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17 **United States District Court**
Eastern District of California
18 **Sacramento Division**

19 20 21 22 23 24	PROTECTMARRIAGE.COM, et al., Plaintiffs, vs. DEBRA BOWEN, et al., Defendants.	Case No. 2:09-CV-00058-MCE-DAD ProtectMarriage.com's Response to Attorney General's First Demand for Production, Inspections, and Copying of Documents Judge Morrison C. England, Jr.
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1 Plaintiff ProtectMarriage.com—Yes on 8, a Project of California Renewal
2 (“ProtectMarriage.com”), hereby responds to the Attorney General’s First Demand for
3 Production, Inspections, and Copying of Documents as follows:

4 **General Objections**

5 1. ProtectMarriage.com objects to the Requests to the extent they call for documents
6 irrelevant to the issues in this case. Significant portions of the discovery sought by these
7 Requests are legally irrelevant and not designed to lead to the discovery of admissible evidence,
8 and it would therefore be objectionably burdensome for ProtectMarriage.com to have to collect,
9 review, produce, and/or log all such documents. Because of the irrelevant nature of these
10 materials, the time and expense that would be required to gather and produce them cannot be
11 reasonably justified. *See* Fed. R. Civ. P. 26(b)(1).

12 2. In *Buckley v. Valeo*, the Supreme Court created the reasonable probability test in response
13 to, and in rejection of, the argument that the proof of a chill on expressive association would be
14 impossible. 424 U.S. 1, 73 (1976). In the *Buckley* appellate court, a dissenting opinion noted the
15 difficulty of obtaining “witnesses who are too fearful to contribute but not too fearful to testify
16 about their fear.” *Id.* at 74. Noting this concern, the Supreme Court established the reasonable
17 probability test, which included a mandate that courts allow “sufficient flexibility” in evidence to
18 fit the situation where witnesses are difficult to obtain because they are chilled by fear of threats,
19 harassment, or reprisals. *Id.* Under the reasonable probability test, the court must determine
20 whether there is a “reasonable probability that the compelled disclosure of a party’s contributors’
21 names will subject them to threats, harassment, or reprisals from either Government officials or
22 private parties.” *McConnell v. FEC*, 540 U.S. 93, 198 (2003) (citation omitted). Here, Plaintiffs
23 have alleged just such threats, harassment, and reprisals, and have provided numerous
24 declarations in support of that.

25 These document requests seek to compel disclosure of speech involving an advocacy
26 association during an election on a ballot measure—speech that “is at the heart of the First
27 Amendment’s protection,” and “the type of speech indispensable to decisionmaking in a
28 democracy.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). As the U.S.

1 Court of Appeals for the Ninth Circuit recently held, “[t]he freedom to associate with others for
2 the common advancement of political beliefs and ideas lies at the heart of the First Amendment.
3 Where, as here, discovery would have the practical effect of discouraging the exercise of First
4 Amendment associational rights, the party seeking such discovery must demonstrate a need for
5 the information sufficient to outweigh the impact on those rights.” *Perry v. Schwarzenegger*, 591
6 F.3d 1147, 1152 (9th Cir. 2010).

7 Thus, ProtectMarriage.com objects to these document requests to the extent that they seek
8 information protected from disclosure by the First Amendment. *See DeGregory v. Attorney*
9 *General of the State of New Hampshire*, 383 U.S. 825, 829 (1966). These document requests call
10 for responses that reflect core First Amendment activity—e.g., political views, legislative and
11 political strategy, religious beliefs, voter intent, political speech, and associational activity—and
12 are not appropriate subjects of discovery and are protected from disclosure. *See, e.g., Dole v.*
13 *Service Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1459 (9th Cir. 1991).
14 Specifically, these document requests call for information on individuals who asserted their First
15 Amendment right to speak and confidentially associate with a political advocacy group to further
16 a political belief. To the extent individuals who have associated with ProtectMarriage.com have
17 been willing to publicly come forward, these individuals have submitted declarations in this case
18 in support of Plaintiffs. However, to the extent that individuals have not been willing to publicly
19 come forward, Plaintiffs have not, and will not, produce information on those individuals.

20 3. Furthermore, *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) recognized that in
21 cases involving political speech, “extensive discovery” including “ha[ving] to turn over many
22 documents related to . . . operations, plans, and finances[,] . . . constitutes a severe burden on
23 political speech,” *id.* at 2666, n.5, so that there must be “minimal if any” discovery in such cases.
24 *Id.* at 2666. Citizen groups asserting First Amendment rights of privacy and freedom from
25 burden in their associational rights may not be penalized through discovery for asserting their
26 First Amendment rights.

