

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

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

Plaintiffs,)

VS.)

NO. C 09-2292-VRW

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

Defendants.)

San Francisco, California

Tuesday

March 16, 2010

TRANSCRIPT OF PROCEEDINGS

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

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P R O C E E D I N G S

1
2 **MARCH 16, 2010**

10:33 A.M.

3
4 **THE CLERK:** Calling civil case 09-2292, Kristin
5 Perry, et al. and the City and County of San Francisco versus
6 Arnold Schwarzenegger, Prop 8 Official Proponents, et al.

7 Counsel, come to the podium and state your
8 appearances.

9 **MR. BOMSE:** Good morning, Your Honor.

10 Stephen Bomse, Orrick, Herrington & Sutcliffe, and
11 Elizabeth Gill on behalf of the ACLU.

12 **THE COURT:** Very well. Good morning, Mr. Bomse.

13 **MR. BOMSE:** Good morning.

14 **MS. WHITTEMORE:** Good morning, Your Honor.

15 Lauren Whittemore and Lynn Pasahow from Fenwick &
16 West, representing Equality California.

17 **THE COURT:** Good morning, Ms. Whittemore.

18 **MS. KROGSENG:** Good morning, Your Honor.

19 Kari Krogseng, at Remcho, Johansen & Purcell, on
20 behalf of Californians Against Eliminating Basic Rights.

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

22 Christopher Dusseault and Enrique Monagas, of Gibson,
23 Dunn & Crutcher, on behalf of the plaintiffs.

24 **THE COURT:** Mr. Dusseault, good morning.

25 **MS. LEE:** Good morning, Your Honor.

1 Deputy City Attorney Mollie Lee on behalf of
2 plaintiff-intervenor City and County of San Francisco.

3 **THE COURT:** Ms. Lee, good morning.

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

5 Jesse Panuccio of Cooper & Kirk, on behalf of
6 defendant-intervenors.

7 **THE COURT:** Mr. Panuccio.

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

9 Deputy Attorney General Tamar Pachter on behalf of
10 the attorney general.

11 **THE COURT:** Ms. Pachter.

12 Very well. Let's begin this morning's discussion
13 with you, Mr. Bomse.

14 **MR. BOMSE:** Thank you.

15 **THE COURT:** I'm sure you know the standard that you
16 have to meet is clear error.

17 **MR. BOMSE:** The standard which we have to meet is
18 that an error of law was committed --

19 **THE COURT:** And it is clear.

20 **MR. BOMSE:** I --

21 **THE COURT:** And you recognize that?

22 **MR. BOMSE:** We -- I recognize the task that is ahead
23 of us.

24 **THE COURT:** All right. Now, tell me, of course, what
25 is the clear error the Magistrate committed?

1 **MR. BOMSE:** The Magistrate committed a clear error in
2 his determination that this information is relevant to a
3 sufficient degree to justify the burden that is being imposed.

4 We view those matters as being interrelated.

5 **THE COURT:** What have you submitted to establish a
6 burden, other than what you contend was the burden before the
7 magistrate? That is to say, as I read the papers that have
8 been submitted, you've submitted nothing to establish that
9 there is any burden imposed by the Magistrate's order. You
10 made an argument before him that there was some level of
11 burden. He then crafted a substantially narrower order. And
12 you have not submitted anything with respect to the burden of
13 complying with the Magistrate's order.

14 **MR. BOMSE:** Your Honor, we did not believe that it
15 was appropriate to submit additional materials in connection
16 with these objections that go to that issue. We rest upon the
17 materials that were submitted to the Magistrate Judge.

18 **THE COURT:** But the issue is whether or not the
19 Magistrate committed clear error.

20 **MR. BOMSE:** That's correct.

21 **THE COURT:** So you start with what the Magistrate
22 required. And if that imposed an undue burden, then you have
23 to establish that fact. Do you not?

24 **MR. BOMSE:** Yes. And --

25 **THE COURT:** You haven't submitted anything.

1 **MR. BOMSE:** We have the record that was submitted
2 before the Magistrate Judge. I must --

3 **THE COURT:** But the request that the Magistrate dealt
4 with is different from the request that the Magistrate granted.

5 **MR. BOMSE:** Well, the Court must assess the question
6 of burden based upon what Magistrate Judge Spero ordered. But
7 the record on which that is to be assessed is the record that
8 is submitted.

9 But I think that putting burden as an issue
10 independent of relevance seems to me to be a fundamental
11 mistake. As we've said, we believe that the two are quite
12 closely related.

13 Now, if one wants to focus solely on the question of
14 burden, we have said what the burden will be under,
15 essentially, the conditions that were specified by Magistrate
16 Judge Spero, with the exception that he has relieved us of the
17 obligation of providing a privilege log.

18 **THE COURT:** He has done more than that. He has done
19 quite a bit more than that.

20 **MR. BOMSE:** Well, by -- by our lights, he has not.
21 He has not done anything which is going to make the burden of
22 review materially less than we anticipated that it would be
23 when we appeared in front of him.

24 One Court will, of course, make its own determination
25 whether that burden is undue, because that is, after all, the

1 standard. And, in fact, I think that you could look at the
2 question of burden in the context of many litigations and say
3 this doesn't seem to be all that hugely burdensome compared to
4 what is sometimes required.

5 But I don't think that that's the right way to look
6 at it, with all respect, Your Honor. I think the place to
7 start is with the game. Then we find out whether that game is
8 worth the candle.

9 And it's our position that the relevance here is
10 either nonexistent or so attenuated that it cannot justify
11 imposing what is under the Magistrate's more limited order a
12 significant burden.

13 We are talking about reviewing thousands upon
14 thousands, tens of thousands of documents, to determine whether
15 or not they satisfy the conditions of relevance. And that is
16 not an insubstantial burden. This is not something that can be
17 done with the push of a button. It is something that is, in
18 fact, quite substantial.

19 Now, is that an appropriate burden to place upon
20 these nonparties? Well, I think, as I say, we can't answer
21 that question without going to the question of relevance. But
22 as far as what --

23 **THE COURT:** Let's just talk about burden for a
24 moment.

25 **MR. BOMSE:** All right.

1 **THE COURT:** Before the Magistrate you said that there
2 are approximately 61,000 potentially relevant communications
3 stored in the Microsoft Outlook files. And then when simple
4 search terms are applied -- these are, essentially, the search
5 terms that the Magistrate required to be searched for -- the
6 number reduced down to about 25,000 potentially responsive
7 communications.

8 **MR. BOMSE:** Yes.

9 **THE COURT:** Okay.

10 **MR. BOMSE:** That's correct. That is only as to the
11 ACLU. That is not as to our co-party objector Equality
12 California.

13 I believe that the burden that they believe that they
14 would encounter is considerably more substantial. And, again,
15 they have chosen to rest, as we do, upon the record that we
16 submitted before Magistrate Judge Spero. And we are happy to
17 rest upon --

18 **THE COURT:** Well, how much is it going to cost and
19 what is the number of responsive documents that would have to
20 be reviewed in order to comply with the Magistrate's order?

21 **MR. BOMSE:** I can speak to the ACLU. And it appears
22 that it's 25,000, once you apply those search terms. Ms. Gill,
23 who is actually the person responsible for evaluating this at
24 the ground level, tells me that it's more.

25 **THE COURT:** Well, but where is this -- this is not in

1 the record. You haven't submitted anything.

2 **MR. BOMSE:** Well, we'll -- we'll stand on what has
3 been submitted. And if you want to say it's 25,000, 25,000
4 e-mails to look through manually is not a small group. I
5 mean --

6 **THE COURT:** With a discreet number of search terms?
7 Those --

8 **MR. BOMSE:** Those are the documents that you end up
9 with after you apply the search terms. Then you have to go and
10 figure out which of those documents, document by document, is
11 relevant within the standard that has been determined for what
12 is a relevant document. That is, is it something that deals
13 with strategy and messaging? Is it something that involves
14 somebody who is not within the core group as has been defined?
15 And that is a not insubstantial burden.

16 **THE COURT:** How much is it going to cost?

17 **MR. BOMSE:** (Gesturing.)

18 **THE COURT:** Don't just throw up your hands.

19 You have an opportunity to request costs,
20 reimbursement. As I read the record, you haven't done so.

21 **MR. BOMSE:** We did, actually, suggest that the cost
22 of doing these searches be borne by the parties seeking the
23 documents, as a way of ameliorating the costs.

24 But the cost is largely in people hours here. And
25 this will be done by people who will not be paid for doing it,

1 other than the salaries that they earn. But they will be
2 diverted from other tasks. And that is a real cost.

3 Now, again, I find of all of the issues that are
4 here, while the question of burden is not insubstantial, I do
5 not understand how it can be assessed other than by first
6 determining whether there is something here which is worth
7 pursuing. Now --

8 **THE COURT:** Don't we have guidance from the Ninth
9 Circuit on that subject?

10 **MR. BOMSE:** Well, naturally --

11 **THE COURT:** The Ninth Circuit, I must say, has taken
12 two different positions. But the last word clearly indicated
13 that the kinds of documents that are being sought here meet the
14 standards of Rule 26, for discovery.

15 And that's all we have to determine, at this point;
16 isn't it?

17 **MR. BOMSE:** I don't believe so. I --

18 **THE COURT:** Why?

19 **MR. BOMSE:** Because this is not the same request to
20 the same party.

21 The Ninth Circuit did speak to this issue. We think
22 it spoke in very clear terms to this issue, in its opinion, and
23 not merely in Footnote 12 of its opinion. Although, I am
24 certainly prepared to discuss with the Court, if you will
25 indulge me, the terms of that footnote.

