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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PROTECTMARRIAGE.COM, et al., Plaintiffs, **v.** **DEBRA BOWEN, SECRETARY OF STATE FOR THE STATE OF CALIFORNIA, et al.,** Defendants.	2:09-cv-00058-MCE-DAD **JOINT STATEMENT RE: DISCOVERY DISAGREEMENT**

Pursuant to Local Rule 251(c), defendants Debra Bowen and Edmund G. Brown Jr., in their official capacities (Defendants), and plaintiffs ProtectMarriage.com, National Organization for Marriage, and National Organization for Marriage California – PAC (Plaintiffs), submit the following joint statement on the discovery disagreement with regard to the first set of interrogatories and first set of requests for production of documents propounded by Defendants.[1]

[1] On May 18, 2009, the Court issued a Pretrial Scheduling Order setting May 14, 2010 as (continued...)

In their first set of interrogatories and requests for production of documents (RFP), Defendants sought information regarding the harassment against supporters of Proposition 8 that Plaintiffs have alleged in this litigation, as well as information about Plaintiffs' collection of that information, their communications with alleged victims, and the impact of disclosure laws on Plaintiffs' operations and finances. In response to those requests, Plaintiffs have stated a number of objections, asserting a privilege based on the First Amendment for some information and otherwise declining to produce any information that Plaintiffs consider "confidential." Plaintiffs have provided a limited range of responsive documents – almost entirely consisting of Plaintiffs' fundraising emails, Plaintiffs' campaign advertisements, public opinion surveys, and angry e-mails sent to Plaintiffs. Plaintiffs also produced partial privilege logs asserting a First Amendment privilege for some documents and designating that other non-privileged documents would not be produced.

DETAILS OF MEET AND CONFER ATTEMPTS

Defendants served their first sets of interrogatories and RFPs on October 30, 2009. On November 30, 2009, Plaintiffs raised multiple objections and claimed a privilege under the First Amendment. Plaintiffs produced no documents in response to the RFPs, and no privilege log with regard to either discovery demand. Thereafter, through multiple telephone conferences and correspondence, the parties have met and conferred in a good-faith attempt to resolve the disagreements set forth in this joint statement.

Specifically, on January 22, 2010, Defendants sent correspondence to Plaintiffs detailing, with specificity, the reasons why Defendants believed Plaintiffs' objections and claim of a First Amendment privilege lacked support. Ex. 1.[2] On February 2, 2010, Defendants and Plaintiffs participated in a conference call in an attempt to resolve their disagreements. At this conference,

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(...continued)
extending all deadlines 60 days. This extension has enabled the parties to schedule Defendants' requested depositions in late May. Therefore, Defendants' do not seek relief in this motion as to the Plaintiff's refusal to produce the deponents prior to the former Pretrial Scheduling Order discovery deadline.

[2] True and correct copies of the relevant documents concerning the discovery disagreement are attached hereto.

Plaintiffs agreed to produce documents responsive to the RFPs, as well as a privilege log, by February 26, 2010. Plaintiffs did not agree to provide any further responses to the interrogatories.

On February 24, 2010, Plaintiffs contacted Defendants and informed them that they would not be able to produce responsive documents by the agreed-upon date. Defendants agreed to allow a rolling production. Over the next five weeks, Plaintiffs ultimately produced some documents apparently responsive to RFPs 1, 2, and 5, but Plaintiffs produced no documents responsive to the remaining thirteen RFPs. Plaintiffs served their final responses and privilege logs on March 23, 2010. Plaintiffs have not produced any documents designated as confidential, except for the privilege logs themselves.[3]

On March 30, 2010, Defendants sent correspondence to Plaintiffs detailing, with specificity, the reasons why Defendants believed Plaintiffs' production was incomplete and inadequate. Ex. 2. Defendants informed Plaintiffs of their intent to proceed with a motion to compel further responses should Plaintiffs fail to further produce. *Ibid.* On April 2, 2010, Plaintiffs sent Defendants correspondence informing them that no further responses to the discovery requests would be forthcoming, and that they would address any concerns in response to a motion to compel. Ex. 3.

NATURE OF ACTION AND RELEVANT FACTUAL DISPUTES

California law subjects committees primarily formed for or against a ballot measure to periodic reporting requirements under California's Political Reform Act. *See* Cal. Gov't Code § 84100 et seq. Political committees must report contributions received of $100 or more, listing the donor name, the date, and amount received. The Act also requires post-election reporting. Through this action, Plaintiffs, representing proponents and various supporters of Proposition 8 (which appeared on the November 2008 statewide ballot), seek to permanently enjoin Defendants from enforcing these disclosure requirements as to them.

Plaintiffs rely on a limited exemption from valid campaign finance disclosure requirements developed by the Supreme Court to protect the ability of discrete, historically persecuted minority

[3] Defendants object to Plaintiffs' designation of the privilege logs as confidential.

parties to engage in political speech. The exception applies, according to the Supreme Court, where a minority party can demonstrate that "the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the [disclosure] requirements cannot be constitutionally applied." *Buckley v. Valeo*, 424 U.S. 1, 71 (1976).

Plaintiffs allege that the state law requiring public disclosure of the names and addresses of campaign donors violates the First Amendment because such disclosure subjects donors to a reasonable likelihood of threats, reprisals or harassment. Plaintiffs support their arguments with allegations, through anonymous declarations and media reports, that contributors and supporters of Proposition 8 have been harassed or intimidated. Defendants deny that Plaintiffs' compliance with the Political Reform Act violates the First Amendment.

Defendants' discovery demands seek evidence the Plaintiffs have that support their allegations in the Third Amended Complaint.

DEFENDANTS' CONTENTIONS REGARDING DISCOVERY DISPUTES

I. PLAINTIFFS' CLAIM OF FIRST AMENDMENT PRIVILEGE

In response to each and every interrogatory and RFP, Plaintiffs claim a First Amendment privilege. Exs. 4-7. Defendants deny that Plaintiffs can avoid answering the interrogatories in full and avoid producing all responsive documents based upon this ground.

A. Defendants' Contention Regarding Plaintiffs' Claim of First Amendment Privilege.

Based upon their assertion of a nonspecific First Amendment privilege, Plaintiffs have refused to provide complete answers to the interrogatories and have produced little more than publicly-disseminated campaign mailers in response to Defendants' comprehensive RFPs. Plaintiffs' sweeping privilege assertions are inconsistent with recent Ninth Circuit precedent holding that the claim of a qualified First Amendment associational privilege is limited to a *core group* of persons and only applies to *private*, *internal* communications regarding formulation of strategy and messages. *See Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). Here, Plaintiffs' privilege assertions should be rejected for at least three reasons. First, Plaintiffs have not identified the core group of persons who may be entitled to assert the privilege. Second,

Plaintiffs have not made a prima facie showing that complying with the discovery requests would subject anyone to threats, harassment or reprisals. Third, Plaintiffs assert the privilege over documents about fundraising and harassment, which are highly relevant to claims and defenses in this matter.

