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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT,

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL KNIGHT, MARTIN GUTIERREZ, MARK JANSSON, AND PROTECTMARRIAGE.COM'S REPLY IN SUPPORT OF MOTION TO STRIKE/RECONSIDER

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

in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

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

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Defendant-Intervenors Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com ("Proponents") respectfully submit this Reply in support of their Motion to Strike/Reconsider, and in response to the Oppositions filed by Plaintiffs and Plaintiff-Intervenor (the "City").

1. Plaintiffs' and the City's main argument is that *Perry II* has *no* implications for *any* of this Court's prior First Amendment rulings. *See, e.g.*, Doc # 659 at 11 (contending that "Proponents' argument that this Court's discovery rulings were erroneous has no basis in … law" and that prior orders were "fully consistent" with *Perry II*.); Doc # 660 at 11 ("Th[e] Court properly applied the Ninth Circuit's holding defining the scope of the privilege exception throughout the trial."). This is a peculiar argument that fails to come to grips with *Perry II*'s guidance with respect to this Court's interpretation of the *Perry I* mandate. *Compare* Doc # 610 at 7 ("The privilege applies only to communications within a campaign organization—communications between or among independent campaign organizations are not covered by the First Amendment privilege."), *and* Doc # 623 at 13 ("The magistrate [judge] did not err *as a matter of law* in concluding that the First Amendment privilege does not cover communications between [or among] separate organizations.") (emphasis added and brackets in original), *with Perry v. Schwarzenegger*, No. 10-15649, slip op. at 9 (9th Cir. Apr. 12, 2010) ("If 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. … We did not hold that the privilege cannot apply to a core group of associate persons spanning more than one entity."). *See also* Doc # 640-2 at 7-8.

Plaintiffs' and the City's flippant dismissal of *Perry II* is nothing more than a reassertion of their "control group" theory, which obviously did not comport with *Perry I*, and which this Court rejected. *Compare* Hr'g of Dec. 16, 2009, Tr. 37:2-8 (Plaintiffs' counsel arguing that privilege could only be applied to "control group" of ProtectMarriage.com), *and* Hr'g of Jan. 6, 2010, Tr. 23:23-24:2 (Plaintiffs' counsel arguing that privilege could only be applied to ProtectMarriage.com executive

committee, campaign manager, and general counsel), *with* Doc # 610. Now, in the wake of *Perry II*, Plaintiffs and the City still stubbornly advance this groundless theory, repeatedly criticizing this Court for finding an "over-inclusive core group" in its January orders. Doc # 637 at 11. *See also* Doc # 659 at 7, 11 (criticizing the Court for adopting an "extremely broad control group").[1] It is little wonder, then, why Plaintiffs and the City resist the implications of *Perry II*: they do not believe that *Perry I* was rightly decided, rightly applied, or is rightly adhered to going forward. Because their rejected "control group" theory is the foundation for all of Plaintiffs' and the City's other arguments, the Court need go no further to conclude that no convincing argument in opposition to the motion to strike has been advanced.

2. Plaintiffs also claim that the Court's prior rulings were fully consistent with *Perry II* because those orders included the ProtectMarriage.com executive committee in the "core group" and that committee "included representatives of different churches and entities." Doc # 659 at 11.[2] But that is just the point: The Court specifically held that members of the ProtectMarriage.com executive committee could claim privilege *only* with respect to communications with other members of ProtectMarriage.com who also qualified for "core group" status. Such persons were flatly prohibited from claiming privilege with respect to any communication back to or within other associations to which they belonged. *See, e.g.*, Trial Tr. 1614-33.

3. Plaintiffs and the City also contend that *Perry II* recognized that evidentiary deficits might

[1] The City alternatively phrases the discredited "control group" test in terms of "meaningful political association." Doc # 660 at 12. The City does not offer any guideposts for determining what is "meaningful" and what is not, but presumably the City, rather than the speaker, is to be the judge. But the First Amendment does not allow the government to be the arbiter of the worth of political speech and association; indeed, its very province is to keep government out of the business of approving or censoring the speech of its citizens. *See Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.").

