NOS. 09-17241, 09-17551

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,

v.

DENNIS HOLLINGSWORTH, et al.
Defendant-Intervenors-Appellees.

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

DEFENDANT-INTERVENORS-APPELLANTS' RELEVANT PARTS OF THE RECORD VOLUME II OF IV

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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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

CASE NO. 09-CV-2292 VRW
Chief Judge Vaughn R. Walker

DEFENDANT-INTERVENORS' NOTICE OF FILING OF SEALED DOCUMENTS FOR IN CAMERA REVIEW

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 for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

Defendant-Intervenors.

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At a telephonic hearing on November 2, 2009, the Court ruled that Defendant-Intervenors may submit for *in camera* review "a limited number of those documents" Defendant-Intervenors maintain are privileged under the First Amendment from disclosure in response to Plaintiffs' discovery requests. Hr'g of Nov. 2, 2009, Tr. at 42-43. *See also* Doc # 247 (minute order following hearing referring to "transcript for details"). Accordingly, Defendant-Intervenors respectfully submit—enclosed herein in a sealed envelope—documents for *in camera* review.

Dated: November 6, 2009

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS

By: /s/Charles J. Cooper
Charles J. Cooper

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November 6, 2009

The Honorable Vaughn R. Walker
Chief Judge of the United States District Court
for the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

At the telephonic hearing held on November 2, 2009, the Court granted Defendant-Intervenors leave to file a sampling of documents for *in camera* review to determine whether Defendant-Intervenors have a First Amendment privilege that protects them from having to produce the documents in response to Plaintiffs' discovery requests. To facilitate this review process, the Court requested that "in addition to a privilege log, [Defendant-Intervenors submit] a fuller description of those kinds of materials" at issue—i.e., "a fuller description of those categories" of documents that are at issue. Hr'g of Nov. 2, 2009, Tr. 43. Enclosed with this letter, Defendant-Intervenors respectfully submit for the Court's consideration the requested "fuller description of … categories." Given the nature and volume of documents implicated by Plaintiffs' discovery requests, it is not possible to devise a manageable list that would capture every feature of every document over which Defendant-Intervenors are claiming a First Amendment privilege. We believe, however, that the attached document provides the Court with a "fuller description … [that] would be extremely helpful in deciding whether or not we should pursue discovery" of the types of documents at issue. Tr. 43-44.

Defendant-Intervenors greatly appreciate the Court's willingness to help the parties work through this discovery dispute and stand ready to provide any additional assistance the Court might require in undertaking this process of *in camera* review.

Respectfully submitted,

/s/ Nicole J. Moss
Nicole J. Moss
Counsel for Defendant-Intervenors

Enclosure

cc: All counsel via the Court's ECF system

Categories of Documents Privileged Under the First Amendment and Implicated by Plaintiffs' Discovery Requests

Perry v. Schwarzenegger
Case No. 3:09-cv-02292-VRW
United States District Court
for the Northern District of California
Chief Judge Vaughn R. Walker

"Documents" refers to documents or communications in any form and as defined in Plaintiffs First Set of Document Requests to Defendant-Intervenors (Doc # 187-3 at 3), including but not limited to hard copies, electronic documents, electronic or computerized data compilations, software, software images, downloads, emails, letters, memoranda, audio or visual recordings, and typewritten or handwritten notes.

1. Documents that reveal names and/or capacities not already publicly known, including but not limited to:
    a. Documents that reveal the names or titles of ad hoc executive committee members of Protectmarriage.com, their time period of involvement, or their responsibilities;
    b. Documents that reveal the names of ProtectMarriage.com's actual or potential employees or independent contractors, their time period of involvement, or their responsibilities;
    c. Documents that reveal the names of key volunteers or persons who took a leadership or management role in Protectmarriage.com or the campaign in favor of Proposition 8 but were not members of the ad hoc executive committee of Protectmarriage.com, their time period of involvement, or their responsibilities;
    d. Documents that reveal names of leaders, volunteers, members or donors of other groups that actively supported Proposition 8 or were affiliated with Proposition 8 but were not under the control of ProtectMarriage.com;
    e. Documents that reveal the names of donors and/or potential donors to Protectmarriage.com;
    f. Documents that reveal the names of ProtectMarriage.com's significant sponsors and affiliates, their time period of involvement, or their responsibilities;
    g. Documents that reveal names of volunteers who had something less than a leadership or management role in Protectmarraige.com and/or the campaign in favor of Proposition 8, their time period of involvement, or their responsibilities.

2. Documents that reveal campaign strategy, such as emails, memoranda, meeting minutes, plans, and similar documents, including but not limited to:
    a. Financial strategy, including but not limited to budgets and resource allocation, fundraising strategy, donor relations and recruiting;
    b. Messaging strategy, including but not limited to:
        i. Selection and planning of messaging strategy,
        ii. Drafts and edits of what would become public communications,

iii. Drafts and edits of what were planned to become public communications but ultimately were not publicly disseminated in any form (i.e., documents that were considered but not sent),
iv. Notes and advice created or conveyed in advance of or following public appearances related to the campaign
v. Notes and advice created or conveyed in advance of or following of private appearances related to the campaign,
vi. Documents containing analysis of effectiveness of messaging,
vii. Draft versions of advertisements and/or campaign literature, and analyses of the message or messages presented or to be presented in those advertisements and literature,
viii. The drafting and circulation of all materials posted at http://www.protectmarriage.com or http:www.protectmarriage.net, at any time, including without limitation advertisements, resources, press releases, and strategy documents,
ix. The creation and airing of all radio, television, or Internet advertisements relating to Proposition 8, including without limitation how the messages, themes, or arguments conveyed by the advertisements were chosen, developed, or implemented, discussions regarding the messages of the advertisements, who created or assisted in creating each advertisement, the amount spent to air each advertisement, the targeted audience for each advertisement, and the estimated viewership for each advertisement,
x. The creation and airing of all other communications with voters relating to Proposition 8, including without limitation any recorded calls, phone banks, letter campaigns, the October 2008 bus tour, and any door-to-door efforts, and any scripts or talking points provided for use or actually used during those communications;

c. Strategy derived from polling, focus groups, or other measures of public opinion;
d. Strategy regarding volunteer or ally recruitment;
e. Strategy regarding grassroots organization and get out the vote efforts;
f. Organizational strategy, including but not limited to who to hire, how to structure the campaign, proposed campaign committees.

3. Nonpublic documents which relate to public communications with third parties.

4. Nonpublic documents which relate to coordination and communication with other organizations and churches regarding campaign strategy in connection with Proposition 8 or messages to be conveyed to voters regarding Proposition 8, including without limitation the National Organization for Marriage, Focus on the Family, California Family Council, Family Research Council, the Knight of Columbus, Church of Jesus Christ of Latter-Day Saints, and/or Colorado for Family Values

5. Nonpublic documents that relate to polling and demographic analysis; focus group analysis; analysis of other measures of public opinion, including the identification of all third-parties for such analysis, what was tested, and any responses or findings.

6. Nonpublic documents which relate to the drafting of the text of Proposition 8, including without limitation who was involved, what was discussed, whether any other language or propositions were discussed or considered, and the reasons why the text of Proposition 8 was selected.

7. Nonpublic documents which relate to the drafting of the official argument in favor of Proposition 8 and the rebuttal to the official argument against Proposition 8, including without limitation who was involved with that process, what was discussed, whether any other language was discussed or considered, and the reasons why the text of the official argument in favor of Proposition 8 and the rebuttal to the official argument against Proposition 8 was selected.

8. Documents in Defendant-Intervenors' possession constituting anonymous public or semi-public communications (and thus that do not reveal authorship), to the extent disclosure would reveal or suggest, wrongly or rightly, authorship by a Defendant-Intervenor.

9. Post-election documents relating to any of the above, including but not limited analysis of campaign, messaging, recruitment, financial strategy.

10. Nonpublic documents which relate to the collection of signatures for qualification of Proposition 8, including without limitation any written materials created in that process or scripts provided for use or actually used with that process.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTE ORDER

VAUGHN R. WALKER
United States District Chief Judge

DATE: November 2, 2009

COURTROOM DEPUTY: Cora Klein **Court Reporter:** Lydia Zinn

CASE NO. C 09-2292 VRW

TITLE: KRISTIN PERRY et al v ARNOLD SCHWARZENEGGER et al

ATTORNEYS:

Ethan D. Dettmer for Plaintiffs.

Mollie Lee for Plaintiff-Intervenor City and County of San Francisco.

Charles J. Cooper for Defendants-Intervenors Prop 8 Proponents and Protectmarriage.com

Andrew W. Stroud for Defendants Schwarzenegger , Horton and Scott

Tamar Pachter for Defendant E.G.Brown, Jr., California Attorney General

Manuel F. Martinez for Defendant Patrick O'Connell, Clerk Recorder of Alameda County

Judy Whitehurst for Defendant Dean C. Logan, Registrar-Recorder/County Clerk, Los Angeles

PROCEEDINGS:

Telephonic Discovery Hearing
See transcript of the hearing for details.

Pages 1 - 46

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. 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 Plainning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Monday November 2, 2009 2:30 p.m.

TRANSCRIPT OF PROCEEDINGS

(AMENDED TO CORRECT APPEARANCES AND SPEAKER IDENTIFICATION AT PAGE 6, LINE 8)

Reported By: Lydia Zinn, CSR #9223, RPR
Official Reporter - U.S. District Court

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(Appearances continued on next page)

Appearances via speaker telephone (Cont'd.)

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BY: CHARLES J. COOPER
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PETER A. PATTERSON
NICOLE MOSS

THE COURT: Good afternoon, counsel. This is Judge Walker. I'm here with a court reporter; Ms. Delfin, the court clerk, whom you know; and two law clerks.

Can we have the appearances of counsel, please?

MR. DETTMER: Good afternoon, your Honor. Ethan Dettmer, Gibson, Dunn & Crutcher, on behalf the plaintiffs.

THE COURT: Good afternoon, Mr. Dettmer.

MS. LEE: Good afternoon, your Honor. Mollie Lee, on behalf of Plaintiff-Intervenor, City and County of San Francisco.

THE COURT: Good afternoon.

MR. COOPER: Good afternoon, Chief Judge Walker. This is Charles Cooper, Cooper & Kirk, representing the Defendant-Intervenors.

Present with me here in my office on the phone, my colleague, Jesse Panuccio, whom you've met previously.

THE COURT: Very well. Good afternoon, Mr. Cooper.

MR. COOPER: Thank you.

THE COURT: Who else?

MR. STROUD: Good afternoon, your Honor. This is Andrew Stroud, Mennemeier, Glassman & Stroud, on behalf of governor Arnold Schwarzenegger, and the Administration defendants.

THE COURT: Good afternoon, Mr. Stroud.

MS. PACHTER: Good afternoon, your Honor. This is Tamar Pachter, for the Attorney General.

THE COURT: Ms. Pachter, good afternoon.

MR. MARTINEZ: Good afternoon, your Honor. Manuel Martinez, for the County of Alameda, representing Defendant Patrick O'Connell.

THE COURT: Very well. Anyone else?

MS. WHITEHURST: Good afternoon, your Honor. This is Judy Whitehurst, representing Dean C. Logan, the Los Angeles County Registrar-Recorder.

THE COURT: Very well. Good afternoon.

Who else? Anybody?

MR. NIELSON: Good afternoon, Chief Judge Walker. Howard Nielson, of Cooper & Kirk, representing the Defendant-Intervenors.

THE COURT: All right. You're with Mr. Cooper?

MR. NIELSON: A different location, but yes.

THE COURT: I see. Anyone else on the line?

MR. PATTERSON: Good afternoon, Chief Judge Walker. This is Pete Patterson, also with the Defendant-Intervenors, from a different location.

THE COURT: All right.

MS. MOSS: And good afternoon, your Honor. Nicole Moss, with Cooper & Kirk, also for Defendant-Intervenors.

THE COURT: All right.

MR. MC GILL: Good afternoon, your Honor. This is Matthew McGill, from Gibson, Dunn & Crutcher, for the plaintiffs.

THE COURT: Very well.

MR. DUSSEAULT: Chris Dusseault, also with Gibson, Dunn & Crutcher for the plaintiffs.

MR. MONAGAS: And good afternoon, your Honor. I think I might be the last one. Enrique Monagas, Gibson, Dunn & Crutcher, also for the plaintiffs.

MR. FLYNN: City and County of San Francisco, for Plaintiff-Intervenor.

(Reporter interruption.)

THE COURT: I'm afraid we'll have to have that appearance again. The reporter did not catch it.

MR. FLYNN: Ron Flynn, City and County of San Francisco.

THE COURT: All right. Well, let's begin.

The subject of our discussion this afternoon is the document request that the plaintiffs have made of the Defendant-Intervenors, who I'll call "the proponents of Proposition 8." That's a nomenclature that I think we've used principally throughout the case.

Let me just make some general comments, and then allow you to react to those comments.

I haven't had a chance to review in great depth the issues that are before us, although the issue is really, I think, not a terribly complicated one. It deals with the proponents' assertion of a qualified First Amendment privilege with respect to certain documents that have been requested by the plaintiffs.

Concerning a privilege assertion, as I read the cases, the Ninth Circuit, the Supreme Court, and other district courts have essentially adopted three approaches to dealing with the assertion of a privilege.

First, of course, is that provided about for in Rule 26(b)(5): the preparation of what has come to be called a "privilege log." The cases that have developed in accordance with that describe some of the requirements of a privilege log. And as we get into our discussion, we may find it appropriate to deal with some of those specifics.

A second approach is that which the proponents, I understand, have advanced. And that is some form of *in camera* review by the Court to test the sufficiency of the privilege assertion.

And a third approach, which is the production of redacted portions of documents, or the production of documents or materials that contain privileged matter but also contain nonprivileged matter, and the privileged matter is redacted from the material that is produced.

There may be other approaches, but those are the three that have come to my attention in thinking about the problem that we're going to be talking about this afternoon, and, obviously, are three approaches that have been used in cases that I'm familiar with. And it sometimes is the situation where more than one of these approaches is appropriate.

So I suppose the first question that comes at least to my mind in thinking about this problem is whether the material, Mr. Cooper, over which your client is asserting a qualified First Amendment privilege embraces the entirety of the material that you have discussed in your recent correspondence, or whether only portions of those materials are, in your view, privileged; because, obviously, if it's a situation in which only a portion of the material is privileged, then, obviously, the redaction approach may be an appropriate way to proceed, and may make a lot of sense; but if not, then perhaps one or two or some combination of the other two approaches might be appropriate.

So let me ask you whether -- of the material that you're asserting the privilege over, are you asserting the privilege as to the entirety of these materials, or only a portion of these materials?

MR. COOPER: Yes. Thank you, Chief Judge Walker.

Our assertion of privilege, your Honor, is, in fact,

over the entirety of this documents that we believe are privileged. And a process of -- of redaction would not speak to the nature of the privilege we've asserted.

And -- and even if there were some theoretical possibilities that a document that was within and responsive to the requests as they have now been revised in light of the Court's October 1 ruling might contain information that was -- that was otherwise unobjectionable, the practical reality is that, you know, we -- we expect to have and have now taken, essentially, inventory of the -- of the universe of documents from which responsive documents are being culled. And we would be talking about thousands and thousands of documents that would have to be reviewed for this redaction purpose, but the real and, to our mind, disqualifying answer is that we do assert a privilege over the entirety of these -- of these confidential nonpublic communications and documents.

THE COURT: Well, that being the case, that would appear to point us in the direction of either an *in camera* review, or a privilege log with respect to -- to these documents.

And I understand from your letter that you believe that the preparation of a privilege log may be burdensome, and you therefore offered to make a production of a sample of the documents; but let's put that issue to one side for the moment.

MR. COOPER: Okay.

THE COURT: Are there approaches that we ought to be considering, other than the two that I've mentioned: privilege log, or *in camera* review? Is there some fourth or fifth alternative that I haven't mentioned this afternoon that we ought to put on the table for discussion?

MR. DETTMER: Your Honor, if I may. Ethan Dettmer, on behalf the plaintiffs.

THE COURT: Yes, Mr. Dettmer.

MR. DETTMER: I'm sorry, your Honor.

THE COURT: Yes. You may proceed, sir.

MR. DETTMER: Thank you.

Your Honor, I think it's helpful to -- I do have -- the answer to your question is, yes, I do have another alternative that I would like to propose and, in fact, have proposed to the proponents --

THE COURT: All right.

MR. DETTMER: -- several weeks ago.

THE COURT: Let me interrupt you, Mr. Dettmer. Before I hear from you, let me direct that question first to Mr. Cooper, and then I'll come back to you. Is that okay?

MR. DETTMER: Certainly.

THE COURT: Mr. Cooper, do you have the question in mind?

MR. COOPER: I think I do, your Honor.

And our efforts to think of an approach to having the

Court make a decision -- make a judgment with respect to the validity of our First Amendment claim has -- we haven't been able to come up with an alternative to essentially what we take to have been at least your implied suggestion in your October 23rd order. And we view that approach as combining the elements of a privilege log, and *in camera* review; but as you mentioned, a privilege log that attempted to log all of the documents over which we are claiming a First Amendment privilege would be a very, very labor-intensive, time-consuming process.

THE COURT: All right. Well, let's -- let put -- as I said, let's put the burdensome issue to one side, and come back to that as it may be necessary to come back to it.

So I gather you would agree, then, that the two alternatives that we should consider are either an *in camera* review, or privilege log, or perhaps a combination of those two; but those are the two that ought to be on the table for discussion this afternoon. I gather that's your position?

MR. COOPER: Well, yes, your Honor. We've made our proposal in my letter to the Court. And -- and, in light of the Court's October 23rd order, we think that is a measured and reasonable way now to proceed.

THE COURT: All right.

Now, Mr. Dettmer, you indicated that you have some third alternative that you think ought to be put on the table

for discussion?

MR. DETTMER: Yes, your Honor. Thank you.

Ethan Dettmer.

And the proposal, I think --

If I may just step back a moment and look at the nature of, I think, the problem that is presented to us all jointly in trying to get to a trial date as it's set, and at the same time address the concerns that Mr. Cooper and his colleagues have raised on behalf of their clients -- the concerns as I've read them in the papers and heard them in the arguments are twofold.

One is that production of these documents would lead to a chilling of their political speech, and a potential harm of, I guess -- related harm of harassment and intimidation of Proposition 8 supporters.

And I could sort of answer that several ways. One is that the Court has already held that they have not made a sufficient showing regarding that chilling and those harms.

And, I guess, as I had mentioned in my letter, the additional answer to that is that these are the Official Proponents of Proposition 8 whose documents we are most interested in. And they are obviously central to this campaign and, in fact, the architects of the campaign. And it seems to me that chilling of their speech seems unlikely, given their centrality to the case.

And certainly, the *NAACP* case and other cases have not protected that: the identities or the speech of those central players in campaigns.

THE COURT: Well, let me get you back on track here.

MR. DETTMER: Oh, of course, your Honor.

THE COURT: What are the approaches that I ought to be considering?

MR. DETTMER: And -- I'm sorry.

THE COURT: Other than a privileged log or *in camera* review or a combination of the two, is there --

MR. DETTMER: The --

THE COURT: -- is there some other approach that ought to be put on the table for consideration?

MR. DETTMER: Yes, your Honor.

The approach that we proposed to the proponents, I believe, on October 14th, but they have thus far not agreed to, is that they produce these disputed documents under a provisional attorneys'-eyes-only protective order until the question of a stay of discovery is finally resolved at whatever level they decide to stop seeking the stay of this discovery, and that at that point, they may then go back and designate the documents as appropriate under the Court's protective order that we have proposed to be entered.

And that solution would allow both for their concerns over these documents to be addressed by the protective order,

and the agreement to have this as an attorneys'-eyes-only protective order, and at the same time, our concerns about moving this case forward promptly and being able to take meaningful depositions. We'll also be able to go forward and move toward a January trial date in an effective way.

THE COURT: All right. Well, that is a third alternative that we can consider: Production under an attorneys'-eyes-only protective order. Fair enough.

Now, does anybody else have any fourth approach that the Court ought to put on the table for consideration?

Hearing none, it looks to me like we've got the alternatives before us.

Now, let's talk about each of these. And let me direct my initial comments to Mr. Cooper.

I've had a lot of experience recently with production of *in camera* material. That experience has largely been in cases involving the assertion of the state-secrets privilege by the government in various cases.

I can tell you, Mr. Cooper, as a Judge who's called upon to try to be impartial and fair to both sides to conduct an evenhanded proceeding, there have been very few things in my judicial experience which have left me with as unsatisfactory a feeling as *in camera* review of materials; that is, review of materials submitted by one side, but as to which access has been denied to the other side.

And, able and experienced as you are, I'm sure you can empathize with that comment.

It's just antithetical to our system of justice for one side to furnish information to the Judge without the other side having access to that material. And so, as between the two -- well, as between the three alternatives that we are discussing this afternoon, an *in camera* review isn't very appealing to me.

Now, it may be the only practical alternative, but I want to hear from you why we shouldn't consider one or the other of the alternatives.

MR. COOPER: Certainly, your Honor. Your Honor, I am certainly sympathetic to the concern that you've voiced about the nature of *in camera* review.

We view it as, frankly, the next and perhaps only step available to us to have a judicial determination of -- as the Court suggested in the October 23rd order, of the First Amendment -- of the validity of our First Amendment privilege with respect to, now, specific documents.

And the case that the Court cited is the *Kerr* case, obviously. And, you know, notwithstanding the limitations on *in camera* review, it suggests that -- as the Court's October 23rd order did, it suggests that process as, I guess, essentially the only one available to now have the privilege claim assessed in light of the Court's order rejecting our

claim of a categorical privilege; a "blanket privilege," as you put it.

So long as there is a possibility that a document-by-document review by the Court of the -- of the types of documents over which we are making this claim is available, it's -- it just seems to me, anyway, that -- and to us that it's the only course really that now is left available for ultimately deciding the First Amendment question.

THE COURT: Well, let's talk about the alternatives. We have three on the table.

Let's talk about the one that Mr. Dettmer has suggested here this afternoon; and that is production under an attorneys'-eyes-only protective order; perhaps a fairly restrictive attorneys'-eyes-only protective order; one in which the attorneys are specifically identified by name, so that the production doesn't become widespread, and we could track back to an individual attorney a disclosure of any of the material that is disclosed. What's wrong with that approach?

MR. COOPER: Your Honor, we don't think, frankly, that that approach is a viable alternative to our claim of privilege.

First, it would -- it would contemplate this limited disclosure only until such time as the -- as the plaintiffs made use of the information that was disclosed to them in the context of the trial itself.

I mean, the only purpose for the plaintiffs to desire disclosure of this information is on the theory that it is relevant to issues they intend to prove up.

And so ultimately, the disclosure -- even if one assumes that it can remain attorneys' eyes only during the discovery process, its ultimate purpose would be to call upon and to use and introduce at trial; but beyond that, your Honor, it -- the disclosure, even at the level of attorneys'-eyes-only, we believe, would -- notwithstanding Mr. Dettmer's very able argument, it would -- it would -- it would constitute an invasion of the First Amendment freedoms of my clients and -- and the individuals who were the volunteers; ordinary citizens who volunteered to -- to undertake this initiative campaign, and to commit their time and their efforts and their resources and engage as professional -- professional political consultants and campaign experts, but -- but again, ordinary citizens who came forward and who -- who engaged in the political process, formed associational funds with -- with their colleagues who had volunteered to join them, and -- and who engaged in the freest kinds of exchange of ideas and political expression.

If you were to tell those people that -- if you hadn't told those people, I would submit to the Court, before this campaign got under way that everything that they said in their e-mails and in their -- and in their conversations and --

and in their counseling with their volunteer colleagues in this campaign -- that all of that information would, after the election, in litigation, be open to and available to their political opponents or even just the lawyers of their political opponents in postelection litigation over the referendum, it is our submission that many of those volunteers either would not have engaged in the process at all or they would certainly have censored their communications and their expression of their political speech.

And I believe that to be true not just of the ordinary citizen volunteers. I believe it surely also to be true of the professional political, you know, campaign people who these -- who the proponents and the members of the ad hoc executive committee and others hired to assist them in their effort to wage this political campaign.

THE COURT: Well, let me respond to that.

And you've certainly made a good points, but let me modify the alternative that Mr. Dettmer has advanced. And that is that the disclosure of these materials subject to an attorneys'-eyes-only privilege order [sic] -- protective order -- excuse me -- the production of this material subject to an attorneys'-eyes-only protective order would not be production for all purposes in the litigation, but only for purposes of testing the privilege assertion.

And if the privilege assertion is sustained with

respect to those documents, then the documents could not be used for any purpose in the litigation; but the idea which I am now advancing is a production of these documents on an attorneys'-eyes-only basis, simply so we can get both sides in the litigation sufficiently well informed about the materials so that we can -- well, so that the Court can have two sides of the issue, whether or not the privilege actually should apply to these materials.

What's your reaction to the idea of, thus, an attorneys'-eyes-only protective order, and a limitation that the production would be simply for purposes of testing the privilege assertion?

MR. COOPER: Your Honor, my -- my admittedly off-the-top-of-my-head reaction is, frankly, a negative one.

I remain concerned about the -- about -- I remain concerned that that even limited type of production would be an invasion of my clients' First Amendment freedoms.

And I -- and I'm also not clear if -- if the Court is suggesting that all of our -- of the documents over which we would claim privilege -- the responsive documents over which we would claim privilege, which, you know, will be thousands and thousands of them -- would be produced for this -- for this purpose, or whether the Court is suggesting that the more manageable -- at least, what we have suggested as being more manageable sampling of documents that our proposal contemplates

in for *in camera* review would be shared for this -- for purposes of -- of testing this issue on this -- on a limited basis, such as we have proposed.

THE COURT: Well, it's true my suggestion didn't distinguish between those alternatives, but let's consider, just for the sake of our discussion, the limited sampling that you've referred to; say, the 25 or so -- whatever the appropriate number is -- of documents necessary for a true test of the adequacy of the privilege assertion. Say we limited the production of documents pursuant to an attorneys'-eyes-only protective order to that number; and with the further restriction that the purpose for which the production is made is simply to test the adequacy of the privilege assertion.

In other words, putting to one side the issue of burden, which does seem to me to be categorically a different kind of objection --

MR. COOPER: Your Honor, I would ask the Court to permit me to consider that. It is -- and it's with appreciation for the Court's effort here with -- with the parties before it to grope for a reasonable and measured solution that I would ask the Court to permit me to consider that; and in particular, to consider it with my client -- my clients; but I -- but I'm obliged to say that I am concerned that even that limited approach to disclosing these materials would be -- would threaten to -- an unacceptable infringement

upon the confidential documents at issue here; but with that, would the Court be -- would the Court be amenable to permitting me to counsel with my clients on that?

THE COURT: Well, offhand, I'm hard pressed to deny a lawyer the chance to communicate with his client. And I think that's fair -- a fair request of you to make; but let's follow our discussion on, and see if there might not be some other alternative that we can explore. And possibly as we explore other alternatives, you'll want to place before your client more than one option.

So, without saying, "No, you can't," or, "Yes, you can consult with your client about this" -- and I must say my strong inclination will be to allow you to consult with your client, of course -- but let's continue our discussion to see where we go next. And that is to shift to the other alternative. And that's the alternative that I opened with in our discussion this afternoon. And that is the production of a privilege log.

And, again, putting to one side whether we're talking about a privilege log covering all of the thousands of documents that you've mentioned -- putting that aside, and focusing only on the 25 or so, the limited number of documents that you think are a fair sample, what's wrong with the production of a privilege log?

After all, a privilege log is generally required,

even for the assertion of the attorney-client privilege, which is an absolute privilege; whereas here, we're dealing with a qualified privilege. What's wrong with a privilege log?

MR. COOPER: Well, your Honor, there's nothing in -- in principle, wrong with a privilege log.

And, in fact, our proposal to the Court for this -- this 25-document selection for *in camera* review contemplates that it would be accompanied with a privilege log, and that our friends representing the plaintiffs and the Plaintiff-Intervenors would have access to that -- to the privilege log; but you know, a privilege log is -- is -- is always nothing more than a tool and a prelude, a predicate to ultimate determination of the privileged nature of the document that it logs.

And there will certainly -- there -- you know, we can't conceive of -- and our efforts to begin the process of logging documents doesn't reveal to us any method by which the -- by which logging the documents that are responsive and privileged would -- would reveal information just on the face of a log that could -- would allow the Court or even our -- our friend for the plaintiffs to make any kind of determination that a document either is or is not privileged.

In fact, to us, it simply confirms that each one of the documents is within the description of the documents that we believe are privileged; that is, they deal with -- as the

Court's October 1st opinion outlined, they deal with issues of campaign strategy. They are documents exchanged between the -- I guess Mr. Dettmer used the term "architects"; that is, the individuals in responsible, lead roles within the campaign itself. And they are -- you know. And they are those types of communications, mainly. I mean, the vast bulk of these thousands and thousands, as I'm sure the Court suspected, are e-mail messages with this kind of, you know, private communication going back and forth among them.

So we don't oppose privilege logs on principle, but it would not, it seems to us, in any way relieve the Court's -- you know, any burden on the Court or the parties to -- to review actual documents to assess their privileged nature.

I guess the final point I want to make, your Honor, if I may, is this. If -- preparing a privilege log that covered all of these documents wouldn't be in anyone's interest. It wouldn't be -- I mean, it would be a hugely resource-intensive and costly enterprise for a party to this case that is an intervenor party that is already -- believe me, your Honor -- strained in terms of its resources and its ability to, you know, deal with the pace and the demands of the litigation, even apart from it. And to commit the resources necessary to prepare that log would -- would just be -- it would -- it would take a long time, and consume enormous talents and resources.

