

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY,)
SANDRA B. STIER, PAUL T. KATAMI,)
and JEFFREY J. ZARRILLO,)
)
Plaintiffs,)

VS.) NO. C 09-2292-VRW

ARNOLD SCHWARZENEGGER, in his)
official capacity as Governor of)
California; EDMUND G. BROWN, JR.,)
in his official capacity as)
Attorney General of California;)
MARK B. HORTON, in his official)
capacity as Director of the)
California Department of Public)
Health and State Registrar of)
Vital Statistics; LINETTE SCOTT,)
in her official capacity as Deputy)
Director of Health Information &)
Strategic Planning for the)
California Department of Public)
Health; PATRICK O'CONNELL, in his)
official capacity as)
Clerk-Recorder for the County of)
Alameda; and DEAN C. LOGAN, in his)
official capacity as)
Registrar-Recorder/County Clerk)
for the County of Los Angeles,)

Defendants.) San Francisco, California
) Wednesday
) December 16, 2009
) 10:00 a.m.

TRANSCRIPT OF PROCEEDINGS

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

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P R O C E E D I N G S

1
2 **DECEMBER 16, 2009**

10:00 A.M.

3
4 **THE CLERK:** Calling civil case 09-2292, Kristin
5 Perry, et al. versus Arnold Schwarzenegger, et al.

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

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

9 Theodore B. Olson, Gibson, Dunn & Crutcher, on behalf
10 of the plaintiffs.

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

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

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

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

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

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

19 **THE COURT:** Good morning.

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

21 Chris Dusseault, Gibson, Dunn & Crutcher, on behalf
22 of plaintiffs.

23 **THE COURT:** Good morning.

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

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

1 plaintiffs.

2 **THE COURT:** Good morning.

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

4 Jeremy Goldman, Boies, Schiller & Flexner, for the
5 plaintiffs.

6 **THE COURT:** Good morning, sir.

7 **MR. SCHILLER:** Good morning, Your Honor.

8 Josh Schiller, from Boies, Schiller & Flexner, on
9 behalf of the plaintiffs.

10 **THE COURT:** Good morning.

11 I am sure Mr. Boies will tell you to keep your voice
12 up when you are in the courtroom.

13 **MS. STEWART:** Good morning, Your Honor.

14 Therese Stewart for the City and County of San
15 Francisco, plaintiff-intervenor.

16 **THE COURT:** Good morning.

17 **MR. CHOU:** Good morning, Your Honor.

18 Danny Chou for the City and County of San Francisco.

19 **THE COURT:** Good morning.

20 **MR. COOPER:** Good morning, Chief Judge Walker.

21 Charles Cooper, with Cooper & Kirk, for the
22 defendant-intervenors, known here, I think, as the proponents.

23 **THE COURT:** Good morning.

24 **MR. THOMPSON:** Good morning, Your Honor.

25 David Thompson, from Cooper & Kirk, for the

1 defendant-intervenors.

2 **THE COURT:** Good morning.

3 **MR. NIELSON:** Good morning, Chief Judge Walker.

4 Howard Nielson, of Cooper & Kirk, for the
5 defendant-intervenors.

6 **THE COURT:** Good morning.

7 **MR. PANUCCIO:** Good morning, Your Honor.

8 Jesse Panuccio, of Cooper & Kirk, for the
9 defendant-intervenors.

10 **THE COURT:** Good morning.

11 **MR. RAUM:** Good morning, Your Honor.

12 Brian Raum, Alliance Defense Fund,

13 defendant-intervenors.

14 **THE COURT:** Good morning.

15 **MS. WHITEHURST:** Good morning, Your Honor.

16 Judy Whitehurst, with the Los Angeles County
17 Counsel's Office, representing Dean C. Logan, Los Angeles
18 County Registrar-Recorder/County Clerk.

19 **THE COURT:** Good morning.

20 **MR. KOLM:** Good morning, Your Honor.

21 Claude Kolm, from the Alameda County Counsel's
22 Office, representing Patrick O'Connell, the Alameda County
23 Clerk Recorder.

24 **THE COURT:** Good morning.

25 **MR. MARTINEZ:** Good morning, Your Honor.

1 Manuel Martinez, also representing the County of
2 Alameda.

3 **THE COURT:** Good morning.

4 **MR. STROUD:** Good morning, Your Honor.

5 Andrew Stroud, Mennemeier, Glassman & Stroud, on
6 behalf of Governor Schwarzenegger and the Administration
7 defendants.

8 **THE COURT:** Good morning.

9 **MS. PACHTER:** Good morning, Your Honor.

10 Tamar Pachter on behalf of the Attorney General.

11 **THE COURT:** Good morning. Any others?

12 Well, welcome back to the District Court. Delighted
13 to have you.

14 (Laughter)

15 **THE COURT:** And we have an agenda of several items
16 that I want to discuss with you this morning, and I'm sure you
17 want to discuss with me. And there may be some other things
18 that are not on my list.

19 And, in addition, I have some news that may be of
20 interest. But, apart from the news which I'll relay to you in
21 a moment, as I understand it, the issues that we need to deal
22 with this morning are essentially three disputes or matters
23 that require resolution.

24 The first is the motion to intervene, filed by
25 Imperial County. And, on that, my inclination is not to hear

1 the merits of that motion at this time because plaintiffs have
2 not had an opportunity to brief it.

3 But I think we can discuss and perhaps even resolve
4 the motion for an order shortening time to hear that motion,
5 and decide on what schedule that motion should proceed.

6 Then we have the motion to realign the Attorney
7 General. And I believe that has been fully briefed, and we can
8 address it and resolve that matter. And it would be helpful,
9 I'm sure, to resolve that before the trial.

10 Then we have some outstanding discovery disputes that
11 we can discuss, and motions in limine, and, finally, a trial
12 schedule.

13 So those are the matters that, as I see it, we should
14 and need to discuss today.

15 In addition, you should know that I have, just
16 moments ago, received a telephone call from the Ninth Circuit,
17 indicating that there has been a call for an en banc panel in
18 connection with the discovery matter which was decided by the
19 Ninth Circuit very recently.

20 My understanding from the Ninth Circuit is that you
21 will receive an order later today indicating that the matter --
22 at least there has been a call for an en banc, and a request
23 for expedited briefing. And the Court is going to attempt
24 every effort to resolve the matter prior to the start of the
25 trial date in this case.

1 So the Court of Appeals did an excellent job of
2 expediting the matter, and hearing it and giving it full
3 consideration when it went up the first time. And I understand
4 that the Court of Appeals is going to make a similar good
5 effort to move that issue along expeditiously.

6 So you'll know more about that later today. And so I
7 guess it's fair to say that at least in one aspect of this
8 case, you're just touching down here today, and you're soon
9 going to be bouncing back to the Court of Appeals.

10 (Laughter)

11 **THE COURT:** But we are going to make every effort to
12 bring you back here in time for our January 11 trial date.

13 Now, I've mentioned the things that I think need to
14 be resolved and I think we can accomplish this morning. Are
15 there any things that I've overlooked?

16 First, from the plaintiffs and the
17 plaintiff-intervenors, any other items you'd like to add to the
18 agenda? Mr. Olson?

19 **MR. OLSON:** I think these are mostly in the nature of
20 trial issues and logistic or procedural things.

21 We had a reference earlier in these proceedings to
22 the possibility of televising the trial. And I think that's
23 still an open item. We expressed support for that, if it could
24 be done. Our opponents were opposed.

25 And I don't know whether you wish to get into that or

1 not, but I wanted to mention it.

2 **THE COURT:** I appreciate that.

3 My understanding is that under current Ninth Circuit
4 policy and rules -- and this is true of our local rules, as
5 well -- that is not permitted; that is, dissemination of
6 courtroom proceedings outside the courthouse is not permitted.

7 However, two years ago the Ninth Circuit Judicial
8 Conference voted for a pilot or experimental program to permit
9 dissemination of District Court proceedings that are nonjury
10 proceedings in civil cases.

11 The Circuit Council has taken up the issue of whether
12 it wishes to implement that resolution that was adopted by the
13 Conference.

14 My understanding is that a proposal to implement that
15 is pending before the Judicial Council of the Ninth Circuit,
16 and may very well be enacted in the very near future.

17 And, if it is, then I think this is an issue that we
18 should probably discuss and decide whether we are going to do
19 it; if so, on what basis we're going to do it, and how we can
20 do it consistent with the needs of the case, and to do it in a
21 way that does not interfere in any way with the processing of
22 this case.

23 But, at the moment, I don't think we have a green
24 light for it. And I'm inclined to wait to discuss this with
25 you after we get a green light, if in fact one comes through.

1 **MR. OLSON:** That's perfectly acceptable, of course,
2 to us. And we're happy to address it whenas and if it's an
3 appropriate time to do so.

4 **THE COURT:** Very well.

5 The Ninth Circuit, of course, has had a good deal of
6 experience with this in appellate proceedings, and has
7 broadcast or permitted broadcasting of appellate proceedings in
8 quite a large number of cases.

9 That, of course, is somewhat different than a
10 District Court proceeding, in that those proceedings last an
11 hour, two hours, three hours at most.

12 Three hours won't do very much for us here in this
13 proceeding, so --

14 **MR. OLSON:** Well, we have a great deal to say about
15 it when it's appropriate and an a propitious time for us to do
16 so. I won't attempt to get into our point of view on it at
17 this time, then.

18 **THE COURT:** That's fine. I think it's probably
19 something we should discuss, if it is possible.

20 There certainly has been a good deal of interest in
21 the case. And it would appear to fit the formula that the
22 Ninth Circuit Judicial Conference contemplated in 2007, when it
23 adopted that resolution that I referred to.

24 **MR. OLSON:** One or two other items --

25 **THE COURT:** Certainly.

1 **MR. OLSON:** -- such as that.

2 We have been approached by a party interested in
3 filing an amicus brief. I don't know if we'll be approached
4 again or not about that. And I thought I'd ask whether the
5 Court would entertain the filing of amicus briefs, and if and
6 when the Court would want them, if you would entertain that.

7 **THE COURT:** Well, is there anything wrong with at
8 least entertaining applications to file amici?

9 **MR. OLSON:** I think not. I mean, there is a
10 widespread interest in this case for the reasons we all know.

11 Different parties who are not entities, or
12 individuals who are not parties to the case have an interest in
13 the outcome and a point of view, I'm sure, on both sides.

14 And I think that it may be -- add an additional
15 burden to your responsibilities, but I -- from our point of
16 view, the points of view and attitudes and information are
17 probably something that should be welcome in this case.

18 They would certainly be filed in an appellate phase
19 of this case, in any event. Now, but -- but I just wanted to
20 raise that with you.

21 And I would guess you would want those at some point
22 before the beginning of the trial, or certainly before the end
23 of trial, so that it will not delay the deliberation that has
24 to take place once the trial takes place.

25 **THE COURT:** Well, I can certainly see someone or some

1 entity that has an interest in these matters wanting to state
2 its position both before trial but also observing the
3 proceedings and perhaps adding something that they or it feels
4 has not been adequately developed by the parties, and wishing
5 to apply for amicus participation after the trial, in the
6 post-trial briefing. So I have an open mind with respect to
7 this.

8 I believe, at the time that I heard the motion by the
9 group that wanted to intervene on behalf of the defendants, the
10 proponents, the name of which escapes me, Ms. --

11 **MR. OLSON:** It happened so long ago, Your Honor.

12 **THE COURT:** In any event, I'm sure you all recall.

13 (Laughter)

14 **THE COURT:** I think I said -- the record may prove me
15 wrong, but I think I said that I would certainly contemplate an
16 amicus brief from that party.

17 **MR. OLSON:** The same dialogue occurred with respect
18 to the parties that sought to intervene on the side of the
19 plaintiffs. And you denied that motion. But we did discuss
20 the possibility that those views could be expressed in amicus
21 briefs.

22 **THE COURT:** Okay. That's a clue, isn't it, as to who
23 the party is?

24 (Laughter)

25 **THE COURT:** All right. Well, I have an open mind

1 with respect to that. I will certainly entertain amici
2 applications.

3 Well, before saying that, you've indicated from the
4 plaintiffs' point of view that you would welcome amicus
5 participation.

6 Mr. Cooper, what's your view? I realize that there
7 may be some additional burden on the parties if we have a
8 flurry of amici come into the case.

9 **MR. COOPER:** I think you're raising a very good
10 point, and the thought was occurring to me as well, Your Honor,
11 that if the Court basically opened itself to amicus
12 participation, you might see replicated here what we saw in
13 some of the other cases in this state, the marriage cases in
14 particular, where the Court was literally inundated with amicus
15 briefs and views.

16 In a normal circumstance, that -- that would be --
17 that would be not objectionable. But I have to say I have
18 concerns about the kinds of demands that would place upon our
19 side of the case and, I think, all sides of the case.

20 Perhaps the Court would entertain the possibility.
21 But apart from that consideration -- and, normally, in this
22 circumstance we would welcome amicus help on my side and would
23 certainly not object to it on Mr. Olson's side.

24 With that consideration, perhaps there's a way to
25 limit, for the Court's own burdens as well as the parties', the

1 amicus participation.

2 I don't know -- I don't have an idea on how that
3 might be effectuated, but I don't -- by the same token, if the
4 Court ends up effectively welcoming amici, it may well inundate
5 the Court.

6 **THE COURT:** Perhaps a way to deal with this would be
7 to set a deadline, as part of the case management order, that
8 any amici who wish to file briefs, memoranda, prior to trial
9 must do so by a date certain. And that, at least, would flush
10 out any folks who have been observing the proceedings and wish
11 to submit an amicus brief prior to trial.

12 Is that a sensible way to proceed?

13 **MR. OLSON:** I believe it is, Your Honor.

14 And with respect to -- because the pretrial
15 conference filings have been so thorough in terms of
16 identifying the witnesses, identifying factual contentions and
17 exhibits, and the whole works, the -- there's been a very
18 substantial preview of the trial available to parties who feel
19 that something else needs to be said.

20 So I think that's a reasonable way to do it. Then
21 someone else can come along and make some motion with -- if
22 there's good cause later on, I suppose. I mean, that would be
23 up to you.

24 **THE COURT:** How does that sound to you, Mr. Cooper?

25 **MR. COOPER:** Well, Your Honor, I think I would make a

1 friendly amendment to that, because it does seem to me that
2 receiving amicus briefs after the trial and in connection with
3 any post-trial filings the Court may want -- I'm sure that's
4 one of the trial practice issues we're likely to raise and
5 discuss here now, but, to my mind, that might make more sense.

6 I frankly --

7 **THE COURT:** Make more sense to do what?

8 **MR. COOPER:** It might make more sense to open --
9 consider the possibility of amicus filings after the trial.

10 **THE COURT:** After the trial, rather than before?

11 **MR. COOPER:** Rather than before.

12 I frankly don't want to, honestly, have to cope with
13 an avalanche of amicus filings as we are preparing to make our
14 presentations to the Court.

15 **THE COURT:** It's hard for me to believe, given the
16 extensive work that's gone into this, that there's a stone left
17 unturned.

18 (Laughter)

19 **MR. COOPER:** I'm sure there are, Your Honor. I'm
20 sure there are.

21 **MR. OLSON:** If there are any, I think we would be
22 perfectly fine with what Mr. Cooper suggested.

23 If there are unturned stones, it might be nice to
24 know about them before the trial, in case, you know, it might
25 affect either side's strategy with respect to covering

1 something in a question to a witness or something like that.

2 But I don't want to make this too much of a
3 back-and-forth thing. I just wanted to raise it because there
4 are interested groups or citizens who wish to have some sort of
5 input, I'm confident, and so it needs to be resolved in some
6 fashion.

7 **THE COURT:** What if we set a deadline for
8 applications to participate as amici pretrial, with a 15-page
9 limitation and the understanding that the participation would
10 have to be based upon a showing of a particular interest in the
11 case that is not otherwise being represented, to avoid an
12 amicus brief that simply says amen to one side or the other?

13 And then leave open the possibility, after the
14 conclusion of trial, that if a party believes that there is
15 some issue that has not been adequately addressed in the trial,
16 that party can apply for an amicus participation?

17 Does that help assuage your concern, Mr. Cooper?

18 **MR. COOPER:** Your Honor, that seems like a very
19 sensible approach to me.

20 **THE COURT:** All right.

