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6 **UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

7 KRISTIN M. PERRY, SANDRA B. STIER,
8 PAUL T. KATAMI, and JEFFREY J.
9 ZARRILLO,

10 Plaintiffs,

11 v.

12 ARNOLD SCHWARZENEGGER, in his official
capacity as Governor of California; EDMUND
13 G. BROWN, JR., in his official capacity as At-
torney General of California; MARK B. HOR-
14 TON, in his official capacity as Director of the
California Department of Public Health and State
15 Registrar of Vital Statistics; LINETTE SCOTT,
16 in her official capacity as Deputy Director of
Health Information & Strategic Planning for the
17 California Department of Public Health; PA-
TRICK O'CONNELL, in his official capacity as
18 Clerk-Recorder for the County of Alameda; and
DEAN C. LOGAN, in his official capacity as
19 Registrar-Recorder/County Clerk for
20 the County of Los Angeles,

21 Defendants,

22 and

23 PROPOSITION 8 OFFICIAL PROPONENTS
DENNIS HOLLINGSWORTH, GAIL J.
24 KNIGHT, MARTIN F. GUTIERREZ, HAK-
SHING WILLIAM TAM, and MARK A. JANS-
25 SON; and PROTECTMARRIAGE.COM – YES
ON 8, A PROJECT OF CALIFORNIA RE-
26 NEWAL,

27 Defendant-Intervenors.
28

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENOR HAK-
SHING WILLIAM TAM'S REPLY IN
SUPPORT OF MOTION TO STRIKE**

Judge: Chief Judge Vaughn R. Walker
Location: Courtroom 6, 17th Floor

1 Defendant-Intervenor Tam respectfully submits the following reply in support of his motion to
2 strike, Doc # 642, and in response to the Oppositions filed by Plaintiff and Plaintiff-Intervenor, Doc ##
3 659, 660.

4 1. Dr. Tam joins, and incorporates by reference, the Reply of Defendant-Intervenors Hol-
5 lingsworth, Gutierrez, Jansson, Knight, and ProtectMarriage.com in support of their Motion to Strike.

6 2. Instead of treating separately with Dr. Tam's motion, Plaintiffs and Plaintiff-Intervenor
7 lump his motion together with that of the other Defendant-Intervenors and make all of their arguments
8 with respect to "Proponents." Accordingly, many of Plaintiffs' and Plaintiff-Intervenor's arguments,
9 which are unconvincing when applied to the other Defendant-Intervenors' motion, lack any sem-
10 blance of coherence when applied specifically to Dr. Tam's motion. For example, Plaintiffs argue
11 that it was not error for "Magistrate Judge Spero to limit the core group in the manner that he did"
12 because of
13

14 Proponents' failure to present competent evidence that could support the extension of the
15 First Amendment privilege to individuals outside of ProtectMarriage.com itself. Propo-
16 nents' decision not to contend and not to submit evidence that numerous organizations
17 beyond ProtectMarriage.com were part of the core group responsible for campaign mes-
18 sages and strategy may be explained by the fact that they were not part of that group, or it
19 may be explained by Proponents' strategic goal of distancing themselves from statements
20 made by others that they now seek to include within the First Amendment privilege.

21 Doc # 659 at 13.

22 One of the "others" referenced by Plaintiffs is Dr. Tam himself, so the argument is essentially that Dr.
23 Tam's "strategic goal" was to "distanc[e] [him]self from [his own] statements" and he did so by
24 "fail[ing] to present competent evidence [regarding] individuals outside of ProtectMarriage.com
25 itself." Not only is this statement absurd on its face, it is also false. As noted in Dr. Tam's motion to
26 strike (but ignored by Plaintiffs and Plaintiff-Intervenor), in a declaration dated September 25, 2009,
27 Dr. Tam stated:

28 I volunteered as the head of a coalition of Asian churches whose membership also
had an interest in the passage of Proposition 8.... As the head of this coalition, I had

1 numerous private communications reflecting mine and others' deeply held political
2 and religious views and our thoughts on political strategy and petitioning the govern-
3 ment. I engaged in these communications as part of this coalition I am very con-
4 cerned that Plaintiffs' broad discovery requests make no distinction in this regard
5 If I am required to disclos[e] such communications ... it would affect how I commu-
6 nicate in the future. I would change what I say, who I feel I can speak to, and who I
7 associate with for fear that such communications would not remain private as they
8 were intended.

9 Doc # 187-12. To the extent any additional evidence was required for communications made among
10 this coalition of Asian churches to qualify for the "core group" concept introduced months *after* Dr.
11 Tam submitted this declaration, he should have been, but was not, afforded the opportunity to meet
12 this newly announced standard. Hr'g of Jan. 6, 2010, Tr. 104:3-12.

