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28 **United States District Court
 Eastern District of California
 Sacramento Division**

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| <p>19 ProtectMarriage.com, et al., 20 Plaintiffs, 21 vs. 22 Debra Bowen, et al., 23 Defendants.</p> | <p>Case No. 2:09-CV-00058-MCE-DAD OPPOSITION TO MOTION TO MODIFY SCHEDULING ORDER TO EXTEND DEADLINES Date: May 13, 2010 Time: 2:00 p.m. Courtroom: 7, 14th Floor Judge Morrison C. England, Jr.</p> |
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1 Plaintiffs ProtectMarriage.com—Yes on 8, a Project of California Renewal
2 (“**ProtectMarriage.com**”), National Organization for Marriage—Yes on 8, Sponsored by
3 National Organization for Marriage (“**NOM-California**”), John Doe #1, an individual, and
4 representative of the Class of Major Donors (“**Major Donors**”), and National Organization for
5 Marriage California PAC (“**NOM-California PAC**”) respectfully submit this memorandum in
6 opposition to Defendants’ Motion to Modify Scheduling Order to Extend Deadlines. (Doc. 210)

7 **I. Discovery Background**

8 On May 18, 2009, this Court issued a Pretrial Scheduling Order. The order set forth a
9 discovery cut-off of May 14, 2010.¹ (Dkt. 96.) On October 30, 2009, over five months after entry
10 of the pretrial scheduling order and half-way through the non-expert discovery period,
11 Defendants served their *first* discovery on Plaintiffs. (Declaration of Sarah E. Troupis in Opp’n to
12 Mot. to Modify Scheduling Order to Extend Deadlines (“Troupis Decl.”) ¶ 2.) Plaintiffs timely
13 responded to this discovery on November 30, 2009. (Troupis Decl. ¶ 3.)

14 Defendants did not object to Plaintiffs’ discovery responses until January 22, 2010, nearly
15 two months *after* Plaintiffs had offered their responses, and seven months into the non-expert
16 discovery period. On February 2, 2010, counsel for both Plaintiffs and Defendants participated in
17 a conference call in an attempt to resolve various disagreements related to discovery. (Troupis
18 Decl. ¶ 5.) Plaintiffs agreed to produce certain non-privileged documents and a privilege log by
19 February 26, 2010. (Troupis Decl. ¶ 5.) During this February 2nd conference call, counsel for
20 Plaintiffs offered to make Ron Prentice, Executive Director of ProtectMarriage.com, and Brian
21 Brown, Executive Director of National Organization for Marriage, available for depositions.

22
23 ¹ On June 3, 2009, Plaintiffs filed a Motion for Summary Judgment. (Dkt. 110.) On June 10,
24 2009. Defendants requested a continuance pursuant to Rule 56(f). (*Id.* at 2.) Defendants stated a
25 continuance until December 18, 2009 "would likely provide sufficient time for the State
26 Defendants to complete discovery and otherwise obtain facts essential to justify their position to
27 [the motion for summary judgment.]" (*Id.* at 2.) On June 24, 2009, the Court granted Defendants’
28 Rule 56(f) motion, stating no party should file a motion for summary judgment before the
non-expert discovery cutoff of May 14, 2010. (Dkt. 189.)

1 (Troupis Decl. ¶ 6.) Both Mr. Prentice and Mr. Brown had answered interrogatories on behalf of
2 their respective organizations in response to Defendants' discovery requests. (Troupis Decl. ¶ 6.)
3 Plaintiffs' counsel also agreed to supplement these interrogatories, which had originally been
4 served on October 30, 2009. (Troupis Decl. ¶ 7.)