27 4. ProtectMarriage.com objects to these Requests to the extent that the information
28 contained in these requests may be prevented from disclosure by the ongoing case of *Doe #1 v.*

1 *Reed*, U.S. Supreme Court Case No. 09-0559, which is currently on petition for a writ of
2 certiorari to the Supreme Court of the United States of America, and may be dispositive on the
3 issue of whether and to what extent the information sought by the Attorney General may be
4 divulged by ProtectMarriage.com, as well as the extent of the reasonable probability test at issue
5 in this case. The case deals with the extent to which individuals who have not contributed to a
6 campaign may be publicly disclosed.

7 5. ProtectMarriage.com objects to the Requests and their accompanying instructions as
8 unduly burdensome and beyond the scope of the obligations imposed by the Federal Rules of
9 Civil Procedure to the extent that they seek documents and information that are publicly
10 available and/or otherwise in the custody or control of third parties. To the extent the Attorney
11 General's Requests place an obligation on ProtectMarriage.com to produce documents and
12 information from entities and/or individuals who are not uniquely within Plaintiffs' custody and
13 control, the Requests are objectionable. *See* Red. F. Civ. P. 26(b)(2)(C)(ii).

14 6. ProtectMarriage.com objects to these Requests as vague, ambiguous and/or unduly
15 burdensome to the extent that the certain terms are not defined and/or limited in any way, and
16 taken at face value would encompass all communications ProtectMarriage.com may have had
17 with any individuals or entities bearing any relationship the campaign surrounding Proposition 8
18 whatsoever. Such documents include, but are not limited to, communications with individual
19 donors, volunteers, or voters; communications with political strategists and other agents or
20 contractors of the ProtectMarriage.com; and communications with friends, colleagues, and casual
21 acquaintances. Moreover, the Attorney General seeks these communications regardless of
22 whether they relate to disclosure of individuals who donate to ballot initiatives. This presents not
23 only First Amendment concerns, but also creates an undue burden on ProtectMarriage.com in
24 attempting to gather, review, and produce all such communications. *See* Fed. R. Civ. P. 26(b)(1);
25 *see also* Fed. R. Civ. P. 26(b)(1) advisory committee's note (2000).

26 7. ProtectMarriage.com objects to these Requests to the extent that they prematurely call for
27 information that is unavailable to ProtectMarriage.com in its final form at this time.

28 8. ProtectMarriage.com objects to these Requests to the extent they seek drafts and other

1 pre-decisional documents or communications associated with preparing final documents or
2 communications regarding Proposition 8 that were actually disseminated by ProtectMarriage.com
3 to the electorate at large. These documents are legally irrelevant and protected from disclosure
4 by the First Amendment.

5 9. ProtectMarriage.com object to the Requests to the extent that they call for the disclosure
6 of any information or document that (a) involves litigation strategy and trial preparation; (b) is
7 protected by the attorney-client privilege; (c) discloses the mental impressions, conclusions,
8 opinions, or legal theories of any attorneys involved in this litigation; (d) was prepared in
9 anticipation of litigation; (e) ProtectMarriage.com to produce information from
10 entities/individuals who are not uniquely within ProtectMarriage.com's custody and control; or
11 (f) is otherwise protected from disclosure under applicable privileges, immunities, laws, or rules.
12 By responding to these document requests, ProtectMarriage.com does not concede that the
13 information requested is relevant to a claim or defense on the subject matter of this litigation, or
14 is admissible at the trial thereof. ProtectMarriage.com reserves any and all objections as to
15 competency, relevance, materiality, privilege, admissibility, or any other grounds on which
16 objection may be made. ProtectMarriage.com expressly reserves the right to object to further
17 discovery into the subject matter of these requests. Subject to the objections detailed herein,
18 including objections to having to undertake the burden of reviewing and/or logging documents
19 implicated by these Requests, ProtectMarriage.com will produce as soon as possible following
20 the completion of any agreed or ordered production of documents a log of all responsive
21 documents that have been withheld from production pursuant to these objections and that
22 ProtectMarriage.com is required to review and/or log pursuant to the Federal Rules of Civil
23 Procedure and/or any existing or future order of the Court.

24 Subject to and without waiving any of the foregoing General Objections, which are hereby
25 incorporated into each response given below, ProtectMarriage.com is answering these Requests
26 in substance to the extent practicable and reasonable under the present circumstances, as stated
27 below. ProtectMarriage.com hereby responds to the individual Requests as follows.

