

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*
 Jesse Panuccio (DC Bar No. 981634)*
 6 *jpanuccio@cooperkirk.com*
 Peter A. Patterson (Ohio Bar No. 0080840)*
 7 *ppatterson@cooperkirk.com*
 1523 New Hampshire Ave. N.W., Washington, D.C. 20036
 8 Telephone: (202) 220-9600, Facsimile: (202) 220-9601

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

12 ALLIANCE DEFENSE FUND
 Brian W. Raum (NY Bar No. 2856102)*
 13 *braum@telladf.org*
 James A. Campbell (OH Bar No. 0081501)*
 14 *jcampbell@telladf.org*
 15 15100 North 90th Street, Scottsdale, Arizona 85260
 Telephone: (480) 444-0020, Facsimile: (480) 444-0028

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

19 * Admitted *pro hac vice*

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

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

24 Plaintiffs,

25 v.

26 ARNOLD SCHWARZENEGGER, in his official
 27 capacity as Governor of California; EDMUND
 G. BROWN, JR., in his official capacity as At-
 28 torney General of California; MARK B. HOR-

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS
 DENNIS HOLLINGSWORTH, GAIL
 KNIGHT, MARTIN GUTIERREZ,
 MARK JANSSON, AND PROTECT-
 MARRIAGE.COM'S RESPONSE TO
 OBJECTIONS BY THE ACLU AND
 EQUALITY CALIFORNIA TO
 MAGISTRATE JUDGE SPERO'S
 MARCH 5, 2010 ORDER GRANTING
 MOTION TO COMPEL**

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

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. JANS-
18 SON; and PROTECTMARRIAGE.COM – YES
19 ON 8, A PROJECT OF CALIFORNIA RE-
20 NEWAL,

21 Defendant-Intervenors.

22 Additional Counsel for Defendant-Intervenors

23 ALLIANCE DEFENSE FUND

24 Timothy Chandler (CA Bar No. 234325)

25 *tchandler@telladf.org*

26 101 Parkshore Drive, Suite 100, Folsom, California 95630

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

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

jlorenc@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*

Date: March 16, 2010

Time: 10:00 a.m.

Judge: Chief Judge Vaughn R. Walker

Location: Courtroom 6, 17th Floor

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
BACKGROUND	1
STANDARD OF REVIEW	1
RESPONSES TO THE ACLU AND EQUALITY CALIFORNIA’S OBJECTIONS	2
A. Relevance.....	2
B. Burden.....	11
C. First Amendment Privilege.....	14
D. Limiting Disclosure	15
CONCLUSION.....	17

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bhan v. NME Hosps., Inc.</i> , 929 F.2d 1404 (9th Cir. 1991)	1
<i>Clarke v. Securities Indus. Ass’n</i> , 479 U.S. 388 (1987)	10
<i>First Nat’l Maintenance Corp. v. NLRB</i> , 452 U.S. 666 (1981).....	10
<i>Indiana Democratic Party v. Rokita</i> , 458 F. Supp. 2d 775 (S.D. Ind. 2006)	5
<i>Keithley v. Homestore.com, Inc.</i> , 629 F. Supp. 2d 972 (N.D. Cal. 2008)	1
<i>Marshall v. Sawyer</i> , 365 F.2d 105 (9th Cir. 1966).....	5
<i>Perriera v. Allstate Ins. Co.</i> , No. 96-56025, 1997 U.S. App. LEXIS 33531 (9th Cir. Nov. 20, 1997).....	4
<i>Rutti v. Lojack Corp.</i> , No. 07-56599, 2010 U.S. App. LEXIS 4278 (9th Cir. Mar. 2, 2010).....	9
<i>United States v. Castro</i> , 887 F.2d 988 (9th Cir. 1989)	5
<i>United States v. Elekwachi</i> , No. 96-10014, 1997 U.S. App. LEXIS 6381 (9th Cir. Apr. 2, 1997)	5
<i>United States v. Huguez-Ibarra</i> , 954 F.2d 546 (9th Cir. 1992).....	5
<i>United States v. Tamura</i> , 694 F.2d 591 (9th Cir. 1982)	5
<i>United Steelworkers v. Weber</i> , 443 U.S. 193 (1979).....	10
<u>Other</u>	
FED. R. CIV. P. 72(a)	1
FED. R. EVID. 201.....	5
FED. R. EVID. 801.....	4
FED. R. EVID. 801(c)	4
FED. R. EVID. 801(d)(2)	4
FED. R. EVID. 803(1).....	5
FED. R. EVID. 803(3).....	5
FED. R. EVID. 803(6).....	5
H. R. Rep. No. 245, 80th Cong., 1st Sess., 71 (1947)	10
9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2409 (3d ed. 2008).....	6

1 Defendant-Intervenors ProtectMarriage.com, Dennis Hollingsworth, Mark Jansson, Gail Knight,
2 and Martin Gutierrez (collectively, “Proponents”), respectfully submit this response to the Objections
3 to the March 5, 2010 order of Magistrate Judge Spero filed by Equality California and No on
4 Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union. *See*
5 Doc #s 610, 614.

