

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOSEPH C. SPERO, MAGISTRATE

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

) January 6, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR

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Debra L. Pas, CSR, CRR, RMR, RPR
Official Reporter - U.S. District Court - San Francisco, California
(415) 431-1477

APPEARANCES :**For Plaintiffs:**

GIBSON, DUNN & CRUTCHER, LLP
 1050 Connecticut Avenue, N.W.
 Washington, D.C. 20036-5306

BY: MATTHEW D. MCGILL, ESQUIRE

GIBSON, DUNN & CRUTCHER LLP
 333 South Grand Avenue
 Los Angeles, California 90071-3197

**BY: THEODORE J. BOUTROUS, JR., ESQUIRE
 CHRISTOPHER D. DUSSEAULT, ESQUIRE**

GIBSON, DUNN & CRUTCHER LLP
 555 Mission Street, Suite 3000
 San Francisco, California 94105-2933

BY: ETHAN D. DETTMER, JR., ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
 1999 Harrison Street, Suite 900
 Oakland, California 94612

BY: JEREMY MICHAEL GOLDMAN, ESQUIRE

**For Plaintiff-
Intervenor:**

CITY AND COUNTY OF SAN FRANCISCO
 OFFICE OF THE CITY ATTORNEY
 One Drive Carlton B. Goodlett Place
 San Francisco, California 94102-4682

BY: DANNY CHOU, DEPUTY CITY ATTORNEY

**For Defendant
Gov. Schwarzenegger:**

MENNEMEIER, GLASSMAN & STROUD
 980 9th Street, Suite 1700
 Sacramento, California 95814-2736

BY: ANDREW WALTER STROUD, ESQUIRE

**For Defendant
Edmund G. Brown Jr.:**

STATE ATTORNEY GENERAL'S OFFICE
 455 Golden Gate Avenue, Suite 11000
 San Francisco, California 94102-7004

BY: TAMAR PACHTER, DEPUTY ATTY GENERAL

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

1 APPEARANCES (CONTINUED):

2 **For Defendant-**
3 **Intervenors:**

COOPER & KIRK
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036

4 **BY: MICHAEL W. KIRK, ESQUIRE**
5 **JESSE PANUCCIO, ESQUIRE**

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P R O C E E D I N G S

JANUARY 6, 2010

1:33 p.m.

THE CLERK: Calling Case C09-2292, Kristin Perry versus Arnold Schwarzenegger.

Counsel, please state your appearances.

MR. BOUTROUS: Good afternoon, your Honor. Theodore Boutrous for the plaintiffs.

THE COURT: Good afternoon, Mr. Boutrous.

MR. MCGILL: Good afternoon, your Honor. Matthew McGill of Gibson, Dunn and Crutcher for the plaintiffs.

THE COURT: Mr. McGill.

MR. DUSSEAULT: Good afternoon, your Honor. Chris Dusseault of Gibson, Dunn and Crutcher also for the plaintiffs.

THE COURT: Mr. Dusseault.

MR. DETTMER: Good afternoon, your Honor. Ethan Dettmer of Gibson, Dunn and Crutcher for the plaintiffs.

THE COURT: Mr. Dettmer.

MR. GOLDMAN: Good afternoon, your Honor. Jeremy Goldman from Boies, Schiller and Flexner for the plaintiffs.

THE COURT: Welcome.

MR. CHOU: Good afternoon, your Honor. Danny Chou for plaintiff-intervenor, City and County of San Francisco.

THE COURT: Welcome, sir.

1 **MR. KIRK:** Good afternoon, your Honor. I'm Michael
2 Kirk with Cooper and Kirk for the defendant-intervenors.

3 **THE COURT:** I see this morning wasn't your last
4 appearance.

5 (Laughter.)

6 **MR. PANUCCIO:** Good afternoon, your Honor. My name
7 is Jesse Panuccio from Cooper and Kirk also --

8 **THE COURT:** Panuccio.

9 **MR. PANUCCIO:** Panuccio, yes, your Honor. Also for
10 defendant-intervenors. Thank you.

11 **THE COURT:** Welcome.

12 **MR. STROUD:** Good afternoon, your Honor. Andrew
13 Stroud, Mennemeier, Glassman & Stroud on behalf of Governor
14 Schwarzenegger and the administration defendants.

15 **THE COURT:** Mr. Stroud.

16 **MS. PACHTER:** Good afternoon, your Honor. Deputy
17 A.G. Tamara Pachter on behalf of the Attorney General.

18 **THE COURT:** Welcome.

19 I thought for a moment we were going to get to deal
20 with the deposition questions as well, but it sounds like
21 that was largely resolved, is that right?

22 **MR. BOUTROUS:** Your Honor, I do want to clarify. I
23 think when I said today that we could do it without
24 depositions, particularly since we've got document issues, we
25 very much would prefer at least to have the opportunity to

1 review the documents and determine whether some of these
2 depositions need to be reopened.

3 **THE COURT:** Here's what I will do. I won't revisit
4 what I think you admitted in front of Judge Walker, but if
5 you review the documents and based on those you think that
6 you now have information you didn't know at that hearing, you
7 can make an appropriate application.

8 **MR. BOUTROUS:** Okay, your Honor. Thank you.

9 **THE COURT:** I just don't feel like we should --
10 having watched that proceeding, that we should change that
11 unless there is some actual application that has some new
12 reason.

13 **MR. BOUTROUS:** That's fine, your Honor. I just
14 want -- I don't mean to be -- try to evade what I -- but I
15 did -- you know, I think we can do it, but -- if needed, but
16 we would much prefer -- if we find additional information, we
17 will look at the documents.

18 And on the issue of burdens on the other side, I
19 think at least 12 lawyers made appearances. So I think it's
20 doable to do depositions and I appreciate your giving us the
21 opportunity once we look at the documents to come back.

22 **THE COURT:** Look at the documents. You can talk
23 about it. I can't tell you how, or he, depending on who gets
24 to resolve that question.

25 **MR. BOUTROUS:** Thank you, your Honor.

1 **MR. KIRK:** I could tell you what our position would
2 be, your Honor. It would be the same as upstairs.

3 **THE COURT:** I thought that.

4 So with regards to documents. As I understand it,
5 I have a list of the sort of issues that I gleaned from your
6 papers and you will need to help me on whether I have got all
7 the issues, or there are other issues, but the document
8 requests that are principally at issue are, obviously,
9 document request number eight, which there has been much
10 litigation about, but also now one and six, which are the
11 ones that the plaintiffs have flagged for compelling
12 production in their papers, and that there are a number
13 issues that have arisen and I've got a list of them. And
14 there are others that you may need to add, but my list is as
15 follows.

16 The first is the issue that was actually identified
17 in connection with the depositions. Did the District Court
18 impose some relevance limits with respect to production of
19 documents? And that could be characterized in a number ways,
20 one of which is maybe it's limitation to internal campaign
21 communications regarding strategy or -- and Mr. Kirk may want
22 to characterize it some other way, but did the Court have
23 some relevance limitation first; general relevance
24 limitations, not just with respect to a particular document
25 request.

1 Second, with respect to the First Amendment
2 privilege, what's the scope of that privilege in terms of
3 what are internal communications of the campaign that are
4 protected? I think that's been largely answered by the
5 footnote in the amended Ninth Circuit ruling, but --
6 regarding the core group, but I think that there needs to be
7 some discussion about the -- whether or not the party -- what
8 the parties' positions are on the scope of the production in
9 that regard, whether or not -- you know, how far does the
10 protection go that the Ninth Circuit has laid down. Is it
11 limited to internal communications among the core group? And
12 in this context, who would be the core group? We are going
13 to need to actually air that question.

14 Next is sort of notwithstanding what we decide
15 about what the courts determined with respect to relevance,
16 whether there are appropriate relevance limits the Court
17 should impose now on production of documents. And I don't
18 know that, other than saying they have to be documents
19 responsive and they have to be documents that aren't within
20 whatever we decide or I decide is the scope of the privileges
21 set down by the Ninth Circuit, should the Court impose on
22 production of these three document requests any other kind of
23 relevance limits?

24 What I'm thinking about is Chief Judge Walker's
25 comments fairly early on that if you ask for all

1 communications about Prop 8, you get, you know, "Are you
2 available Tuesday," as well as, "The reason you should vote
3 for Prop 8 is X." And is there a way of describing or should
4 I embark on an endeavor of describing any kind of a relevance
5 limit with regard to these three document requests?

6 We need to address the issue of the protective
7 order, which was sort of postponed while the Circuit was
8 ruling. I got the versions that everyone proposed.

9 We need to address the issue of what exactly is
10 going to be redacted. Maybe that's not a controversial
11 subject at this point.

12 At some point, as I recall, there was some
13 stipulation that your rank and file volunteers could be
14 redacted, their names could be redacted, how that's going to
15 occur with respect to these documents.

16 And finally what sort of, if any, additional
17 privilege log is going to be provided.

18 So that's my list of things we need to accomplish
19 in the next 10 minutes. Have I forgotten anything? Is
20 anyone expecting to address something else that I haven't
21 listed?

22 **MR. BOUTROUS:** That covers it, your Honor.

23 **THE COURT:** Okay. So let's start with the issue
24 that we left off with in front of Judge Walker.

25 Did the District Court place any relevance

1 limitations with regard to document discovery in general?

2 Anybody want to start?

3 **MR. BOUTROUS:** Certainly, your Honor. Theodore
4 Boutrous for the plaintiffs.

5 The position as you, I think, are aware that the
6 proponents have taken is that somehow the order of October 1
7 and November 11 from Chief Judge Walker dealing with request
8 number eight also constituted a ruling that the only relevant
9 information was internal information. And we just believe
10 that is simply wrong on the face of Chief Judge Walker's
11 orders and -- which denied the motion to compel, except as it
12 related to request number eight.

13 And with request number eight, which we, in light
14 of the judges's order, reformulated and narrowed to focus on
15 the internal communications. But we had request number one,
16 request number six, which explicitly dealt with
17 communications meant for public consumption, things that went
18 to voters, potential voters, donors and the like.

19 **THE COURT:** I actually have never seen a
20 reformulated request number eight, which would be very useful
21 if someone could come up with that.

22 But what you are saying it was reformulated to
23 focus on the internal campaign communications.

24 **MR. BOUTROUS:** Exactly. And so we reformulated --
25 in its original format it was basically all communications to

1 third parties relating to Proposition 8.

2 Chief Judge Walker found that to be too broad and
3 we then narrowed it in light of his ruling to focus on
4 communications among the -- the core group of participants in
5 the campaign, and that is what was the subject of the Ninth
6 Circuit appeal.

7 The other requests, which included request number
8 one, number six, we also had a number of requests that sought
9 documents that tend to refute the positions that the
10 proponents are taking now, dealt with information sent to the
11 voters, which is the core of what Chief Judge Walker found
12 was relevant.

13 On page 16 of the October 1 ruling, Chief Judge
14 Walker said the test was -- and this goes to your Honor's
15 suggestion about relevance standard -- information that
16 documents that share a clear nexus with the information put
17 before the voters.

18 So I don't think there is any way to read this
19 order or any of the other orders to suggest that the
20 information that the campaign, the core group of the campaign
21 sent to voters, discrete groups of voters, individual voters,
22 as the Ninth Circuit noted in footnote 12, that those are not
23 responsive and relevant under our requests and Chief Judge
24 Walker's prior orders. It's just not a reasonable reading of
25 any of those materials.

1 In particular, your Honor, the proponents have
2 filed their protective order motion. The original one was
3 very broad. It applied to everything. And they wanted a
4 ruling that said only materials sent to the public-at-large,
5 the electorate-at-large would be responsive. And Judge
6 Walker rejected that, denied the motion and only granted it
7 as to number eight, saying it's very clear that all these
8 documents that were sent to voters are responsive.

9 And I will save my privilege arguments for later,
10 but I just think it's straightforward, clear, and those
11 documents need to be produced immediately.

12 **THE COURT:** Okay. Thank you.

13 **MR. BOUTROUS:** Thank you, your Honor.

14 **MR. KIRK:** Your Honor, if the Court please, my
15 colleague, Mr. Panuccio, is going to speak for us today.

16 **THE COURT:** Yes.

17 **MR. PANUCCIO:** Thank you, your Honor.

18 May it please the Court. As you -- as your Honor
19 heard upstairs, I believe, counsel for plaintiffs has stated
20 that the Ninth Circuit opinion, quote, puts many documents
21 back on the table. And I think that that's not -- that's
22 just not accurate. Plaintiffs have not been --

23 **THE COURT:** I'm going to stop you there because
24 we're not talking about their version.

25 All I want to talk about is, do you think that

1 Judge Walker in his rulings that were reversed by the Ninth
2 Circuit, in part at least, imposed any relevance limitations
3 on production of documents in the case?

4 **MR. PANUCCIO:** Yes, your Honor. I think that those
5 -- the October 1st, November 11th orders did place
6 limitations on the production of documents.

7 And the point I wanted to make is, I don't think
8 anything that's happened since then has changed those
9 limitations, specifically with the question of relevance in
10 mind.

11 What the litigation -- what the October 1st and
12 November 11 orders dealt with was a request that asked for
13 communications from defendant-intervenors to any third party.
14 And the Court dealt with this sweeping request, said that
15 just goes too far.

16 What the Court said it was concerned with was
17 determining the intent behind the measure enacted by the
18 voters. This is the October 1st docket entry 214 at 13. And
19 the Court credited that for virtually every communication by
20 anyone included in or associated with Protect Marriage cannot
21 be relevant. And then the Court said, a request seeking
22 every communication is, quote, simply too broad.

23 What plaintiffs are now doing, because they lost on
24 request number eight and revised request number eight, they
25 said, Okay, we've lost that. Let's go back to our request

1 number one and our request number six, and let's define
2 "voter" or "the public" as any third party. And so it's --
3 it's just a matter of logic, your Honor.

4 **THE COURT:** It doesn't answer the question
5 actually. What were the relevance limitations that the judge
6 imposed?

7 He certainly wasn't saying -- and I think you
8 probably agree with this. He certainly wasn't saying that no
9 communications outside the core group are relevant. He is
10 not saying that.

11 He is saying that if you say, I want every single
12 thing you sent to anyone about Prop 8, even if it's "Let's
13 have lunch on Tuesday," that's too broad. What are the
14 limitations that you claim he set for the case?

15 **MR. PANUCCIO:** That's right. Well, first of all,
16 we agreed to produce communications that went to voters. And
17 by that you have to take some reasonable interpretation of
18 what "voter" means.

19 If "voter" is determined to mean any communication
20 to any friend, to any colleague at any time about Prop 8, we
21 are right back to that original request.

22 So the limit that the Court set -- the Court said,
23 you know, there are going to be some key documents that went
24 to just a few people and those key documents are going to be
25 these internal campaign communications among this group of

1 managers and leaders because that's going to speak to these
2 documents that did go to voters. That's going to illuminate
3 those documents.

4 And so that's what -- that's what we sorted based
5 on --

6 **THE COURT:** So your view is the judge said the only
7 relevant documents that are reasonably calculated to lead to
8 discoverable admissible evidence are internal campaign
9 discussions.

10 **MR. PANUCCIO:** Well, in light of a request that
11 seeks any document to any third party. I think we conceded
12 from the outset. We said, look, communications that went to
13 voters, that were put out by the campaign or the
14 defendant-intervenor to persuade voters out there, we're
15 going to produce them. We have produced them --

16 **THE COURT:** This is a fight about what that means,
17 because who is a voter and who is not a voter? Are you
18 talking qua voters? Are you talking qua friend?

19 You know, when you are trying to persuade someone
20 who is on your side to work harder, are you talking as a
21 voter? Are you not talking as a voter?

22 What I'm asking for is Judge Walker's limitations.
23 I have my own ideas, which we may or may not ever get to,
24 about what a reasonable limitation might be. I'm wondering
25 whether or not I'm writing on a blank slate.

1 So where is it that Judge Walker said what he
2 wants, that thou shalt only get internal campaign
3 contributions?

4 **MR. PANUCCIO:** I don't believe that Judge Walker
5 said the only thing producible or relevant in this case is
6 solely internal campaign contributions, but I believe he said
7 in the October --

8 **THE COURT:** Communications. I'm sorry. I said
9 "contributions."

10 **MR. PANUCCIO:** I'm sorry, your Honor. I picked up
11 on that.

12 **THE COURT:** We both meant communications.

13 **MR. PANUCCIO:** Excuse me, your Honor.

14 One of the things that Chief Judge Walker said in
15 the October 1st order was it would be impossible to corral
16 all of the information that went to every voter or any voter
17 in the State of California. And, therefore, I think a
18 reasonable reading of the request and of the course of
19 litigation we had is that we would endeavor to produce and
20 have produced those documents that were put out to -- to the
21 electorate, even -- and including subset groups of the
22 electorate. We have even given them --

23 **THE COURT:** Church groups?

24 **MR. PANUCCIO:** We have given them PowerPoint
25 presentations that were given to church groups, small church

1 groups.

2 I believe their reading goes so far as to say if a
3 defendant-intervenor sends himself or herself a document --
4 sometimes you do that over email if you want to get a draft
5 on your file -- that technically goes to a voter because the
6 defendant-intervenor --

7 **THE COURT:** That is a bad example because I will
8 probably get a stipulation that it falls within internal
9 communications.

10 **MR. PANUCCIO:** But we can never get that definition
11 out of them. It's after every order of this Court, after
12 every significant and minor event --

13 **THE COURT:** I'm not concerned about that. I'm
14 concerned about whether or not I'm writing on a blank slate.

