

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOSEPH C. SPERO, MAGISTRATE JUDGE

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	)	
KRISTIN M. PERRY, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. C 09-2292 (JCS)
	)	
ARNOLD SCHWARZENEGGER,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	San Francisco, California
	)	Thursday, February 25, 2010
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TRANSCRIPT OF PROCEEDINGS

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1 Friday, January 23, 2009

2 (9:28 a.m.)

3 **(In open court)**

4 DEPUTY CLERK: Calling case C 09-2292, Kristin M.  
5 Perry versus Arnold Schwarzenegger.

6 Counsel, please state your appearances.

7 MR. PUGNO: Andrew Pugno, general counsel for the  
8 defendant/intervenors.

9 THE COURT: Welcome, Mr. Pugno.

10 MR. BOMSE: Stephen Bomse, Orrick, Herrington &  
11 Sutcliff, for the ACLU; together with Elizabeth Gill of the  
12 ACLU.

13 THE COURT: Mr. Bomse, good afternoon.

14 MS. KROGSENG: Kari Krogseng of Fenwick & West  
15 representing third party Californians Against Eliminating Basic  
16 Rights; and also James Harrison.

17 THE COURT: Welcome.

18 MS. WHITTEMORE: Lauren Whittemore, Fenwick & West,  
19 representing nonparty Equality California. Also here is Lynn  
20 Pasahow.

21 THE COURT: Welcome.

22 MR. DUSSEAULT: Christopher Dusseault, Gibson, Dunn &  
23 Crutcher, on behalf of the plaintiffs; joined by my colleague  
24 Enrico Monagas.

25 THE COURT: Welcome.

1 MS. LEE: Mollie Lee on behalf of plaintiff/intervenor  
2 City and County of San Francisco.

3 THE COURT: Welcome. And on the phone we have  
4 someone?

5 MR. BAILEY: Landon Bailey of the law firm Mennemeier,  
6 Glassman & Stroud, appearing for the administration of the  
7 State of California.

8 THE COURT: Okay. If and when you decide you want to  
9 speak, would you keep your voice up? It will be a little hard  
10 to hear you in the courtroom. Okay?

11 MR. BAILEY: Yes. Thank you, your Honor.

12 THE COURT: We're here on the motion to compel that  
13 was referred by Chief Judge Walker. I thought I would take a  
14 few minutes to talk at you about some of the questions that  
15 occur to me in reviewing this and give everyone a chance to  
16 speak. We've got a little over an hour to do this. The  
17 drop-dead date on a deadline when I have to turn to something  
18 else is 4:00 o'clock, so that should give us plenty of time to  
19 cover what we need to.

20 Taking the sort of in the order the issues present  
21 themselves, the first question is timeliness. The -- on the  
22 one hand, of course, the presentation of the evidence by way of  
23 witnesses has concluded. The judge hasn't set closing  
24 arguments. Certain comments were made during the end of the  
25 proceedings in front of the Chief by the proponents, I believe,

1 about -- that this motion was still pending, that they wanted  
2 to submit some additional evidence. But I'm not sure there's a  
3 vehicle for that. So one of the questions that's raised is  
4 isn't this too late, by that standard?

5 On the other hand, I am cognizant of the fact that  
6 Judge Walker referred this case to me on February 4th,  
7 suggesting that it's not too late. I'm not very sympathetic to  
8 the argument that the initial motion was filed too late, I must  
9 say. The proponents filed this motion. I mean, they lost in  
10 the Circuit or they won in the Circuit, depending on how you  
11 look at it on January 4th. We issued our order or I issued my  
12 order on January 8th. This motion was brought a week later. I  
13 don't know that I am particularly willing to suggest that it's  
14 not timely, for that reason. But I am concerned about whether  
15 or not when you have a motion after the vehicle for presenting  
16 evidence is gone, whether we're engaging in sort of a pointless  
17 act here, which bears on the burden issue.

18 The second issue is relevance. Which is -- overlaps  
19 with the privilege issue, but taking it separately for the  
20 moment, and this question is largely to the nonparties, the  
21 state of play, as I understand it, and having looked at it  
22 several times, is that the district judge has decided and the  
23 Court of Appeals has affirmed that for discovery purposes, the  
24 messages conveyed to the voters are relevant to determining the  
25 purpose and the -- purpose and the intent of Proposition 8.

1           And that, secondarily, internal campaign  
2           communications can elucidate the meaning and impact of the  
3           messages that were actually conveyed to voters.

4           I don't see how, other than in a sort of very abstract  
5           way, your only concern in that regard is with one side's  
6           communications. I mean, the information before the voters, and  
7           we were all there at the time, was a conversation. The  
8           conversation went something like, You know, if you pass  
9           Proposition 8, "X" will happen.

10           No, no that's not what will happen. If you don't pass  
11           Proposition 8, this is what will happen.

12           People went back and forth on various topics. And so  
13           the idea that only the communications in the outside world to  
14           the voters from one side are relevant seems to make no sense.  
15           If that is the case, that is to say, that the entire mix of  
16           information before the voters is what the judge would look at,  
17           then I don't see -- then it seems to me that internal  
18           communications from either side, within either side, would be  
19           relevant to elucidate the messages that got transmitted.

20           So -- and so I don't understand how, having reached  
21           that conclusion with the proponents, I can take now a different  
22           position with the opponents.

23           The privilege issue is, you know, the guidance of  
24           course is the amended opinion of the Circuit. And it seems to  
25           me on -- that it's very difficult to argue that one side or

1 another has a different level of protection by the virtue of  
2 the First Amendment. I mean, it's really interesting to read  
3 the "No on 8" papers, or Equality California's papers, because  
4 I've read all those arguments before. Mr. Pugno put them  
5 before me. It is, down to last night's declaration, it is  
6 exactly the same sort of thing that the "No on 8" -- that the  
7 proponents were trying to persuade. First, this court, and  
8 then the Circuit, and the Circuit eventually said: This is the  
9 standard.

10 And so the issue and the standard is that there is a  
11 limited First Amendment privilege with regard to internal  
12 campaign communications in this initiative election. That  
13 private internal campaign communications among the core  
14 group -- a very important term, obviously -- responsible for  
15 formulating the campaign strategy and messaging, is protected.  
16 And "core group" is a limiting concept. It's designed to  
17 focus -- in my mind. I understand it to be a concept designed  
18 to focus the attention on that area where the First Amendment  
19 interests are the greatest. And that's why the Circuit went  
20 that direction.

21 So one of the things I wanted, and this gets to sort  
22 of the questions, and we can talk about it in terms of each of  
23 the groups involved, but I wanted you to address in some detail  
24 the -- how far that core group concept reaches with respect to  
25 Californians Against Eliminating Basic Rights, Equality

1 California and "No on 8".

2           Lastly, in terms of burden, it is a burden. It was a  
3 substantial burden on the proponents, and in a much shorter  
4 timeframe than I would contemplate for nonparties, because you  
5 are nonparties. I think that I'm called upon to reduce or  
6 eliminate any undue burdens, but not eliminate all burdens.

7           It strikes me that having decided this information is  
8 producible in discovery, I'm not inclined to say because of the  
9 burden issue, they can't have it at all. I think that there  
10 are ways to cabin the burden. For one thing, I'm perfectly  
11 willing to say something like, If you're looking for electronic  
12 documents, you only have to use the following search terms, and  
13 cabin it that way. I'm certainly willing to give you some time  
14 to produce it instead of the week or 10 days I gave the  
15 proponents -- or 10 days, or whatever it was. I don't remember  
16 anymore. It was some very short period of time. But  
17 reasonable, of course.

18           And I'm willing to discuss whether it's a reasonable  
19 burden to produce privilege logs. That may be undue. The  
20 distinction between privileged and nonprivileged is going to be  
21 whether or not it's a communication within a very well-defined  
22 core group. And by well-defined, I mean at the end of the day  
23 if the core group is granted, and the core group excluded,  
24 we'll have to have human beings, individuals, so that you will  
25 know exactly what to look for and what not to look for.



1           Those are my preliminary thoughts.

2           This is a motion to compel. I'll hear from the moving  
3 party first. Whatever you'd like.

4           MR. PUGNO: Thank you, your Honor. Andrew Pugno for  
5 the proponents.

6           Addressing the Court's questions, with regard to the  
7 timeliness question, and whether this is too late and whether  
8 there's really any good that can become of all this, the -- for  
9 both the plaintiffs and the defendants, the defendant  
10 intervenors at trial, there was a mechanism that the judge used  
11 where ones all testimony was concluded one side or the other  
12 got to bring forward a bucket of DVDs and paper records and so  
13 on and we kind of went one by one by one in kind of a document  
14 dump procedure. Where the opposing party got to voice any  
15 objections and we went one by one.

16           THE COURT: This was just -- I don't mean to -- I'm  
17 just to make sure I understand, during the time, which we would  
18 understand to be the evidentiary hearing in this matter, that  
19 counsel went through that exercise.

