No. 10-15649

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EQUALITY CALIFORNIA AND NO ON PROPOSITION 8, CAMPAIGN FOR MARRIAGE EQUALITY: A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

Petitioners/Appellants

v.

KRISTIN M. PERRY, *et al.*,

Respondents/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
C 09-2292 VRW

PETITIONERS/APPELLANTS' APPENDIX OF RELEVANT DOCUMENTS

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APPENDIX OF PETITIONERS/APPELLANTS

INDEX OF EXHIBITS – VOLUME I

			Equality California to March 5, 2010 Order of Magistrate Judge Spero	
10	3/15/2010	620	Defendant-Intervenors' Response to Objections by the ACLU and Equality California to Magistrate Judge Spero's March 5, 2010 Order Granting Motion to Compel	AA 0083
11	3/22/2010	623	Order on Objections to the March 5, 2010 Discovery Order	AA 0104
12	3/23/2010	625	Order Granting Objectors' Motion for Interim Stay	AA 0128
13	3/24/2010		Notice of Appeal	AA 0130
14	3/24/2010		U.S.D.C Northern District Docket	AA 0135

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v

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

Defendants

_____/

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM and MARK A JANSSON, as official proponents of Proposition 8,

Defendant-Intervenors

_____/

No C 09-2292 VRW

ORDER

Plaintiffs Kristin Perry, Sandra Stier, Paul Katami and Jeffrey Zarrillo are California residents in same-sex relationships who applied for marriage licenses in California in May 2009. Doc #1 at ¶32-33. Plaintiffs' applications were denied because the California constitution provides that "only marriage between a man and a woman is valid or recognized in California." Cal Const art I § 7.5. Plaintiffs seek equitable and declaratory relief that section 7.5, recently enacted in California by ballot initiative as Proposition 8 ("Prop 8"), violates the Fourteenth Amendment of the United States Constitution. Doc #1. On May 27, 2009, plaintiffs moved for a preliminary injunction to halt enforcement of Prop 8. Doc #7.

Plaintiffs' motion for a preliminary injunction and the official proponents of Prop 8's motion to intervene are currently set for hearing on July 2, 2009. For the following reasons and in the absence of persuasive reasons to the contrary presented by the parties at the July 2 hearing, the court will CONTINUE the hearing on the preliminary injunction in favor of a case management conference, but will GRANT the proponents' motion to intervene.

I

The court turns first to the motion to intervene filed by the official proponents of Prop 8. Doc #8. Because no party opposes intervention, the court will decide the matter on the papers. See Docs ##28, 31, 32, 35, 37.

To seek intervention as of right under FRCP 24(a), applicants must make a four-part showing: (1) their motion is timely; (2) they have a significant protectible interest relating

to the transaction that is the subject of the action; (3) they are so situated that the disposition of the action may practically impair or impede their ability to protect their interest; and (4) their interest is not adequately represented by the parties to the action. Donnelly v Glickman, 159 F3d 405, 409 (9th Cir 1998). Generally, the court should be "guided primarily by practical and equitable considerations" and should "interpret the requirements broadly in favor of intervention." Id at 409 (citation omitted).

The proponents of Prop 8 meet all four of FRCP 24(a)'s criteria: (1) their motion to intervene is timely, filed just days after plaintiffs filed the complaint; (2) as official proponents, they have a significant protectible interest in defending Prop 8's constitutionality; (3) their interest in upholding Prop 8 is directly affected by this lawsuit; and (4) their interest is not represented by another party, as no defendant has argued that Prop 8 is constitutional. See Docs ##27, 30, 39, 46. Significantly, with respect to the last factor, although the responsibilities of the Attorney General of California contemplate that he shall enforce the state's laws in accordance with constitutional limitations, Cal Const art V § 13, see also Cal Govt Code §§ 12511, 12512, Attorney General Brown has informed the court that he believes Prop 8 is unconstitutional. Doc #39 at 2.

Because the proponents have established their entitlement to intervene as of right, the court GRANTS the proponents' motion to intervene as defendants.

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II

The court turns now to plaintiffs' motion for a preliminary injunction. Because entering a preliminary injunction may raise novel concerns that could be avoided through a prompt decision on the merits, the court's tentative plan is instead to proceed expeditiously to trial, a decision on the merits and final judgment.

A

Defendants' positions regarding the preliminary injunction vary. Los Angeles County registrar-recorder Dean C Logan and Alameda County clerk-recorder Patrick O'Connell take no position on the motion. Docs ##27, 30. California Governor Arnold Schwarzenegger, along with Public Health Director Mark B Horton and Deputy Director Linette Scott, argue against a preliminary injunction because of prudential considerations - specifically, that same-sex marriages performed after the injunction but before a decision on the merits may not be recognized under state law. Doc #33 at 8-10. Attorney General Brown opposes the preliminary injunction because of uncertainty surrounding the validity of post-injunction same-sex marriages. Doc #34. As noted, Brown agrees with plaintiffs that Prop 8 violates the federal Constitution. Doc #39 at 2.

To obtain a preliminary injunction, plaintiffs must show they have raised a serious question on the merits and that the balance of hardships tips sharply in their favor. Department of Parks and Recreation v Bazaar Del Mundo, Inc, 448 F3d 1118, 1123 (9th Cir 2006). Brown's stance that Prop 8 violates the

Constitution may well suffice to establish a serious question on the merits. See Doc #39 at 2. Furthermore, plaintiffs have alleged a violation of their constitutional rights, which alone can demonstrate irreparable harm. Goldie's Bookstore, Inc v Superior Court, 739 F2d 466, 472 (9th Cir 1984).

Governor Schwarzenegger has pointed out that "California and its citizens have already confronted the uncertainty that results when marriage licenses are issued in a gender-neutral manner prior to the issuance of a final, judicial determination of legal and constitutional issues." Doc #33 at 2. The governor avers that in early 2004, shortly before the California Supreme Court's decision in Lockyer v City and County of San Francisco, 33 Cal 4th 1055 (2004), some 4,000 same-sex marriages were performed in California. In the period between the California Supreme Court's decision in In re Marriage Cases, 43 Cal 4th 757 (2008) and the passage of Prop 8, numerous other same-sex marriages were performed. The validity of those marriages remained unclear until the California Supreme Court issued its decision in Strauss v Horton, 46 Cal 4th 364 (2009).

Given that serious questions are raised in these proceedings, issuance of preliminary injunctive relief on an incomplete record may inject still further uncertainty in an important area of concern and interest to the state and its citizens. To avoid the procedural and practical problems surrounding a preliminary injunction, the court is inclined to proceed directly and expeditiously to the merits of plaintiffs' claims and to determine, on a complete record, whether injunctive relief may be appropriate.

B

To reach a decision on the merits, it appears that the court will need to resolve certain underlying factual disputes raised by the parties. The court has identified several questions from the parties' submissions to be resolved at trial. While the issues identified by the parties and discussed below are by no means exhaustive of the issues in this case, the breadth of factual disputes raised by the parties supports the court's plan to proceed directly to trial.

The parties disagree regarding the standard of review the court should apply to plaintiffs' equal protection and due process claims. Compare Doc #7 at 11 (suggesting that under the Due Process Clause, Prop 8 is subject to strict scrutiny) and 18 (arguing that gays and lesbians are a suspect class for equal protection purposes) with Doc #36 at 17 (arguing that Prop 8 does not affect a fundamental right under the Due Process Clause and must therefore only survive rational basis review) and 30 (arguing that gays and lesbians are not a suspect class).

The facts necessary to establish the appropriate level of scrutiny under the Equal Protection Clause have been adverted to in the parties' submissions but have not been adequately briefed, nor have these facts been established on an adequate evidentiary record. The factors, of course, derive from the Supreme Court's formulation in United States v Carolene Products Co, 304 US 144, 153 n4 (1938). See also Varnum v Brien, 763 NW2d 862, 887 (Iowa 2009) (synthesizing federal precedent and listing the factors used to determine whether a classification should receive heightened scrutiny). In the context of the present case, the relevant

factors appear to include: (1) the history of discrimination gays and lesbians have faced; (2) whether the characteristics defining gays and lesbians as a class might in any way affect their ability to contribute to society; (3) whether sexual orientation can be changed, and if so, whether gays and lesbians should be encouraged to change it; and (4) the relative political power of gays and lesbians, including successes of both pro-gay and anti-gay legislation. The parties have also averted to facts, such as the history of marriage and whether and why its confines may have evolved over time, that may be necessary to determine whether the right asserted by plaintiffs is "deeply rooted in this Nation's history and tradition" and thus subject to strict scrutiny under the Due Process Clause. Washington v Glucksberg, 521 US 702, 721 (1997) (citations omitted).

In support of their argument that Prop 8 is constitutional, the intervenors have raised state interests that appear to require evidentiary support. Doc #8 at 17-18 (citing state interests asserted in In re Marriage Cases, 43 Cal 4th at 784 and Hernandez v Robles, 7 NY3d 338 (2006)). To determine whether the asserted state interests can survive plaintiffs' constitutional challenge, the record may need to establish: (1) the longstanding definition of marriage in California; (2) whether 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; (3) whether a married mother and father provide the optimal child-rearing environment and whether excluding same-sex couples from marriage promotes this environment; and (4) whether and how California has

acted to promote these interests in other family law contexts.

The parties' submissions raise the question whether or not Prop 8 discriminates based on sexual orientation or gender or both. Compare Doc #7 at 20, 21 (citing In re Marriage Cases, 43 Cal 4th at 840, to argue it is "sophist to suggest" that Prop 8 does not discriminate against gays and lesbians) with Doc #36 at 29, 32 (citing Cuyahoga Falls, Ohio v Buckeye Comm Found, 538 US 194 (2003), for the proposition that Prop 8 has a disparate impact on gays and lesbians but does not discriminate against them as a class); see also Doc #52 at 17 (asserting that plaintiffs have suffered psychological harm because Prop 8 directs state-sanctioned discrimination at them based their sexual orientation). In addition to the particular facts pertaining to the parties at bar, resolution of this dispute may depend on: (1) the history and development of California's ban on same-sex marriage; (2) whether the availability of opposite-sex marriage is a meaningful option for gays and lesbians; (3) whether the ban on same-sex marriage meaningfully restricts options available to heterosexuals; and (4) whether requiring one man and one woman in marriage promotes stereotypical gender roles.

Finally, the parties have raised a question whether Prop 8 was passed with a discriminatory intent. Doc #7 at 18 (arguing that the sole motivation for Prop 8 was moral disapproval of gays and lesbians) with Doc #8 at 17-18 (arguing various state interests in preventing same-sex couples from marrying). The question of discriminatory intent may inform the court's equal protection analysis. Romer v Evans, 517 US 620, 631-32 (1996); Vil of Arlington Heights v Metro Housing Dev, 429 US 252, 266-67 (1977).

To resolve the question, the court may have to consider the "immediate objective" and "ultimate effect" of Prop 8, along with its "historical context and the conditions existing prior to its enactment," Reitman v Mulkey, 387 US 369, 373 (1967), which in this case may require the record to establish: (1) the voters' motivation or motivations for supporting Prop 8, including advertisements and ballot literature considered by California voters; and (2) the differences in actual practice of registered domestic partnerships, civil unions and marriage, including whether married couples are treated differently from domestic partners in governmental and non-governmental contexts.

The just, speedy and inexpensive determination of these issues would appear to call for proceeding promptly to trial. Although the court will entertain any party's objection to proceeding promptly to trial without deciding plaintiff's request for preliminary injunctive relief, the court believes that a case management conference would likely be a more productive endeavor at the hearing scheduled for July 2, 2009 at 10 AM. At that time, the court will solicit the parties' views on the matters described in FRCP 16(c)(2), as well as scheduling necessary to complete pretrial preparation and the speedy disposition of these proceedings on the merits.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

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

Defendants,

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

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

Plaintiffs and plaintiff-intervenor City and County of San Francisco (collectively "plaintiffs") seek an order compelling production of non-privileged documents responsive to document requests 1, 6 and 8. Doc #325 at 8. Defendant-intervenors, the official proponents of Proposition 8 ("proponents") oppose production, arguing all non-privileged responsive documents have been produced and that additional production at this time would not be practical. Doc #314. Underlying the dispute is the scope of proponents' First Amendment privilege and the application of that privilege to the documents in proponents' possession. The court heard the matter on January 6, 2010. This written order memorializes the oral order made at the hearing.

I

Proponents' First Amendment privilege protects "*private, internal* campaign communications concerning the *formulation of strategy and messages*." Perry v Hollingsworth, 09-17241 Slip Op at 36 n12 (9th Cir January 4, 2010) (emphasis in original). The privilege protects "communications among the core group of *persons* engaged in the formulation of campaign strategy and messages." Id (emphasis in original). The Ninth Circuit left it to this court "to determine the persons who logically should be included" in the core group. Id.

At the January 6 hearing, the court heard argument from counsel concerning the identities of individuals within the core group. Proponents argued the court should consider as part of the core group organizations other than the official campaign in support of Proposition 8, Yes on 8 and ProtectMarriage.com. But

proponents have never asserted a First Amendment privilege over communications to other organizations. Indeed, proponents' November 6, 2009 in camera filing, which was intended to represent (by providing the Court with a representative sample) the universe of documents over which proponents claim a First Amendment privilege, does not identify other organizations' documents as part of proponents' privilege claim. Doc #251. To the contrary, the declaration accompanying the in camera submission refers only to the management structure of the Yes on 8 campaign. Accordingly, the court finds that proponents have only claimed a First Amendment privilege over communications among members of the core group of Yes on 8 and ProtectMarriage.com.

Even if the Court were to conclude that the First Amendment privilege had been properly preserved as to the communication among the members of core groups other than the Yes on 8 and ProtectMarriage.com campaign, proponents have failed to meet their burden of proving that the privilege applies to any documents in proponents' possession, custody or control. There is no evidence before the Court regarding any other campaign organization, let alone the existence of a core group within such an organization. There is also no evidence before the Court that any of the documents at issue are private internal communications of such a core group regarding formulation of strategy and messages.

Counsel did not agree on a core group of Yes on 8 and ProtectMarriage.com at the January 6 hearing, and in the absence of agreement, the court looked to a declaration by Ron Prentice submitted by proponents under seal on November 6, 2009. Doc #251.