15 **MR. PANUCCIO:** I don't think you are, your Honor.
16 I believe that the orders of October 1st and November 11th
17 are controlling here and provide a lot of guidance.

18 I mean, at the end of the November 11th order,
19 Chief Judge Walker stated:

20 "I hope that this gives sufficient
21 guidance for defendant-intervenors to cull
22 their inventory."

23 So we did that. We spent weeks and weeks culling
24 tens of thousands of documents to get to this point. Then
25 the core groups that was left were these internal core group

1 privilege documents. We took that to the Ninth Circuit and
2 we get the mandamus on that, on the privilege issue.

3 So now having lost that, plaintiffs have --

4 **THE COURT:** Well, you didn't get mandamus on the
5 privilege log. You got mandamus on the 22 documents you
6 already produced, right?

7 **MR. PANUCCIO:** Well, the --

8 **THE COURT:** Isn't that right? That that's -- the
9 only thing they had before them is the orders that they
10 already entered.

11 **MR. PANUCCIO:** Yes.

12 **THE COURT:** And so he -- they didn't have your
13 multi-page thousands of document privilege log being the
14 record of the Circuit, right?

15 **MR. PANUCCIO:** Yes, that's correct.

16 **THE COURT:** So they weren't ruling on whether or
17 not those -- whether it was properly corralled or whatever.
18 They were just trying to figure out whether or not these were
19 the right standards.

20 **MR. PANUCCIO:** Well, on the First Amendment issue.
21 Actually, what they said with regard to the relevance or
22 responsiveness limitations, in two places in the note they
23 are very specific about this. We will not address those
24 questions, the Ninth Circuit said.

25 **THE COURT:** They didn't change that at all.

1 **MR. PANUCCIO:** So since plaintiffs did not cross
2 appeal and we, of course -- to the extent that the
3 October 1st and November 11th orders went in our favor and
4 limited the universe of documents, we didn't appeal that.

5 **THE COURT:** Okay. You still haven't explained to
6 me any place in the order where it did anything, other than
7 with respect to relevance, saying that if you ask for every
8 communication in the world about Prop 8, that's too broad.

9 There is no place in that order, is there -- you
10 can point it out to me -- where it says you can only seek
11 documents that were actually sent to significant groups of
12 voters? Is there anywhere where it says that's the
13 limitation?

14 I know you think that's the limitation. Show me
15 where it says that.

16 **MR. PANUCCIO:** I want to be clear. I don't think
17 that's the limitation that the only document that plaintiffs
18 concede are those that were internal. Certainly documents
19 that went from the campaign or from a defendant-intervenor
20 out to the world --

21 **THE COURT:** Out to which parts of the world?

22 **MR. PANUCCIO:** Okay. Well, that is a question.

23 **THE COURT:** But that's the question. My question
24 is this -- and maybe I'm not being clear, which wouldn't be
25 the first time.

1 You said that the appropriate limitation is no
2 internal campaign discussions. Fine. The Ninth Circuit
3 ruled on that, said we will discuss what that means. And
4 that in terms some of external communications, there is a
5 limitation imposed by the Chief's order which says you can
6 only get documents that were provided to, call it significant
7 numbers of voters, maybe even small, but discrete groups of
8 voters or a large swath; but that's your view, right?
9 That's the -- that's the relevance limitation you are looking
10 for?

11 **MR. PANUCCIO:** At the beginning -- I mean, I think
12 that certainly makes very good sense, your Honor, since what
13 the October 1st order said was you can't corral everything.

14 And so, yes, the stuff that went to even subsets of
15 the electorate, even so far as a church group, yes, okay, we
16 have given that over. But when you start to get into whether
17 one proponent sent an email to an --

18 **THE COURT:** You are still getting off track. We
19 are talking about whether or not I can figure out, if it
20 makes sense, whether I have it within my purview to do that
21 or whether it's already been figured out for me by the judge
22 presiding over the case.

23 And I take it what you are saying is we have to go
24 to step two, because the judge didn't actually come down and
25 say this is the relevance limitation there.

1 **MR. PANUCCIO:** Well, there is one further point I
2 make about the October 1st order. I don't have it in front
3 of me right now, but I believe at the beginning of the
4 opinion Chief Judge Walker said, "Defendant-intervenors have
5 agreed to produce," and he had some formulation about the
6 types of documents that went out to voters, to the public.

7 And then he -- Chief Judge Walker went on to say,
8 And now I'm looking at this request that goes to any third
9 party. And that's where he set limits.

10 So I think you can take that, what he saw, as a
11 concession in the beginning as carving out one universe of
12 documents and now dealing with something --

13 **THE COURT:** Okay, I understand that.

14 All right. On this issue, the Court has not set
15 relevance limitations as yet.

16 As respects all discovery in the case, I don't
17 think there is any merit to the defendants' argument.

18 The Court was only ruling on question number eight
19 in the first instance, the document request number eight, not
20 all discovery in the case. And while the Court identified an
21 overbroad request, the Court did not cabin what within that
22 overbroad request might not be overbroad.

23 It also didn't -- the Court also did not previously
24 address the issues regarding the two other document requests
25 that are at issue today.

1 So I think that -- and not to mention that as comes
2 to -- as regards to discovery, while there are issues of
3 delay and prejudice and that sort of thing, there hasn't been
4 law of the case.

5 So I think for all of those reasons I need to look
6 afresh at the question of would it be, if any, a relevance
7 limitation. And you will see, I have some thoughts on what
8 that might be, and we'll get to that.

9 The second issue I had was -- I wanted to take it
10 in this order because it made logical sense, but -- the
11 better order to do it in, but my first instance reaction when
12 I got the opinion was you all should go back and talk before
13 we had this hearing, because having now looked at the amended
14 opinion, it gives -- thankfully, gives a much clearer
15 definition, at least, to the First Amendment privilege the
16 Court was talking about.

17 And so the question for me is, leaving aside any
18 relevance considerations that we might want to address, and
19 we will do that next, with these three document requests, is
20 what is the limitation imposed by the Circuit with respect to
21 the First Amendment privilege? And they made various
22 comments about it in the text and then, again, in great
23 detail in footnote 12, but I think that's the next question.

24 What is the scope of the internal communications
25 that are protected by the First Amendment privilege, and what

1 is outside of that scope, and what kind of limitation should
2 the Court, therefore, allow and otherwise disallow with
3 respect to it?

4 So why don't I hear from the plaintiffs first.

5 **MR. BOUTROUS:** Thank you, your Honor.

6 I do believe footnote 12 does really very
7 specifically lay out the very narrow parameters of the First
8 Amendment privilege. And, in fact, this formulation is very
9 much like the one we had proposed, the way we read the Ninth
10 Circuit's opinion and proposed at the pretrial conference.

11 We did -- just to answer the Court's question, we
12 did at least try to open a dialogue concerning this footnote
13 with defendants' counsel before to see if we could start
14 getting documents, but I think the limitation is squarely as
15 to private internal communications, though tests for
16 determining what is private and internal focuses on the who
17 are the core group, the core group of persons engaged in a
18 formulation of campaign strategy and messages.

19 And the Ninth Circuit left it to the District Court
20 to determine who that core group is. And we agree. I think
21 your Honor suggested that we need to figure out who that core
22 group is.

23 We believe it's pretty clear that it's the
24 executive committee members of the ProtectMarriage.com and,
25 perhaps, the Schubert Flint, their consultants, and

1 Mr. Pugno, who was their lawyer and, apparently, made them a
2 member of the executive committee.

3 The proponents themselves, I think, have indicated
4 that they do not believe that Dr. Tam or Gail Knight, who
5 actually was one of the proponents, is a member of the core
6 group.

7 In their notice of filing their privilege log they
8 said that, that -- it's page 13 of the document that:

9 "Gail Knight and Dr. William Tam,
10 although official proponents, had virtually
11 nothing to do with ProtectMarriage.com's
12 campaign."

13 So I think that it's that -- the executive
14 committee and Mr. Pugno and --

15 **THE COURT:** So the proponents except for Knight and
16 Tam?

17 **MR. BOUTROUS:** Yes.

18 **THE COURT:** Consultants, executive committee,
19 Mr. Pugno. We are going to have to list the consultants
20 because they had more than the Schubert firm.

21 **MR. BOUTROUS:** Yes. And on that, in that regard,
22 your Honor, late last night -- not late last night, but
23 yesterday Mr. Criswell, who was the outside -- I guess,
24 assisted with the -- was a vendor who assisted with the
25 dissemination of the advertising, I believe, filed a motion

1 to quash the trial subpoena we served on him where he
2 basically says he had nothing to do with the formulation of
3 messages and strategy. He was simply the person
4 communicating these things. So we don't think he falls
5 within that group of the core group.

6 But you are correct, your Honor. We would want a
7 list specifically, and we think it should be a very narrow
8 group, of people who are in that core group.

9 **THE COURT:** All right. We will talk further about
10 that.

11 **MR. BOUTROUS:** Yes. So that's -- that's the first
12 test. Once we determine who is in the core group,
13 communications amongst those people, at least, are subject to
14 the privilege. Then we have the higher standard that needs
15 to be met.

16 But beyond that, the documents, the Dr. Tam letter
17 that the Court of Appeals attached to its opinion as an
18 appendix, is used as an example, a letter that is urging
19 support of Proposition 8. It really goes to the core of what
20 we were seeking to begin with.

21 And the Ninth Circuit used the language:

22 "The privilege certainly does not apply
23 to documents or messages conveyed to the
24 electorate-at-large, discrete groups of
25 voters or individual voters for purposes such

1 as persuasion, recruitment or motivation,
2 activities beyond the formulation of strategy
3 and messages."

4 So the -- the Ninth Circuit really focused on those
5 internal documents that involved the formulation of the
6 messages and strategy, but documents conveyed outside that
7 core group that were actually conveying the messages to the
8 people of California are not subject to the privilege and
9 must be produced, we believe.

10 **THE COURT:** Well, it says, "...or documents outside
11 the core group or documents that were not concerned with the
12 formulation of campaign strategy and messages."

13 **MR. BOUTROUS:** Correct. And so I think it really
14 does lay it out very clearly. And we believe there are on --
15 under proponent's own briefing there are thousands of
16 documents that are responsive.

17 And during the process, your Honor, of discovery we
18 were told a number of times that while this discovery dispute
19 was brewing, proponents were gathering and preparing the
20 documents in the event they were required to produce them.

21 So I anticipate an argument about burden and
22 timing. They have known for months and months and months we
23 were seeking these documents, and they have been withholding
24 them. They have been on notice. And they told us that they
25 were preparing to produce them in the event they were

1 required to do so.

2 So we think if the -- the resolution is very
3 straightforward here in terms of the privilege issues.

4 **THE COURT:** Okay.

5 **MR. BOUTROUS:** Thank you.

6 **THE COURT:** Counsel? So let me ask you a
7 preliminary question. You can come up, I'm sorry.

8 I take it from the papers that you were filed
9 before the amended Ninth Circuit decision that the test you
10 apply to your privilege log was not precisely the test that
11 the Circuit came up with in its -- not the test the Circuit
12 came up with in footnote 14.

13 **MR. PANUCCIO:** Well, I think for number 12, your
14 Honor, yes.

15 **MR. BOUTROUS:** 12 -- I'm sorry.

16 **MR. PANUCCIO:** I think that's not entirely
17 accurate.

18 **THE COURT:** Okay.

19 **MR. PANUCCIO:** I mean, what was before the Ninth
20 Circuit, as your Honor has said, are these -- the 21
21 documents and what they implicated.

22 And that was -- I mean, we got to those documents
23 because we sorted based on these relevance determinations
24 made on the October 1st and November 11th orders, including
25 all the subject matter, the 39 documents that were -- out of

1 the 60 that were culled out by the District Court. I mean,
2 we sorted on those grounds.

3 And so what went up to them was -- what went up to
4 the Ninth Circuit was this core group of documents and they
5 said all of those are privileged. So that was our privilege
6 assertion, and it remains our privilege assertion.

7 **THE COURT:** Well, do you disagree with
8 Mr. Boutrous' assertion that the privilege is now limited to
9 communications among the core group of individuals who
10 formulate strategy and messages, and that outside of that
11 communication of that group it's -- the privilege doesn't
12 apply?

13 **MR. PANUCCIO:** Well, I think it's important to,
14 again, remember what was before the Ninth Circuit, which were
15 21 documents that were from within this -- within the
16 management and leadership of ProtectMarriage.com. But I
17 don't think it's a fair reading.

18 Let's not lose sight of the forest for the trees.
19 It's not fair to take one footnote of a Ninth Circuit opinion
20 and say that is the opinion. If we are going to define "core
21 group," the opinion also says at the *Slip* opinion at page 30,
22 note nine, says:

23 "The freedom of members of a political
24 association to deliberate internally over
25 strategy and messaging is an incident of

1 associational autonomy."

2 And at note nine on page 31 the *Slip* opinion says:

3 "Association is no less than individuals
4 have the right to shape their own messages."

5 So to argue that you have to carry a business card
6 that says "Core Group" on it and then you get First Amendment
7 protections, but if you don't carry that business card, you
8 lose your First Amendment protections if you are
9 corresponding with somebody about an associational -- a
10 political matter and the formulation of messages, I think is
11 not a proper reading of the opinion.

12 **THE COURT:** Doesn't it prove too much? Doesn't
13 that read footnote 12 out of the opinion?

14 **MR. PANUCCIO:** Well, no. I think it reads footnote
15 12 in light of what the Ninth Circuit was looking at.

16 **THE COURT:** How do you understand the Ninth Circuit
17 to be ruling when it says:

18 "Our holding is, therefore, limited to
19 communications among the core group of
20 persons engaged in the formulation of
21 campaign strategy and messages. We leave it
22 to the District Court to decide who is in the
23 core group, and then to say it certainly does
24 not apply to documents or messages conveyed
25 to electorate-at-large, discrete peer voters

1 or individuals to persuade, recruit or
2 motivate beyond the formulational strategy
3 and messages."

4 What is left of your discussion of the Ninth
5 Circuit's test if you -- there if we go along with your
6 version of what they meant?

7 **MR. PANUCCIO:** Well, again, they say "our holding
8 is limited". And their holding is limited to what was before
9 them, which are documents that were from this entity called
10 ProtectMarriage.com.

11 But now plaintiffs' counsel has got up and said --
12 and stood up here and said, well, that means if Gail Knight
13 has documents, those aren't privileged, but the -- I don't
14 think the opinion as a whole can be read to say --

15 **THE COURT:** What if I add Gail Knight? What if I
16 add the proponents? Does that change your thoughts on this?
17 What if I say the core group is everything, everything
18 everyone said plus the two proponents, official proponents
19 who they say were not involved in the campaign strategy?

20 **MR. PANUCCIO:** Well, I think for purposes of the
21 core -- I mean, that would go a certain way, but if the --

22 **THE COURT:** So you think anybody can be in the core
23 group?

24 **MR. PANUCCIO:** Well, I mean, not everybody can be
25 in the core group of ProtectMarriage.com, but certainly the

1 opinion is recognized. At page 19 of the District Court's
2 opinion, it says:

3 "Under its interpretation associations
4 that support or oppose initiatives face the
5 risk that they will be compelled to disclose
6 their internal campaign communications in
7 civil discovery. This risk applies not only
8 to the official proponents, but also to the
9 myriad social, economic, religious and
10 political organizations that publicly support
11 ballot measures."

12 Now, take someone like Dr. Tam, for instance. He
13 wasn't a member of ProtectMarriage.com. He wasn't in any
14 core group of ProtectMarriage.com, but he was a -- in the
15 core group of another myriad social political, economic,
16 religious organization.

17 So I don't think you need to register with the
18 State of California to be in support of Prop 8 to have --

19 **THE COURT:** Why do you pick him? They specifically
20 said his communication was not privileged.

21 **MR. PANUCCIO:** They said that specific
22 communication. I don't think they said any communication
23 Dr. Tam has in the world was not privileged. That wasn't
24 before them.

25 **THE COURT:** Okay.

1 **MR. PANUCCIO:** I would also --

2 **THE COURT:** Can I ask, are these -- one, six and
3 eight, are these document requests addressed to all of the
4 intervenor defendants, or are they addressed to a particular
5 intervenor defendant?

6 **MR. PANUCCIO:** I believe they are -- I mean, I
7 think they say defendant-intervenors.

8 **THE COURT:** You say they are for
9 ProtectMarriage.com, but they were actually at every point
10 addressed to all of the intervenor defendants. And so that's
11 what the District Court was working with and that's what the
12 Circuit Court was working with, right?

13 **MR. PANUCCIO:** Yes.

14 Your Honor, one more point about the Ninth Circuit
15 opinion that I think is important just for procedural
16 clarity.

17 I would like to point out the mandate has not
18 issued yet from the Ninth Circuit and until it does, I don't
19 believe that jurisdiction returns to this Court under *Greggs*
20 *versus Provident Consumer Discount Company*, which is at
21 459 U.S., pin cite 58, and, also, under Ninth Circuit case
22 entitled *Beardsley versus Brown*, which is 393 F.3d at pin
23 cite 901. That is for purposes of if we are getting into
24 scope of privilege and so forth, I believe the mandate has to
25 issue before we can have a definitive ruling from the

1 District Court.

2 **THE COURT:** You know, it's an odd thing with
3 discovery. That applies to a discovery question in an
4 ongoing case? We still have jurisdiction over the case.
5 Presumably their opinion supersedes their stay order. We can
6 have discovery in the case.

