

1 COOPER AND KIRK, PLLC
 Charles J. Cooper (DC Bar No. 248070)*
 2 *ccooper@cooperkirk.com*
 David H. Thompson (DC Bar No. 450503)*
 3 *dthompson@cooperkirk.com*
 Howard C. Nielson, Jr. (DC Bar No. 473018)*
 4 *hnielson@cooperkirk.com*
 Nicole J. Moss (DC Bar No. 472424)*
 5 *nmoss@cooperkirk.com*
 Peter A. Patterson (OH Bar No. 0080840)*
 6 *ppatterson@cooperkirk.com*
 1523 New Hampshire Ave. N.W., Washington, D.C. 20036
 7 Telephone: (202) 220-9600, Facsimile: (202) 220-9601

8 LAW OFFICES OF ANDREW P. PUGNO
 Andrew P. Pugno (CA Bar No. 206587)
 9 *andrew@pugnowlaw.com*
 101 Parkshore Drive, Suite 100, Folsom, California 95630
 10 Telephone: (916) 608-3065, Facsimile: (916) 608-3066

11 ALLIANCE DEFENSE FUND
 Brian W. Raum (NY Bar No. 2856102)*
 12 *braum@telladf.org*
 James A. Campbell (OH Bar No. 0081501)*
 13 *jcampbell@telladf.org*
 15100 North 90th Street, Scottsdale, Arizona 85260
 14 Telephone: (480) 444-0020, Facsimile: (480) 444-0028

15 ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH,
 GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM,
 16 MARK A. JANSSON, and PROTECTMARRIAGE.COM – YES ON 8, A
 PROJECT OF CALIFORNIA RENEWAL

17 * Admitted *pro hac vice*

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

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

22 Plaintiffs,

23 CITY AND COUNTY OF SAN FRANCISCO,

24 Plaintiff-Intervenor,

25 v.

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

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS'
 MEMORANDUM IN OPPOSITON TO
 PLAINTIFFS' AND PLAINTIFF-
 INTERVENOR'S MOTION IN
 LIMINE TO EXCLUDE THE EXPERT
 REPORT, OPINION, AND
 TESTIMONY OF KENNETH P.
 MILLER**

Pretrial Conference

Date: December 16, 2009

Time: 10:00 a.m.

Judge: Chief Judge Vaughn R. Walker

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

11
12 Defendants,

13 and

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

21 Defendant-Intervenors.

22
23 Additional Counsel for Defendant-Intervenors

24 ALLIANCE DEFENSE FUND

25 Timothy Chandler (CA Bar No. 234325)

26 *tchandler@telladf.org*

27 101 Parkshore Drive, Suite 100, Folsom, California 95630

28 Telephone: (916) 932-2850, Facsimile: (916) 932-2851

Jordan W. Lorence (DC Bar No. 385022)*

jlorence@telladf.org

Austin R. Nimocks (TX Bar No. 24002695)*

animocks@telladf.org

801 G Street NW, Suite 509, Washington, D.C. 20001

Telephone: (202) 393-8690, Facsimile: (202) 347-3622

* Admitted *pro hac vice*

Location: Courtroom 6, 17th Floor

Trial Date: January 11, 2010

1 Plaintiffs and Plaintiff-Intervenor (collectively, “Plaintiffs”) contend that certain paragraphs
 2 contained in Dr. Kenneth P. Miller’s expert rebuttal report do not present rebuttal information and
 3 are improperly duplicative of another expert’s report. Defendant-Intervenors (“Proponents”)
 4 respectfully submit that Plaintiffs’ claims lack merit, and thus that their motion *in limine* to exclude
 5 Dr. Miller’s expert report, opinion, and testimony should be denied.

6 **FACTS**

7 In an August 19, 2009 Minute Entry the Court established October 2, 2009, as the deadline
 8 for producing expert reports pursuant to Federal Rule of Civil Procedure 26(a)(2)(B). *See* Doc #
 9 160. The parties accordingly exchanged expert reports on that date; among the reports submitted
 10 by Proponents was one written by Dr. Paul Nathanson, *see* Doc # 280-4; among those submitted
 11 by Plaintiffs was one written by Dr. Gary M. Segura, *see* Doc # 280-3. The parties agreed to
 12 exchange rebuttal expert reports on November 9. On that date, Proponents produced an expert
 13 rebuttal report written by Dr. Kenneth P. Miller. *See* Doc # 280-6.

