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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.,*

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.,*

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.,*

Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

PLAINTIFFS' OPPOSITION TO PROPONENTS' AND DR. TAM'S MOTIONS FOR RECONSIDERATION/TO STRIKE

Trial: January 11-27, 2010

Judge: Chief Judge Vaughn R. Walker
Magistrate Judge Joseph C. Spero

Location: Courtroom 6, 17th Floor

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I. INTRODUCTION

Proponents' and Dr. Hak Shing "William" Tam's (collectively "Proponents") Motions for Reconsideration/to Strike are the latest chapter in Proponents' effort to conceal from public view, and exclude from the record in this important civil rights case, non-privileged, relevant and probative evidence about the campaign to strip gay and lesbian individuals of their fundamental right to marry. In this latest resuscitation of their argument, Proponents argue that the Ninth Circuit's decision in *Perry v. Schwarzenegger*, No. 10-15649, slip op. (9th Cir. Apr. 12, 2010) ("*Perry II*")—which considered *and rejected* a challenge to this Court's discovery rulings pertaining to the ACLU—somehow compels the conclusion that this Court's discovery rulings pertaining to Proponents were clearly erroneous. Based entirely on the false premise that this Court committed clear error, *see* Docs ##640-2 at 2, 642-2 at 2, Proponents ask the Court to strike more than 25 exhibits from the trial record more than three months after trial proceedings ended. Proponents' Motions are entirely without merit and should be denied.

There is nothing erroneous about this Court's carefully crafted and thoughtful pre-trial discovery rulings. After extensive briefing and hearings, this Court faithfully and correctly applied the Ninth Circuit's decision in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) ("*Perry I*"), and made well-reasoned discovery rulings based on the evidence presented, and not presented, by Proponents. To create the illusion of error where none exists, Proponents mischaracterize and distort the Ninth Circuit's rulings in *Perry I* and *Perry II*, glossing over the aspects of those decisions that defeat their current position, and they seek to side-step their own failure to present any evidence that could conceivably support the broad and far-reaching privilege that they now claim.

This Court should deny Proponents' Motions for the following reasons:

First, this Court's discovery rulings regarding Proponents applied the controlling legal standard set forth in *Perry I* and further explained in *Perry II*. Under those decisions, the First Amendment privilege is limited to the "private" and "internal" communications concerning the formulation of campaign strategy and messages made among the "core group of *persons* engaged in the formulation of campaign strategy and messages." *Perry II*, slip op. at 8 (quoting *Perry I*, 591 F.3d at 1165 n.12). *Perry II* did not change the controlling law set forth in *Perry I*. While the Ninth

Circuit in *Perry II* recognized that such a core group could, in some cases based upon a sufficient evidentiary showing, include persons from different organizations, that clarification of the "boundaries" of the First Amendment privilege is consistent with what the Court did here. *See id*. This Court did not base its discovery rulings on the premise that persons from different organizations can *never* come together to form a core group, and indeed the core group that it recognized included individuals representing numerous churches and other organizations.

Second, regardless of the outer "boundaries" of the First Amendment privilege, this Court properly defined the scope of the privilege *in this case* based on Proponents' failure to make an evidentiary showing that would support the sweeping privilege they now claim. While Proponents now argue that the First Amendment privilege should extend to dozens of people from numerous organizations that supported Prop. 8, this Court found that the evidence before it with respect to those individuals and organizations was insufficient to support such a broad claim of privilege. Training on the fact that the evidence presented to him focused entirely on ProtectMarriage.com and that Proponents' failed to provide the Court with any evidence regarding the role played by third parties in the formulation of campaign messaging and strategy, Magistrate Judge Spero specifically held that there is "no evidence before the Court regarding any other campaign organization, let alone the existence of a core group within such an organization," and "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." Doc #372 at 3. Indeed, that Proponents now come forward with *new, supplemental declarations* to support their sweeping privilege claims speaks volumes as to the adequacy of the record before the Court when this issue was first decided and confirms the correctness of that ruling based on that record. While Proponents undoubtedly had strategic reasons to withhold evidence concerning the extent of coordination between ProtectMarriage.com and numerous other powerful groups before trial—namely, they were trying to distance themselves from those groups and preclude the introduction of public statements by those groups that would further illustrate the animus underlying Prop. 8—the evidence was certainly available to them at the time and it was their burden to present any and all such evidence to the Court. They failed to do so.