7 Why do you think that we are not allowed to have a
8 discussion about privilege?

9 **MR. PANUCCIO:** Well, for instance, the Ninth
10 Circuit already amended the opinion. Imagine there had been
11 some kind of District Court ruling on the privilege in the
12 interim between, I believe, it was December 11th and
13 January 4th or 5th when the amended opinion came out.

14 The reason for this rule, this sort of firm
15 rule --

16 **THE COURT:** You would like me to not rule on this
17 so you can try this case without having this decided?

18 **MR. PANUCCIO:** Well, I just think --

19 **THE COURT:** You don't want to be too transparent
20 about this. I will tell you, I'm going to rule today. If
21 you want to go to the Court of Appeals and say, Oh, he
22 shouldn't have done that and they'll stay it, it's fine.

23 I'm happy to entertain the substantive arguments,
24 but on discovery I think the Court has at least said what he
25 thinks the scope of the privilege is. We have a trial coming

1 up. As far as actual jurisdiction, if you are wrong, he'll
2 stay it.

3 **MR. PANUCCIO:** Thank you, your Honor.

4 **THE COURT:** Well, thank you.

5 Let me ask you another question, Mister -- Mr.
6 Panuccio.

7 **MR. PANUCCIO:** Panuccio.

8 **THE COURT:** Mr. Panuccio. I don't see you all
9 nearly enough.

10 If I were to define a core group that included, for
11 example, the executive committee of ProtectMarriage.com,
12 that's a known group of individuals and everybody on both
13 sides knows so if I describe it that way, it's clear enough.
14 Is that okay?

15 **MR. PANUCCIO:** What you mean by executive --

16 **THE COURT:** Yes, yes. Because I --

17 **MR. PANUCCIO:** Yes.

18 **THE COURT:** I know there are various sensitivities
19 here and I'm not sure which names are out and which names
20 aren't. That's one of the reasons I'm going through this
21 exercise.

22 There is also -- let me get my notes -- the
23 campaign consultants. And what I think is -- so you had --
24 and one was mentioned. I guess it's the Schubert firm, is
25 that right?

1 **MR. PANUCCIO:** Schubert Flint Public Affairs is
2 one.

3 **THE COURT:** And, you know, I have access to sealed
4 materials that the plaintiffs do not. So, for example, I
5 have heard the sealed submission in connection with the
6 in camera examination.

7 And are there other consultants that we can talk
8 about -- I mean, I think the point was made that the
9 consultants, qua consultants, their names are out, but I want
10 to come up with a list, other than Schubert Flint, who you
11 thought were the consultants that should be on the list of
12 campaign consultants that dealt with campaign strategy and
13 messaging strategy.

14 **MR. PANUCCIO:** Your Honor, I have to admit that
15 standing here today on the fly would be a little difficult
16 for me to do that. I think it would be something that I
17 would need to consult -- I'd need to consult with my clients
18 about to sort of come up with a list.

19 **THE COURT:** Why don't you -- am I permitted to
20 identify the name of the person who filed -- there is a
21 declaration.

22 **MR. PANUCCIO:** I'm not entirely certain --

23 **THE COURT:** Here is what I'm going to do. I'm
24 going to hand you -- you have got it?

25 **LAW CLERK:** Yes.

1 **THE COURT:** We are going to hand you a portion of
2 the filing that was submitted under seal. You take a look at
3 that while I'm hearing from Mr. Boutrous, at least, and see
4 if we can come up with, from your perspective, beyond the
5 core group, if it's limited to the people -- I mean, who were
6 the campaign consultants, and there were a couple others you
7 might want to do. Okay?

8 **MR. PANUCCIO:** Okay.

9 **THE COURT:** Thank you.

10 **MR. BOUTROUS:** Yes, your Honor. Thank you.

11 I wanted to clarify. I think in terms of the
12 official proponents, I think the only official proponent who
13 could really be called part of the core group is Mr. Jansson.
14 The others really weren't looking at the privilege log.

15 And just looking at the record, the other official
16 proponents, even though they were proponents on the ballot
17 measure, does not appear they played a key role, or kind of a
18 role the Ninth Circuit contemplated.

19 Mr. Jansson was on the executive committee. The
20 others were not. So Dr. Tam, Ms. Knight, Senator
21 Hollingsworth and Mr. Gutierrez, I think, would not qualify
22 under the test, but Mr. Jansson would.

23 **THE COURT:** Well, one of my thoughts is to not get
24 too far into that on the following theory; that you need to
25 get discovery to try the case and that at some point there --

1 the extra that you might get from not making a finding that
2 they didn't have a sufficiently large role in formulating a
3 strategy, even though their official proponents might not
4 warrant that intrusion. I would like to set a standard
5 that's really clear and really easy to deal with and, also,
6 it's fairly broad actually so that it's -- so that one
7 looking at it, you can say, well, that gives credence to what
8 the proponents might say, the people most involved in the
9 campaign. That's the thinking, at least, on doing that.

10 **MR. BOUTROUS:** I think, in our view, it would be --
11 it should be this narrower group, but if I'm understanding
12 what you are saying, that would mean, though, that
13 communications, the fact that someone was deemed in a control
14 group, that doesn't mean that their communications to people,
15 voters, and the people outside that group are privileged
16 under the Ninth Circuit's order.

17 So we would urge the narrower view because one of
18 the things we have seen, as we saw today, everybody is part
19 of a core group of something. So the proponents keep
20 expanding the core group so that we're all, apparently, part
21 of the core group, and that's what I'm worried about if we
22 broaden it.

23 And on the privilege log, for example, these are
24 not documents that would fall in this category. These were
25 the documents that were -- they claimed were part of the

1 internal communication.

2 But they had one, for example, from Dr. Tam to
3 Does 1 through 82, and then they claimed that was part of the
4 internal private deliberations privilege.

5 So I just would urge a definition that's narrow
6 enough so it doesn't sweep too broadly. And I think the
7 executive committee and the consultants would be the best way
8 and I appreciate the Court considering that.

9 **THE COURT:** My thought would be to come up with
10 specific names. I don't know how many names there are,
11 whether it's one or fifty, but to come up with specific names
12 so that we are not back here again arguing what I meant. You
13 can argue with someone else about whether I was right, but
14 not to argue about what I meant.

15 **MR. BOUTROUS:** Thank you, your Honor.

16 **THE COURT:** So, yes.

17 **MR. PANUCCIO:** Thank you, your Honor. A few points
18 I would like to make in response to both your Honor's
19 question and Mr. Boutrous' representations.

20 **THE COURT:** Sure.

21 **MR. PANUCCIO:** First, with respect to what you have
22 handed me, which was an under seal declaration, the name of
23 the person who authored the declaration, submitted the
24 declaration, is certainly publicly known.

25 **THE COURT:** Okay. So then maybe you can refer to

1 it by name.

2 **MR. PANUCCIO:** Mr. Prentice.

3 Now, this declaration, however, was submitted not
4 with the -- as your Honor knows, it was submitted with that
5 group of 60 documents. And so I believe the representations
6 made in it were to illuminate who some of the people were in
7 those documents, but, certainly, those documents aren't
8 reflective of the whole world of every consultant or person
9 who was involved.

10 **THE COURT:** Well, I mean, that doesn't answer the
11 question. The judge asked you to put in information so that
12 he could identify the structure of the decision making of the
13 campaign, and that's what that declaration is supposed to do,
14 right?

15 I don't think you are going to be able to walk away
16 from his description of -- you may say there are other groups
17 that you consider, you should consider, Judge, but you can't
18 walk away from this being the decision making -- people
19 involved in the decision making --

20 **MR. PANUCCIO:** I'm not saying -- these people are
21 included. I also think, however --

22 **THE COURT:** When you say "these people." I think
23 actually all of the names are public, but let's go through
24 them.

25 So you have got the executive committee. You have

1 got the official proponents potentially. Maybe not all of
2 them. You have campaign consultants, the Schubert Flint
3 Public Affairs firm.

4 Who else? What other campaign consultants should
5 we be discussing?

6 **MR. PANUCCIO:** Well, at the very least, your Honor,
7 there was the entire list -- well, first of all, I would -- I
8 would ask, your Honor, I think it would help enormously if at
9 the end of this we could have 24 hours to sort of submit a
10 paper on this, rather than have me do it on the fly. I can't
11 tell you in my head I have all of the knowledge --

12 **THE COURT:** We are going to do it right now, I'm
13 afraid. We are going to have to do it now. You have had
14 plenty of time to consider these issues. You have had since
15 the Circuit made its ruling to consider the implications of
16 that. You have -- you have filed things with the Court.

17 They talked to you again on Monday. The Court, the
18 Ninth Circuit issued an opinion that said you have to focus
19 on the core group and here's how to define that.

20 I would expect you to come today prepared to do it,
21 because we have got a trial on Monday. I don't have time to
22 wait 24 hours before things --

23 **MR. PANUCCIO:** Or even less, your Honor. Even by
24 the end of the day today. It's just that, certainly, there
25 are a lot of groups named in the revised request number

1 eight. That would be a start.

2 There are -- some of the folks -- some of the
3 people who would be identified are Doe'd out in the privilege
4 log and I -- standing here, I can't just look and say who
5 that Doe is. I would actually have to go back and look.

6 Any amount of time to be able to do that, I just
7 don't have that knowledge in my head. Some of them are Does,
8 so I couldn't announce them right now if I had them.

9 **THE COURT:** You wouldn't announce them. I mean,
10 you Doe'd them out.

11 **MR. PANUCCIO:** Right. I'm sorry. Maybe I'm
12 misunderstanding. I thought you were asking me to identify
13 specific people for the Court.

14 **THE COURT:** I don't know whether I'm going to give
15 you that opportunity. I think you have had plenty of time to
16 come to identify exactly what the Court -- the Ninth Circuit
17 told you on Monday it had to do to identify a core group.
18 You should be doing it now because today is Wednesday.

19 I'm going to have to set a schedule for production
20 of documents, and that schedule of production of documents
21 has to anticipate that we have got a trial coming up. And so
22 I don't know -- you know, you want to come back here in an
23 hour and tell me whatever additional information, maybe we
24 can do something like that. But I need to get this -- I want
25 to make a ruling on the record here -- I don't think it's

1 necessary to have a full-blown written order -- that will
2 describe for you what to do and when to do it. Otherwise --
3 otherwise, it would be a big mess and you will be handicapped
4 in doing it.

5 So you might persuade me to -- I can't see the
6 clock, but it's now 2:30 or approaching 2:30. We will work
7 on this for a little while longer. I will give you a
8 tentative rule or ruling subject to coming back here in an
9 hour telling me why I shouldn't add to the list. That's
10 fine. But the conceptual idea about who, if anybody, could
11 be added to the list are to be decided now.

12 **MR. PANUCCIO:** If I may, your Honor, on the
13 conceptual idea as to what plaintiffs had previously said
14 they would view this group as, although they are trying for a
15 smaller group today, they said anybody who was implicated by
16 our revised request number eight. And that request said,
17 quote:

18 "Anyone who had a role in managing or
19 directing or provided advice, counseling,
20 information or services."

21 Now, it seems like they are trying to shrink that
22 group to a much smaller group, essentially to the executive
23 committee and the proponents.

24 **THE COURT:** They are, because the Ninth Circuit
25 said this is the definition, not what they set down in their

1 rulings. They weren't responding to the Ninth Circuit's
2 ruling at the time. I don't think that has anything to do
3 with the definition. It's relevant for the privilege.

4 But let's -- continue with me on the -- for the
5 moment on my exercise in going through the declarations we
6 have.

7 And so the campaign consultants will be the
8 Schubert Flint firm.

9 What other campaign consultants -- and they are in
10 there, I think -- are involved in the management decisions?

11 **MR. PANUCCIO:** Sorry, your Honor. I'm just
12 looking -- is there a specific paragraph you are pointing to?

13 **THE COURT:** Sure. We have Mr. Pugno, who was
14 counsel, right?

15 **MR. PANUCCIO:** Yes.

16 **THE COURT:** So Mr. Andrew Pugno.

17 **MR. PANUCCIO:** And a lot of these people identified
18 also have assistants who would, you know, help them prepare
19 documents and so forth and transmit emails. Certainly, those
20 assistants, I would think, by the nature of their job, who
21 would be included.

22 Again, there is a more fulsome list, I believe, of
23 consultants in our revised request number eight itself. I
24 have the record in front of me.

25 **THE COURT:** Look at paragraphs 11 and 12.

1 **MR. PANUCCIO:** All of those would be included, your
2 Honor --

3 **THE COURT:** So everyone will know what we are
4 talking about, I would propose to speak those names out loud.
5 I don't think that any of these names are secret, are they?
6 Certainly, not the campaign consultants.

7 **MR. PANUCCIO:** I believe that paragraph 12 says
8 that the three that were listed, sort of the one, two, three.

9 **THE COURT:** It's publicly known, yes.

10 So Schubert Flint. There's the Lawrence Research
11 firm. And there is the Sterling Corporation. Okay. So
12 those are the -- those would be the campaign consultants.

13 It doesn't really say -- the involvement of
14 paragraph -- persons in Paragraph 11, but I don't know how
15 controversial that is.

16 Do you have any information you can provide to me
17 about that?

18 **MR. PANUCCIO:** I'm not sure to the extent the
19 involvement of these two individuals in their individual
20 capacity is publicly known.

21 **THE COURT:** Are these names -- well, their
22 involvement in the campaign at all is publicly known?

23 **MR. PANUCCIO:** Not in -- well --

24 **THE COURT:** I'm sorry to be having this sort of odd
25 conversation.

1 **MR. PANUCCIO:** I'm sorry, your Honor, that I just
2 don't --

3 **THE COURT:** No, no. But the question is whether or
4 not those two individuals are names that have come up before.

5 **MR. PANUCCIO:** One proposal, your Honor, that might
6 help this, if your Honor would indulge us with a little
7 additional time, Mr. Pugno is the person with the most
8 information about this. We might be able to patch him in by
9 phone, with some ability. I just don't have the sort of
10 working knowledge of the campaign from day-to-day --

11 **THE COURT:** What we will do is get to the end. I
12 will give you a list of who I think I want to put on the core
13 group and I will give you a half hour. Call whoever you
14 want. Get whatever information you want. And we will come
15 back and talk about it.

16 **MR. KIRK:** Your Honor, if I could interrupt. If
17 you could excuse me. With all respect, a half an hour is --

18 **THE COURT:** Okay, an hour.

19 **MR. KIRK:** Your Honor, with respect, that's not
20 reasonable either, and let me try to articulate why.

21 As you point out, the Ninth Circuit issued a
22 revised opinion on Monday, two days ago. That revised
23 opinion changed a bunch of things. Changed some stuff about
24 jurisdiction. It changed some stuff about mandamus. And the
25 plaintiffs have focused on some changes the Court made to

1 footnote 12, which talked about the scope of the privilege
2 and scope of the core group.

3 No one told us that we had to come here with a list
4 of who we thought would be in the core group. Had we been
5 given notice of that, I can assure the Court we would have
6 done our darnedest to get that list prepared.

7 I don't know that in a half an hour or an hour we
8 would be able to get somebody on the phone and get a complete
9 list of who, reasonably speaking, fits within the concept, as
10 the Court defines it, as somebody who is within the core
11 group.

12 If I could respectfully suggest, it seems to me it
13 would be much more reasonable to lay out the Court's ruling
14 conceptually --

15 **THE COURT:** I won't do that. I simply won't do
16 that because if I do that, there will be fights about that.
17 So I won't do that.

18 **MR. KIRK:** Could I finish the proposal, your Honor?

19 **THE COURT:** Sure.

20 **MR. KIRK:** And give us 24 hours. Yes, a trial
21 starts Monday, but it's not our fault.

22 **THE COURT:** I'm not putting any blame on you or
23 anyone else. We have the schedule that we have.

24 **MR. KIRK:** Yes, we do.

25 **THE COURT:** And this was teed up a couple weeks

1 ago, and after the first Ninth Circuit opinion came out.

2 **MR. KIRK:** That's true.

3 **THE COURT:** And everybody filed issues, their
4 pleadings. You filed your pleadings about what you thought
5 the scope of the privilege was and filed your privilege log.
6 And then they filed something saying, no, your scope of the
7 privilege is wrong.

8 Well, you knew you were going to come here and
9 discuss the scope of the privilege. Now you want to -- and
10 if I say to you today, for example, which is very possible,
11 "I want you to produce X scope of documents," you are going
12 to say to me, "We need time to do that."

13 **MR. KIRK:** I will say that. Yes, I will.

14 **THE COURT:** If you say it to me tomorrow, that's
15 one less day that you have to work on it.

16 **MR. KIRK:** I understand that, your Honor. But at
17 the same time, as we stand here today, neither me nor Mr.
18 Panuccio know who is in the core group --

19 **THE COURT:** I'm sorry. You filed a pleading. It
20 may not have been you. It may have been your partner or
21 other counsel. You filed a pleading which describes in great
22 detail who they think are the management people involved in
23 this campaign. Why can't I just rely on that?

24 **MR. KIRK:** Your Honor, my understanding of that
25 declaration -- and I could be wrong.

1 **THE COURT:** Well, read it. Have you read it?

2 **MR. KIRK:** No, your Honor.

3 **THE COURT:** You have to read it before you argue
4 about it, because I don't want you to say something --

5 **MR. KIRK:** I'm not going to say what's in it, but
6 I'm going to say what I understood the purpose of it was. It
7 was to describe the people that were implicated in the 60
8 documents that were given to Judge Walker.

9 **THE COURT:** That's not correct.

10 **MR. KIRK:** Well, again, I could be wrong.

