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 PROJECT OF CALIFORNIA RENEWAL

18 * Admitted *pro hac vice*

19 **UNITED STATES DISTRICT COURT**
 20 **NORTHERN DISTRICT OF CALIFORNIA**

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

23 Plaintiffs,

24 v.

25 ARNOLD SCHWARZENEGGER, in his official
 capacity as Governor of California; EDMUND G.
 26 BROWN, JR., in his official capacity as Attorney
 General of California; MARK B. HORTON, in his
 27 official capacity as Director of the California
 28

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS’
 MOTION FOR A STAY PENDING
 APPEAL AND/OR PETITION FOR
 WRIT OF MANDAMUS**

Date: January 7, 2010
 Time: 10:00 a.m.
 Judge: Chief Judge Vaughn R. Walker
 Location: Courtroom 6, 17th Floor

1 Department of Public Health and State Registrar of
2 Vital Statistics; LINETTE SCOTT, in her official
3 capacity as Deputy Director of Health Information
4 & Strategic Planning for the California Department
5 of Public Health; PATRICK O'CONNELL, in his
6 official capacity as Clerk-Recorder for the County
7 of Alameda; and DEAN C. LOGAN, in his official
8 capacity as Registrar-Recorder/County Clerk for
9 the County of Los Angeles,

10
11 Defendants,

12 and

13 PROPOSITION 8 OFFICIAL PROPONENTS
14 DENNIS HOLLINGSWORTH, GAIL J.
15 KNIGHT, MARTIN F. GUTIERREZ, HAK-
16 SHING WILLIAM TAM, and MARK A.
17 JANSSON; and PROTECTMARRIAGE.COM –
18 YES ON 8, A PROJECT OF CALIFORNIA
19 RENEWAL,

20 Defendant-Intervenors.

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1 respect to Defendant-Intervenors' claim of First Amendment privilege, the Court denied the
2 motion. *Id.* at 17 ("Proponents have not shown that the First Amendment privilege is applicable
3 to the discovery sought by plaintiffs."). The court also provided specific guidance on the types of
4 materials that would be relevant and would, accordingly, have to be produced by Defendant-
5 Intervenors. *See id.* at 16-17.

6
7 On October 8, Defendant-Intervenors noticed an appeal of the order.²

8 ARGUMENT

9 Four factors inform whether a federal court should issue a stay pending appeal: (1) the
10 appellants' likelihood of success on the merits; (2) the possibility of irreparable harm absent a
11 stay; (3) the possibility of substantial injury to other parties if a stay is issued; and (4) the public
12 interest. *See Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008)
13 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). When applying these four factors, the
14 Ninth Circuit employs a "sliding scale" approach: the more sharply the equities weigh in favor of
15 a stay, the less demanding of a showing of likely success on the merits is required. *See Natural*
16 *Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007), *vacated on other grounds by*
17 *508 F.3d 885* (9th Cir. 2007); *Golden Gate*, 512 F.3d at 1116. *See id.* A consideration of the
18 factors and analysis identified by the Ninth Circuit demonstrates that Defendant-Intervenors are
19 entitled to a stay.
20
21
22

23 _____
24 but the parties were unable to reach an agreement.

25 ² On October 5, pursuant to this Court's directive in Doc # 214, Plaintiffs propounded a
26 revised Document Request No. 8. *See Ex. A.* Plaintiffs seek "all versions of any documents
27 ... that constitute analyses of, or communications related to ... campaign strategy in
28 connection with Prop. 8 ... [or] messages to be conveyed to voters regarding Prop. 8." The
Request is directed at "those who (1) had any role in managing or directing
ProtectMarriage.com or the Yes on 8 campaign, or (2) provided advice, counseling,
information, or services with respect to efforts to encourage persons to vote for Prop. 8 or
otherwise to educate persons about Prop. 8." Plaintiffs' other Requests, Doc # 187-3, remain
unchanged.

1 **A. DEFENDANT-INTERVENORS' ARE LIKELY TO SUCCEED ON THE MERITS**³

2 While the Court has registered its disagreement, Defendant-Intervenors maintain that, for
 3 the reasons enunciated in our motion and reply in support of that motion, Docs # 187-1, 197, we
 4 are likely to succeed in the Ninth Circuit on the merits of our claim of First Amendment privilege.
 5 At a minimum, we have raised “serious legal questions” sufficient to warrant a stay in light of the
 6 irreparable harm and equities weighing “sharply in [our] favor,” as demonstrated below. *Golden*
 7 *Gate*, 512 F.3d at 1116.

8 **B. IRREPARABLE HARM IS CERTAIN IN THE ABSENCE OF A STAY**

9 Forcing a litigant to disclose privileged materials necessarily inflicts irreparable harm because
 10 once the materials have been disclosed, it is impossible to “undisclose” them. *In re Napster*, 479
 11 F.3d at 1088; *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989);
 12 *United States v. Amlani*, 169 F.3d 1189, 1193 n.4 (9th Cir. 1999); *Philip Morris*, 314 F.3d at 621-
 13 22. The infringement of “First Amendment freedoms . . . unquestionably constitutes irreparable
 14 injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality); *accord Brown v. Cal. DOT*, 321
 15 F.3d 1217, 1226 (9th Cir. 2003). Not surprisingly, then, the Ninth Circuit has repeatedly found
 16 that the “fact that the [stay applicant has] raised serious First Amendment questions *compels a*
 17
 18
 19

20 ³ The collateral order doctrine allows interlocutory review for a “narrow class of
 21 decisions that do not terminate the litigation, but are sufficiently important and collateral to the
 22 merits that they should nonetheless be treated as final.” *Will v. Hallock*, 546 U.S. 345, 347
 23 (2006) (quotation marks omitted). To be reviewable, a decision must “[1] conclusively
 24 determine the disputed question, [2] resolve an important issue completely separate from the
 25 merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.” *In*
 26 *re: Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1088 (9th Cir. 2007) (brackets in original).
 27 The Ninth Circuit has regularly applied the collateral order doctrine to review discovery-
 28 related decisions involving claims of privilege, and jurisdiction is equally present here. *See,*
e.g., Bittaker v. Woodford, 331 F.3d 715, 718 (9th Cir. 2003) (en banc) (attorney-client
 privilege); *In re Napster*, 479 F.3d at 1087-88 (attorney-client privilege); *United States v.*
Griffin, 440 F.3d 1138, 1141 (9th Cir. 2006) (marital privilege); *United States v. Austin*, 416
 F.3d 1016, 1020 (9th Cir. 2005) (joint-defense privilege); *Agster v. Maricopa County*, 422
 F.3d 836, 838 (9th Cir. 2005) (peer-review privilege involving medical files); *Osband v.*
Woodford, 290 F.3d 1036, 1039-41 (9th Cir. 2002) (protective order involving the attorney-
 client privilege); *Wharton v. Calderon*, 127 F.3d 1201, 1203-04 (9th Cir. 1997) (protective
 order involving the attorney-client privilege); see also *United States v. Philip Morris Inc.*, 314

1 finding that there exists the potential for irreparable injury, or that at the very least the balance of
 2 hardships tips sharply in [the stay applicant’s] favor.” *Cnty. House, Inc. v. City of Boise*, 490
 3 F.3d 1041, 1059 (9th Cir. 2007) (quotation marks omitted; emphasis added); *accord Sammartano*
 4 *v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002). Thus, “[t]o establish irreparable
 5 injury in the First Amendment context” a stay applicant “need only demonstrate the existence of a
 6 colorable First Amendment claim.” *Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217, 1225 (9th
 7 Cir. 2003) (quotation marks and alterations omitted).

9 **C. OTHER PARTIES WILL NOT BE SUBSTANTIALLY INJURED BY A STAY**

10 The Ninth Circuit has given tailored guidance for balancing harms in the First Amendment
 11 context: where a litigant “raise[s] serious First Amendment questions,” it “compels a finding that
 12 . . . the balance of hardships tips sharply in [that litigant’s] favor.” *Cnty. House, Inc.*, 490 F.3d at
 13 1059 (quotation marks omitted; emphasis added); *Sammartano*, 303 F.3d at 973. That principle
 14 fully applies here. And even if the Ninth Circuit were to find that the discovery at issue was not
 15 privileged, the most Plaintiffs could claim is a delay in the proceedings below. But “[a] mere
 16 assertion of delay does not constitute substantial harm.” *Philip Morris Inc.*, 314 F.3d at 622.
 17 Moreover, Defendant-Intervenors will seek expedited treatment of their appeal. This Court should
 18 thus conclude that the balance of hardships tips sharply in favor of issuing a stay pending appeal.

20 **D. THE PUBLIC INTEREST WEIGHS IN FAVOR OF A STAY**

21 “Courts . . . have consistently recognized the significant public interest in upholding First
 22 Amendment principles.” *Sammartano*, 303 F.3d at 974 (listing cases). More particularly, courts
 23 have repeatedly acknowledged that the public interest suffers when core First Amendment rights
 24 of political expression are jeopardized and political participation is chilled. *See, e.g., Buckley v.*
 25 *Valeo*, 424 U.S. 1, 71 (1976) (noting that “the public interest . . . suffers” from chilled political
 26
 27
 28 F.3d 612, 617-21 (D.C. Cir. 2003) (attorney-client privilege).

1 participation); *Sammartano*, 303 F.3d at 974 (“[T]he public interest is better served by . . .
2 protecting the core First Amendment right of political expression.”).

3 Denying this stay and forcing immediate production of the requested documents will
4 curtail the First Amendment freedoms surrounding voter-initiated measures—a political process
5 which the Supreme Court has recognized as vitally important in our democratic form of
6 government. See *James v. Valtierra*, 402 U.S. 137, 142-43 (1971); *McIntyre v. Ohio Elections*
7 *Comm’n*, 514 U.S. 334, 347 (1995). We earnestly believe that it will cause future initiative
8 proponents to censor their speech with campaign volunteers, donors, supporters, and agents, for
9 fear that their communications will be publicly disclosed in future litigation; it will discourage
10 supporters from communicating directly with initiative proponents; and it will silence initiative
11 supporters who want to remain anonymous. These concerns are especially salient where, as here,
12 the losing side of a hard-fought referendum campaign seeks complete disclosure of the successful
13 campaign strategy of the winning side, and it does so while preparing for a political “rematch.”
14 Thus, “the public interest is better served by . . . protecting the core First Amendment right of
15 political expression,” *Sammartano*, 303 F.3d at 974, at least until the Court of Appeals has had an
16 opportunity to consider these important issues on the merits.
17
18

19 CONCLUSION

20 For the foregoing reasons, the Court should grant this motion for a stay.
21

22 Dated: October 8, 2009

23 COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS

24 By: /s/Charles J. Cooper

25 Charles J. Cooper
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