

United States District Court
For the Northern District of California

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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

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

_____ /

1 Defendant-intervenors, the official proponents of
2 Proposition 8 ("proponents"), moved on January 15, 2010 to compel
3 three nonparty entities, Californians Against Eliminating Basic
4 Rights ("CAEBR"), Equality California and No on Proposition 8,
5 Campaign for Marriage Equality, A Project of the American Civil
6 Liberties Union (the "ACLU") (collectively the "No on 8 groups") to
7 produce documents related to the campaign against Proposition 8.
8 Doc #472. Proponents' document subpoenas to the No on 8 groups
9 were intended to mirror the requests plaintiffs served on
10 proponents. Id at 5. On January 8, 2010, the court ordered
11 proponents to produce all documents that "contain, refer or relate
12 to arguments for or against Proposition 8," except those
13 communications solely among members of proponents' core group. Doc
14 #372 at 5. Proponents now ask the court to order a similar
15 production from the No on 8 groups. Doc #472 at 7-8. Equality
16 California and the ACLU oppose proponents' motion to compel, Doc
17 ##543, 546, and CAEBR argues it has produced all responsive
18 nonprivileged documents. Doc #541. The court heard argument on
19 the motion on February 25, 2010. Doc #602.

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21 I

22 The procedural history of proponents' motion to compel is
23 intertwined with the circuitous course discovery took as the
24 parties prepared the case for trial on an expedited basis.
25 Pursuant to FRCP 45, proponents served the No on 8 groups with
26 document subpoenas on August 27, 2009. Doc #472-1 at 10, 19, 28.
27 Proponents simultaneously opposed on relevance and privilege
28 grounds similar document requests served on them by plaintiffs.

1 Doc #187. The court agreed in part with proponents' relevance
2 arguments and ordered plaintiffs to revise an overly broad document
3 request. Doc #214 at 17. In response to the court's order,
4 proponents revised their identical request to the No on 8 groups.
5 Doc #472-3 at 6-7, 15-16, 24-25.

6 Proponents continued to assert a First Amendment
7 privilege over documents related to proponents' campaign for
8 Proposition 8 both in this court and in the Ninth Circuit. While
9 proponents' privilege claim was being litigated, proponents
10 informed the No on 8 groups that proponents expected the No on 8
11 groups to produce only those documents similar to those proponents
12 were obligated to produce. Doc #472-3. The discovery cut-off of
13 November 30, 2009 passed without a final resolution of the scope of
14 proponents' First Amendment privilege claim.

15 On January 4, 2010, the Ninth Circuit issued an opinion
16 providing final guidance to define the scope of the First Amendment
17 privilege. Perry v Schwarzenegger, 591 F3d 1147 (9th Cir 2010).
18 The opinion makes clear that proponents' First Amendment privilege
19 is limited to "*private, internal* campaign communications concerning
20 the *formulation of campaign strategy and messages * * ** among the
21 core group of *persons* engaged in the formulation of strategy and
22 messages." Id at 1165 n12 (emphasis in original). Pursuant to the
23 Ninth Circuit opinion, on January 8, 2010 the court ordered
24 proponents to produce all documents that "contain, refer or relate
25 to arguments for or against Proposition 8," except those
26 communications solely among members of proponents' core group. Doc
27 #372 at 5. On January 15, 2010, four days after the trial began,
28 proponents filed the instant motion.

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II

The No on 8 groups take different positions on the merits of proponents' motion. CAEBR asserts that it has already produced all responsive documents and that proponents' motion is moot as directed to it. Doc #541. Equality California argues that, because it is a nonparty and because it worked to oppose Proposition 8, its internal campaign communications are not relevant and production would be unduly burdensome. Doc #546 at 7-10. The ACLU argues the documents proponents seek are irrelevant and privileged. Doc #543 at 11-18.

