COOPER AND KIRK, PLLC
Charles J. Cooper (DC Bar No. 248070)*
ccooper@cooperkirk.com
David H. Thompson (DC Bar No. 450503)*
dthompson@cooperkirk.com
Howard C. Nielson, Jr. (DC Bar No. 473018)*
hnielson@cooperkirk.com
Nicole J. Moss
nmoss@cooperkirk.com (DC Bar No. 472424)
Jesse Panuccio
jpanuccio@cooperkirk.com (DC Bar No. 981634)
Peter A. Patterson (Ohio Bar No. 0080840)*
ppatterson@cooperkirk.com
1523 New Hampshire Ave. N.W., Washington, D.C. 20036
Telephone: (202) 220-9600, Facsimile: (202) 220-9601

LAW OFFICES OF ANDREW P. PUGNO
Andrew P. Pugno (CA Bar No. 206587)
andrew@pugnolaw.com
101 Parkshore Drive, Suite 100, Folsom, California 95630
Telephone: (916) 608-3065, Facsimile: (916) 608-3066

ALLIANCE DEFENSE FUND
Brian W. Raum (NY Bar No. 2856102)*
braum@telladf.org
James A. Campbell (OH Bar No. 0081501)*
jcampbell@telladf.org
15100 North 90th Street, Scottsdale, Arizona 85260
Telephone: (480) 444-0020, Facsimile: (480) 444-0028

ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, MARK A. JANSSON, and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS' NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER

Date: September 25, 2009
Time: 10:00 a.m.
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

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.

Additional Counsel for Defendant-Intervenors

ALLIANCE DEFENSE FUND
Timothy Chandler (CA Bar No. 234325)
tchandler@telladf.org
101 Parkshore Drive, Suite 100, Folsom, California 95630
Telephone: (916) 932-2850, Facsimile: (916) 932-2851

Jordan W. Lorence (DC Bar No. 385022)*
jlorence@telladf.org
Austin R. Nimocks (TX Bar No. 24002695)*
animocks@telladf.org
801 G Street NW, Suite 509, Washington, D.C. 20001
Telephone: (202) 393-8690, Facsimile: (202) 347-3622

* Admitted *pro hac vice*

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TO THE PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on September 25 at 10:00 a.m., before the Honorable Vaughn R. Walker, United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Defendant-Intervenors will move the Court for a protective order.

For the following reasons, Defendant-Intervenors respectfully request entry of a protective order. The issue to be decided is: Do Plaintiffs seek irrelevant and/or privileged discovery?

INTRODUCTION

This case—supposed to be about the constitutionality of Prop. 8—is quickly morphing into one about protection of core First Amendment activities. For in discovery, Plaintiffs are seeking virtually the entire universe of nonpublic information related in even the remotest sense to the Prop. 8 campaign. Such information is both irrelevant and privileged. Defendant-Intervenors thus respectfully move this Court for a protective order. In the absence of such an order, Defendant-Intervenors will be forced to disclose core political speech and associational activities—disclosure of which will chill the exercise of First Amendment rights. The Court need not take our word for it, however, for Plaintiffs' counsel has recently made our case to the Supreme Court in quite candid and forceful terms:

> [I]nterests [in disclosure are] outweighed by the extraordinary burdens that those requirements impose on First Amendment freedoms—including the risk of harassment and retaliation faced by ... financial supporters, and the substantial compliance costs borne by [the association]....[T]he risk of reprisal ... has vastly increased in recent years... *The widespread economic reprisals against financial supporters of California's Proposition 8 dramatically illustrate the unsettling consequences of disseminating contributors' names and addresses to the public through searchable websites*—some of which even helpfully provide those intent upon retribution with a map to each donor's residence.

Reply Br. for Appellant. 28-29, *Citizens United v. FEC*, No. 08-205 (U.S. Mar. 17, 2009) (emphasis added) (attached hereto as Ex. A.).

I. BACKGROUND

Defendant-Intervenors are (i) five California voters who were the "Official Proponents" of Prop. 8 and (ii) a "primarily formed committee" designated as the official Prop. 8 campaign committee ("Protect Marriage"), which was made up almost exclusively of volunteers. *See* Ex. B (Prentice

Decl.). In their Case Management Statements, Plaintiffs announced that they plan to prove that Prop. 8 was "driven by irrational considerations," and therefore to seek virtually every nonpublic document relating in any way to the Prop. 8 campaign. Doc # 157 at 12. Defendant-Intervenors objected to this venture as seeking information that is both irrelevant and privileged under the First Amendment. *See* Doc # 139 at 26; Doc # 159 at 9; Hr'g of Aug. 19, 2009, Tr. 57-62. At the August 19 hearing, Plaintiffs' counsel attempted to answer this concern: "I frankly do not believe that we will have a problem, at least at the initial stages ... in limiting discovery in a way that does not impermissibly infringe on any First-Amendment issues....[S]tatements that were made publicly" are "subject to discovery," but not "subjective, unexpressed motivations." *Id.* at 63-64.

Plaintiffs' Document Requests, unfortunately, are not so limited. *See* Ex. C (Pls.' First Set of Reqs. for Prod.); Ex. D (Def.-Ints.' Resps.). For example Request No. 8 seeks "[a]ll versions of any documents that constitute communications relating to Proposition 8, between you and any third party" from January 2006 to the present. Plaintiffs, then, are seeking *all* correspondence Defendant-Intervenors may have had with any "third party" bearing any relationship to Proposition 8 whatsoever. Such documents include nonpublic communications with individual donors, volunteers, voters, political strategists or other agents, and even family, friends, and colleagues.[1] Plaintiffs, in an effort to prove the motivations of the electorate at large, also intend to depose numerous individuals. *See* Doc # 134 at 22; Doc # 157 at 12.

Counsel have unsuccessfully attempted to resolve this dispute both by letter and telephone conference. *See* Ex. E (Ltr. of Aug. 27, 2009); Ex. F (Ltr. of Aug. 31, 2009); Ex. G (Moss Decl.). Counsel have also conferred regarding the extent to which Plaintiffs currently seek Defendant-Intervenors' wholly internal communications. *See* Ex. D, Gen. Obj. # 12; Ex. G.

[1] Other Requests are similarly sweeping, encompassing wholly internal drafts of documents, personal posts on invite-only social-networking websites, names and other information regarding volunteers and/or employees of Protect Marriage that are not publicly known, information regarding

II. ARGUMENT

The Federal Rules place at least three limitations on discovery: (i) the requested material must be "relevant to any party's claim or defense," in that it "appears reasonably calculated to lead to the discovery of admissible evidence"; (ii) the requested material cannot be privileged; and (iii) producing the requested material cannot be overly burdensome. FED. R. CIV. P. 26(b)(1), (b)(2)(C)(iii). Plaintiffs' requests for the production of information and materials that were never publicly disclosed to the electorate at large fail on all three counts.[2]

Plaintiffs seek, for example, documents or testimony about: (i) communications between and among Defendant-Intervenors, campaign donors, volunteers, and agents; (ii) draft versions of communications never actually distributed to the electorate at large; (iii) the identity of affiliated persons and organizations not already publicly disclosed; (iv) post-election information; and (v) the subjective and/or private motivations of a voter or campaign participant. Such communications and information are both legally irrelevant and privileged under controlling caselaw, however. Further, denying Plaintiffs' requests will have the practical benefit of avoiding difficult subsidiary questions. For example, Plaintiffs appear to recognize a distinction between wholly "internal" communications among the Defendant-Intervenors and communications between Defendant-Intervenors and a "third-party," *see* Ex. D Gen. Obj. 12,[3] but the parties may not ultimately agree on who is "internal" and who is a "third party."[4] Additionally, issues of reciprocity in discovery will likely lead to further disputes.

