

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

STATE OF FLORIDA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
	)	Case No. 3:10cv00091/RV
	)	
	)	Pensacola, Florida
	)	April 14, 2010
v.	)	9:05 a.m.
	)	
UNITED STATES DEPARTMENT OF	)	
HEALTH AND HUMAN SERVICES,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

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RULE 16 SCHEDULING CONFERENCE PROCEEDINGS  
BEFORE THE HONORABLE ROGER VINSON,  
SENIOR UNITED STATES DISTRICT JUDGE  
(Pages 1 through 46)

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1           **THE COURT:** All right. And for our Defendants?

2           **MR. GERSHENGORN:** Good morning, Your Honor. Ian  
3 Gershengorn from the civil division of the Justice Department on  
4 behalf of the United States, the Defendants.

5           **MR. KENNEDY:** Brian G. Kennedy, also from the civil  
6 division.

7           **MR. BECKENHAUER:** Eric Beckenhauer, also from the  
8 Department of Justice, civil division.

9           **MS. MOINE:** Pamela Moine from the U.S. Attorney's  
10 Office for the United States.

11           **THE COURT:** All right. And now those who are on the  
12 phone, I don't know what particular order you want to -- all  
13 right, let's see, do we have Alabama?

14           **MR. SMYCZEK:** Yes, Your Honor. Pete Smyczek with the  
15 Alabama Attorney General's Office.

16           **THE COURT:** And Florida?

17           **MR. MAKAR:** Yes. This is Scott Makar with the  
18 Solicitor General's Office.

19           **THE COURT:** Very well. And Colorado?

20           **MR. DOMENICO:** This is Dan Domenico, Solicitor  
21 General.

22           **THE COURT:** All right, sir. Indiana?

23           **MR. FISHER:** Tom Fisher, Solicitor General.

24           **THE COURT:** All right, sir. And Michigan?

25           **MR. RESTUCCIA:** Eric Restuccia, Solicitor General.

1           **THE COURT:** All right, sir. And Nebraska?

2           **MS. SPOHN:** Katie Spohn, special counsel.

3           **THE COURT:** All right. And Nevada?

4           **MR. HUTCHISON:** Mark Hutchison, special counsel to the  
5 governor --

6           **THE COURT:** I'm sorry, I missed the second one. Do  
7 you have someone with you, Mr. Hutchison?

8           **MR. HUTCHISON:** Yes. Jacob Reynolds is with me as  
9 well, Your Honor. He's with my firm.

10          **THE COURT:** All right. And South Carolina?

11          **MR. STIRLING:** Bryan Stirling, Deputy Attorney  
12 General, and Emory Smith, Assistant Deputy Attorney General.

13          **THE COURT:** Very well. And South Dakota?

14          **MR. JACKLEY:** Marty Jackley, Attorney General, and  
15 Deputy Attorney General Charlie McGuigan.

16          **THE COURT:** All right, sir. Pennsylvania?

17          **MR. DELONE:** Bart Delone, Senior Deputy Attorney  
18 General.

19          **THE COURT:** All right, sir. And Texas?

20          **MR. COBB:** Bill Cobb, Special Assistant and Senior  
21 Counsel to the Attorney General.

22          **THE COURT:** Thank you. Utah?

23          **MR. SWALLOW:** John Swallow, Chef Deputy Attorney  
24 General.

25          **THE COURT:** And Washington State?

1           **MR. MCKENNA:** Attorney General Rob McKenna and Chief  
2 Deputy Brian Moran.

3           **THE COURT:** All right, sir. I think that's all that I  
4 have listed who are participating. Did I miss anyone?

5           **MS. TAITZ:** Your Honor --

6           **MR. KANEFIELD:** Yes, Your Honor. Joseph Kanefield  
7 with the Arizona Governor Jan Brewer's office.

8           **THE COURT:** I'm sorry, I missed that. Say it again,  
9 please.

10          **MR. KANEFIELD:** Joseph Kanefield, general counsel to  
11 Arizona Governor Jan Brewer.

12          **THE COURT:** All right, Arizona. Thank you. Anyone  
13 else? Yes, ma'am.

14          **MR. TAITZ:** I'm Orly Taitz, an attorney. I brought  
15 the pleadings, Your Honor.

16          **THE COURT:** Why don't you come up and use this  
17 microphone. Are you the one who filed the Motion to Intervene?

18          **MR. TAITZ:** Yes, I filed Motion for Reconsideration.  
19 There are two copies here, one with the Plaintiff and one with  
20 the Defendant.

21          **THE COURT:** All right. I've already dealt with the  
22 Motion to Intervene. I'll deal with whatever the  
23 reconsideration is, but as of now you are not a participant.  
24 Thank you.

