

Volume 1

Pages 1 - 70

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. DUSSEAULT, 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)

APPEARANCES, CONTINUED:

Also For Plaintiffs: BOIES, SCHILLER & FLEXNER
333 Main Street
Armonk, New York 10504
BY: DAVID BOIES, ESQ.
JEREMY M. GOLDMAN, ESQ.
THEODORE H. UNO, ESQ.

For Defendants Schwarzenegger, Scott and Horton:
Mennemeier, Glassman & Stroud
980 9th Street
Suite 1700
Sacramento, California 95814
BY: KENNETH C. MENNEMEIER, ESQ.

For Defendant Attorney General Edmund G. Brown, Jr.:
California Department of Justice
Office of the Attorney General
1300 I Street
17th Floor
SACRAMENTO, CALIFORNIA 95814
BY: GORDON B. BURNS
Deputy Solicitor General
and
California Department of Justice
455 Golden Gate Avenue
Suite 11000
San Francisco, California 94102
BY: TAMAR PACHTER, ESQ.

For Defendant Logan:
Office of the County Counsel
County of Los Angeles
500 West Temple Street
Room 652
Los Angeles, California 90012
BY: JUDY W. WHITEHURST
Principal Deputy County Counsel

(Appearances continued, next page)

APPEARANCES, CONTINUED:**For Defendant Patrick O'Connell:**

Office of County Counsel
County of Alameda
1221 Oak Street
Suite 450
Oakland, California 94612

BY: CLAUDE F. KOLM
LINDSEY STERN
Deputy County Counsel

**For Proposed Intervenor Plaintiffs Our Family Coalition,
Lavender Seniors of East Bay, and PFLAG:**

American Civil Liberties
Union Foundation
125 Broad Street
18th Floor
New York City, New York 10004-2400

BY: JAMES D. ESSEKS, ESQ.
and

American Civil Liberties Union
Foundation of Northern California
39 Drumm Street
San Francisco, California 94111

BY: ELIZABETH GILL, ESQ.
and

Lambda Legal
3325 Wilshire Boulevard
Suite 1300
Los Angeles, California 90010

BY: JENNIFER C. PIZER, ESQ.
and

National Center for Lesbian Rights
870 Market Street
Suite 370
San Francisco, California 94102

BY: SHANNON PRICE MINTER, ESQ.
CHRISTOPHER STOLL, ESQ.

(Appearances continued, next page)

APPEARANCES, CONTINUED:

For Proposed Intervenor Defendant Campaign for California Families:

Liberty Counsel
Post Office Box 11108
Lynchburg, Virginia 24506
BY: RENA M. LINDEVALDSEN, ESQ.

For Intervenor Defendants:

Cooper & Kirk
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
BY: CHARLES J. COOPER, ESQ.
DAVID H. THOMPSON, ESQ.

For Intervenor Defendants:

Alliance Defense Fund
15100 North 90th Street
Scottsdale, Arizona 85260
BY: BRIAN W. RAUM, ESQ.
JAMES A. CAMPBELL, ESQ.

For City and County of San Francisco:

City and County of San Francisco
Office of the City Attorney
1390 Market Street
Seventh Floor
San Francisco, California 94102
BY: THERESE STEWART, ESQ.
ERIN BERNSTEIN, ESQ.
CHRISTINE VAN AKEN, ESQ.
DENNIS HERRERA, ESQ.

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

1 **WEDNESDAY, AUGUST 19, 2009**

2 **10:02 A.M.**

3 **P R O C E E D I N G S**

4 **THE CLERK:** Calling Civil Case 09-2292, Christine
5 Perry, et al. versus Arnold Schwarzenegger, et al.

6 Appearances on the Plaintiffs' side, please.

7 **MR. OLSON:** Good morning, Your Honor. Theodore B.
8 Olson, Gibson, Dunn & Crutcher, on behalf of the Plaintiffs.

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

10 **MR. BOIES:** Good morning, Your Honor. David Boies of
11 Boies, Schiller & Flexner, on behalf of Plaintiffs.

12 **THE COURT:** Mr. Boies, good morning.

13 **MR. BOUTROUS:** Theodore J. Boutrous, Jr., for the
14 Plaintiffs. Good morning, Your Honor.

15 **THE COURT:** Mr. Boutrous, good morning.

16 **MS. KAPUR:** Good morning. Theane Kapur for the
17 Plaintiff.

18 **MR. MONAGAS:** Good morning, Your Honor. Enrique
19 Monagas for the Plaintiffs.

20 **THE COURT:** Good morning.

21 **MR. GOLDMAN:** Good morning, Your Honor. Jeremy
22 Goldman of Boies, Schiller & Flexner, for the Plaintiffs.

23 **MR. UNO:** Good morning, Your Honor. Theodore Uno,
24 Boies, Schiller & Flexner, for the Plaintiffs.

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

1 McGill, Gibson, Dunn & Crutcher, for the Plaintiffs.

2 **THE COURT:** Good morning.

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

4 Christopher Dusseault, also of Gibson, Dunn & Crutcher, for the
5 Plaintiffs.

6 **THE COURT:** Good morning. Any more on the
7 Plaintiffs' side? Very well.

8 How about the other side?

9 **MR. MENNEMEIER:** Good morning, Your Honor. Ken
10 Mennemeier on behalf of Governor Schwarzenegger and two members
11 of his administration.

12 **THE COURT:** Good morning, Mr. Mennemeier.

13 **MR. MENNEMEIER:** Thank you.

14 **MS. LINDEVALDSEN:** Rena Lindevaldsen, Proposed
15 Intervenor Defendant, Campaign for California Families.

16 **THE COURT:** Good morning.

17 **MS. PACHTER:** Good morning, Your Honor. Deputy
18 Attorney General Tamar Pachter, for the Attorney General.

19 **THE COURT:** Good morning.

20 **MR. BURNS:** Good morning. Deputy Solicitor Gordon
21 Burns for the Attorney General.

22 **THE COURT:** Good morning.

23 **MS. WHITEHURST:** Good morning, Your Honor. Judy
24 Whitehurst with the Los Angeles County Counsel's office, on
25 behalf of Dean C. Logan.

1 **THE COURT:** Good morning.

2 **MR. KOLM:** Good morning, Your Honor. Claude Kolm,
3 Alameda County Counsel's Office, on behalf of Defendant Patrick
4 O'Connell, the Alameda County Clerk Recorder.

5 **THE COURT:** Good morning.

6 **MS. STERN:** Good morning, Your Honor. Lindsey Stern,
7 Alameda County Counsel's Office, on behalf of Defendant Patrick
8 O'Connell.

9 **MR. ESSEKS:** Good morning, Your Honor. James Esseks
10 from the American Civil Liberties Union, on behalf of Proposed
11 Plaintiff Intervenors Our Family Coalition, Lavender Seniors of
12 East Bay, and PFLAG.

13 **THE COURT:** I'm sorry.

14 **MR. ESSEKS:** And PFLAG.

15 **THE COURT:** Yes, all right.

16 **MR. ESSEKS:** Thank Your Honor.

17 **MS. PIZER:** Good morning, Your Honor. Jennifer
18 Pizer, Lambda Legal Defense and Education Fund, also for the
19 Proposed Plaintiff Intervenors, Our Family Coalition,
20 et cetera.

21 **THE COURT:** Good morning.

22 **MR. MINTER:** Good morning. Shannon Minter, National
23 Center for Lesbian Rights, also on behalf of Proposed
24 Intervenor Plaintiffs.

25 **THE COURT:** Good morning.

1 **MS. STEWART:** Good morning, Chief Judge Walker.
2 Terry Stewart and City Attorney Dennis Herrera, Erin Bernstein,
3 and Christine Van Aken on behalf of the City and County of
4 San Francisco.

5 **THE COURT:** Very well. Good morning.

6 **MR. COOPER:** Good morning, Mr. Chief Judge. Charles
7 Cooper of Cooper & Kirk, for the Defendant Intervenors.

8 **THE COURT:** Good morning, Mr. Cooper.

9 **MR. THOMPSON:** Good morning, Your Honor. David
10 Thompson from Cooper & Kirk, for the Defendant Intervenors.

11 **MR. RAUM:** Good morning, Your Honor. Brian Raum for
12 Defendant Intervenors.

13 **THE COURT:** Good morning.

14 **MR. CAMPBELL:** Good morning, Your Honor. Jim
15 Campbell from -- I'm sorry, on behalf of the Proposed
16 Plaintiffs Intervenors -- or, I'm sorry, the Prop 8 proponent.

17 **THE COURT:** All right. Any other appearances? All
18 right, that's quite a lineup.

19 Now, we have basically, I think, two things to do
20 this morning. We have the motions to intervene which need to
21 be addressed, and I think we should probably take up those
22 issues first. And then after we address the motions to
23 intervene, I want to talk to Counsel about case management.
24 But because the case management issues may depend upon who's in
25 the case and who's not in the case, and exactly what role

1 various parties have, I think we should take up the motions to
2 intervene first.