Third, even the new evidence that Proponents belatedly present to the Court does not support a finding of privilege under the standard actually articulated by the Ninth Circuit, nor does it support their attempt to expunge more than 25 exhibits from the trial record after the completion of trial. The new evidence that Proponents now offer does not establish, as it would have to, that the documents at issue are *private*, *internal* communications between *the core group of persons engaged in the formulation of campaign strategy and messages*. Instead, Proponents simply revert to their old and unsuccessful arguments that any communication between people who share a desire to strip gay and lesbian individuals of their fundamental right to marry are necessarily privileged. In so doing, they seek not to apply the decisions of the Ninth Circuit, but to expand them beyond recognition.

II. FACTUAL AND PROCEDURAL BACKGROUND

In *Perry I*, the Ninth Circuit ruled that the First Amendment privilege is "limited to *private, internal* campaign communications concerning the *formulation of campaign strategy and messages*" and "therefore limited to communications among the core group of *persons* engaged in the formulation of campaign strategy and messages" for the Yes on 8 campaign. *Perry I*, 591 F.3d at 1165 n.12. The court held that the First Amendment protection "certainly does not apply to documents or messages conveyed to the electorate at large, discrete groups of voters or individual voters for purposes such as persuasion, recruitment or motivation," or to "communications soliciting active support from actual or potential Proposition 8 supporters." *Id*. And, in case the language of the opinion was not clear, the court cited as an example of a document "far afield from the kinds of communications the First Amendment privilege protects," Proponent Tam's now-infamous letter "urging 'friends' to 'really work to pass Prop 8.'" *Id*.

The Ninth Circuit directed this Court to fashion a protective order that would prevent the compelled disclosure of "*private, internal* . . . communications among the core group of *persons* engaged in the formulation of campaign strategy and messages." *Id*. With respect to defining the "core group," the Ninth Circuit purposefully left "it to the district court, which is best acquainted with the facts of this case and the structure of the 'Yes on 8' campaign, to determine the persons who logically should be included in light of the First Amendment associational interests the privilege is intended to protect." *Id*.

On January 6, 2010, Magistrate Judge Spero presided over a lengthy hearing to settle Plaintiffs' outstanding discovery requests. The magistrate judge denied Proponents' objections and dutifully applied the Ninth Circuit's instruction. To determine who from the "Yes on 8" campaign constituted the core group of persons engaged in the formulation of campaign strategy and messages, the magistrate judge consulted various sources, including the parties' previous declarations, briefing and oral arguments. Doc #372 at 2-5. The magistrate judge credited a November 2009 declaration filed by Proponents "explain[ing] the structure of the 'Yes on 8' campaign and identif[ying] by name the individuals with decision-making authority over campaign strategy and messaging." *Id*. at 3-4. When Proponents then argued at the hearing that their November declaration identifying those persons engaged in the formulation of campaign strategy and messages was incomplete, the magistrate judge granted their request for an additional 24 hours to supplement their filing. *Id*.

After reviewing Proponents' submissions and Plaintiffs' opposition, the magistrate judge identified an extremely broad core group that listed 25 individuals and their assistants, employees from ten consulting firms, and any and all "volunteers who had significant roles in formulating strategy and messaging." *Id*. at 4. Indeed, Proponents' core group even included individuals who Proponents had previously argued did not participate in the formulation of campaign strategy and messages. Doc #314 at 13 (arguing that Proponents Knight and Tam "had virtually nothing to do with Protectmarriage.com's [sic] campaign"). But the magistrate judge declined to deem privileged communications between Proponents and organizations other than ProtectMarriage.com on the ground that "[P]roponents have never asserted a First Amendment privilege over communications to other organizations." Doc #372 at 3. Magistrate Judge Spero further held that even if such a privilege claim had been preserved, there was "no evidence before the Court regarding any other campaign organization, let alone the existence of a core group within such an organization," and "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." *Id.*

On January 8, 2010, Magistrate Judge Spero ordered Proponents to produce all non-privileged documents responsive to Plaintiffs' requests. Doc #372 at 5-6. The Court denied Proponents' objections to the magistrate judge's order in their entirety. Doc #496. Just hours before trial,

Proponents began the production of long-withheld documents on a rolling basis, and they made their final production on the last day of trial, January 27, 2010.