[2] We leave to one side the factually inaccurate statement that members of the ProtectMar-
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undermine a privilege claim and that Proponents face just such a deficit. *See* Doc # 659 at 12-13; Doc # 660 at 11. We have already explained at length why this argument is untenable, *see* Doc # 640-2 at 17-22, and Plaintiffs and the City have made no effort to answer that explanation. Accordingly, we need not belabor the point here. In any event, Plaintiffs and the City confine their arguments to the Court's discovery rulings, which led to production under attorneys-eyes-only limitations. Proponents have not moved for reconsideration of those orders (although we do preserve our objections to them), but rather have asked the Court to reconsider its rulings at trial admitting these documents into the public record—a First Amendment harm additional to, but separate and apart from, the discovery orders. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 n.6, 1164 (9th Cir. 2010) (discussing different levels of harm from limited and full public disclosure). And with respect to those rulings, the Court had before it all the evidence necessary to make a First Amendment privilege determination—namely, the documents themselves and accompanying testimony about them.

Tellingly, while Plaintiffs and the City make much over supposed evidentiary defects, they never deign to specify the evidentiary hurdle they would contend parties must clear in claiming the privilege. *See* Doc # 640-2.[3] The City does approvingly cite the declarations submitted by the No-on-8 Groups (which included privilege claims on the City Attorney's behalf, Doc # 609 at 3), Doc # 660 at 11, so we can assume that showings similar to those are sufficient in the City's view. But those declarations often consisted of little more than a list of names with conclusory statements to the effect that the listed persons "worked to defeat Proposition 8 … by participating in the Equality for All campaign, and by working on ACLU-specific activities toward defeating the initiative." Doc # 597 at

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riage.com executive committee served on that committee as representatives of other groups.

[3] They certainly do not, and cannot, cite to any ruling of this Court specifying the metes and bounds of that burden in the wake of *Perry I* (or *Perry II*, for that matter). Indeed, the Court rejected Proponents' specific suggestion that, in the wake of *Perry I*, it would be "much more reasonable to lay out the Court's ruling conceptually" before ruling on a particular list of names for the "core group." Hr'g of Jan. 6, 2010, Tr. 46. Proponents thus cannot possibly be penalized for failing to meet an evidentiary burden that seemingly has never existed and certainly did not

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¶ 5. *See also* Doc # 610 at 3 (crediting this representation as sufficient to claim the First Amendment privilege). If such a showing is sufficient to claim the privilege—and, again, the City agrees that it is—then when an actual document on its face shows the correspondents' names and that it is confidential communication between political associates about the "exchange [of] ideas [or] formulat[ion] [of] strategy," *Perry I*, 591 F. 3d at 1162, surely there is sufficient evidence before the Court to make a privilege determination. Every one of the documents at issue in this motion satisfies that standard.

The City also suggests that parties claiming First Amendment privilege must "set out evidence that the email communications were actually maintained as confidential by the recipients" and that the recipients "were required to do so." Doc # 660 at 20. *See also id.* at 21. To support this breathtaking proposition, the City cites, well, nothing. No case dealing with the First Amendment privilege states that a party claiming privilege must affirmatively trace the chain of custody for every document and also prove that, before engaging in communications, correspondents took a blood oath to maintain absolute confidentiality.[4] It was certainly possible in *DeGregory*, *NAACP*, *McIntyre*, *Buckley II*, etc., that the political associates of those who claimed the privilege would violate the confidentiality of the association. If that possibility is enough to undermine the First Amendment privilege, then there simply is no First Amendment privilege. That is the outcome the City and Plaintiffs favor, but it is not the law.

4. The City (and to a lesser extent Plaintiffs) offer a belabored argument about Proponents' representations and evidence at trial showing that some of the correspondents on the documents at issue in this motion did not control the messaging and strategy for ProtectMarriage.com and thus

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exist at the time the January discovery orders were issued.

[4] Plaintiffs and the City certainly do not present any evidence that the confidentiality of the documents at issue was ever, in any way, compromised. The City alleges, without citation or specific discussion of individual documents, that Proponents are "attempt[ing] to shield from disclosure even broadly disseminated communications," Doc # 660 at 10, but a simple review of

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could not be said to be in the "core group" of that organization as this Court then understood and applied that term. *See* Doc # 660 at 12-18; Doc # 659 at 19-21. As explicitly noted in our motion, it is true that some of these communications involved persons that played "no significant role in the strategic decisionmaking or operations of ProtectMarriage.com and its official campaign." Doc # 640-2 at 15-16.[5] But Proponents have always represented, and continue to represent, that members of ProtectMarriage.com associated and communicated confidentially with many individuals outside of ProtectMarriage.com for shared political purposes during this major referendum campaign. *See* Decl. of R. Prentice dated Sept. 15, 2009, Doc # 187-2 at 4 ("Volunteers of Protect Marriage corresponded with … third parties about political beliefs, campaign strategy, personal beliefs, and much else relating to Proposition 8."); R. Prentice Sealed Decl. dated Nov. 5, 2009 at ¶ 9.[6] To believe otherwise

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the documents at issue shows that this statement is patently false.