28 **Responses to Requests**

**ProtectMarriage.com's Resp. to A.G.'s
First Demand for Production,
Inspections, and Copying of Documents**

1 **Request No. 1:** All documents relating to Plaintiffs' fundraising for Proposition 8, including but
2 not limited to fundraising letters, internal communications, communications with contributors
3 and potential contributors, and communications with third parties. If Plaintiffs sent the same
4 letter to multiple recipients, please provide only one copy.

5 **Response:** Subject to the objections above and without waiving further objection,
6 ProtectMarriage.com responds as follows:

7 Plaintiff has produced or is in the process of producing documents responsive to this request.
8 To the extent that such documents are privileged under an applicable privilege, such documents
9 will be logged in a privilege log which will be provided to opposing counsel.

10 To the extent this response may need revision, ProtectMarriage.com reserves the right to
11 amend this response and will provide any such a revised response to Defendants in a timely
12 manner.

13 **Request No. 2:** All documents relating to fundraising for Proposition 8 by any individual, group
14 or entity other than Plaintiffs. This includes but is not limited to fundraising letters,
15 communications with contributors and potential contributors, communications with third parties
16 provided to or acquired by Plaintiffs, and copies of draft documents or internal communications
17 provided to or acquired by Plaintiffs.

18 **Response:** Subject to the objections above and without waiving further objection,
19 ProtectMarriage.com responds as follows:

20 Plaintiff has produced or is in the process of producing documents responsive to this request.
21 To the extent that such documents are privileged under an applicable privilege, such documents
22 will be logged in a privilege log which will be provided to opposing counsel.

23 To the extent this response may need revision, ProtectMarriage.com reserves the right to
24 amend this response and will provide any such a revised response to Defendants in a timely
25 manner.

26 **Request No. 3:** All documents relating to any harassment alleged by any person as a result of
27 that person's contribution to Organization Plaintiffs or other support for Proposition 8, including
28 all communications between Plaintiffs and any person regarding harassment alleged by that

1 person. This includes drafts of all declarations and other documents regarding the harassment,
2 regardless of whether those documents were filed in this action.

3 **Response:** Subject to the objections above and without waiving further objection,
4 ProtectMarriage.com responds as follows:

5 Plaintiff has produced or is in the process of producing documents responsive to this request
6 to the extent that individuals have come forward publicly regarding threats, harassment, and
7 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
8 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

9 To the extent that such documents are privileged under an applicable privilege, such
10 documents will be logged in a privilege log which will be provided to opposing counsel.

11 To the extent this response may need revision, ProtectMarriage.com reserves the right to
12 amend this response and will provide any such a revised response to Defendants in a timely
13 manner.

14 **Request No. 4:** All documents relating to any harassment or hostility expressed by any
15 government entity toward Plaintiffs or any other person as a result of those persons' support of
16 Organization Plaintiffs or Proposition 8.

17 **Response:** Subject to the objections above and without waiving further objection,
18 ProtectMarriage.com responds as follows:

19 Plaintiff has produced or is in the process of producing documents responsive to this request
20 to the extent that individuals have come forward publicly regarding threats, harassment, and
21 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
22 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

23 To the extent that such documents are privileged under an applicable privilege, such
24 documents will be logged in a privilege log which will be provided to opposing counsel.

25 To the extent this response may need revision, ProtectMarriage.com reserves the right to
26 amend this response and will provide any such a revised response to Defendants in a timely
27 manner.

28 **Request No. 5:** All documents relating to Plaintiffs' efforts to collect information regarding

1 harassment or harms suffered by any persons as a result of those persons' support of
2 Organization Plaintiffs or Proposition 8. This includes but is not limited to letters, emails or
3 internet postings produced or sent by Plaintiffs seeking information or names of individuals who
4 suffered harassment or harm.

5 **Response:** Subject to the objections above and without waiving further objection,
6 ProtectMarriage.com responds as follows:

7 Plaintiff has produced or is in the process of producing documents responsive to this request
8 to the extent that individuals have come forward publicly regarding threats, harassment, and
9 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
10 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

11 To the extent that such documents are privileged under an applicable privilege, such
12 documents will be logged in a privilege log which will be provided to opposing counsel.

13 To the extent this response may need revision, ProtectMarriage.com reserves the right to
14 amend this response and will provide any such a revised response to Defendants in a timely
15 manner.

