

1 COOPER AND KIRK, PLLC
 Charles J. Cooper (DC Bar No. 248070)*
 2 *ccooper@cooperkirk.com*
 David H. Thompson (DC Bar No. 450503)*
 3 *dthompson@cooperkirk.com*
 Howard C. Nielson, Jr. (DC Bar No. 473018)*
 4 *hnielson@cooperkirk.com*
 Nicole J. Moss (DC Bar No. 472424)*
 5 *nmoss@cooperkirk.com*
 Jesse Panuccio (DC Bar No. 981634)*
 6 *jpanuccio@cooperkirk.com*
 Peter A. Patterson (Ohio Bar No. 0080840)*
 7 *ppatterson@cooperkirk.com*
 1523 New Hampshire Ave. N.W., Washington, D.C. 20036
 8 Telephone: (202) 220-9600, Facsimile: (202) 220-9601

9 LAW OFFICES OF ANDREW P. PUGNO
 Andrew P. Pugno (CA Bar No. 206587)
 10 *andrew@pugnotlaw.com*
 101 Parkshore Drive, Suite 100, Folsom, California 95630
 11 Telephone: (916) 608-3065, Facsimile: (916) 608-3066

12 ALLIANCE DEFENSE FUND
 Brian W. Raum (NY Bar No. 2856102)*
 13 *braum@telladf.org*
 James A. Campbell (OH Bar No. 0081501)*
 14 *jcampbell@telladf.org*
 15100 North 90th Street, Scottsdale, Arizona 85260
 15 Telephone: (480) 444-0020, Facsimile: (480) 444-0028

16 ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH,
 GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON,
 17 and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

18 * Admitted *pro hac vice*

19 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA

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

23 Plaintiffs,

24 v.

25 ARNOLD SCHWARZENEGGER, in his official
 26 capacity as Governor of California; EDMUND
 G. BROWN, JR., in his official capacity as At-
 27 torney General of California; MARK B. HOR-
 28 TON, in his official capacity as Director of the
 California Department of Public Health and State

CASE NO. 09-CV-2292 VRW
 Chief Judge Vaughn R. Walker

**DEFENDANT-INTERVENORS' DEN-
 NIS HOLLINGSWORTH, GAIL J.
 KNIGHT, MARTIN F. GUTIERREZ,
 MARK A. JANSSON,
 AND PROTECTMARRIAGE.COM'S
 RESPONSE TO PLAINTIFFS' AD-
 MINISTRATIVE MOTION FOR A
 SEALING ORDER**

1 Registrar of Vital Statistics; LINETTE SCOTT,
2 in her official capacity as Deputy Director of
3 Health Information & Strategic Planning for the
4 California Department of Public Health; PAT-
5 RICK O'CONNELL, in his official capacity as
6 Clerk-Recorder for the County of Alameda; and
7 DEAN C. LOGAN, in his official capacity as
8 Registrar-Recorder/County Clerk for
9 the County of Los Angeles,

10
11 Defendants,

12 and

13 PROPOSITION 8 OFFICIAL PROPONENTS
14 DENNIS HOLLINGSWORTH, GAIL J.
15 KNIGHT, MARTIN F. GUTIERREZ, HAK-
16 SHING WILLIAM TAM, and MARK A. JANS-
17 SON; and PROTECTMARRIAGE.COM – YES
18 ON 8, A PROJECT OF CALIFORNIA RE-
19 NEWAL,

20 Defendant-Intervenors.

21
22 Additional Counsel for Defendant-Intervenors

23 ALLIANCE DEFENSE FUND

24 Timothy Chandler (CA Bar No. 234325)

25 *tchandler@telladf.org*

26 101 Parkshore Drive, Suite 100, Folsom, California 95630

27 Telephone: (916) 932-2850, Facsimile: (916) 932-2851

28 Jordan W. Lorence (DC Bar No. 385022)*

jlorence@telladf.org

Austin R. Nimocks (TX Bar No. 24002695)*

animocks@telladf.org

801 G Street NW, Suite 509, Washington, D.C. 20001

Telephone: (202) 393-8690, Facsimile: (202) 347-3622

* Admitted *pro hac vice*

1 Defendant Intervenors Dennis Hollingsworth, Gail Knight, Martin Gutierrez, Mark Jansson, and
2 ProtectMarriage.com (“Proponents”) object to the introduction into evidence and/or the introduction
3 into the public record of the documents indicated in Plaintiffs’ motion. Although the vast bulk of these
4 documents were not produced or endorsed by Proponents, they nonetheless constitute confidential,
5 nonpublic communications among groups and individuals associated and allied in support of the
6 common political goal of enacting Proposition 8, and Proponents wish to reassert, for purposes of
7 preserving for the record, their objection that these and similar communications are protected by the
8 First Amendment from compelled disclosure. These particular documents specifically relate to
9 formulation of political messaging and strategy and therefore lie at the core of the First Amendment’s
10 protection. Moreover, these documents are irrelevant to any issue in this case. If the Court does rule
11 in favor of submitting the documents into the record, Proponents maintain that they should remain
12 under seal. A declaration setting out the basis for sealing these documents has been filed concurrently
13 with this Response.
14
15

16 **BACKGROUND**

17 On January 12, 2010, Plaintiffs filed an Administrative Motion for Sealing Order, Doc #414, re-
18 questing that this Court allow them to file under seal—or introduce into the public record—the
19 following documents:
20

- 21 1. Email message from Bill May to Ned Dolejsi, sent on June 25, 2008, with the subject line
22 “Report on Evangelical Teleconference today” (hereinafter “the Teleconference email”), and
23 four attachments, Bates numbered DEFINT_PM_005614 to DEFINT_PM_005662.
- 24 2. Email message from Bill May to Ronald Prentice, sent on June 14, 2008, with the subject line
25 “heads up—‘urgent’” (hereinafter the “Heads Up Email”) and two attachments, Bates num-
26 bered DEFINT_PM_005767 to DEFINT_PM_005772.
27
28

1 3. Email message from Kenyn Cureton to ronp@californiafamily.org, sent on August 25, 2008,
2 with the subject line “Stand for Marriage Materials” (hereinafter the “Stand for Marriage
3 Email”), and one attachment, Bates numbered DEFINT_PM_005385 to DE-
4 FINT_PM_005399.

