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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HOR-

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL KNIGHT, MARTIN GUTIERREZ, MARK JANSSON, AND PROTECT-MARRIAGE.COM'S RESPONSE TO OBJECTIONS BY THE ACLU AND EQUALITY CALIFORNIA TO MAGISTRATE JUDGE SPERO'S MARCH 5, 2010 ORDER GRANTING MOTION TO COMPEL

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1 TON, in his official capacity as Director of the California Department of Public Health and State
2 Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of
3 Health Information & Strategic Planning for the
4 California Department of Public Health; PATRICK O'CONNELL, in his official capacity as
5 Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as
6 Registrar-Recorder/County Clerk for
7 the County of Los Angeles,

8 Defendants,

9 and

10 PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J.
11 KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANS-
12 SON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RE-
13 NEWAL,

14 Defendant-Intervenors.

Date: March 16, 2010
Time: 10:00 a.m.
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

15

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9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2409 (3d ed. 2008) 6

Defendant-Intervenors ProtectMarriage.com, Dennis Hollingsworth, Mark Jansson, Gail Knight, and Martin Gutierrez (collectively, "Proponents"), respectfully submit this response to the Objections to the March 5, 2010 order of Magistrate Judge Spero filed by Equality California and No on Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union. *See* Doc #s 610, 614.

BACKGROUND

On March 5, 2010, Magistrate Judge Spero granted Proponents' motion to compel production from 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 ("ACLU"). *See* Doc # 610. Proponents had served document subpoenas on these organizations pursuant to Fed. R. Civ. P. 45. Those subpoenas, and this instant dispute, arose in the context of the more general question of whether internal campaign documents constitute permissible discovery and admissible evidence in a constitutional challenge to a law enacted by voter initiative or referendum.

Equality California and the ACLU (hereinafter the "No-on-8 Objectors") filed objections to the March 5 order on March 11, 2010. *See* Doc # 614. CAEBR has not filed any objections to the March 5 order. Proponents have also today filed limited objections to specific portions of the March 5 order. The background of the instant dispute is set out in greater detail in Proponents' objections and thus is not repeated here.

STANDARD OF REVIEW

Magistrate Judge Spero's order may not be set aside unless it is "clearly erroneous or is contrary to law." FED. R. CIV. PROC. 72(a). *See also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991); *Keithley v. Homestore.com, Inc.*, 629 F. Supp. 2d 972, 974 (N.D. Cal. 2008). Under this standard, the portions of Magistrate Judge Spero's order challenged by Equality California and the ACLU should not be disturbed.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

RESPONSES TO THE ACLU AND EQUALITY CALIFORNIA'S OBJECTIONS

The No-on-8 Objectors level four categories of objections against the March 5 order: relevance, burden, privilege, and scope of disclosure. Taking as a given this Court's rulings and the Ninth Circuit's prior opinion in this case, these objections must fail. In the portions of the order objected to by the No-on-8 Objectors, Magistrate Judge Spero carefully applied the controlling law already set down in this case.[1]

A. Relevance

First, the No-on-8 Objectors contend that Magistrate Judge Spero applied "an incorrect standard of relevance." Doc # 614 at 7. They do not, however, identify what standard of relevance would have been proper. Nor do they cite any authority—not a procedural rule or a single case—for the proposition that the legal standard employed in March 5 order was "erroneous as a matter of law." *Id.* Accordingly, the No-on-8 Objectors have not carried their burden on this point.

The No-on-8 Objectors instead contend that "the discovery phase of this case has long-since passed" and "there has been a trial and the taking of testimony has concluded." *Id.* at 7. From this baseline, the No-on-8 Objectors argue that "there is nothing for the documents at issue to 'lead to' " and the Court cannot order production of the documents unless "the documents themselves can come in as probative evidence." *Id.* at 8. The No-on-8 Objectors then argue that the documents cannot be introduced because they are not party admissions and would constitute hearsay. *Id.* The No-on-8 Objectors cite no legal authority for these points, and thus it cannot be said that the March 5 order's failure to incorporate them was clearly erroneous or contrary to law. But even setting that aside, the argument still fails at every step.

There is nothing to distinguish the timing of the March 5 order from the Court's January 8 or-

[1] Nonetheless, Proponents continue to maintain that on First Amendment privilege, relevance, burden, and scope-of-disclosure grounds this Court's prior and predicate orders and rulings constitute error.

der compelling production of Proponents' similar internal campaign documents, which also issued after formal discovery had closed. *See* Doc # 372. As Magistrate Judge Spero explained, and as the Court is well aware, the expedited nature of this case, along with the Ninth Circuit's unanticipated alteration of its opinion on January 4, 2010, caused "discovery (and litigation regarding the scope of the First Amendment privilege) [to] continu[e] beyond the cut-off." Doc # 610 at 4. *Cf.* Doc # 584 at 17-19 (explaining why Proponents' motion was timely). The No-on-8 Objectors' argument here appears to be a circuitous root to charging that Proponents' motion to compel was not timely, but the No-on-8 Objectors explicitly disclaim any challenge to the March 5 order's finding of timeliness. *See* Doc # 614 at 7 n.3; FED. R. CIV. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to."). And the No-on-8 Objectors are simply wrong in stating that "there has been a trial and the taking of testimony has concluded." Doc # 614 at 7. On January 27, the following colloquy occurred between the Court and counsel for Proponents:

> MR. THOMPSON: And then, finally, Your Honor, we did note, as the Court is aware, that our motions to compel are outstanding. And we're not in a position to formally rest our case until those are resolved. If we were to receive documents from the No On 8 campaign, then we might want leave to submit those documents and/or call witnesses pertaining to those subject matters. But other than that, we have no further witnesses and no further documents.
>
> THE COURT: Very well. We have either this morning or last evening issued an order calling for a response from the third parties that you have subpoenaed, the three organizations, and have also given the plaintiffs an opportunity to chime in, if they wish to do so.

Trial Tr. 2941:19-2942: 7. Accordingly, the documents at issue, if not admissible or relevant themselves, most certainly can "lead to" additional relevant evidence in the form of witness testimony.[2]

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[2] Indeed, it would not have been appropriate to force Proponents to rest their case on January 25, before this motion was conclusively decided and the documents produced. Proponents filed their motion to compel while trial was still in full swing, along with a motion to shorten time to have the matter resolved as expeditiously as possible. The No-on-8 Objectors resisted such expedition and the Court chose to wait to resolve the motion until after January 25. That delay, which was not caused or supported by Proponents, should not now be held against them in (Continued)

1 In any event, even if no further witnesses are called, the No-on-8 Objectors are simply
2 wrong to contend that these documents could only be introduced as admissions of party
3 opponents. Several of the documents introduced by Plaintiffs were *not* created by Proponents
4 (and thus are not admissions), but rather simply were documents that Proponents had in their
5 possession. *See* FED. R. EVID. 801(d)(2); Trial Tr. at 1628-33 (admission of PX 2555 over
6 objection); *id.* at 2368-69 (admission of PX 2655 over hearsay objection); *id.* at 2388 (admis-
7 sion of PX 2455); *id.* at 2931 (admission of PX 2403); *id.* at 2392-93 (admission of PX 2385
8 over hearsay objection). And the No-on-8 Objectors are wrong to conclude that the documents
9 would otherwise constitute hearsay. Hearsay is "a statement, other than one made by the
10 declarant while testifying at the trial ... offered in evidence to prove the truth of the matter
11 asserted." FED. R. EVID. 801(c). This Court has held that documents such as those at issue here
12 "form[] a legislative history that may permit the [C]ourt to discern whether the legislative intent
13 of [Proposition 8] ... was a discriminatory motive." Doc # 214 at 14. Thus, the documents
14 need not be submitted as statements of the declarants for purposes of proving the truth of the
15 matter asserted therein, but rather to shed light on the potential motivations of the non-declarant
16 voters. As Magistrate Judge Spero explained at the February 25 hearing, "whether these
17 [documents] are ... 'hearsay' ... certainly depends on what the purpose those documents were
18 being put [into evidence for]." Hr'g of Feb. 25, 2010, Tr. at 22:13-17. *See also id.* at 25:16-19
19 ("[Y]ou can't tell, actually, the total mix that the voters got and what their intent was, even in
20 passing it, unless you have both sides."). Documents admitted for such purposes are simply not
21 hearsay. *See, e.g.* FED. R. EVID. 801 advisory committee's note to subdivision (c) ("If the
22 significance of an offered statement lies solely in the fact that it was made, no issue is raised as
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their efforts to present the "complete record" the Court has called for, Doc # 76 at 5, including "the mix of information before and available to the voters," Doc # 214 at 14, which includes any document that "contain[s], refer[s] or relate[s] to arguments for or against Proposition 8," Doc #372 at 5.

