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11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA

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

16 Plaintiffs,

17 vs.

18 ARNOLD SCHWARZENEGGER, in his
 19 official capacity as Governor of California;
 EDMUND G. BROWN JR., in his official
 20 capacity as Attorney General of California;
 MARK B. HORTON, in his official capacity
 21 as Director of the California Department of
 Public Health and State Registrar of Vital
 22 Statistics; LINETTE SCOTT, in her official
 capacity as Deputy Director of Health
 23 Information & Strategic Planning for the
 California Department of Public Health;
 24 PATRICK O'CONNELL, in his official
 capacity as Clerk-Recorder for the County of
 25 Alameda; and DEAN C. LOGAN, in his
 official capacity as Registrar-Recorder/County
 26 Clerk for the County of Los Angeles,

27 Defendants.

Case No. 09-CV-2292 VRW

**PLAINTIFF-INTERVENOR CITY AND
 COUNTY OF SAN FRANCISCO'S
 OPPOSITION TO DEFENDANT-
 INTERVENORS PROPONENTS AND DR.
 TAM'S MOTIONS TO STRIKE /
 RECONSIDER**

Trial: Jan. 11-27, 2010

Judge: Chief Judge Vaughn R. Walker

Location: Courtroom 6, 17th Floor

1 and

2 PROPOSITION 8 OFFICIAL PROPONENTS
3 DENNIS HOLLINGSWORTH, GAIL J.
4 KNIGHT, MARTIN F. GUTIERREZ, HAK-
5 SHING WILLIAM TAM, and MARK A.
6 JANSSON; and PROTECTMARRIAGE.COM –
7 YES ON 8, A PROJECT OF CALIFORNIA
8 RENEWAL,

9 Defendant-Intervenors.

10 PROPOSITION 8 OFFICIAL PROPONENTS
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17 Defendant-Intervenors.

18 CITY AND COUNTY OF SAN FRANCISCO,

19 Plaintiff-Intervenor

20 vs.

21 ARNOLD SCHWARZENEGGER, in his official
22 capacity as Governor of California; EDMUND G.
23 BROWN JR., in his official capacity as Attorney
24 General of California; MARK B. HORTON, in
25 his official capacity as Director of the California
26 Department of Public Health and State Registrar
27 of Vital Statistics; and LINETTE SCOTT, in her
28 official capacity as Deputy Director of Health
Information & Strategic Planning for the
California Department of Public Health,

Defendants.

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1 Plaintiff-Intervenor City and County of San Francisco writes separately to emphasize two
2 points relating to the issues before the Court that implicate important government interests. The first
3 reason is to prevent Defendant-Intervenors' ("Proponents") from chipping away at the evidentiary
4 foundation for the City's showing that Proposition 8 is not in the government's interest. Proponents
5 seek to retract from the public record evidence that reflects the involvement in the campaign of groups
6 and individuals who held views and conveyed messages to their voting constituencies that reflected
7 deep antipathy toward lesbians and gay men. The evidence Proponents seek to strike is one piece of
8 the foundation for the City's showing at trial that laws that discriminate against lesbians and gay men,
9 including Proposition 8, stigmatize and injure them and their families, which in turn costs the
10 government money and undermines its interest in promoting a healthy and productive citizenry. The
11 second reason is that Proponents ask this Court to expand the scope of the First Amendment privilege
12 identified in *Perry I*, but there is competing government interest which weighs against such an
13 expansion. That interest, which is crucial to a functioning democracy, is the right of the public to
14 know who was behind the passage of a law that governs the entire citizenry and what were the
15 arguments they made to justify its passage.

16 INTRODUCTION

17 Proponents' motion to reconsider this Court's privilege rulings and to strike evidence from the
18 record is a continuation of its efforts to hide, from the Court and from the public, information about
19 the churches, religious leaders and self-described "pro-family" organizations that participated in the
20 effort to pass Proposition 8, the nature and extent of their efforts, and the messages those entities and
21 persons conveyed to their voting constituents. Those messages were steeped in prejudice against
22 lesbians and gay men—referring to homosexuality as a "perversion" and an abomination, associating
23 homosexuality with pedophilia and bestiality, and suggesting gay people were on a mission to destroy
24 marriage and Christianity. Proponents now seek, post hoc, to sanitize the record by excising this
25 evidence of bias and prejudice.

26 Proponents' goal of preventing the anti-gay messages from seeing the light of day, and
27 excluding them from being admitted at trial, led them to make strategic choices earlier in this litigation
28 which foreclose the current motion to strike. Proponents first asserted the novel theory that *all*

1 campaign-related communications and documents between *any and all persons* who share a political
2 belief are cloaked in a First Amendment privilege of secrecy. That argument was correctly rejected by
3 this Court and the Ninth Circuit. The Ninth Circuit did hold that a limited First Amendment privilege
4 protects communications between the core group of persons engaged in formulation of strategy and
5 messaging for the campaign so long as these communications were internal to the core group and were
6 kept confidential. This limitation posed a dilemma for Proponents. In order to cloak communications
7 with the anti-gay churches, so-called "pro-family" organizations, and associated persons in the
8 privilege, Proponents would have to acknowledge a close "core group" relationship between
9 ProtectMarriage.com and those same entities or their leaders—and thereby admit that the messaging
10 those groups disseminated was central to the campaign.

11 Proponents strategically chose a different path. They proffered evidence that this Court found
12 supported a broad core group of persons who were closely affiliated with ProtectMarriage.com for
13 First Amendment purposes, including its executive committee, its staff and its many consultants. But
14 broad as that group was, Proponents did *not* assert or attempt to prove that the core group of persons
15 engaged in formulating campaign strategy and messaging was so broad as to include the religious
16 leaders, churches and "pro-family" organizations whose messaging they sought to keep at arms length.
17 This Court accepted Proponents' declarations about their core group at face value. Following the clear
18 guidance of the Ninth Circuit, it held that Proponents were not required to disclose confidential
19 communications about strategy and messaging among those individuals Proponents identified as
20 members of the core group responsible for those tasks. The remaining communications, including
21 those at issue in the motion to strike, were required to be disclosed.