3 My inclination is to hear the motions to intervene by
4 the Our Family Coalition and the Campaign for California
5 Families first. And then because I think there are somewhat
6 different issues raised by the City and County of
7 San Francisco, to take up that motion.

8 So, that would be the agenda that I would set for
9 this morning. Do counsel have any alternatives that he or she
10 would like to propose?

11 **MR. OLSON:** (Shakes head)

12 **THE COURT:** All right. Let's proceed, then. Who
13 would like to lead off for the Our Family Coalition?

14 **MR. ESSEKS:** Your Honor --

15 **THE COURT:** Let's see, you are Mister --

16 **MR. ESSEKS:** Esseks.

17 **THE COURT:** Esseks.

18 **MR. ESSEKS:** Yes, Your Honor. I'm James Esseks from
19 the ACLU. Together with my colleagues at Lambda Legal and the
20 National Center for Lesbian Rights, we represent three LGBT
21 community organizations, Your Honor, that wish to intervene in
22 the lawsuit.

23 Those organizations are Our Family Coalition, which
24 is an organization that consists of families headed by same-sex
25 couples and LGBT individuals; Lavender Seniors of the East Bay,

1 which is an organization that is made up of LGBT seniors; and
2 PFLAG, Parents, Friends and Families of Lesbians and Gays,
3 which is an organization that consists both of the LGBT
4 individuals and people who are their family and their
5 supporters.

6 Your Honor, these three community organizations move
7 to intervene here for three reasons. First off, the rights of
8 these organizations' members will be significantly affected by
9 the rulings of this Court.

10 Second, these organizations want to join the lawsuit
11 in order to help illustrate the various different harms that
12 Proposition 8 inflicts on same-sex couples throughout
13 California.

14 And third, these organizations seek to intervene,
15 Your Honor, because through their counsel, they bring expertise
16 and -- a deep understanding of the issues and expertise in
17 putting together the kind of factual record that the Court has
18 indicated it is interested in developing in this case.

19 Given the liberal standards for intervention in the
20 Ninth Circuit, Your Honor, we believe that these three
21 organizations should be allowed to intervene. Either under
22 intervention as of right, or intervention with the Court's
23 permission.

24 **THE COURT:** Well, tell me what the significant
25 protectable interest of these organizations is.

1 **MR. ESSEKS:** Your Honor, the significant protectable
2 interests would be the interests of the organization's members.
3 That is, each of these organizations has among its members
4 same-sex couples who live in California who would like to
5 marry. And Proposition 8 obviously makes that impossible at
6 the moment.

7 **THE COURT:** But isn't that interest represented by
8 the Plaintiffs?

9 **MR. ESSEKS:** That is an interest that is represented
10 by the Plaintiffs, Your Honor. But in terms of getting to the
11 adequacy-of-representation prong of the
12 intervention-as-of-right analysis, they are -- first off, we do
13 share the same ultimate objective with the Plaintiffs. That
14 is, the objective of striking down Proposition 8.

15 That raises a presumption that indeed, the Plaintiffs
16 will adequately represent the interests of our clients, the
17 community organizations and their members. However, that
18 presumption is easily rebutted if the interests of our
19 organizations and the interests of the Plaintiffs' may diverge.
20 And they may diverge in multiple ways, Your Honor.

21 First off, the community organizations, through their
22 members, have experienced a range of harms from Proposition 8
23 that the two Plaintiffs -- and quite frankly, Your Honor, any
24 two couples -- cannot have experienced.

25 **THE COURT:** Well, as a practical matter, it is not

1 going to be possible to bring in every individual, with his or
2 her background, his or her socioeconomic status, views on these
3 issues. So, it's simply going to be impossible to represent
4 the entire mosaic of the backgrounds of the individuals who
5 wish to marry but are precluded from doing so by Proposition 8.

6 So, really, what does adding your group or groups to
7 this lawsuit bring that is not otherwise presented by the
8 Plaintiffs?

9 **MR. ESSEKS:** Your Honor, the -- the variety of
10 interests that the members of the community organizations can
11 present to the Court are directly relevant to legal questions
12 that this Court is going to have to grapple with.

13 For example, one of the questions the Court is going
14 to have to deal with is whether the registered domestic
15 partnership system that California has set up is an adequate
16 substitute for marriage or not. It goes to the core issue of
17 whether there is inequality here, and the degree of that
18 inequality.

19 **THE COURT:** Is that a legal question? Or a factual
20 question?

21 **MR. ESSEKS:** I think it's both, Your Honor. But
22 certainly, the facts that the community organizations can bring
23 to the Court to show the full range of harms inflicted by on
24 same-sex couples by Proposition 8, and how those harms are not
25 remediated by access to the domestic partnership system can

1 help this Court grapple with the degree and the nature of the
2 inequality that is prepared by Proposition 8.

3 So, for example, members of the community
4 organizations have lived for a number of years with domestic
5 partnership registries. And they have experienced how, in very
6 concrete terms, that registry and that registration has not
7 solved the problems that we expect the proponents to say they
8 have solved.

9 For example, situations where, for example, older
10 LGBT couples --

11 **THE COURT:** Well, but does -- is it necessary for
12 your organizations to enter as parties in the litigation, for
13 that evidence to be presented?

14 **MR. ESSEKS:** Well, Your Honor, certainly we would be
15 hard-pressed to present that evidence ourselves if we were
16 solely appearing before the Court amicus. It is possible, Your
17 Honor, that the Plaintiffs could present similar evidence.

18 But, we don't have to show, in terms of the
19 adequacy-of-representation prong of the
20 intervention-as-of-right test, that they won't represent our
21 interests. We simply need to show that the interests may
22 diverge.

23 And these organizations, with their members, are very
24 well-suited to bring to the Court and present the wide range of
25 harms, and with very specific concrete detail, in a way that

1 will give the Court a better ability to grapple with the
2 factual issues and the legal issues that the Court has to
3 decide in the course of putting together the case.

4 A second example, Your Honor, of how the -- the
5 myriad experiences of the members of our community
6 organizations are relevant to legal issues is in the -- one of
7 the in-process claims that is in both the Plaintiffs' complaint
8 and the complaint that the community organizations would file.
9 One.

10 Of those due-process claims, Your Honor, is based on
11 not only the right to marry, but --

12 **THE COURT:** Not on what?

13 **MR. ESSEKS:** Not on the right to marry, but on the
14 right to form intimate relationships, which is a right
15 protected by the U.S. Supreme Court decision in *Lawrence versus*
16 *Texas*.

17 In the Ninth Circuit's decision in *Witt versus*
18 *Department of the Air Force*, Your Honor, which is a case about
19 the don't ask, don't tell restriction on gay people in the
20 military, the Ninth Circuit said that if a law intrudes upon
21 the rights protected by the Supreme Court's decision in
22 *Lawrence versus Texas*, that then this Court's job is to do a
23 balancing act, to weigh two different competing interests. On
24 the one hand, the interests of the government that undergird
25 the law at question -- in that case it was don't ask, don't

1 tell; in this case, obviously, it would be Proposition 8 -- and
2 to weigh thoughts interests against the interests of the
3 individuals whose rights are compromised by that law.

4 And Your Honor, we submit that for this Court to
5 adequately do that balancing, it needs to have or it would be
6 helpful for it to have before it the full range of facts that
7 our clients can provide about all the different ways in which
8 Proposition 8 hurts those individuals.

9 And while it is possible, as I said earlier, that the
10 Plaintiffs could present at least some of that evidence, our --

11 **THE COURT:** No, you're not presenting actual
12 plaintiffs who have personal experience, and are able to
13 present evidence based upon that personal experience. You --
14 you're a group of organizations. And whatever rights your
15 organizations have are derivative of your members.

16 **MR. ESSEKS:** Indeed.

17 **THE COURT:** Whereas the Plaintiffs, of course, are
18 directly affected by the law that is at issue here.

19 **MR. ESSEKS:** That's correct, Your Honor. But it's
20 clear that organizations can bring claims on behalf of their
21 members.

22 And one of the advantages -- and I think it's an
23 advantages that the U.S. Supreme Court has identified of using
24 organizations as plaintiffs, is -- that these organizations who
25 have -- it's not a random collection of individuals. It's

1 people who have come together, for the express purpose of
2 protecting certain rights and advancing certain agendas.

3 And so, these are organizations that collectively
4 have the best interests of the community at heart, and can, you
5 know, bring easily together a full range of the harms that are
6 inflicted by Proposition 8.

7 **THE COURT:** So, basically what you're saying is that
8 the factual record would be richer if your organizations were
9 made parties to the litigation, as opposed to simply
10 participating as amici.

11 **MR. ESSEKS:** Your Honor, I think that is -- that is
12 absolutely correct, that is part of our argument. There.