to the truth of anything asserted, and the statement is not hearsay."); *Perriera v. Allstate Ins. Co.*, No. 96-56025, 1997 U.S. App. LEXIS 33531, at *3-4 (9th Cir. Nov. 20, 1997) ("The district correctly held the contested evidence was not hearsay because it went to knowledge rather than to the truth of the matter asserted."); *United States v. Elekwachi*, No. 96-10014, 1997 U.S. App. LEXIS 6381, at *6-7 (9th Cir. Apr. 2, 1997) ("When an out of court statement is being used not for its truth but to prove knowledge, it is not hearsay.") (citing *United States v. Huguez-Ibarra*, 954 F.2d 546, 552 (9th Cir. 1992); *United States v. Castro*, 887 F.2d 988, 1000 (9th Cir. 1989)); *United States v. Tamura*, 694 F.2d 591, 598 (9th Cir. 1982) (admitting telexes describing a bribery scheme not for the truth of their contents but for the nonhearsay purpose of showing defendant's knowledge of the scheme).[3]

Moreover, many of the issues in this case are legislative facts. *See* FED. R. EVID. 201, advisory committee note (Legislative facts "are those which have relevance to legal reasoning and the lawmaking process."); *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966) ("Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion."). And the Court may take judicial notice of documents that are probative legislative facts; the hearsay rules do not apply. *See, e.g.*, *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 843-44 (S.D. Ind. 2006)

[3] Moreover, some of the documents may qualify as exceptions to the hearsay rule. *See* FED. R. EVID. 803(1) ("[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is "not excluded by the hearsay rule"); FED. R. EVID. 803(3) ("[a] statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is "not excluded by the hearsay rule"); FED. R. EVID. 803(6) ("[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity" is "not excluded by the hearsay rule"). The state of mind of the No-on-8 groups may be probative, for instance, of the political power of gays and lesbians or (under this Court's rulings) of voter intent, and if the documents are probative of these facts, then this they would qualify under the Rule 803(1) exception.

(denying motion to exclude "newspaper articles, transcribed oral statements, letters/press releases, committee reports, websites, polls, and journal articles" as "unsworn, unauthenticated, and contain[ing] hearsay" because case presented question requiring rational basis review and thus "the submissions are admissible to the extent that they tend to establish a reasonable justification for [the challenged law]"); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2409 (3d ed. 2008) ("The Evidence Rules authorize the taking of judicial notice of adjudicative facts but leave notice of legislative facts to development by the federal courts.").

Second, the No-on-8 Objectors argue that while Proponents' statements to voters "could help the Court understand why voters who voted in favor of the initiative did so … in an indirect and inferential sense," the statements of the opponents of Proposition 8 "cannot … illuminate[]" this question "in any realistic or meaningful sense." Doc # 614 at 8.[4] As

[4] In their initial briefing, the No-on-8 Objectors were more fulsome in their objections to the lines of inquiry this case has involved. They contended that their "internal, confidential, and non-public campaign communications have no bearing on and cannot possibly reflect the rationale the … voters adopted in support of Prop. 8." Doc # 546 at 8. *See also* Doc # 543 at 14. As the Court is well aware, Proponents agree wholeheartedly with this position as it applies to both sides' documents and thus believe it was clear error for this Court to allow discovery, and introduction as evidence, of such documents. *See, e.g.*, Doc # 187 at 10-14; Doc # 197 at 6-11; Petitioners' Mot. for a Stay, *Perry v. Hollingsworth*, No. 09-17241 (9th Cir. Nov. 13, 2009) at 19 ("disclosure of Proponents' internal *nonpublic* communications with their political associates would reveal *nothing* about the voters' intent"). Nonetheless, Proponents must litigate this case based on the controlling rulings of this Court, and those rulings hold that discovery requests seeking all communications "to voters" or the "public," Doc # 187-3 at 5, properly seek "relevant discovery" and, "other than communications solely among the core group," require production of *any* documents distributed to *any* person that "contain, refer or relate to arguments for or against Proposition 8," Doc # 372 at 5.

The No-on-8 Objectors charge that "[w]hat Proponents want is simply a 'free peak' at their political opponents' inside information, and that is a misuse of the litigation process." Doc # 614 at 9. As the above procedural history demonstrates, and as the No-on-8 Objectors well know, it has been the Proponents who have fervently and relentlessly argued that the type of documents at issue here are utterly irrelevant to this case and that discovery of such documents violates the constitutional rights of those (on both sides) who participated in the Proposition 8 campaign. *See* Letter from Stephen V. Bomse, Counsel for ACLU of Northern California to Molly C. Dwyer, Clerk of the Court, United States Court of Appeals for the Ninth Circuit (Nov. 27, 2009), *Perry*, No. 09-17241, at 2 n.4 ("In fairness, Proponents served their subpoenas only after they received requests for production from Plaintiffs. Proponents further advised the subpoenaed parties that Proponents were seeking internal campaign communications only in the event that they were

(Continued)

Magistrate Judge Spero recognized, however, there is no basis in this Court's opinions for distinguishing in any way between the nonpublic documents of those who campaigned in support of Proposition 8 and those who campaigned against it. *See* Doc # 610 at 6; Hr'g of Feb. 25, 2010, Tr. at 25:12-19 ("[A]nd the judge has already decided this .... [Y]ou can't tell, actually, the total mix that the voters got and what their intent was, even in passing it, unless you have both sides."). On the contrary, the Court has held that: (i) 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," Doc # 76 at 8-9;[5] (ii) 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 ... was a discriminatory motive," Doc # 214 at 14 (emphasis added); and (iii) that "documents that contain, refer or relate to arguments for *or against* Proposition 8 ... [constitute] relevant discovery," Doc # 372 at 5 (emphasis added). These relevance principles, by their express terms and by their logic, are in no way limited to Proponents' documents. If they were, the Court would have had no occasion to state that "the mix" of information is relevant or that documents containing arguments "against" Proposition 8 are relevant.

Nonetheless, the No-on-8 Objectors maintain that materials relating to opposition to a ballot measure cannot possibly be relevant to the intent of those voters who approved the measure. But given that the Court deems it appropriate to venture beyond the text of a ballot measure itself (to the ballot arguments, to public advertisements, or to nonpublic information),

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obliged to produce such documents."). Proponents lost that fight in this Court, and unless or until the controlling legal rules change, must litigate the case on those terms. A suggestion that so litigating the case on these terms is "a misuse of the litigation process" is baseless.

[5] The No-on-8 Objectors thus appear to simply disagree with this Court's prior holdings. *See* Doc # 614 at 8 ("[T]his Court is not being asked to write a history of the campaign over Proposition 8....").

it follows as a matter of logic that a voter who ultimately voted in support of that measure may have been influenced not only by materials supporting the measure, but also by materials expressing opposition. Most informed voters weigh both sides of a debate—they credit some arguments, dismiss others, and reconsider others in light of new information (from both sides). It is this "mix of information" that informs a voter's choice and the balance he or she ultimately strikes in coming to a final decision. If public ads and private campaign documents are indeed relevant, then such materials from both sides are necessary to evaluate the reasons why voters for Proposition 8 ultimately struck that balance. *See* Hr'g of Feb. 25, 2010, Tr. at 6:6-19 (statement of the Court) ("[T]he information before the voters … was a conversation…. People went back and forth on various topics. And so the idea that only the communications in the outside world to the voters from one side are relevant seems to make no sense. If … the entire mix of information before the voters is what the judge would look at, … then it seems to me that internal communications from either side, within either side, would be relevant to elucidate the messages that got transmitted."); *id.* at 27:5-11. Thus, materials expressing opposition to Proposition 8 form part of the "mix of information" voters may have considered and are equally relevant to materials expressing support (to whatever extent such materials are relevant at all). And there can be no argument that the No-on-8 Objectors possess a significant quantity of this pertinent information. *See* Hr'g of Feb. 25, 2010, Tr. at 40:15-20 (statement of counsel for Equality California) ("[T]his was a statewide campaign that was targeting every single discrete group of voters that you could imagine … and had to employ very different strategies and messaging to reach all of those regions and groups.").

Thus, it is simply not true that Proponents have been "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." Doc #

614 at 8. Though even if this were true, it is not clear why such an argument would be insufficient to carry the day. Voters may well be motivated to vote for (or against) a law in reaction against the statements, arguments, and messages presented by its opponents (or its supporters). Such a possibility seems especially likely in a highly contentious campaign such as that surrounding Proposition 8, where passionate—and sometimes intemperate—statements and arguments were presented by some extremists on both sides of the debate. For example, some voters may have reacted negatively to the religious intolerance displayed by some aspects of the No-on-8 campaign, and the documents of the No-on-8 Objectors may shed light on how such ads and messages were counterproductive. Or the documents might show that voters reacted negatively to the violence committed against supporters of Proposition 8 by its opponents.[6]

This Court has characterized "the mix of information before and available to the voters" as "a legislative history" relevant to this case. Doc # 214 at 14. Courts that examine legislative history for other purposes regularly examine materials supporting *and opposing* the law in question. *See, e.g., Rutti v. Lojack Corp.*, No. 07-56599, 2010 U.S. App. LEXIS 4278, at *16

[6] The No-on-8 Objectors also contend that Proponents' nonpublic documents are relevant because they may reveal the "arguments that the Proponents chose *not* to make (thereby revealing what Proponents believed Proposition 8 was really about or was intended to accomplish)," whereas "the same thing cannot be said of No on 8 documents." Doc # 614 at 9. It is true that *exactly* the same thing cannot be said of the Yes-on-8 and No-on-8 documents, for "Yes" and "No" are, indeed, different words. But (accepting the paradigm established by this Court's orders) arguments that the No-on-8 campaign chose *not* to make may reveal that the opponents (i.e., those who, *inter alia*, drafted the official ballot argument against Prop 8) credited that voters might have intent that is not rooted in animus but instead in rational bases.

