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16 **UNITED STATES DISTRICT COURT**
 17 **NORTHERN DISTRICT OF CALIFORNIA**

18 KRISTIN M. PERRY, SANDRA B. STIER,
 PAUL T. KATAMI, and JEFFREY J. ZARRILLO,

19 Plaintiffs,

20 v.

21 ARNOLD SCHWARZENEGGER, in his official
 capacity as Governor of California; EDMUND
 22 G. BROWN, JR., in his official capacity as
 Attorney General of California; MARK B.
 23 HORTON, in his official capacity as Director of
 the California Department of Public Health and
 State Registrar of Vital Statistics; LINETTE
 24 SCOTT, in her official capacity as Deputy
 Director of Health Information & Strategic
 25 Planning for the California Department of Public
 Health; PATRICK O'CONNELL, in his official
 26 capacity as Clerk-Recorder for the County of
 Alameda; and DEAN C. LOGAN, in his official
 27 capacity as Registrar-Recorder/County Clerk for
 the County of Los Angeles,

28 Defendants.

CASE NO. 09-CV-2292 VRW

**PLAINTIFFS' AND PLAINTIFF-
 INTERVENOR'S JOINT OPPOSITION
 TO DEFENDANT-INTERVENORS'
 MOTION FOR A PROTECTIVE ORDER**

Date: September 25, 2009
 Time: 10:00 a.m.
 Judge: Chief Judge Walker
 Location: Courtroom 6, 17th Floor

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I. INTRODUCTION

1
2 Defendant-Intervenors—the official proponents of Proposition 8 and intervenors in this
3 case—seek a protective order preventing any and all discovery into documents or communications
4 concerning Proposition 8, except those “available to the public at large.” Doc #187-14 at 3. Despite
5 Plaintiffs’ attempts to negotiate the scope of discovery and willingness to maintain the confidentiality
6 of specific information where confidentiality is appropriate, Defendant-Intervenors instead stake out
7 a rigid, across-the-board position that virtually none of their documents are discoverable no matter
8 what they may say or address. Defendant-Intervenors’ position, and their broad-strokes motion for
9 protective order, lack merit.

10 In defense of their position, Defendant-Intervenors try to distract this Court from the
11 numerous important issues in play in this case, and to recast the case altogether as one about
12 “protection of core First Amendment activities.” Doc #187 at 7. But this case is, and always has
13 been, about the vindication of Plaintiffs’ rights under the United States Constitution—rights that are
14 violated every day that California’s Proposition 8 remains in effect. In order to build their case and
15 be in a position to address issues that may arise at trial, Plaintiffs are entitled under the Federal Rules
16 of Civil Procedure to liberal discovery of any non-privileged information that may lead to the
17 discovery of admissible evidence.

18 Defendant-Intervenors’ attempt to portray themselves as like any other “California voter or
19 any person who weighed in on the Prop. 8 debate,” *id.* at 10, is disingenuous and must fail.
20 Defendant-Intervenors voluntarily made themselves parties to this case. As such, they have a
21 responsibility, not necessarily co-extensive with that of third-parties, to produce any and all non-
22 privileged documents that are relevant to *any* issue that may be part of a trial of Plaintiffs’ important
23 claims. Moreover, Defendant Intervenors’ attempt to invoke the First Amendment to block the
24 discovery of virtually all of their documents cannot be supported. Defendant-Intervenors’ attempts to
25 avoid such discovery entirely and shield relevant documents—documents that may contradict the
26 very arguments they advance in this case—lack merit, and their motion should be denied.