13 Is a second way, Your Honor, in which the interests
14 of the proposed community organization intervenors may diverge
15 from the interests of the Plaintiffs. And that is that the
16 Plaintiffs, obviously, are interested in this case because it's
17 about marriage. And the community organizations are also
18 interested in this case because of the core issues about
19 marriage, and access to marriage for same-sex couples that the
20 case will raise.

21 In the course of deciding the issues in this
22 litigation, Your Honor, the Court will make rulings and factual
23 findings that affect not just the question of whether
24 restrictions on the right to marry for gay people violate the
25 Constitution, but will also be relevant to other issues in gay

1 rights litigation and gay rights law. And these are issues
2 that are directly relevant and of great concern to the
3 community organizations, in a range of issues outside of
4 marriage.

5 And there is a concern, Your Honor, that the
6 arguments by the Plaintiffs may be pitched solely in terms of
7 the right to marry, and without considering other issues that
8 may affect other parts of LGBT rights law.

9 **THE COURT:** Very well. Thank you very much,
10 Mr. Esseks.

11 And, let's hear from the Campaign for California
12 Families. Is that Ms. --

13 **MS. LINDEVALDSEN:** Lindevaldsen, yes.

14 **THE COURT:** Yes, Lindevaldsen. Good morning.

15 **MS. LINDEVALDSEN:** Good morning, Your Honor. Rena
16 Lindevaldsen.

17 The case management statement filed by the
18 Proposition 8 Defendants makes very clear -- the one that was
19 just filed on August 17th -- why it is the Campaign's motion
20 should be granted, to intervene in this case.

21 In light of the stipulations that the Proposition 8
22 Defendants have indicated they're willing to agree in whole to,
23 or in part, it is very clear that the interests of the
24 Campaign, and in fact, those who voted to protect marriages
25 between a man and a woman, are inadequately represented in this

1 litigation.

2 It bears emphasis at the outset that the motion to
3 intervene is to be liberally construed in favor of
4 intervention, but --

5 (Reporter interruption)

6 **THE COURT:** Well, are you saying -- are you saying
7 that your client's interests go beyond those that are
8 represented by the Intervenor Defendants, represented by
9 Mr. Cooper? Is that what you're saying?

10 **MS. LINDEVALDSEN:** They include and go beyond those
11 represented by the current Defendants, insofar as the Campaign
12 for California Families has fought for 15 years in this state
13 on behalf of voters to both protect the name of marriage, which
14 is what Proposition 8 does, as well as the substantive rights
15 of marriage and benefits.

16 **THE COURT:** Okay. Explain, then, to me where your
17 client's interests go beyond those represented by Mr. Cooper's
18 client.

19 **MS. LINDEVALDSEN:** Sure. The interests -- and
20 probably the best way to show this is I've actually gone
21 through the case management statement, and come up with eleven
22 arguments or facts that the Proposition 8 Defendants are
23 willing to stipulate to, in whole or part, that the Campaign,
24 in order to vigorously defend marriage as between a man and a
25 woman, which is what the voters so voted to protect in November

1 of 2008, they're willing to concede too much of Plaintiffs'
2 case, both with regard to the similarly-situated aspect of the
3 case, and the factors that Plaintiff have to show to be a
4 suspect classification.

5 So, I can point those out to the Court, but with
6 regard to the interests -- and in fact, this is the
7 give-and-take --

8 **THE COURT:** Well, that would be interesting, if you
9 would do so.

10 **MS. LINDEVALDSEN:** Sure. The Campaign --

11 **THE COURT:** Let me catch up with you, and get the
12 case management statement.

13 **MS. LINDEVALDSEN:** The August 17th filing, yes.

14 **THE COURT:** Yes.

15 **MS. LINDEVALDSEN:** Exhibit B to the case management
16 statement filed by Proposition 8 Defendants has a list of
17 proposed stipulations by the Plaintiffs that the Proposition 8
18 Defendants are willing to agree, in whole or in part.

19 **THE COURT:** All right.

20 **MS. LINDEVALDSEN:** And I have gone through those, and
21 can indicate where the Campaign stands ready to make arguments
22 that the Proposition 8 Defendants are not ready to make
23 arguments on, that are necessary to preserve marriage.

24 **THE COURT:** Okay. Well, give me have a couple of
25 examples, here.

1 **MS. LINDEVALDSEN:** Sure. For example, Proposition 8
2 Defendants -- I'll start with No. 64.

3 **THE COURT:** Okay. Hold on.

4 **MS. LINDEVALDSEN:** -- are ready -- have agreed --
5 have agreed in whole that gays and lesbians, including
6 Plaintiffs, have formed lasting, committed relationships. And,
7 the Proposition 8 Defendants stand ready to agree to that one.

8 Based -- first of all, there's no -- there's no
9 evidence in the sociological research that's out there that
10 indicates this should be agreed to, in whole. Perhaps in part.
11 And this goes to the similarly-situated aspect of Plaintiffs'
12 case.

13 No. 19. Proposition 8 Defendants are willing to
14 agree in whole that with the exception of, quote, "certain
15 matters related to procreation," end quote, sexual orientation
16 bears no relationship on the ability to contribute to society.

17 It does impact more than the ability to procreate.
18 It impacts the ability to raise children, according to
19 sociological research, educate them, and also given high-risk
20 factors of certain pathologies, is going to go to the four
21 factors necessary to show sexual orientations as suspect
22 classification.

23 No. 21, "Same-sex sexual orientation does not result
24 in any impairment of judgment..." Given the high risk factors
25 that is out there right now in the scientific and psychological

1 research, concerning medical, psychological and relationship
2 dysfunctions. This concedes too much to agree to this in
3 whole. And this will relate to the suspect classification
4 aspect.

5 One more that they've agreed in whole, Nos. 35 and
6 36, that lesbians and gays are unable to secure hate crimes in
7 federal legislation protecting them in employment, housing,
8 et cetera.

9 While it's true they haven't secured the legislation,
10 it goes too far to agree to this in whole, because there is no
11 evidence to indicate, as the Congressional testimony back and
12 forth has indicated, that they need protecting in this area
13 because there's no evidence of discrimination in this area.

14 Some of the other ones in particular that they
15 indicate they are willing to agree in part go directly to the
16 suspect classifications.

17 No. 14, that gays and lesbians have suffered severe
18 discrimination. This will go to the history of discrimination.
19 And the Campaign stands ready to make arguments that it appears
20 the Proposition 8 Defendants are not.

21 That discrimination, including hate crimes, exists
22 today, No. 29. Again, the Campaign is willing to make
23 arguments Proposition 8 is not.

24 "Sexual orientation is the kind of distinguishing
25 characteristic that defines gays and lesbians as a discrete

1 group." This practically gives away Factor 2 in the suspect
2 classification.

3 And according to the research, there's no evidence
4 for the Proposition 8 Defendants to agree to this, even in
5 part.

6 **MR. COOPER:** Forgive me. I didn't follow --

7 **MS. LINDEVALDSEN:** Oh, that was No. 28. I apologize.

8 No. 27, again going to suspect classification, that
9 sexual orientation is fundamental to a person's identity.

10 I have three more.

11 No. 26, "harmful to an individual to attempt to
12 change sexual orientation." In light of the APA -- the
13 American Psychological Association's task force report that
14 just came out in August of 2009, even that report by the APA
15 indicates that there is no research to show that it's harmful
16 to attempt to change your sexual orientation.

17 And yet, No. 26, the Proposition 8 Defendants are
18 willing to concede to some form of stipulation on this, which
19 gives away part of Plaintiffs' case, that they will have to
20 show that they are entitled to suspect classification.

21 There are two more, Nos. 20 and 59, that are related
22 to this, again, that help to identify for suspect
23 classification.

24 The medical and psychological communities do not
25 consider sexual orientation to be an illness or disorder.

1 Again, the APA task force report just issued in the beginning
2 of August admits that part of the reason the APA declassified
3 homosexuality as a disorder was based in politics. The report
4 admits that.

5 And there are major medical organizations today that
6 believe that individuals should be entitled to treatment to
7 change your sexual orientation, that it's not harmful. And in
8 fact, two past presidents of the APA indicate that individuals
9 should be able to change their sexual orientation.

10 And finally, No. 59, an individual's capacity to
11 raise children does not depend on one's sexual orientation.
12 Proposition 8 Defendants stand ready to stipulate in some form
13 to this, when the sociological and psychological research
14 suggests that it is relevant to raising children.

15 And, the Campaign stands ready to make argument,
16 based on the scientific literature, that Proposition 8
17 Defendants apparently stand ready not to make.

18 Going back again, since one of the factors is the
19 inability -- the -- there are arguments that are likely not to
20 be made by existing parties, I went through those arguments on
21 that factor.