The Prentice declaration explains the structure of the "Yes on 8" campaign and identifies by name the individuals with decision-making authority over campaign strategy and messaging. Proponents admitted the individuals in the Prentice declaration form at least a part of the core group but sought an additional 24 hours to determine whether additional individuals should also be included. The court granted the request and ordered proponents to supplement their filing not later than January 7, 2010 at 4 PM. Proponents filed a second Declaration of Mr. Prentice (the "Second Prentice Declaration") which offers addition persons that are claimed to be in the core group of ProtectMarriage.com. Doc #364. Plaintiffs submitted objections to the Second Prentice Declaration on January 8, 2010. Doc #367. Having reviewed both of the Prentice declarations and plaintiffs' opposition, the court finds that the court group consists only of the following individuals:

> Dennis Hollingsworth, Gail J Knight, Martin F Gutierrez, Hak-Shing William Tam and Mark A Jansson (The official proponents of Proposition 8); Ron Prentice, Mark A Jansson, Ned Dolejsi and Doug Swardstrom (the members of ProtectMarriage.com's executive committee); David Bauer (the treasurer of ProtectMarriage.com); Andrew Pugno, Joe Infranco and Glen Lavy (ProtectMarriage.com's attorneys); Mike Spence and Gary Lawrence (individuals who provided significant advice and assistance to the campaign); Sonja Eddings Brown, Chip White and Jennifer Kerns (spokespersons for ProtectMarriage.com); Meg Waters and the individuals listed in ¶6(i)-(iii) and ¶6(v)-(vii) of the Second Prentice Declaration (volunteers who had significant roles in formulating strategy and messaging); employees of Schubert Flint Public Affairs, Lawrence Research, Sterling Corporation, Bieber Communications, Candidates Outdoor Graphics, The Monaco Group, Infusion PR, Connell Dontatelli, JRM Enterprises and K Street Communications (consulting firms who had significant input on strategic decisions); and assistants to the named individuals acting on the named individuals' behalf.

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Communications to anyone outside the core group are not privileged under the First Amendment. While the First Amendment privilege only protects internal communications relating to strategy or messaging, proponents will not be ordered at this juncture to produce any internal communications on any subject. Nevertheless, proponents must revise their privilege log to include, as protected by the First Amendment privilege, all documents consisting of communications between or among members of the core group. The revised privilege log shall be served and filed not later than January 24, 2010.

II

Plaintiffs seek an order directing proponents to produce all non-privileged documents responsive to document requests 1, 6 and 8. Doc #325 at 8. To the extent requests 1, 6 and 8 seek documents that contain, refer or relate to arguments for or against Proposition 8, the requests seek relevant discovery as defined in FRCP 26(b)(1). See Doc #252 at 3; Perry, 09-17241 Slip op at 34. Because the scope of proponents' First Amendment privilege has been defined, proponents are now able to identify non-privileged documents and produce them to plaintiffs pursuant to the protective order, Doc #360. Proponents are therefore ordered to produce all documents responsive to requests 1, 6 and 8 that contain, refer or relate to any arguments for or against Proposition 8 other than communications solely among the core group as defined above. They shall begin production of the documents on a rolling basis not later than Sunday, January 10, 2010 at 12 PM. Production shall conclude not later than Sunday, January 17, 2010 at 12 PM. The

short production schedule is necessary in light of the trial scheduled to begin on January 11, 2010.

IT IS SO ORDERED.

JOSEPH C SPERO
United States Magistrate Judge

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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

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL KNIGHT, MARTIN GUTIERREZ, MARK JANSSON, AND PROTECTMARRIAGE.COM'S MOTION TO COMPEL COMPLIANCE WITH NONPARTY DOCUMENT SUBPOENAS

Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

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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TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that as soon as practicable given the Court's trial schedule, before the Honorable Vaughn R. Walker, United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Defendant-Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com ("Proponents") will move the Court for an order compelling production of documents by non-parties Californians Against Eliminating Basic Rights, Equality California, and No on Proposition 8, Campaign for Marriage Equality, A Project of the American Civil Liberties Union of Northern California.[1]

The issue to be decided is: Must the subpoenaed parties, pursuant to subpoenas issued out of this judicial district, produce documents that this Court has deemed relevant and nonprivileged?

INTRODUCTON

The Court has determined that it must build a record of "the mix of information before and available to the voters." Doc #214 at 14. On January 8, the Court held that this mix of information consists of any document that "contain[s], refer[s] or relate[s] to arguments for or against Proposition 8." Doc #372 at 5. The Court thus ordered Proponents of Proposition 8 to produce any such document to Plaintiffs by January 17. But during the election over Proposition 8, the voters did not hear and consider the voices of only ProtectMarriage.com. Instead, there was a cacophony of voices, consisting of far more than Proponents' communications. Indeed, perhaps the loudest voice in the election was that of a coalition of groups opposed to Proposition 8—a coalition that outspent the backers of Proposition 8 and poured a total of $45 million into the election. If the Court is intent on building a

[1] Pursuant to N.D. Cal. L.R. 7-2(a), this motion must be noticed for hearing "on the motion calendar of the assigned Judge for hearing not less than 35 days after service of the motion." Given that the next available date on the Court's calendar is April 1, 2010, and that trial is already underway, Proponents respectfully request that the Court schedule this motion for hearing as soon as the trial schedule will allow. Concurrently with this motion, Proponents have filed an (Continued)

balanced record of the mix of information before and available to the voters, then the documents possessed by the main groups in this coalition are indispensible—and, given that trial is already underway, must be produced immediately.

BACKGROUND

The Proposition 8 election was preceded by one of the most extensive and expensive ballot measure campaigns in California's history. *See, e.g.*, John Wildermuth, *Prop. 8 among costliest measures in history*, S.F. GATE, Feb. 3, 2009, *at* http://articles.sfgate.com/2009-02-03/bay-area/17190799_1_same-sex-marriage-equality-california-campaign. ProtectMarriage.com—one of the Defendant-Intervenors in this case—was the principal organization promoting passage of Proposition 8. Aligned against Proposition 8 was a coalition of organizations that together outspent ProtectMarriage.com—to a total tab of $45 million. *See id.*

As the Court is aware, Plaintiffs have contended that virtually every document created by Proponents during the course of the campaign is relevant to their constitutional challenge to Proposition 8. *See* Doc # 187-3 (Plaintiffs' Requests for Production). Proponents have long objected to the sweeping scope of Plaintiffs' discovery requests, on First Amendment privilege, relevance, and burden grounds. *See, e.g.*, Doc #s 187, 197. Proponents have repeatedly maintained, however, that to the extent the Court deemed such discovery relevant and nonprivileged, Proponents would be obliged to seek reciprocal discovery from the groups and persons who campaigned against Proposition 8. *See, e.g.*, Doc # 187 at 3-4.

Proponents thus issued document subpoenas to several organizations that mounted major campaigns in opposition to Proposition 8, including Californians Against Eliminating Basic Rights ("CAEBR"), Equality California, and No on Proposition 8, Campaign for Marriage Equality, A Project of the American Civil Liberties Union of Northern California ("ACLU") (collectively, "the No on 8

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administrative motion to shorten time.

groups"). *See* Exs. 1 and 2. The document requests in the subpoenas mirrored those in Plaintiffs' requests to Proponents. For example, the subpoenas require the No on 8 groups to produce: (i) "all documents ... or other materials that you distributed to voters, donors, potential donors, or members of the media regarding Proposition 8," and (ii) "all documents constituting communications that you prepared for public distribution relating to Proposition 8"; and (iii) "all versions of any documents that reflect communications relating to Proposition 8 between you and any third party." *See* Ex. 1.[2] Because Proponents' motion seeking a limitation on the permissible scope of discovery was being litigated in this Court and the Ninth Circuit, Proponents advised the No on 8 groups that the requests were to be read to extend no further (but no less extensively) than the permissible scope of discovery as ultimately defined by this Court. Proponents kept the No on 8 groups apprised of developments on this front and continually reminded them of their obligations to produce pursuant to Rule 45. *See* Ex. 3.

The No on 8 groups objected to the subpoenas on several grounds, including relevance, privilege, and burden. *See* Ex. 4. For example, the ACLU objected that "[t]he Subpoena seeks information that is irrelevant to the issues in the case," that "[t]he Subpoena seeks material that is protected and privileged from disclosure pursuant to the First Amendment," and that "[c]ompliance with the Subpoena would impose an undue burden on the ACLU." *See* Ex. 4 at 3-4. And Equality California objected to the subpoena "on the ground that the information and/or documents sought in the requests are irrelevant," and to the extent it "seeks information and documents that were not publicly distributed on privacy grounds and to the extent it violated protections guaranteed by the United States Constitution." *Id.* at 48-59. Indeed, Equality California flatly stated it "will not produce any information or documents that were not publicly distributed." *Id.* at 50. And CAEBR objected that the subpoena because it: is "unduly burdensome"; "requires disclosing confidential research and proprietary information"; infringes "the right to privacy and freedom of association"; and "seeks

[2] Pursuant to Plaintiffs' narrowing of their Request No. 8, this last request was later (Continued)

documents that are not relevant to this action." *Id.* at 28-34.

On October 1 and November 11, this Court set limitations on the permissible scope of a request that seeks documents regarding Prop 8 issued to "any third party." *See* Doc #s 214, 252. On January 7, 2010, however—after the First Amendment privilege issue had been litigated in the Ninth Circuit—the Court withdrew those limitations, ruling that "we're going back." Hr'g of Jan. 6, 2020, Tr. at 89. On January 8, the Court ruled that the "First Amendment privilege protects '*private, internal* campaign communications concerning the *formulation of strategy and messages*,'" and that "[c]ommunications to anyone outside the core group are not privileged under the First Amendment." Doc # 372 at 2, 5 (quoting *Perry v. Schwarzenegger*, 09-17241, Slip op. at 36 n.12 (9th Cir. Jan. 4, 2010) (emphasis in original)). The Court further held that any such "documents that contain, refer or relate to arguments for or against Proposition 8" are "relevant" and must be produced, and that that "all documents consisting of communications between or among members of the core group" must be logged. *Id.* at 5. The Court held that a "short production schedule is necessary in light of the trial scheduled to begin on January 11, 2010." *Id.* at 5-6.

On January 12, 2010, Proponents advised the No on 8 groups of these developments and requested that they identify their "core group" by close of business on January 13 and then begin immediate, rolling production of all responsive, nonprivileged documents. *See* Ex. 5. The No on 8 groups apprised Proponents that, despite this Court's orders defining the permissible scope of document requests in this case, they stood by previous objections and would not produce all documents responsive to the requests in the subpoenas. *See* Ex. 6.

The No on 8 groups have not filed any motions to quash the subpoenas.

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narrowed to mirror Plaintiffs' revised request. *See* Ex. 3 (Letters of Oct. 9, 2009); Ex. 2.

ARGUMENT

The Court has stated its intention "to determine, on a complete record, whether injunctive relief may be appropriate" in this case. Doc # 76 at 5. In order to compile this "complete record," the Court has held that it must examine "the history and development of California's ban on same-sex marriage" and the "historical context and the conditions existing prior to [Prop 8's] enactment," including "advertisements and ballot literature considered by California voters." *Id.* at 8-9. Moreover, the Court has held that "the mix of information before and available to the voters forms a legislative history that may permit the [C]ourt to discern whether the legislative intent of an initiative measure is consistent with and advances the governmental interest that its proponents claim in litigation challenging the validity of that measure or was a discriminatory motive." Doc # 214 at 14. And on January 8, the Court held that this mix of information before and available to the voters consists of any document "that contain[s], refer[s] or relate[s] to arguments for or against Proposition 8." Doc # 372 at 5.

To date, however, only one side of the debate over Proposition 8 has produced such materials—the Proponents. The Court cannot possibly build a "complete" and balanced record of this "mix of information" if the other side of the debate—which has many thousands of relevant documents and spent $45 million in an effort to inform and sway the electorate's knowledge and intent—is completely absent from the record.

Despite the fact that such documents are necessary to build a "complete record" of the "mix of information before and available to voters," the No on 8 groups have refused to produce or log documents in their possession. They have based this refusal on relevance and privilege grounds that this Court has rejected. When a party subpoenaed under Rule 45 interposes objections, "the serving party may move the issuing court for an order compelling production." Fed. R. Civ. P. 45(c)(2)(B)(i). Proponents so move this Court, and respectfully request that the No on 8 groups be directed to begin an immediate, rolling production of documents responsive to the subpoenas and discoverable pursuant to

this Court's orders concerning relevance and privilege. As the Court explained in its January 8 order, a "short production schedule is necessary in light of the trial scheduled to begin on January 11, 2010." Doc # 372 at 5-6.[3]

CONCLUSION

For the foregoing reasons, Proponents respectfully request that the Court grant this motion to compel.

Dated: January 15, 2009

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

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

[3] Some of the No on 8 groups have claimed that a motion to compel is not timely under this Court's Local Rules. Rule 26-2, however, states that a "[d]iscovery cut off" applies "[u]nless otherwise ordered" and that "[d]iscovery requests that call for responses ... after the applicable discovery cut-off are not enforceable, except by order of the Court for good cause shown." N.D. Cal. Civ. L.R. 26-2. Here, although the Court originally set a discovery cut-off of November 30, 2009, *see* Doc # 160 at 2, the Court just recently ruled on the scope of the First Amendment privilege and relevant discovery. *See* Doc # 372. Thus, the Court has already permitted motions to compel beyond the date established by L.R. 26-2, and it was just such a motion that resulted in the January 8 order. *See* Doc # 325 at 8 (seeking order compelling discovery and dated Dec. 28, 2009); Hr'g of Jan. 6, 2010, Tr. at 7 (noting that Doc # 325 seeks a "compelling" order); *id.* at 69 (noting that Plaintiffs "filed ... what amounts to the motion to compel ... on the 28th").

CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 5-6 and 28 U.S.C. § 1746, I hereby certify that on this 15th of January 2010, I caused to be served via electronic mail a true and correct copy of the foregoing document upon the following:

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

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

Defendants,

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

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

Proponents object to Magistrate Judge Spero's discovery order, Doc #372, on three grounds: (1) its definition of relevant documents; (2) its rulings regarding proponents' First Amendment privilege; and (3) its schedule for production of documents. Doc #446. Plaintiffs argue Judge Spero's order was correct and should not be disturbed. Doc #470. A magistrate judge's discovery order may be modified or set aside only if it is "clearly erroneous or contrary to law." FRCP 72(a).

Proponents first object that Judge Spero failed to incorporate the court's relevance rulings from its October 1, Doc #214, and November 11, Doc #252, orders. Doc #446 at 9. At the January 6, 2010 hearing before Judge Spero, proponents could not point to conclusive relevance determinations from the October 1 and November 11 orders regarding plaintiffs' Document Requests Nos 1, 6 and 8. Doc #362, Hrg Tr Jan 6, 2010 at 21. Judge Spero therefore ordered proponents to produce all documents that "contain, refer or relate to any arguments for or against Proposition 8." Doc #372 at 5. Judge Spero's order is consistent with the court's previous relevance rulings and is therefore not clearly erroneous.

Proponents object to Judge Spero's rulings regarding proponents' First Amendment privilege. First, proponents object that they are required to log all communications among core group members regardless of the content of the communication. Doc #446 at 15. But as Judge Spero explained at the January 6 hearing, internal core group communications not related to strategy and messaging do not enjoy protection under proponents' First Amendment privilege in light of the Ninth Circuit's ruling in Perry v Schwarzenegger, 09-17241 amended slip op at 36 n12. Doc #362 at

85. Thus, to the extent Judge Spero permitted proponents to log rather than produce core group documents not related to strategy or messaging, Judge Spero's order benefits proponents and was not clearly erroneous.

Proponents object to Judge Spero's definition of the "core group" involved in developing strategy and messaging for the ProtectMarriage.com - Yes on 8 campaign. Doc #446 at 15-17. But the core group as defined in Judge Spero's order is adopted from the declaration of Ron Prentice submitted by proponents. Doc #372 at 4. Indeed, Judge Spero incorporated almost every individual and entity referenced in the Prentice declaration except MCSI, as Bill Criswell had submitted a declaration under oath stating that "[a]t no time did MCSI develop or assist in the development of the message(s) or theme(s) conveyed by the campaign to the voting populace." Doc #351-1 at 2 ¶5. Judge Spero's reliance on the Prentice declaration and the declaration of Bill Criswell to define the core group was not clearly erroneous.

Finally, proponents object to the production schedule set by Judge Spero to conclude on January 17, 2010 at 12 PM. Doc #446 at 19-20. But in light of the ongoing trial, it was not in error to set an ambitious, but orderly, production schedule.

Because Judge Spero did not clearly err in any of his discovery rulings, proponents' objections, Doc #446, are DENIED.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

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NO ON PROPOSITION 8,
CAMPAIGN FOR MARRIAGE EQUALITY:
A PROJECT OF THE AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN CALIFORNIA

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

SUPPLEMENTAL DECLARATION OF ELIZABETH GILL IN SUPPORT OF OPPOSITION OF NO ON PROPOSITION 8, CAMPAIGN FOR MARRIAGE EQUALITY: A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO DEFENDANT-INTERVENORS' MOTION TO COMPEL COMPLIANCE WITH NONPARTY DOCUMENT SUBPOENAS

Judge: Chief Judge Walker
Location: Courtroom 6, 17th Floor
Trial Date: January 11, 2010

I, Elizabeth Gill, hereby declare:

1. I am a Staff Attorney for the LGBT & AIDS Project of the ACLU Foundation and for the ACLU Foundation of Northern California. I am counsel of record for non-party No on Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union of Northern California, which is a state-registered political action committee ("ACLU PAC"). The ACLU of Northern California also reported the time I spent working to defeat Proposition 8 through the ACLU PAC. I have personal knowledge of the matters contained in this declaration, except where such facts are stated to be based on information and belief, and those facts I believe to be true. If called to testify to the matters set forth in this declaration, I could do so competently.

2. I submit this declaration in response to the Court's February 11, 2010 order (Docket # 589) requesting that non-party ACLU PAC submit a declaration "identifying the core group of individuals engaged in the formulation of campaign strategy and messaging."

3. In my capacity as Staff Attorney, I spent a significant amount of time between June 2008 and November 2008 working to defeat Proposition 8. I did this work in two ways: (1) I worked with numerous other individuals and organizations for an umbrella campaign organization "No on 8 – Equality for All," of which the ACLU of Northern California was a member; and (2) I worked with others within the ACLU on various activities directed toward defeating the initiative (such as communicating to ACLU members about the initiative, holding fundraisers at the ACLU, etc). I also oversaw the work of several other ACLU employees to defeat Proposition 8. All of this work was reported as required as contributions to an issue campaign by the ACLU PAC.

4. The other employees at the ACLU who worked to defeat Proposition 8 between June 2008 and November 2008 (collectively, "the ACLU employees") were:

- Paul Cates, Public Education Director, LGBT & AIDS Project
- Matthew Coles, Director, LGBT & AIDS Project
- Rebecca Farmer, Media Relations Director, ACLU of Northern California
- Shayna Gelender, Field Organizer, ACLU of Northern California
- Maya Harris, Executive Director, ACLU of Northern California
- Ashley Morris, Field Organizer, ACLU of Northern California

- Gigi Pandian, Graphic Design and Public Production Manager, ACLU of Northern California
- Skylar Porras, Director San Jose office, ACLU of Northern California
- Catrina Roallos, Web Content Manager and New Media Strategist, ACLU of Northern California
- Laura Saponara, Communications Director, ACLU of Northern California

5. Like me, most of these other ACLU employees worked to defeat Proposition 8 in two ways—by participating in the Equality for All campaign, and by working on ACLU-specific activities directed toward defeating the initiative. For all the ACLU employees, the formulation of campaign strategy and messaging took place in several different ways.

6. First, a number of the ACLU employees communicated regularly with other participants in the Equality for All campaign about campaign strategy and messaging. Maya Harris and Matt Coles were on the Equality for All Executive Committee; I was on the Statewide Campaign Committee; and Shayna Gelender and Ashley Morris worked for the Equality for All campaign as field organizers. As described in Geoff Kors's supplemental declaration (which I herein incorporate by reference as it pertains to the structure of Equality for All), communication about the formulation of campaign strategy and messaging happened at all levels of the Equality for All campaign structure. For example, the Executive Committee communicated regarding the statewide campaign strategy and messaging to be used in television and other statewide media advertising; the Statewide Campaign Committee communicated regarding the implementation of this strategy and messaging in regionally specific ways (such as a messaging strategy for voters in Fresno); and the field organizers in Northern California communicated regarding the strategy of field outreach in Northern California and the messaging used by volunteers when talking to voters. As also explained in Geoff Kors's declaration, the individuals who made up the Equality for All campaign were sometimes paid campaign staff and sometimes (like the ACLU employees) employees of one of Equality for All's member organizations. And all tiers of the Equality for All campaign communicated with various consultants regarding campaign strategy and messaging.

7. Second, the ACLU employees communicated with activists around Northern

California about campaign strategy and messaging. For example, starting in the summer of 2008, Shayna Gelender and I travelled around Northern California starting "local action committees"—or groups of volunteers dedicated to working to defeat Proposition 8 in their community. By the end of the campaign, we were regularly working with approximately 10 such groups (in Chico, Contra Costa County, Davis, Monterey, Sacramento, Salinas, San Jose, Santa Clara County, Santa Cruz, and San Mateo County). Together with the individuals in these groups, we strategized as to how best to reach voters in those communities, and formulated messaging tailored to those communities. In a number of the communities, we and the local groups planned and held press conferences, in which local politicians and prominent citizens spoke against Proposition 8.

8. Third, the ACLU employees communicated with one another about campaign strategy and messaging. As explained above, in addition to participating in the umbrella campaign organizations and assisting regional activists, the ACLU engaged in its own activities directed toward defeating Proposition 8. For example, the ACLU sent out e-mails to its e-mail lists asking its members to vote against Proposition 8 and telling them what they could do to help defeat the measure. While the ACLU has already produced the final version of all the e-mails it sent out about Proposition 8 (along with all the other material it publicly disseminated), the ACLU employees communicated internally about the content of the e-mails, who they should be sent to, etc.

9. In all these three instances, there may have been many communications between the ACLU employees and Equality for All participants, regional activists, or other ACLU employees that did not involve the formulation of campaign strategy and messaging. Indeed, having worked on the campaign, I can say that a significant percentage of the e-mail I sent and received involved logistics (such as: who is bringing No on 8 signs to the rally). But the only way to determine whether a particular communication between an ACLU employee and one of many other individuals who worked to defeat Proposition 8 reflects non-public campaign strategy information that we believe is privileged under the First Amendment is to review the communication. Given the nature of the Equality for All campaign, as well as the way the ACLU employees worked to defeat Proposition 8, it would not be possible to pre-select a number of individuals with whom the ACLU employees communicated and then limit a determination of privilege to those individuals.

10. In describing the formulation of campaign strategy and messaging in these different ways, I am not suggesting that the ACLU's communications even with targeted groups of voters constitute the formulation of campaign strategy and messaging or are subject to any form of First Amendment privilege. All of the persons with whom the ACLU employees formulated campaign strategy and messaging were themselves working to defeat Proposition 8—as part of the umbrella Equality for All campaign, as part of a regional group dedicated to the defeat of the initiative, or as an ACLU employee, member, or volunteer. It was my experience in working to defeat Proposition 8, however, that campaign strategy and messaging were not just handed down by a high-level group in an organized campaign structure; rather, individuals and groups working all over the state to defeat the measure were themselves strategizing as to how best to do so and how best to get a "No on 8" message out to California voters.

11. If I and the other ACLU employees had not been able to engage in the open and frank communication regarding campaign strategy and messaging with the many different types of individuals identified above, it would seriously have hindered our ability to mount political opposition to Proposition 8. In much of the work the ACLU employees did to defeat Proposition 8, numerous plans were discarded before a final strategy was settled on, and numerous drafts of the messaging that eventually went to voters was prepared. Individuals and groups working together against Proposition 8 also exchanged honest communications about strategic and messaging differences and concerns. Such robust exchange of ideas and free flow of information is necessary both to reaching consensus among diverse individuals and groups working together and to achieving the best, most polished final strategy and messaging.

12. Were it the case that communications about campaign strategy and messaging were accessible through litigation, it would also deter the ACLU from participating in other, similar political activity. Almost every year, the ACLU of Northern California works against or in support of one or more California ballot initiatives that affect civil rights. In 2008 alone, the ACLU of Northern California took an official position on five ballot initiatives: we advocated "no" on four (4, 8, 6, and 9) and "yes" on one (5). The ACLU of Northern California also actively participated in campaigns to defeat the four initiatives we advocated against. This participation would not be

possible—or would be extremely limited—if such participation threatened to expose the ACLU's strategy and messaging on the issues presented by the ballot initiatives. As an organization with long-term political goals the ACLU of Northern California would become quite wary of participating in an initiative campaign if the cost of doing so were the sharing of all of our strategies, messaging, and tactics with our opponents.

13. Indeed, many of these issues that were raised in the Proposition 8 campaign are issues that I personally continue to address in political fora around the state. For example, one of the claims made by the Proposition 8 proponents ("Proponents") was that Proposition 8 would protect California children "from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." (Official Ballot Materials, Argument in Favor of Proposition 8.) Even though Proposition 8 passed, the debate over public school curricula and LGBT issues is ongoing in many parts of California. Thus in 2009, I worked with parents and school officials in the Alameda Unified School District who were confronting a controversy over an LGBT-inclusive curriculum passed by the Board. If the private, internal discussions of campaign strategy and messaging on this issue during the Proposition 8 campaign were required to be revealed to our political opponents, they would have an unfair advantage in the political arena and our political goals would be frustrated.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on February 22, 2010 at San Francisco, California.

Elizabeth Gill

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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,

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.

Case No. 09-CV-2292 VRW

DECLARATION OF GEOFF KORS IN SUPPORT OF EQUALITY CALIFORNIA'S OPPOSITION TO MOTION TO COMPEL

Trial: January 11, 2010
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

FENWICK & WEST LLP ATTORNEYS AT LAW SAN FRANCISCO

I, Geoff Kors, hereby declare:

1. I am the Executive Director of third party Equality California (EQCA). I have personal knowledge of the facts stated below and, if called upon as a witness, could testify competently to such facts.

2. I submit this declaration in response to the Court's February 11, 2010 order (Docket # 589) requesting third party EQCA submit a declaration "identifying the core group of individuals engaged in the formulation of campaign strategy and messaging."

3. EQCA is an organization dedicated to achieving equality and securing the legal protection of the lesbian, gay, bisexual and transgender (LGBT) community. Founded in 1998, EQCA's activities include sponsoring legislation and coordinating efforts to ensure its passage, lobbying legislators and policy makers, building coalitions, developing community strength and empowering individuals and other organizations to engage in the political process. EQCA Institute is an affiliated organization that educates LGBT people and the public at large about issues impacting the LGBT community and its allies.

4. As Executive Director of EQCA, I lead the legislative efforts, as well as the political action committee activities and educational work of EQCA. Also as part of my role as Executive Director of EQCA, I was a member of the Executive Committee of the No on 8 - Equality for All campaign ("Equality for All").

Structure of No on 8 Campaign

5. Equality for All was formed in 2005 to prepare to fight any proposition that would prohibit or eliminate the right of same gender couples to marry. Such a measure qualified for the November 2008 ballot (it was subsequently labeled Proposition 8). The organization was originally comprised of representatives of approximately 35 national, state and local organizations, and it was registered by these representatives with the State of California as a political action committee. The goal of the organization was to defeat Proposition 8 once it qualified for the ballot.

6. Throughout the summer and fall of 2008, many additional organizations joined Equality for All's Statewide Campaign Committee ("Campaign Committee"), and, ultimately,

Equality for All served as an umbrella campaign organization for more than 100 member organizations working to defeat Proposition 8. These organizations included local, statewide, and national LGBT advocacy organizations, civil rights advocacy organizations, political party groups, labor unions, and many other concerned citizen groups. The formulation of campaign strategy and messaging took place at many different levels in what came to be a complex and sprawling campaign organization.