14 Plaintiffs filed a motion *in limine* on December 7 asking this Court to exclude paragraphs
 15 53-72 of Dr. Miller’s expert rebuttal report on the grounds that the information (a) is not rebuttal
 16 information and (b) duplicates Dr. Nathanson’s report. Doc # 280 at 5. A recounting of the
 17 relevant expert reports demonstrates that Plaintiffs’ claims are without merit.

18 **Report of Dr. Paul Nathanson**

19 Dr. Nathanson’s report examines the views of religious organizations, religious people,
 20 and gay rights advocates in California to answer three questions:

- 21 (1) Is religion inherently incompatible with the redefinition of marriage to include gay
 couples?
- 22 (2) Does religious support for the historical definition of marriage necessarily entail
 animus toward gay people, thus amounting to bigotry and “bad faith?”
- 23 (3) Do secular advocates for gay marriage ignore religion?

24 Doc # 280-4 at 6. Dr. Nathanson’s report answers each of the questions it poses in the negative. As
 25 these questions indicate, the “material aspect” of Proponents’ case that Dr. Nathanson’s report
 26 “logically advances” is that Proposition 8 should not be invalidated on the ground that it was driven
 27 by animus or any other improper motivation. *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1315
 28 (9th Cir. 1995).

1 **Report of Dr. Gary M. Segura**

2 Dr. Segura's report addresses "the relative political power of gays and lesbians as a class of
3 citizens, and their level of political vulnerability." Doc # 280-3 at 3. The report, among other
4 things, identifies several purported manifestations of gays' and lesbians' political powerlessness, *id.*
5 at 5-9, and alleged factors contributing to such powerlessness, *id.* at 9-13. Among the contributing
6 factors Dr. Segura identifies are "moral and political condemnation" and "powerful, numerous, and
7 well-funded opposition." *Id.* at 13. In his discussion of each of these factors, set out in full below,
8 Dr. Segura assigns a primary role to religious beliefs:

9 **Moral and Political Condemnation:** While the pluralist framework envisions
10 shifting majorities and rotation in office, Old Testament prohibitions of
11 homosexuality serve to create, in many of America's religious communities, a
12 permanent majority that believes homosexual conduct is sinful and immoral and that
13 it should be condemned and discouraged. The General Social Survey (downloadable
14 from the National Opinion Research Center) regularly asks a representative sample of
15 Americans to evaluate whether homosexual relations are "wrong." In 2008, those data
16 show that 51.5% of Americans still report that sex between two persons of the same
17 sex is "always wrong" while another 10.3% agree that it is "sometimes" or "almost
18 always" wrong. Moreover, the shift in the direction of tolerance is neither large nor
19 rapid. A decade ago, a module from the same survey shows the comparable numbers
20 as 56% and 11.8% respectively.

21 **Powerful, Numerous, and Well-Funded Opposition:** The moral condemnation of
22 homosexual acts fuels and supports political opposition to protections and benefits for
23 gays and lesbians. Campbell and Robinson (2007) found that opposition to same-sex
24 marriages united leadership and core believers across religious traditions. Similarly,
25 the San Francisco Chronicle reported that the campaign in favor of Proposition 8 was
26 conceived and funded by a cooperative effort of the Roman Catholic Archbishop of
27 San Francisco and the senior leadership of the Mormon Church. Churches provide a
28 well-funded, widely spread, untaxed medium in which individuals opposed to gay
and lesbian policy goals can disseminate political messages and campaign materials,
as well as engage in fundraising. Moreover, national religious movements like Focus
on the Family, the Traditional Values Coalition, the Family Research Council, and
other groups provide a national network for pressuring elected officials, fundraising,
message testing, media dissemination and publication, mobilization and coordination
across states and jurisdictions. This nationwide co-ordination, for example, explains
how 14 statewide initiatives appeared in a single year, 2004. Cahill (2007) documents
the vast economic resources of these organizations and their willingness to provide
them to political efforts to prevent or reverse rights, benefits, or protections for gays
and lesbians. Gays and lesbians lack the resources, numbers, and reach to counter this
kind of committed, organized opposition to their interests.

29 *Id.*

30 Dr. Segura's report concludes that gays and lesbians do not have political power in the sense
31 that they have not demonstrated that they can "compel" favorable outcomes from the political
32 system. *Id.* at 5.

1 **Rebuttal Report of Dr. Kenneth P. Miller**

2 Dr. Miller’s rebuttal report expressly sets out to “address[] issues raised by plaintiffs’ expert
 3 witness, Dr. Gary M. Segura.” Doc # 280-6 at 2. To do so, his report “present[s] evidence that
 4 gays and lesbians ... have achieved significant political power in California and elsewhere in the
 5 United States.” *Id.* Part of this evidence consists of “the expanding coalition supporting LGBT
 6 rights” in California. *Id.* at 12. As Dr. Miller explains, gays and lesbians have strong allies in
 7 organized labor, corporations, professional associations, newspapers, political parties, state and
 8 local elected officials, and churches and other faith-based organizations. *Id.* at 12-31. Paragraphs
 9 53 through 72, part of this discussion of gays’ and lesbians’ political coalition, address churches and
 10 other faith-based organizations. They show, among other things, that religious groups were on both
 11 sides of the debate over Proposition 8.

12 **ARGUMENT**

13 **I. Dr. Miller’s Report Rebutts Dr. Segura’s**

14 Federal Rule of Civil Procedure 26(a)(2) provides that parties are not only to disclose the
 15 identities of their expert witnesses but also that in many circumstances they are required to
 16 accompany this disclosure with “a written report ... prepared and signed by the witness.” For
 17 experts whose “evidence is intended solely to contradict or rebut evidence on the same subject
 18 matter identified by another party[‘s]” initial expert disclosures, the rules establish a default
 19 deadline of 30 days following those initial disclosures for a party to disclose their identity and
 20 reports. FED. R. CIV. P. 26(a)(2)(C)(ii). Plaintiffs’ claim that the challenged paragraphs of Dr.
 21 Miller’s report was not timely disclosed rests on their contention that they do not consist of
 22 rebuttal material; Plaintiffs in other words do not challenge the timeliness of the disclosure if it is
 23 properly deemed rebuttal information—as is clearly the case.

24 As we have explained, Dr. Segura’s report aims to provide evidence on the subject of the
 25 “relative political power of gays and lesbians.” Doc # 280-3 at 3. The challenged discussion in
 26 Dr. Miller’s report would rebut Dr. Segura’s evidence on this “same subject matter” even if Dr.
 27 Segura did not discuss religion *at all*. FED. R. CIV. P. 26(a)(2)(C)(ii); *see TC Sys. Inc. v. Town of*
 28 *Colonie*, 213 F. Supp. 2d 171, 180 (N.D.N.Y 2002) (declining to “narrowly construe the phrase

1 ‘same subject matter’ beyond its plain language” because to do so “would impose an additional
 2 restriction on parties that is not included in the Rules”); *Lindner v. Meadow Gold Dairies, Inc.*,
 3 249 F.R.D. 625, 636 (D. Haw. 2008) (explaining that so long as a rebuttal report contradicts or
 4 rebuts the “subject matter” of principal reports it does not matter that a rebuttal expert did not
 5 review those reports). As Dr. Miller’s report explains, religious groups form part of the political
 6 coalition that champions the gay and lesbian rights movement in California. This growing political
 7 coalition “helps explain why the movement has been so successful in achieving legislative
 8 victories in California over the past decade, and why it can continue to rely on democratic
 9 institutions to pursue its goals.” Doc # 280-6 at 12. Evidence of the membership and activities of
 10 this political coalition serves to “explain, repel, counteract or disprove” Segura’s claim that gays
 11 and lesbians are politically powerless—even apart from of his discussion of religion—and is thus
 12 “properly admissible” as rebuttal evidence. *Crowley v. Chait*, 322 F. Supp. 2d 530, 551 (D. N.J.
 13 2004).

14 Dr. Segura’s report, however, *does* discuss religion’s role in affecting the political power of
 15 gays and lesbians. And as the lengthy excerpt from his report included above demonstrates, it does
 16 so extensively. His bottom line assertion is that “[g]ays and lesbians lack the resources, numbers,
 17 and reach to counter [the] kind of committed, organized opposition to their interests” inspired by
 18 religion. Doc # 280-3 at 13.

19 Plaintiffs, not Dr. Miller, have “seized upon a single line” and attempted to make it the sum
 20 and substance of Dr. Segura’s testimony.¹ Doc # 280 at 10-11. While the implications of that

22 ¹ Plaintiffs’ reference to *United States v. Southern California Edison Co.*, 1:01-CV-5167,
 23 2005 U.S. Dist. LEXIS 24592, at *14-16 (E.D. Cal. Sept. 23, 2005) is thus inapposite. The other
 24 cases Plaintiffs’ cite likewise fail to advance their cause. In *Jarritos, Inc. v. Los Jarritos*, 05-02380,
 25 2007 U.S. Dist LEXIS 32245 (N.D. Cal. May 2, 2007), *rev’d on other grounds, Jarritos, Inc. v.*
 26 *Reyes*, No. 07-16083, 2009 U.S. App. LEXIS 18225 (9th Cir. Aug. 14, 2009), the Court excluded
 27 rebuttal reports that “fail[ed] to consider or address the substance” of the expert-in-chief’s report,
 28 *id.* at *19. Dr. Miller’s report, however, is entirely keyed to rebutting Dr. Segura’s. In *J.W. v. City*
of Oxnard, 07-06171, 2008 WL 4810298 (C.D. Cal. Oct. 27, 2009) the Court excluded rebuttal
 testimony on a subject—police procedures—that was not the subject of *any* expert testimony by the
 opposing party, *id.* at *4. That is plainly not the case here. Finally, in *Lindner v. Meadow Gold*
Dairies, Inc., 249 F.R.D. 625 (D. Haw. 2008), although Court did exclude a portion of a rebuttal
 (Continued)

1 line—“that the campaign in favor of Proposition 8 was conceived and funded by a cooperative
 2 effort of the Roman Catholic Archbishop of San Francisco and the senior leadership of the Mormon
 3 Church,” Doc # 280-3 at 13—are rebutted by Dr. Miller’s evidence that religious groups were on
 4 both sides of the debate over Proposition 8, Dr. Miller’s evidence also repudiates Dr. Segura’s
 5 broader arguments that gays and lesbians are politically powerless in the face of a coordinated
 6 movement allegedly fueled by religiously-inspired moral and political condemnation of gays and
 7 lesbians.²

8 **II. Dr. Miller’s Report Does Not Improperly Duplicate Dr. Nathanson’s Report**

9 Plaintiffs also contend that Dr. Miller’s report improperly duplicates Dr. Nathanson’s report,
 10 insinuating that “Proponents are likely violating the rules governing rebuttal reports in an attempt to
 11 substitute a new expert for a prior expert with whom they may now not wish to proceed.” Doc #
 12 280 at 12. Plaintiffs have no basis for this charge. As an initial matter, Proponents’ pretrial
 13 disclosures indicate that they “expect to present” Dr. Nathanson’s testimony at trial. Doc # 292 at 3
 14 & n.1. Moreover, there is nothing improper about the fact that Dr. Miller’s report contains
 15 information similar to that contained in Dr. Nathanson’s.

16 First, while Dr. Miller and Dr. Nathanson present similar evidence about religious attitudes
 17 toward Proposition 8 and same-sex marriage, they employ that evidence for different reasons. Dr.
 18 Nathanson’s report, as we have explained, is intended primarily to demonstrate that religion played a
 19 role on both sides of the Proposition 8 campaign, that religious opposition to Proposition 8 is not
 20 tantamount to animus against gays and lesbians and, in short, that Proposition 8 is not tainted by
 21 animus or any other improper motivations. Dr. Miller’s rebuttal report, on the other hand, addresses
 22 a different subject—the political power of gays and lesbians. The challenged paragraphs of his

23 (Cont’d)

24 report, the excluded part did not “contradict or rebut *anything*” in the reports it was allegedly
 25 countering, *id.* at 637 (emphasis added).

26 ² Plaintiffs also complain that the challenged section of Dr. Miller’s rebuttal report takes up
 27 “six single-spaced pages.” Doc # 280 at 6. Those six pages, however, are all in service of rebutting
 28 Dr. Segura’s expert report regarding the political power of gays and lesbians. Dr. Miller’s “expert
 rebuttal report does exactly what it says: it rebuts, in the form of a *complete statement* of all of the
 opinions expressed by the author, the report of the opposing party’s expert.” *Long Term Capital
 Holdings v. United States*, 3:01-CV-1290, 2003 U.S. Dist. LEXIS 13256, *7-8 (D. Conn. May 15,
 2003) (emphasis added).

1 report are contained under the broader heading of “The Expanding LGBT Rights Coalition,” Doc #
2 280-6 at 12, and they help to demonstrate that members of the religious community are a part of this
3 coalition.³

4 Second, it is of no moment that Proponents could have anticipated that a rebuttal to
5 Plaintiffs’ political power expert may include a discussion of the California religious community’s
6 position on Proposition 8 and same-sex marriage generally. In order to prevail on their claim that
7 gays and lesbians are a “suspect class” under the Equal Protection Clause, Plaintiffs must show that
8 gays and lesbians are politically powerless. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.
9 432, 445 (1985); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th
10 Cir. 1990). “In most cases,” the rule writers have explained, “the party with the burden of proof on
11 an issue should disclose its expert testimony on that issue before other parties are required to make
12 their disclosures with respect to that issue.” Notes of Advisory Committee on 1993 Amendments,
13 FED. R. CIV. PROC. 26. The Court surely did nothing in this case to upset the default rule that
14 rebuttal reports are not due until after the parties make their initial expert disclosures. *See* FED. R.
15 CIV. PROC. 26(a)(2)(C)(ii). And Plaintiffs’ have pointed to no authority for the argument that
16 Proponents should have disclosed the challenged paragraphs of Dr. Miller’s rebuttal report with
17 their initial expert disclosures if they knew or suspected there would be a need for the evidence.
18 *See* Doc # 280 at 12. To the contrary, “[a]ll that is required is for the [rebuttal] information to repel
19 other expert testimony.” *Crowley*, 322 F. Supp. 2d at 551. If Plaintiffs’ position were the rule, it
20 “would lead to the inclusion of vast amounts of arguably irrelevant material in an expert’s report on
21 the off chance that failing to include any information in anticipation” of another expert’s testimony
22 would prevent the expert from introducing the information at all. *Id.*

23
24 ³ *Scientific Components Corp. v. Sirenza Microdevices, Inc.*, 03-CV-1251, 2008 U.S. Dist.
25 LEXIS 92703 (E.D.N.Y. Nov. 13, 2008), is thus off-point. Indeed, while in that case the district
26 court held that one part a rebuttal expert’s report was improperly repetitive, it rejected a similar
27 challenge with respect to two other parts of the rebuttal expert’s report. *Id.* at *9. In one of those
28 instances, both the initial expert and the rebuttal expert discussed low frequency oscillation in
amplifiers, but for different purposes. The initial report offered “a general overview” of the subject,
while the rebuttal report contrasted it to “noise” in response to an alleged confusion of these
phenomena in an expert report submitted by the opposing party. *Id.* at *10 & n.2. The Court held
that this was “appropriate rebuttal testimony.” *Id.* at *10.

1 **CONCLUSION**

2 For these reasons, Plaintiffs' Motion *in Limine* to Exclude the Expert Report, Opinion, and
3 Testimony of Kenneth P. Miller should be denied.

4
5 Dated: December 11, 2009

6 COOPER AND KIRK, PLLC
7 ATTORNEYS FOR DEFENDANT-INTERVENORS
8 DENNIS HOLLINGSWORTH, GAIL J. KNIGHT,
9 MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM,
10 MARK A. JANSSON, AND PROTECTMARRIAGE.COM –
11 YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
By: /s/Charles J. Cooper
Charles J. Cooper