21 **MR. OLSON:** We are all in favor of page limitations,
22 Your Honor.

23 (Laughter)

24 **THE COURT:** Now, let's see, you had another --

25 **MR. OLSON:** These are just housekeeping, and you may

1 have gotten to these later on, but our plaintiffs, our four
2 plaintiffs, have jobs. And we were hoping that it would be
3 understandable and permissible for them not necessarily to be
4 here every day during the trial, because of those commitments;
5 not because they are not interested, but because they do have
6 responsibilities to their families.

7 **THE COURT:** That will be fine.

8 **MR. OLSON:** And we wanted to raise a question about
9 seating in the courtroom. Because of --

10 **THE COURT:** Because of what?

11 **MR. OLSON:** Seating in the courtroom.

12 We were wondering whether it might be possible, and
13 we've discussed this with Mr. Cooper's team, to set aside the
14 first two rows in the courtroom, on either side, for the
15 parties and relations of the parties and participants in our
16 collective teams, so that we would have the availability of
17 getting them in here.

18 That's a very minor -- that's a housekeeping thing,
19 but it may be important when we --

20 **THE COURT:** Well, it is important.

21 And I have been dealing with our excellent staff here
22 on the court, which has had a fair amount of experience,
23 recently, with cases in which there's been widespread interest
24 and the courtrooms are not large enough to accommodate all who
25 are interested in participating.

1 And Joan Anyon, of the court's Clerk's Office, has
2 worked out a procedure which limits the number of observers in
3 the courtroom itself.

4 We are arranging for transmission to the overflow
5 courtrooms -- I think you know that -- so that spectators and
6 media people, as well, could either get a pass to come to the
7 courtroom itself or to the overflow courtroom and observe the
8 proceedings.

9 So there will be a limitation on the number of
10 spectators in the courtroom itself, with adequate space for
11 spectators who cannot get into the courtroom to observe the
12 proceedings in the overflow courtroom.

13 And I would suggest that you let us know how many
14 spaces you need for your teams here in the courtroom. And if
15 you need the first two rows, that's what you'll have.

16 **MR. OLSON:** Thank you, Your Honor.

17 I think there were a couple of other items that
18 Mr. Cooper's team has raised. But the points that were going
19 to be housekeeping-type things, I'll let them mention those
20 items because we've discussed those.

21 With respect to the open items that you mentioned
22 that you will come back to, with respect to the open -- the
23 discovery issues, I'd like my partner, Ted Boutrous, to address
24 those, with the Court's permission.

25 **THE COURT:** Certainly.

1 **MR. OLSON:** And with respect to the in limine motions
2 having to do with expert witnesses, Mr. Boies would be in a
3 position to address that, also with the Court's permission.

4 **THE COURT:** That will be fine.

5 **MR. OLSON:** Thank you, Your Honor.

6 **THE COURT:** All right. Mr. Cooper.

7 **MR. COOPER:** Thank you again, Your Honor.

8 We do have, as Mr. Olson suggested, a number of other
9 kind of trial-practice issues that we have been treating with
10 our friends for the plaintiffs on. And my colleague, David
11 Thompson, has been in that dialogue. And with the Court's
12 permission, I would like him to address those issues to the
13 Court.

14 Also, with respect to the motions in limine,
15 Mr. Nielson, if the Court will permit, would like to address
16 our side of those issues.

17 **THE COURT:** That would be fine.

18 **MR. COOPER:** And with respect to the discovery
19 disputes that we still seem to have, sadly, Mr. Panuccio, will
20 address the Court, with the Court's permission.

21 I should say, in light of the news that the Court
22 has -- has brought to the parties, that obviously will have a
23 direct bearing on, I suspect, the discovery issues that still
24 divide us. And I'm not sure the extent to which we can resolve
25 those in light of that, but, in any event --

1 **THE COURT:** Well, I fully understand. But I think
2 it's imperative that we do our best to resolve all that we can
3 resolve, and work together to move things along so that when we
4 receive any additional guidance from the Court of Appeals,
5 we're in a position to implement that guidance.

6 **MR. COOPER:** Certainly.

7 **THE COURT:** All right. Then shall we turn to the
8 order for an application -- or an application for order
9 shortening time by Imperial County, to hear their motion to
10 intervene?

11 **MR. COOPER:** Your Honor, we are aware of the motion.
12 We support the motion.

13 The counsel who represents Imperial County, I was
14 informed before the Court took the bench that he's on his way
15 here now.

16 **THE COURT:** Ah, well, maybe --

17 **MR. COOPER:** And if we could put that to the end of
18 the list, I think it makes sense.

19 **THE COURT:** That will be fine.

20 If counsel is on his way, then let's move to the
21 second item that I would like to discuss with you this morning,
22 and that is the motion to realign the Attorney General.

23 **MR. COOPER:** Thank you, Your Honor. And I will
24 address the Court on that issue.

25 Your Honor, I don't really have much to say beyond

1 our briefing on the issue. Our position is straightforward,
2 and it can be stated quite succinctly.

3 Attorney General Brown has made clear in this case
4 that he is a de facto plaintiff. He is adverse to the
5 defendants in every significant respect, and allied with the
6 plaintiffs in every significant respect.

7 In his filings before the Court, the Attorney
8 General's Office has openly endorsed the plaintiffs' equal
9 protection and due process claims, has made clear his belief
10 that Proposition 8 is unconstitutional under those provisions.

11 He has admitted the material allegations of the
12 complaint in his answers to the -- to both complaints.

13 He has provided admissions, Your Honor, to the
14 overwhelming 64 of 68 requests for admissions proposed by the
15 plaintiffs to the State; that is, to the Attorney General's
16 Office. And the plaintiffs, of course, have cited those as
17 binding, binding on the State. A proposition, of course, we
18 disagree with.

19 **THE COURT:** But he is the chief law enforcement
20 officer of the state.

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

22 **THE COURT:** And my understanding from his papers is
23 that he is implementing Proposition 8 as interpreted by the
24 California Supreme Court.

25 That is to say, he is doing what the Attorney General

1 would do to prevent the issuance of marriage licenses to
2 same-sex couples, and presumably he will comply with whatever
3 directive results in the final judgment from this Court.

4 So isn't he required to be on the defense side, in
5 that he would implement whatever judgment is entered in this
6 case?

7 **MR. COOPER:** Well, Your Honor --

8 **THE COURT:** And how can he do so if he's the
9 plaintiff?

10 **MR. COOPER:** Your Honor, he's implementing
11 Proposition 8, we would submit, because he has no choice but to
12 do so. It is the constitutional rule in this state. It has
13 been upheld against state constitutional challenge by the
14 California Supreme Court.

15 And we certainly resist the notion that the Attorney
16 General could somehow unilaterally effectively repeal
17 Proposition 8, by virtue of his power as a chief legal officer
18 of the State.

19 The implementation -- and the plaintiffs have taken
20 care to name county clerks and counties who are the ones who
21 really actually implement the marriage-licensing process.

22 The question here is, he is the State's legal
23 representative. And our submission is that -- is that his role
24 in this courtroom is as an advocate. And he is an advocate for
25 the plaintiffs' side.

1 **THE COURT:** How is that different from a situation in
2 which a party is sued and admits the allegations in the
3 complaint, and essentially accepts judgment on that basis?

4 That's -- that doesn't convert that individual from a
5 defendant to a plaintiff. He's still a defendant.

6 **MR. COOPER:** Your Honor, the -- the cases that we
7 have cited to you, we read them to say that a defendant -- and
8 including a government -- a government official defendant, has
9 to be -- his position within the case has to be tested based
10 upon his position on the primary and controlling matter in
11 dispute.

12 And there is no question here that -- and this, in
13 fact, is, we think, a -- a support for our position. There's
14 no question here that there will remain a dispute,
15 notwithstanding the fact that the Attorney General is
16 realigned.

17 We think the Court should follow, for example, the
18 Larios case, which we have cited to the Court, in which a suit
19 was brought by plaintiffs challenging a redistricting plan.

20 And one of the defendant governmental officials there
21 was, as the Attorney General is here, thoroughly aligned with
22 the plaintiffs' side. And the Court, in the light of that
23 fact, concluded that that government official should be
24 realigned to the plaintiffs' side.

25 There's another case, the Delchamps case, from a

1 District Court in Alabama, where the Attorney General of
2 Alabama also took the position supporting the plaintiffs in
3 that case.

4 **THE COURT:** This was the Republican senators in
5 Alabama case?

6 **MR. COOPER:** That's the Larios case, I believe, Your
7 Honor, the Georgia --

8 **THE COURT:** The Georgia. I'm sorry.

9 **MR. COOPER:** The Delchamps case involved the Alabama
10 Attorney General.

11 And, to be sure, as the plaintiffs have noted and the
12 Attorney General has noted, in that case, the Attorney General
13 wanted to be realigned. But the motion to realign was opposed,
14 and the judge had to decide whether or not, according to the
15 applicable standards, that was the appropriate approach.

16 And the applicable standard was: What was the
17 officer's primary -- position on the primary and controlling
18 matter in dispute?

19 **THE COURT:** Let me ask a couple of other questions.

20 One, isn't this realignment procedure usually
21 reserved for one of two situations?

22 One is a jurisdictional situation, where it's
23 necessary either to maintain or defeat diversity.

24 And, secondly, in the patent context, where a party
25 is seeking declaratory relief but in fact is claiming or

1 denying infringement, we do realign parties with some
2 regularity.

3 **MR. COOPER:** Sure.

4 **THE COURT:** But isn't that the usual situation for
5 realignment?

6 **MR. COOPER:** Your Honor, certainly, the
7 jurisdictional context represents the most pressing situation
8 for realignment, where jurisdictional issues may hinge on the
9 issue. We don't --

10 **THE COURT:** But that's not present here, is it?

11 **MR. COOPER:** No, no, Your Honor, it's not.

12 But we haven't found any authority for the
13 proposition that that is the only occasion on which realignment
14 is proper.

15 In fact, Your Honor, we think the authority is to the
16 contrary of that; that it is, even in a rising under case, as
17 opposed to a diversity case or a case where the issue has
18 direct jurisdictional implications, it is not just appropriate
19 but it's essentially the Court's responsibility to align the
20 parties in accordance with their -- their genuine positions.

21 **THE COURT:** How -- I'm sorry. Go ahead.

22 **MR. COOPER:** Not at all, Your Honor. Please.

23 **THE COURT:** Well, how are your clients prejudiced by
24 the Attorney General being aligned as a defendant as opposed to
25 a plaintiff?

1 **MR. COOPER:** Your Honor, I walked through, in my
2 opening, the ways in which the Attorney General has effectively
3 given aid and comfort to the case being advanced here by the
4 plaintiffs.

5 It seems to me obvious why we want the Attorney
6 General to be made a plaintiff. What I think is not at all
7 obvious is why the plaintiffs don't want the Attorney General
8 to be a plaintiff.

9 Normally, you would -- you would welcome the State's
10 chief legal officer to your side of the case. He is more
11 useful to the plaintiffs on the defendants' side of the case,
12 offering positions that can then be advanced as binding
13 positions on the State itself.

14 So it's easy to understand why this wolf in sheep's
15 clothing is not something I want over on my side of the case.
16 The real tough question is why -- and I think it's obvious on
17 both sides, frankly --

18 **THE COURT:** An unfair, kind of an unkind cut to
19 suggest that the Attorney General is in sheep's clothing?

20 (Laughter)

21 **MR. COOPER:** You put me in mind of Justice Scalia's
22 quote, "Yes, this wolf comes as a wolf."

23 **THE COURT:** Well, we certainly face this kind of
24 situation in criminal cases, from time to time, where there are
25 multiple defendants, and one defendant is cooperating to one

1 degree or the other with the prosecution. There are all kinds
2 of issues that come up in that context. But that doesn't
3 result in a realignment of a cooperating defendant into the
4 prosecution side.

5 And the Attorney General does have constitutional
6 responsibilities which he is duty-bound to fulfill.

7 What is so special about this situation that perhaps
8 different points of view, different interests on the
9 defendants' side, necessarily requires that we take a defendant
10 and put him on the other side of the courtroom?

11 **MR. COOPER:** Your Honor, it's -- I think it's an
12 extraordinary situation that is before you on this.

13 It's an extraordinary situation where the State's
14 chief legal officer not only is agnostic, as the Governor is,
15 on the legal issues relating to a constitutional challenge to a
16 constitutional provision duly and properly enacted by the
17 people at large, but, in fact, not only refuses to defend it,
18 and leaves that responsibility to others, but goes beyond that
19 and is heard to say in the court, "I oppose this. I endorse
20 the plaintiffs' side of the case. I agree with the plaintiffs'
21 allegations. The admissions they have asked me as the chief
22 legal officer of the State to make, that aid their case, I
23 readily provide. The opposition to the summary judgment motion
24 put in by those who have stepped forward to defend the
25 constitutionality of the provision, I endorse and I embrace."

1 And, apparently, on a review that took place while the
2 opposition that the plaintiffs filed was in its draft form.

3 The relationship between the plaintiffs and the
4 Attorney General is one of alliance. And this brings us to our
5 request that it be one of alliance formally, and not just
6 de facto.

7 **THE COURT:** Fair enough.

8 Does the Attorney General wish to be heard? Or
9 perhaps I should ask before, does anyone wish to weigh in on
10 the side of realignment?

11 All right. Let me hear from the Attorney General.

12 **MS. PACHTER:** Good morning, Your Honor.

13 **THE COURT:** So you are wearing sheep's clothing.

14 **MS. PACHTER:** I have to admit, Your Honor, the motion
15 was fascinating to research. It never occurred to me that
16 outside the jurisdictional or patent context that this would
17 come up.

18 And Your Honor has been very practical in the conduct
19 of this case so far, so I guess what I'd like to do in my
20 comments is limit myself to practical issues.

21 Since Mr. Cooper first and formally raised this with
22 one of my colleagues following a hearing, I tried to talk to
23 him about, What are the practical issues that you're trying to
24 address?

25 And based on the reply brief, it seems to me that the

1 practical issues that the defendant-intervenors are trying to
2 address are the admissions, and whether those admissions will
3 be conclusive against them in the case.

4 And what I said to Mr. Cooper and what I believe is
5 true now is, those admissions are before Your Honor as every
6 other piece of evidence will be in this case; and it is really
7 a question of weight, and what weight you will give to those
8 admissions in considering all the evidence that is before you
9 in this case.

10 And, otherwise, I really don't think there is any
11 reason to realign the Attorney General in this case. I think
12 we fully briefed the circumstances under which that would be a
13 reasonable thing to do.

14 I think Mr. Cooper's argument would be a lot more
15 compelling if the Attorney General had participated in any way
16 in the depositions in this case in any really active way. But
17 that just hasn't been the case. And there's no legal grounds
18 for it.

19 **THE COURT:** Well, it's certainly true, isn't it, that
20 the Attorney General would like to see the plaintiffs prevail?
21 So why doesn't that make him in league with the plaintiffs?

22 **MS. PACHTER:** Well, while I agree, Your Honor, it is
23 unusual, there are many cases, several of which we cited to you
24 in the briefs, in which the chief law officer -- sometimes it
25 is on the federal level -- agrees with the principal

1 contentions of the plaintiffs' case; and those courts never
2 consider realignment, not unless the chief law officer actually
3 seeks to be realigned in the case.

4 And, presumably, that's for the purpose of pursuing a
5 case, of advancing a case. And that's not the position of the
6 Attorney General here.

7 **THE COURT:** Well, if the Attorney General is taking
8 the position that Proposition 8 is unconstitutional, doesn't
9 that, if not formally, at least as a practical matter, since
10 you put things in practical terms, if not undermine, at least
11 it harms the proponents' position?

12 Doesn't it make their task in defending Proposition 8
13 all the more difficult?

14 **MS. PACHTER:** It certainly does, but that will not be
15 addressed by moving the Attorney General to the plaintiffs'
16 side.

17 Wherever he sits, the Attorney General is the chief
18 law officer of the State, and will be a problem for the
19 defendant-intervenors. But realigning the Attorney General is
20 not going to solve that problem.

21 **THE COURT:** All right. Anything else?

22 **MS. PACHTER:** That's it. Thank you, Your Honor.

23 **THE COURT:** All right. Mr. Olson.

24 **MR. OLSON:** The Attorney General is being sued in his
25 official capacity. We may have a different Attorney General

1 three months from now, if the incumbent Attorney General
2 decides to run for a different office. Just a wild
3 hypothetical speculation.