1 But before we even --

2 **THE COURT:** Everything that's really the meat in that
3 opinion is all in that footnote.

4 **MR. BOMSE:** I -- I could not more strongly disagree
5 with Your Honor.

6 The notion that we have a 36-page opinion and that
7 the meat of the opinion is in a single footnote appended at the
8 end, as if somehow the Court was saying just kidding, I think
9 is a serious misreading of what the Ninth Circuit did and what
10 it had in mind.

11 But I wasn't ready to get to Footnote 12 or to the
12 issue of privilege yet; although, that is a very important
13 issue. I submit to the Court that we first have to determine
14 whether or not there is relevance here within the standards of
15 Rule 26, sufficient to trigger the burden that will be required
16 both of us and Equality California.

17 And that is an issue as to which our opponents would
18 simply gloss over by saying, Two sides of the same coin. But,
19 sometimes, whether it's heads or tails matters.

20 We are not the people who sought passage of this
21 initiative. We are people who opposed the passage of this
22 initiative.

23 So the question that has to be asked is -- now, they
24 would say that these documents (indicating) are irrelevant in a
25 way that I'm not going to begin to argue because it's not my

1 role here to take issue with what Your Honor thinks are the
2 issues in the case. But accepting those, the question is, do
3 these documents that are being sought inform that inquiry in a
4 meaningful way?

5 **THE COURT:** The question is whether or not the
6 Magistrate's order is clearly erroneous.

7 **MR. BOMSE:** Yes. And, as to that, we submit that it
8 is clearly erroneous. Because there is nothing that has been
9 suggested on this record that indicates why these documents are
10 going to inform an issue in this case. That is, why --

11 **THE COURT:** Let's talk about what really is at stake
12 here, for your client.

13 What is the prejudice to your client, other than
14 burden? What is the prejudice of complying with the
15 Magistrate's order, other than burden?

16 You can't make a showing of the kind that was made in
17 the civil rights cases, the NAACP cases. You haven't even
18 tried to make that kind of showing.

19 **MR. BOMSE:** We've --

20 **THE COURT:** The only showing you have attempted to
21 make is this showing of burden.

22 **MR. BOMSE:** Again, Your Honor, with all respect --

23 **THE COURT:** No chilling effects that you've
24 attempted --

25 **MR. BOMSE:** I'm sorry?

1 **THE COURT:** You haven't attempted to demonstrate any
2 chilling effect. You haven't attempted to establish any
3 threats, any reprisals that will be visited upon your client.
4 You stake your entire argument on this notion of burden.

5 **MR. BOMSE:** No. With all respect, again. I don't
6 usually say no to a Court quite so categorically, and I
7 apologize.

8 **THE COURT:** I don't know why you don't more often.

9 **MR. BOMSE:** Well, Your Honor, the -- the Ninth
10 Circuit issued an opinion in this case.

11 **THE COURT:** Two opinions.

12 **MR. BOMSE:** Well, the opinion which is now operative,
13 as we understand it, is the January 4 opinion. That opinion
14 recognized, in quite sweeping language, a very broad First
15 Amendment associational privilege for campaign speech.

16 **THE COURT:** Confined to a narrow group of people.

17 **MR. BOMSE:** We need to come to that. Defined in
18 footnote -- limited in Footnote 12, in a small way.

19 **THE COURT:** And appropriately so. This is a
20 political campaign.

21 **MR. BOMSE:** If the footnote is properly read, I agree
22 with the Court. But I don't believe Magistrate Judge Spero
23 read it properly at all.

24 **THE COURT:** Okay. How did he misread it?

25 **MR. BOMSE:** He misread it because he seized upon a

1 phrase appearing in a paragraph in that footnote which refers
2 to a core group. But that's not the entirety of that
3 paragraph, at all.

4 What that paragraph is about is that, to be
5 privileged, communications must be among the core group of
6 people involved in strategy and messaging. But then he --

7 **THE COURT:** You're talking about Footnote 12?

8 **MR. BOMSE:** I'm sorry?

9 **THE COURT:** You're talking about Footnote 12?

10 **MR. BOMSE:** I'm talking about Footnote 12.

11 **THE COURT:** All right. I have it.

12 **MR. BOMSE:** But then that footnote, in the same
13 paragraph, then goes on to say, in the immediately ensuing
14 sentence, the Court remanded to this Court because this Court
15 is best acquainted with the structure of the Yes On 8 campaign,
16 and, thus, can determine who -- and here I quote, should be
17 included in the core group -- and the next words are the key --
18 "in light of the First Amendment associational interests the
19 privilege intended to protect."

20 Now, I think that that is without attempting to
21 define -- this is, after all, a footnote -- with any greater
22 specificity a rather clear statement of what was expected to be
23 done.

24 That is, what was expected to be done was to figure
25 out from the text of the 35 pages that have preceded it -- at

1 least in the slip opinion version -- what are the
2 First Amendment associational interests that the privilege that
3 the Court has just been defining in the text is intended to
4 protect?

5 And that's how you get to what the core group is.
6 That's not, however, how Magistrate Judge Spero did it. He
7 applied what I have -- what we have described as a talismanic
8 type of test. Or, if you will, he has taken a compass and he
9 has drawn a circle with certain dimensions; and you are either
10 inside or you're outside.

11 That's the wrong way to go about it, as a matter of
12 law. You go about it, as I think the Ninth Circuit made clear
13 in Footnote 12, in a functional sense. That is, what is it
14 we're trying to do here?

15 What we're trying to do here is protect the ability
16 of campaigns not to be chilled, the right of people to
17 associate for a common purpose.

18 **THE COURT:** Who -- and I'm asking for a name or a
19 group of names. Who did you request be included in the core
20 group that Magistrate Spero left out?

21 **MR. BOMSE:** The groups that are essentially defined
22 in paragraphs 6 and 7 of the Kors supplemental declaration.
23 Those are the Equality for All campaign members.

24 **THE COURT:** 6 and 7?

25 **MR. BOMSE:** Of the Kors supplemental declaration,

1 document 609.

2 **THE COURT:** All right.

3 Now, if I'm reading this correctly, these are not
4 individuals associated with your client or with the Equality
5 for California group. These are individuals who have an
6 association with some other organization, or are just
7 individuals. Is that correct?

8 **MR. BOMSE:** These are people who are involved with
9 Equality California. You're quite correct. That I haven't
10 looked through to be sure that is a hundred percent true, but
11 certainly that is, for the most part, the case that these were
12 people with Equality for All.

13 Now, unless one takes what we have called the silo
14 approach to the definition of privilege -- which I suggest is
15 entirely inconsistent with the body of the Ninth Circuit's
16 opinion as well as with Footnote 12 in the Ninth Circuit's
17 opinion -- you cannot draw the line that Magistrate Judge Spero
18 has drawn.

19 And, in fact, I think you can't do it reading most of
20 his opinion, because he has said that, in his opinion -- I'm
21 talking now about the opinion from which we now seek relief --
22 that he credits the declaration of Mr. Kors, at least the one
23 filed on February 22nd. He says it specifically, and I'm happy
24 to refer the Court to where he says it.

25 He then goes on, however, having done that -- because

1 what that ought to do is to get us what we asked for.

2 **THE COURT:** This is his --

3 **MR. BOMSE:** His March 5th order then goes on to say,
4 at the bottom of page 10 and the top of page 11, that the
5 March 3 declaration identifies the individual campaign members
6 and staff, but makes no showing regarding those individuals'
7 roles in the Equality for California campaign.

8 **THE COURT:** And that's true; is it not?

9 **MR. BOMSE:** Let's assume that it's true because it's
10 close enough to true. But it misses the point.

11 **THE COURT:** Close enough to the truth?

12 **MR. BOMSE:** No.

13 **THE COURT:** Is that the standard we're applying,
14 Mr. Bomse?

15 **MR. BOMSE:** No, no, no. What is the keyword there is
16 the March 3rd declaration. Because what he misses is the
17 declaration that he earlier said he credited, which is document
18 598, the original Kors' declaration, in which, as we have
19 pointed out in our brief, we have described with I believe as
20 much detail as with respect to the groups that are included in
21 the core group, but the role of these particular groups were.

22 So I don't know if he was intending to be careful. I
23 don't know if he simply missed the point. But he did not say
24 and he could not say -- because it will not withstand
25 scrutiny -- that we have not, in document 598, discussed the

1 campaign staff and the campaign committee members. So, in that
2 sense, he has simply erred. He has erred as an evidentiary
3 matter and he has erred as a legal matter.

4 And the reason he's erred as a legal matter, Your
5 Honor, is because when you look at Footnote 12 and you look at
6 the paragraph that he focuses on in full, where it talks about
7 things -- where it talks about the definition of a core group
8 in light of the purposes for which the privilege exists, you
9 cannot justify what he said. Now --

10 **THE COURT:** Footnote 12 says:

11 "Our holding is also limited to private
12 internal communications regarding formulation
13 of strategy and messages."

14 **MR. BOMSE:** Yes.

15 **THE COURT:** That's italicized.

16 "It certainly does not apply to documents or
17 messages conveyed to the electorate at large,
18 discrete groups of voters, or individual
19 voters, for purposes such as persuasion,
20 recruitment or motivation, activities beyond
21 the formulation of strategy and messaging.
22 Similarly, communication soliciting actual
23 support from actual or potential Proposition
24 8 supporters are unrelated to the formulation
25 of strategies and messages. The District

1 Court may require the parties to redact the
2 names of individuals with respect to these
3 sorts of communications, but the content of
4 such communications are not privileged."