25                 All right. I think we have everyone, right?

1 Well, as you know, we're here for purposes of a Rule  
2 16 to try to schedule what we need to do and how to do it. And  
3 I don't need to remind you that Rule 1 of the Rules of Civil  
4 Procedure emphasize that these proceedings should secure the  
5 just, speedy and inexpensive determination of every action and  
6 proceeding, so I hope that's what we'll be able to do.

7 There are a number of things that I want to go over  
8 with you, and in no particular order, frankly. But let me see  
9 if any of you have some suggestions on maybe ways that we can  
10 facilitate this and make it more effective.

11 **MR. WINSHIP:** Yes, Your Honor. Blaine Winship for the  
12 Plaintiffs. We have been in discussion with the attorneys who  
13 are here for the Defendants, for the United States, from late  
14 last week right up through this morning, in fact, about trying  
15 to work together to come up with the best way to expedite this  
16 case.

17 And I have a proposed form of order that I think might  
18 be very useful to Your Honor. And if I may be permitted to  
19 approach just to hand you a copy?

20 **THE COURT:** Mr. Gershengorn, have you seen this?

21 **MR. GERSHENGORN:** I have seen it, Your Honor. It's  
22 not a joint proposal, but I have seen it. Thank you, sir.

23 **THE COURT:** All right.

24 **MR. WINSHIP:** Thank you, Your Honor. And let me say  
25 at the outset, speaking on behalf of the Plaintiffs, that we

1 have not only taken to heart the spirit and intent of Rule 1,  
2 but we also have been very mindful of Your Honor's own statement  
3 in your order of last week, I believe it was published on the  
4 8th of April, that the parties to this litigation and indeed the  
5 citizens of this country have an interest in having this case  
6 resolved as soon as practically possible.

7 We believe that we have come up with an approach that  
8 would enable us to do exactly that. We proposed -- we  
9 indicated, by the way, to the Department of Justice attorneys  
10 that we would be amending this complaint of ours. We have a  
11 need to do that not only because we have several other parties  
12 coming in, several states that are going to be joining, but in  
13 addition to that, of course, we had reconciliation legislation  
14 that was passed that has modified the terms of the Act itself,  
15 and the Act, of course, as Your Honor knows, is quite lengthy.

16 We have -- in this proposed scheduling order we have  
17 indicated a date for our amended complaint to be filed, which  
18 would be May 14th. Our understanding, from talking to counsel  
19 for the Department of Justice, is that there is no dispute with  
20 respect to that. If we have any difference at all, it lies  
21 downstream from there. We have indicated to them why --

22 **THE COURT:** That's 30 days from today basically, May  
23 14th?

24 **MR. WINSHIP:** Yes, Your Honor. They had indicated to  
25 us that they desired to file a Motion to Dismiss, which, of

1 course, is not at all surprising in this type of litigation. We  
2 indicated to them that we wanted to file a Motion for Summary  
3 Judgment, and we wanted to file that very quickly. We believe  
4 that our claims in this litigation are ripe for a determination  
5 by Summary Judgment. They raise essentially questions of law  
6 concerning the constitutionality of the Act in question.

7 **THE COURT:** Well, let me cut you short just a minute,  
8 because it seems to me that this is really a case with no  
9 factual issues, so there will be no discovery, if I view the  
10 case as it seems to be. Is that a fair assumption or am I  
11 wrong?

12 **MR. WINSHIP:** Well, I think you are essentially  
13 correct, and that is our view. Most of our causes of action  
14 really will sound purely in law. To the extent that there might  
15 be any question of fact that would be involved, we believe that  
16 those will be facts that are matters of public record and that  
17 are beyond reasonable dispute.

18 What we propose is to have our Motion for Summary  
19 Judgment and their Motion to Dismiss, in effect, sequenced.  
20 When we brought that up to the Department of Justice, they  
21 actually sent us back a proposed form of sequencing of these,  
22 and that's pretty much reflected in what I've given Your Honor.

23 We had a couple of differences that are really minor  
24 with regard to dates for -- I think the September 7th date for  
25 the Plaintiffs to do an opposition to the Defendants' Motion to

1 Dismiss and for us to file our own Summary Judgment Motion.  
2 They had proposed a slightly different date from that. But  
3 otherwise, we were fairly well in agreement, we thought, on  
4 that.

5 This morning they indicated to us, and I'm sure they  
6 will present this point themselves, that the way they would  
7 prefer to proceed would be to have a Motion to Dismiss filed by  
8 them and briefed and argued and decided, and then after that is  
9 over we would then proceed to have our Motion for Summary  
10 Judgment filed and briefed and heard.

11 And we believe that that's not in the best interest of  
12 the Court or judicial economy. We think there are a lot of  
13 overlapping arguments between what they're going to be arguing  
14 as a matter of law for dismissal, what we're going to be arguing  
15 as a matter of law for a judgment in our favor as a matter of  
16 Summary Judgment under Rule 56.