11 **THE COURT:** It's got a much broader purpose than
12 that and you need to read it to understand where I'm coming
13 from in discussing it, because I think that the Court in the
14 transcript of November 2nd instructed you to disclose during
15 an in camera review the identity of all those persons who
16 were in a position of management responsibility for the
17 campaign for Prop 8. That's the purpose of this declaration.

18 So you can see why, you know, one would think
19 coming in that, number one, you would have already known that
20 you had to discuss the scope of the privilege.

21 Number two, that you would already have discussed
22 who was in the core group.

23 And, number three, that you would have already gone
24 on record in deciding who was in the core group.

25 Now, you may want to argue -- you may want to argue

1 that, no, Judge, you should consider these other kinds of
2 groups outside of it, and I'm willing to entertain that
3 argument. But if I reject that argument, conceptually I
4 think I'm left with this.

5 **MR. KIRK:** If I understood what you just said, your
6 Honor, that strikes me as fair. And I'm not standing here
7 trying to walk away from something I haven't even read.

8 And as I read the first paragraphs, it does appear
9 to be describing the management structure of the campaign,
10 and we are certainly not going to disavow what's in that.

11 That being said, I don't know that this is the
12 known universe. To the extent that what was being addressed
13 here in any way differs from the concept articulated in
14 footnote 12 or that your Honor might articulate in issuing an
15 order. And all I'm asking for is 24 hours to supplement the
16 list.

17 **THE COURT:** Maybe -- it depends what the concept
18 ends up being. If the concept ends up being that it extends
19 beyond the people who were involved in the campaign strategy
20 for on ProtectMarriage.com and its official campaign
21 consultants and proponents, if it gets beyond that, I don't
22 have any list in front of me and we would need more
23 information.

24 If it's narrowed to that, then maybe I have the
25 list in front of me. That's all I'm saying.

1 If I don't have enough information to decide who
2 was in -- within the category of people that I include are
3 within the core group, then I don't have information. Then,
4 of course, you need more time to do it, but it depends on the
5 scope.

6 And where we stopped is we were talking about -- my
7 guess is everybody in the room except me knows about the
8 people contained in paragraph 11, and I just wanted to talk
9 about them. I didn't want to say it out loud in case I'm
10 wrong.

11 **MR. KIRK:** If I could have 30 seconds, your Honor.

12 **THE COURT:** Yes.

13 (Discussion held off the record amongst
14 defense counsel.)

15 **MR. KIRK:** It appears, your Honor, we know that
16 Mr. Lawrence is known. We don't know the answer with respect
17 to --

18 **THE COURT:** Gary Lawrence?

19 **MR. KIRK:** Yes, sir.

20 **THE COURT:** Does anyone in the room know what his
21 role was?

22 **MR. PANUCCIO:** I believe it's in the next
23 paragraph. It says -- there is a company.

24 **THE COURT:** Oh, he is one of the Lawrence Research.

25 I see. I see.

1 **MR. KIRK:** Okay.

2 **THE COURT:** Well, then, you have to define the
3 other individuals. Okay. All right.

4 Well, so I was about to take argument from -- who
5 was I about to take argument from -- from Mr. Panuccio about
6 concept.

7 Conceptually, if we wanted to identify the core
8 group -- and assuming that we have identified the core group,
9 if we are talking about the management of a campaign -- why
10 should it go beyond the management of the campaign? And if
11 it does go beyond the corporate, goes beyond the management
12 of the campaign, to whom does it go? To what -- conceptually
13 to what people or entities?

14 **MR. PANUCCIO:** Conceptually I would say that the
15 best place to look is the October 1st and November 11th
16 orders to the extent they said, Revise -- to the extent they
17 said, Please revise the request this way.

18 **THE COURT:** I'm talking about a privilege. I want
19 to know -- and the judge didn't have before him the Ninth
20 Circuit's ruling.

21 Under the Ninth Circuit's ruling how broad does the
22 core group go? That's the question.

23 **MR. PANUCCIO:** I don't believe that this footnote
24 say's who the core group would be. I think it leaves it to
25 the District Court.

1 And why I'm referencing your earlier orders is
2 because I think that they already had this in mind when they
3 went from any third party to this -- to a definition of who
4 would be most relevant. That's what those orders had in
5 mind, which was trying to get to this kind of --

6 **THE COURT:** That wasn't they. That wasn't the
7 judge. That was them formulating a document request.

8 I don't care what the document requests are. I
9 want to figure out, for the purposes of the privilege, how
10 far out you think constitutionally the core group goes.

11 The argument from the other side is, it's the
12 campaign core group. It is the people involved, persons
13 involved in the formulation of campaign strategy and messages
14 and not communications to other individuals or groups.

15 And so I want to know how far you think it goes and
16 conceptually how you describe the institutions or individuals
17 outside of the individuals who are actually involved in the
18 management of the campaign set forth in Mr. Prentice's
19 declaration.

20 **MR. PANUCCIO:** Conceptually, I believe, if you are
21 talking about a core group, first of all, I think certainly
22 leaders of the campaign, managers of the campaign, the
23 consultants they engage, those who provide them advice about
24 formulation of message --

25 **THE COURT:** That's the Prentice declaration, right?

1 That's the Prentice declaration. He's saying, these are the
2 people who are involved in the formulation of messaging
3 strategy and gives us advice on messaging strategy and
4 campaign strategy. The people involved in the decision
5 making for the campaign.

6 **MR. PANUCCIO:** Yes, although I believe that this
7 declaration also may talk about groups without identifying
8 every individual within a group. In other words, if --

9 **THE COURT:** I don't think so. I mean --

10 **MR. PANUCCIO:** So, for instance --

11 **THE COURT:** It says we have lots of vendors, but
12 the vendors involved in the management and formulation of the
13 strategy are. It's not --

14 **MR. PANUCCIO:** Well, your Honor --

15 **THE COURT:** It says whatever it says, but whatever
16 is in there, that's the narrow version of core group.

17 **MR. PANUCCIO:** I would also say, your Honor, that
18 to conceptually illuminate the concept in footnote 12, look
19 elsewhere in the Ninth Circuit's opinion.

20 For instance, when they say:

21 "The freedom of members of a political
22 association to deliberate internally over
23 strategy and messaging is an incident of
24 associational autonomy."

25 So if two members of an association themselves

1 talked about a message, it would be hard to say they have no
2 privilege.

3 **THE COURT:** Well, but it -- they -- they were
4 balancing a number of things in the opinion, right, in
5 deciding the scope of the privilege. It wasn't everything
6 that has anything to do with the exercise of First Amendment
7 freedoms is protected by the privilege, right?

8 So that's why they came down with its only got to
9 be core group formulation of strategy. How can you have a
10 core group if any person who is a member of any of these --
11 of any groups that are involved in this talk to another
12 person about messaging, that they are automatically part of a
13 core group?

14 **MR. PANUCCIO:** I don't know that the Ninth Circuit
15 was only talking about identities and then not also subject
16 matter.

17 So imagine if you have a -- any kind of political
18 or social religious organization where you have a leadership,
19 but a good idea springs up from the mind of one of the rank
20 and file members. I don't think that that idea has no
21 associational First Amendment rights simply because it came
22 from the brain of someone without the right --

23 **THE COURT:** So that means any communication about
24 messaging with anyone in any of the many groups that may
25 loosely be organized to work on this campaign, volunteer or

1 otherwise, any communication about messaging is covered by
2 the privilege. Is that your --

3 **MR. PANUCCIO:** I think internal communications
4 about messaging are covered by the privilege --

5 **THE COURT:** By "internal" you mean anybody within
6 any group, communications about messaging?

7 **MR. PANUCCIO:** Well, when you say within any group
8 or by any group. I mean, yes, the people who were in
9 ProtectMarriage.com, whether they were volunteers of the
10 leaders or the vendors that they hired and said, Help us form
11 the art signs and so forth. That is how they form that
12 messaging strategy. That would include people --

13 **THE COURT:** So take the example of Mr. Tam, that is
14 on the privilege log, not this one. It goes to ADP. All 80
15 of those people are in the core group, you are saying?

16 **MR. PANUCCIO:** Well, I believe with Dr. Tam, I
17 think again I would just like to stress there is a difference
18 between Dr. Tam and other associations or organizations he
19 was a member of, where he may have discussed Proposition 8 in
20 any internal communication in that organization versus
21 ProtectMarriage.com.

22 So within his other organizations or his other
23 associations, there may well be core groups within that. So
24 that would be a very different definition than
25 ProtectMarriage.com's core group.

1 **THE COURT:** "Core group responsible for formulating
2 campaign strategy and messaging." Tell me what those core
3 groups --

4 **MR. PANUCCIO:** I guess what is meant by "campaign."
5 "Campaign" is meant ProtectMarriage.com. Dr. Tam had other
6 organizations that could be said to be part of a campaign,
7 that campaign for ProtectMarriage.com. So they would have
8 their own core group.

9 Take Ron Prentice, the chairman of
10 ProtectMarriage.com. He had nothing to do with any of
11 Dr. Tam's side organizations. He wouldn't have been involved
12 in their formation or strategy or messaging, but there may
13 well be that -- they were a myriad social group that was
14 involved with strategy and messaging, just like the ACLU had
15 their strategy and messaging for this campaign.

16 And so these requests, because they go to all
17 defendant-intervenors, don't implicate only
18 ProtectMarriage.com. Maybe that's where there is some
19 disconnect here, and I apologize for that. There has always
20 been this sort of notion that there are other groups out
21 there. There were a lot of voices in this campaign and a lot
22 of organizations.

23 So, you know, it would seem that a focus on
24 ProtectMarriage.com would make a lot of sense. It's not the
25 official major campaign. We can talk more informed about who

1 makes up that organization, as opposed to any other group
2 that somebody may have been a member of. That requires a lot
3 more elucidation.

4 **THE COURT:** Which you are not in a position to do
5 right now. There is nothing in the record before this Court
6 about what those other groups might be, or who they are, or
7 what their structure is, or anything about that, right?

8 **MR. PANUCCIO:** I believe there is nothing in the
9 record, your Honor. There may be from -- well, from the
10 depositions that are in the record, and I'm not sure to what
11 extent they are in those.

12 Just as, your Honor, I would note that one of the
13 things that's now implicated here is the reciprocal
14 discovery. We issued many subpoenas to "No On 8" groups to
15 the extent that we would be -- to the extent that this kind
16 of information comes before the Court, the information on the
17 other side is going to be relevant. And those groups will
18 have to define a core group versus a non-core group.

19 The ACLU is going to have to define its core group
20 and give over any documents outside of the core group.

21 **THE COURT:** All I'm saying is you never bothered to
22 define a core group. You have nothing before this Court that
23 supports in the slightest any core group, other than the
24 Prentice declaration. There is nothing before the Court.

25 So you come before the Court and say, Don't give

1 them anything until we define a core group.

2 **MR. PANUCCIO:** Your Honor, I would submit that our
3 privilege log -- actually, the names identified in the
4 privilege log for the ProtectMarriage.com documents goes very
5 far --

6 **THE COURT:** No, it doesn't. You have 80 Does on
7 one of those things.

8 **MR. PANUCCIO:** I'm sorry. That's with respect to
9 Dr. Tam.

10 **THE COURT:** Well, ProtectMarriage.com is not at
11 issue. That's the Prentice declaration. I mean, or some
12 version close to that. That's not what we are talking about.

13 I bet if we were just talking about
14 ProtectMarriage.com, we might come to some conclusion, and
15 maybe we are. I don't know. When we get to them, we will
16 see if they take you up on your suggestion.

17 But if we are talking beyond, to the other
18 individuals who I would consider part of the core group of
19 ProtectMarriage.com but have other interests, like the
20 official proponents have other interests and other members of
21 other groups, there is nothing in front of the Court to
22 suggest that any of the people that they suggest are part of
23 their core groups actually are part of a core group, right?
24 There is nothing in front of the Court on that.

25 **MR. PANUCCIO:** I'm --

1 **THE COURT:** There is no supporting evidence to
2 validate the privilege as to -- you have got this long
3 privilege log with -- on -- is it Dr. Tam? Dr. Tam's -- I'm
4 sorry. I'm just reading from the Circuit.

5 Dr. Tam lists a document sent to 80 people with no
6 evidence whatsoever that they are within the core group. I
7 don't know how I can sustain a privilege on that basis.

8 **MR. PANUCCIO:** Well, your Honor, the Ninth Circuit
9 opinion says some form of a privilege log is required.

10 We submitted a privilege log with the 60 documents
11 that the Court did not say was inadequate. The Court
12 generated an order based on that log. And so we produced our
13 second log similar to the first, which was adequate for the
14 Court --

15 **THE COURT:** It wasn't adequate for the Court
16 because the Court had the actual documents. You're still --
17 you still have the burden of proof on privilege issues. It's
18 your burden to sustain that these are privileged documents.

19 I'm just wondering how I deal with this when I
20 don't have anything, any evidence before the Court. I don't
21 even have any description of what we are talking about, who
22 these organizations might be, who are the core groups of
23 these organizations that might be implicated by these
24 documents requests.

25 **MR. PANUCCIO:** Well, your Honor, to the extent that

1 we needed to define a core group, and the reliance is on
2 footnote 12, of course, the privilege log was submitted
3 before -- before the amended footnote 12 came out.

4 If further evidence is needed to sort of figure out
5 what now fits within footnote 12, we could provide that, your
6 Honor; but before having footnote 12, we wouldn't have been
7 in a position to set out the metes and bounds of something
8 that didn't exist yet.

9 **THE COURT:** I'm not entirely sure that's right.
10 Let me hear from the other side about it a little bit. Here
11 is the, if I could use the word, core of my argument.

12 As respects what you have all understood to be the
13 campaign, ProtectMarriage.com, I'm beginning to develop a
14 sense of what the Court rule might be under the Circuit.

15 It's not lost on me that there might be other
16 groups who are campaigning in the sense that they are
17 figuring out messaging. They are talking to each other about
18 messaging, and maybe even putting out messages that aren't
19 run through ProtectMarriage.com. So that some of the
20 official firms, Dr. Tam might be one of them, at least the
21 argument goes, are involved in other groups doing other
22 things. That's the way the argument goes. And those groups
23 have their on own associational rights and their own core
24 groups. And Dr. Tam is one of them, and so are others.

25 And so you can't, even if you could define a core

1 group for ProtectMarriage.com, that's fine. Their
2 communications are one thing.

3 But before the individuals are identified, the
4 official proponents, those people have their own other
5 organizations who have their own associational rights.

6 Is there a simple way through that?

7 **MR. BOUTROUS:** I think there is, your Honor, and
8 you alluded to the fact that the burden is on the proponents,
9 all the proponents and the defendant-intervenors to justify
10 their privilege claims.

11 This has gone on for months and months. They have
12 been on notice. We suggested this core group idea before the
13 pretrial conference. They have been on notice, all of them.
14 Dr. Tam certainly has. We deposed him on this. The Ninth
15 Circuit -- we brought it to the Ninth Circuit's attention.

16 If they had a claim of this nature, that there was
17 some core group of some other organization, that they should
18 have filed things months and months ago raising that kind of
19 privilege claim.

20 And what I -- what we are hearing is and it's
21 just -- we must -- I fully support the Court's suggestion
22 that we need to define the core group now, get the list
23 today. Because what we have been hearing is basically double
24 lock. It's either -- everybody is part of some core group,
25 so no documents need to be discovered. We need more time.

1 The Court has before it -- apparently, we haven't seen any of
2 this, as the Court knows -- this Prentice declaration, which
3 they claim that was the management structure. It sounds like
4 it's broader than the core group definition in the Ninth
5 Circuit's opinions, which is the core group of persons
6 engaged in the formulation of campaign strategy and messages,
7 but nonetheless they put down on paper this group.

8 So, and it sounds like it's broader because if --
9 counsel suggested that their privilege log might be some clue
10 to this core group. Well, they have Dr. Tam on there. He
11 had nothing to do, according to them, with the formulation of
12 the campaign strategy.

13 They have Mr. Criswell on there. Mr. Criswell's
14 declaration, signed under penalty of perjury and filed
15 yesterday, he declares:

16 "At no time did I develop or assist in
17 the development of the messages or themes
18 conveyed by the campaign to the voting
19 populace."

20 And he's on the privilege log. I don't know if he
21 is in the Prentice declaration, but he certainly isn't part
22 of the core group.

23 And so what I'm concerned about is if we don't --
24 it's too late for other core organizations. We did subpoena
25 other groups, who have been withholding documents. And so

1 theoretically they could make their own -- we need to know
2 their core groups, but they are not before the Court today.
3 They have been waiting. They haven't produced any documents.
4 They have been waiting to see what happened here.

5 I think with respect to Dr. Tam and proponents, the
6 intervenors here who we have served this discovery on, it's
7 the core group of ProtectMarriage.com and it's -- and it
8 should be the narrow group that was the core group that
9 formulated strategy and messaging.

10 And I think we need certainty. We have a trial
11 coming up. They could get Mr. Pugno on the phone right now
12 and we could resolve this. And the notion that somehow we
13 are burdening them, it's really -- it's outrageous. We have
14 been trying to get this information, and we have the trial.

15 And so we would ask the Court to draw a clear line,
16 order production of documents as soon as possible.

17 And with respect to the other potential groups, no
18 one has filed a motion or ever made that argument and they
19 should have done it a long time ago if they were going to do
20 it.

21 **MR. KIRK:** May I respond?

22 **THE COURT:** Just one small point before you do and
23 then you can.

24 **MR. KIRK:** Yes, your Honor. Thank you.

25 **THE COURT:** Who are their assistants on their

1 behalf, core group members or their assistants on their
2 behalf?