[5] For example, the City and Plaintiffs point to a statement by Proponents' counsel that Dr. Tam "'had nothing to do with the campaign.'" Doc # 660 at 13 (quoting Trial Tr. 550:14-17); Doc # 659 at 19 (quoting Trial Tr. 550:14-17). Upon further review of the evidence and documents, however, Proponents have repeatedly clarified that while it is true Dr. Tam had no authority or control over ProtectMarriage.com's strategy and messaging (and vice versa), members of ProtectMarriage.com did sporadically communicate with Dr. Tam on a confidential basis and in furtherance of a shared political goal. The City accepts these facts, *see* Doc #660 at 13, 18, but contends that such a political association is not sufficient for First Amendment protection. But the City and Plaintiffs cannot point to a single case (and certainly not to language in *Perry I* or *Perry II*) that supports the contention that political associates must have complete and total (and presumably legally formalized) control over each others' political speech and strategy to qualify for what the City and Plaintiffs view as the very narrow protections the First Amendment affords citizens who participate in a controversial referendum campaign.

[6] The City claims that Mr. Prentice's deposition testimony forecloses Proponents' claim of privilege over communications with political associates whose messages and strategy Proponents ultimately did not control. But a full and fair reading of that deposition makes clear that Mr. Prentice was simply reacting to the "control group" theory that the City embraces and that the City's counsel was insisting upon in the deposition. The City's counsel attempted to equate any association with other groups as total agreement with and control over those groups' speech and messaging. Mr. Prentice was thus simply rejecting the same faulty theory that the City advances in its Opposition. *See, e.g.*, Prentice 12/17/09 Dep. Tr. at 55-60, 73, 75-77, 114-115, 201-202, 222-223, 265-268 (attached as Ex. A to Decl. of Nicole J. Moss (May 10, 2010)). The specific example cited by the City at page 10 of its Opposition—about Mr. Prentice's alleged inconsistencies in how he described the Family Research Council—does not withstand scrutiny. Mr. Prentice was very clear that the FRC "participated in the promotion of the passage of Proposition 8." Prentice 12/17/09 Dep. Tr. 265. But he was also clearly concerned that the City's counsel was "inferring that [the ProtectMarriage.com coalition is] something monolithic and that the committee is authoritarian." *Id.* at 266. The deposition transcript makes clear that Mr. Prentice was reluctant to agree to counsel's definition and implication about what it meant to be a part of the "ProtectMarriage.com coalition" and thus was

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is to defy common sense. The documents at issue reflect that members of ProtectMarriage.com would sometimes associate with members of other organizations and groups to advance their common political goal, and thus would engage in confidential conversations about political issues, including strategy and messaging. This does not mean that the associates controlled each others' messages or strategy—or even that the communications at issue ultimately led to a final, shared message or strategy—but it does mean that these "inter-organizational" communications were of the type that political associates engage in during a campaign "to advance … shared political beliefs" and thus that they enjoyed the right "to do so in private." *Perry I*, 591 F.3d at 1162.[7] As *Perry II* and the whole body of caselaw the Ninth Circuit has relied on in this case make clear, the First Amendment is capacious enough to allow for such political associations—these comprise, in the words of *Perry II*, "an association subject to First Amendment protection" "whether or not [the persons in the association] are members of a single organization or entity." *Perry II*, slip op. at 9. *See also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387-88 (D.C. Cir. 1981) (applying "extra-careful scrutiny" to FEC subpoenas for nonpublic communications "internal" to a single group and "communications among various groups whose alleged purpose was to defeat the President"); *Wymoing v. USDA*, 208 F.R.D. 449, 455 (D.D.C. 2002) (protecting against disclosure of communications among environmental advocacy groups).

Plaintiffs and the City thus appear to contend that there are only two possibilities when it comes to the First Amendment: either individuals have to agree with (and exert control over) everything their political associates say and do or there is no First Amendment privilege to be claimed. There is no

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reluctant to agree that certain organizations that were working towards passage of Proposition 8 were part of a coalition. The City's Opposition fully vindicates Mr. Prentice's concerns about the City's tactics.