22 The messages filled with anti-gay rhetoric were admitted at trial, over Proponents' objections
23 that the material was unrelated to the official campaign because the groups that authored and
24 distributed them were acting on their own. Proponents even jettisoned from their core group one of
25 the official proponents, Dr. Tam, when his hate-filled messages were revealed. But evidence of these
26 groups' and individuals' connections to Proponents also came to light, making it impossible for
27 Proponents to distance themselves from these groups and their messages.

1 So Proponents now seek to go down a different path, one that is diametrically opposed to their
2 prior testimony and representations to Plaintiffs and this Court. They now seek to embrace the same
3 groups and individuals, including Dr. Tam, that at trial and during discovery they worked tirelessly to
4 disclaim. They argue for an expansion of the limited privilege established by the Ninth Circuit,
5 relying on an opinion that did not involve the evidence at issue here. Ignoring the limits on the
6 privilege in that and the Ninth Circuit's prior decision, they argue that virtually all campaign-related
7 communications and documents are cloaked in a First Amendment privilege of secrecy so long as the
8 persons included in them share a political belief or goal, and that the Court erred in not finding these
9 groups part of the core group of persons entitled to First Amendment privilege. They claim not only
10 that previously produced documents are privileged, but ask this Court to take the extraordinary step of
11 altering the record created at trial by excising these documents and the testimony that relates to them.

12 Having made the choice to distance themselves from these groups in the first instance, they
13 cannot now be heard to argue the opposite. And even if the Court were to entertain Proponents'
14 complete about-face on the issue, their current declarations fail to lay the foundation that the Ninth
15 Circuit and this Court required for the privilege to apply: evidence of a core group of persons engaged
16 in formulation of campaign strategy and messaging and proof that the material claimed to be
17 privileged was internal to persons within that group and treated as confidential. Indeed, the Prentice
18 declaration concedes that the authors or recipients of these emails were *not* part of the core group as
19 this Court (consistent with the Ninth Circuit) defined it. The Court did not err, and the motion should
20 be denied.

21 This motion must be denied for a reason independent of Proponents' prior representations and
22 admissions and complete failure of proof – one that is even more important than the significance of the
23 documents at issue to this case. This Court should not revisit or depart from strict adherence to the
24 limits on the privilege set by the Ninth Circuit because while the privilege protects one First
25 Amendment interest, there is an equally, indeed more important, First Amendment interest on the
26 other side of the scale. That interest is the public's right to know – in a country where we have a true
27 democracy – the identity of those who promoted the laws that affect all citizens and the arguments
28 they made to support those laws. Without openness about the interests at stake in a law, the public

1 cannot meaningfully participate on an ongoing basis in the democracy. This First Amendment interest
2 is at least as weighty as that which led the Ninth Circuit and this Court to protect certain
3 communications of those who seek to influence the political process from disclosure. The First
4 Amendment privilege recognized in *Perry I* and *Perry II* is an exception to the rule of disclosure that
5 is just as central to democracy as the freedom to participate in the process itself. Those countervailing
6 First Amendment interests require the Court to adhere to the narrow limitations of the privilege that
7 the Ninth Circuit articulated and to avoid expanding this new privilege beyond that limited scope.

8 **I. AS THE DISTRICT COURT RECOGNIZED, THE FIRST AMENDMENT**
9 **PRIVILEGE DESCRIBED IN *PERRY I* AND *PERRY II* IS LIMITED IN TWO**
10 **CRITICAL RESPECTS.**

11 The Ninth Circuit's opinions in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010)
12 ("*Perry I*") and *Perry v. Schwarzenegger*, No. 10-15649 (9th Cir. Apr. 12, 2010) ("*Perry II*")
13 recognized a limited exception to the general requirement of transparency in government affairs and to
14 the general rule that litigants are entitled to information reasonably calculated to lead to the discovery
15 of admissible evidence.¹ Specifically, the Ninth Circuit held that campaign groups could make a
16 prima facie showing of arguable First Amendment infringement by demonstrating either 1)
17 harassment, membership withdrawal, or discouragement of new members, or 2) other consequences
18 suggesting a chilling on members' associational rights. It held that Proponents and Dr. Tam
19 (collectively referred here as "Proponents") made a prima facie showing of "other consequences" by
20 submitting declarations asserting that disclosure would discourage political association and inhibit
21 internal campaign communications. But in *Perry I*, the Ninth Circuit emphasized that its holding was
22 limited in two critical respects, both of which remain in force after *Perry II* and both of which
23 Proponents ignore.

24 First, the privilege exception is "limited to communications among the core group of persons
25 engaged in the formulation of campaign strategy and messages." *Perry I*, 591 F.3d at 1165 n.12. In
26

27 _____
28 ¹ We refer to the doctrine as the "privilege exception" because it is an *exception* to the general
rule of transparency with respect to governmental affairs.

1 *Perry II*, the Ninth Circuit clarified that the First Amendment privilege exception could extend to
2 communications among individuals in different groups, but it retained the core group requirement,
3 holding that the privilege exception only “applies to the *core group* of persons engaged in the
4 formulation of strategy and messages, whether or not they are members of a single organization or
5 entity” (emphasis added). *Perry II*, slip op. at 9. The Ninth Circuit thus retained the requirement that
6 the party asserting the privilege identify the members of a limited core group of persons engaged in
7 formulation of strategy and messages. Proponents ignore this limitation and suggest instead that the
8 privilege applies broadly “among persons who associated during the Proposition 8 campaign.” Doc.
9 #640-2 at 4:5-7. They would have this Court literally delete the core group requirement that is central
10 to the Ninth Circuit’s holding and expand the privilege exception to communications between any
11 persons who “associated” at all for the purpose of passing Proposition 8.
12