17 We note that under Rule 56 we have the right to move  
18 for Summary Judgment at any time. We also note that Rule 57,  
19 with respect to declaratory judgments, does consider within its  
20 purview the ordering of a speedy trial by the Court.

21 We're interested in expediting this case as well. We  
22 think that the legal issues are basically going to be  
23 substantially overlapping, and we think that this proposed  
24 interlocking schedule of motions and briefs, the way this is set  
25 up, which is largely the product of suggestions from the

1 Department of Justice lawyers themselves, very much work to that  
2 end in order to achieve that.

3           If at the end of the day, Your Honor, when all of  
4 these motions are heard -- and we believe they should be heard  
5 together at the same time. And under our timing, we have -- the  
6 last submission would be November 14th, and we would be ready to  
7 have a hearing anytime Your Honor would be ready to receive us  
8 to argue these motions, anytime thereafter. I think that's a  
9 fairly aggressive and efficient way of moving this case along,  
10 and we would urge the Court to give that consideration.

11           If at the end of the day, when the Court has ruled --  
12 has considered and ruled on these motions, if the Court were,  
13 for whatever reason, to decide that the case should neither be  
14 dismissed nor disposed of by way of Summary Judgment in favor of  
15 Plaintiffs, we believe this motion practice will help greatly in  
16 terms of narrowing the issues and focussing us all on what  
17 discovery there might be that would be in order with regard to  
18 anything that remains before the Court after that.

19           It is our hope that all of this would be resolved as a  
20 matter of law. I would note in connection with that that we've  
21 added a provision that I think both parties are in agreement  
22 with that we would ask that the requirements for initial  
23 disclosure under Rule 26 and other reporting requirements under  
24 Rule 16 and the corresponding local rules, that we be excused  
25 from complying with those for the time being pending further

1 order of the Court, precisely because we do basically subscribe  
2 to Your Honor's view that this case sounds essentially at law.

3 And so we think the best resolution of this case would  
4 be along the lines of what we have proposed and what we had  
5 understood that the Department of Justice favored as well.

6 And I guess in fairness, if Your Honor -- do you have  
7 any questions of me?

8 **THE COURT:** Well, let me just ask in the alternative,  
9 because our circuit has sometimes indicated that it's not  
10 necessary to go through the formalities of Summary Judgment  
11 motions if, in fact, it's a purely legal matter that can be  
12 resolved on briefing.

13 In lieu of handling it by Rule 56, can we just set up  
14 a briefing schedule, because that's really what it seems to be  
15 coming down to, in the nature of the way you do it in an  
16 appellate setting?

17 **MR. WINSHIP:** Well, we could -- we could be --  
18 certainly try to be a little more creative in how we're doing  
19 this.

20 We did -- in terms of doing these motions together, we  
21 and the Department of Justice attorneys did consider how best to  
22 proceed for this, and we did think it would be orderly to do it  
23 in this particular fashion that we have set forth here. I do  
24 think there will be a lot of economy of scale.

25 If you'll note, the September 7th date would have us

1 filing a Memorandum in Opposition to the Motion to Dismiss along  
2 with a Motion for Summary Judgment. I think the Summary  
3 Judgment route for us, in terms of asking for affirmative relief  
4 from the Court as compared to avoiding relief that the  
5 Defendants seek which is dismissal, has some benefits because it  
6 will allow us to focus on a claim-by-claim basis with regard to  
7 what the elements are and what the showing would have to be.  
8 And in order to get everything, I think, fully briefed and  
9 argued in accordance with each of the claims in a separate  
10 sense, I think the structure has some genuine merit to it, Your  
11 Honor.

12 **THE COURT:** Very well.

13 Mr. Gershengorn?

14 **MR. GERSHENGORN:** Thank you, Your Honor. I guess I  
15 would say that we share a lot of the goals of Florida and the  
16 Plaintiffs here.

17 **THE COURT:** Let me remind everyone, I think we're all  
18 either directly or indirectly working for the taxpayers,  
19 including myself, so we have that at heart.

20 **MR. GERSHENGORN:** And we recognize that, Your Honor,  
21 and therefore, I do think judicial economy, which my colleague  
22 mentioned, is definitely a central theme, and narrowing the  
23 issues is also what we're interested in.

24 We do think, however, that a Motion to Dismiss,  
25 largely for the reasons Your Honor mentioned that these are

1 likely to be legal issues, we do think there is a strong basis  
2 for a Motion to Dismiss. And we would -- we think that it  
3 serves the purpose of narrowing the issues, which, again, the  
4 Plaintiffs have suggested and Your Honor has recognized as well,  
5 and also comports with the notion of dealing with the  
6 jurisdictional issues, and we think there are some here that,  
7 for at least a number of the claims, and perhaps all, that we  
8 would want the Court to resolve.