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documents created and/or communicated *after* the vote on Prop. 8, and much more.

[2] In an effort to minimize dispute, we are producing documents that were available to the electorate at large (such as print ads, the text of radio ads, and the content of public Internet posts). We do not, however, concede the legal relevance of such documents under controlling Supreme Court and Ninth Circuit precedent. *See infra* at 4-8.

[3] *But see* Doc. #157 at 12 ("Specifically, Plaintiffs plan to seek documents relating to ... Intervenors' communications with each other....").

[4] Even if such a line could be drawn, definitional problems would persist. If a Protect Marriage volunteer served as a representative from another association or religious group, are communications between the volunteer and the outside group "internal"? What if the volunteer was also an employee of another group? At what point are communications about Prop. 8 ones made as a volunteer of Protect Marriage as opposed to ones made as an employee of the outside group?

While we have not yet sought similar types of information from the Plaintiffs and the many groups that campaigned against Prop. 8—such as the ACLU, Lambda, and the NCLR—we will have no choice but to do so if Plaintiffs are permitted to obtain such information.[5] Indeed, Plaintiffs' theory is boundless: if the discovery they seek is relevant and not privileged, then so too is discovery from any and every California voter or any person who weighed in on the Prop. 8 debate.

A. **Plaintiffs Seek Irrelevant, Burdensome Discovery**

Plaintiffs "seek documents relating to Prop. 8's genesis, drafting, strategy, objectives, advertising, campaign literature, and Intervenors' communications with each other, supporters, and donors." Doc # 157 at 12. The Supreme Court, however, has never authorized the use of the type of information at issue here to ascertain the purpose of an initiative, and the Ninth Circuit has specifically ruled out resort to such evidence of voter intent.

1. **Ninth Circuit Precedent Precludes Resort to the Discovery at Issue**

In *SASSO v. Union City*, the Ninth Circuit addressed an equal protection challenge to a referendum measure. The plaintiffs there, as here, contended that "the purpose and the result of the referendum were to discriminate." 424 F.2d 291, 295 (9th Cir. 1970). The Court held "the question of motivation for [a] referendum (apart from a consideration of its effect) is [not] an appropriate one for judicial inquiry." *Id.* at 295. Pointing to the Supreme Court's analysis of another equal protection challenge to another California referendum, the Ninth Circuit explained that in *Reitman v. Mulkey*, 387 U.S. 369 (1967), "purpose was treated as a relevant consideration," but it "was judged ... in terms of

[5] In a September 11 letter to the Court, Plaintiff-Intervenors charge that we are seeking from third parties involved in the campaign *against* Prop. 8 the very types of documents that we argue here are not discoverable. Defendant-Intervenors, however, instructed in a cover letter to these parties that we are not seeking "any of the organization's internal communications and documents, including communications between the organization and its agents, contractors, attorneys, or others in a similarly private and confidential relationship with the organization" and that "the requests contained in this subpoena, to the extent they call for communications or documents prepared for public distribution, include only documents that were actually disclosed to the public." To the extent that there is any misunderstanding, we wish to make clear that we are not seeking disclosure of any nonpublic communications, unless and until the Court rules such information is discoverable.

ultimate effect and historical context." *SASSO*, 424 F.2d at 295. "The only 'conceivable' purpose [of the *Reitman* referendum], judged by wholly objective standards, was to restore [a] right to ... private racial discrimination." *Id.* (citing *Reitman*, 387 U.S. at 381); *see also* 387 U.S. at 375-76. But where discrimination is not the only conceivable purpose—where "many environmental and social values are involved"—a determination of "the voters' purpose ... would seem to require far more than simple application of objective standards." *SASSO*, 424 F.2d at 295. And this, the Ninth Circuit explained, is not a legitimate judicial inquiry: "If the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise." *Id.*

As the Ninth Circuit has more recently explained, even in contexts where questions of voter intent are legally relevant—for example when interpreting the meaning of ambiguous referendum text—materials such as those sought by plaintiffs here are not permissible sources for determining that intent. In *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997), the Ninth Circuit held that a California referendum was infirm because the electorate did not have proper notice that the law would create a lifetime ban on legislative service (the effect the California Supreme Court deemed it to have). The Ninth Circuit repeatedly stressed that the text of the referendum "on its face contained no reference to *lifetime* limits, and the ballot arguments submitted by the initiative's proponents failed to mention that the measure contemplated such a ban; so, too, the materials prepared by the state were wholly silent on the point." *Id.* at 855. *See also id.* at 844, 856. The Court explained:

> [T]he search for the people's intent in passing initiatives is far different from the attempt to discern legislative intent.... There is nothing, other than the facially ambiguous initiative, the official ballot arguments and the state-prepared materials, to look to in order to discern the people's intent in passing the measure.

Id. at 860. Thus, the Ninth Circuit held that where a particular purpose cannot be found on the face of a ballot measure itself, in the official ballot arguments in favor of the referendum, or in the official

statements prepared by the State, a court is not free to infer such a purpose. Indeed, *Jones* specifically makes clear that resort even to publicly disclosed advertisements is improper: "Such materials are, at bottom, only advertisements. Relying on them as indicative of the voters' intent would be tantamount to relying on political parties' campaign advertisements to interpret legislative acts." *Id.* at 860 n.32.[6]

The California Supreme Court, whose interpretations and methodology the Ninth Circuit looks to when resolving the meaning of a state law, *S.D. Meyers v. San Francisco*, 253 F.3d 461, 473 (9th Cir. 2001), follows the same approach. In construing the meaning of ballot measures, the California high court holds that the electorate's intent controls. *See, e.g., Robert L. v. Superior Court of Orange County*, 69 P.3d 951, 955 (Cal. 2003); *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 641 (Cal. 1994). Yet, that court has squarely ruled out resort to the types of materials and information Plaintiffs seek here: "The opinion of drafters or legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent. *Robert L.*, 69 P.3d at 957.[7] Instead, where intent cannot be derived from the text alone, the court turns only to "those extrinsic aids that bear on the enactors' intent" because they were publicly disclosed to the electorate and can inform the court as to an objective view of voter intent. *Id.* at 957-58.[8] Thus, the California Supreme Court construed the electorate's intent in enacting Prop. 8—the question here—by looking solely to official ballot materials and judicial rulings preceding the vote. *See Strauss v. California*, 46 Cal. 4th 364, 406, 408-10, 470-72 (Cal. 2009).[9]

2. **Supreme Court and Other Circuit Precedent Is to the Same Effect**

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[6] Even the dissent in *Jones*, which argued that "it is appropriate for the court to examine indications of voter intent that lie outside the four corners of the initiative," resorted only to materials publicly available to the electorate at large. *Id.* at 864-66 (Sneed, J., dissenting).

[7] *See also id.* at 958 ("[O]ur court has never strayed from our pronouncement ... that legislative antecedents not directly presented to the voters ... are not relevant to our inquiry.").

[8] *See also Hill*, 865 P.2d at 644; *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 155 P.3d 226, 241 (Cal. 2007); *Robert L.*, 69 P.3d at 955, 958; *Arias v. Superior Court of San Joaquin*, 209 P.3d 923, 929 (Cal. 2009).

