

## **EXHIBIT 1**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

## TRANSCRIPT OF PROCEEDINGS

**Reported By:** *Katherine Powell Sullivan, CSR #5812, RPR, CRR  
Official Reporter - U.S. District Court*

## PROCEEDINGS

**DECEMBER 16, 2009**

10:00 A.M.

**THE CLERK:** Calling civil case 09-2292, Kristin Perry, et al. versus Arnold Schwarzenegger, et al.

Can I get the appearances from the plaintiffs' side, please.

**MR. OLSON:** Good morning, Your Honor.

**THE COURT:** Good morning, Mr. Olson.

**MR. BOIES:** Good morning, Your Honor.

13 David Boies, Boise, Schiller & Flexner, also on  
14 behalf of plaintiffs.

**THE COURT:** Good morning, Mr. Boies.

**MR. BOUTROUS:** Good morning, Your Honor.

17 Theodore Boutrous, also from Gibson, Dunn & Crutcher,  
18 for plaintiffs.

**THE COURT:** Good morning.

**MR. DUSSEAULT:** Good morning, Your Honor.

**THE COURT:** Good morning.

**MR. MCGILL:** Good morning, Your Honor.

25                   Matthew McGill, Gibson, Dunn & Crutcher, for the

1 the "electorate at large" is the language that proponents have  
2 used -- their communications to voter groups and to  
3 individuals, and door-to-door communications from script would  
4 be privileged.

5 And so we are being blocked from that discovery. We  
6 served this discovery months and months ago, and so it really  
7 is hindering us.

8 As the Court knows, we have many, many arguments that  
9 do not depend on this information. So I'm not standing here  
10 telling the Court that we can't make our case without it. But  
11 it seems fair game. And it's clearly outside the narrow  
12 privilege, in terms of the documents that are covered by the  
13 Ninth Circuit's ruling, internal communications that were  
14 private.

15 **THE COURT:** What are the entities to which these  
16 subpoenas have been served?

17 **MR. BOUTROUS:** I think we have some church  
18 organizations, other advocacy groups or other organizations  
19 that were supporting Proposition 8.

20 And we're -- you know, we would limit it to the same  
21 sort of sphere of documents.

22 **THE COURT:** Were these entities all supporters of  
23 Proposition 8, as opposed to, say, the Wall Street Journal,  
24 which is obviously not involved in the campaign except as a  
25 media organization?

1 you're making against Proposition 8?

2 Could it be that if discovery goes too broad in this  
3 case, to impinge upon the First Amendment, you would jeopardize  
4 any judgment that you obtain adverse to the constitutionality  
5 of Proposition 8?

6 **MR. BOUTROUS:** We do want to be careful on that, Your  
7 Honor. We believe that we -- I want to be very clear. We  
8 believe we can -- we can prevail and will prevail, ultimately,  
9 on these issues, even if we don't have these documents; that  
10 the Romer test -- we think there are alternative ways to  
11 prevail under Romer and under the Supreme Court's other  
12 decisions, that, yes, if we have evidence that shows improper  
13 motivations, that adds to the case.

14 And so we would be sensitive to that, I think. And I  
15 think, though, that if we receive discovery, we receive  
16 documents, and the Court were to analyze the case as -- with  
17 the documents and with the information, and without it, there  
18 would be a way to ensure that any ruling that was favorable to  
19 us did not rise or fall on those documents. And the fact that  
20 they had been produced or compelled to be produced would not  
21 affect the judgment.

22 **THE COURT:** Well, under those circumstances, doesn't  
23 that undermine the position which the Ninth Circuit has told us  
24 the plaintiffs must demonstrate in order to obtain this  
25 discovery; that is, it must meet a higher than usual standard

1 of relevance and make a compelling showing of need?

2 **MR. BOUTROUS:** Absolutely, Your Honor, as to the  
3 documents that are covered by the privilege, the internal  
4 communications.

5 And right now, today, I'm only talking about our  
6 efforts to seek things that we think are clearly outside the  
7 privilege, which are subject to the normal rules because they  
8 are not private internal campaign communications.

9 But I do take your point. We are very sensitive to  
10 that fact. We want to build the best record for our clients we  
11 can, and don't want to take risks. And we have thought we have  
12 been well within the heart of the First Amendment, and very  
13 respectful of those interests. It's something we would take  
14 into account.

15 As for discovery, I don't think that having discovery  
16 on issues, particularly things that are clearly outside the  
17 privileges laid out by the Ninth Circuit, would jeopardize our  
18 arguments and jeopardize any judgment we might obtain.

19 **THE COURT:** Thank you. Anything further?

20 **MR. BOUTROUS:** I think that's it, Your Honor. Thank  
21 you very much.

22 **THE COURT:** All right. Let's see, Mr. Cooper, you  
23 said which of your colleagues, Mr. Thompson, is --

24 **MR. COOPER:** No, Your Honor. Mr. Panuccio.

25 **THE COURT:** What's that?