6 **BACKGROUND**

7
8 On March 5, 2010, Magistrate Judge Spero granted Proponents’ motion to compel production
9 from Californians Against Eliminating Basic Rights (“CAEBR”), Equality California, and No on
10 Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union
11 (“ACLU”). *See* Doc # 610. Proponents had served document subpoenas on these organizations
12 pursuant to Fed. R. Civ. P. 45. Those subpoenas, and this instant dispute, arose in the context of the
13 more general question of whether internal campaign documents constitute permissible discovery and
14 admissible evidence in a constitutional challenge to a law enacted by voter initiative or referendum.
15

16 Equality California and the ACLU (hereinafter the “No-on-8 Objectors”) filed objections to the
17 March 5 order on March 11, 2010. *See* Doc # 614. CAEBR has not filed any objections to the March
18 5 order. Proponents have also today filed limited objections to specific portions of the March 5 order.
19 The background of the instant dispute is set out in greater detail in Proponents’ objections and thus is
20 not repeated here.

21 **STANDARD OF REVIEW**

22
23 Magistrate Judge Spero’s order may not be set aside unless it is “clearly erroneous or is contrary
24 to law.” FED. R. CIV. PROC. 72(a). *See also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1414 (9th Cir.
25 1991); *Keithley v. Homestore.com, Inc.*, 629 F. Supp. 2d 972, 974 (N.D. Cal. 2008). Under this
26 standard, the portions of Magistrate Judge Spero’s order challenged by Equality California and the
27 ACLU should not be disturbed.
28

1 **RESPONSES TO THE ACLU AND EQUALITY CALIFORNIA’S OBJECTIONS**

2 The No-on-8 Objectors level four categories of objections against the March 5 order:
 3 relevance, burden, privilege, and scope of disclosure. Taking as a given this Court’s rulings and the
 4 Ninth Circuit’s prior opinion in this case, these objections must fail. In the portions of the order
 5 objected to by the No-on-8 Objectors, Magistrate Judge Spero carefully applied the controlling law
 6 already set down in this case.¹

7
 8 **A. Relevance**

9 First, the No-on-8 Objectors contend that Magistrate Judge Spero applied “an incorrect stan-
 10 dard of relevance.” Doc # 614 at 7. They do not, however, identify what standard of relevance
 11 would have been proper. Nor do they cite any authority—not a procedural rule or a single case—for
 12 the proposition that the legal standard employed in March 5 order was “erroneous as a matter of
 13 law.” *Id.* Accordingly, the No-on-8 Objectors have not carried their burden on this point.

14 The No-on-8 Objectors instead contend that “the discovery phase of this case has long-since
 15 passed” and “there has been a trial and the taking of testimony has concluded.” *Id.* at 7. From this
 16 baseline, the No-on-8 Objectors argue that “there is nothing for the documents at issue to ‘lead to’ ”
 17 and the Court cannot order production of the documents unless “the documents themselves can
 18 come in as probative evidence.” *Id.* at 8. The No-on-8 Objectors then argue that the documents
 19 cannot be introduced because they are not party admissions and would constitute hearsay. *Id.* The
 20 No-on-8 Objectors cite no legal authority for these points, and thus it cannot be said that the March
 21 5 order’s failure to incorporate them was clearly erroneous or contrary to law. But even setting that
 22 aside, the argument still fails at every step.

23 There is nothing to distinguish the timing of the March 5 order from the Court’s January 8 or-
 24

25
 26
 27 ¹ Nonetheless, Proponents continue to maintain that on First Amendment privilege, relev-
 28 ance, burden, and scope-of-disclosure grounds this Court’s prior and predicate orders and rulings
 constitute error.

1 der compelling production of Proponents' similar internal campaign documents, which also issued
 2 after formal discovery had closed. *See* Doc # 372. As Magistrate Judge Spero explained, and as the
 3 Court is well aware, the expedited nature of this case, along with the Ninth Circuit's unanticipated
 4 alteration of its opinion on January 4, 2010, caused "discovery (and litigation regarding the scope of
 5 the First Amendment privilege) [to] continu[e] beyond the cut-off." Doc # 610 at 4. *Cf.* Doc # 584
 6 at 17-19 (explaining why Proponents' motion was timely). The No-on-8 Objectors' argument here
 7 appears to be a circuitous root to charging that Proponents' motion to compel was not timely, but the
 8 No-on-8 Objectors explicitly disclaim any challenge to the March 5 order's finding of timeliness.
 9 *See* Doc # 614 at 7 n.3; FED. R. CIV. P. 72(a) ("A party may not assign as error a defect in the order
 10 not timely objected to."). And the No-on-8 Objectors are simply wrong in stating that "there has
 11 been a trial and the taking of testimony has concluded." Doc # 614 at 7. On January 27, the
 12 following colloquy occurred between the Court and counsel for Proponents:
 13

14
 15 MR. THOMPSON: And then, finally, Your Honor, we did note, as the Court is aware,
 16 that our motions to compel are outstanding. And we're not in a position to formally rest
 17 our case until those are resolved. If we were to receive documents from the No On 8
 18 campaign, then we might want leave to submit those documents and/or call witnesses
 19 pertaining to those subject matters. But other than that, we have no further witnesses and
 20 no further documents.

21 THE COURT: Very well. We have either this morning or last evening issued an order
 22 calling for a response from the third parties that you have subpoenaed, the three organiza-
 23 tions, and have also given the plaintiffs an opportunity to chime in, if they wish to do so.