13 Second, the Ninth Circuit held that the privilege exception applies only to “private, internal
14 campaign communications concerning the formulation of campaign strategy and messages.” *Perry I*,
15 591 F.3d at 1165 n.12. Again, Proponents ignore this critical part of the Ninth Circuit’s holding and
16 attempt to shield from disclosure even broadly disseminated communications. But there is no chilling
17 effect, and consequently no arguable First Amendment infringement, in disclosing a communication
18 that has already been widely broadcast by a speaker. This Court recognized this when Proponents first
19 asserted a privilege over campaign communications, noting that “a rather striking disclosure
20 concerning campaign strategy has already voluntarily been made by at least one, if not the principal,
21 campaign manager-consultant employed by Proponents.” Doc. 214 at 10-11 (describing Schubert Flint
22 article about passing Proposition 8). The Ninth Circuit acknowledged this as well when it specifically
23 rejected the proposition that general campaign communications to large groups of voters are protected
24 by the privilege. *See Perry I*, 591 F.3d at 1165 n.12 (holding that communication from Bill Tam
25 urging “friends” to work to pass Prop 8 is “plainly not a private, internal formulation of strategy or
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1 message and is thus far afield from the kinds of communications the First Amendment privilege
2 protects").

3 This Court properly applied the Ninth Circuit's holding defining the scope of the privilege
4 exception throughout the trial. After the Ninth Circuit remanded to the district court "to determine the
5 persons who logically should be included in the core group," Proponents argued that the core group
6 should include organizations other than the official campaign. *See* Doc. #372 at 2. Magistrate Judge
7 Spero rejected this because Proponents had not previously asserted a First Amendment privilege over
8 communications with other groups and because Proponents did not present evidence about any
9 campaign organization or group other than ProtectMarriage.com. *Id.* at 3. Critically, the Judge did not
10 reject the notion that the privilege could apply to a core group that extended beyond the official
11 campaign.
12

13 In fact, when presented with evidence about a political group encompassing multiple separate
14 organizations, the Magistrate identified a core group for that broader group, and the Court affirmed
15 this determination. *See* Doc. #610 (Magistrate's Order defining core group for the umbrella
16 organization Equality for All); Doc. #623 at 19-21 (District Court overruling Proponent's objections to
17 the Magistrate defining a core group for Equality for All). The District Court explained: "Because the
18 evidence showed a formal relationship between Equality for All and the No on 8 groups, it was not an
19 error for the magistrate to conclude that individuals associated with the Equality for All umbrella
20 organization who were engaged in the formulation of strategy and messages may claim a privilege
21 over communications within the umbrella organization." Doc. #623 at 20:21-27. As this application
22 of the privilege exception demonstrates, the Magistrate Judge and the District Court understood and
23 applied the privilege exactly as intended by the Ninth Circuit.
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26 Proponents' arguments to the contrary are unavailing. For instance, Proponents make much of
27 the Court's remarks when it admitted Plaintiffs' Exhibit 2554 over Proponents' objections. They
28

1 suggest that the Court rejected their assertion of privilege because the document was created by a
2 group other than ProtectMarriage. But as the transcript shows, Defendant Intervenors claimed the
3 privilege for PX2554 not on the ground that it was created or disseminated by a member of the core
4 group under the privilege exception established by the Ninth Circuit, but rather on the wholly separate
5 and novel theory that it was a private, internal communication within a church or religious
6 organization and was protected from discovery on *that* separate ground. This Court rejected that
7 argument because it was not supported by the *facts*, observing that PX2554 was *not* private and
8 internal to the church, as Proponents claimed, but instead was in the files and possession of
9 ProtectMarriage.com. Tr. 1621-16.

10
11 **II. THE PRIVILEGE PROPONENTS NOW ADVOCATE IS INCONSISTENT WITH**
12 **THEIR REPRESENTATIONS AND TESTIMONY IN DISCOVERY AND AT TRIAL,**
13 **INCONSISTENT WITH THE LIMITED PRIVILEGE EXCEPTION ESTABLISHED**
14 **BY THE NINTH CIRCUIT AND VIRTUALLY UNLIMITED IN SCOPE.**

15 **A. Contrary to their current assertions, Proponents consistently denied any close**
16 **political association with the groups and individuals whose communications they**
17 **now seek to cloak in privilege.**

18 Through this motion, Proponents seek to cloak in the privilege exception communications
19 between them and various religious and self-described “pro-family” organizations. During depositions
20 and throughout trial, Proponents denied any meaningful political association with the very groups they
21 now claim are political associates for purposes of determining the First Amendment privilege
22 exception. Having previously disclaimed any meaningful political coordination with these groups and
23 individuals at trial and in discovery, Proponents cannot now be heard to claim that these same groups
24 and persons are within “the core group of persons engaged in the formulation of campaign strategy
25 and messages” for the Prop. 8 campaign. *Perry I*, 591 F.3d at 1165 n.12.

26 First, and perhaps most starkly, Defendant-Intervenors now argue that documents sent to or
27 received by Dr. Tam are entitled to the privilege exception from disclosure because they are
28 “confidential communications” between “political associates ... in a common effort to pass
Proposition 8.” Doc. #260-2 at 12:11-20; *see also* Doc. #640-2 at 10-12 (discussing PX2620 (email