5 That's pretty clear.

6 **MR. BOMSE:** I guess -- I guess this is my day to be
7 irreverent.

8 **THE COURT:** Go ahead.

9 **MR. BOMSE:** But, the paragraph you just read from is
10 a paragraph to which we take no objection. If the order is
11 limited to documents involving persuasion, recruitment, or
12 motivation, or subjects other than strategy and messaging, we
13 will be content with that, at least as far as privilege is
14 concerned.

15 Now, we --

16 **THE COURT:** And what is there that you have shown
17 that any of the individuals mentioned in paragraph 6 and 7 of
18 the Kors supplemental declaration do not fall within these kind
19 of communications that are referred to in the third paragraph
20 of Footnote 12?

21 **MR. BOMSE:** Your Honor, I'm sorry, I believe the
22 Court is confusing "what" with "who." Our concern is not with
23 a limitation based upon what. That is, if there are, in fact,
24 documents that involve these subjects --

25 **THE COURT:** And communications with these kinds of

1 individuals.

2 **MR. BOMSE:** No. I -- the two -- the two are entirely
3 different. One has to do with who is involved in the function
4 of strategy and messaging. And that's what we're seeking to
5 protect. And that's actually all that the proponents are
6 seeking to get from us.

7 So, I mean, if -- if we can -- if we can agree here
8 that documents not involving strategy and messaging need not be
9 produced, well, then, maybe we don't have a problem. Except
10 that then I wonder, really, why we're bothering.

11 But I think that to try to take a sentence -- or,
12 actually, it's not a sentence, it's a phrase "core group," that
13 we are then told how to define in a particular way, that is, in
14 light of the First Amendment associational interest the
15 privilege is entitled to protect, then we have a coherent
16 document that we have no problem with.

17 But, I mean, I -- I have here -- and I don't want to
18 burden the Court with it unnecessarily, but I have here a list
19 of quotations from the Ninth Circuit's opinion which are
20 referenced here. That is:

21 "In light of the First Amendment associational
22 interests the privilege is intended to protect."

23 "The freedom to associate with others for the common
24 advancement of political beliefs and ideas lies at the heart of
25 the First Amendment."

1 "There must be a right not only to form political
2 associations, but to organize and direct them in the way that
3 will make them most effective."

4 And we have explained -- Mr. Kors has explained in
5 his original declaration exactly what that was. I could go on
6 and on.

7 **THE COURT:** The trouble with your very expansive
8 argument, Mr. Bomse, is that it throws a blanket privilege over
9 political speech. And political speech is inherently not
10 private. It's public.

11 **MR. BOMSE:** And, of course, all of the public
12 documents were produced voluntarily. We are now talking about
13 documents that were not public, at least not in the sense that
14 we believe either the Court's definition of relevance in the
15 case or anything else.

16 But the fact that you -- that a privilege --

17 **THE COURT:** And, furthermore, you're contending that
18 communications between the individuals that the Magistrate
19 found in the core group and the individuals in paragraphs 6 and
20 7 of the Kors supplemental declaration are the kinds of
21 private, internal communications regarding formulation of
22 strategy and messaging that the Ninth Circuit has indicated
23 should be protected.

24 **MR. BOMSE:** That is my contention, yes.

25 **THE COURT:** And you're telling me that a

1 communication between the core group, as found by the
2 Magistrate, and individuals who are with organizations such as
3 the Business Council, such as the Black AIDS Institute, the
4 Stonewall Democrats, the various and sundry groups that are
5 referred to here in these paragraphs 6 and 7, fall within the
6 definition of a private internal communication.

7 That simply strains credulity, to suggest that these
8 kinds of outreach efforts by the core group, as defined by the
9 Magistrate, would fall within this internal private
10 communication definition that the Ninth Circuit has referred
11 to.

12 **MR. BOMSE:** Well, then, I suppose, Your Honor, I am
13 asking you to strain credulity, because that is, in fact,
14 precisely my position.

15 It is my position that individuals with various
16 organizations -- that you read, and you could read many more --
17 came together for the common advancement -- and here I quote --
18 of political beliefs and ideas. And that is exactly what is
19 protected by the First Amendment.

20 People with different organizations perform different
21 roles in a campaign. It was the source of my attempt to
22 illustrate in a somewhat fanciful way the idea of some -- of
23 General Eisenhower communicating with people low down his staff
24 about certain aspects of the D-Day invasion, or communicating
25 with the British about certain aspects of that.

1 There are reasons why people have communications
2 within a campaign. They may be very discreet. They may be
3 related to a particular group of voters. And there is an
4 expectation that those kinds of things are done for the common
5 advancement of a political principle.

6 **THE COURT:** But the difficulty I have with your
7 argument is, you haven't provided any indication of where this
8 privilege ends.

9 And in a political campaign, especially when the
10 Court of Appeals has told us that the privilege you're relying
11 upon is a limited one, you've got to provide some coherent
12 definition of where the limits of this privilege are. That,
13 you haven't done.

14 **MR. BOMSE:** The limits --

15 **THE COURT:** That, it seems to me, you must do in
16 order to show that the Magistrate is clearly erroneous.

17 **MR. BOMSE:** The limits are the limits of "what." The
18 limits are not the limits of "who," except insofar as these are
19 people who did not have the function of being involved in
20 strategy and messaging.

21 I am --

22 **THE COURT:** And what --

23 **MR. BOMSE:** I am not --

24 **THE COURT:** Go ahead.

25 **MR. BOMSE:** It is not my intention to back down from

1 the proposition that those who are involved in strategy and
2 messaging, which the Kors declaration and the record shows
3 included the people we are talking about, that those people's
4 communications about the subject of strategy and messaging are
5 subject to a First Amendment privilege.

6 One need not achieve a particular title. One must
7 achieve or be involved in a particular function. And where the
8 Magistrate Judge erred, as a matter of law, in our opinion, is
9 in attempting to define, by reference to "who," where the whos
10 that he has excluded, were people whom the record shows were
11 involved in strategy and messaging.

12 And I do -- and I do give you -- whether you credit
13 it or not, a principled basis for limiting the privilege. And
14 it's the next paragraph that you read.

15 If there are communications about subjects other than
16 strategy and messaging, then we do not claim that there is
17 necessarily a First Amendment privilege.

18 **THE COURT:** The next paragraph?

19 **MR. BOMSE:** Paragraph talking about purposes such as
20 persuasion, recruitment, or motivation, activities beyond the
21 formulation of strategy and messaging.

22 What we are saying to you --

23 **THE COURT:** Wait a minute. The language is, "It" --
24 meaning the privilege -- "certainly does not apply to documents
25 or messages conveyed to the electorate at large, discreet

1 groups of voters, or individual voters for purposes such as
2 persuasion, recruitment, or motivation."

3 **MR. BOMSE:** Yes. And we --

4 (Simultaneous colloquy.)

5 **THE COURT:** ... groups of voters. And, it seems to
6 me that the individuals mentioned in paragraphs 6 and 7 fall
7 clearly within the discreet groups of voters that the Ninth
8 Circuit was referring to.

9 And, in any event, it's very hard to see how the
10 Magistrate's interpretation of paragraphs 6 and 7 in that
11 regard is clearly erroneous.

12 **MR. BOMSE:** Well, it's -- it's clear error because it
13 applies an incorrect legal standard.

14 This is not a -- if -- if the Court credits our
15 position that one must look at this functionally rather than
16 formally or talismanically or by drawing a circle with a
17 compass, then you get to this paragraph here, and you get to an
18 appropriate limit.

19 **THE COURT:** And "this paragraph here" is which
20 paragraph?

21 **MR. BOMSE:** The paragraph begins, "Our holding is
22 also limited."

23 The problem with the order is that the Magistrate
24 Judge reads the words "core group" without -- as having some
25 kind of magic or mantra-like significance, rather than reading

1 the whole paragraph and rather than reading it in connection
2 with the opinion as a whole. And that is, with all respect, a
3 mistake.

4 **THE COURT:** I understand your position. Just let me
5 try one more time.

6 Other than burden, what is the prejudice to your
7 client of complying with the Magistrate's order?

8 **MR. BOMSE:** That our constitutional rights will be
9 infringed; that the privilege, as defined by the Ninth
10 Circuit's January 4 opinion, will be rendered nugatory. That
11 is the fundamental and overwhelming harm that's here, far more
12 than the mere question of burden, as pertinent as we believe
13 that is.

14 And that -- that, above all, is why we are here and
15 why we are very reluctantly finding ourselves in the position
16 of doing something that I fear will give aid and comfort to the
17 proponents here, which is the last thing we want to do.

18 But this is a critical matter, as far as we're
19 concerned. It's why -- it's why we joined with them in the
20 Ninth Circuit, to begin with.

21 **THE COURT:** What political speech is going to be
22 chilled? What political speech has been chilled?

23 **MR. BOMSE:** Well, nothing has been chilled in the
24 sense that before this issue arose that campaign was done. But
25 I believe, actually, the Ninth Circuit, in its opinion, used

1 the notion that it was self-evident that there would be
2 chilling.

3 And we have, in fact, included material talking about
4 how people are going to conduct campaigns in the future; that
5 they are going to be concerned:

6 Am I in the core group?

7 Is this a communication that I cannot be confident
8 will be kept private?

9 If I associate with people in another group will we,
10 therefore, lose privilege for our communications?

11 If I decide that I need to talk to somebody whose
12 position is to try and influence students at Stanford or
13 influence people of Hispanic background on an issue?

