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

<p>20 <b>ProtectMarriage.com, et al.,</b></p> <p>21 <i>Plaintiffs,</i></p> <p>22 <b>v.</b></p> <p>23 <b>Debra Bowen, et al.,</b></p> <p>24 <i>Defendants.</i></p>	<p>Case No. 2:09-CV-00058-MCE-DAD</p> <p><b>PLAINTIFFS' RESPONSE TO STATE DEFENDANTS' OBJECTIONS TO PLAINTIFFS' EVIDENCE</b></p> <p>Date: January 29, 2009          Time: 11:00 a.m.          Judge Morrison C. England, Jr.</p>
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27 **Plaintiffs' Response to State Defendants'**  
 28 **Objections to Plaintiffs' Evidence**

1 **Introduction**

2 Plaintiffs ProtectMarriage.com - Yes on 8, a Project of California Renewal  
3 (“ProtectMarriage.com”), National Organization for Marriage California - Yes on 8, Sponsored  
4 by National Organization for Marriage (“NOM-California”), and Plaintiff John Doe #1, an  
5 individual, and as a representative of the Class of Major Donors, file this Response to State  
6 Defendants’ Objections to Plaintiffs’ Evidence, which sets forth the reasons that Plaintiffs’  
7 evidence is appropriate to this Court’s determination on whether to issue a preliminary  
8 injunction.

9 Plaintiffs agree with State Defendants that newspaper articles and reports are generally  
10 inadmissible hearsay. *See Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991)  
11 (“[N]ewspaper articles have been held inadmissible hearsay as to their content.”). However, two  
12 exceptions to that generally applicable rule are pertinent here. First, otherwise inadmissible  
13 hearsay may be allowed for purposes of determining whether to issue a preliminary injunction.  
14 Relatedly, in a preliminary injunction hearing, Plaintiffs are allowed flexibility in the proof that  
15 they may offer in support of their Motion for Preliminary Injunction. Second, otherwise  
16 inadmissible hearsay may be used, so long as it is not used to prove the truth of the matters  
17 asserted therein.

18 **Argument**

19 **I. In Determining Whether to Issue a Preliminary Injunction, Hearsay May Be**  
20 **Considered By the Court.**

21 The United States Court of Appeals for the Ninth Circuit has allowed the use of hearsay -  
22 despite its generally inadmissible nature - to determine whether to issue a preliminary injunction.  
23 In upholding a district court’s grant of a preliminary injunction in *Republic of Philippines v.*  
24 *Marcos*, the Ninth Circuit stated that it is “within the discretion of the district court to accept this  
25 hearsay for purposes of deciding whether to issue the preliminary injunction.” 862 F.2d 1355,  
26 1363 (9th Cir. 1988).

1 Further, the Ninth Circuit has singled out the difficulty of obtaining affidavits as a reason  
2 for allowing hearsay to make a determination on the issuance of a preliminary injunction. “The  
3 urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it  
4 difficult to obtain affidavits from persons who would be competent to testify at trial. The trial  
5 court may give even inadmissible evidence some weight, when to do so serves the purpose of  
6 preventing irreparable harm before trial.” *Flynt Distributing Company, Inc. v. Harvey*, 734 F.2d  
7 1389, 1394 (9th Cir. 1984).

8 Thus, this Court is fully justified in using the newspaper articles and reports attached to  
9 the Declaration of Sarah E. Troupis in Support of Plaintiffs’ Motion for Preliminary Injunction  
10 (“Troupis Declaration”) in determining whether to issue a preliminary injunction. Further,  
11 Plaintiffs have already submitted declarations from nine potential witnesses, and have noted for  
12 the Court the difficulty in obtaining even these nine witnesses. Affidavit of Sarah E. Troupis in  
13 Support of Plaintiffs’ Motion to Shorten Time ¶ 6. The newspaper articles and reports attached  
14 to the Troupis Declaration show the Court the incidents that are alleged to have happened, and  
15 for which Plaintiffs hope to obtain witnesses in the future.

16 Relatedly, in a preliminary injunction hearing, Plaintiffs are given flexibility in the proof  
17 they are allowed to use to show the Court the injury that they will suffer without the preliminary  
18 injunction. An organization that is subjected to hostility for exercising its First Amendment  
19 rights may find it difficult to find witnesses willing to testify, as Plaintiffs have found here.  
20 Thus, the organization must be allowed “sufficient flexibility in the proof of injury.” *Buckley v.*  
21 *Valeo*, 424 U.S. 1, 74 (1976).

22 **II. The Newspaper Articles and Reports May Be Used by the Court for Purposes Other**  
23 **than to Prove the Truth of the Matters Asserted Therein.**

24 One of the basic rules of hearsay is that a statement is only hearsay if it is offered to  
25 prove the truth of the matter asserted; it is part of the very definition of hearsay. Fed. R. Evid.  
26 801(c). Hearsay offered to show or prove something other than the truth of the matter asserted in

1 the statement is not hearsay. Here, for instance, the evidence shows the widespread reporting of  
2 alleged incidents related to supporters of Proposition 8, which gives rise to a widespread chilling  
3 effect on potential donors. Such chilling effect also goes to the ability of Plaintiffs to find  
4 witnesses who are willing to come forward and talk about what has happened to them, for fear of  
5 further retaliation. Further, the articles also illustrate the general controversy surrounding  
6 Proposition 8.