As this Court may be aware, one of the plaintiffs in this litigation is also presently a party to litigation in the U. S. District Court for the Northern District of California challenging the constitutionality of Proposition 8 - *Perry v. Schwarzenegger*, C09-2292 VRW. During the course of that litigation, Plaintiffs became involved in a discovery dispute not unlike the present dispute. The Ninth Circuit, in reviewing a district court discovery order compelling Plaintiffs to produce documents, explained that the First Amendment privilege is limited to certain internal communications among a core group of campaign strategists:

> Our holding is therefore limited to communications among the core group of persons engaged in the formulation of campaign strategy and messages. We leave it to the district court, which is best acquainted with the facts of this case and the structure of the "Yes on 8" campaign, to determine the persons who logically should be included in light of the First Amendment associational interests the privilege is intended to protect.
>
> Our holding is also limited *to private, internal* communications regarding *formulation of strategy and messages*. It certainly does not apply to documents or messages conveyed to the electorate at large, discrete groups of voters or individual voters for purposes such as persuasion, recruitment or motivation – activities beyond the formulation of strategy and messages. Similarly, communications soliciting active support from actual or potential Proposition 8 supporters are unrelated to the formulation of strategy and messages. The district court may require the parties to redact the names of individuals with respect to these sorts of communications, but the contents of such communications are not privileged under our holding.
>
> By way of illustration, plaintiffs produced at oral argument a letter from Bill Tam, one of Proposition 8's official proponents, urging "friends" to "really work to pass Prop 8." A copy of the letter is appended to this opinion. Mr. Tam's letter is plainly not a private, internal formulation of strategy or message and is thus far afield from the kinds of communications the First Amendment privilege protects.

Perry v. Schwarzenegger, 591 F.3d at 1165, n.12 [emphasis in original].

In this case, Plaintiffs have completely failed to identify the "core group" of individuals whose communications could be subject to this privilege. Defendants specifically requested such a list, but received nothing in return. Instead, Plaintiffs have simply chosen to produce little more than fundraising mailers in response to Defendants' narrowly-drawn discovery demands.

Without identification of this "core group," neither this Court nor Defendants have a means by which to assess the claimed privilege.

But even assuming for argument's sake that this privilege applied to Plaintiffs' responses to the discovery demands, Plaintiffs cannot make the required prima facie showing required in the Ninth Circuit to succeed on their claimed First Amendment privilege:

> In this circuit, a claim of First Amendment privilege is subject to a two-part framework. The party asserting the privilege "must demonstrate . . . a 'prima facie showing of arguable first amendment infringement.'" *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). "This prima facie showing requires appellants to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id.* at 350.[fn] "If appellants can make the necessary prima facie showing, the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." *Id.*; see also *Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1459-61 (9th Cir. 1991) (same). More specifically, the second step of the analysis is meant to make discovery that impacts First Amendment associational rights available only after careful consideration of the need for such discovery, but not necessarily to preclude it. The question is therefore whether the party seeking the discovery "has demonstrated an interest in obtaining the disclosures it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association." *NAACP*, 357 U.S. at 463.

Perry, 591 F.3d at 1160-61 [footnote omitted].

Notably, in the instant case, Assigned District Judge England has already opined on the factors identified by the Ninth Circuit in *Perry*. In its order denying Plaintiffs' Motion for Preliminary Injunction, the District Court issued a 61-page order discussing the very factors noted by the Ninth Circuit above. *See* Docket No. 88, Mem. & Order on Prelim. Inj., at p. 35. Many of the Court's findings are relevant here.

Most importantly, the basis of Plaintiffs' Motion for Preliminary Injunction was that disclosure has and will continue to subject them to threats, harassment, and reprisals, and thus chills their right to speech and association in violation of the First Amendment. *See* Plfs Mem. in Support of Motion for Prelim. Inj., Docket No. 17. These same allegations form the basis of Plaintiffs' present objections to the discovery demands. In denying the preliminary injunction, this Court found that Plaintiffs "have evidenced a very minimal effect on their ability to sustain

their movement, and . . . are unable to produce evidence of pervasive animosity even remotely reaching the level of that present in *Brown* [*v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982)]." (Order Denying Motion for Prelim. Inj., Docket No. 88 at 33.)

This Court concluded that "[t]he facts in the current case could not be more distinguishable from those in which successful [First Amendment] challenges have been brought." (*Id.* at 36.) It thus follows that in the context of this discovery dispute, Plaintiffs cannot make the required prima facie showing that responding to the discovery requests will subject them or some unidentified third parties to "(1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Perry*, *supra*, at 25-26, quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 350 (9th Cir. 1988).

Even if Plaintiffs could somehow make the requisite *prima facie* showing, Defendants would still be entitled to the requested discovery because it is highly relevant to their defense of this action. *See Perry*, 591 F.3d at 1161. Plaintiffs' case depends upon their ability to demonstrate that California's disclosure laws subject their supporters to a reasonable likelihood of threats, harassment or reprisals; that Plaintiffs are a minor party or fringe organization eligible for as-applied exceptions to campaign disclosure laws; and that the State's disclosure laws inhibit the speech of Plaintiffs' supporters in a way that the Constitution does not permit. *See Buckley*, 424 U.S. 1; *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982). Defendants' first sets of interrogatories and RFPs were designed to elicit information relevant to that question. For example, Defendants seek discovery on fundraising by Plaintiffs (Ex. 4 [Interrogs. Nos. 1-2]), their claims of harassment of supporters of Proposition 8 (Interrogs. Nos. 3-6), and their claims that disclosure has a chilling effect on supporters of Proposition 8 (Interrogs. Nos. 7-15).

But Plaintiffs have produced almost no information regarding these claims. Indeed, aside from anonymous declarations, e-mails sent to the campaign, and descriptions in fundraising appeals, Plaintiffs have produced no documents to substantiate their claims that their supporters have been or will be subject to harassment, reprisals or threats. Plaintiffs have offered no

evidence to support their assertion that their compliance with the Political Reform Act has adversely impacted their ability to sustain their movement, and Plaintiffs have produced no evidence of pervasive animosity toward them anywhere near the level of that present in *Brown*. Plaintiffs also have produced no evidence that their financial backing is so tenuous as to render them susceptible to a demonstrable fall-off in contributions, or that the seven million individuals who voted in favor of Proposition 8 can be considered a "fringe organization" whose beliefs would be considered unpopular or unorthodox for purposes of applying the limited public disclosure exception. Moreover, Plaintiffs have produced nothing to demonstrate that their contributors intend to retreat from the marketplace of ideas such that available discourse regarding same-sex marriage will be materially diminished. And Plaintiffs have produced no evidence contradicting Defendants' assertion that the Political Reform Act's disclosure requirements are narrowly tailored to serve compelling governmental interests. Defendants' discovery demands seek nothing more than the evidence Plaintiffs have that supports their allegations in the Third Amended Complaint. Plaintiffs' response is woefully inadequate, if not bad faith.

In the end, Plaintiffs claim of a First Amendment privilege fails here in the discovery context for the same reasons this Court found that Plaintiffs were not entitled to a preliminary injunction – disclosure will not violate Plaintiffs' First Amendment rights.

B. Defendants' Contention Regarding Plaintiffs' Claim of Confidentiality.

ProtectMarriage.com's response to Interrogatory No. 1 states: "ProtectMarriage has heard from approximately 500 individuals who, in confidence, told ProtectMarriage.com about the various forms of threats, harassment, and reprisals to which they were subject because of their support for Proposition 8 and a traditional definition of marriage. Almost all of these individuals contacted ProtectMarriage.com via e-mail." Ex. 4 at 4:14-20. The response also states that: "I [Ron Prentice] have heard from approximately fifty individuals who, in confidence told me about the various forms of threats, harassment, and reprisals to which they were subject because of their support for Proposition 8 and a traditional definition of marriage. The majority of these individuals contacted me via e-mail..." *Id.* at 4:11-16. ProtectMarriage.com has not produced

any of these communications, and the privilege log for ProtectMarriage.com lists only approximately 41 documents regarding a "specific instance of harassment."[4] For most of these 41 documents, the privilege log simply indicates DNP (do not produce) without asserting a privilege or providing any additional information about the document.