And -- and it would just put off what -- what seems to us to be inevitable anyway; and that is, in light of the Court's determination in the October 23rd order, just put off the inevitability of an *in camera* review and an ultimate decision -- judicial decision whether, you know, a document or these documents or perhaps, you know, this category of documents is or is not protected by the qualified First Amendment privilege in the context of the case.

THE COURT: Well, we are making some progress, it seems to me.

You've indicated that there's nothing wrong with a privilege log per se. And, indeed, you point out that that is an alternative that you've suggested, along with *in camera* review. And that seems fair enough.

And, indeed, I find that suggestion to be appealing, because -- appealing in this sense, Mr. Cooper: it allays, at least to some degree, the uneasiness that I have about conducting an *in camera* review of materials produced by one side in litigation, without access to that information by the other.

It's true that the plaintiffs would not have access to the documents that were subject to *in camera* review, but they would have the information produced by a privilege log, and enable them to attempt to make a case that the assertion of privilege should not extend to the documents at issue.

So that does seem to me to be a reasonably practical step in the direction of resolving this. And I gather that that is something that your side is prepared to do promptly.

MR. COOPER: Yes, your Honor, we -- we would. You know, we would be prepared to do that whenever the Court gave us permission to do so.

THE COURT: Now, I did take a look at, at least, a couple of cases with respect to the content of a privilege log.

And, of course, the federal rules describe that when a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must expressly make the claim, and then describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in the manner, without revealing the information itself privileged or protected, that will enable other parties to assess the claim.

In reviewing a fairly old Ninth Circuit case -- 1992. That doesn't seem old to me, but I'm sure to some of the younger lawyers who may be listening in, it seems old.

MR. COOPER: Nor to me, your Honor.

THE COURT: All right. We're on the same wavelength, then.

This is *In re: Grand Jury Investigation*, at 974 F. 3d. 1046.

And the content of the privilege log that is described by the Ninth Circuit in that case identifies, one --

And parenthetically, of course, they're talking here about an attorney-client privilege, but we can extend that to our context.

One, the attorney and client involved; two, the nature of the document; three, all persons or entities shown on the document to have received or sent the document; four, all persons or entities to have been furnished the document or informed of its substance; and, five, the date of the document -- the date the document was generated, prepared, or dated.

Now, the privilege log that you contemplate, I assume, Mr. Cooper, would follow that general pattern, adapted, of course, to the specifics of this privilege. Is that a fair assumption?

MR. COOPER: Your Honor, it is a fair assumption.

I want to quickly add that, however, the privilege log we would contemplate would not be able to identify all of the addressees, as it is our, you know, view, as the Court knows, that there are volunteers who were involved in this whose -- whose anonymity has -- has never been -- has never been compromised, and whose -- and for whom anonymity was

important from the beginning.

And so, apart from -- apart from that caveat, we would contemplate that the privilege log would -- would contain the information that you have referenced, but it would -- what we had contemplated was that it would list as Does, which is what we've done in our previous -- our previous dealings with the counsel for the plaintiffs -- list as Does individuals who may have been addressees on a particular document whose -- whose identities have not -- have never come forward.

THE COURT: Well -- hold on. Hold on.

MR. DETTMER: Certainly.

THE COURT: You say "volunteers." Can you tell me who you mean by "volunteers"?

I assume that a lot of people who were involved in the campaign were not compensated, and therefore, might fall under the rubric of a volunteer; but they might, nonetheless, have had a significant role in the management and direction of the campaign.

MR. COOPER: That's certainly true, your Honor. There were -- but the campaign was -- was really, apart from the compensated political consultants and other -- and other political professionals who were engaged by the -- by the campaign, the Proposition 8 campaign was, in fact, managed, and -- and staffed by volunteers. No one was -- no one was compensated.

And, yes, the volunteers had roles that ranged from being members of the ad hoc executive committee, to licking stamps.

And -- and the -- however, the documents that we're talking about here, as Mr. Dettmer has made clear previously, are -- are documents that -- that, by and large, had individuals who had, you know, responsible volunteer positions in the campaign.

I would -- I would also like to note that in the context of an attorney-client privilege, the identity of addressees is a crucial feature of the -- of whether the privilege itself applies or not; perhaps even the most crucial; but that is not the case, we would submit, with respect to the privilege we're talking about.

The identity of individuals who -- whose anonymity has never been compromised is -- is not really a necessary piece of information to determine whether or not the communication itself is within the privilege, at least, that we are advocating for.

THE COURT: Well, let's talk about that for a minute.

I wonder if there isn't an analogy here. Looking at the cases which have crafted this First Amendment qualified privilege, it appears that the cases have drawn a distinction between individuals who were rank-and-file members of the various organizations -- principally, the NAACP, which is the

organization that was involved in most of the cases from which this doctrine has arisen -- and those who were officers or directors or managers of the NAACP, who may very well have included people who were, in your phrase, "volunteers," or who may not have been compensated monetarily for their efforts.

So there is a distinction -- isn't there? -- between managers, directors, individuals who have had responsibility for directing the organization, and those who were rank-and-file members, such as those, as you put it, who lick stamps or distribute fliers or do activities of that kind.

So isn't there an analogy with the attorney-client privilege, at least, in this, at least, as far as this context is concerned?

MR. COOPER: Your Honor, I agree with you that in the *NAACP* case, the issue of the directors and officers of that branch of the NAACP was not an issue, but I would submit that it wasn't an issue because there was never a claim in that case over the -- over the identities of those individuals. Either they had been made public, as a number of individuals in the Proposition 8 campaign have been, and whose identities we are not in any way seeking to protect, or, for whatever reason, the NAACP did not assert any kind of privilege over them.

THE COURT: Well, are there individuals who were involved in the management of the campaign, whether compensated or not, who were equivalent to officers, directors, managing

agents; individuals who sat on the executive committee, and who otherwise were charged with directing the campaign? Are there individuals in that role whose identity you are seeking not to disclose?

MR. COOPER: Yes, your Honor. There are a couple of members of the executive committee -- the ad hoc executive committee -- whose -- whose identities have never been disclosed, and who we have not disclosed before, and over whom we have -- we have asserted a First Amendment privilege, yes.

THE COURT: Well, how does the First Amendment privilege extend to those individuals, as distinguished from people in the position of, say, a Mrs. MacIntyre, who I'm sure you remember from that case that reached the Supreme Court; that is, someone who licked envelopes or who passed out leaflets? How does this First Amendment qualified privilege extend to people who had a role in managing and directing the Proposition 8 campaign?

MR. COOPER: Well, your Honor, I think that our view, your Honor, is that it extends to those individuals to ensure that they are willing to engage in the First Amendment political expression and associational activity of a campaign of this kind.

I mean, they are -- we, frankly, don't see why or how the purposes of the First Amendment privilege would not apply equally to those who step forward to take and volunteer for a

substantial role, even a leadership role or some type of volunteer managerial role, than those who -- who volunteer to associate themselves with this campaign or with any type of referendum campaign on some lesser basis.

I think the concern of the First Amendment is that the type of consequences that flowed, for example, as a result of the disclosure of donors who -- who donated more than a hundred dollars to the campaign -- the kind of unfortunate harassment and other kinds of consequences that flowed to them are -- are the very kinds of things that -- that make, oftentimes, individuals desire to -- desire to involve themselves and associate with political efforts of -- of this controversial kind only on an anonymous basis. And it's our submission that the First Amendment entitles them to do that, and that if it didn't, the prospect that they would step forward to take a leadership role, as opposed to some, you know, lesser type of role, would, we think, be dramatically reduced and chilled.

THE COURT: Now, the campaign for Proposition 8 raised a substantial amount of money. And, of course, there was a substantial amount of money raised in opposition. Did this ad hoc committee that you've mentioned, Mr. Cooper, have the responsibility of managing those funds?

MR. COOPER: To be quite honest with you, your Honor, I am not sure what level of -- what level of responsibility the

ad hoc executive committee had to that. I feel confident in telling you that it had ultimate responsibility, but I do believe that there was a different group with -- with, perhaps, you know, a cross membership, but a different group of -- and a different committee that had particular responsibility for handling of the financial issues.

And, of course, as the Court knows from previous hearings, the Protect Marriage organization itself had a treasurer who was responsible for financial -- had financial responsibilities as well.

THE COURT: Did the treasurer report to and answer to the ad hoc executive committee?

MR. COOPER: My recollection is that that is so, yes, your Honor.

THE COURT: Okay. All right. Well, we've covered a lot of ground. And I've held you off, Mr. Dettmer. And I'm sure you would like to join in this discussion, so let me give you the floor.

MR. DETTMER: Thank you very much, your Honor. I appreciate it.

And I do have a number of comments, but I'd like to keep them as brief as possible; but the ultimate problem that I see that we all collectively face right now is trying to meet the deadlines that exist in this case, while still getting these documents in this litigation that your Honor has found

are at least potentially relevant to the litigation.

And I'm concerned that a privilege log or an *in camera* review of all of these documents would use up all of the time that we have left before trial and, thus, these documents would not be used in the trial or certainly in the discovery process.

THE COURT: Well, let's put that issue to one side for a moment. We can deal with that. I understand your concern and, indeed, I share your concern; but put that to one side, and address these other topics that I've discussed and had a nice discussion with Mr. Cooper about.

MR. DETTMER: Certainly, your Honor.

Well, maybe I can address the privilege-log issue first.

I think that, first of all, it was a little unclear from the discussion about whether we were talking about a privilege log that encompassed all or a substantial portion of these documents, or just 25 documents. Obviously, we would have a serious concern about any *in camera* review or privilege log that had such a small subset of documents that were hand-selected by counsel for the proponents.

I think that that procedure takes the problems of an *in camera* review that your Honor had mentioned, and amplifies them dramatically, given that the Court is only seeing the documents that the proponents' counsel have picked for that

purpose. And obviously, if we're seeing a privileged log for only 25 documents, that even further amplifies that concern.

So I -- I think that the privilege-log issue becomes very difficult for that reason. And it would be very difficult for us to, based on the information that Mr. Cooper had identified as being something that he'd be willing to put on a privilege log, and other items, such as names, that he would not -- it would be of, I think, limited value for us in determining how to argue with Mr. Cooper to your Honor about that privilege, and whether it is, indeed, valid.

With respect to the *in camera* review, your Honor has mentioned that -- the concerns that we would have about that, and that I think any litigant would have in having items presented to the Court without them having an opportunity to comment on them.

And I think what all of this pulls me back to is -- is the fundamental issue here which both you and Mr. Cooper spoke about, your Honor, which is the point that this is not the attorney-client privilege; this is a qualified privilege that is based on very specified concerns that have been laid out in a number of cases.

And those concerns are, as Mr. Cooper mentioned, intimidation and harassment of participants in the political process, and the concern that there will be a chilling of their speech based on that.

And Mr. Cooper has also raised the issue of sharing campaign strategy with the campaign's opponents.

And I would put a footnote there, and say: my clients are not the campaign's opponents; they're individual people. And we're not part of the campaign against Proposition 8, except in, you know, the most -- the most attenuated way.

So I guess the point of this is that those concerns that are the basis for all of this case law that protects these types of things from disclosure, I think, are very amply protected by a good protective order.

And the notion that Mr. Cooper's clients are going to be harmed or their speech is going to be chilled by some handful of lawyers looking at these documents seems to me far-fetched.

And, as your Honor has pointed out, there's already been substantial exposure by Mr. Schubert and Mr. Flint, the campaign -- the Yes on 8 campaign's political strategists, of their strategy. And they've talked about it and -- and broadcast it in several different venues. Your Honor has seen one of them, and commented on it in the October 1st order.

In light of all of that, it seems to me that there is a good way to cut this knot, which is to produce these documents right away to a limited group of lawyers who can look at them and analyze them and move forward. And, at the same

time, Mr. Cooper's clients will be protected from the harms that they've articulated until such time as there's no longer a stay of discovery that can be gotten.

And I think the final point -- and then I'll stop, your Honor -- is the notion that at some point -- and these are going to be introduced in the record -- is something that -- as your Honor knows, there's a whole series of rules in the Court's local rules about how that happens once we get to the point after we've reviewed these documents and looked at them and seen which ones we may want to use at trial or to submit to your Honor.

Then the question of whether they will be in the public record or not is something that I think we could then have a manageable discussion about between Mr. Cooper's team and our team. And then, if we have disagreements at that point, we can bring them to your Honor and get them resolved in advance of anything being submitted in the public record.

THE COURT: Anybody else want to speak up before I go back to Mr. Cooper with a little further discussion on another aspect of this?

Ms. Lee? Mr. Stroud? Ms. Pachter? Martinez? Whitehurst? Who else wants to speak? Anybody?

MS. LEE: This is Mollie Lee, from San Francisco. I have just one quick additional comment.

San Francisco agrees with Plaintiff that a protective

order would adequately -- is the right solution to this problem, and that an attorneys'-eyes-only protective order is more than sufficient to address any concerns that proponents might have about possible harm or chill resulting from disclosure.

And on that line, I wanted to note that in another case, *Protect Marriage v. Mullen*, which is pending in the Eastern District of California, proponents raised similar concerns about disclosure of information that they believed was highly sensitive. And in that case, they did stipulate to a protective order that provided access to sensitive information. And it provided it, I think, particularly as relevant to some of the timing issues in this case -- the protective order was entered, and governed the production and disclosure of confidential information through discovery in all pretrial processes.

So I guess to me, that suggests that that's a very workable solution with respect to these particular parties and the particular concerns that opponents have raised here.

THE COURT: All right. Anyone else?

All right. Let me come back to you, Mr. Cooper. One subject we didn't cover in our discussion, which I thought was very helpful, is the category of the various documents or information that we're talking about.

You mentioned e-mails.

In thinking about the qualified privilege as it has been developed in the case law, various kinds of documents or materials have been discussed: member lists, financial records.

What are we talking about here? Are we talking about membership lists? Members of the campaign? Volunteers who have agreed to walk precincts? Are we talking about financial records? Are we talking about letters from persons in a management position?

And by "letters," I mean not just letters, but also e-mails, telephone calls, documents, as defined in the Federal Rules of Evidence.

Are we talking about communications between those in a management position in the campaign, and the paid political consultants? Just exactly what are we talking about here?

MR. COOPER: Your Honor, we're talking about most of the things that you've identified.

We're talking about, for example, e-mails that -- that discuss campaign finance strategy and fund-raising strategy.

We're talking about -- we're talking about communications back and forth with respect to advertising strategy, and the actual content of ads, and how those ads should be -- or whether they should be revised in some fashion.

We're talking about communications dealing with the

results of focus groups, and the kind of things that -- you know, just the kinds of things you would expect, I think, in any kind of political effort of this kind.

We're talking about drafts of -- of everything from, you know, advertisements to -- to letters.

THE COURT: Hello?

MR. COOPER: Yes.

And I'm just -- there are probably other -- others on my team who are better -- even better acquainted to a level with the kinds of -- with the kinds of internal confidential communications and documents that -- that we're talking about here.

I -- we're not -- we -- we do not have any longer -- as a result of the Court's October 1 ruling, we're not talking about membership lists of, you know, rank and file volunteers or, you know, members of ProtectMarriage.com, or donors that -- whose names haven't been already disclosed, because, you know, we no longer understand that to be even responsive.

So that's not among the information that we have now. You know, we're deep into the culling process, but the kinds of things are along the lines of what I've just -- what I've just described.

And I could perhaps describe a few more kinds of things, if the Court would permit me to confer with my colleagues -- my colleagues here.

THE COURT: Sure, sure. You have some colleagues on the line. Maybe -- maybe they've gotten down to a somewhat more granular level in the pretrial discovery, and they might be able to be helpful. Any of those individuals? Let's see. That's Nielson, Moss. I think there was one other name that I missed: Mr. Panuccio.

MR. COOPER: Mr. Panuccio; but actually, I would ask my colleague, Nicole Moss, who has a much more granular-level understanding of the kinds of documents we're talking about. Nikki, would you like to add to what I've -- what I've described?

MS. MOSS: Certainly. This is Nicole Moss.

I think Chuck has very well stated the sorts of documents that are at issue.

I would note that, while membership lists are not encompassed in light of the October 1 ruling, that is not to say that there are not volunteers' and members' names revealed in these documents. There -- there certainly are references to individuals. And their names are in these documents; but primarily what we're dealing with, as Mr. Cooper noted, is e-mail communications which go to the heart of strategy; discussing specific messaging; what language to use; how to craft a message; the timing of messaging; both language to use, and suggesting things not to be said. That goes to sort of the heart of the strategy.

In addition, there is a great deal of information about fund-raising. And where strategic -- you know, strategic plans for the entire fund-raising plan for the campaign is reflected in some of these documents. The communications plan for the campaign is reflected in these documents.

I mean, on a general basis, that is what we're dealing with primarily here.

THE COURT: All right that's very helpful. Very helpful indeed.

Let me, before drawing this to a close, ask: does anyone have anything that he or she would like to add before I make a suggestion, and see how we proceed from this point? Anybody have anything that he or she thinks ought to be expressed before I try to draw this matter to a close?

Hearing nothing --

MR. COOPER: Nothing more from the proponents, your Honor.

MR. DETTMER: No, your Honor. Thank you.

THE COURT: Well, I think this has been a very helpful discussion. And I certainly share Mr. Dettmer's concern about getting discovery wrapped up in time to meet the scheduled trial date.

And I have some empathy for you all on the other end of this telephone conversation. Although I have been on this side of the bench for almost 20 years, I haven't completely

forgotten what it's like to be on the other side, and know what it's like to be dealing with discovery deadlines.

And I will say that, having not forgotten what it's like, I'm going to try to work with you, because of the schedule that we've set, which I think is a practical schedule, and one that the nature of the case warrants; but I'm going to try to work with you so that we can get the discovery completed in an orderly fashion in time to beat the case schedule, as well as to allow a full and fair opportunity to conduct the discovery that's necessary, so that the case can be adequately presented.

It seems to me that Mr. Cooper's suggestion of combining a privilege log with the *in camera* disclosure of documents is worth a try, to see if that is not sufficient to begin sorting out this issue.

I'm reasonably sure that it's not going to deal with all aspects of the discovery concerns that we have on both sides here, but I think it is a good start.

So -- and I understand also Mr. Cooper's concern about requiring a privilege log as to the entire universe of documents that he or his clients feel are covered by the qualified First Amendment privilege that his clients are claiming.

So a privilege log and an *in camera* review of a limited number of those documents, I think, is an appropriate

way to proceed.

Now, however, in order to make that meaningful and to ensure fairness in the selection of the documents listed on the privilege log and included within the documents offered up for *in camera* review, I think there are a couple of additional elements that we need to flesh out at this point. And that is a bit more detail about the nature or category of the documents that are involved in the privilege assertion.

Certainly, that is consistent with a requirement of a privilege log, which requires that the nature of the document be described; but it seems to me that if there are a limited number of documents -- whether it's 25, 50, or a hundred -- it may not cover all categories of the kinds of documents that the proponents are asserting the privilege over. And so I think a fuller description of those categories than we've had the opportunity to include today would be very, very helpful.

Mr. Cooper has mentioned e-mails and other communications involving finance of a campaign, campaign strategy, advertising strategy, focus-group results, drafts of advertisements, advertisements or appeals that the campaign decided not to make, and internal communications. That's, I think, a helpful first start of categorizing these kinds of documents, but I think in addition to a privilege log, a fuller description of those kinds of materials would be extremely helpful in deciding whether or not we should pursue discovery

of those categories of documents.

And the other issue that I find still to be troubling is this issue of the identity of the individuals who were in management responsibility for the campaign.

And perhaps a way to deal with that, Mr. Cooper, would be for -- and I'll throw this out for your reaction -- would be for you to disclose the identity of all of those who were in a position of management responsibility as part of the *in camera* disclosure, so that I could make some kind of a determination whether it seems reasonable that the identity of such individuals would have the kind of chilling effect that you contend applies to this situation.

It does seem to me that, in reading the cases -- four to five in this view -- there is a pretty clear distinction that is drawn between those who are running the campaign, and those who were simply supporting or opposing a campaign. And I am -- I am troubled that individuals who have management responsibility for a political campaign should be shielded from disclosure, given all of the case law and all of the other law that applies to running initiative and referendum campaigns.

I'm not by any means saying that I reject the argument that the identity of these individuals may not implicate First Amendment privileges that are important here; but frankly, I do need to be persuaded of that. And maybe the only way to -- to achieve that would be for an *in camera*

disclosure of those individuals. So that's what I would propose.

And I would propose further that, with respect to the preparation of a privilege log, the full list of the categories of documents that you think are covered by the qualified privilege and the identity of those in management positions or with management responsibility for the campaign -- that if at all possible, to meet Mr. Dettmer's concern about the pace of discovery, that we have that production *in camera* together with the log and the other disclosures that I've mentioned not later than the end of this week.

Now, is that possible?

MR. COOPER: Your Honor, that is possible.

With respect to fleshing out the categories, I hear you. We will do that. We will do our level best to -- to make the descriptions as -- as thorough and as granular as we can.

And with respect to the *in camera* review of all identities, we will -- we will provide that information for the Court's *in camera* review. And -- and, yes, sir, we will commit ourselves to get that to you by the end of the week.

In light of this -- the Court's further guidance on this, it may be well -- and I suspect that it will be well -- for us to perhaps enlarge the sampling a bit; but it's been our idea that -- that, you know, we didn't want to overburden the Court; but I think in light of the Court's further guidance

here this evening, that we may want to add some number of documents to the sampling that -- just to ensure that we -- we -- we have addressed all of the categories that we can identify discretely.

THE COURT: Good. Well, I think that probably would be helpful to you, and would certainly be helpful and informative to the Court.

Well, counsel, I appreciate your willingness to have this discussion this afternoon or evening. And I will express the hope that this may be the last time that we'll have a discovery discussion, but I will not be surprised if it is not the last time; but I do appreciate the good work on both sides of the case. And I think we've made some fairly significant progress this afternoon.

So, if no one has anything further, I'll let you all go.

MR. DETTMER: Thank you very much, your Honor.

THE COURT: Mr. Dettmer, Ms. Lee, Mr. Stroud, any of the others? Anything further?

MS. LEE: Nothing further, your Honor.

MR. STROUD: No thank you, your Honor.

MR. DETTMER: Nothing further, your Honor. Thank you.

(At 3:55 p.m. the proceedings were adjourned.)

- - - -

CERTIFICATE OF REPORTER

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C. 09-2292-VRW, Kristin M. Perry v. Arnold Schwarzenegger, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

_____

/s/ Lydia Zinn, CSR 9223, RPR

Tuesday, November 3, 2009

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October 28, 2009

The Honorable Vaughn R. Walker
Chief Judge of the United States District Court
for the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

I write pursuant to paragraph 1.5 of the Court's Standing Orders, and this Court's Order of October 23, 2009 (Doc # 237), to request that the Court conduct an *in camera* review of a representative grouping of 25 documents over which Defendants-Intervenors ("Proponents") assert a claim of First Amendment privilege.

In its October 23 order, the Court declined to stay, pending appeal or petition for mandamus, its October 1 order (Doc # 214) in which the Court rejected Proponents' assertion of a categorical First Amendment privilege over Proponents' nonpublic and/or anonymous communications implicating campaign strategy, the identity of donors and volunteers, and the content of messages to include or exclude from Proponents' public political speech. The Court based its stay ruling, at least in part, on its holding that "the October 1 order was not a conclusive determination because proponents had not asserted the First Amendment privilege over any specific document or communication. Proponents' blanket assertion of privilege was unsuccessful, but whether the privilege might apply to any specific document or information was not finally determined in the October 1 order." Doc # 237 at 4. The Court further explained that, in view of the balancing test that governs claims of First Amendment privilege, "the applicability of the qualified privilege cannot be determined in a vacuum but only with reference to a specific document or particular information." *Id*. at 5. Specifically, the Court stated that it "might yet apply proponents' purported privilege in the manner described in *Kerr* [*v. United States District Court*, 426 U.S. 394 (1976)]." Doc # 237 at 7.

In *Kerr*, the Supreme Court held that the petitioners had an available remedy in the district court that may obviate the need for mandamus: they would be "afford[ed] … the opportunity to apply for, and upon proper application, receive *in camera* review" of the documents for which they claimed privilege. 426 U.S. at 406. In accordance with *Kerr*, and the Court's October 23 order, Proponents seek now to

"identif[y] specific documents that they claim are privileged" in order to "give[] the court an opportunity to determine whether any claim of privilege might apply to a specific document." Doc # 237 at 7.

Because Proponents' assertion of First Amendment privilege extends to thousands of documents, we have selected 25 documents that we believe to be representative of the larger mass of documents. These documents, which we have drawn from categories of documents in which Plaintiffs have specifically expressed the greatest interest (*see* Exhibit A attached hereto), should provide the Court with a concrete context within which to review Proponents' privilege claims. Of course, if upon reviewing these documents, the Court determines that a larger sample must be reviewed, Proponents will be happy to submit additional documents *in camera*.

In the October 23 order, the Court also expressed concern about the fact that Proponents have not yet filed and served a privilege log. *See id*. at 5. While we do not believe that a log will assist "the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged," *Burlington North & Santa Fe Ry. Co. v. United States Dist. Court for the District of Montana*, 408 F.3d 1142, 1150 (9th Cir. 2005), we will submit and serve a privilege log covering the documents we propose to submit for *in camera* review. We respectfully submit that Proponents should not be put to the extraordinary burden of preparing a log covering the remaining thousands of privileged documents at least until judicial review of the representative sample has been completed, for we believe that the *in camera* review will convince the Court that a log is not helpful. At this point, we submit, such an effort would only serve to unnecessarily delay proceedings without significantly assisting the Court or counsel in their respective assessments of Proponents' privilege claims.

If, upon completion of the *in camera* review, the Court rejects our claim of privilege, we respectfully request that the Court stay any order compelling production pending appeal and/or mandamus. If the Court rejects our stay request, we respectfully ask that the Court maintain the documents *in camera* to permit the Ninth Circuit to consider a request for a stay pending appeal. Proponents would file such a request within three business days of this Court's denial of a stay.

Counsel for Proponents have discussed the above-described request for *in camera* review with counsel for Plaintiffs. Counsel for Plaintiffs stated that they object to this proposal and will file a letter of response. We look forward to discussing the matter with the Court in the telephone conference that the Court directed the parties to schedule. *See* Doc # 237 at 13.

Sincerely,

/s/ Charles J. Cooper

Charles J. Cooper
Counsel for Defendant-Intervenors

cc: All Counsel (via the Court's ECF System)

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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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

CASE NO. 09-CV-2292 VRW

DECLARATION OF JESSE PANUCCIO IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR A STAY PENDING APPEAL AND/OR PETITION FOR WRIT OF MANDAMUS

Date: January 7, 2010
Time: 10:00 a.m.
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

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 for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

Defendant-Intervenors.

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I, Jesse Panuccio, attorney for Defendant-Intervenors Proposition 8 Proponents Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A. Jansson, and Proposition 8 Campaign Committee ProtectMarriage.com – Yes on 8, a Project of California Renewal, have personal knowledge of the facts in this declaration, and if called as a witness, I could and would competently testify to these facts under oath:

1. Attached hereto as Exhibit A is a true and correct copy of a letter from Plaintiffs' counsel propounding Plaintiffs' revised Document Request # 8.

Executed on October 8, 2009 at Washington, D.C.

Jesse Panuccio

Exhibit A

GIBSON, DUNN & CRUTCHER LLP

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VIA ELECTRONIC MAIL

Nicole Jo Moss, Esq.
Cooper & Kirk, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036

Re: *Perry, et al. v. Schwarzenegger, et al.,*
N.D. Cal. No. C-09-2292 VRW

Dear Nicole:

Pursuant to the Court's Order of October 1, 2009 (see Dkt. #214 at pp. 16-17), I have set forth below Plaintiffs' revised request for production number 8. I am generally available this week to discuss with you any objections and the scope of your production in response to this revised request. As I mentioned on our phone call last week, I would like to follow up with you regarding Defendant-Intervenors' supplemental production in light of the Court's October 1 Order. Please let me know at your earliest convenience when you can discuss these matters.

Revised Request No. 8

The following request is limited to those who (1) had any role in managing or directing ProtectMarriage.com or the Yes on 8 campaign, or (2) provided advice, counseling, information, or services with respect to efforts to encourage persons to vote for Prop. 8 or otherwise to educate persons about Prop. 8, including its meaning, intent, effects if enacted, or effects if rejected; including communications among and between any two or more of the following persons or entities: Defendant-Intervenors, members of the Ad Hoc Committee described at the September 25, 2009 hearing in this matter, Frank Schubert, Jeff Flint, Sonia Eddings Brown, Andrew Pugno, Chip White, Ron Prentice, Cheri Spriggs Hernandez, Rick Ahern, Laura Saucedo Cunningham, Schubert Flint Public Affairs, Lawrence Research, Bader & Associates, Bieber Communications, Candidates Outdoor Graphic Service Inc., Cardinal Communication

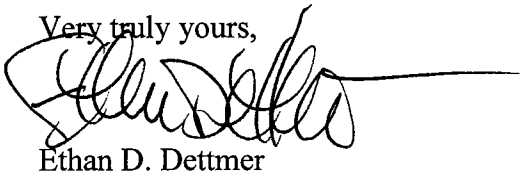
Strategies, Church Communication Network Inc., The Monaco Group, Connell Donatelli, Message Impact Consulting, K Street Communications, Marketing Communications Services, Sterling Corp., and JRM Enterprises.

Please produce all versions of any documents within your possession, custody or control that constitute analyses of, or communications related to, one or both of the following topics: (1) campaign strategy in connection with Prop. 8; and (2) messages to be conveyed to voters regarding Prop. 8, without regard to whether the voters or voter groups were viewed as likely supporters or opponents or undecided about Prop. 8 and without regard to whether the messages were actually disseminated or merely contemplated.

* * * * *

I look forward to talking with you soon.

Very truly yours,



Ethan D. Dettmer

cc: All Counsel

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vaughn R. Walker, Chief Judge

Kristin Perry, et al., Plaintiffs,	)	
VS.	)	NO. C 09-2292 VRW
Arnold Schwarzenegger, et al., Defendants.	)	

San Francisco, California
Friday, September 25, 2009

TRANSCRIPT OF PROCEEDINGS

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(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Kelly L. Bryce, CSR No. 13476
Court Reporter Pro Tem

Computerized Transcription By Eclipse

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Friday - September 25, 2009 10:05 a.m.

THE CLERK: Calling Civil Case 09-2292, Kristin Perry, et al. versus Arnold Schwarzenegger, et al.

Can I get appearance for the plaintiffs, please.

MR. DUSSEAULT: Good morning, Your Honor. Chris Dusseault of Gibson, Dunn & Crutcher on behalf of the plaintiffs.

THE COURT: Good morning.

MR. DUSSEAULT: Good morning.

MR. McGILL: Good morning, Your Honor. Matthew McGill of Gibson, Dunn & Crutcher for the plaintiffs.

MR. MONAGAS: Good morning, Your Honor. Enrique Monagas for the plaintiffs.

MS. PIEPMEIER: Good morning, Your Honor. Sarah Piepmeier also with Gibson, Dunn for the plaintiffs.

MR. FLYNN: Good Morning, Your Honor. Ron Flynn, City and County of San Francisco, for plaintiff intervenor City and County of San Francisco.

THE COURT: Good morning.

MS. LEE: Good Morning, Your Honor. Mollie Lee, City and County of San Francisco, also for the plaintiff intervenor City and County of San Francisco.

MR. GOLDMAN: Good morning, Your Honor. Jeremy Goldman, Boies, Schiller & Flexner.

THE COURT: Very well.

MR. COOPER: Good morning, Mr. Chief Judge. Chuck Cooper of Cooper & Kirk for the defendant intervenors. I would like to introduce the Court to my colleague, Mr. Jesse Panuccio.

MR. PANUCCIO: Good morning, Your Honor.

MR. COOPER: And I'd like to ask the Court's special permission, since his pro hac motion is pending, that the Court allow him to sit with me at counsel today above the bar.

THE COURT: Well, that would be fine. I trust that you vouch for him.

MR. COOPER: Without reservation.

THE COURT: Good. All right. That will be fine.

MR. RAUM: Good Morning, Your Honor. Brian Raum, Alliance Defense Fund, for the defendant intervenor.

MR. CHANDLER: Timothy Chandler, Alliance Defense Fund, defendant intervenor.

MR. BURNS: Deputy Solicitor General Gordan Burns for the Attorney General.

THE COURT: Good morning.

MR. BURNS: Good Morning.

THE COURT: Very well. And I believe we have Mr. Mennemeier on the telephone representing the Governor; is that correct?

MR. MENNEMEIER: Yes, Your Honor.

THE COURT: Very well. Mr. Mennemeier indicated that he did not think that he needed to weigh in on this issue and, to save money, which is a pressing concern of the State these days, that he thought telephone appearance would be appropriate, and I agreed to do that.

In thinking about the problem that you've presented, I've done a little thinking and some research on something that I've not heretofore been familiar with, that is the law in California that applies to individuals and organizations that sponsor initiative and referenda that are placed before the voters, and have taken a look at the Political Reform Act of 1974, which is codified in the Government Code and some provisions in the Election Code.

And, so, at the outset, before we get into the specific arguments on the issue that is before us this morning, I'd like a little help from both sides, since I'm sure you're far more knowledgeable on these subjects than am I. And tell me a bit about the requirements that apply to individuals and organizations, in this case ProtectMarriage.com is the organization as I understand it, that sponsor and put before the voters an initiative measure.

Some of these questions probably should be directed first to you, Mr. Cooper, since ProtectMarriage.com is your organization. When was that entity organized?

MR. COOPER: Your Honor, the Court kindly assumes a

level of knowledge with these State Court provisions that I'm frank to confess to the Court, with some embarrassment, that I'm not an expert on, but I have at hand a genuine expert on this in the courtroom. His name is Andy Pugno, Andrew Pugno. He was the ad hoc general counsel to ProtectMarriage, and with the Court's permission I think the Court would be edified very much if I would call my colleague to the podium to treat to these questions.

THE COURT: That certainly would be fine.

MR. COOPER: Thank you.

THE COURT: Mr. Cuneo, is it?

MR. COOPER: Pugno, P-U-G-N-O.

THE COURT: Thank you.

Good morning.

MR. PUGNO: Good morning, Your Honor. I cannot say that I was expecting to have to visit with you this morning.

THE COURT: I beg your pardon?

MR. PUGNO: I cannot say that I was expecting to visit with you and talk about this this morning.

THE COURT: Well, this is a discovery dispute and, so, we don't need be too formal about it.

MR. PUGNO: ProtectMarriage.com, Yes on 8, is a ballot, primarily formed Ballot Measure Committee. There are different kinds of Ballot Measure Committees. One is primarily formed when its sole purpose is the passage or defeat of one

ballot measure. And, so, ProtectMarriage.com is registered as such a committee, as a creature of statute of the Political Reform Act. And I would say that it was either -- I want to say that it was October or November of 2007.

THE COURT: 2000 what?

MR. PUGNO: And '7.

THE COURT: Okay.

MR. PUGNO: Roughly one year before the election date. It was roughly around the time that the official proponents which, under the Elections Code, has a different standing. Only a registered elector, a voter, can sponsor a ballot measure. A nonprofit organization, a Ballot Measure Committee cannot submit to the Attorney General to begin the process an initiative. Only a registered voter can. So in this case there were five registered voters that together submitted the measure to begin the process.

THE COURT: And those five registered voters are the intervenors here; is that correct?

MR. PUGNO: They're five of the six intervenors.

THE COURT: Five of the six.

MR. PUGNO: Yes.

THE COURT: So there were six?

MR. PUGNO: The sixth intervenor is the committee, the creature of statute.

THE COURT: I see. But the registered voters for

purposes of putting the initiative on the ballot were the five individual intervenors here; is that correct?

MR. PUGNO: That's correct.

THE COURT: All right.

MR. PUGNO: And then a Ballot Measure Committee primarily formed can also be a vanilla variety or what's called a sponsored committee. In this case it was sponsored in that it's administrative.

The California Renewal, a California nonprofit organization, basically said, "We're going to create this creature of statute and that's going to be this campaign committee." And, so, in this case you will see a project of California Renewal in the name of the committee, which by law the sponsor of the committee has to be named in the committee's legal name as registered with the State. So that's why it has a long name.

THE COURT: Okay. Now, once formed, how long does one of these organizations have to remain in existence?

MR. PUGNO: Well, the committee can terminate at any time. However, most of the time they go on, if the initiative makes the ballot and the campaign proceeds and concludes, generally speaking there is a postelection audit conducted by the State to make sure that all the expenditures were correctly reported and all the contributions were correctly reported, and that all expenditures were authorized by law under the

Political Reform Act.

And then you get either a fine from the Fair Political Practices Commission or a clean bill of health, and at that point you're permitted to terminate the committee and it ceases to exist.

So the lifespan of a committee, of a registered committee, begins at the point that a statement of organization is filed with the State and it ends when a statement of termination is filed.

THE COURT: What is the present status of ProtectMarriage.com?

MR. PUGNO: It is still a registered Ballot Measure Committee, and it is awaiting the conclusion of that audit, which often takes a year to a year and a half after the election day.

THE COURT: I see. So that audit has not been completed and, thus, the termination has not yet taken place.

MR. PUGNO: That's right. We're not permitted to terminate the committee until we have that audit report from the State.

THE COURT: Is that audit ongoing or what's the status?

MR. PUGNO: The State asks for documents and then they're supplied, and they may ask for more, it's a back and forth. And if they find an irregularity, maybe a missing page,

they'll say, "Go look for that"; and, so, we're still in the middle of that audit. We started but it is not completed.

THE COURT: Okay. Now, does one of these organizations have officers and directors like a corporation?

MR. PUGNO: Unlike a corporation in California, which has to have by law certain officers and directors, the creature of statute, the Ballot Measure Committee, may have multiple what are called responsible officers. In this case, the only responsible officer, as far as the State is concerned, is the Treasurer David Bauer. It only takes one person.

I guess the term "committee" is a misnomer because it really is a vehicle for conducting a campaign, and in this case the only officer of record in the filings with the Fair Political Practices Commission and with the Political Reform Division of the Secretary of State is David Bauer, the treasurer of the committee.

THE COURT: Okay. Now he's not a party to this action?

MR. PUGNO: That's correct.

THE COURT: And what is the relationship to the committee as -- I'm sorry, to ProtectMarriage.com as it presently exists of the individual intervenors here, the individual defendant intervenors?

MR. PUGNO: Could you restate that question for me?

THE COURT: What is the relationship to

ProtectMarriage.com --

MR. PUGNO: Between the intervenors, the registered voters?

THE COURT: Yes. Between Mr. Hollingsworth, Ms. Knight -- is it Gutierrez?

MR. PUGNO: Gutierrez, Tam, and Jansson.

THE COURT: -- Tam and Jansson.

MR. PUGNO: Sure. Those five electors had special things that they -- and the responsibilities and duties and rights and privileges under the Election Code that they carried out as official proponents. They pointed to ProtectMarriage.com and said, "This is who we would like to manage this campaign."

THE COURT: So the way to think about them, from a legal point of view, would be as directors of the organization; is that fair?

MR. PUGNO: Not at all, Your Honor.

THE COURT: Okay. How is that incorrect?

MR. PUGNO: Well, because under California law, once the official proponents -- the official proponents have a duty and then responsibility and powers unto themselves. Any organization or any group of people or any one person can go out and form a Ballot Measure Committee. In fact there were multiple committees formed and operated in support of the Yes on 8 position. I think at least three or four, maybe more.

On the No on 8 side there was one principal committee, but there were others, kind of free actors, that started their own committees as well.

And, so, there is -- at this moment I cannot think of a legally significant connection where a proponent points to a committee and says, "We govern that committee," unless they were to themselves go out and register the entity as themselves.

In this case we have a very broad coalition, a lot of people involved that work with the proponents; and the proponents and the rest of the coalition said, "We want to form a committee and we want this treasurer to form the committee for us."

So the proponents by virtue of their status as proponents do not have any legal authority over the campaign by virtue of their status having submitted the measure for the voters, just in the same way that they don't have any official director status over any of the other five or six organizations that went out and started a Ballot Measure Committee of their own.

THE COURT: Well, is the implication of that that ProtectMarriage.com is really an entity that's separate from these five individuals or is there a connection here that --

MR. PUGNO: The connection is that they were all working together, that this was a coalition, and that the

proponents acknowledged this committee as the vehicle, the creature of statute, the vehicle selected for this broad coalition of many people through and by which to conduct this campaign.

THE COURT: Now who has possession of the books and records of ProtectMarriage.com?

MR. PUGNO: Well, the financial books and records are all in the possession of the treasurer, David Bauer.

THE COURT: Okay. And he would be responsible, then, for maintaining those and presumably making those available to the auditors who come in to do the postelection audit?

MR. PUGNO: He has two responsibilities, both dealing with the postelection audit and filing the periodic statements that have to be filed for public disclosure.

THE COURT: Let's see, the audit is conducted by the Fair Political Practices Commission; is that correct?

MR. PUGNO: Well, I'm going to have to plead a little bit of ignorance. I think that it's handed over, believe it or not, to auditors of the Franchise Tax Board who come in and do this for Political Reform, the Political Reform Division of the Secretary of State's Office. I blend the two because the Fair Political Practices Commission also has jurisdiction to investigate and prosecute failure to disclose and things like that.

THE COURT: All right. Where are the books and records of ProtectMarriage.com maintained and located?

MR. PUGNO: I would have to say, Your Honor, in many places. I mean, there was a professional campaign manager that was hired to conduct the campaign. Many of those records are located there, and we have many volunteers and independent contractors who work for the campaign and with the campaign.

And, so, depending on what the scope of the books and records of the campaign is understood to be, that would define how big the circle is of where those are located.

I mean, there were literally hundreds of people involved in this campaign. This was a 40-million-dollar campaign involving hundreds or thousands of volunteers and workers all the way from the very minimal involvement to a great deal of involvement. And, so, these campaigns are typically conducted in this fashion where it's a coalition and lots of people involved, and the records are enormous because there's a lot of work associated with qualifying and passing a ballot measure.

THE COURT: Okay. Well, this all bears on the burden issue in a discovery dispute.

All right. We'll we may have some more questions on this line as we go along --

MR. PUGNO: Thank you, Your Honor.

THE COURT: -- but that was most helpful indeed, and

I appreciate your assistance.

MR. PUGNO: All right. Thank you, Your Honor.

THE COURT: You bet.

MS. LEE: Your Honor, may I make one clarification?

THE COURT: Yes. You are?

MS. LEE: I'm Mollie Lee, Deputy City Attorney for the City and County of San Francisco, for plaintiffs intervenors.

THE COURT: Tell me your name again.

MS. LEE: Mollie Lee.

THE COURT: Ms. Lee.

MS. LEE: Good morning, Your Honor.

THE COURT: You didn't -- oh, yes, you did sign in. All right.

MS. LEE: I want to clarify the relationship between the primarily formed Ballot Measure Committee ProtectMarriage.com, which you were inquiring about, and the five individuals who are also listed as defendant intervenors.

The defendant intervenors state in their own papers that ProtectMarriage.com was designated by these five individuals who have an official status and act in a legislative capacity in proposing a ballot measure and submitting it for circulation and eventually advocating for its passage.

And in thinking about this in the larger scheme of

California's direct democracy, system of direct democracy, you see individuals take on the specific role under the California Elections Code, and they then in this case say that they designated ProtectMarriage.com as the official Proposition 8 campaign committee.

And, so, to the extent that defendant intervenors are now attempting to sort of disaggregate that, I think that's an unfair characterization of what's going on here, where we see a clear link between five individual voters who assume a legislative role and the campaign committee that they designate to carry out that function.

THE COURT: What's the implication of that for purposes of the discovery dispute before the Court this morning?

MS. LEE: You know, I think the implication really goes to the public interests that are at stake here. And, as you note, the Political Reform Act recogni -- or you noted the Political Reform Act may be relevant here; and the Political Reform Act, as well as the California Constitution and other open meeting and public records laws, recognize there's a strong public interest in open government and in public access to information about the conduct of government, which includes the legislative -- access to legislative records that relate to statutes and proposed constitutional amendments.

And, so, here when you see individuals who are

acting in a legislative capacity, they are assuming a legislative role, and the general interest in open government also extends to an interest in their activities in furtherance of this legislative function.

THE COURT: Well, we are getting a little ahead of ourselves, and I haven't heard from Mr. Cooper; but one of the questions that occurred to me in reading these papers, and in fairness to both sides I should probably put this on the table, is the application of California's open meeting and open records laws to individuals or organizations which undertake what is, in essence, a legislative function.

And, obviously, it's a little different when you're attempting to apply those to Boards of Supervisors or City Councils or the State legislature or some State commission. But when citizens organize to perform that same function, there would seem to be some carryover to the activities of those individuals, but I can well understand the carryover may not be direct.

MS. LEE: Exactly, Your Honor, and if you'd like, I'd be happy to speak to that later or now.

THE COURT: All right. Fine.

All right. Anything further on setting the groundwork before we turn to Mr. Cooper for his argument?

(No response.)

MR. COOPER: Thank you, again, Chief Judge Walker.

I have nothing further on the terrain that this discovery dispute is based on; and I'd like to, I guess, frame our dispute by identifying what, at least by my reckoning, I think we are agreed on.

The plaintiffs, as we understand it, are not seeking production of any internal, private communications between and among the defendant intervenors, which have been identified, the five individuals and the committee ProtectMarriage.com, number one.

Number two, the defendant intervenors are producing and have produced and are continuing to search for and produce, as we find them, all communications that were made or distributed to members of the public at large, what we call public communications; and that includes communications that were targeted to particular types of members of the public at large, such as members who have an affiliation with, say, the Republican Party.

But what we're not producing, pending this Court's consideration of our petition and its ruling, are communications between and among the defendant intervenors and the others that Mr. Pugno has described to you that have formed an associational bond for purposes of this political activity, this core political activity. And that obviously includes people as close to the ground zero, if you will, of this campaign as the ad hoc Executive Committee that gave it much of

its direction and management; and the campaign consultants, Mr. Frank Schubert, whose name has been forwarded previously; and other paid consultants and agents; the donors who step forward to fund this very large campaign; and the people who step forward to volunteer; and these can be some pretty large numbers, as Mr. Pugno has indicated.

But, Your Honor, the lines aren't easy to draw in this case but, by our lights anyway, we think that is the line that is compelled by core First Amendment issues.

What the plaintiffs are seeking are communications between and among the defendant intervenors and any third party, any third party, including members of the ad hoc Executive Committee as we understand it, individual donors, e-mail communications that are one on one, all the communications between the political consultant that gave the strategy or at least informed the strategy of this campaign, and the individuals who formed to manage and to give it its direction and in the fuel of funding.

THE COURT: Who were the members of this ad hoc committee?

MR. COOPER: Your Honor, that's never been disclosed. I think I have seen -- we have admitted that they're about six or eight members of the ad hoc Executive Committee, some of whom had relationships with larger organizations, including religious organizations, that had a

key and central interest in the campaign to advance Proposition 8.

But we've never seen where -- and I don't believe, Your Honor, it's ever been publically disclosed who those ad hoc members were, and the law requires that donors be disclosed at least if they've given a hundred dollars or more; and we have thousands of donors, Your Honor, who gave $99 or less, some of whom to avoid the disclosure that this very discovery dispute would bring forward publically.

THE COURT: Well, those donors who gave more than a hundred dollars names are already on some Web site. I don't know whether it's an official Web site or one that's been picked up in some fashion, but that information is already out in the public; is it not?

MR. COOPER: Those names are out there, yes, Your Honor.

And one other area where we have some very important agreement is, and these are the proponents' words -- excuse me, the plaintiffs' words themselves, and that is that the proponents' communications concerning Proposition 8 referendum campaign are core political speech and are undeniably entitled to First Amendment protection.

There's also no dispute here that the disclosure of the names of those donors brought forward widespread economic reprisal, widespread harassment, widespread abusive practices

that are detailed in our motion papers and detailed graphically in another case that we've called the Court's attention to also brought by ProtectMarriage.com.

THE COURT: Is that the case in Sacramento before Judge England?

MR. COOPER: Yes, Your Honor.

THE COURT: I read that.

MR. COOPER: And that is the case that raises what we believe are grave constitutional objections to the disclosure requirement itself.

THE COURT: Let me go back for a minute to this ad hoc Executive Committee. What role did it play in the campaign?

MR. COOPER: Your Honor, I believe that it is most accurate to say that it provided the executive direction to the campaign. It made decisions relating to, for example, who the campaign itself would engage for professional political consulting services and such things as that, including --

THE COURT: So it hired the consultants?

MR. COOPER: That's among the things, yes, sir, but also gave it its strategy direction in consultation with obviously professional political advisers and others.

It was primarily responsible for giving management and direction to the fundraising effort. Many of the members of the ad hoc Executive Committee were themselves large --

responsible for large amounts of the funding.

So the ad hoc Executive Committee was a group of volunteers just like anyone clicking a volunteer button on the Web site, but they were -- they volunteered, you know, at a very intensive level in order to assist this campaign and give it direction and executive management.

But they really weren't any different from the volunteers who came to lick envelopes and stamps and help in the sense that these individuals, small groups like the ad hoc committee and large groups like the whole of the volunteers, formed an associational bond to advance this critical, to them, political effort and engage in this political activity.

Your Honor, to put -- and I think the First Amendment, elements of the First Amendment privilege balancing test that the cases that we've cited to the Court go through when this kind of claim is being made to resist a discovery inquiry into core political activity, the First Amendment elements of that are established by agreement to the parties. The parties agree this is core political speech, that there has been this widespread economic and other types of reprisal.

The next step for this Court is to examine, well, okay, what compelling interest is there for requiring this disclosure, for requiring the disclosure that the plaintiffs --

THE COURT: Before getting into exploring the First Amendment privilege that you're claiming --

MR. COOPER: Yes, Your Honor.

THE COURT: -- and dealing only with the issue you just touched upon, namely, the concern about reprisals or threats of one kind or another if there were disclosures, why wouldn't a protective order that required the disclosure of certain materials on an attorneys'-eyes-only basis be sufficient to protect against those concerns?

MR. COOPER: Your Honor, that's a fair question. It's come up -- it's come up before and in several cases, and it is typically denied in the same way attorney-client privilege isn't something that privileged materials are simply provided to the other side on an attorneys'-eyes-only basis.

And this actually gets a little bit ahead of at least the logic, it seems to us, of the First Amendment interest at stake here, but there are three cases that have permitted, that we've been able to find, a protective order like the Court is suggesting. I think we've cited them all to the Court.

THE COURT: Let's see, those cases are what? They're cited in your papers?

MR. COOPER: They are cited in our papers, Your Honor.

THE COURT: All right.

MR. COOPER: Yes. They're the *Christ Covenant* case from the Southern District of Florida, *Anderson against Hale*

from the Northern District of Illinois, and *Dole against Service Employees Union*, a Ninth Circuit case.

THE COURT: Okay.

MR. COOPER: And each one of those cases, and I offer the *Christ Covenant* case that it seems to me is the most elucidating on this point, all three of those cases involved an eyes-only device but only after the Court concluded that the information that was sought had overriding relevance to a central issue in the case.

And even then, for example, in the *Christ Church* case, the issue was whether or not the church should be allowed to build a new facility because it claimed under a federal law that its religious practices and exercise of its religious freedoms were being burdened because its congregation wasn't able to fit in the sanctuary anymore. They had to turn people away.

And, Your Honor, the town that had denied them authority to build a new building then sought discovery of individual members. They wanted the members so they could go and depose the members themselves. The Court denied that request limiting it to only those members who had actually been turned away from a sanctuary. The church had to identify those members. And the attorney and only the attorney could ask questions only about: Is it true you were turned away from a sanctuary service?

The point I'm making here, Your Honor, is that the circumstances which, in this balancing process, which made it appropriate to invade those associational freedoms, those First Amendment freedoms of protecting them, for example, the membership, the names of members of a church, were overridden because of the overriding relevance of the information.

This brings me back to a point, Your Honor, that seems to me puts this into, you know, very, at least for me, illuminating terms. Suppose that the California Legislature enacted an election law requiring that the official proponents of a referendum measure, any referendum, were required on a realtime basis during the campaign to provide the internal, nonpublic kind of information that the plaintiffs seek here to the opponents of the referendum, something like this open meetings law perhaps.

Your Honor, I would submit to you that a law like that would not stand a moment's chance under a First Amendment review because it would go to the core of, as these discovery requests do, go to the core of political associational activity.

THE COURT: Well, picking up on that and Ms. Lee's point, a legislative committee, City Council that meets to discuss some proposed policy must meet in open, the discussions amongst the members must be on the record and open and accessible to those who would oppose whatever policy is being

fostered.

Why wouldn't the same -- and that seems to not interfere with the legislative process. Why wouldn't the same principle apply here when citizens undertake what is, in essence, a legislative process?

MR. COOPER: Your Honor, the first point I would make is because the citizens themselves are engaged in this democratic political activity themselves not as elected representatives in public hearings or public mark-up sessions, or things such as that.

Even in that context, Your Honor, I can't imagine that the kind of information that plaintiffs are asking for could be required of legislators even. Their e-mail exchanges with fellow legislators, their written communications with individual constituents, could those things be brought forward in order to test, for example, what the real purpose was as opposed to the public information that was available?

The law we have here does not place those kinds of public disclosure burdens on one of these initiative committees, and I suggest to you that it couldn't.

THE COURT: That touches on one of the reasons I was interested in when ProtectMarriage.com was organized. It would seem to me -- let me be the devil's advocate here. If you and I engage in a discussion that some law ought to be changed or there ought to be some initiative measure developed, of course

our discussions would be private discussions; but once we organize a committee, register that committee with the State authorities to promote that particular initiative or legislative measure, then the activities associated with that organization take on a different character; do they not? They are no longer private discussions subject to the kinds of First Amendment protections that you're speaking about.

MR. COOPER: Well, but, Your Honor, I believe that they are.

THE COURT: Okay. Why?

MR. COOPER: They continue to be private discussions because there's no law that has ever suggested that they're not. And, so, the individuals who are involved in this campaign, when they exchange their views and their thoughts and their ideas about political strategy and things that are at the very core of their freedom of political activity and speech, they exchanged without any inkling of a notion that there might be a statute that could be enacted, because certainly there had never been, or that there might be a judge who could come along and say, "Those communications that you engaged in, I want your political opponents to hear them now."

It may well be that the law could, for future political activity of this down the road, be crafted like the law you're suggesting here, an open meetings kind of law. I don't think so. I suggest to you that it would raise the

gravest First Amendment questions, but at least it wouldn't be a retroactive disclosure of communications that were uttered in a nonpublic way.

And communications, Your Honor, and this really is also at the heart of our petition here to you as well as at the heart of the First Amendment balancing test that the Courts go through when this kind of discovery is sought. And that is, what private communication or nonpublic communication that any of the people who formed an associational bond with one another to get this thing passed or, for that matter, people who formed associational bonds on the other side of it to defeat it, what nonpublic communication could possibly be relevant to the central issues in this case?

THE COURT: That's quite a different argument, and before we get into that, I think that's something we need to talk about.

Is this First Amendment privilege that you are contending applies here different in character from any other privilege; attorney-client privilege, the priest-penitent privilege, and so forth? Is it a different privilege in any qualitative sense?

MR. COOPER: I think it is, Your Honor, in the sense that its origins come from the First Amendment. They don't come from the common law the way the attorney-client privilege does, even though it obviously is infused with due process

consideration, which are constitutional in nature; but at least in that --

THE COURT: Let me put the cards on the table. The reason I ask is, as you well know, assertion of a privilege or work-product protection requires certain disclosures. You have to disclose the items that you are withholding from production, identify them sufficiently so that the individual on the other side or the party on the other side is able to determine whether the privilege is well taken.

Why would that requirement not apply to this First Amendment privilege that you are asserting?

MR. COOPER: Your Honor, I don't think that requirement could apply and I will put to the side the question of burden the Court mentioned earlier, which would be unimaginable. But the attorney-client privilege is designed to protect an attorney's communications with his client; and if those communications aren't with his client, then they're not protected.

These communications, Your Honor, they go to the very identity of the individuals with whom the communications are taking place. That is the -- that is the font, if you will, from which this whole line of First Amendment cases comes from, the *NAACP against Alabama* case, the membership list. It is the identity of the individuals, which a privilege log requires understandably, that is itself at the essence of this

First Amendment privilege, the identity of the donors.

The point here is even under the existing law, which we think raises gravely serious First Amendment concerns, the existing law requiring simple disclosure of the name of donors above a hundred dollars, that led to the very chill in the associational privileges that the First Amendment is designed to prevent.

THE COURT: I realize there are protections that the cases have purported to membership lists, such as the *NAACP* case many years ago and similar organizations.

But there's also a line of cases which holds that it is quite relevant to the voters' consideration of initiative and referendum to be able to identify the sponsors, the individuals who are behind the particular initiative or referendum.

So the identity of supporters of a particular measure is a relevant consideration for voters, and the Political Reform Act requires a fair amount of identification, and that identification is consistent with the First Amendment. It doesn't infringe on this First Amendment association activity, does it?

MR. COOPER: Yes, Your Honor, I do believe that just the disclosure requirement, even though it is indeed supported by a strong interest in public and public information concerning who are the sponsors of a particular campaign

initiative, referendum initiative, but I also believe that the First Amendment interests that are at stake at that are of core importance.

And this -- you know, I've called your attention to my friend's very fine brief in the *Citizens United* case in which they themselves have challenged the federal disclosure requirements under the First Amendment citing the widespread economic reprisals suffered by donors disclosed in California in the Prop. 8 campaign. These implicate First Amendment interests of the highest order.

And, Your Honor, when we are talking about more than just disclosing a name, we're talking about disclosing the actual content of speech like the private communication that you and I might have if we were involved in this campaign, it goes beyond, well beyond, in terms of its encroachment into these First Amendment values, than just the name of a donor.

And I want to share with the Court a passage from this *McIntyre* case, which I think speaks directly to the issues, from the United States Supreme Court at 514 at page 348. Your Honor, that case, and we describe it very succinctly in our paper, our opening paper to the Court, dealt with the validity of a law requiring one Mrs. McIntyre to provide her name and address on a leaflet that she distributed at a middle school which urged her fellow citizens there to oppose a local referendum raising taxes for educational

purposes. And that's all it was, just a disclosure requirement. She was fined a hundred dollars because her leaflet didn't have that disclosure on it and she refused to put it on there.

Here's what the majority of the Supreme Court said as it struck down that requirement. And keep in mind this was a woman who brought her own leaflet, nobody doubted who the author was, to this gathering. Here's what they said in striking down that disclosure requirement: (reading)

> "We think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude."

And they continue: (reading)

> "The simple interest in providing voters with additional relevant information does not justify," again, "the simple interest in providing voters with additional relevant information does not justify a state requirement that a writer makes statements or disclosures she would otherwise omit."

So it's very clear that not only did she have a First Amendment right not to disclose her name on her leaflet, but she clearly had a First Amendment right to be her own editor, to not disclose what she didn't want to disclose

publicly.

And, Your Honor, could the State in this case have compelled Mrs. McIntyre to disclose her drafts of that leaflet? Plaintiffs seek drafts of all of my information. Could they have required Mrs. McIntyre to disclose her e-mail communications with her own political confidants as she's forming her own speech, her own strategy of how she will persuade her fellow citizens to join her in opposing that measure? Your Honor, we submit to the Court, no.

And, so, the question becomes: Is there a more compelling reason in the context of this discovery? Because I can't imagine that this could have been compelled of us, this kind of information, just, you know, in the open political -- open political arena.

THE COURT: Well, that brings us to your relevancy issue.

MR. COOPER: Yes, Your Honor. Yes, it does.

THE COURT: All right.

MR. COOPER: And in the cases, Your Honor, that have gone through this balancing process, and I mentioned earlier three cases that did find appealing your -- the idea you suggested of a possible kind of attorneys' eyes only type of protective order.

But, Your Honor, the key question in these cases is: Well, is the information sought of overriding relevance to a

central issue in the case?

And, Your Honor, the plaintiffs haven't identified any issue in this case other than voter motivation, other than the purposes of this referendum, which is itself inseparable from voter motivation, to say that their inquires are relevant; and we would submit to Your Honor the nonpublic communications of individuals involved on either side of this debate can't possibly weigh.

THE COURT: How do we determine whether a communication is public or not public, and who makes that determination?

MR. COOPER: Well, you're going to make it.

THE COURT: What's that?

MR. COOPER: You're going to make it.

THE COURT: Well, but that means I have to look at each communication. I'm happy to work on this case, but I don't know that I want to read all of those.

MR. COOPER: Well, here's the principle that I want to submit to the Court, this is the principle and it doesn't obey quantitative laws here because this principle does indeed shield communications that were shared among large numbers of people. But the principle I want to suggest to the Court is that a communication is public when it is distributed and intended to go to members of the general public, even if it has some targeting theory.

But it isn't public if it's going to people and is intended only for people with whom you have formed what I call an associational bond, a political associational bond. These rights flow from our right to associate for political purposes and our right --

THE COURT: Let's try some examples. Obviously a leaflet or a radio or television advertisement that is broadcast, that clearly is a public communication.

MR. COOPER: Yes, Your Honor.

THE COURT: There's no question about that.

MR. COOPER: And we've already produced those, though with reservations of our right to suggest that some or all of them may not be admissible when we get to our trial; but, yes, Your Honor, we've produced them.

THE COURT: Admissibility, we're not at that stage now.

MR. COOPER: True.

THE COURT: How about mailers to identified groups, say members of the Republican Party you mentioned, or members of a particular organization, a church, Boy Scouts, whatever, Boy Scout leaders? We're going to send a mailer to all of the Boy Scout leaders in California. Would that be a public communication?

MR. COOPER: I believe that it would and, Your Honor, the kind of inquiry we're going through right now,

we obviously have tried to think through and we've done a lot of, you know, backing and forthing with our friends for the plaintiffs; and, in fact, it was as a result of that backing and forthing that our own position was adjusted.

Because we suggested early on in our conversations with Mr. McGill, I'm told by my colleagues, that perhaps some of those kinds of communications would not be public. We, as a result of those discussions, we thought better of it and they would. We do believe that they would.

THE COURT: Okay. What about a proponent, one of the proponents meeting with a coffee klatch of some organization, rather like the coffee klatches that political candidates have? They go around to churches, groups, the Kiwanis Club, and whatnot, and speak to members of that organization. Is that a public communication?

MR. COOPER: It probably is, Your Honor. And I say "probably" only because it is entirely conceivable to me that it could be a gathering of people who have made known their support for Proposition 8 and they want to hear how they can help advance this campaign and convince their fellow Californians to support it. I believe that would not be a public discussion.

THE COURT: Would not be?

MR. COOPER: Would not be. If the individuals are donors, for example, a coffee klatch with donors, a coffee

klatch with volunteers, here's -- those kinds of things; but a coffee klatch of just some people who want to hear our side of this and we're there to persuade, they're just members of the public, yes.

THE COURT: That suggests that the distinction between private and public is a communication to the converted is private; to the unconverted, it's public.

MR. COOPER: Well --

THE COURT: Is that the distinction?

MR. COOPER: That is one way I think of, perhaps, describing this principle I'm offering to the Court, which is: Has there been some associational bond? Do we have a political association? Are we in association one with another for First Amendment purposes? Have we joined the NAACP together?

And, Your Honor, this is a hard -- these are hard lines. I don't deny it. But if we have formed -- if we are in political association one with another, even if it's one with a thousand others, what we say to each other and the fact of our membership in the association are protected by the First Amendment. That's my submission to the Court.

And, as I mentioned earlier, it doesn't obey, you know, quantitative lines here; and in the context of a referendum fight in this state where you have, you know, roughly 7,000 -- 7 million people on both sides, yes, the people who have formed associational bonds can grow large.

We had, I'm not sure how many but 10s of thousands of donors. They stepped forward. They sent money to support this campaign. Yes, if they -- to me, Your Honor, they clearly formed associational bonds by doing that, like joining a membership organization; and if they contributed more than a hundred dollars, they understood, presumably, that their association with this cause would be disclosed publicly.

So, yes, I accept the Court's characterization that it does in a sense, at least the principle I'm suggesting to the Court, does in a sense turn on whether you're preaching to the converted or you're trying to convert people to your -- to form associational bond with you.

THE COURT: All right. Thank you very much, Mr. Cooper.

MR. DUSSEAULT: Good morning, Your Honor. Chris Dusseault of Gibson, Dunn & Crutcher on behalf of the plaintiffs.

Just organizationally, the way we had intended to present the argument to you is, if it's acceptable to Your Honor, to divide. I would address the relevance issues and the concerns that plaintiffs have raised in that regard, and my colleague, Mr. McGill, would speak to the First Amendment concerns.

THE COURT: Well, you know, ordinarily I enforce a rule that this is not moot court. We have one lawyer on a

side. Now, we had a little help from Mr. Cooper on an issue that he properly and I can well understand did not feel comfortable speaking to; but going forward, this is not moot court. So one lawyer argues each proceeding and no other lawyer.

MR. DUSSEAULT: Understood, Your Honor. We'll certainly observe that going forward. I appreciate your diligence here.

Let me speak very briefly to the issue that we think is really an antecedent issue to the First Amendment concern, which is the fact that these requests are seeking relevant information and that the proponents have not established otherwise in a motion which they don't --

THE COURT: Let's begin not at the last point where Mr. Cooper left off but his penultimate point.

What's the relevance of these third-party communications? How is that something that is going to lead to admissible evidence in this case?

MR. DUSSEAULT: Absolutely, Your Honor. I think that's the key question, and there are a number of factual issues that this Court has already recognized the Court may need to resolve to reach the merits of the case.

THE COURT: Now remember, Counsel, I didn't make up those factual issues.

MR. DUSSEAULT: Absolutely.

THE COURT: I got those out of the initial case management statements that you all filed.

MR. DUSSEAULT: Absolutely. And we believe, Your Honor, and we agree that those are issues that are presented by our claims that may, depending on determinations made on one issue or another, need to be reached.

But let me give an example. We believe that there are factual determinations before the Court about the applicable level of scrutiny that applies to these claims. There are factors that the courts have addressed that involve factual inquiries.

THE COURT: How does this discovery relate to those factors?

MR. DUSSEAULT: The defendant intervenors are parties to this case, Your Honor. They have chosen to become involved in this case and to make factual and legal arguments to the Court on particular issues; for example, the relative political power of gay and lesbian individuals, immutability, history of discrimination.

If they have documents, and I would submit public or not public, that make statements that contradict the positions they are taking in this case, how would that not be relevant evidence?

And let me give you an example. Let's just assume hypothetically --

THE COURT: Impeachment evidence.

MR. DUSSEAULT: Impeachment evidence or admissions, Your Honor. Let's assume that --

THE COURT: To what degree is the intent of a legislator relevant to the validity of the legislation that he sponsors?

MR. DUSSEAULT: Your Honor, I believe that there are cases that we have pointed to in our brief showing that the intent of the proponents of the initiative is something that courts should look to, in the initiative context, to discern voter motivation, but my point I think is broader than that.

THE COURT: Different from an elected legislator?

MR. DUSSEAULT: Your Honor, honestly, I have focused more on how it applies in the initiative context given that that's where we are; but there are cases to which we pointed the Court, including the *Washington* case, that have demonstrated that in this sort of a context, the Court should look at the overall campaign and the --

THE COURT: Which *Washington* case?

MR. DUSSEAULT: I'm sorry, Your Honor. Let me give you the cite. The *Washington versus Seattle* case, looking at statements of the proponents -- that was a Boston case I believe, Your Honor -- looking at the statements of the proponents to understand whether that was racially motivated. It involved school integration.

I believe that it is relevant to that purpose, but the point that I hope will be clear here is that there is another maybe even more direct path to relevance here, and that is admissions of particular facts.

And let me use as an example a fact like whether sexual orientation is immutable. This is something that has been briefed in the summary judgment brief. It's been talked about.

Suppose hypothetically that one of the defendant intervenors did or commissioned a study, a 60-page study, that went through this issue and said, "We have determined that sexual orientation is immutable and here's why, and we don't want to get into this issue in the campaign because we're wrong on it."

And now they're in this case and they're trying to argue, as an element for not applying higher scrutiny, the opposite side of exactly what their documents show. The notion that their direct on-point admissions on factual issues before the Court are not only not admissible, Your Honor, but not even discoverable? We can't even go try to find out who did that study, perhaps that person would be a good witness in this case I think is unsupported.

And I would note in all the cases that the defendant intervenors have offered, you don't see cases barring discovery in the manner that they're seeking.

THE COURT: That's pretty speculative, isn't it, Mr. Dusseault? Maybe you can find something a little closer to home.

MR. DUSSEAULT: Your Honor, frankly, we are in something of a difficult position in that we have been denied, and Mr. Cooper I think has made quite clear today that he intends to continue to deny, access to any of their nonpublic documents. So, unfortunately, at this stage it is somewhat difficult for us to be too specific because we have not seen any of their particular documents.

THE COURT: Well, you have had access to, I believe, at least understanding Mr. Cooper's comment to suggest that you had access to a very substantial amount of public commentary regarding Proposition 8 by the proponents; have you not?

MR. DUSSEAULT: Well, we have, Your Honor, been provided, I think, in the last couple of weeks a body of publicly disseminated documents. And our original understanding, based on their representations, was that that was not targeted, that would only be things available to the public at large. Mr. Cooper now represents that they're including in some of their production things to larger groups.

But I would submit, Your Honor, and I think the defendant intervenors have shown this in their own declarations, there is a real difference between what they might say in their most cleansed, most public documents versus

what they say internally.

And on the issue of relevance --

THE COURT: But if you can find in the wealth of public statements some inconsistencies of the kind that you just described, that would be a pretty persuasive reason to open the door for some of these nonpublic communications.

MR. DUSSEAULT: But, Your Honor, I would submit from a discoverability perspective in this case, why should the defendant intervenors have control over what we see? So if they have had -- let's say they've done a good job and all the bad stuff is private and only the good things come out.

THE COURT: In a campaign, it's a dream world if anybody thinks cats don't come out of the bag in a political campaign.

MR. DUSSEAULT: Understood, Your Honor, but I think one of the fundamental premises of liberal discovery is the notion that documents that are not public are very often the ones that are most candid, most probative to a case.

And they have submitted declarations in this case, in fact specifically saying under oath, "If I knew that this discussion was going to be public, I would have been more," quote-unquote, "guarded."

I would submit that on fact issues before the Court we have a right to unguarded admissions from a relevance and discoverability perspective; and that goes, we believe, to

issues of voter intent and motivation, but it also goes to the numerous issues that we've talked about, not just level of scrutiny but let's say potential state interests. I think this is a very important issue.

THE COURT: Potential what?

MR. DUSSEAULT: Potential state interests.

THE COURT: Okay.

MR. DUSSEAULT: Mr. Cooper's brief repeatedly says that under their standard, the only question is whether there's any conceivable basis for passing Prop. 8 and, therefore, the actual intent of the voters is irrelevant. A couple strong reactions to that.

One is that presumes the correctness of an issue that has not yet been resolved, which is the level of scrutiny. And in discovery we should be permitted to take discovery that would apply to any standard.

But maybe even more importantly, documents may very well go to even the narrow issue that the defendant intervenors present which is, is there any conceivable basis.

Again, one thing that is unique about this case, Your Honor, is there is almost a complete disconnect between the justifications offered in the ads and the promotions in the public discourse about Prop. 8 and the ones that they're now presenting to you. They are --

THE COURT: That's what I was driving at. What can

you show in that regard?

MR. DUSSEAULT: Well, and if there are internal documents -- and again, Your Honor, I admit that we are forced to speculate to some degree because we have not seen the documents -- if there are documents that say, for example, one possible justification is this notion of responsible procreation. Our testing and studies show that no rational person could conceivably buy that. Don't do it. Don't talk about it. Don't put it in the ads, because no one could conceivably believe it. A statement like that is relevant even to the issue as most narrowly presented by the defendant intervenors.

Now we submit that that is, again, their best case scenario. If there is a heightened level of scrutiny, then the actual intent becomes relevant and I don't believe defendant intervenors have even submitted for a moment that that sort of information would not be relevant.

But I just think it's important to note that they don't get out of the relevance box that they're in by saying that the question is whether a justification is rational. These are political professionals who are working with this campaign, working on this campaign in addition to volunteers. If they have studies or documents that talk about the rationality of a potential justification, the conceivability of it, that is, I think, number one, admissible; and, number two,

at the very least something that we should be able to use as a starting block.

The final point I'll make, Your Honor, on relevance, and then I'll sit down, is the approach that the plaintiffs are taking here really turns the discovery process on its head. The way this works normally in the trial courts is there is liberal discovery at the outset followed later, as Your Honor stated earlier, by specific determinations about what's admissible.

For the defendant intervenors to take the position right now under their best view of the case we should be denied virtually every document regardless of the substance -- and I think that's really important. The defendant intervenors' argument about internal documents in particular has nothing to do with substance. There's just no statement they could make, according to them, that could be relevant to any issue.

This is not the stage of a litigation where that decision is made. The documents should be produced. If with a specific document we discuss its admissibility, then we get to that point.

We are not suggesting, as they say in their reply brief, that somehow there's no limitations on discovery. The limitation that is imposed is whether our requests are tailored to lead to the discovery of admissible evidence.

THE COURT: Well, let's talk about tailoring. Your

request number 8 is exceedingly broad: (reading)

"Any communication by the proponents with any third party."

Well, that could cover quite a lot of individuals and organizations. And I can well understand that the proponents might have a lot of this information and, in fact, find it not only burdensome to respond to an inquiry that broadly drafted, but to be in the position where they could not reasonably be assured that they had complied with the discovery request.

Any third party. Now, can you not focus and narrow that inquiry? Could you address the burden objection which the proponents have made?

MR. DUSSEAULT: Your Honor, I suspect that we could; and, in fact, we set out in the meet-and-confer process to negotiate, and that's what normally happens in a case like this is, you say, "Okay. What do you really want? What can we get you?"

But, frankly, we were told in no uncertain terms at the outset that unless it went to every member of the public, we were not getting it. So those discussions didn't go very far.

I do think if --

THE COURT: I gather some progress has been made in that regard.

MR. DUSSEAULT: Well, really just in the briefs, Your Honor, but not really in the discussions. We're sort of learning some of these concessions in the briefs and their argument.

But we would, I think, be willing, according that we can do it, like we're doing everything else in this case in an expedited way so as not to affect the schedule, to talk about some reasonable limitations of third-party communications that would go after the issues in the case.

THE COURT: What limitations do you think would be reasonable at least as a starting point?

MR. DUSSEAULT: Well, I think I made reference to the factual issues and the category of factual issues that we've already talked about a number of times in the case. Generally the level of scrutiny, the potential state interests, the presence of discriminatory intent, and whether there's a fundamental right involved.

We may be able in a meet-and-confer process to identify the specific subjects, for example, where we would want any documents that address those issues. And I think we can rule out -- and, again, if there's something about, and you often do get documents like this in discovery, but if there's something like, "Hey, let's meet at 5:00 o'clock before this meeting," and they're talking to a third party, I'm not suggesting that that's relevant, but the relevance is going to

turn on the subject matter of what they discuss. If they get into factual subjects that are at issue in this case, we would think it needs to be produced. If they don't, then we could probably work out a limitation.

THE COURT: Well, we've had some discussion here this morning about some of the relationships that exist. Mr. Cooper has mentioned the ad hoc Executive Committee. The consultants have been mentioned; and, indeed, the consultant, whose name escapes me, but a speech I read in which he described the campaign, which was quite forthcoming with respect to various aspects of the campaign. I should think a discussion along the lines of identifying who some of these third parties are would be very helpful --

MR. DUSSEAULT: I think so, Your Honor.

THE COURT: -- in bridging the gap.

MR. DUSSEAULT: And the way we have approached discovery is we started with the parties, the defendant intervenors. We have since served requests on a narrow group of entities and individuals who are the political consultants and advisers to the parties for this case.

THE COURT: These are third-party subpoenas.

MR. DUSSEAULT: We have served third-party subpoenas, although I would submit, Your Honor, particularly based on some of what was said today, I think that some of those documents should be deemed in the possession, custody,

and control of ProtectMarriage. I think if Mr. Schubert is running the campaign, and I understood Mr. Pugno to say that some of the documents may reside with him, I would think those should be deemed to be in ProtectMarriage.com's possession, custody, and control. But we have, in abundance of caution, sought a subpoena for him.

What we have not yet done is served subpoenas to third-party groups that also worked on the campaign, and I think that is something that we have some intention of doing in a narrow fashion to try to get documents that may be discoverable and relevant, but we had not yet done that.

And we don't intend, Your Honor, I think to get out to every individual by any means, but there are certain bodies that threw themselves completely into running this campaign and trying to get this initiative passed, and they may well have documents that are at the very least discoverable.

THE COURT: Very well, Mr. Dusseault, anything else?

MR. DUSSEAULT: No, Your Honor. Thank you.

THE COURT: You are Mr. McGill?

MR. McGILL: Yes, sir. Thank you, Your Honor.

THE COURT: Your Honor is usually the way you talk to a judge.

MR. McGILL: Thank you, Your Honor, for the correction.

I want to address just three key points of

Mr. Cooper's First Amendment presentation. The first, it bears noting at the outset that defendant intervenors have chosen to be a part of this litigation and that, of course, sets them much apart from many of the cases they cite, including the NAACP line of cases.

I think Mr. Cooper in his reply brief actually identifies the correct way to analyze this as a constitutional matter, and that's the question of whether compliance with normal discovery burdens, normal party discovery burdens in effect constitutes an unconstitutional condition on their right to proceed in this litigation.

And the cases that they cite as illustrative of the fact that a plaintiff can also bring this kind of First Amendment privilege claim -- the ***Christ Church*** case, the ***Beinin*** case, the ***Black Panther*** case -- all those cases have in common is that -- what they have in common is that the plaintiffs in those cases had rights under federal law that they were seeking to vindicate in that litigation.

So that the discovery basically did present them with the Hobson's choice of either vindicating their rights under federal law -- in the ***Christ Church*** case it was the RyuPa, rights under RyuPa; in ***Beinin*** it was a copyright claim; and the ***Black Panther*** case it was a Section 1985 claim -- either vindicate your rights under those federal laws or give up your First Amendment rights.

And the key difference in this case is that the defendant intervenors have no rights at stake in this litigation. They have no rights that they are seeking to vindicate of their own in this litigation, and that means that it's not an unconstitutional condition to require them to comply with normal discovery.

The second point would be, even under the typical First Amendment privilege analysis, if they get in the First Amendment door, then under the Ninth Circuit's decision in *Dole*, it's their burden, they have to establish a prima facie burden that the disclosure will result in harassment, membership withdrawal, or discouragement of new members, or other chilling of members' associational rights.

The declarations that appended to the motion simply don't meet that burden. The Ninth Circuit emphasized the evidence has to contain objective and articulable facts which go beyond broad allegations or subjective fears. That's page 1460 of 950 F.2d in the *Dole* case.

If you actually walk through what the declarations say, for instance, the Prentice declaration, paragraph 14, he says: (reading)

> "I would have done things differently. My communications would have been more guarded. We would have warned people that their communications might be subject to disclosure."

That doesn't make him appreciably different from many other clients I have who are on the wrong side of discovery; but above and beyond that, there's no allegation of a chilling effect in that declaration. There's no allegation that if he complies with the discovery burdens in this case, that he is actually going -- that his speech will be -- that he will not engage in the associational activities in which he's currently engaged.

The Schubert declaration is actually indistinguishable from the declaration the Ninth Circuit found insufficient in the prior iteration of the *Dole* case. There in the first version, or I believe at that point it was known as SEU1, in SEU1, the Ninth Circuit said -- looked at a declaration from the attorney of the union that basically opined, based on his experience, that he -- that the union members' associational rights would be burdened if they were compelled to submit the minutes of these union meetings; and the Ninth Circuit found that insufficient as a matter of law to meet a prima facie burden, the prima facie burden that the plaintiff has to -- or that the litigant has to establish.

Schubert goes on to say that he will change the way he does business; but that, again, is not a statement that he will -- he will reduce his speech. He's saying he will change the way he communicates, he will change the way he does business; but he's not saying, "I will not engage in this

speech anymore."

The Jansson declaration, paragraphs 2 and 5: (reading)

> "I will dramatically alter my speech. I will be less willing. I will seriously reconsider my speech."

This, again, is not the types of declarations that the Court found sufficient in the *Dole* case where there the union members said, "I will no longer go to union meetings. I am not participating anymore."

I think that based on the *Dole* case, it's difficult to see how the declarations appended to the -- appended to the motion satisfy their prima facie burden of their First Amendment privilege.

The final point is that they've asserted the First Amendment privilege in gross, and they urge the application of a balancing test. They urge the application of an examination of relevance versus our need for the evidence versus the costs it will exact on their associational freedoms, but there's no way to meaningfully analyze that when you're talking about an assertion that every relevant document is privileged.

So I don't understand how we could meaningfully engage in any kind of balancing at this juncture.

If, Your Honor, has no questions....

THE COURT: Very well. Mr. Cooper, I suspect you

want a very brief rebuttal; is that correct?

And then what I would like to do is to take a very brief break and then meet in chambers with a court reporter and one lawyer from each of the parties about a case-management issue that we may confront in the case, and that will be simply an informal discussion not on any of the merits or any of the issues but simply how we organize going forward.

But the floor is yours, Mr. Cooper.

MR. COOPER: Certainly, Your Honor. Thank you very much, Your Honor.

And also I would like now to ask the Court's permission that Mr. Pugno may come back to the podium after you're finished with me because there's something that he believes he needs to correct.

THE COURT: All right. Fine. I appreciate that.

MR. COOPER: Your Honor, I'm going to begin with this notion that the defendant intervenors did not meet their prima facie First Amendment showing.

We have, out of the plaintiffs' counsel own mouth, the acknowledgment of the widespread economic reprisals, reprisals, Your Honor, that continue to go on to this day as was dramatically illustrated on the Web site of Equality California earlier this week; that is, the main No on 8 group. Earlier this week, as they reiterated on this Web site, they are called to continue a boycott against a prominent business

owned by a man who was a No on 8 donor, and for that reason because -- he was a Yes on 8 donor.

Your Honor the declarations that we've submitted and the declarations that were submitted and that we've referred the Court to and we'll be -- you know, hopefully we won't have to redo them and submit them here, but that were submitted in this other case that we discussed earlier --

THE COURT: Well, these disclosure requirements have already passed constitutional muster and those are the disclosures that would, it seems to me, to have the chilling effect that you're concerned about. That's already been found to be acceptable under the First Amendment. So why cannot, if there are these concerns, a protective order be fashioned along the lines that we discussed earlier to avert any further harm that may result from additional disclosure?

MR. COOPER: Well, those disclosures, yes, they have created harm and they continue to do so, but that harm would be -- would only be, we submit to the Court, increased if additional individuals, those, for example, donated less than 99, $100, were brought forward publicly as a result of this, of this discovery; or the internal actual speech that was used by these donors in their associational -- in exercising their associational free speech freedoms was disclosed publicly.

NAACP against Alabama held that: (reading)

"Past showings of economic reprisal," this

is quoting, "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility are sufficient to trigger First Amendment past."

Your Honor, the record is replete with, and admitted by the plaintiff -- the plaintiffs here, of this type of -- of this type of chill activity by virtue of those disclosures. It is simply a fortiori that that chill and that type of activity will not -- somehow not attend additional disclosures that come forward as a result of this discovery.

But, Your Honor, I want to go back to this question of relevance and my friend Mr. Dusseault, some of his points. I want to keep in mind that the issues that he has identified are issues of legislative fact. For example, immutability. Let's assume there's some kind of internal discussion about the immutability of sexual orientation; that the proponents decided not to share with the electorate. How could that somehow weigh or bear on any issue this Court has to decide?

Could it be that some study saying, "There's no question that sexual orientation is immutable, that it is internal," could be binding, that could be an admission by the defendant intervenors? Could we bind the State of California? Could we bind the electorate? Of course not.

Could it -- really, could it help this Court's analysis of that legislative fact on which expert witnesses

will be brought forward? I suggest not. And I think the Court was quite correct, that is an extraordinary stretch for relevance.

You know, the closer is the notion that there's some type of nonpublic internal documents going to the issue of voter motivation or going to the issue of some of the plausible purposes that Proposition 8 could serve.

Those are --

THE COURT: Well, he also touched upon the governmental interest in marriage, and the governmental interest in limiting the privileges and responsibilities of marriage to opposite sex couples. So that's something that may very well come out in these kinds of communications.

MR. COOPER: Well, Your Honor, it could.

THE COURT: And that's going to be an issue in our case.

MR. COOPER: It will be very much an issue in our case; and the issue will be, Your Honor, we submit, under binding Ninth Circuit precedent, again we submit respectfully, whether or not there is any conceivable legitimate state interest supporting or state purpose supporting Proposition 8.

But, Your Honor, regardless of the level of scrutiny, and we're obviously suggesting it will be rational basis, but regardless of what level of scrutiny it is, the information they seek, nonpublic information that never got to

a voter, that could not have weighed on the mind of the electorate itself has -- is simply irrelevant to that question whether or not the electorate embraced any particular purpose, and it doesn't matter.

And the other thing, Your Honor, is I do believe I have to disagree with Mr. Dusseault in terms of whether any Court, any Supreme Court case has looked at that. Our submission to you is that no Supreme Court case, not one, in which the purpose or intent of a referendum measure was at issue has considered the type of information, nonpublic information, never disclosed or presented to the electorate that the plaintiffs seek to discover in this case, not one.

Romer is their key case, is a perfect example of what the Court really does. It examines the purpose of the legislation on the basis of its text known to the voters, on the basis of its historical context, on the basis of how it fits into the rest of the legislative scheme, and on the basis of its effect.

In that case those, in *Romer*, those elements, no internal information whatsoever but those elements concluded -- brought the Court to conclude that all conceivable legitimate purposes could be excluded. It only had one and one evil and bad purpose.

Washington versus Seattle Mr. Dusseault cites. That case is a good example of exactly what I'm talking about.

Proposition I think it was 350 there, Initiative 350 in the State of Washington, the only thing that any of the Courts involved in that case looked at were public information like the text of the statute, the official ballot information provided to the voters, information in the media openly and at large.

There is -- not only is there no Supreme Court case, there's no Ninth Circuit case that looks at this kind of material in determining the purpose or intent, not one; and --

THE COURT: How about that Eighth Circuit case, the *South Dakota Farm Bureau* case?

MR. COOPER: Well, that's his case. That's his case and it's wrong.

THE COURT: We all have our cases.

(Laughter)

MR. COOPER: That's his case, okay, and I'm going to trudge through all of my cases and, Your Honor, I've got lots of them. And I simply submit to you that the issue never was really examined by Judge Bowman in that case, that South Dakota case. It appears that there wasn't any dispute among the parties in terms of this type of internal stuff that was indeed called upon, although I would simply hasten to add that even the Eighth Circuit in that case acknowledged that the most important, the most relevant material were the official ballot materials submitted to the voters themselves.

The *SASSO* case in this circuit, though, Your Honor, we think is the most directly on point case that we have; and, of course, the en banc decision, my friends correctly noted went en banc, as we had discussed the panel decision to the Court, but that case, too, looked only at these publicly-available-and-presented-to-the-voters-themselves information.

Finally, Your Honor, there's no California Supreme Court case. When the California Supreme Court is interpreting or identifying the purpose and the intent of a referendum in this state, it looks only at the text of the referendum, the official ballot literature, and the effect its context, its historical placement in context, and here's why. In fact, in the *Straus* case, when this very initiative was before the California Supreme Court and it had to be interpreted, that's all they looked at and here's why.

The Court explained, not in *Straus* but in another case, my colleague can remind me which case this comes from, but the opinion of the drafters who sponsor an initiative is not relevant since it does not represent the intent of the electorate. And we cannot say with assurance that the voters were aware of the drafters' intent. Yes, they have the South Dakota case. I suggest to you it just doesn't provide either binding authority or, for that matter, persuasive authority.

The final point I want to make before Mr. Pugno comes -- and thank you for your indulgence, Your Honor -- is

that this -- these inquiries to whatever extent, you know, these materials are relevant to the plaintiffs' case, these materials from the other side are relevant to our case, and this -- this dispute I hope will not degenerate into --

THE COURT: Nope. I think that's why I was exploring with Mr. Dusseault some of the alternatives that we might pursue here.

MR. COOPER: Thank you, Your Honor.

THE COURT: Very well. Yes, Mr. Pugno?

MR. PUGNO: Thank you, Your Honor. Andrew Pugno.

And just to clarify, I'm not just wandering in. I am counsel of record in this case, and it just so happens that I have published and done some teaching on the Political Reform Act and the open meeting laws, both of which were brought up by the Court today, so I wanted to address those two items.

THE COURT: All right.

MR. PUGNO: I want to submit, the current Political Reform Act in California marks the outer boundaries of what can constitutionally be compelled in the way of disclosure with regard to political activity. It all traces back to *Buckley versus Valeo* and that is when we're dealing with core protective First Amendment interests, there is a compelling interest, public interest in the knowing, in the disclosure of public information about the source of money and its corrupted influence -- because of its corrupted influence in politics.

And so all of the political --

THE COURT: Money is the only corrupting influence in politics?

MR. PUGNO: Well, I am sure there are others, but the special corruptive influence of money and politics underpins what had to be a compelling of public interest to justify forcing disclosure of political speech and political information.

The -- and really the entire Political Reform Act flows from that. Everything that it requires has to do with the source of money in campaigns. We haven't really talked about that today, but really everything from a hundred dollars plus, that has to be -- a donor has to be disclosed. When a campaign has received $50,000 or more from a donor, its advertisements have to say, "Major funding by," and then identify the top two donors to a ballot measure campaign. We see that at the bottom of television commercials now when they're run in California.

The paid political spokesperson who's paid $5,000 or more, the Political Reform Act requires the campaign to disclose and to put a disclaimer on saying, "This is a paid spokesperson."

The identity of a sponsor who provides funding and infrastructure, like a labor union or a corporation that provides the infrastructure and covers the overhead of a

political action committee, has to be disclosed.

THE COURT: Why would that be a good model for fashioning the limitations on third parties in this case?

MR. PUGNO: Our submission is the disclosure that's permissible with regard to the sources of funding has already all been made in compliance with the Political Reform Act through the periodic disclosures that are made, all of which are public documents, all of which the plaintiffs, intervenor plaintiffs, have.

What they seek in this case today is far beyond all of that, and it would be completely foreign to the Political Reform Act because the Political Reform Act nowhere requires the disclosure of who's making the decisions, what -- their internal communications, their deliberative process, anything that is not 200 or more pieces of mail, a billboard, a, television commercial, and so on, those don't even have to have disclaimers on them unless they are communicated to the public at large.

In other words, what I'm trying to say is that the Political Reform Act, and it didn't really occur to me until the Court brought it up today, really is the measuring stick for what constitutionally can be compelled in the way of disclosure; and it all traces back to the compelling government interest, public interest, in knowing the source of money in politics, and all of that has been disclosed. What is being

sought here is far beyond that. So I think that's very instructive.

The second point on the open meeting laws, on the open meeting laws, the Brown Act in California, the whole purpose is that public decisions be made in open and public.

THE COURT: This is the Ralph M. Brown Act; right?

MR. PUGNO: Yes, the Brown Act, that's correct.

There are really three purposes of the Act and that is that the public be given notice when a decision is going to be made, that the public be given a chance to be heard by the decision makers before the decision is made; and, third, that the decisions be made in an open and public forum with exceptions.

Okay. Private conversations among City Council members, members of the governing enacting body are not subject to the open meeting laws. A meeting with a constituent, the content of that meeting is not covered by the Ralph M. Brown Act.

So that tells us that that has nothing to do with this case, because there the decision makers are the City Council members or the County Board of Supervisors, and the public has an interest in seeing public decisions made in a noticed forum where there's an opportunity to be heard by the public and the decision is made publicly.

In this case, the enacting body is the electorate,

the people of California. And, so, it cannot be said that anything that bears on the decision of the electorate was not available to the electorate; or I should say that anything that is relevant to -- went into the voters' decision making was not available because it was public.

In other words, if our proponents, if our intervenors were City Council and they tried to make this decision to pass or not pass Proposition 8 in the backroom, that would violate the open meeting laws. But because they are not the decision makers, they're the proponents, the decision maker is the electorate, the open meeting law actually tells us that all of the public interest in notice and opportunity to be heard and that the decision is made publicly, all of that is satisfied in the open initiative process where the people themselves are the enacting body.

THE COURT: All right.

MR. PUGNO: Thank you.

THE COURT: Thank you.

Now may I take a brief break and then we'll set up in the jury room? And can I see Mr. Cooper, Mr. Burns, and Mr. Dusseault and Ms. Lee. Just an organizational matter going forward.

(Recess taken at 11:49 a.m.)

(Proceedings resumed at 11:54 a.m.)

(The following proceedings were heard in chambers:)

THE COURT: Ordinarily, Counsel, this is something we just discuss off the record; but given this case, I thought we better have it on the record in case anybody asks what we're talking about.

I wanted to alert you. There has obviously been a lot of public interest in this case. I was, therefore, pleased to see a rather sparse turnout in the courtroom this morning. I suppose discovery disputes don't generate the kind of interest that we've had in the past.

MR. COOPER: I actually thought I was in the wrong place.

THE COURT: But I don't think we can count on that going forward. And what we have done in similar situations where there has been more interest in the case than there are seats in the courtroom, is to set up an arrangement whereby the images of counsel, the witness, and the judge can be relayed into another courtroom. We use the ceremonial courtroom on the 19th floor of this building, which has a substantial amount of seating capacity.

So we can accommodate a lot more people in a case that has widespread public interest, and that proves to be of some value and interest to the media as well because they're able to come and go a lot more readily than they can in a courtroom where the proceedings are actually transpiring.

You saw in the courtroom today three cameras and

they aren't positioned where they would be, but they were approximately where they would be. I assume that none of you have any objection to that procedure.

ALL: No objection. None at all.

THE COURT: I appreciate that.

And we've also received some inquiries, although I have not responded to these inquiries, about projecting this image even beyond an overflow courtroom, and you might consider what your position is with respect to that.

I haven't acted on that in any way. I haven't even responded, but you might consider whether you have a concern about that, or you don't object to it, what limitations, if any, you think ought to be placed on it.

The case is going to generate the kind of attention that this case has already generated, will generate, is something that we ought to be aware of. So give it some thought, confer amongst yourselves.

Obviously, what we do is open and public and should be, but we want to do it in a way that's consistent with the rights of the parties and the appropriate decorum and dignity of the judicial process.

So, anyway, that's what I wanted to talk to you about.

MR. DUESSEAULT: Thank you, Your Honor.

How would you like us to get back to you on our

thoughts about that?

THE COURT: I suspect you can confer amongst yourselves and either get back to me in writing, a joint letter; or, perhaps, if you have separate positions, you can do that.

And maybe you don't need to. Maybe if you're perfectly happy with what I've told you about the overflow courtroom and you don't have any concern about, say, this image being broadcast beyond that, then you don't have to respond. I just wanted to give you a heads up. I didn't want you to be surprised.

MR. COOPER: Your Honor, may I ask you --

THE COURT: Sure.

MR. COOPER: -- what the display of the image beyond the overflow courtroom might contemplate? A public broadcast?

THE COURT: The image itself would be counsel, the witness, and the judge on a split screen, and that's what would be shown in the overflow courtroom; and if it extended beyond that, that's what would be shown.

MR. COOPER: I see. And do you contemplate that it might be shown on a public television station or something like that? I mean --

THE COURT: I certainly received an inquiry about that.

MR. COOPER: Okay. No surprise.

THE COURT: No, it isn't a surprise. It isn't a surprise. There are, of course, Judicial Conference positions on this. This is all in flux. As you know, the Ninth Circuit has broadcast certain arguments. I'm sure you know the recall litigation in, what was that, 2003?

MR. BURNS: Actually the *In Re: Marriage* and the *Straus* cases were televised.

THE COURT: Well, I was thinking of the Ninth Circuit, the challenge to the Governor Davis recall, that was broadcast in Ninth Circuit.

No, the State is far ahead of the Federal courts in both the technology and the sophistication in handling these issues; but the Ninth Circuit has, at least in that case, and I think in some other cases, permitted broadcast of those proceedings.

MR. FLYNN: And the Ninth Circuit also pretty regularly has the close-circuit to deal with overflow rooms because their rooms are much smaller.

THE COURT: Yes. So, anyway, I wanted to give you a heads up.

MR. COOPER: Thank you very much, sir. I appreciate that.

(Pause in proceedings.)

MR. DUESSEAULT: May I clarify one more thing, Your Honor?

THE COURT: Sure.

MR. DUESSEAULT: Your moot court rule, no moot court rule, if we have, for example, on the motion for summary judgment that's coming up, we've got one moving party, two opposing parties on the same brief, one person --

THE COURT: Well, each party gets to speak, but what I don't like are seriatims.

MR. COOPER: We appreciate the patience today.

THE COURT: One lawyer takes one issue, another lawyer takes another issue, and so forth.

ALL: Thank you.

THE COURT: Thank you very much, Counsel.

(Proceedings adjourned at 12:01 p.m.)

CERTIFICATE OF REPORTER

I, KELLY BRYCE, Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 VRW, Kristin Perry, et al v. Arnold Schwarzenegger, et al., were reported by me, a shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

Kelly Bryce

Kelly Bryce, CSR No. 13476

Monday, September 28, 2009

Exhibit A

AO 88B (Rev. 01/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises

UNITED STATES DISTRICT COURT

for the

Eastern District of California

Kristin M. Perry, et al.
Plaintiff
v.
Arnold Schwarzenegger, et al.
Defendant

Civil Action No. 09-cv-2292 VRW

(If the action is pending in another district, state where:
Northern District of California

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES

To: Schubert Flint Public Affairs, Inc.
1415 L Street, Suite 1250, Sacramento, CA 95814

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See attached Exhibit A for list of requested documents and electronically stored information.

Place:	Date and Time:
BOIES, SCHILLER & FLEXNER LLP 1999 HARRISON STREET, SUITE 900 OAKLAND, CA 94612	10/07/2009 12:00 pm

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 09/17/2009

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Plaintiffs Kristin M. Perry, et al., who issues or requests this subpoena, are:

Theodore H. Uno (tuno@bsfllp.com)
BOIES, SCHILLER & FLEXNER LLP, 1999 HARRISON STREET, SUITE 900, OAKLAND, CA 94612
(510) 874-1000

Civil Action No. 09-cv-2292 VRW

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the subpoena on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the subpoena at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the subpoena to *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because _____ ; or

❒ other *(specify):*

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

EXHIBIT A

DEFINITIONS:

1. "You" and "your" mean the organization identified in the Subpoena to which this Exhibit is attached. It includes all predecessor or successor organizations regardless of their names. It also includes all employees, agents, or representatives of that organization.

2. "Proposition 8" means the proposition that was placed on the November, 2008 ballot in the State of California and became known as "Proposition 8" for purposes of that election. No reference to "Proposition 8" shall be construed as limited by the date on which Proposition 8 received its official number ("8") or ballot title on the November, 2008 California ballot.

3. "Document" shall be synonymous in meaning and equal in scope to the broadest meaning provided by Rule 34 of the Federal Rules of Civil Procedure, including without limitation, hard copies, electronic documents, electronic or computerized data compilations, software, software images, or downloads. This term shall apply to documents, whether in hard copy or electronic form, on your computers or the computers of your employees and independent contractors or consultants, whether provided by you to such individuals or otherwise.

4. "Communication" means the transmittal of information in the form of facts, ideas, inquiries, thoughts, or otherwise, and without limitation as to means or method.

5. "Protect Marriage" means Proposition 8 Campaign Committee ProtectMarriage.com – Yes on 8, a Project of California Renewal.

6. The terms "any," "all," "each," and "every" should be understood in either their most or least inclusive sense as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of their scope.

7. Each of the words "reflecting," "relating," "supporting," "concerning," "evidencing," and "referring" as used herein include the common meanings of all those terms, as well as indirect and direct references to the subject matter set forth in the document request.

8. The words "and" and "or" shall be construed conjunctively or disjunctively, whichever makes the request most inclusive.

INSTRUCTIONS:

1. In producing documents and things, you are required to furnish all documents or things in your possession, custody, or control, or known or available to you, regardless of whether such documents or things are possessed directly by you or your employees, agents, representatives, accountants, attorneys, investigators, and consultants.

2. All documents should be produced in the same order as they are kept or maintained by you in the ordinary course of business, or the documents should be organized and labeled to correspond to the categories of the documents requested below.

3. All electronically stored information should be produced in the same manner as it is kept in the ordinary course of business, or that information should be organized and labeled to correspond to the categories in these requests.

4. If you object to a portion or an aspect of a request, state the grounds for your objection with specificity. If any document called for by these requests is withheld because you claim that such information is protected under the attorney-client privilege, work product doctrine, or other privilege or doctrine, you are requested to so state, specifying for each such document its title, subject matter, sender, author, each person to whom the original or copy was circulated, recipients of copies, the persons present during the communication, the identity of the privilege being asserted, and the basis upon which the privilege is claimed.

5. If production of any portion of a document is required pursuant to these requests, produce the entirety of that document.

6. If any document cannot be produced in full, produce to the extent possible, specifying the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you do have concerning the portion not produced.

7. Each request applies to the period from January 1, 2006 through and including the date of production.

REQUESTS:

1. All documents, including without limitation literature, pamphlets, flyers, direct mail, advertisements, emails, text messages, press releases, or other materials, that you distributed to

voters, donors, potential donors, or members of the media regarding Proposition 8.

2. All versions of any internet advertisement relating to Proposition 8 that you had any involvement in producing, creating, or distributing.

3. All versions of any television advertisement relating to Proposition 8 that you had any involvement in producing, creating, or distributing.

4. All versions of any radio advertisement relating to Proposition 8 that you had any involvement in producing, creating, or distributing.

5. All plans, schematics, and versions of the websites relating to Proposition 8 that you hosted, paid for, designed, or sponsored.

6. All documents that you prepared for use in communicating with voters, donors, potential donors, or members of the media, including but not limited to speeches, scripts, talking points, articles, notes, and automated telemarketing phone calls.

7. All documents constituting postings relating to Proposition 8 that were made by you on social networking websites, including but not limited to Facebook, MySpace, and Twitter.

8. All versions of any documents that reflect communications relating to Proposition 8 between you and any third party, including without limitation emails between you and Protect Marriage, documents you provided to Protect Marriage, and communications between you and members of the media.

9. Documents sufficient to show the title of everyone employed by you from January 1, 2006 to December 31, 2008, including but not limited to organizational charts.

10. All documents reflecting public media coverage of Proposition 8 referring or related to your organization.

11. All documents constituting, reflecting, or referring to coordination or cooperation among organizations and/or individuals supporting the passage of Proposition 8.

12. All minutes or other memorializations for meetings in which you participated concerning Proposition 8.

13. Documents sufficient to show all expenditures by you and payments to you in connection with Proposition 8.

Exhibit B

AO 88B (Rev. 01/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises

UNITED STATES DISTRICT COURT

for the

Eastern District of Virginia

Kristin M. Perry, et al.
Plaintiff
v.
Arnold Schwarzenegger, et al.
Defendant

Civil Action No. 09-cv-2292 VRW

(If the action is pending in another district, state where:
Northern District of California

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES

To: Connell Donatelli Holdings, Inc., c/o W MICHAEL HOLM, Agent for Service
8270 Greensboro Drive, Suite 700, McLean, VA 22102-0000

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See attached Exhibit A for list of requested documents and electronically stored information.

Place:	Date and Time:
BOIES, SCHILLER & FLEXNER LLP 1999 HARRISON STREET, SUITE 900 OAKLAND, CA 94612	10/07/2009 12:00 pm

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 09/17/2009

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Plaintiffs
Kristin M. Perry, et al. , who issues or requests this subpoena, are:

Theodore H. Uno (tuno@bsfllp.com)
BOIES, SCHILLER & FLEXNER LLP, 1999 HARRISON STREET, SUITE 900, OAKLAND, CA 94612
(510) 874-1000

Civil Action No. 09-cv-2292 VRW

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the subpoena on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the subpoena at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the subpoena to *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because _____ ; or

❒ other *(specify):*

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

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(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

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DEFINITIONS:

1. "You" and "your" mean the organization identified in the Subpoena to which this Exhibit is attached. It includes all predecessor or successor organizations regardless of their names. It also includes all employees, agents, or representatives of that organization.

2. "Proposition 8" means the proposition that was placed on the November, 2008 ballot in the State of California and became known as "Proposition 8" for purposes of that election. No reference to "Proposition 8" shall be construed as limited by the date on which Proposition 8 received its official number ("8") or ballot title on the November, 2008 California ballot.

3. "Document" shall be synonymous in meaning and equal in scope to the broadest meaning provided by Rule 34 of the Federal Rules of Civil Procedure, including without limitation, hard copies, electronic documents, electronic or computerized data compilations, software, software images, or downloads. This term shall apply to documents, whether in hard copy or electronic form, on your computers or the computers of your employees and independent contractors or consultants, whether provided by you to such individuals or otherwise.

4. "Communication" means the transmittal of information in the form of facts, ideas, inquiries, thoughts, or otherwise, and without limitation as to means or method.

5. "Protect Marriage" means Proposition 8 Campaign Committee ProtectMarriage.com – Yes on 8, a Project of California Renewal.

6. The terms "any," "all," "each," and "every" should be understood in either their most or least inclusive sense as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of their scope.

7. Each of the words "reflecting," "relating," "supporting," "concerning," "evidencing," and "referring" as used herein include the common meanings of all those terms, as well as indirect and direct references to the subject matter set forth in the document request.

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INSTRUCTIONS:

1. In producing documents and things, you are required to furnish all documents or things in your possession, custody, or control, or known or available to you, regardless of whether such documents or things are possessed directly by you or your employees, agents, representatives, accountants, attorneys, investigators, and consultants.

2. All documents should be produced in the same order as they are kept or maintained by you in the ordinary course of business, or the documents should be organized and labeled to correspond to the categories of the documents requested below.

3. All electronically stored information should be produced in the same manner as it is kept in the ordinary course of business, or that information should be organized and labeled to correspond to the categories in these requests.

4. If you object to a portion or an aspect of a request, state the grounds for your objection with specificity. If any document called for by these requests is withheld because you claim that such information is protected under the attorney-client privilege, work product doctrine, or other privilege or doctrine, you are requested to so state, specifying for each such document its title, subject matter, sender, author, each person to whom the original or copy was circulated, recipients of copies, the persons present during the communication, the identity of the privilege being asserted, and the basis upon which the privilege is claimed.

5. If production of any portion of a document is required pursuant to these requests, produce the entirety of that document.

6. If any document cannot be produced in full, produce to the extent possible, specifying the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you do have concerning the portion not produced.

7. Each request applies to the period from January 1, 2006 through and including the date of production.

REQUESTS:

1. All documents, including without limitation literature, pamphlets, flyers, direct mail, advertisements, emails, text messages, press releases, or other materials, that you distributed to

voters, donors, potential donors, or members of the media regarding Proposition 8.

2. All versions of any internet advertisement relating to Proposition 8 that you had any involvement in producing, creating, or distributing.

3. All versions of any television advertisement relating to Proposition 8 that you had any involvement in producing, creating, or distributing.

4. All versions of any radio advertisement relating to Proposition 8 that you had any involvement in producing, creating, or distributing.

5. All plans, schematics, and versions of the websites relating to Proposition 8 that you hosted, paid for, designed, or sponsored.

6. All documents that you prepared for use in communicating with voters, donors, potential donors, or members of the media, including but not limited to speeches, scripts, talking points, articles, notes, and automated telemarketing phone calls.

7. All documents constituting postings relating to Proposition 8 that were made by you on social networking websites, including but not limited to Facebook, MySpace, and Twitter.

8. All versions of any documents that reflect communications relating to Proposition 8 between you and any third party, including without limitation emails between you and Protect Marriage, documents you provided to Protect Marriage, and communications between you and members of the media.

9. Documents sufficient to show the title of everyone employed by you from January 1, 2006 to December 31, 2008, including but not limited to organizational charts.

10. All documents reflecting public media coverage of Proposition 8 referring or related to your organization.

11. All documents constituting, reflecting, or referring to coordination or cooperation among organizations and/or individuals supporting the passage of Proposition 8.

12. All minutes or other memorializations for meetings in which you participated concerning Proposition 8.

13. Documents sufficient to show all expenditures by you and payments to you in connection with Proposition 8.

Exhibit C

ALLIANCE DEFENSE FUND
Defending Our First Liberty

September 15, 2009

Via Overnight Delivery and Electronic Mail

Californians Against Eliminating Basic Rights
c/o James C. Harrison and Kari Krogseng
201 Dolores Avenue
San Leandro, California 94577

Re: *Perry v. Schwarzenegger*,
U.S.D.C., N.D. Cal., C-09-2292 VRW

Dear Mr. Harrison and Ms. Krogseng:

This letter is a follow-up correspondence regarding the subpoena to produce documents and electronically stored information previously issued to your organization by the Proposition 8 Proponents and ProtectMarriage.com (collectively referred to as the "Proposition 8 Proponents") in connection with the above-captioned case, *Perry v. Schwarzenegger*.

The Proposition 8 Proponents reiterate, as we indicated in the cover letter that accompanied the subpoena, that in responding to the document requests you should "follow the same narrowing constructions that the Proposition 8 Proponents and ProtectMarriage.com are following with respect to their responses to document requests from the Plaintiffs in this action." Further, we are not seeking your "organization's internal communications and documents, including communications between [your] organization and its agents, contractors, attorneys, or others in a similarly private and confidential relationship with the organization" and "to the extent [the requests] call for communications or documents prepared for public distribution, include only documents that were actually disclosed to the public."

The requests in the subpoena issued to your organization mirror the document requests that the Plaintiffs served on the Proposition 8 Proponents, with the significant caveat that the Proposition 8 Proponents—through the "narrowing construction" set forth above—attempted to exclude any documents we believe are irrelevant or constitutionally protected under controlling law. Unlike the Proposition 8 Proponents' attempts to exclude such materials in its subpoena to your organization, the Plaintiffs are insisting that the Proposition 8 Proponents provide documents that we believe are irrelevant and constitutionally protected. As a result, the Proposition 8 Proponents have objected to the Plaintiffs' requests. I have attached to this letter a copy of the Proposition 8 Proponents' objections.

15100 N. 90TH STREET • SCOTTSDALE, ARIZONA 85260 • PHONE 480-444-0020 FAX 480-444-0028 WEB WWW.TELLADF.ORG

Please understand that when you produce the requested documents, the Proposition 8 Proponents do not expect your organization to produce any of the materials to which we have objected in the attached document.

Nevertheless because the Proposition 8 Proponents and the Plaintiffs have been unable to reach an agreement on the permissible scope of discovery, we are filing with the Court a motion for a protective order. While the Proposition 8 Proponents will urge the Court that the objected-to materials are protected from disclosure, should the Court disagree with us, we would expect your organization to produce the same types of materials that we are required to produce.

If the Court rejects the motion for a protective order, the Proposition 8 Proponents will alert you of the need to provide additional documents at that time.

Thank you for your assistance in this matter.

Sincerely,

James A. Campbell

cc: All counsel of record

Encl.

Exhibit F

F-1

Dennis Herrera for San Francisco City Attorney (http://www.dennisherrera.org/)

Biography

Share (http://www.addthis.com/bookmark.php)
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Print
Font Size:
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San Francisco City Attorney Dennis Herrera leads an office that has won national acclaim as one of the most talented, progressive and innovative public law offices in the nation.

The first Latino ever to hold the office, Dennis was elected City Attorney of San Francisco in 2001 on a pledge to defend the integrity of our public institutions, to expand neighborhood protection efforts, and to enhance local government's accountability to its citizens and taxpayers. But it has been several of his bolder, affirmative litigation efforts for which Herrera has earned his national reputation.

- He filed the first government litigation in American history to challenge the constitutionality of marriage laws that discriminate against gay and lesbian couples. His case was among those that won a landmark 2008 decision that not only toppled the discriminatory marriage exclusion, but solidified civil rights protections for lesbians and gay men from discrimination in California.
- He led the nation's only public sector intervention to challenge the constitutionality of the Bush Administration's federal abortion ban, representing public hospitals and clinics that are often a safety net of last resort for poor and underserved women, and fighting to protect women's right to reproductive choice all the way to the U.S. Supreme Court.
- He led the groundbreaking public integrity investigation and lawsuit on behalf of the San Francisco

Unified School District that blew the whistle on a nationwide scam to defraud the federal E-Rate program, which helps expand access to technology to America's poorest school districts. His testimony before Congress on the case helped establish lasting protections against waste, fraud and abuse for countless public school children.

Beyond his role as City Attorney, Herrera is active participant in numerous local, state and national organizations. He serves on the board of the Hunter's Point Boys and Girls Club, and helps to impart his love of sports and recreation by helping to coach local youth soccer and baseball programs. He worked tirelessly to raise money statewide to support the 2008 campaign to defeat Proposition 8. He was chosen to serve on a judicially appointed committee on the independence of the judiciary, and he has spoken and written extensively on the importance of protecting our judicial branch of government from cynical political attacks. He also serves on the board of the American Constitution Society, a prestigious and influential national legal organization past leadership includes U.S. Attorney General Eric Holder and others.

Herrera was born on November 6, 1962 in Bay Shore, New York, and grew up in the nearby Long Island community of Glen Cove. He obtained his bachelor's degree at Villanova University in Pennsylvania, and went on to earn his juris doctor from the George Washington University School of Law in Washington, D.C. He was admitted to the California Bar in 1989.

With the inauguration of President Bill Clinton in January 1993, Herrera was appointed to the U.S. Maritime Administration in Washington, D.C., where he served under Transportation Secretary Federico Pena and helped lead implementation of the National Shipbuilding Initiative and Maritime Security Program. Herrera later returned to private practice in San Francisco as a partner in the maritime law firm of Kelly, Gill, Sherburne & Herrera, but remained active in local community service. He was appointed to the City's Transportation Commission by then-Mayor Willie L. Brown Jr., who later named him to the San Francisco Police Commission.

Herrera won high marks from police accountability advocates and police officers' association leaders alike for his fair-minded temperament and focus on bridging divides and solving problems. He would later be elected Police Commission President. As a commissioner, Herrera led a groundbreaking effort to develop police department protocols to assure fair treatment and protect the dignity of transgendered people.

Dennis Herrera and his wife, Anne, live in the Potrero Hill neighborhood of Dogpatch, with their seven-year-old son, Declan.

F-2

So City Attorney Dennis Herrera Was on 'No on 8' Executive Committee -- Can He Do That? And What Will Enraged LGBT Activists Think?

By Joe Eskenazi in Government, Politics Friday, Jan. 23 2009 @ 6:30AM

If LGBT activists excoriate Dennis Herrera for his role on the No on Prop. 8 executive committee, then he'll be feeling the heat from all sides

This week, after months of rancor and a public records request, the names of the 16 folks on the No on Prop. 8 executive committee began circulating on the Internet. Very quickly, this became a case of indignant LGBT blogger see, indignant LGBT blogger link.

We couldn't help but notice that one of the 16 folks mentioned is City Attorney Dennis Herrera. This prompts two questions: Is a city attorney legally allowed to serve on the executive board of a statewide political action committee, potentially charting strategy, allotting millions of dollars, and fund-raising from folks he may well see in court one day?

And, secondly, we've written how Herrera's tenacious legal work on behalf of advancing gay marriage has helped make him a solid mayoral candidate. Does serving on the executive committee of the organization that laid a $45 million egg and lost the electoral fight for marriage equality tarnish his candidacy?

The answer to these questions, respectively, are "yes" and "perhaps." Let us explain.

The handful of California legal and good-government experts *SF Weekly* called could not recall a single instance in which a city attorney was so heavily involved in a major statewide political campaign (face it, San Francisco is just a political town).

That being said, all agreed that while Herrera's involvement was highly unusual, it was also certainly legally permissible.

"It's unusual for a city attorney to get involved in a statewide race. But this was an unusual race and an unusual election issue that affected San Francisco more than most other statewide measures," said Bob Stern, president of Los Angeles' Center for Governmental Studies and a former general counsel for the Fair Political Practices Commission. "Herrera was bringing the lawsuit, not judging it."

(Incidentally, San Francisco law prohibits the city attorney from weighing in on local candidates and ballot measures.).

Derek Cressman, the western states regional director of California Common Cause, also saw nothing improper about San Francisco's city attorney serving on a statewide PAC. But he did perceive one red flag: "If Herrera was in a position

F-3

Statement of Organization
Recipient Committee

STATEMENT OF ORGANIZATION

Type or print in ink

Date Stamp

CALIFORNIA FORM 410

For Official Use only

Statement Type

☐ **Initial**
Not yet qualified ☐ or

Date qualified as committee

■ **Amendment**
List I.D. number:
1259396
10/3/2003
Date qualified as committee (If applicable)

☐ **Termination - See Part 5**
List I.D. number:
#
Date of Termination

1. Committee Information

NAME OF COMMITTEE
No on 8, Equality for All

STREET ADDRESS (NO P. O. BOX)

CITY | STATE | ZIP CODE | AREA CODE/PHONE

MAILING ADDRESS (IF DIFFERENT)

OPTIONAL: FAX/E-MAIL ADDRESS

COUNTY OF DOMICILE

COUNTY WHERE COMMITTEE IS ACTIVE IF DIFFERENT THAN COUNTY OF DOMICILE

Attach additional information on appropriately labeled continuation sheets.

2. Treasurer and Other Principal Officers

NAME OF TREASURER

STREET ADDRESS

CITY | STATE | ZIP CODE | AREA CODE/PHONE

NAME OF ASSISTANT TREASURER, IF ANY

STREET ADDRESS

CITY | STATE | ZIP CODE | AREA CODE/PHONE

NAME AND POSITION OF OTHER PRINCIPAL OFFICER(S), IF APPLICABLE
Dennis Herrera

MAILING ADDRESS

CITY | STATE | ZIP CODE | AREA CODE/PHONE
San Francisco | CA | 94102 | 415-554-4700

3. Verification

I have used all reasonable diligence in preparing this statement and to the best of my knowledge the information contained herein is true and complete. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____ (DATE) By _____ (SIGNATURE OF TREASURER OR ASSISTANT TREASURER)

Executed on _____ (DATE) By _____ (SIGNATURE OF CONTROLLING OFFICEHOLDER, CANDIDATE, OR STATE MEASURE PROPONENT)

Executed on _____ (DATE) By _____ (SIGNATURE OF CONTROLLING OFFICEHOLDER, CANDIDATE, OR STATE MEASURE PROPONENT)

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RR 203

F-4

Published: September 17,2008

Send to a friend

Brad Pitt Opposes Prop. 8; Donates $100k: No on Prop. 8

LOS ANGELES, Sept. 17 /PRNewswire/ -- Brad Pitt today donated $100,000 to fightCalifornia's Proposition 8, which would eliminate same sex couples' right to marry.

Prop. 8 threatens to take away important benefits like health insurance, eliminate protections for children, and complicate decision-making related to medical emergencies and other situations. These and other issues are not resolved by domestic partnerships.

"Because no one has the right to deny another their life even though they disagree with it, because everyone has the right to live the life they so desire if it doesn't harm another, and because discrimination has no place in America, my vote will be for equality and against Proposition 8," Pitt said.

"The entertainment industry should view this contribution as a challenge. It is our hope that others in the entertainment industry will step up and match Brad Pitt's heroic commitment to equality and to defeating Prop. 8," said Chad Griffin, political strategist for the No on 8 campaign. "This isn't a special interest issue -- this measure affects every business and every family. WithCalifornia's budget and the national economy in chaos, the last thing we need is an unnecessary measure that threatens health benefits and protections for children."

For more information or to contribute, visit
http://www.votenoonproposition8.com

Paid for by Californians Against Eliminating Basic Rights, No on Prop. 8 San Francisco City

Attorney Dennis Herrera, Chair PO Box 2973,Beverly Hills, CA 90213 T: 310.285.2316 - ID#1307787

Californians Against Eliminating Basic Rights is a member of the Equality for All Coalition

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Events

You Are Cordially Invited to Join Event Champions and Chairs for

An Evening to Benefit the No On 8 Campaign

Special performance by Melissa Etheridge and Mary J. Blige

Tuesday, October 21
6:30 p.m.

At the home of Ron Burkle
Green Acres Estate
Beverly Hills

Champions: Steve Bing, David C. Bohnett & Tom Gregory, Jonathan Lewis

Chairs: John & Mike August, Ron Burkle, Kate Capshaw & Steven Spielberg, Bruce Cohen & Gabe Catone, David Geffen, Chad Griffin, Frank Pond, Hon. Dennis Herrera, Hon. Gavin Newsom, Hon. Fabian Nuñez, Hon. Antonio Villaraigosa, Equality California - Geoff Kors, Human Rights Campaign - Joe Solmonese, L.A. Gay & Lesbian Center - Lorri L. Jean, National Center for Lesbian Rights - Kate Kendell

Honorary Chair: Barbra Streisand

Hosts: Julie Anderson & Amy Dantzler, Tess Ayers & Jane Anderson, Shelley Freeman, Susan Feniger & Dean Hansell, Jason Hendler & Chad Billmyer, John Gile, Jeffrey & Marilyn Katzenberg, Kathy Kennedy & Frank Marshall, Jonathan King, Hugh Kinsellagh & Dana Perlman, Kelly Lynch & Annie Goto, Rayman Mathoda & Avantika Shahi, Gary Meade, Bill Resnick & Doug Cordell, Dan Ricketts & Steve Frankel, Fred Paul & Eric M. Shore, Joel Safranek, Lorraine & Sid Sheinberg

Sponsors: Steve Afriat & Curtis Sanchez, Jehan F. Agrama & Dwora Fried, Mark Baer, Tammy Billik, Ilene Chaiken, Elizabeth Chase & Janelle Eagle, Chris Cook, Clifford Davidson & Andy Sfeir, Craig Dougherty & Tony Leonhardt, Brian Hargrove and David Hyde Pierce, Chuck Henry, Ellen Huang, Barry Karas, Barbara Kaufman, Barton H. Kogan, Kirk & Rob Marcolina, George Mariella, Jym Genesta & Tommy Chambers, Rafael Medina, Loren Ostrow & Brian Newkirk, David Pence & Andrew Georgiou & Yael Swerdlow, Vahan Saroians, Rodney Scott, Curt Shepard & Alan Hergott, Dannielle Thomas, Bart Verry & Mark Arteaga, Lew Wolf

Co-Chairs: Greg Berlanti, Hon. John Duran, Fall Out Boy, Michele & Rob Reiner, Anita May Rosenstein

List of supporters still in formation.

$1,000 donation per person or $10,000 Event Sponsor includes reception and entertainment

For the private dinner preceding the reception (seating limited to 75 guests):
$250,000 Champion | $100,000 Chair | $50,000 Co-Chair | $25,000 Host

This is sold out!

For more information please call 818.905.9831

More Information: www.NoOnProp8.com/laevent

Back to Events

Submit an Event

Our affiliated organizations: Equality California Institute & Equality California PAC
2370 Market St. 2nd Floor, San Francisco, CA 94114 phone: 415.581.0005 fax: 415.581.0805

F-6

2005 Press Releases

For Immediate Release: January 21, 2005

EQUALITY CALIFORNIA CO-HOSTS WEEKEND MARRIAGE SUMMIT AND ACTIVIST TRAINING WITH ASSEMBLYMEMBER MARK LENO, NCLR AND OTHER LOCAL ORGANIZATIONS

Sunday, January 23rd, 2005, 9:30 AM - 3:30 PM
State Building, Basement Auditorium
455 Golden Gate Ave, near the Civic Center in San Francisco
Free Admission/ Refreshments Provided

San Francisco - On Sunday, January 23, 2005, Equality California is co-hosting a marriage summit and activist training to give supporters the latest update on the marriage litigation from the attorneys, legislators and organizations leading the charge. Press are welcome to attend. The agenda is below.

10:00-10:15 AM Welcome, Organizational Sponsors Introduced
10:15-10:45 AM **California Litigation Update**
Courtney Joslin, NCLR, lead counsel in marriage litigation
Dennis Herrera, SF City Attorney
Plaintiffs: John Lewis & Stuart Gaffney

10:45-11:00 AM **Assemblymember Mark Leno**,AB 19: Religious Freedom & Marriage Protection Act

11:00-11:10 AM **Geoffrey Kors, EQCA Executive Director**
Overview of 2005 Plans to combat discrimination and secure equality for LGBT families

11:15-12:00 PM **Part One of Panel Breakout Sessions** (select one)

1. **Building an Asian Pacific Islander Movement for Marriage Equality** (Andy Wong moderator, panelists Felix Tsai (GAPA) Stuart Gaffney and John Lewis (EQCA/MECA)

2. **Building Coalitions: Finding Common Goals and Strategies with non-LGBTQ Groups**
Moderator: Eve Lubalin - PFLAG Statewide Advocacy Coordinator for CA Panelists include: Nicole Yelich (Political Organizer, NARAL Pro-Choice California), Diane Harrison (President and CEO, Planned Parenthood Golden Gate)

3. **Prop 54/Three Strikes/Lessons:** Moderator: Rafael Mandelman Panelists include: Maya Harris (Racial Justice Project, ACLU) Steve Phillips (Power PAC.org), Stephanie Ong (Hope Road Consulting)

4. **Marriage Equality in the Latino Community** Moderator: David Campos Panelists: Mark Sanchez (Commissioner, San Francisco Board of Education); Victor Marquez (Former President, La Raza Lawyers Association)

12:00-12:45 PM Lunch (on your own)

12:45-1:30 PM **Part Two of Panel Breakout Sessions** (select one)

1) **Why Marriage Equality? Why Now?**
Moderator: Debra Walker/Michael Goldstein Panelists include: Leslie Katz (Chair of SF Democratic Party), Joey Cain (Chair of SF Pride Board), Devina Kotulski (Marriage Equality)

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[Additional counsel listed on signature page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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 for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants.

CASE NO. 09-CV-2292 VRW

PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S JOINT OPPOSITION TO DEFENDANT-INTERVENORS' MOTION FOR A PROTECTIVE ORDER

Date: September 25, 2009
Time: 10:00 a.m.
Judge: Chief Judge Walker
Location: Courtroom 6, 17th Floor

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RULES

I. INTRODUCTION

Defendant-Intervenors—the official proponents of Proposition 8 and intervenors in this case—seek a protective order preventing any and all discovery into documents or communications concerning Proposition 8, except those "available to the public at large." Doc #187-14 at 3. Despite Plaintiffs' attempts to negotiate the scope of discovery and willingness to maintain the confidentiality of specific information where confidentiality is appropriate, Defendant-Intervenors instead stake out a rigid, across-the-board position that virtually none of their documents are discoverable no matter what they may say or address. Defendant-Intervenors' position, and their broad-strokes motion for protective order, lack merit.

In defense of their position, Defendant-Intervenors try to distract this Court from the numerous important issues in play in this case, and to recast the case altogether as one about "protection of core First Amendment activities." Doc #187 at 7. But this case is, and always has been, about the vindication of Plaintiffs' rights under the United States Constitution—rights that are violated every day that California's Proposition 8 remains in effect. In order to build their case and be in a position to address issues that may arise at trial, Plaintiffs are entitled under the Federal Rules of Civil Procedure to liberal discovery of any non-privileged information that may lead to the discovery of admissible evidence.

Defendant-Intervenors' attempt to portray themselves as like any other "California voter or any person who weighed in on the Prop. 8 debate," *id.* at 10, is disingenuous and must fail. Defendant-Intervenors voluntarily made themselves parties to this case. As such, they have a responsibility, not necessarily co-extensive with that of third-parties, to produce any and all non-privileged documents that are relevant to *any* issue that may be part of a trial of Plaintiffs' important claims. Moreover, Defendant Intervenors' attempt to invoke the First Amendment to block the discovery of virtually all of their documents cannot be supported. Defendant-Intervenors' attempts to avoid such discovery entirely and shield relevant documents—documents that may contradict the very arguments they advance in this case—lack merit, and their motion should be denied.

II. ARGUMENT

A. The Disputed Discovery Is Relevant to the Factual Disputes the Court Identified as Requiring Resolution and to the State Interests Advanced by Defendant-Intervenors

Defendant-Intervenors have consistently argued that "there are no genuine issues of material fact that must be resolved at trial" and that they "are entitled to judgment as a matter of law." Doc #172-1 at 30. It thus comes as no surprise that they believe *all* discovery propounded to them is irrelevant and that the Court need only rely on public records and prior California Supreme Court opinions to adjudicate this matter. Doc #187 at 9, 11-13. While Plaintiffs believe that there are certain issues in this case that can be resolved in *Plaintiffs'* favor as a matter of law and without resort to detailed factual inquiry (and so argued in their motion for a preliminary injunction), the Court has set this case for trial in January 2010 and set a discovery schedule within which the parties must prepare the case for a full trial on the merits. The issues on which Plaintiffs intend to prepare a record for trial include, but are not limited to, the fifteen specific factual issues that the Court identified in its June 30, 2009 Order. Doc #76 at 7-9.

In spite of the Court's direction that the parties prepare this case for trial, Defendant-Intervenors have steadfastly maintained their position that no trial is needed and that there are no factual issues to be resolved. This motion is simply the latest manifestation of that position, as Defendant-Intervenors ask the Court to prohibit virtually all discovery sought by Plaintiffs, taking the remarkable position that even readily accessible "documents that were available to the electorate at large" are not relevant or admissible. Doc #187 at 9 n.2. Thus, according to Defendant-Intervenors, documents distributed to millions of potential voters specifically laying out why they should support Prop. 8 are not discoverable if the list of recipients was targeted, for example, to all registered Republicans or voters who had supported particular causes in the past. Defendant-Intervenors also would take the position that *no* internal document, or communication with a third party, including consultants or other vendors assisting them on the campaign, could possibly be relevant regardless of what it says, even if it would constitute a binding admission or a statement directly at odds with representations that Defendant-Intervenors now make to the Court.

In an effort to reach compromise, Plaintiffs negotiated in good faith with Defendant-Intervenors to narrow document requests, even offering to enter into confidentiality agreements in order to address their fears of harassment and reprisal. *See* Declaration of Matthew D. McGill, ¶ 2-3, attached hereto as Exh. A. Plaintiffs' offers to compromise, however, were rejected. *Id.* at ¶ 3.

1. Defendant-Intervenors Misconstrue Relevance Standards and Conflate Relevance with Admissibility

Defendant-Intervenors' limited view of what is relevant and discoverable runs counter to the broad scope of discovery permitted by the Federal Rules of Civil Procedure. "The scope of discovery under Rule 26 is broad; '[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.'" *Castaneda v. Burger King Corp.*, --- F.R.D. ---, 2009 WL 2748932, at *2 (N.D. Cal. Aug. 19, 2009) (quoting Fed. R. Civ. P. 26(b)(1)) (alteration in original). Here, Defendant-Intervenors assert that they will only produce documents "available to the public at large." Doc #187-14 at 3. This position is plainly designed to prevent Plaintiffs from ever seeing anything but the most carefully crafted and broadly disseminated messages relating to their campaign. And Defendant-Intervenors offer no explanation of why a communication to the voters "at large" may be relevant, but a communication to a targeted but still large group of voters could not possibly be relevant.

Moreover, Defendant-Intervenors' position confuses the separate standards for admissibility at trial and for discovery by improperly seeking to limit Plaintiffs' discovery to those documents admissible at trial. *See* Doc #187 at 10 ("The Supreme Court, however, has never authorized the use of the type of [nonpublic] information at issue here to ascertain the purpose of an initiative"). But "[a]s emphasized in the Advisory Committee Notes [to Rule 26], the language of Rule 26(b) 'make[s] clear the broad scope of examination and that it may cover *not only* evidence for use at trial but also inquiry into matters in themselves *inadmissible as evidence* but which will lead to the discovery of evidence.'" *Del Campo v. Kennedy*, 236 F.R.D. 454, 457 (N.D. Cal. 2006) (emphasis added) (alteration in original). Defendant-Intervenors cannot draw a bright line, as they attempt to here, that a document is under no circumstances discoverable unless it was shared with the public at large.

Furthermore, Defendant-Intervenors focus myopically on a single issue—voter intent—while ignoring all other issues to which Plaintiffs' discovery requests may be relevant and other purposes for which documents produced may be admissible. Doc #187 at 10. Specifically, and as explained below, Plaintiffs' discovery requests are reasonably calculated to lead to the discovery of (1) admissible evidence concerning the rationality and strength of Defendant-Intervenors' purported state interests and whether voters could reasonably accept them as a basis for supporting Prop. 8, and (2) admissible evidence related to the factual disputes the Court identified as matters to be resolved at trial in its June 30, 2009 Order. As such, the discovery Plaintiffs seek is reasonably calculated to lead to the discovery of admissible evidence and is thus discoverable.[1]

2. Plaintiffs' Discovery Is Reasonably Calculated to Lead to the Discovery of Party Admissions and Impeachment Evidence Regarding Defendants' Positions in this Case and the Factual Disputes Identified by the Court

Defendant-Intervenors advance just one argument about the relevance of the disputed discovery: that it is irrelevant because the requests seek to "ascertain the purpose of an initiative." Doc #187 at 10. While Plaintiffs believe that much of their discovery is in fact relevant to this issue, Plaintiffs' discovery is *not*, and does not have to be, limited just to the discovery of the motivations for supporting Prop. 8; rather, the discovery propounded is also calculated to lead to the discovery of party admissions and impeachment evidence regarding the purported state interests that Defendant-Intervenors' advance and the factual disputes identified in the Court's June 30, 2009 Order. Certainly statements made by Defendant-Intervenors that are at odds with the positions they are taking in this action would not just be discoverable, but would be *admissible* at trial as a party admission, or could

---

[1] The discovery does not intrude on the "subjective, unexpressed motivations" of Prop. 8's proponents. Doc #187 at 8. Defendant-Intervenors refuse to produce communications they made to tens of thousands of voters, on the theory that those communications were targeted and not made available to every voter in the State. They refuse to produce communications, even when made outside of their own organization, that would demonstrate their conclusions about what voters might accept as purposes and rationales for Prop. 8. They refuse to produce information that would show the size and strength of forces mustered against gay and lesbian individuals, even as they assert that gay and lesbian individuals are a politically powerful group. Defendant-Intervenors' evaluation of Prop. 8 and communications with others about it are relevant to understanding the "immediate objective" and "ultimate effect" of Prop. 8, Doc #76 at 9, necessary to prepare for depositions and cross-examination at trial, and reasonably calculated to lead to the discovery of other relevant information.

be used as impeachment evidence. *See, e.g.*, Fed. R. Evid. 801(d). Indeed, given the Defendant-Intervenors' role as the official proponents of Prop. 8, their voluntary and willful participation in the case, and their role as the defenders of Prop. 8 in this case, their prior statements or admissions regarding the purported state interests they now advance and the factual underpinnings of those asserted interests are relevant as to whether these interests are indeed legitimate. Simply put, Plaintiffs have the right to discover these prior statements or admissions to properly challenge Defendant-Intervenors' current characterizations of the positions they espouse in this case.

3. Plaintiffs' Discovery Is Reasonably Calculated to Lead to the Discovery of Admissible Evidence Concerning the "Motivations for Supporting Prop. 8"

Similarly, whether a defendant acted with discriminatory intent or purpose is a relevant consideration in an equal protection challenge. *See Washington v. Davis*, 426 U.S. 229, 239-40 (1976); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484-85 (1982) ("when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations."); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973). The Court has already recognized the relevance of this evidence, identifying the "motivations for supporting Prop. 8" as one of the fifteen factual disputes that likely need to be resolved at trial. Doc #76 at 9.

More specifically, where intent is relevant, "the Court may look to the nature of the initiative campaign to determine the intent of the drafters and voters in enacting it." *City of Los Angeles v. County of Kern*, 462 F. Supp. 2d 1105, 1114 (C.D. Cal. 2006) (citing *Seattle Sch. Dist. No. 1*, 458 U.S. at 471); *see also S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593-96 (8th Cir. 2003) ("Plaintiffs have the burden of proving discriminatory purpose and can look to several sources to meet that burden."). In *South Dakota Farm Bureau*, the Court considered whether the drafters of a referendum purposely discriminated against interstate commerce. 340 F.3d at 593. The Court observed that "[t]he most obvious [source of evidence] would be direct evidence that the drafters of Amendment E or the South Dakota populace that voted for Amendment E intended to discriminate against out-of-state businesses." *Id*. Accordingly, the Court reviewed both public and nonpublic

materials, including notes from the amendment drafting meetings and testimony by individuals involved with the drafting of the proposed amendment, focusing on the "desire" of the drafters to block out of state entities from farming in South Dakota. *Id.* The court noted that it would be impossible to ascertain the intention of all of the voters; however, the Court did "have evidence of the intent of individuals who drafted the amendment that went before the voters. It is clear that those individuals had a discriminatory purpose." *Id.* at 596. Thus, on the strength of the drafters' public and nonpublic statements, the court held that the referendum was unconstitutional as it was motivated by a discriminatory purpose. *Id.* at 596-98.

Defendant-Intervenors' reliance on *SASSO v. Union City*, 424 F.2d 291 (9th Cir. 1970) is unavailing.[2] *SASSO* is not on point, both because it did not concern a discovery dispute, and also because Plaintiffs are not seeking the "private attitudes of voters." That decision sheds no light on whether the beliefs of Prop. 8's official proponents—*voluntary parties* to this litigation who willfully sought out party status and likely will present testimony at trial—are relevant to a determination of discriminatory purpose. Furthermore, *SASSO* was decided in 1970, six years before the Supreme Court decided *Washington v. Davis*, 426 U.S. 229 (1976), which held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of a protected class. In *Washington*, the Supreme Court held that whether there was a discriminatory intent in passing a law was a relevant inquiry. 426 U.S. at 239-40. Accordingly, discovery into Defendant-Intervenors' "motivations for supporting Prop. 8" is relevant and appropriate.

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[2] Defendant-Intervenors' reliance on other case law cited in its motion is equally misplaced. *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997) was reversed en banc. *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997)(en banc). The en banc panel determined that the proper inquiry was voter notice, not voter intent and did not address the type of discovery at issue in this action. *See id.* at 846. *Crawford v. Board of Education*, 458 U.S. 527 (1982) is irrelevant to this inquiry as it concerned a legislatively created referendum—not the type of discovery at issue in this action. Finally, Defendant-Intervenors' reliance on California law is unavailing given that federal courts "may look to the nature of the initiative campaign to determine the [discriminatory] intent of the drafters and voters in enacting it." *City of Los Angeles*, 462 F. Supp. 2d at 1114.

4. Defendant-Intervenors' Position Is Internally Inconsistent and Designed to Prevent Discovery Going to Issues Relevant to this Case

Defendant-Intervenors maintain that the only documents they will produce are communications that were "available to the public at large." Doc #187-14 at 3. This "compromise position," Doc #187 at 9 n.2, is at odds with the reality of their Yes on 8 campaign, which relied heavily on targeted messaging, which by definition constitutes messages *not* "available to the public at large." *See* F. Schubert & J. Flint, *Passing Prop 8*; *Smart Timing and Messaging Convinced California Voters to Support Traditional Marriage*, Politics (Feb. 2009), attached hereto as Exh. B. Accordingly, the documents that will be produced under Defendant-Intervenors' "compromise position" will not accurately reflect the "motivations for supporting Prop. 8" or provide Plaintiffs with a complete picture of relevant evidence regarding their purported state interests and the factual disputes identified by the Court. Such a limitation would allow Defendant-Intervenors to paint an incomplete picture of the information they deliberately communicated to voters and the positions they took on issues that are now directly relevant to this lawsuit. The Court should not allow the Defendant-Intervenors the opportunity to game their discovery obligations.

Ironically, Defendant-Intervenors' argument that Plaintiffs' discovery is irrelevant is undermined by the discovery *they* propounded on third-parties, which seeks the same information that Defendant-Intervenors now argue is irrelevant and privileged.[3] Doc #182 at 4-48. While Defendant-Intervenors are asserting the complete irrelevance of any documents that they possess as a party to this litigation, they simultaneously are aggressively pursuing documentary evidence from other parties and non-parties alike.

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[3] Since Prop. 8 was passed and became the law of California, information obtained from its proponents is obviously relevant to the issues in this litigation in a way that information sought from those who unsuccessfully opposed it is not.

B. Defendant-Intervenors' Claim to a Sweeping First Amendment Privilege Against Party Discovery Is Makeweight

Defendant-Intervenors contend that even if the documents Plaintiffs seek are discoverable, ***all of them*** nevertheless are subject to a First Amendment privilege against disclosure. That sweeping claim of privilege fails for at least three reasons.

1. Although Defendant-Intervenors' communications concerning the Prop. 8 referendum campaign are core political speech and undeniably entitled to broad First Amendment protection, Defendant-Intervenors should not now be heard to complain that Plaintiffs are seeking discovery of the communications most relevant to Plaintiffs' claims for relief. Rather than participate as *amici curiae*, Defendant-Intervenors elected to intervene in this action as parties, and they cannot now evade the responsibilities that attach to the party status they voluntarily assumed, including the obligation to comply with reasonable requests for discovery.

Defendant-Intervenors cite several cases upholding a First Amendment privilege against compelled disclosure of confidential membership information, but in ***none*** of those cases was the entity resisting disclosure a voluntary participant in underlying litigation. In *NAACP v. Alabama*, 357 U.S. 449 (1958), the NAACP was the respondent to an equity suit brought by the Attorney General of Alabama. *Id.* at 452-53. *Bates v. City of Little Rock*, 361 U.S. 516 (1960) involved generally-applicable ordinances requiring organizations within the municipalities to provide lists of their members. *Id.* at 517-18. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) concerned a legislative committee's subpoena to which the NAACP was the respondent. *Id.* at 540. Likewise, *Dole v. Service Employees Union*, 950 F.2d 1456 (9th Cir. 1991) and *Brock v. Local* 375, 860 F.2d 346 (9th Cir. 1988), involved subpoenas issued by the Department of Labor to certain labor unions. *See Dole*, 950 F.2d at 1458; *Brock*, 860 F.2d at 348.[4]

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[4] The district court rulings cited by Defendant-Intervenors are no different. *See In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2009 U.S. Dist. LEXIS 66005 (D. Kan. May 28, 2009) (defendants resisting discovery of communications with trade associations); *Anderson v. Hale*, No. 00-C-2021, 2001 WL 503045 (N.D. Ill. May 10, 2001) (defendant resisting subpoena of third-party electronic records); *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202 (N.D. Cal. 1983) (defendant LGBT advocacy group resisting discovery from plaintiffs). Though, in *Coors*, the district court seemed to frown upon the notion that one could "impl[y] a waiver of . . . constitutional safeguards by reason of the party's decision

[Footnote continued on next page]

Unlike the NAACP and the unions in *Dole* and *Brock*, Defendant-Intervenors chose to be parties in this litigation. And their resistance to Plaintiffs' reasonable discovery is particularly inappropriate given that, in their recent motion for summary judgment, Defendant-Intervenors have squarely placed at issue the subjective intentions of Prop. 8's supporters by denying that Prop. 8 was motivated by discriminatory animus toward gay and lesbian individuals. *See* Doc #172-1 at 107 ("It is simply implausible that in acting with surgical precision to preserve and restore the venerable definition of marriage, the people of California somehow transformed that institution into an instrument of bigotry against gays and lesbians."); *id*. at 111 ("Plaintiffs' claim that animus against gays and lesbians is the only possible explanation for the enactment of Proposition 8 is false"). Similarly, in their case management statement, Defendant-Intervenors announced that they would not be able to reach stipulations with Plaintiffs regarding any of the factual underpinnings of the governmental interests on which they now rely. *See*, *e.g.*, Doc #139 at 23 (refusing to take a position on "[w]hether the exclusion of same-sex couples from marriage leads to increased stability in opposite sex marriage or alternatively whether permitting same-sex couples to marry destabilizes opposite sex marriage"). It is therefore Defendant-Intervenors' own litigating positions that necessitate the discovery sought by Plaintiffs.

2. Defendant-Intervenors have failed to demonstrate how the discovery Plaintiffs seek will diminish Defendant-Intervenors' associational freedoms. Quite unlike nearly all of the cases Defendant-Intervenors cite, Plaintiffs' discovery requests do not seek ProtectMarriage.com's membership list, or a list of donors to the "Yes on 8" cause—even though the latter is available for public inspection under California law. California Sec'y of State, Campaign Finance: Proposition 008, http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1302602&session=2007 (last

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[Footnote continued from previous page]

to instigate litigation," the district court itself recognized that "given the facts at bar" the issue was not implicated there. 570 F. Supp. at 209. Defendant-Intervenors do cite two cases where the party initiating the litigation thereafter resisted discovery, *see Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987); *Christ Covenant Church v. Town of Sw. Ranches*, No. 07-60516, 2008 U.S. Dist. LEXIS 49483 (S.D. Fla. June 29, 2008), but in each case the court found that the First Amendment privilege could not be sustained where the plaintiff "ha[d] placed certain information into issue." *Grandbouche*, 825 F.2d at 1467; *see also Christ Covenant Church*, 2009 U.S. Dist LEXIS 49483, at *28-*32.

visited Sept. 18, 2009). Plaintiffs rather seek documents relating to the issues the Court has identified as central to this litigation and Defendant-Intervenors' factual contentions concerning the same, including "the nature of the initiative campaign to determine the intent of the drafters and voters in enacting it." *City of Los Angeles*, 462 F. Supp. 2d at 1114.

Courts in this Circuit have rejected claims of First Amendment privilege where a litigant seeks to apply it "not to specific membership documents, but instead to prevent any discovery of her files." *Wilkinson v. FBI*, 111 F.R.D. 432, 436 (C.D. Cal. 1986); *see also id.* ("While it is clear that the privilege may be asserted with respect to specific requests for documents raising these core associational concerns, it is equally clear that the privilege is not available to circumvent general discovery."). Yet, relying principally on an unpublished district court decision from Kansas, Defendant-Intervenors argue that ***all*** of their political advocacy communications except those disseminated to the "electorate at large" are privileged from disclosure. Doc #187 at 18 (citing *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2009 U.S. Dist. LEXIS 66005 (D. Kan. May 28, 2009)).

Above and beyond the fact that Defendant-Intervenors chose to participate in the lawsuit and chose to place their political communications in issue, there at least two features that distinguish this case from *In re Motor Fuel Temperature Sales Practices Litigation*.