4 (Laughter)

5 **MR. OLSON:** But my point is that this is an action
6 against the Attorney General as an officer of the State of
7 California, not against an individual person.

8 The Attorney General is enforcing the law. A
9 judgment is being sought against the Attorney General, against
10 the State of California, in that forum, which would result, if
11 we're successful, in an injunction.

12 The plaintiffs are suing --

13 **THE COURT:** Well, how are the plaintiffs hurt if the
14 Attorney General is realigned?

15 Let's assume that you prevail here. You would still
16 have a judgment that would be binding on the State of
17 California; would you not?

18 **MR. OLSON:** Well, it's a little confusing as to
19 whether or not a plaintiff bringing a case is going to get a
20 judgment against another plaintiff in the case.

21 How would we be affected if the Court decides -- if a
22 court decides to start putting other people in the position of
23 the plaintiffs at this table, who can call witnesses and
24 conduct the trial? It's the same thing we talked about with
25 respect to the intervention.

1 The proper place for the State of California in this
2 case is as a defendant.

3 Now, what Mr. Cooper doesn't like is that the
4 Attorney General has made some admissions in the best tradition
5 of law enforcement officials.

6 The government wins its case when justice is done.
7 And so the Attorney General, in the tradition, the honorable
8 tradition, having come to the conclusion that a law of the
9 State of California is unconstitutional, has courageously, I
10 suppose, said so. That does not make that Attorney General
11 into a plaintiff.

12 The Attorney General is continuing to enforce the
13 law, and a judgment is sought against him to prevent him from
14 enforcing the law. That is the right position for a defendant
15 in this case, as chief law enforcement official.

16 As you pointed out, if a plaintiff -- if a defendant
17 in a tort case or in a contract case admits liability, that
18 does not make the defendant a plaintiff. It makes that
19 defendant an honest defendant.

20 (Laughter)

21 **MR. OLSON:** And he may concede facts that are
22 frustrating to other codefendants, and so forth, but it doesn't
23 require an realignment of the party.

24 The government, from time to time, confesses error,
25 as it should, when it is wrong or when it believes it is wrong.

1 And that's all that's happened here.

2 I can understand Mr. Cooper's frustration that a law
3 enforcement official says that, Well, this statute that we
4 passed, I think, is unconstitutional. But that's not really
5 making it any harder for Mr. Cooper to present all the
6 arguments.

7 The Court has not defaulted the State of California.
8 The Court allowed the proponents to intervene precisely so that
9 they can make the case that they want, that Proposition 8 is
10 constitutional.

11 I'm submitting that there isn't case law
12 justification, and, certainly, the facts of this case don't
13 justify moving the State of California to the other side of the
14 ledger in this case.

15 And the plaintiffs are entitled to conduct their own
16 case, without people being added against whom they are seeking
17 a judgment.

18 **THE COURT:** All right. Thank you.

19 Anything further on this issue?

20 **MR. COOPER:** Just one quick point, Your Honor.

21 Certainly, if in a few months from now there is a new
22 Attorney General, and that Attorney General takes our view of
23 it, we will welcome that Attorney General with open arms, and
24 Mr. Olson's effort to realign him.

25 (Laughter)

1 **THE COURT:** All right. Well, I'll issue a written
2 order on this matter.

3 I am disinclined, I will say, Mr. Cooper, to realign
4 the Attorney General formally. I think the Attorney General's
5 counsel has well stated that this is a practical matter more
6 than a legal matter.

7 And it's not at all unusual that there are different
8 perspectives on one side of the case. And I don't believe that
9 the fact that the Attorney General has made the admissions that
10 you've referred to necessarily prejudices the proponents in any
11 material way.

12 But, I will give you an order that will finally
13 resolve this matter.

14 Now, discovery matters. Let's see. We have quite a
15 number of these. How would you like to address them? What do
16 you need the most, in order to move things along so that we can
17 begin our trial on the 11th of January?

18 **MR. BOUTROUS:** Thank you, Your Honor. Theodore
19 Boutrous for plaintiffs.

20 What we need the most, I think, are two things:

21 First, the privilege log that the Ninth Circuit has
22 ordered in confirming this Court's order that plaintiffs'
23 proponents must present. We still have not received that.

24 That, I think, will help us in all other respects, in
25 a practical way and a speedy way, to get the documents we think

1 we are entitled to under the Ninth Circuit's order as it stands
2 today.

3 Secondly, the Ninth Circuit in its opinion said, I
4 think, at least a half a dozen times, that its ruling was
5 limited to private internal communications regarding campaign
6 strategy and messaging.

7 And it left on the table, we believe, all the public
8 communications by the proponents to voters, to discreet voter
9 groups, to individuals, communications that were meant to
10 inspire people to go out and work to pass Proposition 8.

11 The proponents are taking an extraordinarily broad
12 view of what -- of what this privilege means, at this point.

13 They are declining to produce documents that would
14 be -- we attached it, I think, to the December 7 letter that we
15 submitted to the Court, this document from Mr. Tam, the "What
16 If We Lose" document that he signed in his official capacity as
17 the head of the Traditional Family council.

18 They take the position that that type of document is
19 privileged because it was sent to a smaller group of family and
20 friends, even though it was urging those people to go out and
21 vote and to work to pass Proposition 8.

22 And so I think what we need is a definition of what
23 an internal communication really means in this context.

24 We have a proposal that I think is fair and
25 reasonable. We made it to the proponents, and they rejected

1 it.

2 But it seems to us that the core group, the control
3 group, we could sort of call them, the proponents themselves,
4 and the top officers of protectmarriage.com, and basically the
5 way the Court outlined it in the October 1 order, when talking
6 about No. 8, our Request No. 8, those people, I would think,
7 would be the folks who could generate internal documents,
8 communications to each other, and the like.

9 I assume --

10 **THE COURT:** What about a communication from Mr. and
11 Mrs. John Q. Public to either protectmarriage.com or to one of
12 the officers or directors, managing agents of that entity,
13 saying, "I'd like to have a neighborhood party in support of
14 Proposition 8. What are the materials that I can distribute,
15 and signs, and whatnot"? Is that an internal communication?

16 **MR. BOUTROUS:** No, Your Honor, I do not think it is,
17 because it's a communication with someone in the public with
18 whom there is no connection, no official connection or
19 managerial capacity in the organization.

20 The way I'm starting to read the proponents'
21 argument, it's that everyone is internal who voted for
22 Proposition 8, at this point, who was part of the efforts to
23 pass Proposition 8, which obviously is too broad.

24 So I think that would -- we could redact the names,
25 if private citizens wrote in, and there were communications,

1 into the kind of protective order that we had talked about
2 before.

3 But I don't think the Ninth Circuit was contemplating
4 that that would be a private communication because, as the
5 Court will recall, Mr. Cooper had used this phrase about an
6 "associational bond." And I used the example in the Ninth
7 Circuit argument that under their interpretation, if they
8 asserted an associational bond, they could send documents to
9 thousands of people as long as they claimed that they were
10 doing it in this world of the bond.

11 The Court rejected that. And the proponents have
12 seized on that language in Footnote 12, of the opinion,
13 however, to argue to us that unless the documents were
14 communicated to a large swath of the electorate, they are
15 private.

16 And I don't think the meaning of the word "private"
17 or the meaning of the word "internal" would support that
18 interpretation.

19 And the Court, the Ninth Circuit, was very clear
20 that, "Our holding is limited to private internal campaign
21 communications concerning the formulation of campaign strategy
22 and messages, not the messages themselves that were conveyed to
23 voters."

24 So we think it's a very reasonable proposition that
25 all the external communications to -- whether it be to one

1 voter or five voters or ten voters, where the campaign was
2 seeking to inspire people to pass Proposition 8, are on the
3 table and should be discoverable if they relate to efforts, and
4 could reasonably be interpreted to be an effort to prompt the
5 passage of the proposition.

6 **THE COURT:** Tell me what the proposal is that you
7 have made to the proponents, that you say they have rejected.

8 **MR. BOUTROUS:** We -- essentially, what I've outlined.
9 One, that we would get a privilege log; that the
10 privilege log could be limited to external communications;
11 that --

12 **THE COURT:** External in what sense?

13 **MR. BOUTROUS:** External to the core group that we
14 would define to include the individual proponents who have
15 intervened in the case, the executive committee members of
16 protectmarriage.com and other -- I think the Court talked about
17 it as sort of individuals with managerial capacity.

18 So people who are actually part of the campaign
19 itself and the proponents' group that intervened in this case.

20 And one other, I think, limiting factor, Your Honor,
21 I presume that Mr. Cooper and his team, diligent lawyers that
22 they are, conducted a search of all the people and all the
23 individuals' documents who they believe are subject to this
24 internal -- internal privilege.

25 And I think that would be another way to limit it.

1 The people that they view as part of the campaign and the
2 people they view who were subject to our discovery requests,
3 that group, communications amongst those people for present
4 purposes, without regard to the Ninth Circuit proceedings, we
5 would leave off the table for now. They would not have to do a
6 privilege log.

7 This is what we proposed before we heard about the en
8 banc issue.

9 And then the documents that we would seek would be
10 communications outside of that group to individuals and
11 citizens that could be reasonably interpreted to have it as
12 their goal the prompting of a vote or some other form of
13 support of Proposition 8.

14 And so I think that's a very targeted, limited
15 interpretation.

16 The other issue we've had, Your Honor, is that
17 proponents claim that now that we've got the ruling from the
18 Ninth Circuit, that requests -- our Request No. 1, for example,
19 which sought all communications with voters, are somehow
20 resolved and they are not required to produce documents
21 responsive to that document -- to document requests; which
22 there's no support for that.

23 The only issue that was dealt with in this Court's
24 November 11th order, which was before the Ninth Circuit and
25 that they dealt with, was our No. 8 request as revised.

1 So a related issue to this, Your Honor, is the
2 identity of the executive committee. This kind of puts in
3 context, I think, the extreme nature of this privilege claim.

4 We've been fighting to find out the fifth person who
5 was a member of this executive committee of
6 protectmarriage.com, that ran this \$40 million campaign.

7 This wasn't like Mrs. McIntyre, in the Supreme Court
8 case, out there anonymously leafletting. This was this huge
9 campaign.

10 The proponents have refused to disclose the name of
11 this fifth person, claiming it's privileged and nonpublic.

12 Well, yesterday we received a document during
13 production, which was an e-mail trail from the executive
14 committee members of protectmarriage.com to the Wall Street
15 Journal, asking the Wall Street Journal to publish a letter by
16 the executive committee members.

17 And I can provide the Court with a copy, but it
18 has -- it's signed. This is to the editors, asking this to be
19 published to millions of people. It has the five members of
20 the executive committee. But on our copy, they redacted the
21 name of the fifth person.

22 So they are taking the position that somehow, under
23 some version of the First Amendment, information they gave the
24 Wall Street Journal is privileged and confidential and private.

25 And I just don't think the Ninth Circuit's ruling or

1 any case of this Court, the Ninth Circuit, or the Supreme Court
2 supports that interpretation.

3 Once you communicate with someone outside the group
4 that is private and confidential, First Amendment protection is
5 waived in that context.

6 And that principle, I think, is being disregarded
7 here. And we are simply getting blocked, in terms of any
8 discovery regarding things that weren't broadcast on TV and the
9 like.

10 **THE COURT:** One of the issues that the Ninth Circuit
11 panel focused on was the availability of much of this
12 information from other sources.

13 Why is it that you can't develop this information
14 from sources outside the proponents' campaign?

15 **MR. BOUTROUS:** We are developing it to the extent we
16 can, Your Honor, in terms of publicly-available information.

17 But we served, I think, 15 to 20 subpoenas on
18 third-party groups during the argument that I think Judge
19 Wardlaw made the point: Why can't you go to these other groups
20 and get their documents?

21 They have all been refraining from producing
22 documents because they are prepared to ride the First Amendment
23 privilege, however it pans out, that the proponents are urging.

24 So I presume they would take the position that unless
25 they were communications on television or very broad, public --

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

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

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

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

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

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

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

1 **MR. BOUTROUS:** They were organizations that were
2 involved in the effort to pass Prop 8, and that supported the
3 organization.

4 So we haven't subpoenaed the Wall Street Journal or
5 other --

6 **THE COURT:** You have not?

7 **MR. BOUTROUS:** -- entities.

8 We have not, no.

9 And entities that might have accumulated this
10 information, as well, we've limited ourselves there to public
11 information, advertisements and things that we were able to
12 find on the Internet.

13 We found some things on the Internet, like this
14 document from Mr. Tam, which contains all kinds of inflammatory
15 rhetoric and urges people to help --

16 **THE COURT:** Would it not be a fair interpretation of
17 the Ninth Circuit Panel decision that a communication from
18 protectmarriage.com to a church organization or some other
19 group that is supporting the passage of Proposition 8 is one of
20 these internal communications that the First Amendment
21 privilege and the Ninth Circuit found implicates?

22 **MR. BOUTROUS:** No, Your Honor, I don't think so.

23 The court, the Ninth Circuit, cited the In Re Motor
24 Fuels case, which is what they cited in Footnote 12. And the
25 District Court in that case specifically rejected the notion

1 that communications between trade associations, which would be
2 very analogous to our situation, would be covered by the
3 First Amendment privilege that the District Court recognized
4 there.

5 And the District Court in the Motor Fuels case
6 said -- emphasized -- I am only talking about internal
7 documents in evaluations of lobbying and legislation, and
8 everything else is subject to normal discovery rules.

9 And then I think it's in a footnote the Court said,
10 "When one trade association engaged in First Amendment advocacy
11 communicates with another group, the confidentiality interests
12 fade."

13 **THE COURT:** Well, the footnote, in its second
14 sentence, states, "Proponents cannot avoid disclosure of
15 broadly-disseminated material by stamping them 'private' and
16 claiming an associational bond with large swaths of the
17 electorate."

18 But would that foreclose the privilege covering a
19 communication from protectmarriage.com to the governing body of
20 a church organization, or some other organization that was
21 supportive of Proposition 8, if that communication was not
22 broadly disseminated?

23 **MR. BOUTROUS:** I don't think it would foreclose, Your
24 Honor. I think the Court was giving an example. In part, I --
25 I mean, I maybe gave them the -- suggested this example,

1 because I said, well, under the proponents' interpretation,
2 this sort of material would be covered. And they -- I'm glad
3 they did -- said, no, it would not be covered by the privilege.

4 But Footnote 12 is connected to the sentence that
5 says, "Proponents have already agreed to produce all
6 communications actually disseminated to voters, including
7 communications targeted to discreet voter groups."

8 And I would think that a church group or some other
9 smaller unit of people, a group of family and friends and
10 associates that one citizen is saying, "Go out there and pass
11 this law, vote for it" -- Mr. Schubert, in his article which I
12 know the Court is familiar with, in analyzing the campaign
13 strategy, touted the grass roots strategy that really was
14 crucial to the effort, which does not involve big rallies or
15 public -- sort of the traditional campaign style event.

16 It would include smaller targeting of groups, telling
17 one neighbor to go tell another neighbor, "Here's the message.
18 Carry this with you out into the world and convince people to
19 vote for this proposition."

20 And I do not think that is the kind of internal,
21 private communication that the Ninth Circuit was concerned
22 about.

23 And I think the opinion really focuses on the
24 internal files of the group. "These are our files. This is
25 what we are thinking of doing. This is why we are thinking of

1 doing it." That was the focus of the briefing and the focus of
2 the Court's concerns in the opinion.

3 The other issue, Your Honor, that is related to this,
4 in the depositions of the proponents, the proponents' lawyers
5 have taken extreme positions in terms of the scope of the
6 inquiry.

7 We are sensitive to the fact -- well, first of all,
8 this Court ruled that unexpressed sentiments about why a
9 proponent engaged in the battle for Proposition 8 were not
10 something that were discoverable. We are very sensitive to
11 that. But that's different than expressed sentiments.

12 In Mr. Tam's deposition, based on this First
13 Amendment privilege and this notion of private communication,
14 when we were questioning Mr. Tam about the document that was
15 posted on the Internet, that was addressed to friends and
16 signed by him in his official capacity, the counsel for
17 proponents objected to this question:

18 "Was your goal in writing this letter to
19 encourage people to vote in favor of
20 Proposition 8?"