A

The court first considers whether proponents' motion is timely. Pursuant to Civ LR 26-2, all motions to compel discovery must be filed within seven days of the discovery cut-off. In this case, Civ LR 26-2 dictates that proponents' motion should have been filed by December 7, 2009. Proponents' motion was filed more than a month later, on January 15, 2010. Nevertheless, because discovery (and litigation regarding the scope of the First Amendment Privilege) has continued beyond the cut-off and because the No on 8 groups are not parties and are not meaningfully prejudiced by the timing of proponents' motion, the court will consider the merits of the motion. In addition, this motion was filed within one week of this court's final decision defining the scope of proponents' First Amendment privilege and ordering production of nonprivileged documents. The court will, however, consider the timing of the motion as it relates to burden pursuant to FRCP 45(c)(1).

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2 Next, the court considers whether proponents' subpoenas
3 seek relevant documents. Proponents assert that they seek the
4 documents to help elucidate voter intent and the purpose of
5 Proposition 8 and because the documents may address the political
6 power of gays and lesbians. Doc #584 at 7-14. Pursuant to FRCP
7 26(b)(1), a party may obtain nonprivileged discovery that is
8 relevant to any claim or defense, and "[r]elevant information need
9 not be admissible at the trial if the discovery appears reasonably
10 calculated to lead to the discovery of admissible evidence." While
11 a party may obtain discovery from a nonparty, the party must take
12 "reasonable steps to avoid imposing an undue burden or expense" on
13 the nonparty. FRCP 45(c)(1).

14 Perry, 591 F3d 1147, provides perhaps the best authority
15 to determine whether the communications sought by proponents are
16 relevant. The Ninth Circuit held that plaintiffs' document
17 requests to proponents, which sought documents similar to those at
18 issue in the instant motion, were "reasonably calculated to lead to
19 the discovery of admissible evidence on the issues of voter intent
20 and the existence of a legitimate state interest." Perry, 591 F3d
21 at 1164.

22 The ACLU points out that the Ninth Circuit's opinion was
23 tailored to the dispute between plaintiffs and proponents and that
24 documents relating to strategy and messages against Proposition 8
25 are not relevant because Proposition 8 passed. See Doc #543 at 13.
26 According to the ACLU, the intent of voters who voted against
27 Proposition 8 is not relevant, because those voters did not enact a
28 constitutional amendment, and the No on 8 groups' documents are not

1 relevant to the question why some voters chose to support
2 Proposition 8, because those voters rejected the arguments. Id.

3 While the intent of those who voted against Proposition 8
4 is not relevant, the mix of information available to voters who
5 supported Proposition 8 is relevant under FRCP 26 to the questions
6 of intent and state interest. That mix of information includes
7 arguments considered and ultimately rejected by voters, including
8 arguments against Proposition 8. As was the case with the
9 proponents, the documents and communications at issue may shed
10 light on the meaning and impact of the messages that were sent to
11 the voters. Thus, the subpoenaed documents are relevant and must
12 be produced to the extent the documents are not privileged and
13 contain, refer or relate to arguments for or against Proposition 8.

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16 III

17 The No on 8 groups assert that at least some of the
18 documents in their possession are protected by the First Amendment
19 privilege. Again, the Ninth Circuit's opinion in Perry, 591 F3d
20 1147, provides the best guidance to determine the scope of the
21 First Amendment privilege in the context of initiative campaigns.
22 As the Ninth Circuit explained, it was deciding "an important issue
23 of first impression - the scope of the First Amendment privilege
24 against compelled disclosure of internal campaign communications."
25 Id at 1157.

26 In the context of an initiative campaign, a campaign
27 organization may assert a First Amendment privilege over "private,
28 *internal* campaign communications concerning the *formulation of*

1 *campaign strategy and messages * * ** among the core group of
2 *persons engaged in the formulation of campaign strategy and*
3 *messages.”* Id at 1165 n12 (emphasis in original). Despite the
4 ACLU’s argument to the contrary, Doc #543 at 16, nothing in Perry
5 limits footnote 12’s application to “the specific circumstance of
6 the requests served by plaintiffs on Proponents and to the
7 structure of the Yes on 8 campaign.” The footnote does not
8 determine definitively who belongs in the core group of persons;
9 instead, the footnote provides guidance for the court to make the
10 final determination who is a member of a campaign organization’s
11 core group. Id. That guidance is applicable to the instant
12 dispute. Accordingly, the court will apply the First Amendment
13 privilege to communications about strategy and messages internal to
14 each No on 8 group’s core group. The privilege applies only to
15 communications within a campaign organization – communications
16 between or among independent campaign organizations are not covered
17 by the First Amendment privilege.