9           And it seems to us that proceeding first through a  
10 Motion to Dismiss briefing and holding off on the Summary  
11 Judgment, either holding briefing in abeyance or otherwise, is  
12 the right way to proceed, that that allows this Court to narrow  
13 the issues, rule on the jurisdictional question, and then set a  
14 sensible course going forward.

15           **THE COURT:** Well, let me -- and I don't mean to put  
16 you on the spot. I know the Federal Government normally has 60  
17 days in which to file its responsive pleading, but in this case  
18 it seems like that time could be reduced somewhat. Is it  
19 possible to move the proposed schedule so that your Motion to  
20 Dismiss would be, say, 30 days earlier?

21           **MR. GERSHENGORN:** Your Honor, certainly from the May  
22 14th date I will say that we do have some flexibility. I will  
23 just note for the Court that we have some personal scheduling  
24 issues that we'd like to try to work around, in particular a  
25 wedding for one of the -- a daughter of one of the lead counsel.

1 Perhaps, Your Honor, is there a way two weeks -- we had  
2 proposed, I think, July 16th or July 1st.

3 **THE COURT:** Well, just looking at these dates, I would  
4 like to see us move everything about one month up. I think that  
5 would seem to me to be certainly within the rule of possibility.

6 **MR. GERSHENGORN:** So you would have -- Your Honor, I'm  
7 sorry. June 16th would be a Motion to Dismiss.

8 **THE COURT:** August would be the response time, and  
9 then they would then use that time for the Motion for Summary  
10 Judgment to which you would respond.

11 **MR. GERSHENGORN:** And I'm sorry, Your Honor, would you  
12 be working off the -- with a Motion to Dismiss briefing first,  
13 the complete briefing on the Motion to Dismiss --

14 **THE COURT:** Well, we'll get into that. I'm just  
15 talking about the timing right now. I would like to see us move  
16 about a month faster than the proposed schedule, is really what  
17 I'm suggesting to you.

18 **MR. GERSHENGORN:** And Your Honor, the only hesitancy I  
19 have --

20 **THE COURT:** And it may be appropriate to deal with the  
21 Motion to Dismiss completely independent of any subsequent  
22 filing. But I think if we go by Rule 56, that motion can be  
23 filed at any time, so it can be filed while, you know, while the  
24 Motion to Dismiss is still pending. But I can promise you it  
25 will be ruled on rather quickly, as soon as I can deal with it.

1           **MR. GERSHENGORN:** Right. I guess, Your Honor, a  
2 couple of things. The only hesitancy I have -- we certainly  
3 could move it up, as Your Honor suggests. The only hesitancy I  
4 have is we haven't seen the amended complaint, so it's a little  
5 tricky.

6           On the Summary Judgment Motion, I would say that it  
7 does seem to us that holding the briefing on -- it certainly  
8 could be filed at any time, but holding the briefing in abeyance  
9 pending resolution of the Motion to Dismiss is the way that we  
10 think makes the most sense for Your Honor, but we certainly  
11 could move -- we are prepared, you know, to move more  
12 expeditiously than is scheduled here, as Your Honor --

13           **THE COURT:** Well, let me do it this way: I will give  
14 you -- what have you -- you've used a 40-day response time or 30  
15 -- 40 days to respond?

16           **MR. GERSHENGORN:** Oh, yes, okay.

17           **THE COURT:** I'll give you 40 days to respond to the  
18 Motion for Summary Judgment. After a ruling is made on the  
19 Motion to Dismiss, if it's necessary for you to respond, then  
20 you'll have 40 days in which to do that.

21           **MR. GERSHENGORN:** Okay.

22           **THE COURT:** If I grant your motion, that will be the  
23 end of it. If I deny the motion, then you'll have 40 days from  
24 the time it's denied.

25           **MR. GERSHENGORN:** Okay. And just so I'm clear, Your

1 Honor, so we would have a Motion to Dismiss and the briefing on  
2 that. Whatever the Summary Judgment Motion is, it would be 40  
3 days from the time you rule on the Motion to Dismiss?

4 **THE COURT:** Let me see how that jibes with the other  
5 time sequence we have, because -- well, there's no reply brief  
6 time, I don't think, set out in your schedule.

7 **MR. GERSHENGORN:** Well, I think actually there would  
8 be, Your Honor. I understand the local rules don't generally  
9 contemplate reply. I think both sides would request -- I speak  
10 for the Plaintiffs, but I certainly request here that it be  
11 unilateral. I do think that the schedule does provide for the  
12 motion for a reply, so we would request that.

13 **THE COURT:** Mr. Winship, do you have a reply time  
14 cranked into the schedule?