3 **MR. BOUTROUS:** I think if -- the way I would look
4 at it would be in a situation where you have someone who was
5 assisting that person in their job. So if -- if my
6 assistant, as I was participating as a core group member
7 formulating a message and I handed a document to that
8 assistant and that assistant then worked on it, I think that
9 would fall within it. So I think that would sort of be
10 acting as an agent in that narrow sense.

11 And, again, I think beyond that if we are talking
12 about someone who is not participating in the formulation of
13 messages, but instead who was out sending out documents and
14 making communications --

15 **THE COURT:** Well, it's got to be -- the
16 communication still has to be --

17 **MR. BOUTROUS:** Still needs to be internal, you are
18 right. Yes, you're right, your Honor.

19 **THE COURT:** Thank you very much. That takes care
20 of that issue.

21 **MR. BOUTROUS:** You are right, your Honor.

22 **THE COURT:** Okay.

23 **MR. BOUTROUS:** Thank you, your Honor.

24 **THE COURT:** Mr. Kirk?

25 **MR. KIRK:** Your Honor, I don't think Mr. Boutrous

1 answered your question, and I want to take a crack at
2 answering your question.

3 Your question, as I understood it, went to, okay,
4 if I take this Prentice declaration and that defines the
5 metes and bounds of the Protect Marriage core group, what do
6 I do about people who belong to One and One Association? And
7 the example you gave, your Honor, was Dr. Tam. He belongs to
8 other groups with whom he communicates and with whom he
9 separately has an associational privilege.

10 Just because the communication is not with the --
11 it's the same as I belong to the Independent Party of
12 Arlington County and I belong to the Virginia State
13 Independent Party. That's two different core groups that you
14 have to deal with.

15 Now, Mr. Boutrous says, well, wait a minute. Why
16 didn't they come forward with all this stuff about the core
17 groups before now? It's outrageous, he says.

18 The answer is simple, your Honor. Footnote 12, in
19 footnote 12 is the first time core group entered into the
20 equation here. And unfortunately, your Honor, that leaves us
21 with a hard practical problem.

22 If this case was going to trial in July, the
23 obvious solution would be to go back and redo the privilege
24 log and identify, this communication is a communication among
25 this association. This communication is a communication

1 among that association, and so forth. And that would be a
2 reasonable solution.

3 There is no practical way to do that before Monday
4 and, you know, when we get to the problems we face in terms
5 of burden, there is no practical way to do that beyond that.

6 And the solution I would like to something to your
7 Honor is this, and I think this is quoted in our papers.
8 During the pretrial conference when this discussion came up
9 in a colloquy between Chief Judge Walker and Mr. Boutrous, in
10 response to a question from Mr. Judge Walker as to, Aren't
11 you worried that you are going to all this trouble, trying to
12 get all these documents and you end up winning the case and
13 you are going to get reversed on appeal? Obviously, I'm
14 paraphrasing based on that. And Mr. Boutrous' response was
15 quite telling. Don't worry about it, your Honor. You can
16 write the judgment in our favor in a way that doesn't even
17 look at these documents.

18 The bottom line is in the greater scheme of things,
19 these documents aren't that important to them.

20 **THE COURT:** Well, but I can't -- you know, I can't
21 say that.

22 **MR. KIRK:** He says it. I'm not asking you to say
23 it. I'm asking you to credit it from him.

24 **THE COURT:** I understand that, but that's not my
25 job. My job is to figure out what is reasonably relevant to

1 the case, and it seems to me that documents about arguments
2 for and against Proposition 8 and messaging for and against
3 Proposition 8 which went to others are things that the
4 Circuit has already said may be relevant to the case.

5 Now, it may be in the end that some judge will
6 decide, no, they are not really relevant to the case. That's
7 fine. But for my purposes, I think that's settled law for
8 the discovery. And all I have to do -- I mean, I -- I
9 understand that it's a complex question, but I don't think
10 that it's my position to second guess at this point.

11 **MR. KIRK:** I'm certainly not asking you to second
12 guess the Ninth Circuit or Chief Judge Walker, but in making
13 a practical ruling to deal with a practical problem in a very
14 short time frame, I don't think it's unreasonable to take
15 plaintiffs at their word.

16 **THE COURT:** Take plaintiffs at their word? What do
17 you mean? Take them at their word and say, Oh, the judge can
18 write it some other way. But the judge may not want to write
19 it that way. He may want to write it differently. So it
20 doesn't matter what the plaintiffs say.

21 **MR. KIRK:** They get to decide what matters to them.

22 **THE COURT:** They get to decide what evidence they
23 are going to put on. The judge will decide what is
24 important.

25 And the judge has already decided, several times,

1 and the circuit agreed that this type of information that I
2 have described outside of some privilege is important.

3 So I don't -- I'm not prepared -- I mean, there are
4 many cabins to this information and we are going to talk
5 about that next, but it seems to me that I don't cabin it
6 beyond that. The messages that went out and arguments that
7 went out about this proposition are discoverable.

8 **MR. KIRK:** Then I return to the point that you
9 can't limit the privilege ruling to just one association.
10 The one association -- the Protect Marriage campaign is one
11 association, but to the extent that communications within
12 other associations, those -- the law recognizes that First
13 Amendment right, too. You don't get to -- there is no limit
14 that you only get to belong to one association.

15 **THE COURT:** Why isn't that a burden issue? I mean,
16 they challenge your privilege log and you don't identify the
17 particular associations involved in the privilege log -- you
18 don't identify at all. Why can't I just say, Well, you
19 didn't sustain your burden?

20 **MR. KIRK:** I would respectfully submit, your Honor,
21 that the Court would need to give me a reasonable chance to
22 meet that burden. And I would respectfully submit that the
23 introduction of the concept of the core group limit on the
24 privilege on Monday is not enough reasonable opportunity for
25 me to meet that burden.

1 So I don't think that's a reasonable basis to
2 decide against it.

3 **THE COURT:** Well, you know, they filed their -- I
4 suppose what amounts to the motion to compel, the response to
5 the privilege log on the 28th. It's a week later, about a
6 week later, something like that. You had some chance to do
7 something, but instead you come to court without anything
8 on -- I mean, here is my problem.

9 I'm trying to figure out what the balance is
10 between practicalities and the situation as imposed on you by
11 those practicalities and how much is your fault.

12 You know for a long time that the scope of the
13 First Amendment privilege is at -- it's in *Clay*. You have
14 known that for a long time. And you know that the discussion
15 about internal campaign materials and the extent of their
16 protection has been at issue. And you get a decision from
17 the Circuit and you interpret it in a particular way and you
18 file a privilege log.

19 The privilege log makes no effort by itself to
20 justify why those documents fall within the scope of the
21 privilege as defined by the Circuit, because it leaves out
22 who these people are completely. It's got a million Does in
23 this privilege log.

24 Then they say -- they don't make their burden,
25 compelling, and you wait and you don't do anything in

1 response to that. You come here and you say, Give us a
2 lot -- presumably you need a lot more time to enable you to
3 figure out -- the week you could have had, been doing it this
4 last week, you now want to do it for the next week or the
5 next two weeks. Why should I allow that?

6 **MR. KIRK:** Let me respond to that, your Honor,
7 because it's a fair question, but I think I have a good
8 answer to that.

9 The Ninth Circuit's original opinion said that --
10 and this was what we argued in the brief that we put in on
11 this -- said that the defining line is you can't claim
12 privilege if it went to large swaths of the electorate.

13 **THE COURT:** Or discrete groups.

14 **MR. KIRK:** Or discrete groups.

15 Our position was, is, and still is that we produced
16 everything that went to discrete groups and certainly
17 everything that went to large swaths of the electorate.

18 So when we found on paper, our position was and is
19 we have done everything we were supposed to do --

20 **THE COURT:** Of course, I can't tell that by the
21 privilege log. I mean, you don't even sustain your burden on
22 the privilege log.

23 **MR. KIRK:** If I could disagree with that, your
24 Honor. The privilege log doesn't -- it Does people out who
25 are people that had chosen to remain anonymous. And that's

1 under the privilege as recognized in the *McIntyre* case.

2 But none of the documents listed on the privilege
3 log went to anything approaching why it's wrong for the
4 electorate. There were --

5 **THE COURT:** Discrete groups, discrete groups. If
6 you sent something to 80 people, why isn't that a discrete
7 group?

8 **MR. KIRK:** If they are 80 of your political
9 associates, that's not a discrete group of voters. If you
10 sent something to --

11 **THE COURT:** Well, I can understand. You understand
12 how looking at that one might think there was an issue here.

13 **MR. KIRK:** There was an issue --

14 **THE COURT:** And, of course, obviously, in the end
15 you are wrong because what the Circuit meant is two
16 individuals, to persuade them or motivate them. So your
17 associates doesn't do it enough.

18 **MR. KIRK:** If I could finish, your Honor. That was
19 the state of play before Monday.

20 Monday, out of the blue, the Court of Appeals
21 issues a new opinion, an amended opinion. It now for the
22 first time says, no, we want you to look at this, this
23 concept called core groups.

24 I would respectfully submit it's not fair to say to
25 proponents, to say to defendant-intervenors, your privilege

1 log didn't satisfy your burden of proof because it didn't
2 anticipate that the Court of Appeals would rewrite its
3 opinion.

4 **THE COURT:** No, no, no. I'm not saying that. My
5 question is whether or not given the state of play after the
6 first opinion, you have satisfied your burden.

7 **MR. KIRK:** And my answer to that is yes --

8 **THE COURT:** I understand it's yes, but my question
9 is: If you don't identify sufficiently why these people fall
10 within the privilege, it's still internal campaign
11 information. You have to do something to show that it is.

12 I mean, there are --

13 **MR. KIRK:** The privilege log asserts accurately
14 that -- you know, communication-by-communication. This
15 communication was from one associate to another concerning
16 matters of their political association.

17 **THE COURT:** Which was not even the standard set
18 forth in the first Ninth Circuit opinion.

19 **MR. KIRK:** I think it was, your Honor. There was
20 nothing in the first Ninth Circuit opinion or, really, in the
21 second one that limits it that way.

22 The limitation that was introduced in the second
23 one was this notion that somehow it had to be core groups,
24 whatever that means.

25 **THE COURT:** Well, I appreciate your -- does

1 somebody have a copy of the privilege log?

2 **MR. PANUCCIO:** I do.

3 **THE COURT:** Can I see it? Because I want to get an
4 idea of the dimension of what I'm talking about. Do you have
5 an unmarked copy?

6 **MR. KIRK:** We do, your Honor, and I hope the Court
7 has a magnifying glass.

8 **THE COURT:** I want to get an idea of dimensions. I
9 think it's divided among the various responding parties.

10 **MR. KIRK:** I believe so, but I want to make one
11 other point in terms of the number of people.

12 **THE COURT:** I'm not worried about the number of
13 people.

14 **MR. KIRK:** On communications.

15 **THE COURT:** Yes, go ahead.

16 **MR. KIRK:** I don't believe -- and I could be
17 corrected. There may be one or two, but virtually all of the
18 communications listed went to less than 200 people.

19 And in terms of trying to find an objective
20 dividing line between sending something out to voters or
21 sending something out to your own associates, California law
22 specifically identifies the number 200 as the -- as the
23 dividing line. I think that was in our papers, right?
24 Perhaps not.

25 **THE COURT:** That's different -- well, okay. I

1 understand that.

2 Where is it in here that you divide among the
3 various defendant-intervenors who have -- who are producing
4 these or not producing these documents? I can't really tell
5 from looking at them.

6 **MR. PANUCCIO:** I'm sorry. Can your Honor just
7 repeat the question?

8 **THE COURT:** Just to be clear what I'm saying, maybe
9 there isn't, but is there a way of looking at this privilege
10 log where it's divided up by who is claiming the privilege as
11 to those? It looks like it's the defendant-intervenor's
12 privilege log. You put a bunch of stuff together so it
13 doesn't say -- it doesn't say that a particular
14 defendant-intervenor is asserting an associational privilege
15 or anything, right?

16 **MR. PANUCCIO:** Well, I think if you looked at, I
17 think, the author's line, certainly the documents come
18 from -- often if they come from a defendant-intervenor, they
19 are the author or someone who is --

20 **THE COURT:** But you can't say that. You can't say,
21 well, you got the document. It could have been from a
22 ProtectMarriage.com file.

23 **MR. PANUCCIO:** Well, yes. ProtectMarriage.com's
24 files were typically its documents. The --

25 **THE COURT:** I understand. My point is this. You

1 said, when you were arguing to me, we should consider the
2 associational privileges of groups other than what we have
3 understood to be the campaign ProtectMarriage.com; that I
4 should specifically consider that there are a number of
5 defendant-intervenors.

6 The document requests are addressed to a number of
7 the defendant-intervenors and some of them are not producing
8 documents that are identified in the privilege log because
9 those documents implicate the associational privileges of
10 other groups you want me to consider.

11 I can't tell looking at that where the documents
12 originate. That is to say, well, whose file it came out of,
13 who is, therefore, entitled to assert their associational
14 privilege. Because I'm not sure that if -- if Core Group A
15 from one person, one group, sent as a document in somebody
16 else's file, I don't know that you have the privilege any
17 more.

18 But my point is, is you can't -- I can't tell who
19 withheld the document, right? They just -- as a group, these
20 are all the documents you are withholding, right?

21 **MR. PANUCCIO:** Yes. Although I think that some of
22 that information is --

23 **THE COURT:** It might be the recipient who got it.
24 It might be in someone else's file.

25 **MR. PANUCCIO:** But with that level of specificity,

1 again, I would go back to what Mr. Kirk said, which is that
2 the type of log that was produced prior to the amended
3 opinion, when you look at the description of the document,
4 those document descriptions track what the types of things in
5 the preamended opinion that the Ninth Circuit said were
6 privileged. And the document descriptions themselves say --

7 **THE COURT:** So if I was to say to you, for
8 example -- I mean, the problem I have now is this, and it's a
9 practical problem, but I think it's somewhat of your making.
10 We come here now to test the privilege, and you say, Well,
11 the privilege may be limited to the core group of
12 ProtectMarriage.com with respect to its documents. But as to
13 the other people's documents, there may be other
14 associational privileges. And there is not a shred of
15 evidence before the Court in a privilege log as to what you
16 are talking about, what is for which.

17 So if I said produce ProtectMarriage.com's
18 documents other than those within this core group, you might
19 be able to say, because we have no evidence in the record,
20 that all those are somebody else's associational group --
21 associational rights and they are a core group of someone
22 else.

23 **MR. PANUCCIO:** The preamended opinion did not say
24 you need to identify core groups. It talked about the
25 associational rights of people to form messages and

1 strategies. All of these documents -- this privilege log was
2 made with that opinion and this Court's prior orders. All of
3 these are identified as documents that are the formulation of
4 messages.

5 If you look at the descriptions, they are not a
6 message. They are actually about formulation of strategy and
7 messages. It's not, here is a final message and we are
8 claiming it's privileged. It's, a message was being
9 formulated in this communication. There was back-and-forth
10 about formulation of a message that might go out or did go
11 out.

12 So it's not like what's on this log are these
13 communications to discrete groups of voters that were
14 messages. They were communications among associates,
15 political associates --

16 **THE COURT:** I guess the plaintiffs dispute that
17 description.

18 **MR. PANUCCIO:** Well, and they have never challenged
19 a single entry in the log. They just say, We think the log
20 is insufficient. They say it broadly and they never give any
21 specificity.

22 **THE COURT:** If we get down to the details of your
23 argument, I say to Mr. Boutrous, are there any documents on
24 the log that are not about formulation of messages? Are
25 there, Mr. Boutrous?

1 **MR. BOUTROUS:** I believe there are, your Honor.

2 **THE COURT:** Is Dr. Tam's "Dear Friend" memo on the
3 log?

4 **MR. BOUTROUS:** It is not on the log.

5 **THE COURT:** Oh, good.

6 **MR. BOUTROUS:** But, you know, I think -- well,
7 we'll look, but the -- two points I want to make.

8 **THE COURT:** I mean, he has a good point, that the
9 core group that came out on Monday, I would have thought,
10 frankly, given the pace at which this is developing, you
11 would have spent between when it came out on Monday and today
12 trying to figure out exactly what you are going to say to the
13 Court about who is in the core group, but you are not and you
14 didn't. And I don't know whether or not I'm willing to say
15 that that was sufficient time. Maybe it was. But we are
16 here.

17 I mean, he doesn't have to respond to your
18 arguments about a core group that you made two months ago
19 that he disagrees with. He doesn't have to collect
20 documents. He doesn't have to identify a core group just
21 because you argue it. He has to do it when a Court says or
22 when he has notice or when he thinks the law supports it.

23 So my question to you is: We are here now. He has
24 had a week since your motion to compel, and he has had a
25 couple of days since the Court amended its opinion. What do

1 I do about that? Assuming for the moment, as I do -- not
2 just assuming, but there may be associational rights
3 implicated for other groups.

4 **MR. BOUTROUS:** Your Honor, I think this Court,
5 yourself and Chief Judge Walker have been enormously patient.
6 They have had every opportunity to respond.

7 As soon as the opinion came out Monday, we sent a
8 letter saying, look, produce these documents.

9 The issue of who is in the core group in some ways
10 is a red herring because we if took the broadest possible
11 definition of the core group, the Prentice declaration, and
12 add a bunch people in there, we know they haven't produced
13 documents that are now required by the Court's opinion, by
14 the footnote, the documents that went to individual voters,
15 discrete groups of voters.