NOM California's Interrogatory Response No. 1 similarly states that hundreds of communications regarding threats, harassment and reprisals have been made "in confidence." Ex. 5 at 4:25-28. NOM has not produced any of these communications and its privilege log does not list any such documents.

In Protectmarriage.com and NOM-California's Interrogatory Response No. 2, Plaintiffs assert that specific individuals outside of ProtectMarriage and NOM-California may have knowledge of threats, harassment and reprisals, which suggests that Plaintiffs may have corresponded with these individuals about this topic. Ex. 4 at 5:8-24; Ex. 5 at 5:15-20 Plaintiffs have not produced any such correspondence.

Plaintiffs assert in their interrogatory responses that, aside from anonymous declarations, they will not produce e-mails or any documentation about allegations of threats, harassment and reprisals because they consider that information to be confidential. Ex. 4 at 3:14-17; Ex. 5 at 3:15-19.

There is no general "confidentiality" privilege supporting Plaintiffs' failure to respond to Defendants' discovery requests. Self-serving confidentiality assertions are not a proper basis for refusing to respond to discovery requests. But it appears that Plaintiffs have failed to either log or produce a number of purportedly confidential documents. They have also listed some "confidential" documents on the ProtectMarriage.com privilege log but failed to assert a privilege over those documents or describe them with specificity.

Federal Rule of Civil Procedure 26(b)(5) requires a party to claim a privilege expressly and describe the nature of the documents not produced in a manner that will enable other parties to

[4] Plaintiffs have designated their privilege logs "Highly Confidential; Attorneys Eyes Only." Although Defendants object to the confidential designation on the privilege logs, Defendants are not attaching the privilege logs as exhibits here because of the existing Protective Order in the case. *See* Docket No. 192.

assess the applicability of the privilege or protection, without revealing information itself privileged or protected. Plaintiffs have completely failed to comply with this mandatory rule.

With the possible exception of 41 documents listed on the ProtectMarriage.com privilege log, Plaintiffs' privilege logs do not reference *any* documents regarding correspondence between Plaintiffs and individuals who allegedly suffered harassment, threats or reprisals as a result of supporting Proposition 8. This lack of documentation is striking for two reasons. First, Plaintiffs allege in their interrogatory responses that they received hundreds of e-mails about threats, harassment and reprisals, and Defendants' discovery specifically requested production of any such communication. Second, Plaintiffs previously filed 58 Doe declarations in this case and have already provided Defendants with the identities of these declarants. Plaintiffs cannot now claim that information about these individuals is somehow privileged.

Even if confidentiality were warranted for some of the documents Plaintiffs have not produced, which Defendants do not concede, the Protective Order previously entered by Assigned District Judge England offers a means by which Plaintiffs may seek to designate the documents as confidential. *See* Docket No. 192. Plaintiffs have chosen not to pursue this mechanism, however, and there is no basis for simply refusing to provide non-privileged documents that are plainly responsive to Defendants' requests.

C. Defendants' Contentions Regarding Plaintiffs' Failure to Produce Specific Categories of Requested Documents.

Plaintiffs have produced no documents in the following categories: financial statements (RFP Nos. 14-15 [Exs. 6 & 7]); many communications concerning fundraising, including communications with No on 8 supporters (RFP Nos. 1, 10;)[5]; personal communications with individual donors or potential donors related to fundraising (RFP Nos. 1- 2); records or documentation concerning responses to fundraising efforts (RFP Nos. 1-2, 7-8); communications with individuals concerning allegations of threats, harassment or reprisals, including responses to

[5] Defendants have been provided with one such piece of correspondence sent out by ProtectMarriage.com to Jim Abbott, a copy of which is attached to the correspondence in Exhibit 2. Obviously, Plaintiffs must be in possession of such responsive documents.

a February 2009 letter produced by Plaintiffs (RFP Nos. 3-6, 8); communications with the numerous Doe declarants concerning allegations of threats, harassment or reprisals (RFP Nos. 6, 8); records or documentation counting, tracking, summarizing, or concerning allegations of threats, harassment or reprisals (RFP No. 5).

Plaintiffs have provided no justification whatsoever for failing to produce any documentation in the above-noted categories. Plaintiffs' sole response to Defendants' meet and confer letter detailing such failure is as follows: "We have provided you with all documents that we believe are responsive to your requests, and are not covered by an applicable privilege or otherwise not subject to production." Ex. 4.

This discovery dispute is not complex. In its Order Denying Preliminary Injunction (Docket No. 88 at 35-36) this court has pointed out in detail where and how Plaintiffs have failed to support their fundamental claims with factual evidence. If Plaintiffs have access to heretofore undisclosed evidence supporting their allegations, they cannot withhold it in discovery, only to attempt to produce it when the parties file their dispositive motions.

Defendants are undoubtedly entitled to this discovery. As this Court already recognized, "it would be arguably irresponsible for the Court to prematurely permit the parties to pursue a final determination on the merits of the instant controversy without a fully developed record. The Court is satisfied that Defendants are diligently seeking the necessary discovery and that such discovery is relevant to their Opposition to Plaintiffs' MSJ." (Mem. & Order on MSJ and R. 56(f) Motion, p. 10, Docket No. 189 [emphasis added].)

II. DEFENDANTS' REQUEST FOR MONETARY SANCTIONS

Pursuant to Federal Rule of Civil Procedure 37(a)(5)(A), Defendants contend that the Court must award reasonable expenses, including attorneys fees, against Plaintiffs for their failure to comply with discovery requests and failure to make deponents available in a timely manner. Defendants request that this Court award reasonable expenses and attorney fees in an amount to be determined after giving Plaintiffs an opportunity to be heard.

PLAINTIFFS' CONTENTIONS REGARDING DISCOVERY DISPUTES

I. DETAILS OF MEET AND CONFER ATTEMPTS

Plaintiffs offer the following additions to the details of meet and confer attempts set forth by Defendants. On May 18, 2009, this Court issued a Pretrial Scheduling Order. The order set forth a discovery cut-off of May 14, 2010.[6] (Dkt. 96.) On October 30, 2009, approximately six months after entry of the pretrial scheduling order and half-way through the non-expert discovery period, Defendants served their *first* discovery on Plaintiffs. Plaintiffs responded on November 30, 2009.

Defendants did not object to Plaintiffs' discovery responses until January 22, 2010, nearly two months *after* Plaintiffs' had offered their responses. On February 2, 2010, counsel participated in a conference call in an attempt to resolve their disagreements. The conference resulted in an agreement to produce all non-privileged documents and a privilege log by February 26, 2010. During the February 2 conference, counsel for Plaintiffs offered to make Ron Prentice, Executive Director of ProtecMarriage.com, and Brian Brown, Executive Director of National Organization for Marriage, available for depositions. Plaintiffs agreed to produce further responses to the interrogatories served on October 30, 2009 during the February 2 conference.

On February 24, 2010, Plaintiffs requested an extension of the discovery deadline agreed upon at the February 2 conference. Defendants agreed to allow rolling production. Plaintiffs served supplemental interrogatory answers on March 1, 2010 via email, and produced all requested documents not subject to applicable privileges and discovery protections by March 23, 2010. Approximately one week later, Defendants sent a letter objecting to the adequacy of Plaintiffs' amended discovery responses. On April 2, 2010, Plaintiffs indicated that their

[6] On June 3, 2009, Plaintiffs filed a Motion for Summary Judgment. (Dkt. 110.) Defendants request a continuance pursuant to Rule 56(f) on June 10, 2009. (*Id.* at 2.) Defendants stated a continuance until December 18, 2009 "would likely provide sufficient time for the State Defendants to complete discovery and otherwise obtain facts essential to justify their position to [the motion for summary judgment.]" (Id. at 2.) On June 24, 2009, the Court granted Defendants' 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.)

responses are adequate and complete, and that no further discovery responses would be forthcoming.

