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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

CASE NO. 09-CV-2292 VRW

The Honorable Vaughn R. Walker, Chief Judge

NOTICE OF APPEAL

Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder 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,

Defendant-Intervenors.

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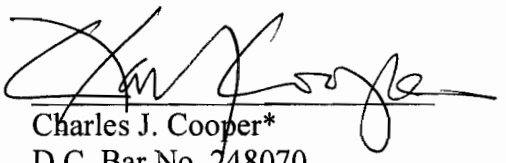
Notice is hereby given under Fed. R. App. P. 3 that Defendant-Intervenors hereby appeal to the United States Court of Appeals for the Ninth Circuit from the orders of the Northern District of California (Docs # 214, 237, 252), dated October 1, October 23, and November 11, 2009, to the extent they deny Defendant-Intervenors' Motion for a Protective Order (Doc # 187) and/or require the production of documents asserted as privileged under the First Amendment.

Dated: November 12, 2009

By: 

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USCA DOCKET # (IF KNOWN)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL:

KRISTIN M. PERRY, et al., v. DENNIS HOLLINGSWORTH, et al.

(Please see Attachment A for full title.)

DISTRICT: N. Dist. of California

JUDGE: Hon. Vaughn Walker, C.J.

DISTRICT COURT NUMBER: 09-CV-2292 VRW

DATE NOTICE OF APPEAL FILED: Nov 12, 2009

IS THIS A CROSS APPEAL? ☐ YES

IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):

No. 09-16959; No. 09-17241

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

The underlying action is a federal constitutional challenge to a provision of the California Constitution defining marriage as between a man and a woman. The orders under review involve a denial of a motion for a protective order, predicated on First Amendment privilege and relevance grounds.

PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:

Whether participants in a referendum campaign have a valid First Amendment privilege shielding from discovery nonpublic and/or anonymous documents reflecting core political speech and associational activity with little or no relevance to the merits of the case.

PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POST-JUDGMENT MOTIONS):

Defendant-Intervenors previously appealed the district court's Order of October 1, 2009. The Ninth Circuit Case No. is 09-17241. Defendant-Intervenors will seek to consolidate this appeal with that appeal.

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

☐ Possibility of Settlement

☐ Likelihood that intervening precedent will control outcome of appeal

☒ Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify)

Defendant-Intervenors will seek a stay of discovery from this Court.

☐ Any other information relevant to the inclusion of this case in the Mediation Program

☐ Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges

LOWER COURT INFORMATION

JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF
☒ FEDERAL QUESTION ☐ DIVERSITY ☐ OTHER (SPECIFY):	☐ FINAL DECISION OF DISTRICT COURT ☐ INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT ☐ INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY): ☒ OTHER (SPECIFY): Collateral order doctrine; mandamus	☐ DEFAULT JUDGMENT ☐ DISMISSAL/JURISDICTION ☐ DISMISSAL/MERITS ☐ SUMMARY JUDGMENT ☐ JUDGMENT/COURT DECISION ☐ JUDGMENT/JURY VERDICT ☐ DECLARATORY JUDGMENT ☐ JUDGMENT AS A MATTER OF LAW ☒ OTHER (SPECIFY): Interlocutory discovery orders.	☐ DAMAGES: SOUGHT $ AWARDED $ ☐ INJUNCTIONS: ☐ PRELIMINARY ☐ PERMANENT ☐ GRANTED ☐ DENIED ☐ ATTORNEY FEES: SOUGHT $ AWARDED $ ☐ PENDING ☐ COSTS: $

CERTIFICATION OF COUNSEL

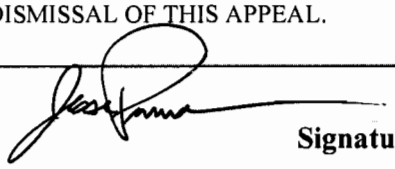
I CERTIFY THAT:

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.

2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).

3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.

4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.



Signature

Nov 12, 2009

Date

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****THIS DOCUMENT SHOULD BE FILED IN DISTRICT COURT WITH THE NOTICE OF APPEAL. ****
****IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS.****

Attachment A

TITLE IN FULL:

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

Plaintiffs

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder 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, MARKTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM—YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

Defendant-Intervenors.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNORLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as registrar-recorder/county clerk for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM and MARK A JANSSON, as official proponents of Proposition 8,

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

The defendant-intervenors, who are the official proponents of Proposition 8 ("proponents") move for a protective order against the requests contained in one of plaintiffs' first set of document requests. Doc #187. Proponents object to plaintiffs' request no 8, which seeks "[a]ll versions of any documents that constitute communications relating to Proposition 8, between you and any third party, including, without limitation, members of the public or the media." Doc #187 at 8. Proponents also object to all other "similarly sweeping" requests. Id at 8 n 1. Proponents argue the discovery sought: (1) is privileged under the First Amendment; (2) is not relevant; and (3) places an undue burden on proponents. Doc #187 at 9. Plaintiffs counter that the discovery sought is relevant and not privileged. Doc #191.

During the course of briefing the dispute for the court, the parties appear to have resolved at least one issue, as proponents now agree to produce communications targeted to discrete voter groups. Doc #197 at 6. The agreement appears only partially to resolve the parties' differences. Because of the broad reach of request no 8 and the generality of proponents' objections, the unresolved issues will almost certainly arise in other discovery, as well as to require resolution of the parties' differences with respect to request no 8. Accordingly, the court held a lengthy hearing on September 25, 2009 and seeks by this order not only to address the parties' remaining dispute with respect to request no 8 but also provide guidance that will enable them to complete discovery and pretrial preparation expeditiously.

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I

As an initial matter, and because plaintiffs' request no 8 is quite broad, the court must determine what discovery remains disputed. Proponents object to disclosing documents that fall into five categories: "(i) communications between and among [d]efendant-[i]ntervenors, campaign donors, volunteers, and agents; (ii) draft versions of communications never actually distributed to the electorate at large; (iii) the identity of affiliated persons and organizations not already publicly disclosed; (iv) post-election information; and (v) the subjective and/or private motivations of a voter or campaign participant." Doc #187 at 9. But in their reply memorandum, proponents explain that they only object to "nonpublic and/or anonymous communications" (emphasis in original), "drafts of documents that were never intended to, and never did, see public light" and "documents created after the Prop 8 election." Doc #197. Plaintiffs have stated they "do not seek ProtectMarriage.com's membership list or a list of donors to the 'Yes on 8' cause." Doc #191 at 13.