13 3. In any event, Plaintiffs and Plaintiff-Intervenor focus their arguments on the wrong rulings.
14 Dr. Tam is not seeking, at this time, the return of the documents he produced on an attorneys-eyes-
15 only basis pursuant to this Court's discovery orders (although he does not waive his objections to that
16 production). Instead, Dr. Tam seeks reconsideration of the Court's rejection of his objections to
17 moving certain documents into the public record. *See* Trial Tr. 1893-94 (standing objection lodged).
18 With respect to those objections, and as explained in the motion to strike, all the evidence necessary
19 to show that these documents fall within the First Amendment privilege (as defined in *Perry I* and
20 *Perry II*) is found on the face of the documents themselves, in the prior declaration by Dr. Tam, and in
21 Dr. Tam's testimony. Moreover, because Dr. Tam was explicitly prohibited from putting in further
22 evidence regarding his organization in the wake of *Perry I*, to the extent the Court requires further
23 evidence in support of the privilege, it should consider the supplemental declaration submitted by Dr.
24 Tam with his motion to strike.

25 4. With respect to the specific exhibits (and associated portions of the trial transcript) that Dr.
26 Tam alone moves to strike—PX2472, PX2476, PX2504, PX2538, PX2609, and PX2612 (and
27 associated transcript portions)—Plaintiffs argue that "Dr. Tam *asserted* in open court that he was not
28 a member of the core group" and "[t]hus, [these documents] are not privileged because they are not

1 communications ‘among the core group.’” Doc # 659 at 19 (emphasis in original). It is hard to pin
2 down exactly what Plaintiffs mean by “the core group,” but two things are clear: (i) they rip Dr.
3 Tam’s statement out of context, and (ii) whatever Plaintiffs mean by “the core group,” their meaning
4 does not comport with anything the Ninth Circuit has said. As to context, Plaintiffs themselves quote
5 verbatim what Dr. Tam said: “I don’t believe I am ProtectMarriage.com, within their core group.
6 I’m not.” Doc # 659 at 19 (quoting Trial Tr. 1907:9-1908:1)). But Dr. Tam does not contend that
7 the six documents at issue here are privileged because they were created by or distributed among
8 members of ProtectMarriage.com’s “core group.” He contends that they are communications he had
9 as the “head of a coalition of Asian churches” with political associates about the formulation of
10 strategy and messaging. See Doc # 642-2 at 4-6.

12 As to Plaintiffs’ brooding omnipresence—“the core group”—they can point to *nothing* in
13 either *Perry I* or *Perry II* that states that in a given political campaign there can be one and only one
14 “core group” of persons who may claim the protections of the First Amendment. To the contrary,
15 *Perry I* quite clearly states that the privilege extends “to the myriad social, economic, religious and
16 political organizations that publicly support or oppose ballot measures.” *Perry v. Schwarzenegger*,
17 591 F.3d 1147, 1158 (9th Cir. 2010). See also *Citizens Against Rent Control/Coalition for Fair*
18 *Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981) (“The tradition of volunteer committees for
19 collective action has manifested itself in myriad community and public activities; in the political
20 process it can focus on a candidate or on a ballot measure.”). But following *Perry I*, this Court
21 rejected this interpretation of *Perry I*, holding that *all* Defendant-Intervenors could claim privilege
22 over one and only one “core group” of persons who were part of the specific ProtectMarriage.com
23 organization. See, e.g., Doc # 372. *Perry II* then made quite clear that during a campaign multiple
24 “core groups” could exist. “The operative inquiry is whether they are part of an *association* subject to
25 First Amendment protection.” *Perry v. Schwarzenegger*, No. 10-15649, slip op. at 9 (9th Cir. Apr.
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27
28

1 12, 2010).

2 Plaintiffs offer no argument—not a single word—to the effect that Dr. Tam’s organization
3 is not one of the myriad “association[s] subject to First Amendment protection.” They offer no
4 argument as to why Dr. Tam and his organization do not also enjoy the “incident of associational
5 autonomy” that preserves “[t]he freedom of members of a political association to deliberate internally
6 over strategy and messaging.” *Id.* at 1162 n.9. *See also id.* at 1162 (“Implicit in the right to associate
7 with others to advance one’s shared political beliefs is the right to exchange ideas and formulate
8 strategy and messages, and to do so in private.”). Plaintiffs and Plaintiff-Intervenor offer no such
9 arguments because they would be facially absurd, as Dr. Tam’s associations, whether Plaintiffs and
10 Plaintiff-Intervenor approve of them or not, are no less protected than ProtectMarriage.com’s, the
11 ACLU’s, Equality California’s, the NAACP’s, or those of Plaintiffs themselves.
12

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14 5. Plaintiffs argue that Dr. Tam cannot claim privilege over his communications to political
15 associates in TFC because, supposedly, the Ninth Circuit “specifically rejected” this “attempt.” Doc
16 659 at 19. But as Plaintiffs well know, the specific document that the Ninth Circuit referenced was
17 *posted on the Internet*, whereas the documents at issue here were not and were not before the Ninth
18 Circuit.
19

20 CONCLUSION

21 For the foregoing reasons, Defendant-Intervenor Tam respectfully requests that the Court grant
22 the motion to strike exhibits and associated transcript portions from the record.

23 Dated: May 10, 2010

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SHING WILLIAM TAM

By: /s/ Terry L. Thompson
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