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9  
 10 UNITED STATES DISTRICT COURT  
 11 EASTERN DISTRICT OF CALIFORNIA  
 12 SACRAMENTO DIVISION

13 **ProtectMarriage.com - Yes on 8, a Project**  
 14 **of California Renewal; National**  
 15 **Organization for Marriage California - Yes**  
 16 **on 8, Sponsored by National Organization**  
 17 **for Marriage, John Doe #1, an individual,**  
 18 **and as a representative of the Class of Major**  
 19 **Donors,**

20 Plaintiffs,  
 21  
 22 vs.

23 **Debra Bowen**, Secretary of State for the State  
 24 of California, in her official capacity; **Edmund**  
 25 **G. Brown, Jr.**, Attorney General for the State  
 26 of California, in his official capacity; **Dean C.**  
 27 **Logan**, Registrar-Recorder of Los Angeles  
 28 County, California, in his official capacity;  
**Department of Elections - City and County**  
**of San Francisco; Jan Scully**, District  
 Attorney for Sacramento County, California, in  
 her official capacity and as a representative of  
 the Class of District Attorneys in the State of  
 California; **Dennis J. Herrera**, City Attorney  
 for the City and County of San Francisco,  
 California, in his official capacity and as a  
 representative of the Class of Elected City  
 Attorneys in the State of California; **Ross**  
**Johnson, Timothy Hodson, Eugene**

Case No. 2:09-CV-00058-MCEDAD

**SAN FRANCISCO DEFENDANTS' REPLY IN**  
**SUPPORT OF DEFENDANTS' RULE 56(F)**  
**MOTION**

Date: June 18, 2009  
 Time: 10:00 a.m.  
 Courtroom: 7, 14th Floor  
 Judge: Morrison C. England, Jr.  
 Trial Date: March 14, 2011  
 Action Filed: January 7, 2009

1 **Huguenin, Jr., Robert Leidigh, and Ray**  
2 **Remy**, members of the California Fair Political  
Practices Commission, in their official  
capacities,

3 Defendants.

4  
5  
6 Defendants Department of Elections - City and County of San Francisco and Dennis J. Herrera,  
7 City Attorney for the City and County of San Francisco ("San Francisco Defendants") hereby join in  
8 the Reply in Support of Rule 56(f) Motion filed by State Defendants Debra Bowen, Edmund G.  
9 Brown, Jr. and members of the Fair Political Practices Commission ("State Defendants"). San  
10 Francisco Defendants join in and adopt State Defendants' Reply in its entirety, including all arguments  
11 and statements of issue or fact contained therein, and all exhibits incorporated therein. San Francisco  
12 Defendants submit this separate reply only to respond to arguments directed at San Francisco  
13 Defendants' initial joinder.

#### 14 INTRODUCTION

15 As described in State Defendants' opening brief and San Francisco Defendants' joinder,  
16 summary judgment is premature at this time, and the Court should allow for a period of reasonable  
17 discovery, as Rule 56 requires in almost all instances. In March, all parties in this action agreed to a  
18 six-month period of discovery ending in October 2009. In its subsequent scheduling order, the Court  
19 extended the period for fact and expert discovery until May and July 2010, respectively. But Plaintiffs  
20 now have engaged in a sharp about-face from their previous position in this litigation, and attempt to  
21 prevent Defendants – and the Court – from testing the factual allegations underlying their legal claims.

22 Plaintiffs now assert that the circumstances have changed and that no discovery is appropriate  
23 at all, but none of their arguments have any merit. Regardless of Plaintiffs' assertions, Defendants  
24 need at least some basic information about Plaintiffs' witnesses to determine what, if any, discovery  
25 would be necessary to oppose Plaintiffs' motion for summary judgment. And Defendants cannot be  
26 faulted for not obtaining this information earlier. The Court only one month ago entered its pretrial  
27 scheduling order establishing discovery deadlines and a trial date for this litigation. Plaintiffs have not

1 provided any Defendants basic identifying information on which Defendants can base their discovery  
2 decisions. For these reasons, the Court should grant State Defendants' request to continue Plaintiffs'  
3 summary judgment motion.