It is also worth noting that in the course of making this argument, the No-on-8 Objectors contend that they "already have produced … voluntarily" all "public" documents. Doc # 614 at 9. The No-on-8 Objectors have crafted their own definition of "public," however, which they explained as hewing to "the definition of 'mass mailing' provided by the California Government code §82041.5, which refers to anything sent to at least 200 people." Doc # 544 at ¶ 4. *See also* Doc # 543 at 6-7. This Court, however, has squarely rejected that definition of "public" documents. *Compare* Hr'g of Jan. 6, 2010, Tr. at 73:19-24 ("And in terms of trying to find an objective dividing line between sending something out to voters or sending something out to your own associates, California law specifically identifies the number 200 … as the dividing line."), *with* Doc # 372 at 5 (ordering production of "*all* documents" regardless of number of recipients) (emphasis added).

1 (9th Cir. Mar. 2, 2010) ("The failure of the minority report to stimulate any change in the bill
2 indicates that Congress did not object to employers setting conditions on their employees use of
3 company cars for commuting."); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 675
4 n.14 (1981) ("The adoption, instead, of the general phrase now part of § 8(d) was clearly meant
5 to preserve future interpretation by the Board. *See* H. R. Rep. No. 245, 80th Cong., 1st Sess., 71
6 (1947) (minority report)."); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 414-15 (1987)
7 (Stevens, J., concurring in part) (citing minority report as evidence of legislative compromise
8 that was ultimately reached); *United Steelworkers v. Weber*, 443 U.S. 193, 232-44 (1979)
9 (Burger, C.J., dissenting) (discussing how varying views of proponents and opponents of a bill
10 affected its final version and meaning). Accordingly, to the extent the Court has ruled it must
11 examine the "legislative history" of Prop 8, and that the documents possessed by political
12 campaigns are part of that "legislative history," the documents possessed by the losing
13 campaign are also a critical component of that record.
14
15
16 Moreover, the No-on-8 Objectors focus solely on the relevance of the documents at issue
17 with respect to voter intent. But one of the important issues in this case is whether or not gays
18 and lesbians are politically powerless. And at trial Plaintiffs introduced internal documents
19 created by supporters of Proposition 8 for the alleged proposition that there are "powerful
20 political forces arrayed against gay men and lesbians in connection with the Proposition 8
21 campaign." Trial Tr. 1614:12-1615:2 (direct examination of Professor Segura, Plaintiffs'
22 expert on the political power of gays and lesbians). Documents possessed by the No-on-8
23 groups will likely be highly relevant to whether, in fact, gays and lesbians lack political power.
24 For example, even in the very limited production provided by CAEBR on February 1, there is
25 evidence that the No-on-8 campaign had high level contacts within, or the backing of: the
26 presidential campaigns of Hilary Clinton and Barack Obama; major Hollywood and media
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figures; and major corporations. *See* Doc # 584-1 at 6 ("former LGBT Director for Hillary for President" stating that "it is clear that on LGBT issues, Senator Obama is with our community" and stating that the author is "part of Obama LGBT Steering Committee and LGBT Finance Committee"); *id.* at 8-9 (arguing that the No-on-8 campaign has to be "as organized, well funded and aggressive as [the Yes-on-8 campaign]" and questioning whether "Brad" would appear "at a carefully orchestrated media event" or "help set an example for other entertainment and business leaders to follow"); *id.* at 11 (indicating support from Levi Strauss & Co.). The documents being withheld by the No-on-8 groups are thus relevant to this issue, as they may show the coalition of powerful political forces aligned against Proposition 8 and in support of the political goals of gays and lesbians. Yet without access to these documents, Proponents' experts were unable to address issues put into contention by Plaintiffs. Trial Tr. 2667:10-18 (cross examination of Professor Miller) ("**Q.** As part of your work, did you investigate the extent to which the groups favoring Proposition 8, the religious groups favoring Proposition 8, contributed far more in money and manpower than the groups opposing Proposition 8? Did you investigate that? **A.** I wasn't able to determine in a quantitative way the monetary and organizational contributions of the progressive churches to the No On 8 campaign. I didn't have any access to the No On 8 campaign's internal documents to know about that.").

B. Burden

The No-on-8 Objectors argue that considerations of burden should preclude their having to produce a single internal campaign document. Doc # 614 at 9-11. It is important at the outset to note that this argument is based on the No-on-8 Objectors' theory that such documents are of minimal relevance. *See id.* at 10. As demonstrated above, under the direct language and explicit logic of this Court's orders, such documents are highly relevant and thus the scales do not settle at the balance the No-on-8 Objectors would prefer. In light of the relevance of these documents under

1 this Court's orders, the March 5 order represents a careful balancing of relevance and burden. *See*
2 Doc # 610 at 13 ("the court recognizes the need to ensure that any burden borne by the third parties
3 is not undue"). As Magistrate Judge Spero noted at the hearing, however, the need to avoid undue
4 burden does not mean the elimination of burden altogether. Hr'g of Feb. 25, 2010, Tr. at 8:5-6.
5 Rule 45 exists because third parties sometimes possess information that is relevant to the claims in a
6 lawsuit. Under this Court's relevance rulings—that the "the mix of information before and available
7 to the voters forms a legislative history that may permit the [C]ourt to discern whether the legislative
8 intent of an initiative measure," Doc # 214 at 14—the No-on-8 Objectors possess such information
9 and thus must be compelled to produce it. Indeed, suppose that California's Attorney General had
10 chosen to defend Proposition 8 and Proponents had not had to intervene. Given all that the Court
11 has said regarding the probative nature of Proponents' internal and confidential campaign docu-
12 ments and their centrality to this litigation, would Proponents have been spared the burdens and
13 harm of production and compelled disclosure of such purportedly essential materials simply because
14 they were third parties?
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17 In particular, the No-on-8 Objectors claim that the search terms adopted in the March 5 order
18 will result in an overly burdensome review and production process. But the No-on-8 Objectors can
19 hardly complain about these terms now, as they are the verbatim terms that the No-on-8 Objectors
20 themselves argued that Magistrate Judge Spero should adopt—and that was after the No-on-8
21 Objectors had a week to unilaterally review their documents and decide on what search terms to
22 propose. Indeed, the March 5 order actually includes one *less* term than the list proposed by the No-
23 on-8 Objectors. *Compare* Doc # 609 (declaration submitted by Equality California) (arguing that
24 "the following search terms be used to reduce the number of email to be reviewed: 'No on 8,' 'Yes
25 on 8,' 'Prop 8,' 'Proposition 8,' 'Equality for All,' 'Marriage Equality,' and 'ProtectMar-
26 riage.com.'"), *with* Doc # 610 at 13 ("[T]he No on 8 groups shall only be required to review
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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.'").[7] The No-on-8 Objectors can hardly now come to the Court and claim that Magistrate Judge Spero has imposed an undue burden upon them when the March 5 order gives them *more* than they asked for with respect to search terms. If waiver has any application at all, it applies here.[8]

The burden arguments raised by the No-on-8 Objectors before Magistrate Judge Spero were the same as those raised by Proponents from the beginning of the discovery period straight through to the January 6 hearing. The Court has rejected these arguments as grounds for prohibiting the type of discovery at issue here. *See* Doc # 372; Doc # 496. Thus, the only possible difference between Proponents and the No-on-8 Groups is that the latter are not intervenors in the lawsuit. Magistrate Judge Spero accounted for this difference, imposing certain burden reducing measures—and even those measures were overly generous in light of the Court's ruling concerning the relevance of these documents and the role the No-on-8 Objectors played in both the campaign surrounding Proposition 8 and this very litigation. *See* Doc # 584 at 16-17 (spelling out the vast sums of money spent by the No on 8 campaign in the election and the No-on-8 Objectors' attempts to intervene in this lawsuit and the significant resources they have already committed to supporting Plaintiffs). The Court has deemed the "mix of information before and available to the voters," Doc # 214 at 14, including any documents "that contain, refer or relate to any arguments for or against Proposition 8," Doc # 372 at 5, as critical to its efforts to review the "legislative history" of Prop 8 and to determine whether the

[7] As Proponents' objections make clear, the list of six search terms adopted in the March 5 order is actually vastly underinclusive and thus can hardly be said to be unduly burdensome, especially when compared to the review and production Proponents had to undertake, which was not constrained by *any* search terms or other reasonable limitations whatsoever.