The *Perry II* decision—of which Proponents make so much in these Motions—did not arise from Plaintiffs' attempts to obtain discovery from Proponents. Rather, *Perry II* concerned an appeal from this Court's discovery order involving Proponents' requests for production by non-parties No on Proposition 8, Campaign for Marriage Equality, A Project of the American Civil Liberties Union and Equality California (collectively "the ACLU"). On April 12, 2010, the Ninth Circuit held that it did not have jurisdiction over the ACLU's appeal. In its order dismissing the appeal, the Ninth Circuit observed that "the district court *may* have partly misinterpreted the legal boundaries of the First Amendment privilege" because while *Perry I* held that the privilege was limited to "'communications among the core group of *persons* engaged in the formulation of campaign strategy and messages,'" it "did not hold that the privilege is limited only to persons within a particular organization or entity." *Perry II*, slip op. at 8 (first emphasis added). The Ninth Circuit explained that *"[i]f* the district court meant that the privilege *cannot* apply to persons who are part of a political association spanning more than one organization or entity, then this interpretation was questionable." *Id*. at 8-9 (emphasis added). But importantly, the Court went on to find that even if this Court misinterpreted this principle, "there does not appear to have been clear error" in the Court's discovery rulings because the Court "granted in part Proponents' motion to compel because appellants 'in any event failed to furnish the magistrate [judge] information from which a functional interpretation of [an inter-organizational] core group . . . could be derived.'" *Id*. at 9 (quoting Doc #623 at 10) (alteration in original).

Even though *Perry II rejected* a challenge to this Court's discovery rulings and found that the Court's rulings did *not* appear clearly erroneous, on April 23, 2010 and April 26, 2010 Proponents seized upon the ruling to file motions for reconsideration seeking an order striking from evidence various non-privileged documents and associated testimony. Docs ##640-2, 642-2. Proponents argue that *Perry II* "provided further guidance on the meaning of its prior mandate" and clarified that "the associations subject to First Amendment privilege are simply those persons who come together to advance one's shared political beliefs." Doc #640 at 4 (internal quotation omitted). As such,

Proponents assert that "communications regarding the exchange of ideas and/or formulation of messaging and strategy among persons who associated during the Proposition 8 campaign for the common political purpose of securing the passage of that measure" are privileged. *See* Doc #640-2 at 9. *Perry II* did not, however, alter or expand the First Amendment privilege recognized in *Perry I*. Rather, *Perry II* merely reiterated and "emphasized" its limited scope. *Perry II*, slip op. at 8; *see infra* Section III.A

Incredibly, Proponents now distort the Ninth Circuit's decision in *Perry II* and revert back to the broad and untenable interpretation of the qualified First Amendment privilege they first advanced after the Ninth Circuit issued its initial *Perry I* opinion on December 11, 2009—an interpretation that was specifically rejected by the Ninth Circuit in its January 4, 2010 amended opinion. *Compare* Doc #314 at 15 (Proponents arguing that "private, internal campaign communications" include any communications that did not go "to the electorate at large or to discrete groups of voters" even if those communications were widely disseminated to Proponents' "political associates."), *with Perry I*, 591 F.3d at 1165 n.12 ("Our holding . . . certainly does not apply to documents or messages conveyed to the electorate at large, discrete groups of voters or individual voters for purposes such as persuasion, recruitment or motivation—activities beyond the formulation of strategy and messages."). Based on their unfounded interpretation of *Perry II*, Proponents now argue—more than three months after the presentation of evidence at trial—that the Court should *strike* from the trial record virtually every document that they originally tried, unsuccessfully, to shield from discovery *and* the portions of the trial transcript discussing those unprivileged documents. Docs ##640-2, 642-2. According to Proponents, virtually any communication between people working to strip gay and lesbian individuals for their fundamental right to marry is and must be absolutely secret, a premise that of course finds no support in the Ninth Circuit's decisions or elsewhere.

III. ARGUMENT

A. This Court's Discovery Orders Are Correct Because The Court Applied The Appropriate Legal Standard

Proponents' Motions for Reconsideration/To Strike are based entirely on the false premise that this Court's discovery rulings were legally erroneous. Docs ##640-2 at 2, 642-2 at 2. But this

Court committed no error. To the contrary, the Court faithfully applied *Perry I* and made discovery rulings based on the evidence Proponents submitted. In addition, the Court's discovery rulings are entirely consistent with *Perry II*, which did not alter the operative standard regarding First Amendment privilege.

In *Perry I*, the Ninth Circuit directed this Court to fashion a protective order that would prevent the compelled disclosure of "*private, internal* . . . communications among the core group of *persons* engaged in the formulation of campaign strategy and messages" for the Yes on 8 campaign. *Perry I*, 591 F.3d at 1165 n.12. With respect to defining the "core group," the Ninth Circuit purposefully left "it to the district court, which is best acquainted with the facts of this case and the structure of the 'Yes on 8' campaign, to determine the persons who logically should be included in light of the First Amendment associational interests the privilege is intended to protect." *Id*.