[9] Plaintiffs' Requests are not even limited to materials that pre-date the Prop. 8 election. Obviously, post-election materials do not have any possible relevance to the electorate's purpose.

Supreme Court cases addressing referenda confirm that the information at issue here is wholly irrelevant. Most prominent is Plaintiffs' principal case: *Romer v. Evans*, 517 U.S. 620 (1996). *See, e.g.*, Doc # 7 at 7, 13, 17; Doc # 134 at 9 (relying on *Romer* to argue for a trial here). There, as in *Reitman*, the Court's conclusion "that the disadvantage imposed [by the challenged referendum was] born of animosity" was an "inevitable inference" derived from looking solely at the language and effects of the law which "belie any legitimate justifications that may be claimed for it." 517 U.S. at 634-35. The Court ascribed a discriminatory motivation to the electorate only when every other conceivable motivation proved objectively implausible. The Court did not look to any other evidence.

Similarly, in *Crawford v. Board of Education*, 458 U.S. 527 (1982), the Court considered a claim that a California law enacted by referendum was motivated by a racially discriminatory purpose. In determining whether such a purpose existed, the Court deferred to the findings of the California Court of Appeal. *Id.* at 544-45. That court reasoned, and the Supreme Court agreed, that because "legitimate, nondiscriminatory" "purposes of the Proposition were well stated in the Proposition itself," *id.* at 543-45, it would be "pure speculation to suppose that voters who supported Proposition 1[] ... were motivated by the specific intent to effect racial segregation and by discriminatory purpose," *Crawford v. Bd. of Educ.*, 113 Cal. App. 3d 633, 655 (Cal. Ct. App. 1980). Tellingly, neither the California court nor the Supreme Court resorted to evidence outside the four corners of the proposition itself—and certainly not to nonpublic communications expressing subjective views of the measure's supporters. Where a plausible legitimate rationale was conceivable, the inquiry was over.[10] *See also* Doc # 172-1 (Def.-Ints.' Mot. for Summ. J.) at 82-84.

In *Washington v. Seattle School Dist. No. 1*, the Court concluded a facially neutral initiative had

[10] In *James v. Valtierra*, 402 U.S. 137 (1971), the Supreme Court considered an equal protection claim about yet another California law enacted by referendum. Again, the Court found the law facially neutral, *id.* at 141; and while the Court considered the law's effects, *id.* at 142, it did not resort to evidence of the electorate's purpose, and especially not to evidence of individual voters' purposes. In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court did not need to turn to the purpose of the electorate

a "racial nature." 458 U.S. 457, 471 (1982). Two aspects of its analysis stand out. First, just as in *Romer*, the *Seattle* Court examined the text of the statute and its effect and ascribed an unconstitutional discriminatory purpose to the electorate only after concluding that the design of the law ruled out any other purpose. Second, although unnecessary to its analysis, the Court cited official and/or public statements about the law's effects—statements which the "electorate surely was aware of." *Id.* No citations were made to nonpublic statements unavailable to the electorate at large, and the Court certainly did not engage in an examination of individual voters' or sponsors' subjective intent or private communications. Thus, nothing in *Seattle* supports discovery of the information at issue here.

Notably, the Sixth Circuit has adopted this same understanding of the Supreme Court's referendum cases. *See Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986) (explaining the reasons undergirding a bar on examination of voters' subjective intent). *See also Equality Found. of Greater Cincinnati v. Cincinnati*, 128 F.3d 289, 293 n.4 (6th Cir. 1997) (reaffirming *Arthur*, noting that "a reviewing court in this circuit may not even inquire into the electorate's possible actual motivations for adopting a measure via initiative and referendum").[11]

B. Plaintiffs Seek Material that Is Privileged Under the First Amendment

Plaintiffs' discovery requests seek to compel disclosure of speech by an advocacy association during a referendum election—speech that "is at the heart of the First Amendment's protection," and "the type of speech indispensable to decisionmaking in a democracy." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). A long line of federal cases recognizes that the fundamental rights of free

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because the referendum at issue contained "an explicitly racial classification." *Id.* at 389.

[11] *See Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 454 (9th Cir. 1983) (protective order where requested discovery was "irrelevant and immaterial"); *Hoffart v. United States Gov't*, 24 Fed. Appx. 659, 665-66 (9th Cir. 2001) (refusal to issue subpoena for information not reasonably calculated to lead to the discovery of admissible evidence); *Barcenas v. Ford Motor Co.*, 2004 U.S. Dist. LEXIS 25279 at *6 (N.D. Cal. 2004) ("'some threshold showing of relevance must be made before parties are required to open wide the doors of discovery'") (quoting *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992)); *Brown's Crew Car of Wyo. LLC v. State Transp. Auth.*, 2009 U.S. Dist. LEXIS 39469 at *18-19 (D. Nev. 2009); *Blumenthal v. Drudge*, 186 F.R.D. 236, 245 (D.D.C. 1999).

speech and association in the political realm lie at the core of the First Amendment, that anonymity in the exercise of those rights is vital to their protection, and that compelled disclosure of speech and association—even in the discovery context—violates those rights.

The Supreme Court long ago held that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and that there is a "vital relationship between freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. 449, 460, 462 (1958). "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Thus, the Court has repeatedly held that compelled disclosure of an advocacy association's membership lists would "affect adversely the ability of [the association] and its members to pursue their collective effort to foster beliefs which they ... have a right to advocate, in that it may induce members to withdraw from the [a]ssociation and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *NAACP*, 357 U.S. at 462-63. *See also Bates*, 361 U.S. at 523; *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963).

Applying the insight and logic of the *NAACP* line, lower federal courts have found that "[t]he First Amendment associational privilege emerges when a discovery request specifically asks for ... information that goes to the heart of an organization's associational activities, and such disclosure could arguably infringe upon associational rights." *Anderson v. Hale*, 2001 U.S. Dist. LEXIS 6127, at *9 (N.D. Ill. 2001).[12] And as this Court has explained, "a private litigant is entitled to as much solicitude to its constitutional guarantees of freedom of associational privacy when challenged by another private party, as when challenged by a government body." *Adolph Coors Co. v. Wallace*, 570

[12] *See also Christ Covenant Church v. Town of Sw. Ranches*, 2008 U.S. Dist. LEXIS 49483 at *16 (S.D. Fla. 2008); *Buckley v. Valeo*, 424 U.S. 1, 65 (1976); *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987).

F. Supp. 202, 208 (N.D. Cal. 1983) (Williams, J.).

Coors explained that when faced with a good faith claim of First Amendment privilege, the Court must first "ascertain whether the precise material sought by discovery is truly 'relevant' to the gravamen of the complaint." 570 F. Supp. at 208. The Court must "demand a heightened showing of 'relevancy'": to weigh in favor of disclosure, the requested discovery must "go[] to the 'heart of the matter.'" *Id.* at 208-09.[13] "This enhanced scrutiny is appropriate since civil lawsuits could be misused as coercive devices to cripple, or subdue, vocal opponents." *Coors*, 570 F. Supp. at 209. And even then "the court must balance the rights and interests of each litigant, the particular circumstances of the parties to the controversy, and the public interest in overriding the private litigants' representations as to resultant injury or to unavoidable need." *Id.* at 208. On the First Amendment side of the ledger, "the litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure." *Id.* at 210. "[I]n making a prima facie case of harm, the burden is light." *Christ Covenant*, 2008 U.S. Dist. LEXIS 49483, at *17.