21 And that's a good example of the -- she objected that
22 since the document was intended by him to be private, questions
23 just about the foundation of the document, its purpose and
24 meaning, and identifying what it was and what it was supposed
25 to do, were off limits.

1 And, again, we think that is far broader than
2 anything the Ninth Circuit was contemplating.

3 Senator Hollingsworth, the government official, when
4 asked in the last sentence of the official materials, "Voting
5 Yes Protects Our Children," counsel for the proponents objected
6 and instructed him not to answer the question:

7 "What did that mean? What do you mean by
8 that phrase?"

9 So it's really made the proponent depositions
10 extraordinarily unhelpful and unilluminating. And the huge
11 inquiries, huge swaths of inquiry have been blocked, we think,
12 by asserting a vastly overbroad interpretation of the
13 First Amendment.

14 **THE COURT:** Well, let me ask a couple of other
15 questions. The first is focusing on the first footnote of the
16 panel's decision.

17 As often is the case, really interesting stuff is in
18 the footnote.

19 **MR. BOUTROUS:** It really is interesting.

20 **THE COURT:** In any event, the first footnote states,
21 "The District Court observed that proponents had failed to
22 produce a privilege log, as required by Federal Rule of Civil
23 Procedure 26(b)(5)(A)(2). We agree that some form of a
24 privilege log is required, and reject proponents' contention
25 that producing any privilege log would impose an

1 unconstitutional burden."

2 Focusing now on that language, "some form of a
3 privilege log," well, I know you're familiar with the general
4 form of a privilege log when you're dealing with the
5 attorney-client privilege. What's the appropriate form of a
6 privilege log in this context?

7 **MR. BOUTROUS:** Your Honor, I think it would be
8 tailored to the proposal I have made about a core group, in the
9 way -- how I would propose we define "internal."

10 So it would include a description of the document
11 along the lines that this Court used in its November 11 order,
12 then giving us a sense of the nature of the document, what is
13 the document.

14 Then, I think, in order to make a judgment call for
15 us as to whether to go after the document, and for the Court a
16 description of the recipients in a manner that gives us a sense
17 who these people were, if their identities are confidential or
18 it being asserted to be confidential, that could be redacted or
19 not explicitly stated, but something that tells us how many
20 people received the document; was there a confidentiality
21 designation of the document when it was sent, unlike some of
22 the documents we're seeing; something that just lets us look at
23 the documents and make a judgment call as to whether it sounds
24 like it's a valid claim of privilege.

25 If it were a document sent to 15 people at a

1 different organization, we would argue that is not covered by
2 the privilege, and that sort of information would allow us to
3 target our challenges, and if we have to bother the Court again
4 with these issues, at least we could narrow the universe to the
5 documents that really seem to be in play under the definition
6 of --

7 **THE COURT:** So what you contemplate is, basically, a
8 privilege log very much akin to the privilege log that you see
9 in the attorney-client privilege context, from whom, to whom,
10 date, and the general nature of the communication, without
11 disclosing the communication itself.

12 **MR. BOUTROUS:** Essentially, Your Honor, and with some
13 general description of the topics covered. And, again, we are
14 for now limiting our requests and our inquiry with the Ninth
15 Circuit issues pending to documents that were -- can reasonably
16 be interpreted to have been intended to persuade people to
17 support Proposition 8.

18 **THE COURT:** Now, another issue and a more strategic
19 one, from the point of view of both parties, it's pretty clear
20 this First Amendment issue is an important one and a very
21 interesting one, and one that has implications that go far
22 beyond this case.

23 To what degree should -- to what degree is it in
24 plaintiffs' interest to mix this First Amendment issue with the
25 merits of the equal protection and due process claim that

1 you're making against Proposition 8?

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

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

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

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

1 of relevance and make a compelling showing of need?

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

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

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

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

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

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

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

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

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

1 **MR. COOPER:** Mr. Panuccio.

2 **THE COURT:** Mr. Panuccio. All right. Fine.

3 **MR. PANUCCIO:** Thank you, Your Honor. Again,
4 Jesse Panuccio for the defendant-intervenors.

5 What we have here today, I guess, is the latest
6 iteration of plaintiffs' discovery request. This would be the
7 third iteration of No. 8.

8 They now say that -- what happened in this court, if
9 you remember, we had the October 1st order, the November 11th
10 order. Each of those sort of narrowed what the Court felt
11 would be relevant to this case.

12 On the First Amendment issue, we took it up to the
13 Ninth Circuit on what was still left after that narrowing, and
14 said we believe the First Amendment privilege is implicated
15 there. And the Ninth Circuit vindicated us on that claim.

16 Now, what was left, after the November 11th order,
17 was this -- what Mr. Boutrous is now calling this control
18 group. It would have been this set of internal communications
19 between or among a list of people that was in that revised
20 request.

21 Having lost in the Ninth Circuit, they take that
22 opinion -- and there was no cross-appeal. They take that
23 opinion, and they say, Okay, we lost on that. We now want
24 everything that is on the other side of the line that this
25 Court already narrowed.

1 And their view is that everything this Court had
2 previously done, even though they didn't cross-appeal, is now
3 off the table and they can start anew, three weeks before
4 trial, with a brand-new discovery request.

5 That's what we are facing. That is the practical
6 nature of what we are facing.

7 They are asking us now to go back through the 90- to
8 100,000 documents we've had to look through in response to
9 their request. "Look through it again and take out everything
10 you sorted out based on the November 11th order, and give it to
11 us."

12 And we'll have to litigate the First Amendment nature
13 of that again because we didn't have to do that under the
14 November 11th order.

15 **THE COURT:** Well, explain that to me. I'm not sure I
16 follow that.

17 There were, basically, three elements to the Ninth
18 Circuit opinion. One, they determined that these internal
19 communications met the discoverability standard of Rule 26;
20 two, that in order to preserve the First Amendment privilege, a
21 privilege log is necessary; and, three, that a higher than
22 usual standard, a high standard of relevance, is necessary in
23 order to obtain that discovery, which went considerably beyond
24 what the Supreme Court had provided in other cases, but it's
25 certainly a fair reading of the First Amendment privilege.

1 So how does Mr. Boutrous's argument somehow or other
2 run counter to that fundamental three-part holding of the Ninth
3 Circuit?

4 **MR. PANUCCIO:** Yes, Your Honor. I think it's
5 important to remember, again, what was -- what they say in
6 their letter to us is, they say, you know, the Ninth Circuit
7 ruled that the privilege is limited to the following. That's
8 not actually what the sentence is.

9 The Ninth Circuit said our holding is limited, and
10 the reason our holding is limited is because we appealed -- and
11 if you look at both of our notices of appeal, we appealed the
12 October 1st order and the November 11th order, to the extent
13 they denied our claim of First Amendment privilege.

14 And what documents were at issue after the
15 November 11th order? Well, only those documents that this
16 Court said would be relevant and responsive.

17 Before the Ninth Circuit, Mr. Boutrous repeatedly
18 endorsed this Court's limiting and said, yes, that limiting
19 controls, that's what's before the Court.

20 So that's all the Ninth Circuit had to consider.
21 There was no cross-appeal about the limiting that this Court
22 engaged in.

23 The plaintiffs didn't say --

24 **THE COURT:** Well, I don't understand that the
25 plaintiffs are challenging the determination which I made, that

1 purely internal expression of sentiments or even strategy
2 documents such as, "Shall we hire such and such polling firm?
3 Or shall we conduct canvassing of this group and that group?"

4 I'm not sure that the plaintiffs are seeking that
5 kind of information, are they, if those are internal
6 communications?

7 **MR. PANUCCIO:** So there were a few different aspects
8 of the limiting between the Tuesday, October 1st, and November
9 11th orders.

10 One was the subject matter limiting. But another
11 was -- well, you said it should be sufficient for this case to
12 get documents from this group of people.

13 What they -- what plaintiffs said to us when they
14 came back with revised requests, they said, We were just
15 following exactly what the Court said in terms of the list we
16 have given you here. So this is the list of people we are
17 interested in and is sufficient to get the information we need
18 for this case.

19 Having now lost on getting those documents, they are
20 going back to original request No. 8 -- or, actually, to a
21 third request now and saying, We want -- here's the basis for
22 what they want: We want every communication you might have had
23 with anyone who is a, quote, voter; anyone outside. And they
24 say, And, by the way, "outside" means anyone who wasn't in this
25 control group.

1 So their -- basically, their position now is if
2 Dr. Tam or Mr. Jansson has a one-on-one communication with a
3 family member, a friend, a known political associate, a church
4 leader they have known for 20 years, and the church leader came
5 to them and said, "I am on board. What can I do to help?"
6 Those communications are now discoverable.

7 So there is no First Amendment right for individuals,
8 is what they claim. You have to be a member of a 501c3, and
9 then you get First Amendment protection if you have an official
10 title. Which, by the way, in a volunteer campaign you often
11 don't have.

12 But what they would say is, if Dr. Tam, who wasn't a
13 member of protectmarriage.com, if he has individual
14 communications, we get those.

15 And I suppose it would extend -- their own
16 plaintiffs, Kristin Perry, has no First Amendment rights to
17 talk about this issue, under the plaintiffs' view of the
18 First Amendment, after the Ninth Circuit's order. It's
19 remarkable.

20 **THE COURT:** Well, Mr. Boutrous pointed out Footnote
21 12 of the Ninth Circuit's opinion, which you pointed out.

22 The Court stated, "Our holding is limited to private,
23 internal campaign communications concerning the formulation of
24 campaign strategy and messages."

25 In fact, the November order that I issued was really

1 only directed to campaign messages. And of the 60 documents
2 that I reviewed, I think I did not order the production of the
3 strategy documents, but only those that referred or related in
4 some manner to messages disseminated to the voters, and that
5 that is what will form a universe of information from which we
6 might determine voter intent.

7 But, in any event, it would appear that in some ways
8 the Ninth Circuit might approve the disclosure, assuming you
9 meet a high standard of relevance, of these campaign strategy
10 documents, as well as those that relate to messages
11 disseminated to voters.

12 **MR. PANUCCIO:** A few points on that, if I may
13 respond.

14 The first point would be, the Ninth Circuit, yes,
15 there is this footnote and, you know, we obviously have a
16 competing view. They say it opened up whole new worlds. We
17 say it basically confirmed the discovery we have already given
18 you. We have agreed from the outset to give them materials
19 disseminated to large swaths of voters.

20 What the Ninth Circuit also said is, you know, with
21 respect to internal campaign documents, we are not saying that
22 a party seeking discovery can never get internal campaign
23 documents. But the request has to meet a heightened standard
24 of relevancy, and must be narrowly tailored.

25 We have never received from the plaintiffs a

1 narrowly-tailored request. And we still don't. Now we just
2 have this new request, which asks for all communications,
3 again, back to the first request, No. 8, which this Court said
4 was overbroad, both in the hearing and in its opinions.

5 So we have nothing to work from with this request
6 that requires us to go through, sort, resort again and again
7 and again these tens of thousands of documents, just draining
8 untold resources from our side of the case.

9 So I don't think they have met, at any point now --
10 they also haven't issued a revised request. They just have a
11 letter saying --

12 **THE COURT:** Well, if there are 10,000 or thousands
13 upon thousands of these documents, how can they be internal
14 documents?

15 **MR. PANUCCIO:** Well, so what we have --
16 (Simultaneously colloquy.)

17 **THE COURT:** I mean, they can't exchange that many
18 documents in the course of a campaign.

19 **MR. PANUCCIO:** Well, if you think about it, if you
20 have -- just talking about somebody's e-mail account, imagine
21 the daily traffic of e-mail that goes -- someone who is running
22 a campaign.

23 Now, they may have 20 messages that day about
24 messaging. They may have 20 messages that day about whether
25 they are going to hire a janitorial staff for the building.

1 We have to look at all of those, every time, to
2 figure out their -- you know, if they say Prop 8, you know, the
3 Prop 8, Yes on 8, building needs a new janitorial staff, we
4 have to look at every one of those and sort and resort, to
5 figure out whether they are responsive to the ever-shifting
6 request for documents in this case.

7 The other response I would make, again with respect
8 to the Ninth Circuit's opinion, when they say their holding is
9 limited, the only thing before them was this set of documents
10 that resulted from the November 11th order.

11 They actually looked at the 60 documents Your Honor
12 looked at, and they quoted the language Your Honor --

13 **THE COURT:** I think they looked at 21, if I remember.

14 **MR. PANUCCIO:** I'm sorry. You're right. I stand
15 corrected.

16 **THE COURT:** They requested only the 21 documents.
17 They didn't look at the others.

18 **MR. PANUCCIO:** I stand corrected. I should know
19 because I helped get that shipment out the door. Sorry.

20 But they basically -- they quote this Court's
21 November 11th order, and what the universe of documents was
22 restricted to. So I really don't think you can say the Ninth
23 Circuit addressed this new universe that plaintiffs want to get
24 into.

25 I also would think it's important to look at what is

1 out of the footnotes but actually in the core of the opinion.

2 The Ninth Circuit said --

3 **THE COURT:** Where are you?

4 **MR. PANUCCIO:** Well, you know, I neglected a couple
5 of pin cites. One of the places will be at the slip opinion at
6 page 30. And I will furnish you with the others immediately
7 after I sit down. But I would like to just read the quotes,
8 and then I can give you the pin cites right after.

9 The Ninth Circuit said, "The compelled disclosure of
10 political associations can have just such a chilling effect."
11 And the chilling effect they are referring to is an
12 unconstitutional chilling effect.

13 They also said, "Disclosures of political
14 affiliations and activities that have a deterrent effect on the
15 exercise of First Amendment rights are, therefore, subject to
16 exacting scrutiny."

17 So when they say that they can get, say, Mark
18 Jansson's one-on-one communications with somebody he happens to
19 associate with in his neighborhood on a political issue, I
20 believe that would get to the type of chilling effect they were
21 worried about in the opinion.

22 They were focused, I suppose, on protectmarriage.com
23 as an entity because that's where the parties have often
24 focused. But that is not the only thing implicated in this
25 case. There are individuals. And it is the individual right

1 to associate, whether it be through a formal organization or
2 informally, that is implicated.

3 **THE COURT:** They did say that Mr. Jannson's
4 declaration was lacking particularity, and the chilling effect
5 is not as serious as that involved in the *NAACP vs. Alabama*
6 case and so forth. It's very definitely a measured approach to
7 this problem.

8 **MR. PANUCCIO:** Measured. But, nonetheless, they
9 credited it, and the holding went in our favor. So they may
10 have stepped back and said, Well, this isn't *NAACP vs. Alabama*,
11 but we are going to vindicate the First Amendment issues that
12 proponents have raised in this case.

13 **THE COURT:** What about a privilege log?

14 **MR. PANUCCIO:** Okay. The issue of the privilege
15 log --

16 **THE COURT:** It's pretty clear the Court of Appeals
17 said in order to preserve this privilege, you have to prepare a
18 privilege log.

19 **MR. PANUCCIO:** And, as you point out, I think, in a
20 somewhat cryptic footnote about what that would look like, they
21 did say there would be no unconstitutional burden.

22 If you're asking me from a factual standpoint where
23 we stand on constructing a privilege log, based on if the
24 Court's orders of October 1st and November 11th still stand in
25 terms of the universe of documents we need to look at as

1 responsive and relevant in this case, then I believe we could
2 have a privilege log probably by Monday of next week.

3 You know, that's with the qualification that if the
4 Ninth Circuit orders very significant en banc briefing, that
5 may adjust the schedule a little bit.

6 I do believe we are getting in a position to be
7 able --

8 **THE COURT:** That undoubtedly would be most helpful.

9 **MR. PANUCCIO:** And, again, that would be if the
10 universe of documents -- if we have to deal with the third
11 request or letter that plaintiffs have issued revising their
12 request, that burden and time would increase significantly.

13 I wanted to -- unless Your Honor would like more on
14 the issue of documents, Mr. Boutrous brought up the issue of
15 depositions, and I would like to address that if I may.

16 **THE COURT:** Very well. Please do so.

17 **MR. PANUCCIO:** With respect to deposition testimony,
18 I would like to just read the Court a few examples of what it
19 is plaintiffs' counsel is asking the deponents in this case.
20 And I have listed more of these at document 297-1, Footnote 3.