Perry II did not alter the scope of the First Amendment privilege previously recognized in *Perry I*. Indeed, the Ninth Circuit observed in *Perry II* that it was simply applying *Perry I*, not revisiting it. *See Perry II*, slip op. at 9-10 ("In *Perry I*, we exercised mandamus jurisdiction because the proceedings raised a particularly novel and important question of first impression . . . . By contrast, the current proceedings present the application of that now recognized privilege."). Proponents' claim of First Amendment privilege was not before the Ninth Circuit in *Perry II*, which involved the ACLU's privilege claims. And the Ninth Circuit did not even rule on the merits of the ACLU's claims, but rather dismissed the appeal for lack of jurisdiction.

In *Perry II*, the Ninth Circuit specifically reemphasized that the privilege applies only to the "core group of *persons* engaged in" messaging and strategy and did not extend the privilege beyond communications going specifically to the "formulation of campaign strategy and messages." *Perry II*, slip op. at 8. Furthermore, the court did not disturb the requirement that the communications be "private" and "internal." *See id*. At most, the Ninth Circuit's decision in *Perry II* highlights and further clarifies just one aspect of its earlier decision regarding "persons who are members of a single political association comprised of different organizations." *Id*. at 9-10. Specifically, the Ninth Circuit observed that, under certain circumstances and based on a sufficient showing, a core group may include persons from more than one entity. *See id*.

Magistrate Judge Spero's order is fully consistent with the Ninth Circuit's decisions in *Perry I* and *Perry II*. Following *Perry I*, Magistrate Judge Spero held a lengthy hearing and considered evidence submitted by Proponents in support of their privilege claims before reaching his decision. In formulating the Yes on 8 campaign's core group, the magistrate judge credited two declarations filed by Proponents. Doc #372 at 2-4. Proponents' first declaration, filed under seal in connection with this Court's *in camera* review of their withheld documents, *see* Doc #252, identified those persons who were in a position of management responsibility for the Yes on 8 campaign. Doc #364-1 at 3. In a second declaration submitted after the January 6, 2010 hearing on Plaintiffs' motion to compel, Proponents "further explain[ed] those persons who could be said to be a part of the 'core group' of those involved in the formulation of ProtectMarriage.com's messages and strategy." *Id*.

Relying on Proponents' declarations, the magistrate judge identified an extremely broad core group of 25 individuals and their assistants, employees from ten consulting firms, and any and all "volunteers who had significant roles in formulating strategy and messaging." Doc #372 at 4. As this Court observed, the magistrate judge "incorporated almost every individual and entity referenced" in Proponents' declarations. Doc #496 at 3. Specifically, the core group included persons "spanning more than one entity," *Perry II*, slip op. at 9, because the ProtectMarriage.com executive committee included representatives of different churches and entities. Doc #640-3 at 4 (Prentice Decl.) ("[A]ll of the members of the ProtectMarriage.com ad hoc executive committee are also members of, or associated with, other organizations that shared a common interest in the passage of Proposition 8."). Thus, Magistrate Judge Spero found that in this particular case, the core group responsible for formulating the messages and strategy of the Yes on 8 campaign consisted of representatives of numerous other organizations who chose to come together under the banner of ProtectMarriage.com.

Proponents' argument that this Court's discovery rulings were erroneous has no basis in fact or law. Contrary to Proponents' assertion, the Court did not formulate Proponents' core group based on "whether [persons are] members of a single organization or entity," Doc #640-2 at 6, but rather on "whether they are part of an *association* subject to First Amendment protection." *Perry II*, slip op. at 9. To answer that question, the "operative inquiry" is not, as Proponents insist, whether the persons

at issue are "simply [individuals] who [came] together to advance one's shared political beliefs," Doc #640-2 at 8, but rather whether those persons were part of an ascertainable core group engaged in campaign strategy and messaging and therefore "part of an association *subject to First Amendment protection*." *Perry II*, slip op. at 9 (emphasis added). Further, even communications within such a group can be privileged *only* if they are private and internal to that group. Proponents nonetheless assert that "communications regarding the exchange of ideas and/or formulation of messaging and strategy among persons who associated during the Proposition 8 campaign for the common political purpose of securing the passage of that measure" are privileged. Doc #640-2 at 9. Because this unsupported argument flatly contradicts the standard articulated by *Perry I* and *Perry II*, and because this Court faithfully applied the correct standard, the Court should deny Proponents' motions.