Plaintiffs have told proponents that they are seeking communications between proponents and "their agents, contractors, attorneys, donors or others" to the extent the communications are responsive and not otherwise privileged. Doc #187-6 at 2. Plaintiffs argue that the election materials put before the voters are insufficient to discern the intent or purpose of Prop 8. The questions whether Prop 8 was passed with discriminatory intent and whether any claimed state interest in fact supports Prop 8 underlie plaintiffs' Equal Protection challenge, at least in part. See, e g, Doc #157 at 12. Proponents assert that Prop 8 was intended

simply to preserve the traditional characteristic of marriage as an opposite-sex union. See, e g, Doc #159 at 5. As a result of these conflicting positions, the intent or purpose of Prop 8 is central to this litigation. The issue on which resolution of the present discovery dispute turns is whether that intent should be divined solely from proponents' public or widely circulated communications or disseminations or whether their communications with third parties not intended for widespread dissemination may also illuminate that intent. Before deciding that issue, the court first addresses the grounds on which proponents seek a protective order.

II

Proponents seek to invoke the First Amendment qualified privilege to refrain from responding to any discovery that would reveal political communications as well as identities of individuals affiliated with the Prop 8 campaign whose names have not already been disclosed. Doc #197 at 14. The free associational prong of the First Amendment has been held to provide a qualified privilege against disclosure of all rank-and-file members of an organization upon a showing that compelled disclosure likely will adversely affect the ability of the organization to foster its beliefs. National Ass'n for A of C P v Alabama, 357 US 449, 460-63 (1958) ("NAACP"); see also Adolph Coors Co v Wallace, 570 F Supp 202, 205 (ND Cal 1983). This qualified privilege has been found especially important if the disclosures would subject members to reprisals for the exercise of their associational rights under the First Amendment or otherwise deter exercise of those

rights. Here, however, plaintiffs are not seeking disclosure of membership lists. Doc #191 at 13. Indeed, many names associated with ProtectMarriage.com and the Yes on 8 campaign have already been disclosed. See ProtectMarriage.com v Bowen, 09-0058-MCE Doc #88 (ED Cal Jan 30, 2009).

The California Political Reform Act of 1974 requires disclosure of a great deal of information surrounding the Prop 8 campaign, including the identity of, and specific information about, financial supporters. Cal Govt Code § 81000 et seq. Proponents have not shown that responding to plaintiffs' discovery would intrude further on proponents' First Amendment associational rights beyond the intrusion by the numerous disclosures required under California law – disclosures that have already been widely disseminated. Proponents asserted at the September 25 hearing that these California state law disclosure requirements extend to the outer boundaries of what can be required of political actors to reveal their activities. But the information plaintiffs seek differs from that which is regulated by these state disclosure requirements.

The First Amendment qualified privilege proponents seek to invoke, unlike the attorney-client privilege, for example, is not an absolute bar against disclosure. Rather, the First Amendment qualified privilege requires a balancing of the plaintiffs' need for the information sought against proponents' constitutional interests in claiming the privilege. See Adolph Coors, 570 F Supp at 208. In this dispute, the interests the parties claim are fundamental constitutional rights. Proponents argue that their First Amendment associational rights are at stake

while plaintiffs contend that Prop 8 violates their Equal Protection and Due Process rights and that denial of their discovery request jeopardizes the vindication of those rights. The claimed rights at issue thus appear to be of similar importance.

One tangible harm that proponents have claimed, and events made known to the court substantiate, lies in threats and harassment proponents claim have been suffered by known supporters of Prop 8. Identifying new information about Prop 8 supporters would, proponents argue, only exacerbate these problems. Doc #187.

The court is aware of the tendentious nature of the Prop 8 campaign and of the harassment that some Prop 8 supporters have endured. See Doc #187-11. Proponents have not however adequately explained why the discovery sought by plaintiffs increases the threat of harm to Prop 8 supporters or explained why a protective order strictly limiting the dissemination of such information would not suffice to avoid future similar events. In sum, while there is no doubt that proponents' political activities are protected by the First Amendment, it is not at all clear that the discovery sought here materially jeopardizes the First Amendment protections. Furthermore, whether the First Amendment qualified privilege should bar all or any part of plaintiffs' discovery request is open to question under the circumstances of this case.

The key Supreme Court case upon which proponents rely, NAACP v Alabama, supra, involved a civil contempt against the NAACP for its failure to reveal the names and addresses of "all its Alabama members and agents, without regard to their positions or functions in the Association." 357 US at 451. As noted, plaintiffs do not here seek the names and addresses of proponents'

rank-and-file members or volunteers. More importantly, the protection against disclosure afforded by the holding in NAACP appears fairly restricted.

Alabama sought "a large number of the Association's records and papers, including bank statements, leases, deeds, and records of all Alabama 'members' and 'agents' of the Association." 357 US at 453. The NAACP produced "substantially all the data called for" except for its lists of rank-and-file members. Id at 454. Notably, the NAACP did not object "to divulging the identity of its members who are employed by or hold official positions" in the organization or to providing various other business records. Id at 464-65. The Court contrasted the NAACP's extensive disclosures with that in an earlier case in which another organization made no disclosures at all. Id at 465-66. Alabama's request for rank-and-file membership lists in NAACP was predicated solely on its interest in enforcement of the state's foreign corporation registration statute. Id at 464.

The Court observed that the disclosure of the names of rank-and-file members seemed to lack a "substantial bearing" on whether the NAACP, as a foreign corporation, should be authorized to do business in Alabama. Id at 464. The interest of Alabama in disclosure of rank-and-file membership lists thus was insubstantial relative to the significant interests of the NAACP and its members in carrying out their First Amendment and other activities that included - in 1956 - "financial support and [ ] legal assistance to Negro students seeking admission to the state university" and support of "a Negro boycott of the bus lines in Montgomery to compel the seating of passengers without regard to race." Id at

452.