18 The No on 8 groups submitted supplemental declarations to
19 explain and support their core groups. Doc #593 (CAEBR); Doc #597
20 (ACLU); Doc #598 (Equality California). Following the February 25
21 hearing, Equality California submitted a supplemental declaration
22 to define a core group for an umbrella organization known as No on
23 8 - Equality for All (“Equality for All”). Doc #609. The No on 8
24 groups’ declarations raise two questions: (1) which individuals
25 were sufficiently involved in the development of strategy and
26 messages that they should be included in each organization’s core
27 group; and (2) the application of the First Amendment privilege to
28 the No on 8 groups. The court begins with the first question.

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CAEBR filed the declaration of Marisa Moret to support individuals it believes should be included in its core group. Doc #593. The Moret declaration lists individuals, their role in the campaign and their reasons for being included within the core group. Doc #593. The court credits the Moret declaration and finds that CAEBR's core group consists of:

Ben Barnz, Marisa Moret and Patti Rockenwanger (CAEBR board members); Dennis Herrera (CAEBR chair); employees of Griffin Schake, Armour Media Group and Bonner Group, Inc (campaign consulting firms that had significant input into campaign strategy and messages); Diane Hamwi and Mark Walsh (fundraising consultants who played a significant role in campaign strategy and formulating messages); and Monique Moret Stevens (CAEBR advisor); and assistants to the named individuals acting on the named individuals' behalves.

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Equality California submitted the February 22 declaration of Geoff Kors in support of its core group. Doc #598 ¶¶16-17. The declaration explains the individuals' roles regarding formulation of strategy and messages. Id. The court credits the February 22 Kors declaration and finds the following individuals are members of Equality California's core group:

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1 John Duran, Cary Davidson, Tim Hohmeier, Deb Kinney, Diane
2 Abbitt, Jim Abbott, Dave Baron, Xavier Barrera, Brandon
3 Brawner, Betsy Butler, Jody Cole, Larry Colton, Doug Dombek,
4 Jeff Haber, Mike Hutcheson, Roslyn Jones, Tom Maddox, Shannon
5 Minter, James Nguyen, Jeff Orr, Dennis Rasor, Jaime Rook, Rick
6 Saputo, Linda Scaparotti, Eric Siddall, Alan Uphold (members
7 of Equality California’s board of directors); Jean Adams, Ali
8 Bay, Ian Barrera, Jim Carroll, Maya Scott-Chung, Liam Cooper,
9 Doug Flater, Joe Goldman, Daniel Gould, Kendra Harris, Ted
10 Jackson, Kaitlin Karkos, Alice Kessler, Seth Kilbourn, Hannah
11 Johnson, Geoff Kors, Erica Liscano, Shumway Marshall, Randy
12 Medenwald, Miranda Meisenback, Trina Olson, Michelle Ortiz,
13 Zorina Price, Leanne Pittsford, Jennifer Sample, George
14 Simpson, Sean Sullivan, Sarah Tomastik and Clarence Williams
15 (Equality California staff members engaged in the formulation
16 of strategy and messages); and assistants to the named
17 individuals acting on the named individuals’ behalves.

18 Equality California has also sought to include certain
19 individuals associated with the Equality California Institute in
20 its core group. Id at ¶ 18. Equality California has not
21 demonstrated that the Institute engaged in the formulation of
22 strategy and messages for Equality California; accordingly, these
23 individuals are not included in the Equality California core group.