II. NATURE OF ACTION AND RELEVANT FACTUAL DISPUTES

Plaintiffs ProtectMarriage.com, NOM-California, and a John Doe filed a complaint on January 7, 2009, alleging various Political Reform Act of 1974 ("PRA") provisions violate the First and Fourteenth Amendments to the United States Constitution. (Compl., Dkt. 1.) On January 9, 2009, Plaintiffs filed their First Amended Complaint,[7] (1st Am. Compl., Dkt. 10), along with a motion for preliminary injunction. (Mot. for Prelim. Inj., Dkt. 16.) The Court denied Plaintiffs' motion for preliminary injunction on January 30, 2009. (Mem. & Order, Dkt. 88.) On May 28, 2009, Plaintiffs filed their Third Amended Complaint, adding Plaintiff NOM-California PAC, and filed a motion for summary judgment on all counts set forth in the Third Amended Complaint. (Mot. for Summ. J., Dkt. 110.) Pursuant to FRCP 56(f), the motion for summary judgment was denied without prejudice on June 24, 2009, to allow Defendants an opportunity to conduct discovery. (Mem. & Order, Dkt. 189.)

Plaintiffs' Third Amended Complaint consists of four counts. Specifically, Plaintiffs allege that:

(1) The Political Reform Act of 1974, Cal. Gov't Code §§ 81000 *et seq.* ("PRA"), is unconstitutional as applied to Plaintiffs because compliance with the PRA will expose Plaintiffs to a reasonable probability of threats, harassment, and reprisals.

(2) PRA's reporting requirement of the names, addresses, occupations, and employers of contributors of $100 or more violates the First and Fourteenth Amendments to the United States Constitution.

(3) PRA's reporting requirements after a ballot measure election violate the First and Fourteenth Amendments to the United States Constitution.

[7] The First Amended Complaint added Plaintiff John Doe #1, on behalf of the proposed class of major donors. The Court certified the Class of Major Donors on August 28, 2009. (Mem. & Order, Dkt. 199.) Plaintiffs filed a Second Amended Complaint on January 22, 2009, substituting Defendant Herrera for Defendant Teichert. (2d Am. Compl., Dkt. 68.)

(4) PRA violates the First and Fourteenth Amendment to the United States Constitution because it lacks a mechanism for purging public reports related to a ballot measure after the election to which they relate has occurred.

In support of their Motion for Summary Judgment, Plaintiffs submitted fifty-eight declarations setting forth incidents of threats, harassment, and reprisals directed at supporters of a traditional definition of marriage.[8] (*See* Dkt. 32-40, 45, 113-162.) The Court considered only the first nine declarations when it denied Plaintiffs' motion for preliminary injunction in January 2009. (Dkt. 88 at 5-9.)

Plaintiffs also submitted copies of newspaper articles setting forth examples of retaliation against traditional-marriage supporters in California and across the country. (*See* Dkt. 19.) The threats, harassment, and reprisals set forth in the declarations and news reports include death threats, property damage, harassing phone calls and emails, and economic retaliation.

The Supreme Court cited Plaintiffs' declarations and other evidence of harassment directed at Proposition 8 supporters in two recent opinions, calling the substantial evidence of threats, harassment, and reprisals "cause for concern." *Citizens United v. FEC*, __ U.S. __, 130 S. Ct. 876, 916 (2010); *see also Hollingsworth v. Perry*, __ U.S. __, 130 S. Ct. 705, 707 (2010).

The Supreme Court's concern is appropriate. Websites combined campaign-report information with publicly available contact information enabling Proposition 8 opponents to harass donors at home and work. *See, e.g.*, www.californiansagainsthate.com; www.eightmaps.com. Proposition 8 supporters became death threat targets.[9] Plaintiffs have set out extensive examples of the threats, harassment, and reprisals directed at supporters of Proposition 8 and traditional marriage throughout the course of this case. (*See, e.g.*, Dkt. 19 (declaration setting forth numerous examples of publicly reported incidents of threats, harassment, and reprisals); Dkt. 32-45 (John Doe declarations of individuals subject to threats,

[8] Summaries of the declarations are available as appendices to Plaintiffs' statement of undisputed facts, filed on June 3, 2009. (Stmt. of Undisputed Facts, Dkt. 112.)

[9] *See* Andres Araiza, *Prop 8 Threat: Fresno Police Close to Arrest*, ABC-30 (KFSN-TV), Oct. 31, 2008, http://abclocal.go.com/kfsn/story?section=news/local&id=6479879 (death threat directed at Fresno mayor for support of Proposition 8.

harassment, and reprisals); Dkt. 113-162 (same).) The result of these extensive reports of threats, harassment, and reprisals is that individuals are intimidated from engaging in political speech.

Through their discovery requests, the State seeks to obtain information including, but not limited to, individuals who were targeted for fundraising efforts, information on individuals who were targeted for threats, harassment, and reprisals yet unwilling to publicly come forward with that information, information on individuals who feared being targeted for threats, harassment, and reprisals yet were unwilling to come forward publicly with that information, Plaintiffs' communications with these individuals, and individuals who donated beneath the disclosure threshold for California. (*See generally* Attorney General's Demands for Production, Inspection, and Copying of Documents). The State also seeks information on the private financial affairs of political organizations, such as information on donors who donated beneath California's disclosure threshold. (*See, e.g.*, Attorney General's First Demand for Production, Inspection, and Copying of Documents Requests ¶¶ 13-15.) As will be set forth below, this requested information is irrelevant, and even if relevant, would be protected from discovery by the First Amendment and applicable case law.

III. ARGUMENT

Rule 26 of the Federal Rules of Civil Procedure contains three limitations on discovery. First, the discovery must be "relevant to any party's claim or defense" and "reasonably calculated to lead to the discovery of admissible evidence." Second, the material must not be subject to an applicable privilege. Third, the production sought may not be overly burdensome. FRCP 26(b)(1) & (b)(2)(C)(iii).

In addition to the three Rule 26 limitations, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469, 127 S. Ct. 2652, 2666 (2007) ("*WRTL-II*"), recognized that in cases involving campaign-finance regulation of expressive-association rights "extensive discovery" including "ha[ving] to turn over many documents related to . . . operations, plans, and finances[,] . . . constitutes a severe burden on political speech," *id.* at 468 n.5, 127 S. Ct. at 2666 n.5, so that there must be "minimal if any discovery" in such cases. *Id.* at 469, 127 S. Ct. at 2666.

Moreover, this is not an enforcement action, but a case asserting First Amendment rights, so citizen groups asserting First Amendment rights of privacy and freedom from burden in their expressive association may not be penalized through discovery for asserting their rights. The discovery sought by Defendants' falls under the substantial burden the Supreme Court stated must be avoided in cases involving the First Amendment. *Id.*

The discovery propounded by Defendants is a fishing expedition for evidence that is irrelevant to any claim or defense presented in Plaintiffs' Third Amended Complaint. Moreover, many of the items are also protected by the First Amendment from discovery. Thus, Defendants' motion to compel should be denied in its entirety.