[8] The No-on-8 Objectors claim that "Judge Spero's Order also failed to consider the other burden-reducing steps proposed in the March 3 Kors Declaration." Doc # 614 at 11 n.6. A more accurate statement would be that the March 5 order refused to adopt every single proposal put forth by Equality California for vastly limiting the scope of relevant documents it would have to produce. The proposals—such as limiting searches only to the "sent" mail folders of specific individuals—were untenable on their face.

"legislative intent ... was a discriminatory motive," Doc # 214 at 14. Given that the Court is deciding a question of public law, and that the No-on-8 Objectors have spent millions (including on resources in this case) to affect that public law, the additional burdens of complying with a subpoena are outweighed by the evidentiary needs in this case.

C. First Amendment Privilege

The No-on-8 Objectors argue that the March 5 order's First Amendment privilege analysis constitutes error, and that this is "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." Doc # 614 at 11. Indeed. As Proponents explained to the Ninth Circuit, "[i]f this type of core political speech is not privileged under the speech and associational protections of the First Amendment from ordinary discovery in post-election litigation, then nothing is, and the political process surrounding initiative elections in California, and everywhere else, will be profoundly and permanently chilled." Defendant-Intervenors-Appellants' Mot. for a Stay, *Perry v. Hollingsworth*, No. 09-17241, at 2 (9th Cir. Nov. 13, 2009). The No-on-8 Objectors provide a very eloquent and true defense of the First Amendment principles that have been in play in this litigation from the first instant Plaintiffs embarked on their scorched-earth discovery crusade. And Proponents agree that those principles should have prevailed. But this Court has spoken in a series of orders and rulings explicitly *rejecting* all of the arguments that the Proponents have previously made and that the No-on-8 Objectors now make. And it is by those rulings and orders that parties subject to the jurisdiction of this Court must abide unless or until a higher court reverses those decisions. And adherence to those prior rulings is precisely what is reflected in the portions of March 5 order objected to by the No-on-8 Objectors. *See* Hr'g of Feb. 25, 2010, Tr. at 7:2-9 ("it's really interesting to read the 'No on 8' papers ... because I've read all those arguments before.... [I]t is

1 exactly the same sort of thing that the ... proponents were trying to persuade [the Court of].").[9]

2 **D. Limiting Disclosure**

3 The March 5 order permits the No-on-8 groups to "produce documents pursuant to the terms of
4 the protective order, Doc # 425, if they wish," which allows for designation of materials as "highly
5 confidential – attorneys eyes only." Doc # 610 at 14. The Court, over Proponents' objections, deemed
6 this procedure sufficient to protect Proponents' confidential campaign information. *Compare* Doc #
7 446 at 18-19, *with* Doc # 496. The No-on-8 Objectors argue, however, that this is not good enough for
8
9

10 [9] The No-on-8 Objectors main claim is that it was error to "treats communications about strategy and messages in 'silos' " and that Magistrate Judge Spero's reading of footnote 12 of the Ninth Circuit's opinion "cannot be squared with the overall decision." Doc # 614 at 11. *See also id.* at 11-15. This Court has heard this argument before—by Proponents in many varied iterations and circumstances—and has flatly and repeatedly rejected it. *Compare* Hr'g of Jan. 6, 2010, Tr. at 28:18-20 ("Let's not lose sight of the forest for the trees. It's not fair to take one footnote of a Ninth Circuit opinion and say that is the opinion."), *with* Doc # 372, *and* Doc # 496. *See also* Doc # 187 at 9 n.4; Sealed Declaration of Ronald Prentice (Nov. 5, 2009) at ¶ 9; Hr'g of Dec. 16, 2009, Tr. 57:7-11 ("So there is no First Amendment right for individuals, is what they claim. You have to be a member of a 501c3, and then you get First Amendment protection if you have an official title. Which, by the way, in a volunteer campaign you often don't have."); Hr'g of Jan. 6, 2010, Tr. 29:5-11 ("So to argue that you have to carry a business card that says 'Core Group' on it and then you get First Amendment protections, but if you don't carry that business card, you lose your First Amendment protections if you are corresponding with somebody about an associational—a political matter and the formulation of messages, I think is not a proper reading of the opinion."); Doc. 446 at 17 ("The definition of the 'core group' requires production of thousands of documents shared confidentially among those who 'associate[d] with others to advance [their] shared political beliefs, and [did] so in private.' Proponents respectfully object on First Amendment grounds.") (quoting *Perry*, slip op. at 30); *id.* ("Magistrate Judge Spero held that Proponents could not claim privilege over communications made in their capacity as members of any formal political association other than ProtectMarriage.com or as part of an informal political association. This holding runs afoul of the First Amendment."); *id.* at 18 ("Proponents object to Magistrate Judge Spero's orders to the extent they hold that two different associations cannot receive First Amendment protection for communications made between persons in the groups during a political campaign in which they are allied. As with any large campaign, the ProtectMarriage.com effort necessarily involved the support and cooperative effort of other allied persons and groups who may not have held a formal title or position within ProtectMarriage.com (and vice versa). But those other allied persons or groups were part of the political coalition, and sometimes shared with ProtectMarriage.com internal, confidential information to devise general campaign strategy and messages. Proponents object to the disclosure of such nonpublic communications on First Amendment grounds."); Trial Tr. at 1614:11-1621:22 (rejecting privilege objection asserted by member of ProtectMarriage.com executive committee made over document shared solely among the leadership of a separate religious association of which he was also a leader); *id.* at 1628-33 (overruling First Amendment objection regarding internal church document that was in possession of church member who was also a member of ProtectMarriage.com executive committee).

11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

them and that disclosure should 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." Doc # 614 at 6. It is ironic in the extreme for the No-on-8 Objectors to be bringing this objection to the Court. Mr. Herrera is an attorney representing Plaintiff-Intervenor in this case, but he was also deeply involved in the campaign against Proposition 8—so deeply involved that the No-on-8 Objectors demanded that he receive "core group" status, which the March 5 order grants him twice over. Yet when Proponents raised the exact same concerns about Mr. Herrera's receiving the same type of documents from the Yes-on-8 campaign, Mr. Herrera vehemently protested that the request to limit disclosure was "insulting," that he and his deputies "take their role as Officers of the Court seriously," and that it should not be assumed that he and other lawyers who were deeply involved in the No-on-8 campaign "will not abide by the terms of a protective order issued in this case." Doc # 263 at 1. *See also* Doc # 182 (letter from Mr. Herrera supporting disclosure of Proponents' confidential campaign documents); Doc # 273 (same); Doc # 393 (motion seeking leave to amend protective order to allow City attorneys access to confidential documents); Doc # 197 at 15. The Court agreed and allowed Mr. Herrera and other City attorneys who were active in the No-on-8 campaign to have full and unfettered access to they Yes-on-8 campaign's most sensitive internal documents. *See* Hr'g of Jan. 6, 2010, Tr. at 101:10-102:3. Proponents do not understand the No-on-8 Objectors (who claim Mr. Herrera as part of their "core group") to suggest that the Court should assume that Proponents' attorneys will be any less diligent or responsible than Mr. Herrera and his office in meeting their ethical obligations under the protective order and the rules of the Bar. Moreover, forcing an attorney to attest that he or she will never "participate in any political campaign involving same-sex marriage" is, to put it mildly, a bit much. Under this proposed regime, Proponents' attorneys presumably could not participate in the 2012 presidential election if the issue of same-sex marriage is raised. This case features enough First Amendment issues already that this additional wrinkle need not be introduced.

The No-on-8 Objectors also ask that the Court specify that "no document produced by Objectors shall be admitted into evidence without first providing Objectors with the right to object and/or seek restrictions upon access to the document at issue." Doc # 614 at 13. To the extent the No-on-8 groups produce documents pursuant to the protective order's provisions, Proponents do not oppose such a requirement so long as it permits for the orderly and timely resolution of any disputes.

CONCLUSION

For the foregoing reasons, the Court should overrule the Objections of the ACLU and Equality California to the March 5, 2010 order.