20           MR. PUGNO: That's right. Principally at the end of  
21 the live witness testimony. In other words, anything that  
22 was -- that a party wanted to have part of the record but did  
23 not get introduced and authenticated and so on through a  
24 witness, there was a kind of en masse movement of documents  
25 after the live witness testimony had concluded. And I think

1 conceptually, that opportunity is still open. The defendant's  
2 having reserved the --

3 THE COURT: Conceptually, what do you mean by that?  
4 Has the June said that he's willing to take any further  
5 document dump? I mean I'm just wondering what you mean by  
6 that. Ordinarily in a bench trial, even though there's a gap  
7 between when the evidentiary hearing happens and the arguments  
8 happen, you know, the opportunity to do things is at the  
9 evidentiary hearings, don't you think you have to move to  
10 reopen to get that opportunity?

11 MR. PUGNO: I think if we had rested our case, that  
12 would be true. In this case, we were given this opportunity,  
13 we exercised the opportunity to the extent we were able, and  
14 then the record shows that we rested the case with the  
15 exception of the outstanding motion and additional evidence  
16 that may come out --

17 THE COURT: Just because you said that doesn't make it  
18 true though. That's just what you said.

19 MR. PUGNO: I think there was agreement, in fact,  
20 that -- I mean we could have simply refused to rest our case.  
21 That would have been really not very helpful or productive.  
22 And I think there was broad recognition that we had this  
23 outstanding. We had raised it many times with the Court  
24 throughout the trial. And ultimately it was referred  
25 afterwards. And so I do think that whether it would probably

1 not be in closing arguments, it would probably be through a  
2 paper submission where we would essentially do what we did in  
3 person, submit documents, the other side could object and the  
4 judge could decide what comes in or what doesn't. I think it  
5 would be a non in-person version of the same mechanism which we  
6 reserved on at the time.

7 THE COURT: Okay.

8 MR. PUGNO: Second of all, on the relevance issue, it  
9 seems to be addressed mainly to the nonparties. It is true  
10 that the -- that Judge Walker said that the internal  
11 communications can elucidate what was said in the campaign.  
12 Publicly. As well as messages that were considered and  
13 ultimately decided to not be used. In other words the judge  
14 said that what was not said can elucidate the conversation as  
15 much as what was said.

16 THE COURT: Well, let me just play -- talk to you  
17 about that for a second. Because the argument from the other  
18 side is: These are not of equivalent positions. That the  
19 test -- what the judge has to decide is whether or not -- one  
20 of the things the judge may have to decide is whether or not  
21 the purpose of Proposition 8 was a legitimate purpose or not.  
22 Whether it had a discriminatory purpose or it had a  
23 nondiscriminatory purpose. All right? And the argument from  
24 the other side is, Well, you know, you don't get from the  
25 forces that were working together to defeat Proposition 8

1 the -- an understanding of what the purpose was for people who  
2 were voting for it, or who were official proponents of it.  
3 These are not not official anything. These are outside groups  
4 opposing it.

5           Why isn't it just apples and oranges? That this is  
6 a -- these are -- that what we're really looking at is the  
7 intent of the voters, who you were appealing to, who your side  
8 decided -- the kind of communications you put forth and the  
9 meaning and impact of those communications? Why isn't that --

10           MR. PUGNO: Because I think, as your Honor just said,  
11 the relevant state of mind is that of the voters. Not of the  
12 proponents. Not of the -- what the abstract purpose of an  
13 initiative was. But the inquiry is: Did the voters enact it  
14 with an improper purpose? And so it's the state of mind and  
15 the understanding and the intent, really, legislative intent of  
16 the voters, that the Court is examining. And normally we stop  
17 at the ballot arguments to see what the voters were exposed to,  
18 and in this case we went substantially beyond that into  
19 advertisements and internal memos and things like that.

20           And so in looking at the mix, the mix is relevant to  
21 what the voters were exposed to, and all of the factors they  
22 considered when making their decision.

23           So to essentially have a one-sided conversation in  
24 court does not fully inform the Court of what the voters had  
25 before them. If all that is produced is what the proponents

1 put before the voters but not what the --

2 THE COURT: Give me something practical. What does  
3 that mean? You put forth an advertisement that they say, based  
4 on internal memos or whatever they say, puts forth an improper  
5 purpose -- and I'm not picking out any particular one, but I'm  
6 sure they've said it about some things. What is it that you  
7 get from the other side that affects in any way what the  
8 purpose was of the proposition with respect to the people who  
9 passed it?

10 I mean, I'm not really comfortable with the idea of  
11 the mind of the voters, because I don't think this is an intent  
12 in that sense. But in terms of the purpose of the proposition,  
13 what is it that you get from the other side that shows anything  
14 about whether or not they're correct?

15 MR. PUGNO: I think a perfect example would be when  
16 the proponents make a claim about what would happen if Prop 8  
17 were to not pass. And if the opponents, the "No" campaign,  
18 were to have had a discussion that in fact the proponents may  
19 be right, but we need to distract voters away from that point,  
20 or we need to try and turn that around in a way that leads  
21 voters in a different direction. And so that would be  
22 essentially a vindication of the Yes side's prediction, and  
23 probably do an awful lot to undermine the claim that that was  
24 an irrational fear. And that that was an irrational --

25 THE COURT: Is that what you're looking to find? You

1 went the internal campaign communications that say, you know,  
2 they're really right about that, this is going to affect  
3 education in this way, it's going to affect marriage in this  
4 way?

5 MR. PUGNO: Your Honor, we have no idea.

6 THE COURT: What do you think the odds are?

7 MR. PUGNO: Pardon?

8 THE COURT: What do you think the odds are that when I  
9 look into the internal communications among the ACLU staff  
10 they're going to say, you know, I saw that thing on television  
11 the other night about education; they're really right about  
12 that, but let's distract the voters?

13 MR. PUGNO: Your Honor, you asked me to make a  
14 hypothetical --

15 THE COURT: I'm trying to figure out if there's  
16 anything really, practically there.

17 MR. PUGNO: Let me go to one other thing that's also  
18 important -- and I think there are many. But another one is  
19 that -- a central issue in the equal protection analysis here  
20 is relative political strength or political powerlessness of  
21 the gay and lesbian community. And records that reflect either  
22 the reliability of strong allies and so on, all the things that  
23 the Court is looking at right now, those would be directly  
24 relevant.

25 THE COURT: How significant? To the issues? Is it

1 the case that -- I mean, usually when there's an issue on equal  
2 protection analysis where that issue is brought up, we're  
3 talking about the extreme ends of political power. We're not  
4 talking about people who are discriminated against but have --  
5 but may have political power. Is that something that's really  
6 going to have any significant impact on how the judge decides  
7 whether or not this has got one standard apply or another to  
8 it?

9 MR. PUGNO: I think in many ways much of the ballgame  
10 is guided by the standard, and plaintiffs felt it was  
11 sufficiently important to put on evidence that they brought  
12 expert witnesses to the stand and so on, precisely on this  
13 point. It is a core element of a threshold analysis on what  
14 level of scrutiny's going to apply. I don't see how there  
15 could be anything less important in this case.

16 THE COURT: Oh, I'm sure there's lots of things that  
17 are less important. But okay.

18 MR. PUGNO: As an example, I mean, there are half a  
19 dozen issues in this case, and I think that that's just one  
20 example of ways -- and it is very difficult, your Honor, to  
21 guess what may be there, decide what legal significance it may  
22 have, when we're talking about things we've never seen. So  
23 it's quite difficult.

24 THE COURT: And what is it that you're asking for that  
25 shows that particular thing? Political power?

1 MR. PUGNO: Oh, I think -- well, again, I'm just  
2 hypothesizing here, but --

3 THE COURT: Well, no, a subpoena's out there.  
4 Subpoena everything in the world on Prop 8. I'm not going to  
5 produce that. What is it in that narrow category of documents  
6 that you're looking for that have to do with political power?

7 MR. PUGNO: Well, the relevant standard that the Court  
8 has laid down had to do with, referring to containing or  
9 relating to an argument for or against Proposition 8. I think  
10 that documents showing those arguments being presented to  
11 politically powerful institutions or political allies of the  
12 "no" side and the reactions and whether it's positive or  
13 negative, and the ability -- I mean, that's a core issue, the  
14 ability of the "no" side, of the -- to attract and retain the  
15 political reliability of major political influences. And  
16 that's exactly -- that was what they attempted to do in the  
17 campaign. There were numerous statewide officials, celebrities  
18 and so on, that they were able to attract, feature in  
19 advertisements and so on. And that reflects the relative  
20 political power of that campaign.

21 THE COURT: Okay. Thank you.

22 MR. PUGNO: On the First Amendment privilege issue of  
23 the first -- your first question seemed to be addressed to the  
24 nonparties. I do want to point out that the implementation of  
25 this standard -- we will agree that the standard is a standard,



1 and it applies to whichever side; and we also agree that it  
2 applies to nonparty versus nonparty. But we do think that,  
3 particularly through the declarations, that the implication of  
4 that here is extraordinarily broad, and seeks to include folks  
5 that were rejected when we asked to do the same thing before.  
6 And maybe we can come back to that, or I can go through those  
7 now.