1 chain between Mr. Henderson, Dr. Tam, and at least eleven other individuals), PX2633 (email chain
2 between Mr. Pugno, Mr. Flint, Ms. Pollo, Mr. Dolejsi, Mr. Swardstrom, and Mr. Jansson), PX2650
3 (email chain between Dr. Tam, Ms. Fishel, and other “political associates,” Doc. #640-2 at 11:13),
4 PX2651 (email chain between Dr. Tam and Ms. Fishel, with others copied to certain parts) PX2640
5 (email chain between Mr. Pugno and Dr. Tam, cc’ing Mr. Prentice in part), and PX2627 (email chain
6 between Mr. Pugno, Mr. Ng, and Dr. Tam)). Proponents have made no effort to prove that Dr. Tam
7 was part of the core group as required by the Ninth Circuit. Moreover, at trial Proponents represented
8 to Plaintiffs and the Court that Dr. Tam, one of the official proponents of Proposition 8, was *anything*
9 *but* a close political associate of ProtectMarriage.com engaged in strategy and messaging with core
10 group members. Mr. Thompson stated emphatically, “[T]his gentleman had nothing to do with the
11 campaign. Even though he was an official proponent, the evidence will show quite clearly that he had
12 nothing to do with the campaign.” Tr. 550:14-17 (emphasis added). Proponents reiterated this
13 assertion when confronting messages that Dr. Tam wrote and disseminated through his organization
14 (the “Traditional Family Coalition”): “[T]he official campaign committee was ProtectMarriage.com,
15 and these materials were not in any way associated with or paid for by or did anyone at
16 ProtectMarriage.com have any cognizance of these documents.” Tr. 551:23 - 552:1; *see also* Tr.
17 1223:10-15 (“There’s no indication that this -- there’s any foundation for this document. As I’ve
18 indicated a moment ago, it’s not an official campaign document from ProtectMarriage.com. It’s highly
19 prejudicial if it’s associated with the campaign as an official document, and it should be excluded.”).²
20 Taking Proponents at their word in trial would thus preclude categorizing Dr. Tam as a close political
21 associate deserving of core group status.
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26 ² Dr. Tam has also moved separately to exclude certain documents, including two described above, as
27 “private communication[s] among individuals and/or groups that had a shared political objective and
28 were associating and engaging in conversations towards that end.” Doc #642-3, Tam Decl. at ¶ 6. Yet
on the stand, Dr. Tam joined in the effort to refute any notion of political association with
ProtectMarriage.com. *See, e.g.*, Tr.1907:19-22 (“[F]rankly, I don’t believe I am ProtectMarriage.com,
within their core group. I’m not.”).

1 Similarly, Proponents seek to shield from public view documents concerning the simulcasts.
2 Proponents contend PX2656 (an email chain about the simulcasts between Mr. Prentice, Mr. Garlow,
3 Mr. Flint, Mr. Pugno, and Ms. Layman of the Church Communications Network), falls within the
4 privilege exception because “Pastor Garlow shared the political goal of passing Proposition 8 and
5 associated with other religious leaders and ProtectMarriage.com for that purpose.” Doc. #640-2 at
6 4:12-15. Proponents similarly argue that PX2773 (an email chain about the simulcasts between Mr.
7 Prentice, Mr. Garlow, Mr. Packard, and Mr. Dallas) is within the privilege exception as “an email
8 chain sent and received among associates who were communicating for purposes of formulating
9 messages and strategy.” Doc. #640-2 at 4:20-22. Again, Proponents have never claimed nor proffered
10 evidence to prove that these individuals (Garlow, Layman, Packard, and Dallas) were members of the
11 core group engaged in formulating campaign messaging and strategy. Moreover, at trial Proponents
12 emphatically disclaimed any involvement in or control over the simulcast messages.³ Rather,
13 Proponents represented to the Court, “The campaign does not dispute that these simulcasts were paid
14 for with money that was raised by ProtectMarriage.com. But there is no evidence that they had control
15 over the content of these simulcasts or what was said in these simulcasts.” Tr. 2363:4-8. Proponents
16 also specifically disclaimed control over the content of PX2656, one of the exhibits they now claim
17 falls within the privilege exception. *See* Tr. 2367:3-12. According to their own representations, then,
18 ProtectMarriage.com did not engage in privileged associational activity in developing the simulcast
19 messages. Certainly Proponents have not proven otherwise.

22 In deposition, Mr. Prentice – offered by Proponents as the person most knowledgeable about
23 ProtectMarriage.com’s organizational structure and campaign messaging and strategy (Declaration of
24 Therese M. Stewart ¶ 2, Exh. A at 5-7; Exh. B at 12:8-14) – testified under oath that many of the
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27 ³ In his declaration accompanying Proponents’ reconsideration motion, Mr. Prentice re-
28 confirms that ProtectMarriage.com funded the simulcasts (which Proponents attempted to exclude
from evidence, but which are not subject to the motion to strike). Doc. #640-3, Prentice Decl. ¶ 5.x.

1 groups Proponents *now* claim as political associates were *not* part of any ProtectMarriage.com
2 coalition, even broadly defined. For example, Proponents today seek to exclude PX2403, an email
3 sent to Mr. Prentice from Kenyn Cureton at the Family Research Council (“FRC”), contending, “FRC
4 and ProtectMarriage.com were political allies associated together regarding a common political goal.”
5 Doc. #640-3, Prentice Decl. at ¶ 5.iii. This conclusory assertion falls far short of establishing that FRC
6 was part of the core group engaged in formulating strategy and messaging for Proposition 8. But even
7 if it were sufficient, Proponents' current position is directly contradicted by their own testimony earlier
8 in the case. In stark contrast to Proponents' current claim of a political association with FRC, when
9 asked in deposition whether FRC was part of the ProtectMarriage.com coalition Mr. Prentice refused
10 even to concede the existence of such a coalition, defining it as merely “the vague non-descript loose
11 association that you're referring to as the coalition.” Stewart Decl., Exh. B, Prentice Depo. Vol. I at
12 265:7-8. Using even this amorphous definition, Mr. Prentice *still* did not place FRC within that
13 “coalition,” stating only, “Family Research Council participated in the promotion of the passage of
14 Proposition 8.” *Id.*, Exh. B (Prentice Depo. Vol. I at 265:10-11). Later, using the somewhat more
15 cohesive concept of “coalition” that ProtectMarriage.com had used on its own website – “a broad-
16 based coalition of California families, community leaders, religious leaders, pro-family organizations
17 and individuals from all walks of life who have joined together to support Proposition 8,” Mr. Prentice
18 again denied that FRC was part of such a coalition with ProtectMarriage.com. *See id.*, Exh. B
19 (Prentice Depo. Vol. I at 267:9-268:8). Proponents cannot be heard now to claim that
20 ProtectMarriage.com and FRC “joined together” to pass Proposition 8 when Mr. Prentice so
21 thoroughly disclaimed any such association at his deposition in December.
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25 Similarly, Proponents now move to strike PX2385, an email chain including members of the
26 Arlington Group, as shielded by the privilege exception because “[a]ll of these individuals and their
27 respective organizations were political allies who had associated together for the common goal of
28