15 **MR. WINSHIP:** I do, sir. On the October 14th date,  
16 you'd note, Your Honor, that there would be Defendants' reply in  
17 support of the Motion to Dismiss. And then on November 14th,  
18 there would be Plaintiffs' reply in support of the Motion for  
19 Summary Judgment. We understand, of course, Your Honor, that --

20 **THE COURT:** You have another 30 days. I will have to  
21 say that should be reduced for your reply time to about 14 days.  
22 Can you do that?

23 **MR. WINSHIP:** Certainly, Your Honor.

24 **THE COURT:** That will expedite things. Because that  
25 actually will -- well, let me see. Wait just a minute.

1 Everything is moved up a month anyway, but we're looking at --  
2 instead of September, it would be August.

3 **MR. GERSHENGORN:** So something like June 16th, August  
4 7th, and then August -- Your Honor was suggesting the 21st or --

5 **THE COURT:** August 21st would be the reply. That  
6 would --

7 **MR. GERSHENGORN:** Can we get three weeks for that,  
8 Your Honor? Split the difference, so make it the 20th?

9 **THE COURT:** I contemplate, now, there will be a Motion  
10 for Summary Judgment from the Plaintiffs. Are the Defendants  
11 moving for Summary Judgment?

12 **MR. GERSHENGORN:** No, no, I'm sorry. The Defendants  
13 -- I'm sorry. Your Honor, are you talking about the briefing  
14 schedule for the Motion to Dismiss? So it would be June --

15 **THE COURT:** The Motion to Dismiss would be June 16th.  
16 The response would be due August 7th.

17 **MR. GERSHENGORN:** Right, and then the reply.

18 **THE COURT:** And then they would also be able to file  
19 their Motion for Summary Judgment at that same time, August 7th,  
20 to which you would not have to respond until we deal with the  
21 Motion to Dismiss, which will be going on simultaneously.

22 **MR. GERSHENGORN:** Right. And then the only question  
23 then is the reply --

24 **THE COURT:** Their reply would be --

25 **MR. GERSHENGORN:** And that's when I was asking Your

1 Honor whether you would consider three weeks there, so it would  
2 be August 28th would be the reply brief on the Motion to  
3 Dismiss.

4 **THE COURT:** Your reply would be -- instead of 14,  
5 you're asking for 21?

6 **MR. GERSHENGORN:** 21, yes, sir.

7 **THE COURT:** Well, if I gave you 21, they're going to  
8 have to have 21 days, too.

9 **MR. GERSHENGORN:** We have no objection.

10 **THE COURT:** Can we do that? I mean, I'm happy. 21  
11 days.

12 **MR. GERSHENGORN:** So it'll be Motion to Dismiss, June  
13 16th, August 7th, August 28th.

14 **THE COURT:** August 28th. Now let me see what the  
15 calendar looks like. I suspect we may be getting over into the  
16 weekend here.

17 **THE CLERK:** The 28th is a Saturday, Judge.

18 **THE COURT:** That's a Saturday, so we can't do that.

19 **THE CLERK:** The 27th is a Friday.

20 **THE COURT:** 27th, can we make it that way?

21 **MR. GERSHENGORN:** Sure.

22 **THE COURT:** And that means August 7th is also a  
23 Saturday.

24 **THE CLERK:** Correct.

25 **THE COURT:** So that would have to be August 6th.

1           **MR. GERSHENGORN:** Okay. And Your Honor, I presume  
2 that this is all premised off of that May 14th amended complaint  
3 filed?

4           **THE COURT:** Right, that's where it starts.

5           **MR. GERSHENGORN:** From the Defendants' perspective,  
6 Your Honor, we are comfortable in saying that we can work with  
7 that schedule.

8           **MR. WINSHIP:** Your Honor, if I may just interject on  
9 that?

10          **THE COURT:** Okay.

11          **MR. WINSHIP:** I'm a little bit confused at this point  
12 that we would be having our Motion for Summary Judgment filed  
13 and served on them and then just basically held in abeyance  
14 pending all the briefings --

15          **THE COURT:** It would be held in abeyance. And we can  
16 move that Summary Judgment date back some because obviously  
17 we're not going to be able to decide the Motion to Dismiss until  
18 you've had an opportunity to respond and the Defendants have  
19 responded. So we could actually move that to anytime you want  
20 up until -- well, I'll leave it up to you.

21          **MR. WINSHIP:** Well, all right, Your Honor. I just  
22 wanted to mention one more time that -- I understand the  
23 sequence you have. I do believe that we would have a faster  
24 resolution of all of this if we did have this stuff interlocking  
25 even if we ended up with a hearing that resolved the Motion to

1 Dismiss beforehand. It was our goal -- because we do believe  
2 there is going to be significant overlap of the arguments and  
3 the issues as between what we're asking for as a matter of law  
4 for relief and what they're asking for as a matter of law for  
5 relief.