14 This is as core, Your Honor, as it gets, in terms of
15 political speech. And the Ninth Circuit agreed with us. And
16 the fact that they suggested that there was a limit, which
17 properly understood we have no problem with, but as applied by
18 Magistrate Judge Spero we find completely unsustainable as a
19 matter of law.

20 **THE COURT:** All right. Thank you, Mr. Bomse.

21 Anybody else wish to speak on that side?

22 Ms. Whittemore?

23 **MS. WHITTEMORE:** Yes.

24 **THE COURT:** Do you wish to add anything?

25 **MS. WHITTEMORE:** Thank you, Your Honor. Lauren

1 Whittemore for Equality California.

2 If I could try to provide some more background on the
3 Equality for All campaign and how it was organized, to try to
4 help get past this impasse of why the people in paragraphs 6
5 and 7 were actually participants in the formation of strategy
6 and messaging for the campaign, and weren't simply a vehicle to
7 provide outreach to discreet groups of voters.

8 **THE COURT:** Okay. What can you show in that regard?

9 **MS. WHITTEMORE:** In the original Geoff Kors
10 declaration, which was filed on February 22nd --

11 **THE COURT:** Let me get that. What's the document
12 number on that?

13 **MS. WHITTEMORE:** I'm afraid the copy I have doesn't
14 have the document number on it.

15 **MR. BOMSE:** What do you need?

16 **MS. WHITTEMORE:** The original Kors declaration.

17 **MR. BOMSE:** 598.

18 **MS. WHITTEMORE:** It's 598.

19 **THE COURT:** 598. All right. Hold on a second. All
20 right. That was filed when?

21 **MS. WHITTEMORE:** February 22nd.

22 **THE COURT:** All right. I have it. 598.

23 **MS. WHITTEMORE:** Yes. Starting on paragraph 5, we
24 describe the structure of the Equality for All campaign. The
25 reason we did this was, Mr. Kors was a member of the executive

1 committee of the Equality for All campaign and, therefore, many
2 of his e-mails go directly to Equality for All campaign members
3 as opposed to simply Equality California staff and volunteers.

4 So we made the effort to describe the Equality for
5 All campaign, in an effort to enlarge the core group. And
6 Equality for All existed before the Prop 8 campaign. But once
7 Prop 8 qualified for the ballot, it ramped up, in an effort to
8 defeat the proposition, and did so by gathering a coalition of,
9 ultimately, over 100 organizations to participate in a
10 statewide campaign against Prop 8. And it was the main
11 umbrella organization that served to campaign against
12 Proposition 8.

13 Equality California, ACLU, many other organizations
14 were part of the campaign, both as individuals and as
15 representatives of their organization.

16 In paragraph 7 we describe the role of the executive
17 committee. That's not an issue here because Judge Spero
18 accepted the executive committee as being members of the core
19 group.

20 In paragraphs 8 and 9, we describe the role of the
21 executive committee -- I mean, the campaign committee, pardon
22 me, and the campaign staff.

23 The campaign committee actually ratified decisions
24 made by the executive committee, and met monthly in person or
25 over conference calls. And as the election approached, they

1 met weekly.

2 And the campaign staff, of course, which was paid
3 either by the Equality for All organization or by the member
4 organizations, were responsible for working with the campaign
5 committee and the executive committee to formulate the
6 strategies and deal with the logistics of getting the messaging
7 out to the voters.

8 And if you'll turn to paragraph 13, you'll see a more
9 detailed -- on page 4, a more detailed explanation of the types
10 of roles members of the campaign committee played.

11 The campaign committee members did not simply receive
12 strategy and messaging from the executive committee, and
13 deliver those to discreet groups of voters. If that was their
14 only function, then, yes, under the -- under Footnote 12, they
15 would not be members of the core group. However, they did play
16 a role in formulating strategy and messaging in such a way as
17 to more appropriately target discreet voter groups.

18 And to say that the development of generic statewide
19 strategy and messaging should be privileged over the
20 formulation of strategy and messaging targeting discreet voter
21 groups seems, to me, to be a wrong way to approach protecting
22 the First Amendment associational right.

23 And, also, the campaign staff was involved in
24 formulating specific strategy and messaging for specific
25 groups. They also played a role in delivering that messaging.

1 And we're not arguing that e-mails in which staff
2 members or campaign committee members sent messages to
3 volunteers should be privileged. Of course, those aren't
4 privileged. That is the role of taking the strategy and
5 messaging from within the organization and delivering it out.

6 But, we're saying that the campaign committee and the
7 staff played a role in the formulation of strategy and
8 messaging. They weren't simply message carriers to the
9 discrete voter groups.

10 And on the issue of Footnote 12 --

11 **THE COURT:** But these groups are embraced, are they
12 not, within the core group as defined by the Magistrate?

13 I'm looking at his order on pages 11 and 12. And
14 it's a very expansive list of individuals and consultants.

15 **MS. WHITTEMORE:** Yes. That is --

16 **THE COURT:** He quite carefully went through all of
17 these individuals, all of these organizations, and made a
18 reasoned determination whether they fell within the core group
19 or did not. And so what I'm struggling to understand is how
20 the Magistrate went off the rails and committed clear error in
21 making these determinations.

22 **MS. WHITTEMORE:** Because he failed to recognize that
23 the campaign committee and the campaign staff still played a
24 role in formulating strategy and messaging that wasn't simply
25 the executive committee and the consultants hired by the

1 campaign.

2 **THE COURT:** But the consultants, or at least some of
3 the consultants, are embraced within the definition of the core
4 group as found by the Magistrate.

5 **MS. WHITTEMORE:** Yes. And we have absolutely no
6 argument with that. Our argument is that the exclusion of the
7 members of the campaign committee and the campaign staff is
8 clear error. Because to say that they played no role,
9 whatsoever, in the formulation of campaign strategy and
10 messaging is simply wrong.

11 **THE COURT:** Well, it's not a question of "no role
12 whatever," as you read the instructions from the Ninth Circuit.
13 It is an internal communication. And an organization that is
14 communicated with, that is outside that which organized the
15 campaign, is not an internal communication.

16 **MS. WHITTEMORE:** But it's internal to the Equality
17 for All campaign.

18 **THE COURT:** Let me ask you the question that I asked
19 Mr. Bomse.

20 What are the limits? What's a rational definition
21 that would allow one to decide how far this privilege extends
22 or how narrow the privilege is?

23 **MS. WHITTEMORE:** Well, I think --

24 **THE COURT:** You can't have -- particularly when
25 you're talking about a political campaign and a privilege that

1 applies to a political campaign, you have to have a pretty
2 definite notion of where the boundaries of this privilege are.

3 **MS. WHITTEMORE:** Yes. I -- I agree. We -- we need
4 to be able to draw lines.

5 However, I think it would be illustrative to look at
6 the case that the Ninth Circuit cited in their famous Footnote
7 12, *In Re: Motor Fuel Temperature Sales Practices Litigation*.

8 In that case, the Court was addressing whether or not
9 trade associations could protect their internal communications
10 under the First Amendment.

11 And the Court found that individual trade
12 associations could do so, but communications between trade
13 associations were not privileged. And I would put to the Court
14 that the Equality for All campaign was essentially a trade
15 association.

16 One of the associations in the Motor Fuel case is the
17 National Association of Truck Stop Operators, which is made up
18 of more than 240 corporate entities. Requiring that any
19 communications between those corporate entities not be
20 protected by the First Amendment privilege would destroy the
21 entire purpose of having a trade association.

22 Here, while the political campaign is limited by
23 time, the purpose is essentially the same; coming together,
24 forming an organization to better represent the interests of
25 the group.

1 Here the campaign committee members, certainly the
2 campaign staff, were people who came together for a very
3 specific purpose and participated in all the associational
4 interests that comes with being engaged in a political
5 campaign.

6 So we were able to identify the members of the
7 campaign committee. We were able to identify the staff. Any
8 communications between the executive committee and the campaign
9 staff were internal communications.

10 **THE COURT:** But does this campaign committee, as
11 you've described it, have any purpose or existence outside the
12 Proposition 8 campaign?

13 **MS. WHITTEMORE:** No.

14 **THE COURT:** And isn't that the distinction which was
15 drawn in the *Motor Fuel Sales Practices Litigation*, and which,
16 evidently, the Ninth Circuit had in mind at the time it
17 formulated the definition that it included in Footnote Number
18 12?

19 **MS. WHITTEMORE:** Well, the -- the --

20 **THE COURT:** That is to say, if -- if the campaign is
21 defined by Proposition 8 alone, then the communication amongst
22 the individuals and groups in that campaign group cannot fit
23 the definition of a private internal communication.

24 **MS. WHITTEMORE:** I disagree with the Court because
25 the Equality for All campaign was formed for a brief period,

1 for one particular purpose which has now passed.

2 But that does not take away the fact that people,
3 individuals and representative of organizations, formed a
4 coherent group and engaged in communications within that
5 coherent group for the purpose of defeating Proposition 8.

6 Within that coherent group, they formulated their
7 strategy, their messaging. And then the individual members
8 took those messages out to the various counties and groups in
9 the state.

10 However, communications within that coherent group
11 were private, internal campaign communications. While they
12 were between individuals of different organizations that have
13 separate existences beyond the campaign is true. But that does
14 not require that they could not be part of a temporary trade
15 association, as it were.

