8. Identifying new information about Prop 8 supporters  
9 would, proponents argue, only exacerbate these problems. Doc #187.

10 The court is aware of the tendentious nature of the Prop  
11 8 campaign and of the harassment that some Prop 8 supporters have  
12 endured. See Doc #187-11. Proponents have not however adequately  
13 explained why the discovery sought by plaintiffs increases the  
14 threat of harm to Prop 8 supporters or explained why a protective  
15 order strictly limiting the dissemination of such information would  
16 not suffice to avoid future similar events. In sum, while there is  
17 no doubt that proponents' political activities are protected by the  
18 First Amendment, it is not at all clear that the discovery sought  
19 here materially jeopardizes the First Amendment protections.  
20 Furthermore, whether the First Amendment qualified privilege should  
21 bar all or any part of plaintiffs' discovery request is open to  
22 question under the circumstances of this case.

23 The key Supreme Court case upon which proponents rely,  
24 NAACP v Alabama, supra, involved a civil contempt against the NAACP  
25 for its failure to reveal the names and addresses of "all its  
26 Alabama members and agents, without regard to their positions or  
27 functions in the Association." 357 US at 451. As noted,  
28 plaintiffs do not here seek the names and addresses of proponents'

1 rank-and-file members or volunteers. More importantly, the  
2 protection against disclosure afforded by the holding in NAACP  
3 appears fairly restricted.

4 Alabama sought "a large number of the Association's  
5 records and papers, including bank statements, leases, deeds, and  
6 records of all Alabama 'members' and 'agents' of the Association."  
7 357 US at 453. The NAACP produced "substantially all the data  
8 called for" except for its lists of rank-and-file members. Id at  
9 454. Notably, the NAACP did not object "to divulging the identity  
10 of its members who are employed by or hold official positions" in  
11 the organization or to providing various other business records.  
12 Id at 464-65. The Court contrasted the NAACP's extensive  
13 disclosures with that in an earlier case in which another  
14 organization made no disclosures at all. Id at 465-66. Alabama's  
15 request for rank-and-file membership lists in NAACP was predicated  
16 solely on its interest in enforcement of the state's foreign  
17 corporation registration statute. Id at 464.

18 The Court observed that the disclosure of the names of  
19 rank-and-file members seemed to lack a "substantial bearing" on  
20 whether the NAACP, as a foreign corporation, should be authorized  
21 to do business in Alabama. Id at 464. The interest of Alabama in  
22 disclosure of rank-and-file membership lists thus was insubstantial  
23 relative to the significant interests of the NAACP and its members  
24 in carrying out their First Amendment and other activities that  
25 included - in 1956 - "financial support and [ ] legal assistance to  
26 Negro students seeking admission to the state university" and  
27 support of "a Negro boycott of the bus lines in Montgomery to  
28 compel the seating of passengers without regard to race." Id at

1 452.

2           Similarly, in a later case, the Supreme Court upheld a  
3 qualified First Amendment privilege against disclosure of NAACP  
4 membership lists where there was "no relevant correlation" between  
5 the purpose for which the lists were sought, enforcement of  
6 occupational license taxes, and the identity of NAACP rank-and-file  
7 members. Bates v Little Rock, 361 US 516, 525 (1960). On like  
8 grounds, the Supreme Court reversed a contempt conviction of the  
9 president of the NAACP Miami branch who refused to produce NAACP  
10 membership lists at a 1959 hearing of a state legislative committee  
11 investigating "infiltration of Communists" into various  
12 organizations. Gibson v Florida Legislative Committee, 372 US 539  
13 (1963). No evidence in that case suggested that the NAACP was  
14 "either Communist dominated or influenced," id at 548, undermining  
15 the required nexus between the membership lists and the purpose for  
16 which they were sought. Furthermore, at the hearing, the branch  
17 president answered questions concerning membership in the NAACP and  
18 responded to questions about a number of persons previously  
19 identified as communists or members of communist front or other  
20 affiliated organizations. Id at 543. Here, too, the qualified  
21 First Amendment privilege protected only membership lists, and the  
22 NAACP or its officials made significant disclosures apart from  
23 membership lists.