6 **THE COURT:** Well, you have a much better grasp of what  
7 the overlap might be. I've given it some thought, and as I  
8 understand it, there's really no challenge to any of the action  
9 in Congress. In other words, the way this Act was adopted or  
10 anything about that is not being challenged in the least.

11 So the question of justiciability is probably, at  
12 least with respect to that, is not going to be coming up. But  
13 there may be some overlaps in other areas which at this point in  
14 time I can't anticipate, but maybe the two of you can enlighten  
15 me.

16 Are there some other areas that --

17 **MR. GERSHENGORN:** Yeah, I do think, Your Honor, that  
18 there are -- that there's good reason to keep it separate, as  
19 Your Honor has proposed.

20 I think there are going to be some serious  
21 jurisdictional and standing issues that are really better  
22 resolved in a Motion to Dismiss setting or at least presented to  
23 the Court in a Motion to Dismiss setting, and that once those  
24 issues are resolved, I actually think, although we share the  
25 desire for expedition, that it's actually more expeditious to do

1 it that way, have a ruling from Your Honor on the Motion to  
2 Dismiss so that the parties know exactly what is still on the  
3 table. So I guess we do think that what you broached along the  
4 line, Your Honor, is the way to go.

5 **MR. WINSHIP:** Well, Your Honor, if I may say, when we  
6 asked -- when we were asked by counsel for the United States how  
7 long they thought we would need to respond --

8 **THE COURT:** Let me ask you all just to use that  
9 microphone so our telephone participants can hear better.

10 **MR. WINSHIP:** Sure, Your Honor. Thank you. When we  
11 were asked --

12 **TELEPHONE OPERATOR:** Joseph Kanefield has just joined  
13 conference.

14 **MR. GERSHENGORN:** Shall we start again, Your Honor?

15 **THE COURT:** All right. Mr. Winship, go ahead.

16 **MR. WINSHIP:** Thank you, sir.

17 When we were asked by counsel for Defendants last week  
18 how long we thought we would need to respond to their Motion to  
19 Dismiss, we asked them, well, that would depend on the nature of  
20 the motion. And the response that we got from them was that the  
21 motion was not really going to be limited just to jurisdictional  
22 issues.

23 They are, as we understand it from what they've said,  
24 going to be pitching a very broad-based Motion to Dismiss, not  
25 just on issues of justiciability or ripeness or standing or just

1 preliminary sorts of things, but also on the basis of whether  
2 our causes of actions state legal claims for which relief can be  
3 granted.

4           And that is really what led us to be talking about  
5 this kind of an interlocking schedule to begin with, which, as I  
6 pointed out to Your Honor, actually the Department of Justice  
7 sent back to us with the idea in mind that we all thought -- and  
8 I certainly thought we were in concurrence -- that there is -- I  
9 mean, I understand tactically why they want to have their bite  
10 of the apple first, and I think that's going to slow this entire  
11 procedure down a lot to have all of that resolved -- briefed and  
12 resolved, and then we turn our attention to summary judgment,  
13 when, in fact, they are going to be broadly addressing reasons  
14 why our causes of action do not lie at law and they are really,  
15 in effect, the obverses of the positions that we're going to be  
16 taking in our own moving papers, that they certainly do and  
17 that, as a matter of law, we're entitled to relief.

18           That is the essence that gave rise to this concept of  
19 interlocking motions. I mean, we often see, of course, in  
20 constitutional challenges cross-motions for Summary Judgment.  
21 This is a little unusual because they wanted to file a Motion to  
22 Dismiss and raise other types of issues as well.

23           And we appreciate that, but as I said at the very  
24 beginning, we are mindful of the need to move this case forward,  
25 and we are trying to do precisely that. We're trying to move

1 this forward as aggressively as possible. We had frankly  
2 envisioned that by the end of this briefing process and moving  
3 the end of this up so that instead of ending it November 14th,  
4 it would end around maybe October 14th -- we can understand the  
5 Court's reasons for doing that, and we are in a position to  
6 agree with that. We certainly will comply with that, and we  
7 think it's in the best interest of moving the case along to do  
8 that.

9           After that, the question of whether the Motion to  
10 Dismiss should -- when the Court has had the benefit of all of  
11 the briefing, whether the Motion to Dismiss should be heard in a  
12 separate hearing or should be collapsed into the same hearing  
13 with maybe jurisdictional arguments addressed first is  
14 something, obviously, that is entirely within Your Honor's  
15 discretion.

16           We would urge Your Honor to consider having a single  
17 hearing that would address the Motion to Dismiss and the Motion  
18 for Summary Judgment because we believe Your Honor will see that  
19 there is a tremendous economy of scale to be achieved here and a  
20 great deal of judicial efficiency in moving this case forward.  
21 That is why this interlocking briefing schedule came to be in  
22 the first place and why it came to emanate from the Department  
23 of Justice.