#### 4 **PROCEDURAL HISTORY**

5 The present litigation is still in its infancy. The parties only recently filed the operative  
6 pleadings in this case. Plaintiffs filed their third amended complaint on May 28. *See* Docket No. 106.  
7 Defendants filed their answers on June 5 and June 11. *See* Docket Nos. 165 and 172. Just one month  
8 ago, on May 18, the Court entered its pretrial scheduling order, and established discovery deadlines  
9 and a trial date. *See* Docket No. 96. Plaintiffs have not yet served Defendants with unredacted  
10 versions of the declarations they have filed, or reference lists providing the redacted information. On  
11 June 10, San Francisco Defendants contacted Plaintiffs regarding an appropriate modification of the  
12 Court's protective order, a key prerequisite for discovery in light of Defendants' need for basic  
13 information about witnesses and Plaintiffs' concerns for the privacy interests of those witnesses.  
14 Discussions on an appropriate protective order are ongoing. *See* Declaration of Mollie Lee ¶ 11,  
15 Docket No. 173.

#### 16 **ARGUMENT**

17 Defendants have not yet had any opportunity to engage in discovery and further factual  
18 development, and the Court should grant their motion to continue. "Where . . . a summary judgment  
19 motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue  
20 discovery relating to its theory of the case, district courts should grant any Rule 56(f) motion fairly  
21 freely." *Burlington Northern Santa Fe Railroad Co. v. The Assiniboine and Sioux Tribes of the Fort*  
22 *Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003). "[T]he Supreme Court has restated [Rule 56(f)]  
23 as *requiring*, rather than merely permitting, discovery 'where the nonmoving party has not had the  
24 opportunity to discover information that is essential to its opposition.'" *Metabolife Intern., Inc. v.*  
25 *Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
26 250 n.5 (1986)) (emphasis added).

1 By filing their premature summary judgment motion and opposing Defendants' requested  
2 continuance, Plaintiffs have dramatically altered their position on an appropriate timeline for this  
3 litigation. In the parties' March 6 joint status report, all parties agreed to a six-month discovery period,  
4 with all discovery to be completed by October 1, 2009 and dispositive motions to be filed by  
5 November 16, 2009. See Docket No. 95. But in a sudden shift, Plaintiffs now expect discovery to be  
6 completed in June, with summary judgment briefing more than *five months* prior to the earlier  
7 proposed deadline and *fifteen months* earlier than the Court's scheduled filing date.

8 Plaintiffs argue that five "critical events" have taken place since March 6 that justify changing  
9 their position on how this case should proceed. Plaintiffs claim that (1) they have uncovered  
10 additional evidence that threats, harassment, and reprisals have continued against Proposition 8  
11 supporters; (2) the Ninth Circuit issued a relevant ruling on February 25; (3) on May 26, the California  
12 Supreme Court upheld Proposition 8 against a state constitutional challenge; (4) Plaintiff added a party  
13 that would be subject to a July 31 campaign finance reporting deadline; and (5) Plaintiffs likely will  
14 launch another ballot measure campaign for a November 2010 election. None of these events  
15 adequately explain Plaintiffs' professed need to stop Defendants from taking any discovery.

16 First, over 30,000 individuals made contributions to Plaintiffs ProtectMarriage.com and NOM-  
17 California before January, and perhaps more since. See Declaration of David Bauer in Support of  
18 Plaintiffs' Motion for Preliminary Injunction ¶¶ 4-5, Docket No. 44. That Plaintiffs have now  
19 managed to gather a mere 58 declarants from that pool of potential witnesses does not suggest that the  
20 need for a resolution of this important case has become more urgent. Second, it is plain that the Ninth  
21 Circuit's February 25 ruling was available prior to the March 6 filing of the parties' joint status report.  
22 And Plaintiffs' counsel was aware of the that ruling at the time. See Declaration of Mollie M. Lee in  
23 Support of San Francisco Defendants' Reply in Support of Defendants' Rule 56(f) Motion, Exh. A  
24 (February 26, 2009 newspaper article quoting James Bopp Jr., Plaintiffs' counsel of record,  
25 commenting on the *Canyon Ferry* ruling). Third, it was foreseeable to many observers that the  
26 California Supreme Court might uphold Proposition 8, thus setting the stage for a possible future  
27 ballot initiative. See, e.g., *id.*, Exh. B. (reporting on oral argument heard on March 5, 2009). But until

1 the filing of Plaintiffs' summary judgment motion, Plaintiffs never suggested that the Supreme Court's  
2 decision would require expedited resolution or an early discovery cut-off in this action. Fourth, while  
3 NOM-California PAC must file campaign reports by July 31, Plaintiffs' summary judgment motion –  
4 which Plaintiffs noticed for August 13 – will not affect that filing. Moreover, Plaintiffs added NOM-  
5 California PAC as a party on May 20. They cannot now use their recent addition of that party  
6 effectively to eliminate Defendants' ability to take discovery. Finally, the Court's decision to set a trial  
7 date in 2011 is also not a reason to terminate discovery immediately. If Plaintiffs prefer a trial date  
8 prior to November 2010, they can seek to amend the scheduling order instead of short-circuiting the  
9 entire litigation. In sum, Plaintiffs offer no legitimate reason for their suddenly urgent need to avoid  
10 discovery.