II. ARGUMENT

A. The Disputed Discovery Is Relevant to the Factual Disputes the Court Identified as Requiring Resolution and to the State Interests Advanced by Defendant-Intervenors

Defendant-Intervenors have consistently argued that “there are no genuine issues of material fact that must be resolved at trial” and that they “are entitled to judgment as a matter of law.” Doc #172-1 at 30. It thus comes as no surprise that they believe all discovery propounded to them is irrelevant and that the Court need only rely on public records and prior California Supreme Court opinions to adjudicate this matter. Doc #187 at 9, 11-13. While Plaintiffs believe that there are certain issues in this case that can be resolved in Plaintiffs’ favor as a matter of law and without resort to detailed factual inquiry (and so argued in their motion for a preliminary injunction), the Court has set this case for trial in January 2010 and set a discovery schedule within which the parties must prepare the case for a full trial on the merits. The issues on which Plaintiffs intend to prepare a record for trial include, but are not limited to, the fifteen specific factual issues that the Court identified in its June 30, 2009 Order. Doc #76 at 7-9.

In spite of the Court’s direction that the parties prepare this case for trial, Defendant-Intervenors have steadfastly maintained their position that no trial is needed and that there are no factual issues to be resolved. This motion is simply the latest manifestation of that position, as Defendant-Intervenors ask the Court to prohibit virtually all discovery sought by Plaintiffs, taking the remarkable position that even readily accessible “documents that were available to the electorate at large” are not relevant or admissible. Doc #187 at 9 n.2. Thus, according to Defendant-Intervenors, documents distributed to millions of potential voters specifically laying out why they should support Prop. 8 are not discoverable if the list of recipients was targeted, for example, to all registered Republicans or voters who had supported particular causes in the past. Defendant-Intervenors also would take the position that no internal document, or communication with a third party, including consultants or other vendors assisting them on the campaign, could possibly be relevant regardless of what it says, even if it would constitute a binding admission or a statement directly at odds with representations that Defendant-Intervenors now make to the Court.

1 In an effort to reach compromise, Plaintiffs negotiated in good faith with Defendant-
 2 Intervenors to narrow document requests, even offering to enter into confidentiality agreements in
 3 order to address their fears of harassment and reprisal. *See* Declaration of Matthew D. McGill, ¶ 2-3,
 4 attached hereto as Exh. A. Plaintiffs' offers to compromise, however, were rejected. *Id.* at ¶ 3.

5 **1. Defendant-Intervenors Misconstrue Relevance Standards and Conflate**
 6 **Relevance with Admissibility**

7 Defendant-Intervenors' limited view of what is relevant and discoverable runs counter to the
 8 broad scope of discovery permitted by the Federal Rules of Civil Procedure. "The scope of discovery
 9 under Rule 26 is broad; '[r]elevant information need not be admissible at the trial if the discovery
 10 appears reasonably calculated to lead to the discovery of admissible evidence.'" *Castaneda v. Burger*
 11 *King Corp.*, --- F.R.D. ---, 2009 WL 2748932, at *2 (N.D. Cal. Aug. 19, 2009) (quoting Fed. R. Civ.
 12 P. 26(b)(1)) (alteration in original). Here, Defendant-Intervenors assert that they will only produce
 13 documents "available to the public at large." Doc #187-14 at 3. This position is plainly designed to
 14 prevent Plaintiffs from ever seeing anything but the most carefully crafted and broadly disseminated
 15 messages relating to their campaign. And Defendant-Intervenors offer no explanation of why a
 16 communication to the voters "at large" may be relevant, but a communication to a targeted but still
 17 large group of voters could not possibly be relevant.

18 Moreover, Defendant-Intervenors' position confuses the separate standards for admissibility
 19 at trial and for discovery by improperly seeking to limit Plaintiffs' discovery to those documents
 20 admissible at trial. *See* Doc #187 at 10 ("The Supreme Court, however, has never authorized the use
 21 of the type of [nonpublic] information at issue here to ascertain the purpose of an initiative"). But
 22 "[a]s emphasized in the Advisory Committee Notes [to Rule 26], the language of Rule 26(b) 'make[s]
 23 clear the broad scope of examination and that it may cover *not only* evidence for use at trial but also
 24 inquiry into matters in themselves *inadmissible as evidence* but which will lead to the discovery of
 25 evidence.'" *Del Campo v. Kennedy*, 236 F.R.D. 454, 457 (N.D. Cal. 2006) (emphasis added)
 26 (alteration in original). Defendant-Intervenors cannot draw a bright line, as they attempt to here, that
 27 a document is under no circumstances discoverable unless it was shared with the public at large.
 28

