

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"), move for reconsideration of the
3 admission of documents at trial based on the Ninth Circuit's
4 opinion in Perry v Schwarzenegger, 602 F3d 976 (9th Cir 2010)
5 ("Perry II"). Doc #640-2. Dr Hak-Shing William Tam, a proponent,
6 moves by separate motion. Doc #642. Plaintiffs and plaintiff-
7 intervenor City and County of San Francisco ("CCSF") oppose the
8 motions. Doc ##659, 660. Proponents and Tam ask the court to
9 strike 28 documents that were admitted during trial along with
10 related testimony. For the reasons explained below, the motions to
11 strike are DENIED.

I

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14 The court may grant a motion to reconsider an earlier
15 ruling when the moving party puts forth newly discovered evidence
16 or shows a material change in law or a "manifest failure" by the
17 court to consider material facts or dispositive law. See Civ LR 7-
18 9(b). Proponents argue that Perry II constitutes an intervening
19 change in law supporting reconsideration.

20 Perry II explains that a First Amendment privilege
21 against disclosure applies to a core group of persons "engaged in
22 the formulation of strategy and messages, whether or not they are
23 members of a single organization or entity." Id at 981. An
24 individual asserting a First Amendment privilege against disclosure
25 must show that he or she formed a "single political association"
26 with a group of persons. Id. Thus, a single political association
27 can consist of individuals who are members of various organizations
28 as long as those individuals together formed an associational bond.

1 Proponents' motion seeks reconsideration of the court's
2 prior rulings regarding the application of the First Amendment
3 privilege in light of Perry II. Proponents assert that the court
4 previously misinterpreted Perry v Schwarzenegger, 591 F3d 1147,
5 1165 n12 (9th Cir 2010) ("Perry I") as requiring an association to
6 consist solely of members of a single entity or organization. Now,
7 according to proponents, the Ninth Circuit has made clear that an
8 association for purposes of the First Amendment privilege can
9 consist of individuals who are members of various entities or
10 organizations, as long as those individuals show they have created
11 a single political association protected by the First Amendment.
12 Perry II, 602 F3d at 981.

13
14 II

15 The court determined on January 8, 2010 the core group of
16 persons engaged in the formulation of strategy and messages for
17 ProtectMarriage.com, proponents' campaign to pass Proposition 8.
18 Doc #372. Based on the evidence presented, the court concluded
19 that the core group of individuals engaged in the formulation of
20 strategy and messages for the ProtectMarriage.com campaign
21 consisted of the proponents, executive committee, spokespersons and
22 volunteers along with consulting firms. Id at 4. The court did
23 not limit the core group to those individuals who were members of
24 the entity "ProtectMarriage.com." Instead, consulting firms were
25 included precisely because the evidence showed that the consulting
26 firms and ProtectMarriage.com had formed an associational bond.
27 See Doc #496 at 3 (noting that Magistrate Judge Spero had
28 incorporated into the core group "almost every individual and

1 entity referenced" by proponents). Thus, Perry II does not
2 announce a standard different from the standard the court applied
3 in January 2010.

4 Even if the court were to conclude that Perry II amounts
5 to an intervening change in law, proponents have not made a showing
6 sufficient for the court to conclude the documents at issue are
7 protected by any privilege. The First Amendment does not protect a
8 communication against disclosure simply because it was intended to
9 be private. Rather, in the initiative campaign context, the First
10 Amendment protects against disclosure only those communications
11 about strategy or message formulation between or among individuals
12 who have come together under an associational bond. See Perry I,
13 591 F3d 1165 n12. While Perry II makes clear that individuals may
14 form an associational bond even if they are members of different
15 entities, Perry II does not alter the requirement that the
16 individuals demonstrate the existence of an associational bond.
17 See Perry II, 602 F3d at 981.

18 To be a member of a core group of persons developing
19 campaign strategy and messages, the individual must be part of a
20 "single political association," which requires more than simply
21 sharing a common political goal. Perry II, 602 F3d at 981. All
22 people who worked to pass Proposition 8 and occasionally
23 communicated cannot be said to have formed a political association.
24 The existence of a political association must be supported by at
25 least some evidence. See Perry II, 602 F3d at 981.