22 Back to the interest just briefly -- and then I'll
23 conclude, Your Honor -- the Campaign's interests includes in
24 part defense of the definition of "marriage." But the Campaign
25 has a broader interest it's fought for for years that if this

1 case goes the wrong way, it will not be able to pursue.

2 If the Plaintiffs win this case, the Campaign will
3 not be able to pursue, as it has tried to do for the past 15
4 years, to fully protect the rights of marriage solely for a man
5 and a woman.

6 **THE COURT:** How so?

7 **MS. LINDEVALDSEN:** If the Plaintiffs win their case
8 here, and it's declared unconstitutional simply to define
9 "marriage" as one man and one woman, it's going to impair the
10 Campaign's ability to seek an even stronger amendment, as I
11 would characterize it, that preserves the name and the rights
12 of marriage.

13 Not only will the Campaign's interests be impaired if
14 the Plaintiffs win, but the Campaign's interests will be
15 impaired if the Plaintiffs lose, and the Defendants have
16 conceded too much on sexual orientation and suspect
17 classification.

18 This Court is being asked to be the first court in
19 this -- federal court in this nation to declare sexual
20 orientation to be a suspect classification. Proposition 8's
21 case management statement makes very clear that they do not
22 stand ready to make all of the available arguments based on the
23 available sociological, psychological, and medical research to
24 defend against a classification of sexual orientation as a
25 suspect classification.

1 The Campaign stands ready do that, and it must be
2 done, in order to preserve marriage in the state of California.

3 **THE COURT:** Very well. Well, thank you very much,
4 Ms. Lindevaldsen.

5 Now let's hear from the City and County of
6 San Francisco. Ms. Stewart?

7 **MS. STEWART:** Thank you, Your Honor.

8 As the Court's aware, the City has sought
9 intervention under the permissive part of Rule 24, which really
10 is, focuses on a bit of a different inquiry than 24(a).

11 Instead of really being about a movant's right to be
12 at the table, the focus of the Rule 24(b) inquiry really is
13 about whether the moving party will contribute to the
14 development of a factual and legal record, and help assist the
15 Court in arriving at a good and solid legal and factual
16 decision.

17 **THE COURT:** You make an interesting argument that's a
18 little different from those that we have heard from the Our
19 Family Coalition or the Campaign for California Families.

20 And, that is that the City and County of
21 San Francisco has a governmental interest in the outcome of
22 this litigation that is different from the Plaintiffs, and
23 different from any of the intervenors.

24 Just exactly what is that interest?

25 **MS. STEWART:** Thank you, Your Honor. It is a

1 perspective, number one, that comes from being a city that has
2 one of the highest lesbian and gay populations -- in fact, the
3 highest, I think -- of any city across the nation, and has been
4 long involved in trying to eliminate sexual-orientation
5 discrimination because of its experience with the very real
6 economic and public health costs that come with discrimination
7 against a part of its citizenry.

8 **THE COURT:** What are you prepared to show in that
9 regard?

10 **MS. STEWART:** Well, we would put on, in addition to
11 the experts that the Perry Plaintiffs Perry have listed in
12 their case management statement, we would suggest that we might
13 offer the testimony of someone like the controller, who can
14 inform the Court about -- I mean, one of the key issues in the
15 case, as the Court knows, is is there is a legitimate and very
16 real government interest that supports this law. That's a key
17 issue.

18 And what the controller of our city -- and it might
19 not be from our city, but our experience is that the costs are
20 very high on cities, and in fact, on the state and the federal
21 government.

22 Now the State is here, and there are two other
23 counties. But those entities have indicated that they don't
24 plan to play an active role in the trial of this case. And I
25 think we -- we bring, both because our work on these issues

1 goes quite far back, and in part also because of our work on
2 the marriage cases --

3 **THE COURT:** Well, if there is a financial impact on
4 the City and County of San Francisco, there should, I would
5 think, be a similar impact on the State of California.

6 **MS. STEWART:** That's correct, Your Honor.

7 **THE COURT:** The Governor's represented here, and the
8 Attorney General. Isn't that sufficient to bring these issues
9 to the fore?

10 **MS. STEWART:** Well, for two reasons, I don't think it
11 is, Your Honor. Most significantly, the Governor and the State
12 have indicated they don't intend to play an active role in the
13 litigation.

14 Secondly, the City has been studying these issues for
15 quite a long time, and it has a developed body of evidence.
16 And it is also familiar with the evidence that goes to the
17 costs to the State and the federal government as well as to
18 local government.

19 But remember that local governments really serve as
20 the bottom-line social safety net for individuals and families
21 who end up falling apart when they're not adequately recognized
22 and supported.

23 And so, the City and the County, in a way that is
24 different from the State, ends up being responsible when
25 families fall apart if there are no obligations.

1 **THE COURT:** Well, explain to me the sequential facts
2 that you're going to attempt to show that how the elimination
3 of Proposition 8 would minimize or ameliorate these social
4 costs that the City you allege has to bear.

5 **MS. STEWART:** Sure. The City would put on evidence
6 to show that first of all, recent studies indicate that where
7 same-sex couples are offered marriage, they are far more likely
8 to marry than they are to enter into civil unions or domestic
9 partnerships.

10 **THE COURT:** And how does that relieve the City of
11 certain social costs of the kind that you are talking about?

12 **MS. STEWART:** When couples enter into marriage, they
13 take on the reciprocal obligations, legal obligations, they get
14 the social support that comes with marriage, and they take on
15 obligations to the children of the couple that the couple is
16 responsible for. What --

17 **THE COURT:** And they don't do this in a domestic
18 partnership?

19 **MS. STEWART:** They can do it in a domestic
20 partnership, but as -- again, as the evidence shows, couples
21 are far more likely to enter into marriage where it's
22 available.

23 One of the reasons for that, I think, Your Honor, is
24 because when you enter into a domestic partnership, it's not a
25 recognized institution. It gets questioned a lot. It is not

1 something that people immediately understand.

2 Furthermore, at this point in time, you are not
3 getting even the whole thing that marriage conveys, in terms of
4 the federal rights. So, without either of those two things,
5 domestic partnership is less attractive.

6 Now, marriage today doesn't provide the federal
7 benefits that come with marriage for heterosexual couples.
8 But, the social valuation, the validation that the government
9 gives and that society gives, induces people to marry.

10 There are many people who have indicated -- and in
11 fact, that is probably why some of the Plaintiffs may have not
12 married, and some of the people in the groups, that they are
13 not going to do it until they get the entire social validation
14 that comes with marriage equality.

15 And so, because of that, with couples not entering
16 into those kinds of relationships where they're bound together
17 and have mutual obligations, they then are much more likely to
18 fall on the government.

19 There's a case, incidentally, that the California
20 Supreme Court heard not too long ago that involved a couple
21 that was in a domestic partnership, where one partner tried to
22 walk away from the child. And, you know, the county ended up
23 trying to sue for support, and in the end, did obtain support.

24 But the problem with relationships that are not fully
25 recognized or relationships --

1 **THE COURT:** And that would have been different, had
2 they been married?

3 **MS. STEWART:** It would have, Your Honor. I mean, I
4 think there's no question that with marriage comes presumed
5 family status, presumed parent status.

6 Now, that is true in California, but at every level,
7 every time an issue like this comes up with domestic
8 partnership, it gets litigated. And people question it.

9 And further, there are a number of public benefits
10 that are determined, eligibility that is determined by marital
11 status. So for all of those reasons, the City brings a unique
12 perspective.

13 It also -- there's another aspect of it, Your Honor,
14 besides the purely economic one. And that has to do with the
15 fact that when society has a law, when the government has a law
16 that makes this distinction between lesbians and gay men on the
17 one hand and heterosexual people on the other, it sends the
18 message that there is something different about them. And it
19 is a difference that matters.

20 And that has tremendous public health consequences
21 that go far beyond just the economic ones. The City of
22 San Francisco is the home to literally hundreds, and I think
23 thousands of lesbian and gay youth who come here from other
24 states where they are kicked out of their homes, and from
25 counties around California, because they are gay.

1 The message that something is wrong with being gay is
2 still alive and well in California, because of Proposition 8.
3 And so, the public health costs that counties like
4 San Francisco have to incur to deal with discrimination and its
5 effects on youth, its effects on the elderly, its effects on
6 all levels of society are very real.

7 So, another area of testimony that we would bring
8 would be someone from our Public Health Department, to talk
9 about what those effects are.

10 We believe that this will go a long way to showing
11 the utter lack of justification, any kind of government
12 interests and in fact, the -- the counter interest, the
13 interest of the government in eliminating discrimination.

14 **THE COURT:** All right.

15 **MS. STEWART:** So, in the *Romer* case, I wanted to
16 remind the Court, *Romer versus Evans*, the city government, city
17 and county local governments were the lead plaintiffs in this
18 case.

19 And they actually put on testimony of the kind that I
20 just described to the Court. They had public officials talking
21 about --

22 **THE COURT:** That was in state court, wasn't it?