[7] Plaintiffs claim that Proponents are now contending 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.'" Doc # 659 at 21. This, of course, is not a reflection of what Proponents are arguing, but rather of Plaintiffs' discredited "control group" theory.

controlling jurisprudence in either the Ninth Circuit or the Supreme Court to support this extremely restrictive, peculiar, and unworkable view of the First Amendment. *See Citizens United*, 130 S. Ct. at 896 ("First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invit[es] complex argument in a trial court and a virtually inevitable appeal.") (quotation marks omitted and alteration in original); *id.* at 898 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."); *id.* at 905 ("the First Amendment generally prohibits the suppression of political speech based on the speaker's identity"); *id.* at 912 ("[I]nformative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights…. [I]ndividuals, do not have monolithic views."). As *Perry I* explains, "[i]mplicit in the right to associate with others to advance one's shared political beliefs is *the right to exchange ideas* … and to do so in private." 591 F.3d at 1162 (emphasis added). And as *Perry II* explains, "the operative inquiry" for determining whether this "right to exchange [political] ideas … in private" obtains is whether there is an "association subject to First Amendment protection." *Perry II*, slip op. at 9 (emphasis added). And the associations subject to First Amendment protection include "the myriad social, economic, religious and political organizations that publicly support or oppose ballot measures." *Perry I*, 591 F.3d at 1158. *See also Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981) ("The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure."). It would *not* be a proper interpretation of *Perry I*, the Ninth Circuit said in *Perry II*, to conclude that "the privilege cannot apply to persons who are part of a political association spanning more than one organization or entity." *Perry II*, slip op. at 9.

5. With respect to specific arguments about the exhibits at issue:

- **PX 2350**. Oddly, Plaintiffs cite Mr. Prentice's statement that the email forwards an

article he "thought the pastors might find … useful in preparing sermons" for the proposition that the communication was *not* about the formulation of messaging. Doc # 659 at 15. This argument refutes itself, and the face of the document reveals its privileged nature.

- **PX 2385; PX 2403; PX 2455**. Plaintiffs' only basis for arguing against the privileged nature of these documents (and the City's only argument with respect to PX 2385 and PX 2455) is their all-or-nothing "control group" theory of the First Amendment privilege. That theory has been repeatedly rejected by the Ninth Circuit, and *Perry II* makes clear that these inter-organizational communications are privileged.

- **PX 2389**. This document is an email from the Executive Director of California Conference of Catholic Bishops to the leadership of that organization (i.e., the Bishops), but Plaintiffs incredibly claim that it is instead a general recruitment letter to supporters of Proposition 8. It requires only the bare minimum of common sense to understand that the Executive Director of the CCC would not send out a general recruitment letter to his bosses in that organization. Plaintiffs' other argument about this document is equally absurd—namely, that an "update" about strategy cannot be a part of the process of formulating strategy. The communications that comprise the process of formulating strategy in an organization are not always stamped "formulation-of-strategy email," but clearly the process of providing the leaders of an organization with updates and reports about how plans are unfolding is part of the process that allows those leaders to intelligently formulate further strategy. Indeed, in determining that communications by members of the Equality California executive committee (including those of the City Attorney) were privileged, this Court credited the simple representation that these persons "made decisions of great importance to the campaign." Doc # 610 at 11. Is there any doubt that the Bishops of the CCC make decisions of great importance to that organization?

- **PX 2554**. Plaintiffs attempt to walk away from their own expert's characterization of this communication between various volunteers of the LDS Church's public affairs councils. Doc # 640-2 at 12. They claim that because one of the correspondents was not a "spokesman or leader" for a Proposition 8 campaign organization, he cannot claim any First Amendment privilege over his confidential communications with political associates about political matters. This is simply the rejected "control group" theory rearing its head again. For its part, the City argues that PX 2554 cannot be privileged because it "was in the files and possession of ProtectMarrige.com." Doc # 660 at 12. As explained in our motion, this is false. Doc # 640-2 at 12. The document was in Mr. Jansson's files, and he *was a volunteer* of the LDS group distributing the documents. If his concurrent (i) possession of a document from one group of which he is a member and (ii) membership in another group means that the document cannot be privileged, then that means individuals are allowed to be a member of only a single associational entity—a premise the Ninth Circuit has now rejected.

