

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his  
official capacity as governor of  
California; EDMUND G BROWN JR, in  
his official capacity as attorney  
general of California; MARK B  
HORTON, in his official capacity  
as director of the California  
Department of Public Health and  
state registrar of vital  
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 clerk-  
recorder of the County of  
Alameda; and DEAN C LOGAN, in his  
official capacity as registrar-  
recorder/county clerk for the  
County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J  
KNIGHT, MARTIN F GUTIERREZ,  
HAKSHING WILLIAM TAM, MARK A  
JANSSON and PROTECTMARRIAGE.COM -  
YES ON 8, A PROJECT OF  
CALIOFORNIA RENEWAL, as official  
proponents of Proposition 8,

Defendant-Intervenors.

No C 09-2292 VRW  
ORDER



1 proponents have never asserted a First Amendment privilege over  
2 communications to other organizations. Indeed, proponents'  
3 November 6, 2009 in camera filing, which was intended to represent  
4 (by providing the Court with a representative sample) the universe  
5 of documents over which proponents claim a First Amendment  
6 privilege, does not identify other organizations' documents as part  
7 of proponents' privilege claim. Doc #251. To the contrary, the  
8 declaration accompanying the in camera submission refers only to  
9 the management structure of the Yes on 8 campaign. Accordingly,  
10 the court finds that proponents have only claimed a First Amendment  
11 privilege over communications among members of the core group of  
12 Yes on 8 and ProtectMarriage.com.

13           Even if the Court were to conclude that the First  
14 Amendment privilege had been properly preserved as to the  
15 communication among the members of core groups other than the Yes  
16 on 8 and ProtectMarriage.com campaign, proponents have failed to  
17 meet their burden of proving that the privilege applies to any  
18 documents in proponents' possession, custody or control. There is  
19 no evidence before the Court regarding any other campaign  
20 organization, let alone the existence of a core group within such  
21 an organization. There is also no evidence before the Court that  
22 any of the documents at issue are private internal communications  
23 of such a core group regarding formulation of strategy and  
24 messages.

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

1 The Prentice declaration explains the structure of the "Yes on 8"  
2 campaign and identifies by name the individuals with decision-  
3 making authority over campaign strategy and messaging. Proponents  
4 admitted the individuals in the Prentice declaration form at least  
5 a part of the core group but sought an additional 24 hours to  
6 determine whether additional individuals should also be included.  
7 The court granted the request and ordered proponents to supplement  
8 their filing not later than January 7, 2010 at 4 PM. Proponents  
9 filed a second Declaration of Mr. Prentice (the "Second Prentice  
10 Declaration") which offers addition persons that are claimed to be  
11 in the core group of ProtectMarriage.com. Doc #364. Plaintiffs  
12 submitted objections to the Second Prentice Declaration on January  
13 8, 2010. Doc #367. Having reviewed both of the Prentice  
14 declarations and plaintiffs' opposition, the court finds that the  
15 court group consists only of the following individuals:

16 Dennis Hollingsworth, Gail J Knight, Martin F Gutierrez, Hak-  
17 Shing William Tam and Mark A Jansson (The official proponents  
18 of Proposition 8); Ron Prentice, Mark A Jansson, Ned Dolejsi  
19 and Doug Swardstrom (the members of ProtectMarriage.com's  
20 executive committee); David Bauer (the treasurer of  
21 ProtectMarriage.com); Andrew Pugno, Joe Infranco and Glen Lavy  
22 (ProtectMarriage.com's attorneys); Mike Spence and Gary  
23 Lawrence (individuals who provided significant advice and  
24 assistance to the campaign); Sonja Eddings Brown, Chip White  
25 and Jennifer Kerns (spokespersons for ProtectMarriage.com);  
26 Meg Waters and the individuals listed in ¶6(i)-(iii) and  
27 ¶6(v)-(vii) of the Second Prentice Declaration (volunteers who  
28 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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1                   Communications to anyone outside the core group are not  
2 privileged under the First Amendment. While the First Amendment  
3 privilege only protects internal communications relating to  
4 strategy or messaging, proponents will not be ordered at this  
5 juncture to produce any internal communications on any subject.  
6 Nevertheless, proponents must revise their privilege log to  
7 include, as protected by the First Amendment privilege, all  
8 documents consisting of communications between or among members of  
9 the core group. The revised privilege log shall be served and  
10 filed not later than January 24, 2010.

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12                   II

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

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

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4 IT IS SO ORDERED.



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7 JOSEPH C SPERO  
8 United States Magistrate Judge  
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