7. The Executive Committee of Equality for All was responsible for managing the umbrella campaign organization. In that capacity, the Executive Committee coordinated campaign fundraising, hired campaign consultants and professionals (who were paid fees or salaries by the Equality for All campaign), and managed the campaign manager and campaign director. The Executive Committee collectively made decisions of great importance to the campaign. The Executive Committee met in person every month either in San Francisco or Los Angeles, and in addition extensively coordinated with one another, as well as campaign consultants and campaign staff, through email and conference calls.

8. Key campaign decisions made by the Executive Committee were ratified by Equality for All's Campaign Committee. This committee was comprised of the Equality for All member organizations (including the many organizations that were not represented on the Executive Committee), as well as representatives of regional and other groups that were working with Equality for All to defeat Proposition 8. The Campaign Committee met once a month in person either in San Francisco or Los Angeles, and the rest of the time coordinated with one another, along with campaign consultants and campaign staff, through email and conference calls. As the election approached, the Campaign Committee met weekly. Individual staff and board members of the Campaign Committee member organizations participated in the conference calls as well as communicated through email.

9. The Equality for All campaign staff, which was either paid by the campaign or donated by one of the member organizations, was led first by a campaign manager and then by a campaign director. As with most political campaigns, the work of the campaign was organized topically—into fundraising, field (reaching out to potential voters), political, and advertising.

Each of these areas had a director (or sometimes several regional directors), and numerous other staff.

10. Equality for All paid numerous consultants to provide advice and technical support for a wide array of campaign activity. These consultants included: political consultants who provided overall advice on campaign strategy; political consultants who provided advice about specific campaign strategies (such as reaching out to certain targeted voter groups); messaging consultants in a variety of media; messaging consultants who conducted polling and focus group research; and technology consultants who, for example, created and managed Equality for All's website and social media presence.

11. The member organizations of Equality for All participated both in the campaign activities of the umbrella organization, and in campaign activities on behalf of their own organizations. For example, EQCA was a member of the Equality for All campaign, but EQCA also worked to defeat Proposition 8 in its own capacity—using its own website to argue against Proposition 8, sending emails to its own list regarding Proposition 8, and holding its own fundraisers to defeat Proposition 8. It is my understanding and belief that the many of the other member organizations of Equality for All worked within and independently of the Equality for All campaign in the same way EQCA did.

Formulation of Campaign Strategy and Messaging

12. Strategy and messaging to defeat Proposition 8 were formulated, debated and discussed at all levels of the Equality for All campaign. In my role as Executive Director of EQCA and as a member of the Executive Committee, I communicated regularly with other members of the Executive Committee, with members of the Campaign Committee, with consultants hired by Equality for All and with staff of both Equality for All and of the Equality for All member organizations regarding the formulating of campaign strategy and messaging. These communications included discussions, among many other things, of the Equality for All campaign structure, fundraising, advertising, messaging research, and targeted outreach to press, politicians, and voter groups.

13. It is my understanding and belief that all of the individual participants in the

Equality for All campaign engaged in some formulation of strategy and messaging. Within each area of campaign activity, individuals formulated campaign strategy and messaging and communicated with one another about such formulation. For example, outside of the Executive Committee, which met and communicated regularly on the strategy and messaging of the statewide campaign:

- The Campaign Committee regularly engaged in the formulation of campaign strategy and messaging by (a) adapting the generic messaging developed by consultants and campaign staff and approved by the Executive Committee to the more than 50 counties of California and numerous, discrete voter groups, and (b) developing campaign strategies specific to those regions and groups. For example, the messaging and strategy used in a particular California county, such as Inyo, or with a particular voter group, such as one of the Asian Pacific-Islander (API) groups, often looked very different from the generic messaging and advertising used in statewide campaign material. The members of the Campaign Committee, who were organizations working in these regions or with the voter groups, had significant input into how Equality for All campaign strategy and messaging was carried out in their communities, and they regularly communicated with one another, with the Executive Committee, and with Equality for All campaign staff and consultants about strategy and messaging.
- Equality for All campaign staff working in the different topical areas regularly engaged in the formulation of campaign strategy and messaging. For example: (a) the campaign staff dedicated to working on college campuses came up with a unique strategy and different messaging to get the "No on 8" message out on campuses (in part, they combined the "No on 8" messaging with "No on 4" messaging, another initiative of interest to younger voters (involving parental notification for abortion)); (b) the field

staff dedicated to hosting phone banks, during which Equality for All volunteers would call potential voters, were constantly revising their strategies in reaching out to volunteers and in the messaging scripts communicated over the phone to voters; and (c) the fundraising staff working on getting people to host house parties (to raise money for the Equality for All campaign) developed house party tool kits that were regionally tailored and that included campaign messaging.

14. It is further my understanding and belief that the formulation of campaign strategy and messaging took place within each of the member organizations of Equality for All. Outside of the work EQCA employees did directly for the campaign, we communicated with one another and with EQCA's board members about the formulation of strategy and messaging directed toward defeating Proposition 8. EQCA is not claiming that every communication between the Equality for All campaign staff and campaign consultants and the Equality for All member organization staff involved the formulation of campaign strategy or messaging. In fact, most of these communications were likely about much more mundane matters, like coordinating specific phone banks or rallies. However, the only way to determine whether a particular communication between, for example, an EQCA employee and an Equality for All consultant contains the internal, private campaign strategy and messaging information that the Ninth Circuit has held is privileged under the First Amendment is to review the communication.

15. Identifying a core group of persons involved in the formulation of Equality for All campaign strategy and messaging must necessarily include persons who served on the Executive Committee, persons and organizations on the Statewide Campaign Committee, Equality for All staff, consultants hired by the Executive Committee and individuals at each Campaign Committee organization. If the Court requests, EQCA will seek to provide a comprehensive list of all persons involved in the Equality for All campaign.

Individual Participants in EQCA Campaign

16. The EQCA Board of Directors was communicated with regarding campaign strategy and messaging and involved in formulating EQCA's fundraising efforts to defeat

Proposition 8. The members of the EQCA Board of Directors during the 2008 campaign were: John Duran; Cary Davidson; Tim Hohmeier; Deb Kinney; Diane Abbitt; Jim Abbott; Dave Baron; Xavier Barrera; Brandon Brawner; Betsy Butler; Jody Cole; Larry Colton; Doug Dombek; Jeff Haber; Mike Hutcheson; Roslyn Jones; Tom Maddox; Shannon Minter; James Nguyen; Jeff Orr; Dennis Rasor; Jaime Rook; Rick Saputo; Linda Scaparotti; Eric Siddall; Alan Uphold; and assistants to the named individuals acting on the named individuals' behalf.

17. As part of EQCA, the following EQCA staff members were responsible for formulating campaign strategy and messaging: Jean Adams; Field Organizer; Ali Bay, Communications Manager; Ian Barrera, Intern; Jim Carroll, Managing Director; Maya Scott-Chung, Field Organizer; Liam Cooper, Field Organizer; Doug Flater, Regional Manager and Major Gifts Officer; Joe Goldman, Communications Intern; Daniel Gould, Heath Network Coordinator; Kendra Harris, Government Affairs Manager; Ted Jackson, Field Organizer; Kaitlin Karkos, Development Associate; Alice Kessler, Government Affairs Director; Seth Kilbourn, Public Policy Director; Hannah Johnson, Field Organizer; Geoff Kors, Executive Director; Erica Liscano, Special Events Associate; Shumway Marshall, eCommunications and Graphics Manager; Randy Medenwald, Development Director; Miranda Meisenback, Field Intern; Trina Olson, Field Director; Michelle Ortiz, Deputy Director of Development; Zorina Price, Office Manager; Leanne Pittsford, Database Coordinator; Jennifer Sample, Office Manager; George Simpson, Online and Communications Manager; Sean Sullivan, Development Director; Sarah Tomastik, Data Input; Clarence Williams, Major Gifts Officer.

18. The EQCA Institute Board of Directors was communicated with regarding campaign strategy and messaging and involved in formulating EQCA's fundraising efforts to defeat Proposition 8. The members of the EQCA Institute Board of Directors during the 2008 campaign were: Gwyneth Borden, Chris Carnes, Cathy Schwamberger, Hon. José Cisneros, Randy Clark, Jody Cole, Troup Coronado, Carrie Farrell, Kelly Ferrero, Mark Goodson, Ben Patrick Johnson, Hon. Leslie Katz, Liz Maldonado, Michael Martinez, Shannon Minter, Kimberly Nichols, Dennis Rasor, Donna Sachet, Gary Soto, Laura Spanjian, Doug Spearman, Hon. Phil Ting, and William Tompkins.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on February 22, 2010 at Palm Springs, California.

/s/ Geoff Kors
Geoff Kors

Attestation Pursuant to General Order 45

Pursuant to General Order No. 45, Section X.B., I, Lauren Whittemore, hereby attest that I have obtained concurrence of the signatory, Geoff Kors, indicated by a "conformed" signature (/s/) within this e-filed document.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 22, 2010 at San Francisco, California.

Dated: February 22, 2010

FENWICK & WEST LLP

By: */s/* Lauren Whittemore
Lauren Whittemore

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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,

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.

Case No. 09-CV-2292 VRW

SUPPLEMENTAL DECLARATION OF GEOFF KORS IN SUPPORT OF EQUALITY CALIFORNIA'S OPPOSITION TO MOTION TO COMPEL

Trial: January 11, 2010
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

I, Geoff Kors, hereby declare:

1. I am the Executive Director of third party Equality California (EQCA). I have personal knowledge of the facts stated below and, if called upon as a witness, could testify competently to such facts.

2. I submit this declaration in response to the Court's February 25, 2010 order (Docket # 602) requesting third party EQCA submit a declaration containing the names of executive committee members, campaign committee members, and consultants, as well as a description of a reasonable search methodology.

3. EQCA is an organization dedicated to achieving equality and securing the legal protection of the lesbian, gay, bisexual and transgender (LGBT) community. As Executive Director of EQCA, I lead the legislative efforts, as well as the political action committee activities and educational work of EQCA. Also as part of my role as Executive Director of EQCA, I was a member of the Executive Committee of the No on 8 - Equality for All campaign ("Equality for All").

4. As described in my declaration submitted to the Court on February 22, 2010, and which I herein incorporate by reference as it pertains to the structure of Equality for All, the Equality for All campaign involved over 100 member organizations and discussion of campaign strategy and messaging took place at many levels of the campaign. Because of the structure of the campaign, the organization capable of defining a core group for the entire campaign is Equality for All. However, it is my understanding that Proponents have made a choice not to move to compel against Equality for All. As a result, while I will endeavor to provide as complete a listing as possible, I do not have knowledge of the entire core group for the campaign. However, as one person in an enormous statewide campaign and as Executive Director of one of the largest LGBT rights organizations in the state, I regularly communicated with hundreds of people regarding strategy and messaging – the people listed here are a partial listing of all of those people. Accordingly, I necessarily must reserve the right to add people to the core group who had significant involvement and participation in campaign strategy and messaging and are later identified during the review of EQCA's emails or otherwise.

Individual Participants in Equality for All Campaign

5. Executive Committee Officers and Members:

On information and belief, the following is a list of the officers and voting members of the Executive Committee: Dale Kelly Bankhead, Equality for All Campaign Manager; Heather Carrigan, ACLU Foundation of Southern California; Cary Davidson, Secretary and Legal Counsel, Equality for All; Oscar de la O, BIENESTAR; Sue Dunlap, Planned Parenthood; Michael Fleming; Patrick Guierrero, Equality for All Campaign Director; Maya Harris, ACLU of Northern California; Dan Hawes, National Gay and Lesbian Task Force; Dennis Herrera, San Francisco City Attorney; Delores Jacobs, San Diego LBGT Center; Lorri L. Jean, Los Angeles Gay & Lesbian Center; Kate Kendell, National Center for Lesbian Rights (NCLR); Geoff Kors, Equality California; Steve Mele, Treasurer; Joyce Newstat; Tawal Panyacosit, Jr., API Equality; Rashad Robinson, Gay and Lesbian Alliance Against Defamation (GLAAD); Marty Rouse, Human Rights Campaign (HRC); Kevin Tilden; Andy Wong, API Equality; and assistants to the named individuals acting on the named individuals' behalf.