A

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2 Proponents submit the declaration of Ron Prentice, Doc
3 #640-3, the chairman of ProtectMarriage.com, as evidence to support
4 a finding that members of ProtectMarriage.com formed a "single
5 political association" with members of other organizations working
6 to pass Proposition 8. Prentice declares that ProtectMarriage.com
7 "sometimes" coordinated on projects with other organizations and
8 "occasionally" reimbursed their expenses. Doc #640-3 at 3 ¶13.
9 Prentice also declares that individual members of
10 ProtectMarriage.com were involved in other organizations that
11 supported Proposition 8. Id at 4 ¶4. The declaration is
12 consistent with Prentice's testimony during his deposition that
13 ProtectMarriage.com's relationship with other organizations working
14 to pass Proposition 8 was nothing more than "a loose association of
15 people walking in the same direction." Doc #661-2 at 13:9-10.

16 Proponents argue the Prentice declaration supports a
17 claim of privilege over:

- 18 • PX 2350 (an email between Prentice and individuals at the
19 Fatherhood Foundation);
- 20 • PX 2385 (an email from a ProtectMarriage.com vendor to an
21 individual associated with the Arlington Group);
- 22 • PX 2403 (an email from an individual associated with the
23 Family Research Council to Prentice);
- 24 • PX 2455 (emails from individuals associated with the
25 National Organization for Marriage to Prentice and
26 another ProtectMarriage.com associate);
- 27 • PX 2561 (an email from a pastor of the Calvary Chapel
28 Costa Mesa Church to Prentice);

- 1 • PX 2562 (an email chain between Prentice and an
2 independent consultant and donors discussing fundraising
3 strategy);
- 4 • PX 2589 (an email from Prentice to United Families
5 International);
- 6 • PX 2598 (a fundraising email from a ProtectMarriage.com
7 vendor to an anonymous major donor);
- 8 • PX 2656 (an email between ProtectMarriage.com associates
9 and Pastor Jim Garlow and the Church Communication
10 Network regarding a simulcast funded by
11 ProtectMarriage.com);
- 12 • PX 2773 (emails between Pastor Garlow and
13 ProtectMarriage.com regarding the simulcast);
- 14 • PX 2599, PX 2630, PX 2631 (emails inviting various
15 organizations to participate in grassroots conference
16 calls);
- 17 • PX 2620 (an email from the organizer of an earlier
18 version of a ballot initiative similar to Proposition 8
19 to ProtectMarriage.com).

20 The Prentice Declaration does not support a claim of privilege over
21 any of the exhibits listed above. Prentice explains that the
22 communications involved individuals who "occasionally" communicated
23 regarding a common goal. Occasional communication does not suffice
24 to support the existence of a political association.

25 Proponents also argue that the following exhibits are
26 privileged:

- 1 • PX 2633 (an email forwarding a statement of unity signed
2 by Dr Tam). The document was apparently produced because
3 proponents did not believe Dr Tam was a member of
4 ProtectMarriage.com's core group despite a court order
5 giving him that designation. Doc #640-3 at 11;
- 6 • PX 2650, PX 2651 (emails between Prentice's assistant and
7 Dr Tam). The documents were apparently produced because
8 proponents did not believe Dr Tam was a member of
9 ProtectMarriage.com's core group, despite a court order
10 granting him that status. See Doc #640-3 at 11.

11 To the extent these documents are core group communications as
12 defined by the court's January 8 order, Doc #372, proponents'
13 decision to produce them constitutes a waiver of any claim of First
14 Amendment privilege.

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16 B

17 Proponents submit the declaration of Ned Dolejsi, a
18 member of the executive committee of ProtectMarriage.com, to
19 support a finding that Dolejsi had formed an associational bond
20 with members of the Catholic leadership in California. Doc #640-4.
21 Through the Dolejsi declaration proponents attempt to strike PX
22 2389, an election day email celebrating the successes of the
23 Catholic leadership in the effort to pass Proposition 8. But even
24 if the court were to conclude that Dolejsi had an associational
25 bond with Catholic leadership sufficient to invoke a privilege
26 under the First Amendment, the Dolejsi declaration makes clear that
27 a "courtesy copy" of this email was sent to ProtectMarriage.com
28 executive committee member Doug Swardstrom. Doc #640-4 at 4 ¶5.