24           These cases from the civil rights struggles of the 1950s  
25 would thus appear to offer proponents scant support for refusing to  
26 produce information other than rank-and-file membership lists which  
27 plaintiffs, in any event, do not seek. Nor does proponents'  
28 position gain much traction from McIntyre v Ohio Elections Comm'n,



1 514 US 334 (1995), which reversed petitioner's conviction, upheld  
2 by the Ohio Supreme Court, for anonymously distributing leaflets  
3 regarding a referendum on a proposed school tax levy in violation  
4 of a statute prohibiting unsigned campaign materials. Petitioner  
5 "acted independently," not as part of a campaign committee or  
6 organization. Id at 337. Proponents, by contrast, are the  
7 official proponents of Prop 8 with responsibility under state law  
8 for compliance with electoral and campaign requirements. See Cal  
9 Election Code § 342; Cal Gov't Code § 8204.7.

10 Proponents, moreover, have not demonstrated that the  
11 procedure for invoking any First Amendment privilege applicable to  
12 their communications with third parties differs from that of any  
13 other privilege, such as the attorney-client privilege and trial  
14 preparation or work product protection. A party seeking to  
15 withhold discovery under a claim of privilege must "describe the  
16 nature of the documents, communications, or tangible things not  
17 produced or disclosed \* \* \* in a manner that, without revealing  
18 information itself privileged or protected, will enable other  
19 parties to assess the claim." FRCP 26(b)(5)(A)(ii). Proponents  
20 have failed to aver that they have prepared a privilege log that  
21 would comply with the requirement of FRCP 26(b)(5)(A)(ii), a  
22 necessary condition to preservation of any privilege. This failure  
23 ordinarily could be fatal to any assertion of a privilege.

24 Burlington Nort & Santa Fe Ry v Dist Ct, Mt, 408 F3d 1142, 1149  
25 (9th Cir 2005).

26 Proponents suggested at the September 25 hearing that the  
27 enumeration requirement of FRCP 26 does not apply to a First  
28 Amendment privilege, based as it is on fundamental constitutional

1 principles rather than common law, the origin of the attorney-  
2 client privilege and work product protection. Proponents contend  
3 that as the communications regarding Prop 8 involve political  
4 speech or association, Doc #197 at 11-12, they are entitled to a  
5 greater degree of confidentiality than common law privileges. In  
6 fact, as noted, it appears that any First Amendment privilege is a  
7 qualified privilege affording less expansive protection against  
8 discovery than the absolute privileges, such as the attorney-client  
9 and similar privileges. The First Amendment privilege proponents  
10 seek to invoke requires a balancing of interests that simply are  
11 not weighed in the area of attorney-client communications, and that  
12 balancing tends to limit or confine the First Amendment privilege  
13 to those materials that rather directly implicate rights of  
14 association.

15 In striking the appropriate balance, the court notes that  
16 in addition to the substantial financial and related disclosures  
17 required by California law, a rather striking disclosure concerning  
18 campaign strategy has already voluntarily been made by at least  
19 one, if not the principal, campaign manager-consultant employed by  
20 proponents. Plaintiffs have attached to their memorandum a  
21 magazine article written by Frank Schubert and Jeff Flint, whose  
22 public affairs firm managed the Yes on 8 campaign. Doc #191-2. In  
23 the article, Schubert and Flint refer specifically to campaign  
24 strategy and decisions, noting that they needed to convince voters  
25 "that there would be consequences if gay marriage were to be  
26 permanently legalized." *Id.* at 3. Schubert and Flint make clear  
27 that their goal in the campaign was to "rais[e] doubts." *Id.* They  
28 explain the campaign's "three broad areas" of focus as "religious



1 the information sought would be admissible at trial; instead, the  
2 court must determine whether the information sought is "reasonably  
3 calculated" to lead to discovery of admissible evidence.