23 **MS. STEWART:** It started out in state court, that's
24 correct, Your Honor. However, it went all the way to the U.S.
25 Supreme Court, as the Court knows, and those cities remain --

1 **THE COURT:** (Inaudible) familiar with the
2 intervention principals under Colorado law.

3 **MS. STEWART:** Correct, Your Honor. It wasn't an
4 intervention matter, actually. They were party plaintiffs.

5 **THE COURT:** They were initial parties, were they?

6 **MS. STEWART:** Right. And they remained parties. And
7 the Supreme Court did not suggest in any way that there was
8 anything to question about that.

9 I am happy to address the arguments -- I would say
10 that neither the state nor the local government entities object
11 to our appearing. I think some of them, at least, support it.

12 The Plaintiffs have objected solely about a concern
13 about delay, but I think that we have demonstrated, in the way
14 that we have dealt with them and with the Court, that we won't
15 delay the case.

16 We did not submit a case management statement because
17 the Court had not decided that we were a party, and I didn't
18 want to be presumptuous. If we were to submit one, it would be
19 in many respects quite similar to the Plaintiffs'. It --
20 probably wouldn't even repeat it, but would join in theirs. I
21 would add the witnesses I mentioned.

22 I would also suggest that an education expert of some
23 sort may need to be called, because so much of the campaign
24 focused on education issues and supposed changes to the
25 curriculum that would be necessitated if same-sex couples were

1 permitted to marry.

2 And, one other area of difference we would have would
3 concern the schedule. And I think that -- the schedule that
4 the Perry Plaintiffs are arguing. It's very important
5 obviously to get the case decided quickly, but the Court has to
6 balance the need to have a really full factual record. And we
7 think that it may be too ambitious a schedule.

8 **THE COURT:** All right. Anything further,
9 Ms. Stewart?

10 **MS. STEWART:** I will leave it at that, Your Honor.

11 **THE COURT:** Very well.

12 Mr. Olson. Now, most, most folks who are in your
13 situation and they have people who are trying to come in on the
14 same side welcome intervenors. Why aren't you taking that
15 attitude?

16 **MR. OLSON:** Well, I will explain. Thank you,
17 Your Honor. And I know that the Court has read the briefs and
18 knows the law, so I will try to be brief in response to your
19 question.

20 First, it is very important for me to say that we
21 have the greatest respect for counsel for the proposed
22 intervenors. Particularly I'm focusing now on the Our Family
23 Coalition. We have worked with them from the outset of this
24 case. And we have the greatest respect for their experience,
25 and their points of view.

1 However, experience and reputation of counsel is not
2 a basis for intervention. And we are concerned that the
3 consequent dilution of the rights of the Plaintiffs to control
4 the strategy, timing, and issues in this case that they brought
5 to this Court and the proposed intervenors chose not to bring
6 to this Court to validate their constitutional rights can be
7 affected by the addition of additional parties, no matter how
8 much they might want to help.

9 **THE COURT:** How so, other than possibly slowing down
10 the process?

11 **MR. OLSON:** Well, slowing down the process is very
12 important, as you recognized on July 2.

13 I think you must have said five times in your
14 June 30th order and a number of times during that hearing on
15 July 2, that in -- in not granting the motion for a preliminary
16 injunction, however serious these issues are, that it was
17 important to have a prompt expeditious and efficient resolution
18 of the merits of this case.

19 **THE COURT:** I'm glad that message got through.

20 **MR. OLSON:** It certainly got through to us, because
21 we went along with -- and you may have come to the same
22 conclusion anyway, what -- we agreed with Your Honor about
23 proceeding to the resolution on the merits and not granting a
24 preliminary injunction, although we fully felt the Plaintiffs
25 were entitled to it because their constitutional rights are

1 being violated, the State of California admits. And that is
2 irreparable injury every day.

3 However, we were persuaded by your statement in your
4 order of June 30th, that it is important to get to a resolution
5 on the merits, and you were balancing the uncertainty that
6 might come from a preliminary injunction with the importance of
7 getting to a resolution on the merits.

8 Every additional party that the Court adds as
9 intervenors will add to the complexity and the time that this
10 case takes. And as you heard from Our Family Our Families
11 Coalition, they say, they acknowledge, that their interests
12 diverge. They talked about other issues besides the right to
13 marry that they might want to have ventilated in this Court.
14 I'm not sure that I know all of those issues.

15 Our Plaintiffs, our clients, are concerned with the
16 right to marry. And they are concerned that they are being
17 deprived of that right every single day. The State of
18 California acknowledges that that's a violation of the
19 Constitution.

20 Let me add that the intervenors Our Family -- I'm
21 focusing on them for a moment -- assert the same injury, make
22 essentially the same arguments, and seek the same relief,
23 ultimate relief as the Plaintiffs. So they are adding nothing
24 there. I think your question suggested that you are at least
25 sensitive to that point.

1 The diversity of their membership adds nothing to the
2 actual claims. It doesn't change the actual claims, it doesn't
3 change the actual relief sought by the Plaintiffs. At bottom,
4 they tender nothing new to this case, other than the talent and
5 experience of the lawyers that they have selected. And, we
6 respect that. But that is not a basis for intervention.

7 And the Plaintiffs chose lawyers whose talents and
8 expertise they respected. And their choice should not be
9 usurped by the proposed intervenors, by --

10 **THE COURT:** What about the other two intervenors, the
11 Campaign for California Families, and then the City and County?

12 **MR. OLSON:** Well, the Campaign for California
13 Families demonstrated today that it's going to be a great deal
14 longer and more complicated case, because they are not willing
15 to stipulate to things that the State of California implicitly
16 agrees to by acknowledging that the statute -- the proposition
17 is unconstitutional, that the proponents of Proposition 8 --
18 and they are very skilled individuals represented by very
19 skilled lawyers -- they are willing to stipulate to certain
20 things because, I'm confident, they believe that we could prove
21 those things if we had to go through a six-month trial with
22 expert witnesses and all of that.

23 To their credit, and as you suggested in your orders
24 and in hearing on July 2nd, we need to work together to resolve
25 those issues that don't need to be contested. This, this

1 intervening -- proposed intervening group wants to challenge
2 virtually everything.

3 And I submit that you could find any number of
4 groups, any number of permutations of groups in the United
5 States that were willing to say "The proponents are not being
6 adequately represented because they are admitting something
7 that I'm not willing to admit, and I want to put them to their
8 proof, and I'm going to bring in evidence and so forth."

9 And so I think that they only add delay which
10 competent counsel -- very competent counsel are willing to
11 avoid.

12 **THE COURT:** What about the City and County of
13 San Francisco?

14 **MR. OLSON:** The City and County of San Francisco I
15 think is, as you suggested, a slightly different case. I
16 listened to the presentation by Ms. Stewart this morning, and I
17 read the materials very carefully.

18 We have the same concerns about additional parties
19 and additional -- because it's a permutation thing, everything
20 takes a little bit longer. But I do acknowledge that the City
21 of San Francisco, because in a sense, it's a *parens patriae*
22 kind of thing. They are looking out for citizens that are
23 affected by an unconstitutional statute.

24 And they do indicate that they are capable of
25 addressing and willing to address governmental perspectives

1 that cause this statute to be unconstitutional, and cause this
2 statute to discriminate and hurt individuals in their city.
3 Many -- so many individuals that are affected live in the City
4 of San Francisco.

5 And they are apparently willing to present reasons
6 that the State of California, through the Governor and the
7 Attorney General's office, while they are willing to concede
8 that Proposition 8 is unconstitutional, they are not willing to
9 say why they think, as representative of the citizens of
10 California, why it is unconstitutional. They want to play --
11 and I respect this, but they want to play a passive role.

12 The City of San Francisco seems to me willing to add
13 something to this case that we probably, on behalf of the
14 Plaintiffs, are not in a position very well to add. We don't
15 see things from the perspective of a government being adversely
16 affected by an unconstitutional constitutional provision.

17 So although we're not withdrawing our opposition, I
18 do think it is a separate situation, that -- the other thing
19 about The City and County of San Francisco is what they wish to
20 add seems to me does not appreciably encumber the proceedings
21 or delay the process.

22 They want to focus on certain narrow things about
23 which they do have expertise. They're not interested in
24 duplicating the things that the Plaintiffs are interested in
25 doing. So, I do think it's a slightly different story.

1 I think at the end of the day, whatever you decide
2 with respect to intervention, I can't stress enough that -- and
3 again I'm turning back to the Coalition. These are individuals
4 and attorneys who had the opportunity to raise federal
5 constitutional questions in the Proposition 8 litigation in the
6 California Supreme Court.

7 For reasons that --

8 **THE COURT:** So did the Attorney General.

9 **MR. OLSON:** Yes.

10 **THE COURT:** And the Attorney General is under an oath
11 to uphold the Constitution of the United States. And he didn't
12 raise these issues in the California Supreme Court.