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24 The ACLU filed the declaration of Elizabeth Gill to
25 identify the core group of individuals involved in the development
26 of campaign strategy and messages for the ACLU. Doc #597. The
27 Gill declaration explains that the ACLU staff members listed worked
28 “on ACLU-specific activities toward defeating [Proposition 8].” Id
at ¶ 5. The court credits the Gill declaration and finds the
following individuals are members of the ACLU’s core group:

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1 Elizabeth Gill, Paul Cates, Matthew Coles, Rebecca Farmer,
2 Shayna Gelender, Maya Harris, Ashley Morris, Gigi Pandian,
3 Skylar Porras, Catrina Roallos, Laura Saponara (employees of
the ACLU who worked to defeat Proposition 8); and assistants
4 to the named individuals acting on the named individuals'
behalfes.

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6 According to the February 22 Geoff Kors declaration,
7 which the ACLU incorporates by reference, Doc #597 ¶6, the umbrella
8 organization Equality for All was formed in 2005 to fight against
9 any proposition that would limit marriage to opposite-sex couples.
10 Doc #598 ¶5. Initially, the organization consisted of
11 approximately 35 organizations, which registered Equality for All
12 as a political action committee with the State of California. Id.
13 During the Proposition 8 campaign, Equality for All had an
14 executive committee, a campaign committee and campaign staff. Id
15 ¶¶7-9. Proponents did not serve Equality for All with a document
16 subpoena.

17 The March 3 declaration of Geoff Kors identifies
18 individuals and consulting firms involved in the development of
19 strategy and messages for Equality for All. Doc #609. The
20 declaration identifies the Equality for All executive committee,
21 campaign committee, campaign staff and consultants. Id at ¶¶ 5-8.
22 At the February 25 hearing, the court directed Equality California
23 to submit the supplemental declaration and to support the
24 inclusion, in the core group of Equality for All, of individuals in
25 the campaign committee, staff members and consultants who were
26 instrumental in developing strategy and messages.

27 The March 3 Kors declaration identifies the individual
28 campaign committee members and staff but makes no showing regarding

1 those individuals' roles in the Equality for All campaign. Id at
2 ¶¶ 6-7. Accordingly, the court lacks a basis to include these
3 individuals in Equality for All's core group. The March 3 Kors
4 declaration does, however, support through explanation the
5 inclusion of the campaign consultants and consulting firms listed
6 in Doc #609 ¶ 8. Because the February 22 Kors declaration explains
7 that the Equality for All executive committee "collectively made
8 decisions of great importance to the campaign," members of the
9 executive committee listed in Doc #609 ¶ 5 will be included in the
10 Equality for All core group.

11 For the foregoing reasons, the court finds that the
12 Equality for All core group consists of:

13 Dale Kelly Bankhead, Heather Carrigan, Cary Davidson, Oscar de
14 la O, Sue Dunlap, Michael Fleming, Patrick Guerrerero, Maya
15 Harris, Dan Hawes, Dennis Herrera, Delores Jacobs, Lorri L
16 Jean, Kate Kendall, Geoff Kors, Steve Mele, Joyce Newstat,
17 Tawal Panyacosit Jr, Rashad Robinson, Marty Rouse, Kevin
18 Tilden and Andy Wong (the Equality for All executive
19 committee); Steve Smith, Lilia Tamm, Molly Weedn and other
20 employees of Dewey Square Group, LLC; Maggie Linden, Lindsey
21 Nitta, Eddie Fernandez, Kris Hanson and other employees of
22 Ogilvy Public Relations; Chad Griffin, Mark Armour and other
23 employees of Amour Griffin Media Group, Inc; Kasey Perry and
24 other employees of Perry Communications; Yvette Martinez and
25 Javier Angulo of Progressive Strategy Partners LLC; Patrick
26 Guerriero and James Dozier of Gill Action; Adam Freed; Joe
27 Rodota; Guy Cecil; Rick Claussen; Gale Kaufman; Nick
28 Donatiello; Phyllis Watts; Thalia Zepatos; Steve Mele and
other employees of M L Associates LLC; Kimberly Ray; Marjan
Philhour; Stephanie Berger and other employees of Berger
Hirschberg; Shayna Elgin; Mary Pat Bonner and employees of The
Bonner Group; John Gile; Thom Lynch; Larry Huynh and other
employees of Blackrock Associates LLC; Alice Huffman of A C
Public Affairs Inc; Wendy Liao and other employees of the I W
Group; Justin Garrett and other employees of Logo Online/MTV
Networks; Chris Nolan and other employees of Spot-On; Suzanne
Stanford and other employees of Ofrenda; Eric Jaye of
Storefront Political Media; David Binder and other employees
of Binder Research; and Celinda Lake and other employees of
Lake Associates; and assistants to the named individuals
acting on the named individuals' behalves.