B. This Court's Discovery Orders Are Valid And Enforceable Because They Were Based On Findings That Proponents Failed To Make An Evidentiary Showing In Support Of Their Broader Privilege Claims

This Court applied the correct legal standard when making its discovery rulings. But even assuming *arguendo* that the Court somehow misinterpreted the outer "boundaries" of the First Amendment privilege, its rulings still were not clearly erroneous because they were expressly based on Proponents' failure to make the requisite evidentiary showing to extend the privilege beyond those individuals that the Court included in the core group. Magistrate Judge Spero declined to deem communications between Proponents and organizations other than ProtectMarriage.com privileged on the ground that "[P]roponents have never asserted a First Amendment privilege over communications to other organizations." Doc #372 at 3.[1] The magistrate judge further explained:

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[1] In concluding that Proponents had waived any claim of privilege as to communications with other organizations, the magistrate judge considered Proponents' November 2009 *in camera* submission, "which was intended to represent . . . the universe of documents over which proponents claim a First Amendment privilege." Doc #372 at 3. The magistrate judge observed that the *in camera* production did "not identify other organizations' documents as part of proponents' privilege claim." *Id*. Further, the accompanying declaration from Ron Prentice only identified persons from ProtectMarriage.com as managing the Yes on 8 campaign. *See id*. Accordingly, Proponents failed to preserve their claim of privilege. It should be noted that Plaintiffs were never afforded an opportunity to review Proponents' *in camera* submission.

"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." *Id*. The magistrate judge concluded that "[t]here is no evidence before the Court regarding any other campaign organization, let alone the existence of a core group within such an organization" and "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." *Id*.

It was not clear error—indeed, it was not erroneous at all—for Magistrate Judge Spero to limit the core group in the manner that he did based on the evidence, or lack of evidence, before him, and specifically based on Proponents' failure to present competent evidence that could support the extension of the First Amendment privilege to individuals outside of ProtectMarriage.com itself. Proponents' decision not to contend and not to submit evidence that numerous organizations beyond ProtectMarriage.com were part of the core group responsible for campaign messages and strategy may be explained by the fact that they were not part of that group, or it may be explained by Proponents' strategic goal of distancing themselves from statements made by others that they now seek to include within the First Amendment privilege. It is telling that for all they make of the Ninth Circuit's decision in *Perry II*, they ignore that the Ninth Circuit *specifically found* that this Court's discovery ruling did *not* appear to be clearly erroneous because the decision was based on the failure of the party seeking to avoid production of documents to demonstrate a more broad and inclusive core group. *Perry II*, slip op. at 9. Indeed, the Ninth Circuit's decision in *Perry II* supports, rather than contradicts, the propriety of Magistrate Judge Spero's determinations concerning the scope of the First Amendment privilege based on the record before him. Proponents' attempt to stretch that decision—which found no clear error—into one that somehow now *compels* a finding of clear error strains credulity.

C. Proponents Have Not Demonstrated That Any Of The Evidence They Attempt To Strike Is Privileged

In any event, Proponents' latest declarations do not support expanding their core group or striking any evidence.[2] *Perry I* explicitly limited the scope of the First Amendment privilege to: (1) "*private, internal* campaign communication[s]"; (2) "concerning the *formulation of campaign strategy and messages*"; and (3) communicated "among the core group of *persons* engaged in the formulation of campaign strategy and messages" for the Yes on 8 campaign. *See Perry I*, 591 F.3d at 1165 n.12; *Perry II*, slip op. at 8-9. It explained that the privilege "certainly does not apply to documents or messages conveyed to the electorate at large, discrete groups of voters or individual voters for purposes such as persuasion, recruitment or motivation," nor does it apply to "communications soliciting active support from actual or potential Proposition 8 supporters." *Perry I*, 591 F.3d 1165 n.12.

Proponents' "new" evidence does not come close to establishing that the documents at issue are privileged under *Perry I and II*. Rather than make a showing under the correct standard, Proponents simply dust off their old argument that *any* communication between *any* people who share an interest in stripping gay and lesbian individuals of the fundamental right to marry is necessarily privileged. Thus, Proponents' declarations claim a blanket association "for the common purpose of passing Proposition 8," *see, e.g.*, Doc #640-3 at 3, but they fail to demonstrate how the

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[2] Proponents' latest declarations at most contain information that they could have presented in the first instance concerning their relationships with third party entities. *See, e.g.*, Doc #640-3 at 3 (Prentice Decl.) ("As I have previously explained, ProtectMarriage.com associated with various other organizations for the common purpose of passing Proposition 8."). As such, these declarations—filed months after the Court ruled on the parties' discovery dispute and formulated Proponents' core group, but larded with "evidence" irrelevant to their claim of privilege and indisputably available to Proponents during the January briefing on Plaintiffs' motion to compel—do not warrant the "extraordinary remedy" of reconsideration. *See Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995) ("[R]eargument 'should not be used as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided.'") (citation omitted); *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) ("It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him. Were such a procedure to be countenanced, some lawsuits really might never end, rather than just seeming endless.").

exhibits they seek to strike are in fact communications among "an association *subject to First Amendment protection*." *Perry II*, slip op. at 9 (emphasis added).