13 **MR. OLSON:** And I'm not going to criticize the
14 Attorney General of California, because the Attorney General of
15 California -- particularly because the Attorney General of
16 California has now recognized that it is an unconstitutional
17 statute. And we welcome that.

18 But my point, I guess, is that the issues were not --
19 that were not raised before the California courts and then were
20 not raised by the attorneys who wish to participate now, those
21 decisions were made for tactical, strategic reasons. And we
22 respect that, and we respect them.

23 But, these Plaintiffs are real people. They have
24 announced their intention to get married now, if they possibly
25 can. They're not groups. And I respect the fact that these

1 groups represent interests. But we represent real people with
2 real concerns that are -- present, ripe for adjudication now,
3 and represent issues. And they have demonstrated that they are
4 going to present the issues responsibly, professionally,
5 thoroughly and expeditiously.

6 We respectfully submit that whatever you decide with
7 respect to intervention, the lawyers that were selected by the
8 Plaintiffs should remain in control of this case.

9 And I refer to the *Stringfellow* case, which is a
10 Ninth Circuit decision that went to the Supreme Court, where
11 limitations were imposed.

12 And I simply request in closing that if there is any
13 further intervention on the side of the Plaintiffs, at least,
14 that the Plaintiffs' lawyers who were carefully selected by the
15 Plaintiffs who are willing to take the chance by bringing this
16 case remain in full control, unequivocal control, and
17 undisputable control over the destiny of the case they choose
18 to bring, and others chose not to bring.

19 **THE COURT:** Very well. Thank you, Mr. Olson.

20 Mr. Cooper, are you going to be speaking on behalf of
21 the proponents of Proposition 8?

22 **MR. COOPER:** With the Court's permission, my
23 colleague Mr. Thompson would like to address the Court on
24 intervention. Thank you.

25 **THE COURT:** That's fine.

1 Well, Mr. Thompson, that was kind of an unkind cut
2 that Ms. Lindevaldsen cast in your direction. What is your
3 response?

4 **MR. THOMPSON:** Well, we saw vivid reflection and
5 example, Your Honor, of the complexity that will be brought to
6 trying to resolve this expeditiously if another Defendant
7 Intervenor is permitted into the case.

8 In terms of negotiating stipulations, they don't
9 become easier the more lawyers you put in a room, Your Honor.
10 The experts will multiply like locusts, if they are permitted
11 and other intervenors are permitted to come into this.

12 So we would respectfully suggest that in terms of
13 permissive intervention, it would be a grave error.

14 In terms --

15 **THE COURT:** Well, Ms. Lindevaldsen says that you're
16 not raising the issues, you're not adequately defending all of
17 the interests at stake here.

18 **MR. THOMPSON:** Well, we are -- she -- they have not
19 identified any interest that we are not going to vigorously
20 pursue.

21 What they are saying is they disagree on tactics with
22 us. They say it's a tactical mistake not to contest each one
23 of these points that the Plaintiffs could make the rubber
24 bounce on, and that we need to be in the trenches fighting
25 every war, even battles that can't be won. And, that is a

1 tactical concern.

2 And under Rule 24(a), that is not sufficient to show
3 inadequacy of representation. And moreover -- it's rather,
4 which arguments should be advanced. They need to be able to
5 show that there's some divergence of interests. They need to
6 be able to establish under 24(a) that they have an interest
7 that is different from ours. And they haven't done it.

8 In their brief, they try to conjure up the notion
9 that, well, there are three other statutes that reference
10 marriage is between a man and a woman. And, all those statutes
11 are being challenged, and the proponents are only interested in
12 upholding the validity of Proposition 8.

13 Your Honor, we will defend all -- all those three
14 statutes and Proposition 8. And those three statutes raise or
15 fall with Proposition 8. So there's just no separate interest.
16 All we have heard are tactical concerns about what is
17 well-advised and not advised to stipulate to.

18 So that, that would be our submission on the
19 California Families. They were denied the right to intervene
20 in the *Strauss* case in the California Supreme Court, and we
21 would respectfully suggest they should be -- the same result
22 should obtain here.

23 **THE COURT:** What about the other two intervenors?

24 **MR. THOMPSON:** With respect to the ACLU, the
25 community organizations, we've read their briefs very

1 carefully, and listened very carefully this morning, looking
2 for -- they say that their interests may diverge. But they
3 never explain how that is so.

4 They talk about subjective reasons why their members
5 may want to have Proposition 8 struck down, but when you look
6 at how could there be a divergence of interest between what
7 their members want and what the Plaintiffs want, you see
8 nothing. So under 24(a), they haven't been able to show that
9 they're inadequately represented.

10 And under 24(b), their case management statement
11 shows that they want to bring on at least 14 new experts. In
12 terms of delay, it will necessarily delay the trial, and the
13 amount of discovery, if they can bring in 14 experts from
14 different countries and different continents, as they promise
15 to do in their case management statement. So, we would
16 suggest, under 24(b), they should be kept out.

17 With respect to the City of San Francisco, they
18 articulated this morning a governmental interest. And we would
19 submit that binding Ninth Circuit precedent precludes their
20 being able to intervene under 24(b).

21 We cited in our brief *EEOC versus Pan American*, which
22 is 897 F.2d, 1499. And that in turn cited to *EEOC versus*
23 *Nevada Resort*, 792 F.2d, 882. And those --

24 **THE COURT:** What is the logic of those decisions?

25 **MR. THOMPSON:** Those cases are very interesting, Your

1 Honor, because what they say is that when the EEOC is
2 litigating and then an entity that has standing -- in the
3 *Nevada Resorts* case, an organization that had a member that was
4 injured, the injury was caused by the action, and it was
5 redressable.

6 They nevertheless were -- and the District Court
7 granted 24(b) intervention, and it was reversed by the Ninth
8 Circuit. And the reason was is because there was no private
9 right of action. The permissive intervenor that the show that
10 there was a subject matter jurisdiction for their claim.

11 And because there was no private right of action
12 under that provision of Title VII that was at issue, the Ninth
13 Circuit said they're not allowed in.

14 And this is exactly the flip of it. There's no
15 public right of action under the Supreme Court cases that we've
16 identified. In other words, no one disputes that the
17 plaintiffs have a private right of action under 1983 to bring
18 this claim, but the City cannot turn on its creator like a
19 Frankenstein monster and then try to challenge the
20 constitutionality of its conduct.

21 And when they say, "Oh, but the Attorney General and
22 the Governor aren't contesting it," it is the people of
23 California that enacted Proposition 8. And they are sovereign
24 in this matter. And they have not given San Francisco the
25 right to come in and challenge their will.

1 So in terms of the governmental interest, it just
2 doesn't hold water. And these two EEOC cases, especially
3 *Nevada Resorts*, show quite conclusively that there is no
4 subject matter jurisdiction, and they cannot be permitted in
5 this case.

6 And with respect to the interests and the -- and the
7 complexity, these issues about the public health effects of
8 Proposition 8 will be very nuanced and complex, and will
9 necessitate expert evidence on both sides, and we would
10 respectfully suggest, are really a sideshow to the main issues
11 in this litigation.

12 And if the Court were inclined to grant their
13 intervention, we would at the very least ask the Court to
14 confine their activity to the issues that are unique to the
15 City, as opposed to allowing them to put on evidence on all the
16 various issues.

17 **THE COURT:** Very well. Thank you, Mr. Thompson.

18 **MR. THOMPSON:** Thank you.

19 **THE COURT:** Well, we have three motions to intervene
20 presently before the Court. And, as we have discussed this
21 morning, the speedy determination of this action requires that
22 these motions be ruled upon promptly.

23 The Our Family Coalition; Lavender Seniors of the
24 East Bay; and Parents, Families and Friends of Lesbians and
25 Gays move to intervene as of right under Rule 24(a), and

1 alternatively, seek permissive intervention under Rule 24(b).

2 The Campaign for California Families moves to
3 intervene of right as a defendant, or alternatively, for
4 permissive intervention.

5 In addition, the City and County of San Francisco
6 seeks the Court's permission to intervene under Rule 24(b),
7 permissive intervention.

8 All three of these motions were filed within the time
9 frame provided in the Court's July 13 order. And accordingly,
10 all three motions are timely.

11 Turning first to the motions to intervene as of right
12 by the Campaign and by the Our Family Coalition, intervention
13 as of right requires the applicants for intervention to make a
14 four-part showing:

15 One, their motion is timely; two, they have a
16 significant protectable interest relating to the transaction
17 that is the subject matter of the action; three, they are so
18 situated that the disposition of the action may practically
19 impair or impede their ability to protect their interest; and
20 four, their interest is not adequately represented by the
21 parties to the action.

22 The applicants must demonstrate all four factors to
23 intervene as of right. Although the motions are timely,
24 neither the Campaign nor the Our Family Coalition demonstrate
25 the remaining factors.