A. Defendants' Discovery is Not Relevant to Counts II-IV of Plaintiffs' Third Amended Complaint

In Counts II-IV of their Third Amended Complaint, Plaintiffs allege that various compelled disclosure provisions of the PRA violate the First and Fourteenth Amendment. (3d Am. Compl., Dkt. 106, 17-28.) The challenges are facial, the issues presented are legal as opposed to factual, and the claims are not dependent on the evidence of threats, harassment, and reprisals. The resolution of the claims presented in Counts II-IV cannot sustain the burdensome discovery Defendants are attempting to conduct.

The provisions of PRA challenged in Counts II-IV are compelled disclosure provisions. Compelled disclosure provisions undeniably impinge on the core freedoms protected by the First Amendment.[10] *Davis v. FEC*, _ U.S. _, 128 S. Ct. 2759, 2774-75 (2008). Because compelled disclosure provisions impose severe burdens on core political speech, they are subject to "exacting scrutiny. . . . [T]here must be a 'relevant correlation' or 'substantial relation' between

[10] In the context of a ballot measure, the First Amendment protections may even be greater, because the First Amendment ensures that a collection of individuals "can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. Berkley*, 454 U.S. 290, 294, 102 S. Ct. 434, 436 (1981). Ballot measure campaigns are incredibly expensive, increasing the need for associational protections. *See* Center for Governmental Studies, *Democracy by Initiative: Shaping California's Fourth Branch of Government*, 282 (2d ed. 2008) (*available at* http://cgs.org/images/publications/cgs_dbi_full_book_f.pdf) (substantial financial resources needed to circulate and campaign for ballot measure).

the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64, 96 S. Ct. at 656.

Under exacting scrutiny, "California bears the burden of proving that the PRA provisions at issue are '(1) narrowly tailored, to serve (2) a compelling state interest.'"[11] *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75, 122 S. Ct. 2528, 2534 (2002)) ("*CPLC-II*"). Therefore, with respect to Counts II-IV, the entire inquiry is focused on the asserted state interests and the tailoring of the challenged PRA provisions to those interests.

Defendants served substantial discovery, purportedly to assess the extent of the burden of PRA's compelled disclosure provisions. (*See, e.g.*, Demand for Production of Documents, No. 1-2, 10-15.) As set forth above, this information is irrelevant to the claims asserted in Counts II-IV. Plaintiffs are entitled to a permanent injunction unless Defendants demonstrate the challenged provisions survive exacting scrutiny. *CPLC-II*, 507 F.3d at 1178. The extent of the burden is not at issue because the Supreme Court has already held that compelled disclosure provisions impose substantial burdens and are subject to exacting scrutiny. *Davis*, 128 S. Ct. at 2774-75; *Buckley*, 424 U.S. at 64, 96 S. Ct. 656. Under this standard there is no balancing of the burdens against the state's asserted interests in disclosure—they are unconstitutional unless they are narrowly tailored to serve compelling state interests.

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[11] There is some debate about whether "exacting scrutiny" is equivalent to "strict scrutiny." *See, e.g.*, *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009) (Montana compelled disclosure statute unconstitutional under any standard of review). *See also Cal. Council Pro-Life , Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) (applying strict scrutiny); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 787-88 (9th Cir. 2006) (assuming without deciding that strict scrutiny applies); and *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979, 992-93 (9th Cir. 2004) (applying strict scrutiny).

The Court need not answer this question to resolve the discovery dispute. Under any standard of review, the burden is on Defendants to prove the compelled disclosure provisions are designed to address a valid state interest. Whether the appropriate standard is strict scrutiny (i.e., narrowly tailored to serve compelling state interest), or some lesser standard (i.e., substantial relation between government interest and information sought) does not affect the scope of permissible discovery. Under either standard of review, evidence of the burdens imposed by the compelled disclosure provisions is irrelevant because the Supreme Court has already ruled that the burdens of compelled disclosure are substantial. *Davis*, 128 S. Ct. at 2774-75.

The focus on the asserted state interests and the tailoring to those interests is consistent with the command of "minimal, if any" discovery to resolve First Amendment disputes. *WRTL-II*, 551 U.S. at 469, 127 S. Ct. at 2666. The standard allows litigants to assert their First Amendment rights without incurring additional First Amendment injuries. Defendants' attempted discovery requires a party asserting its First Amendment rights to check its rights at the courthouse door.

Thus, with respect to Counts II-IV of Plaintiffs' Third Amended Complaint, Defendants discovery is improper under FRCP 26(b)(1). As set forth below, the discovery is also improper with respect to Count I, and many of the requested documents are also protected from discovery by the First Amendment.

B. The Reasonable Probability Test Does Not Contemplate the Broad Discovery Sought by Defendants.

1. The Standards Applicable to the Reasonable Probability Test and the Other Claims Presented in Plaintiffs' Third Amended Complaint.

Count I of Plaintiffs' Third Amended Complaint is an as applied challenge to PRA. (3d Am. Compl., Dkt. 106, 17-21.) Plaintiffs seek an exemption from the reporting requirements on the ground that compliance will subject contributors to a reasonable probability of threats, harassment, and reprisals.[12] *See Buckley*, 424 U.S. at 68-74, 96 S. Ct. 658-61. As set forth below, Defendants' attempted discovery directed at Count I is also improper.

The Supreme Court articulated the reasonable probability test in *Buckley*.[13] 424 U.S. at 68-74, 96 S. Ct. 658-61. Concluding that reasonable compelled financial disclosure requirements generally survive First Amendment scrutiny,[14] *id.* at 68, 96 S. Ct. 658, the Supreme Court turned

[12] This exception will be referred to throughout as the "reasonable-probability test."

[13] The reasonable-probability test builds upon the Court's analysis in *NAACP v. Alabama*. 357 U.S. 449 (1958).

[14] The Supreme Court has not decided whether the government can compel the disclosure of the identity of small campaign contributors. *See Buckley*, 424 U.S. at 84, 96 S. Ct. 665-66 (declining to decide whether government can compel disclosure of contributors of less than $100 (in 1976 dollars)).

In *Canyon Ferry*, the Ninth Circuit ruled there is a threshold where the information gleaned from knowing the identity of a small donor is so insubstantial that compelled disclosure of the donor's identity is unconstitutional. *Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009). However, the Ninth Circuit declined to establish the threshold and held only that *de minimis* (first dollar) reporting is clearly below the threshold. (continued...)

to a request to create an exception from reporting requirements for minor political parties. *Id.* at 72, 96 S. Ct. at 660. Refusing to create a categorical exception for minor political parties, the Supreme Court instead created the reasonable-probability test. *Id.* at 72-74, 96 S. Ct. at 660-61. The test states that *any* party is entitled to a reporting exception if it demonstrates that compelled disclosure creates a reasonable probability of threats, harassment, and reprisals. *Id.*

The reasonable-probability test requires a court to answer a single question: Is there a reasonable probability that compelled disclosure of a party's contributors' names will subject the contributors to threats, harassment, or reprisals from *either* government officials *or* private parties?" *McConnell v. FEC*, 540 U.S. 93, 198, 124 S. Ct. 619, 692 (2003) (citation omitted) (emphases added). The Supreme Court reaffirmed its commitment to this simple test in *Citizens United v. FEC*, __ U.S. __, 130 S. Ct. 876, 914 (2010).

Importantly, the Supreme Court's decision in *Citizens United* occurred after the denial of Plaintiffs' motion for a preliminary injunction. Discussing the continued viability of the reasonable-probability test, the Supreme Court cited evidence of threats, harassment, and reprisals introduced in this case, calling it "cause for concern." *Id.* at 916; *id.* at 980-81 (Thomas, J., concurring in part and dissenting in part) (citing to Plaintiffs' complaint in this case). *See also*, *Hollingsworth v. Perry*, 130 S.Ct. 705 (2010) (blocking broadcast of Prop. 8 trial in N.D. Cal. and citing evidence of harassment introduced in this case).