1 promoting and defending traditional marriage and passing Proposition 8.” Doc. #640-3, Prentice Decl.
2 at ¶ 5.ii.b. At trial, however, Proponents sought to distance themselves from the Arlington Group,
3 challenging the admissibility of PX2385 as insufficiently connected to the campaign: “Ms. Snow’s e-
4 mail is – she is not a party. ... [T]he portion that they’re seeking to go offer in, or what this reflects, is
5 an e-mail from *somebody outside the campaign*, sending it in.” Tr. 2393:11-16 (emphasis added). Ms.
6 Moss went on to challenge the notion that the Arlington Group had any association with
7 ProtectMarriage.com whatsoever, stating, “Your Honor, I would again just note, these statements as to
8 what The Arlington Group are supposedly doing or not doing are out-of-court statements being offered
9 for the truth of the matter asserted. It hasn't even been established that these are efforts. My
10 understanding is, they were also involved in the ballot initiatives in other states. And so to what extent
11 this is even pertinent or applicable to California, I don't think has been established.” Tr. 2394:16-24.
12 Proponents thus effectively disclaimed any relationship with the Arlington Group in connection with
13 the campaign to pass Proposition 8.
14

15 In short, to the extent that Proponents now argue that there was a large core group of persons
16 working together to formulate strategy and messages that extended beyond ProtectMarriage.com and
17 its agents, this position is inconsistent with Proponents' prior assertions. Throughout the litigation,
18 Proponents sought to combat the notion that ProtectMarriage.com coordinated its campaign with *any*
19 other political organizations, let alone formed associations deserving of a limited privilege exception.
20 As briefly noted above, Mr. Prentice disputed the very notion of a coordinated campaign. When asked
21 about ProtectMarriage.com’s website description of a “broad-based coalition of California families,
22 community leaders, religious leaders, pro-family organizations and individuals from all walks of life
23 who have joined together to support Proposition 8,” Mr. Prentice stated there “was no organization as
24 such” matching that description. Stewart Decl., Exh. B, Prentice Depo. Vol. I at 226:19 – 227:3.
25 Specifically, Mr. Prentice “would not agree with the accuracy of that statement on the website. I
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1 would have – I would have taken issue with it and – and said working towards the passage. *And I*
2 *would have left out ‘joined together.’”* *Id.*, Exh. B (Prentice Depo. Vol. I at 78:1a-16 [emphasis
3 added]). Instead, he described the other groups supporting Proposition 8 as merely a “loose
4 association of people walking in the same direction.” *Id.*, Exh. B (Prentice Depo. Vol. 1 at 260:9-10).

5 Indeed, contrary to their present assertions, Proponents attempted to draw a sharp boundary
6 around the official legal contours of ProtectMarriage.com and to distance that entity from, and
7 disclaim any close association with, other persons and entities. For example, Proponents now ask the
8 Court to cloak in privilege PX2455, an email chain between members of ProtectMarriage.com and
9 members of the National Organization for Marriage (“NOM”) about a NOM press release.
10 Proponents contend this document falls within the privilege exception because “NOM and
11 ProtectMarriage.com had associated for the common purpose of passing Proposition 8 and sometimes
12 communicated thoughts and advice about the formulation of messaging and strategy.” Doc. #640-3,
13 Prentice Decl. at ¶ 5.iv. However, at trial, when discussing a public message disseminated by NOM,
14 Proponents stated: “Your Honor, number one, this was not produced by ProtectMarriage.com. And
15 ProtectMarriage.com is not the National Organization for Marriage.” Tr. 111:4-6. Later, Mr.
16 Thompson sought to clarify the record once more about that particular message, stating, “And just so
17 the record is clear, your Honor, this was paid for and sponsored by the National Organization For
18 Marriage, not ProtectMarriage.com.” Tr. 1855:7-9.

19 With respect to each group and person working to pass Proposition 8 other than
20 ProtectMarriage.com and its consultants, Proponents in discovery and at trial repeatedly *denied any*
21 *meaningful coordination* that would render these groups part of a core group of close political
22 associates for the purposes of the First Amendment privilege exception. Indeed, though they seek to
23 invoke the privilege exception, to this day Proponents do not contend that any of these persons were
24 part of a core group that formulated the strategy and messaging for Prop. 8. Instead, Mr. Prentice
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1 admits that none of these individuals or groups were within the "core group" as defined by this Court,
2 and that while they occasionally communicated with ProtectMarriage.com about their own messaging,
3 neither consistently informed the other of their messaging nor controlled each other's messaging. *See*
4 Doc. #640-3, Prentice Decl. ¶¶ 3-4, 5.ii.a, 5.v, 5.ix, 5.xi, 5.xii, 5.xiii. Mr. Prentice does not suggest that
5 any of these groups or persons had any input at all into ProtectMarriage.com's messaging. Rather,
6 Proponents have repeatedly and deliberately sought to distance themselves from other pro-Prop 8
7 persons and groups, disclaiming any joint effort to coordinate messaging and strategy. The "vague,
8 non-descript loose assimilation of groups attempting to pass Proposition 8" that Mr. Prentice described
9 as the *only* coalition supporting the measure (Stewart Decl. Exh. B, Prentice Depo. Vol. 1 at 266:23-
10 25), certainly does not meet the requirement of a "core group" under the Ninth Circuit's test.

12 **B. Evidence presented at trial demonstrates that proponents were linked to various**
13 **organizations, but that link falls far short of the Ninth Circuit's standard for the**
14 **First Amendment privilege exception.**

15 As the preceding section demonstrates, Proponents' current assertions about their political
16 association with the groups whose communications they now seek to cloak in the privilege exception
17 are in stark contrast to the statements they and their counsel made in discovery and at trial attempting
18 to disavow their association with such groups' bias-infused messaging. Proponents should be bound
19 by their prior representations under doctrines of waiver and judicial estoppel. Further, even though (as
20 Proponents now finally and belatedly admit but had previously denied) ProtectMarriage.com is linked
21 to the messages disseminated by other groups, including messages designed to promote stereotypes
22 about, and prejudice against, gay and lesbian individuals, and even though the evidence shows
23 ProtectMarriage.com sometimes knew of, encouraged or acquiesced in, and even funded the
24 distribution of such messages, these facts are not enough to establish that its communications with
25 these groups fall within the privilege exception to disclosure. Even now, Proponents have failed to
26 demonstrate the existence of a core group extending beyond ProtectMarriage.com and its consultants
27 that was engaged in formulating campaign messaging and strategy, much less that each of the groups
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1 and individuals whose communications they now seek to shield was a member of that core group. Nor
2 have Proponents shown that the communications at issue were intended to remain within that core
3 group, and in fact kept confidential.