8 THE COURT: Well, I want to hear from them on that  
9 subject, and maybe you can respond to it. Although I've got to  
10 tell you, my approach when I went through your declaration the  
11 first time through was, I thought, very broad. Generally,  
12 anyone, you said, would be swept into the core group. If you  
13 said they were part of the core group for formulation -- there  
14 were a couple of exceptions to that. And maybe there's a  
15 couple of exceptions here.

16 But my view is that in order to be true to the rights  
17 that you are asserting and that they are now asserting, for  
18 examination of them, a careful examination -- but if there's a  
19 default, it's to be more inclusive rather than less inclusive.

20 All right. Let me hear -- is there something else?

21 MR. PUGNO: The last issue that your Honor raised, the  
22 burden and the caging of the burden, the cabining of the  
23 burden. I would like to point out that our position is that  
24 when one exposes -- when one engages in a \$45 million statewide  
25 high profile campaign, it is at that moment that they've

1 exposed themselves to this possibility of being in litigation,  
2 and really whether --

3 THE COURT: Where is that in Rule 45 that the nonparty  
4 shall be spared all undue burdens unless they've spent a lot of  
5 money?

6 MR. PUGNO: I think it goes to the question of whether  
7 it's undue. In other words, if someone has a very tenuous  
8 connection to the case, and it would be a heavy burden, it is  
9 undue. But the connection to the case really cannot be --

10 THE COURT: I see. If the connection's direct, then  
11 no burden is undue?

12 MR. PUGNO: No, I don't believe that at all.

13 THE COURT: But that's -- the question is: How far  
14 you go? I mean, that's the question. And my thought was --

15 MR. PUGNO: We think the burden should be the same.

16 THE COURT: As a party and a nonparty.

17 MR. PUGNO: That's right. When you come forward and  
18 run a statewide --

19 THE COURT: Well, that proves too much. You're saying  
20 a nonparty has the same burden as a party? That proves too  
21 much. They were denied the opportunity to come into this case,  
22 and so they've got -- there is no question but that the Court  
23 has to be -- consider their burdens in a different way than a  
24 party. So -- now, it may be in analyzing undue burden that,  
25 you know, how involved they are and whether they wanted to get

1 into the case and all those things come into play. But at the  
2 end of the day, I think I have to be more solicitous of a  
3 nonparty's burdens.

4 But let me hear from the other side. Thank you.

5 MR. PUGNO: Thank you.

6 MR. BOMSE: Good afternoon, your Honor. Stephen Bomse  
7 on behalf of the nonparty ACLU.

8 First of all, thank you very much for accommodating my  
9 travel schedule. I seem to have lost my voice, but at least  
10 I'm here in body, and I'll do my best to work my way through  
11 this.

12 I also appreciate very much your Honor's comments that  
13 helped us to focus on these issues -- and indeed, some of the  
14 comments that were made during your conversation with  
15 Mr. Pugno, because I think there are things there that are  
16 useful as well.

17 Now you suggested that there are, and I agree with you  
18 entirely, four issues here. Leaving aside timeliness, which  
19 although I'm only going to leave it aside for a second because  
20 I think it may be a way to cut this whole thing off at the  
21 pass, but leaving that aside for the moment, the three other  
22 issues -- that is relevance, privilege and burden -- while we  
23 need to talk about them separately, are, in fact, rather  
24 closely intertwined.

25 THE COURT: Yes.

1           MR. BOMSE: And it's going to be my suggestion that  
2 the burden that would be undue here in light of the other  
3 considerations, as well as the consideration which also  
4 animated some of your conversation with Mr. Pugno, that we deal  
5 here with nonparties, informs in a very important way this  
6 issue.

7           But let me start where you started, with timeliness.  
8 And I'm not going to argue here that, well, they waited too  
9 long in a sense of "gotcha". But they have waited too long in  
10 a sense that your Honor articulated, which is where we stand in  
11 the process. That is, witnesses have concluded. Nobody seems  
12 to dispute that. But what is the implication of that for the  
13 information that is sought here? Well, we're not in the  
14 discovery phase of the case. We know that. So if this  
15 information is to serve any purpose here whatsoever, it must be  
16 because it is first produced, and then introduced. But how is  
17 it going to be introduced when the witnesses have concluded?

18           THE COURT: Let me just ask you a question about that.  
19 Why am I, remembering the position I hold, and particularly the  
20 position with respect to this motion, why and I allowed to even  
21 consider that? The judge -- the motion was filed before the  
22 district judge. The district judge ordered briefing, during  
23 the trial. And after the witnesses were concluded, the  
24 district judge referred it out then for resolution. Isn't that  
25 ultimately going to be up to him? Maybe he has in mind

1 re-opening and allowing a witness to testify as to the  
2 authenticity of these documents, I don't know. But why is --  
3 can it be my position to even consider that?

4 MR. BOMSE: Well, if you are wishing me to move on  
5 because you think that having mentioned the issue is now not  
6 something between the two of us, but perhaps something between  
7 us and Judge Walker somewhere down the road, then fine. I will  
8 do that.

9 But it does seem to me that it is in everybody's  
10 interest to this along in a sensible way. And what I was  
11 saying -- I'll be brief and then move on -- which is that  
12 unless the Court decides that this evidence, and we're going to  
13 get to what this evidence is all about in a second, but unless  
14 the Court decides that this evidence is so significant -- and  
15 by the way, if there were to be something that was sufficiently  
16 significant, I'd assure you, we would be back there objecting  
17 to its admissibility on grounds of privilege and prejudice,  
18 that I can assure you; we would take up as far as necessary. I  
19 don't think that would ever happen, because I think this is  
20 much ado about nothing.

21 But the point is, to get this evidence in --

22 THE COURT: Uh-huh.

23 MR. BOMSE: -- you would have to -- because we are not  
24 parties, the first time I'm going to mention that. We are not  
25 parties. Anything in our document is not an admission. So the

1 arguments that were made about documents of the  
2 defendant/intervenors being admissions cannot be made against  
3 us. Those documents are hearsay. It's understood to admit  
4 them you would need a witness. And again, it may be the  
5 plaintiffs will stipulate to it -- I would be rather  
6 astonished -- but that's not for me to decide either.

7 But I am suggesting that when we look at the whole  
8 calculus here --

9 THE COURT: Yeah, I know.

10 MR. BOMSE: The very first thing that happens is a  
11 significant issue of whether any use could be made of these  
12 documents.

13 THE COURT: I don't disagree with the concept. I  
14 actually disagree with your analysis on whether these are,  
15 quote, "hearsay", because it certainly depends on what the  
16 purpose those documents were being put as to whether they're  
17 hearsay. But you do have a good threshold issue about whether  
18 or not they're going to be allowed to be used. I agree with  
19 that.

20 MR. BOMSE: So then let me turn to the question of  
21 relevance. And there were two comments -- when I said that I  
22 thought that the colloquy was very helpful -- there were two  
23 comments that were made that I think are pertinent here. First  
24 was your Honor's: What do you think the odds are? And I  
25 understand you were in some ways being flip, but I think you

1 were in some ways getting to the nub of the issue. The notion  
2 that there is going to be, once we have carved out as we must  
3 the documents that are protected from discovery under the Ninth  
4 Circuit opinion, that we are going to have non-core people  
5 talking in some document to some other non-core person about  
6 something that is so significant that it would inform in any  
7 meaningful way the issues before the Court, I think is  
8 extraordinarily remote. So that's Point 1.

9 The second thing that was said --

10 THE COURT: Can I ask about that just briefly?

11 MR. BOMSE: Of course.

12 THE COURT: Do you think that is different from the  
13 proponents? Do you think --

14 MR. BOMSE: Do I what?

15 THE COURT: That the odds of finding are different?

16 MR. BOMSE: Absolutely.

17 THE COURT: And if you find with the proponents  
18 whether they might be talking with non-core people in a way  
19 that would be significant, you think that's much more likely?

20 MR. BOMSE: I don't think it's probably all that  
21 likely even as to their documents. I haven't seen their  
22 documents; I'm not going to see their documents; I don't really  
23 have any interest in seeing their documents.

24 THE COURT: But you're nonparties.

25 MR. BOMSE: But the proponents are talking about, how

1 are we going to persuade voters to vote for this? What's this  
2 all about? And that's the point I'm going to get to in a  
3 second, which is the real core problem on relevance.

4 But before I do, I would like to note that when you  
5 finally put the question to Mr. Pugno about what he expects to  
6 find, he says: Difficult to guess.

7 Now, what phrase would better encapsulate the notion  
8 of a fishing expedition than "difficult to guess"?

9 So we now have, after the conclusion of evidence,  
10 people coming, looking for documents, the main corpus of which  
11 we all agree are privileged. But there's something out there,  
12 and it's difficult to guess what it might contain.