5 These documents were produced to Plaintiffs by Proponents pursuant to the orders of Magistrate
6 Judge Spero. *See* Doc # 372; Hr’g of Jan. 6, 2010. Proponents produced these documents on an
7 attorneys-eyes-only basis and with a highly confidential designation. *See* Doc # 425 (amended
8 protective order). Proponents have filed objections to Magistrate Judge Spero’s orders compelling
9 production. *See* Doc # 446.
10

11 As explained in the accompanying declaration of Ronald Prentice, the vast bulk of the docu-
12 ments at issue (all, save for a few slides in a large PowerPoint presentation) were not created by,
13 endorsed by, or used by ProtectMarriage.com or the individual Proponents of Proposition 8. Nonethe-
14 less, as Mr. Prentice also explains, these materials still constitute confidential, nonpublic communica-
15 tions among groups and individuals associated and allied in support of the common political goal of
16 enacting Proposition 8.
17

18 ARGUMENT

19 **A. The Documents Are Protected Under the First Amendment**

20 The Court should deny Plaintiffs’ motion. Again, Proponents reiterate and preserve their objec-
21 tions that the documents at issue are protected from compelled disclosure by the First Amendment.
22 Proponents herein incorporate their objections to Magistrate Judge Spero’s orders compelling produc-
23 tion. *See* Doc # 446.
24

25 As Mr. Prentice explains in an accompanying declaration, the vast bulk of the documents at is-
26 sue were not created by or endorsed by Proponents or ProtectMarriage.com. Nonetheless, the
27 documents indicated in Plaintiffs’ motion contain precisely the kind of exchange ideas and formulation
28

1 of strategy and messages, the disclosure of which will have a deterrent effect on the exercise of
2 protected activities. In particular:

3 • The Teleconference Email is a confidential political communication between two reli-
4 gious and political associates. The attached PowerPoint presentation was shared only with those
5 known to be allies in the effort to pass Proposition 8. And the few slides that were created by Pro-
6 tectMarriage.com contain highly confidential information about the operation and strategy of Protect-
7 Marriage.com. *See* Prentice Decl. at ¶¶ 5-10. Such internal, confidential material is privileged from
8 compelled disclosure under the First Amendment.

10 • The first or cover email in Heads Up Email string contains confidential and internal dis-
11 cussion of ProtectMarriage.com strategy and fundraising. The forwarded materials, while not those of
12 ProtectMarriage.com, nonetheless contain confidential, nonpublic communications about political
13 strategy and message formulation (among some persons who have not publicly announced their
14 political association or position) as well as draft messaging materials never disclosed to the public.
15 Prentice Decl. at ¶¶ 11-15. Such internal, confidential material is privileged from compelled disclosure
16 under the First Amendment.

18 • The Stand for Marriage Email contains internal, confidential, and draft materials of the
19 Family Research Council regarding formulation of political strategy and messaging. Prentice Decl. at
20 ¶¶ 16-21. These are precisely the types of materials protected from compelled disclosure under the
21 First Amendment.
22

23
24 **B. The Documents Are Irrelevant**

25 Proponents reiterate and incorporate the relevance objections stated in their motion for a protec-
26 tive order and supporting papers. *See* Doc #s 187, 197. But even under the standards adopted by this
27 Court in its order denying those objections in part, the documents at issue here are not relevant. The
28

1 Court has held that “the mix of information before and available to the voters forms a legislative
2 history that may permit the court to discern ... the legislative intent of an initiative measure.” Doc #
3 214 at 14. As the documents on their face make clear, and as Mr. Prentice’s declaration confirms, the
4 documents at issue here were not “before and available to the voters.”
5

6
7 **C. At the Very Least, the Documents Should be Submitted Under Seal**

8 If the Court does rule in favor of entering these documents into the record, they should be en-
9 tered under seal. The documents at issue contains confidential information—including confidential
10 campaign strategy and the names, associations, and political beliefs of persons who have not publicly
11 disclosed that information—and therefore should not be made available for public disclosure. At the
12 very least, the names of the correspondents in the emails should be redacted. In the event the Court
13 should rule in favor of admitting the documents at issue into the record, Proponents have, pursuant to
14 Local Rule 7-5(d), attached to this Response a proposed sealing order.
15

16
17 **CONCLUSION**

18 For the foregoing reasons, the Court should deny Plaintiffs Administrative Motion for a Sealing
19 Order to the extent it seeks to enter the documents at issue into the record. Barring that disposition, the
20 Court should seal the documents.
21

22 Dated: January 13, 2010

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS
DENNIS HOLLINGSWORTH, GAIL KNIGHT, MARTIN
GUTIERREZ, MARK JANSSON, AND PROTECTMAR-
RIAGE.COM

25 By: /s/Charles J. Cooper
26 Charles J. Cooper
27
28