1 Because no evidence in the record shows that Swardstrom had formed
2 an associational bond with Catholic leadership, PX 2389 cannot be
3 privileged under the First Amendment.

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6 Proponents submit the declaration of Mark Jansson, an
7 official proponent of Proposition 8, to support a finding that
8 Jansson formed a political association with members of the
9 leadership of the Mormon Church. Doc #640-5. Proponents argue
10 that this associational bond allows Jansson to claim a privilege
11 over PX 2554, an email from a Mormon leader to various church
12 members who were working to pass Proposition 8, and PX 2555,
13 minutes from a Mormon church public affairs council meeting where
14 Jansson spoke to describe the efforts of ProtectMarriage.com. Id.
15 Only the portion of the minutes relating to Jansson's presentation
16 is in evidence; the remainder of PX 2555 is redacted.

17 Even if the court were to conclude that Jansson could
18 claim a First Amendment privilege over strategy and message
19 communication within a core group of Mormon leadership, the
20 exhibits here do not fall within the scope of such a privilege. PX
21 2554 is an email sent to a wide audience of Mormon leaders and
22 "other interested persons." It is on its face not a communication
23 solely within a core group of Mormon leaders. PX 2555 is not
24 privileged because it reflects Jansson's communication on behalf of
25 ProtectMarriage.com to Mormon leaders explaining the steps
26 ProtectMarriage.com asked of the Mormon church. No evidence
27 supports a conclusion that ProtectMarriage.com and the Mormon
28 church are a "single political association;" accordingly, a

1 communication from ProtectMarriage.com to the Mormon church cannot
2 be privileged under the First Amendment

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6 Dr Hak-Shing William Tam, an official proponent of
7 Proposition 8, submits his own declaration to support a finding
8 that he can assert a First Amendment privilege over communications
9 to individuals associated with the Traditional Family Coalition, of
10 which Tam is executive director. Doc #642-3. Even if the court
11 were to conclude that Tam could claim a First Amendment privilege
12 over communications about strategy and messages within a core group
13 associated with the Traditional Family Coalition, none of the
14 documents identified by Tam in his motion would fall within that
15 privilege.

16 Tam asks the court to strike PX 2472, PX 2476 and PX
17 2612, emails from Tam to various "friends" of the Traditional
18 Family Coalition. The Ninth Circuit held that a similar letter
19 from Tam to these same "friends" was "plainly not a private,
20 internal communication." Perry I, 591 F3d 1165 n12. The law has
21 not changed, and these communications are not privileged.

22 PX 2504, an email between Tam and an anonymous associate,
23 does not involve the formulation of strategy and messages. Because
24 Tam is instead soliciting "active support" from his associate, see
25 Perry I, 591 F3d at 1165 n12, PX 2504 does not fall within any
26 claim of First Amendment privilege. PX 2538, an email to pastors
27 and ministry leaders attempting to motivate supporters of
28 Proposition 8, and PX 2609, a fundraising dinner invitation, are

1 not communications about strategy and messages protected by the
2 First Amendment. See Perry I, 591 F3d at 1165 n12 (holding that
3 messages about "persuasion, recruitment or motivation" are not
4 privileged). PX 2627 is an email from ProtectMarriage.com to Tam
5 and the head of another organization working to pass Proposition 8.
6 Because no evidence supports a finding that ProtectMarriage.com
7 formed a "single political association" with the other
8 organization, the communication is not privileged.

9 PX 2640, an email between Tam and ProtectMarriage.com
10 counsel Andrew Pugno, was produced despite the court's holding that
11 both Tam and Pugno are members of ProtectMarriage.com's core group.
12 See Doc #372. Any claim of privilege was thus waived when the
13 document was produced.

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15 III

16 For the reasons explained above, the exhibits identified
17 in proponents' and Tam's motions to strike are not privileged.
18 Accordingly, the motions to strike, Doc ##640, 642, are DENIED.
19 The exhibits and related testimony will therefore remain in the
20 trial record.

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24 IT IS SO ORDERED.

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27 VAUGHN R WALKER
28 United States District Chief Judge