1 The second factor that must be shown for a party to
2 intervene as of right is that the party seeking intervention
3 must have a significant protectable interest in the
4 controversy.

5 An interest is significantly protectable if: One, it
6 is protected under some law; and two, applicants show a
7 relationship between the legally protected interest and the
8 claims at issue.

9 Applicants here need not assert a specific legal or
10 equitable interest in the underlying action. And no bright
11 line rule determines whether applicants have a significant
12 interest.

13 The Campaign asserts that it has a significant
14 protectable interest in assuring marriage is defined only as
15 the union between one man and one woman. The Campaign argues
16 that this interest arises from its work to ensure the passage
17 of Proposition 8.

18 But because the Campaign is not the official sponsor
19 of Proposition 8, its interest in Proposition 8 is essentially
20 no different from the interest of a voter who supported
21 Proposition 8, and is insufficient to allow the Campaign to
22 intervene as of right. The Campaign's motion to intervene of
23 right thus fails to demonstrate that the Campaign has a
24 protectible interest in the action.

25 Indeed, the Campaign asserts that its interests are

1 broader than merely upholding Proposition 8 because it wishes
2 to assure marriage is defined only as an opposite-sex union.
3 But the Campaign fails to explain the practical effect of this
4 broader interest, or to explain how the Court could protect
5 this interest, or how Proposition 8, if upheld as
6 constitutional, would fail to assure this claimed broader
7 interest in defining marriage as only an opposite-sex union.

8 Accordingly, the Campaign's interest is not
9 significantly protectible, and intervention of right is not
10 appropriate.

11 Even if the Campaign had asserted a protectible
12 interest in the litigation, however, the Campaign has failed to
13 explain that its interest is not adequately represented by the
14 Intervenor Defendants who are, after all, the official
15 proponents of Proposition 8.

16 The Court considers several factors to determine
17 whether representation is adequate, including whether the
18 current parties will undoubtedly make all of the Intervenors'
19 arguments appropriate to the case in controversy, whether the
20 current parties are capable and willing to make such arguments,
21 and whether the intervenor offers a necessary element to the
22 proceedings that would otherwise be neglected.

23 And I'm essentially quoting from the *Sagebrush*
24 *Rebellion* case in the Ninth Circuit, of 1983.

25 The burden of making this showing is minimal. But

1 where the existing party and the applicant have the same
2 ultimate objective, the current representative is presumptively
3 adequate.

4 The Campaign argues that the proponents of
5 Proposition 8 will not make all of the arguments the Campaign
6 wishes to present, because the Campaign has this broader
7 interest it claims in not only upholding Proposition 8 but also
8 in securing a definition of marriage as an opposite-sex union.

9 The Campaign attempts to distinguish this interest
10 from that of the proponents of Proposition 8, who, according to
11 the Campaign, seek only to uphold Proposition 8. But the
12 Campaign does not explain how its interest is meaningfully
13 distinct from the proponents' interest, or how the Court could
14 fashion a remedy for this claimed broader interest.

15 Perhaps more importantly, the Campaign fails to
16 counter proponents' assertions that they are willing and able
17 to present all of the arguments the Campaign wishes to
18 introduce that are consistent with the law and the facts.
19 Accordingly, the Campaign's interest is represented adequately
20 by the proponents of Proposition 8.

21 Because the Campaign has neither shown that it has a
22 significant protectible interest in this litigation nor that
23 the proponents of Proposition 8 would not adequately represent
24 its claimed interest, the Campaign's motion to intervene as of
25 right is denied.

1 Our Family's motion to intervene of right is
2 similarly flawed, because the Our Family Coalition fails to
3 identify an interest that is not adequately represented by the
4 current Plaintiffs.

5 Unlike the Campaign, it appears that the Our Family
6 Coalition may have a significant protectible interest in this
7 litigation, because many of the organization's members are
8 individuals who wish to marry a person of the same sex but
9 cannot do so because of Proposition 8.

10 It is possible that this derivative or organizational
11 interest may rise to the level of a protectible interest for
12 purposes of intervention. This is, after all, the very
13 interest that the Plaintiffs assert. But Plaintiffs possess
14 this interest directly as they are the parties who allege that
15 they seek to marry but are barred by Proposition 8 from doing
16 so. The Our Family Coalition, if it possesses this interest,
17 does so only indirectly or derivatively.

18 Nonetheless, the Our Family Coalition fails to
19 overcome the presumption that the Plaintiffs' representation of
20 the interests the Our Family Coalition alleges is adequate.
21 The Our Family Coalition does not identify an interest that
22 Plaintiffs are unwilling or unable to protect or an argument
23 that Plaintiffs are unwilling or unable to make.

24 The Our Family Coalition argues that it represents a
25 broad spectrum of individuals who wishes to enter same-sex

1 marriages, including individuals who may differ from the
2 current Plaintiffs, based on age, race, parental status or
3 socioeconomic class.

4 While the Our Family Coalition asserts that the
5 effect on an individual of denial of same-sex marriage may be
6 distinct, based in part on an individual's peculiar
7 circumstances, the Our Family Coalition fails to identify the
8 relevance of this distinction.

9 No doubt, those seeking to marry a person of the same
10 sex possess a great variety of backgrounds and probably have
11 varied reasons for seeking marital status. But both the
12 Plaintiffs and the Our Family Coalition assert that the root of
13 the harms they face is the alleged discrimination based on
14 sexual orientation or sex worked by Proposition 8.

15 The remedy the Plaintiffs and the Our Family
16 Coalition seek is identical. Accordingly, the Court finds that
17 the interests identified by the Our Family Coalition can be
18 adequately represented by the current Plaintiffs. And the Our
19 Family Coalition's motion to intervene of right is therefore
20 denied.

21 Next, the Court considers whether to permit any party
22 to intervene under Rule 24(b), permissive intervention. Rule
23 24(b) permits the Court, in its discretion, to allow an
24 applicant to intervene when its motion is timely and it has a
25 claim or defense that it shares with the main action, in short,

1 possesses a common question of law or fact with that raised by
2 the parties.

3 The Court considers several factors in making this
4 determination. These include the nature and extent of the
5 applicants' interest, their standing to raise relevant legal
6 issues, the legal position they seek to advance and its
7 probable relation to the merits of the case. These factors are
8 explained by the Ninth Circuit in *Spangler versus Pasadena City*
9 *Board of Education*, reported at 552 F.2d, a 1977 decision of
10 our circuit.

11 Additional factors include whether the applicants'
12 interests are adequately represented by the other parties,
13 whether intervention will prolong or unduly delay the
14 litigation, and whether parties seeking intervention will
15 significantly contribute to the full development of the
16 underlying factual issues in the suit and to the just and
17 equitable adjudication of the legal questions presented.

18 In this case, in addition to the Campaign and the Our
19 Family Coalition, the City and County of San Francisco seeks
20 permissive intervention under Rule 24(b).

21 Turning first to the motions by the Our Family
22 Coalition and the Campaign, the *Spangler* factors weigh against
23 permitting Our Family Coalition and the Campaign to intervene.
24 Their interests are represented by the current parties to the
25 action.

1 While the Our Family Coalition and the Campaign
2 appear capable of presenting evidence and developing a record
3 on the factual issues at stake in this litigation, nothing in
4 the record before the Court suggests that the current parties
5 are not independently capable of developing a complete factual
6 record encompassing all of the applicants' interests.

7 Furthermore, permitting the Our Family Coalition and the
8 Campaign to intervene might very well delay the proceedings, as
9 each group would need to conduct discovery on substantially
10 similar issues.

11 As noted, the interests asserted by the Campaign and
12 the Our Family Coalition are indistinguishable from those
13 advanced by the Plaintiffs. Hence, the participation of these
14 additional parties would add very little, if anything, to the
15 factual record, but in all probability would consume additional
16 time and resources of both the Court and the parties that have
17 a direct stake in the outcome of these proceedings.

18 Accordingly, the motions to intervene of the Our
19 Family Coalition and the Campaign are denied. Of course, the
20 Our Family Coalition and the Campaign may seek to file amicus
21 briefs on specific legal issues that they believe require
22 elaboration or explication that the parties fail to provide.
23 Those applications will be considered, and if appropriate,
24 granted.

25 Now, San Francisco's motion to intervene presents a

1 somewhat different circumstance. Unlike the Our Family
2 Coalition and the Campaign's, San Francisco has identified an
3 independent interest in the action: It claims a financial
4 interest that it alleges is adversely affected by Proposition
5 8.

6 The City points out that it acts as a social and
7 economic safety net for those individuals it asserts lay claim
8 to City services who would not require those services if
9 Proposition 8 were invalidated. Currently, San Francisco is
10 the only governmental entity seeking to present evidence on the
11 effects of Proposition 8 on governmental services and budgets.
12 Despite Defendant Intervenors' argument to the contrary,
13 San Francisco does not need independent standing to intervene
14 permissively.