16 **Request No. 6:** All documents relating to any allegations of harassment experienced by any
17 persons as a result of those persons' opposition to Proposition 8, including all communications
18 between Plaintiffs and any person regarding the alleged harassment suffered by those persons.

19 **Response:** Subject to the objections above and without waiving further objection,
20 ProtectMarriage.com responds as follows:

21 Plaintiff has produced or is in the process of producing documents responsive to this request
22 to the extent that individuals have come forward publicly regarding threats, harassment, and
23 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
24 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

25 To the extent that such documents are privileged under an applicable privilege, such
26 documents will be logged in a privilege log which will be provided to opposing counsel.

27 To the extent this response may need revision, ProtectMarriage.com reserves the right to
28 amend this response and will provide any such a revised response to Defendants in a timely

1 manner.

2 **Request No. 8:** All communications Plaintiffs received from persons stating they were
3 concerned about making a contribution to Plaintiffs because of threats and harassment directed at
4 them or others.

5 **Response:** Subject to the objections above and without waiving further objection,
6 ProtectMarriage.com responds as follows:

7 Plaintiff has produced or is in the process of producing documents responsive to this request
8 to the extent that individuals have come forward publicly regarding threats, harassment, and
9 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
10 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

11 To the extent that such documents are privileged under an applicable privilege, such
12 documents will be logged in a privilege log which will be provided to opposing counsel.

13 To the extent this response may need revision, ProtectMarriage.com reserves the right to
14 amend this response and will provide any such a revised response to Defendants in a timely
15 manner.

16 **Request No. 9:** All documents relating to Plaintiffs' efforts to respond to concerns expressed by
17 contributors or potential contributors to Organization Plaintiffs about disclosure and reporting of
18 contributions, including internal communications, communications with contributors, and
19 communications with other persons.

20 **Response:** Subject to the objections above and without waiving further objection,
21 ProtectMarriage.com responds as follows:

22 Plaintiff has produced or is in the process of producing documents responsive to this request
23 to the extent that individuals have come forward publicly regarding threats, harassment, and
24 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
25 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

26 To the extent that such documents are privileged under an applicable privilege, such
27 documents will be logged in a privilege log which will be provided to opposing counsel.

28 To the extent this response may need revision, ProtectMarriage.com reserves the right to

1 amend this response and will provide any such a revised response to Defendants in a timely
2 manner.

3 **Request No. 10:** All documents relating to Organization Plaintiffs' communications with
4 contributors and potential contributors concerning whether or how information about those
5 contributors would be publicly disclosed or reported in public filings.

6 **Response:** Subject to the objections above and without waiving further objection,
7 ProtectMarriage.com responds as follows:

8 Plaintiff has produced or is in the process of producing documents responsive to this request
9 to the extent that individuals have come forward publicly regarding threats, harassment, and
10 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
11 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

12 To the extent that such documents are privileged under an applicable privilege, such
13 documents will be logged in a privilege log which will be provided to opposing counsel.

14 To the extent this response may need revision, ProtectMarriage.com reserves the right to
15 amend this response and will provide any such a revised response to Defendants in a timely
16 manner.

17 **Request No. 11:** All documents relating to Plaintiffs' collection, handling, sharing and
18 distribution of information regarding contributors and potential contributors to Organization
19 Plaintiffs or other persons supporting Proposition 8.

20 **Response:** Subject to the objections above and without waiving further objection,
21 ProtectMarriage.com responds as follows:

22 Plaintiff has produced or is in the process of producing documents responsive to this request.
23 To the extent that such documents are privileged under an applicable privilege, such documents
24 will be logged in a privilege log which will be provided to opposing counsel.

25 To the extent this response may need revision, ProtectMarriage.com reserves the right to
26 amend this response and will provide any such a revised response to Defendants in a timely
27 manner.

28 **Request No. 12:** All documents produced or disseminated in any form by Plaintiffs indicating

1 that a majority of residents, citizens, voters or persons in California or the United States agree
2 with Plaintiffs' public positions regarding the legal definition of marriage.

3 **Response:** Subject to the objections above and without waiving further objection,
4 ProtectMarriage.com responds as follows:

5 Plaintiff has produced or is in the process of producing documents responsive to this request.
6 To the extent that such documents are privileged under an applicable privilege, such documents
7 will be logged in a privilege log which will be provided to opposing counsel.

8 To the extent this response may need revision, ProtectMarriage.com reserves the right to
9 amend this response and will provide any such a revised response to Defendants in a timely
10 manner.