16 There is no excuse that they didn't come today with
17 a proposal to the Court. It's their burden. They know we
18 have been fighting for these documents. I never suggested in
19 the pretrial conference that we didn't think these were
20 meaningful, important documents. I said we have alternative
21 arguments, and there is a way to protect the record.

22 We think this is crucial information and we have
23 got this stalling tactic now of how do we define the core
24 group? They've got an executive committee. They've got
25 their consultants.

1 Dr. Tam is their client. If Dr. Tam had some group
2 with an associational bond in a core group, they should have
3 filed a separate motion for him that related to his
4 particular associational relation with whatever groups he was
5 in. It's far too late.

6 The Court has been extraordinarily patient and even
7 cut them many breaks that -- that I don't think they warrant
8 given the way they have really withheld, they say, tens of
9 thousands of documents.

10 And the notion that they don't know who the people
11 were, it's a pretty narrow definition. The core group of
12 persons engaged in formulation of campaign strategy and
13 messages, they should know that. They should be able to
14 resolve that in five minutes. And for them to suggest they
15 can't do it, I think, is disingenuous.

16 As for -- again, for Dr. Tam -- I'm sorry, your
17 Honor.

18 **THE COURT:** I don't know if it's disingenuous.
19 That's a little strong.

20 **MR. BOUTROUS:** I didn't mean to be -- to go over
21 the top.

22 But it is frustrating because we have made clear
23 our position. Just going back to the pretrial, I did propose
24 this core group theory to Chief Judge Walker and the idea was
25 that we get the privilege log and then revisit these

1 questions. So they were on notice that that was our theory.

2 Chief Judge Walker's order of October 1 at the end
3 talked about a more broadly defined core group, and the
4 Prentice declaration tracks that. So this isn't some
5 shocking surprise.

6 And in response to that October 1 order, they did
7 not submit a separate list of the other associational groups
8 that the proponents were members of and say, by the way,
9 Dr. Tam also was part of this group and the -- and here is
10 the managerial group that relates to that, and that's also
11 protected. They didn't raise that privilege claim. They
12 focused on the ProtectMarriage.com campaign and the
13 managerial group, at least as I'm interpreting this
14 declaration, that related to that group.

15 So I -- I really strongly urge the Court to define
16 this core group and order that they produce these documents.

17 The privilege log really is indecipherable. As you
18 point out, one can't tell who has the document, whether --
19 and who stopped producing it. In some of the documents they
20 are making -- who they are claiming a privilege claim, they
21 name certain members of the executive committee and then they
22 go to eight more Does. So these people we don't know are
23 being protected by the privilege. It's really, really
24 difficult to really decipher what's there and to test the
25 privilege. I just don't think they have met their burden.

1 And I know Dr. Tam and the other proponents, to the
2 extent they are part of other groups, have not met their
3 burden because they have never maintained any kind of
4 submission, any kind of declaration, any kind of showing that
5 some other group's rights are at stake and somehow being
6 intruded upon.

7 And so with that, I would ask the Court to define
8 the core group and order production.

9 And with respect to the individual proponents, they
10 need -- they must produce the documents that are responsive
11 that went to individuals, groups of voters, discrete groups
12 of voters, that track the language of the Ninth Circuit's
13 opinion.

14 And if I could add one more point, your Honor. The
15 Ninth Circuit's opinion lays it out quite specifically, but
16 this was the argument we were making all along after the
17 first opinion; that this material was on the table. So there
18 was no -- again, we haven't given that issue up. Chief Judge
19 Walker hadn't decided it. He said, Let's get the privilege
20 log and look at it.

21 So, again, it's now in footnote 12, but this was
22 our position going back to the pretrial conference and
23 before.

24 (Discussion held off the record
25 amongst plaintiffs' counsel.)

1 **MR. BOUTROUS:** Your Honor, since the print is so
2 small, I can't really read it, would be okay if
3 Mr. McGill just gave you a couple examples --

4 **THE COURT:** Somebody younger is going to do it for
5 us. Neither you nor I can --

6 **MR. BOUTROUS:** I bring in a youthful reader on this
7 point, and he doesn't even have glasses on.

8 **THE COURT:** That's right. I hate that.

9 **MR. MCGILL:** Thank you, your Honor.

10 You had asked if there were any documents on the
11 log that did not relate to messaging or campaign strategy. I
12 was just flipping through it and I came up with two. This is
13 just two on one page.

14 This is page 59 of the log. Document number 1059
15 is a document, author is Doe No. 1. The recipient is Ron
16 Prentice, who is the chairman of the executive committee, and
17 it's a non-public confidential correspondence transmitting
18 resources for developing campaign messaging. So I take that
19 to mean a letter that came with a check.

20 Another one is from 1045. This is -- the author is
21 Charles Lemandry, who I think is a lawyer in San Diego, to
22 Frank Schubert and a copy to Ron Prentice. This is a
23 non-public confidential communication concerning resources
24 for potential campaign strategy and messaging.

25 And as an overarching matter, we just cannot accept

1 and don't agree that they can simply assert that something is
2 a confidential messaging discussion, as they do over a
3 thousand times, and that we just have to accept that as
4 gospel truth.

5 **THE COURT:** Well, you know, that's a harder
6 problem. And if we are going to get into a
7 document-by-document analysis, we will finish that sometime
8 after this Circuit rules on the result of the trial.

9 So what I'm looking for is a practical way to deal
10 with this problem so that I might cut you off, the plaintiffs
11 off, from documents that you might otherwise get if we did
12 some kind of detailed analysis of whether it really fell into
13 messaging.

14 But we would get what you need for the trial
15 somewhat more quickly than we would line-by-line every page
16 of these documents.

17 **MR. BOUTROUS:** I think, your Honor, on that in some
18 ways now I think the most important thing are the things that
19 were not even put or the privilege log.

20 The privilege log does not include the external
21 communications that we claim should have been produced long
22 ago, and so the --

23 **THE COURT:** I understand that, but that's the core
24 group issue.

25 **MR. BOUTROUS:** Right. And I agree with you, doing

1 the line-by-line, it would be very difficult to do. And with
2 since we don't know precisely what the documents are, we
3 aren't asking to go through each one.

4 We do have, for example, the Tam documents that
5 went to 85 Does. We thought we would pick the easy -- the
6 low-hanging fruit, so to speak, and seek to deal with those,
7 but not go through and try to figure out at this stage. I
8 think they failed to meet their burden, but we recognize the
9 practicalities at least at this point.

10 **THE COURT:** Well, let me tell you what I think
11 about this piece of it.

12 I think that the Ninth Circuit limited the
13 applicability of the privilege in its original amended
14 opinion. It is limited to internal communications among the
15 core group of a campaign. And with respect to those
16 communications, limited to subject matter the formulation of
17 strategy and messaging are not resources for them or things
18 like that.

19 Nonetheless, for purposes of this argument, I'm
20 going to -- and purposes of this order, I'm going to only
21 impose a broader restriction, which is that the
22 defendant-intervenors need not produce and shall log
23 documents that are responsive to document requests number
24 one, six and eight, which are communications among the core
25 group regardless of subject matter. You don't have to

1 produce them. You have to log them.

2 And by that I don't mean to impose a broader --
3 with respect to the members of the core group where you have
4 already understood them to be members of the core group, I
5 don't need you to impose a broader subject matter for the
6 log. But what I meant to say that you need to log those
7 documents that are communications among the core group
8 regarding messaging and strategy. You need to produce
9 responsive documents to those that are not communications
10 among the core group.

11 You don't need to produce responsive documents that
12 are communications among the core group regardless of their
13 subject matter.

14 Okay? Is that clear? You are giving me a puzzled
15 look. We are going to debate to what the core group means,
16 which is the key thing you are waiting for.

17 **MR. KIRK:** Your Honor, would it be okay if I
18 repeated back --

19 **THE COURT:** Fabulous.

20 **MR. KIRK:** Because I did want to make sure I'm
21 understanding what you just said.

22 **THE COURT:** All I'm saying is that the privilege is
23 limited to communications among the core group. And as to
24 the communications among the core group, you don't have to
25 produce them.

1 What you do need to, and I think that you have --
2 you will have -- at some point we'll have to decide -- to log
3 those withheld communications among the core group relating
4 to strategy and messaging. That needs to be logged.

5 **MR. KIRK:** Let me repeat it back because I do think
6 I have it, but I want to make sure I'm right.

7 We have to produce all documents that are not --
8 that are responsive to one, six and eight that are not
9 communications among the core group.

10 **THE COURT:** Yes.

11 **MR. KIRK:** We have to log any documents that are
12 responsive to one, six only eight that are communications
13 among the core group that are related to messaging.

14 **THE COURT:** Strategy and messaging.

15 **MR. KIRK:** And messaging.

16 **THE COURT:** Okay. Clear so far. Are we okay so
17 far? Any comments on that?

18 **MR. BOUTROUS:** Your Honor, if I could just add the
19 other requests 9, 10 and 13, which --

20 **THE COURT:** You can move to compel on them. I'm
21 not going to address them.

22 **MR. BOUTROUS:** I believe we mentioned them in our
23 examples, your Honor, the requests --

24 **THE COURT:** No, no, no. I'm looking at what you
25 want, and what you want is relief. We want documents

1 responsive to request one and request six and a privilege
2 log. That's D on page seven.

3 You'll probably get similar things out of those,
4 but that's what you say on D and that's what I'm going to do.

5 **MR. BOUTROUS:** Okay. Thank you, your Honor.

6 **MR. KIRK:** Your Honor, could I ask one further
7 clarification?

8 **THE COURT:** Yes.

9 **MR. KIRK:** Some of the 39 -- you recall the 60
10 documents that Judge Walker looked at in camera. Some of the
11 39 that he said we don't have to produce would fall within
12 what your Honor just said we had to log, because there are
13 some documents within the 39 that are communications among
14 core group, the core group so to speak.

15 **THE COURT:** That relate to strategy and messaging.

16 **MR. KIRK:** Not messaging so much, but strategy.
17 And it would seem unreasonable to have to log documents that
18 Judge Walker specifically ruled --

19 **THE COURT:** I would agree with that.

20 **MR. KIRK:** And I take it we can extend that to like
21 documents?

22 **THE COURT:** No, you can't. It's too amorphous.
23 "Like documents" could mean anything. You pick out what you
24 think the subject matters are of those documents and we'll
25 all disagree with that and then it won't get us anywhere.

1 **MR. KIRK:** I can't say anything your Honor said was
2 wrong, but I can say this. The one thing that seemed to be a
3 source of agreement in a sea of disagreement was that the 60
4 documents, that Chief Judge Walker specifically wanted that
5 to be the template that would be applied to the universe.

6 **THE COURT:** It don't work. It didn't work. You
7 came up with a version of it. They came up with another
8 version of it. The Circuit came up with an third version of
9 the it.

10 I appreciate the effort, but I was hoping was you
11 would all look at it and say, this is a reasonable way to
12 proceed and we're going to all do this. You didn't like it.
13 You appealed. We're going back.

14 So I don't think I'm changing very much by way of
15 burden by that little nuance, but you could prove me wrong I
16 suppose.

17 **MR. KIRK:** You are right. 39 is off the table, but
18 that doesn't help on burden, but I understand.

19 **THE COURT:** Right, right.

20 **MR. BOUTROUS:** Your Honor, I don't want to push
21 this too far, but we did ask for an order that required them
22 to comply with their discovery obligations, including
23 producing documents responsive to request number one and
24 earlier --

25 **THE COURT:** Where did you request this?

1 **MR. BOUTROUS:** That was on page 7, Section D, in
2 the paragraph that -- just the beginning that paragraph.

3 **THE COURT:** I understand that. But if you don't
4 actually call out and ask me to do something about it, and we
5 don't argue about it, and I don't read the request, and they
6 are not attached, and I don't know what they say, as far as
7 I'm concerned, you waived the right to move for them now. So
8 I'm not going to get into that.

9 **MR. BOUTROUS:** Thank you, your Honor.

10 **THE COURT:** So with respect to the core group, core
11 group has been defined by the Circuit and that definition is
12 contained in various ways and most recently in footnote 12 of
13 page 36 of the amended opinion as "persons engaged in the
14 formulation of campaign strategy and messages and not
15 messages communicated to the electorate-at-large, discrete
16 groups of voters or individual voters for purposes such as
17 persuasion, recruiting or motivation activities beyond the
18 formulation of strategy and messages." That is the core
19 group.

20 And the Circuit left it up to this Court to decide,
21 based on the evidence before it, what the core group might
22 be. That can logically include, in light of the First
23 Amendment association, interests privileges intended to
24 protect. And the -- despite briefing on the subject, despite
25 filing a privilege log, the only evidence before the Court

1 that bears on this is contained in the Prentice declaration.

2 There is no evidence that's been submitted to the
3 Court beyond the Prentice declaration regarding who might be
4 in the core group. There has never previously been any
5 assertion that there were groups other than the campaign as
6 defined in the Prentice declaration who might have
7 associational rights that are implicated by this.

8 And in any event, the burden is on the persons
9 asserting privilege to sustain their burden and to the extent
10 that they have decided that there should be a privilege
11 extending beyond the campaign's core group, they have
12 submitted no evidence or even any particularized arguments to
13 the Court in that regard.

14 It is -- I'm sensitive to the notion that we are on
15 a rather fast time frame here, but, frankly, everybody has
16 known we have been on a fast time frame for the past month
17 and could readily have, at least, come to the Court with
18 appropriate argument and evidence of who might be the
19 organizations whose other associational rights were
20 implicated, or at least argument about what those arguments
21 were.

22 But nonetheless, because this -- this matter has
23 been scheduled for -- since Judge Walker's communication to
24 everyone, which I think was on the 30th of December, and the
25 Court of Appeals' amended decision, although its original

1 decision came out on Monday, at least some effort could have
2 been made to at least identify for the Court, even in oral
3 argument the -- who these might be, these associational
4 rights, which, by the way, have never been raised before as
5 separate from the campaign. So I think the defendant failed
6 to meet the burden of proof in that regard.

7 I think they have sustained the burden of proof in
8 the core group as follows: The executive committee of
9 ProtectMarriage.com; the official proponents of Proposition
10 8; campaign consultants of Schubert Flint Public Affairs
11 Committee; Lawrence Research firm; the Sterling Corporation.
12 Mr. Andrew Pugno -- I think is how his name is pronounced --
13 as counsel and sometimes listed as a member of the executive
14 committee.

15 I'm also going to include the person listed on
16 Paragraph 11, sub little i, as a member of the core group.
17 That person is listed in the declaration by Mr. Prentice that
18 is filed under seal, so I won't -- and I don't know that
19 people know his name outside the campaign, so I'm not going
20 to mention it, but that person is also a member of the core
21 group.

22 I'm going to also include in the core group -- I'm
23 going to find that those individuals are the individuals for
24 whom there is any evidence or even any argument before the
25 Court as to persons who are engaged in the formulation of

1 campaign strategy and messages and find that the proof fails
2 with respect to any else.

3 I am going to add to the core group with respect to
4 these individuals and entities that I have listed in the core
5 group. They will include any of their assistants, individual
6 assistants acting on their behalf with respect to the
7 formulation of campaign strategy and messages.

8 Now, that is -- would require production of certain
9 information responsive to those document requests except as
10 limited by the privilege, produced by the
11 defendant-intervenors.

12 One thing I do want to talk about, though, is
13 whether or not I should impose in addition to that privilege
14 limitation a relevance limitation. And what my thinking
15 was -- and I think I telegraphed this, so I might as well
16 just say it -- is that not every one of those documents that
17 are sent to anyone who might be a voter, because we all vote,
18 or every person regarding Proposition 8 would necessarily be
19 useful in terms of being -- useful at the trial or relevant
20 to the case. I'm thinking, my example is "Let's meet for
21 lunch on Tuesday." That email or email to that effect,
22 obviously, would not be particularly helpful.

23 So one of the things I was thinking is limiting, in
24 addition to privilege, you only have to produce documents
25 which contain, refer or relate to a message to be conveyed to

1 voters or an argument for or against Prop 8. And I'm not
2 wedded to the formulation so much as I -- as the concept
3 frankly, but that's the idea.

4 What matters here and what the -- I understand
5 these documents to be sought for is to prove up or to
6 disprove the propositions -- by "propositions" I mean not on
7 Prop 8, but other statements that might be made by the
8 defendant-intervenors.

9 And it seems to me the most -- the documents that
10 are particularly relevant to that subject are documents that
11 have to do with actual messages that might be conveyed to the
12 voters or arguments. And I say arguments for or against Prop
13 8 because I don't want to limit it to something that someone
14 intended to go to another.

15 If it's communicated out and it's an argument for
16 Prop 8 and it's outside of the core group within the meaning
17 of the Circuit's ruling, that seems to me to be what the
18 core -- that seems to me to be information that is most
19 relevant to what you are talking about. Other things seem to
20 me are pretty peripheral.

21 But I don't know how people feel about that
22 limitation or whether I can craft it in a better way, but let
23 me hear from you.

24 **MR. BOUTROUS:** Your Honor, that generally sounds
25 sensible and a good approach.

1 Two things I would add. As long as it's clearly
2 understood by the proponents that when the Court refers to
3 "voters," it's including people outside of the core group
4 essentially. Because what we have is this issue about voters
5 as voters and that's been a big debate.

6 I think the Ninth Circuit's footnote really
7 resolves that. The language they used was "the large
8 discrete groups of voters or individual voters for purposes
9 of persuasion, recruitment." It's a broad definition. So I
10 just don't want to be back here fighting about this issue of
11 what a voter is.