24 Trial Tr. 2941:19-2942: 7. Accordingly, the documents at issue, if not admissible or relevant
 25 themselves, most certainly can "lead to" additional relevant evidence in the form of witness
 26 testimony.²

27
 28 ² Indeed, it would not have been appropriate to force Proponents to rest their case on Janu-
 ary 25, before this motion was conclusively decided and the documents produced. Proponents
 filed their motion to compel while trial was still in full swing, along with a motion to shorten
 time to have the matter resolved as expeditiously as possible. The No-on-8 Objectors resisted
 such expedition and the Court chose to wait to resolve the motion until after January 25. That
 delay, which was not caused or supported by Proponents, should not now be held against them in
 (Continued)

1 In any event, even if no further witnesses are called, the No-on-8 Objectors are simply
2 wrong to contend that these documents could only be introduced as admissions of party
3 opponents. Several of the documents introduced by Plaintiffs were *not* created by Proponents
4 (and thus are not admissions), but rather simply were documents that Proponents had in their
5 possession. *See* FED. R. EVID. 801(d)(2); Trial Tr. at 1628-33 (admission of PX 2555 over
6 objection); *id.* at 2368-69 (admission of PX 2655 over hearsay objection); *id.* at 2388 (admis-
7 sion of PX 2455); *id.* at 2931 (admission of PX 2403); *id.* at 2392-93 (admission of PX 2385
8 over hearsay objection). And the No-on-8 Objectors are wrong to conclude that the documents
9 would otherwise constitute hearsay. Hearsay is “a statement, other than one made by the
10 declarant while testifying at the trial ... offered in evidence to prove the truth of the matter
11 asserted.” FED. R. EVID. 801(c). This Court has held that documents such as those at issue here
12 “form[] a legislative history that may permit the [C]ourt to discern whether the legislative intent
13 of [Proposition 8] ... was a discriminatory motive.” Doc # 214 at 14. Thus, the documents
14 need not be submitted as statements of the declarants for purposes of proving the truth of the
15 matter asserted therein, but rather to shed light on the potential motivations of the non-declarant
16 voters. As Magistrate Judge Spero explained at the February 25 hearing, “whether these
17 [documents] are ... ‘hearsay’ ... certainly depends on what the purpose those documents were
18 being put [into evidence for].” Hr’g of Feb. 25, 2010, Tr. at 22:13-17. *See also id.* at 25:16-19
19 (“[Y]ou can’t tell, actually, the total mix that the voters got and what their intent was, even in
20 passing it, unless you have both sides.”). Documents admitted for such purposes are simply not
21 hearsay. *See, e.g.* FED. R. EVID. 801 advisory committee’s note to subdivision (c) (“If the
22 significance of an offered statement lies solely in the fact that it was made, no issue is raised as
23
24
25
26
27
28
their efforts to present the “complete record” the Court has called for, Doc # 76 at 5, including
“the mix of information before and available to the voters,” Doc # 214 at 14, which includes any
document that “contain[s], refer[s] or relate[s] to arguments for or against Proposition 8,” Doc
#372 at 5.

1 to the truth of anything asserted, and the statement is not hearsay.”); *Perriera v. Allstate Ins.*
 2 *Co.*, No. 96-56025, 1997 U.S. App. LEXIS 33531, at *3-4 (9th Cir. Nov. 20, 1997) (“The
 3 district correctly held the contested evidence was not hearsay because it went to knowledge
 4 rather than to the truth of the matter asserted.”); *United States v. Elekwachi*, No. 96-10014,
 5 1997 U.S. App. LEXIS 6381, at *6-7 (9th Cir. Apr. 2, 1997) (“When an out of court statement
 6 is being used not for its truth but to prove knowledge, it is not hearsay.”) (citing *United States v.*
 7 *Huguez-Ibarra*, 954 F.2d 546, 552 (9th Cir. 1992); *United States v. Castro*, 887 F.2d 988, 1000
 8 (9th Cir. 1989)); *United States v. Tamura*, 694 F.2d 591, 598 (9th Cir. 1982) (admitting telexes
 9 describing a bribery scheme not for the truth of their contents but for the nonhearsay purpose of
 10 showing defendant’s knowledge of the scheme).³

12 Moreover, many of the issues in this case are legislative facts. *See* FED. R. EVID. 201,
 13 advisory committee note (Legislative facts “are those which have relevance to legal reasoning
 14 and the lawmaking process.”); *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966) (“Legis-
 15 lative facts do not usually concern the immediate parties but are general facts which help the
 16 tribunal decide questions of law, policy, and discretion.”). And the Court may take judicial
 17 notice of documents that are probative legislative facts; the hearsay rules do not apply. *See*,
 18 *e.g.*, *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 843-44 (S.D. Ind. 2006)

21 _____
 22 ³ Moreover, some of the documents may qualify as exceptions to the hearsay rule. *See*
 23 FED. R. EVID. 803(1) (“[a] statement describing or explaining an event or condition made while
 24 the declarant was perceiving the event or condition, or immediately thereafter” is “not excluded
 25 by the hearsay rule”); FED. R. EVID. 803(3) (“[a] statement of the declarant’s then-existing state
 26 of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental
 27 feeling, pain, and bodily health)” is “not excluded by the hearsay rule”); FED. R. EVID. 803(6)
 28 (“[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions,
 opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person
 with knowledge, if kept in the course of a regularly conducted business activity” is “not excluded
 by the hearsay rule”). The state of mind of the No-on-8 groups may be probative, for instance, of
 the political power of gays and lesbians or (under this Court’s rulings) of voter intent, and if the
 documents are probative of these facts, then this they would qualify under the Rule 803(1)
 exception.

1 (denying motion to exclude “newspaper articles, transcribed oral statements, letters/press
 2 releases, committee reports, websites, polls, and journal articles” as “unsworn, unauthenticated,
 3 and contain[ing] hearsay” because case presented question requiring rational basis review and
 4 thus “the submissions are admissible to the extent that they tend to establish a reasonable
 5 justification for [the challenged law]”); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER,
 6 FEDERAL PRACTICE AND PROCEDURE § 2409 (3d ed. 2008) (“The Evidence Rules authorize the
 7 taking of judicial notice of adjudicative facts but leave notice of legislative facts to development
 8 by the federal courts.”).