6. Equality for All Campaign Committee Members:

On information and belief and based on review of lists maintained by members of the Equality for All campaign, the following is a list of the members of the campaign committee who regularly participated in the formulation of campaign strategy and messaging. There may be additional people who participated in discussions of campaign strategy and messaging. Because it is not possible to identify every person and define their role without reviewing all of the relevant emails (which cannot be done in the time allowed by the Court), I necessarily must reserve the right to add additional people when EQCA's email has been collected and reviewed:

Sarah Abernathy, San Fernando Valley Office Manager; Becca Ahuja, Deputy Field Director; Judy Appel, Our Family Coalition; Nancy J. Appel, Anti-Defamation League Yali Bair, Planned Parenthood Affiliates of California; Juan Barajas, GLAAD; Eric C. Bauman, Los Angeles County Democratic Party; Ali Bay, Equality California, Communications Director ; Jasmine Beach-Ferrara, The Progressive Project; Pamela Brown, Marriage Equality USA; Ron Buckmire, Jordan/Rustin Coalition; Leslie Bulbuk, Santa Clara County Local Action Committee

co-Director; Pat Callahan, co-chair Wine Country Committee Against Prop 8; Rea Carey, Executive Director, National Gay & Lesbian Task Force; Kerry Chaplin, California Faith for Equality; Jennifer Chrisler, Family Equality Council; Kalil Cohen, Trans Equality LA; Matt Coles, ACLU LGBT & AIDS Project; Ember Cook, Family Equality Council, Field Organizer; Candy Cox, Creative Director for Volunteer Media Efforts; Dayton Crummey; Herdon Davis, National Black Justice Coalition; Masen Davis, Transgender Law Center; Micah D. Davis, COLOR; Chelsea Del Rio, California NOW; Caroline Dessert, Regional Field Director; Michelle N. Deutchman, Anti-Defamation League; Julie Dorf, Horizons Foundation; Tom Dreher, HRC - Palm Springs; Francisco Duenas, Latino Coalition for Justice-LA /Lambda Legal; Rajat Dutta, Horizons Foundation; Rabbi Denise L. Eger, Congregation Kol Ami; Tom Felkner; Meredith Fenton, COLAGE; Aimee Fisher, Our Family Coalition; Alex Fukui, API Equality-LA; Stuart Gaffney, API Equality-SF; Simeon Gant, California NAACP; Shayna Gelender, ACLU of Northern California; Heather Gibson, Silverlake Co-Field Manager; Elizabeth Gill, ACLU Northern California; Shay Aaron Gilmore, (Bay Area Lawyers for Individual Freedom) BALIF; Sherry Groce, California NAACP; Andrea Guerrero, ACLU Foundation of San Diego and Imperial Counties; Elizabeth Hampton-Brown, PFLAG; Stu Harrison, Wine Country Committee Against Prop 8; Jasper Henricks; Kris Hermanns, NCLR, Campaign Communications; Evan Horowitz, House Parties / Fundraising Events; Jody Huckaby, PFLAG; Loren Javier, Lambda Legal; Sky Johnson, Deputy Campaign Manager; Hannah Johnson, Northern California Field Director; Kim Jones, PFLAG; Paul Karr, Gay & Lesbian Alliance Against Defamation; Alice Kessler, EQCA; Seth Kilbourn, Campaign manager; Rev. Peter Laarman ; Jeff Laterno; Carolyn Laub, GSA Network; John Lewis, Marriage Equality USA; Andy Linsky, HRC; Harvey Liss, Orange County Local Action Committee Director; Sandra Lowe; Sean Lund, Gay & Lesbian Alliance Against Defamation; Paul Marchegiani, BALIF; Clayton Marsh, Gay And Lesbian Alliance of the Central Coast (GALA); Laurie McBride, Stonewall Democrats California, Sacramento County Local Action Committee Director; Terry McGuire, Human Rights Campaign; Molly McKay, Marriage Equality USA; Daniel Medress, Democracy for America; Chase Mohney, Internet Consultant; Ron Oden, National Black Justice Coalition; Orla O'Keeffe,

House Party Coordinator; Trina Olson, Deputy Field Director; Roberto Isaac Ordeñana, San Francisco LGBT Community Center, San Francisco County Local Action Committee Director; Michelle Ortiz, Equality California; Vincent Pan, CAA Chinese for Affirmative Action; Debra Peevey, Statewide Faith Field Organizer; Denis Penn, American Institute of Bisexuality; David Pierce.; Paula Pilecki, Spectrum LGBT Center. Marin County Local Action Committee Director; Jeremy Pittman, HRC; Jenny Pizer, Lambda Legal; Corri Planck; Cesar Portillo, BIENESTAR; Rob Power, Libertarian Party Representative; Courtni Pugh, SEIU; Lindi Ramsden, Unitarian Universalist Legislative Ministry Action Network; Francine Ramsey, Zuna Institute; Sarah Reece, National Gay and Lesbian Task Force, Statewide Field Director; Abby Riskin, Family Equality Council; H. Alexander Robinson, National Black Justice Coalition; Rebecca Rolfe, San Francisco LGBT Community Center; Julia Rosen, Courage Campaign; Patrick Sammon, Log Cabin; Sarah Scanlon, Human Rights Campaign; Glen Schaller, Santa Cruz County No on 8 Local Action Committee Director; Scott Schmidt, Republicans Against 8; Rodney Scott, Christopher Street West, No on 8 Los Angeles County Local Action Committee Director; David Selberg, Pacific Pride Center (Santa Barbara); Aejaie Sellars, Billy DeFrank Lesbian & Gay Community Center, Santa Clara County Local Action Committee co-Director; Sara Shirrell, Planned Parenthood Affiliates Los Angeles; Bill Stewart, Business Council; Ron Suckle, Stonewall Democrats of Ventura County; Kara Suffredini, Family Equality Council; Jodi Swick; Che Tabisola, HRC; Sandra Telep, Pride At Work; Beth Teper, COLAGE; Anthony Thigpenn; Reverend Neil G Thomas, Metropolitan Community Church, LA; Samuel Thoron, PFLAG; Darrell Tucci, Liberty Hill; Andrea Villa, San Diego Democratic Club, No on 8 San Diego County Local Action Committee Director; Sid Voorakkara, San Diego No on 8 Local Action Committee; Karin Wang, Asian Pacific American Legal Center of Southern California; Thomas Watson, Love, Honor, Cherish; Mickey Welsh, Monterey County Local Action Committee Director; Anne-Marrie Williams, Jordan/Rustin; Ruth Williams, NCJW/LA; Phill Wilson, Black AIDS Institute; Chuck Wolfe, Gay & Lesbian Victory Fund and Leadership Institute; Natalie Wormeli, Yolo County Local Action Committee Director; Richard Zaldivar; George Zander, No on 8 Riverside County Local Action Committee Director

7. On information and belief and based on review of lists maintained by members of the Equality for All campaign, the following is a list of the members of the Equality for All Campaign staff who were involved in the formulation of campaign strategy and messaging: Theresa Applegate, Field Organizer; Holli Banks, Volunteer Recruitment Manager, San Francisco; Danielle Bernstein, Phone Bank Manager, San Francisco; Amber Burkan, Assistant to Campaign Manager; Joscelyn Chapman, Field Organizer/ IPVR Coordinator; Vanessa Cosio, Deputy Field Director; Julie Davis, Northern California Campaign Manager and Northern California Political Director ; Ryan Darsey, Senior Field Organizer/North County Coordinator; Eric Duran, Field Organizer/South Bay Coordinator; Simone Flores, San Diego Data Coordinator; Bennett Foster, Sacramento County Local Action Committee; Jeffrey Girard, Field Organizer, Sacramento; John Hainline, Field Organizer; Denise Heitzenroder, Regional Campus Director; Amy Herndon Martin, Larena Iocco, Field Organizer, Data Team, San Francisco; Laila Johns, Field Organizer, Volunteer Recruitment Team, San Francisco; Michael Kaiser-Nyman, Field Organizer, Volunteer Recruitment Team, San Francisco; Sinakhone Keodara, Dawna Knapp, Northern California Data Coordinator; Robert Koening, LA Data Coordinator; Erika Larson, SF Office Manager ; Jay Lee, Lead Field Organizer, South Bay/Peninsula; Vanessa Lopez, Wambui Magua, Silverlake Confirm Call Coordinator, Dale Manzella, West LA IPVR Coordinator ; Nathaniel Marken, Anne Marks, Regional Field Director; Nicholas Martinez, Field Organizer (IPVR); Moof Mayeda, LA County Field Director ; Johanna Michael, Izaak Mills, Lilya Mitelman, Confirmation Call Manager, San Francisco; Corlee Morris, Jeffrey Olsen, Jacqueline Palmer, Phone Bank Manager; Hannah Pearson, Sabrina Petrescu, Gary Reinecke, Deputy Phone Bank Manager, San Francisco; Christine Riley, Lead Field Organizer, South Bay/Peninsula; Lindsay Roberts, Field Organizer, Phone Bank Team, San Francisco; Cameron Smith, Field Organizer; Nicole Suell, Brandon Tate, Deputy Director of Election Day; Lindsay Waggerman, Deputy Volunteer Recruitment Manager, San Francisco; A. Lee Watson III, Daniel Wherley, Field Organizer (IPVR); and Yana Zhukova, Operations Manager.

8. Equality for All political consultants who were involved in the formulation of campaign strategy and messaging:

- The following consultants and their staff provided general consulting and campaign management services. Each played a significant role in formulating strategy and messaging: Steve Smith, Lilia Tamm, Molly Weedn and other employees of Dewey Square Group, LLC (lead political consultant; participated in formulating campaign strategy and messaging); Maggie Linden, Lindsey Nitta, Eddie Fernandez, Kris Hanson and other employees of Ogilvy Public Relations (lead messaging consultant; participated in formulating campaign strategy and messaging); Chad Griffin, Mark Armour and other employees of Armour Griffin Media Group, Inc. (produced advertising; participated in formulating campaign messaging); Kassy Perry and other employees of Perry Communications (public relations consultant; participated in formulating campaign messaging); Yvette Martinez and Javier Angulo of Progressive Strategy Partners LLC (Yvette Martinez served as State Wide Political Director of campaign; Javier Angulo served as Deputy State Wide Political Director and both participated in formulating campaign strategy and messaging); Patrick Guerriero and James Dozier of Gill Action (Patrick Guerriero served as Campaign Director; participated in formulating campaign strategy and messaging); Adam Freed (served as deputy campaign manager; participated in formulating campaign strategy and messaging); Joe Rodota (key strategy and messaging consultant), Guy Cecil (key strategy and messaging consultant), Rick Claussen (key strategy and messaging consultant), Gale Kaufman (key strategy and messaging consultant), Nick Donatiello (key strategy and messaging consultant), Phyllis Watts (key strategy and messaging consultant), and Thalia Zepatos (coordinated field operations; participated in formulating campaign strategy and messaging);
- The following consultants and their staff provided fundraising and

accounting services. Each played a significant role in formulating messaging: Steve Mele and other employees of M L Associates, LLC (served as campaign treasurer; participated in formulating campaign strategy and messaging regarding fundraising); Kimberly Ray (fundraising consultant; participated in formulating campaign strategy and messaging regarding fundraising), Marjan Philhour (fundraising consultant; participated in formulating campaign strategy and messaging regarding fundraising), Stephanie Berger and other employees of Berger Hirschberg (fundraising consultant; participated in formulating campaign strategy and messaging regarding fundraising); Shayna Englin (fundraising consultant; participated in formulating campaign strategy and messaging regarding fundraising); Mary Pat Bonner and employees of The Bonner Group (fundraising consultant; participated in formulating campaign strategy and messaging regarding fundraising); John Gile (fundraising consultant; participated in formulating campaign strategy and messaging regarding fundraising), Thom Lynch (fundraising consultant; participated in formulating campaign strategy and messaging regarding fundraising);

- The following consultants and their staff provided web consulting services and played a significant role in formulating messaging: Larry Huynh and other employees of Blackrock Associates, LLC (web consulting);
- The following consultants and their staff provided outreach services to discrete voter groups. Each played a significant role in formulating messaging: Alice Huffman of A C Public Affairs, Inc. (outreach services); Wendy Liao and other employees of I W Group (outreach services);
- The following consultants and their staff provided advertising and focus group services. Each played a significant role in formulating and evaluating messaging: Justin Garrett and other employees of Logo Online/MTV Networks and Chris Nolan and other employees of Spot-On

(internet advertising consultants; participated in formulating and evaluating campaign messaging); Suzanne Stanford and other employees of Ofrenda (focus group testing consultant; participated in formulating and evaluating campaign messaging);

- The following consultants and their staff provided direct mail services and played a significant role in formulating messaging: Eric Jaye of Storefront Political Media; and
- The following consultants and their staff provided polling services. Each played a significant role in formulating and evaluating messaging: David Binder and other employees of Binder Research; and Celinda Lake and other employees of Lake Associates.

Reasonable Search Methodology

9. As described in James Carroll's declaration submitted to the Court on February 2, 2010, and which I herein incorporate by reference as it pertains to EQCA's email system, EQCA uses a central email server. While many emails are stored on the central server, individual staff members can archive email messages and save those archives on their individual computers. Approximately 75 people at EQCA could have potentially relevant emails, which would require copying 75 hard drives. I have been informed by IT personnel at EQCA's pro bono counsel, Fenwick & West LLP, that copying 75 hard drives could take more than a week and that a conservative estimate of the amount a client would be quoted would be $30,000 for collecting and processing the email. It is the normal practice of EQCA to delete the email accounts and all saved email of staff members who leave the organization approximately 30 days after their employment with EQCA has been terminated.

10. EQCA has approximately 27 to 30 gigabytes of email stored on its Microsoft Exchange email server. I have been informed by IT personnel at EQCA's pro bono counsel that collecting and processing that amount of email would require several days of work at a cost of $14,000 to $20,000. It would require a significant number of hours to review that many emails in order to determine which emails contained relevant information and were communicated to

persons outside of the core group.

11. Accordingly, requiring EQCA to collect, process, review and produce all of these emails and documents would be an incredible burden. In order to reduce the burden on third party EQCA of complying with an order to produce relevant emails, EQCA proposes several steps to reduce the amount of email to be collected and searched.

12. Many of the staff and board members of EQCA joined campaign-related email lists and as a result received numerous emails each week during the campaign. The vast majority of these emails are not relevant. They contain event announcements, fundraising updates, meeting plans and other non-strategic subjects. EQCA proposes that only email sent by EQCA staff members should be collected and reviewed, rather than all email sent and received. This will eliminate a large number of regular weekly campaign updates that EQCA staff members received during the campaign.

13. EQCA proposes that only the email of EQCA staff members with significant roles in EQCA's efforts to raise funds for the campaign be collected and reviewed. As noted in my declaration submitted to the Court on February 22, 2010, Equality for All is the organization that coordinated the No on 8 – Equality for All campaign, not EQCA. As an organization, EQCA was tasked with fundraising for the Equality for All campaign.

14. Proposition 8 qualified for the ballot on June 2, 2008. Discussions of campaign strategy and messaging to convey to the voters after the proposition qualified EQCA proposes that only email sent by EQCA staff between June 2, 2008 and November 4, 2008 be collected and reviewed.

15. Finally, EQCA proposes that the following search terms be used to reduce the number of email to be reviewed: "No on 8," "Yes on 8," "Prop 8," "Proposition 8," "Equality for All," "Marriage Equality," and "ProtectMarriage.com."

16. These proposals will reduce the burden on third party EQCA while still including the most relevant email communications regarding the EQCA's involvement in the No on 8 - Equality for All campaign.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on March 3, 2010 at San Francisco, California.

/s/ Geoff Kors
Geoff Kors

Attestation Pursuant to General Order 45

Pursuant to General Order No. 45, Section X.B., I, Lauren Whittemore, hereby attest that I have obtained concurrence of the signatory, Geoff Kors, indicated by a "conformed" signature (/s/) within this e-filed document.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 3, 2010 at San Francisco, California.

