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NO ON PROPOSITION 8,
13 CAMPAIGN FOR MARRIAGE EQUALITY:
A PROJECT OF THE AMERICAN CIVIL
14 LIBERTIES UNION OF NORTHERN CALIFORNIA

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

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

19 v.

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

27 Defendants.
28

CASE NO. 09-CV-2292 VRW

**DECLARATION OF ELIZABETH GILL IN
SUPPORT OF OPPOSITION OF NO ON
PROPOSITION 8, CAMPAIGN FOR
MARRIAGE EQUALITY: A PROJECT OF
THE AMERICAN CIVIL LIBERTIES
UNION OF NORTHERN CALIFORNIA TO
DEFENDANT-INTERVENORS' MOTION
TO COMPEL COMPLIANCE WITH
NONPARTY DOCUMENT SUBPOENAS**

Judge: Chief Judge Walker
Location: Courtroom 6, 17th Floor
Trial Date: January 11, 2010

1 I, Elizabeth Gill, hereby declare:

2 1. I am a Staff Attorney for the LGBT & AIDS Project of the ACLU Foundation
3 and for the ACLU Foundation of Northern California. I am counsel of record for Non-Party No on
4 Proposition 8, Campaign for Marriage Equality: A Project of the American Civil Liberties Union of
5 Northern California ("ACLU"). I have personal knowledge of the matters contained in this
6 declaration, except where such facts are stated to be based on information and belief, and those facts I
7 believe to be true. If called to testify to the matters set forth in this declaration, I could do so
8 competently.

9 2. On August 27, 2009, Defendant-Intervenors, the Proponents of Proposition 8
10 ("Proponents"), served an administrative subpoena on the ACLU, seeking documents and
11 information related to the No on 8 campaign (attached as Exhibit 1 to Proponents' Motion to
12 Compel).

13 3. On September 17, 2009, the ACLU served Responses and Objections to
14 Proponents' administrative subpoena (attached as Exhibit 4 to Proponents' Motion to Compel). In its
15 response, the ACLU agreed to produce documents that it had disseminated to the general public and
16 that could not be obtained readily from another source. The ACLU objected to the rest of the
17 requests on grounds of relevance, burden, and constitutional privilege.

18 4. On November 2, 2009, the ACLU produced documents that were widely
19 disseminated to the general public regarding the No on 8 campaign. As a cut-off, the ACLU used the
20 definition of "mass mailing" provided by California Government Code §82041.5, which refers to
21 anything sent to at least 200 people. This production consisted primarily of (a) e-mails regarding
22 Proposition 8 sent to various ACLU email lists and information regarding Proposition 8 placed in the
23 ACLU's newsletter; (b) a No on 8 toolkit, including No on 8 endorsement forms, flyers containing
24 arguments against Proposition 8, and sample No on 8 letters to the editor; (c) a No on 8 house party
25 toolkit, describing how to hold a fundraiser for the No on 8 campaign; (d) invitations to an ACLU No
26 on 8 fundraising event sent to donors and members; and (e) flyers for various No on 8 rallies.

27 5. In mid-November Proponents sent the ACLU a revised subpoena again
28 seeking its internal communications; once again, the ACLU submitted objections (attached as

1 Exhibits 2 & 4 to Proponents' Motion to Compel).

2 6. The ACLU received no further communications regarding the November
3 subpoena or document production until January 12, 2010, when the ACLU received a letter from
4 Proponents demanding that it provide Proponents with a list of "core" group members whose
5 documents might be subject to a First Amendment privilege as well as a log of all communications
6 subject to such a privilege (attached as Exhibit 5 to Proponents' Motion to Compel). The letter
7 further demanded that the ACLU should begin the immediate production of relevant, non-privileged
8 documents.

9 7. Complying with Proponents' demands would be significantly burdensome to
10 the ACLU, a nonprofit organization with limited financial and human resources.

11 8. In order to identify a "core" group of individuals whose documents might be
12 subjected to the First Amendment privilege, the ACLU would be forced to search for
13 communications between and among the numerous groups and individuals that the ACLU partnered
14 with during the No on 8 campaign. Along with a number of other organizations, such as Equality
15 California, the ACLU participated in a coordinated campaign to defeat Proposition 8 (the official
16 name of which was No on 8, Equality for All). But the ACLU also independently worked with many
17 additional organizations and individuals on developing strategy and messaging to defeat
18 Proposition 8. Simply identifying each of these individuals would require a substantial, organization-
19 wide effort.

20 9. If the Court were to conclude that any of the ACLU's communications or other
21 documents related to the ACLU's efforts to defeat Proposition 8 are relevant to this litigation, then it
22 is likely that a large number of communications between and among this "core" group would require
23 individualized review. For example, I am informed and believe that among the ACLU staff involved
24 in the No on 8 campaign, there are approximately 61,046 potentially relevant communications, all
25 stored on the staffs' Microsoft Outlook files. When simple search terms are applied to these Outlook
26 files (*e.g.*, "Proposition 8," "Prop. 8," "No on 8") – terms that are by no means exhaustive – there are
27 still approximately 25,091 potentially relevant communications.

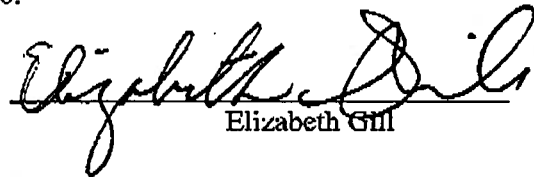
28 10. The ACLU is not equipped to search such a large volume of potentially

1 relevant material. ACLU staff members are only able to run simple key-word searches on their
2 Outlook files. There would be no way to ensure such searches were exhaustive, creating a substantial
3 risk of missing a significant portion of potentially relevant material. The only solution would be to
4 hire an outside vendor to properly search through the 61,046 potentially relevant communications. I
5 am informed and believe that simply settling on search terms for such an endeavor would be
6 prohibitively expensive for the ACLU. The ACLU simply does not have the resources to conduct
7 such a search.

8 11. Even if search terms could be applied, the collection of potentially relevant
9 communications would still number in the tens of thousands. Each of these communications would
10 need to be reviewed on a document-by-document basis not only for responsiveness, but for attorney-
11 client privilege as well as the First Amendment privilege articulated by the Ninth Circuit. The ACLU
12 does not have the human resources to conduct this sort of extensive review.

13 12. Further, even if the ACLU somehow managed to complete this review, it is my
14 belief, based on my own knowledge, plus information and belief as the result of conversations with
15 other ACLU employees involved in the Proposition 8 campaign, we would locate only a handful of
16 relevant, non-privileged documents. Many of the 61,046 potentially relevant documents would
17 simply be planning communications, setting or conveying the date and time for an event, etc.
18 Virtually all of the remainder would be documents discussing non-public strategy and messages,
19 which are privileged under the First Amendment.

20 I declare under penalty of perjury that the foregoing is true and correct and that this
21 declaration was executed by me on February 2, 2010.

22 
23 Elizabeth Gill
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