16 If I may make one point on the issue of prejudice.
17 On February 22nd, Elizabeth Gill submitted a declaration which
18 addressed the prejudice that the ACLU would suffer. And on
19 February 24th, Equality California submitted a declaration from
20 James Carroll, regarding the chilling effect that would be
21 suffered by Equality California if the members who participated
22 in the campaign had been aware that their communications might
23 be discoverable.

24 We included a exhibit to that declaration, a letter
25 that was sent to one of the donors to Equality California. Not

1 a donor to the campaign in particular, but simply a donor to
2 Equality California, from protectmarriage.com, which asked for
3 a donation to the Yes On 8 campaign in the same amount as the
4 donation that was made to Equality California.

5 And we pointed out that as more information about the
6 people who participated in the campaign comes to light, more
7 people might be at risk of these types of communications, which
8 will have an effect on our ability to raise funds in the
9 future.

10 **THE COURT:** Very well, Ms. Whittemore. Anything
11 further?

12 **MS. WHITTEMORE:** No, Your Honor.

13 **THE COURT:** All right. Mr. -- I wonder, before I
14 turn to Mr. Panuccio, Mr. Dusseault, do you have anything you
15 wish to contribute on this?

16 **MR. DUSSEAULT:** Your Honor, I do, very briefly. And
17 not on either side of this particular matter, so if you would
18 rather I wait until the end, I would be happy to.

19 **THE COURT:** All right. If you're not going to weigh
20 in on the subject we're discussing then maybe I'll let you
21 defer.

22 **MR. DUSSEAULT:** Well, I can make clear, we have not
23 taken any position as to whether these documents should be
24 produced or as to the objections.

25 We do have some very significant concerns about the

1 timing of this production. I'm happy to address that now or
2 later.

3 **THE COURT:** All right. Let's come to that after I
4 talk to Mr. Panuccio, because that also is on my mind.

5 Now, let's begin right there, Mr. Panuccio. The
6 trial is over. Why are we doing this?

7 **MR. PANUCCIO:** Well, if Your Honor will recall, at
8 the sort of close of the January phase of the trial,
9 Mr. Thompson said that, while this motion was still pending the
10 defendant-interveners could not rest their case, and asked
11 for -- you know, we put in this motion at the beginning of the
12 proceedings and asked for expedited resolution. Wasn't
13 granted.

14 So, you know -- and what did not -- no resolution
15 occurred throughout the January phase of the trial. So we had
16 no choice but to reserve the right to get these documents, look
17 at them, and --

18 **THE COURT:** Okay. I don't think anybody is
19 criticizing the proponents with regard to the timing. So I
20 don't think that's an issue. At least, that's certainly not on
21 my mind.

22 But picking up on something Mr. Bomse said, what's
23 the relevance of all of this? One, what do you expect to find
24 in these documents? Two, how is this likely to lead to
25 admissible evidence? Three, if you do come up with evidence

1 that you think is admissible, how are you going to get it in?
2 Are you going to call more witnesses? Are you going to reopen
3 the evidence? What's ahead of us?

4 **MR. PANUCCIO:** Okay. I'll start with, your first
5 question, I believe, was: What do we expect to find? And here
6 I would refer the Court back to the orders that -- of this
7 Court, that defined the scope of what it would be looking at in
8 deciding this case.

9 And one of the things the Court said in its
10 October 1st order was that the mix of information before and
11 available to voters forms a legislative history that may permit
12 the Court to discern whether the legislative intent of an
13 initiative measure was a discriminatory motive. And I'm
14 (inaudible) some of the middle of that quotation, but I don't
15 think I'm changing the meaning.

16 So if that is the inquiry the Court is going to take,
17 we think it's only natural that if you look at a legislative
18 history, you look at both sides.

19 Right now, we have a very lopsided record, where
20 there's only one -- only one side has been required to produce
21 this legislative history, and the entire other side of the
22 legislative history is missing.

23 Equality California and the ACLU who are all, for
24 short, say, the No On 8 objectors, the No On 8 objectors say
25 that, well, yes, all of the proponents' documents are relevant,

1 but none of our documents are relevant.

2 **THE COURT:** There is some logic to that; isn't there?
3 After all, you folks are the ones who are seeking to change the
4 constitution of the State of California. The objectors are not
5 seeking to change -- to enact anything in the law or into the
6 constitution.

7 And so isn't it fair to look at the materials of the
8 proponents to determine if the objective of the proposition
9 that they are sponsoring complies with a legitimate and
10 substantial state interest?

11 **MR. PANUCCIO:** Well, I believe one of the inquires
12 that the plaintiffs have identified and that the Court has
13 credited is, is there a discriminatory intent of the voters?
14 And the Court has said the Court will look at the legislative
15 history to determine that.

16 I do not think it is possible to say or credible to
17 say that a voter who votes in favor of an issue or a candidate
18 looks only at the things that were said on -- in support of
19 that issue or that that candidate said.

20 For instance, I would wager that at least some
21 members of Equality California voted for then Candidate Obama
22 for president. Now, Candidate Obama came out against the
23 legalization of same-sex marriage. Does that mean that every
24 person from Equality California who voted for Candidate Obama,
25 at the time, for president had shared his intent because he

1 made those statements? No.

2 A voter for president would look at the variety of
3 arguments and the cacophony of voices in a presidential
4 campaign and balance it. And it's the same thing here.

5 There were a lot of things being said about
6 Proposition 8 at the time it was before the electorate. And
7 any reasonable voter is going to look at arguments on both
8 sides. Sometimes the No On 8 campaign might have made a
9 credible argument that would cancel out one of the arguments in
10 favor.

11 **THE COURT:** What are you expecting to find? Let's
12 assume you find the smoking gun document out of the Equality
13 California group or the ACLU. What would that document look
14 like?

15 **MR. PANUCCIO:** I don't know what a single smoking
16 gun. I think we might find a variety of documents that shed
17 light on the issues that this Court has said it would look at,
18 and the manner in which it would look at them.

19 So, for instance, we might find documents that say we
20 need to respond to this argument or that argument because it's
21 legitimate and voters might well credit that.

22 We might find documents that talk about the religious
23 influence in the campaign and how the voters might be swayed by
24 that.

25 We might find documents that, separate and apart from

1 voter intent, talk about political power, another issue in this
2 case.

3 Without seeing the documents, I can't say, well,
4 there's this smoking gun out there. And neither could the
5 plaintiffs, by the way, when they were pursuing these documents
6 from us.

7 They were pursuing discovery to see if they could
8 find relevant evidence. And certain rules were laid down by
9 the Court for how that could go forward. And we're suggesting
10 that should be applied here.

11 **THE COURT:** Are you suggesting that the kind of thing
12 that you are after is a document or evidence that suggests that
13 the proponents of Proposition 8 had a legitimate argument in
14 support of the proposition, and it is an admission of some kind
15 on the part of the opponents that their internal documents show
16 that kind of admission? Is that what you're after?

17 **MR. PANUCCIO:** I don't know that we would call it an
18 admission, if Your Honor is referring to the Federal Rules of
19 Evidence and to admission because, of course, these third
20 parties are not parties to the case.

21 However, there may well be documents that are
22 probative of what the conceivable legislative intent of the
23 voters was when they enacted this initiative. And that may be
24 crediting arguments from the other side.

25 It may be that we find documents that show that

1 voters were turned off by certain No On 8 messages. And so,
2 therefore, we can say, well, maybe they just voted in reaction
3 to those messages. We don't know exactly what --

4 **THE COURT:** You mean that the "No" folks ran a lousy
5 campaign, and that's the reason that the proposition passed?

6 **MR. PANUCCIO:** I don't know that it has to be that
7 it's a lousy campaign. It could be that certain ads were so
8 volatile or so offensive that certain voters said, "I take
9 exception to that, and I'm going to vote on this side of the
10 issue."

11 I mean, the inquiry here is a difficult one -- and we
12 have said that from the outset -- trying to find voter intent
13 from a cacophony of voices. And we have objected to that
14 inquiry. But it's being undertaken, so we need to try to
15 litigate the case as best we can within that framework. And we
16 have no record, because these parties have refused to produce.
17 We have not been able to counterbalance anything on our side of
18 the case.

19 **THE COURT:** Mr. Bomse tells me that the light is not
20 worth the candle here. That is to say that, the cost of
21 imposing this discovery on the objectors is not going to turn
22 up evidence that will have any material bearing on the outcome
23 of the case.

24 Tell me what evidence you think will have a material
25 bearing on the outcome of the case, that you can obtain through

1 this discovery.

2 **MR. PANUCCIO:** Well, again, I would refer back to
3 what I just submitted to the Court, which is, we believe that,
4 just as proponents' internal documents about strategy and
5 messaging might be relevant under this Court's orders to what
6 the voters thought when they went to the ballot box in November
7 of 2008 --

8 **THE COURT:** Which their internal communications with
9 regard to strategy and messaging will be protected under the
10 Ninth Circuit's definition of the privilege.

11 **MR. PANUCCIO:** To the extent --

12 **THE COURT:** Their internal communications.

13 **MR. PANUCCIO:** To the extent -- I don't know that the
14 Ninth Circuit's opinion and the word "internal" are
15 concentric -- are -- occupy exactly the same sphere.

16 But, yes, to the extent they have documents that fall
17 within the definition of the core group, those would be
18 protected.

19 To the extent they have documents that fall outside
20 of that, just as we had thousands of documents that fall
21 outside of that, they would not be protected.

22 So -- well. Sorry. Is there something else?

23 **THE COURT:** Well, you were answering what you expect
24 to find.