12 I think it's just any person that is not part of
13 the core group, communications sent to them in order to
14 prompt them to support or -- and using the Court's
15 definition, communications for or against Prop 8, I think
16 that would -- that makes a lot of sense, the Court's
17 definition.

18 **THE COURT:** Maybe another way to say it is just any
19 documents that contain any messages or arguments for or
20 against Prop 8. I mean, does that work for you?

21 **MR. BOUTROUS:** I think that works. I think
22 documents -- documents relating to that, but I think --

23 **THE COURT:** Relating to arguments for or against
24 Prop 8.

25 **MR. BOUTROUS:** I think that does it and that way we

1 don't have this debate about voters.

2 **THE COURT:** Okay.

3 **MR. BOUTROUS:** And then just one other clarifying
4 point, your Honor, as to the -- I will wait till the
5 Court's --

6 **THE COURT:** Go ahead.

7 **MR. BOUTROUS:** As to the first group of documents,
8 documents that proponents claim are private and internal to
9 the core group, we request that the Court make clear that
10 private and internal does not mean documents that are sent to
11 people outside the core group.

12 So on the privilege log, for example, there are
13 people who seem to be in the core group and then people who
14 aren't. They are Does. But if that --

15 **THE COURT:** It's limited to communications among
16 the core group. If it goes outside the core group, it's not
17 a private internal communication. That goes without saying.
18 Maybe it doesn't.

19 But the privilege is limited to those -- those
20 communications that are private to the core group. Once it
21 gets outside the core group, it's not -- it doesn't have the
22 same level of protection. Okay.

23 **MR. BOUTROUS:** Thank you.

24 **THE COURT:** What do you think about the relevance
25 limitation?

1 **MR. KIRK:** Your Honor, as far as I can tell, it's
2 not really a limitation at all.

3 **THE COURT:** It's not.

4 **MR. KIRK:** No. I don't believe it is. The request
5 that -- the underlying document request asks for all
6 documents that went to voters that related to Proposition 8.
7 As I understood -- that refer or relate to Proposition --
8 communications to voters relating to Proposition 8.

9 If I wrote what you said down correctly, you
10 suggested all documents that contain, refer or relate to
11 messages to be conveyed to voters or arguments for or against
12 Proposition 8.

13 **THE COURT:** In fact, I was thinking about saying
14 just the latter. Documents that were -- contain or refer or
15 led to arguments for or against Prop 8.

16 **MR. KIRK:** As a practical matter, when you are
17 going through 90,000 documents, the reality is if it says
18 Prop 8 on it or it says something relating to Prop 8, it's
19 in; otherwise, it's out.

20 **THE COURT:** I understand that it may be your choice
21 not to take advantage of this relevance limitation. As a
22 practical matter, I have always thought relevance limitations
23 were kind of silly, except where there was something that you
24 could say with respect to those. The documents that are
25 irrelevant, you really don't want to produce. If it's not

1 that sort of thing, then just ignore the relevance limitation
2 and produce them all.

3 **MR. KIRK:** I completely agree.

4 **THE COURT:** If you don't want me to put it, I won't
5 put it. I did want to give you that opportunity if you
6 wanted to use it, because there are some things that I think
7 are relevant and some that aren't.

8 **MR. KIRK:** Our position, your Honor, is all of it's
9 irrelevant.

10 **THE COURT:** I understand.

11 **MR. KIRK:** So I was viewing the suggestion entirely
12 from a practical standpoint. Does it make the job easier?
13 And it does not.

14 **THE COURT:** So what do you want me to do about it?
15 Put it in or not?

16 **MR. KIRK:** Do you want it?

17 **MR. PANUCCIO:** I mean, yes.

18 **MR. KIRK:** Yes.

19 **THE COURT:** Fine. Then it's in.

20 **MR. KIRK:** I did want to ask the Court. The Court
21 ruled on what it was considering the core group, but didn't
22 indicate whether we would be given an opportunity to
23 supplement that.

24 **THE COURT:** Well, I'm going to get into that in a
25 second.

1 **MR. KIRK:** Because even in the course of working
2 through the binders, I have discovered at least one pleading
3 that lists additional consultants, for whatever that's worth.
4 And it's document -- ironically enough, it's a letter from
5 plaintiffs' counsel. It's document 220-1 and it's appended
6 to a declaration, but it's a letter from plaintiffs' counsel
7 that lists a whole series of consultants beyond those listed
8 in the Court's order. And we would at least -- and it's
9 actually their reformulation of request eight --

10 **THE COURT:** I understand that. I know that. But
11 what I'm concerned about is not their requests. What I want
12 is evidence --

13 **MR. KIRK:** This is evidence that the parties agree
14 that these people are consultants.

15 **THE COURT:** Consultants isn't enough. Because
16 consultants involved in the formulation of campaign strategy
17 and messaging is the test.

18 **MR. KIRK:** For example, Sonia Eddings Brown was the
19 spokesperson for the campaign. I would suggest that she is
20 someone who is --

21 **THE COURT:** Might be. In any event, my thought is
22 that we are going to start this train rolling so that we can
23 get things done, but I will give you an opportunity to put in
24 something additional.

25 Okay. We have been going for how long, and I

1 haven't given my court reporter a break. So before I get in
2 too much trouble, let's take a five-minute recess.

3 (Whereupon there was a recess in the proceedings
4 from 3:49 p.m. until 3:58 p.m.)

5 **THE CLERK:** Recalling C 09-2292, Kristin Perry
6 versus Arnold Schwarzenegger.

7 **THE COURT:** So the next thing I want to take brief
8 argument on is the protective order, so you can produce these
9 documents under whatever level of protection that you think
10 is appropriate.

11 So we have got the proposed protective orders from
12 both sides and the arguments. What I was thinking of doing
13 is entering a form of protective order that is essentially
14 the form proposed by the plaintiffs, except with respect to
15 Paragraph 7.3(a) and (b) adding the following qualification:

16 "Provided, however, that notice of all
17 such attorneys and employees to whom highly
18 confidential attorney's eyes only information
19 will be disclosed shall be given not less
20 than 24 hours in advance of the disclosure to
21 give the other parties the opportunity to
22 object to the disclosure on grounds specific
23 to the designated employee or attorney."

24 The idea being, I mean, you get this list and if
25 there is someone on there that you have a particular issue

1 with, you have an opportunity to come to at least -- you
2 raise your objection. If you don't get satisfaction, do an
3 emergency application for the Court saying don't apply --
4 don't let that person see those documents.

5 I picked 24 hours -- I would normally have picked a
6 further, a longer period of time -- because we don't have
7 very much time.

8 So that was my thought on that, but I would hear
9 from anyone on the protective order.

10 **MR. BOUTROUS:** Your Honor, I think that sounds
11 fine. The one issue I would flag on the Court's addition is
12 I think the proponents had objected to anyone from the City
13 of San Francisco having any access to the documents, and we
14 would object to that.

15 **THE COURT:** No. I'm not going to -- I'm going to
16 reject that as a general proposition. The city attorney's
17 office will be allowed to identify those individuals and the
18 office that they are going to have access to these documents.
19 If there are particular problems with those specific
20 individuals that you -- the defendant-intervenors have
21 evidence of and want to make an application to the Court as
22 to those particular individuals, but just because one works
23 for the city attorney, that's not sufficient.

24 The city attorney's office, I must say, has worked
25 in this Court and with this Court on many cases, many cases

1 involving highly confidential matters, and I have always
2 found their lawyers supremely ethical and I have no doubt
3 they will treat this ethically.

4 On the other hand, if there is some specific
5 evidence as to an individual, I want to hear about that.

6 **MR. BOUTROUS:** Your Honor, once the protective
7 order is issued, will it be possible for us to get a copy of
8 the Prentice declaration just so we can see -- pursuant to
9 the protective order, so we can see who is on there?

10 **THE COURT:** I haven't thought through all the
11 implications on that. That was submitted with the
12 understanding that it be in camera. I'm not sure that it
13 would be provided to you. You would have to separately
14 address that. I can't address it on the fly.

15 **MR. BOUTROUS:** Okay, your Honor. Thank you.

16 **THE COURT:** Did you want to say anything about the
17 protective order?

18 **MR. KIRK:** We will rest. We thought ours was
19 better, but --

20 **THE COURT:** Yours was quite good. It was quite
21 good. It's a hard -- there is no absolutely right and wrong
22 there. So I'm going to hand to my courtroom deputy...

23 (Whereupon, document was tendered
24 to the courtroom deputy.)

25 **THE COURT:** So, hopefully, that will get out

1 tomorrow.

2 Is there any disagreement about what names are
3 going to get to be redacted on documents? We are already
4 producing a number of documents before. I assume that that
5 hasn't been an issue.

6 The rank and file names, I think, you have been
7 redacting them if they come up, but there hasn't been an
8 issue about that, is there?

9 **MR. BOUTROUS:** Not that I'm aware of, your Honor.

10 **THE COURT:** Then I won't make any rulings about
11 that.

12 So I want to give you an opportunity to put in some
13 supplemental declaration about the core group of
14 ProtectAmerica.com -- I keep doing that. I'm sorry,
15 ProtectMarriage.com. By next week I will have it,
16 ProtectMarriage.com. Because, I mean, the one you suggest
17 may very well be the spokesperson probably was involved in
18 the campaign messaging. Certainly hope so. But it seems to
19 me that that could be done rather quickly. This time
20 tomorrow?

21 **MR. KIRK:** Could I have until the end of tomorrow?

22 **THE COURT:** Yeah. By the end of tomorrow --

23 **MR. KIRK:** ECF end of tomorrow?

24 **THE COURT:** Well, see, the problem is, they are
25 going to want to respond to it and then I have to deal with

1 it. So I don't think I want to have it at midnight.

2 **MR. KIRK:** We will do the best we can.

3 **THE COURT:** Okay. Do the best you can. All right.
4 4:00 o'clock tomorrow.

5 And just to be clear, we are not getting into the
6 issue of -- that we talked about, which is core groups of
7 other organizations that might be implicated by the
8 documents.

9 We are talking about -- the Prentice declaration
10 may not be sufficiently inclusive as to ProtectMarriage.com's
11 core group. You want to put in some declaration about that,
12 add some people, that's fine.

13 **MR. KIRK:** I understand, your Honor.

14 There is one further point. I believe some of the
15 people who may be listed may be themselves not people who
16 have been previously disclosed as related to Protect Marriage
17 and in those instances I think we will want to file under
18 seal with a redacted copy to the other side.

19 **MR. BOUTROUS:** Well, we are going to have a
20 protective order, your Honor, and I think we should be able
21 to find out who the core group is, and we will -- if it's
22 someone like that, I don't see why we shouldn't have access
23 to that.

24 **THE COURT:** I mean, if it's part of the core group,
25 I mean, you have heard the judge's view on people who are

1 involved in the management of the campaign and their privacy
2 rights.

3 I'm happy to have them protected by a protective
4 order, but to not have them have some ability to say this
5 person has got nothing to do with this --

6 **MR. KIRK:** If it's someone who has never been
7 disclosed as having any involvement in the campaign -- I know
8 my friend Mr. Boutrous doesn't like this, but they are just
9 like Mrs. McIntyre.

10 **THE COURT:** Well, they are not just like Mrs.
11 McIntyre. There are many -- they are part of the management
12 of the campaign, otherwise they are not part of the core
13 group. A public campaign, a \$40 million campaign.

14 **MR. KIRK:** The cost of the campaign is irrelevant
15 on this point, I would respectfully submit. And if it's
16 someone who is a consultant who has never been disclosed, but
17 has been privately consulting with the campaign, and
18 California law doesn't otherwise require reporting or
19 disclosing, the First Amendment does protect that person's
20 right to participate in that campaign anonymously.

21 **MR. BOUTROUS:** Your Honor, if consultants are being
22 paid money to participate in a campaign, I can't conceive of
23 a First Amendment privilege that would protect their
24 identity, number one.

25 And, number two, if produced to us under a

1 protective order, I don't think there is any basis for
2 suggesting First Amendment rights would be violated, and we
3 should have the ability to find out who this control group
4 consists of.

5 **THE COURT:** And I think it's particularly difficult
6 to accept your interpretation of this given the Ninth
7 Circuit's ruling that I have to decide who the core group is.
8 And I don't think they meant I have to decide on an ex-parte
9 basis.

10 **MR. KIRK:** Your Honor, I certainly accept that we
11 need to disclose it to the Court, and I'm not trying to keep
12 it from the Court.

13 But if the right to anonymous speech means
14 anything, if the right to participate anonymously in a
15 campaign means anything, surely, it means that you don't have
16 to, if you don't want to, and if you haven't previously
17 disclosed it to the lawyers for the people who are -- were
18 politically on the other side.

19 **THE COURT:** Not necessarily. Judge Walker said
20 that this person who was previously an anonymous member of
21 the executive committee's objection was frivolous.

22 **MR. KIRK:** The reason Judge Walker ruled that way,
23 I believe, and there wasn't much dialogue on that --

24 **THE COURT:** It had nothing to do with it had been
25 disclosed before. Judge Walker explained himself clearly.

1 There can be no First Amendment protection to someone who is
2 involved in as an officer, manager, director, managing agent
3 for a campaign. There can't be --

4 **MR. KIRK:** Even if the person -- is it the Court's
5 ruling that even if it's a person who is a consultant who has
6 never previously been disclosed, you are saying the First
7 Amendment doesn't protect that person?

8 **THE COURT:** I am saying that there is not a
9 sufficient privilege that would need to be protected by
10 nondisclosure to even the lawyers from the other side. That
11 with respect to that identity, it might be sufficient to have
12 attorney's eyes only. That's my point.

13 Obviously, there are different levels of interest
14 in different things with regards to the First Amendment. And
15 it seems to me that as to someone who is involved in the
16 formulation of strategy and messaging and is the core group
17 involved in the formulation of strategy and messaging, and
18 since we have to decide under this test, I don't see how I
19 cannot have at least on an attorney's eyes only basis and I
20 don't see why you would object on an attorney's eyes only
21 basis to these persons knowing the identity.

22 **MR. KIRK:** I do object, your Honor, and I do
23 believe the First Amendment does protect the right of someone
24 to remain anonymous even as to the attorneys representing the
25 political opponents. I believe it is possible for the Court

1 and, indeed, counsel --

2 **THE COURT:** Fine. We will do it that way. 4:00
3 o'clock tomorrow you can submit under seal those you want
4 under seal.

5 But I will tell you, like Judge Walker, I'm
6 extremely uncomfortable with under seal filings.

7 **MR. KIRK:** I understand, your Honor.

8 **THE COURT:** I cannot take them at face value. I
9 just simply can't, because there is no testing involved. It
10 is your statements about it and untested by the other side.
11 So I will need to be completely convinced by your filings
12 that they are correct.

13 But if you want to do it that way. I might be much
14 more forgiving in terms of how broad I interpret this core
15 group if I felt it had been tested by having the other side
16 look at it.

17 **MR. KIRK:** Just to be clear, your Honor, I would
18 expect most of the people we submit don't fall into this
19 category.

20 **THE COURT:** That's fine. I will give you that
21 opportunity. You can have two filings, one under seal.

22 **MR. KIRK:** Thank you, your Honor.

23 **MR. BOUTROUS:** And, your Honor, could I just add a
24 request? If we could at least know how many people when they
25 make that filing?

1 **THE COURT:** Sure.

2 **MR. BOUTROUS:** And if the Court could require them
3 to include the unidentified person from the Prentice
4 declaration in that filing, so then if the Court determines,
5 we can at least find out that way without having to go
6 through the whole Prentice declaration.

7 **THE COURT:** Oh, oh. What he is saying is figure
8 out whether or not you --

9 **MR. KIRK:** There may be an easy step on that. For
10 all I know that person has already been identified and we
11 will just tell them.

12 **THE COURT:** Fine.

13 **MR. BOUTROUS:** And if you still maintain he needs
14 to be kept confidential, put it in your sealed submission and
15 we can argue that we should get his name, too, under the
16 protective order.

17 **THE COURT:** Fine.

18 **MR. BOUTROUS:** Thank you.

19 **THE COURT:** So now we have addressed all the easy
20 digs. We have to deal with the hard digs.

21 Date of production and date for any amended
22 privilege log. The first seems more important than the
23 second to me.

24 **MR. KIRK:** May I be heard, your Honor?

25 **THE COURT:** Please.

1 **MR. KIRK:** Nobody is going to like what I have to
2 say.

3 **THE COURT:** Fine.

4 **MR. KIRK:** As best we can tell, and I believe this
5 was in the brief that we put into the Court, we believe that
6 we will have to go back and rereview roughly 30,000
7 documents. We don't have the resources to do that while we
8 are simultaneously trying the case.

9 This is -- before the break, your Honor made the
10 point, and it was entirely accurate, that the definition of
11 what's in and what's out has been a moving target as we have
12 proceeded through the fall. First there was the October 1st
13 order, then there was the November 11th order, then there was
14 the first Ninth Circuit opinion, and then there was the
15 second Ninth Circuit opinion.

16 The practical result of that is that in sorting
17 what's in and what's out, the sort has been done based on
18 moving criteria. The only way we are going to be able to
19 comply with the order that the Court just described in terms
20 of what must be produced is to go back and rereview 30,000
21 documents and figure out, This is one that must be produced.
22 This is one that must be logged. This is one we don't have
23 to worry about.

24 That is something that will take us, even if we
25 could devote, you know, one or two lawyers and a paralegal to

1 it, months.

2 **THE COURT:** That's ridiculous. I have got to tell
3 you. I have been in so many large litigations, that is
4 completely preposterous. People -- it's not the case that a
5 person can only log essentially five or ten documents an hour
6 or can only review five or ten documents an hour. That is
7 preposterous.