10 Second, the No-on-8 Objectors argue that while Proponents’ statements to voters “could
 11 help the Court understand why voters who voted in favor of the initiative did so ... in an
 12 indirect and inferential sense,” the statements of the opponents of Proposition 8 “cannot ...
 13 illuminate[.]” this question “in any realistic or meaningful sense.” Doc # 614 at 8.⁴ As

15 ⁴ In their initial briefing, the No-on-8 Objectors were more fulsome in their objections to
 16 the lines of inquiry this case has involved. They contended that their “internal, confidential, and
 17 non-public campaign communications have no bearing on and cannot possibly reflect the
 18 rationale the ... voters adopted in support of Prop. 8.” Doc # 546 at 8. *See also* Doc # 543 at 14.
 19 As the Court is well aware, Proponents agree wholeheartedly with this position as it applies to
 20 both sides’ documents and thus believe it was clear error for this Court to allow discovery, and
 21 introduction as evidence, of such documents. *See, e.g.*, Doc # 187 at 10-14; Doc # 197 at 6-11;
 22 Petitioners’ Mot. for a Stay, *Perry v. Hollingsworth*, No. 09-17241 (9th Cir. Nov. 13, 2009) at 19
 (“disclosure of Proponents’ internal *nonpublic* communications with their political associates
 would reveal *nothing* about the voters’ intent”). Nonetheless, Proponents must litigate this case
 based on the controlling rulings of this Court, and those rulings hold that discovery requests
 seeking all communications “to voters” or the “public,” Doc # 187-3 at 5, properly seek “relevant
 discovery” and, “other than communications solely among the core group,” require production of
 any documents distributed to any person that “contain, refer or relate to arguments for or against
 Proposition 8,” Doc # 372 at 5.

23 The No-on-8 Objectors charge that “[w]hat Proponents want is simply a ‘free peak’ at their
 24 political opponents’ inside information, and that is a misuse of the litigation process.” Doc # 614
 25 at 9. As the above procedural history demonstrates, and as the No-on-8 Objectors well know, it
 26 has been the Proponents who have fervently and relentlessly argued that the type of documents at
 27 issue here are utterly irrelevant to this case and that discovery of such documents violates the
 28 constitutional rights of those (on both sides) who participated in the Proposition 8 campaign. *See*
 Letter from Stephen V. Bomse, Counsel for ACLU of Northern California to Molly C. Dwyer,
 Clerk of the Court, United States Court of Appeals for the Ninth Circuit (Nov. 27, 2009), *Perry*,
 No. 09-17241, at 2 n.4 (“In fairness, Proponents served their subpoenas only after they received
 requests for production from Plaintiffs. Proponents further advised the subpoenaed parties that
 Proponents were seeking internal campaign communications only in the event that they were

(Continued)

1 Magistrate Judge Spero recognized, however, there is no basis in this Court’s opinions for
2 distinguishing in any way between the nonpublic documents of those who campaigned in
3 support of Proposition 8 and those who campaigned against it. *See* Doc # 610 at 6; Hr’g of Feb.
4 25, 2010, Tr. at 25:12-19 (“[A]nd the judge has already decided this [Y]ou can’t tell,
5 actually, the total mix that the voters got and what their intent was, even in passing it, unless
6 you have both sides.”). On the contrary, the Court has held that: (i) it must examine “the
7 history and development of California’s ban on same-sex marriage” and the “ ‘historical
8 context and the conditions existing prior to [Prop 8’s] enactment,’ ” including “advertisements
9 and ballot literature considered by California voters,” Doc # 76 at 8-9;⁵ (ii) that “the *mix* of
10 information before and available to the voters forms a legislative history that may permit the
11 [C]ourt to discern whether the legislative intent of an initiative measure ... was a discriminatory
12 motive,” Doc # 214 at 14 (emphasis added); and (iii) that “documents that contain, refer or
13 relate to arguments for *or against* Proposition 8 ... [constitute] relevant discovery,” Doc # 372
14 at 5 (emphasis added). These relevance principles, by their express terms and by their logic, are
15 in no way limited to Proponents’ documents. If they were, the Court would have had no
16 occasion to state that “the mix” of information is relevant or that documents containing
17 arguments “against” Proposition 8 are relevant.

20
21 Nonetheless, the No-on-8 Objectors maintain that materials relating to opposition to a
22 ballot measure cannot possibly be relevant to the intent of those voters who approved the
23 measure. But given that the Court deems it appropriate to venture beyond the text of a ballot
24 measure itself (to the ballot arguments, to public advertisements, or to nonpublic information),

25
26 _____
obliged to produce such documents.”). Proponents lost that fight in this Court, and unless or
until the controlling legal rules change, must litigate the case on those terms. A suggestion that
so litigating the case on these terms is “a misuse of the litigation process” is baseless.

27
28 ⁵ The No-on-8 Objectors thus appear to simply disagree with this Court’s prior holdings.
See Doc # 614 at 8 (“[T]his Court is not being asked to write a history of the campaign over
Proposition 8....”).