13 I think one could, on the issue of relevance, fairly  
14 stop there, but I don't want to. Because I wanted to now go to  
15 the question that the difference between the proponents and the  
16 opponents is not apples and oranges, it is apples and  
17 orangutans. That is, you are not in any realistic sense going  
18 to find within our documents that might elucidate the issues  
19 that the judge has said he wants to consider in this case. For  
20 the simple reason that we're talking about why people did  
21 something. So the only people we are talking about are those  
22 who did it: Namely, the voters. And those who were trying to  
23 persuade the voters.

24 Those on our side, who were trying, sadly, without  
25 success, to persuade the voters not to enact Proposition 8,



1 their intent is, alas, not pertinent at all.

2 THE COURT: That seems to me a red herring. I've got  
3 to tell you, that seems to be a red herring. We're talking  
4 about -- and maybe "intent" of the vote is such an odd term.  
5 But we are talking about the purpose for which it was enacted.  
6 And the intent of the voters is as good a substitute for that  
7 as any. But don't you think that in deciding what the  
8 intent -- whether the purpose was discriminatory or not, all  
9 right, which it's not just some abstract intent of the voters,  
10 it is was it an improper purpose, or was it a permitted  
11 purpose? In deciding that, that you want not just the messages  
12 that -- and the judge has already decided this, the judge has  
13 actually already decided this -- not just the messages that  
14 went to the voters from one side which show perhaps, if you  
15 think they are, discriminatory messages, but you get messages  
16 from the other side. And the reason for that is, because you  
17 can't tell, actually, the total mix that the voters got and  
18 what their intent was, even in passing it, unless you have both  
19 sides.

20 So for example, if one side brings up an argument and  
21 it is a discriminatory argument. But it is completely swamped  
22 by the discussion from the other side, well then it's less  
23 likely that the purpose for which it was enacted was that one.  
24 There may be other purposes. There may be other purposes. But  
25 it seems to me it's a red herring to say, well, our voters

1 didn't vote for it. I don't think that's got anything to do  
2 with it.

3 MR. BOMSE: Your Honor, let me start with, although I  
4 could take up a fair by the of our time quibbling with some of  
5 that, but let me start with the assumption that what you said  
6 is right. If that is the case, then the things that are going  
7 to have swamped it are the things that were out there to the  
8 public, not the things that were never said. Not the things  
9 that couldn't have swamped because the faucet was off. We have  
10 given up, voluntarily, everything that was out there that had  
11 swamp capacity. We are left with dribbles of droplets of  
12 something that one might think that maybe there was a leak  
13 faucet and if we go through 60,000 e-mails, we will find  
14 somebody somewhere speculating about some argument that, aha,  
15 this will show that actually the yes on eight people are going  
16 to lose because of that.

17 But how much better can we both do than to look at  
18 what it is that our opponents had to say when they came, when  
19 they had to come up and say what their relevance is. I invite  
20 you to look at the arguments they made on Pages 6 and 7 of  
21 their reply papers, where they start out by declaring victory.  
22 They say, Well, you've already decided this against us.

23 Well, if you have -- but my assumption is we have got  
24 a purpose here. To try to figure out the right answer, let's  
25 figure out what their arguments are. They start out by saying

1 voters can consider both sides. Yeah, I hope at least some  
2 voters do that. But at the end, if they voted no, we don't  
3 care; and if they voted yes, apparently our arguments didn't  
4 persuade.

5 THE COURT: You see, I've got to tell you I just think  
6 that is overly simplistic. That's overly simplistic. Because  
7 the question is not whether in deciding the constitutionality  
8 of the proposition, whether or not your arguments persuaded  
9 them to vote for or against. The question is whether they  
10 enacted it with a discriminatory purpose. That's the question.  
11 Right?

12 MR. BOMSE: I think that is the question of  
13 discriminatory purpose. And I don't see how any of this  
14 possibly goes to that.

15 But at the end of the day, they're actually forced at  
16 the top of Page 7 to say, voters may well have voted for this  
17 law in reaction against the statements and messages presented  
18 by the opponents.

19 New, I will give that very high marks for credibility.  
20 Probably somewhere out there there is somebody who really  
21 detests Brad Pitt's skills as an actor. And therefore when she  
22 found out that Brad Pitt was opposed to Proposition 8, well, by  
23 God, that turned around her vote. But is that seriously the  
24 basis upon which we are going to impose any type of burden, let  
25 alone on a nonparty at this stage of the case?

1 I'd simply suggest to your Honor that on the question  
2 of relevance, while I can accept, at least for these purposes  
3 and with our time deadline, that there is an argument that one  
4 can make about the complexity of this process, it cannot begin  
5 to justify what is being asked here.

6 Now let me turn then to the question of privilege.  
7 And your Honor, you began by saying that in your view, it  
8 probably was the same level of protection. Well, again, I'm  
9 not going to be arrogant and suggest that I know what you had  
10 in mind in your order of January 8. But I am going to suggest  
11 that having read it, what you had to say was that they hadn't  
12 made this argument, and if -- and that's on Page 2, continuing  
13 over to the top of Page 3. And then you said if they had made  
14 the argument, well they haven't really shown us what the  
15 structure of the campaign was, how any of this worked.

16 Well, I don't think that --

17 THE COURT: By "this argument", you're talking  
18 about --

19 MR. BOMSE: The argument that people talk to people in  
20 different organizations and at different levels.

21 THE COURT: Well, they made the arguments. They  
22 didn't put in evidence of it. They still --

23 MR. BOMSE: But we have.

24 THE COURT: And I understand that and we'll talk about  
25 that. But the argument was, you know, we spent a considerable

1 period of time talking about the merits of that argument. Both  
2 from whether or not they've justified it -- because you know,  
3 although the names are different, the structure of that  
4 campaign as described in oral argument wasn't dramatically  
5 different from the way you, the campaign on the other side was  
6 structured. But they hadn't sufficiently done their due  
7 diligence, and in any event I rejected it on the merits, right?

8 MR. BOMSE: Again I certainly can't say what you did.  
9 I can say that from reading your opinion at pages two and  
10 three, I don't think that that's -- that's not what I took from  
11 it.

12 THE COURT: Having talked with you about the notion of  
13 whether or not the Ninth Circuit's description of the limits of  
14 the First Amendment protection as extending to the core group  
15 can fairly be said to be something, anything other than a  
16 limitation, a limiting concept, that is designed to say that  
17 considering all the factors that they considered, in deciding  
18 the scope of the protection imposed by the First Amendment,  
19 that it is limited to a small number of people in what are  
20 equivalent to management type positions, or guiding positions,  
21 and not anybody, anywhere, anyplace, all up and down, anyplace  
22 in the campaign, because "core group" doesn't, to my mind,  
23 doesn't -- is not susceptible of that -- I mean, when I read  
24 the declarations, what you're trying to establish is that we  
25 talked everywhere about formulating strategy. From the person

1 in -- you know from our conversations with every single  
2 activist in each of the counties to all the way up to the top  
3 of the campaign, all of us talked about formulating strategy.  
4 The people on the phone talked to each other at the phone bank  
5 about how they should -- their messages should go out while  
6 they're sitting there. That suggests that the position is,  
7 everybody is -- and it strikes me the core group is just not  
8 susceptible of that kind of interpretation.

9 MR. BOMSE: Well, I have two answers. First one is,  
10 and one of the most famous things ever said about politics,  
11 which is all politics is local. That is you had a statewide  
12 campaign, but you had campaigns that were going on in Madera,  
13 in Sonoma County, down in Yucaipa. And things that were going  
14 to be said to influence voters there, to create messages there,  
15 weren't going to be the same. And to cut this off on the  
16 theory that you need to have some über category at a statewide  
17 level and that it does not include the vast number of people  
18 who came together, recognizing that politics is local, in order  
19 to try to defeat Proposition 8, I think undoes what the  
20 privilege is all about.

21 THE COURT: You still haven't explained to me -- and I  
22 would appreciate an answer to the question.

23 MR. BOMSE: I'm sorry.

24 THE COURT: "Core group", how is that consistent with  
25 the core group? The Ninth Circuit had something specific in

1 mind.

2 MR. BOMSE: Well, maybe.

3 THE COURT: They said it. I have to deal with it.

4 MR. BOMSE: Right. They did use the words in one  
5 footnote, without otherwise in a fairly lengthy and careful  
6 opinion consider what -- that was, to me, rather -- they said,  
7 We need to send this back to the District Court in order to  
8 figure out what "core group" is.

9 And I am suggesting to you that you have, at least by  
10 my lights, to the extent that you did rule on the merits,  
11 underread what a core group ought to be. And we have read it  
12 correctly.