5 On February 24, 2010, Plaintiffs requested an extension of the discovery deadline agreed
6 upon during the February 2nd conference call. (Troupis Decl. ¶ 8.) Defendants agreed to allow
7 rolling production. (Troupis Decl. ¶ 8.) Plaintiffs served supplemental interrogatory answers to
8 Defendants on March 1, 2010 via email, and produced all requested documents not subject to
9 applicable privileges and discovery protections by March 23, 2010. (Troupis Decl. ¶¶ 9-10 .)
10 Approximately one week later, Plaintiffs received correspondence from Defendants regarding
11 certain deficiencies Defendants believed present in Plaintiffs' responses to Defendants'
12 discovery. (Troupis Decl. ¶ 11.) On April 2, 2010, Plaintiffs replied to Defendants regarding the
13 alleged deficiencies, and informed Defendants that they believe their discovery responses to be
14 adequate and complete, and that no further discovery would be forthcoming from Plaintiffs.
15 (Troupis Decl. ¶ 12.)

16 As set forth above, although Plaintiffs specifically informed Defendants that Mr. Brown and
17 Mr. Prentice were available for depositions in a phone conference on February 2, 2010,
18 Defendants did not begin any process to depose them until much later.² On April 15, 2010, with
19 less than a month before the discovery deadline, Defendants noticed depositions for Ron Prentice
20 and Brian Brown for depositions to occur two weeks later, on April 29 and 30, 2010.³ (Troupis
21 Decl. ¶ 14.)
22

23
24 ² Even if Plaintiffs had not informed Defendants of the availability of Ron Prentice and Brian
25 Brown for depositions, Defendants were able to notice depositions for Plaintiffs at any time, but
26 failed to do so until less than a month before the discovery cutoff.

27 ³ Prior to the notices, Plaintiffs and Defendants attempted to come up with mutually-agreed upon
28 dates on which to hold the depositions. (Troupis Decl. ¶ 13.)

1 **II. No Good Cause Exists to Extend the Deadlines.**

2 Defendants, who now seek an extension of the discovery deadline, are solely responsible for
3 the delayed discovery process that now requires such an extension. Thus, no good cause for such
4 an extension exists, and to do so would prejudice Plaintiffs, as set forth below.

5 As set forth above, Plaintiffs originally sought summary judgment on June 3, 2009. (*See* Doc.
6 110.) Defendants subsequently filed a Rule 56(f) Motion, seeking time to conduct discovery. (*See*
7 Doc. 110 at 2.) This Court granted that Motion, and set a discovery cutoff date of May 14, 2010.
8 Although Defendants vigorously sought the opportunity to conduct discovery before responding
9 to Plaintiffs’ motion for summary judgment, they did not act with such vigor in actually seeking
10 that discovery from Plaintiffs. Defendants waited over five months to serve Plaintiffs with any
11 discovery requests, and upon obtaining Plaintiffs’ responses, delayed another two months before
12 conferring with Plaintiffs regarding those responses. Defendants now seek a two month extension
13 to conduct discovery caused by their own five month delay.

14 Defendants’ delays with regard to depositions are even more troubling. Though Plaintiffs’
15 counsel took the unneeded step of specifically asking Defendants about deposing key members of
16 their organizations months before the discovery deadline, Defendants delayed noticing those
17 depositions until less than a month remained in the discovery period.

18 Because of prior scheduling conflicts, Plaintiffs and their attorneys were unable to attend the
19 depositions for the noticed time period.⁴ Moreover, because one of the individuals who was to be
20 deposed lives on the east coast and Plaintiffs’ lead counsel live in Indiana, coordinating clients
21 and scheduling with only two weeks notice is a nearly impossible task, even if all required to
22 attend are available. Thus, Plaintiffs proposed scheduling depositions at the end of May 2010, so
23 that all would be able to attend and Defendants could have a chance to take depositions despite
24

25 ⁴ Among other scheduling conflicts, each member of Plaintiffs’ lead counsel in this case was
26 participating in an argument at the U.S. Supreme Court during the week of April 26, 2010.
27 (Troupis Decl. ¶ 14.)