- **PX 2555**. Plaintiffs admit that this document constitutes internal minutes of a joint meeting of LDS committees dealing with "public affairs." Doc # 659 at 17. Controlling precedent clearly establishes such minutes as privileged, *see* Doc # 640-2 at 13, and *Perry II* undermines the only basis the Court had for rejecting the claim of privilege. Thus, all Plaintiffs can do is repeat their mantra that the document is not privileged "because it is not a communication '*among* the core group.' " Doc # 659 at 17. A conclusory statement devoid of support does not a convincing argument make.

- **PX 2561**. Far from proving their argument, the sentence Plaintiffs pull from this communication affirmatively demonstrates that Mr. Prentice was writing to political associates about strategy in the effort to pass Proposition 8 (whether a political ally should meet

with an influential pastor).

- **PX 2562**. Plaintiffs mischaracterize this exhibit. It is not a communication seeking support from any donors; it is not a fundraising letter; it is not directed at potential voters or potential donors. It is a communication between Mr. Prentice and an individual, David Lane, for the purpose of discussing fundraising strategy and discussing how funds raised should be spent. Two donors to the campaign are copied on the email but, as is clear from context, not for the purpose of solicitation, but rather because they were also part of the political association working to pass Proposition 8. Nowhere in this communication is there a request for donations or an encouragement to vote.

- **PX 2589; PX 2620; PX 2656; PX 2773**. Plaintiffs' and the City's only argument with respect to these documents is that they do not fit within their rejected "control-group" theory of the First Amendment privilege that would restrict protection solely to documents among the leadership of ProtectMarrige.com. For the reasons stated above and in *Perry II*, this argument fails.

- **PX 2598**. As noted, this document is an example of a communication about strategy from ProtectMarriage.com to the assistant of a major donor. While the communication does request additional funds, that is not its only purpose, and, in any case, it was sent to someone who was already a political ally. If one-on-one communications like this do not fall within the First Amendment's protection, very little does.

- **PX 2599; PX 2630; PX 2631**. As noted in our motion, these documents are confidential meeting minutes of a political association, which *Perry I* recognized are the type of documents privileged from compelled disclosure. *See* Doc # 640-2 at 14-15. Although the political associates at these meetings were from separate organizations that did not control each other's strategy and messaging, *Perry II* makes clear that this is not a valid basis for re-

jecting a privilege claim. Plaintiffs' only argument against striking these documents is grounded in their discredited "control group" theory.

- **PX 2627; PX 2633; PX 2640; PX 2650; PX 2651**. Plaintiffs argue that because Dr. Tam was not a part of ProtectMarriage.com's individual "core group," communications among members of ProtectMarriage.com and him cannot be privileged under any circumstances. We have already explained at length how, even though Dr. Tam does not fit within Plaintiffs' discredited "control group" theory, such documents are privileged under *Perry I* and *Perry II*. *See supra* note 5; Doc # 640-2 at 15-17

6. Ignoring the Supreme Court's warning that a "State's broad power to regulate the time, place, and manner of elections does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens," *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989) (quotation marks omitted), the City waxes poetic about its alleged "strong" interest in compelling disclosure of all private communications that California citizens have in the course of engaging in political activity. Doc # 660 at 22-26. And make no mistake: the City believes that *all* communications are subject to disclosure at the whim of City officials and that there is simply *no* First Amendment right to engage in *any* anonymous or confidential political speech. *See* Doc # 191 (arguing against the existence of any First Amendment privilege).[8] Or, at least, that is the rule the City advances for speech and political activity with which

[8] Indeed, the City even argues that all of Proponents' private political speech and activity is subject to compelled disclosure because by proposing and supporting a ballot measure, "[t]hey assume[d] the mantle of the state, and their actions have operative effect." Doc # 600 at 25. Presumably, then, the City would contend that there is no right to a secret ballot. After all, it is the voters who actually turn a ballot measure into law and whose votes have "operative effect." Luckily for the citizens of California, the City's regime finds no support in the caselaw. *See Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 n.11 (1999) ("Nothing in this opinion should be read to suggest that initiative-petition circulators are agents of the State…. [C]irculators act on behalf of themselves or the proponents of ballot initiatives."); *McIntyre*, 514 U.S. 334, 343 (1995) (First Amendment "tradition of anonymity in the advocacy of political causes" is "best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation"). And given that, as noted below, the City itself has used (Continued)