1 it follows as a matter of logic that a voter who ultimately voted in support of that measure may
2 have been influenced not only by materials supporting the measure, but also by materials
3 expressing opposition. Most informed voters weigh both sides of a debate—they credit some
4 arguments, dismiss others, and reconsider others in light of new information (from both sides).
5 It is this “mix of information” that informs a voter’s choice and the balance he or she ultimately
6 strikes in coming to a final decision. If public ads and private campaign documents are indeed
7 relevant, then such materials from both sides are necessary to evaluate the reasons why voters
8 for Proposition 8 ultimately struck that balance. *See* Hr’g of Feb. 25, 2010, Tr. at 6:6-19
9 (statement of the Court) (“[T]he information before the voters ... was a conversation.... People
10 went back and forth on various topics. And so the idea that only the communications in the
11 outside world to the voters from one side are relevant seems to make no sense. If ... the entire
12 mix of information before the voters is what the judge would look at, ... then it seems to me
13 that internal communications from either side, within either side, would be relevant to elucidate
14 the messages that got transmitted.”); *id.* at 27:5-11. Thus, materials expressing opposition to
15 Proposition 8 form part of the “mix of information” voters may have considered and are equally
16 relevant to materials expressing support (to whatever extent such materials are relevant at all).
17 And there can be no argument that the No-on-8 Objectors possess a significant quantity of this
18 pertinent information. *See* Hr’g of Feb. 25, 2010, Tr. at 40:15-20 (statement of counsel for
19 Equality California) (“[T]his was a statewide campaign that was targeting every single discrete
20 group of voters that you could imagine ... and had to employ very different strategies and
21 messaging to reach all of those regions and groups.”).

22 Thus, it is simply not true that Proponents have been “reduced to arguing that the
23 documents they seek could be relevant because some voter may have been so offended by
24 something said by the No on 8 campaign that she changed her vote to Yes from No.” Doc #
25
26
27
28

1 614 at 8. Though even if this were true, it is not clear why such an argument would be
2 insufficient to carry the day. Voters may well be motivated to vote for (or against) a law in
3 reaction against the statements, arguments, and messages presented by its opponents (or its
4 supporters). Such a possibility seems especially likely in a highly contentious campaign such
5 as that surrounding Proposition 8, where passionate—and sometimes intemperate—statements
6 and arguments were presented by some extremists on both sides of the debate. For example,
7 some voters may have reacted negatively to the religious intolerance displayed by some aspects
8 of the No-on-8 campaign, and the documents of the No-on-8 Objectors may shed light on how
9 such ads and messages were counterproductive. Or the documents might show that voters
10 reacted negatively to the violence committed against supporters of Proposition 8 by its
11 opponents.⁶

12
13
14 This Court has characterized “the mix of information before and available to the voters”
15 as “a legislative history” relevant to this case. Doc # 214 at 14. Courts that examine legislative
16 history for other purposes regularly examine materials supporting *and opposing* the law in
17 question. *See, e.g., Rutti v. Lojack Corp.*, No. 07-56599, 2010 U.S. App. LEXIS 4278, at *16

18
19 ⁶ The No-on-8 Objectors also contend that Proponents’ nonpublic documents are relevant
20 because they may reveal the “arguments that the Proponents chose *not* to make (thereby
21 revealing what Proponents believed Proposition 8 was really about or was intended to accom-
22 plish),” whereas “the same thing cannot be said of No on 8 documents.” Doc # 614 at 9. It is
23 true that *exactly* the same thing cannot be said of the Yes-on-8 and No-on-8 documents, for
24 “Yes” and “No” are, indeed, different words. But (accepting the paradigm established by this
25 Court’s orders) arguments that the No-on-8 campaign chose *not* to make may reveal that the
26 opponents (i.e., those who, *inter alia*, drafted the official ballot argument against Prop 8) credited
27 that voters might have intent that is not rooted in animus but instead in rational bases.

28 It is also worth noting that in the course of making this argument, the No-on-8 Objectors
contend that they “already have produced ... voluntarily” all “public” documents. Doc # 614 at
9. The No-on-8 Objectors have crafted their own definition of “public,” however, which they
explained as hewing to “the definition of ‘mass mailing’ provided by the California Government
code §82041.5, which refers to anything sent to at least 200 people.” Doc # 544 at ¶ 4. *See also*
Doc # 543 at 6-7. This Court, however, has squarely rejected that definition of “public”
documents. *Compare* Hr’g of Jan. 6, 2010, Tr. at 73:19-24 (“And in terms of trying to find an
objective dividing line between sending something out to voters or sending something out to
your own associates, California law specifically identifies the number 200 ... as the dividing
line.”), *with* Doc # 372 at 5 (ordering production of “all documents” regardless of number of
recipients) (emphasis added).

1 (9th Cir. Mar. 2, 2010) (“The failure of the minority report to stimulate any change in the bill
2 indicates that Congress did not object to employers setting conditions on their employees use of
3 company cars for commuting.”); *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 675
4 n.14 (1981) (“The adoption, instead, of the general phrase now part of § 8(d) was clearly meant
5 to preserve future interpretation by the Board. See H. R. Rep. No. 245, 80th Cong., 1st Sess., 71
6 (1947) (minority report).”); *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 414-15 (1987)
7 (Stevens, J., concurring in part) (citing minority report as evidence of legislative compromise
8 that was ultimately reached); *United Steelworkers v. Weber*, 443 U.S. 193, 232-44 (1979)
9 (Burger, C.J., dissenting) (discussing how varying views of proponents and opponents of a bill
10 affected its final version and meaning). Accordingly, to the extent the Court has ruled it must
11 examine the “legislative history” of Prop 8, and that the documents possessed by political
12 campaigns are part of that “legislative history,” the documents possessed by the losing
13 campaign are also a critical component of that record.
14
15