1. **At Issue Here Are Core First Amendment Rights**

The rationale undergirding *NAACP* and its progeny—that anonymity is vital to the freedoms of speech and association and thus cannot be constitutionally abrogated absent a compelling interest—is not limited, either by logic or precedent, to compelled disclosure of membership lists. Indeed, in the specific context of referendum campaigns, the Supreme Court has held that there is a First Amendment right to anonymity with respect to political communications. And lower courts have specifically held that private communications made in connection with political activity are privileged from discovery.

In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court held that "the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process." *Id.* at 344. The incident under review involved an individual's anonymous public distribu-

[13] *See also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 1985 U.S. Dist. LEXIS 22188, at

tion of an argument against a proposed referendum in violation of a state law requiring identifying information on such communications. The Court held that "[t]he freedom to publish anonymously extends" to the political realm where there is "a respected tradition of anonymity in the advocacy of political causes." *Id.* at 342-43.[14] "This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." *Id.* Because the speech at issue "occupie[d] the core of the protection afforded by the First Amendment,"—indeed "[wa]s the essence of First Amendment expression"—the Court found that the state law did not pass muster under "exacting scrutiny." *Id.* at 346-47. *See also Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) ("the right of individuals to associate for the advancement of political beliefs ... rank[s] among our most precious freedoms"). Indeed, that "this advocacy occurred in the heat of a controversial referendum vote only strengthen[ed] the protection afforded to [it]." *McIntyre*, 514 U.S. at 347.[15]

McIntyre thus stands for the proposition that political activity and speech surrounding a referendum election implicate core First Amendment rights worthy of the utmost solicitude.[16] *NAACP* stands for the proposition that core First Amendment activity can be unconstitutionally burdened by compelled disclosure in the litigation context. Taken together, the conclusion is inescapable the First Amendment would be improperly infringed if Defendant-Intervenors are compelled to answer

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*24 (S.D.N.Y. 1985); *Anderson*, 2001 U.S. Dist. LEXIS 6127 at *8-9.

[14] *McIntyre* relied extensively on *Talley v. California*, 362 U.S. 60 (1960). *Talley* invalidated an ordinance banning the distribution of anonymous handbills.

[15] *See also Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.... Thus, the circulation of a petition involves the type of interactive communication concerning political change that is ... 'core political speech.'"). The fact that a speaker in a referendum campaign is not just an individual voter, but also a sponsor, does not somehow strip the speaker of First Amendment rights. *See Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999).

[16] *See also Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009) (invalidating disclosure law as applied to church's collection of petition signatures); *Doe v. Reed*, No. 09-05456, Doc # 63 (W.D. Wash. Sept. 10, 2009) (granting preliminary injunction barring disclosure of identities of traditional marriage supporters because "[t]he weight of authority ... counsels toward the finding that supporting the referral of a referendum is likely protected political speech") (attached as Ex. H).

Plaintiffs' wide-ranging requests for disclosure of substantially all of their internal, private, and/or otherwise nonpublic political speech and associational activity surrounding the Prop. 8 campaign.[17]

Lower federal courts have repeatedly found that nonpublic political communications, such as lobbying and campaign strategy documents, are entitled to First Amendment protection. For example, the District of Kansas, on First Amendment privilege grounds, recently shielded from discovery "information about defendants' communications with trade associations, weights and measures associations, and state or federal agencies." *In re: Motor Fuel Temp. Sales Practices Litig.*, 2009 U.S. Dist. LEXIS 66005, at *34 (D. Kan. 2009). *See also id.* at *45 (describing information at issue as "past political activit[y]" and "information related to ... associations' legislative affairs and lobbying efforts"). The court held that

> the trade associations' internal communications and evaluations about advocacy of their members' positions on contested political issues, as well as their actual lobbying on such issues, would appear to be a type of political or economic association that would ... be protected by the First Amendment privilege.

Id. at *47. The court rejected the argument that merely shielding the identities listed on communications would be sufficient because members or potential members of the associations could fear reprisal against "the motor fuel industry as a whole" and because disclosure of the "associations' evaluations of possible lobbying and legislative strategy certainly could be used ... to gain an unfair advantage over [the associations] in the political arena" in an ongoing policy debate. *Id.* at *49-50.[18]

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[17] Political speech, association, and petition rights are not the only First Amendment rights threatened here. *See Brock v. Local 375*, 860 F.2d 346, 349 (9th Cir. 1988) ("'Implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'") (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Because religious groups participated in the campaign for Prop. 8, free exercise of religion—and the freedom to associate in that exercise—are also at stake. *See Christ Covenant*, 2008 U.S. Dist. LEXIS 49483 at *16.

[18] Several other cases are to the same effect. *See Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 U.S. Dist. LEXIS 19475 at *15-20 (D. Kan. 2007) (protecting an association's "documents related to ... strategy of advocating for bills in the Kansas legislature" because "petitioning the government is ... central to first amendment values," and thus the privilege extends not only to membership lists "but also encompass[es] the freedom to protest policies to which one is opposed, and the freedom to organize, raise money, and associate with

Similarly, the Ninth Circuit has found First Amendment rights threatened by discovery requests for a union's minutes of meetings at which "highly political issues" were discussed. *Dole v. Serv. Employees Union, AFL-CIO*, 950 F.2d 1456, 1459 (9th Cir. 1991).[19]

And as for Plaintiffs' requests for post-election documents, those run afoul of this Court's holding that "[c]ompelled disclosure of the names of individuals or groups supporting a ... lawsuit ... creates a risk of interference with First Amendment-protected activities." *Beinin*, 2007 U.S. Dist. LEXIS 47546, at *8-9. *See also Blumenthal v. Drudge*, 186 F.R.D. 236, 245 (D.D.C. 1999) (denying discovery of membership list of legal defense fund on First Amendment grounds).

2. Relevancy

As explained above, the information sought by Plaintiffs is wholly irrelevant to their claims. This alone justifies granting our motion. *See Dawson v. Delaware*, 503 U.S. 159, 168 (1992); *Hale*, 2001 U.S. Dist. LEXIS 6127, at *24. Plaintiffs simply cannot maintain that such information bears on, let alone goes to the "heart of," the matters in this case. *Coors*, 570 F. Supp. at 208-09.

3. Balancing

Balancing the interests at stake here results in a scale tipped far in Defendant-Intervenors' direction. First, there need only be "some probability" that disclosure would chill the exercise of First Amendment rights, *id.* at 210, and "the burden is light," *Christ Covenant*, 2008 U.S. Dist. LEXIS 49483, at *17. Supporters of Prop. 8 have been subjected to social disapprobation, verbal abuse,

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other like-minded person so as to effectively convey the message of protest"); *ETSI Pipeline Project v. Burlington N., Inc.*, 674 F. Supp. 1489 (D.D.C. 1987) (shielding a party from having to be deposed on legislative, lobbying, and political communications); *Austl./E. USA Shipping Conf. v. United States*, 537 F. Supp. 807, 808-10 (D.D.C. 1982) (barring discovery into "efforts to influence government to pass or enforce laws" because "petitioning the government is equally central to first amendment values as the interests involved" in *NAACP*).