24           They do, as we understand it, anticipate doing a very  
25 broad-based Motion to Dismiss that will go very much into the

1 very questions that we will be broaching for the Court in our  
2 Summary Judgment Motion.

3 **THE COURT:** I think Mr. Rivkin stood up to say  
4 something. I want to give him the chance.

5 **MR. RIVKIN:** Your Honor, thank you very much.

6 **THE COURT:** Let me ask you to use microphone, too,  
7 please.

8 **MR. RIVKIN:** Thank you very much. Actually, Mr.  
9 Winship made the same points, but all I was going to reiterate  
10 is that we believe there are advantages to Your Honor in the  
11 full briefing schedule completed on both Defendants' Motion to  
12 Dismiss and our Motion for Summary Judgment, opportunity for you  
13 to get the full flavor of all the arguments.

14 How you choose to rule on them, whether it is in a  
15 single hearing, that we are suggesting, or staggered, is  
16 something that is entirely in your discretion. But again, the  
17 benefits of laying out the full sets of briefs for you rather  
18 than deferring the briefing on our motions is, I think, very  
19 palpable, given all the imperatives that Your Honor has laid  
20 out. Thank you.

21 **THE COURT:** Well, I anticipated in -- you know,  
22 because I thought about what we could discuss today, I  
23 anticipated that the Government is going to want to go through  
24 with the regular Motion to Dismiss.

25 And I think -- my leaning is that we ought to take it

1 one bite at a time, even though, as I've already indicated to  
2 you, I think we can go ahead and start the Summary Judgment  
3 process, particularly if there's not going to be cross-motions  
4 for Summary Judgment, and that's where I understand we are.

5 The Motion for Summary Judgment is going to be yours,  
6 right?

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

8 **MR. GERSHENGORN:** Well, again, it would depend, Your  
9 Honor, on where we stood after our Motion to Dismiss. It's  
10 unclear at this point whether there will be, you know,  
11 cross-motions of which their opposition may --

12 **THE COURT:** Well, there are all sorts of  
13 possibilities.

14 **MR. GERSHENGORN:** Well, yeah.

15 **THE COURT:** I mean, the Motion to Dismiss could be  
16 successful with some claims and not others.

17 **MR. GERSHENGORN:** Sure, right.

18 **THE COURT:** It could be totally successful or totally  
19 unsuccessful or any variation, I suppose.

20 **MR. GERSHENGORN:** Certainly.

21 **THE COURT:** So there are some reasons, I guess, to  
22 deal with that. But again, I don't have a good, full grasp of  
23 how these issues are going to mesh, and you're telling me  
24 there's a lot of overlap.

25 **MR. RIVKIN:** If I may, Your Honor, that's why -- I

1 guess the real issue -- and we are entirely agreeable with  
2 judicial expedition as to the schedule that has been suggested.

3 All we're really debating here, if we're debating  
4 anything, is whether or not the briefing on the Motion for  
5 Summary Judgment would be delayed after we file the motion or  
6 would it proceed at the same time as the briefing on the Motion  
7 to Dismiss unfolds.

8 And again, it seems to us that completing both  
9 briefing processes puts you in the best position at that point  
10 in time in exercising your discretion how you wish to tackle  
11 these motions. I see no particular benefit in delaying the  
12 briefing, especially since the Government, undoubtedly, is going  
13 to have sufficient resources to -- in fact, in a lot of cases,  
14 the Department of Justice -- I know how many able attorneys they  
15 would be able to put on this. You can have one team working on  
16 the Motion to Dismiss briefing and one team working on the  
17 Motion for Summary Judgment.

18 **THE COURT:** Well, one thing I'm looking forward to is  
19 the quality of what I'm going to receive, so that's good.

20 **MR. RIVKIN:** Thank you, Your Honor.

21 **THE COURT:** Well, let's see what --

22 **MR. GERSHENGORN:** Well, I actually want to say a  
23 couple of things, Your Honor. Again, not to seem prejudice, but  
24 I think that Your Honor's one bite at a time is exactly the way  
25 to proceed in this case.

1 I do want to make clear and candor to the Court, we  
2 think there are substantial 12(b)(1) issues, but we do intend  
3 most likely to file the 12(b)(1) and the 12(b)(6) as  
4 appropriate.

5 But there is -- you know, although counsel for the  
6 Plaintiffs suggest that Your Honor is better with a sort of mass  
7 of undifferentiated briefs, I think there is a good reason that  
8 the Federal Rules provide for the Motion to Dismiss first, and  
9 it's precisely to narrow the issues before the Court for the  
10 benefit of judicial economy both for the Court and for the  
11 parties so we know exactly what remains live.