1 Furthermore, Defendant-Intervenors focus myopically on a single issue—voter intent—while
 2 ignoring all other issues to which Plaintiffs’ discovery requests may be relevant and other purposes
 3 for which documents produced may be admissible. Doc #187 at 10. Specifically, and as explained
 4 below, Plaintiffs’ discovery requests are reasonably calculated to lead to the discovery of
 5 (1) admissible evidence concerning the rationality and strength of Defendant-Intervenors’ purported
 6 state interests and whether voters could reasonably accept them as a basis for supporting Prop. 8, and
 7 (2) admissible evidence related to the factual disputes the Court identified as matters to be resolved at
 8 trial in its June 30, 2009 Order. As such, the discovery Plaintiffs seek is reasonably calculated to lead
 9 to the discovery of admissible evidence and is thus discoverable.¹

10 **2. Plaintiffs’ Discovery Is Reasonably Calculated to Lead to the Discovery of**
 11 **Party Admissions and Impeachment Evidence Regarding Defendants’**
 12 **Positions in this Case and the Factual Disputes Identified by the Court**

13 Defendant-Intervenors advance just one argument about the relevance of the disputed
 14 discovery: that it is irrelevant because the requests seek to “ascertain the purpose of an initiative.”
 15 Doc #187 at 10. While Plaintiffs believe that much of their discovery is in fact relevant to this issue,
 16 Plaintiffs’ discovery is *not*, and does not have to be, limited just to the discovery of the motivations
 17 for supporting Prop. 8; rather, the discovery propounded is also calculated to lead to the discovery of
 18 party admissions and impeachment evidence regarding the purported state interests that Defendant-
 19 Intervenors’ advance and the factual disputes identified in the Court’s June 30, 2009 Order. Certainly
 20 statements made by Defendant-Intervenors that are at odds with the positions they are taking in this
 21 action would not just be discoverable, but would be *admissible* at trial as a party admission, or could

22 ¹ The discovery does not intrude on the “subjective, unexpressed motivations” of Prop. 8’s
 23 proponents. Doc #187 at 8. Defendant-Intervenors refuse to produce communications they
 24 made to tens of thousands of voters, on the theory that those communications were targeted
 25 and not made available to every voter in the State. They refuse to produce communications,
 26 even when made outside of their own organization, that would demonstrate their conclusions
 27 about what voters might accept as purposes and rationales for Prop. 8. They refuse to produce
 28 information that would show the size and strength of forces mustered against gay and lesbian
 individuals, even as they assert that gay and lesbian individuals are a politically powerful
 group. Defendant-Intervenors’ evaluation of Prop. 8 and communications with others about it
 are relevant to understanding the “immediate objective” and “ultimate effect” of Prop. 8,
 Doc #76 at 9, necessary to prepare for depositions and cross-examination at trial, and
 reasonably calculated to lead to the discovery of other relevant information.

1 be used as impeachment evidence. *See, e.g.*, Fed. R. Evid. 801(d). Indeed, given the Defendant-
 2 Intervenor's role as the official proponents of Prop. 8, their voluntary and willful participation in the
 3 case, and their role as the defenders of Prop. 8 in this case, their prior statements or admissions
 4 regarding the purported state interests they now advance and the factual underpinnings of those
 5 asserted interests are relevant as to whether these interests are indeed legitimate. Simply put,
 6 Plaintiffs have the right to discover these prior statements or admissions to properly challenge
 7 Defendant-Intervenor's current characterizations of the positions they espouse in this case.