Dated: March 3, 2010

FENWICK & WEST LLP

By: /s/ Lauren Whittemore
Lauren Whittemore

Attorneys for Third-Party, Equality California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

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

Defendants,

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

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

Defendant-intervenors, the official proponents of Proposition 8 ("proponents"), moved on January 15, 2010 to compel three nonparty entities, Californians Against Eliminating Basic Rights ("CAEBR"), Equality California and No on Proposition 8, Campaign for Marriage Equality, A Project of the American Civil Liberties Union (the "ACLU") (collectively the "No on 8 groups") to produce documents related to the campaign against Proposition 8. Doc #472. Proponents' document subpoenas to the No on 8 groups were intended to mirror the requests plaintiffs served on proponents. Id at 5. On January 8, 2010, the court ordered proponents to produce all documents that "contain, refer or relate to arguments for or against Proposition 8," except those communications solely among members of proponents' core group. Doc #372 at 5. Proponents now ask the court to order a similar production from the No on 8 groups. Doc #472 at 7-8. Equality California and the ACLU oppose proponents' motion to compel, Doc ##543, 546, and CAEBR argues it has produced all responsive nonprivileged documents. Doc #541. The court heard argument on the motion on February 25, 2010. Doc #602.

I

The procedural history of proponents' motion to compel is intertwined with the circuitous course discovery took as the parties prepared the case for trial on an expedited basis. Pursuant to FRCP 45, proponents served the No on 8 groups with document subpoenas on August 27, 2009. Doc #472-1 at 10, 19, 28. Proponents simultaneously opposed on relevance and privilege grounds similar document requests served on them by plaintiffs.

Doc #187. The court agreed in part with proponents' relevance arguments and ordered plaintiffs to revise an overly broad document request. Doc #214 at 17. In response to the court's order, proponents revised their identical request to the No on 8 groups. Doc #472-3 at 6-7, 15-16, 24-25.

Proponents continued to assert a First Amendment privilege over documents related to proponents' campaign for Proposition 8 both in this court and in the Ninth Circuit. While proponents' privilege claim was being litigated, proponents informed the No on 8 groups that proponents expected the No on 8 groups to produce only those documents similar to those proponents were obligated to produce. Doc #472-3. The discovery cut-off of November 30, 2009 passed without a final resolution of the scope of proponents' First Amendment privilege claim.

On January 4, 2010, the Ninth Circuit issued an opinion providing final guidance to define the scope of the First Amendment privilege. Perry v Schwarzenegger, 591 F3d 1147 (9th Cir 2010). The opinion makes clear that proponents' First Amendment privilege is limited to "*private*, *internal* campaign communications concerning the *formulation of campaign strategy and messages* * * * among the core group of *persons* engaged in the formulation of strategy and messages." Id at 1165 n12 (emphasis in original). Pursuant to the Ninth Circuit opinion, on January 8, 2010 the court ordered proponents to produce all documents that "contain, refer or relate to arguments for or against Proposition 8," except those communications solely among members of proponents' core group. Doc #372 at 5. On January 15, 2010, four days after the trial began, proponents filed the instant motion.

II

The No on 8 groups take different positions on the merits of proponents' motion. CAEBR asserts that it has already produced all responsive documents and that proponents' motion is moot as directed to it. Doc #541. Equality California argues that, because it is a nonparty and because it worked to oppose Proposition 8, its internal campaign communications are not relevant and production would be unduly burdensome. Doc #546 at 7-10. The ACLU argues the documents proponents seek are irrelevant and privileged. Doc #543 at 11-18.

A

The court first considers whether proponents' motion is timely. Pursuant to Civ LR 26-2, all motions to compel discovery must be filed within seven days of the discovery cut-off. In this case, Civ LR 26-2 dictates that proponents' motion should have been filed by December 7, 2009. Proponents' motion was filed more than a month later, on January 15, 2010. Nevertheless, because discovery (and litigation regarding the scope of the First Amendment Privilege) has continued beyond the cut-off and because the No on 8 groups are not parties and are not meaningfully prejudiced by the timing of proponents' motion, the court will consider the merits of the motion. In addition, this motion was filed within one week of this court's final decision defining the scope of proponents' First Amendment privilege and ordering production of nonprivileged documents. The court will, however, consider the timing of the motion as it relates to burden pursuant to FRCP 45(c)(1).

B

Next, the court considers whether proponents' subpoenas seek relevant documents. Proponents assert that they seek the documents to help elucidate voter intent and the purpose of Proposition 8 and because the documents may address the political power of gays and lesbians. Doc #584 at 7-14. Pursuant to FRCP 26(b)(1), a party may obtain nonprivileged discovery that is relevant to any claim or defense, and "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." While a party may obtain discovery from a nonparty, the party must take "reasonable steps to avoid imposing an undue burden or expense" on the nonparty. FRCP 45(c)(1).

Perry, 591 F3d 1147, provides perhaps the best authority to determine whether the communications sought by proponents are relevant. The Ninth Circuit held that plaintiffs' document requests to proponents, which sought documents similar to those at issue in the instant motion, were "reasonably calculated to lead to the discovery of admissible evidence on the issues of voter intent and the existence of a legitimate state interest." Perry, 591 F3d at 1164.

The ACLU points out that the Ninth Circuit's opinion was tailored to the dispute between plaintiffs and proponents and that documents relating to strategy and messages against Proposition 8 are not relevant because Proposition 8 passed. See Doc #543 at 13. According to the ACLU, the intent of voters who voted against Proposition 8 is not relevant, because those voters did not enact a constitutional amendment, and the No on 8 groups' documents are not

relevant to the question why some voters chose to support Proposition 8, because those voters rejected the arguments. Id.

While the intent of those who voted against Proposition 8 is not relevant, the mix of information available to voters who supported Proposition 8 is relevant under FRCP 26 to the questions of intent and state interest. That mix of information includes arguments considered and ultimately rejected by voters, including arguments against Proposition 8. As was the case with the proponents, the documents and communications at issue may shed light on the meaning and impact of the messages that were sent to the voters. Thus, the subpoenaed documents are relevant and must be produced to the extent the documents are not privileged and contain, refer or relate to arguments for or against Proposition 8.

III

The No on 8 groups assert that at least some of the documents in their possession are protected by the First Amendment privilege. Again, the Ninth Circuit's opinion in Perry, 591 F3d 1147, provides the best guidance to determine the scope of the First Amendment privilege in the context of initiative campaigns. As the Ninth Circuit explained, it was deciding "an important issue of first impression - the scope of the First Amendment privilege against compelled disclosure of internal campaign communications." Id at 1157.

In the context of an initiative campaign, a campaign organization may assert a First Amendment privilege over "*private, internal* campaign communications concerning the *formulation of*

campaign strategy and messages * * * among the core group of *persons* engaged in the formulation of campaign strategy and messages." Id at 1165 n12 (emphasis in original). Despite the ACLU's argument to the contrary, Doc #543 at 16, nothing in Perry limits footnote 12's application to "the specific circumstance of the requests served by plaintiffs on Proponents and to the structure of the Yes on 8 campaign." The footnote does not determine definitively who belongs in the core group of persons; instead, the footnote provides guidance for the court to make the final determination who is a member of a campaign organization's core group. Id. That guidance is applicable to the instant dispute. Accordingly, the court will apply the First Amendment privilege to communications about strategy and messages internal to each No on 8 group's core group. The privilege applies only to communications within a campaign organization — communications between or among independent campaign organizations are not covered by the First Amendment privilege.

The No on 8 groups submitted supplemental declarations to explain and support their core groups. Doc #593 (CAEBR); Doc #597 (ACLU); Doc #598 (Equality California). Following the February 25 hearing, Equality California submitted a supplemental declaration to define a core group for an umbrella organization known as No on 8 - Equality for All ("Equality for All"). Doc #609. The No on 8 groups' declarations raise two questions: (1) which individuals were sufficiently involved in the development of strategy and messages that they should be included in each organization's core group; and (2) the application of the First Amendment privilege to the No on 8 groups. The court begins with the first question.

A

1

CAEBR filed the declaration of Marisa Moret to support individuals it believes should be included in its core group. Doc #593. The Moret declaration lists individuals, their role in the campaign and their reasons for being included within the core group. Doc #593. The court credits the Moret declaration and finds that CAEBR's core group consists of:

> Ben Barnz, Marisa Moret and Patti Rockenwanger (CAEBR board members); Dennis Herrera (CAEBR chair); employees of Griffin Schake, Armour Media Group and Bonner Group, Inc (campaign consulting firms that had significant input into campaign strategy and messages); Diane Hamwi and Mark Walsh (fundraising consultants who played a significant role in campaign strategy and formulating messages); and Monique Moret Stevens (CAEBR advisor); and assistants to the named individuals acting on the named individuals' behalves.

2

Equality California submitted the February 22 declaration of Geoff Kors in support of its core group. Doc #598 ¶¶16-17. The declaration explains the individuals' roles regarding formulation of strategy and messages. Id. The court credits the February 22 Kors declaration and finds the following individuals are members of Equality California's core group:

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John Duran, Cary Davidson, Tim Hohmeier, Deb Kinney, Diane Abbitt, Jim Abbott, Dave Baron, Xavier Barrera, Brandon Brawner, Betsy Butler, Jody Cole, Larry Colton, Doug Dombek, Jeff Haber, Mike Hutcheson, Roslyn Jones, Tom Maddox, Shannon Minter, James Nguyen, Jeff Orr, Dennis Rasor, Jaime Rook, Rick Saputo, Linda Scaparotti, Eric Siddall, Alan Uphold (members of Equality California's board of directors); Jean Adams, Ali Bay, Ian Barrera, Jim Carroll, Maya Scott-Chung, Liam Cooper, Doug Flater, Joe Goldman, Daniel Gould, Kendra Harris, Ted Jackson, Kaitlin Karkos, Alice Kessler, Seth Kilbourn, Hannah Johnson, Geoff Kors, Erica Liscano, Shumway Marshall, Randy Medenwald, Miranda Meisenback, Trina Olson, Michelle Ortiz, Zorina Price, Leanne Pittsford, Jennifer Sample, George Simpson, Sean Sullivan, Sarah Tomastik and Clarence Williams (Equality California staff members engaged in the formulation of strategy and messages); and assistants to the named individuals acting on the named individuals' behalves.

Equality California has also sought to include certain individuals associated with the Equality California Institute in its core group. Id at ¶ 18. Equality California has not demonstrated that the Institute engaged in the formulation of strategy and messages for Equality California; accordingly, these individuals are not included in the Equality California core group.

3

The ACLU filed the declaration of Elizabeth Gill to identify the core group of individuals involved in the development of campaign strategy and messages for the ACLU. Doc #597. The Gill declaration explains that the ACLU staff members listed worked "on ACLU-specific activities toward defeating [Proposition 8]." Id at ¶ 5. The court credits the Gill declaration and finds the following individuals are members of the ACLU's core group:

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Elizabeth Gill, Paul Cates, Matthew Coles, Rebecca Farmer, Shayna Gelender, Maya Harris, Ashley Morris, Gigi Pandian, Skylar Porras, Catrina Roallos, Laura Saponara (employees of the ACLU who worked to defeat Proposition 8); and assistants to the named individuals acting on the named individuals' behalves.

4

According to the February 22 Geoff Kors declaration, which the ACLU incorporates by reference, Doc #597 ¶6, the umbrella organization Equality for All was formed in 2005 to fight against any proposition that would limit marriage to opposite-sex couples. Doc #598 ¶5. Initially, the organization consisted of approximately 35 organizations, which registered Equality for All as a political action committee with the State of California. Id. During the Proposition 8 campaign, Equality for All had an executive committee, a campaign committee and campaign staff. Id ¶¶7-9. Proponents did not serve Equality for All with a document subpoena.

The March 3 declaration of Geoff Kors identifies individuals and consulting firms involved in the development of strategy and messages for Equality for All. Doc #609. The declaration identifies the Equality for All executive committee, campaign committee, campaign staff and consultants. Id at ¶¶ 5-8. At the February 25 hearing, the court directed Equality California to submit the supplemental declaration and to support the inclusion, in the core group of Equality for All, of individuals in the campaign committee, staff members and consultants who were instrumental in developing strategy and messages.

The March 3 Kors declaration identifies the individual campaign committee members and staff but makes no showing regarding

those individuals' roles in the Equality for All campaign. Id at ¶¶ 6-7. Accordingly, the court lacks a basis to include these individuals in Equality for All's core group. The March 3 Kors declaration does, however, support through explanation the inclusion of the campaign consultants and consulting firms listed in Doc #609 ¶ 8. Because the February 22 Kors declaration explains that the Equality for All executive committee "collectively made decisions of great importance to the campaign," members of the executive committee listed in Doc #609 ¶ 5 will be included in the Equality for All core group.

For the foregoing reasons, the court finds that the Equality for All core group consists of:

> Dale Kelly Bankhead, Heather Carrigan, Cary Davidson, Oscar de la O, Sue Dunlap, Michael Fleming, Patrick Guierrero, Maya Harris, Dan Hawes, Dennis Herrera, Delores Jacobs, Lorri L Jean, Kate Kendall, Geoff Kors, Steve Mele, Joyce Newstat, Tawal Panyacosit Jr, Rashad Robinson, Marty Rouse, Kevin Tilden and Andy Wong (the Equality for All executive committee); Steve Smith, Lilia Tamm, Molly Weedn and other employees of Dewey Square Group, LLC; Maggie Linden, Lindsey Nitta, Eddie Fernandez, Kris Hanson and other employees of Ogilvy Public Relations; Chad Griffin, Mark Armour and other employees of Amour Griffin Media Group, Inc; Kasey Perry and other employees of Perry Communications; Yvette Martinez and Javier Angulo of Progressive Strategy Partners LLC; Patrick Guerriero and James Dozier of Gill Action; Adam Freed; Joe Rodota; Guy Cecil; Rick Claussen; Gale Kaufman; Nick Donatiello; Phyllis Watts; Thalia Zepatos; Steve Mele and other employees of M L Associates LLC; Kimberly Ray; Marjan Philhour; Stephanie Berger and other employees of Berger Hirschberg; Shayna Elgin; Mary Pat Bonner and employees of The Bonner Group; John Gile; Thom Lynch; Larry Huynh and other employees of Blackrock Associates LLC; Alice Huffman of A C Public Affairs Inc; Wendy Liao and other employees of the I W Group; Justin Garrett and other employees of Logo Online/MTV Networks; Chris Nolan and other employees of Spot-On; Suzanne Stanford and other employees of Ofrenda; Eric Jaye of Storefront Political Media; David Binder and other employees of Binder Research; and Celinda Lake and other employees of Lake Associates; and assistants to the named individuals acting on the named individuals' behalves.