4 For instance, despite Proponents' and Dr. Tam's efforts to distance ProtectMarriage.com from
5 Dr. Tam and his prejudiced-infused messages directed to the Asian-American community, the
6 evidence shows Dr. Tam worked with and received support from ProtectMarriage.com. *See* PX2609
7 (email from Bill Tam inviting people to a fundraising dinner and noting that he "worked closely with
8 ProtectMarriage.com."); PX2633 (Statement of Unity with ProtectMarriage.com signed by Dr. Tam).
9 Following instructions in the Statement of Unity, Dr. Tam's organization raised money by collecting
10 checks made out to ProtectMarriage.com, and ProtectMarriage.com in turn funneled money back to
11 Dr. Tam for communications to the Asian-American community. *See* PX2627. Thus, Proponents
12 were paying for many of the messages that Dr. Tam disseminated. Despite these connections,
13 however, neither Proponents nor Dr. Tam, even in the motion for reconsideration, provides the factual
14 basis for a finding that their communications should be shielded by the First Amendment privilege as
15 defined by *Perry I* and *Perry II*. Mr. Prentice and Dr. Tam continue to deny that Dr. Tam was within
16 the only core group that has been shown to exist with respect to the pro-Proposition 8 campaign. Doc.
17 #640-3, Prentice Decl. ¶ 5.xii ("Dr. Tam . . . would not fit in ProtectMarriage.com's particular 'core
18 group' as that term was defined by this Court in January 2010."); Doc. #642-3, Tam Decl. ¶ 6 ("This
19 email reflects one of the limited conversations that I had with a representative of ProtectMarriage.com
20 during the campaign phase of the Proposition 8 election."). Instead, they admit only that Dr. Tam was
21 part of "the larger collection of political associates working together to pass Proposition 8." Doc.
22 #640-3, Prentice Decl. ¶ 5.xii; *see also* Doc. #642-3, Tam Decl. ¶ 7 (share "political objective of
23 qualifying Prop. 8 for the ballot.). Proponents continue to seek to keep Dr. Tam and his hostile anti-
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1 gay messages a safe distance from ProtectMarriage.com, while at the same time wrapping all his
2 communications in an ever-expanding First Amendment privilege.

3 Proponents also seek to cloak in the First Amendment privilege email communications sent to
4 “representatives from grassroots organizations that shared the political goal of passing Proposition
5 8.” Doc. #640-3, Prentice Decl. ¶ 5xi. Those communications show that ProtectMarriage.com was
6 aware of and promoted Dr. Tam’s website “1manand1woman.com,” and that the campaign funded and
7 coordinated the simulcasts. *See* PX2599. While ProtectMarriage.com funded projects by these
8 organizations, and encouraged them to disseminate information, there is no evidence that they and
9 ProtectMarriage.com joined together to form a core group or other close political association to engage
10 in formulation of strategy and messaging. Mr. Prentice himself emphasizes that the recipients did not
11 have a “substantial or regular role in ProtectMarriage.com’s operations and decisionmaking;” rather,
12 the recipients belonged to organizations that simply shared the political goal of passing Proposition 8.
13 Doc. #640-3, Prentice Decl. at ¶ 5.xi. He says nothing about the recipients' involvement in
14 formulating strategy or messaging with or for ProtectMarriage.com. In addition, nowhere do
15 Proponents set out evidence that the email communications were actually maintained as confidential
16 by the recipients, or even that they were required to do so. Instead, Proponents argue that the mere
17 shared political desire to pass Proposition 8 is sufficient to shield all such communications in a First
18 Amendment privilege.
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21 Proponents’ attempt to drastically expand the First Amendment privilege is aimed not at
22 protecting private, internal communications within a core group engaged in formulating campaign
23 strategy and messaging, but rather at clearing the trial record of some of the most damaging examples
24 of anti-gay bias perpetrated by the campaign. For example, Proponents were well aware that the
25 general public would consider the simulcasts to reveal the true “bias” of the messages that were
26 targeted at evangelical voters. *See* PX2773 at DEFINT_PM_018900. Accordingly,
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1 ProtectMarriage.com worked desperately to prevent any portion of the simulcasts (which were
2 publicly available) from being shown on national television through the Dr. Phil Show. The email
3 Proponents seek to exclude, PX2773, was sent to “associates or vendors” of Pastor Garlow after the
4 election, discussing the simulcast “put on” by Pastor Garlow but paid for by ProtectMarriage.com.
5 Doc. #640-3, Prentice Decl. ¶ 5.x. While Mr. Prentice discusses some recipients of the email in his
6 declaration, the exhibit itself contains redactions that eliminate the ability to see all of the email’s
7 actual recipients. Accordingly, there is no evidence that the email itself was actually maintained as
8 confidential. Proponents' motion to strike this exhibit is revealing. Striking the email would simply
9 remove from the record that ProtectMarriage.com knew the simulcast messages were biased, had a say
10 in how they were used, and that after the campaign it hoped to shield these prejudiced statements from
11 the public-at-large. But the simulcasts themselves (including the biased nature of their contents), and
12 the fact that ProtectMarriage.com paid for them, would remain in the record, as those facts are
13 revealed by the publicly available simulcasts, campaign finance disclosure reports, and by Mr.
14 Prentices’ own statements in deposition and in the motion for reconsideration. The motion to strike is
15 simply an effort to distance Proponents from biased messages and avoid the admission that they are
16 biased, not an effort to shield the formulation of campaign messages or strategy.