[19] *See also Beinin v. Ctr. for the Study of Pop. Culture*, 2007 U.S. Dist. LEXIS 47546 (N.D. Cal. 2007) (Ware, J.); *Klayman v. Freedom Watch, Inc.*, 2007 U.S. Dist. LEXIS 83653 at *17 (S.D. Fla. 2007) ("Defendants shall not be required to identify any donors, other than those whose disclosure is already in the public domain or is otherwise required by law."); *Hale*, 2001 U.S. Dist. LEXIS 6127 at *4-5, 22-23 (describing prior order quashing discovery into membership lists, telephone records, and email messages; quashing discovery into anonymous members' Internet subscription information).

economic reprisal, vandalism of property, threats of physical violence, and actual physical violence. As the declarations attached hereto demonstrate, such responses have chilled and threaten to continue to chill the exercise of First Amendment rights by supporters of the traditional definition of marriage. *See* Ex. B (Prentice Decl.); Ex. I (Schubert Decl.); Ex. J (Jannson Decl.); Ex. L (Tam Decl.); Ex. K (articles on effects of disclosure); Ex. M; Docs # 32-33, 35-40, 45, 113-162, *ProtectMarriage.com v. Bowen*, No. 09-00058 (E.D. Cal. filed Jan. 9, 2009) (declarations regarding reprisal and harassment).[20]

As noted above, Plaintiffs' counsel has explicitly recognized the harassment of and reprisal against Prop. 8's supporters. *See* Ex. A. And *Citizens United* concerned only the disclosure of the identity of donors. Here, Plaintiffs seek the much more invasive, chilling disclosure of specific nonpublic communications and thoughts, which "is particularly intrusive" and "reveals unmistakably the content of [the speaker's] thoughts on a controversial issue." *McIntyre*, 514 U.S. at 355. Matching a speaker's identity not only with a donation, but with specific speech (such as a petition) "more clearly identifies the circulator with the precisely defined point of view he or she is personally encouraging others to support." *Am. Const. Law Found., Inc. v. Meyer* , 120 F.3d 1092, 1103 (10th Cir. 1997), *aff'd Buckley*, 525 U.S. 182.[21] Here, where the political debate over the definition of marriage wages on, and where another ballot measure is likely in the offing, the chill from disclosure would be no less.[22]

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[20] *ProtectMarriage.com v. Bowen* is a case challenging aspects of California's referendum finance disclosure laws. The declarations filed therein demonstrate some of the results even limited disclosure has had in the Prop. 8 context. To expedite consideration of this motion and the progression of discovery, we cite directly to those documents. Should the Court so desire, we can attempt to have the Doe declarants in *Bowen* submit additional declarations here.

[21] *See also Talley*, 362 U.S. at 64 ("identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression"); *id.* at 65 ("identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance"); *Motor Fuel Litig.*, 2009 U.S. Dist. LEXIS 66005 at *47-50 (disclosure of legislative affairs and lobbying would interfere with associational activities by causing member withdrawal, dissuading potential members, and by unfairly disclosing political strategy). *Cf. Meyer*, 486 U.S. at 422-23 (invalidating restriction on method of circulating a ballot petition that "limits the number of voices who will convey [a sponsor's] message" and "the size of the audience they can reach").

[22] *See* Ex. I; Bob Egelko, *Prop. 8 Stands; More Ballot Measures Ahead*, San Francisco

Moreover, harassment and reprisal are not the only tools for chilling speech in this arena. Establishing a precedent that ballot sponsors and their supporters will be subject to sweeping discovery every time a successful ballot measure is challenged would surely chill core First Amendment activity of speakers of all stripes on initiative measures of all kinds, simply because the speakers might prefer to remain anonymous. *See* Ex. I; Ex. L; *McIntyre*, 514 U.S. at 341-42 ("The decision in favor of anonymity may be motivated by fear of ... retaliation ... or merely by a desire to preserve as much of one's privacy as possible."); *Beinin*, 2007 U.S. Dist. LEXIS 47546, at *10 (Ware, J.) ("Had Plaintiff's email correspondents realized that privately supporting his litigation would potentially subject them to intrusive depositions or other discovery, they may have chosen to refrain from speaking.").

Finally, the public interest weighs strongly in favor of shielding Defendant-Intervenors from this discovery. In many states, and in California especially, successful referenda are challenged in court with regularity. The Supreme Court has found that the referendum process is vitally important, *James*, 402 U.S. at 142-43, and that individuals' freedom to engage in that process lies at the core of the First Amendment, *McIntyre*, 514 U.S. at 347. If a mere lawsuit can open up participants' in that process to wide-ranging discovery into their private communications during a campaign, only the fearless or reckless few will continue to participate. *See, e.g., id.* at 357; *Buckley*, 424 U.S. at 71 ("the public interest also suffers" from chilled political participation).

CONCLUSION

For the foregoing reasons, the Court should grant this motion for a protective order.

Dated: September 15, 2009

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS
By: /s/Charles J. Cooper
Charles J. Cooper

Chronicle (May 27, 2009); Website of the Secretary of State of California, http://www.sos.ca.gov/elections/elections_j.htm#circ (listing circulating ballot petitions).

COOPER AND KIRK, PLLC
Charles J. Cooper (DC Bar No. 248070)*
ccooper@cooperkirk.com
David H. Thompson (DC Bar No. 450503)*
dthompson@cooperkirk.com
Howard C. Nielson, Jr. (DC Bar No. 473018)*
hnielson@cooperkirk.com
Nicole J. Moss
nmoss@cooperkirk.com (DC Bar No. 472424)
Jesse Panuccio
jpanuccio@cooperkirk.com (DC Bar No. 981634)
Peter A. Patterson (Ohio Bar No. 0080840)*
ppatterson@cooperkirk.com
1523 New Hampshire Ave. N.W., Washington, D.C. 20036
Telephone: (202) 220-9600, Facsimile: (202) 220-9601

LAW OFFICES OF ANDREW P. PUGNO
Andrew P. Pugno (CA Bar No. 206587)
andrew@pugnolaw.com
101 Parkshore Drive, Suite 100, Folsom, California 95630
Telephone: (916) 608-3065, Facsimile: (916) 608-3066

ALLIANCE DEFENSE FUND
Brian W. Raum (NY Bar No. 2856102)*
braum@telladf.org
James A. Campbell (OH Bar No. 0081501)*
jcampbell@telladf.org
15100 North 90th Street, Scottsdale, Arizona 85260
Telephone: (480) 444-0020, Facsimile: (480) 444-0028

ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, MARK A. JANSSON, and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Date: September 25, 2009
Time: 10:00 a.m.
Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

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.

Additional Counsel for Defendant-Intervenors

ALLIANCE DEFENSE FUND
Timothy Chandler (CA Bar No. 234325)
tchandler@telladf.org
101 Parkshore Drive, Suite 100, Folsom, California 95630
Telephone: (916) 932-2850, Facsimile: (916) 932-2851

Jordan W. Lorence (DC Bar No. 385022)*
jlorence@telladf.org
Austin R. Nimocks (TX Bar No. 24002695)*
animocks@telladf.org
801 G Street NW, Suite 509, Washington, D.C. 20001
Telephone: (202) 393-8690, Facsimile: (202) 347-3622

* Admitted *pro hac vice*

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I. THE DISCOVERY AT ISSUE

Ignoring the actual content of their own document requests, Plaintiffs attempt to shift the focus of what is at issue in this motion by claiming that Defendant-Intervenors (hereinafter, also "Proponents") seek a protective order shielding "documents distributed to millions of potential voters ... if the list of recipients was targeted, for example, to all registered Republicans...." Doc # 191 at 6. *See also id.* at 15. In fact, we have already produced such documents (*e.g.*, mass mailings, mass emails, text of robo calls) and continue our efforts to gather and produce any such public material that may remain in Proponents' custody and control. This motion is really about Plaintiffs' demands for disclosure of Proponents' *nonpublic* and/or anonymous communications,[1] including (but not limited to) the Proponents' communications targeted to (and/or received from) (i) persons who donated money to or otherwise volunteered to assist the Prop. 8 campaign; (ii) agents and contractors of the campaign, including political consultants; and even (iii) family, friends, and colleagues. Despite Plaintiffs' assurances, Plaintiffs have not cabined their requests to public or even widely-distributed information. To the contrary, their requests reach virtually *all* material in any way related to Prop. 8 in the possession of any Defendant-Intervenor. This includes drafts of documents that were never intended to, and never did, see public light. It also includes documents created *after* the Prop. 8 election. Plaintiffs have also noticed similarly sweeping document subpoenas on two of Protect Marriage's campaign consultants. *See* Exs. A, B.