8 **3. Plaintiffs' Discovery Is Reasonably Calculated to Lead to the Discovery of**
 9 **Admissible Evidence Concerning the "Motivations for Supporting**
 10 **Prop. 8"**

11 Similarly, whether a defendant acted with discriminatory intent or purpose is a relevant
 12 consideration in an equal protection challenge. *See Washington v. Davis*, 426 U.S. 229, 239-40
 13 (1976); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484-85 (1982) ("when facially neutral
 14 legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine
 15 whether the legislation in some sense was designed to accord disparate treatment on the basis of
 16 racial considerations."); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979); *Dep't of*
 17 *Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973). The Court has already recognized the relevance of
 18 this evidence, identifying the "motivations for supporting Prop. 8" as one of the fifteen factual
 19 disputes that likely need to be resolved at trial. Doc #76 at 9.

20 More specifically, where intent is relevant, "the Court may look to the nature of the initiative
 21 campaign to determine the intent of the drafters and voters in enacting it." *City of Los Angeles v.*
 22 *County of Kern*, 462 F. Supp. 2d 1105, 1114 (C.D. Cal. 2006) (citing *Seattle Sch. Dist. No. 1*, 458
 23 U.S. at 471); *see also S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593-96 (8th Cir. 2003)
 24 ("Plaintiffs have the burden of proving discriminatory purpose and can look to several sources to
 25 meet that burden."). In *South Dakota Farm Bureau*, the Court considered whether the drafters of a
 26 referendum purposely discriminated against interstate commerce. 340 F.3d at 593. The Court
 27 observed that "[t]he most obvious [source of evidence] would be direct evidence that the drafters of
 28 Amendment E or the South Dakota populace that voted for Amendment E intended to discriminate
 against out-of-state businesses." *Id.* Accordingly, the Court reviewed both public and nonpublic

1 materials, including notes from the amendment drafting meetings and testimony by individuals
 2 involved with the drafting of the proposed amendment, focusing on the “desire” of the drafters to
 3 block out of state entities from farming in South Dakota. *Id.* The court noted that it would be
 4 impossible to ascertain the intention of all of the voters; however, the Court did “have evidence of the
 5 intent of individuals who drafted the amendment that went before the voters. It is clear that those
 6 individuals had a discriminatory purpose.” *Id.* at 596. Thus, on the strength of the drafters’ public
 7 and nonpublic statements, the court held that the referendum was unconstitutional as it was motivated
 8 by a discriminatory purpose. *Id.* at 596-98.

9 Defendant-Intervenors’ reliance on *SASSO v. Union City*, 424 F.2d 291 (9th Cir. 1970) is
 10 unavailing.² *SASSO* is not on point, both because it did not concern a discovery dispute, and also
 11 because Plaintiffs are not seeking the “private attitudes of voters.” That decision sheds no light on
 12 whether the beliefs of Prop. 8’s official proponents—*voluntary parties* to this litigation who willfully
 13 sought out party status and likely will present testimony at trial—are relevant to a determination of
 14 discriminatory purpose. Furthermore, *SASSO* was decided in 1970, six years before the Supreme
 15 Court decided *Washington v. Davis*, 426 U.S. 229 (1976), which held that a neutral law does not
 16 violate the Equal Protection Clause solely because it results in a racially disproportionate impact;
 17 instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of a
 18 protected class. In *Washington*, the Supreme Court held that whether there was a discriminatory
 19 intent in passing a law was a relevant inquiry. 426 U.S. at 239-40. Accordingly, discovery into
 20 Defendant-Intervenors’ “motivations for supporting Prop. 8” is relevant and appropriate.