16 Moreover, the No-on-8 Objectors focus solely on the relevance of the documents at issue
17 with respect to voter intent. But one of the important issues in this case is whether or not gays
18 and lesbians are politically powerless. And at trial Plaintiffs introduced internal documents
19 created by supporters of Proposition 8 for the alleged proposition that there are “powerful
20 political forces arrayed against gay men and lesbians in connection with the Proposition 8
21 campaign.” Trial Tr. 1614:12-1615:2 (direct examination of Professor Segura, Plaintiffs’
22 expert on the political power of gays and lesbians). Documents possessed by the No-on-8
23 groups will likely be highly relevant to whether, in fact, gays and lesbians lack political power.
24 For example, even in the very limited production provided by CAEBR on February 1, there is
25 evidence that the No-on-8 campaign had high level contacts within, or the backing of: the
26 presidential campaigns of Hilary Clinton and Barack Obama; major Hollywood and media
27
28

1 figures; and major corporations. *See* Doc # 584-1 at 6 (“former LGBT Director for Hillary for
2 President” stating that “it is clear that on LGBT issues, Senator Obama is with our community”
3 and stating that the author is “part of Obama LGBT Steering Committee and LGBT Finance
4 Committee”); *id.* at 8-9 (arguing that the No-on-8 campaign has to be “as organized, well
5 funded and aggressive as [the Yes-on-8 campaign]” and questioning whether “Brad” would
6 appear “at a carefully orchestrated media event” or “help set an example for other entertainment
7 and business leaders to follow”); *id.* at 11 (indicating support from Levi Strauss & Co.). The
8 documents being withheld by the No-on-8 groups are thus relevant to this issue, as they may
9 show the coalition of powerful political forces aligned against Proposition 8 and in support of
10 the political goals of gays and lesbians. Yet without access to these documents, Proponents’
11 experts were unable to address issues put into contention by Plaintiffs. Trial Tr. 2667:10-18
12 (cross examination of Professor Miller) (“**Q.** As part of your work, did you investigate the
13 extent to which the groups favoring Proposition 8, the religious groups favoring Proposition 8,
14 contributed far more in money and manpower than the groups opposing Proposition 8? Did
15 you investigate that? **A.** I wasn’t able to determine in a quantitative way the monetary and
16 organizational contributions of the progressive churches to the No On 8 campaign. I didn’t
17 have any access to the No On 8 campaign’s internal documents to know about that.”).

21 **B. Burden**

22 The No-on-8 Objectors argue that considerations of burden should preclude their having to
23 produce a single internal campaign document. Doc # 614 at 9-11. It is important at the outset to
24 note that this argument is based on the No-on-8 Objectors’ theory that such documents are of
25 minimal relevance. *See id.* at 10. As demonstrated above, under the direct language and explicit
26 logic of this Court’s orders, such documents are highly relevant and thus the scales do not settle at
27 the balance the No-on-8 Objectors would prefer. In light of the relevance of these documents under
28

1 this Court's orders, the March 5 order represents a careful balancing of relevance and burden. *See*
2 Doc # 610 at 13 ("the court recognizes the need to ensure that any burden borne by the third parties
3 is not undue"). As Magistrate Judge Spero noted at the hearing, however, the need to avoid undue
4 burden does not mean the elimination of burden altogether. Hr'g of Feb. 25, 2010, Tr. at 8:5-6.
5 Rule 45 exists because third parties sometimes possess information that is relevant to the claims in a
6 lawsuit. Under this Court's relevance rulings—that the "the mix of information before and available
7 to the voters forms a legislative history that may permit the [C]ourt to discern whether the legislative
8 intent of an initiative measure," Doc # 214 at 14—the No-on-8 Objectors possess such information
9 and thus must be compelled to produce it. Indeed, suppose that California's Attorney General had
10 chosen to defend Proposition 8 and Proponents had not had to intervene. Given all that the Court
11 has said regarding the probative nature of Proponents' internal and confidential campaign docu-
12 ments and their centrality to this litigation, would Proponents have been spared the burdens and
13 harm of production and compelled disclosure of such purportedly essential materials simply because
14 they were third parties?
15

16
17 In particular, the No-on-8 Objectors claim that the search terms adopted in the March 5 order
18 will result in an overly burdensome review and production process. But the No-on-8 Objectors can
19 hardly complain about these terms now, as they are the verbatim terms that the No-on-8 Objectors
20 themselves argued that Magistrate Judge Spero should adopt—and that was after the No-on-8
21 Objectors had a week to unilaterally review their documents and decide on what search terms to
22 propose. Indeed, the March 5 order actually includes one *less* term than the list proposed by the No-
23 on-8 Objectors. *Compare* Doc # 609 (declaration submitted by Equality California) (arguing that
24 "the following search terms be used to reduce the number of email to be reviewed: 'No on 8,' 'Yes
25 on 8,' 'Prop 8,' 'Proposition 8,' 'Equality for All,' 'Marriage Equality,' and 'ProtectMar-
26 riage.com.'"), *with* Doc # 610 at 13 ("[T]he No on 8 groups shall only be required to review
27
28

1 electronic documents containing at least one of the following terms: No on 8,’ ‘Yes on 8,’ ‘Prop 8,’
2 ‘Proposition 8,’ ‘Marriage Equality,’ and ‘ProtectMarriage.com.’”).⁷ The No-on-8 Objectors can
3 hardly now come to the Court and claim that Magistrate Judge Spero has imposed an undue burden
4 upon them when the March 5 order gives them *more* than they asked for with respect to search
5 terms. If waiver has any application at all, it applies here.⁸