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2 The court has determined a core group for each No on 8
3 group as well as Equality for All and must now decide how to apply
4 the First Amendment privilege to the relevant campaign
5 communications. Communications solely within a No on 8 group's
6 core group are privileged under the First Amendment. Perry, 591
7 F3d 1165 n12. Here, some individuals, like Geoff Kors, Maya Harris
8 and Dennis Herrera, are within core groups of more than one
9 organization. Accordingly, the scope of the First Amendment
10 privilege could arguably depend on the capacity in which a core
11 group member is communicating. For example, whether a
12 communication between Geoff Kors and Maya Harris is privileged may
13 depend on whether Geoff Kors was communicating in his Equality
14 California or Equality for All capacity. But because the effort
15 required by such an inquiry might amount to an undue burden on the
16 No on 8 groups under FRCP 45(c)(1), the court will not require
17 production of any communications about strategy and messages
18 between core group members who belong to that core group,
19 regardless of the capacity in which the core group member is
20 communicating. Thus, members of the Equality for All core group
21 may assert a privilege over responsive communications solely within
22 the Equality for All core group - even if there is an argument that
23 one of the parties to the communication was not participating in
24 his or her capacity as a member of that particular core group.

25 For the reasons explained above, the court finds that the
26 First Amendment privilege covers communications regarding strategy
27 and messages within each No on 8 group's core group as defined
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1 above. The First Amendment privilege does not cover communications
2 between separate organizations.

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4 IV

5 Because proponents seek discovery from third parties, the
6 court recognizes the need to ensure that any burden borne by the
7 third parties is not undue. FRCP 45(c)(1). Accordingly, the No on
8 8 groups shall be required only to undertake the following steps in
9 searching electronic documents to respond to proponents'
10 subpoenas.¹

11 First, the No on 8 groups shall only be required to
12 review electronic documents containing at least one of the
13 following terms: "No on 8;" "Yes on 8;" "Prop 8;" "Proposition 8;"
14 "Marriage Equality;" and "ProtectMarriage.com."

15 Second, Equality California shall only be required to
16 search its central email server for responsive electronic
17 documents, identified in the March 3 declaration of Geoff Kors as
18 the Microsoft Exchange email server. Doc #609 at 9 ¶10.

19 While the foregoing limitations do not eliminate the
20 burden of production on third parties, they do reduce costs and
21 focus the production on only the most responsive documents.

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27 ¹This restriction, however, does not apply to paper documents.
28 The No on 8 groups shall search paper documents for documents that
contain, refer or relate to arguments for or against Proposition 8.

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IV

For the reasons explained above, proponents' motion to compel, Doc #472, is GRANTED. Each No on 8 group is DIRECTED to produce all documents in its possession that contain, refer or relate to arguments for or against Proposition 8, except those communications solely among members of its core group. The No on 8 groups shall begin a rolling production of nonprivileged responsive documents as soon as possible to conclude not later than Wednesday, March 31, 2010. The No on 8 groups may produce documents pursuant to the terms of the protective order, Doc #425, if they wish. The No on 8 groups are not required to produce a privilege log.

IT IS SO ORDERED.



JOSEPH C SPERO
United States Magistrate Judge