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 24 ² Defendant-Intervenors’ reliance on other case law cited in its motion is equally misplaced.
 25 *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997) was reversed en banc. *Bates v. Jones*, 131 F.3d
 26 843 (9th Cir. 1997)(en banc). The en banc panel determined that the proper inquiry was voter
 27 notice, not voter intent and did not address the type of discovery at issue in this action. *See id.*
 28 at 846. *Crawford v. Board of Education*, 458 U.S. 527 (1982) is irrelevant to this inquiry as it
 concerned a legislatively created referendum—not the type of discovery at issue in this action.
 Finally, Defendant-Intervenors’ reliance on California law is unavailing given that federal
 courts “may look to the nature of the initiative campaign to determine the [discriminatory]
 intent of the drafters and voters in enacting it.” *City of Los Angeles*, 462 F. Supp. 2d at 1114.

1 **4. Defendant-Intervenors’ Position Is Internally Inconsistent and Designed**
2 **to Prevent Discovery Going to Issues Relevant to this Case**

3 Defendant-Intervenors maintain that the only documents they will produce are
4 communications that were “available to the public at large.” Doc #187-14 at 3. This “compromise
5 position,” Doc #187 at 9 n.2, is at odds with the reality of their Yes on 8 campaign, which relied
6 heavily on targeted messaging, which by definition constitutes messages *not* “available to the public
7 at large.” See F. Schubert & J. Flint, *Passing Prop 8; Smart Timing and Messaging Convinced*
8 *California Voters to Support Traditional Marriage*, Politics (Feb. 2009), attached hereto as Exh. B.
9 Accordingly, the documents that will be produced under Defendant-Intervenors’ “compromise
10 position” will not accurately reflect the “motivations for supporting Prop. 8” or provide Plaintiffs
11 with a complete picture of relevant evidence regarding their purported state interests and the factual
12 disputes identified by the Court. Such a limitation would allow Defendant-Intervenors to paint an
13 incomplete picture of the information they deliberately communicated to voters and the positions they
14 took on issues that are now directly relevant to this lawsuit. The Court should not allow the
15 Defendant-Intervenors the opportunity to game their discovery obligations.

16 Ironically, Defendant-Intervenors’ argument that Plaintiffs’ discovery is irrelevant is
17 undermined by the discovery *they* propounded on third-parties, which seeks the same information
18 that Defendant-Intervenors now argue is irrelevant and privileged.³ Doc #182 at 4-48. While
19 Defendant-Intervenors are asserting the complete irrelevance of any documents that they possess as a
20 party to this litigation, they simultaneously are aggressively pursuing documentary evidence from
21 other parties and non-parties alike.

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27 ³ Since Prop. 8 was passed and became the law of California, information obtained from its
28 proponents is obviously relevant to the issues in this litigation in a way that information
 sought from those who unsuccessfully opposed it is not.

1 **B. Defendant-Intervenors' Claim to a Sweeping First Amendment Privilege Against**
 2 **Party Discovery Is Makeweight**

3 Defendant-Intervenors contend that even if the documents Plaintiffs seek are discoverable, *all*
 4 *of them* nevertheless are subject to a First Amendment privilege against disclosure. That sweeping
 5 claim of privilege fails for at least three reasons.

6 1. Although Defendant-Intervenors' communications concerning the Prop. 8 referendum
 7 campaign are core political speech and undeniably entitled to broad First Amendment protection,
 8 Defendant-Intervenors should not now be heard to complain that Plaintiffs are seeking discovery of
 9 the communications most relevant to Plaintiffs' claims for relief. Rather than participate as *amici*
 10 *curiae*, Defendant-Intervenors elected to intervene in this action as parties, and they cannot now
 11 evade the responsibilities that attach to the party status they voluntarily assumed, including the
 12 obligation to comply with reasonable requests for discovery.

