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 and PROTECTMARRIAGE.COM – YES ON 8, A  
 17 PROJECT OF CALIFORNIA RENEWAL

18 \* Admitted *pro hac vice*

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

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

23 Plaintiffs,

24 v.

25 ARNOLD SCHWARZENEGGER, in his official  
 capacity as Governor of California; EDMUND  
 26 G. BROWN, JR., in his official capacity as  
 Attorney General of California; MARK B.  
 27 HORTON, in his official capacity as Director of  
 28 the California Department of Public Health and

CASE NO. 09-CV-2292 VRW

**DEFENDANT-INTERVENORS**  
**DENNIS HOLLINGSWORTH, GAIL**  
**KNIGHT, MARTIN GUTIERREZ,**  
**MARK JANSSON, AND**  
**PROTECTMARRIAGE.COM'S**  
**MOTION TO AMEND JANUARY 8,**  
**2010 DISCOVERY ORDER**

Judge: Chief Judge Vaughn R. Walker  
 Magistrate Judge Joseph C. Spero

Location: Courtroom 6, 17th Floor  
 Trial Date: Jan. 11, 2010

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

10 Defendants,

11 and

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

19 Defendant-Intervenors.

20 Additional Counsel for Defendant-Intervenors

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1 Prentice (“January 7 Declaration”) (Doc # 364).

2 The November 5 Declaration focused on individuals within the ProtectMarriage.com campaign  
3 with positions of management responsibility. *See* Doc # 372 at 4. At a hearing on January 6, 2010,  
4 Proponents acknowledged that “the individuals in the [November 5 Declaration] form at least a part of  
5 the core group but sought an additional 24 hours to determine whether additional individuals should  
6 also be included,” which the Court granted. *Id.* The January 7 Declaration listed additional names of  
7 persons involved in internal formulation of messaging and strategy, many of which the Court found to  
8 be part of the “core group.”  
9

10 The January 7 Declaration, however, omitted the following individuals:

- 11 • Richard Peterson. Mr. Peterson personally appeared on behalf of ProtectMarriage.com in  
12 statewide television advertisements of the campaign, and participated directly with other  
13 members of the core group to formulate the specific campaign messages he delivered in  
14 those television advertisements.  
15
- 16 • Robb Wirthlin. Mr. Wirthlin personally appeared on behalf of ProtectMarriage.com in  
17 statewide television advertisements of the campaign, and participated directly with other  
18 members of the core group to formulate the specific campaign messages he delivered in  
19 those television advertisements.  
20
- 21 • John Doe. Mr. Doe was a professional opinion research consultant who was hired by  
22 ProtectMarriage.com to conduct focus groups and other voter opinion research, which  
23 were essential parts of the internal formulation of the campaign’s strategy and  
24 messaging.<sup>2</sup>

25 Declaration of Ronald Prentice (January 16, 2010) (“January 16 Declaration”), ¶ 3. Copies of  
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27 <sup>2</sup> John Doe is an alias to protect the individual’s First Amendment right to participate  
28 anonymously in a political campaign. Mr. Doe’s name is revealed in the concurrently filed  
declaration of Ronald Prentice, which Proponents’ have moved this Court to seal.

1 representative examples of documents containing internal campaign communications by or among  
2 these three individuals and other members of the “core group” are attached as exhibits to the January  
3 16 Declaration.

4         The January 7 Declaration described the role of Marketing Communications Services Inc.  
5 (“MCSI”) in the production and distribution of television advertisements for ProtectMarriage.com. *See*  
6 January 7 Declaration, ¶ 7(vii).<sup>3</sup> The January 7 Declaration stated that “[a]lthough MCSI did not have  
7 a key role in the substantive development of messaging strategy, in this capacity as a vendor, MCSI  
8 was often provided with confidential draft scripts and messages that were never publicly distributed  
9 beyond the core group of ProtectMarriage.” January 7 Decl., ¶ 7(vii). The Court’s January 8 Order did  
10 not include MCSI in the core group. Doc # 372 at 4. As Mr. Prentice’s January 16 Declaration attests,  
11 however, the head of MCSI—Bill Criswell—attended campaign focus groups in which key messaging  
12 and strategy issues were evaluated and he was a party to many key campaign communications  
13 regarding messages to test in focus groups, the creation of ads to test in focus groups, and the analysis  
14 and determination of which messages to use in public advertising. He thus regularly received the most  
15 sensitive internal communications regarding campaign strategy and messaging (including draft scripts,  
16 advertisements for testing in focus groups, and the results and analysis of focus groups and polling).  
17 January 16 Declaration, ¶ 3(d), 6. Copies of representative emails attached to the January 16  
18 Declaration demonstrate the involvement of Mr. Criswell in the innermost discussions of strategy and  
19 messaging within the ProtectMarriage.com campaign.

20         The failure to include or adequately describe these four individuals in the January 7 Declaration  
21 was an oversight caused by the extreme time constraints faced by legal counsel and Proponents in  
22 preparing for this trial, the difficulty of remembering the precise scope of involvement of all persons  
23  
24  
25  
26

27 <sup>3</sup> The January 7 Declaration contained Bill Criswell’s name in a parenthetical alongside  
28 MCSI (“Marketing Communications Services, Inc. (Bill Criswell)”) and then described MCSI’s  
role in the campaign. January 7 Declaration, ¶ 7(vii).

1 engaged in the formulation of strategy and messages in such a massive and complex citizens' campaign  
2 extending over months, and Mr. Prentice's own personal work schedule. *Id.* at ¶ 3.

### 3 4 ARGUMENT

5  
6 The sweeping scope of Plaintiffs' discovery requests implicates fundamental First Amendment  
7 rights. As this Court has summarized, the Ninth Circuit held that "Proponents' First Amendment  
8 privilege protects 'private, internal campaign communications concerning the formulation of strategy  
9 and messages.'" Doc # 372 at 2 (quoting *Perry*, No. 09-17241, slip op at 36 n.12) (emphasis omitted).  
10 "The privilege protects 'communications among the core group of persons engaged in the formulation  
11 of campaign strategy and messages.'" *Id.* (emphasis omitted). The Ninth Circuit left the determination  
12 of which persons "logically should be included" in the core group to this Court. *Id.*

13  
14 The Court "has wide discretion" to reopen its January 8 Order to ensure that all who properly  
15 belong in the "core group" are reflected in that Order. *Little v. City of Seattle*, 863 F.2d 681, 685 (9th  
16 Cir.1988). Sound reasons exist for doing so. Each of the four persons listed above played an important  
17 role in, and/or were privy to, the most sensitive internal deliberations of the ProtectMarriage.com  
18 campaign regarding messages and strategy. Messrs. Peterson and Wirthlin were involved in  
19 formulating campaign messages and advertising and sometimes were the very voices of the campaign  
20 to the public. January 16 Declaration, ¶¶ 3, 4. Mr. Doe was involved in focus-group research, which  
21 has become an indispensable component of modern campaign messaging and strategy. *Id.*

22  
23 Mr. Criswell was also involved in focus-group research as well as the production and distribution  
24 of television and radio advertisements. *Id.* at ¶¶ 3, 4, 6; January 7 Declaration, ¶ 7(vii). While Mr.  
25 Criswell has submitted a declaration stating that "MCSI did not participate in conceptualizing or  
26 devising the advertising campaign," Doc # 351-1, the communications attached to Mr. Prentice's  
27 declaration bring into sharp focus the fact that Mr. Criswell, by virtue and necessity of his role as a  
28

1 critical campaign vendor of advertising, was systematically and routinely copied on many of the most  
2 confidential and sensitive internal communications about content and strategy of the campaign's  
3 messaging. In this regard, he was similar to the assistants of "core group" members who, while they  
4 might not themselves have "conceptualized or devised" campaign messaging and strategy, were  
5 nonetheless necessarily part and parcel of the formulation of this privileged speech by virtue of their  
6 job. To exclude Mr. Criswell from the "core group" is to destroy the privilege where its application is  
7 most fervently needed—for internal communications among the very heart of the campaign concerning  
8 the formulation of messaging and strategy. *See Perry*, No. 09-17241, slip op. at 30.

10 Thus, the communications of these four individuals with or from other core-group members  
11 concerning messaging or strategy lie at the very heart of the First Amendment privilege defined by the  
12 Ninth Circuit and implemented by the Court's January 8 Order. The documents attached to the January  
13 16 Declaration make this fact plain.

15 First Amendment rights are of paramount importance. The rights of these four individuals and  
16 the campaign should not be denied merely because their names or the scope of their roles in the  
17 campaign were omitted from the January 7 Declaration. The time pressures of this case are obvious  
18 and severe. While preparing for a January 11 trial, Proponents had very little time from the Ninth  
19 Circuit's January 4 opinion to review the entire course of a long campaign and its many participants to  
20 determine which individuals should be included in the "core group." Innocent omissions were  
21 inevitable and came to light as Proponents continued to review the history of the campaign and  
22 documents associated with it.

24 Moreover, there is no prejudice to Plaintiffs in reopening the Order to add these additional names  
25 to the core group. Production of Proponents' documents pursuant to the January 8 Order has just been  
26 completed, save for documents pertaining to the four individuals that are the subject of this motion.  
27 While some documents bearing communications between these four additional individuals and other  
28

1 core group members may have already been produced, Plaintiffs had no right to privileged documents  
2 in the first place and, given the short timeframe since production, cannot be said to have relied on them  
3 to their detriment in preparing and trying their case. The balance of rights and equities favors  
4 amending the order to add these four individuals to the core group. *See Perry*, No. 09-17241, slip op.  
5 at 37.  
6

7 **CONCLUSION**

8 For the foregoing reasons, Proponents respectfully request that the Court grant this motion to  
9 amend the January 8 Order (Doc # 372) to add Richard Peterson, Robb Wirthlin, John Doe, and Bill  
10 Criswell to the “core group” defined in that Order.  
11

12  
13 Dated: January 18, 2010

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By: /s/ Charles J. Cooper  
Charles J. Cooper