

Exhibit 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, JUDGE

KRISTIN PERRY, ET AL.,)
)
Plaintiffs,)
)
VS.) NO. C 09-2292 VRW
)
ARNOLD SCHWARZENEGGER, ET AL.,)
) San Francisco, California
Defendants.) Wednesday
) August 19, 2009
) 10:02 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs: Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071-3197
BY: CHRISTOPHER D. DUSSEAUT, ESQ.
THEANE E. KAPUR, ESQ.
THEODORE J. BOUTROUS, JR., ESQ.
and
Gibson, Dunn & Crutcher
555 Mission Street
Suite 3000
San Francisco, California 94105-2933
BY: ENRIQUE A. MONAGAS, ESQ.
and
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
BY: THEODORE B. OLSON, ESQ.
MATTHEW D. MCGILL, ESQ.

Reported By: Belle Ball, CSR 8785, RMR, CRR
Official Reporter, U.S. District Court

(Appearances continued, next page)

1 which the -- and it is unclear at this point the degree to
2 which the State Defendants may seek to defend these alleged
3 governmental interests, San Francisco's motion for permissive
4 intervention under Rule 24(b) will be granted.

5 And I would suggest, unless any of the parties
6 object, that any answer or otherwise -- any answer or
7 responsive pleading to the complaint and intervention by the
8 City and County of San Francisco be answered in ten days.

9 Is that possible, Mr. Cooper, on your side?

10 **MR. COOPER:** It is, indeed, Your Honor.

11 **THE COURT:** Very well. Now, let's turn to case
12 management. And first of all, I want to commend the parties,
13 and particularly Mr. Olson and Mr. Cooper. You have obviously
14 taken to heart the discussion that we had here last month, and
15 the order that was issued in the wake of the earlier case
management statements.

17 I thought that the specification of issues that the
18 Plaintiffs proposed and the responses by the Intervenor
19 Defendants was very helpful, very helpful indeed, in narrowing
20 the issues, and defining what it is that is before us, in terms
21 of how we are going to develop the record in this case.

22 Obviously, not every one of these facts is agreed to
23 by the Intervenors, but a number of them were. And, quite
24 understandable that in some instances Mr. Cooper might have a
25 little different verbal formulation of some of them.

1 But nonetheless, I think we have made and you have
2 made some very considerable progress in shaping up the issues
3 so that we can proceed to a prompt determination of the cause
4 that is before the Court.

5 Now, before telling you what schedule I have in mind,
6 I gather, Mr. Cooper, at some point or other, it would be your
7 intent to file a motion for judgment on the pleadings as to
8 some -- perhaps more than some issues. Perhaps quite a number
9 of issues. Is that a fair reading?

10 **MR. COOPER:** That is, Your Honor, yes, sir. We -- we
11 believe that there are several issues on which -- on which this
12 Court's not free to depart from binding precedent in the Ninth
13 Circuit. And that -- and that if we are right on that, it
14 would significantly skinny down the -- now the discovery
15 burdens that will face the Plaintiffs and the Defendant
16 Intervenors as we go forward.

17 We may not be right, but we -- we would certainly --
18 we believe we are, and we would like an initial opportunity to
19 present those arguments to the Court.

20 **THE COURT:** I'm inclined to think that while we
21 should, in view of your position, schedule a dispositive motion
22 schedule with a hearing date, that at least some of the basic
23 discovery in the case can and should go forward very promptly.

24 I assume you want to take the depositions of the
25 Plaintiffs. And, Mr. Olson has indicated that he has some

1 depositions in mind of your folks. And, seems to me we can get
2 those depositions out of the way very quickly. And, should do
3 so.

4 What's your reaction to that?

5 **MR. COOPER:** Your Honor, I don't quarrel with that
6 proposition.

7 I will say that some of the things that Mr. Olson
8 would like to inquire into of my clients -- the official
9 Proposition 8 proponents -- going to voter motivation are
10 issues that we earnestly believe are not fit and appropriate
11 for judicial inquiry, and that in fact, would raise the gravest
12 possible First-Amendment issues.

