

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,

No C 09-2292 VRW  
ORDER

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.

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1           The court ordered defendant-intervenors ("proponents") to  
2 produce documents responsive to plaintiffs' eighth document request  
3 pursuant to a production schedule to be worked out among the  
4 parties. Doc #252 at 9. The parties apparently have not been able  
5 to agree to a production schedule, and plaintiffs have submitted a  
6 letter asking the court to "direct immediate production of those  
7 documents and categories of documents found to be relevant,  
8 responsive and non-privileged." Doc #256. Proponents oppose an  
9 order directing immediate production. Doc #257.<sup>1</sup> The court held a  
10 telephonic hearing on the issues raised by these two letters on  
11 November 19, 2009. The following counsel appeared: Matthew McGill  
12 for plaintiffs, Nicole Jo Moss for proponents, Mollie Lee for  
13 plaintiff-intervenors City and County of San Francisco, Andrew  
14 Stroud for defendants Arnold Schwarzenegger, Mark B Horton and  
15 Linette Scott and Tamar Pachter for defendant Edmund G Brown Jr.

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18           On October 1, 2009, the court denied proponents' blanket  
19 claim that the qualified First Amendment privilege protects Yes on  
20 8 campaign documents against disclosure. Doc #214. Proponents  
21 appealed the order or alternatively sought mandamus relief. Doc  
22 #222. Simultaneously, proponents sought a stay of discovery in  
23 this court, which was denied. Doc #237. The Ninth Circuit issued  
24 an order to show cause why proponents' appeal should not be  
25 dismissed for lack of jurisdiction but has otherwise not acted on  
26 the appeal. See Ninth Circuit case no 09-17241 at Doc #8.

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28 <sup>1</sup>Chief Judge Walker has referred discovery disputes that arise  
in his absence to the undersigned pursuant to 28 USC § 636(b)(1)(A).

1           After the court denied proponents' motion for a stay,  
2 proponents sought in camera review over a sample of sixty documents  
3 to allow the court to determine whether the First Amendment  
4 qualified privilege might apply to some of the thousands of  
5 potentially responsive documents in proponents' possession. Doc  
6 #238. After reviewing the documents in camera, the court  
7 determined that the qualified First Amendment privilege offered  
8 little, if any, protection against disclosure. Doc #252 (the  
9 "November 11 order") at 2-3. As part of the balancing process  
10 required in the case of qualified privileges, the court noted that  
11 plaintiffs do not oppose redaction of the names of rank-and-file  
12 volunteers and similarly situated individuals. Id at 3. The court  
13 previously noted that an appropriate protective order could  
14 eliminate any tangible harm that disclosure of the disputed  
15 documents might otherwise exacerbate. Doc #214 at 6. The court  
16 determined that only twenty-one of the sixty documents provided for  
17 review were responsive to plaintiffs' eighth document request and  
18 explained its reasoning to assist the parties in determining the  
19 potential relevance of the remaining documents not provided for  
20 review. Doc #252 at 3-9. The November 11 order relied on the able  
21 counsel for the parties to develop an appropriate production  
22 schedule. Id at 9.

23           Proponents now seek to appeal the court's discovery  
24 orders (Doc ##214, 237, 252) or alternatively seek mandamus relief.  
25 Doc #253. The Ninth Circuit has not yet accepted the appeal or  
26 mandamus petition or issued a stay. Proponents have asked the  
27 Ninth Circuit "to expedite these appeals." Ninth Circuit case no  
28 09-17241 Doc #14 at 25.



1 and until the Ninth Circuit stays discovery, the November 11 order  
2 remains in effect, and proponents are obligated to produce the  
3 documents the court has found to be responsive and not privileged.  
4 The court ordered the parties to "work out a production schedule."  
5 Doc #252 at 9. While the court relied on the parties to schedule  
6 the actual production of the responsive material in an appropriate  
7 manner, that charge plainly did not authorize proponents to  
8 "decline to produce any documents" while the possibility of a stay  
9 exists. See Doc #256-1 at 2. The court has previously set a fact  
10 discovery cut off date of November 30, 2009. See Doc #160 at 2.

11           The practical difficulties associated with production of  
12 documents responsive to plaintiffs' eighth document request counsel  
13 against entering an order compelling production of all responsive  
14 documents within three days. Nevertheless, the upcoming discovery  
15 cut off date of November 30, 2009, as well as the impending January  
16 trial, necessitate a production schedule that is consistent with  
17 those dates. Accordingly, and in light of the parties' inability  
18 to agree to a production schedule, the court DIRECTS the parties to  
19 proceed as follows:

20           The court reiterates its view that appropriate  
21 protections can be implemented to reduce or eliminate many of the  
22 problems that proponents believe they will suffer as a result of  
23 the production of documents pursuant to the November 11 order. The  
24 parties shall meet and confer on the terms of a protective order.  
25 Any stipulated protective order shall be filed not later than  
26 Monday, November 23, 2009 at 12 PM PST. The Court is available to  
27 assist the parties in that matter. However, if no stipulated order  
28 is filed, the court intends to enter an appropriate order based on

1 the standard protective order that can be viewed on the court's  
2 website.

3           The twenty-one documents identified by the court in its  
4 November 11 order as responsive and not privileged shall be  
5 designated "attorneys-eyes only" and produced to plaintiffs not  
6 later than the close of fact discovery on Monday, November 30,  
7 2009. Similarly, proponents shall produce the additional documents  
8 responsive to plaintiffs' eighth document request on a rolling  
9 basis to conclude not later than the close of fact discovery on  
10 November 30, 2009. Proponents shall be guided by the November 11  
11 order, at 3-9, in determining which documents are responsive to  
12 plaintiffs' request. Names of rank-and-file campaign volunteers  
13 and similarly situated individuals shall be redacted from all  
14 documents produced to plaintiffs. These documents may only be  
15 viewed by counsel of record in this action until a full protective  
16 order is entered by the court.

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18           IT IS SO ORDERED.

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20           Dated: November 19, 2009

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24           JOSEPH C SPERO  
25           United States Magistrate Judge  
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