15 Plaintiffs acknowledge what they describe as the
16 extraordinary factual record that San Francisco appends to its
17 motion, and strongly suggests that San Francisco is well on its
18 way to contributing to full development of the underlying
19 factual issues in the suit.

20 Despite the timeliness of the City's motion to
21 intervene, the factual record that San Francisco appends to its
22 motion, standing alone, would probably not be sufficient to
23 warrant intervention, with the additional complications that
24 attend adding an additional party.

25 This is especially the case here, given that the

1 factual record the City seeks to present is largely, if not
2 entirely, a record based upon testimony and evidence presented
3 by expert witnesses. These witnesses are as available to
4 Plaintiffs as well as the City. And to the extent the
5 Plaintiffs believe such evidence is necessary, Plaintiffs can
6 call these witnesses, and no doubt obtain cooperation of the
7 City in the development of such evidence.

8 Rather, it seems to the Court that what distinguishes
9 San Francisco as an intervenor, especially from the others
10 seeking intervention, that is San Francisco claims a
11 governmental interest that no other party, including the
12 Governor and the Attorney General of California, has asserted.

13 Because of this interest, it appears that
14 San Francisco has an independent interest in the proceedings,
15 and the ability to contribute to the development of the
16 underlying issues without materially delaying the proceedings.

17 The Court notes that the City has filed a proposed
18 complaint in intervention that appears straightforward, and it
19 should not require prolonged effort for the other parties to
20 answer or otherwise respond to this pleading promptly.

21 Because it is San Francisco's governmental interest
22 that warrants the decision to allow it to intervene, it seems
23 that San Francisco shares interests with the State Defendants,
24 the Governor and the Attorney General. Furthermore, as the
25 Attorney General has taken the position that Proposition 8 is

1 unconstitutional, it would appear appropriate in the interest
2 of a speedy determination of the issues that the Attorney
3 General and San Francisco work together in presenting facts
4 pertaining to the affected governmental interests.

5 Counsel for San Francisco and the Attorney General
6 are therefore directed to confer, and if possible, agree on
7 ways to present these facts so as to avoid unnecessary
8 duplication of effort and delay.

9 But I want to emphasize that I believe on the general
10 issues that pertain to the interests of Californians who seek
11 to marry but are barred by Proposition 8 from doing so, it
12 appears that Plaintiffs adequately represent those interests,
13 and unnecessary duplication would be involved in San Francisco
14 seeking to present those facts, especially under these
15 circumstances, and that San Francisco should cooperate with the
16 Plaintiffs and Plaintiffs' counsel in presenting whatever
17 issues pertain to these general interests.

18 To the extent that San Francisco claims a government
19 interest in the controversy about the constitutionality of
20 Proposition 8, it may represent that interest and present such
21 evidence as necessary for the Court to decide that issue.

22 Hence, San Francisco's involvement in this litigation
23 may very well be quite limited. But as the City's interest
24 does appear distinct from any other party except possibly the
25 State Defendants, it is unclear at this point the extent to

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
16 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 Intervenor, 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,

1 October 2. Pretrial conference, December 17. We will have to
2 pick a time. The Clerk will remind me, that's a Wednesday, I
3 believe. Is it not?

4 **THE CLERK:** December 17, Your Honor?

5 **THE COURT:** No, it's a Thursday.

6 **THE CLERK:** That's a Thursday.

7 **THE COURT:** Maybe we ought to --

8 **THE CLERK:** Move it up to 16?

9 **THE COURT:** Why don't we make that the 16th. That is
10 a Wednesday, I believe.

11 **THE CLERK:** It is a Wednesday, Your Honor.

12 **THE COURT:** And what does the calendar look like on
13 the 16th?

14 (Off-the-Record discussion)

15 **THE COURT:** Well, we're in trial on the 16th. Let's
16 set it for the 16th, in any event. I may be in trial that
17 week, but we can work around that in some fashion.

18 And in any event, in any event, if you have to wait
19 and listen to the evidence in that case, it is an interesting
20 case.

21 **MR. COOPER:** Well, that's a relief, Your Honor.

22 **THE COURT:** All right.

23 **MR. COOPER:** Your Honor, this schedule, while a
24 bit -- a bit more relaxed than the one which the Plaintiffs
25 initially offered, is quite an aggressive schedule. I don't

1 think it's impossible. I think it is something we may be able
2 to cope with.

3 I am mainly concerned, frankly, about the expert
4 witness and expert discovery element of this. And in all
5 candor, Your Honor, we -- we have been in a reactive profile,
6 of course, as -- as is typical of Defendants, especially
7 Defendant Intervenors.

8 And so, it isn't -- it hasn't been, honestly, until
9 we received the supplemental case management papers from
10 Plaintiffs, which were, as you say, very -- very helpful, that
11 we became clear on -- on exactly where the Plaintiffs were
12 going, and -- and came to our own resolves, that okay, we are
13 going to now need to really hurry up and line up expert
14 analysis -- experts, in order to help us analyze some subject
15 matters that we weren't altogether clear we were going to be
16 involved with.

17 And so the truth is, we haven't done the hundreds and
18 hundreds of hours or had a chance to do the hundreds and
19 hundreds of hours that the City of San Francisco, in their
20 papers, indicated it took them to identify potential experts,
21 interview those experts, assess their backgrounds, and all the
22 things that you know, as a litigator, one has to do before one
23 commits oneself to designating an expert.

24 But with all that having been said, Your Honor, I
25 have -- I -- we will commit all the resources that we have

1 available to us to comply with this schedule, with the hope
2 that the Court will keep an open mind as this thing unfolds.

3 **THE COURT:** Well, I do remember what it is like to
4 practice law, so --

5 **MR. COOPER:** Yes, Your Honor.

6 **THE COURT:** But I think if I were to set anything
7 other than an ambitious schedule, why, this case might
8 metastasize into something that would be un- --

9 **MR. COOPER:** I don't think so with these guys, but --
10 I might also add, I very much welcome Mr. Boies's
11 clarification, perhaps, of some of the points that were made in
12 their supplemental case management order, in terms of what they
13 intended to inquire of the proponents.

14 And with the comments that he's made, which I accept,
15 it may well be possible --

16 **THE COURT:** I suspect most of these issues, you will
17 be able to work out between yourselves. But, I'm prepared to
18 rule on any discovery disputes that you have, to do so
19 informally. I commend to you our local rules with respect to
20 how those are handled, on the telephone or a short letter.

21 And in the event you have a dispute and I'm
22 unavailable, I'm going to appoint Magistrate Judge Spero to
23 handle any of those discovery disputes, so that you get a very
24 prompt resolution. And so the discovery can move on and not be
25 impeded by having to wait for some kind of a decision on a

1 discovery dispute.

2 So, I'm sure you will have some disputes on
3 discovery, but probably less than in the hands -- in
4 less-capable hands would arise.

5 **MR. COOPER:** Very well, Your Honor. Thank you.

6 **THE COURT:** All right? Now. I have not built in a
7 dispositive motion hearing date. The date that I had in mind
8 for that -- and Mr. Cooper, this is probably of more interest
9 to you than it is to the Plaintiffs, although the Plaintiffs
10 may have some issues that they want to bring forward by a
11 motion -- I was thinking about October 14th.

12 I don't know whether that's too soon, or whether that
13 date works on your calendars, but we can build in that date.

14 **MR. BOIES:** We can do that, Your Honor.

15 **THE COURT:** Mr. Cooper?

16 **MR. COOPER:** Your Honor, that should work fine.

17 **THE COURT:** All right. Fine. Now, what else do we
18 have to do this morning?

19 **MR. BOIES:** I don't think anything, from our
20 standpoint, Your Honor.

21 **THE COURT:** Mr. Cooper?

22 **MR. COOPER:** We have no further business, Your Honor.

23 **THE COURT:** Very well. Mr. Mennemeier, anything
24 further on behalf of the Governor?

25 **MR. MENNEMEIER:** Nothing, Your Honor. Thank you.

1 **THE COURT:** I must say I'm surprised at the
2 Governor's position in this case. I know he has a budget to
3 worry about, and water, and fires, and other things, but this
4 is a matter of some importance to the people of the state.

5 And you're his lawyer, and I'm sure you have his
6 attention, and it would be quite useful to have his input on a
7 constitutional issue of this magnitude that affects the state
8 in the way that it does. The Governor's thoughts and views
9 would be very helpful, and very much appreciated.

10 **MR. MENNEMEIER:** I will share that, Your Honor.

11 **THE COURT:** Very well. If there's nothing further,
12 Counsel, thank you. And I will see you at our next proceeding.

13 (Conclusion of Proceedings)

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 VRW, Perry, et al. v. Schwarzenegger , et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

_____/S/ Belle Ball_____

Belle Ball, CSR 8785, CRR, RMR

Friday, August 21, 2009