13 And we -- we have cited to the Court a case called
14 *Sasso* (Phonetic), but we would like an opportunity to fully
15 brief that proposition before we get off in the direction of
16 taking depositions of our clients and subpoenaeing their
17 e-mails and the rest of it, going to their internal campaign
18 strategies and the rest of it.

19 **THE COURT:** Disagreements as to the scope of
20 discovery are not unusual.

21 **MR. COOPER:** No, Your Honor, they're not. But
22 discovery that at least we believe we would be privileged
23 against on a constitutional basis are pretty unusual.

24 And we think this is a -- this, at least as we
25 understand their intentions, would be unprecedented insofar as

1 we have been able to tell. We have not been able to find a
2 single case where this kind of discovery was taken of the
3 proponents of a referendum measure in this state or in any
4 other.

5 And, so we think it's gravely serious issue, Your
6 Honor. We would urge the Court to give us an opportunity to
7 fight this out in briefing to the Court before we get down that
8 road.

9 And if we do go down that road, obviously we will
10 want to take the same kind of deposition testimony, as well as
11 document inquiries of those --

12 **THE COURT:** Who oppose Proposition 8.

13 **MR. COOPER:** Of course, Your Honor.

14 **THE COURT:** All right.

15 **MR. COOPER:** But --

16 **THE COURT:** What, in your view -- without getting too
17 far down the road, in your view, what is the scope of
18 appropriate discovery with reference to the proponents and the
19 opponents of Proposition 8?

20 **MR. COOPER:** That -- and I don't want to get too far
21 in front of myself, because to be quite honest with Your Honor,
22 I'm not sure where that line can safely be drawn as a
23 First-Amendment matter.

24 I do believe that when a judicial inquiry into the
25 intendment and meaning and purpose of a voter referendum is

1 before the Court, that the one clear and certain analysis is to
2 test the conceivable legitimate state interests that it might
3 serve. And if it will serve none, the inference that flows
4 from that is that there was some illegitimate purpose at work.
5 That was the *Romer* case.

6 The *Romer* case concluded, the Court concluded that
7 "We have assessed against the language of the statute, we have
8 assessed against every conceivable purpose offered to us, or
9 that we could think of ourselves," the Court. "And we've
10 assessed it against its various impacts and effects."

11 And --

12 **THE COURT:** What discovery was taken in the *Romer*
13 case on that issue?

14 **MR. COOPER:** Your Honor, the interesting thing, I
15 understand there was a trial in this case. I don't understand
16 there was any discovery taken into the --

17 **THE COURT:** Well, that's refreshing, a trial without
18 discovery. That's like the old days.

19 **MR. COOPER:** Well, actually, there was discovery, but
20 it -- but there was no discovery taken into -- that we've been
21 able to find, in that case or any other, into the subjective
22 motivations of the voters, which -- or into the subjective
23 motivation presumably of their proxies, those that organized
24 the referendum effort, and those who organized and provided the
25 strategy for the campaign for the referendum, itself. We

1 haven't been able to find any evidence that a party was allowed
2 to make inquiry into those things.

3 And, think of what that might mean. How could
4 proposition proponents, future proposition proponents, not be
5 chilled in the exercise of their First-Amendment rights as they
6 sought to bring forward for consideration by the people these
7 types of propositions. So, Your Honor, we think that that's
8 off the table.

9 Clearly, the kind of inquiry that *Romer* engaged in is
10 plenty on the table. I think it is going to be hard for me
11 probably to convince myself, let alone you, that -- that the
12 types of public statements, official campaign literature,
13 certainly the official ballot information and brochures that
14 have the imprimatur of the state, and go to every voter, those
15 things are, it would appear, legitimate sources of information
16 about the purposes of the referendum.