B

The court has determined a core group for each No on 8 group as well as Equality for All and must now decide how to apply the First Amendment privilege to the relevant campaign communications. Communications solely within a No on 8 group's core group are privileged under the First Amendment. Perry, 591 F3d 1165 n12. Here, some individuals, like Geoff Kors, Maya Harris and Dennis Herrera, are within core groups of more than one organization. Accordingly, the scope of the First Amendment privilege could arguably depend on the capacity in which a core group member is communicating. For example, whether a communication between Geoff Kors and Maya Harris is privileged may depend on whether Geoff Kors was communicating in his Equality California or Equality for All capacity. But because the effort required by such an inquiry might amount to an undue burden on the No on 8 groups under FRCP 45(c)(1), the court will not require production of any communications about strategy and messages between core group members who belong to that core group, regardless of the capacity in which the core group member is communicating. Thus, members of the Equality for All core group may assert a privilege over responsive communications solely within the Equality for All core group - even if there is an argument that one of the parties to the communication was not participating in his or her capacity as a member of that particular core group.

For the reasons explained above, the court finds that the First Amendment privilege covers communications regarding strategy and messages within each No on 8 group's core group as defined

above. The First Amendment privilege does not cover communications between separate organizations.

IV

Because proponents seek discovery from third parties, the court recognizes the need to ensure that any burden borne by the third parties is not undue. FRCP 45(c)(1). Accordingly, the No on 8 groups shall be required only to undertake the following steps in searching electronic documents to respond to proponents' subpoenas.[1]

First, the No on 8 groups shall only be required to review electronic documents containing at least one of the following terms: "No on 8;" "Yes on 8;" "Prop 8;" "Proposition 8;" "Marriage Equality;" and "ProtectMarriage.com."

Second, Equality California shall only be required to search its central email server for responsive electronic documents, identified in the March 3 declaration of Geoff Kors as the Microsoft Exchange email server. Doc #609 at 9 ¶10.

While the foregoing limitations do not eliminate the burden of production on third parties, they do reduce costs and focus the production on only the most responsive documents.

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[1]This restriction, however, does not apply to paper documents. The No on 8 groups shall search paper documents for documents that contain, refer or relate to arguments for or against Proposition 8.

IV

For the reasons explained above, proponents' motion to compel, Doc #472, is GRANTED. Each No on 8 group is DIRECTED to produce all documents in its possession that contain, refer or relate to arguments for or against Proposition 8, except those communications solely among members of its core group. The No on 8 groups shall begin a rolling production of nonprivileged responsive documents as soon as possible to conclude not later than Wednesday, March 31, 2010. The No on 8 groups may produce documents pursuant to the terms of the protective order, Doc #425, if they wish. The No on 8 groups are not required to produce a privilege log.

IT IS SO ORDERED.

JOSEPH C SPERO
United States Magistrate Judge

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NO ON PROPOSITION 8,
CAMPAIGN FOR MARRIAGE EQUALITY:
A PROJECT OF THE AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN CALIFORNIA

(Additional Counsel Listed on Signature Page)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

OBJECTIONS OF NO ON PROPOSITION 8, CAMPAIGN FOR MARRIAGE EQUALITY: A PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AND EQUALITY CALIFORNIA TO MARCH 5, 2010 ORDER OF MAGISTRATE JUDGE SPERO

Judge: Chief Judge Walker
Location: Courtroom 6, 17th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Pursuant to Federal Rule of Civil Procedure 72(a), Non-Parties Equality California ("EQCA") and No on Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union of Northern California ("ACLU") (collectively "Objectors") respectfully object, on the grounds set forth below, to the Order of Magistrate Judge Joseph C. Spero entered on March 5, 2010, Doc # 610 ("Order").

BACKGROUND

As the latest chapter in a long-running dispute over the production of non-public campaign documents, Objectors have been directed to produce, on a rolling basis but not later than March 31, 2010, documents involving the "campaign strategy and messages" of Objectors in their efforts to prevent the passage of Proposition 8, "except those communications solely among members of [a] core group" as defined in the Order. Order at 14. Given the Court's familiarity with all relevant aspects of this lengthy saga, Objectors limit their statement of the background to matters directly pertinent to their objections.

On January 4, 2010, the Ninth Circuit issued its amended opinion granting a writ of mandamus to vacate prior orders by this Court directing Defendant-Intervenors ("Proponents") to produce non-public campaign documents. *Perry v. Schwarzenegger,* 591 F.3d 1147 (9th Cir. 2010). The court concluded that the compelled disclosure of such documents would violate the First Amendment by infringing the right of those involved in a political campaign to associate and communicate freely about campaign issues, thereby creating a chilling effect on the political process. *Id.* Notwithstanding the broad associational right it recognized, the court noted, in footnote 12 of its opinion, that this right did not extend to all communications associated with a campaign but, rather, was limited to campaign strategy and messaging which, in turn, depended upon "the structure of the 'Yes on 8' campaign." *Id.* at n.12. The court further observed that the First Amendment did not protect communications involving subjects other than strategy or messaging, such as "persuasion, recruitment or motivation". *Id.*

Since application of the Ninth Circuit's opinion to certain of Proponents' documents could not be resolved on the basis of the record before that court, including particularly the "structure" of the Yes on 8 campaign, the court remanded the case for further consideration of the plaintiffs' requests in

light of its opinion. Following remand, on January 8, 2010, Magistrate Judge Spero issued an order in which he concluded that certain of Proponents' requested documents involving "strategy" or "messaging" could shed light upon the reasons why the electorate voted in favor of Proposition 8 and, therefore, were relevant under Rule 26 to the issues of voter intent and to the legitimacy of asserted state interests supporting the disputed initiative. (Doc # 372.) After reviewing Proponents' submissions regarding the structure of the Yes on 8 campaign, Judge Spero held that communications among certain specified individuals involved in the campaign were protected from disclosure under the First Amendment but that communications involving messaging or strategy between and among other individuals were not privileged and should be produced. *Id.* On January 20, 2010, this Court denied Proponents' objections to that order. (Doc # 496.)

Meanwhile, following issuance of the January 8 order, Proponents renewed their own parallel requests for the production of non-public campaign communications by certain of their political opponents, including Objectors, and they demanded that Objectors immediately produce documents regarding campaign messages or strategy except for those involving only members of Objectors' "core group".[1] After Objectors declined to produce documents pursuant to this renewed demand, Proponents moved to compel production. Objectors opposed on grounds of timeliness, relevance, privilege, and burden and further submitted detailed declarations regarding the structure of the No on 8 campaign from employees of Equality California (Doc # 598) and the ACLU (Doc # 597). Objectors further pointed out that, in response to subpoenas served on them during the summer of 2009, they had voluntarily produced all public documents in their possession related to campaign strategy and messages.

Magistrate Judge Spero held a hearing on the motion to compel on February 25, 2010, at the conclusion of which he directed EQCA to submit certain additional information concerning the

[1] Proponents chose not to pursue their requests for the production of non-public campaign communications from Equality for All, the umbrella campaign entity that EQCA and the ACLU, among other groups, joined for the purpose of defeating Proposition 8. (Kors Decl. at 5 (Doc # 598); Kors Supp. Decl. at 1 (Doc # 609).)

structure of the No on 8 campaign not later than March 3, 2010. A further declaration of Geoff Kors responding to that request was timely filed. (Doc # 609.)

On March 5, 2010, Magistrate Judge Spero granted the motion to compel to the extent set forth in his Order. Specifically, Judge Spero found that the motion was timely despite the procedural posture of the case; that the documents requested were relevant under the broad discovery standards of Rule 26(b)(1), Fed. R. Civ. P; that, under footnote 12 of the Ninth Circuit's opinion, the First Amendment privilege applied only to a certain, small group of "core" individuals "within a campaign organization"(as enumerated in the Order) and "communications between or among independent campaign organizations are not covered by the First Amendment privilege"; and that it was not unduly burdensome for Objectors to be directed to produce non-electronic documents related to campaign strategy or messaging and to locate and produce non-privileged and relevant documents by searching through all electronic communications containing the terms "No on 8"; "Yes on 8"; Prop 8"; "Proposition 8"; "Marriage Equality"; or "ProtectMarriage.com". Objectors were directed to begin production on a rolling basis "as soon as possible" and to conclude such production not later than March 31, 2010. Objectors were excused from producing a privilege log. (*See* Order at 14.)

OBJECTIONS

Objectors respectfully object to the Order on the ground that it is "contrary to law" and "clearly erroneous" for the reasons set forth hereafter. Fed. R. Civ. P. 72(a). Insofar as these objections are made on the ground that the Magistrate Judge applied an incorrect legal standard, the objections are separate and independent. To the extent that objection is made on the ground that the Order is clearly erroneous, however, the objections should be considered interdependent and cumulative. Thus, for example, relevance must be assessed with respect to the timing of the motion in relation to the posture of the case. For the same reason, burden is directly intertwined not only with the posture of the case but with the—at best—tenuous relevance of the information sought in relation to the issues in the case.

A. The Information That the Order Requires to Be Produced Is Either Entirely Irrelevant or of Such Tenuous Relevance to the Issues in the Case That It Was Clear Error to Require Production in Light of the Posture of the Case and the Substantial Burden Involved in Production.

Objectors have been directed to produce, after the close of testimony, documents regarding campaign strategy and messaging, excepting only communications among a group of participants in the campaign against Proposition 8 that the Order deemed "core". The theory of the Order is that this information, somehow, will shed light upon the purpose of the voters in enacting that initiative, because the "mix of information" considered by voters who decided to vote in favor of Proposition 8 would (or at least might) have included "arguments against Proposition 8" that those Yes on 8 voters—by definition[2]—did not find persuasive. *See* Order at 6. While Objectors submit that this information is entirely irrelevant, it is sufficient for present purposes that any attenuated or theoretical relevance such documents might have is vastly outweighed by (a) other evidence in the case; (b) the posture of the litigation; and (c) the burden involved in production. Thus, the Order directing the production of such information is clearly erroneous.

1. The Order Applied an Incorrect Legal Standard in Determining Relevance.

As an initial matter, the Order applied an incorrect standard of relevance and is therefore erroneous as a matter of law. Objectors do not assert that the Court lacks power to order production at this stage of the case. The posture of the litigation, however, bears upon the standard of relevance to be applied.[3] The Order explicitly references, and relies upon, the ordinary standard of "discovery" relevance—quoting the portion of Rule 26 which allows discovery of information that may "lead to the discovery of admissible evidence". Order at 5. Yet, the discovery phase of this case has long-since passed. In fact, there has been a trial and the taking of testimony has concluded.

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[2] Magistrate Judge Spero agrees that the "intent" of those who voted against Proposition 8 is not relevant. *See* Order at 6.

[3] Magistrate Judge Spero held that since there was no prejudice to Objectors, the Proponents' motion to compel was not inherently untimely. Order at 4. Objectors do not seek review of that determination. However, Magistrate Judge Spero purported to acknowledge that the "timing of the motion" needed to be considered "as it relates to burden pursuant to FRCP 45(c)(1)." *Id.* Yet nothing in the text of the Order suggests that any consideration actually was given to this interrelationship.

Those are critical facts which distinguish the situation involved in the January 8 Order from the situation here. First, the very fact that relevance cannot be justified under a discovery standard is sufficient, without more, to require reversal. Simply put, there is nothing for the documents at issue to "lead to". Unless the documents themselves can come in as probative evidence on issues in the case, there is no justification for ordering their production. Second, unlike Proponents, who are before the Court as litigants, Objectors are non-parties and their documents cannot be offered as admissions. To the contrary, any documents from Objectors that Proponents offered for the purpose of establishing indirectly what the "intent" of Proposition 8 was on the part of voters must be offered for the truth of the matter asserted in the documents, and that renders them inadmissible as hearsay.[4]

2. Objectors' Documents Are Irrelevant.

Whatever the applicable standard, the notion that the issues in this case will be materially enlightened by production of the documents at issue here cannot be seriously credited. Moreover, when such relevance is considered in light of the posture of the case and, most important, the burden involved in review and production, the Order is clearly erroneous.

First, this Court is not being asked to write a history of the campaign over Proposition 8—it is being asked to pass upon its constitutionality. Objectors do not question that evidence of what was said to voters during the campaign could help the Court understand why voters who voted in favor of the initiative did so (albeit only in an indirect and inferential sense), but the same simply cannot be said of documents from the initiative's opponents. A message in opposition to the passage of Proposition 8 may well have been something that was *considered* by a Yes on 8 voter, but, by definition, it did not persuade that voter. The question presented here is why a voter who voted in favor of Proposition 8 did so, but that cannot be illuminated by No on 8 documents in any realistic or meaningful sense. Indeed, it is for that reason that Proponents ultimately were reduced to arguing that the documents they seek could be relevant because some voter may have been so offended by something said by the No on 8 campaign that she changed her vote to Yes from No. But when that

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[4] It is for that reason that plaintiffs relied on the party admission exception to the hearsay rule in their motion to compel production of the Proponents' documents.

kind of argument is the best that can be offered in support of a post-trial motion to compel the production of documents by non-parties, the only sensible conclusion to be drawn is that there is no serious argument in support of production. What Proponents want is simply a "free peek" at their political opponents' inside information, and that is a misuse of the litigation process.

Second, unlike Proponents' documents, which could be pertinent to intent and legitimacy because of arguments that the Proponents chose *not* to make (thereby revealing what Proponents believed Proposition 8 was really about or was intended to accomplish), the same thing cannot be said of No on 8 documents. The Order says that the "mix of information" (an isolated phrase that appears to have taken on a life of its own in connection with the various motions involving non-public campaign documents) includes "arguments considered and ultimately rejected by voters." Yet the only way that the No on 8 documents could be part of the "mix" of information considered by a Yes on 8 voter is if that information actually was heard by that voter—*i.e.* if it was *public.* But if it was public, then EQCA and the ACLU already have produced it voluntarily.