7 State Defendants' complaints about the evidence - particularly State Defendants'  
8 complaints that the newspaper articles and reports are repetitive of the same stories - are likewise  
9 misplaced. The numerous articles and reports detailing the same incidents illustrate the  
10 widespread reporting of alleged incidents related to Proposition 8, and the consequent  
11 widespread chilling effect that such newspaper articles and reports are having. For example,  
12 Defendants' object to Exhibits C, D, E, O, Q and R, of the Troupis Declaration, as well as three  
13 videos thereto, which all discuss the death threats leveled against the mayor of Fresno and a  
14 pastor in Fresno as a result of their support of Proposition 8. However, these newspaper articles  
15 and videos are from multiple sources in different parts of California (two of the major networks  
16 in Fresno, a Sacramento newspaper, and a magazine), and even when the sources are the same,  
17 the stories reported are different. For example, Exhibit D to the Troupis Declaration details the  
18 first threats that the Mayor of Fresno and the Pastor in Fresno received as a result of their  
19 support of Proposition 8, as reported by the Fresno ABC affiliate. Approximately a week later,  
20 the Fresno ABC affiliate ran a second story, Exhibit E to the Troupis Declaration, providing  
21 more detailed information on the threats that the Mayor and Pastor had received, including the  
22 actual language of those threats.

23 Defendants also state that numerous articles discuss the same set of events, but fail to  
24 mention that nearly all of such articles mention multiple, unrelated additional instances of threats  
25 and harassment aimed at supporters of Proposition 8, while disseminating the already-reported  
26 information to an even greater audience. Defendants list twenty-eight articles that they state

1 concern “mostly the same businesses alleging boycotting or blacklisting.” State Defendants’  
2 Objections to Plaintiffs’ Evidence at 3, n. 1. What Defendants fail to mention is that the twenty-  
3 eight articles they suggest cover mostly the same incident include over thirty separate incidents  
4 of harassment directed at thirty different people, businesses, or organizations associated with  
5 Proposition 8:

- 6 1. Death threats against a pastor in Fresno;
- 7 2. The forced resignation of the director of a non-profit musical theater in Sacramento;
- 8 3. The forced resignation of the director of a film festival;
- 9 4. Boycott of a cinema chain;
- 10 5. Boycott of a film festival in Utah;
- 11 6. The loss of patients for a dentist;
- 12 7. Boycott of a restaurant over a \$100 donation by one employee;
- 13 8. Newspaper writer called a “bigot” for authoring a story sympathetic to a supporter of  
14 Proposition 8 despite his own opposition to Proposition 8;
- 15 9. Physical assault and attempted sexual assault of Christians praying;
- 16 10. Storming of a church in East Lansing, Michigan during Sunday services;
- 17 11. Racial slurs shouted at African-Americans;
- 18 12. LDS Temple in Los Angeles receives envelope of white powder;
- 19 13. LDS Temple in Salt Lake City, Utah receives envelope of white powder;
- 20 14. Boycott of an ice cream store and protestors handing out free ice cream in front of  
21 store;
- 22 15. Arson at a LDS church in Littleton, Colorado;
- 23 16. Picketer outside a Sacramento business;
- 24 17. Yes on 8 sign and a heavy object thrown through a church window;
- 25 18. Sign and banner stolen from a church;
- 26 19. Pastor targeted for harassment after his picture appears in a newspaper as a supporter

1 of Proposition 8;

2 20. "No on 8" spray painted on LDS church;

3 21. Eggs thrown at church and toilet paper strewn across church lawn;

4 22. Brick thrown through window of church;

5 23. Church marquee vandalized and church flags stolen;

6 24. Writer of letter to editor is threatened after his name appears in newspaper;

7 25. Websites creating "blacklists" of donors who supported Proposition 8 published;

8 26. Supporters of Proposition 8 "beaten up";

9 27. Supporters of Proposition 8 "outed" on Facebook and Craigslist;

10 28. Angry calls to a health food store whose owners supported Proposition 8;

11 29. Angry calls to and pickets of a car dealership whose owner supported Proposition 8;

12 30. Boycott of hotels owned by a donor to Proposition 8; and

13 31. Boycott of storage units owned by a donor to Proposition 8.

14 This widespread reporting of threats, harassment, and reprisals directed at supporters of  
15 Proposition 8 shows that, in places across the state of California and the United States, it was  
16 easy to find evidence of actions directed against supporters of Proposition 8 that could deter  
17 potential witnesses from coming forward to testify in person as to what happened to them.

### 18 **Conclusion**

19 This Court should allow the evidence presented in the newspaper articles and reports  
20 attached to the Troupis Declaration, because even hearsay is allowed to be considered by the  
21 Court when considering a preliminary injunction. Further, even if the Court decides that such  
22 articles and reports should not be allowed on this exception to the general hearsay rules, the  
23 articles can be used to show the widespread reporting of alleged incidents, leading to the chilling  
24 of people who might otherwise be willing to come forward as witnesses and give testimony as to  
25 the incidents that have happened to them based on their support for Proposition 8. Therefore,  
26 this Court should accept and use the evidence presented in the newspaper articles and reports

1 attached to the Troupis Declaration in reaching its decision on the issuance of a preliminary  
2 injunction.

3  
4 Dated this 26th day of January, 2009.

5 Respectfully submitted,

6  
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1 **CERTIFICATE OF SERVICE**

2 I, James Bopp, Jr., am over the age of 18 years and not a party to the within action. My  
3 business address is 1 South Sixth Street, Terre Haute, Indiana 47807.

4 On January 26, 2009, I electronically filed the foregoing document described as  
5 Plaintiffs' Response to State Defendants' Objections to Plaintiffs' Evidence, with the Clerk of  
6 Court using the CM/ECF system which will send notification of such filing to:

7 Zackary Paul Morazzini  
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19 Department of Elections - City and Count of San Francisco*

20 I declare under the penalty of perjury under the laws of the State of Indiana that the above is true  
21 and correct. Executed on January 26, 2009.

22 /s/ James Bopp, Jr.  
23 James Bopp, Jr. (Ind. State Bar No. 2838-84)  
24 Counsel for All Plaintiffs