21 But here are some of the questions:

22 Quote, "And do you believe that to be true, what is
23 written there?" End quote.

24 Quote, "Do you believe that Satan is behind the
25 same-sex marriage movement?" End quote.

1 **THE COURT:** Do you believe what, sir?

2 **MR. PANUCCIO:** "... that Satan is behind the same-sex
3 marriage movement?" End quote.

4 Another one:

5 Quote, "Was your goal in writing this letter to
6 encourage people to vote in favor of Proposition 8?"
7 End quote.

8 Now I would like to read this Court's October 1st
9 order. Quote, "Discovery directed to uncovering whether
10 proponents harbor private sentiments that may have prompted
11 their efforts is simply not relevant." End quote. That's
12 document 214 at 16.

13 Now, let me read again, here's the question they're
14 asking:

15 "Was your goal in writing this letter to encourage
16 people to vote in favor of Proposition 8?"

17 What they are seeking to do in depositions is get to
18 what they are not allowed to get to in document requests, which
19 is the subjective, private views of individuals who engage in
20 this political campaign, what this Court has said is irrelevant
21 and what the Ninth Circuit has now said is protected.

22 And here's the practical implication of their view.
23 If I were engaged in a campaign with Mr. Cooper, and I wrote to
24 him in an e-mail, "I really think we need to do the following
25 four things in the campaign, and the flier we put out should

1 have this language on it," and Mr. Cooper rejects that, and
2 that never goes public, it's just our internal communication,
3 under the Ninth Circuit's order that's protected.

4 But if, in my head, I rejected an idea because
5 Mr. Cooper would think it's ridiculous, that they can get to in
6 a deposition. So what's in my own head is less protected than
7 what is in the private communications that I send to my
8 political associates.

9 I don't think that follows both logically or legally
10 from the Ninth Circuit's order and the cases they rely on
11 there. And the Ninth Circuit said, in fact -- well, they cited
12 *McIntyre*, and *ACLU vs. Heller*.

13 And they said, "Associations no less than individuals
14 have the right to shape their own messages." Individuals have
15 a right to shape a message to the public and let the public
16 take it for what it is.

17 **THE COURT:** Well, but is there anything wrong with
18 asking someone who has disseminated a message to the public
19 what it was that he or she intended to accomplish? That would
20 be permissible discovery; would it not?

21 **MR. PANUCCIO:** Well, I don't think so.

22 I think a good -- I think an analogous case here is
23 the *Wisconsin Right to Life* case in the Supreme Court. And
24 that's 551 U.S. And the pin cite would be 468.

25 And in that case, which was -- you know, it's one of

1 these campaign finance cases, and the question is: Were these
2 electioneering communications?

3 Chief Justice Roberts said in his opinion that
4 something that turns, that is a non-objective inquiry,
5 subjective inquiry into the ad-maker's intent, would -- I
6 believe the exact quote, "They declined to adopt such a test
7 turning on speaker's intent because it would," quote, "chill
8 core political speech and would also lead to bizarre results."

9 So if one speaker -- all that the public sees is
10 what's on the face of the document. So if one deponent said,
11 "Yeah, my intent was X," and another deponent said, "My intent
12 was Y," I guess the result in two cases with that testimony
13 would be different, even though the public saw the same
14 document and would have had the same reactions.

15 The Ninth Circuit also addressed this and said, Look,
16 if that's the kind of information you're interested in, voter
17 reaction, you can get that information from other sources.

18 **THE COURT:** Wouldn't it be fair for a lawyer in
19 deposition to ask, "When you disseminated this message to the
20 electorate or to this group of the electorate, you used certain
21 words that we deemed to be code words; and weren't you seeking
22 to elicit some response on the part of the electorate based
23 upon the use of that particular word or phrase?"

24 Wouldn't that be an appropriate avenue of inquiry,
25 once you deal with -- once you have a message that has, in

1 fact, been disseminated --

2 **MR. PANUCCIO:** Well --

3 **THE COURT:** -- as opposed to, say, a communication
4 between people who are attempting to formulate strategy?

5 **MR. PANUCCIO:** If the question -- and, please,
6 correct me if I'm wrong.

7 If the legal question the Court is trying to address
8 is what would the voter reaction be --

9 **THE COURT:** Voter intent is, yes.

10 **MR. PANUCCIO:** The voter intent.

11 **THE COURT:** Correct.

12 **MR. PANUCCIO:** But, again, the question is the people
13 who saw the document, what did the code word -- what
14 motivations did it actuate for them?

15 The subjective intent of the person who made that
16 document, who is a non-expert on psychology or voter intent or
17 whatever the case may be, is not going to be probative of that
18 reaction. You would have to have experts or just the Court
19 bringing its judgment to bear on what's on the face of the
20 document.

21 This is precisely Chief Justice Roberts' insight in
22 *Wisconsin Right to Life*, is that that kind of inquiry would be
23 chilling to the First Amendment because everybody who put out a
24 poster and chooses their speech, and just wants to let it ride
25 in the public as it is on the face of the document, would have

1 to worry -- if they got involved in a political campaign, would
2 have to worry about facing depositions about what's in their
3 own head about the document.

4 I think that would -- in many ways, that would be
5 more chilling.

6 **THE COURT:** The question would not be, "What was in
7 your head?" but, "What was your effort? What did you expect
8 the voter reaction to be to the use of this phrase or word or
9 formulation?"

10 **MR. PANUCCIO:** Well, I mean --

11 **THE COURT:** That would be a fair inquiry; would it
12 not?

13 **MR. PANUCCIO:** Well, I think just under the law of
14 the case here, under the October 1st order, the Court said
15 discovery directed to uncovering whether proponents harbor
16 private sentiments that may have prompted their efforts is
17 simply not relevant.

18 And so if my effort is to put out a flier, it's just
19 simply not relevant what prompted that, my private sentiment as
20 to what I wanted that flier to do or why I posted it on the
21 telephone pole. It isn't relevant. And, beyond being not
22 relevant, it's highly privileged.

23 If communications between two people are privileged,
24 certainly your own thoughts, your own inner thoughts about
25 First Amendment speech are at the very core, you know, even

1 more privileged, even more chilling.

2 The disclosure would be even more chilling than the
3 communications between two people because at least you've aired
4 the thought to somebody. But if you've aired your thought to
5 nobody, how could it possibly be that that doesn't violate the
6 First Amendment privilege?

7 **THE COURT:** Well, but here you have a situation where
8 there has been an airing of thoughts to somebody, and probably,
9 in this instance, a large number of somebodies. And that would
10 seem to open the door to the intent behind that dissemination.

11 **MR. PANUCCIO:** Well, I think Mr. Cooper put it well
12 before the Ninth Circuit, citing to both the *McIntyre* case and
13 *ACLU vs. Heller*, which was the Ninth Circuit's post-*McIntyre*
14 iteration of that principle which is -- in *McIntyre*, there is a
15 quote, and we've quoted it in our briefings. I don't have the
16 exact language at hand. They say that individuals have the
17 right to be their own editors.

18 So when you have a pamphlet and you leave snippets on
19 the editing room floor, that state can't come in and pick up
20 those snippets and say, "Give them to me. Air them to the
21 public."

22 **THE COURT:** Are we dealing with Mrs. McIntyre, or are
23 we dealing with the individuals who are the proponents of
24 Proposition 8 --

25 **MR. PANUCCIO:** Well --

1 **THE COURT:** -- like Hollingsworth, like Tam, Jansson?

2 **MR. PANUCCIO:** We are dealing with those individuals,
3 as well as all the other individuals that -- the over 20
4 third-party subpoenas that plaintiffs have issued in this case.

5 And we are also setting a principle of law that I
6 guess would apply in every referendum campaign. And we are
7 also dealing with outside organizations like the ACLU, who put
8 in the amicus brief in the Ninth Circuit.

9 But I believe the Ninth Circuit -- I mean, that
10 argument that the proponents are different because they are
11 proponents, that was raised in the Ninth Circuit. Plaintiffs
12 raised that. It was clearly rejected.

13 The Ninth Circuit did not bite on that argument. So
14 I don't think that we can say there's a constitutional
15 difference between status as a proponent and status as an
16 individual.

17 Simply because you get involved in the referendum
18 process, be it officially or unofficially, it cannot subject
19 you to lesser First Amendment protection.

20 **THE COURT:** Well, but the proponents of
21 Proposition 8, these individuals and others, and the
22 organization itself is required to file a whole panoply of
23 financial disclosure documents. And that has been consistently
24 held not to violate the First Amendment privilege.

25 Those disclosures are very sweeping and detailed, as

1 I'm sure your clients don't need to be told that.

2 **MR. PANUCCIO:** Thank you, Your Honor. That's right.
3 And you are perfectly right. And so those cases -- those laws,
4 of course, in the robust campaign finance law that's out there,
5 have been challenged multiple times in the Ninth Circuit and
6 the Supreme Court. And every time they are upheld the Supreme
7 Court says, The state has a compelling interest for the need to
8 this information.

9 Now, plaintiffs -- we went to the Ninth Circuit, and
10 plaintiffs took their case and said, Here is our compelling
11 interest. And the Ninth Circuit said, I'm sorry, but that is
12 not compelling. Come back with something more narrowly
13 tailored and more compelling, and maybe you can have this
14 stuff.

15 But they have not demonstrated that. So, you know,
16 citing those laws, they met the standard. So far nothing in
17 this case has met the standard of compelling interest and
18 heightened relevance.

19 **THE COURT:** Very well.

20 **MR. PANUCCIO:** If I may, Your Honor, there was one
21 more issue about this document that has surfaced with the last
22 name -- the name of the last member of the executive committee.

23 **THE COURT:** All right. That would be helpful to
24 address.

25 **MR. PANUCCIO:** And I just want to -- there are some

1 factual development, I think, that would be helpful to the
2 Court. That surfaced as we have been culling our documents,
3 creating a log, inevitably, in a discovery effort like this --

4 (Reporter interrupts.)

5 **MR. PANUCCIO:** Inevitably, in a discovery effort like
6 this, you come up with more documents.

7 We found this document, and realized that the name
8 was on it. But I believe, as the Court is aware, this
9 particular Doe member is represented by separate counsel, and
10 is asserting his privilege individually as well. And that
11 document has not been disclosed to the public; although, it was
12 sent to a reporter. And he instructed us that he would like to
13 continue to assert his privilege to anonymity, at this point.

14 And we felt it was not our place to waive it --

15 **THE COURT:** Has that defendant been served? Has he
16 entered an appearance? What's the status? I'm not aware there
17 are any Doe defendants in the case.

18 **MR. PANUCCIO:** I'm sorry. It is a Doe member of the
19 executive committee. And this issue has surfaced with the
20 Court before that -- that that name we had asserted -- we have
21 asserted, is privileged. It was -- has not been disclosed to
22 the public.

23 But he has not entered a separate appearance as a
24 separate party to the case, no.

25 **THE COURT:** So that individual is not before the

1 Court?

2 **MR. PANUCCIO:** I believe that's -- I mean, only in
3 the sense of there -- he was a volunteer of the organization
4 that is before the Court.

5 **THE COURT:** But he was a member of this executive
6 committee of the campaign; was he not?

7 **MR. PANUCCIO:** Yes, Your Honor.

8 **THE COURT:** Well, how do you -- since you've raised
9 that, how do you justify the failure to disclose someone who is
10 an officer, director, managing agent of a corporate entity
11 which is a party to the litigation?

12 **MR. PANUCCIO:** Well, Your Honor, as with other
13 instances in which a third-party may have a privilege that is
14 implicated, you know, they argue they have a privilege that is
15 implicated in litigation, and they can come in and try to
16 defend that privilege.

17 The parties who might be in a position to waive that
18 privilege will, quite frequently, allow that third-party to
19 come in and assert that privilege.

20 You know, now there will be this battle over this
21 document, and we would allow this third-party, through his
22 counsel, to defend that privilege as he sees -- he or she sees
23 fit.

24 You know, an example is if a -- you know, all these
25 third-party subpoenas in this case, you know, some of those --

1 an agent of the Yes On 8 or No On 8 campaign, a vendor who has
2 documents that would, you know, fit within the Ninth Circuit's
3 definition of these internal campaign communications, if the
4 vendor were to simply say, "I am ready to turn these documents
5 over," a No On 8 group or Yes On 8 group could come into court
6 and say, "Well, now, hold on. This is my privilege and I would
7 like a chance to litigate it." And that is the situation we
8 would be faced with here.

9 **THE COURT:** That's an interesting wrinkle.

10 All right. Anything further, sir?

11 **MR. PANUCCIO:** That's all on discovery, sir. Thank
12 you, Your Honor.

13 **THE COURT:** All right. Mr. Boutrous.

14 **MR. BOUTROUS:** Yes, Your Honor. Thank you.

15 I would just like to refocus things a bit.

16 Mr. Panuccio is just simply wrong about the discovery requests
17 that are on the table.

18 Our request for the public communications to
19 voters -- and this is a narrow request that was meant to affect
20 the election and prompt people to support Proposition 8 -- was
21 Request No. 1.

22 And, as the Court will recall, the proponents filed a
23 really broad motion for protective order. They proposed to the
24 Court exactly the standard they are now articulating, that
25 "nonpublic" basically means anything that wasn't broadcast on

1 TV or sent to the public at large.

2 The Court granted the protective order motion only as
3 to No. 8, which was "all communications with third parties,"
4 which the Court, I think, correctly found was a little bit
5 broad.

6 But Request No. 1 is still on the table. This isn't
7 a new request. We've been seeking this information. Voter
8 communications -- and Counsel points to the one-on-one, the
9 truly private communications. We are not talking about that.
10 We are talking about efforts by the proponents and this
11 organization to sway and woo voters to vote for this
12 proposition. And that's clearly encompassed in our request.

13 **THE COURT:** Isn't Mr. Panuccio's statement that,
14 We're going to have a privilege log by Monday, isn't that going
15 to be a good first step toward the resolution of this?

16 **MR. BOUTROUS:** Absolutely, Your Honor. And I think
17 that if it contains the information we need -- we're going to
18 be -- we're going to be reasonable. And we want to get to
19 trial. We're going to pick our spots.

20 If we get a privilege log that encompasses -- but I
21 want to make clear, and I would request that the Court make
22 clear, that documents responsive to our Request No. 1, this
23 Court has not ruled in any way -- the Court denied the
24 protective order motion on October 1, as to their complaints
25 about Request for Production No. 1, which was, essentially, I

1 paraphrase, all documents constituting communications to
2 voters, donors, potential donors, or members of the media
3 regarding Proposition 8.

4 There's not a protective order. Their motion was
5 denied. That was not the issue on appeal. It only related to
6 private, internal communication.

7 So I would -- if the Court can make clear that the
8 privilege log must cover all of the documents that are
9 responsive to our requests that remain standing and remain
10 viable, that would, I think, be helpful.

11 **THE COURT:** Well, it does seem to me that -- and,
12 Mr. Panuccio, you might want to join into this conversation.

13 It does seem to me that if there is anything crystal
14 clear in the Ninth Circuit panel's decision -- and it is, by
15 and large, a very clear and thoughtful opinion -- it is that
16 the preservation of this First Amendment privilege requires the
17 production of a privilege log. And the proponents, I think,
18 concede that. And that even these internal communications do
19 meet the discoverability standard of Rule 26; although, they do
20 not meet what the Court believes is the heightened relevancy
21 standard that the First Amendment requires.

22 So if we have a privilege log with respect to all of
23 the materials as to which the proponents are asserting a
24 First Amendment privilege, I think that will help move this
25 issue along to a reasonable resolution.

1 And, furthermore, in terms of case management, it's
2 possible that this discovery can continue even as the trial
3 proceeds.

4 I can understand there might be volumes of this
5 information that might be difficult to compile in time for the
6 January 11 trial date. But I'm not sure we have to wait for
7 the last document to fall in response to the document request
8 in order to wrap up the core issues that are before the Court.

9 So the first step, the order will be that the
10 privilege log be produced.

11 You said on Monday?

12 **MR. PANUCCIO:** Well, there would be a qualification
13 to that, Your Honor.

14 **THE COURT:** Well, I know, in case the Ninth Circuit
15 throws you a curve.

16 **MR. PANUCCIO:** And one more, which is, as I said, if
17 we are talking about sorting for responsiveness based on the
18 November 11th order, then, yes, we could do that.

19 Significantly, as the Court said, you should cull
20 your inventory of documents based on this order. That would be
21 a log we could produce by Monday.