13 Defendant-Intervenors cite several cases upholding a First Amendment privilege against
 14 compelled disclosure of confidential membership information, but in *none* of those cases was the
 15 entity resisting disclosure a voluntary participant in underlying litigation. In *NAACP v. Alabama*, 357
 16 U.S. 449 (1958), the NAACP was the respondent to an equity suit brought by the Attorney General of
 17 Alabama. *Id.* at 452-53. *Bates v. City of Little Rock*, 361 U.S. 516 (1960) involved generally-
 18 applicable ordinances requiring organizations within the municipalities to provide lists of their
 19 members. *Id.* at 517-18. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539
 20 (1963) concerned a legislative committee's subpoena to which the NAACP was the respondent. *Id.*
 21 at 540. Likewise, *Dole v. Service Employees Union*, 950 F.2d 1456 (9th Cir. 1991) and *Brock v.*
 22 *Local 375*, 860 F.2d 346 (9th Cir. 1988), involved subpoenas issued by the Department of Labor to
 23 certain labor unions. *See Dole*, 950 F.2d at 1458; *Brock*, 860 F.2d at 348.⁴

24 ⁴ The district court rulings cited by Defendant-Intervenors are no different. *See In re Motor*
 25 *Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2009 U.S. Dist. LEXIS
 26 66005 (D. Kan. May 28, 2009) (defendants resisting discovery of communications with trade
 27 associations); *Anderson v. Hale*, No. 00-C-2021, 2001 WL 503045 (N.D. Ill. May 10, 2001)
 28 (defendant resisting subpoena of third-party electronic records); *Adolph Coors Co. v. Wallace*,
 570 F. Supp. 202 (N.D. Cal. 1983) (defendant LGBT advocacy group resisting discovery
 from plaintiffs). Though, in *Coors*, the district court seemed to frown upon the notion that
 one could "impl[y] a waiver of . . . constitutional safeguards by reason of the party's decision

[Footnote continued on next page]

1 Unlike the NAACP and the unions in *Dole* and *Brock*, Defendant-Intervenors chose to be
 2 parties in this litigation. And their resistance to Plaintiffs' reasonable discovery is particularly
 3 inappropriate given that, in their recent motion for summary judgment, Defendant-Intervenors have
 4 squarely placed at issue the subjective intentions of Prop. 8's supporters by denying that Prop. 8 was
 5 motivated by discriminatory animus toward gay and lesbian individuals. *See* Doc #172-1 at 107 ("It
 6 is simply implausible that in acting with surgical precision to preserve and restore the venerable
 7 definition of marriage, the people of California somehow transformed that institution into an
 8 instrument of bigotry against gays and lesbians."); *id.* at 111 ("Plaintiffs' claim that animus against
 9 gays and lesbians is the only possible explanation for the enactment of Proposition 8 is false").
 10 Similarly, in their case management statement, Defendant-Intervenors announced that they would not
 11 be able to reach stipulations with Plaintiffs regarding any of the factual underpinnings of the
 12 governmental interests on which they now rely. *See, e.g.*, Doc #139 at 23 (refusing to take a position
 13 on "[w]hether the exclusion of same-sex couples from marriage leads to increased stability in
 14 opposite sex marriage or alternatively whether permitting same-sex couples to marry destabilizes
 15 opposite sex marriage"). It is therefore Defendant-Intervenors' own litigating positions that
 16 necessitate the discovery sought by Plaintiffs.

17 2. Defendant-Intervenors have failed to demonstrate how the discovery Plaintiffs seek will
 18 diminish Defendant-Intervenors' associational freedoms. Quite unlike nearly all of the cases
 19 Defendant-Intervenors cite, Plaintiffs' discovery requests do not seek ProtectMarriage.com's
 20 membership list, or a list of donors to the "Yes on 8" cause—even though the latter is available for
 21 public inspection under California law. California Sec'y of State, Campaign Finance: Proposition
 22 008, <http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1302602&session=2007> (last
 23

24 [Footnote continued from previous page]

25 to instigate litigation," the district court itself recognized that "given the facts at bar" the issue
 26 was not implicated there. 570 F. Supp. at 209. Defendant-Intervenors do cite two cases
 27 where the party initiating the litigation thereafter resisted discovery, *see Grandbouche v.*
 28 *Clancy*, 825 F.2d 1463 (10th Cir. 1987); *Christ Covenant Church v. Town of Sw. Ranches*,
 No. 07-60516, 2008 U.S. Dist. LEXIS 49483 (S.D. Fla. June 29, 2008), but in each case the
 court found that the First Amendment privilege could not be sustained where the plaintiff
 "ha[d] placed certain information into issue." *Grandbouche*, 825 F.2d at 1467; *see also*
Christ Covenant Church, 2009 U.S. Dist LEXIS 49483, at *28-*32.