13 But I do want to go further.

14 THE COURT: Okay.

15 MR. BOMSE: I do want to say to you, your Honor, that  
16 we do have the concept of "core group" that was advanced in  
17 another context. Came before the United States Supreme Court.  
18 Had to do with the attorney/client privilege. For years and  
19 years, you had something known as a control group. And  
20 everybody -- not everybody, because it was actually a division  
21 in the law -- but you had this control group notion because  
22 there were only some people up there at the top --

23 THE COURT: I remember it.

24 MR. BOMSE: -- who could have the privilege. And the  
25 Supreme Court took the case, the *Upjohn* case, and it said,

1 Huh-uh, that makes no sense in relation to the privilege --

2           And I went back and I read *Upjohn*. And I would invite  
3 your Honor to do the same, recognizing that it's not the same  
4 privilege. I'm not arguing that it's the same privilege. But  
5 I am arguing to you that we have to read what is said one place  
6 with regard to our knowledge of the law and the purposes more  
7 broadly. We have to make sense of this. Does it not make  
8 sense to say that when you're conducting a campaign, it is not  
9 some group at the top that is creating strategy, and only what  
10 they do is entitled to constitutional protection? Because I  
11 don't think that makes sense.

12           And yes, here I may well be saying that I simply  
13 disagree with what your Honor did the last time, and I simply  
14 invite you --

15           THE COURT: That's allowed.

16           MR. BOMSE: -- within the context of considering what  
17 to do in this case, to think whether or not the evidence we  
18 have put before you, considered in light not simply of  
19 Footnote 12, but of the entirety of the Ninth Circuit's  
20 opinion, means that our position in fact makes sense.

21           THE COURT: Okay.

22           MR. BOMSE: But then I want to come finally to the  
23 question of burden.

24           THE COURT: All right.

25           MR. BOMSE: And I certainly do appreciate your Honor's



1 comments that you are cognizant of the fact that we are a  
2 nonparty. I think it actually goes a little beyond that,  
3 because I think there was an argument for judicial estoppel  
4 here. And it only occurred when I read the reply brief. We're  
5 not nonparties here because we chose to be nonparties here.  
6 We're nonparties here because we sought to intervene and we  
7 failed.

8 THE COURT: Okay.

9 MR. BOMSE: And one of the reasons we failed was  
10 because Mr. Pugno's clients opposed. And one of the grounds on  
11 which they opposed was that we brought nothing new, nothing  
12 additional, to the party.

13 Now, if you go back and read their opposition -- you  
14 will find that on Page 9 -- you will find them talking about  
15 anything useful we have to say can be said simply in an amicus  
16 brief.

17 Well, now, they won that. And now they're coming here  
18 and taking the opposite position, that there is something  
19 unique, something that they need after the witnesses have  
20 concluded in order to make their case. I don't think they  
21 should be heard to make that argument, but even if they should  
22 be heard to make that argument, the argument should be  
23 rejected. They should not be entitled to put a burden of  
24 difficult to guess on us.

25 I -- frankly, your Honor, if this were a question of

1 our going out and looking through a few pieces of paper to  
2 satisfy everybody that there was nothing that actually met  
3 their set, or that there was one innocuous thing that  
4 duplicated things that had been said publicly, well, maybe we  
5 could say, What's the big deal. But that's not the situation.  
6 And we have put before you the numbers of documents that are  
7 involved, the circumstances in which we find ourselves, and --  
8 you know, I'm an antitrust lawyer when I'm not trying to defend  
9 the ACLU.

10 THE COURT: I remember.

11 MR. BOMSE: And the number of documents here relative  
12 to an antitrust case, pretty small. The number of documents  
13 relative to this organization, relative to its financial  
14 situation, relative to the things that its people have to do,  
15 quite substantial. This is not set up like Sony. It's not set  
16 up like The Gap. They don't have staffs and they don't have  
17 servers and they don't have consultants. We're going to have  
18 to go out -- no matter you will do, you're going to end up  
19 imposing a truly enormous burden. I tried to figure out what  
20 are the search terms that we might use that could get this  
21 quickly down to nothing.

22 THE COURT: Well, it can't get it quickly down to  
23 nothing, but one of the things I thought of were just the  
24 search terms that you suggested -- that were inadequate, but  
25 could get it down to 25,000 documents.

1 MR. BOMSE: But 25,000 documents would then have to be  
2 reviewed individually. That's not a small --

3 THE COURT: It's not a small thing. It's about a  
4 third of the 60- or 70,000 documents, I can't remember exactly.

5 MR. BOMSE: Yes, and I'm now talking only about the  
6 ACLU.

7 THE COURT: And I'm sure that Orrick, Herrington to  
8 know, and Sutcliff will help them when they do it.

9 MR. BOMSE: You know, I thought about that.

10 THE COURT: I'm sure you did.

11 MR. BOMSE: And I understand, you can order --

12 THE COURT: And Fenwick & West.

13 MR. BOMSE: You can order us to do that. But I think  
14 that you're imposing a cost that shouldn't be borne unless  
15 there is clearly a basis to do that. Unless you have  
16 concluded, after taking into account all of the other things,  
17 after taking into account what are the odds, after taking into  
18 account "difficult to guess", after taking into account the  
19 question of how we really apply privilege in this circumstance,  
20 and the likelihood that at the end of the day, we will come up  
21 with anything meaningful, that they will then be able to get it  
22 into evidence. I would suggest to you that telling Orrick,  
23 Herrington and Sutcliff or Fenwick & West that you need to  
24 undertake this task -- I think it's undue.

25 THE COURT: Uh-huh.

1           MR. BOMSE: And I don't think there's a showing that's  
2 been made that justifies it.

3           THE COURT: Okay.

4           MR. BOMSE: I have taken more than my time at the  
5 podium, but of course, if your Honor has any questions...

6           THE COURT: I don't. I want to hear from the other  
7 nonparties. I'm particularly interested in hearing from  
8 Equality California next if I could, because I do want some  
9 elucidation about the campaign structure in the core group in  
10 that regard. And thank you for the very detailed declaration.  
11 That was most helpful.

12           But it -- and it does try to make the same argument  
13 that Mr. Bomse made, of course, which is that this is a  
14 campaign where everybody from the chairman to the local  
15 assistant talked about everything from signage to formulation  
16 of messaging. And the question is, if I decide -- and I'm not  
17 deciding right now; I'll take it under submission at the end of  
18 this hearing -- not to go -- to infringe that direction, the  
19 question is: What can I, with some careful thought, carve out  
20 as an appropriate core group? And the -- you, you know this  
21 is -- I am concerned, the documents are with regard to Equality  
22 California, but you elucidated on the Equality For All umbrella  
23 campaign, which I think was appropriate. It has, as I  
24 understand it, an executive committee. It has a campaign  
25 committee. I assume that while those are people from member

1 organizations, they are identifiable human beings; is that  
2 right?

3 MS. WHITTEMORE: Yes, that is correct, your Honor, and  
4 may I approach the bench? I brought an additional document.

5 THE COURT: Sure. Karen.

6 MS. WHITTEMORE: Under Tab A, you'll find the  
7 declaration we filed last night.

8 THE COURT: Yeah.

9 MS. WHITTEMORE: But under Tab B, I tried to sort of  
10 provide a visual of how the "No on 8" Equality For All campaign  
11 is structured to help provide some understanding of why so many  
12 of the communications at different levels could possibly fall  
13 under the privilege.

14 And as you can see at the first level, the executive  
15 committee, campaign committee and campaign consultants all took  
16 part in core conversations involving campaign --

17 THE COURT: This isn't about core conversations.  
18 There's lots of core conversations. We're all having core  
19 conversations. This is about core individuals.

20 MS. WHITTEMORE: Yes, and I think we can, you know,  
21 definitely point to the executive committee as action a group  
22 of individuals who definitely engaged in some of the important  
23 campaign strategy and messaging. However focusing only on the  
24 executive committee leaves out the campaign commit did he which  
25 had a rather difficult to pin down membership, because the

1 campaign committee was made up of member organizations and  
2 individuals at those member organizations were on some calls,  
3 were on some of the e-mails, but were not on every single  
4 e-mail. And the --

5 THE COURT: Why doesn't that cut against you? I mean,  
6 I've articulated that my preliminary thought is that the  
7 concept of a core group with responsibility for formulation of  
8 strategy and messaging is an intentional design by the circuit  
9 to limit the reach of not First Amendment rights -- Mr. Bomse  
10 said something about limiting First Amendment -- it's not about  
11 limiting First Amendment rights. It's about the extent of the  
12 First Amendment privilege from disclosure. Slightly different  
13 concept. But it's designed to limit that concept to particular  
14 people that they have described.

15 If you have a floating campaign committee which is  
16 anybody from these organizations who shows up and sometimes  
17 people show up and sometimes they don't, you know, that's  
18 essentially a membership group. Why isn't that obviously not a  
19 core group within the meaning of what the circuit had in mind?

20 MS. WHITEMORE: Well, I think, looking at the  
21 Circuit's opinion, they were, in talking about the core group,  
22 they were looking at the associational interests of those  
23 individuals. And although an individual at NCLR might not have  
24 been on every single conference call and contributed to every  
25 single e-mail conversation about a certain campaign strategy,

1 that does not mean that that individual did not want to  
2 participate and have a free flow of information and express  
3 their political ideas in the context of the campaign.