Similarly, in a later case, the Supreme Court upheld a qualified First Amendment privilege against disclosure of NAACP membership lists where there was "no relevant correlation" between the purpose for which the lists were sought, enforcement of occupational license taxes, and the identity of NAACP rank-and-file members. Bates v Little Rock, 361 US 516, 525 (1960). On like grounds, the Supreme Court reversed a contempt conviction of the president of the NAACP Miami branch who refused to produce NAACP membership lists at a 1959 hearing of a state legislative committee investigating "infiltration of Communists" into various organizations. Gibson v Florida Legislative Committee, 372 US 539 (1963). No evidence in that case suggested that the NAACP was "either Communist dominated or influenced," id at 548, undermining the required nexus between the membership lists and the purpose for which they were sought. Furthermore, at the hearing, the branch president answered questions concerning membership in the NAACP and responded to questions about a number of persons previously identified as communists or members of communist front or other affiliated organizations. Id at 543. Here, too, the qualified First Amendment privilege protected only membership lists, and the NAACP or its officials made significant disclosures apart from membership lists.

These cases from the civil rights struggles of the 1950s would thus appear to offer proponents scant support for refusing to produce information other than rank-and-file membership lists which plaintiffs, in any event, do not seek. Nor does proponents' position gain much traction from McIntyre v Ohio Elections Comm'n,

514 US 334 (1995), which reversed petitioner's conviction, upheld by the Ohio Supreme Court, for anonymously distributing leaflets regarding a referendum on a proposed school tax levy in violation of a statute prohibiting unsigned campaign materials. Petitioner "acted independently," not as part of a campaign committee or organization. Id at 337. Proponents, by contrast, are the official proponents of Prop 8 with responsibility under state law for compliance with electoral and campaign requirements. See Cal Election Code § 342; Cal Gov't Code § 8204.7.

Proponents, moreover, have not demonstrated that the procedure for invoking any First Amendment privilege applicable to their communications with third parties differs from that of any other privilege, such as the attorney-client privilege and trial preparation or work product protection. A party seeking to withhold discovery under a claim of privilege must "describe the nature of the documents, communications, or tangible things not produced or disclosed * * * in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." FRCP 26(b)(5)(A)(ii). Proponents have failed to aver that they have prepared a privilege log that would comply with the requirement of FRCP 26(b)(5)(A)(ii), a necessary condition to preservation of any privilege. This failure ordinarily could be fatal to any assertion of a privilege. Burlington Nort & Santa Fe Ry v Dist Ct, Mt, 408 F3d 1142, 1149 (9th Cir 2005).

Proponents suggested at the September 25 hearing that the enumeration requirement of FRCP 26 does not apply to a First Amendment privilege, based as it is on fundamental constitutional

principles rather than common law, the origin of the attorney-client privilege and work product protection. Proponents contend that as the communications regarding Prop 8 involve political speech or association, Doc #197 at 11-12, they are entitled to a greater degree of confidentiality than common law privileges. In fact, as noted, it appears that any First Amendment privilege is a qualified privilege affording less expansive protection against discovery than the absolute privileges, such as the attorney-client and similar privileges. The First Amendment privilege proponents seek to invoke requires a balancing of interests that simply are not weighed in the area of attorney-client communications, and that balancing tends to limit or confine the First Amendment privilege to those materials that rather directly implicate rights of association.

In striking the appropriate balance, the court notes that in addition to the substantial financial and related disclosures required by California law, a rather striking disclosure concerning campaign strategy has already voluntarily been made by at least one, if not the principal, campaign manager-consultant employed by proponents. Plaintiffs have attached to their memorandum a magazine article written by Frank Schubert and Jeff Flint, whose public affairs firm managed the Yes on 8 campaign. Doc #191-2. In the article, Schubert and Flint refer specifically to campaign strategy and decisions, noting that they needed to convince voters "that there would be consequences if gay marriage were to be permanently legalized." Id at 3. Schubert and Flint make clear that their goal in the campaign was to "rais[e] doubts." Id. They explain the campaign's "three broad areas" of focus as "religious

freedom," "individual freedom of expression" and "how this new 'fundamental right' would be inculcated in young children through the public schools." Id. Schubert and Flint refer to the help of "a massive volunteer effort through religious denominations." Id. The article describes, in great detail, how Schubert and Flint conceptualized the Yes on 8 television advertising campaign, culminating with "the break of the election": footage of "bewildered six-year-olds at a lesbian wedding." Id at 4-5.

These extensive disclosures about the strategy of proponents' campaign suggest that relatively little weight should be afforded to proponents' interest in maintaining the confidentiality of communications concerning campaign strategy. If harm is threatened from disclosure of proponents' campaign strategy, it seems likely to have been realized by the candid description of the Prop 8 campaign's strategy already disseminated by Schubert and Flint. In any event, the unfortunate incidents of harassment to which proponents point as having occurred appear mostly to have been directed to proponents' financial supporters whose public identification was required by California law.

III

Proponents argue that the discovery sought is not relevant and therefore not discoverable. Under FRCP 26(b)(1), discovery is limited to "any nonprivileged matter that is relevant to any party's claim or defense," but "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Accordingly, the court need not determine at this juncture whether

the information sought would be admissible at trial; instead, the court must determine whether the information sought is "reasonably calculated" to lead to discovery of admissible evidence.

Plaintiffs assert that the discovery sought is relevant to "the rationality and strength of [proponents'] purported state interests and whether voters could reasonably accept them as a basis for supporting Prop 8," as well as other factual disputes. Doc #191 at 8. Additionally, plaintiffs believe the discovery will lead to "party admissions and impeachment evidence." Id.

Plaintiffs' strongest argument appears to be that some of the information sought about proponents' communications with third parties may be relevant to the governmental interest that proponents claim Prop 8 advances. Id. Relevant information may exist in communications between proponents and those who assumed a large role in the campaign, including the campaign executive committee and political consultants, as that information well may have been conveyed to the ultimate decision-makers, the voters, and thus discloses the intent Prop 8 serves.