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19 The documents Proponents seek to hide also show that they were aware of and encouraged or
20 acquiesced in the prejudice-filled messages that were prepared and disseminated by other groups. For
21 instance, Family Research Council sent a document to Ron Prentice. PX2403; Doc. #640-3, Prentice
22 Decl. at ¶5.iii. There is no evidence that the transmission was done in a confidential manner, and no
23 evidence that ProtectMarriage.com revised the material (*i.e.*, shaped the message or strategy).

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25 PX2403, Doc. #640-2, Prentice Decl. ¶ 5.iii.⁴ It is no wonder, however, why ProtectMarriage.com
26 wants to hide the document. This kit that FRC – one of the powerful national organizations that

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28 ⁴ Moreover, as described more fully above, FRC was one of the organizations Mr. Prentice denied was part of any ProtectMarriage coalition.

1 provided funding and other support for the campaign (*see* Doc. #608-1 at 17-18, PPF 29) – prepared
2 for distribution for "Christian voters" blatantly reinforces gender stereotypes, PX2403 at
3 DEFINT_PM_005387, 5427, declares homosexuals and their agenda to be "evil," *id.* at
4 DEFINT_005418, 5421, 5423, and engaged in a "Destructive Program" whose "aim" is "domination,"
5 *id.* at DEFINT_PM_005389-005392, characterizes homosexuality as a "devilish perversion,"
6 "DECEPTIVE PERVERSION," "detestable," an "abomination" and "condemn[ed]" by scripture, *id.* at
7 DEFINT_PM 005387-005388, 005392, 005407-005413, and generally exhorts recipients to participate
8 in their churches' efforts to pass Proposition 8, *id.* at DEFINT_PM_005430-005436. The
9 significance of the exhibit is not the formulation of a strategy or message. Instead, the document is
10 part of the evidence that Proponents were aware of – and did nothing to discourage, *see* Doc. #640-3,
11 Prentice Decl. ¶ 5.iii ("neither I nor Protect Marriage ever provided any edits or response to this
12 email") – the hate-filled anti-gay messages that self-described "pro-family" organizations like FRC
13 used to tap into voters' prejudice.
14

15 Proponents' proposed expansion of the First Amendment privilege articulated in *Perry I* and
16 *Perry II* to include all communications between anyone who shares a political ideology, without any
17 core group or confidentiality requirement, would shield this highly relevant information both from the
18 Court and from the public.
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21 **III. THERE IS A STRONG PUBLIC INTEREST IN TRANSPARENCY ABOUT THE**
22 **ENACTMENT OF LAWS THAT WEIGHS AGAINST REVISITING AND**
23 **EXPANDING THE SCOPE OF THE LIMITED PRIVILEGE.**

24 As discussed above, Proponents have asked this Court to vastly expand the scope of the limited
25 First Amendment privilege as defined in *Perry I* and *Perry II*. Those decisions – including limitations
26 they impose on the privilege exception they and this Court recognized – are binding on the Court. But
27 even if this Court concludes otherwise, San Francisco respectfully requests that it decline to expand
28 the privilege exception. It is critically important to enforce the limitations of the privilege. Proponents'

1 proposed expansion would not only strike information that is relevant to this case, but it would do so at
2 the expense of strong countervailing First Amendment interests, including a strong public interest in
3 favor of disclosing campaign information about ballot measures so that California citizens can know
4 the history and circumstances underlying the passage of laws that affect them all.

5 As the Ninth Circuit recently observed, “in the context of disclosure requirements, the
6 government’s interest in providing the electorate with information related to election and ballot issues
7 is well-established.” *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 (9th Cir.
8 2007) (citing *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 196 (2003); *Buckley v. Valeo*, 424
9 U.S. 1, 66 (1976); *Goland v. United States*, 903 F.2d 1247, 1261 (9th Cir. 1990); *Alaska Right to Life*
10 *Comm. v. Miles*, 441 F.3d 773, 791 (9th Cir. 2006)). This interest is rooted in the First Amendment.
11 As the Ninth Circuit recognized in *Alaska Right to Life Committee*, “there is a compelling state interest
12 in informing voters who or what entity is trying to persuade them to vote in a certain way” and
13 attempts to shield such information about political campaigns “ignore[] the competing First
14 Amendment interests of individual citizens seeking to make informed choices in the political
15 marketplace.” 441 F.3d at 793 (quoting *McConnell*, 540 U.S. at 197).

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18 The public interest in an informed electorate finds expression in laws requiring regular
19 reporting by campaign committees and public disclosure of information about donors and
20 expenditures. In California, for instance, the Political Reform Act of 1974, Cal. Gov’t Code (“CGC”)
21 § 81000 *et seq.*, requires significant disclosures from campaign committees, including detailed
22 reporting and disclosure of contributions and expenditures.⁵ Plaintiff-Intervenor has enacted local
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24 ⁵ For instance, the Political Reform Act requires campaign committees to file a Statement of
25 Organization that includes the name, street address, and telephone number of the committee, CGC §
26 84102(a); the full name, street address, and telephone number of the treasurer and other principal
27 officers, CGC § 84102(c); and a brief description of its general political activities or the ballot measure
28 or candidate that the committee supports or opposes as its primary activity, CGC § 84102(e). The
Political Reform Act also requires disclosure of the name, address, occupation, and employer of that
for each donor who contributed \$100 or more, CGC § 84211(f), and disclosures regarding
expenditures of \$100 or more and the persons to whom those expenditures were made, CGC §
84211(k). Furthermore, it requires committees to state their name, street address and city on the

1 laws that impose additional disclosure requirements on local candidates and committees.⁶ In
2 numerous cases, the Supreme Court and the Ninth Circuit have held that the governmental interest
3 underlying such disclosure requirements outweighs any burdens they may impose on First
4 Amendment rights. *See, e.g., Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981)
5 (upholding an ordinance requiring disclosure of ballot measure expenditures and contributions);
6 *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d at 1183-87 (holding the definition of
7 "contribution" in California's Political Reform Act is narrowly tailored to a compelling governmental
8 interest in disclosing information about ballot measure advocacy); *Alaska Right To Life Comm. v.*
9 *Miles*, 441 F.3d 773, 793 (9th Cir. 2006) (upholding Alaska's requirement that campaign advertising
10 disclose the identity of major donors).