these government officials disagree. With respect to certain speech—that of City officials themselves and their political allies—the City Attorney has been quite content to cast aside the "strong public interest in … know[ing] the history and circumstances underlying the passage of laws" and assert wide-ranging objections and claims of privilege. Doc # 660 at 23. For example, even though this Court has deemed relevant documents that contain arguments for or against Proposition 8 in the possession of those who campaigned against the measure, *see* Doc ## 610, 623, when Proponents requested such documents from the City and the City Attorney, they asserted a range of objections and privileges. *See, e.g.*, Ex. B to Decl. of Nicole J. Moss (May 10, 2010) at 7 (City refusing to produce relevant documents in possession of City officials on the ground officials were not "acting in their official capacity"); Doc # 609 at 3 (asserting that City Attorney's communications with dozens of individuals in the No-on-8 campaign are privileged under the First Amendment). So much for the City as the champion of "the general requirement of transparency in government affairs." Doc # 660 at 9.[9]

In any event, the City supports its argument with citations to laws, and cases upholding those laws, that have nothing to do with the disclosures at issue here. As the Supreme Court has recently reaffirmed, regulations that compel disclose of political activity are "subject[] … to exacting scrutiny." *Citizens United*, 130 S. Ct. at 914 (quotation marks omitted). While the "interest in provid[ing] the electorate with information about the sources of election-related spending" in candidate elections has sometimes been found to pass such exacting scrutiny, neither the Supreme Court nor any court of appeals has ever found such interest sufficient to justify the types of disclosures at issue here—namely, *post*-election disclosure of confidential communications among political

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the shield of privilege, this "mantle-of-the-state" argument rings rather hollow.

[9] It is a wonder that the City does not describe its own efforts to claim privilege as efforts to "cloak" or "hide" anything. Doc # 660 at 6, 7, 8, 21. Such derogation of the assertion of First Amendment rights appears reserved only for assertions of those rights by the City's political opponents.

associates regarding political ideas, political strategy, and political messaging. Instead, the precedent all goes the other way. *See DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 828-29 (1966) (noting that "[t]he substantiality of appellant's First Amendment claim can best be seen by considering what he was asked to do," namely to "disclose information relating to his political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings," and holding that there was "no showing of [an] overriding and compelling state interest that would warrant intrusion into th[is] realm of political and associational privacy protected by the First Amendment") (quotation marks omitted); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 348 (1995) ("Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author *is free to include or exclude*.") (emphasis added); *Dole v. Service Employees Union, AFL-CIO*, 950 F.2d 1456, 1459 (9th Cir. 1991) (prima facie case of First Amendment privilege made with respect to minutes of meetings at which "members discuss highly political issues"). *See also Perry I*, 591 F.3d at 1158, 1159-63. Moreover, the Ninth Circuit has squarely held that "[t]he disclosure requirements [in California law] are not designed to advise the public generally what groups may be in favor of, or opposed to, a particular … ballot issue; they are designed to inform the public what groups have a demonstrated an interest in the passage or defeat of a … ballot issue by their *contributions* or *expenditures* directed to that result." *Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021, 1032-33 (9th Cir. 2009).[10] That pre-election interest was fully satisfied by the required disclosures that various groups made during the Proposition

[10] Moreover, the Supreme Court has held that the interests that justify certain restrictions on speech in candidate elections are not sufficient to justify those same restrictions in referendum elections like the one at issue here. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978).

8 election.[11] The City is thus trying to use a narrow exception to the First Amendment's protection to swallow that protection completely. Indeed, the City would eschew exacting scrutiny altogether and has maintained from the outset that the only test applicable to *all* discovery at issue in this case is that found in Fed. R. Civ. P. 26. *See* Doc # 191. This effort, so contrary to the First Amendment and the caselaw applying it, should be rejected outright.

CONCLUSION

For the foregoing reasons, Proponents respectfully request that the Court grant their motion to strike from the record exhibits and associated portions of the trial transcript.

Dated: May 10, 2010

Respectfully Submitted,

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By: /s/ Charles J. Cooper
Charles J. Cooper

[11] If the City believes it has a compelling interest in disclosure of the types of documents at issue here, it can pass a disclosure law that applies to all citizens (and not just Proponents, with the City Attorney excepted) and allow that law to be tested in court.