4 THE COURT: I understand. But there's lots of people  
5 who do that. And that reads too much life into "core group".  
6 That means the entire campaign, other than people who just  
7 happen to be handing out fliers, would be covered by the core  
8 group. Core group is a limiting concept of individuals who are  
9 engaged in the formulation of campaign strategy and messaging.

10 It doesn't mean people who ratify campaign messaging  
11 and strategy. It doesn't mean people who distribute  
12 campaign -- it doesn't mean people who modify it when they're  
13 down in the field talking to a particular activist. It  
14 means -- it's a much more vibrant concept than that. It seems  
15 to me that the circuit was balancing all those things.

16 So it is, if I have, you know, a group which is  
17 essentially just -- maybe I can ask the question this way:

18 The campaign committee is a -- is a committee of all  
19 the members of Equality For All, all the organizations that are  
20 members of it?

21 MS. WHITTEMORE: Yes, organizations who joined the  
22 campaign.

23 THE COURT: Which is the membership of the Equality  
24 For All campaign?

25 MS. WHITTEMORE: Right.

1 THE COURT: So when you say it's a campaign committee,  
2 it is -- in fact, it's a membership -- it's a meeting of the  
3 members of the entire campaign, right?

4 MS. WHITTEMORE: Yes.

5 THE COURT: So how can I say that's a core committee,  
6 how can I say that's the core group within the committee,  
7 within this group? I -- I'm not sure how -- the practical  
8 significance of these distinctions, frankly, because you know,  
9 if you tell me these folks are on your executive committee, the  
10 likelihood is I say, Fine, you get them all. But how can I go  
11 to just the meaning at which members participate or don't?  
12 It's everybody who's a member, who can be in it, how can that  
13 be a core group with the responsibilities the circuit talked  
14 about?

15 MS. WHITTEMORE: Because this was a statewide campaign  
16 that was targeting every single discrete group of voters that  
17 you could imagine. That was running campaigns in Fresno and in  
18 San Francisco and in Oakland, and had to employ very different  
19 strategies and messaging to reach all of those regions and  
20 groups.

21 THE COURT: But aren't you just talking about the  
22 campaigns? I mean, a presidential campaign does the same  
23 thing. A senatorial campaign does the same thing. And not --  
24 if you're talking about the core group of a campaign, it  
25 renders -- don't you think it renders it meaningless to



1 interpret it the way you're interpreting it? That it's not a  
2 core group?

3 MS. WHITTEMORE: Well, I --

4 THE COURT: You may disagree with what the Circuit  
5 did -- and I don't have a problem with you disagreeing with  
6 what the Circuit did.

7 MS. WHITTEMORE: I think it's problematic to get hung  
8 up on the word "core" when we're talking about persons who had  
9 a role in campaign strategy and messaging and the formulation  
10 of that strategy and messaging.

11 THE COURT: I --

12 MS. WHITTEMORE: Because we can say there's a group of  
13 18 to 20 people on the executive committee who no doubt had a  
14 very powerful role in formulating strategy. However, that does  
15 not preclude the fact that people on the campaign committee  
16 also had a role in that. It's -- they think using the word  
17 core is forcing us to limit it, when in fact what we should be  
18 looking at are the levels of activity rather than --

19 THE COURT: I'd love not to use the word "core". I  
20 didn't make it up. It's not my word.

21 MS. WHITTEMORE: I understand that. And I think if we  
22 focus instead on the associational interests of the people who  
23 were working in the campaign, it would be a much more useful  
24 way to come at it.

25 THE COURT: So let me ask you a different question:

1 So we've talked about the executive, we've talked about the  
2 campaign committee. There is a vague -- and let me just look  
3 at your -- there's campaign staff.

4 MS. WHITTEMORE: There's several levels of staff.  
5 There's -- Equality For All had paid staff. And paid staff at  
6 the various member organizations also worked on the Equality  
7 For All campaign, either part-time or some of them full-time.  
8 But were paid by their member organizations.

9 THE COURT: Okay. And I'm just trying to figure out  
10 what the significance is for this. We're talking about  
11 documents in Equality California's possession that may be  
12 communications between individuals of Equality California and  
13 someone else at Equality For All.

14 The campaign manager, I don't think it's possible to  
15 object to the campaign manager being part of a core group. You  
16 know maybe there are some other levels of staff that are  
17 clearly part of a core group and that's what I'm trying to  
18 elucidate, because you've talked in general terms about the  
19 staff, but you know, who would be the individuals that on the  
20 staff like the executive committee have the responsibility for  
21 the formulation of a strategy for the campaign and the  
22 messaging for the campaign.

23 MS. WHITTEMORE: Well, there were directors within the  
24 Equality For All staff for different regions, and also for  
25 different topical areas.

1 THE COURT: So there were regional directors, field  
2 directors and -- or area directors or whatever, subject matter  
3 directors, campaign manager, and were those individuals  
4 involved, you'll say yes, involved in the core group of  
5 formulating....? Who are those people? How many of them are  
6 there.

7 MS. WHITEMORE: I can't speak to that right now. I  
8 can say it's probably in the double digits.

9 We made an effort to collect all of these names before  
10 we came to the hearing today and we quickly ran into the  
11 problem that if we get nine of the names and there are 12  
12 names, that will effectively destroy the privilege.

13 THE COURT: I understand the problem. They understand  
14 the problem. Everybody's got that.

15 No, I think core group is a slippery and difficult  
16 concept to apply. But I'm trying to do it as I can.

17 You had lots of different consultants. Which  
18 consultants were involved in formulating messages?

19 MS. WHITEMORE: Again, it depends on how we define  
20 "formulating messages". I mean, we could point to the --

21 THE COURT: Writing.

22 MS. WHITEMORE: -- general campaign consultants who  
23 did provide important input on how to formulate the messages.  
24 How to --

25 THE COURT: How to say it.

1 MS. WHITTEMORE: -- address certain populations. But  
2 then we also -- the campaign also received expertise from  
3 people who would provide outreach services, people who'd  
4 provide advertising services, people who provided web services.  
5 Because this, you know, getting into social media is a new  
6 thing, relatively new thing for campaigns. So help in that  
7 arena on how to formulate Twitter messages, and -- I mean,  
8 that's also part of the strategy of getting the messaging out  
9 there.

10 THE COURT: How many consultants were there that were  
11 involved in what you count as formulating messages?

12 MS. WHITTEMORE: I think we had about 15 to 20  
13 consultants.

14 THE COURT: So do you think -- how quickly do you  
15 think you could put together an affidavit for me that  
16 identifies the specific individuals who were employed as  
17 campaign managers, or you called it field directors or regional  
18 directors -- in their role in formulating messaging? And  
19 consultants that you think, specific individuals you think were  
20 involved in this, as consultants in formulating messaging. How  
21 quickly could that be put together?

22 MS. WHITTEMORE: I think we could do that by mid next  
23 week.

24 THE COURT: What's today, Thursday? So by March 3rd.

25 MS. WHITTEMORE: To make sure I understand what you're

1 asking, are you interested in a more complete definition of  
2 individuals on the executive committee.

3 THE COURT: You've got to -- you now have given me I  
4 think a list of individuals on the executive committee.

5 MS. WHITTEMORE: Well, this list I've provided does  
6 not include all of the officers.

7 THE COURT: Well -- yes, fine. Any executive  
8 committee members?

9 MS. WHITTEMORE: And the campaign committee.

10 THE COURT: Well, from your description of the  
11 campaign committee, I don't see how that's a useful venture.  
12 It's every member, presumably every member organization had  
13 different people at different times participate in various  
14 meetings of the membership, and from your description I don't  
15 know that that's a useful venture.

16 MS. WHITTEMORE: Well if it would be possible to  
17 identify a few individuals who played a larger role than  
18 others, would you accept information on that.

19 THE COURT: Yeah, I think if there are a few -- I  
20 mean, I don't have a fixed idea, despite what I have said of  
21 exactly how many people can be on a core group, or whatever it  
22 is, and by sheer dint of you putting in more evidence, the core  
23 groups that are going to be elucidated in this order are going  
24 to be much larger than the ones on the other side just because  
25 you've gone to greater lengths to identify more people. You've

1 also had more time to identify more people.

2           You're also a third party, so I think I have to be  
3 more considerate of the burdens.

4           But if you want to identify a few individuals in the  
5 campaign committee who had particularly important roles in the  
6 formulation of messaging and strategy, you can.

7           MS. WHITEMORE: I appreciate that, your Honor. And  
8 if I may add some information on the burden.

9           THE COURT: Before you get to that, I want to talk  
10 about the Institute. I didn't really understand why the  
11 Institute would be part of the core group of Equality  
12 California for the formulation of strategy and messaging.