Dated: March 15, 2010

Respectfully submitted,

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS DENNIS HOLLINGSWORTH, GAIL KNIGHT, MARTIN GUTIERREZ, MARK JANSSON, AND PROTECTMARRIAGE.COM

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

United States District Court
For the Northern District of 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

1 On January 15, 2010, defendant-intervenors, the official
2 proponents of Proposition 8 ("proponents") moved to compel
3 production of documents from three nonparties: Californians
4 Against Eliminating Basic Rights ("CAEBR"), Equality California and
5 No on Proposition 8, Campaign for Marriage Equality, A Project of
6 the American Civil Liberties Union (the "ACLU") (collectively the
7 "No on 8 groups"). Doc #472. The court referred the motion to
8 Magistrate Judge Spero pursuant to 28 USC § 636(b)(1)(A) on
9 February 4, 2010. Doc #572. The magistrate heard argument on
10 February 25, 2010 and, on March 5, 2010, granted the motion to
11 compel and ordered the No on 8 groups to produce nonprivileged
12 documents that "contain, refer or relate to arguments for or
13 against Proposition 8." Doc #610 at 14. The ACLU and Equality
14 California objected to the magistrate's order pursuant to FRCP
15 72(a) on March 11, 2010. Doc #614. Proponents filed their
16 objections on March 15, 2010. Doc #619. CAEBR did not object to
17 the magistrate's order. The court heard argument on the objections
18 on March 16, 2010.
19
20 I

21 The magistrate's order requires the No on 8 groups to
22 produce nonprivileged documents that "contain, refer or relate to
23 arguments for or against Proposition 8" not later than March 31,
24 2010. Doc #610. The order relies on the Ninth Circuit's amended
25 opinion, Perry v Schwarzenegger, 591 F3d 1147, 1164 (9th Cir 2010),
26 to determine that proponents' subpoenas may lead to the discovery
27 of admissible evidence under FRCP 26. Doc #610 at 5. The order
28 also relies on Perry, 591 F3d at 1165 n12, to determine the scope

of the No on 8 groups' First Amendment privilege. Doc #610 at 6-7. Finally, the order adopts measures to reduce the burden of production on the No on 8 groups. Id at 12-14.

A magistrate judge's discovery order may be modified or set aside if it is "clearly erroneous or contrary to law." FRCP 72(a). The magistrate's factual determinations are reviewed for clear error, and the magistrate's legal conclusions are reviewed to determine whether they are contrary to law. United States v McConney, 728 F2d 1195, 1200-1201 (9th Cir 1984) (overruled on other grounds by Estate of Merchant v CIR, 947 F2d 1390 (9th Cir 1991)). The clear error standard allows the court to overturn a magistrate's factual determinations only if the court reaches a "definite and firm conviction that a mistake has been committed." Wolpin v Philip Morris Inc, 189 FRD 418, 422 (CD Cal 1999) (citing Federal Sav & Loan Ins Corp v Commonwealth Land Title Ins Co, 130 FRD 507 (DDC 1990)). The magistrate's legal conclusions are reviewed de novo to determine whether they are contrary to law. Equal Employment Opportunity Commission v Lexus of Serramonte, No 05-0962 SBA, Doc #68 at 4; William W Schwarzer, et al, Federal Civil Procedure Before Trial, 16:278.

When the court reviews the magistrate's determination of relevance in a discovery order, "the Court must review the magistrate's order with an eye toward the broad standard of relevance in the discovery context. Thus, the standard of review in most instances is not the explicit statutory language, but the clearly implicit standard of abuse of discretion." Geophysical Sys Corp v Raytheon Co, Inc, 117 FRD 646, 647 (CD Cal 1987). The court should not disturb the magistrate's relevance determination except

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1 where it is based on "an erroneous conclusion of law or where the
2 record contains no evidence on which [the magistrate] rationally
3 could have based that decision." Wolpin, 189 FRD at 422 (citation
4 omitted). The abuse of discretion standard does not apply to a
5 discovery order not concerned with relevance.
6 For the reasons explained below, the magistrate's order
7 is neither clearly erroneous nor contrary to law. Accordingly, all
8 objections to the order are DENIED.
9
10 II
11 The ACLU and Equality California object to the
12 magistrate's order on the basis that the magistrate's FRCP 26
13 analysis was clearly erroneous and that the magistrate's
14 application of the First Amendment privilege was contrary to law.
15 Doc #614. The court addresses each objection in turn.
16
17 A
18 The ACLU and Equality California argue that the
19 magistrate clearly erred and abused his discretion in determining
20 that proponents' subpoenas would lead to relevant information under
21 FRCP 26. Doc #614 at 7. This objection has three parts: first,
22 that the magistrate applied the FRCP 26 relevance standard when a
23 more searching standard was appropriate; second, that the subpoenas
24 do not seek relevant documents under any standard of relevance; and
25 third, that the magistrate failed to weigh the marginal relevance
26 of the documents against the heavy burden production of the
27 documents would impose.
28

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To determine whether proponents' subpoenas seek discoverable documents, the magistrate applied the standard set forth in FRCP 26(b)(1) that "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.'" Doc #610 at 5 (citing FRCP 26(b)(1)). The ACLU and Equality California argue as a matter of law that because the discovery period is closed and the trial has all but concluded,[1] the magistrate should have applied a more searching standard of relevance than is found in FRCP 26. Doc #614 at 7.

The ACLU and Equality California cite no authority for the proposition that the court should apply a more searching standard of relevance when the formal discovery cutoff has passed. Even if a more searching standard is appropriate for post-trial discovery motions, the instant motion to compel was filed before trial proceedings concluded. See Doc #610 at 4 (discussing the procedural history of proponents' motion to compel). Thus, even if a post-trial motion to compel could be subject to a more searching standard of relevance, the ACLU and Equality California have not shown the magistrate erred as a matter of law in concluding the typical standard applies in this case. The objection on this point is accordingly DENIED.

[1]Live witness testimony concluded on January 27, 2010, although proponents did not officially rest their case pending resolution of the instant motion to compel. Doc #531 at 107-108 (Trial Tr 1/27/10). The court has not yet scheduled closing arguments, and proponents have stated they do not plan to call additional witnesses.

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2

The magistrate determined that the documents sought through proponents' subpoenas met the standard of relevance under FRCP 26(b)(1). Doc #610 at 6. The magistrate relied on Perry, 591 F3d at 1164, which held that a document request seeking similar campaign documents from proponents was "reasonably calculated to lead to the discovery of admissible evidence on the issues of voter intent and the existence of a legitimate state interest." The magistrate then determined that documents from the No on 8 campaign could be relevant to the question why voters approved Proposition 8, as the messages from the No on 8 campaign were part of the mix of information available to the voters. Doc #610 at 6.

The ACLU and Equality California argue that the documents sought are simply not relevant to the question of voter intent. But because the Ninth Circuit has determined that campaign documents may lead to discovery of admissible evidence, and because the Ninth Circuit's holding is not limited to campaign documents from the side that succeeded in persuading voters, the magistrate did not clearly err in determining that the documents sought by proponents meet the FRCP 26 relevance standard. The magistrate considered and rejected the contrary argument, finding that campaign documents from both sides of the Proposition 8 campaign met the FRCP 26 standard of relevance. Because the record supports a finding that campaign documents from both sides meet the standards of discoverability laid out in FRCP 26, the magistrate's relevance determination is not clearly erroneous.

3

Having determined that proponents' subpoenas seek discoverable documents under FRCP 26, the magistrate then adopted measures to reduce the burden of production on the No on 8 groups. Doc #610 at 12. The measures adopted to reduce burden, including adopting a list of electronic search terms, restricting Equality California's electronic document search to a central server, not requiring a privilege log and not requiring production of any document constituting a communication solely within a core group, appear tailored to eliminate unnecessary burdens and focus production on documents most likely to be relevant to proponents' case.

The ACLU and Equality California argue the magistrate erred as a matter of law in failing to consider relevance and burden on a sliding scale. Doc #614 at 10. The ACLU and Equality California argue proponents have demonstrated only a marginal relevance, if any, for the documents sought in the subpoenas.

Indeed, proponents' showing of relevance is minimal. Proponents rely without elaboration on the court's previous orders and the Ninth Circuit's opinion in Perry to assert that the subpoenas seek relevant documents under FRCP 26. In response to the court's question at the March 16 hearing why proponents need the documents, proponents referred to the court's order that the mix of information available to the voters could help determine the state interest in Proposition 8 and asserted that documents from No on 8 groups could add to the mix. Proponents also argue that the documents might speak to the political power of gays and lesbians, although proponents do not appear to have made use of publicly

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1 available documents in this regard during trial. See Doc #620 at
2 15 (stating that proponents "were unable to address issues put into
3 contention by Plaintiffs," like contributions to the No on 8
4 campaign by progressive churches, even though information about
5 such donations is available to the public under the Political
6 Reform Act of 1974, Cal Govt Code § 81000 et seq). Although
7 proponents describe the documents sought as "highly relevant," Doc
8 #620 at 15, proponents do not attempt to make a showing that their
9 need for the documents meets the heightened standard necessary to
10 overcome the No on 8 groups' First Amendment privilege. See Perry,
11 591 F3d at 1164-1165 (applying the "First Amendment's more
12 demanding heightened relevance standard" whether the party seeking
13 discovery has "demonstrated an interest in obtaining the
14 disclosures which is sufficient to justify the deterrent effect on
15 the free exercise of the constitutionally protected right of
16 association.") (citing NAACP v Alabama, 357 US 449, 463). Thus,
17 proponents have failed to make a showing that the documents they
18 seek are highly relevant to the claims they are defending against.

19 Nevertheless, proponents' showing satisfies the standard
20 of discoverability set forth in FRCP 26, and the magistrate did not
21 err in ordering the No on 8 groups to comply with the proponents'
22 subpoenas and to produce nonprivileged documents. Indeed, the
23 magistrate carefully weighed the marginal relevance of proponents'
24 discovery against the burden cast on the No on 8 groups. In doing
25 so, the magistrate took substantial steps to ensure compliance with
26 the subpoenas would not amount to an undue burden on the No on 8
27 groups. Doc #610 at 13. To the extent the ACLU and Equality
28 California argue the magistrate's order imposes an undue burden on

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them, they have failed to substantiate the burden the magistrate's order imposes. See Doc #614 at 10-11 (citing to Doc #544, the declaration of Elizabeth Gill, filed before the magistrate issued the order compelling production). At the March 16 hearing, counsel for the ACLU stated he could not quantify the cost of production but that he believed the parties' submissions before the magistrate were sufficient to support the claim that the production ordered by the magistrate amounts to an undue burden. Tellingly, the ACLU and Equality California have made no showing regarding the burden on the No on 8 groups in complying with the magistrate's order. The court cannot, therefore, conclude that the magistrate clearly erred in compelling production despite the burden compliance may impose.

For the foregoing reasons, the court declines to disturb the magistrate's rulings regarding burden and relevance. The objections of the ACLU and Equality California on these points are DENIED.

B

The court now turns to the objections of the ACLU and Equality California regarding the magistrate's application of the First Amendment privilege. The ACLU and Equality California argue the magistrate's application of the First Amendment privilege is contrary to law as the privilege requires a "more demanding heightened relevance standard" for the campaign documents. See Perry, 591 F3d at 1164. The ACLU and Equality California also object that the magistrate erred in failing to include groups of individuals in Equality for All's core group.

1

Because the No on 8 groups assert a First Amendment privilege against disclosure of their campaign documents, the magistrate determined the scope of the privilege. Doc #610 at 6. In doing so, the magistrate relied on Perry, 591 F3d at 1165 n12, which held that the 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." The magistrate thus determined a core group of individuals whose communications within a No on 8 group are entitled to protection against disclosure under the First Amendment. The magistrate determined that the privilege extends to communications within a core group but not to communications between or among different groups, as such communications are by definition not "internal." Doc #610 at 7.

The ACLU and Equality California object that the magistrate erred as a matter of law by focusing on individuals whose communications are privileged. Instead, the ACLU and Equality California argue the magistrate should have adopted a more functional approach to the privilege based on the structure of the campaign. But the ACLU and Equality California make no suggestion concerning how the court should implement their suggested functional approach and in any event failed to furnish the magistrate information from which a functional interpretation of the core group as defined in footnote 12 could be derived.

The footnote, and indeed the entire amended opinion, supports the magistrate's determination that the First Amendment

privilege is limited to a core group of individuals. Unlike the attorney-client privilege in the corporate context, see Upjohn Co v United States, 449 US 383, 392 (1981) (holding that a control group test "frustrates the very purpose" of the attorney-client privilege), the First Amendment privilege protects against disclosure only those communications intentionally kept within a group engaged in strategy and message formulation.

To explain the scope of the First Amendment privilege, the Ninth Circuit relied on In re Motor Fuel Temperature Sales Practices Litigation, 258 FRD 407, 415 (D Kan 2009) (O'Hara, MJ) (applying the First Amendment privilege to trade associations' internal communications regarding lobbying, planning and advocacy). The Kansas district court considered objections to the magistrate's order and held that the magistrate erred as a matter of law in concluding that internal trade association communications were inherently privileged. In re Motor Fuel Temperature Sales Practices Litigation, -- FRD --, 2010 WL 786583, *5 (D Kan March 4, 2010) (Vratil, J). Instead, the law requires those claiming a First Amendment associational privilege to put forth a prima facie case that disclosure would have a chilling effect on their associational rights. Id at *5-*6; see also Perry, 591 F3d at 1162-1163 (finding that proponents had made a prima facie case for application of the First Amendment privilege against compelled disclosure based on declarations tending to show disclosure would chill their associational rights). Thus:

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1 [A] party seeking First Amendment association privilege [must] demonstrate an objectively reasonable probability that
2 disclosure will chill associational rights, i e that disclosure will deter membership due to fears of threats,
3 harassment or reprisal from either government officials or private parties which may affect members' physical well-
4 being, political activities or economic interests.

5 In re Motor Fuels, -- FRD --, 2010 WL 786583 at *8.

6 The ACLU and Equality California presented some evidence
7 to the magistrate regarding the chilling effect of compelled
8 disclosure. The ACLU submitted the declaration of Elizabeth Gill,
9 who stated that disclosure of campaign strategy and messages "would
10 have hindered [the ACLU's] ability to mount political opposition to
11 Proposition 8" because it would have inhibited a "robust exchange
12 of ideas and free flow of information." Doc #597 at ¶11. Gill
13 declared further that compelled disclosure would make the ACLU
14 "quite wary" of participating in political campaigns in the future.
15 Id at ¶12. Equality California submitted the declaration of James
16 Brian Carroll, who stated that disclosure of communications
17 internal to Equality California would restrict its ability to
18 organize and fund a political campaign. Doc #601. The showing
19 ACLU and Equality California make is similar to the showing made by
20 proponents and accepted by the Ninth Circuit. Perry, 591 F3d at
21 1163 (noting that proponents' evidence was "lacking in
22 particularity but consistent with the self-evidence conclusion"
23 that a discovery request seeking internal campaign communications
24 implicates important First Amendment questions).

25 Because the prima facie case of chill made by the ACLU
26 and Equality California is substantially the same as the prima
27 facie case made by proponents, the magistrate did not err as a
28 matter of law in applying the First Amendment privilege standard

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1 set forth in Perry, 591 F3d at 1165 n12. That standard protects
2 internal communications among a core group of persons, as
3 disclosure of these communications may lead to the chilling effects
4 described in the Gill and Carroll declarations. The standard does
5 not protect campaign communications that are not private and
6 internal. Nothing in the Gill and Carroll declarations suggests
7 the standard as applied is insufficient to protect the No on 8
8 groups' associational rights.
9 This follows from the magistrate's correct focus on the
10 individuals engaged in the formulation of strategy and messages
11 whose communications were not intended for public distribution.
12 The functional approach advocated by the ACLU and Equality
13 California ignores the important limiting principle that a
14 communication must be private to be privileged under the First
15 Amendment.
16 The ACLU and Equality California object to the
17 magistrate's determination to limit the scope of the First
18 Amendment privilege to communications within but not between core
19 groups. See Doc #610 at 12-13. The objection is not well-taken.
20 The magistrate did not err as a matter of law in concluding that
21 the First Amendment privilege does not cover communications between
22 [or among] separate organizations. Doc #610 at 12-13. A
23 communication "internal" to an organization is by definition wholly
24 within that organization. The ACLU and Equality California would
25 have the court stretch the meaning of "internal" to embrace a broad
26 coalition of groups that took a position against Proposition 8.
27 See Doc #609 at 2-6 ("Equality for All Campaign Committee
28 Members"). The problem with attempting to categorize

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communications among individuals associated with a laundry list of groups is that the ACLU and Equality California failed to furnish the magistrate or the undersigned with a comprehensible limiting principle by which to define a communication between or among persons affiliated with such organizations as internal. No evidence in the record supports a finding that communications among a broad coalition of groups are private and internal.

2

The ACLU and Equality California argue that the magistrate erred in failing to include in the Equality for All core group the Equality California Institute Board of Directors, the Equality for All Campaign Committee and Equality for All Campaign Staff. Doc #614 at 13. The ACLU and Equality California argue that the February 22 Kors declaration, Doc #598, supports a finding that members of these groups were involved in the formulation of strategy and messages for Equality for All. But the February 22 Kors declaration makes no showing concerning <u>who</u> in the these groups should be included in the Equality for All core group. Because the No on 8 groups did not present evidence sufficient for the magistrate to include any individual from these groups as part of the core group for Equality for All, the magistrate's decision to exclude the groups is supported by the record and is therefore not clearly erroneous.

At the February 25, 2010 hearing, the magistrate asked counsel for Equality California for an affidavit to support inclusion of individuals from the campaign committee and campaign staff in the Equality for All core group. Doc #613 at 44 (Hrg Tr

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1 2/25/10). Counsel agreed to identify individuals "who played a
2 larger role than others" in the development of strategy and
3 messages. Id at 45. In response to the magistrate's inquiry, the
4 No on 8 groups submitted the March 3 Kors declaration, which fails
5 to identify individuals in the campaign committee and campaign
6 staff who were engaged in the formulation of strategy and messages,
7 Doc #609 at ¶¶6-7. The March 3 Kors declaration thus did not
8 provide the magistrate with the evidence he sought at the February
9 25 hearing. Based on the March 3 Kors declaration, the magistrate
10 concluded that the individuals' roles had not been explained and
11 that "the court lacks a basis to include these individuals in
12 Equality for All's core group." Doc #610 at 11. The magistrate's
13 finding that the No on 8 groups did not provide the magistrate with
14 information necessary to include the campaign committee and
15 campaign staff in the core group is thus supported by the record.

16 The Equality California Institute was described at the
17 February 25, 2010 hearing as "involved with the effort of Equality
18 California with regards to fundraising." Doc #613 at 46. The No
19 on 8 groups made no further showing that the Institute developed
20 campaign strategy and messages for the Proposition 8 campaign for
21 any No on 8 group. Accordingly, the magistrate did not clearly err
22 in refusing to include the Equality California Institute in a core
23 group.

24 The magistrate's application of the First Amendment
25 privilege is not contrary to law, and the magistrate's core group
26 determinations are supported by the record and are therefore not
27 clearly erroneous. Accordingly, the court declines to disturb the
28 magistrate's First Amendment rulings.

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3

The ACLU objects that 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." Doc #614 at 15. Because the ACLU did not raise this point with the magistrate, the magistrate did not clearly err in failing to include the restriction, and the court need not consider the objection further. See United States v Howell, 231 F3d 615, 621 (9th Cir 2000). The objection is accordingly DENIED.

III

Proponents bring eight objections to the magistrate's order. Doc #619 at 13-21. The court addresses each in turn.

A

Proponents object that the magistrate did not require the No on 8 groups to prepare a privilege log and did not offer an explanation why no privilege log would be required. Doc #619 at 13. The magistrate's order states: "The No on 8 groups are not required to produce a privilege log." Doc #610 at 14. While the order provides no additional explanation, the magistrate explained at the February 25 hearing that he was "willing to discuss whether it's a reasonable burden to produce privilege logs. That may be undue. The distinction between privileged and nonprivileged is going to be whether or not it's a communication within a very well-defined core group." Doc #613 at 8 (Hrg Tr 2/25/10). The court thus concludes the magistrate's decision not to require a privilege

log was a measure intended to reduce the production burden on the No on 8 groups.

Proponents argue that under FRCP 45(d)(2)(A)(ii), a nonparty claiming a privilege must prepare some form of a privilege log to preserve the privilege. Moreover, the Ninth Circuit held that "some form of a privilege log is required" to preserve the First Amendment privilege. Perry, 591 F3d at 1153 n1. Nevertheless, no rule prevents the court from waiving the privilege log requirement to reduce a nonparty's burden. The magistrate's rulings to reduce the burden on the No on 8 groups are more fully addressed in subsection II(A)(3), above. In any event, the magistrate concluded that waiving the privilege log requirement was appropriate, because the privilege can be tested without a log as it depends only on the identities of those communicating. See Doc #613 at 8. Because that conclusion neither contrary to law nor clearly erroneous, proponents' objection on this point is DENIED.

B

The magistrate ordered that the No on 8 groups are only "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.'" Doc #610 at 13. The magistrate explained the limitation was intended "to ensure that any burden borne by the third parties is not undue." Id. Proponents object that the search terms are underinclusive and argue the magistrate erred in failing to allow proponents the opportunity to present additional search terms to the court. Doc #619 at 14-15.

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At the February 25 hearing, the magistrate stated his intent to cabin production with search terms like "Proposition 8, 'No on 8,' 'Yes on 8,' Prop 8 – something like that." Doc #613 at 46. Proponents were thus on notice that the magistrate intended a limited number of search terms. The magistrate directed Equality California to submit an additional declaration on core group issues and burden and then stated he intended to "put out a ruling shortly" after he received the declaration. Id at 60. Despite this notice, proponents failed to seek the opportunity to respond to Equality California's declaration. It was not clearly erroneous for the magistrate to rule on the motion to compel without awaiting a response from proponents, because proponents had not requested the opportunity to provide the magistrate with a response.

Moreover, the magistrate's decision to adopt only a small number of search terms is not clearly erroneous. Proponents suggest an expansive list of search terms, including generic terms like "ad" or "equal*." Doc #619 at 15. The search terms suggested by proponents do not appear tailored to cabin production. Indeed, it would appear that the search term "equal*" would capture every document in Equality California's possession. It was thus not in error for the magistrate to conclude that a narrow list of search terms would be appropriate to reduce undue burden on the No on 8 groups. Proponents' objection on this point is therefore DENIED.

C

The magistrate also ordered, as a measure to reduce burden, that "Equality California shall only be required to search its central email server for responsive electronic documents." Doc

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1 #610 at 13. The magistrate relied on the March 3 declaration of
2 Geoff Kors, which states that "[a]pproximately 75 people at
3 [Equality California] could have potentially relevant emails on
4 their hard drives" and that producing email from the 75 hard drives
5 "could take more than a week" at a cost of around "$30,000." Doc
6 #609 at ¶9. The March 3 Kors declaration states further that
7 Equality California has "approximately 27 to 30 gigabytes of email
8 stored" on central email server, and that it would take "several
9 days" at a cost of "$14,000 to $20,000" to collect and process
10 email stored on the central server. Id at ¶10.

11 The magistrate determined that the additional burden the
12 search of 75 hard drives would impose was not worth the cost. That
13 determination is not clearly erroneous in light of the volume of
14 documents stored on the central server.

15 Proponents object that the magistrate did not "require
16 Equality California to cease archiving any and all emails from the
17 central server." Doc #619 at 18. To the extent proponents are
18 concerned that Equality California may attempt to spoliate
19 evidence, proponents may seek to bring the appropriate motion.
20 There was nothing before the magistrate or brought to this court's
21 attention that suggests any such attempt. The magistrate did not,
22 in any event, err in failing to include this specific instruction
23 in the order. Proponents' objection to the magistrate's order
24 regarding the central email server is accordingly DENIED.

25

26 D

27 As the court of appeals noted in Perry, delineation of
28 the core group is central to determining the scope of the First

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1 Amendment privilege and this determination rests on the specific
2 facts of the case. The magistrate applied the standard set in
3 Perry, 591 F3d at 1165 n12, to determine for each No on 8 group a
4 core group of persons whose internal communications may be
5 privileged under the First Amendment. Doc #610 at 6. Based on the
6 specific facts of the No on 8 campaign, the magistrate also
7 determined a core group of persons for the umbrella No on 8
8 organization Equality for All. Id at 10-11. Proponents object
9 that the magistrate had no reason to determine a core group for
10 Equality for All, because proponents did not subpoena documents
11 from Equality for All and because Equality for All did not place
12 evidence before the magistrate. Doc #619 at 18.

13 The magistrate relied on the declarations of Geoff Kors,
14 Doc ##598, 609, to determine a core group for Equality for All.
15 The February 22 Kors declaration explains that Equality for All
16 "acted as an umbrella campaign organization for more than 100
17 member organizations," including the three No on 8 groups subject
18 to proponents' subpoenas. Doc #598 at ¶6. The magistrate examined
19 the Kors declarations to determine who should and should not be
20 included in the Equality for All core group, as more fully
21 explained in section II(B)(2), above. Because the evidence showed
22 a formal relationship between Equality for All and the No on 8
23 groups, it was not an error for the magistrate to conclude that
24 individuals associated with the Equality for All umbrella
25 organization who were engaged in the formulation of strategy and
26 messages may claim a privilege over communications within the
27 umbrella organization. Nor was it clearly erroneous to rely on the
28 declarations of Geoff Kors, a member of Equality for All's

executive committee, to define Equality for All's core group. Proponents' objection on this point is accordingly DENIED.

E

The magistrate found based on the evidence presented that certain individuals have core group status in more than one organization. The magistrate noted that "the scope of the First Amendment privilege could arguably depend on the capacity in which a core group member [of more than one No on 8 group] is communicating." Doc #610 at 12. Nevertheless, the magistrate's order does "not require production of any communications about strategy and messages between core group members who belong to that core group," as the effort required to inquire into the capacity in which a core group member is communicating "might amount to an undue burden." Id.

Proponents object that the magistrate's order in this regard is contrary to the court's previous holding that proponents could not assert a First Amendment privilege over communications with other groups. Doc #619 at 18-19. The court previously held that proponents had "only claimed a First Amendment privilege over communications among members of the core group of Yes on 8 and ProtectMarriage.com," and that even if proponents had preserved the privilege, they had "failed to meet their burden of proving that the privilege applies to any documents in proponents' possession, custody or control." Doc #372 at 3. Here, even if the communications might not be protected by the First Amendment privilege, the magistrate did not clearly err in refusing to order their production because the burden of determining whether the

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communications are in fact privileged would be undue. The court's previous order is not inconsistent with the magistrate's order. Accordingly, proponents' objection on this point is DENIED.

F

Related to the objection discussed in subsection E, above, proponents object as inconsistent with the court's previous order that the magistrate included certain individuals in more than one core group. Doc #619 at 19. The previous order denied proponents' claim of privilege over communications to other Yes on 8 organizations, because "[t]here [was] no evidence before the court regarding any other campaign organization." Doc #372 at 2-3. Here, in contrast, the magistrate found that the No on 8 groups had supported through declarations inclusion of individuals in more than one No on 8 core group. The magistrate's finding is based on evidence regarding the No on 8 campaign and is not inconsistent with the court's previous order or contrary to law. Proponents' objection on this point is therefore DENIED.

G

Proponents object that Armour Media Group and Armour Griffin Media Group Inc were included in the core groups of CAEBR and Equality for All on the ground that the court has previously held that media vendors cannot be considered part of an organization's core group. Doc #619 at 19-20. The magistrate appears to have included Armour Griffin Media Group Inc in the Equality for All core group based on the March 3 Geoff Kors declaration, Doc #609 at ¶8 (stating that the Armour Griffin Media

1 Group "produced advertising" and "participated in formulating
2 campaign messaging"). The magistrate apparently relied on the
3 Moret declaration to include Armour Media Group in the CAEBR core
4 group. Doc #593 at ¶4(f) (stating that Armour Media Group
5 "conducted polling and assisted CAEBR in its early formulation of
6 campaign strategy and messaging"). Because the Kors and Moret
7 declarations support inclusion of the media groups in the core
8 groups, the magistrate's decision to include the media groups is
9 not clearly erroneous. Proponents objection on this point is
10 DENIED.
11
12 H
13 The magistrate ordered each No on 8 group, including
14 CAEBR, to "produce all documents in its possession that contain,
15 refer or relate to arguments for or against Proposition 8, except
16 those communications solely among members of its core group." Doc
17 #610 at 14. The magistrate did not address CAEBR's assertion that
18 it had already completed its production. Proponents argue the
19 magistrate erred in failing to address whether CAEBR's production
20 was "credible," as CAEBR produced only sixty documents. Doc #619
21 at 20. But the magistrate did not err as a matter of law in
22 failing to address CAEBR's production. The magistrate set the
23 standard for CAEBR's production. Proponents can if necessary
24 address any problems with CAEBR's production by appropriate motion.
25 Proponents' objection on this point is therefore DENIED.
26
27
28

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IV

For the reasons explained above, the magistrate's order granting proponents' motion to compel discovery from the No on 8 groups is neither clearly erroneous nor contrary to law. Accordingly, the objections of the ACLU and Equality California, Doc #614, and of proponents, Doc #619, are DENIED.

The magistrate's order contemplates that production will take place on a rolling basis to conclude not later than March 31, 2010. Doc #610 at 14. The court adopts the schedule set by the magistrate. If proponents wish to supplement their trial record with documents obtained through this production, they must make the appropriate motion or submission not later than Monday, April 12, 2010.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

United States District Court
For the Northern District of California

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4
5 KRISTIN M PERRY, SANDRA B STIER,
PAUL T KATAMI and JEFFREY J
6 ZARRILLO,
7 Plaintiffs,
8 CITY AND COUNTY OF SAN FRANCISCO,
9 Plaintiff-Intervenor,
10 v
11 ARNOLD SCHWARZENEGGER, in his
official capacity as governor of
12 California; EDMUND G BROWN JR, in
his official capacity as attorney
13 general of California; MARK B HORTON, in his official capacity
14 as director of the California
Department of Public Health and
15 state registrar of vital
statistics; LINETTE SCOTT, in her
16 official capacity as deputy
director of health information &
17 strategic planning for the
California Department of Public
18 Health; PATRICK O'CONNELL, in his
official capacity as clerk-
19 recorder of the County of
Alameda; and DEAN C LOGAN, in his
20 official capacity as registrar-
recorder/county clerk for the
21 County of Los Angeles,
22 Defendants,
23 DENNIS HOLLINGSWORTH, GAIL J
KNIGHT, MARTIN F GUTIERREZ,
24 HAKSHING WILLIAM TAM, MARK A
JANSSON and PROTECTMARRIAGE.COM –
25 YES ON 8, A PROJECT OF
CALIOFORNIA RENEWAL, as official
26 proponents of Proposition 8,
27 Defendant-Intervenors.
_______________________________/
28

No C 09-2292 VRW

ORDER

The ACLU and Equality California ("objectors") move for a stay of the court's March 22, 2010 order, Doc #623, as they intend to appeal the order or alternatively to seek a writ of mandamus. Doc #624. Objectors state that they intend to seek review on "an extraordinarily expedited basis." Id at 3. As an alternative to a stay pending appeal, objectors move for an interim stay while they seek appellate relief. Id at 7.

Having considered the arguments presented by objectors, the court GRANTS the motion for an interim stay. The court's March 22 order, Doc #623, is STAYED until March 29, 2010 to allow objectors to seek relief in the court of appeals.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

United States District Court
For the Northern District of California

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Attorneys for Third-Party Equality California

(Additional Counsel Listed on Signature Page)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

The Honorable Vaughn R. Walker, Chief Judge

JOINT NOTICE OF APPEAL

Notice is hereby given under Fed. R. App. P. 3 that third parties Equality California ("EQCA") and No on Proposition 8, Campaign for Marriage Equality, A Project of the American Civil Liberties Union ("ACLU") hereby jointly appeal to the United States Court of Appeals for the Ninth Circuit from the orders of the Northern District of California dated March 5, 2010 (Doc. # 610) and March 23, 2010 (Doc. # 623), to the extent that they require EQCA and the ACLU to produce documents which are protected by the First Amendment privilege.

Dated: March 24, 2010

FENWICK & WEST LLP

By: ______________________
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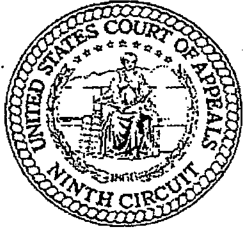
USCA DOCKET # (IF KNOWN)



UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL:

KRISTIN M. PERRY, et al., v. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, et al.

(Please see Attachment A for full title.)

DISTRICT: N. District of California

JUDGE: Hon. Vaughn Walker, C.J.

DISTRICT COURT NUMBER: 09-CV-2292 VRW

DATE NOTICE OF APPEAL FILED: March 24, 2010

IS THIS A CROSS APPEAL? ☐ YES

IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):

No. 09-17241

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

The underlying action is a federal constitutional challenge to a provision of the California Constitution which denies same-gender couples the right to marry. The orders under review involve a denial of a First Amendment privilege raised by third parties No on Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union of California and Equality California.

PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:

Whether the Magistrate Judge and the District Court Judge erred in refusing to recognize a First Amendment privilege for non-public communications involve campaign strategy or messaging among individuals involved in the formulation of such strategy or messaging both within and among organizations working in common to defeat Proposition 8.

PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POST-JUDGMENT MOTIONS):

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

- ☐ Possibility of Settlement
- ☐ Likelihood that intervening precedent will control outcome of appeal
- ☒ Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify)

Chief Judge Walker has granted a stay of discovery until March 29, 2010 and Third Parties seek expedited appeal.

- ☐ Any other information relevant to the inclusion of this case in the Mediation Program

- ☐ Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges

LOWER COURT INFORMATION

JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF
[X] FEDERAL QUESTION [ ] DIVERSITY [ ] OTHER (SPECIFY):	[X] FINAL DECISION OF DISTRICT COURT [ ] INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT [ ] INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY): [X] OTHER (SPECIFY): Mandamus, in the alternative	[ ] DEFAULT JUDGMENT [ ] DISMISSAL/JURISDICTION [ ] DISMISSAL/MERITS [ ] SUMMARY JUDGMENT [X] JUDGMENT/COURT DECISION [ ] JUDGMENT/JURY VERDICT [ ] DECLARATORY JUDGMENT [ ] JUDGMENT AS A MATTER OF LAW [ ] OTHER (SPECIFY):	[ ] DAMAGES: SOUGHT $ AWARDED $ [ ] INJUNCTIONS: [ ] PRELIMINARY [ ] PERMANENT [ ] GRANTED [ ] DENIED [ ] ATTORNEY FEES: SOUGHT $ AWARDED $ [ ] PENDING [ ] COSTS: $

CERTIFICATION OF COUNSEL

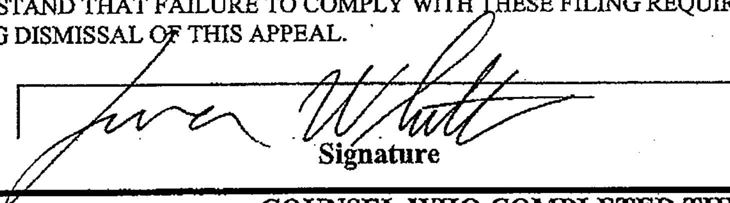
I CERTIFY THAT:

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.

2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).

3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.

4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.



Signature

March 24, 2010
Date

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****THIS DOCUMENT SHOULD BE FILED IN DISTRICT COURT WITH THE NOTICE OF APPEAL. ****
****IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS.****

Attachment A

TITLE IN FULL:

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

Plaintiffs

and

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 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.

ADRMOP, E-Filing, PROTO, ProSe, REFDIS

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:09-cv-02292-VRW

Perry et al v. Schwarzenegger et al
Assigned to: Hon. Vaughn R. Walker
Referred to: Magistrate Judge Joseph C. Spero
Demand: $0
Case in other court: 9th Circuit, 09-16959
9th Circuit, 09-17241
9th Circuit, 09-17551
Cause: 42:1983 Civil Rights Act

Date Filed: 05/22/2009
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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