1. PX2350

PX2350 is an email from Ron Prentice to "a handful of pastors" who simply "shared with ProtectMarriage.com the common goal of passing Proposition 8." Doc #640-3. Proponents fail to demonstrate how PX2350 is a communication "*among* the core group of persons engaged in" formulating strategy and messages. Nor is it a communication concerning *the formulation* of campaign strategy and messages, *see* PX2350 ("All – the following is self-explanatory"), but rather it is an email sent for the purposes of persuasion, recruitment, or motivation. Doc #640-3 at 5 ("I thought the pastors might find [the email attachment] useful in preparing sermons or creating information to disseminate to others."). PX2350 is therefore not privileged.

2. PX2385

PX2385 is an email sent among Proponents and Peter Henderson, an individual that Proponents have never previously claimed to be among the core group of persons engaged in the formulation of campaign messages and strategy. Instead, Proponents assert that Mr. Henderson "regularly associated as an individual with ProtectMarriage.com to work cooperatively in securing the passage of Proposition 8." Doc #640-3 at 6. This proffer clearly does not make him part of the "core group of persons engaged in the formulation of campaign strategy and messages." As such, PX2385 is not privileged because it is not a communication "*among* the core group."

3. PX2389

PX2389 is an email sent from Ned Dolejsi to Doug Swardstrom and various third-parties, members of the California Catholic Conference. Proponents have not demonstrated that the various third-party recipients of Mr. Dolejsi's email were among the "core group of persons engaged in the formulation of campaign strategy and messages" for the Yes on 8 campaign. Furthermore, PX2389 is not a communication concerning "*the formulation* of campaign strategy and messages." Indeed, Proponents admit that the communication is at best an "update" on strategy. *See* Doc #640-4 at 4. In any event, PX2389 is clearly an unprivileged email to Yes on 8 supporters and donors "for purposes such as persuasion, recruitment or motivation." *Perry I*, 591 F.3d at 1165 n.12; PX2389

("Today is Election Day! I am sure you share my relief that it is finally here. . . . Even though support for Proposition 8 is surging and we have momentum, the race is very close. Every vote matters. Please forward our new video now, and make sure you are part of our volunteer army on Election Day."). For these reasons, PX2389 is not privileged.

4. PX2403

PX2403 is an email from Kenyn Cureton of the Family Research Council ("FRC") to Ron Prentice. Proponents do not assert that Mr. Cureton was part of the core group, but rather advise that "FRC and ProtectMarriage.com were political allies associated together regarding a common political goal." Doc #640-3 at 7. Because Proponents have failed to establish that Mr. Cureton is a member of Proponents' core group, PX2403 is not a communication "*among* the core group" and is therefore not privileged.

5. PX2455

PX2455 is an email chain among members of the National Organization for Marriage ("NOM") and Frank Schubert. Proponents assert that the NOM members copied on the email "have authority over NOM's formulation of messaging and strategy." Doc #640-3 at 7. But their authority with respect to NOM does not make them part of the "core group of persons engaged in the formulation of campaign strategy and messages" with respect to the Yes on 8 campaign. PX2455 is thus not privileged because it is not a communication "*among* the core group."

6. PX2554

PX2554 is an email from Joseph Bentley to various members of the LDS Church. Proponents claim that Mr. Bentley and others on the email are part of a core group in support of Prop. 8. But the email itself contradicts that assertion. Mr. Bentley advises, "Once again, please understand that *I am not a spokesman or leader of any kind for Prop. 8*. My charge as I understand it is *only this*: To gather and send out articles on Prop. 8 as I find them." PX2554 (emphasis added). As such, Mr. Bentley—by his own admission—is not part of the "core group of persons engaged in the formulation of campaign strategy and messages" for the Yes on 8 campaign. PX2554 is thus not privileged because it is not a communication "*among* the core group."

7. PX2555

PX2555 is the July 13, 2008 minutes of the "Multi-Stake Public Affair" councils of the Mormon Church. According to Proponents, PX2555 memorializes the "monthly meeting of several public affairs councils of the LDS Church from across the State of California." Doc #640-5 at 4. Proponents have not demonstrated how the members of these public affairs councils are members of the core group. Accordingly, PX2555 is not privileged because it is not a communication "*among* the core group."

8. PX2561

PX2561 is an email from Ron Prentice to Prop. 8 supporters. It is not privileged because it is a "communication soliciting active support from actual or potential Proposition 8 supporters," *Perry I*, 591 F.3d at 1165 n.12; *see* PX2561 ("The reason I write to you today is because [redacted] asked if it would be helpful if he met again with Pastor Chuck."), and not the formulation of campaign strategy and messages. Additionally, PX2561 is not privileged because it is not a communication "*among* the core group."