1 visited Sept. 18, 2009). Plaintiffs rather seek documents relating to the issues the Court has identified
2 as central to this litigation and Defendant-Intervenors' factual contentions concerning the same,
3 including "the nature of the initiative campaign to determine the intent of the drafters and voters in
4 enacting it." *City of Los Angeles*, 462 F. Supp. 2d at 1114.

5 Courts in this Circuit have rejected claims of First Amendment privilege where a litigant
6 seeks to apply it "not to specific membership documents, but instead to prevent any discovery of her
7 files." *Wilkinson v. FBI*, 111 F.R.D. 432, 436 (C.D. Cal. 1986); *see also id.* ("While it is clear that
8 the privilege may be asserted with respect to specific requests for documents raising these core
9 associational concerns, it is equally clear that the privilege is not available to circumvent general
10 discovery."). Yet, relying principally on an unpublished district court decision from Kansas,
11 Defendant-Intervenors argue that *all* of their political advocacy communications except those
12 disseminated to the "electorate at large" are privileged from disclosure. Doc #187 at 18 (citing *In re*
13 *Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2009 U.S. Dist. LEXIS
14 66005 (D. Kan. May 28, 2009)).

15 Above and beyond the fact that Defendant-Intervenors chose to participate in the lawsuit and
16 chose to place their political communications in issue, there at least two features that distinguish this
17 case from *In re Motor Fuel Temperature Sales Practices Litigation*.

18 First, Defendant-Intervenors' claim of privilege is not remotely limited to "confidential
19 communications." *Motor Fuel Litigation*, 2009 U.S. Dist. Lexis 66005, at *45. To the contrary,
20 Defendant-Intervenors' claim of privilege sweeps in all documents responsive to Plaintiffs' request
21 except those that were disclosed to the "electorate at large." Doc #187 at 9 n.2; *see also* Doc #187-7
22 at 6 (Moss Decl.). On Defendant-Intervenors' view, all communications that were targeted in any
23 manner or fashion to particular recipients are privileged—even if the communications were received
24 by tens of thousands (or more) California voters. *See* Exh. A (McGill Decl.) at ¶ 3. Thus,
25 Defendant-Intervenors' claim of privilege sweeps in every article of mail they ever sent—postal or
26 electronic.

27 At the other end of the spectrum, Defendant-Intervenors' claim of privilege also sweeps in all
28 of their communications with their paid political consultants notwithstanding the fact that those

1 consultants have published articles describing their strategy, Exh. B, and indeed, have sought
2 accolades from trade associations for that strategy. *See “The 18th Annual Pollie Awards &*
3 *Conference,”* attached hereto as Exh. C (identifying Schubert Flint Public Affairs’ work on the “Yes
4 on 8” campaign as the recipient of multiple 2009 Pollie Awards).

5 When communications and strategies are widely disseminated and discussed (indeed,
6 trumpeted) in public—as were many of the documents Defendant-Intervenors now claim are
7 privileged from disclosure—it is difficult to envision how disclosure of those documents to Plaintiffs
8 could chill Defendant-Intervenors’ speech.

9 And, in fact, Defendant-Intervenors have made no credible showing of how the discovery
10 *Plaintiffs* have requested *in this case* is likely to lead to reprisals against Defendant-Intervenors or
11 their supporters. This is the second feature that distinguishes this case from *In re Motor Fuel*
12 *Temperature Sales Practices Litigation*.