25 **MR. PANUCCIO:** Well, and so I would rest on what I've

1 already just submitted. I think I've marched through, already,
2 what I think we would find, which is the types of information
3 this Court has identified are part of the legislative history
4 of this constitutional amendment.

5 **THE COURT:** Okay. Then before we go on to the next
6 point, why isn't it fair that the proponents of the initiative
7 should bear a greater burden of this kind of discovery than
8 those who are opponents of the proposition? After all, your
9 folks wanted to change the law, to change the constitution in
10 the state.

11 **MR. PANUCCIO:** Well, if the submission is that
12 citizens who desire legislative and political change,
13 therefore, have to pay a cost for that change in litigation
14 simply because they desired that, I would say that there are
15 First Amendment implications of that --

16 **THE COURT:** No one is paying the cost. It's simply
17 that they are subject to a level of scrutiny that those who are
18 opposed to the proposition -- which would not affect any change
19 in the law -- would not be subject to.

20 **MR. PANUCCIO:** The Court has said it was the mix of
21 information before and available -- this issue has been decided
22 already, I submit. The Court has said it was the mix of
23 information before and available to voters.

24 **THE COURT:** Was that decided by the Ninth Circuit, or
25 was that decided here?

1 **MR. PANUCCIO:** That was decided here, and that the
2 Court has said the Ninth Circuit affirmed those relevance
3 rulings.

4 And, the January 8th order from Judge Spero, which
5 was then affirmed later by this Court, later in January, said
6 documents that contained arguments for or against
7 Proposition 8.

8 Well, that really can't make a great deal of sense,
9 if it's only confined to the proponents' documents. I assume
10 they would mostly have arguments in favor or for Proposition 8,
11 and not arguments against Proposition 8.

12 But the Court has said documents containing both
13 arguments are relevant to this legislative history, this record
14 that needs to be built to decide this issue.

15 So on the burden issue, it seems to me that if the
16 Court needs to undertake that kind of inquiry, both sides
17 engaged in a very expensive campaign.

18 In fact, the No On 8 groups outspent the Yes On 8
19 groups in this campaign. So the notion that, well, they lost
20 at the ballot box, so they have to bear no costs when the Court
21 wants to look at the information before and available to the
22 electorate, I think, does not -- would only serve to then chill
23 those who want to go to the ballot, who want political change
24 through the referendum processes.

25 **THE COURT:** And that, you contend, is an unfair

1 allocation of these costs?

2 **MR. PANUCCIO:** I would agree with that, Your Honor.
3 And, also -- well, I'll just stand on that. I would agree with
4 that, Your Honor.

5 **THE COURT:** All right.

6 Now, let's assume you come up with something that you
7 think is relevant. What are you going to do with it?

8 **MR. PANUCCIO:** Well, I believe at the end of trial
9 there was a process by which many documents were moved in en
10 masse through a stipulation with plaintiffs. So, of course,
11 the first thing we need to do is get the production and have
12 some time to review it.

13 After we've reviewed it, any documents that we felt
14 needed to -- that we want to put into the record, we would see
15 if we could work something out with the plaintiffs on getting
16 those in in a manner that was similar to the way in which
17 documents were submitted throughout the trial and especially at
18 the close of the trial.

19 Another possibility is that --

20 **THE COURT:** Let's assume Mr. Dusseault objects to
21 this process.

22 **MR. PANUCCIO:** We would certainly, in that case, have
23 to bring the dispute to the Court and make our case as to
24 why --

25 **THE COURT:** And how would you do that?

1 **MR. PANUCCIO:** Well, I suppose, a motion would be the
2 appropriate vehicle.

3 **THE COURT:** A motion to reopen, I would imagine?

4 **MR. PANUCCIO:** Well, I mean, the
5 defendant-intervenors did not rest their case. And that was
6 with the Court's permission.

7 I believe that was in the January 25th transcript.
8 And the Court -- Mr. Thompson said, Having not received these
9 documents, we cannot rest our case. And the Court said, Very
10 well, I've ordered the No On 8 parties to respond to your
11 motion, and then a few days later referred it to the
12 Magistrate.

13 **THE COURT:** Why shouldn't I ask you to make a proffer
14 with respect to what it is you believe that you'll be able to
15 show with respect to the discovery that you're pursuing?

16 **MR. PANUCCIO:** Well, first of all, we haven't
17 received any of the discovery. So you would be asking
18 defendant-intervenors to make a proffer in the dark about what
19 it is they would receive.

20 What we would say is, everything that the plaintiffs
21 said that they could show through our -- through the
22 proponents -- the documents that they wanted from the
23 proponents, the documents from the No On 8 groups could be
24 relevant to those questions for disproving some of the points
25 advanced by the plaintiffs, for advancing some of the rational

1 bases and other arguments that have been advanced by the
2 proponents.

3 **THE COURT:** Well, given the posture of the case
4 presently, why is it unfair to require the proponents to make a
5 proffer of what it is they expect to be able to prove once this
6 discovery has been completed?

7 **MR. PANUCCIO:** Well, I would say it's -- there are
8 two reasons why that wouldn't be a proper procedure, at this
9 point.

10 The first is, I believe our papers submitted in the
11 motion and then throughout this process have shown the types
12 of -- have pointed in the Court's orders to the types of
13 inquires that these documents may be relevant to. We can't say
14 more about a specific document because we haven't had a single
15 one.

16 Two --

17 **THE COURT:** Well, you know, you don't undertake
18 discovery without an idea of what it is you hope to find.

19 **MR. PANUCCIO:** We hope to find the information that
20 was before and available to the electorate.

21 **THE COURT:** And sometimes you find it and sometimes
22 you don't find it.

23 **MR. PANUCCIO:** I believe --

24 **THE COURT:** But is it unfair or inappropriate for the
25 Court to require you, at this time, to make a proffer of what

1 it is you expect this discovery will substantiate?

2 **MR. PANUCCIO:** I think it is proper for the Court to
3 impose on the proponents the same burden that were imposed on
4 the plaintiffs when they sought this material. That's point
5 one. Point two is that --

6 **THE COURT:** And what was that?

7 **MR. PANUCCIO:** Was that they submitted -- we had the
8 motion back in September, our motion, the proponents' motion
9 for a protective order.

10 **THE COURT:** Right.

11 **MR. PANUCCIO:** The plaintiffs submitted their
12 response to that, and their document requests were before the
13 Court. And they said that these documents, we think, will be
14 relevant to, among other things, legislative intent, rational
15 bases, political power. They listed all the issues in the
16 case. And we would make the same proffer.

17 The second point is --

18 **THE COURT:** And have you done so?

19 **MR. PANUCCIO:** I believe that we have, in our papers.

20 **THE COURT:** Where?

21 **MR. PANUCCIO:** I believe our initial motion, our
22 reply in support of the motion, and our papers before this
23 court that were filed last evening.

24 Beyond that, I would just note for the Court the
25 posture as you -- as the Court noted at the outset with

1 Mr. Bomse. The posture is, did Magistrate Spero clearly err?

2 And they have brought certain objections. Asking us
3 to proffer -- the failure to ask us to proffer is not one of
4 the objections those parties have brought before this Court,
5 asking for it to be corrected. So, I don't think it would be
6 proper.

7 **THE COURT:** That is true. Although, Mr. Bomse spent
8 a good deal of time saying that this discovery is not worth a
9 hill of beans, much less the costs and burden that it's going
10 to cast on the objectors.

11 **MR. PANUCCIO:** I would say that the nub of that
12 argument is the nub of the argument we advanced in August and
13 September and all the way throughout to the Ninth Circuit.
14 That's what this is really about.

15 I think that the No On 8 objectors full well know
16 that this type of discovery is objectionable not only on
17 privilege grounds but on relevance grounds. But, we litigated
18 that, and we lost.

19 So, as I say, we have to build the record that the
20 Court has asked for. And we're just asking for the opportunity
21 to build that record.

22 **THE COURT:** Well, I don't know that you have to. You
23 raised that argument. You lost.

24 Now, you're saying, well, we lost so, therefore, the
25 objectors should lose. But if you really stick by your guns,

1 you'll say, well, we lost, but all of this discovery is
2 irrelevant anyway; couldn't possibly amount to anything that
3 could be probative of any of the issues in the case.

4 So why don't you just stick by your guns?

5 **MR. PANUCCIO:** Well, because one court has told us we
6 are wrong on that. And I think it would be irresponsible
7 lawyering not to build the record in case higher courts tell us
8 (inaudible) on that, as well, and want to look at this record.

9 So, you know, we are here in the trial court now. We
10 need to build the record that may or may not persist all the
11 way through the case, however high it goes.

12 If I may turn -- if Your Honor is satisfied on the
13 burden of relevance point --

14 **THE COURT:** I don't know about that, but you may
15 certainly turn to the next issue.

16 **MR. PANUCCIO:** Were there more questions the Court
17 had on those issues? I'm happy to --

18 **THE COURT:** Go ahead.

19 **MR. PANUCCIO:** Very quickly, on privilege.

20 As Mr. Bomse points out, we are sympathetic to some
21 of the First Amendment arguments. So sympathetic, in fact,
22 that Your Honor heard me read the exact same list of quotations
23 from the Ninth Circuit on December 16th, and then I read them
24 to Magistrate Judge Spero. And I've made all these arguments,
25 but they have been rejected. So, again, I would just say that

1 we have to litigate based on the rules that have been
2 established.