17 But again, Your Honor, the -- the inquiries that we
18 think neither side should be allowed to take of the other are
19 those that go to -- and we believe would encroach and gravely
20 threaten First-Amendment freedoms.

21 **THE COURT:** Mr. Olson, what are your views on this
22 subject?

23 **MR. OLSON:** I would like to have my colleague,
24 Mr. Boies, address the case management issues.

25 **THE COURT:** All right. Mr. Boies? You've taken a

1 lot of discovery in your life.

2 **MR. BOIES:** I have, Your Honor. And one of the
3 things that I think it underscores is what the Court said,
4 which is that discovery disputes are not uncommon, and that
5 they ordinarily are worked out in the course of discovery.

6 I think the very issue that Mr. Cooper candidly
7 addresses, which is the difficulty of finding exactly where
8 that line is, is something that experiences counsel can try to
9 work out among themselves, and if there's a problem, bring to
10 the Court.

11 I frankly do not believe that we will have a problem,
12 at least at the initial stages of the discovery, in limiting
13 discovery in a way that does not impermissibly infringe on any
14 First-Amendment issues. I think --

15 **THE COURT:** But I gather that you are planning some
16 discovery of the proponents.

17 **MR. BOIES:** Yes, Your Honor. And for example, I
18 think Mr. Cooper's exactly right, that there is some stuff that
19 is clearly on the table; there's some stuff that I think is
20 probably not on the table unless we were to make a showing that
21 we have not yet made; and then there's a number of things that
22 are in the middle.

23 I think that in terms of their official statements,
24 the statements that were made publicly, none of those, I think,
25 are something that can be plausibly argued should not be

1 subject to discovery. Certainly, there are subjective,
2 unexpressed motivations. Those things I think we would not be
3 inquiring into, because we do not believe that those would
4 actually go to the issues that we are presenting to the Court.

5 So, I think that if there is a -- if there's a gray
6 area, there will be some objectively-stated assertions,
7 propositions, that may be encompassed in documents and the like
8 that may or may not have become public, and there may be some
9 issue as to what it means to say something has become public.
10 How broad does have it to be distributed in order to be
11 classified as public?

12 Those are all the kinds of gray-area discovery
13 decisions that we will make along the way. And I don't think
14 that any of those ought to hold up the commencement of
15 discovery, because no matter whose view you take, and -- and it
16 may be that we're not even in disagreement as to where the line
17 will ultimately be drawn, we are in agreement that there are
18 many areas that are going to be subject to discovery.

19 And if we are going to get this process going, and
20 really achieve what I know the Court's objective is and what
21 all of our objective is, which is a prompt resolution of this,
22 I think we need to get started. And I think that we can get
23 started on fact discovery, we can get started in preparing
24 expert reports now.

25 That doesn't mean that you can't have dispositive

1 motions. But what it means is that we don't have to delay the
2 commencement of the work towards trial until we go through the
3 dispositive motions.

4 **THE COURT:** Well, with that in mind, let me discuss
5 with you and Mr. Cooper a schedule that I have in mind, based
6 upon what lies before me in the next several months.

7 And, that would be that we commence discovery in this
8 case today. That by the 2nd of October, experts, expert
9 witnesses, opinion witnesses, will be designated. We will have
10 a close of discovery by November 30, except for rebuttal
11 witnesses, which will be designated at that time, rebuttal
12 expert witnesses.

13 We will have a pretrial conference on the 17th of
14 December, a close of rebuttal expert recovery on the 31st of
15 December, and a trial beginning January 11.

16 Is that --

17 **MR. BOIES:** Your Honor, I think that is easily
18 doable.

19 **THE COURT:** Good. Mr. Cooper?

20 **MR. COOPER:** Your Honor, I wasn't able, honestly, to
21 get all of that down, but --

22 **THE COURT:** Well, let's go through it again.

23 **MR. COOPER:** Yeah, thank you.

24 **THE COURT:** Close of all discovery except expert
25 rebuttal discovery, November 30. Designation of experts,