22 But if we are talking about opening up the world of
23 documents to everything that had already been culled out,
24 Monday would not be achievable.

25 **THE COURT:** Well, let's do the best we can on Monday,

1 and that will move things along considerably.

2 **MR. BOUTROUS:** Your Honor, may I just add one point?

3 I think it's a very serious matter that they are
4 interpreting your October 1 order, denying the protective order
5 motion, to take off the table all communications that were sent
6 to voters.

7 And they have known for four months that we were
8 requesting that information, and represented to us that they
9 have been collecting those documents in the event they were
10 ordered to be produced.

11 And so we feel very strongly that Monday -- well,
12 we'll take what we can get, when we can get it. I agree -- we
13 agree with Your Honor, that we don't have to hold anything up
14 for this, but we feel very strongly that the privilege log --
15 they need to respond to the other preceding seven discovery
16 requests, which this Court rejected their protective order
17 motion on, including the one that goes to the communications
18 that I'm asking for today, the communications to voters
19 external to the campaign.

20 So we feel very strongly about that, but we
21 appreciate the Court hearing us out on this.

22 **MR. PANUCCIO:** Your Honor, if I may have one chance
23 to respond.

24 **THE COURT:** Well, what about these communications to
25 voters?

1 **MR. PANUCCIO:** Yes. This is an important point, and
2 I'm sorry I neglected to bring it up before.

3 They are now taking Request No. 1 -- we have said
4 repeatedly we will produce the communications that went out to
5 the electorate at large, that went to targeted groups of
6 voters. But what they are doing now is, they are saying, We
7 couldn't get it under Request No. 8, so let's define "voter" as
8 any single person in California. And Mr. Boutrous now says, We
9 are not talking about one-on-one communications. I would
10 encourage the Court to go back to the transcript of what he
11 said in his opening argument, where he said, We are talking
12 about one-on-one communications.

13 That is how they are defining "voter" and "donor"
14 now, or "potential donor," which is any communication you have
15 with any third-party in California is discoverable. That was
16 original request No. 8.

17 And the Court said, in its October 1st order,
18 Discovery not sufficiently related to what the voters could
19 have considered is not relevant and will not be permitted.

20 The October 1st order talked about what the relevant
21 sphere of discovery in this case would be. And we think that
22 applies.

23 I'm sorry.

24 **THE COURT:** Go ahead.

25 **MR. PANUCCIO:** Well, and to the extent they are

1 relying on the denial of our motion for protective order, of
2 course, that was what was appealed to the Ninth Circuit. We
3 said, To the extent the October 1st and November 11th order is
4 denied, our motion, we are appealing.

5 And the Ninth Circuit said, We recognize the appeal;
6 you prevail; and a protective order should be entered in the
7 case below. That's the opinion.

8 So they can't well say -- rest on the denial, the
9 overturned denial of our protective order -- motion for
10 protective order.

11 **THE COURT:** Well, it does seem to me we need, first,
12 a privilege log with respect to the documents as to which the
13 proponents are seeking to assert the First Amendment privilege.

14 To the extent that there are communications to voters
15 that are not internal communications but external
16 communications from the campaign or the individual-named
17 defendants, that the proponents are asserting some other
18 objection to other than a First Amendment objection, that the
19 documents that are being withheld on the basis of those
20 objections need to be spelled out so that the plaintiffs and
21 the Court can make a determination whether that's a proper
22 objection, whether it's burdensomeness or whatever it may be.

23 **MR. PANUCCIO:** So -- I'm sorry. Are you talking
24 about an attorney-client privilege type of --

25 **THE COURT:** Well, that would be one. There may be

1 some of those documents, as well, that you're -- you're
2 asserting an attorney-client privilege about, but --

3 **MR. PANUCCIO:** It's hard to know what exactly we
4 should log.

5 I mean, if a communication to seven friends who are
6 political -- who have said, you know, "I want to be in this
7 effort, I'm with you," we would not view that as a
8 communication to voters. And if we have to log that type of
9 document, we are talking about an exponential increase in the
10 size of this log.

11 Again, that would get to -- basically that becomes --

12 **THE COURT:** Well, what would be the basis for
13 withholding that document? It's not one of these internal
14 documents to which the First Amendment privilege covers.

15 **MR. PANUCCIO:** Well, it is a -- we would contend the
16 First Amendment privilege does extend to communications between
17 people who have banded together, whether officially or
18 unofficially, to advance a political cause.

19 I mean, again, this comes back to the plaintiffs
20 saying, If you are a member of a 501c3 and you have internal
21 communications, that's fine. But if you are Mrs. McIntyre and
22 you and your neighbor get together in your home and make a
23 flier, and you communicate about it, no privilege there.

24 **THE COURT:** What you're saying is that your assertion
25 of the First Amendment privilege is going to embrace these

1 communications with the small, discreet voter groups; is that
2 it?

3 **MR. PANUCCIO:** Well, we think the privilege would
4 embrace that, but we also think it's a responsiveness point.

5 **THE COURT:** Did I understand you correctly? Are you
6 saying that the First Amendment privilege extends to
7 communications from the campaign to these, what you've
8 described as discreet, small voter groups?

9 **MR. PANUCCIO:** I'm sorry. I misheard the question.
10 What I'm saying is --

11 **THE COURT:** Yes or no?

12 **MR. PANUCCIO:** Well, I mean, when you say "the
13 campaign," you know, for instance, when we are talking about
14 Dr. Tam, he was not the campaign. He was an individual who
15 engaged in some political activity of his own.

16 **THE COURT:** He is a defendant.

17 **MR. PANUCCIO:** Correct.

18 **THE COURT:** And the document request extends to him
19 as a defendant.

20 **MR. PANUCCIO:** Right.

21 **THE COURT:** Okay. So we're talking about the
22 defendants, the named defendants, protectmarriage.com and the
23 individual-named defendants.

24 **MR. PANUCCIO:** And all I'm saying is that I don't
25 think the individuals can be called "the campaign." They might

1 have engaged in -- and so it's --

2 **THE COURT:** All right. That's a fair point.

3 Communications to or from the defendants to what you
4 describe as small, discreet voter groups, are those
5 communications covered by this First Amendment privilege, in
6 your view?

7 **MR. PANUCCIO:** I think what we need is a definition
8 of what a "small, discreet voter group" is. If it was a group
9 of unknown --

10 **THE COURT:** I didn't come up with that. You did.

11 **MR. PANUCCIO:** What's that?

12 **THE COURT:** I didn't come up with that phrase. You
13 did.

14 **MR. PANUCCIO:** Well, what I'm saying -- I did not
15 mean to say "voter group." I believe I said "political
16 associates." And I would say that if it were to a group of
17 known political associates, then, yes --

18 **THE COURT:** Known political associates?

19 **MR. PANUCCIO:** Yes.

20 But if you were sending them communication and just
21 sending it out there to unknown -- saying, "Voters, come vote,"
22 I would agree that there is no privilege over that.

23 There is certainly a tension here. We have to figure
24 out what is public and what is private. There is no doubt that
25 we need to do that. But I think the Ninth Circuit gave us some

1 guidance on that, which said, Look, get discovery into what was
2 sent to large swaths of the electorate. And we have repeatedly
3 said from the beginning we will give them that; and we have
4 given them that.

5 They have hundreds of e-mails that -- blast e-mails
6 that the campaign sent, of the scripts and the video of the
7 television and radio commercials, of the Robocalls, of the --
8 you know, anything like that, they have. They have all that.
9 It's hard to see what is left.

10 I have -- we have asked them in letters repeatedly,
11 Give us an example of what concerns you have, what types of
12 documents. So they sent us five documents. All of them, but
13 one, were nonresponsive.

14 The one that was responsive was Dr. Tam's website
15 biography. And there was one line in it that mentioned Prop 8.
16 It said, "I was a proponent for Proposition 8."

17 And we admit we missed that document, that website
18 biography, in the tens of thousands of documents we were
19 looking at.

20 The other documents they said we should have produced
21 related to -- not to Prop 8, to the 2006 campaign for a similar
22 ballot measure.

23 So we are trying to pin them down on what they want,
24 and it's a constantly moving target.

25 **THE COURT:** It sounds like we are going to make some

1 progress when we see the privilege log and we see exactly how
2 you log in those documents. And I have a feeling we are going
3 to be discussing this further and more fully later.

4 **MR. PANUCCIO:** Thank you, Your Honor.

5 **THE COURT:** I think we probably made as much progress
6 as we can on this issue, then.

7 The court reporter has requested a break. And it
8 probably would be a good idea.

9 And I should advise counsel that we have a jury
10 that's deliberating, and we may have an interruption for a
11 verdict or a question from the jury at any time. So I'll check
12 on that as well.

13 So why don't we take 15 minutes, and we'll resume at
14 12:15.

15 (Recess taken from 11:58 a.m. to 12:18 p.m.)

16 **THE COURT:** All right. Counsel --

17 **MR. COOPER:** Your Honor, I would just like to inform
18 the Court that the lawyer representing the County of Imperial
19 has arrived in the courtroom --

20 **THE COURT:** Oh, well, let's hear that matter.

21 Let's see. Would that lawyer identify herself.

22 **MS. MONK:** Good morning, Your Honor. I apologize for
23 not being here earlier.

24 Jennifer Monk on behalf of the County of Imperial.

25 **THE COURT:** Welcome. Did you come all the way

1 from --

2 **MS. MONK:** Murrieta.

3 **THE COURT:** -- Imperial County?

4 **MS. MONK:** Murrieta, California.

5 **THE COURT:** Murrieta.

6 **MS. MONK:** Not quite as far.

7 **THE COURT:** Welcome.

8 **MS. MONK:** Thank you.

9 **THE COURT:** Now, what I told the lawyers at the
10 outset, when we discussed this, is, I don't think it is
11 appropriate, at this time, to discuss the merits of your motion
12 because the parties have not had an opportunity to respond to
13 your motion.

14 But it does seem to me that we can address the
15 application for order shortening time to hear your motion --

16 **MS. MONK:** Thank you, Your Honor.

17 **THE COURT:** -- and would like to do that.

18 Let me begin with this question. You state that you
19 do not intend to participate in the presentation of the
20 evidence, to call any witnesses, and otherwise participate in
21 the trial. Your primary interest is to preserve a right of
22 appeal, in the event that a final judgment is entered in the
23 case.

24 Well, under those circumstances, is it really
25 necessary to hear this motion on an accelerated basis?

1 **MS. MONK:** Your Honor, it is our hope to get involved
2 before the trial, so that the County can represent their
3 interests just by being a party and being able to support,
4 largely, the defendant-intervenors that have already been
5 admitted.

6 We understand that we're not going to make a
7 substantial difference at the trial, but the motion currently
8 is set for in the middle of the trial, so it would seem, if
9 nothing else, just to push it up slightly so that it can be
10 heard before the trial would begin.

11 **THE COURT:** Well, you're not going to call witnesses.
12 You're not going to present evidence.

13 Provide some moral support to the proponents. I'm
14 sure that will be welcomed. But other than that, what do you
15 plan to do?

16 **MS. MONK:** At the trial, Your Honor, we do not plan
17 to have an active participation.

18 **THE COURT:** All right. But you would like to get
19 into the case before the trial starts, and you think that might
20 be helpful.

21 Let me ask the plaintiffs what their view is with
22 reference to when we could hear the merits of the County of
23 Imperial's motion to intervene.

24 Mr. Olson.

25 **MR. OLSON:** We will be opposing the motion. We will

1 be happy to accommodate schedule of counsel and the Court with
2 respect to shortening time and having the hearing. We'll have
3 someone here. I don't know whether it will be me, but we will
4 have a representative of our team here. And we will put
5 something together in writing as fast as is convenient for you.

6 I mean, we're entirely willing to accommodate
7 whatever is convenient for the Court.

8 **THE COURT:** Okay. Who else? What about the Attorney
9 General, any of the other government parties, do they have any
10 view on this?

11 **MS. PACHTER:** Your Honor, the Attorney General is
12 taking the same position with respect --

13 **THE COURT:** I'm sorry. You are going to have to come
14 to the podium.

15 **MS. PACHTER:** The Attorney General is taking the same
16 position on these proposed intervenors as on all the other
17 intervenors who have sought to come into the case, which is we
18 do not oppose.

19 **MR. KOLM:** Claude Kolm, for the Alameda County Clerk
20 Recorder.

21 Same position for the Alameda County Clerk Recorder.
22 We do not oppose.

23 **MS. WHITEHURST:** Judy Whitehurst, with Los Angeles
24 County.

25 Same here, Your Honor. We do not oppose.

1 **MR. STROUD:** Andrew Stroud on behalf of the governor
2 and administration defendants.

3 The governor and the administration defendants do not
4 oppose, so long as there is no continuance of the trial date.
5 We do want to see the trial date maintained, Your Honor.

6 **THE COURT:** All right. Well, let's see what would be
7 a reasonable schedule.

8 Mr. Olson, you said that your team is going to oppose
9 the motion. Let's say I grant an order shortening time. Could
10 we have any opposition submitted -- could we get it in next
11 week -- it's a very short week -- or early the following week?
12 That would be --

13 **MR. OLSON:** Well, earlier the following week would be
14 a little bit easier on the people who are going to have to do
15 it.

16 (Laughter)

17 **MR. OLSON:** But as the person that's making the
18 promise, I think it would be best early the following week,
19 maybe two weeks from -- today is Wednesday. Maybe two weeks
20 from today.

21 **THE COURT:** That's the 30th of December.

22 **MR. OLSON:** Is that okay? We'll try to do it sooner
23 than that, if we can.

24 **THE COURT:** That's fine. 30th of December for the
25 opposition.

1 And any reply, then, should be submitted -- can you
2 submit that reply by not later than the 7th of January?

3 **MS. MONK:** Certainly, Your Honor.

4 **THE COURT:** All right.

5 And I'm inclined, unless -- unless I change my
6 mind --

7 (Laughter)

8 **THE COURT:** -- I'm inclined to try to decide this on
9 the papers, to obviate any further proceedings with reference
10 to this issue.

11 All right. And I suppose, Mr. Cooper, you may want
12 to weigh in on this as well; although, I don't know that you
13 have to.

14 **MR. COOPER:** Your Honor, we will plan to support the
15 motion, yes, Your Honor.

16 **THE COURT:** On the same schedule?

17 **MR. COOPER:** On the schedule you have set.

18 **THE COURT:** That will be fine.

19 All right. Anything else with reference to Imperial
20 County?

21 **MS. MONK:** No. Thank you, Your Honor.

22 **THE COURT:** Certainly.

23 Now, let's talk about some of these other issues. We
24 have motions in limine. Motions in limine, I confess, are not
25 the favorite motions that I hear.

1 And how significant and important are these motions
2 in limine in a bench trial?

3 And I see, Mr. Boies, you raising yourself to come to
4 the podium.

5 **MR. BOIES:** Your Honor, I think --

6 **THE COURT:** Why shouldn't I just hear these folks,
7 and allow cross-examination as to their credentials and their
8 testimony, and simply make a determination based upon that?

9 **MR. BOIES:** I think with respect to three of the
10 experts to which we have directed our motions in limine, that
11 would be a perfectly sensible approach.

12 **THE COURT:** And you're talking now about Young, Marks
13 and Blankenhorn; is that correct?

14 **MR. BOIES:** Yes. Exactly, Your Honor.

15 And I've always been ambivalent about what the rule,
16 if any, was about motions in limine addressed to experts when
17 you have a bench trial.

18 I think the only advantage of it is, sometimes, to
19 make decisions ahead of time that will streamline the trial and
20 make it more efficient. I think that's entirely something for
21 the Court to consider.

22 I think we have put before the Court what our issues
23 are with respect to these people's expertise. I think we can
24 make those points on cross-examination. The Court can consider
25 it in the context of the entire trial. And if that is a way

1 the Court would prefer to do it, I think that's entirely
2 appropriate to do.

3 **THE COURT:** That is my preference.

4 **MR. BOIES:** I will then move only to the other one.

5 **THE COURT:** Obviously, this not being a jury trial,
6 we don't have to be as concerned about bringing those folks --
7 deciding whether those folks are going to testify or not.

8 And it isn't going to materially streamline the case
9 to grant these motions in limine, so ...

10 **MR. BOIES:** I don't disagree with that at all, Your
11 Honor.

12 **THE COURT:** Fine. What about, let's see, Miller?

13 **MR. BOIES:** Miller. Miller is quite a different
14 case. With respect to Miller, we're not moving against his
15 testimony in its entirety. He has got 120 paragraphs. We're
16 only moving against paragraphs 53 to 72.

17 And the issue there is an issue as to whether he is
18 an appropriate rebuttal expert or not. If he's an appropriate
19 rebuttal expert, then I think both we and the proponents would
20 agree that he testifies on this.

21 If he is not an appropriate rebuttal expert, as
22 opposed to an expert-in-chief, then I think we both agree that
23 he is not timely identified, and he should not be permitted to
24 testify as to these paragraphs.

25 The background is that they identified two experts in

1 religion. Particularly, a Dr. Paul Nathanson, whose expert
2 report substantially was the same as paragraphs 53 to 72 of
3 Mr. Miller's purported rebuttal report.

4 I took Mr. Nathanson's -- Dr. Nathanson's deposition,
5 and he made a number of admissions that I suspect has led the
6 proponents to decide maybe he's not their strongest expert and
7 perhaps they don't even want to call him.

8 They have then made the tactical judgment that they
9 would try to substitute in Mr. Miller, Dr. Miller,
10 Professor Miller, to testify as to these paragraphs.

11 There is, I think, no room for doubt, at all, that
12 they were totally aware of the subject matter of this testimony
13 and the relevance, if any, of that testimony at the time they
14 put in their expert reports in chief.

15 Indeed, that's what Dr. Nathanson addressed. And if
16 you look at the materials -- and we cited this in our motion.
17 If you look at the materials that Professor Miller relies on,
18 they are essentially the same materials that Dr. Nathanson
19 relied on.

20 And if you look at the materials that come from
21 websites, the last date visited was, in general,
22 September 27th, 2009, which was even before our expert reports
23 went in, before there was any supposed need for rebuttal. And
24 it was exactly the same date that they were visited in
25 connection with Dr. Nathanson's report.

1 **THE COURT:** You referred me to specific paragraphs of
2 Miller's rebuttal report. Now that I have that before me,
3 remind me which paragraphs.

4 **MR. BOIES:** Paragraphs 53 through 72.

5 And they are the paragraphs that essentially deal
6 with the role of religious organizations in the Proposition 8
7 campaign. This was the subject both of Dr. Nathanson's report
8 and Dr. Young's report and testimony to a lesser extent.

9 But what is here in paragraphs 53 to 72 is
10 essentially duplicated from what Dr. Nathanson was going to
11 say.

12 The proponents say, We are using it for a different
13 purpose. But that's not what the rule addresses. What the
14 rule addresses is that a rebuttal witness's testimony must be
15 limited solely -- and "solely" is in the rule -- solely to
16 contradict or rebut evidence on the same subject matter
17 identified by another party.

18 So in order to bring themselves within the rebuttal
19 rule, they have got to come forward with something that they
20 are putting forward solely to contradict or rebut evidence that
21 we have offered in one of our expert reports.

22 And we think that's obviously not what's going on
23 here. For one thing, they knew about it when they put in the
24 Nathanson report. For another, the materials that -- here
25 simply duplicate that Nathanson report. For another, they knew

1 about these materials prior to the time that the expert
2 reports -- our expert reports were even put in.

3 That's what the relevance is of the website, that
4 we've demonstrated. They pulled this stuff off the website
5 before we even put our expert reports in. They pulled it off
6 to support the Nathanson report.

7 **THE COURT:** Well, if the Miller paragraphs that
8 you're moving to strike simply duplicate what's in the
9 Nathanson report, what's the harm of leaving the Miller
10 rebuttal report in?

11 **MR. BOIES:** Your Honor, there is a sense in which,
12 with the various teams that we have, there's almost never harm
13 in adding an additional witness to the --

14 **THE COURT:** I have noticed that.

15 (Laughter)

16 **MR. BOIES:** And I would be hard pressed to tell you
17 that because he was added at the rebuttal stage, as opposed to
18 the expert-in-chief stage, that's going to prevent us from
19 getting ready to cross-examine him.

20 However, I think the purpose of having these rules in
21 which you say, Here's when you identify certain witnesses, and
22 if you don't identify them then you can't call them later, is
23 to impose a certain discipline. I think that discipline is
24 useful.

25 I don't think there's any prejudice to them. They

1 still have Dr. Nathanson. The only prejudice to them is they
2 have decided, after Dr. Nathanson's deposition, that they don't
3 want to rely on him. So it is something in which I think there
4 is no prejudice to them in any normal sense of the word.

5 And they had complete notice that they needed to put
6 in experts at a particular date. We had a pretrial schedule
7 where each of us had to get certain things done. They knew
8 they had to get it done. They didn't get it done. And now
9 they're trying to add a new witness to testify to the same
10 thing.

11 On the other hand, if the Court says, can we get
12 ready to cross-examine him, the answer is, of course we can.

13 **THE COURT:** Well, Nathanson has been withdrawn?

14 **MR. BOIES:** No, they haven't formally withdrawn him.
15 But -- and, of course, we have his deposition, and we can use
16 his deposition to the extent we think it's useful to us.

17 But this is, as we indicated in our papers, so
18 duplicative of what Nathanson's testimony is, that it's hard to
19 believe that they would be trying to shoehorn in this testimony
20 into Miller's report, if they really intended to call
21 Nathanson. Indeed, if they tried to call Nathanson and Miller
22 to testify to the same points, that seems to be probably
23 something the Court might not --

24 **THE COURT:** Has Miller been deposed?

25 **MR. BOIES:** That is a question I don't know the

1 answer to, Your Honor.

2 **PLAINTIFFS' COUNSEL:** Yes.

3 **MR. BOIES:** He has been deposed. Because -- and in
4 part, because he -- we weren't objecting at all to most of his
5 testimony. In other words, from 1 through 52, and from 73 to
6 120, we didn't try to strike him even on our general motion in
7 limine.

8 **THE COURT:** All right. Who is going to be arguing
9 this, Mr. --

10 **MR. NIELSON:** Nielson.

11 **THE COURT:** Mr. Nielson.

12 **MR. NIELSON:** Good afternoon, Chief Judge Walker.

13 **THE COURT:** Good afternoon, sir.

14 **MR. NIELSON:** I want to clarify the record, if I may,
15 first.

16 We put Miller in before Nathanson was deposed. And
17 we have not withdrawn Nathanson. And I'll tell you that while
18 they have similar testimony, the purposes are different.

19 Nathanson's testimony is directed to showing that
20 religious opinion regarding Proposition 8 is not uniform. The
21 religious opposition to Proposition 8 doesn't necessarily
22 constitute animus or an inappropriate motive.

23 He is not being offered to testify to whether gays
24 and lesbians have political power. That is what
25 Professor Miller is prepared to testify to.

1 So while, on the one hand, it would not be
2 prejudicial to the plaintiffs to have both of these experts
3 testifying, it would be prejudicial to us not to have
4 Professor Miller be able to testify to the fact that religious
5 support for same-sex marriage demonstrates the political power
6 of the gay and lesbian community.

7 Now, with those clarifications, I think if you
8 actually look at Professor Segura's report, specifically page
9 12 --

10 **THE COURT:** Of Miller's report?

11 **MR. NIELSON:** No. Professor Segura's report.

12 **THE COURT:** Segura.

13 **MR. NIELSON:** That's the report that Miller was
14 offered to rebut.

15 **THE COURT:** I see. All right. Hold on. I think I
16 have that here.

17 **MR. NIELSON:** If Your Honor would look on page 12,
18 there is two headings there. There is "Moral and Political
19 Condemnation" -- excuse me. I will wait just a moment.

20 **THE COURT:** What page, sir?

21 **MR. NIELSON:** It's page 12.

22 **THE COURT:** I have it.

23 **MR. NIELSON:** Very good.

24 The testimony Professor Miller offers about religion
25 is related to these two paragraphs that are headed, "Moral and

1 Political Condemnation," and "Powerful, Numerous and
2 Well-funded Opposition."

3 Now, it's simply not the case that his report
4 contains just a single line about the impact religion has on
5 the political power of gays and lesbians.

6 These two headings are in a larger heading called,
7 "The Political Powerlessness of Gays and Lesbians." And these
8 are factors that contribute to that, according to Professor
9 Segura.

10 But I'd call your attention to, for example, the
11 second paragraph of the second heading -- the second sentence
12 of the second heading. He quotes a statement that, "Opposition
13 to same sex marriages united leadership and core believers
14 across religious traditions."

15 He talks about, towards the bottom of that, after
16 talking about the religious groups that oppose same-sex
17 marriage, he talks about -- he ends that paragraph by saying,
18 "Gay and lesbians lack the resources, numbers, and reach to
19 counter this kind of committed organized opposition to their
20 interests."

21 The clear inference here, Your Honor, is that
22 religion is a unified, cohesive force pitted against the
23 interests of gays and lesbians. And Professor Miller's
24 testimony is directly responsive to that.

25 Also, more generally, the subject matter of

1 Professor Segura's report is the political power of gays and
2 lesbians. He argues that gay men and lesbians do not have
3 political power.

4 And, plainly, in discussing all of the groups that
5 supported -- or that opposed Proposition 8 and supported
6 same-sex marriage in California, Professor Miller demonstrates
7 that gays and lesbians do have political power and that, in
8 fact, many religious organizations and religious individuals
9 are part of the coalition that has, by and large, successfully
10 supported gay and lesbian rights in California.

11 So I would submit that Professor Miller's testimony
12 is directly responsive both at a specific level and at the
13 general level of political power.

14 Now, Dr. Nathanson uses the same material or similar
15 material for a different purpose. And less to his --
16 Professor Nathanson's testimony was not intended to speak to
17 political power and whether gays and lesbians constitute a
18 suspect class. It was intended to go to the issue of whether
19 Proposition 8 reflects improper animus of some sort.

20 And that is the purpose for which we offered
21 Professor Nathanson's testimony.

22 So I would also -- and with regard to the suggestion
23 that somehow, because we could have anticipated that plaintiffs
24 would have put on this evidence, we should have put it in
25 earlier, the advisory notes are quite clear, the advisory notes

1 to the Federal Rule of Civil Procedure 26, that governs that,
2 where one party bears the burden of proof on an issue, the
3 other party can wait and respond to that with their expert
4 report. It says, quote, "In most cases, the party with the
5 burden of proof on an issue should disclose its expert
6 testimony on that issue before other parties are required to
7 make their disclosures with respect to that issue."

8 And plaintiffs clearly bear the burden of proof on
9 the proposition that gays and lesbians are a suspect class
10 entitled to heightened scrutiny. So we were entitled to await
11 their evidence so we could decide how to rebut it.

12 In fact, the courts have recognized that. I'll cite
13 this court to the *Crowley vs. Chait* case. It's a District
14 Court case. There isn't much in the way of precedent, except
15 at the District Court level, on this issue.

16 But the Court rejected the argument that rebuttal
17 information is improper simply because the expert, quote,
18 "could have included it in his or her original report." And it
19 went on to explain, "Such a rule would lead to the inclusion of
20 vast amounts of arguably irrelevant material in an expert's
21 report on the off chance that failing to include any
22 information in anticipation of a particular criticism would
23 forever bar the expert from later introducing the relevant
24 material."

25 In other words, if we were required to anticipate

1 everything we might want to say in response to plaintiffs' case
2 about political power, we would have had to put in something
3 before, that would potentially contain all sorts of irrelevant
4 material, things that just are not responsive to what their
5 expert actually ends up saying.

6 So for all of those reasons, I would suggest that the
7 motion in limine should be denied. And unless the Court has
8 further questions, that's all I have.

9 **THE COURT:** Very well. Thank you, Mr. Nielson.

10 Last word, Mr. Boies? Anything further, or shall we
11 submit the matter?

12 **MR. BOIES:** I think we can submit the matter, Your
13 Honor.

14 **THE COURT:** Ordinarily, the rules of procedure with
15 respect to putting in affirmative evidence and rebuttal
16 evidence are important, and play a significant role in
17 management of evidence and presentation of evidence in a case,
18 and, typically, should be strictly adhered to.

19 In this case, however, the parties have been very
20 ably and effectively proceeding with an accelerated trial
21 preparation schedule. And under those circumstances, it's
22 understandable that some of the formalisms that normally
23 accompany the pretrial preparation process might be observed
24 more informally than otherwise.

25 And so I don't believe the fact that the sequence of

1 the presentation of these pieces of -- pieces of testimony are
2 at all unusual under the circumstances that we face here.

3 Further, the issues in this case, many of them, are
4 obviously very broad-gauged. The issues that are highlighted
5 in the Segura testimony or the Segura report and the Miller
6 rebuttal report deal with an important issue in the case,
7 having to do with the level of scrutiny to be applied to
8 Proposition 8.

9 And so my inclination is not to exclude the
10 paragraphs of the Miller expert rebuttal report, but to
11 consider that information; to allow Mr. Miller to be
12 cross-examined fully on his report; and to not be too
13 punctilious in enforcing the scheduling rules with the
14 preparation of expert testimony.

15 So, I don't want to send a signal that I'm not going
16 to be punctilious in other regards --

17 (Laughter)

18 **THE COURT:** -- but in this area, I think maybe we
19 will just kind of rise above the problem.

20 All right. What else?

21 Trial schedule. Any other issues before we deal with
22 the trial schedule?

23 Yes, sir.

24 **MR. THOMPSON:** Your Honor, this relates to the trial
25 schedule.

1 **THE COURT:** All right. Fine.

2 **MR. THOMPSON:** And there were a few issues that we
3 wanted to seek some guidance from the Court from. And I've
4 raised them with our friends, in at least a preliminary
5 function, at Gibson, Dunn.

6 And one issue relates to the timing of disclosure of
7 witnesses. And we're familiar with the Court's guidelines for
8 the conduct of trials in which, in a typical case, disclosure
9 must be 24 hours ahead of time.

10 But the plaintiffs have 32 witnesses, not including
11 our experts, who are also on their expert report, but 32
12 witnesses. And if we are going to find out on the morning of
13 January 10th who their first witness is going to be, we will
14 have to show up in San Francisco, ready to cross-examine any of
15 32 individuals, and that would place an enormous burden on us.
16 We are going to have hundreds of thousands of pages of binders
17 for the 32 cross-examinations.

18 So we would request -- and we won't have all the
19 lawyers here for the entire trial. So we would request that
20 one week before a case -- the case-in-chief commences for each
21 side, that they disclose the order of the witnesses that
22 they're going to call, bearing in mind that they are free not
23 to call every witness, and that there'll inevitably be
24 scheduling issues where a professor can only testify on a
25 particular day. And as long as there was reasonable notice, we

1 would have no problem with having there be a change in the
2 order.

3 And we're not requesting that all the exhibits in
4 connection with all 32 witnesses be disclosed a week before the
5 case-in-chief.

6 But if we were permitted to have that order -- and we
7 would, of course, extend the same courtesy to them -- it would
8 dramatically alleviate the burdens of trying this case.

9 **THE COURT:** Well, I think that's a fair request. I
10 don't know about a week, but -- particularly after we get into
11 trial, but, certainly, I think you're perfectly entitled to
12 know who the first few witnesses of the plaintiffs are going to
13 be.

14 What have they told you they will tell you, and when
15 will they tell that to you?

16 **MR. THOMPSON:** They like your rule, Your Honor, of 24
17 hours beforehand, precisely because of the enormous burden that
18 it places on our side, I suspect, even though they didn't give
19 voice to that. So that's why we've had to raise the issue with
20 the Court --

21 **THE COURT:** I see.

22 **MR. THOMPSON:** -- but if they would like to speak to
23 it ...

24 **THE COURT:** Well, Mr. Olson told me a minute ago that
25 the named plaintiffs have jobs and occupational obligations. I

1 assume, therefore, that they would like to pin down precisely
2 when they are going to testify.

3 And perhaps they are going to be the first witnesses;
4 are they?

5 **MR. OLSON:** I don't know for sure; but, yes, that's
6 probably correct.

7 And I think -- we take the point, your point on it as
8 well. I don't see any reason why we couldn't give -- we're
9 starting on the 11th of January. I don't see any reason why we
10 couldn't, several days before that, identify the first two days
11 worth of witnesses, Your Honor.

12 The need for flexibility and the reason that the rule
13 has 24 hours in it is -- there are lots of good reasons for
14 that, and we would prefer adhering to that with respect to the
15 balance of the trial.

