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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

United States District Court  
For the Northern District of California

1           On March 22, 2010, the court upheld Magistrate Judge  
2 Spero's March 5 discovery order and ordered nonparties Equality  
3 California and the ACLU (the "No on 8 groups"), along with  
4 Californians Against Eliminating Basic Rights, to produce all  
5 responsive non-privileged documents on a rolling basis to conclude  
6 not later than March 31, 2010. Doc #623. The No on 8 groups  
7 appealed the court's orders, which were stayed until the Ninth  
8 Circuit dismissed the No on 8 groups' appeal for lack of  
9 jurisdiction. Perry v Schwarzenegger, No 10-15649 Doc #14 (9th Cir  
10 April 12, 2010). Proponents now ask the court to hold the No on 8  
11 groups in contempt, as they have failed to produce documents as  
12 ordered in the March 5 and March 22 orders. Doc #632.

13           The No on 8 groups assert that they are withholding  
14 documents because they believe the First Amendment privilege should  
15 apply to communications between or among all No on 8 core group  
16 members regardless of organizational affiliation. See Doc #639 at  
17 4. The No on 8 groups' current position stems from the Ninth  
18 Circuit's observation that the First Amendment privilege applies to  
19 communications among individuals who have formed an associational  
20 bond regardless of organizational membership. Perry, No 10-15649  
21 Doc #14 at 9. The No on 8 groups have not however pointed to any  
22 evidence in the record to support a finding that communications  
23 between the No on 8 groups were sufficiently private to be deemed  
24 privileged under the First Amendment. See Doc #639 at 4 (arguing  
25 that the No on 8 groups' evidentiary submissions support an  
26 expanded First Amendment privilege but failing to refer to  
27 particular evidence in the record supporting this position). The  
28 No on 8 groups have thus not shown that any amendment to the

1 court's previous orders is appropriate.

2 In order for the No on 8 groups to be held in contempt,  
3 the court must find by clear and convincing evidence that (1) the  
4 No on 8 groups violated the March 5 and March 22 orders; (2) beyond  
5 substantial compliance; and (3) the violation was not based on a  
6 good faith and reasonable interpretation of the order. See In re  
7 Dual-Deck Video Cassette Recorder Antitrust Litig, 10 F3d 693, 695  
8 (9th Cir 1993). It appears from the record before the court that  
9 the No on 8 groups have not in any way complied with the court's  
10 orders. See Doc #639 (explaining that the No on 8 groups do not  
11 intend to comply with the court's orders as currently formulated).  
12 The No on 8 groups are therefore ORDERED to SHOW CAUSE in writing  
13 by not later than April 27, 2010 at 5 PM PDT and at a hearing  
14 before the undersigned on April 28, 2010 at 10:30 AM PDT why they  
15 should not be held in contempt for failing to produce documents as  
16 ordered in the March 5 and March 22 orders.

17 The declaration of Geoff Kors estimates that production  
18 of Equality California's documents could cost \$20,000. Doc #609  
19 ¶10. If the court determines that the No on 8 groups are in  
20 contempt of its orders, the court is considering imposing sanctions  
21 to coerce compliance in the amount of \$2,000 per day per group, or  
22 one-tenth the cost of production, for each day that the No on 8  
23 groups fail to comply with the court's orders.

24  
25 IT IS SO ORDERED.

26 

27  
28 VAUGHN R WALKER  
United States District Chief Judge