13           MS. WHITEMORE: Well, the board of the Institute was  
14 involved with the effort of Equality California with regards to  
15 fundraising. I mean, they were included on discussions about  
16 which people to target, whether they would try to reach out to  
17 new populations, the --

18           THE COURT: So if I, for example, limited by subject  
19 matter, the communications that are going to be produced to, as  
20 I did before, documents, you know, referring or relating to or  
21 containing arguments for and against Prop 8, and, as I'm likely  
22 to do, put in if it's electronic-only, search it for the  
23 following search terms: Proposition 8, "No on 8", "Yes on 8",  
24 Prop 8 -- something like that -- am I going to pick up any  
25 Institute fundraising activities in that group? Or is that

1 subject matter sufficient so that we don't need to get into  
2 whether the Institute's part of the --

3 MS. WHITTEMORE: I think if you search the e-mail of  
4 anyone who had any association with Equality California with  
5 those search terms, you're going to hit everybody.

6 THE COURT: Okay.

7 MS. WHITTEMORE: E-mails -- regarding whether it was  
8 strategy or whether it was logistics, were undoubtedly  
9 disseminated to the entire staff and boards of directors.

10 THE COURT: I see.

11 MS. WHITTEMORE: So those will be picked up and a  
12 human being will have to read each of those e-mails.

13 THE COURT: I can certainly see your point.

14 Okay. And did you give us the names of the directors  
15 of the institute? Yes, you did.

16 MS. WHITTEMORE: Yes.

17 THE COURT: Okay. Tell me a little bit about the  
18 burden from your perspective.

19 MS. WHITTEMORE: Yes. In our -- the first declaration  
20 from Jim and Carol that we submitted with our opposition, we  
21 gave a conservative estimate of the number of e-mails that  
22 we --

23 THE COURT: Remind me what that was.

24 MS. WHITTEMORE: Approximately 50,000. That was based  
25 on a rather unscientific pole of talking to several of his

1 colleagues and running some basic word searches and figuring  
2 out how many e-mails that might pick up. But if we broaden  
3 that to all of the, both boards of directors and all of the  
4 staff who had involvement in the campaign, it's going to be a  
5 much larger number.

6 THE COURT: Well both boards of Equality California.

7 MS. WHITTEMORE: Yes. And way that Equality  
8 California runs their e-mail system, they do have a main e-mail  
9 server. However, individual e-mail users can archive past  
10 e-mails, and those archives are stored on individual hard  
11 drives, so...

12 THE COURT: How many hard drives?

13 MS. WHITTEMORE: Well, there are approximately 75  
14 people in the list that we gave you.

15 THE COURT: Right.

16 MS. WHITTEMORE: So in order to ensure that we have  
17 gathered all of the potential relevant e-mails, we might have  
18 to image 75 hard drives.

19 THE COURT: Well, how can we constrain that burden?  
20 Are there servers on which it's more likely that the relevant  
21 e-mails reside.

22 MS. WHITTEMORE: Yes. I mean we could just pull the  
23 e-mails off the main web server and not check every  
24 individual's hard drive to see if they had archived some of the  
25 e-mails from the pertinent time period.



1 THE COURT: And the -- tell me about the web -- the  
2 server you use. The server is the e-mail server for all of the  
3 individuals we're talking about in terms of their campaign  
4 e-mail for Equality California, right?

5 MS. WHITTEMORE: Yes.

6 THE COURT: And is it -- and how far back will the  
7 unarchived e-mails that are on there go?

8 MS. WHITTEMORE: It totally depend on the individual  
9 user. Some people archive at the end of each year. Other  
10 people --

11 THE COURT: Never.

12 MS. WHITTEMORE: Other archive --

13 THE COURT: That's my e-mail strategy.

14 MS. WHITTEMORE: However, another issue is that some  
15 of the board members might not use their Equality California  
16 e-mail account for all of their communications. Many of the  
17 board members are affiliated with other organizations and so  
18 would likely use their own organization's e-mail account.

19 THE COURT: Uh-huh. Well, I don't know how I deal  
20 with that. I appreciate the burden issue. I'm -- it's, you  
21 know, I'll take a look at all this, but if I conclude that this  
22 information is producible, I want to reduce the burden as much  
23 as I can, but I'm not sure how I do that, given your  
24 description. I'm open to thoughts or suggestions you may have.  
25 But I'm not sure I can do it.

1           One way we could think about it is, and I don't know  
2 how the other groups keep their e-mails, but is if the -- is  
3 that given that it's nonparty discovery, I could limit it to  
4 the Equality California server. And order those produced.  
5 That's one possibility.

6           And you don't have an estimate of what the nature of  
7 the number of documents a search would turn up on the web  
8 server?

9           MS. WHITTEMORE: No, but we could get that information  
10 relatively quickly.

11           Another suggestion would be to limit the number of  
12 people at Equality California whose e-mail would be searched.  
13 For example, Jeff Corse is on the executive committee. There  
14 were a few other people who had -- some of the people at  
15 Equality California had more significant involvement than  
16 others.

17           Everybody participated to some extent. But it  
18 wouldn't be possible to identify --

19           THE COURT: Why don't you in your submission on the  
20 3rd, take a stab at describing what might be a reasonable  
21 search methodology, what servers would be searched. And, if  
22 you want, how. Or I'll do it -- I'll make -- or I'll make my  
23 own suggestions.

24           But -- and if you would do that, then I can get --  
25 because I don't -- because I think it's your call.

1 MS. WHITTEMORE: Thank you, your Honor.

2 THE COURT: Yeah. Anything else?

3 MS. WHITTEMORE: One other point I wanted to make is,  
4 again, looking at the Ninth Circuit opinion, they did suggest  
5 that the Court could require that we delete or redact names  
6 from e-mails in order to protect the membership list aspect.  
7 In particular e-mails that went from the executive committee to  
8 the campaign committee.

9 THE COURT: Yeah, I mean, the -- and I think in the  
10 past, and plaintiffs may know better than I'll know, and you  
11 may know, any sort of rank and file member's names were allowed  
12 to be redacted, and I would certainly encourage you to do that  
13 at this time. I would also encourage you to produce the  
14 documents to the extent they're sensitive under our protective  
15 order which I think allows nonparties to designate, which I  
16 think is our standard order of protective orders, it probably  
17 does, designate them in whatever fashion you think's  
18 appropriate, including attorney's eyes only. You know, it has  
19 only certain limited utility. The attorneys on both sides are  
20 involved in this matter. But you know, the City Attorney's  
21 office is going to see this, as well as counsel for the  
22 intervenors.

23 But -- there's some additional, at least court-ordered  
24 protections, and those kind of protections -- you're welcome to  
25 use that as well.

1 MS. WHITTEMORE: Thank you, your Honor. Do you have  
2 anything further?

3 THE COURT: No. Thank you. I wanted to hear a little  
4 bit from Californians Against Elimination of Basic Rights.

5 Do we have anything to talk about?

6 MS. KROGSENG: Not quite as much as you had to talk  
7 about with them. But I would like to note that we do join  
8 their arguments regarding relevance the reason we produced is  
9 obviously we're a much smaller organization.

10 THE COURT: It's easier.

11 MS. KROGSENG: And we thought it would be easier to  
12 just go ahead and attempt to produce. So if you have any  
13 concerns...

14 THE COURT: In terms of what you haven't produced.  
15 What you haven't produces is otherwise requested documents  
16 which were between your -- the people on your staff or involved  
17 in your group and the other nonparties who are resisting the  
18 subpoenas here?

19 MS. KROGSENG: It's a handful of documents. We  
20 thought it was fair to withhold them until you gave a decision  
21 regarding ours, so...

22 THE COURT: That's fine.

23 MS. KROGSENG: In addition to that, we have withheld  
24 only, you know, again, a handful of documents that were amongst  
25 the core group that discussed an argument about -- or sorry,

1 for or against Prop 8.

2 THE COURT: And the core group is as reflected in your  
3 letters and the declaration.

4 MS. KROGSENG: Right.

5 THE COURT: Okay. Thank you. I appreciate that.

6 MS. KROGSENG: Thank you.

7 MR. DUSSEAULT: May I be heard on a single issue?

8 THE COURT: Only one. No, you can talk about any  
9 issue you want. We've got all of five minutes.

10 MR. DUSSEAULT: Christopher Dusseault, Gibson Dun &  
11 Crutcher, for the plaintiffs.

12 We didn't take a position on the motion, so I'm not  
13 going to address whether they should be granted or denied, but  
14 there was a single issue discussed that I did want to raise one  
15 more point, and it's the issue of timing.

16 THE COURT: I thought you might.

17 MR. DUSSEAULT: So it's probably predictable what I'm  
18 going to say.

19 I don't mean to make your job hard, but from the  
20 beginning of this case, we have proceeded with the recognition  
21 that plaintiff's claims implicate constitutional rights, and  
22 therefore cause irreparable harm every day that they are unable  
23 to exercise those constitutional rights. I would hope that in  
24 crafting a remedy here and in weighing what the appropriate  
25 burden is, your Honor would consider that and implement an

1 approach, if documents are to be produced, that could  
2 realistically could be done in a relatively short window of  
3 time. Mr. Pugno has indicated today that his end game here is  
4 some kind of document dump -- those are his words, not mine.