13 Defendant-Intervenors have produced declarations that describe “many instances of
14 harassment and retaliation against Protect Marriage’s donors and volunteers that occurred after their
15 affiliation with Protect Marriage became public.” Doc #187-2 at 5 (Prentice Decl.). But the
16 inescapable fact is that Defendant-Intervenors’ affiliation with Protect Marriage has been widely
17 known to the public for more than a year, as has that of their political consultant, Frank Schubert.
18 There is no additional chilling effect on their speech that will accrue, at this late date, from their
19 disclosure of the documents Plaintiffs seek. The public is already aware of the Defendant-
20 Intervenors’ “deeply held moral and political views,” Doc #187-12 at 4 (Tam Decl.), and Defendant-
21 Intervenors have suggested no reason why compliance with discovery is likely to generate a new
22 round of reprisals. Indeed, even Defendant-Intervenors’ own out-of-circuit authorities recognize that
23 “where a Plaintiff does not ask for a membership list, nor ... seek to identify a single anonymous ...
24 member” but rather seek only “to discover what the publicly identified ... members know about [the
25 subject of Plaintiff’s claims] through their personal information and communications with other
26 people,” it “cannot be said that Plaintiff’s subpoenas constitute an arguable threat to associational
27 rights by creating an apparent chilling effect.” *Anderson v. Hale*, No. 00-C-2021, 2001 WL 503045,
28 at *6. (N.D. Ill. May 10, 2001); *see also In re Motor Fuel Temperature Sales Practices Litig.*, 2009

1 U.S. Dist. LEXIS 66005, at *44 (“To the extent, however, that defendants seek protection of
2 associational membership lists or financial contributor lists that have been publicly disclosed, ... A
3 chilling effect caused by additional disclosure cannot be presumed.”).

4 Even still, to assuage any concerns about the threat of reprisals, in their last meet-and-confer
5 on September 10, Plaintiffs offered to entertain *any* reasonable confidentiality agreement or
6 procedure for redaction or sealing if Defendant-Intervenors had a good-faith belief that particular
7 documents raised a threat of reprisal to persons whose affiliation with Protect Marriage is not already
8 widely known to the public. Exh. A at ¶ 3. Defendant-Intervenors, however, refused to discuss any
9 potential procedures for designation and treatment of confidential documents. This suggests that the
10 vow of Defendant-Intervenors and their agents to “drastically alter how [they] communicate in the
11 future,” if they are made to comply with ordinary discovery requests, Doc #187-10 at 4 (Jansson
12 Decl.), is motivated less by a fear of reprisals than an unwillingness to fulfill the obligations of a
13 party to litigation in federal court.

14 3. Even under the balancing test that Defendant-Intervenors argue is applicable, Defendant-
15 Intervenors’ claim of privilege must fail. The Court has advised the parties that it wishes to conduct a
16 trial on various factual questions that undergird the constitutional questions raised by Plaintiffs’
17 claims for relief. As detailed above, Plaintiffs’ requests for discovery are plainly relevant to those
18 inquiries and, absent discovery, Plaintiffs have no means available to obtain the documents they seek
19 from Defendant-Intervenors. And to the extent that Defendant-Intervenors have a well-founded,
20 good-faith belief that particular documents could generate reprisals if disclosed to the public,
21 Plaintiffs are willing to negotiate any reasonable confidentiality measures to ensure that the First
22 Amendment rights of Defendant-Intervenors, their agents, and their supporters, are not chilled.

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III. CONCLUSION

For the foregoing reasons, Plaintiffs and Plaintiff-Intervenor respectfully urge this Court to deny Defendant-Intervenors’ motion for protective order and require that they produce all documents responsive to Plaintiffs’ First Set of Requests for Production on or before September 28, 2009.

DATED: September 18, 2009

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ATTESTATION PURSUANT TO GENERAL ORDER NO. 45

Pursuant to General Order No. 45 of the Northern District of California, I attest that concurrence in the filing of the document has been obtained from each of the other signatories to this document.

By: /s/ Theodore B. Olson
Theodore B. Olson

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