16 But I do think that we could accommodate counsel, our
17 opponents, in the manner in which you suggested.

18 **THE COURT:** Can you tell them who the first two days
19 of testimony are going to be coming from on the 6th of January?

20 **MR. OLSON:** Yes.

21 **THE COURT:** Okay.

22 **MR. THOMPSON:** And that would be extremely useful,
23 Your Honor, as a start, but, you know, we have this sort of
24 continuing issue.

25 Would it be possible to maintain this kind of on a

1 rolling basis, so that if they say, well, here -- out of our 32
2 witnesses, here are the first two, you know, or three, for the
3 first two days, we still have the problem of not knowing, okay,
4 well, who are the next 29?

5 And I strongly suspect, Your Honor, if their
6 witnesses are like our witnesses, they are very busy academics,
7 with many different obligations, that they have some sense as
8 to roughly the week or the days -- many of the witnesses, at
9 least on our side, have very specific availability.

10 So we would appreciate if there could be that
11 continuing rolling at least 72 hours beforehand, to know
12 who's --

13 **THE COURT:** I think after we get started, 48 hours
14 would be more reasonable than 72, given the schedule.

15 One of the things that I happily gave up when I
16 stopped practicing law was managing witnesses at trial. So I
17 don't want to be too strict about that.

18 I understand you both have problems. This is a bench
19 trial. We can accommodate unexpected events to the extent
20 necessary.

21 But I think 48 hours should probably be sufficient
22 after we get started.

23 **MR. THOMPSON:** Thank you, Your Honor.

24 **THE COURT:** And, of course, the same is going to
25 apply to your side.

1 **MR. OLSON:** We accept that, Your Honor.

2 **THE COURT:** Fine.

3 Now, there is one witness that appears on the
4 plaintiffs' witness list, that raises some concern on my part,
5 and that is Mr. Pugno, who is designated on the plaintiffs'
6 witness list.

7 He is an attorney in the case, is he not? Is he
8 not -- has he not appeared in the case, representing the
9 proponents?

10 **MR. THOMPSON:** He has, Your Honor.

11 **THE COURT:** Is it your intent to call one of the
12 lawyers on the other side?

13 **MR. OLSON:** May I ask Mr. Boutrous to respond to
14 that?

15 **THE COURT:** Of course.

16 Mr. Boutrous.

17 **MR. BOUTROUS:** Yes, Your Honor. He is an attorney.
18 We're cognizant and sensitive to that.

19 He does appear, for example, in the Wall Street
20 Journal letter to the editor as a member of the executive
21 committee. So some of these issues we're just exploring.

22 To the extent we call him as a witness, it would be
23 on non-privileged, and -- and efforts by him that did not
24 involve providing legal advice. We would be very careful of
25 that. We listed him in an abundance of caution and would,

1 going forward, be very careful that we respect the
2 attorney-client relationship.

3 **THE COURT:** I would urge you to make every effort to
4 obtain whatever information you think Mr. Pugno can offer from
5 other witnesses, so that it's not necessary to call him.

6 **MR. BOUTROUS:** We will do that, Your Honor. Thank
7 you.

8 **THE COURT:** All right.

9 **MR. THOMPSON:** Your Honor, three more issues, if I
10 may, that have practical significance. I apologize. I will be
11 very brief.

12 **THE COURT:** Don't apologize. Let's get this out on
13 the table.

14 **MR. THOMPSON:** The second issue is whether we need a
15 sponsoring witness to move documentary evidence into the record
16 of the case.

17 As we have submitted previously, there are
18 legislative facts that are at issue in this case. And, as a
19 consequence, the Court is free to consider materials that amici
20 discuss but the parties don't discuss. And the Court is free
21 to analyze materials that none of the parties bring to it. And
22 that is true of the appellate courts, as well.

23 And, so, the reason I make that point is, it's clear
24 that there's no requirement that, for legislative facts, that a
25 sponsoring witness speak to a document in order to get it into

1 record. It's distinct from adjudicated facts in that way.

2 And I raise this because the trial will be at least
3 twice, if not three times, as long if every document that we
4 want into this record has to be used with a witness.

5 We oftentimes will want to establish a proposition,
6 and will use one or two documents, but we might have a hundred
7 that say the same thing. And we want to show that this is a
8 point that was well-understood and there's a depth to it. And
9 we wouldn't want to waste the Court's time with moving these
10 documents in one at a time.

11 We have raised this with plaintiffs, and they -- I'll
12 let them speak for themselves as to what their position is,
13 but, as I understand it, they agree that we don't need to have
14 a sponsoring witness for each document that would come into the
15 record. But they're proposing that the lawyers get up and then
16 identify why each document is relevant. That might be slightly
17 less time consuming than using a witness, but not much.

18 We have entire books that we want to have moved into
19 the record. And if we have to explain, on this page there's
20 this relevance, and on that page there's that relevance, we
21 don't think that makes sense.

22 **THE COURT:** Well, I must say, you both have submitted
23 pretty awesome exhibit lists; 1500 for the plaintiff, and over
24 3,000 for the proponents. I trust that we are not going to
25 have all of these admitted into evidence; there is going to be

1 some selectivity as the case is presented.

2 **MR. THOMPSON:** There may be some, Your Honor. But,
3 quite frankly, you know, given the magnitude and the sorts of
4 issues that are at stake in this, and the numerosity of those
5 issues and the amount of evidence that pertains into it, I
6 would think that, at least speaking for ourselves, the majority
7 of our exhibit list we intend to move into evidence.

8 We put a little asterisk next to, you know, what we
9 thought we were required to under Rule 26, of what we intend to
10 move into evidence and --

11 **THE COURT:** Including the vital statistics from
12 Iceland?

13 **MR. THOMPSON:** Exactly. And Denmark. Don't forget
14 that.

15 So we do intend to move a lot of the evidence into
16 the record. And we don't mean to burden the Court with a huge
17 mountain of evidence that hasn't been explained. Rather, we
18 would say for most of it we think it will be clear why we're
19 moving it in.

20 And if it's not, in our post-trial findings of fact
21 we will then, for each finding of fact, you know, specify which
22 piece of evidence relates to which finding, so that we think
23 that would alleviate any burden on the Court.

24 **THE COURT:** Well, I suspect that if you're moving in
25 materials that have some very generalized application to the

1 issues here, there will not be an objection by the plaintiffs,
2 and this shouldn't be a problem.

3 What, in your discussions, have you determined you
4 think is going to be a problem? Are there particular documents
5 on this exhibit list that you anticipate there may be an
6 objection to without a sponsoring witness?

7 **MR. THOMPSON:** Well, that relates, actually, to the
8 third issue, which is, we would like -- we have had dialogue
9 with Gibson, Dunn about trying to identify the extent to which
10 we have problems with the other parties' exhibits, to their
11 admissibility and authenticity.

12 And we would like the Court to impose a deadline on
13 the parties by which we would identify problems we have with
14 authenticity, for example, and admissibility, so that if we
15 have to bring in witnesses to authenticate hundreds and
16 hundreds of documents, we know that in advance.

17 I can tell the Court, having looked very carefully at
18 many of the exhibits on their exhibit list, we don't anticipate
19 that sort of objection from us, especially given these are
20 legislative facts. And we believe the Court is entitled to
21 look at whatever it chooses to, with respect to these
22 legislative facts, unless --

23 **THE COURT:** Well, why don't you point out an exhibit
24 on your exhibit list that you believe falls within that
25 category of a legislative fact, so that I have some idea of

1 what we are dealing with here.

2 **MR. THOMPSON:** I've opened at random, but happily,
3 since almost everything is legislative -- so page -- if we
4 looked at Exhibit DIX8 -- this is page 55. And -- all right.
5 We could look at DIX eight five zero.

6 **THE COURT:** This is an article from what appears to
7 be a journal; is that correct?

8 **MR. THOMPSON:** Yes, Your Honor. And there are
9 hundreds of journals or articles. And they go -- many of them
10 go to the issue of whether the optimal environment to raise a
11 child is a married biological mother and father. And I believe
12 that this is one of those articles that has some relevance to
13 that issue.

14 And the point is, if we have an expert, Dr. Marks,
15 for example, who is going to speak to the importance of having
16 a married biological parent, and he's got a hundred articles
17 that support him, we don't think it's a beneficial use of the
18 trial time to say, "And now what's the next report, Dr. Marks,
19 that supports this proposition or that?"

20 **THE COURT:** Well, if that's how these are going to
21 come in, could he not simply refer to the group of documents,
22 and those documents could be included within one exhibit, what
23 we used to call a "banker box exhibit"?

24 **MR. THOMPSON:** We could do that, Your Honor. And as
25 long as that's permitted, where we in bulk are allowed to move

1 in documents, without having to sift through them one by one,
2 then I think that would alleviate our concerns.

3 But we still would maintain that there's no support
4 for the notion that legislative facts have to have a sponsoring
5 witness to get a document into evidence because, of course, the
6 Court is free to examine materials that the parties have not
7 brought to its attention. And the Court of Appeals and the
8 United States Supreme Court are, as well.

9 So we want clarity on how the process would work, but
10 I think we have a shared premise that it's not necessary.

11 **THE COURT:** I understand your -- I appreciate your
12 concern.

13 My objective in this proceeding, as much as any other
14 objective, is the preparation of a record which will allow
15 appellate review of this issue.

16 And so while I appreciate that the range of issues is
17 very broad-gauged, and may cover a lot of material of the kind
18 that you've described, I do think we want to, if not be too
19 strict about the introduction of this material, nevertheless,
20 enforce rules of authenticity and reliability, so that we've
21 got a pretty concrete record when the case takes the next step.

22 So I'm rather disinclined just to let in wholesale
23 materials that deal with some of these issues, unless there is
24 a witness who can say, "These are materials that are pertinent
25 to the question. These are materials that I have relied upon.

1 These are materials that I believe are reliable to establish or
2 to refute whatever proposition is at issue."

3 So ...

4 **MR. THOMPSON:** May I propose, perhaps, what might be
5 a compromise -- because we certainly don't want to flout, in
6 any way, the rules of evidence -- but would be, a week before
7 each party's case-in-chief they would identify, Here are the
8 documents we intend to move into evidence, and we may or may
9 not use a witness.

10 And they'd only have to disclose the ones they knew
11 they weren't going to use a witness with. And the other side
12 would have an opportunity to object, These aren't authentic,
13 you know.

14 **THE COURT:** I understand when a witness is identified
15 for testimony that, along with the designation of a witness and
16 when he or she is going to testify, that the other side is
17 alerted as to the documents or exhibits that that witness is
18 going to sponsor in his or her affirmative testimony.

19 I think that's a standard part of this two-day alert
20 that you're going to have as to the first two days of trial,
21 and then the 48-hour alert that you are going to have
22 thereafter.

23 **MR. THOMPSON:** And we appreciate that, Your Honor.
24 So this would be in addition to that, for those documents that
25 the parties were not planning on using with a witness, to

1 encompass those at the beginning of a parties' case-in-chief,
2 maybe a week beforehand, so the other side, if they wanted to
3 use that document in cross-examination, they would know about
4 it. If the other side wanted to object to authenticity or
5 admissibility, they would be put on notice that this is coming
6 into the record, if there is an objection lodged.

7 **THE COURT:** Here's my inclination. Let me see what
8 your reaction to that is. And that is, if we pretty much
9 enforce the rule that every document or every exhibit to be
10 introduced in the course of a trial must have a sponsoring
11 witness, but at the conclusion of the testimonial part of the
12 trial, if one side or the other believes that there are
13 additional materials that are necessary, as to which it did not
14 have an opportunity to present a sponsoring witness or a
15 sponsoring witness would not be brought to court without undue
16 expense or inconvenience, then I will permit that party to seek
17 to move into evidence that additional exhibit or group of
18 exhibits.

19 **MR. THOMPSON:** And we appreciate that, Your Honor,
20 because I think that resolution of this issue is consistent
21 with our point, which is that the Federal Rules of Evidence are
22 clear that it's not required to have a sponsoring witness for a
23 legislative fact.

24 **THE COURT:** Well, we'll make a good-cause
25 determination at the end of the trial.

1 What's the plaintiffs' view with respect to that,
2 Mr. Boies?

3 **MR. BOIES:** Your Honor, we think that's a sensible
4 approach.

5 We do think there needs to be some good cause shown
6 at the end, rather than just laying -- dumping all the
7 documents in. And we believe that part of that good cause will
8 be to show what the relevance is of the documents.

9 We think it would be unfortunate if we had a record
10 that went up to the appellate courts with three or four
11 thousand documents. That's an unmanageable record,
12 particularly if there is no tether that demonstrates the
13 reliability or relevance of all the documents that are in the
14 record.

15 So, we basically agree with what the Court proposes.

16 **THE COURT:** Then that will be the order, that
17 exhibits to be received during the course of the trial will
18 require a sponsoring witness.

19 The Court will consider the admission of additional
20 materials for good cause shown based on unavailability, undue
21 expense or burden, and a showing of relevance to the issues
22 that need to be adjudicated.

23 **MR. THOMPSON:** Your Honor, thank you.

24 Two more of these points.

25 **THE COURT:** Okay.

1 **MR. THOMPSON:** The third one is, we would
2 appreciate -- we think both parties would be served by having a
3 deadline by which we had to at least identify concerns over
4 authenticity of these documents.

5 Because if we're going to have to call witnesses in
6 to authenticate, one by one, different documents, it would
7 certainly be beneficial, I think, to the parties to know that.
8 Hopefully, we can avoid that. But --

9 **THE COURT:** It's been years since I've had a serious
10 authenticity objection.

11 **MR. THOMPSON:** Okay. Very well, Your Honor.

12 And then the last issue, Your Honor, is post-trial
13 briefing. And I know --

14 **THE COURT:** Oh, my goodness gracious, are you
15 getting --

16 (Laughter)

17 **MR. THOMPSON:** The cart before the horse, I know,
18 Your Honor.

19 We are entirely at the Court's pleasure on whatever
20 the Court would find most helpful. But if there were going to
21 be post-trial briefing, and if it were going to be a
22 highly-compressed schedule, we would like to know about that
23 beforehand so that we can do something that's meaningful.

24 But, our view is that we could not do anything
25 meaningful in less than 30 days.

1 **THE COURT:** All right. Well, we'll deal with that
2 when we need to. I've already, by setting this schedule,
3 ruined your holiday plans, so I'm not going to ruin any other
4 at this juncture.

5 **MR. THOMPSON:** Thank you, Your Honor.

6 **THE COURT:** Absolutely. Anybody else?

7 Does that mean we're done?

8 **MR. OLSON:** Thank you, Your Honor.

9 **MR. BOIES:** Thank you, Your Honor.

10 **THE COURT:** Thank you, Counsel.

11 Let me give you one other piece of advice, because I
12 don't think -- except as we may have some discussions with
13 regard to further discovery, I think it's unlikely that we will
14 all be together again until the 11th of January.

15 It would be my plan to proceed beginning at 9 o'clock
16 on January 11. And we'll go until approximately the noon hour,
17 and then we'll take about an hour or so for lunch, and then go
18 until about 4 o'clock in the afternoon.

19 But after the 11th, we'll probably start about 8:30
20 in the morning. But you may need a little more time to get
21 organized on that first day, so I will be happy to accommodate
22 that.

23 Now, if you have additional problems that you need to
24 discuss with me, and if the proceedings at 7th and Mission
25 Street, or wherever the Court of Appeals deals with some of

1 these discovery disputes, necessitates you discussing further
2 issues with me, I'm available and happy to accommodate you. I
3 will be around. So I should have no problem in trying to move
4 these issues along so we tee off on the 11th of January.

5 **MR. BOIES:** Great.

6 **THE COURT:** All right.

7 (Counsel thank the Court.)

8 **THE COURT:** Thank you. And happy holidays to
9 everybody.

10 (Counsel respond.)

11 (At 1:09 p.m. the proceedings were adjourned.)

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13
14 **CERTIFICATE OF REPORTER**

15 I certify that the foregoing is a correct transcript
16 from the record of proceedings in the above-entitled matter.

17
18 DATE: Tuesday, December 22, 2009

19
20 s/b Katherine Powell Sullivan

21 _____
22 Katherine Powell Sullivan, CSR #5812, RPR, CRR
23 U.S. Court Reporter
24
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