A party seeking an exception from reporting requirements pursuant to the reasonable-probability test must be allowed sufficient flexibility of proof. *Buckley*, 424 U.S. at 74, 96 S. Ct. at 661.. The flexibility is required because few "witnesses too fearful to contribute" will be willing to come forward and testify about their fear. *Buckley*, 424 U.S. at 73-74, 96 S. Ct. at 661. The First Amendment requires that the case involve "minimal, if any, discovery." *WRTL-II*, 551 U.S. at 469, 127 S. Ct. at 2666. And the Supreme Court has stated that as-applied First

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(...continued)
Id. Even in *Canyon Ferry*, the focus was on the asserted state interests, and the statute's tailoring, not the extent of the burden created by the statute.

Count II asks this Court to decide the questions left open in *Buckley* and *Canyon Ferry*: May the government compel disclosure of contributions of less than $100, and must the government adjust the threshold for inflation?

Amendment challenges must be "objective," and "eschew the open-ended rough-and-tumble of factors which invites complex argument in a trial court and a virtually inevitable appeal." *Id.* at 469, 127 S. Ct. 2667. Indeed, Plaintiffs are now sixteen months removed from the filing of their complaint. As each day passes, individuals identified through PRA reports remain exposed to a reasonable probability of threats, harassment, and reprisals. (*See* Decl. of John Doe. #54, Dkt. 151.)

Accordingly, the First Amendment, the reasonable-probability test, and the Supreme Court's mandate of sufficient flexibility of proof, govern the quantum and quality of evidence required to obtain a reporting exception. The Supreme Court has set forth five requirements on the quantum and quality of evidence required to meet the reasonable-probability test that are applicable here. Each must be considered to determine whether Defendants attempted discovery is appropriate.

First, the Supreme Court has rejected the notion that a causal link must be established between public disclosure and the threats, harassment, and reprisals. *Buckley*, 424 U.S. at 74, 96 S. Ct. at 661. ("A strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought would make the task even more difficult.").[15] Defendants' discovery, directed at testing the causal link, evidences a misunderstanding of the twin goals of the reasonable probability test—protecting actual *and* prospective contributors from the chill on First Amendment activity when a reasonable probability of threats, harassment, and reprisals exists. The protection of both is necessary to prevent intimidation from chilling protected First Amendment activity. Thus, any evidence directed at the causal link between disclosure and harassment is not necessary or relevant to the claim presented in Count I.

[15]The Second Circuit provides a helpful application of the reasonable-probability test in *FEC v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), in which it, *inter alia*, makes clear that those seeking exemption have no burden to prove "harassment will certainly follow compelled disclosure" because "breathing space" is required in the First Amendment context. *Id.* at 421.

The second "sufficient flexibility" requirement allows an organization to rely on evidence of threats, harassment, or reprisals directed at other individuals and organizations holding similar views. *Buckley*, 424 U.S. at 74, 96 S. Ct. at 661. The focus is on the political environment in which disclosure is about to occur. *See id.* ("A patter of threats or specific manifestations of public hostility may be sufficient."). If other individuals supporting traditional marriage have been subjected to threats, harassment, and reprisals for espousing their views on marriage, then it is reasonable for potential contributors to fear similar retaliation if their identities are disclosed. The process is not adversarial because the focus is on the impact such threats, harassment, and reprisals have on potential contributors, not on the actual incidents that have occurred.

Thus, in *Averill v. City of Seattle*, the court granted an exemption to a specific candidate's campaign committee primarily upon evidence of threats and harassment directed at the Freedom Socialist Party and Radical Women generally, rather than incidents involving those bringing suit. 325 F. Supp. 2d 1173, 1175 (W.D. Wash. 2004). Likewise, the Socialist Workers Party continues to renew its federal exemption from reporting requirements by simply filing an application with the FEC that sets forth the harassment directed individuals associated with the party. *See, e.g.*, FEC Advisory Opinion 2003-02 (FEC reporting exemption granted to Socialist Workers Party). Again, the evidence consists primarily of newspaper articles and affidavits of party officials.

Plaintiffs have met their burden of proof once the court is convinced that the assumption about the possibility of future harassment is reasonable. As even the Supreme Court has taken note of the events occurring in California and called the evidence specifically presented in this case a "cause for concern," that burden has been met by Plaintiffs. *Citizens United*, 130 S. Ct. at 916.

Third, the reasonable-probability test does not require threats, harassment, or reprisals to be substantial or severe, but simply that they exist. The test is one of probability, making quantity a logical criterion. However, the nature of the claim makes it difficult to rely solely on the number of instances of threats, harassment, and reprisals that have occurred. As the Court recognized in *Buckley*, plaintiffs face a daunting task in trying to find witness who are "too fearful to contribute but not too fearful to testify about their fear." 424 U.S. at 74, 96 S. Ct. at 661; *see also*

Hollingsworth v. Perry, __ U.S. __, 130 S. Ct. 705, 712-13 (2010) (noting difficulty of obtaining witnesses in context of Proposition 8). The fear may be based on relatively few but serious incidents of retaliation, like death threats, or, it may be based on more modest but widespread retaliation, like harassing phone calls and emails. Provided that the evidence establishes a reasonable probability of threats, harassment, and reprisals, an exception is warranted.

Fourth, while *Buckley* and *Brown* make references to "minor parties," the reasonable-probability test is available to all. The minor party language results from a request for a blanket exemption for minor political parties. *Buckley*, 424 U.S. at 72, 96 S. Ct. at 660. The Supreme Court has refused to create a categorical exception, ruling that minor political parties, like everyone else, must meet the requirements of the reasonable probability test to obtain a reporting exception.[16] *See Buckley*, 424 U.S. at 68-74, 96 S. Ct. at 658-61.

Indeed, in *McConnell v. FEC*, the Court expressly affirmed the analysis and holding of the district court, which applied the reasonable-probability test to entities that were, by no stretch of the imagination, minor parties, or even political parties at all. *McConnell v. FEC*, 251 F. Supp. 2d 176, 245-47 (D.D.C. 2003) (reasonable-probability test applied to Chamber of Commerce coalition, American Builders and Contractors, Associated General Contractors of America, American Civil Liberties Union, and National Rifle Association). The exemption has also been applied in non-partisan elections. *McArthur v. Smith*, 716 F. Supp. 592, 594 (S.D. Fla. 1989). And the Supreme Court's recent discussions about the reasonable-probability test confirm the

[16] "The First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms." *Bellotti*, 435 U.S. at 802, 98 S. Ct. at 1429 (Burger, J., concurring). As the *Buckley* court put it, age, size, and political success, are all poor factors upon which to create a blanket exemption. *Buckley*, 424 U.S. at 73, 96 S. Ct. at 660. The Court explained that some "long-established parties are winners—some are consistent losers," and sometimes a new party "may garner a great deal of support if it can associate itself with an issue that has captured the public's imagination." *Id.* Today's winners might be tomorrow's losers, and the First Amendment must protect both.

Limiting the *Brown* exemption to minor parties fails to protect the First Amendment's goal of encouraging "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964). All parties, large or small, new or well-established, winners or losers, must remain free to advocate their position free from the deplorable acts directed at supporters of Proposition 8 and a traditional definition of marriage. *See The Ku-Klux Cases*, 110 U.S. 651, 658, 667 (1884) ("[T]he two great natural and historical enemies of all republics . . . [are] open violence and insidious corruption," and that "the temptations to control . . . elections by violence and corruption is a constant source of danger").

exception is not limited to minor parties. *See Citizens United*, 130 S. Ct. at 914 (stating that the reasonable-probability test is available to "group[s]," and not limiting its availability to minor parties or political parties).

Finally, the reasonable-probability test does not require any threats, harassment, or reprisals from government officials. *See NAACP v. Alabama*, 357 U.S. at 463, 78 S. Ct. at 1172 ("[I]t is only after the initial exertion of state power represented by the production order that private action takes hold"). An exemption is warranted from the most well-intentioned disclosure statute if there is a reasonable probability of threats, harassment, and reprisals. *See id.* (deterrent effect of unintended, but inevitable results flowing from compelled disclosure); *McArthur*, 716 F. Supp. at 594 ("The Court clearly stated that the first amendment prohibits compelled disclosure of contributors or recipients' names if the revelation would subject them to harassment from *either* government officials or private parties. The Court's use of 'either' indicates that harassment, reprisals, or threats from private persons is sufficient to allow this court to enforce the plaintiff's first amendment rights by cloaking the contributors and recipients' names in secrecy." (emphasis in original). California cannot stick its head in the sand and ignore the real and inevitable consequences of its compelled disclosure statute, however well-intentioned the statute may be.

Thus, under the well-established standards of the reasonable-probability test of the Supreme Court, the discovery sought by Defendants is irrelevant.

2. Even if Relevant, the Discovery Sought By Defendants Is Protected From Discovery.

As set forth above, to prevail on their first count, Plaintiffs must meet only *one* test: whether there is a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from Government officials or private parties." *McConnell*, 540 U.S. at 198, 124 S. Ct. at 692 (citation omitted); *see also* FRCP 26. If that test is met, Plaintiffs must receive an exemption. There is no further test or balancing because the Supreme Court has already established the reasonable-probability test as the sole criterion a party needs to meet to gain a disclosure exemption. *McConnell*, 540 U.S. at 198, 124 S. Ct. at 692. All of the discovery sought by Defendants falls under the balancing that the Supreme Court

has already stated shall not occur. Therefore, the discovery sought by Defendants is irrelevant, and therefore not discoverable under the reasonable probability test or Federal Rules of Civil Procedure.

3. Even if Relevant, the First Amendment Prevents the Broad Discovery Sought by Defendants.

a. The First Amendment Prevents Broad Discovery Against Individuals Who Come Forward With Claims of Threats, Harassment, and Reprisals.

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, 112 S.Ct. 1093, 1099 (1992). Here, the State seeks to impinge on the First Amendment rights of Plaintiffs through broad discovery requests that would destroy the rights of individuals to associate with Plaintiffs.

To determine whether the materials here are protected from disclosure under the First Amendment, Plaintiffs need only show that such disclosure will result in "harassment, membership withdrawal, or discouragement of new members," or that "other consequences which objectively suggest an impact on, or chilling of, the members' associational rights." *Brock v. Local Union 375, Plumbers Int'l Union of America, AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988) (citation omitted); *see also Dole v. Service Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1459-60 (9th Cir. 1991). Plaintiffs have submitted nearly sixty declarations in this case showing such harassment and chilling of speech. Moreover, the Supreme Court has noted that the incidents giving rise to this case are a "cause for concern." *Citizens United*, 130 S. Ct. at 914.

Because Plaintiffs have made this showing, the burden shifts to Defendants to show both "that the information sought . . . is rationally related to a compelling governmental interest" and that "the government's disclosure requirements are the least restrictive means of obtaining the desired information." *Brock*, 860 F.2d at 350 (citation omitted); *see also Dole*, 950 F.2d at 1461. And even then, "[i]t is possible that in some circumstances the government would not prevail even if it carried [this] burden." *Dole* at 1461, n. 2. Defendants have made no such showing, and,

in light of the circumstances—circumstances in which disclosure of the information sought by Defendants could potentially cost individuals their livelihoods or even lives—even a compelling government interest in the information does not outweigh the Plaintiffs' rights to engage in protected First Amendment political associational activity.

Specifically, through their discovery requests, the State seeks to obtain information including, but not limited to, individuals who were targeted for fundraising efforts, information on individuals who were targeted for threats, harassment, and reprisals yet unwilling to publicly come forward with that information, information on individuals who feared being targeted for threats, harassment, and reprisals yet were unwilling to come forward publicly with that information, Plaintiffs' communications with these individuals, and individuals who donated beneath the disclosure threshold for California. (*See generally* Attorney General's Demands for Production, Inspection, and Copying of Documents). Each of the requests for production of documents asks for documents that fall either within the First Amendment protections described here, or under those financial protections described below.

The discovery sought by Defendants seeks information on individuals who have been subject to various forms of threats, harassment, and reprisals, including individuals who had an expectation of privacy in their communications with individuals who shared similar beliefs, as well as individuals who, through donating beneath limits set by the State on disclosure, took affirmative steps to conceal their identity from the State. The disclosure of further private communications "is particularly intrusive" and "reveals unmistakably the content of [the speaker's] thoughts on a controversial issue." *McIntyre*, 514 U.S. at 355, 115 S.Ct. at 1523. That another ballot measure on a similar issue may occur in the future only serves to increase the problem of revealing individuals who support this controversial issue—any disclosure now will also chill speech in the future, whether it be that of the speaker, or that of other individuals who choose not to speak in the future on similar issues. Moreover, the information sought by Defendants goes to communication involving individuals who presumed their identity would be kept from the government because they did not donate to the campaign, or who took affirmative

steps to prevent that information from going to the government, by donating under California's disclosure threshold.

The holdings in cases such as *NAACP v. Alabama* further illustrate that the First Amendment protections Defendants seek to circumvent through their discovery requests. As the Supreme Court stated in *NAACP v. Alabama*, "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. at 463, 78 S. Ct. at 1171.

Through its discovery requests in this case, Defendants are seeking to compel discovery on individuals who voluntarily chose to associate with Plaintiffs—i.e., members of the Plaintiff organizations or potential members.[17] Moreover, in so doing, Defendants are also seeking people who not only voluntarily chose to associate with Plaintiffs, but may have done so in a manner that would affirmatively protect their anonymity in such association—i.e., through donating below the compelled disclosure level that the State asserts is the level at which such disclosure is of interest to them.[18] In *NAACP v. Alabama*, the Court specifically prohibited the State of Alabama from obtaining membership lists from a group singled out for the same sort of threats, harassment, and

[17] While Defendants rely almost entirely on *Perry* and this Court's previous rulings in this case, the Supreme Court's actions since the initial rulings in this case bolster Plaintiffs' initial arguments on the reasonable-probability test. While *Perry* may provide guidance on some aspects of this case, it is not controlling, nor does its holding apply in this case, where the discovery goes to the heart of the very right being sought to protect on an issue that was not raised in *Perry*, and where the very act of discovery can act to destroy Plaintiffs' case before the case can even be made.

While *Perry* did involve issues of First Amendment privilege in the discovery context, the discovery sought in *Perry* was not of the sort sought here. Here, Defendants seek communications that are far different than the "internal campaign communications concerning strategy and messaging" at issue in *Perry* and to which the holding in *Perry* was limited. *Perry*, 591 F.3d at 1153. Instead, Defendants are seeking communications of just the sort that the reasonable-probability test outlined above, as well as previous Supreme Court precedent, have explicitly found to be non-discoverable, such as membership lists, lists of donors (including donors who contributed less than the threshold amount triggering public disclosure), and all correspondence between Plaintiffs and individuals who were subject to threats, harassment, and reprisals. *See WRTL-II*, 551 U.S. at 468 n.5, 127 S. Ct. at 2666 n.5 (critical of district court's decision to allow discovery of "many documents related to . . . operations, plans, and finances").

[18] Such disclosure is also challenged in this case, but not at issue here.

reprisals that have occurred to the individuals here. *NAACP v. Alabama*, 357 U.S. at 466, 78 S. Ct. at 1174. Through their discovery requests, the State seeks to discover exactly what the Supreme Court has already prohibited from discovery.[19]

To require Plaintiffs to disclose the membership and other information sought by Defendants contemplates far more intrusion than is allowed. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. City of Little Rock*, 361 U.S. 516, 524, 80 S. Ct. 412, 417 (1960); *see also NAACP v. Alabama*, 357 U.S. at 449, 78 S. Ct. at 1163. With political speech, the associational rights of individuals must be protected, in order that their speech—especially in the context of the First Amendment—is not chilled. To allow the broad discovery of information sought by the State in this case would severely chill the speech of Plaintiffs and their supporters, and violate long-standing Supreme Court precedent that has long sought to protect these vital First Amendment associational rights.

b. The First Amendment Prevents the State and Governmental Entities from Discovery of Internal Financial Communications

Since the U.S. Supreme Court's decision in *Buckley*, it has been apparent that while the State and other governmental entities are able to obtain certain financial disclosures from individuals and groups engaging in political speech, that disclosure is not unlimited, and to obtain such disclosure, the State must meet specific burdens before having the right to obtain that financial information. Through its discovery requests for virtually any and all financial documents held by Plaintiffs, the State seeks to circumvent these long-standing rules regarding financial disclosure.

Specifically, here the State seeks information on the private financial affairs of political organizations that it is not otherwise entitled to under Constitutional precedent, such as

[19]Even to the extent that Defendants may assert that they are not specifically seeking "membership lists," the discovery requests they have made upon Plaintiffs—such as information regarding individuals who donate to Plaintiffs below the threshold disclosure amount and information on individuals who voluntarily disclosed threats, harassment, and reprisals without thinking that this information would subsequently be available to the State through litigation proceedings—essentially performs the same task as asking for membership lists.

information on donors who donated beneath California's disclosure threshold. (*See, e.g.*, Attorney General's First Demand for Production, Inspection, and Copying of Documents Requests nos. 13-15.) Such information is well beyond the statutorily authorized financial disclosures of political groups, and that which is allowed under applicable case law. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976).

The long-standing precedent of *Buckley* preventing the disclosure of the sort of financial information sought by the Defendants here has recently been reiterated by the Ninth Circuit. In *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, the Ninth Circuit prevented the compelled disclosure of individuals who had contributed *de minimis* amounts to a campaign. 556 F.3d 1021, 1031 (9th Cir. 2009). Thus, the discovery requests of the State that ask for information on individuals who may not have contributed at all to the campaign, or did so in such *de minimis* amounts, are not Constitutional in the context of campaign expenditures, and the State should not be allowed to circumvent that ruling through discovery requests. As will be set forth below, allowing such broad discovery here would allow the State to do so in any future campaign through the use of litigation, and subvert the speech and associational protections of the First Amendment.[20]

C. Application of the Case Law to the Specific Discovery Sought by Defendants Shows the Problems with Allowing Such Broad Discovery.

Though Defendants characterize the threats, harassment, and reprisals that have been presented as evidence by Plaintiffs up to this point as "almost no information," the Supreme Court has called this exact same evidence presented by Defendants in this case as "a cause for concern" in regard to the reasonable probability test. *Citizens United*, 130 S. Ct. at 914 (citing to

[20] The State presumably seeks this financial information to determine whether Plaintiffs remain economically viable entities who can participate in elections going forward. However, as set forth above, this is not information that goes to disprove the reasonable-probability test established by the Supreme Court, and is therefore irrelevant to the State's inquiry. The State's interpretation of the relevance of financial information is fundamentally flawed, as it presumes that the issue here is viability of an organization, when the actual issue is whether the right of individuals to speak and associate for political purposes has been, and will be, chilled.

amicus discussing the declarations presented by Plaintiffs in this case).[21] Moreover, the express problems with revealing information about individuals related to Proposition 8—exactly the sort of information sought by Defendants—has already been expressly recognized by the Supreme Court as problematic. *Hollingsworth*, 130 S. Ct. at 712-13 (noting the irreparable harm caused by the release of identities through broadcast media and that certain witnesses would be unwilling to testify if their identities were broadcast).

To allow the broad discovery Defendants are seeking would not only be improper under prior precedent and the Federal Rules, but would create problems that are incompatible with the First Amendment and political speech. If ballot sponsors and their supporters—including those individuals who took affirmative steps to prevent their identities from being handed over to the State—are subject to the sweeping discovery sought by Defendants, this encourages suit against any ballot sponsor who the State finds adverse to their interests, knowing that through the litigation process, the speech of these ballot sponsors can effectively be chilled.[22]

The right to the ballot process is at the core of the First Amendment. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347, 115 S. Ct. 1511 (1995). If the government can use the discovery process and litigation to open up those who exercise this core right to extensive discovery that includes information that is otherwise unavailable to the State—especially when that discovery process seeks to further chill those already subject to harassment and violence—only those who are fearless will continue to participate in this core exercise of First Amendment rights. *McIntyre*, 514 U.S. at 357, 115 S. Ct. at 1524; *Buckley*, 424 U.S. at 71, 96 S. Ct. at 659.

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[21] Indeed, Justice Thomas, in his opinion concurring in part and dissenting in part, went so far as to quote Plaintiffs' complaint in this case. *Citizens United*, 130 S. Ct. at 980-981 (Thomas, J., concurring in part and dissenting in part).

[22] An enforcement action—where specific violation of the election code are alleged—raises different concerns and implicates narrow discovery regarding only the specific allegations. This is far different than the broad discovery sought by the State here. The difference has been drawn in other courts: "[E]ven when requiring disclosure of political speech activities to a *government agency* may be necessary to facilitate law enforcement functions, we have held that '[c]ompelled *public* disclosure presents a separate first amendment issue' that requires a separate justification." *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003) (*quoting Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986) (emphasis added by *AFL-CIO*)).

D. Specific Concerns Regarding Other Aspects of Discovery.

1. Document Categories Not Specified.

To complete the review of documents requested by Defendants, Plaintiffs reviewed over 160,000 pages of documents. Plaintiffs' attorneys are members of a small law firm, and therefore only had one attorney available for this review. Thus, this review was undertaken by the one attorney available for the task, which necessitated both the extension of the original review, and the failure to specify categories if it was to be given to the other side.

2. Sanctions Are Not Warranted.

As set forth above, the discovery sought by Defendants is not relevant, and even if relevant, would be protected by various discovery doctrines.

In its Pretrial Scheduling Order, this Court provided for nearly a year of discovery. Yet, Defendants waited until nearly halfway through that discovery period before even beginning discovery. Plaintiffs have complied with the discovery requests to the extent they are relevant and not protected by the applicable discovery doctrines. Moreover, even though Defendants waited until there was less than a month left in the discovery period to ask for depositions, Plaintiffs agreed to provide those depositions, even at a period outside the discovery period.

Plaintiffs have therefore complied with the pertinent rules of discovery, despite the unreasonable requests of Defendants within those discovery rules.

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CONCLUSION

The parties have been unable to resolve the discovery disagreements set forth herein. Therefore, the parties respectfully request that the Court issue a ruling in this matter.

Dated: May 24, 2010

Respectfully submitted,

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/s/

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/s/

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