Key in this regard is the extent to which the requested discovery could be relevant "to ascertain the purpose" of Prop 8. Doc #187 at 10. Legislative purpose may be relevant to determine whether, as plaintiffs claim, Prop 8 violates the Equal Protection Clause. Washington v Davis, 426 US 229, 239-41 (1976) (holding that a law only violates the Equal Protection component of the Fifth Amendment when the law reflects a "discriminatory purpose," regardless of the law's disparate impact); see also Personnel Adm'r of Massachusetts v Feeney, 442 US 256, 274 (1979) ("purposeful discrimination is the condition that offends the Constitution.")

(citation omitted). The analysis remains the same whether the challenged measure was enacted by a legislature or directly by voters. Washington v Seattle School Dist no 1, 458 US 457, 484-85 (1982).

Proponents point to Southern Alameda Span Sp Org v City of Union City, Cal, 424 F2d 291, 295 (9th Cir 1970) ("SASSO"), and Bates v Jones, 131 F3d 843, 846 (9th Cir 1997) (en banc), for the proposition that the subjective intent of a voter is not a proper subject for judicial inquiry. In SASSO, the court determined that "probing the private attitude of the voters" would amount of "an intolerable invasion of the privacy that must protect an exercise of the franchise." 424 F2d at 295. In Bates, the court looked only to publicly available information to determine whether voters had sufficient notice of the effect of a referendum. 131 F3d at 846. While these cases make clear that voters cannot be asked to explain their votes, they do not rule out the possibility that other evidence might well be useful to determine intent.

Plaintiffs' proposed discovery is not outside the scope of what some courts have considered in determining the intent behind a measure enacted by voters. The Eighth Circuit has held that courts may look to the intent of drafters of an initiative to determine whether it was passed with a discriminatory intent. South Dakota Farm Bureau, Inc v Hazeltine, 340 F3d 583, 594 (8th Cir 2003). At least one district court in this circuit has considered drafter intent along with voter intent. City of Los Angeles v County of Kern, 462 F Supp 2d 1105, 1114 (CD Cal 2006). The parties acknowledge that the line demarking relevance in this context is not clearly drawn. The difficulty of line-drawing stems

from the fact that, as the California Supreme Court put it well, "motive or purpose of [a legislative enactment] is not relevant to its construction absent reason to conclude that the body which adopted the [enactment] was aware of that purpose and believed the language of the proposal would accomplish it." Robert L v Superior Court, 30 Cal 4th 894, 904 (2003).

In the case of an initiative measure, the enacting body is the electorate as a whole. The legislative record for an initiative cannot, therefore, be compiled with the precision that the legislative history of an enactment by a legislative body can be put together. This would seem to suggest, as the Eighth Circuit implied in South Dakota Farm Bureau, that the scope of permissible discovery might well be broader in the case of an initiative measure or a referendum than a law coming out of a popularly elected, and thus democratically chosen, legislative body. However that may be, the mix of information before and available to the voters forms a legislative history that may permit the court to discern whether the legislative intent of an initiative measure is consistent with and advances the governmental interest that its proponents claim in litigation challenging the validity of that measure or was a discriminatory motive.

Proponents have agreed to disclose communications they targeted to voters, including communications to discrete groups of voters. Doc #197 at 6. But at the September 25 hearing, proponents stated that they did not believe "non-public" communications to confirmed Prop 8 supporters or to those involved in the Prop 8 campaign could be relevant to the intent determination. Proponents point out that those communications were

not directly before the voters. But it does appear to the court that communications between proponents and political consultants or campaign managers, even about messages contemplated but not actually disseminated, could fairly readily lead to admissible evidence illuminating the messages disseminated to voters. At least some of these contemplated, but not delivered, messages may well have diffused to voters through sources other than the official channels of proponents' campaign. Furthermore, of course, what was decided not to be said in a political campaign may cast light on what was actually said. The line between relevant and non-relevant communications is not identical to the public/non-public distinction drawn by proponents. At least some "non-public" communications from proponents to those who assumed a large role in the Prop 8 campaign could be relevant to the voters' understanding of Prop 8 and to the ultimate determination of intent.

While it appears that plaintiffs' request no 8 seeks relevant disclosures, the request itself is broader than necessary to obtain all relevant discovery. Proponents point out that even if some of the discovery sought by plaintiffs might be relevant, "virtually every communication made by anyone included in or associated with Protect Marriage" cannot be relevant. Doc #197 at 7. The court agrees. Further, of course, no amount of discovery could corral all of the information on which voters cast their ballots on Prop 8. Proponents' undue burden objection is thus well-taken. It should suffice for purposes of this litigation to gather enough information about the strategy and communications of the Prop 8 campaign to afford a record upon which to discern the intent underlying Prop 8's enactment. Plaintiffs' request no 8,

currently encompassing any communication between proponents and any third party, is simply too broad.

Narrowing of plaintiffs' request is required. In their discussions, the parties have focused on the appropriate distinction – that between documents which relate to public communications with third parties and purely private communications among proponents. Hence, discovery directed to uncovering whether proponents harbor private sentiments that may have prompted their efforts is simply not relevant to the legislative intent behind Prop 8. That does not mean that discovery should be limited strictly to communications with the public at large. Documents pertaining to the planning of the campaign for Prop 8 and the messages actually distributed, or contemplated to be distributed, to voters would likely to lead to discovery of admissible evidence, as such documents share a clear nexus with the information put before the voters. Communications distributed to voters, as well as communications considered but not sent appear to be fair subjects for discovery, as the revision or rejection of a contemplated campaign message may well illuminate what information was actually conveyed to voters. Communications that took place after the election date may similarly be relevant if they are connected in some way to the pre-election messages conveyed to the voters. But discovery not sufficiently related to what the voters could have considered is not relevant and will not be permitted.

Plaintiffs are therefore DIRECTED to revise request no 8 to target those communications most likely to be relevant to the factual issues identified by plaintiffs.

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While it is not the province of the court to redraft plaintiffs' request no 8 or to interpose objections for proponents, the foregoing highlights general areas of appropriate inquiry. It seems to the court that request no 8 is appropriate to the extent it calls for (1) communications by and among proponents and their agents (at a minimum, Schubert Flint Public Affairs) concerning campaign strategy and (2) communications by and among proponents and their agents concerning messages to be conveyed to voters, without regard to whether the voters or voter groups were viewed as likely supporters or opponents or undecided about Prop 8 and without regard to whether the messages were actually disseminated or merely contemplated. In addition, communications by and among proponents with those who assumed a directorial or managerial role in the Prop 8 campaign, like political consultants or ProtectMarriage.com's treasurer and executive committee, among others, would appear likely to lead to discovery of admissible evidence.