12 This informational interest is particularly strong for campaign materials concerning ballot
13 measures because these materials constitute the legislative record for a measure. As the Court
14 recognized when Proponents first asserted the privilege, "[i]n the case of an initiative measure, the
15 enacting body is the electorate as a whole." Doc. #214 at 14:7-8. Put differently, "[v]oters act as
16 legislators in the ballot-measure context, and interest groups and individuals advocating a measure's
17 defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat
18 legislation." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003). Thus,
19 when individuals associate for the purpose of proposing or passing a ballot measure, they do more than
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23 outside of each piece of mass mailing, CGC § 84305, requires independent expenditures that expressly
24 support or oppose any ballot measure to include the names of the two persons making the largest
25 contributions to the committee making the independent expenditure, CGC § 84506, and requires any
26 advertisement for or against any ballot measure to include a disclosure statement identifying the top
27 two contributors of \$50,000 or more, CGC § 84503.

28 ⁶ *See, e.g.,* San Francisco Campaign and Governmental Conduct Code § 1.134 (third-party reporting relating to voluntary expenditure ceilings); § 1.135 (pre-election statements) § 1.152 (third-party reporting relating to public financing program for mayoral and board races); § 1.161 (mass mailings); § 1.161.5 (electioneering); § 1.162 (disclaimer requirement for campaign ads); § 1.163 (disclaimer requirement for robo-calls) § 2.110 (disclosure of contributions made by lobbyists).

1 petition the government in their capacity as private citizens. They assume the mantle of the state, and
2 their actions have operative effect.⁷

3 Because voters act in a legislative capacity when they approve or reject ballot measures,
4 disclosure of campaign communications and materials about these measures also serves the broader
5 public interest in open government. In California, this interest is expressed in numerous public
6 meeting and public records laws.⁸ *See, e.g.*, Legislative Open Records Act, CGC §§ 9070-9080
7 (providing for public access to legislative documents); CGC § 10248 (requiring the Legislative
8 Counsel to provide numerous legislative documents in electronic form for public access); Bagley-
9 Keene Open Meeting Act, CGC §§ 11120-11132 (providing for public access to government
10 meetings); California Public Records Act, CGC §§ 6250-70 (providing for public access to files
11 maintained by state agencies). As the California Public Records Act states: "In enacting this chapter,
12 the Legislature, mindful of the right of individuals to privacy, finds and declares that access to
13 information concerning the conduct of the people's business is a fundamental and necessary right of
14 every person in the state." CGC § 6250. In short, when state laws are enacted through the ordinary
15 legislative process, citizens have an expansive right to review the legislative files for those laws.
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19 ⁷ The initiative power, as well as the powers and duties of initiative proponents, is described in
20 numerous provisions of the California Constitution and the California Elections Code. *See, e.g.*, Cal.
21 Const. art. II § 8(b) ("An initiative measure may be proposed by presenting to the Secretary of State a
22 petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified
23 to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in
24 the case of an amendment to the Constitution of the votes for all candidates for Governor at the last
25 gubernatorial election."); *id.* § 10(a) ("An initiative statute or referendum approved by a majority of
26 votes thereon takes effect the day after the election unless the measure provides otherwise."); Cal.
27 Elec. Code § 9001(a) ("Prior to the circulation of any initiative or referendum petition for signatures,
28 the text of the proposed measure shall be submitted to the Attorney General with a written request that
a circulating title and summary of the chief purpose and points of the proposed measure be prepared.
The electors presenting the request shall be known as the 'proponents.' "); § 9604 (describing process
by which proponents may withdraw a ballot measure); § 9607 (requiring proponents to instruct
petition circulators "on the requirements and prohibitions imposed by state law with respect to
circulation of the petition and signature gathering thereon").

⁸ San Francisco has a particularly strong commitment to open government, and it has enacted
local laws that provide even greater public access to records and meetings than State law requires. *See*
The San Francisco Sunshine Ordinance of 1999, S.F. Admin. Code § 67.1 *et seq.*

1 These statutory disclosure rules do not, of course, require automatic reporting and disclosure of
2 the types of documents Proponents seek to shield here, but they demonstrate the general principle that
3 campaign-related information should be available to the public, and weigh against expanding the
4 privilege as Proponents have requested. The free flow of information is the lifeblood of a robust
5 democracy. "There is a profound national commitment to the principle that debate on public issues
6 should be uninhibited, robust and *wide-open*." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909
7 (1982) (emphasis added). Proponents vigorously assert the First Amendment rights of organizations
8 campaigning in support of Proposition 8, which they claim will somehow be "chilled" by disclosure of
9 campaign-related documents, but they ignore altogether "the competing First Amendment interests of
10 individual citizens seeking to make informed choices in the political marketplace." *McConnell*, 540
11 U.S. at 197 (quoting with approval the district court, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)). As in
12 *McConnell*, Proponents "never satisfactorily answer the question of how uninhibited, robust, and wide
13 open speech can occur when organizations hide themselves from the scrutiny of the voting public."
14 251 F. Supp. 2d at 237 (internal citations and quotation marks omitted). And Proponents' continued
15 efforts to shield campaign documents from discovery is particularly troubling because "informed
16 public opinion is the most potent of all restraints upon misgovernment." *Grosjean v. American Press*
17 *Co.*, 297 U.S. 233, 250.

20 In striking the balance required by recognition of a privilege exception to transparency in
21 government affairs, the Court should weigh in the balance not only the First Amendment interest of
22 ballot measure proponents but also the equally important First Amendment interests of the public in
23 participating in the legislative process on an ongoing basis with full access to information about the
24 legislative record. The latter interests weigh strongly against any expansion of the privilege exception.
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CONCLUSION

For all of the foregoing reasons, the City respectfully request that the Court deny Proponents' motion to reconsider and strike.

Dated: May 6, 2010

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