1 Defendants' delay in scheduling those depositions. (Troupis Decl. ¶¶ 14-16) Plaintiffs made this
2 proposal to conduct the depositions at the end of May on the condition that the other dates in the
3 Pretrial Scheduling Order not be amended, as the harms of the laws challenged in Plaintiffs' suit
4 continue on an ongoing, daily basis and any modification to the scheduling order results in further
5 and continuing harm to Plaintiffs, as set forth below. Despite Plaintiffs' attempts to come up with
6 a mutually acceptable solution to conducting depositions and Defendants' last minute attempts to
7 conduct the depositions, Defendants did not agree to Plaintiffs' proposal.

8 **III. Plaintiffs Would Be Prejudiced by the Proposed Modification.**

9 Recently, the U.S. Supreme Court called the threats, harassment, and reprisals suffered by
10 Plaintiffs in this case a "cause for concern." *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876,
11 916 (2010); *see also id.* at 980-981 (Thomas, J., concurring in part and dissenting in part) (noting
12 the threats, harassment, and reprisals in this case and specifically citing to Plaintiffs' Complaint);
13 *Hollingsworth v. Perry*, ___ U.S. ___, 130 S. Ct. 705, 713 (2010) (using evidence of threats,
14 harassment, and reprisals in California to support stay of broadcasting a trial related to
15 Proposition 8). To delay this case a further two months and further these harms which concern the
16 Supreme Court—a court not normally concerned with the goings-on in a case still in discovery at
17 the District Court level—is prejudicial to Plaintiffs, against whom the threats, harassment, and
18 reprisals noted by the Supreme Court act as a constant chill on their First Amendment rights.⁵

19 "The loss of First Amendment freedoms, even for minimal periods of time, constitute[s]
20 irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). In this case, Plaintiffs have alleged
21 numerous violations of their First Amendment rights. Each day that Plaintiffs are not granted the
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23
24 ⁵ Further, the scheduling order proposed by Defendants proposes that a summary judgment
25 hearing may be left until after the November 2, 2010 election scheduled for California, on which
26 ballot measures may appear. The harms alleged by Plaintiffs regarding California's disclosure
27 levels for all ballot measures may not have a chance to be decided under the proposed scheduling
28 order of Defendants, causing further widespread chill of First Amendment rights.

1 relief they seek, they are harmed by these First Amendment violations. To allow Defendants the
2 discovery they now seek opens Plaintiffs up to two further months of potential threats, harassment
3 and reprisals. In light of Defendants' failure to conduct any discovery for over five months in this
4 case—despite the ongoing possibility of threats, harassment, and reprisals as well as First
5 Amendment deprivations of Plaintiffs—a two month extension of discovery is not only
6 prejudicial, it is potentially life-threatening.

7 **Conclusion**

8 Defendants dragged their heels in beginning discovery in this matter. For over five months,
9 Defendants had the opportunity to begin discovery in this case, and failed to do so even though
10 Plaintiffs continued to suffer ongoing First Amendment harms that drew the “concern” of the
11 U.S. Supreme Court. Had Defendants begun their discovery process in a timely manner, they
12 would not need the two months they now request to conduct this discovery. Plaintiffs should not
13 be punished for Defendants' failure to conduct discovery in a timely manner, and this case should
14 proceed on the original schedule outlined by this Court.

15 Dated this 5th day of May, 2010.

Respectfully submitted,

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1 **Certificate of Service**

2 I, Sarah E. Troupis, am over the age of eighteen years and not a party to the above-captioned
3 action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

4 On May 5, 2010, I electronically filed the document described as Opposition to Motion to
5 Modify Scheduling Order to Extend Deadlines with the Clerk of Court using the CM/ECF system
6 which will send notification of such filing to:

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26 I declare under the penalty of perjury under the laws of the State of Indiana that the above is
27 true and correct. Executed this 5th day of May, 2010.

28 s/ Sarah E. Troupis
Sarah E. Troupis
Counsel for Plaintiffs