First, Defendant-Intervenors' claim of privilege is not remotely limited to "confidential communications." *Motor Fuel Litigation*, 2009 U.S. Dist. Lexis 66005, at *45. To the contrary, Defendant-Intervenors' claim of privilege sweeps in all documents responsive to Plaintiffs' request except those that were disclosed to the "electorate at large." Doc #187 at 9 n.2; *see also* Doc #187-7 at 6 (Moss Decl.). On Defendant-Intervenors' view, all communications that were targeted in any manner or fashion to particular recipients are privileged—even if the communications were received by tens of thousands (or more) California voters. *See* Exh. A (McGill Decl.) at ¶ 3. Thus, Defendant-Intervenors' claim of privilege sweeps in every article of mail they ever sent—postal or electronic.

At the other end of the spectrum, Defendant-Intervenors' claim of privilege also sweeps in all of their communications with their paid political consultants notwithstanding the fact that those

consultants have published articles describing their strategy, Exh. B, and indeed, have sought accolades from trade associations for that strategy. *See* "*The 18th Annual Pollie Awards & Conference*," attached hereto as Exh. C (identifying Schubert Flint Public Affairs' work on the "Yes on 8" campaign as the recipient of multiple 2009 Pollie Awards).

When communications and strategies are widely disseminated and discussed (indeed, trumpeted) in public—as were many of the documents Defendant-Intervenors now claim are privileged from disclosure—it is difficult to envision how disclosure of those documents to Plaintiffs could chill Defendant-Intervenors' speech.

And, in fact, Defendant-Intervenors have made no credible showing of how the discovery *Plaintiffs* have requested *in this case* is likely to lead to reprisals against Defendant-Intervenors or their supporters. This is the second feature that distinguishes this case from *In re Motor Fuel Temperature Sales Practices Litigation*.

Defendant-Intervenors have produced declarations that describe "many instances of harassment and retaliation against Protect Marriage's donors and volunteers that occurred after their affiliation with Protect Marriage became public." Doc #187-2 at 5 (Prentice Decl.). But the inescapable fact is that Defendant-Intervenors' affiliation with Protect Marriage has been widely known to the public for more than a year, as has that of their political consultant, Frank Schubert. There is no additional chilling effect on their speech that will accrue, at this late date, from their disclosure of the documents Plaintiffs seek. The public is already aware of the Defendant-Intervenors' "deeply held moral and political views," Doc #187-12 at 4 (Tam Decl.), and Defendant-Intervenors have suggested no reason why compliance with discovery is likely to generate a new round of reprisals. Indeed, even Defendant-Intervenors' own out-of-circuit authorities recognize that "where a Plaintiff does not ask for a membership list, nor ... seek to identify a single anonymous ... member" but rather seek only "to discover what the publicly identified ... members know about [the subject of Plaintiff's claims] through their personal information and communications with other people," it "cannot be said that Plaintiff's subpoenas constitute an arguable threat to associational rights by creating an apparent chilling effect." *Anderson v. Hale*, No. 00-C-2021, 2001 WL 503045, at *6. (N.D. Ill. May 10, 2001); *see also In re Motor Fuel Temperature Sales Practices Litig.*, 2009

U.S. Dist. LEXIS 66005, at *44 ("To the extent, however, that defendants seek protection of associational membership lists or financial contributor lists that have been publicly disclosed, ... A chilling effect caused by additional disclosure cannot be presumed.").

Even still, to assuage any concerns about the threat of reprisals, in their last meet-and-confer on September 10, Plaintiffs offered to entertain ***any*** reasonable confidentiality agreement or procedure for redaction or sealing if Defendant-Intervenors had a good-faith belief that particular documents raised a threat of reprisal to persons whose affiliation with Protect Marriage is not already widely known to the public. Exh. A at ¶ 3. Defendant-Intervenors, however, refused to discuss any potential procedures for designation and treatment of confidential documents. This suggests that the vow of Defendant-Intervenors and their agents to "drastically alter how [they] communicate in the future," if they are made to comply with ordinary discovery requests, Doc #187-10 at 4 (Jansson Decl.), is motivated less by a fear of reprisals than an unwillingness to fulfill the obligations of a party to litigation in federal court.

3. Even under the balancing test that Defendant-Intervenors argue is applicable, Defendant-Intervenors' claim of privilege must fail. The Court has advised the parties that it wishes to conduct a trial on various factual questions that undergird the constitutional questions raised by Plaintiffs' claims for relief. As detailed above, Plaintiffs' requests for discovery are plainly relevant to those inquiries and, absent discovery, Plaintiffs have no means available to obtain the documents they seek from Defendant-Intervenors. And to the extent that Defendant-Intervenors have a well-founded, good-faith belief that particular documents could generate reprisals if disclosed to the public, Plaintiffs are willing to negotiate any reasonable confidentiality measures to ensure that the First Amendment rights of Defendant-Intervenors, their agents, and their supporters, are not chilled.

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III. CONCLUSION

For the foregoing reasons, Plaintiffs and Plaintiff-Intervenor respectfully urge this Court to deny Defendant-Intervenors' motion for protective order and require that they produce all documents responsive to Plaintiffs' First Set of Requests for Production on or before September 28, 2009.

DATED: September 18, 2009

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ATTESTATION PURSUANT TO GENERAL ORDER NO. 45

Pursuant to General Order No. 45 of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

By: /s/ Theodore B. Olson
Theodore B. Olson

Exhibit A

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal
From The United States District Court
For The District Of Columbia

REPLY BRIEF FOR APPELLANT

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief for Appellant remains accurate.

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rate-funded electioneering communications. And, as applied to Citizens United, not even the reporting requirement could further the government's enforcement interest (or its purported informational interest, for that matter) because, as the government concedes, Citizens United "already discloses its identify at the website referred to in the advertisements." FEC Br. 51. In this case, then, the government's supposed enforcement interest is pure fiction.

3. The Burdens Imposed By BCRA §§ 201 And 311 Outweigh Any Government Interest In Applying Those Speech Restrictions To Citizens United.

Even if the government did have an informational or enforcement interest in applying BCRA's disclaimer, disclosure, and reporting requirements to Citizens United, those interests would be outweighed by the extraordinary burdens that those requirements impose on First Amendment freedoms—including the risk of harassment and retaliation faced by Citizens United's financial supporters, and the substantial compliance costs borne by Citizens United.

The government dismisses the risk of reprisal against Citizens United's supporters because the record does not document previous acts of retaliation. But the risk of reprisal against contributors to Citizens United—and other groups that espouse controversial ideological messages—has vastly increased in recent years as a result of the same "technological advances" that the government touts in BCRA's defense, which "make it possible . . . for the public to review and even search the [contribution] data with ease." FEC Br. 40-41. The widespread economic re-

prisals against financial supporters of California's Proposition 8 dramatically illustrate the unsettling consequences of disseminating contributors' names and addresses to the public through searchable websites (*see, e.g.*, CCP Br. 13; IJ Br. 13)—some of which even helpfully provide those intent upon retribution with a map to each donor's residence. *See* Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Is 2-Edged Sword*, N.Y. Times, Feb. 8, 2009.

The chilling effect on First Amendment expression generated by the specter of retribution is substantiated by empirical studies, which have found that "'[e]ven those who strongly support forced disclosure laws will be less likely to contribute'" where their personal information will be disclosed. IJ Br. 10 (quoting Dick Carpenter, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* 8 (2007)). And this chilling effect on First Amendment freedoms is compounded by the extreme administrative burdens generated by BCRA's disclosure requirements, which are notoriously difficult to implement for even the lawyers and accountants who advocacy groups are inevitably required to retain to monitor their disclosure obligations. *See id.* at 19 (discussing an empirical study in which none of the 255 participants was able to comply successfully with campaign disclosure requirements).

The fact that the record does not explicitly document the burdens that BCRA's disclaimer, disclosure, and reporting requirements impose on Citizens United's First Amendment rights is not a sufficient basis for discounting these very real impositions on Citizens United's freedom of expression. In this as-applied challenge, it is the *government* that bears the burden of establishing that BCRA's speech restrictions are compatible with the First Amendment

(*WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.))—and it therefore falls to the government to demonstrate that BCRA does not intolerably restrict Citizens United's First Amendment freedoms. The government has not met that burden.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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March 17, 2009

Ex. A-1

(Brief of Amicus Curiae Center for Competitive Politics in Support of Appellant, No. 08-205, Cited in Reply Brief for Appellants)

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,
Appellant,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANT

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Mandatory disclosure in ballot-initiative and referenda campaigns also carries heavy burdens for citizens that would participate, but unlike candidate races, doesn't even further the ability of citizens to monitor the performance of their elected officials. "[T]he invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Buckley,* 424 U.S. at 66 (internal citations omitted).

For example, in the wake of voting on California's controversial Proposition 8 to prohibit same sex marriage, Scott Eckern, formerly the artistic director of the California Musical Theatre was forced to resign "amid controversy over a donation he made to the Proposition 8 campaign." Niesha Lofing, *CMT artistic director quits in fallout from Prop. 8 support,* SACRAMENTO BEE, Nov. 12, 2008 (available at <http://www.sacbee.com/1089/story/1391705.html>). The theatre board "thanked Eckern for '25 years of invaluable service to the organization and the advancement of musical theatre as an art form.'" *Id.* Eckern gave $1,000 to support Proposition 8, "a donation that sparked criticism from theater workers and the gay, lesbian, bisexual and transgender community." *Id.* Eckern "'honestly had no idea' that the contribution would spark such outrage and made the donation ... on his belief [that] the traditional definition of marriage be preserved." *Id.* Eckern said he is "disappointed that my personal convictions have cost me the opportunity to do what I love most ... to

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prohibit same-sex marriage. These are the people who donated in order to pass it."

continue enriching the Sacramento arts and theatre community." *Id.*

In another example, after Proposition 8 passed, dozens of "activists descended on the El Coyote restaurant with signs and placards. They chanted 'Shame on you,' cussed at patrons and began a boycott of the cafe." Jim Carlton, *Gay Activists Boycott Backers of Proposition 8,* WALL ST. J., Dec. 27, 2008, at A3. "The restaurant's crime: A daughter of the owner donated $100 to support Prop 8." *Id.*

Richard Raddon, former director of the Los Angeles Film Festival, resigned after "being at the center of controversy" for giving "$1500 to Proposition 8." Rachel Abramowitz, *Film fest director resigns; Richard Raddon steps down over reaction to his support of Prop. 8.*, L.A. TIMES, Nov. 26, 2008, at E1. Raddon, a Mormon, gave for religious reasons. *Id.* After Raddon's contribution was "made public online," Film Independent was "swamped with criticism from No on 8 supporters," and "in the blogosphere." *Id.* One fellow board member noted, "Someone has lost his job and possibly his livelihood because of privately held religious beliefs." *Id.* Since Proposition 8 has passed, "Hollywood has been debating whether and how to publicly punish those who supported the ... amendment," including boycotts of the "Cinemark theater chain, whose chief executive, Alan Stock, donated $9,999 to 'Yes on 8.'" *Id.*

These are not isolated examples. In the aftermath of Proposition 8, numerous blacklists are now being established, and those establishing them note that the existence of reliable data over the internet makes such lists easier to compile. "Years ago we would never have been able to get a blacklist that fast and quickly," said one opponent of Proposition 8. Richard

Abowitz, *Where's the Outrage? Online.*, LAS VEGAS WEEKLY, Jan. 8, 2009 (available at <http://www.lasvegasweekly.com/news/2009/jan/08/wheres-outrage-online/>). While citizens have a right to organize boycotts that do not violate anti-trust or non-discrimination laws, the government does not have a compelling interest in making political preferences public so that citizens who support the "wrong" side can be subjected to harassment and blacklisting. This harassment emphasizes *Amicus'* point, *see* Section II, *supra*, that, unlike information on donations to candidates, once a ballot initiative has been enacted, mandatory public disclosure of financial donors serves no anti-corruption purpose because it does not allow citizens to evaluate the performance and character of their elected officials. But it does allow for efforts to chill and intimidate speakers in the future.

Even worse, mandatory disclosure for issue advocacy has the danger of intimidating funding and supporters away from issues, not just candidates and campaigns.

For example, in a letter[6] to ExxonMobil CEO Rex Tillerson, Senators Olympia Snowe and Jay Rockfeller "urge[d]" the company to end its support of what the Senators called "climate change denial front groups" like the Competitive Enterprise Institute, and said the company "should repudiate its climate change denial campaign and make public its funding history." Editorial, *Nobles and Knaves*, WASH. TIMES, Nov. 11, 2006, at A12; Editorial, *Political Science,*

[6] The letter is available at <http://snowe.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=9acba744-802a-23ad-47be-2683985c724e>.

Ex. A-2

(Brief of The Institute for Justice as Amicus Curiae in Support of Appellant, Citizens United, No. 08-205, Cited in Reply Brief for Appellants)

No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From
The United States District Court
For The District Of Columbia

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLANT, CITIZENS UNITED

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B. Fear Of Political Reprisal Is Both Real and Reasonable

In the most recent election cycle, supporters of California's Proposition 8, relating to same-sex marriage, found themselves subject to reprisals in a variety of forms following the proposition's success. *See* Steve Lopez, *A Life Thrown in Turmoil by $100 Donation for Prop. 8*, Los Angeles Times, December 14, 2008 (describing the experience of a restaurant manager who made a personal donation in support of Proposition 8, ultimately resulting in the boycott of her restaurant); John R. Lott, Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides: Supporters of California's Prop. 8 Have Faced a Backlash*, Wall St. J., Dec. 26, 2008 (summarizing examples of individuals who faced economic retaliation for donations in support of Proposition 8); Amy Bounds, *Gay rights advocates picket Boulder Cineplex*, Rocky Mountain News, November 30, 2008 (business picketed and boycotted based on CEO's personal donation). In fact, a website recently appeared providing an interactive map with pinpoint locations, names, addresses, and donation amounts for individuals and entities that supported Proposition 8 – in this circumstance, access to this personal information regarding political activities is even easier. *See* www.eightmaps.com (last visited January 12, 2009).

The experience of Proposition 8 supporters in 2008 is by no means unique. Exacting political retribution for individuals' support or opposition of particular candidates or causes specifically based on data

gleaned from campaign finance reports is becoming a new field of battle in politics. *See* Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. Times, August 8, 2008 (describing the planned campaign of liberal nonprofit group Accountable America, which planned "to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions"); *see also* Associated Press, *John Kerry Grills Belgium Ambassador Nominee Over Swift Boat Donation*, FoxNews.com, February 28, 2007 ("A Senate hearing that began with glowing tributes to a St. Louis businessman and his qualifications to become ambassador to Belgium turned bitterly divisive Tuesday after he was criticized for supporting a controversial conservative group.").

The rising acceptance of this type of political retribution is already generating anecdotal evidence of a chilling effect on political speech and association. For instance, in West Virginia's most recent race for state attorney general, a newcomer challenged the incumbent, a man described by the Wall Street Journal as "a case study of abuse in office." Kimberley A Strassel, *Challenging Spitzerism at the Polls*, Wall St. J., August 1, 2008. Because of the effect of mandatory reporting requirements, the challenger alleged he faced a significant uphill battle in fundraising:

> [Incumbent Attorney General Darrell McGraw's] other main asset is fear. [Challenger] Mr. Grear admits a big hurdle is fund

> raising, even among a business community that is desperate to throw out Mr. McGraw. "I go to so many people and hear the same thing: 'I sure hope you beat him, but I can't afford to have my name on your records. He might come after me next.'" This is a frightening example of how the power of an attorney general can corrupt even the electoral process.

Id.

Reprisals for political contributions can also come in forms unrelated to the donation itself. Gigi Brienza discovered this when her name and address appeared on the website of an animal-rights organization, which had culled FEC records for donors whose employers perform animal testing. *See* Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, Wash. Post, July 1, 2007 at B03.

Quite simply, the easy accessibility of information about one's political leanings, address, employer, and occupation suggests that it is time for this Court to reexamine its conclusions about the cost of mandatory disclosure rules. In 2009, a person wishing to harass citizens with a different viewpoint no longer needs to visit a government office to sift by hand through published data to access political information. Now, data regarding one's political leanings, address, employer, and occupation are searchable from any computer, day or night. In such an environment, it is perfectly understandable that

reasonable individuals fear the implications of publicizing their political positions.

C. The FEC's Regulations Violate the First Amendment

In *McIntyre v. Ohio Elections Commission*, this Court struck down a law that required the disclosure of one's identity on written election communications. 514 U.S. 334, 357 (1995). This Court held that individuals have a right to anonymous speech and that a law requiring them to disclose their views on controversial issues did so in violation of that right. *Id.* "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* This Court also emphasized the importance of anonymity in protecting rights to speech and association. "Anonymity is a shield from the tyranny of the majority" which "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *Id.*

Disclosure Costs (supra), the first study to question the general presumption that mandatory disclosures are cost-free, demonstrates that this Court's conclusions in *McIntyre* were not only correct, they

Ex. A-3

(*Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*, NY Times, Cited in Reply Brief for Appellants)

February 8, 2009

SLIPSTREAM

Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword

By BRAD STONE

FOR the backers of Proposition 8, the state ballot measure to stop single-sex couples from marrying in California, victory has been soured by the ugly specter of intimidation.

Some donors to groups supporting the measure have received death threats and envelopes containing a powdery white substance, and their businesses have been boycotted.

The targets of this harassment blame a controversial and provocative Web site, eightmaps.com.

The site takes the names and ZIP codes of people who donated to the ballot measure — information that California collects and makes public under state campaign finance disclosure laws — and overlays the data on a Google map.

Visitors can see markers indicating a contributor's name, approximate location, amount donated and, if the donor listed it, employer. That is often enough information for interested parties to find the rest — like an e-mail or home address. The identity of the site's creators, meanwhile, is unknown; they have maintained their anonymity.

Eightmaps.com is the latest, most striking example of how information collected through disclosure laws intended to increase the transparency of the political process, magnified by the powerful lens of the Web, may be undermining the same democratic values that the regulations were to promote.

With tools like eightmaps — and there are bound to be more of them — strident political partisans can challenge their opponents directly, one voter at a time. The results, some activists fear, could discourage people from participating in the political process altogether.

That is why the soundtrack to eightmaps.com is a loud gnashing of teeth among civil libertarians, privacy advocates and people supporting open government. The site pits their cherished values against each other: political transparency and untarnished democracy versus privacy and freedom of speech.

"When I see those maps, it does leave me with a bit of a sick feeling in my stomach," said Kim Alexander, president of the California Voter Foundation, which has advocated for open democracy. "This is not really the intention of voter disclosure laws. But that's the thing about technology. You don't really know where it is going to take you."

Ms. Alexander and many Internet activists have good reason to be queasy. California's Political Reform Act of 1974, and laws like it across the country, sought to cast disinfecting sunlight on the political process by requiring contributions of more than $100 to be made public.

Eightmaps takes that data, formerly of interest mainly to social scientists, pollsters and journalists, and publishes it in a way not foreseen when the open-government laws were passed. As a result, donors are exposed to a wide audience and, in some cases, to harassment or worse.

A college professor from the University of California, San Francisco, wrote a $100 check in support of Proposition 8 in August, because he said he supported civil unions for gay couples but did not want to change the traditional definition of marriage. He has received many confrontational e-mail messages, some anonymous, since eightmaps listed his donation and employer. One signed message blasted him for supporting the measure and was copied to a dozen of his colleagues and supervisors at the university, he said.

"I thought what the eightmaps creators did with the information was actually sort of neat," the professor said, who asked that his name not be used to avoid becoming more of a target. "But people who use that site to send out intimidating or harassing messages cross the line."

Joseph Clare, a San Francisco accountant who donated $500 to supporters of Proposition 8, said he had received several e-mail messages accusing him of "donating to hate." Mr. Clare said the site perverts the meaning of disclosure laws that were originally intended to expose large corporate donors who might be seeking to influence big state projects.

"I don't think the law was designed to identify people for direct feedback to them from others on the other side," Mr. Clare said. "I think it's been misused."

Many civil liberties advocates, including those who disagree with his views on marriage, say he has a point. They wonder if open-government rules intended to protect political influence of the individual voter, combined with the power of the Internet, might be having the opposite effect on citizens.

"These are very small donations given by individuals, and now they are subject to harassment that ultimately makes them less able to engage in democratic decision making," said Chris Jay Hoofnagle, senior fellow at the Berkeley Center for Law and Technology at the University of California.

THANKS to eightmaps.com, the Internet is abuzz with bloggers, academics and other pundits

offering potential ways to resolve the tension between these competing principles. One idea is to raise the minimum donation that must be reported publicly from $100, to protect the anonymity of small donors.

Another idea, proposed by a Georgetown professor, is for the state Web sites that make donor information available to ask people who want to download and repurpose the data to provide some form of identification, like a name and credit card number.

“The key here is developing a process that balances the sometimes competing goals of transparency and privacy,” said the professor, Ned Moran, whose undergraduate class on information privacy spent a day discussing the eightmaps site last month.

“Both goals are essential for a healthy democracy,” he said, “and I think we are currently witnessing, as demonstrated by eightmaps, how the increased accessibility of personal information is disrupting the delicate balance between them.”

Exhibit B

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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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.

CASE NO. 09-CV-2292 VRW

DECLARATION OF RONALD PRENTICE IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR A PROTECTIVE ORDER

Date: September 25, 2009
Time: 10:00AM
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

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 for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

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I, Ronald Prentice, make the following declaration pursuant to 28 U.S.C. § 1746**:**

1. I am a resident of California over 18 years of age, and my statements herein are based on personal knowledge.

2. The California ballot measure in 2008 known as Proposition 8 had five "Official Proponents" pursuant to California law, Cal. Elec. Code §342. Those five Proponents are Defendant-Intervenors in this case: Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson ("the Proponents").

3. The Proponents endorsed ProtectMarriage.com – Yes on 8, a Project of California Renewal ("Protect Marriage"), a "primarily formed committee" under the California Political Reform Act, Cal. Gov. Code § 82047.5, as the official Proposition 8 campaign committee. Protect Marriage was designated to receive all contributions and to disburse expenditures for the Proposition 8 campaign.

4. For purposes of state law, Protect Marriage has a single officer responsible for filing required disclosures. David Bauer serves as that officer.

5. Unofficially, Protect Marriage was and is supported by many volunteers with varying levels of involvement and input, including an ad hoc "executive committee" consisting of several individuals. Some of those individuals served as agents for other organizations with an interest in the qualification and passage of Proposition 8, and the marriage debate generally. I serve as chairman of the ad hoc executive committee.

6. The ad hoc executive committee was often advised by an attorney, who was retained to serve as Protect Marriage's general counsel.

7. Protect Marriage employed a public relations firm to serve as the Proposition 8 campaign manager.

8. Volunteers of Protect Marriage corresponded with each other, with the public relations firm, with various vendors and independent contractors, and with other third parties about political beliefs, campaign strategy, personal beliefs, and much else relating to Proposition 8.

9. As chairman of the ad hoc executive committee, I had extensive dealings with Protect Marriage's donors and volunteers. Many of the donors were quite concerned that publicly-disclosed affiliation with Protect Marriage would lead to retaliation against them. They were specifically concerned with the scope of information that would be revealed, and for some donors the determining factor in favor of donating was that the only information that would be publicly disclosed was the amount of their contribution and their name, address, occupation and employer.

10. I am aware of many instances of harassment and retaliation against Protect Marriage's donors and volunteers that occurred after their affiliation with Protect Marriage became public. The names of donors to Proposition 8 were widely distributed on the Internet, and many donors experienced boycotts of their businesses. I am aware of several individuals who chose to resign from their employment in order to escape the harassment and intimidation brought upon them and their employers. Volunteers who made a public stand in support of Proposition 8 by holding signs or distributing materials were victims of physical assaults such as being spat upon and having hot coffee thrown on them by passengers in passing automobiles. Several reports of vandalism to property came from volunteers who placed Yes on 8 bumper strips on their cars.

11. Widespread retaliation and harassment against donors and volunteers had a negative effect on participation in the campaign in favor of Proposition 8. As acts of harassment against Proposition 8 donors and volunteers became public, donors expressed concern over being publicly identified and placing themselves, their family members, and their employees at possible risk. Potential donors contacted me to ask how donations could be made without publicly disclosing their identity, and when campaign finance disclosure laws were explained to those donors, many declined to make any contribution. After receiving significant media attention and public protests, several major donors to the Proposition 8 campaign refused to make further contributions.

12. I personally experienced harassment and retaliation due to my affiliation with Protect Marriage. While the physical addresses of my residence and office locations were not public , I received harassment on a regular basis via E-mails, letters, and phone calls. Derisive name-calling and statements of hatred toward me became commonplace. Attacks on my character and integrity were also attempted, with bogus claims regarding the fiscal management of the organization I direct.

13. Some donors to Protect Marriage conditioned their donation on being privy to the political strategy, polling, opinion research, and internal workings of the campaign in favor of Proposition 8. Some donors communicated to Protect Marriage their thoughts about the election, about the marriage debate generally, and/or ideas for campaign strategy.

14. If I had known that the non-public communications of Protect Marriage, its donors and volunteers would be subject to disclosure, I would have communicated differently with other volunteers of Protect Marriage, with its donors, and with others associated with the campaign and/or the marriage debate. I would have been more guarded, and fearful that my communications could later be distorted, utilized for purposes of intimidation, or utilized to learn my personal beliefs of the political strategies I thought advisable. Also, I would have warned donors, volunteers, and affiliates that by nature of participation in the political campaign, anything they communicate to any party regarding Proposition 8 or the marriage debate generally could be subject to compelled disclosure in a lawsuit.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on: September 15, 2009

Ronald Prentice

Ronald Prentice

Exhibit C

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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 for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants.

CASE NO. 09-CV-2292 VRW

PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANTS-INTERVENORS PROPOSITION 8 PROPONENTS AND PROTECTMARRIAGE.COM

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Plaintiffs hereby propound the following Requests for Production ("Requests") on Defendants-Intervenors Proposition 8 Proponents and Protectmarriage.com, to be answered fully, in writing, and under oath, no later than 30 days after service of these Requests. All objections, responses, and responsive documents shall be served in compliance with Rules 26 and 34 and produced to Gibson, Dunn & Crutcher LLP, c/o Ethan Dettmer, 555 Mission Street, Suite 3000, San Francisco, California 94105.

DEFINITIONS

The definitions, instructions, and requirements of Federal Rules of Civil Procedure 26, 34, and 37 are adopted and incorporated by this reference. The following words and phrases shall have the following meanings in these Requests:

1. "You," "your," or "intervenors" mean, individually and collectively, the persons and organizations 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, who are defendant-intervenors in the instant action.

2. "Proposition 8" or "Prop. 8" means the proposition that was placed on the November, 2008 ballot in the State of California and became known as "Proposition 8" for purposes of that election. No reference to "Proposition 8" or "Prop. 8" shall be construed as limited by the date on which Proposition 8 received its official number ("8") or ballot title on the November, 2008 California ballot.

3. "Document" shall be synonymous in meaning and equal in scope to the broadest meaning provided by Rule 34 of the Federal Rules of Civil Procedure, including without limitation, hard copies, electronic documents, electronic or computerized data compilations, software, software images, or downloads. This term shall apply to documents, whether in hard copy or electronic form, on your computers or the computers of your employees and independent contractors or consultants, whether provided by you to such individuals or otherwise.

4. "Communication" means the transmittal of information in the form of facts, ideas, inquiries, thoughts, or otherwise, and without limitation as to means or method.

5. The terms "any," "all," "each," and "every" should be understood in either their most or least inclusive sense as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of their scope.

6. Each of the words "reflecting," "relating," "supporting," "concerning," "evidencing," and "referring" as used herein include the common meanings of all those terms, as well as indirect and direct references to the subject matter set forth in the document request.

7. The words "and" and "or" shall be construed conjunctively or disjunctively, whichever makes the request most inclusive.

INSTRUCTIONS

1. In producing documents and things, you are required to furnish all documents or things in your possession, custody, or control, or known or available to you, regardless of whether such documents or things are possessed directly by you or your employees, agents, representatives, accountants, attorneys, investigators, and consultants.

2. All documents should be produced in the same order as they are kept or maintained by you in the ordinary course of business, or the documents should be organized and labeled to correspond to the categories of the documents requested below.

3. If you object to a portion or an aspect of a Request, state the grounds for your objection with specificity. If any document called for by these Requests is withheld because you claim that such information is protected under the attorney-client privilege, work product doctrine, or other privilege or doctrine, you are requested to so state, specifying for each such document its title, subject matter, sender, author, each person to whom the original or copy was circulated, recipients of copies, the persons present during the communication, the identity of the privilege being asserted, and the basis upon which the privilege is claimed.

4. If production of any portion of a document is required pursuant to these Requests, produce the entirety of that document.

5. If any document cannot be produced in full, produce to the extent possible, specifying the reasons for your inability to produce the remainder and stating whatever information, knowledge, or belief you do have concerning the portion not produced.

6. Your obligation to respond to these Requests is continuing in nature, and pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, you are required to supplement your responses in the event new or additional information is discovered or obtained.

7. Each Request applies to the period from January 1, 2006 through and including the date of production.

8. Defendant-intervenors and Plaintiffs shall confer prior to defendant-intervenors' time to respond to this set of discovery requests so that the parties can reach an agreement under Rule 34(e) of the Federal Rules of Civil Procedure as to the procedures that will be applied to the production of documents or electronically stored information.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

All documents constituting literature, pamphlets, flyers, direct mail, advertisements, emails, text messages, press releases, or other materials that were distributed to voters, donors, potential donors, or members of the media regarding Proposition 8.

REQUEST FOR PRODUCTION NO. 2:

All versions of any internet advertisement relating to Proposition 8.

REQUEST FOR PRODUCTION NO. 3:

All versions of any television advertisement relating to Proposition 8.

REQUEST FOR PRODUCTION NO. 4:

All versions of any radio advertisement relating to Proposition 8.