6
7 The burden arguments raised by the No-on-8 Objectors before Magistrate Judge Spero were
8 the same as those raised by Proponents from the beginning of the discovery period straight through
9 to the January 6 hearing. The Court has rejected these arguments as grounds for prohibiting the type
10 of discovery at issue here. *See* Doc # 372; Doc # 496. Thus, the only possible difference between
11 Proponents and the No-on-8 Groups is that the latter are not intervenors in the lawsuit. Magistrate
12 Judge Spero accounted for this difference, imposing certain burden reducing measures—and even
13 those measures were overly generous in light of the Court’s ruling concerning the relevance of these
14 documents and the role the No-on-8 Objectors played in both the campaign surrounding Proposition
15 8 and this very litigation. *See* Doc # 584 at 16-17 (spelling out the vast sums of money spent by the
16 No on 8 campaign in the election and the No-on-8 Objectors’ attempts to intervene in this lawsuit
17 and the significant resources they have already committed to supporting Plaintiffs). The Court has
18 deemed the “mix of information before and available to the voters,” Doc # 214 at 14, including any
19 documents “that contain, refer or relate to any arguments for or against Proposition 8,” Doc # 372 at
20 5, as critical to its efforts to review the “legislative history” of Prop 8 and to determine whether the
21
22

23
24 ⁷ As Proponents’ objections make clear, the list of six search terms adopted in the March 5
25 order is actually vastly underinclusive and thus can hardly be said to be unduly burdensome,
especially when compared to the review and production Proponents had to undertake, which was
not constrained by *any* search terms or other reasonable limitations whatsoever.

26 ⁸ The No-on-8 Objectors claim that “Judge Spero’s Order also failed to consider the other
27 burden-reducing steps proposed in the March 3 Kors Declaration.” Doc # 614 at 11 n.6. A more
28 accurate statement would be that the March 5 order refused to adopt every single proposal put
forth by Equality California for vastly limiting the scope of relevant documents it would have to
produce. The proposals—such as limiting searches only to the “sent” mail folders of specific
individuals—were untenable on their face.

1 “legislative intent ... was a discriminatory motive,” Doc # 214 at 14. Given that the Court is
2 deciding a question of public law, and that the No-on-8 Objectors have spent millions (including on
3 resources in this case) to affect that public law, the additional burdens of complying with a subpoena
4 are outweighed by the evidentiary needs in this case.

5
6 **C. First Amendment Privilege**

7 The No-on-8 Objectors argue that the March 5 order’s First Amendment privilege analysis
8 constitutes error, and that this is “a matter of great importance—not simply as it applies in this case,
9 but as it may be applied to political campaigns in the future.” Doc # 614 at 11. Indeed. As Propo-
10 nents explained to the Ninth Circuit, “[i]f this type of core political speech is not privileged under the
11 speech and associational protections of the First Amendment from ordinary discovery in post-election
12 litigation, then nothing is, and the political process surrounding initiative elections in California, and
13 everywhere else, will be profoundly and permanently chilled.” Defendant-Intervenors-Appellants’
14 Mot. for a Stay, *Perry v. Hollingsworth*, No. 09-17241, at 2 (9th Cir. Nov. 13, 2009). The No-on-8
15 Objectors provide a very eloquent and true defense of the First Amendment principles that have been
16 in play in this litigation from the first instant Plaintiffs embarked on their scorched-earth discovery
17 crusade. And Proponents agree that those principles should have prevailed. But this Court has spoken
18 in a series of orders and rulings explicitly *rejecting* all of the arguments that the Proponents have
19 previously made and that the No-on-8 Objectors now make. And it is by those rulings and orders that
20 parties subject to the jurisdiction of this Court must abide unless or until a higher court reverses those
21 decisions. And adherence to those prior rulings is precisely what is reflected in the portions of March
22 5 order objected to by the No-on-8 Objectors. *See* Hr’g of Feb. 25, 2010, Tr. at 7:2-9 (“it’s really
23 interesting to read the ‘No on 8’ papers ... because I’ve read all those arguments before.... [I]t is
24
25
26
27
28

1 exactly the same sort of thing that the ... proponents were trying to persuade [the Court of].”⁹

2 **D. Limiting Disclosure**

3 The March 5 order permits the No-on-8 groups to “produce documents pursuant to the terms of
4 the protective order, Doc # 425, if they wish,” which allows for designation of materials as “highly
5 confidential – attorneys eyes only.” Doc # 610 at 14. The Court, over Proponents’ objections, deemed
6 this procedure sufficient to protect Proponents’ confidential campaign information. *Compare* Doc #
7 446 at 18-19, *with* Doc # 496. The No-on-8 Objectors argue, however, that this is not good enough for
8