4 Plaintiffs assert that the discovery sought is relevant  
5 to "the rationality and strength of [proponents'] purported state  
6 interests and whether voters could reasonably accept them as a  
7 basis for supporting Prop 8," as well as other factual disputes.  
8 Doc #191 at 8. Additionally, plaintiffs believe the discovery will  
9 lead to "party admissions and impeachment evidence." Id.

10 Plaintiffs' strongest argument appears to be that some of  
11 the information sought about proponents' communications with third  
12 parties may be relevant to the governmental interest that  
13 proponents claim Prop 8 advances. Id. Relevant information may  
14 exist in communications between proponents and those who assumed a  
15 large role in the campaign, including the campaign executive  
16 committee and political consultants, as that information well may  
17 have been conveyed to the ultimate decision-makers, the voters, and  
18 thus discloses the intent Prop 8 serves.

19 Key in this regard is the extent to which the requested  
20 discovery could be relevant "to ascertain the purpose" of Prop 8.  
21 Doc #187 at 10. Legislative purpose may be relevant to determine  
22 whether, as plaintiffs claim, Prop 8 violates the Equal Protection  
23 Clause. Washington v Davis, 426 US 229, 239-41 (1976) (holding  
24 that a law only violates the Equal Protection component of the  
25 Fifth Amendment when the law reflects a "discriminatory purpose,"  
26 regardless of the law's disparate impact); see also Personnel Adm'r  
27 of Massachusetts v Feeney, 442 US 256, 274 (1979) ("purposeful  
28 discrimination is the condition that offends the Constitution.")

1 (citation omitted). The analysis remains the same whether the  
2 challenged measure was enacted by a legislature or directly by  
3 voters. Washington v Seattle School Dist no 1, 458 US 457, 484-85  
4 (1982).

5 Proponents point to Southern Alameda Span Sp Org v City  
6 of Union City, Cal, 424 F2d 291, 295 (9th Cir 1970) ("SASSO"), and  
7 Bates v Jones, 131 F3d 843, 846 (9th Cir 1997) (en banc), for the  
8 proposition that the subjective intent of a voter is not a proper  
9 subject for judicial inquiry. In SASSO, the court determined that  
10 "probing the private attitude of the voters" would amount of "an  
11 intolerable invasion of the privacy that must protect an exercise  
12 of the franchise." 424 F2d at 295. In Bates, the court looked  
13 only to publicly available information to determine whether voters  
14 had sufficient notice of the effect of a referendum. 131 F3d at  
15 846. While these cases make clear that voters cannot be asked to  
16 explain their votes, they do not rule out the possibility that  
17 other evidence might well be useful to determine intent.

18 Plaintiffs' proposed discovery is not outside the scope  
19 of what some courts have considered in determining the intent  
20 behind a measure enacted by voters. The Eighth Circuit has held  
21 that courts may look to the intent of drafters of an initiative to  
22 determine whether it was passed with a discriminatory intent.  
23 South Dakota Farm Bureau, Inc v Hazeltine, 340 F3d 583, 594 (8th  
24 Cir 2003). At least one district court in this circuit has  
25 considered drafter intent along with voter intent. City of Los  
26 Angeles v County of Kern, 462 F Supp 2d 1105, 1114 (CD Cal 2006).  
27 The parties acknowledge that the line demarking relevance in this  
28 context is not clearly drawn. The difficulty of line-drawing stems

1 from the fact that, as the California Supreme Court put it well,  
2 "motive or purpose of [a legislative enactment] is not relevant to  
3 its construction absent reason to conclude that the body which  
4 adopted the [enactment] was aware of that purpose and believed the  
5 language of the proposal would accomplish it." Robert L v Superior  
6 Court, 30 Cal 4th 894, 904 (2003).

7           In the case of an initiative measure, the enacting body  
8 is the electorate as a whole. The legislative record for an  
9 initiative cannot, therefore, be compiled with the precision that  
10 the legislative history of an enactment by a legislative body can  
11 be put together. This would seem to suggest, as the Eighth Circuit  
12 implied in South Dakota Farm Bureau, that the scope of permissible  
13 discovery might well be broader in the case of an initiative  
14 measure or a referendum than a law coming out of a popularly  
15 elected, and thus democratically chosen, legislative body. However  
16 that may be, the mix of information before and available to the  
17 voters forms a legislative history that may permit the court to  
18 discern whether the legislative intent of an initiative measure is  
19 consistent with and advances the governmental interest that its  
20 proponents claim in litigation challenging the validity of that  
21 measure or was a discriminatory motive.