3 There's one other issue. They do pose an objection
4 to disclosure of these documents. They want it limited to
5 certain lawyers in a very constraining way.

6 I would say it's somewhat ironic, because one of the
7 people -- Mr. Herrera is part of these groups that have to
8 disclose documents. And when we raised the same objection with
9 respect to certain people from the City that were on No On 8
10 campaigns, they called it insulting.

11 So I would say, it is no less insulting today to say
12 that the lawyers representing proponents would be anything less
13 than circumspect in their obligations with respect to this
14 discovery.

15 The proponents also put in some objections last
16 night. I will not rehash them all here. I think we can stand
17 on our papers on most of them. I would just like to raise two,
18 briefly, with the Court.

19 One is the privilege log issue. This Court said that
20 if there was one thing that was crystal clear in the Ninth
21 Circuit's opinion -- this is Footnote 1 of the Ninth Circuit's
22 opinion -- is that you must submit a privilege log to maintain
23 this privilege.

24 So there is a clear error of law in the -- at least
25 one clear error of law in the opinion below. It is that a

1 party can in any way preserve its privilege without a privilege
2 log, at least based upon the rulings that we have from the
3 Ninth Circuit and this Court.

4 The other is, we would submit, we do not object to a
5 reasonable -- a use of a reasonable list of search terms --

6 **THE COURT:** A reasonable?

7 **MR. PANUCCIO:** List of search terms, excuse me, for
8 culling through electronic documents.

9 **THE COURT:** Okay. Well, you -- the Magistrate gave
10 you a list of search terms, didn't he?

11 **MR. PANUCCIO:** Yes, the Magistrate did. And they
12 were culled from a -- they are actually less than the search
13 terms that were proposed. The No On 8 parties submitted a list
14 of seven, and the Magistrate Judge eliminated one and gave us a
15 list of six.

16 **THE COURT:** That's on page --

17 **MR. PANUCCIO:** You're asking me the page of the
18 order?

19 **THE COURT:** Yes.

20 **MR. PANUCCIO:** Excuse me, for one second. I believe
21 that is on Pacer page 13. It's the second to the last page of
22 the order. It's --

23 **THE COURT:** Yes. I beg your pardon. I got it.
24 Well, you got six out of seven.

25 **MR. PANUCCIO:** Well, we didn't. They got.

1 We never had a chance to put in any response to the
2 search terms that they proposed. The order came out -- they
3 put -- these search terms came in at -- well, Eastern time,
4 near 3:00 in the morning, near midnight Pacific time, on
5 Wednesday evening. The order came out midday on Friday.

6 So all we would submit is that to have a searching
7 party -- the party that is searching for the documents submit
8 the list of search terms without any response, and for the
9 Court to unilaterally adopt them, we think, is error. And most
10 courts that use search terms typically allow both parties to
11 weigh in on that.

12 We don't object to --

13 **THE COURT:** Well, let me ask this. If there's
14 anything in this discovery that is going to be pertinent to the
15 issues in the case, are not those documents going to be flushed
16 out by the six search terms that the Magistrate included in his
17 order, his March 5th order?

18 **MR. PANUCCIO:** Well, all I can argue, based on that,
19 is from logic, based on the terms, because I don't have their
20 databases, of course, to run a test.

21 I can say that they submitted these terms after they
22 ran tests for a week. So assuming they wanted to minimize the
23 number of documents they had to produce, there is at least some
24 suspicion that it would certainly cull out a certain number of
25 documents.

1 But I would also point Your Honor to the terms. For
2 instance, "Prop 8" and "Proposition 8." Now, there is no doubt
3 that a lot of documents will mention those terms because, of
4 course, the campaign was about that.

5 But in just thinking about, for instance, counsels'
6 e-mails over the last six months, this is a trial about Prop 8.
7 You tend to stop saying -- if everybody knows what the main
8 subject matter is, you are not always going to repeat that word
9 in every e-mail that you send.

10 So we think that these are very general terms, and
11 they will pick up a number of e-mails. But there are some
12 other specific terms that relate to specific issues in the
13 case, that we think were not included here and might well
14 pinpoint relevant documents.

15 **THE COURT:** Well, I would assume that if there is
16 some particularly pertinent document that does not mention one
17 of these six terms, that there will be a predecessor document
18 that does. And you'll be able to say, well, wait a minute,
19 there is obviously a follow-up. And you could pursue that in
20 subsequent discovery.

21 That is, if there's an e-mail exchange that doesn't
22 mention one of these six terms, that is particularly
23 enlightening, I will bet you dollars to doughnuts that there is
24 a predecessor e-mail exchange or document that does mention one
25 of those terms; and you'd be able to follow the trail through.

1 **MR. PANUCCIO:** Two points on that, if I may.

2 **THE COURT:** Okay.

3 **MR. PANUCCIO:** One would be, other than the terms
4 "Prop 8" and "Proposition 8," I'm not sure that the other --
5 the other terms may well capture relevant documents, but I'm
6 not sure how often "Yes On 8" is going to turn up in these
7 documents, or "protectmarriage.com."

8 I mean, they could have been reacting to any number
9 of -- I don't think that most of their documents will contain
10 the phrase "protectmarriage.com" in them. So I'm just not sure
11 that I would accept the factual predicate to that.

12 Secondly --

13 **THE COURT:** Well, okay. But is it clearly wrong?

14 **MR. PANUCCIO:** I believe, based on the process that
15 occurred -- which was a unilateral submission, with no chance
16 for the proponents to propose any other terms -- I believe it
17 was clearly wrong, yes, Your Honor.

18 A second point would be, in terms of the later
19 discovery point, I think all parties are interested in not
20 dragging out this process, as Your Honor alluded to a little
21 bit earlier in asking me how we would go about this.

22 **THE COURT:** Correct.

23 **MR. PANUCCIO:** So I would just suggest, as a
24 procedural -- we could nip that in the bud by just expanding
25 this list somewhat and not having to go through that procedure.

1 With that, unless Your Honor has -- I'll just leave
2 the other objections we have to the papers, if that's okay with
3 the Court.

4 **THE COURT:** That's fine. Thank you, Mr. Panuccio.

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

6 **THE COURT:** Now, Mr. Dusseault.

7 **MR. DUSSEAULT:** Yes. Thank you, Your Honor.

8 Your Honor, as I mentioned, our primary issue is one
9 of timing. But there is one issue that Mr. Panuccio
10 referenced, that I do want to highlight. It's the one issue on
11 which we did submit papers to Magistrate Judge Spero.

12 Mr. Panuccio mentioned this issue of a lopsided
13 record about the mix of information before voters, and the
14 legislative history. And your Honor was asking questions
15 about: What is this going to lead to? How important is it?

16 I do think it's very important to bear in mind that
17 there really was a wealth of information available to the
18 proponents about the mix of information from the No On 8
19 campaign, that they could have made part of the trial record if
20 that was truly their strategy and approach.

21 There were many radio ads, many television ads, many
22 print materials, many documents that were produced by the third
23 parties before trial. My understanding is that there were, in
24 fact, 300 documents from the third parties, that were put on
25 the proponents' exhibit list, but only four that were

1 introduced.

2 So your Honor had asked: Does the fact that
3 plaintiffs pursued and got this information really mean that
4 they need to put it into the record?

5 I think the trial record makes clear that they made
6 strategic decisions not to focus on a wealth of available
7 No On 8 material, for whatever reasons. We, in contrast, on
8 the plaintiffs' side, put in a wealth of evidence about the
9 messages that were before voters.

10 So I think it's a bit puzzling to me that the
11 proponents are now taking the position that this, you know,
12 legislative history and mix of information put in by both sides
13 is critical, when they seem to have made a strategic decision
14 not to do so with the information they had.

15 But the primary issue I did want to speak to is the
16 matter of timing. And, as Your Honor is very well aware, one
17 of the issues that we have been just emphasizing from the very
18 beginning of this case is that we represent individuals in this
19 case who are suffering daily irreparable harm.

20 When we originally came to this court seeking a
21 preliminary injunction, this Court denied the preliminary
22 injunction but said we can conduct a trial on the merits in an
23 expedited case.

24 Both sides, proponents certainly included, the
25 plaintiffs, and the Court, as well, worked really tirelessly to

1 handle this case in an expedited manner, that we really did all
2 the fact discovery, all the expert discovery, and a trial in
3 about five months.

4 We are now close to two months after the close of the
5 evidence, and we're having this fight. And it's not clear to
6 me where it will end; where it will end in terms of how long it
7 will take to search these documents; where it might end in
8 terms of Mr. Panuccio coming back --

9 **THE COURT:** Hasn't the Magistrate put a time limit?

10 **MR. DUSSEAULT:** The Magistrate, I believe, put a time
11 limit of the end of the month for the production of the
12 documents that he directed to be produced.

13 But our concern, certainly, with some of the issues
14 that Mr. Panuccio is raising, for example, expanding the search
15 terms, as I understand, the proponents are asking that the
16 third parties search documents that don't refer to Prop 8, but
17 use words like "election" and "vote" and "Obama."

18 I can only imagine that what we would then hear from
19 the ACLU is: You want us to read every document that says
20 Obama? That will take us quite a bit of time.

21 We need a resolution to our clients' claims that they
22 are suffering this harm. And we're now in a position where
23 we're facing a lot of delay.

24 Now, Your Honor made a comment earlier that nobody
25 faults the proponents in terms of -- or is suggesting that they

1 didn't act diligently. The one point I would make here is that
2 the proponents made a strategic decision to handle this
3 discovery in stages, to fight tooth and nail against the
4 production of this material; and only when it came to the
5 bitter end, which was during the trial, to then contact people
6 who had been subpoenaed much earlier and say, okay, we've been
7 telling you all along that you don't have to produce documents
8 even though we subpoenaed them, that you could wait.