5 THE COURT: I'm sure it's not Judge Walker's.

6 MR. DUSSEAULT: And obviously it will ultimately be up  
7 to Chief Judge Walker what to do with that, but with that being  
8 their end game, I'm sure they'll take a position that any  
9 ruling should be delayed while this is ongoing and because we  
10 have irreparable harm and because we have constitutional rights  
11 I think it's imperative that we do this as quickly as possible.

12 THE COURT: I appreciate that.

13 Mr. Bomse, one more thing; and I think Mr. Pugno may  
14 want to say something.

15 MR. BOMSE: Seems to me he ought to have the  
16 prerogative, if he does.

17 MR. PUGNO: Go ahead.

18 THE COURT: Go ahead.

19 MR. BOMSE: I merely wanted to suggest that in the  
20 event you do decide, and I hope you won't, that the game here  
21 is worth the candle, that you will hold a subsequent hearing.

22 THE COURT: You say things in the greatest way. I  
23 love that.

24 MR. BOMSE: On the specific -- you know where that  
25 comes from? You say you have to light a candle --

1 THE COURT: Yes, yes.

2 MR. BOMSE: Because I really do predict that, this is  
3 not based upon having looked at the documents, but by the time  
4 we have eliminated the people who would be involved, by -- we  
5 will be down to a large corpus of documents, that we will have  
6 to look through in order to find that there is the tiniest  
7 handful of responsive things, none of which one can say what  
8 are the odds will contain something new -- that is, something  
9 that did not make its way out into the public. And I hope your  
10 Honor will take that balance into consideration.

11 But I also would ask you to take into consideration  
12 the possibility of avoiding undue burden, if you're going to  
13 impose one, by a fee-shifting provision. That is, rather than  
14 making Orrick enter into involuntary servitude for this  
15 enterprise.

16 THE COURT: This is not personal. I like Orrick.

17 MR. BOMSE: It's not personal. It's going to be  
18 personal to me. It's my wife who's going to be taking your  
19 name in vain.

20 THE COURT: You know how to hurt.

21 MR. BOMSE: But instead, I would suggest it is to  
22 allow them to bear the burden of us going through what I am  
23 quite confident will turn out to be a monumental waste of time.  
24 And while, as I say, I hope we avoid that, because of the way  
25 in which you rule on the merits, certainly if there is a burden

1 here, it ought to be borne by somebody else, not by us.

2 THE COURT: Okay. Thank you for that suggestion.

3 Mr. Pugno, agreement to that, I'm sure? Yes.

4 MR. PUGNO: Your Honor, I actually crossed off one of  
5 the points I'd like to make, but Mr. Bomse had me bring it back  
6 on to the table.

7 THE COURT: Go ahead.

8 MR. PUGNO: With regard to the remoteness of the  
9 possibility that anything useful is going to come up, I would  
10 just inform the Court that we ultimately under the rules set by  
11 the Court ended up producing over 11 thousand documents, nearly  
12 12,000 documents. And you might remember, your Honor, from the  
13 January 20th hearing when I was here that I was describing in  
14 many cases where the most sensitive analyses of messaging and  
15 strategy and so on, that if it had been sent to a major donor  
16 or to a very significant player who was not in the core, that  
17 was a produced document.

18 And so with regard to the argument that it's remote  
19 that anything worthwhile will come out, I think just by nature  
20 of the way this whole little test has been formulated, in fact,  
21 it does.

22 THE COURT: How many documents did you have to review  
23 to get down to your 11,000? Do you know that?

24 MR. PUGNO: I do know it was many tens of thousands,  
25 and I would say on the order of magnitude of two or three times



1 the documents that the individual third parties have suggested  
2 that they need to go through.

3 I might also remind the Court that we had to do it  
4 while our entire legal team was in trial.

5 THE COURT: No -- as you told me at the time. I know,  
6 I know.

7 MR. PUGNO: Yeah, that was quite a burden. But I do  
8 want to say, for the record, that we actually very much  
9 sympathize with the third parties here. I think we share their  
10 disagreement with some of the ways in which this rule has been  
11 articulated, and I think they've done a very good job of  
12 explaining how this rule results in a lot of things being  
13 disclosed that probably should not be disclosed. So I just  
14 want to make that clear.

15 THE COURT: Okay.

16 MR. PUGNO: I do want to specifically say, with regard  
17 to this new exhibit that Equality California has provided.

18 THE COURT: Yes.

19 MR. PUGNO: As far as I can tell, the structure that's  
20 been put forward, I think your Honor has acknowledged, would  
21 essentially involve anyone who had anything to do with any  
22 organization opposing Prop 8 in California. And in fact,  
23 the -- their declaration states that all participants in the  
24 campaign participated in the formulation of messaging and  
25 strategy. And so because there's not really a lot of specific

1 information, I think it is hard for the Court to figure out who  
2 is in this core.

3 I want to also point out that who was in this  
4 membership list of organizations, there were about 15 -- I know  
5 I'm testifying, but there were about 15 individual campaign  
6 committees registered with the state to fight over Prop 8. And  
7 I recognize at least seven and maybe 10 of the organizations  
8 here that have just been handed to us that formed and operated  
9 campaign committees of their own. And so this attempt now to  
10 say that the committee sponsored by Equality California, that  
11 was created by, under state law, as a ballot measure committee,  
12 somehow enveloped all of these another organizations, really  
13 just is -- is -- I understand the effort, but I think it is  
14 far, far too inclusive and really is not consistent with the  
15 fact that these organizations were running campaigns of their  
16 own.

17 THE COURT: But consistent with the position you took  
18 in January.

19 MR. PUGNO: And on which we lost.

20 THE COURT: Yes, right.

21 MR. PUGNO: So that --

22 THE COURT: So our lives would be simpler, yes.

23 MR. PUGNO: I do think that the CAEBR organization, I  
24 would draw the Court's attention to document 593, their  
25 declaration where they identified at Page 3, Paragraphs (g),

1 (h) and (i), they list several categories of individuals that  
2 were provided with internal drafts of information. And I want  
3 to remind the Court that being provided with and exposed to  
4 drafts was held not to be sufficient to be included within the  
5 core.

6 THE COURT: Uh-huh.

7 MR. PUGNO: ACLU's declaration, Document 597,  
8 similarly goes through some fairly remote categories of  
9 individuals that really I think are beyond the core.

10 THE COURT: Okay.

11 MR. PUGNO: So the very last thing -- again, I just  
12 want to say we sympathize with this situation the third parties  
13 are in. We did suffer quite a burden, and we're sorry to see  
14 that they need to do the same. Or may need to do the same.

15 THE COURT: Maybe this time it will go en banc.

16 MR. PUGNO: Yeah, maybe.

17 And all that we're looking for, your Honor, is that  
18 it -- the same rules be applied uniformly. That's all we're  
19 asking for.

20 THE COURT: Okay.

21 MR. PUGNO: Thank you.

22 THE COURT: Anyone who hasn't spoken want to speak  
23 before I give anyone who has one last chance? Okay? Are we  
24 all good? Anything further?

25 MS. WHITTEMORE: If I may.

1 THE COURT: Yes.

2 MS. WHITTEMORE: Your Honor, regarding the structure  
3 of Equality For All, I would like to point out that in  
4 defendant/intervenor's motion to intervene, they identify  
5 themselves as the campaign committee for Proposition 8.  
6 Equality For All wasn't an organization that existed prior to  
7 the Prop 8 campaign. The campaign committee was formed from  
8 that organization. And we certainly do not dispute that  
9 individuals who work at Equality California did have a very  
10 significant role in Equality For All. It is, in fact, a  
11 separate organization. The campaign committee was made up of a  
12 number of member organizations, some of whom had their own  
13 involvement in the campaign, but that does not take away from  
14 the fact that they were involved in the umbrella "No on 8"  
15 Equality For All campaign.

16 THE COURT: Okay. All right.

17 MS. WHITTEMORE: Thank you.

18 THE COURT: Are we done?

19 Okay. Well, thank you. I very much appreciate all  
20 the effort you all went through to brief this and get the  
21 declarations in so promptly, and I appreciate the argument.  
22 And I'll take it under submission, and I'll look forward to the  
23 additional affidavit on Wednesday. I'll probably await and put  
24 out a ruling shortly thereafter.

25 Okay?

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MR. BOMSE: Thank you, your Honor.

MR. DUSSEAULT: Thank you.

MS. KROGSENG: Thank you.

MS. WHITTEMORE: Thank you, your Honor.

THE COURT: The court stands in recess.

(Adjourned)

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CERTIFICATE OF REPORTER

I, Connie Kuhl, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into written form.

*Connie Kuhl*

\_\_\_\_\_  
Connie Kuhl, RMR, CRR  
Wednesday, March 10, 2010