REQUEST FOR PRODUCTION NO. 5:

All plans, schematics, and versions of the websites that have ever been available at the URLs http://www.protectmarriage.com or http://www.protectmarriage.net.

REQUEST FOR PRODUCTION NO. 6:

All documents constituting communications prepared for public distribution and related to Proposition 8, including without limitation speeches, scripts, talking points, articles, notes, and automated telemarketing phone calls.

REQUEST FOR PRODUCTION NO. 7:

All documents constituting postings related to Proposition 8 that were made by you on social networking websites, including but not limited to Facebook, MySpace, and Twitter.

REQUEST FOR PRODUCTION NO. 8:

All versions of any documents that constitute communications relating to Proposition 8, between you and any third party, including, without limitation, members of the public or the media.

REQUEST FOR PRODUCTION NO. 9:

All documents that tend to support or refute the claims, denials, or assertions made in your [Proposed] Answer in this litigation (Doc #9).

REQUEST FOR PRODUCTION NO. 10:

All documents that tend to support or refute the arguments made in your Memorandum in Opposition to Motion for Preliminary Injunction in this litigation (Doc #36).

REQUEST FOR PRODUCTION NO. 11:

Documents sufficient to show the title of everyone employed by Protect Marriage, at any time, including but not limited to organizational charts.

REQUEST FOR PRODUCTION NO. 12:

All documents reflecting public media coverage of Proposition 8.

REQUEST FOR PRODUCTION NO. 13:

All documents that tend to support or refute your responses to Plaintiffs' Interrogatories Nos. 1-3 propounded on August 21, 2009.

REQUEST FOR PRODUCTION NO. 14:

All documents that tend to support or refute any one of your responses to Plaintiffs' Requests for Admission Nos. 1-68, propounded on August 21, 2009, that is not an unequivocal admission.

REQUEST FOR PRODUCTION NO. 15:

All documents that you intend to use as exhibits at trial in this litigation.

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DATED: August 21, 2009

GIBSON, DUNN & CRUTCHER LLP

By: _____
Matthew D. McGill

and

BOIES, SCHILLER & FLEXNER LLP

David Boies

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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS' RESPONSES AND OBJECTIONS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION

Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

Defendant-Intervenors.

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* Admitted *pro hac vice*

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Defendant-Intervenors object and respond as follows to Plaintiffs' First Set of Requests for Production ("Requests"), propounded on August 21, 2009.

GENERAL OBJECTIONS

1. Defendant-Intervenors, in a letter to the Court, have sought leave to file a Motion for a

Protective Order. That letter details, and the motion will detail, Defendant-Intervenors' objections to these Requests on grounds of both relevance and First Amendment privilege. Any and all objections contained in the letter and motion are incorporated herein as objections to these Requests as if each of these arguments was separately and specifically set forth herein.

2. Defendant-Intervenors object to the Requests to the extent that they purport to call for the disclosure of any information or document that (a) contains privileged attorney-client communications, (b) constitutes attorney work product, or (c) is otherwise protected from disclosure under applicable privileges, immunities, laws or rules. Subject to the objections detailed herein, including objections to having to undertake the burden of reviewing and/or logging documents implicated by these Requests, Defendant-Intervenors will produce as soon as possible following the completion of the production of documents a log of all responsive documents that have been withheld from production pursuant to this objection and that Defendant-Intervenors are required to review and/or log pursuant to the Federal Rules of Civil Procedure and/or any existing or future order of the Court.

3. Defendant-Intervenors object to these Requests to the extent that any of the Requests individually or collectively when coupled with Plaintiffs' Instructions for production would require the production or logging of communications and documents from the files of any of Defendant-Intervenors' litigation counsel regarding this litigation. Based on the meet-and-confer between counsel on September 4, 2009, it is Defendant-Intervenors' understanding that Plaintiffs have agreed to narrow their Requests so as not to implicate information from the files of litigation counsel. To the extent this understanding is incorrect, Defendant-Intervenors note for the record their objection. Because any responsive information and materials would be held uniquely by such an attorney (as distinct from the Proponents, who are themselves producing responsive information and materials), they would be privileged or otherwise protected work product, virtually by

definition. It would be unduly burdensome, unhelpful to all concerned, and gravely prejudicial to this overall production effort were these Requests to reach Defendant-Intervenors' attorneys who are specifically providing legal counsel in this matter. There simply is no way to compile a comprehensive privilege log detailing all privileged materials in the possession of Defendant-Intervenors' litigation counsel while accomplishing document production on this timetable, and under these circumstances; nor would it be reasonable or productive to require Defendant-Intervenors to do so.

4. Defendant-Intervenors object to the Requests to the extent that they seek information, documents, or other materials protected from disclosure by the First Amendment. Defendant-Intervenors incorporate herein as objections to these Requests the letter to the Court seeking leave to file a Motion for a Protective Order and any and all arguments that will be set forth in that Motion when it is filed as if each of these arguments was separately and specifically set forth herein. Communications that reflect core First Amendment activity—e.g., political views, legislative or political strategy, religious beliefs, voter intent, political speech, and associational activity—are not an appropriate subject of discovery and are protected from disclosure under applicable law.

5. Defendant-Intervenors also object to the Requests and their accompanying instructions as unduly burdensome and beyond the scope of obligations imposed by the Federal Rules of Civil Procedure to the extent that they seek documents and information that are publically available and/or otherwise in the custody and control of third-parties. To the extent Plaintiffs' Requests place an obligation on Defendant-Intervenors to produce documents and information from entities and/or individuals who are not uniquely within Defendant-Intervenors' custody and control, the Requests are objectionable. *See* Fed. R. Civ. P. 26(b)(2)(C)(ii).

6. Defendant-Intervenors object to these Requests to the extent they call for documents

irrelevant to any issue in this case. Because virtually all of the discovery sought by these Requests is legally irrelevant and not designed to lead to the discovery of admissible evidence, it would be objectionably burdensome for Defendant-Intervenors to have to collect, review, produce, and/or log all such documents. Because of the irrelevant nature of these materials, the time and expense that would be required to gather and produce them cannot be reasonably justified.

7. Because they are publicly available, and in an effort to minimize dispute, we are producing public advertisements and communications (such as newspaper advertisements, the text of radio advertisements, and the content of social networking posts available to the electorate at large) that were actually communicated to the electorate at large. We do not, however, concede that these documents are properly discoverable, legally relevant, or constitute competent evidence in this case.

8. Defendant-Intervenors object to these Requests, for the reasons stated herein and in the Motion for a Protective Order we intend to file, which is incorporated herein by reference, to the extent they seek drafts and other pre-decisional documents or communications associated with preparing final documents or communications regarding Proposition 8 that were actually disseminated to the electorate at large. These documents are legally irrelevant and protected from disclosure by the First Amendment.

9. Defendant-Intervenors object to these Requests and accompanying Instruction No. 7 to the extent they call for the production of documents and information postdating the passage of Proposition 8 in November of 2008. Not only are such communications and materials irrelevant to any conceivable issue in this lawsuit, their disclosure will violate Defendant-Intervenors' First Amendment rights. Defendant-Intervenors specifically incorporate herein by reference the arguments made in the Motion for a Protective Order we intend to file regarding why such post-election documents and communications are not an appropriate subject of discovery.

10. Defendant-Intervenors object to these Requests as vague, ambiguous and/or unduly burdensome to the extent that the terms "public" and "third-party" are not defined and/or limited in any way, and taken at face value would encompass all communications Defendant-Intervenors may have had with any "third party"—even a single individual, whether or not a California voter—bearing any relationship to Proposition 8 whatsoever. Such documents include, but are not limited to, communications with individual donors, volunteers, or voters; communications with political strategists and other agents or contractors of the Proponents or Committee; and communications with friends, colleagues, and casual acquaintances. Moreover, Plaintiffs seek these communications regardless of whether they relate to the public understanding of or motivation for enacting Proposition 8. This presents not only First Amendment concerns, but also creates an undue burden on Defendant-Intervenors in attempting to gather, review, and produce all such communications.

11. Defendant-Intervenors object to these Requests to the extent they prematurely call for specific information that need not be made available under the Court's orders and/or is otherwise unavailable to the Defendant-Intervenors in its final form at this time. As such, Defendant-Intervenors must caution that, although they are answering these Requests to the best of their present ability subject to the objections noted herein, the information contained herein is necessarily and expressly subject to change and to supplementation as circumstances associated with and surrounding this litigation continue to develop and unfold in the coming weeks.

12. Defendant-Intervenors' responses to these Requests are subject to the understanding, based on an exchange of correspondence between counsel and a telephonic meet and confer, that Plaintiffs are not requesting internal communications among and between the Defendant-Intervenors. By letter of August 30, Plaintiffs stated that they "do[] not seek internal communications among and between [Defendant-Intervenors] regarding Proposition 8 and the

related political campaign, except to the extent that you deem such communications responsive to Requests Nos. 9, 10, 13, 14, or 15." Requests Nos. 9, 10, 13, and 14 seek "[a]ll documents that tend to support or refute" the claims, denials, assertions, arguments, or responses made in Defendant Intervenors Answer (Doc. # 9), Memorandum in Opposition to Motion for Preliminary Injunction (Doc. # 36), responses to Plaintiffs' Interrogatories Nos. 1-3 and Requests for Admission Nos. 1-68 propounded on August 21, 2009. By telephone conference of September 4, 2009, Defendant-Intervenors explained that because our position is that all internal communications are legally irrelevant to any claim in this case, we "deem such communications" as "tend[ing] [neither] to support or refute" any claim or argument in this case. Plaintiffs appeared to accept this as a permissible interpretation of these Requests. To the extent Defendant-Intervenors have misunderstood Plaintiffs' agreement to narrow their requests in this regard, Defendant-Intervenors note their objection to producing any internal communications and incorporate herein by reference the arguments against production that will be set forth in the Motion for a Protective Order that we have sought leave of Court to file. Defendant-Intervenors also note that disagreement still exists as to which persons and/or entities should properly be considered "internal" to Defendant-Intervenors; we preserve herein our objections to an overly expansive or overly narrow definition of that term.

Subject to and without waiving any of the foregoing General Objections, which are hereby incorporated into each response given below, Defendant-Intervenors are answering these Requests in substance to the extent practicable and reasonable under the present circumstances, as stated below. Defendant-Intervenors hereby object and respond to the individual Requests as follows:

SPECIFIC OBJECTIONS AND RESPONSES

REQUEST FOR PRODUCTION NO. 1:

All documents constituting literature, pamphlets, flyers, direct mail, advertisements, emails, text messages, press releases, or other materials that were distributed to voters, donors, potential donors, or members of the media regarding Proposition 8.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant documents and documents privileged from disclosure under the First Amendment. Defendant-Intervenors further specifically object to this Request to the extent it calls for the production of documents and information to "donors" or "potential donors." Defendant-Intervenors further specifically object to this Request to the extent it calls for production of documents and information that are not relevant and/or protected by the First Amendment—including documents not distributed to the electorate at large. Defendant-Intervenors incorporate by reference the objections and explanations in our Motion for a Protective Order, which we have sought leave of Court to file.

Subject to and without waiving any objection, and without conceding the relevancy of any materials being produced in response to this Request, Defendant-Intervenors will produce final copies of public communications responsive to this Request that were distributed to and or available to the electorate at large.

REQUEST FOR PRODUCTION NO. 2:

All versions of any internet advertisement relating to Proposition 8.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant documents and documents privileged from disclosure under the First Amendment. Defendant-

Intervenors' object to producing drafts of final public communications, which would include, e.g., non-public versions of Internet advertisements relating to Proposition 8 that were never actually posted on the Internet. Defendant-Intervenors object to this Request to the extent it calls for production of documents not available to the electorate at large (e.g., Internet communications of limited or invite-only distribution). Defendant-Intervenors also specifically object to this Request to the extent it calls for the production of material from the Internet that is not uniquely within Defendant-Intervenors' custody or control in violation of Fed. R. Civ. P. 26(b)(2)(C)(i). To the extent there were or are Internet advertisements related to Proposition 8 posted on the Internet by persons or entities other than the Defendant-Intervenors, that information is as equally available to Plaintiffs as it is to Defendant-Intervenors and thus is not the proper subject of discovery to Defendant-Intervenors.

Subject to and without waiving these objections, and without conceding the relevancy of any materials being produced in response to this Request, Defendant-Intervenors will produce final versions of internet advertisements posted on the internet by Defendant-Intervenors.

REQUEST FOR PRODUCTION NO. 3:

All versions of any television advertisement relating to Proposition 8.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant documents and documents privileged from disclosure under the First Amendment. Defendant-Intervenors' object to producing drafts of final public communications, which would include non-public versions of television advertisements relating to Proposition 8 that were never actually aired. Defendant-Intervenors object to this Request to the extent it calls for production of

documents not available to the electorate at large. Defendant-Intervenors also specifically object to this Request to the extent it calls for the production of material not uniquely within Defendant-Intervenors' custody or control in violation of Fed. R. Civ. P. 26(b)(2)(C)(i). To the extent there were television advertisements related to Proposition 8 aired by persons or entities other than Defendant-Intervenors, that information is as equally available to Plaintiffs as it is to Defendant-Intervenors and thus is not the proper subject of discovery to Defendant-Intervenors.

Subject to and without waiving these objections, and without conceding the relevancy of any materials being produced in response to this Request, Defendant-Intervenors will produce final versions of any television advertisements created by or for Defendant-Intervenors that were actually aired on television.

REQUEST FOR PRODUCTION NO. 4:

All versions of any radio advertisement relating to Proposition 8.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant documents and documents privileged from disclosure under the First Amendment. Defendant-Intervenors' object to producing drafts of final public communications, which would include non-public versions of radio advertisements relating to Proposition 8 that were never actually aired. Defendant-Intervenors object to this Request to the extent it calls for production of documents not available to the electorate at large. Defendant-Intervenors also specifically object to this Request to the extent it calls for the production of material not uniquely within Defendant-Intervenors' custody or control in violation of Fed. R. Civ. P. 26(b)(2)(C)(i). To the extent there were radio advertisements related to Proposition 8 created by persons or entities other than Defendant-

Intervenors, that information is as equally available to Plaintiffs as it is to Defendant-Intervenors and thus is not the proper subject of discovery to Defendant-Intervenors.

Subject to and without waiving these objections, and without conceding the relevancy of any materials being produced in response to this Request, Defendant-Intervenors will produce final versions of radio advertisements created by or for Defendant-Intervenors that were actually aired on the radio.

REQUEST FOR PRODUCTION NO. 5:

All plans, schematics, and versions of the websites that have ever been available at the URLs http://www.protectmarriage.com or http://www.protectmarriage.net.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant documents and documents privileged from disclosure under the First Amendment. Defendant-Intervenors' object to producing drafts of final public communications, which would include non-public versions of websites relating to Proposition 8 that were never actually accessible by the electorate at large. Defendant-Intervenors object to this Request to the extent it calls for production of documents not available to the electorate at large.

Subject to and without waiving these objections, and without conceding the relevancy of any materials being produced in response to this Request, Defendant-Intervenors will produce final versions of Internet pages posted on the URLs http://www.protectmarriage.com or http://www.protectmarriage.net.

REQUEST FOR PRODUCTION NO.6:

All documents constituting communications prepared for public distribution and related to Proposition 8, including without limitation speeches, scripts, talking points, articles, notes, and automated telemarketing phone calls.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant documents and documents privileged from disclosure under the First Amendment. Defendant-Intervenors' object to this Request to the extent it calls for drafts of final public communications, which would include non-public versions of documents relating to Proposition 8 that were never actually distributed or available to the public at large. Defendant-Intervenors object to this Request to the extent it calls for production of documents not available to the electorate at large. For example, documents "prepared for public distribution" but never actually publicly distributed are both irrelevant and privileged under the First Amendment. Defendant-Intervenors object to the "term" public as vague, ambiguous, undefined, and not reasonably narrowed.

Subject to and without waiving these objections, and without conceding the relevancy of any materials being produced in response to this Request, Defendant-Intervenors will produce final versions of documents responsive to this Request that are outside the scope of our objections.

REQUEST FOR PRODUCTION NO.7:

All documents constituting postings related to Proposition 8 that were made by you on social networking websites, including but not limited to Facebook, MySpace, and Twitter.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant documents and documents privileged from disclosure under the First Amendment. Defendant-Intervenors object to this Request to the extent it calls for production of documents not available to the electorate at large. Defendant-Intervenors further specifically object to this Request to the extent it purports to reach the non-public communications and postings of individual Defendant-Intervenors on their personal (as opposed to postings publicly accessible by any member of the electorate at large) social-networking sites. While Defendant-Intervenors do not, at this time, believe that any such postings exist, were such postings to exist Defendant-Intervenors would object to producing them, as this would violate their First Amendment rights and call for information that is entirely irrelevant to any issue in this matter. Thus, to the extent any such postings do exist, Defendant-Intervenors object to their production.

Subject to and without waiving these objections, and without conceding the relevancy of any materials being produced in response to this Request, Defendant-Intervenors will produce postings on Defendant-Intervenors' public social networking sites.

REQUEST FOR PRODUCTION NO.8:

All versions of any documents that constitute communications relating to Proposition 8, between you and any third party, including, without limitation, members of the public or the media.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant

documents and documents privileged from disclosure under the First Amendment. Defendant-Intervenors object to this Request to the extent it calls for production of documents not available to the electorate at large. Defendant-Intervenors' object to producing drafts of final public communications, which would include non-public versions of communications relating to Proposition 8 that were never available to the electorate at large. Defendant-Intervenors object to the phrases "any third party" and "members of the public" as vague, ambiguous, not defined, and not reasonably narrowed. Defendant-Intervenors further specifically object to this Request as impermissibly vague, ambiguous and/or unduly burdensome. It is unclear what additional communications apart from those already requested in Request Nos. 1 to 7 are being requested here. On its face, this Request appears to be seeking any communication related to Proposition 8 in any way, whether or not it is related to a public communication to the California electorate at large or was actually available to the electorate at large. This Request appears to include, for example: any and all communications Defendant-Intervenors may have had with their vendors, consultants, donors, members, friends, associates, or other correspondents; disclosure reports posted and available on public websites; and even pleadings filed in this case. In addition to being objectionable on First Amendment grounds as set forth above and in the Motion for a Protective Order that Defendant-Intervenors' have sought leave to file, which is incorporated herein by reference, this incredibly broad Request is objectionable because of the undue burden it would impose on Defendant-Intervenors if we were to gather, review, log and/or produce all responsive materials, the overwhelming majority of which are irrelevant to any issue in dispute in this case in violation of Fed. R. Civ. P. 26(b)(2)(C)(iii).

Based on the objections asserted above, Defendant-Intervenors have no additional documents to produce at this time.

REQUEST FOR PRODUCTION NO. 9:

All documents that tend to support or refute the claims, denials, or assertions made in your [Proposed] Answer in this litigation (Doc #9).

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. In particular, Defendant-Intervenors reiterate General Objection No. 12. Defendant-Intervenors object to this Request to the extent it calls for irrelevant documents and documents protected from disclosure under the First Amendment. Defendant-Intervenors further specifically object to this Request to the extent it purports to call for either the production of documents that are protected by the attorney work-product privilege and/or are publically available and thus as readily available to Plaintiffs as they are to Defendant-Intervenors. *See* Fed. R. Civ. P. 26(b)(2)(C)(i). For example, Defendant-Intervenors specifically object to this Request to the extent it purports to call for the production of publically available information such as research or news articles, statistical data and information, Internet postings, pleadings in this and other cases, etc.

Subject to and without waiving these objections, because Defendant-Intervenors' position is that all documents implicated by these Requests, apart from those objected to on the grounds that they are work product and/or are publically available, are legally irrelevant to any claim in this case. Unless and until a court with jurisdiction over this case rules otherwise Defendant-Intervenors "deem such communications" as "tend[ing] [neither] to support or refute" any claim or argument in this case, and thus have no responsive documents to produce.

REQUEST FOR PRODUCTION NO. 10:

All documents that tend to support or refute the arguments made in your Memorandum in Opposition to Motion for Preliminary Injunction in this litigation (Doc #36).

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. In particular, Defendant-Intervenors reiterate General Objection No. 12. Defendant-Intervenors object to this Request to the extent it calls for irrelevant documents and documents protected from disclosure under the First Amendment. Defendant-Intervenors further specifically object to this Request to the extent it purports to call for either the production of documents that are protected by the attorney work-product privilege and/or are publically available and thus as readily available to Plaintiffs as they are to Defendant-Intervenors. *See* Fed. R. Civ. P. 26(b)(2)(C)(i). For example, Defendant-Intervenors object to this Request to the extent it purports to call for the production of publically available information such as research or news articles, statistical data and information, Internet postings, pleadings in this and other cases, etc..

Subject to and without waiving these objections, because Defendant-Intervenors' position is that all documents implicated by these Requests, apart from those objected to on the grounds that they are work product and/or are publically available, are legally irrelevant to any claim in this case. Unless and until a court with jurisdiction over this case rules otherwise Defendant-Intervenors "deem such communications" as "tend[ing] [neither] to support or refute" any claim or argument in this case, and thus have no responsive documents to produce.

REQUEST FOR PRODUCTION NO. 11:

Documents sufficient to show the title of everyone employed by Protect Marriage, at any time, including but not limited to organizational charts.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant

documents. Defendant-Intervenors object to this Request as calling for documents privileged from disclosure under the First Amendment, such as membership lists, organizational charts, and other documents identifying individuals involved or associated with Defendant-Intervenors. Defendant-Intervenors object to this Request to the extent it calls for production of documents not available to the electorate at large.

Without waiving these objections, Defendant-Intervenors state that Protectmarriage.com – Yes on 8, a Project of California Renewal (the "Committee"), a "primarily formed ballot measure committee" under the California Political Reform Act, has a single officer responsible for filing required public disclosures – David Bauer. Unofficially, the Committee had many volunteers with varying levels of involvement and input. Several of those individuals served as agents for other organizations with an interest in the marriage debate, but none of these individuals were "employees" of the Committee while the Proposition 8 campaign was ongoing. Producing any further information about the volunteers and members of Protect Marriage.com is objectionable on First Amendment grounds, and further, to the extent the identity of volunteers and members of Protect Marriage.com is already in the public realm, Plaintiffs can obtain this information from that source without the need for a production from Defendant-Intervenors.

REQUEST FOR PRODUCTION NO. 12:

All documents reflecting public media coverage of Proposition 8.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. Defendant-Intervenors object to this Request as calling for irrelevant documents and documents privileged from disclosure under the First Amendment. Defendant-Intervenors object to this Request to the extent it calls for production of documents not available to

the electorate at large. Defendant-Intervenors' object to producing drafts of final public communications, which would include non-public versions of documents relating to Proposition 8 that were never available to the electorate at large. Defendant-Intervenors further specifically object to this Request to the extent it purports to call for the production of publically available information that is not uniquely within Defendant-Intervenors' custody and control and is as readily available to Plaintiffs as it is to Defendant-Intervenors. *See* Fed. R. Civ. P. 26(b)(2)(C)(i). To the extent Plaintiffs wish to review the public media coverage of Proposition 8, they can access such materials just as easily as Defendant-Intervenors. Defendant-Intervenors further object to this Request to the extent it calls for collections, compilations, summaries, or analysis of public media coverage that may have been created by Defendant-Intervenors for personal, political, strategic, or other reasons.

Subject to and without waiving these objections, and without conceding the legal relevancy of such materials, Defendant-Intervenors will produce documents created by Defendant-Intervenors and produced to the media for dissemination to the electorate at large.

REQUEST FOR PRODUCTION NO. 13:

All documents that tend to support or refute your responses to Plaintiffs' Interrogatories Nos. 1-3 propounded on August 21, 2009.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. In particular, Defendant-Intervenors reiterate General Objection No. 12. Defendant-Intervenors object to this Request to the extent it calls for irrelevant documents and documents protected from disclosure under the First Amendment. Defendant-Intervenors further specifically object to this Request to the extent it purports to call for either the production of

documents that are protected by the attorney work-product privilege and/or are publically available and thus as readily available to Plaintiffs as they are to Defendant-Intervenors. *See* Fed. R. Civ. P. 26(b)(2)(C)(i). Plaintiffs' Interrogatories Nos. 1-3 specifically sought information related to the legal contentions of Defendant-Intervenors regarding what governmental interests they contend are important, legitimate, or compelling. Any information and/or documents that Defendant-Intervenors have compiled to assess, support, and/or respond to these Interrogatories and/or to evaluate these legal issues constitute work product that is not subject to disclosure. Further, to the extent a response to Plaintiffs' Interrogatories 1 to 3 can be found in the caselaw, such caselaw is as readily available to Plaintiffs as it is to Defendant-Intervenors.

Subject to and without waiving these objections, because Defendant-Intervenors' position is that all documents implicated by these Requests, apart from those objected to on the grounds that they are work product and/or are publically available, are legally irrelevant to any claim in this case. Unless and until a court with jurisdiction over this case rules otherwise Defendant-Intervenors "deem such communications" as "tend[ing] [neither] to support or refute" any claim or argument in this case, and thus have no responsive documents to produce.

REQUEST FOR PRODUCTION NO. 14:

All documents that tend to support or refute any one of your responses to Plaintiffs' Requests for Admission Nos. 1-68, propounded on August 21, 2009, that is not an unequivocal admission.

RESPONSE:

Defendant-Intervenors reiterate their General Objections as if specifically set forth below in response to this Request. In particular, Defendant-Intervenors reiterate General Objection No. 12. Defendant-Intervenors object to this Request to the extent it calls for irrelevant documents and

documents that are protected from disclosure under the First Amendment. Defendant-Intervenors further specifically object to this Request to the extent it purports to call for either the production of documents that are protected by the attorney work-product privilege and/or are publically available and thus as readily available to Plaintiffs as they are to Defendant-Intervenors. *See* Fed. R. Civ. P. 26(b)(2)(C)(i).

Subject to and without waiving these objections, because Defendant-Intervenors' position is that all documents implicated by these Requests, apart from those objected to on the grounds that they are work product and/or are publically available, are legally irrelevant to any claim in this case. Unless and until a court with jurisdiction over this case rules otherwise Defendant-Intervenors "deem such communications" as "tend[ing] [neither] to support or refute" any claim or argument in this case, and thus have no responsive documents to produce.

REQUEST FOR PRODUCTION NO. 15:

All documents that you intend to use as exhibits at trial in this litigation.

RESPONSE:

Defendant-Intervenors object to responding to this Request at this time as the Request is premature. Discovery is not yet complete and a final list of trial exhibits has not yet been compiled. Defendant-Intervenors further object to this Request to the extent it purports to impose obligations beyond those set forth in the case management orders of the Court pertaining to the timing and disclosures of exhibit lists and exhibits. Subject to and without waiving this objection, Defendant-Intervenors note that they will, consistent with the Orders of this Court, produce at the appropriate time all documents (apart from documents that may used for purposes of cross-examination or impeachment) they intend to use as exhibits at trial.

September 11, 2009

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-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

By:/s/Charles J. Cooper
Charles J. Cooper

Exhibit E

Cooper & Kirk
Lawyers
A Professional Limited Liability Company
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036

Nicole J. Moss
nmoss@cooperkirk.com

(202) 220-9600
Fax (202) 220-9601

August 27, 2009

By Electronic Mail

Matthew D. McGill
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036-5306

Re: *Perry v. Schwarzenegger, et al.*,
U.S.D.C., N.D. Cal., C-09-2292 VRW

Dear Matt,

We are in receipt of Plaintiffs' First Set of Requests for Production and appreciate the efforts you have made to confine the scope of those Requests to the representations made at the August 19, 2009 hearing. Consistent with those representations, I write to clarify that Defendant-Intervenors understand Plaintiffs' Requests as not calling for the disclosure of Defendant-Intervenors' internal communications and documents, including communications between and among Defendant-Intervenors, as well as communications between Defendant-Intervenors and their agents, contractors, attorneys, donors, or others in a similarly private and confidential relationship with Defendant-Intervenors. We also understand your Requests, to the extent they call for communications or documents prepared for public distribution, to call for documents that actually were disclosed to the public. We, in turn, intend to make clear that our discovery requests to individuals and organizations opposed to Proposition 8 will be similarly limited.

Sincerely,

Nicole J. Moss

Cc: Charles J. Cooper, Esq.
David Thompson, Esq.

Exhibit F

GIBSON, DUNN & CRUTCHER LLP

LAWYERS

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

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August 31, 2009

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Client No.
T 36330-00001

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

Nicole J. Moss, Esq.
Cooper & Kirk, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036

Re: *Perry, et al. v. Schwarzenegger, et al.,*
U.S.D.C., N.D. Cal. C--9-2292-VRW

Dear Nicole:

Thank you for your correspondence of August 27, 2009. I am writing to confirm that Plaintiffs' First Set of Requests for Production does not seek internal communications among and between your clients regarding Proposition 8 and the related political campaign, except to the extent that you deem such communications responsive to Requests Nos. 9, 10, 13, 14, or 15. We reserve the right to make additional requests for production of your clients' internal communications in the future.

Contrary to your letter, however, to the extent communications between your clients "and their agents, contractors, attorneys, donors, or others" are responsive to Plaintiffs' First Set of Requests for Production and not otherwise subject to the attorney-client, work product, or other recognized legal privilege, we do expect that they will be produced in response to these requests. Consistent with the instructions in the document requests, we expect that all versions of such communications, including those not actually distributed publicly, will be produced.

I would be happy to discuss these matters with you at your convenience.

Very truly yours,

Matthew D. McGill

cc: Charles J. Cooper
David H. Thompson
Christopher Dusseault
Ethan D. Dettmer