11 **Request No. 13:** All documents relating to Organization Plaintiffs' attempts after November 4,
12 2008 to raise funds to pay or otherwise retire any debt incurred or accrued by Organization
13 Plaintiffs prior to November 5, 2008.

14 **Response:** Subject to the objections above and without waiving further objection,
15 ProtectMarriage.com responds as follows:

16 Plaintiff has produced or is in the process of producing documents responsive to this request.
17 To the extent that such documents are privileged under an applicable privilege, such documents
18 will be logged in a privilege log which will be provided to opposing counsel.

19 To the extent this response may need revision, ProtectMarriage.com reserves the right to
20 amend this response and will provide any such a revised response to Defendants in a timely
21 manner.

22 **Request No. 14:** All documents relating to any discussion, consideration or suggestion that
23 Organization Plaintiffs would cease or limit their operations or their support for Proposition 8 at
24 any time because Organization Plaintiffs lacked or anticipated lacking sufficient funds.

25 **Response:** Subject to the objections above and without waiving further objection,
26 ProtectMarriage.com responds as follows:

27 Plaintiff has produced or is in the process of producing documents responsive to this request.
28 To the extent that such documents are privileged under an applicable privilege, such documents

1 will be logged in a privilege log which will be provided to opposing counsel.

2 To the extent this response may need revision, ProtectMarriage.com reserves the right to
3 amend this response and will provide any such a revised response to Defendants in a timely
4 manner.

5 **Request No. 15:** All documents relating to Organization Plaintiffs' assets, liabilities, and cash
6 flow, including internal communications and reports, communications with contributors and
7 communications with other persons.

8 **Response:** Subject to the objections above and without waiving further objection,
9 ProtectMarriage.com responds as follows:

10 Plaintiff has produced or is in the process of producing documents responsive to this request.
11 To the extent that such documents are privileged under an applicable privilege, such documents
12 will be logged in a privilege log which will be provided to opposing counsel.

13 To the extent this response may need revision, ProtectMarriage.com reserves the right to
14 amend this response and will provide any such a revised response to Defendants in a timely
15 manner.

16 **Request No. 16:** All documents that tend to support or refute the claims or assertions made in
17 your Third Amended Complaint in this litigation (Doc # 106).

18 **Response:** Subject to the objections above and without waiving further objection,
19 ProtectMarriage.com responds as follows:

20 Plaintiff has produced or is in the process of producing documents responsive to this request
21 to the extent that individuals have come forward publicly regarding threats, harassment, and
22 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
23 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

24 To the extent that such documents are privileged under an applicable privilege, such
25 documents will be logged in a privilege log which will be provided to opposing counsel.

26 To the extent this response may need revision, ProtectMarriage.com reserves the right to
27 amend this response and will provide any such a revised response to Defendants in a timely
28 manner.

1 **Request No. 17:** All documents that tend to support or refute the arguments made in your
2 Memorandum in Support of Motion for Summary Judgment (Doc # 111).

3 **Response:** Subject to the objections above and without waiving further objection,
4 ProtectMarriage.com responds as follows:

5 Plaintiff has produced or is in the process of producing documents responsive to this request
6 to the extent that individuals have come forward publicly regarding threats, harassment, and
7 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
8 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

9 To the extent that such documents are privileged under an applicable privilege, such
10 documents will be logged in a privilege log which will be provided to opposing counsel.

11 To the extent this response may need revision, ProtectMarriage.com reserves the right to
12 amend this response and will provide any such a revised response to Defendants in a timely
13 manner.

14 **Request No. 18:** All documents that relate to any one of Plaintiffs' responses to the Attorney
15 General's interrogatories Nos. 1-23, propounded on October 30, 2009.

16 **Response:** Subject to the objections above and without waiving further objection,
17 ProtectMarriage.com responds as follows:

18 Plaintiff has produced or is in the process of producing documents responsive to this request
19 to the extent that individuals have come forward publicly regarding threats, harassment, and
20 reprisals that they have been subject to, or that the threats, harassment, and reprisals in question
21 were directed at ProtectMarriage.com or employees of ProtectMarriage.com.

22 To the extent that such documents are privileged under an applicable privilege, such
23 documents will be logged in a privilege log which will be provided to opposing counsel.

24 To the extent this response may need revision, ProtectMarriage.com reserves the right to
25 amend this response and will provide any such a revised response to Defendants in a timely
26 manner.

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1 Dated this 1st day of March, 2010.

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Respectfully submitted,

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