IV

Proponents motion for a protective order is GRANTED in part and DENIED in part. Doc #187. Proponents have not shown that the First Amendment privilege is applicable to the discovery sought by plaintiffs. Because plaintiffs' request no 8 is overly broad, plaintiffs shall revise the request and tailor it to relevant factual issues, individuals and entities. The court stands ready to assist the parties in pursuing specific additional discovery in line with the guidance provided herein and, if necessary, to assist the parties in fashioning a protective order where necessary to

ensure that disclosures through the discovery process do not result in adverse effects on the parties or entities or individuals not parties to this litigation.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as registrar-recorder/county clerk for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIOFORNIA RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

Defendant-intervenors, the official proponents of Proposition 8 ("proponents") move for a limited stay of discovery pending resolution of a purported appeal or mandamus petition in the alternative. Doc #220. Plaintiffs oppose any delay in discovery in light of the upcoming trial date and ask the court to compel proponents to respond to their discovery requests in seven days. Doc #225.

To obtain a stay, proponents "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." Winter v Natural Resources Defense Council, Inc, -- US --, 129 SCt 365, 374 (2008). A "possibility" of success is "too lenient." Id at 375; see also American Trucking Associations, Inc v City of Los Angeles, 559 F3d 1046, 1052 (9th Cir 2009). Because, for the reasons explained below, proponents have met no part of this test, proponents' motion for a stay is DENIED.

I

Proponents are unlikely to succeed on their appeal or mandamus petition because (1) the court of appeals lacks jurisdiction over the appeal and mandamus petition and (2) the appeal lacks merit.

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A

Proponents have noticed an appeal of the court's October 1 order, Doc #214, "to the extent it denies [proponents'] Motion for a Protective Order (Doc #187)." Doc #222. The motion for a protective order cites to National Ass'n for the A of C P v Alabama, 357 US 449 (1958) ("NAACP") (invoking a qualified First Amendment privilege to protect NAACP rank-and-file membership lists against disclosure), and its progeny to claim a qualified First Amendment privilege against discovery of any of proponents' communications with third parties. Doc #187. Proponents' docketing statement in the Ninth Circuit describes the October 1 order as an "INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT." Id at 5. However proponents may characterize the October 1 order, it is manifestly not a final judgment appealable as of right under 28 USC § 1291, nor did proponents seek, or the court find suitable, an interlocutory appeal under 28 USC § 1292(b). Proponents' right to seek review of the October 1 order must therefore rest on the collateral order doctrine or on grounds warranting mandamus by the court of appeals. Neither of these, however, provides an adequate foundation for the instant appeal or mandamus petition.

1

The collateral order doctrine allows appeal under section 1291 of "a narrow class of decisions that do not terminate the litigation but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." Digital Equipment Corp v Desktop Direct, Inc, 511 US 863, 867 (1994). The October 1 order was not such a decision.

Ordinarily, of course, the court of appeals lacks jurisdiction to review discovery orders before entry of judgment. Truckstop.net, LLC v Sprint Corp, 547 F3d 1065, 1067 (9th Cir 2008). As interpreted by the Ninth Circuit, the collateral order doctrine allows the court of appeals to exercise jurisdiction over interlocutory appeals of certain orders denying application of a discovery privilege, but only when the order: "(1) conclusively determine[s] the disputed question; (2) resolve[s] an important issue completely separate from the merits of the action; and (3) [is] effectively unreviewable on appeal from final judgment." United States v Austin, 416 F3d 1016, 1020 (9th Cir 2005) (citations omitted). As long as the question remains "tentative, informal or incomplete, there may be no intrusion by appeal." Id (citing Cohen v Beneficial Loan Corp, 337 US 541, 546 (1949)).

In Austin, the Ninth Circuit found that it lacked jurisdiction to review the district court's order that "statements made during discussions between inmates in their cells with no lawyers present are not covered as confidential communications under the joint defense privilege." 416 F3d at 1019. The court held that the third prong of the jurisdictional test was not satisfied because defendants had not "raised any specific privilege claims" over specific communications. Id at 1023.

Here, the October 1 order was not a conclusive determination because proponents had not asserted the First Amendment privilege over any specific document or communication. Proponents' blanket assertion of privilege was unsuccessful, but whether the privilege might apply to any specific document or information was not finally determined in the October 1 order.

Moreover, because the First Amendment qualified privilege that proponents seek to invoke requires the court to balance the harm of disclosure against the relevance of the information sought, the applicability of the qualified privilege cannot be determined in a vacuum but only with reference to a specific document or particular information.

Proponents have made no effort to identify specific documents or particular information to which the claim of qualified privilege may apply. Notably, proponents have failed to serve and file a privilege log, a prerequisite to the assertion of any privilege. See Burlington North & Santa Fe Ry Co v United States Dist Court for Dist of Mont, 408 F3d 1142, 1149 (9th Cir 2005). Furthermore, the balancing required to apply the qualified privilege must consider whether any injury or risk to the producing party can be eliminated or mitigated by a protective order. The October 1 order directed the parties to discuss the terms of a protective order and expressed the court's willingness to assist the parties in fashioning such an order. Doc #214 at 17.

The cases proponents cite to support appellate jurisdiction under the collateral order doctrine deal with absolute privileges, like the attorney-client privilege. See Doc #220 at 5 n3 (citing In re Napster, Inc Copyright Litigation, 479 F3d 1078 (9th Cir 2007) (attorney-client privilege); Bittaker v Woodford, 331 F3d 715 (9th Cir 2003) (attorney-client privilege); United States v Griffin, 440 F3d 1138 (9th Cir 2006) (marital privilege)). These cases allow a collateral appeal at least in part because an order denying a claim of absolute privilege usually resolves a question independent from the merits of the underlying case. See

In re Napster, 479 F3d at 1088-89.