8 **MR. KIRK:** Your Honor, a person can review and log
9 somewhere between 50 and 60 documents an hour, not five; 50
10 or 60.

11 **THE COURT:** You said 25 in your declaration. That
12 is silly. I mean, what am I to believe? Well, in any
13 event --

14 **MR. KIRK:** Fifty to 60 if you are flying, 25 if you
15 are doing it right.

16 I mean, your Honor --

17 **THE COURT:** All you are doing is going through a
18 list of names and saying, they're in or they're out. Because
19 you decided you are not going to do this thing with regard to
20 relevance. So if you just are reviewing it for who is in the
21 core group, those documents that only contain to and from of
22 the core group, they are on the log. Those that don't
23 contain any other name, they are not on the log.

24 **MR. KIRK:** You also have to review to see if it's
25 related to Proposition 8.

1 **THE COURT:** Okay. That will take all of a half a
2 second per document, maybe a second per document.

3 **MR. KIRK:** And then -- I mean, your Honor, what do
4 you want me to say? Honestly --

5 **THE COURT:** Okay. I understand, but I think this
6 is a problem of your own making. I actually think this is a
7 problem of your own making. I think you decided a long time
8 ago that you weren't going to review this except as your
9 interpretation of what might be within the privilege.

10 **MR. KIRK:** That's true.

11 **THE COURT:** Right.

12 **MR. KIRK:** We reviewed it --

13 **THE COURT:** You didn't leave open for the
14 possibility that there might be other documents,
15 notwithstanding the fact that trial is coming up, where
16 someone might disagree with you. So it's really of your own
17 making.

18 Why didn't you anticipate that there might be
19 additional -- another way of looking at this?

20 **MR. KIRK:** Your Honor, I don't believe,
21 respectfully, that we are responsible for anticipating what
22 the Court is going to rule before the Court rules.

23 **THE COURT:** No, no. And I don't mean that. What I
24 do mean is that when you decide we are going to make a cut on
25 privilege, okay, and it's coming up on trial and you know

1 that privilege is at issue and you might be wrong, well, you
2 better anticipate that there might be other things that the
3 Court might require you to do before trial. Don't you?

4 **MR. KIRK:** Your Honor, I honestly do not believe
5 that there is any obligation to anticipate --

6 **THE COURT:** I see. So as long as you have the
7 ability to keep the privilege ball in the air up to the time
8 of trial, you are forgiven. You don't have to produce any of
9 those documents that the Court now decides are not
10 privileged.

11 I mean, what you're essentially saying is this
12 ruling by the Ninth Circuit as regards to the limitation of
13 the privilege is a nullity for this case.

14 **MR. KIRK:** No. I'm not saying that, your Honor,
15 but I am saying that a party is entitled to a reasonable
16 opportunity when a new ruling comes out to adjust to it given
17 the realities of the situation.

18 The reality here is there's 30,000 documents. I do
19 not believe that it was our obligation to guess in advance
20 that the Ninth Circuit was going to adopt the new footnote
21 12.

22 Now that it has adopted that and now that your
23 Honor has ruled on what that means practically, we have to be
24 given a reasonable amount of time to implement this. And
25 this --

1 **THE COURT:** Notwithstanding the fact that there is
2 a trial imminent.

3 **MR. KIRK:** The answer to that is honestly yes, your
4 Honor, notwithstanding the fact that there is a trial.

5 **THE COURT:** Irrelevant of the fact that there is a
6 trial.

7 **MR. KIRK:** It's not irrelevant, but we can only do
8 what we can do.

9 **THE COURT:** You say you don't have the resources.
10 How many lawyers have worked on this case from your firm and
11 all the other firms listed?

12 **MR. KIRK:** I don't know the answer to that. I will
13 tell you there's only 12 lawyers in my firm and not all of
14 them have worked on this case, but some number.

15 **THE COURT:** I mean, his number was nine, I think,
16 lawyers have worked on this case.

17 **MR. KIRK:** I can't dispute that. There might be
18 nine. Honestly, all the lawyers on this case are fully
19 consumed, as any lawyer would be, as any team would be
20 preparing for trial.

21 **THE COURT:** Okay. I understand that. But I don't
22 think you can play this trump a card. I think it is
23 outrageous that you are playing this trump card and I
24 actually can't believe you are doing it.

25 That notwithstanding, just because -- just because

1 you were able to keep the ball in the air on privilege until
2 December, therefore, you don't have to produce these
3 documents in this litigation, that is not an appropriate
4 answer.

5 It may be that you are going to have to produce the
6 documents to the other side and not do other things. That
7 may be. That may be the price you pay.

8 **MR. KIRK:** Your Honor, may I respond to that?
9 Respectfully, I don't think the characterization "keep the
10 ball in the air until December" is fair.

11 The positions we've taken on privilege not only
12 have been fully fair, but were largely vindicated by the
13 Court of Appeals. No one can say that they were purposely
14 putting out objections and taking positions.

15 **THE COURT:** I didn't, I didn't.

16 **MR. KIRK:** Maybe I mistook the phrase "keep the
17 ball in the air" --

18 **THE COURT:** It's an inappropriate phrase. I
19 withdraw it.

20 **MR. KIRK:** Your Honor, I don't want to get cross
21 with this. Thank you, your Honor.

22 **THE COURT:** Not a problem.

23 **MR. KIRK:** All I want to suggest is with respect to
24 the Court, I believe we carried out our responsibilities
25 entirely appropriately and the cold reality here is that the

1 rules of the game changed a week before the trial is going to
2 start and as a result of that change in the rules, we have to
3 go back and look at 30,000 documents. That's something we
4 don't have the resources to do over any short reasonable
5 period of time.

6 There is nothing else I can say other than that's
7 the reality.

8 **THE COURT:** Okay. Let me hear from the other side.
9 How do I solve this problem?

10 **MR. BOUTROUS:** Your Honor, we would request that
11 the Court order production to begin Saturday on a rolling
12 basis.

13 We understand that there is some practical
14 limitations, but this really is of the proponents' own
15 making. They withheld these documents by their own
16 statements in their notice of privilege log filing on page 12
17 based on the relevance responsiveness objection, which was
18 clearly baseless.

19 **THE COURT:** I have to tell you, I agree with that.
20 I think the relevance objection is entirely frivolous. I
21 think that interpretation of Judge Walker's ruling is
22 completely frivolous, and I agree with that.

23 But nonetheless, some of this has to do with the
24 interpretation of the privilege. So, for example, if they
25 ignored the relevance issue, they still have to go through

1 and identify the names on these things, which are core group
2 only and which have other people, which actually went to
3 other people, have names under there that they really didn't
4 go to. Who is this person who is listed there, and should I
5 have said that person was a core group? I mean, that will
6 take some time.

7 So he still has a problem. It's not as big a
8 problem as he says, because I don't think he has to review
9 for relevance in any particular way. He certainly said he
10 doesn't think he is going to have to review for relevance.
11 A relevance limitation doesn't help.

12 I think that their objections on relevance and
13 having withheld documents on relevance is entirely frivolous,
14 but there is still a problem there. There is still 30,000
15 documents to go through for -- even just for First Amendment
16 privilege. I'm not sure how fast one can do that.

17 **MR. BOUTROUS:** I guess, your Honor, that the
18 privilege claim -- my colleague is making the point the
19 documents they claimed were privileged were these documents
20 (indicating), and they submitted a privilege log.

21 The other documents, the ones we said needed --
22 that went externally, I think --

23 **THE COURT:** Why isn't that an answer? I guess I
24 don't understand why that's not an answer. I guess let me
25 make sure I understand what the point is.

1 **MR. KIRK:** I didn't understand the point.

2 **THE COURT:** The point is this, as I understand it,
3 because I want to make sure I understand. The maximum
4 universe of documents that you assert in the First Amendment
5 privilege are contained in the privilege log.

6 You were required to put a privilege log together.
7 You put a privilege log together and that's it. They're
8 not -- you're not asserting privilege as to other documents.

9 **MR. KIRK:** Yes, we are, your Honor.

10 **THE COURT:** Why aren't they in the privilege log?

11 **MR. KIRK:** They are not on the privilege log
12 because, and I understand --

13 **THE COURT:** Because of the relevance objection.

14 **MR. KIRK:** I understand that --

15 **THE COURT:** I see, I see. That's the point.

16 **MR. KIRK:** Your Honor, can I finish, please?

17 **THE COURT:** Yes, sure.

18 **MR. KIRK:** It's not just relevance. That shorthand
19 is a little bit misleading in the following sense.

20 Judge Walker's November 11th order, as we
21 understood it -- and I appreciate you think that our
22 understanding was frivolous and I don't agree with that, but
23 be that as it may, he specifically said the following
24 categories of documents are not relevant to this case and
25 they are not responsive.

1 **THE COURT:** To number eight.

2 **MR. KIRK:** He did use it to number eight. And
3 because we believed that numbers one and number six were
4 subsets of number eight, we believed his rulings extended to
5 numbers one and six.

6 **THE COURT:** Except that by that time one and six
7 were not subsets of eight.

8 **MR. KIRK:** No, actually --

9 **THE COURT:** Because eight had been limited by that
10 time to internal communications, so they clearly weren't
11 subsets.

12 **MR. KIRK:** We limited our interpretation to
13 those -- to --

14 **THE COURT:** I understand what you are --

15 **MR. KIRK:** I don't want to reargue that.

16 All I'm trying to tell you is that we did not
17 believe -- and we clearly stated this. It's in our paper
18 that we submitted with the privilege log. We did what the
19 parties ordinarily do in discovery. We listed on the
20 privilege logs those documents that we believed were
21 responsive to the requests, as we believed they had been
22 limited by Judge Walker, that didn't include those documents
23 that we thought were not responsive, yet, are privileged.

24 **THE COURT:** That's the answer to this point.

25 That's the answer. That is a fair answer to the point, that

1 they -- they haven't reviewed for privilege in that sense.
2 Documents that they understood to fall outside the
3 responsiveness limitations. I think they thought they were
4 in error. And they were grasping at straws, frankly, to
5 getting the responsiveness limitation because it's clear the
6 ruling only on number eight, wasn't ruling on any other
7 document request, and he was clearly ruling only in the
8 context of the assertion of the privilege.

9 So I don't think that that's reasonable. But it
10 really proves not too much because of the notion that his
11 description of relevance had only to do with internal
12 documents was the universe of relevant documents where the
13 cases he sought was clearly contradicted by other parts of
14 it. But having said that, they do have a problem.

15 **MR. BOUTROUS:** They -- they do. It's of their own
16 making and again --

17 **THE COURT:** How long will it take them to go
18 through all those documents?

19 **MR. BOUTROUS:** Well, if they have an electronic
20 data base, it shouldn't be very hard because it really is, as
21 you pointed out, the to, the from, names of the people. You
22 run the search and --

23 **THE COURT:** I'm sure he's going to say it's all
24 paper copies.

25 **MR. KIRK:** Not all paper. I believe they are --

1 **THE COURT:** PDFs or something.

2 **MR. PANUCCIO:** Or some equivalent. Outlook files.

3 But we don't have a --

4 **MR. BOUTROUS:** A searchable.

5 **MR. KIRK:** -- a normal litigation database. The
6 resources weren't there for that in this case.

7 **MR. BOUTROUS:** But I have another point. Going
8 back to the point about the privilege log, the revised
9 request number eight defined the universe of people to whom
10 the request would apply to basically include everyone who, I
11 think, could conceivably be viewed as in the control group.

12 It was:

13 "Any person who had a role in managing or
14 directing at ProtectMarriage.com or provided
15 advice, counseling, information or services
16 with respect to efforts to encourage persons
17 to vote for Proposition 8 or otherwise
18 educate persons about Proposition 8."

19 So if they were viewing that group and
20 communications among those people as subject to this
21 privilege, I would think they would have searched the
22 document for the very same people in the core group and
23 booked them in the privilege log.

24 **THE COURT:** They thought they didn't have to go
25 that broad a subject matter.

1 The same argument, that he thought the subject
2 matter was limited by the responsiveness ruling of Judge
3 Walker and, therefore, he didn't have to review that stuff.

4 But whatever it is, I'm sure -- I take it as his
5 word, which has always been good with this Court, that they
6 haven't reviewed them for privilege. So they have got to
7 review them for privilege, and it takes some time. And
8 30,000 documents -- it may not take months to work through,
9 but certainly takes days and days and days.

10 How long do you think it takes to do a privilege
11 review, this type of privilege review for 30,000 documents on
12 a paper file?

13 **MR. BOUTROUS:** Your Honor, given the pretty clear
14 parameters here, basically the names of the people, and if
15 you put aside the relevant -- the relevance limitation you
16 put, I would think they could do it quickly.

17 I can't off the top of my head think it through
18 here, but they have an army of people working on this case.
19 They have had 12 lawyers file appearances. They have a huge
20 group of people who participated in their campaign. They
21 have been very adept at marshaling an army of people in
22 connection with their efforts on Proposition 8.

23 Mr. Schubert's article talks about this
24 unbelievable effort they had, getting people in, the
25 grassroots campaign, this huge group of people who helped

1 them.

2 This is so -- it's not going to take all lawyers to
3 do this. You have a list of the names and Proposition 8, and
4 I would think if they could get a big group of people, all
5 the volunteers that they talked about, and crank through
6 these documents. We would like to have them, obviously, by
7 Saturday so we could start our own review and then if they
8 need to retake some depositions or reopen depositions and use
9 them at trial, be ready to do that.

10 We are ready to work ourselves. We'll have to
11 review the documents once we get them and pull together our
12 team.

13 And so I just think it rings very hollow that this
14 notion that they don't have the resources and --

15 **THE COURT:** So how long is the trial going to be?

16 **MR. BOUTROUS:** We think at least three weeks and
17 probably longer. It could be a month.

18 And we recognize, your Honor, you're trying to
19 balance things out and we very much appreciate all the effort
20 you have put into this and we just want to get the
21 information and see it and go to trial.

22 **THE COURT:** Well, this may be one of those things
23 where you get some of it, maybe a great deal of it, during
24 trial. It seems unavoidable.

25 Did you want to say something?

1 **MR. KIRK:** I just want to make the obvious response
2 to Mr. Boutrous. It's one thing to recruit people to work on
3 a campaign on an issue they believe in. I don't believe we
4 can go out and recruit volunteers to do document discovery.
5 That's just not realistic.

6 **THE COURT:** I know, but the point -- I wasn't
7 listening to the campaign argument, frankly, because I don't
8 think that's relevant.

9 The relevant point is if 12 lawyers made an
10 appearance in this case, that means there's probably at least
11 that many paralegals or secretaries, too, that could also be
12 used. Why among those people can't you marshal a number
13 folks and get this done on an expedited basis?

14 **MR. KIRK:** We certainly do not have 12 paralegals.
15 I know of two. There might be a couple more that work with
16 co-counsel. Those two will be consumed full time assisting
17 in marshaling exhibits and so forth during the trial.

18 In terms of the lawyers who have made appearances,
19 at least some of them -- and certainly me -- have only done
20 so because the rest of the team was consumed with trial and
21 my appearance was limited to, really, dealing with the issues
22 that were before the Court today.

23 **THE COURT:** I knew I was going to get you back. I
24 knew I was going to get you back. I was hoping it wasn't for
25 document review.

1 **MR. KIRK:** So was I, your Honor. So was I.

2 Just in thinking about --

3 **THE COURT:** Let me tell you the parameters that I'm
4 thinking about.

5 It's not acceptable to me that the documents are
6 not produced. It's not acceptable to me that the documents
7 are not produced in time for most of the trial. So I'm
8 trying to figure out what schedule is practical within those
9 parameters.

10 There are -- you have a number of members of
11 lawyers who have shown up. You have -- whatever clerical
12 help you have. You have the ability to use people on
13 contract. It may be a burden. I have no doubt that it's a
14 significant burden, but I have to balance that against the
15 entire side having this information for trial and not
16 necessarily at the beginning of trial.

17 On a rolling basis sounds fine with me. We have to
18 figure out a starting point and ending point.

19 **MR. KIRK:** Your Honor, unfortunately, I don't think
20 I can give you a helpful answer to that, because -- because
21 honestly from our perspective with those parameters it's not
22 something that we feel we have the ability to do.

23 **THE COURT:** Okay. Then I will just make a ruling.

24 Okay. You will start a rolling production of the
25 documents at noon on Sunday -- that is January 10th -- and

1 finish up by noon on January 17. I'm not going to require a
2 log to be produced until after that point, because I don't
3 think it's going to be particularly useful again. But we'll
4 have a revised log on January 24th. So that will be two
5 weeks into the trial.

6 Okay. Is there anything I have forgotten to rule
7 on?

8 **MR. BOUTROUS:** I think you have covered it, your
9 Honor. We would just request if there are documents that the
10 proponents can produce before Sunday, that they start
11 producing them. It would be -- it would be great to have
12 them, to the extent that they are there.

13 There has got to be a universe of documents they
14 know are not privileged and not subject to the core group and
15 went to voters and we would --

16 **THE COURT:** I will leave it to you, but, obviously,
17 you're going to start reviewing for privilege right away on
18 this basis. As you get through, you ought to produce them,
19 but starting on Sunday.

20 **MR. BOUTROUS:** Thank you, your Honor. I believe we
21 have covered the issues that we have on our list.

22 **THE COURT:** Okay. Anything further? Okay. Thank
23 you. Court stands in recess.

24 (Whereupon, further proceedings in the
25 above matter were adjourned.)

CERTIFICATE OF REPORTER

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

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/s/ Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Thursday, January 7, 2010