Even assuming that there is some EQCA or ACLU document that was not public, but is also not privileged, and that affected a Yes on 8 voter, its attenuated relevance cannot justify Objectors' burden. Objectors' burden, as non-parties resisting a demand for their documents, is not to demonstrate that there is no conceivable piece of paper that could lead, by some chain of inference piled upon inference, to some morsel of evidence bearing upon an issue in the case. The term "fishing expedition" was coined long ago to describe, and to defeat, production demands of that attenuated sort. But this is not merely "fishing"—it is casting for brook trout in the Atlantic Ocean. The odds of a catch do not justify the exercise, let alone (as we discuss in a moment) its cost. Or, to borrow an equally apt observation from the ancient lore of antitrust, Proponents' quest here is for a "strange red-haired, bearded, one-eyed, man with a limp". *United States v. Grinnell Corporation,* 384 U.S. 563, 591 (1966) (Fortas, J., dissenting). It is possible that there could be such a person, but the effort involved in ascertaining his existence and the trivial value of what he would contribute if found simply are not sufficient to justify the effort involved in the search.

3. Even If the Documents in Question Could Have Some Relevance, It Is Vastly Outweighed by the Burden of Production.

Relevance is not an issue to be considered in isolation, of course. It is tied inextricably and importantly to burden. As the Order recognizes, the Federal Rules themselves direct the court to avoid imposing an undue burden on non-parties. Fed. R. Civ. P. Rule 45(c)(1). While the Magistrate Judge made some efforts (discussed below) to reduce the burden and cost of compliance, he did not place relevance and burden on a scale. But that is exactly what he should have done. Given the posture of the case and the improbability of finding non-public yet non-privileged documents that are so material to the issues in the case that the Court would re-open the trial in order to admit them, it is "undue" to impose the burdens on Objectors that are detailed in the declarations they have submitted (which burdens are not disputed by anyone). Although the costs here may not seem immense when measured by the standards of a securities or antitrust class action among Fortune 500 companies, they are very substantial for non-profit organizations.[5]

The limitation of Objectors' search to documents containing only certain terms is directionally a good idea, but the articulation of the terms that must be searched is a virtual guarantee that nothing having anything to say about Proposition 8 will be eliminated from the review process. The ACLU ran a test search on a much more limited set of terms, which resulted in a universe of more than 60,000 e-mails that will need to be sorted manually to determine if they are "core group" communications and, then, those that are not will need to be reviewed to determine if a "strategy" or "message" was part of the document. (*See* Gill Decl. at 2 (Doc # 544).) EQCA estimated that three staff members, out of the twenty-nine staff members who make up the core group at EQCA, have

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[5] At the hearing on February 25, Judge Spero suggested that the burden here was not all that great because Objectors were being represented on a pro bono basis by large law firms. That suggestion is not reiterated in the Order and, perhaps, was only meant facetiously. If seriously intended, however, it needs to be firmly rejected. Pro bono resources for legal services are every bit as scarce as charitable dollars—particularly in the current legal climate. The fact that lawyers are willing to offer their individual time to help organizations such as the ACLU and Equality California address issues of important public policy does not mean that those lawyers—let alone their entire law firms—may be conscripted to review documents in order to ameliorate the cost of complying with an otherwise unduly burdensome subpoena.

almost 60,000 email messages from the relevant time period. (*See* Carroll Decl. at 1 (Doc # 547); Kors Decl. at 6 (Doc. # 598).)[6]

Public interest resources are scarce resources, in terms of both people and dollars. The burden of complying with this order is no small matter for Objectors, and it was clear error not to conclude that that burden vastly outweighs any possible relevance of the documents at issue.

B. The Order's Privilege Analysis Is Legally Erroneous

The most important error made by the Order is its analysis of the privilege issue. Objectors consider this to be a matter of great importance—not simply as it applies in this case, but as it may be applied to political campaigns in the future. We therefore respectfully submit that the Order is incorrect as a matter of law and must be vacated for that reason.

As Judge Spero reads footnote 12 of the Ninth Circuit's opinion, the existence of a First Amendment privilege for campaign communications turns not only upon the nature of the communications but upon the identity of the people involved in them, that is, whether they were part of something known as a "core group". Further, Judge Spero's decision treats communications about strategy and messages in "silos". That is, communications among people in different organizations (save for a very select and formal group at the top of a formal campaign structure) are, by the Order's definition, automatically non-privileged. These conclusions not only are *not* compelled by the Ninth Circuit's decision (including, specifically, footnote 12), but they cannot be squared with the overall decision, which recognizes a broad zone of protection for campaign communications in order both to avoid a chilling effect on political discourse as well as to protect the right of individuals to associate to advance shared political goals.

The Ninth Circuit opinion unquestionably recognizes that there is a constitutionally protected interest in free discourse related to political campaigns, and that interest, and the purpose for which it was recognized, therefore must be the starting point and the touchstone of analysis. That being said,

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[6] Judge Spero's Order also failed to consider the other burden-reducing steps proposed in the March 3 Kors Declaration, such as limiting the review and production of email to each EQCA staff member's Sent folder or eliminating the review and production of email to only key EQCA staff members. (Kors Supp. Decl. at 9 (Doc # 609).) These steps would significantly reduce the burden on third party EQCA.

Objectors do not dispute that there are limits to the protections afforded to campaign communications by the First Amendment. Thus, for example, the observation in footnote 12 that communications for a purpose such as "persuasion" or "recruitment" would not fall within the First Amendment appears sound. Similarly, communications among people who have some attenuated connection to a political campaign but who were not involved in efforts to develop or implement campaign strategy or messages might not properly be considered privileged since their activities bear no functional relation to the reason why internal campaign communications enjoy constitutional protection. The line actually drawn by the Order, however, is far too restrictive when considered in light of the constitutional rights recognized by the Ninth Circuit's opinion.

The instruction from the Ninth Circuit, while admittedly not fully explicated (it was a *footnote,* after all), was for this Court to consider the privilege in relation to the way the campaign in question was structured. The court plainly viewed that as a case specific inquiry, which is why it remanded the matter to the district court "which is best acquainted with...the structure of the 'Yes on 8' campaign." 591 F.3d at 1165 n.12. While the court did refer in passing to a "core group" of people whose communications would be protected, footnote 12 also plainly contemplated that that group needed to be defined "in light of the First Amendment associational interests the privilege is intended to protect." *Id.* In other words, the issue of whose communications were protected needed to be approached and defined in a functional, not a talismanic, sense.

The actual structure of the No on 8 campaign was provided to the court in the form of a declaration from Elizabeth Gill of the ACLU and two declarations from Geoff Kors, the Executive Director of Equality California. As their declarations—which were not contested factually—make clear, the No on 8 campaign involved communications about strategy and messages both within and among the organizations working at both a statewide and a local level to defeat passage of the initiative. (*See* Gill Supp. Decl. at 2-3 (Doc # 597); Kors Decl. at 3-6 (Doc # 598); Kors Supp. Decl. at 2-8 (Doc # 609).) The essential point of these submissions was to explain to the Court that the process of developing and implementing the strategy and messages of the No on 8 campaign was not limited to a small group of people operating within individual organizations or on a statewide basis. While Objectors fully appreciate that giving effect to the reality of that structure would result in a

broad definition of "core group," the approach adopted by Magistrate Judge Spero would impermissibly deprive people involved in the *function* of campaign strategy and messaging from the protections of the First Amendment that the opinion of the Ninth Circuit in this case recognized.

For example, Judge Spero's Order denied "core group" status to three groups of people who participated in the No on 8 Equality for All campaign: the EQCA Institute Board of Directors, the Equality for All Campaign Committee and the Equality for All Campaign Staff. As described in Mr. Kors' Declaration and Supplemental Declaration, each of these groups played vital roles in formulating campaign strategy and messaging in various areas of the campaign.[7] The Campaign Committee not only ratified the decisions of the Executive Committee, but also "regularly engaged in the formulation of campaign strategy and messaging" by adapting the generalized messaging developed by the Executive Committee members to more specific voter groups across the state as well as formulating strategy and messaging for those groups. (Kors Decl. at 4 (Doc #598).) The process of formulating messaging to reach a discrete group of voters in Sacramento County or on a college campus surely is worthy of the same First Amendment protection as the process of formulating messaging for a statewide television advertisement.

These observations apply both to the "vertical" (communications within an organization among people responsible for helping to establish and then implement campaign strategy and messages) and the "horizontal" (communications among people in different organizations) aspects of the Order. However, Objectors submit that denying any privilege to the latter type of communication

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[7] Thus, as described in the February 22 Kors Declaration, "Equality for All campaign staff working in the different topical areas regularly engaged in the formulation of campaign strategy and messaging. For example: (a) the campaign staff dedicated to working on college campuses came up with a unique strategy and different messaging to get the "No on 8" message out on campuses (in part, they combined the "No on 8" messaging with "No on 4" messaging, another initiative of interest to younger voters (involving parental notification for abortion)); (b) the field staff dedicated to hosting phone banks, during which Equality for All volunteers would call potential voters, were constantly revising their strategies in reaching out to volunteers and in the messaging scripts communicated over the phone to voters; and (c) the fundraising staff working on getting people to host house parties (to raise money for the Equality for All campaign) developed house party tool kits that were regionally tailored and that included campaign messaging." Further, "[t]he EQCA Institute Board of Directors was communicated with regarding campaign strategy and messaging and involved in formulating EQCA's fundraising efforts to defeat Proposition 8." (Kors Decl. at 4-5, 6 (Doc #598).)

is particularly egregious. People in different organizations quite obviously communicate in support of their shared political objectives, and those communications occur not merely at the highest, formal level of a campaign but at all levels where coordination occurs. This is particularly the case where, as here, the political campaign is actually comprised of individual organizations, each of which is independently dedicated to achieving the same political goal, but choose to work together under an umbrella campaign organization for the express purpose of coordinating campaign strategy and messaging. *See* Kors Decl. at 3-5 (Doc # 598). Given the actual structure of the No on 8 campaign, communications at all levels between and among the organizations that participated in the campaign necessarily implicate the associational and political interests that are at the heart of the Ninth Circuit's opinion.[8]

To illustrate the error of this approach in vivid terms: If the reasoning of the Order were applied to a literal battle, as opposed to the virtual "war" of an election, then communications by Dwight Eisenhower of elements of the plan for the D-Day invasion to individuals not at the "core" level of command, so that those "non-core" people could perform their critical functions, would not be deemed privileged. Similarly, if people on the staff of the U.S. Army communicated about the invasion with people on the staff of the Royal Air Force those, too, would be excluded from protection.

The United States Supreme Court considered a closely analogous issue in *Upjohn v. United States,* 449 U.S. 383 (1981). The issue in that case was whether the attorney-client privilege could be limited to a so-called "control group"—senior executives of a corporation. The Court decisively rejected that approach, recognizing that what mattered was the function of the person in relation to the reasons for having a privilege. As the Court noted, in terms equally apt here: "The control group test...frustrates the very purpose of the privilege." *See* 449 U.S. at 392. What was relevant, said the Court, was who were the people who participated in the activities that gave rise to the need for attorney-client communications. Those often would be "[m]idle-level and indeed lower-level

[8] In fact, the Order does not even deem the representatives of each organization that participated in the Equality for All umbrella No on 8 campaign—the Campaign Committee—part of the "core group" that is protected by the First Amendment privilege.

employees" as it would only be "natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client...." *Id.* at 391.[9] So, too, in the case of political campaigns, many people not at a senior level of campaign responsibility nonetheless participate integrally in the development of campaign messages or strategies—particularly on a localized level. If the communications by and to these people are not entitled to First Amendment protection, then there can be little doubt that the conduct of campaigns will be significantly chilled, not to mention the rights of people to associate to advance shared political objectives. *See* Gill Supp. Decl. at 4-5 (Doc #597).

In short, it is one thing to say that certain *types* of communication are not privileged (although those communications most likely would not involve matters of non-public strategy or messages). However, it simply places too much weight on an unexplicated phrase in a footnote to hold that communications between people involved in the creation and implementation of strategies and messages for the campaign (on a statewide or local basis) are not protected by the First Amendment. Thus, the refusal of Magistrate Judge Spero to extend the privilege in the manner proposed by Objectors in the Kors and Gill declarations constitutes error as a matter of law.

C. In All Events, the Order Should Be Modified to Preclude Disclosure to Anyone Involved in the Proposition 8 Campaign or Who May Be Involved in a Future Political Campaign Involving the Right of Same-Sex Couples to Marry.

For the reasons set forth above, the Order must be reversed and the Proponents' motion to compel must be denied. In all events, however, there is no possible justification for allowing Objectors' documents (or their contents) to be disclosed to anyone involved in the campaign over Proposition 8 or future campaigns involving the marriage rights of same-sex couples. No legitimate purpose can be served by such disclosure and the harm to those who favor allowing same sex couples the right to marry (and who may need to gain that right through a future electoral campaign) is

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[9] Without meaning to belabor the point, the law similarly recognizes that parties sharing a common interest in litigation enjoy a "joint defense" privilege which protect communications between counsel for different parties. *See, e.g., Waller v. Financial Corporation of America,* 828 F.2d 579, 583 n.7 (9th Cir. 1987).

obvious.[10] Therefore, the Order, in all events, should be modified to provide: (a) that disclosure of any documents shall be limited to attorneys at Cooper and Kirk PLLC who affirm that they will not in the future participate in any political campaign involving same-sex marriage, and (b) that no document produced by Objectors shall be admitted into evidence without first providing Objectors with the right to object and/or to seek restrictions upon access to the document at issue.

CONCLUSION

For the foregoing reasons, the Order should be vacated and Proponents' motion to compel should be denied.

Dated: March 11, 2010

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[10] For example, the letter sent to an EQCA donor that demanded that the donor provide a donation in the same amount to the Yes on 8 campaign or risk a boycott effort directed towards its customers was signed by Andrew Pugno in his role as General Counsel of ProtectMarriage.com. *See* Doc # 601, Ex. A. In this capacity, Mr. Pugno now represents ProtectMarriage.com as a Defendant-Intervenor.