An order denying a claim of qualified privilege, which balances the harm of production against the relevance of the discovery sought, is not so easily divorced from the merits of the underlying proceeding. The question whether discovery is relevant is necessarily enmeshed in the merits, as it involves questions concerning "the substance of the dispute between the parties." Van Cauwenberghe v Biard, 486 US 517, 528 (1988). Here, for example, the question of relevance is related to the merits of plaintiffs' claims, as the relevance of the information sought would be greater were the court to apply an exacting level of scrutiny to plaintiffs' Equal Protection claims. Doc #214 at 12-13.

2

Proponents also apparently seek mandamus if the appellate court does not accept their interlocutory appeal. Mandamus is a "drastic" remedy that is appropriately exercised only when the district court has failed to act within the confines of its jurisdiction, amounting to a "judicial 'usurpation of power.'" Kerr v United States District Court, 426 US 394, 402 (1976) (citing Will v United States, 389 US 90, 95-96 (1967)). A party seeking mandamus must show that he has "no other adequate means to attain the relief he desires" and that "his right to issuance of the writ is clear and indisputable." Kerr, 426 US at 403 (citations omitted).

In Kerr, petitioners sought a writ of mandamus to vacate the district court's order that petitioners produce personnel files and prisoner files after plaintiffs sought the discovery as part of

their class action against the California Department of Corrections. 426 US at 396-97. Petitioners had asserted that the discovery sought was both irrelevant and privileged. Id. The Court denied mandamus at least in part because petitioners' privilege claim had not been asserted with "requisite specificity." Id at 404.[1] Petitioners therefore had a remedy remaining in the district court: petitioners could assert their privilege claim over a specific document or set of documents and allow the district court to make the privilege determination in the first instance. Id.

Here, the court might yet apply proponents' purported privilege in the manner described in Kerr. Proponents have not identified specific documents they claim are privileged and have not given the court an opportunity to determine whether any claim of privilege might apply to a specific document. Additionally, as the court explained in its October 1 order, it is not "clear and indisputable" that proponents should succeed on their First Amendment claim of privilege. Doc #214 at 4-11. Proponents, as the official supporters of a California ballot initiative, are situated differently from private citizen advocates. Cf McIntyre v Ohio Elections Comm'n, 514 US 334, 351 (1995) (distinguishing between "individuals acting independently and using only their own modest resources" and official campaigns). McIntyre determined whether an individual who distributed leaflets in opposition to a

[1]Under quite different, and indeed rather unique, circumstances, the Court has directed an appellate court to consider a writ of mandamus even when petitioners had not asserted privilege claims over specific discovery. See Cheney v United States Dist Court for D C, 542 US 367, 390-391 (2004).

local tax levy could be forced to disclose her identity on the leaflet pursuant to an Ohio statute. Id at 338. In this case, plaintiffs' discovery requests do not appear to call for disclosure of identities of persons "acting independently and using their own modest resources," but simply the individuals acting as, or in coordination with, the official sponsors of the Yes on 8 campaign. Plainly, there is a difference between individuals or groups who have assumed the privilege of enacting legislation or constitutional provisions and individuals who merely favor or oppose the enactment. To the extent that plaintiffs' discovery might disclose the identity of individuals entitled to some form of anonymity, an appropriate protective order can be fashioned. A blanket bar against plaintiffs' discovery is unwarranted. Proponents case for mandamus relief is therefore tenuous at best.

B

Having determined that the court of appeals is unlikely to accept proponents' appeal[2] or order mandamus relief, the court turns more specifically to the merits of proponents' motion to stay discovery pending the court of appeals' consideration of proponents' proceedings in that court. For the reasons previously noted and discussed further below, proponents are unlikely to succeed on the merits of their resort to the court of appeals, and their case for irreparable harm is weak.

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[2] The court of appeals has issued an order to show cause why the appeal should not be dismissed. Ct Appls Docket #09-17241, Doc #8.

1

In its October 1 order, the court declined proponents' invitation to impose a blanket bar against plaintiffs' discovery of proponents' communications with third parties. Doc #214 at 4-11. Proponents contend that a blanket bar against such discovery was required by the First Amendment. Doc #187 at 15 (citing NAACP, 357 US at 460; Bates v City of Little Rock, 361 US 516, 523 (1960); Gibson v Florida Legislative Comm, 372 US 539 (1963)). Proponents misread the October 1 order as foreclosing any application of a First Amendment qualified privilege to the discovery plaintiffs seek. The court simply decided that proponents had not established the grounds necessary to invoke the First Amendment qualified privilege while also sustaining in part proponents' objection to the scope of plaintiffs' eighth document request.

At the risk of repetition, proponents are not likely to succeed on the merits of their appeal for the following reasons: (1) proponents have not put forth a strong case that the entirety of discovery sought by plaintiffs in the eighth document request is protected by a qualified First Amendment privilege when plaintiffs do not seek disclosure of ProtectMarriage.com's rank-and-file membership lists, Doc #214 at 4-11; (2) McIntyre, 514 US 334 (1995), does not support the application of a First Amendment qualified privilege because McIntyre was acting independently, not legislating, and because McIntyre dealt with the constitutionality of an Ohio statute, not the application of a qualified privilege in the context of civil discovery, Doc #214 at 8-9; and (3) proponents have not properly preserved their privilege claim in light of both the numerous disclosures already made surrounding the Yes on 8

campaign and of proponents' failure to produce a privilege log. Doc #214 at 10-11.

It simply does not appear likely that proponents will prevail on the merits of their appeal.

2

The question whether proponents are likely to suffer irreparable harm if a stay is not entered is difficult to answer in a vacuum. The court does not know at this juncture exactly what documents or information would be disclosed in the absence of a stay. Generally, the threat of a constitutional violation suggests the likelihood of irreparable harm. Community House, Inc v City of Boise, 490 F3d 1041 (9th Cir 2007). But it does not appear that the entirety of communications responsive to plaintiffs' eighth document request is covered by the First Amendment qualified privilege. Doc #214 at 4-11.

As the court explained in its October 1 order, Prop 8 supporters claim to have faced threats, harassment and boycotts when their identities were revealed; however, proponents have not made a showing that the discovery sought in this case would lead to further harm to any Prop 8 supporter. Doc #214 at 6. Proponents offer nothing new in the instant motion to support their claim that disclosure would lead to irreparable harm. See Doc #220 at 5.