9. PX2562

PX2562 is an email from Ron Prentice to David Lane "soliciting active support from" Mr. Lane, an individual Proponents admit was not affiliated with the Yes on 8 campaign. Doc #640-3 at 8. Also copied on the email were "two donors to ProtectMarriage.com." *Id*. Given that this email is not a communication "*among* the core group" and is not the formulation of campaign strategy and messages, but rather an email "soliciting active support from actual or potential Proposition 8 supporters," *see Perry I*, 591 F.3d at 1165 n.12, PX2562 is not privileged.

10. PX2589

PX2589 is an email from Ron Prentice to the President of United Families International. Doc #640-3 at 8. Proponents fail to demonstrate how the email recipient is part of "the core group of persons engaged in the formulation of campaign strategy and messages" for the Yes on 8 campaign. Indeed, they never assert that she even had a role in the campaign. Thus, PX2589 is not privileged because it is not a communication "*among* the core group."

11. PX2598

PX2598 is an email to a potential donor requesting "$500,000 to be donated directly to the ProtectMarriage.com committee, the official campaign to pass Proposal 8." By definition, PX2598 is not privileged. *Perry I*, 591 F.3d at 1165 n.12 ("Similarly, communications soliciting active support from actual or potential Proposition 8 supporters are unrelated to the formulation of strategy and messages."). Furthermore, the email recipient is clearly not "*among* the core group."

12. PX2599, PX2630, & PX2631

PX2599, PX2630, and PX2631 are emails to various third-parties. Proponents concede that the recipients of the emails were not part of their core group. Doc #640-3 at 10 ("[S]ome of the attendees did not have a substantial or regular role in ProtectMarriage.com's operations and decisionmaking."). Additionally, Proponents do not claim the recipients were even part of the core group of their respective organizations. *See id.* at 10-11. Moreover, these emails were all sent to Dr. Tam who asserted in open court that he was not a member of Proponents' core group. *See infra* Section III.C.15. Thus, PX2599, PX2630, and PX2631 are not privileged because they are not communications "*among* the core group."

13. PX2620

PX2620 is an email from Peter Henderson to various people. But Proponents have not demonstrated that Mr. Henderson and other "rank and file" recipients of his email are members of "the core group of persons engaged in the formulation of campaign strategy and messages" for the Yes on 8 campaign. *See infra* Section III.C.2; Doc #640-3 at 6. As such, PX2620 is not privileged because it is not a communication "*among* the core group."

14. PX2656 & PX2773

PX2656 and PX2773 are emails from Jim Garlow to Jeff Flint, Deborah Layman, Derek Packard, Bill Dallas, and others. Proponents assert that "Pastor Garlow and ProtectMarriage.com were part of an association of political allies joined together for the common goal of passing Proposition 8." Doc #640-3 at 9. But this assertion does not demonstrate that either Jim Garlow, Deborah Layman, Derek Packard, or Bill Dallas were part the "core group of persons engaged in the

formulation of campaign strategy and messages." PX2656 and PX2773 are therefore not privileged because they are not communications "*among* the core group."

15. PX2472, PX2476, PX2504, PX2538, PX2609, PX2612, PX2627, PX2633, PX2640, PX2650, & PX2651

PX2472, PX2476, PX2504, PX2538, PX2609, PX2612, PX2627, PX2633, PX2640, PX2650, and PX2651 are communications either sent from or received by Proponent Dr. Tam. During trial, Dr. Tam *asserted* in open court that he was not a member of the core group. Tr. 1907:9-1908:1 ("But, frankly, I don't believe I am ProtectMarriage.com, within their core group. I'm not."); Tr. 2002:24-2003:1 ("Q. Am I correct, that you are not part of the core group, according to your current testimony? A. Right. I'm not the core group."); *see also* Tr. 550:14-17 (Proponents' counsel arguing Dr. Tam "had nothing to do with the campaign. Even though he was an official proponent, the evidence will show quite clearly that he had nothing to do with the campaign."). Thus, PX2472, PX2476, PX2504, PX2538, PX2609, PX2612, PX2627, PX2633, PX2640, PX2650, and PX2651 are not privileged because they are not communications "*among* the core group."