II. RELEVANCE

1. Plaintiffs appear to contend that because the Federal Rules grant wide latitude in discovery, they prescribe no limits at all. But the Rules are not so unbounded: "'some threshold showing of

[1] Anonymity in political speech, even public speech, is protected from compelled disclosure by the First Amendment. *See Watchtower v. Bible & Tract Soc'y of N.Y., Inc. v. Stratton*, 536 U.S. 150, 167 (2002) ("The fact that circulators revealed their physical identities d[oes] not foreclose our consideration of the circulators' interest in maintaining their anonymity."). Similarly, the First Amendment protects even the public, but anonymous, speech of a Proponent of Prop. 8.

relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.'" *Barcenas v. Ford Motor Co.*, 2004 U.S. Dist. LEXIS 25279, at *6 (N.D. Cal. 2004) (quoting *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992)).

2. In justifying discovery into the Prop. 8 campaign, Plaintiffs previously asserted their need to gather evidence about the intent of the electorate. *See* Docs # 134 at 9, # 157 at 12. That was the bait; now comes the switch. Plaintiffs now claim that the main reason they require discovery into virtually every communication made by anyone included in or associated with Protect Marriage is a need to gather "admissions and impeachment evidence regarding the purported state interests that Defendant-Intervenors' advance and the factual disputes identified in the Court's June 30, 2009 Order." Doc # 191 at 8. This shift in focus does not save Plaintiffs' requests.

Plaintiffs seek "communications ... that would demonstrate [Proponents'] conclusions about what voters might accept as purposes and rationales for Prop. 8." Doc # 191 at 8 n.1. But such communications simply do not matter here, for Prop. 8 must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). This is a wholly objective inquiry, and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the [electorate]." *Id.* at 315; *see also U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("this Court has never insisted that a legislative body articulate its reasons for enacting a statute").[2] Accordingly, whether a particular purpose or rationale for Prop. 8 was actually

[2] This objective test makes sense, of course, because the question of whether the electorate actually acted on a particular rationale cannot be answered, or even informed, by resort to the information at issue here. *See McIntyre v. Oh. Elec. Comm'n*, 514 U.S. 334, 343 (1995) ("the Court[] [has] ... embraced a respected tradition of anonymity in the advocacy of political issues," which is "best exemplified by the secret ballot"); *SASSO v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970); *Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986); *Seattle School Dist. No. 1 v. Washington*, 473 F.

presented to, or considered by, the electorate is "entirely irrelevant" to this case. And whether the Defendant-Intervenors, or any particular voter, subjectively knew of, believed in, announced, or denounced a particular rational basis (in public or private) is likewise irrelevant.

Thus, if Prop. 8 serves any *conceivable* legitimate governmental purpose, that purpose obviously cannot be negated by any "admission of a party opponent" that Plaintiffs might claim to find in the Proponents' nonpublic communications.[3] Indeed, Plaintiffs surely are not serious in suggesting that Proponents' communications, whether public or private, could somehow constitute an admission that is binding on the electorate and the State of California. For the same reason, it simply matters not whether the Proponents' nonpublic communications support or *contradict* any of the particular legitimate state interests that Prop. 8 conceivably serves.

Lastly, even if the information at issue here were relevant for these purposes, it would still be privileged under the First Amendment. Parties regularly make statements (such as those to their lawyers) that would constitute admissions of a party opponent or impeachment evidence—yet such statements are neither discoverable nor admissible.

3. Citing *Washington v. Davis*, 426 U.S. 229 (1976), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), Plaintiffs contend that "whether a defendant acted with discriminatory intent or purpose is a relevant consideration in an equal protection challenge." Doc # 191 at 9. These cases, however, hold that the lawmakers' intent is relevant *only* for the purpose of determining whether a facially neutral law was nevertheless intended to discriminate on the basis of race. In this

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Supp. 996, 1014 (W.D. Wash. 1979) ("as to the subjective intent of the voters ... the secret ballot raises an impenetrable barrier"). Moreover, even if such material could be compelled from Proponents without infringing on the First Amendment, it would not suffice to show the entire electorate's motives. As the Sixth Circuit has explained, even if some voters have an improper motive, that motive cannot be ascribed to the electorate at large and thus cannot serve to invalidate an act of the electorate that "has an otherwise valid reason for its decision." *Arthur*, 782 F.2d at 574.

[3] *See* FED. R. EVID. 402; *Strom v. United States*, 583 F. Supp. 2d 1264, 1269 n.3 (W.D. Wash. 2008) (striking evidence because although it "may ... be considered an admission of a party opponent ... such evidence [wa]s not relevant").

case, however, Proponents are not disputing that Prop. 8 can be viewed as creating a classification based on sexual orientation for purposes of the Equal Protection Clause. *See* Doc # 172-1 at 55. Further, as we have demonstrated, controlling Ninth Circuit precedents (as well as persuasive precedents from every other Circuit to address the issue) clearly hold that sexual orientation, unlike race, is not a suspect classification. *See id.* at 56. Accordingly, unlike the question at issue in *Davis* and *Seattle*—which determined whether the challenged measures were subject to strict scrutiny or only rational basis review—the question whether Prop. 8 classifies on the basis of sexual orientation has no effect on the type of scrutiny to which Prop. 8 is subject, and is thus irrelevant for purposes of the Equal Protection Clause. For all of these reasons, *Davis* and *Seattle* have no application here.

Plaintiffs, quoting *City of Los Angeles v. County of Kern*, 462 F. Supp. 2d 1105, 1114 (C.D. Cal. 2006), *vacated* 2009 U.S. App. LEXIS 20078 (9th Cir. 2009), repeatedly assert that "the Court may look to the nature of the initiative campaign to determine the intent of the drafters and voters in enacting it." Doc 191 at 9, 10, 14. That case involved equal protection and dormant commerce clause challenges to a county referendum limiting importation of "sludge" from Los Angeles. The Court rejected the equal protection claim, noting: "[T]he fact that [the referendum] apparently was motivated in part by animus [against Los Angeles] . . . is not fatal for equal protection purposes, so long as that animus was accompanied by other plausible, legitimate legislative goals." *Id.* at 1111. Looking solely to the text of the referendum itself, the Court concluded that "[o]n this record, such legitimate goals exist." *Id.* Similarly, in determining that the referendum was intended to discriminate against interstate commerce, the Court looked solely to the text of the referendum and to the public advertising supporting it. *See id.* at 1113-14.

In all events, even if intent were relevant here, none of the Supreme Court's cases dealing with an equal protection challenge to a referendum has delved into the type of information Plaintiffs seek

here.[4] Simply put, "the Supreme Court ... has [n]ever inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results." *Arthur*, 782 F.2d at 573; *accord Equal. Found. v. Cincinnati*, 128 F.3d 289, 293 n.4 (6th Cir. 1997); *37712, Inc. v. Ohio Dep't of Liquor Ctrl.*, 113 F.3d 614, 620 n.11 (6th Cir. 1997).