A protective order provides a means by which discovery could continue without the threat of harm proponents seek to avoid. But proponents have not sought a protective order directed to specific disclosures. The possibility that harm could be eliminated or substantially minimized through a protective order

suggests that a stay of discovery is not required.

3

In light of the court's determination that proponents have neither demonstrated a likelihood of success on the merits nor shown that they are likely to suffer irreparable harm if the stay is not issued, it is unnecessary to address the remaining factors required for proponents to obtain a stay. Nevertheless, the court will touch on them briefly.

Whether the balance of equities tips in proponents' favor depends upon a comparison of the harm proponents claim they would face if a stay were not granted with the harm plaintiffs would face if a stay were granted. Winter, 129 SCt at 376. As just explained, proponents' projected harm could be remedied through a protective order. Plaintiffs assert they too face harm as they seek to vindicate what they claim is a violation of their constitutional rights. Doc #225 at 13. A stay would serve to delay discovery and potentially postpone the scheduled January 2010 trial. A "mere assertion of delay does not constitute substantial harm." United States v Phillip Morris Inc, 314 F3d 612, 622 (9th Cir 2003). But because proponents have not articulated any meaningful harm, the balance of equities nevertheless tips in plaintiffs' favor in light of the potential for delay.

4

Finally, the court must determine whether a stay is in the public interest. Proponents assert that the denial of a stay will "curtail the First Amendment freedoms surrounding voter-

initiated measures." Doc #220 at 7. Plaintiffs counter that citizens have an interest in seeing plaintiffs' constitutional claims determined on the merits as quickly as possible. Doc #225 at 14. It appears that a protective order would likely remedy any harm to the public identified by proponents. It also appears that a limited discovery stay would not significantly affect the public interest in a prompt resolution of plaintiffs' claims. Thus, the public interest does not appear to weigh strongly in favor of any party's position.

II

Even in the unlikely event that the court of appeals exercises jurisdiction over proponents' appeal or mandamus petition, a discovery stay is inappropriate. Proponents have not demonstrated that they are likely to succeed on the merits of their claims or that they face irreparable harm in the absence of a stay. The balance of equities appears to tip in favor of denying a stay, and the public interest does not point clearly one way or another. Accordingly, proponents' motion to stay discovery is DENIED.

Plaintiffs seek an order compelling discovery within seven days. Doc #225. But it is not clear whether the discovery sought can practically be produced within the next seven days. While it is imperative to proceed promptly with discovery to keep these proceedings on schedule, the court prefers to look to the good faith and professionalism of proponents' able counsel to respond to plaintiffs' modified eighth document request in a timely manner. The court stands ready to assist the parties.

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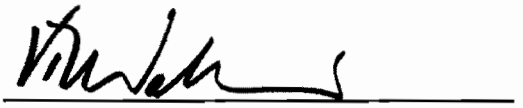
Accordingly, the parties are directed to contact the clerk within five days to schedule a telephone conference to discuss the progress of their efforts.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as registrar-recorder/county clerk for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIOFORNIA RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

The court has received defendant-intervenors' ("proponents") in camera submission containing a sample of documents potentially responsive to plaintiffs' revised eighth document request. Doc #251. Proponents assert that the documents are protected by the qualified First Amendment privilege and that in any event the documents are not relevant. Id; see also Doc #187 (proponents' motion for a protective order); Doc #220 (proponents' motion to stay discovery).

The court denied proponents' blanket assertion of privilege, Doc #214, but offered to review a sample of the documents at issue in camera to determine if the privilege might apply to some of proponents' documents, Doc #246, Nov 2 Hrg Tr at 42-43. While plaintiffs have not seen the documents, they are in possession of proponents' privilege log, Doc #250-1, which identifies the submitted documents by number and provides a simple description of the documents.

The court has reviewed proponents' in camera submission and finds that while the qualified First Amendment privilege does not provide the documents much, if any, protection against disclosure, many of the documents submitted by proponents are simply not responsive to plaintiffs' discovery request.

I

The documents submitted by proponents are at most subject to a limited application of the qualified First Amendment privilege. Proponents have argued vigorously that the privilege should protect all campaign communications as well as identities of all individuals whose association with the campaign has not yet

been made public. Doc ##187, 220. Proponents have not however identified a way in which the qualified privilege could protect the disclosure of campaign communications or the identities of high ranking members of the campaign. See Doc #187 at 14-19 (citing National Ass'n for the A of C P v Alabama, 357 US 449 (1958) ("NAACP") and its progeny, which protect only the identity of rank-and-file organization members, along with McIntyre v Ohio Elections Comm'n, 514 US 334, 351 (1995), which protects "individuals acting independently and using only their own modest resources."). If the qualified privilege identified by proponents protects anything, it is the identities of rank-and-file volunteers and similarly situated individuals. Plaintiffs have indicated that they do not oppose redaction of these names. Doc #250 at 2 n1.

II

Plaintiffs' eighth document request is likely to lead to the discovery of admissible evidence to the extent the evidence relates to messages or themes conveyed to California voters or is otherwise likely to lead to this relevant information. See Washington v Seattle School Dist No 1, 458 US 457, 463-463 (relying in part on messages relayed to voters to hold that a busing initiative was "directed solely at desegregative busing"); see also Robert L v Superior Court, 30 Cal 4th 894, 905 (2003) (relying on "materials that were before the voters" to interpret a California initiative and rejecting "evidence of the drafters' intent that was not presented to the voters").

Here, communications discussing campaign messaging or advertising strategy, including targeted messaging, are generally

responsive; communications regarding fundraising strategy, polling information or hiring decisions are generally not responsive, unless the communications deal with themes or messages conveyed to voters in more than a tangential way. To assist the parties in proceeding with discovery, the court has analyzed each of the sixty documents submitted by proponents and determined for the reasons explained below that only the following twenty-one are responsive to plaintiffs' discovery request: 3, 4, 6, 7, 9, 11, 12, 17, 27, 28, 29, 30, 48, 49, 50, 51, 53, 55, 56, 58 and 60. These documents discuss messages or themes conveyed to voters through advertising or direct messaging. The remaining documents are either not responsive to plaintiffs' request or are so attenuated from the themes or messages conveyed to voters that they are, for practical purposes, not responsive.

A

Documents 3, 4, 6, 7, 9, 11, 12, 17, 27, 28, 29, 30, 48, 49, 50, 51, 53, 55, 56, 58 and 60 are responsive because they relate to the messages or themes the campaign attempted to or did convey to voters. These documents deal directly with advertising or messaging strategy and themes.

- Doc 3 discusses talking points for a meeting with a newspaper editorial board.
- Doc 4 discusses edits to a television advertisement.
- Doc 6 discusses edits to flyers targeted to a group of voters.
- Doc 7 contains emails and attachments dealing with arguments to be presented to voters in some form.

- Doc 9 discusses a campaign targeted to certain voters.
- Doc 11 discusses messages conveyed during the campaign's grassroots outreach.
- Doc 12 analyzes materials for the ballot pamphlet.
- Doc 17 discusses voter reaction to a theme in campaign advertising.
- Doc 27 contains line edits of the ballot arguments.
- Doc 28 is a meeting agenda outlining the campaign's advertising themes.
- Doc 29 is a draft of a campaign flyer.
- Doc 30 is a proposal for themes to be conveyed during the campaign.
- Doc 48 is an email exchange discussing language to be used in conveying a message to voters.
- Doc 49 is generally relevant as an email exchange discussing information for voters contained on the campaign's public website, although an email from a private citizen within the exchange may not itself be relevant to campaign messaging and could, therefore, be redacted.
- Doc 50 discusses focus group responses to various campaign themes.
- Doc 51 contains talking points to be conveyed to voters.
- Doc 53 is a grassroots plan to convey specific messages to voters.
- Doc 55 discusses a potential message to be conveyed in response to an opposition advertisement.

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- Doc 56 deals with television advertisements to convey certain messages to voters.
- Doc 58 is a post-election summary of successful themes conveyed to voters.
- Doc 60 is a draft of a television advertisement.

These documents are responsive because they discuss in relative detail the messages and themes that the campaign attempted to convey to the voters.

B

Documents 1, 2, 5, 10, 14, 15, 16, 18, 23, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 52, 57, and 59 say nothing about campaign messages or themes to be conveyed to the voters and are therefore not responsive.

- Docs 1 and 2 are memos discussing the mechanics of operating a campaign.
- Doc 5 deals solely with the petition drive to qualify Prop 8 for the ballot.
- Doc 10 is an email exchange discussing internal campaign strategy.
- Docs 14, 15 and 16 discuss mechanics of the campaign's internal structure.
- Doc 18 is an email exchange discussing a campaign contribution.
- Doc 23 is an email exchange discussing polling numbers.
- Doc 31 similarly discusses poll results and also contains a long email that appears mostly to be musings regarding poll results.

- Doc 32 deals with volunteer coordination and organization.
- Doc 33 seeks information about a specific volunteer.
- Doc 35 deals with the campaign's structure and arrangements with other entities.
- Doc 36 contains the campaign's steering committee meeting minutes, which discuss organizational structure.
- Doc 37 provides draft poll questions.
- Doc 38 discusses a strategy to obtain volunteers.
- Doc 39 is a list of potential donors.
- Doc 40 is an email exchange discussing recruitment of a potential staff member.
- Doc 41 is a fundraising letter seeking money to help qualify Prop 8 for the ballot.
- Doc 42 discusses volunteer organization.
- Docs 43 and 44 discuss meetings with major donors.
- Doc 46 deals with the mechanics of petition drives.
- Doc 52 deals principally with the mechanics of operating a phone bank.
- Doc 57 discusses polling numbers.
- Doc 59 is a post-election email discussing a supporter apparently not officially associated with the campaign.

Because these documents do not discuss campaign messages to voters, they are not responsive to plaintiffs' discovery request.

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Documents 8, 13, 19, 20, 21, 22, 24, 25, 26, 34, 45, 47 and 54 are not responsive because they say nothing about campaign messaging or themes to be conveyed to voters, even though they discuss topics that might relate to messages ultimately adopted or considered by the campaign. Because the documents do not discuss voters or their potential reactions, they are not responsive.

- Doc 8 contains internal emails discussing recent articles about gay marriage and its effects.
- Doc 13 may be protected by the attorney-client privilege; moreover, it is not relevant because it is an internal memorandum discussing proposed language for Prop 8 in a way that is at most marginally pertinent to advertising strategy.
- Docs 19, 20, 21 and 22 discuss a potential volunteer consultant and ways the volunteer might aid campaign strategies.
- Docs 24, 25 and 26 deal with polling and voter data; while the email exchanges contain some brainstorming regarding messaging, the content is too attenuated to have a reasonable likelihood of leading to the discovery of admissible evidence.
- Doc 34 discusses strategy for disseminating a message but does not discuss the message itself.
- Doc 45 deals with the appropriate language to use for the text of Prop 8.
- Doc 47 contains an email exchange discussing a targeted fundraising drive.

- Doc 54 deals with a potential disclaimer in an advertisement but does not touch on any campaign messages to be conveyed to voters.

In some ways these documents fall in the margin of potentially responsive discovery; nevertheless, the court deems them not responsive because their relationship to messages or themes conveyed to voters is attenuated enough that it appears as a practical matter unlikely to lead to discovery of admissible evidence.

III

The court recognizes that the documents provided for in camera review are merely a sample of the hundreds of documents in proponents' possession and that the determination whether the remaining documents are responsive in light of the foregoing instruction may not be mechanical. Nevertheless, the court hopes that the foregoing affords proponents sufficient and specific enough guidance to cull their inventory of documents and other materials in order to respond to plaintiffs' document request. The court looks to the parties' able counsel to work out a production schedule.

The court also directs the parties to proceed promptly to take the principal depositions they believe are necessary to prepare for trial. In doing so, the parties should recognize that the unreasonable withholding of requested documents may frustrate appropriate deposition discovery and creates a risk of multiple depositions of the same witness.

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The court stands ready to assist the parties should further disputes arise. In the undersigned's absence, any such disputes are referred to Magistrate Joseph Spero, 28 USC § 636(b)(1)(A).

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge