1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA 3 4 KRISTIN M PERRY, SANDRA B STIER, 5 PAUL T KATAMI and JEFFREY J ZARRILLO, 6 Plaintiffs, 7 CITY AND COUNTY OF SAN FRANCISCO, 8 Plaintiff-Intervenor, 9 10 ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney No C 09-2292 VRW general of California; MARK B HORTON, in his official capacity ORDER as director of the California Department of Public Health and state registrar of vital 15 statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerkrecorder of the County of 19 Alameda; and DEAN C LOGAN, in his official capacity as registrar-20 recorder/county clerk for the County of Los Angeles, 21 Defendants, 22 DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM -25 YES ON 8, A PROJECT OF CALIOFORNIA RENEWAL, as official proponents of Proposition 8, 26 Defendant-Intervenors. 27 28

Plaintiffs and plaintiff-intervenor City and County of San Francisco (collectively "plaintiffs") seek an order compelling production of non-privileged documents responsive to document requests 1, 6 and 8. Doc #325 at 8. Defendant-intervenors, the official proponents of Proposition 8 ("proponents") oppose production, arguing all non-privileged responsive documents have been produced and that additional production at this time would not be practical. Doc #314. Underlying the dispute is the scope of proponents' First Amendment privilege and the application of that privilege to the documents in proponents' possession. The court heard the matter on January 6, 2010. This written order memorializes the oral order made at the hearing.

I

Proponents' First Amendment privilege protects "private, internal campaign communications concerning the formulation of strategy and messages." Perry v Hollingsworth, 09-17241 Slip Op at 36 n12 (9th Cir January 4, 2010) (emphasis in original). The privilege protects "communications among the core group of persons engaged in the formulation of campaign strategy and messages." Id (emphasis in original). The Ninth Circuit left it to this court "to determine the persons who logically should be included" in the core group. Id.

At the January 6 hearing, the court heard argument from counsel concerning the identities of individuals within the core group. Proponents argued the court should consider as part of the core group organizations other than the official campaign in support of Proposition 8, Yes on 8 and ProtectMarriage.com. But

proponents have never asserted a First Amendment privilege over communications to other organizations. Indeed, proponents'

November 6, 2009 in camera filing, which was intended to represent (by providing the Court with a representative sample) the universe of documents over which proponents claim a First Amendment privilege, does not identify other organizations' documents as part of proponents' privilege claim. Doc #251. To the contrary, the declaration accompanying the in camera submission refers only to the management structure of the Yes on 8 campaign. Accordingly, the court finds that proponents have only claimed a First Amendment privilege over communications among members of the core group of Yes on 8 and ProtectMarriage.com.

Even if the Court were to conclude that the First

Amendment privilege had been properly preserved as to the

communication among the members of core groups other than the Yes

on 8 and ProtectMarriage.com campaign, proponents have failed to

meet their burden of proving that the privilege applies to any

documents in proponents' possession, custody or control. There is

no evidence before the Court regarding any other campaign

organization, let alone the existence of a core group within such
an organization. There is also no evidence before the Court that

any of the documents at issue are private internal communications

of such a core group regarding formulation of strategy and

messages.

Counsel did not agree on a core group of Yes on 8 and ProtectMarriage.com at the January 6 hearing, and in the absence of agreement, the court looked to a declaration by Ron Prentice submitted by proponents under seal on November 6, 2009. Doc #251.

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The Prentice declaration explains the structure of the "Yes on 8" campaign and identifies by name the individuals with decisionmaking authority over campaign strategy and messaging. admitted the individuals in the Prentice declaration form at least a part of the core group but sought an additional 24 hours to determine whether additional individuals should also be included. The court granted the request and ordered proponents to supplement their filing not later than January 7, 2010 at 4 PM. filed a second Declaration of Mr. Prentice (the "Second Prentice Declaration") which offers addition persons that are claimed to be in the core group of ProtectMarriage.com. Doc #364. Plaintiffs submitted objections to the Second Prentice Declaration on January Doc #367. Having reviewed both of the Prentice declarations and plaintiffs' opposition, the court finds that the court group consists only of the following individuals:

Dennis Hollingsworth, Gail J Knight, Martin F Gutierrez, Hak-Shing William Tam and Mark A Jansson (The official proponents of Proposition 8); Ron Prentice, Mark A Jansson, Ned Dolejsi and Doug Swardstrom (the members of ProtectMarriage.com's executive committee); David Bauer (the treasurer of ProtectMarriage.com); Andrew Pugno, Joe Infranco and Glen Lavy (ProtectMarriage.com's attorneys); Mike Spence and Gary Lawrence (individuals who provided significant advice and assistance to the campaign); Sonja Eddings Brown, Chip White and Jennifer Kerns (spokespersons for ProtectMarriage.com); Meg Waters and the individuals listed in  $\P6(i)-(iii)$  and  $\P6(v)$ -(vii) of the Second Prentice Declaration (volunteers who had significant roles in formulating strategy and messaging); employees of Schubert Flint Public Affairs, Lawrence Research, Sterling Corporation, Bieber Communications, Candidates Outdoor Graphics, The Monaco Group, Infusion PR, Connell Dontatelli, JRM Enterprises and K Street Communications (consulting firms who had significant input on strategic decisions); and assistants to the named individuals acting on the named individuals' behalf.

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Communications to anyone outside the core group are not privileged under the First Amendment. While the First Amendment privilege only protects internal communications relating to strategy or messaging, proponents will not be ordered at this juncture to produce any internal communications on any subject. Nevertheless, proponents must revise their privilege log to include, as protected by the First Amendment privilege, all documents consisting of communications between or among members of the core group. The revised privilege log shall be served and filed not later than January 24, 2010.

II

Plaintiffs seek an order directing proponents to produce all non-privileged documents responsive to document requests 1, 6 and 8. Doc #325 at 8. To the extent requests 1, 6 and 8 seek documents that contain, refer or relate to arguments for or against Proposition 8, the requests seek relevant discovery as defined in FRCP 26(b)(1). See Doc #252 at 3; Perry, 09-17241 Slip op at 34. Because the scope of proponents' First Amendment privilege has been defined, proponents are now able to identify non-privileged documents and produce them to plaintiffs pursuant to the protective order, Doc #360. Proponents are therefore ordered to produce all documents responsive to requests 1, 6 and 8 that contain, refer or relate to any arguments for or against Proposition 8 other than communications solely among the core group as defined above. They shall begin production of the documents on a rolling basis not later than Sunday, January 10, 2010 at 12 PM. Production shall conclude not later than Sunday, January 17, 2010 at 12 PM.

## United States District Court For the Northern District of California

short production schedule is necessary in light of the trial scheduled to begin on January 11, 2010.

IT IS SO ORDERED.

JOSEPH C SPERO United States Magistrate Judge