11 Moreover, Plaintiffs' suggestion that San Francisco Defendants have not been diligent in  
12 seeking the declarants' identities is spurious. The parties exchanged initial disclosures in April, and  
13 the Court issued its scheduling order less than a month ago. That order gave the parties until July  
14 2010 to engage in discovery. And San Francisco Defendants took initial steps to engage in discovery  
15 by contacting Plaintiffs regarding a protective order in early June. Plaintiffs' allegation that San  
16 Francisco Defendants have sat on their hands is simply wrong. The San Francisco Defendants have  
17 not engaged in any behavior that would constitute a lack of diligence for Rule 56(f) purposes. *Cf.*  
18 *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1997) (finding lack of diligence where  
19 court postponed ruling on summary judgment for more than a year to allow for depositions, but  
20 plaintiff never took the depositions); *Hauser v. Farrell*, 14 F.3d 1338, 1340-41 (9th Cir. 1994)  
21 (overruled on other grounds by *Central Bank v. First Interstate Bank*, 511 U.S. 164, 173 (1994))  
22 (finding lack of diligence where movant failed to depose witness during the twenty-seven months  
23 between start of litigation and discovery cut-off).

24 Whatever Plaintiffs' reasons for expediting summary judgment, San Francisco Defendants  
25 should be permitted to proceed with discovery. As explained in their joinder, San Francisco  
26 Defendants require additional information to determine what type of discovery is appropriate and who  
27 has relevant information for their opposition. San Francisco Defendants cannot perform certain

1 informal factual investigation – or even assess the need for formal discovery – without basic  
2 identifying information. San Francisco Defendants could not prepare something as simple as a third-  
3 party deposition or document subpoena without knowing the declarants' names.

4 In opposing the San Francisco Defendants' attempt to seek discovery, Plaintiffs assert that they  
5 are completely free of any obligation "to establish a causal link between disclosure and harassment,"  
6 so the facts that San Francisco Defendants may seek to uncover would be irrelevant. Mot. at 12. The  
7 case law, however, suggests that the opposite is true. In *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), the  
8 Supreme Court addressed the evidence that a plaintiff seeking the application "minor-party" exception  
9 must establish:

10 The evidence offered need show only a reasonable probability that *the compelled*  
11 *disclosure of a party's contributors' names will subject them to threats, harassment, or*  
12 *reprisals* from either Government officials or private parties. The proof may include, for  
13 example, specific evidence of past or present harassment of members due to their  
14 associational ties, or of harassment directed against the organization itself.

15 (Emphasis added.) The *Buckley* court thus set forth that the ultimate inquiry is whether the disclosure  
16 of contributors was likely to lead directly to harassment. Other evidence not directly linked to  
17 disclosure, such as past history of harassment, may be relevant as well. But a complete absence of any  
18 causal relationship between disclosure and harassment is insufficient to establish an infringement of  
19 First Amendment associational rights. *Cf. Dole v. Local Union 375, Plumbers Int'l Union of America,*  
20 *AFL-CIO*, 921 F.2d 969, 974 (9th Cir. 1990) ("The cases in which the Supreme Court has recognized a  
21 threat to first amendment associational rights, however, have consistently required more than an  
22 argument that disclosure leads to exposure."). Demonstrating that Plaintiffs have not established that  
23 more than a handful of actual contributors suffered any meaningful harassment or threats would  
24 certainly be relevant in determining whether First Amendment rights are at risk. Defendants should  
25 have the opportunity to gather that information through discovery.

26 In sum, Defendants are not seeking any remarkable relief. Based on Plaintiffs' previous  
27 representations, San Francisco Defendants understood that there would still be a reasonable  
28 opportunity to engage in relevant discovery. One necessary condition of beginning discovery is to

1 reach an agreement with Plaintiffs regarding an appropriate protective order. San Francisco  
2 Defendants have started those discussions.

3 **CONCLUSION**

4 Therefore, San Francisco Defendants respectfully request that the Court grant State  
5 Defendants' request to deny Plaintiffs' Motion for Summary Judgment or, in the alternative, to  
6 continue the hearing date on Plaintiffs' motion to December 18, 2009.

7  
8 Dated: June 17, 2009

9 DENNIS J. HERRERA  
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14 By: \_\_\_\_\_ /s/  
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18 FRANCISCO AND DENNIS HERRERA  
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