9 **THE COURT:** Well, the bitter end was on January 4,
10 wasn't it, when the Ninth Circuit clarified its --

11 **MR. DUSSEAULT:** Well, it was, Your Honor. But the
12 motion to compel, if I recall my hazy trial memory, was filed
13 on Martin Luther King Day, or that weekend, when we were a week
14 into trial.

15 **THE COURT:** All right. But that was, basically, a
16 week after the Ninth Circuit had given us the guidance that --

17 **MR. DUSSEAULT:** Well, it was. It was, Your Honor.

18 And my only point is that the proponents certainly
19 could have done this in tandem and said: We oppose the
20 discovery that plaintiffs are seeking. But, if you,
21 Chief Judge Walker or Ninth Circuit is going to compel us to
22 produce, these third parties have to be compelled to produce.

23 They chose not to do that. I'm not saying that
24 wasn't diligent. But I'm saying, as a result of that, we are
25 now where we are, where we are almost two months after trial.

1 And we need to, I would submit, find some way to bring this to
2 closure, both in terms of a speedy and readily-resolved
3 production. I would submit that a very tight time frame be put
4 on either party to look at those documents and identify any
5 that have to be made part of the record.

6 **THE COURT:** What --

7 **MR. DUSSEAULT:** And then to figure out how we're
8 going to handle that.

9 **THE COURT:** What of the Magistrate's order has failed
10 to accomplish those objectives?

11 **MR. DUSSEAULT:** Well, I would submit, Your Honor,
12 that if, in fact, documents are produced by the deadline set by
13 Magistrate Judge Spero, that would accomplish those objectives.

14 And what I would then ask the Court to do is, set a
15 very tight time frame, like maybe a week to ten days, that the
16 parties could look at those documents and come to the Court and
17 say, These four documents, even though we didn't introduce the
18 publicly-available documents about the No On 8 campaign, these
19 four, these 15, have to come in.

20 **THE COURT:** How do we know it's going to be four or
21 15?

22 **MR. DUSSEAULT:** I don't know. I really don't know
23 what it's going to be. And I also don't know that there's not
24 going to be another complaint raised about the nature of the
25 production. But I think some short deadline has to be set to

1 come to the Court, for the proponents, and say, Here's what we
2 actually intend to do, and to resolve that quickly so that we
3 can proceed.

4 **THE COURT:** What would you propose? I talked to
5 Mr. Panuccio about the possibility of a motion to reopen or
6 introduce additional evidence or a proffer.

7 **MR. DUSSEAULT:** Your Honor, I think --

8 **THE COURT:** What do you suggest?

9 **MR. DUSSEAULT:** I think those solutions that you
10 mentioned would be acceptable to us as alternative.

11 I think, particularly given the absence of the use of
12 the publicly available information, some form of proffer is
13 very reasonable. And I don't think that anything that
14 Judge Spero did limits that, because Magistrate Judge Spero
15 never addressed how the documents would or would not be
16 introduced.

17 And I think it's very reasonable for you, as the
18 judge presiding over the trial, to say, If we're going to do
19 all of this in discovery, give me a proffer of how it would be
20 used.

21 I think that is reasonable. If that's not going to
22 be done, and perhaps in a addition to that, it sounds like what
23 the other side is suggesting is something like we did at the
24 end of the case, where they may come to us with some number of
25 documents and say, Counsel for plaintiffs, we'd like to have

1 you agree that these 15 documents can be added to the exhibits
2 that have already been admitted.

3 It may be that we look at those and we say, Okay, we
4 don't have any objection to that. We don't think it's going to
5 bear at all on the issues that we spent trial proving. We
6 would say, You know what? We don't have an objection to that.

7 And if Your Honor wanted to accept that and make that
8 part of the trial record, then we could be done with it. Our
9 hope would be that there might be some resolution that could be
10 handled in that sort of manner.

11 If you start talking about calling additional
12 witnesses, calling third parties to talk about their documents,
13 I just think, at that point, it really undoes the whole spirit
14 of what we were doing here, which was this expedited trial in
15 just a matter of months, where we all worked so hard to get to
16 that resolution.

17 **THE COURT:** Anything further, Mr. Dusseault?

18 **MR. DUSSEAULT:** No. Thank you.

19 **MR. BOMSE:** May I, Your Honor?

20 **THE COURT:** Well, I have a question for you --

21 **MR. BOMSE:** Yes.

22 **THE COURT:** -- Mr. Bomse.

23 **MR. BOMSE:** Yes.

24 **THE COURT:** Why shouldn't you produce a privilege
25 log?

1 **MR. BOMSE:** I'm sorry?

2 **THE COURT:** Why should you not produce a privilege
3 log? As Mr. Panuccio said, if there's anything clear in the
4 Ninth Circuit's opinion, it is that the failure to produce a
5 privilege log is a problem.

6 **MR. BOMSE:** It would be --

7 **THE COURT:** Now, the Magistrate, of course, relieved
8 you of that burden because of your argument about undue burden.
9 But if there is anything that is clearly erroneous -- as
10 Mr. Panuccio said -- in the Magistrate's approach, it would
11 appear to be the failure to require the ACLU to provide a
12 privilege log.

13 **MR. BOMSE:** And I would say, we have now identified
14 an enormous burden. Producing a privilege log would be far,
15 far more burdensome than even reviewing the documents. And I
16 suspect for Equality California that that is true to an even
17 greater degree. And it seems to me, again, to no good end.
18 And that's my response there.

19 But, if I may, I had hoped, when I first stood up, to
20 be able to go to the issue that -- the issues that occupied
21 your colloquy with Mr. Panuccio and, actually, with
22 Mr. Dusseault, which has to do with what are we doing here and
23 what --

24 **THE COURT:** But you're not a party to this lawsuit.

25 **MR. BOMSE:** No. But if I have something to say that

1 might be useful to the Court, I would hope you would,
2 nonetheless, want to hear it. Because I think that, in fact,
3 you managed to illuminate, through your questions to
4 Mr. Panuccio and then Mr. Dusseault, managed to illuminate yet
5 another issue, both of which are related, which is the fact
6 that we are engaged here in a largely fruitless task that will
7 have the unfortunate effect of delaying what, really, Your
8 Honor has strived and accomplished, which I am in awe of, to
9 get a case like this --

10 **THE COURT:** Forget the compliments. After all, if
11 there's any occasion for delay --

12 (Simultaneous colloquy.)

13 **MR. BOMSE:** We're not seeking delay. We filed our
14 objections as quickly as we could. We said we'd come here and
15 waive our right to file reply briefs. We don't want delay.

16 But we do care about these issues. And it seems to
17 me, when Your Honor asks about the burden, and you asked about
18 the burden on us, I think the real burden that is going to be
19 imposed here, if Your Honor were to affirm the Magistrate
20 Judge's order, would be that resolution of these incredibly
21 important issues is going to get delayed, whether we like it or
22 not.

23 Simply in this court, March 31st would simply be the
24 beginning. You illustrated it yourself. The documents don't
25 come in -- if there are any such documents -- on their own.

1 Witnesses will need to be called. There will be, potentially,
2 further fights about all of that. And this case will be
3 delayed in its resolution.

4 But it's also the case, Your Honor, that if you are
5 inclined to affirm Magistrate Judge Spero's order, we, of
6 course, are going to have to seek review, as a matter of
7 principle, in the Ninth Circuit.

8 And you may think that that is, in fact, a fruitless
9 act on our part because the Ninth Circuit has spoken. I'm sure
10 Your Honor believed that his original opinion was correct in
11 this case, but the Ninth Circuit felt otherwise.

12 This is a case in which the Ninth Circuit has
13 actually decided to invoke its very rarely-used mandamus
14 jurisdiction. This is a question that, as much as we want
15 Mr. Dusseault and his clients to prevail, we have to pursue,
16 and we are going to pursue.

17 But let me -- let me go back, then, with all of Your
18 Honor's obvious dubiousness about everything I'm saying, to the
19 question of: What is this about?

20 You know, I have been doing this long enough -- maybe
21 I've been doing it too long. But I think I've done enough of
22 these cases to know when somebody is doing something for the
23 purpose they say and when they are doing it for some other
24 purpose.

25 Now, when I was opposing, when I was seeking to

1 compel production of documents or get certain discovery, I had
2 the wonderful, wonderful opportunity -- I always loved it,
3 because I could speculate about just what I was going to find.
4 In the most grandiose terms, I could explain to the Court how I
5 would find not merely a smoking gun but an arsenal of
6 heavy-duty artillery.

7 But let's look at what's been offered here.

8 **THE COURT:** I think Mr. Dusseault has made that
9 argument quite effectively.

10 **MR. BOMSE:** I'm -- I think he has. I think he also
11 has made the argument that I was about to make in this reply,
12 which is, all the public documents were produced. They made
13 virtually no use of them. We are, it seems to me, doing
14 nothing that is going to advance the proper resolution of this
15 case.

16 **THE COURT:** All right. Thank you very much.

17 (At 12:09 p.m. the proceedings were adjourned.)

18 - - - -

19 **CERTIFICATE OF REPORTER**

20 I certify that the foregoing is a correct transcript
21 from the record of proceedings in the above-entitled matter.

22 DATE: Wednesday, March 24, 2010

23

24 _____
25 Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter