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January 22, 2010

James Bopp, Jr.
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1 South Sixth Street
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RE: *ProtectMarriage.com - Yes on 8, et al. v. Debra Bowen, et al.*
United States District Court, Eastern District of California, Case No. 2:09-cv-00058-MCE-DAD

Dear Mr. Bopp:

I am writing in regard to your objections to the Attorney General's narrowly focused First Set of Interrogatories and Demand for Production of Documents seeking any possible evidentiary support for your clients' allegations. In short, your objections and your clients' responses to the discovery demands are completely inadequate.

First, in responding to each and every request, you assert a First Amendment privilege on behalf of your clients, yet you have failed to provide a privilege log as mandated by Federal Rule of Civil Procedure 26(b)(5)(A)(ii). This rule provides, in relevant part:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: [¶]
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Should this correspondence otherwise fall on deaf ears, at least have the courtesy to comply with this rule and provide a privilege log for all records, information, and responses your clients are withholding based upon your asserted objections.

More fundamentally, I must take issue with your sweeping objections based upon the asserted First Amendment privilege. The Ninth Circuit recently held that, in the discovery context, your clients' claim of a First Amendment privilege is limited to *private, internal*

communications regarding *formulation of strategy and messages* regarding the Proposition 8 campaign:

> 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. City and County of San Francisco, Ninth Cir. Ct. App., Case No. 09-17241, Amended Opinion filed 1/4/2010 at n. 12 ("*Perry*") [emphasis in original].

In short, your clients' assertion of a First Amendment privilege is baseless. Nothing in defendants' discovery demands seeks "*private*, *internal* communications regarding *formulation of strategy and messages*."

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*, at 25-26 [footnote omitted].)

You will no doubt recall that in denying your clients' Motion for Preliminary Injunction, the District Court issued a 61-page order discussing the very factors noted by the Ninth Circuit above. I am happy to take a moment to highlight the Court's discussion, and explain why your clients' claimed First Amendment privilege fails on the merits.

First, the basis of your clients' motion for a 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. These same allegations form the basis of your clients' present objections to the discovery demands.

However, the District Court has already rejected this argument[1]:

> There is no evidence that [plaintiffs'] financial backing is so tenuous as to render them susceptible to a relatively minor and entirely speculative fall-off in contributions. There is surely no evidence that the seven million individuals who voted in favor of Proposition 8 can be considered a "fringe organization" or that their beliefs would be considered unpopular or unorthodox. Finally, there is no evidence that any of Plaintiffs' contributors intend to retreat from the marketplace of ideas such that available discourse will be materially diminished.

(Mem. & Order on Prelim. Inj., p. 35, Docket No. 88.) The Court also 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)]." (*Id.* at 33.) Finally, the Court held 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.* at36.)

Simply put, based upon the evidence and allegations presently in the record (and your clients are ironically refusing to supply anything further), the District Court has already determined that your clients cannot establish any likelihood of succeeding on their claim that disclosure of their identities will violate their rights under the First Amendment. Thus, in the context of the present discovery dispute, your clients 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*, at 25-26, quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 350 (9th Cir. 1988).

On the other hand, the District Court held, in no uncertain terms, that when the State's disclosure laws are "applied to the massive movement waged by Plaintiffs, the State's interest in disclosure is at full force." (Mem. & Order, at p. 34.) Indeed, as the District Court duly noted, "Plaintiffs' concede, as they must, that California has a compelling justification for requiring disclosure of Plaintiffs' contributors." (*Id.* at 17.) And the State's interest in defending those laws against the present challenge and enforcing those laws as to plaintiffs is no less compelling.

Moreover, the discovery my clients seek is highly relevant to their defense of this action. *Perry*, at 28. The discovery demands seek nothing more than the evidence your clients have that supports their allegations in the Third Amended Complaint. For example, my clients seek discovery on fundraising by your clients (Interrogs. Nos. 1-2.), their claims of harassment of

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[1] While the District Court's Order denying the preliminary junction is not a final ruling on the merits of this case, it is unquestionably relevant to the instant discovery dispute.

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). Your clients have provided the name of one individual in response to these narrowly focused demands. This response is woefully inadequate, if not bad faith.

Additionally, your claim that the Washington state case *Doe v. Reed*, U. S. Supreme Court case no. 09-559, "may be dispositive" to this dispute is meritless. The granting of a petition for writ of certiorari in a lawsuit concerning the law of another state regarding the disclosure of names of those signing circulating petitions has no precedential value regarding your clients' obligation to provide the requested discovery. Instead, the Ninth Circuit *Perry* case -- binding precedent -- will control the outcome of the present dispute.

With regard to your other boilerplate objections, the District Court's Memorandum and Order granting my clients' Rule 56(f) motion and denying your clients' motion for summary judgment is directly on point. As the District Court noted, "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].) Yet your clients have provided virtually nothing responsive to the discovery demands, and certainly nothing that supports plaintiffs' claims.

Nevertheless, I would be happy to discuss a reasonable confidentiality agreement or procedure for redaction of identifying information if plaintiffs can demonstrate a good-faith belief that a particular response to the discovery demands will raise a threat of reprisal to persons whose affiliation with plaintiffs is not already publicly available. Please contact me at your earliest possible convenience if you wish to further discuss this matter. If I do not hear back from you, my clients will proceed with the filing of a motion to compel further responses to the discovery demands.

Sincerely,

ZACKERY P. MORAZZINI
Supervising Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

ZPM:sm

cc: Lawrence T. Woodlock, counsel for FPPC
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