4. Plaintiffs assert a hodge-podge of reasons why this Court should ignore the Ninth Circuit's controlling opinion in *SASSO*.[5] First, Plaintiffs claim that *SASSO* is inapposite because they are not seeking information about the "private attitudes of voters." Doc # 191 at 10. Well, then exactly what is "evidence concerning the 'motivations for supporting Prop. 8'"? *Id.* at 9. Second, Plaintiffs claim that Proponents cannot rely on *SASSO* because we chose to intervene. Plaintiffs fail to explain why the relevance of certain information in an equal protection challenge is determined by the identity of the parties to the litigation. If Proponents had not joined this lawsuit, would Plaintiffs have thus conceded that Proponents' nonpublic communications are irrelevant? What then justifies the sweeping third-party subpoenas that Plaintiffs have noticed on Proponents' campaign consultants? Third, Plaintiffs argue that *SASSO* is no longer controlling in light of subsequent Supreme Court cases. But the Ninth Circuit has never questioned *SASSO* and, as noted, the Sixth Circuit—in

[4] For example, *Seattle* affirmed the finding, made by both the district court and the Ninth Circuit, that the referendum at issue "was effectively drawn for racial purposes." 458 U.S. at 471. But in making this finding, the district court explicitly held that "[i]t is, of course, impossible to ascertain the subjective intent of those who enacted Initiative 350" and "[o]ne must simply look elsewhere than within the minds of the voters." 473 F. Supp. at 1013-14. The district court thus engaged in an objective inquiry, looking to "[t]he very words of the initiative"; publicly-known facts that "the voters in general ... were well aware" of; "the historical background," and a "departure from the procedural norm." *Id.* at 1015-16. For its part, the Ninth Circuit "f[ound] it unnecessary to discuss ... discriminatory purpose" and looked only at the initiative's language and effect. 633 F.2d 1338, 1342-43 (9th Cir. 1980). Thus, at every level of adjudication, nonpublic materials such as those at issue here were irrelevant to the equal protection claim in *Seattle*.

[5] Plaintiffs rightly note that *Bates* received en banc consideration, but fail to note that, like both the panel majority and dissent, the court looked to nothing more than the language the ballot measure, the official ballot materials, public "media attention," and decisions of the California Supreme Court. 131 F.3d 843, 846 (9th Cir. 1997) (en banc). Plaintiffs try to paint *Bates* as a case about "notice," but such a formulation does not save them from the implications of *Bates*. If the case is about "notice," it is about what the voters knew—an inquiry that is indistinguishable from intent.

full view of subsequent Supreme Court cases—has adopted *SASSO*'s holding and rationale. *See Paul v. HCI Direct, Inc.*, 2003 U.S. Dist. LEXIS 12170, at *10-18 (C.D. Cal. 2003) (courts may not ignore binding authority even if parallel or higher authority "implicitly" calls it into question).[6]

5. Plaintiffs and Plaintiff-Intervenors claim that we are seeking from third parties the very same type of information at issue in this motion. This charge was false when first represented to the Court in Plaintiff-Intervenors' letter, Doc # 182, as we pointed out in our motion, Doc # 187 at 10 n.5. In an effort to dispel any confusion, we specifically alerted Plaintiff-Intervenors that this was not the case. And, well before Plaintiffs' response was submitted, we sent an additional letter to the third parties instructing them not to produce such materials, *see* Ex. C, which was copied to all counsel. We are perplexed, and dismayed, that Plaintiffs continue to advance this false charge.[7]

III. FIRST AMENDMENT PRIVILEGE

Plaintiffs concede that Proponents' "communications concerning the Prop. 8 referendum campaign are core political speech and undeniably entitled to First Amendment protection." Doc # 191 at 12. And they do not contest that when information about support for Prop. 8 has become public, it has led to, in Plaintiffs' counsels' words, "widespread economic reprisals" and chilling of First Amendment activity. Yet they dismiss our First Amendment claim as "makeweight."

1. Plaintiffs argue that Defendant-Intervenors waived any and all First Amendment privileges by joining this lawsuit.[8] As an initial matter, we note again that Plaintiffs have noticed third-party subpoenas upon the Proponents' campaign consultants for the same type of discovery at issue here.

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[6] Eschewing controlling Ninth Circuit precedent, Plaintiffs can cite only *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), as support for their position. But even the Eighth Circuit turned to official ballot materials as the "most compelling" evidence of intent. *Id.* at 594. Accordingly, the materials cited by the Eighth Circuit were unnecessary to its decision. In any event, *SASSO* controls in this Circuit and, along with *Arthur*, is the better reasoned case.

[7] These third parties have also lodged relevance and privilege objections. *See* Exs. D, E.

[8] Plaintiffs also argue that a waiver exists where a party places the requested information at issue. Doc # 191 at 12 n.4, 13. Yet Proponents have not placed the intent of the electorate or their subjective belief in a particular rational basis at issue; instead, we maintain that such inquiries are legally irrelevant and, unless and until the Court rules otherwise, do not plan to present any evidence

In any event, this Court has flatly rejected such an argument, holding that a "generic distinction" creating a "waiver of [First Amendment] safeguards by reason of the party's decision to instigate litigation" would prove to be "as much a potential 'chill' upon hallowed First Amendment freedoms by indirectly penalizing its exercise, as would be a direct assault." *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 209 (N.D. Cal. 1983). Thus, in *Beinin v. Center for the Study of Popular Culture*, this Court found that a *plaintiff* had validly asserted First Amendment rights with respect to a defendant's discovery requests; the fact that the plaintiff had brought the suit did not matter. 2007 U.S. Dist. LEXIS 47546 (N.D. Cal. 2007). *See also Int'l Action Ctr. v. United States*, 207 F.R.D. 1 (D.D.C. 2002) (granting protective order to plaintiffs with regard to information about "political activities"); *Black Panthers Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981), *granted, vacated as moot, and remanded by* 458 U.S. 1118 (1982)[9]; *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 1985 U.S. Dist. LEXIS 22188, at *27 (S.D.N.Y. 1985) (granting plaintiffs' claim of First Amendment privilege against "an extensive inquiry into [their] associations and ...finances").[10]

These cases are in keeping with the longstanding "unconstitutional conditions" doctrine, which "holds that the government 'may not deny a benefit on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). Although Proponents may be in this lawsuit

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about them, nor to call Proponents as fact witnesses. *See* Doc # 172-1 at 95-98, 101-03.

[9] "Even though the *Black Panther* decision was later vacated as moot ... there is no suggestion in later case law in th[e] [D.C.] Circuit that its reasoning or analysis has been rejected or abandoned." *Int'l Action Ctr.*, 207 F.R.D. at 3 n.6. Indeed, many cases dealing with *NAACP* claims often rely on the case as persuasive. *See, e.g., Coors* 570 F. Supp. at 210.

[10] Plaintiffs try to cast *Grandbouche v. Clancy*, 825 F.2d 1463 (10th Cir. 1987) and *Christ Covenant Church v. Southwest Ranches*, 2008 U.S. Dist. LEXIS 49483 (S.D. Fla. 2008), as supporting their absolute waiver argument. But both courts specifically applied the *NAACP* balancing test despite the fact that it was invoked by party-plaintiffs; the courts simply held that the invoking party's status as plaintiff could be taken into account in analyzing the balance. *Grandbouche* specifically stated that even in light of this factor "information sought by defendants may, on balance, be protected from disclosure." 825 F.2d at 1467. Here, where the documents sought have no relevance (unlike those in *Christ Covenant*) the balance must be struck for the party claiming privilege. Moreover, Proponents are not plaintiffs—they have intervened to defend the People's

voluntarily, their right to defend in Court a ballot initiative they sponsored and that was passed by the majority of voters in California (an initiative that would go undefended but for their intervention) cannot be conditioned on Proponents effectively leaving all First Amendment rights at the courthouse doors. Yet this is precisely what Plaintiffs demand.

2. Plaintiffs contend that they "do not seek ProtectMarriage.com's membership list, or a list of donors." Doc # 191 at 13. But Plaintiffs' document requests clearly implicate disclosure of organizational charts; email distribution lists (of donors, members, or supporters); lists of donors contributing less than the threshold amount triggering public disclosure; and identities of all correspondents, whether or not their identities have previously been publicly disclosed. Further, as we have demonstrated, numerous cases have held that the First Amendment shields not only membership or donor lists, but also other private information of the types at issue here. *See* Doc # 187 at 18-19 & nn. 18-19 (listing cases); *see also Int'l Action Ctr.*, 207 F.R.D. at 2-4 (protective order barring discovery into "political activities."). Plaintiffs attempt to deal with only one of these cases, arguing that we seek to shield documents beyond those at issue in *Motor Fuel*.[11] But *Motor Fuel* broadly shielded "documents related to lobbying and legislative affairs," including "internal communications and evaluations about advocacy of their members' positions on contested political issues, as well as their actual lobbying on such issues." 2009 U.S. Dist. LEXIS 66005, at *43-47 (D. Kan. 2009). *See also*

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vote because their official representatives would not.

[11] Ignoring the other cases from this Circuit cited in our opening brief, Plaintiffs cite a single case for the proposition that "[c]ourts in this Circuit have rejected claims of First Amendment privilege where a litigant seeks to apply it [to] ... 'discovery of her files.'" Doc # 191 at 10 (quoting *Wilkinson v. FBI*, 111 F.R.D. 432, 436 (C.D. Cal. 1986)). But *Wilkinson* concerned a request for blanket immunity from *any* discovery into 30 years' worth of "documents, tapes and microfilm" that had already been donated to a historical society. 111 F.R.D. at 434. It was not clear in *Wilkinson* how many of the documents reflected core First Amendment activity, and the court found that there was *no* showing that "the information sought would impair the group's associational activities." *Id.* at 437. Here, Plaintiffs concede that the documents at issue are core political speech and we have made a showing of the impairment that would result from disclosure. *Wilkinson* also found that the *NAACP* doctrine had been applied only to membership lists and thus refused to entertain any claim of privilege for other types of documents. In light of the Supreme Court's holdings about the nature of speech in a referendum campaign, and the cases that have applied the *NAACP* doctrine more

Heartland Surgical Specialty Hosp. v. Mw. Div., Inc., 2007 U.S. Dist. LEXIS 19475, at *20 (D. Kan. 2007) ("documents related to ... strategy of advocating for bills in the Kansas legislature").

Plaintiffs also contend that because the "public is already aware" of Defendant-Intervenors' affiliations with Protect Marriage, all of Defendant-Intervenors' political communications should be subject to compelled public disclosure. Plaintiffs ignore what was already explained in our opening brief: public disclosure of affiliation with a group or cause is far different from—and reveals far less than—disclosure of specific communications.[12] *See Am. Const. Law Found. v. Meyer*, 120 F.3d 1092, 1103 (10th Cir. 1997), *aff'd, Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999).[13]

3. Plaintiffs claim that Proponents' First Amendment privilege cannot stand because Plaintiffs are willing to entertain "any reasonable confidentiality agreement." Doc # 191 at 16. But a confidentiality agreement cannot obviate the fact that the information sought is irrelevant and thus Defendant-Intervenors should not have to shoulder the onerous burden of reviewing and producing it. Indeed, where information has little relevance and implicates First Amendment concerns, courts have rejected confidentiality agreements. *See Anderson*, 2001 U.S. Dist. LEXIS 6127 (allowing an attorneys-eyes-only restriction for relevant information that had only a remote possibility of reach-

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broadly, such a view is no longer tenable.

[12] Plaintiffs argue that *Anderson v. Hale* stands for the blanket proposition that once a person's organizational affiliation is publicly known, all of that person's other First Amendment activity loses protection. But the dispute in *Anderson* was about Internet "subscription information" and "neither party [could] describe exactly what information" was at issue. 2001 U.S. Dist. LEXIS 6127, at *46 (N.D. Ill. 2001). The only argument the defendants raised with regard to the publicly-disclosed members was that production of subscription information might reveal the identity of anonymous members. *Id.* at *14. The Court found this possibility "too remote and speculative" as defendants had failed to show that production would "reveal the identity of an anonymous ... member." *Id.* at *19 & n.5. Indeed, the court relied on a finding that the discovery would reveal information that was highly relevant and, at least in part, had nothing to do with the associational activities in question. *Id.* at *17-18. With respect to anonymous members, however, the Court refused all discovery, finding that it struck at the heart of the association's activities and was supported by only "a general statement regarding ... relevancy." *Id.* at *22-25. And contrary to Plaintiffs' suggestion here, a "factual record of past harassment ma[de] the chilling effect of disclosure apparent." *Id.* at *23.

[13] Plaintiffs' claim that public discussion by Proponents' campaign consultant of some aspects of the campaign renders nugatory all claims of privilege over any undisclosed First Amendment activity. Speakers are free to choose for themselves what to make public and what to keep private. *See Watchtower*, 536 U.S. at 167.

ing associational rights, but rejecting *any* disclosure where greater claims of First Amendment privilege existed). Further, it is not clear what Plaintiffs would deem a "reasonable" agreement, but we suspect it would include the ability to introduce the information at trial and on appeal. Public disclosure would thus occur regardless of confidentiality in the discovery phase. Most important, First Amendment chill occurs from any compelled disclosure—even limited disclosure. *Austl./E. USA Shipping Conf. v. United States*, 537 F. Supp. 807, 810 (D.D.C. 1982) ("There is no doubt that the overwhelming weight of authority is to the effect that forced disclosure of first amendment activities creates a chilling effect which must be balanced against the interests in obtaining the information."). This is especially so when the party receiving the information is the disclosing party's political opponent. *See Motor Fuel*, 2009 U.S. Dist. LEXIS 66005 at *50 ("Disclosure of the associations' evaluations of possible lobbying and legislative strategy certainly could be used by plaintiffs to gain an unfair advantage over defendants in the political arena."); Ex. F (showing City Attorney Herrera's extensive anti-Prop. 8 political activities). Thus, the First Amendment "prohibits the State from requiring information from an organization that would impinge on First Amendment associational rights if there is no connection between the information sought and the State's interest." *Dawson v. Delaware*, 503 U.S. 159, 168 (1992). Indeed, if "reasonable" confidentiality agreements were the answer in cases such as this, the Supreme Court would have adopted them in cases like *NAACP*; yet, courts crediting claims of First Amendment privilege routinely shield parties from any production, just as with valid claims of the attorney-client and other privileges.

CONCLUSION

For the foregoing reasons, the Court should grant this motion for a protective order.

Dated: September 22, 2009

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS

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