22           Proponents have agreed to disclose communications they  
23 targeted to voters, including communications to discrete groups of  
24 voters. Doc #197 at 6. But at the September 25 hearing,  
25 proponents stated that they did not believe "non-public"  
26 communications to confirmed Prop 8 supporters or to those involved  
27 in the Prop 8 campaign could be relevant to the intent  
28 determination. Proponents point out that those communications were

1 not directly before the voters. But it does appear to the court  
2 that communications between proponents and political consultants or  
3 campaign managers, even about messages contemplated but not  
4 actually disseminated, could fairly readily lead to admissible  
5 evidence illuminating the messages disseminated to voters. At  
6 least some of these contemplated, but not delivered, messages may  
7 well have diffused to voters through sources other than the  
8 official channels of proponents' campaign. Furthermore, of course,  
9 what was decided not to be said in a political campaign may cast  
10 light on what was actually said. The line between relevant and  
11 non-relevant communications is not identical to the public/non-  
12 public distinction drawn by proponents. At least some "non-public"  
13 communications from proponents to those who assumed a large role in  
14 the Prop 8 campaign could be relevant to the voters' understanding  
15 of Prop 8 and to the ultimate determination of intent.

16           While it appears that plaintiffs' request no 8 seeks  
17 relevant disclosures, the request itself is broader than necessary  
18 to obtain all relevant discovery. Proponents point out that even  
19 if some of the discovery sought by plaintiffs might be relevant,  
20 "virtually every communication made by anyone included in or  
21 associated with Protect Marriage" cannot be relevant. Doc #197 at  
22 7. The court agrees. Further, of course, no amount of discovery  
23 could corral all of the information on which voters cast their  
24 ballots on Prop 8. Proponents' undue burden objection is thus  
25 well-taken. It should suffice for purposes of this litigation to  
26 gather enough information about the strategy and communications of  
27 the Prop 8 campaign to afford a record upon which to discern the  
28 intent underlying Prop 8's enactment. Plaintiffs' request no 8,

1 currently encompassing any communication between proponents and any  
2 third party, is simply too broad.

3           Narrowing of plaintiffs' request is required. In their  
4 discussions, the parties have focused on the appropriate  
5 distinction – that between documents which relate to public  
6 communications with third parties and purely private communications  
7 among proponents. Hence, discovery directed to uncovering whether  
8 proponents harbor private sentiments that may have prompted their  
9 efforts is simply not relevant to the legislative intent behind  
10 Prop 8. That does not mean that discovery should be limited  
11 strictly to communications with the public at large. Documents  
12 pertaining to the planning of the campaign for Prop 8 and the  
13 messages actually distributed, or contemplated to be distributed,  
14 to voters would likely to lead to discovery of admissible evidence,  
15 as such documents share a clear nexus with the information put  
16 before the voters. Communications distributed to voters, as well  
17 as communications considered but not sent appear to be fair  
18 subjects for discovery, as the revision or rejection of a  
19 contemplated campaign message may well illuminate what information  
20 was actually conveyed to voters. Communications that took place  
21 after the election date may similarly be relevant if they are  
22 connected in some way to the pre-election messages conveyed to the  
23 voters. But discovery not sufficiently related to what the voters  
24 could have considered is not relevant and will not be permitted.

25           Plaintiffs are therefore DIRECTED to revise request no 8  
26 to target those communications most likely to be relevant to the  
27 factual issues identified by plaintiffs.

28 \ \





1 ensure that disclosures through the discovery process do not result  
2 in adverse effects on the parties or entities or individuals not  
3 parties to this litigation.

4  
5  
6 IT IS SO ORDERED.

7   
8 \_\_\_\_\_

9 VAUGHN R WALKER  
10 United States District Chief Judge