Proponents even attempt to invoke First Amendment protection for the "Dear friends" communications Dr. Tam made as the Executive Director of the Traditional Family Coalition—an attempt that was specifically rejected by the Ninth Circuit when it appended a similar letter from Dr. Tam to its opinion in *Perry I* and declared that it "is plainly not a private, internal formulation of strategy or message and is thus far afield from the kinds of communications the First Amendment privilege protects." *Perry I*, 591 F.3d at 1165 n.12; *see also* Tr. 1982:3-18, 1986:6-8 (Dr. Tam testified that his allegedly private and internal "Dear friends" communications were each sent to at least 100 individuals). Proponents' outrageous assertion that Dr. Tam's "Dear friends" communications are privileged flouts the Ninth Circuit's clear guidance on this issue and demonstrates that this motion aims not to enforce—but to dramatically expand—the privilege standard articulated by the Ninth Circuit.

D. Proponents' Current Position Is Flatly Inconsistent With Their Arguments At Trial

Proponents' motions to strike also should be denied because the arguments they now advance in support of their blanket privilege claims are flatly inconsistent with their arguments at trial. *See,*

e.g., *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). At trial, Proponents repeatedly objected to the admission into evidence of messages or communications from individuals and groups outside the official contours of ProtectMarriage.com (for example, Dr. Tam and the creators of the simulcasts) on the ground that they were *not* part of the official campaign and therefore were irrelevant in assessing voter intent. *Compare* Doc #314 at 13 ("Dr. William Tam—who, although [an] official proponent[], had virtually nothing to do with Protectmarriage.com's [sic] campaign."), *with* Doc #640-3 at 11 ("Dr. Tam and his organization were nonetheless associated with persons in ProtectMarriage.com in a common effort to pass Proposition 8, and thus on occasion they engaged in confidential communications about the formulation of political messaging and strategy."); *compare* Tr. 2361:5-2367:23 (Proponents' counsel arguing relevance: "[T]his Exhibit 421, it is not a website of ProtectMarriage.com. . . . [W]hile [Proponents] may have offered money to pay for this, to the extent that [Plaintiffs are] trying to draw the inference that somehow this means that ProtectMarriage.com controlled the content of those simulcasts, that has not been established."), *with* Doc #640-3 at 13 ("Because Pastor Garlow and ProtectMarriage.com were so associated, they shared confidential information related to the formulation of messaging and strategy [with respect to the simulcasts]."); *compare also* Tr. 108:22-112:1 (Proponents' counsel arguing relevance: "Your Honor, number one, this was not produced by ProtectMarriage.com. And ProtectMarriage.com is not the National Organization for Marriage."), *with* Doc #640-3 at 7 ("NOM and ProtectMarriage.com had associated for the common purpose of passing Proposition 8 and sometimes communicated thoughts and advice about the formulation of messaging and strategy.").

Further, Counsel for Proponents (Mr. Pugno) conceded that ProtectMarriage.com's First Amendment privilege did not extend to separate religious organizations: The "First Amendment privilege articulated by the Ninth Circuit was with regard to *the campaign's internal formulation of messaging strategy*. We are on a *completely different field here*," because "[w]e're dealing with the religious association of a religious denomination and their ability to communicate with one another within the walls of the church." Tr. 1618:8-17 (emphasis added).

Now, after consistently arguing at trial that evidence concerning the Yes on 8 campaign and its messages should be limited to ProtectMarriage.com, Proponents would have the Court conclude

that a broad range of individuals and entities were in fact part of the "core group" that controlled the strategy and messages of the campaign. Ironically, Proponents now seek to strike from the record numerous exhibits that were used to counter Proponents' own efforts to disclaim connections to third party groups in the campaign by arguing that those groups were in fact part of the core group responsible for messages and strategy. This Court should not permit Proponents to assert a privilege based on the involvement of numerous individuals and entities in the campaign, while erasing the evidence of their involvement from the record.

E. Proponents Have Not Demonstrated A Material Change In Circumstances Justifying A Motion For Reconsideration

Reconsideration of a previous order is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). The Ninth Circuit has warned that "a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id*. (internal quotation omitted); *see also* N.D. Cal. Civ. R. 7-9(b) (setting forth similar factors). As explained above, the Ninth Circuit's short decision in *Perry II* rejecting the ACLU's challenge to this Court's discovery orders did not change the controlling law, *supra* Section III.A; this Court did not commit any error—let alone clear error in admitting the documents Proponents now attempt to strike, *supra* Section III.A & B; and Proponents fail to offer any newly discovered evidence in support of their motions, *supra* Section III.C. The Court should therefore deny Proponents' motions for reconsideration.

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IV. CONCLUSION

The Court should deny Proponents' Motions for Reconsideration/to Strike because the Court's discovery orders are entirely consistent with *Perry I* and *Perry II*. Moreover, Proponents fail to put forth any evidence to support their blanket privilege claims, and the documents they attempt to strike are not protected from disclosure by the First Amendment.

Respectfully submitted,

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