9
10 ⁹ The No-on-8 Objectors main claim is that it was error to “treats communications about
11 strategy and messages in ‘silos’ ” and that Magistrate Judge Spero’s reading of footnote 12 of the
12 Ninth Circuit’s opinion “cannot be squared with the overall decision.” Doc # 614 at 11. *See also*
13 *id.* at 11-15. This Court has heard this argument before—by Proponents in many varied
14 iterations and circumstances—and has flatly and repeatedly rejected it. *Compare* Hr’g of Jan. 6,
15 2010, Tr. at 28:18-20 (“Let’s not lose sight of the forest for the trees. It’s not fair to take one
16 footnote of a Ninth Circuit opinion and say that is the opinion.”), *with* Doc # 372, *and* Doc # 496.
17 *See also* Doc # 187 at 9 n.4; Sealed Declaration of Ronald Prentice (Nov. 5, 2009) at ¶ 9; Hr’g of
18 Dec. 16, 2009, Tr. 57:7-11 (“So there is no First Amendment right for individuals, is what they
19 claim. You have to be a member of a 501c3, and then you get First Amendment protection if you
20 have an official title. Which, by the way, in a volunteer campaign you often don’t have.”); Hr’g
21 of Jan. 6, 2010, Tr. 29:5-11 (“So to argue that you have to carry a business card that says ‘Core
22 Group’ on it and then you get First Amendment protections, but if you don’t carry that business
23 card, you lose your First Amendment protections if you are corresponding with somebody about
24 an associational—a political matter and the formulation of messages, I think is not a proper
25 reading of the opinion.”); Doc. 446 at 17 (“The definition of the ‘core group’ requires production
26 of thousands of documents shared confidentially among those who ‘associate[d] with others to
27 advance [their] shared political beliefs, and [did] so in private.’ Proponents respectfully object on
28 First Amendment grounds.”) (quoting *Perry*, slip op. at 30); *id.* (“Magistrate Judge Spero held
that Proponents could not claim privilege over communications made in their capacity as
members of any formal political association other than ProtectMarriage.com or as part of an
informal political association. This holding runs afoul of the First Amendment.”); *id.* at 18
 (“Proponents object to Magistrate Judge Spero’s orders to the extent they hold that two different
associations cannot receive First Amendment protection for communications made between
persons in the groups during a political campaign in which they are allied. As with any large
campaign, the ProtectMarriage.com effort necessarily involved the support and cooperative effort
of other allied persons and groups who may not have held a formal title or position within
ProtectMarriage.com (and vice versa). But those other allied persons or groups were part of the
political coalition, and sometimes shared with ProtectMarriage.com internal, confidential
information to devise general campaign strategy and messages. Proponents object to the
disclosure of such nonpublic communications on First Amendment grounds.”); Trial Tr. at
1614:11-1621:22 (rejecting privilege objection asserted by member of ProtectMarriage.com
executive committee made over document shared solely among the leadership of a separate
religious association of which he was also a leader); *id.* at 1628-33 (overruling First Amendment
objection regarding internal church document that was in possession of church member who was
also a member of ProtectMarriage.com executive committee).

1 them and that disclosure should be limited “to attorneys at Cooper and Kirk PLLC who affirm that
2 they will not in the future participate in any political campaign involving same-sex marriage.” Doc #
3 614 at 6. It is ironic in the extreme for the No-on-8 Objectors to be bringing this objection to the
4 Court. Mr. Herrera is an attorney representing Plaintiff-Intervenor in this case, but he was also deeply
5 involved in the campaign against Proposition 8—so deeply involved that the No-on-8 Objectors
6 demanded that he receive “core group” status, which the March 5 order grants him twice over. Yet
7 when Proponents raised the exact same concerns about Mr. Herrera’s receiving the same type of
8 documents from the Yes-on-8 campaign, Mr. Herrera vehemently protested that the request to limit
9 disclosure was “insulting,” that he and his deputies “take their role as Officers of the Court seriously,”
10 and that it should not be assumed that he and other lawyers who were deeply involved in the No-on-8
11 campaign “will not abide by the terms of a protective order issued in this case.” Doc # 263 at 1. *See*
12 *also* Doc # 182 (letter from Mr. Herrera supporting disclosure of Proponents’ confidential campaign
13 documents); Doc # 273 (same); Doc # 393 (motion seeking leave to amend protective order to allow
14 City attorneys access to confidential documents); Doc # 197 at 15. The Court agreed and allowed Mr.
15 Herrera and other City attorneys who were active in the No-on-8 campaign to have full and unfettered
16 access to they Yes-on-8 campaign’s most sensitive internal documents. *See* Hr’g of Jan. 6, 2010, Tr. at
17 101:10-102:3. Proponents do not understand the No-on-8 Objectors (who claim Mr. Herrera as part of
18 their “core group”) to suggest that the Court should assume that Proponents’ attorneys will be any less
19 diligent or responsible than Mr. Herrera and his office in meeting their ethical obligations under the
20 protective order and the rules of the Bar. Moreover, forcing an attorney to attest that he or she will
21 never “participate in any political campaign involving same-sex marriage” is, to put it mildly, a bit
22 much. Under this proposed regime, Proponents’ attorneys presumably could not participate in the
23 2012 presidential election if the issue of same-sex marriage is raised. This case features enough First
24 Amendment issues already that this additional wrinkle need not be introduced.
25
26
27
28

1 The No-on-8 Objectors also ask that the Court specify that “no document produced by Objectors
2 shall be admitted into evidence without first providing Objectors with the right to object and/or seek
3 restrictions upon access to the document at issue.” Doc # 614 at 13. To the extent the No-on-8 groups
4 produce documents pursuant to the protective order’s provisions, Proponents do not oppose such a
5 requirement so long as it permits for the orderly and timely resolution of any disputes.
6

7 **CONCLUSION**

8 For the foregoing reasons, the Court should overrule the Objections of the ACLU and Equality
9 California to the March 5, 2010 order.

10
11 Dated: March 15, 2010

Respectfully submitted,

12
13 COOPER AND KIRK, PLLC
14 ATTORNEYS FOR DEFENDANTS-INTERVENORS
15 DENNIS HOLLINGSWORTH, GAIL KNIGHT, MARTIN
GUTIERREZ, MARK JANSSON, AND PROTECTMAR-
RIAGE.COM

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