12 And I guess just to -- in the interest of keeping it  
13 brief, I'll just say I think that the schedule that's been set  
14 up -- we have the Motion to Dismiss, we narrow the issues, the  
15 Summary Judgment Motion is on file. As soon as Your Honor  
16 rules, we've got 40 days and we will meet that. We certainly  
17 have both the resources and the talent to meet Your Honor's  
18 schedule, and so we would be happy to do that.

19 **THE COURT:** Well, I haven't asked you, I asked Mr.  
20 Winship, about the alternative of just going directly to a  
21 briefing of the issues instead of really going through the  
22 formal Summary Judgment Motion under Rule 56.

23 I don't think it really has any substantive  
24 difference. It's just that sometimes there's some steps that  
25 have to be taken that, when you blow away all the chaff, the

1 real substance of it is the same.

2 **MR. GERSHENGORN:** Your Honor, I guess I can say a  
3 couple of things. First of all, I mean, I do think that this is  
4 one where we do want to dot the Is and cross the Ts on this  
5 case, and I do think that an approach that sticks to the Motion  
6 to Dismiss in the normal course is actually the better way to  
7 proceed for all concerned. I think it sets the right tone and  
8 narrows the issues.

9 **THE COURT:** Well, that's fine. I mean, I'm just --  
10 I'm just tossing it out as an alternative.

11 **MR. GERSHENGORN:** That would be our recommendation,  
12 Your Honor, so the approach that you have outlined so far has  
13 worked and we think is the one better suited for this case.  
14 Thank you, sir.

15 **THE COURT:** Let me find where I think we are on our  
16 dates and see what that leaves us.

17 I think we're agreed that the Plaintiffs may have up  
18 until and through May 14th to amend the complaint. The  
19 Defendants will have up until and through June 16th -- let me  
20 see if that date is right. That's a Wednesday, so that should  
21 not be a problem -- to file their -- actually, it says Motion to  
22 Dismiss, but I suppose that's the answer to the amended  
23 complaint as well.

24 **MR. GERSHENGORN:** That's correct, Your Honor.

25 **THE COURT:** You would have until June 16th to respond,

1 including the Motion to Dismiss. And the motion would be  
2 accompanied by the appropriate briefing. And we'll get to some  
3 page numbers and things about that in a bit.

4 The Plaintiffs' opposition brief to the Motion to  
5 Dismiss would give you to August 6th. And they may file a  
6 Motion for Summary Judgment at that time or anytime subsequent  
7 to that, and we'll deal with it in the manner that I've  
8 indicated, and that is that the Defendants will not have to  
9 respond to that until I have ruled on the Motion to Dismiss.

10 And we will take the Motion to Dismiss separately. I  
11 understand the rationale that the Plaintiffs are proposing here,  
12 but it seems to me that it's just a much cleaner way to deal  
13 with it is to get any issues that may be subject to a Motion to  
14 Dismiss fully aired and resolved one way or the other before we  
15 get into the Summary Judgment.

16 As soon as there is a -- well, wait just a minute.  
17 Before we do that, August 6th, and then there will be a response  
18 to the reply to the Plaintiffs' opposition to the Motion to  
19 Dismiss, which would be due August 27th, I think we said.

20 **MR. GERSHENGORN:** Yes, Your Honor.

21 **THE COURT:** Now, I think we need to schedule an  
22 argument date on the Motion to Dismiss soon after that, and I'm  
23 agreeable to most any date, probably. And we're really looking  
24 at the latter half of the month of August, it looks like to me.  
25 Is that --

1           **MR. GERSHENGORN:** The reply brief comes in August  
2 27th, Your Honor.

3           **THE COURT:** That's right, so it would be, really,  
4 early September.

5           **MR. GERSHENGORN:** Your Honor, the only thing I'd ask  
6 -- I don't have the calendar in front of me. I know that there  
7 are some -- it's not -- there are some Jewish holidays that come  
8 up in the middle of September. I would sure like to predate  
9 those, if we could, and work around those.

10          **THE COURT:** Let's see, I think I've got those on this  
11 calendar.

12          **MR. GERSHENGORN:** I apologize, Your Honor, for not  
13 having the calendar with me.

14          **THE COURT:** Rosh Hashanah begins September 8th and  
15 runs, well, through the remainder of that week, and Yom Kippur  
16 begins September 17th.

17          **MR. GERSHENGORN:** Maybe the 15th?

18          **THE COURT:** I'm looking at the week of September 13th.  
19 What does that look like?

20          **MR. WINSHIP:** That's fine for us, Your Honor.

21          **MR. GERSHENGORN:** Sometime around the 15th, Your  
22 Honor, if that's consistent with your schedule? Yom Kippur is  
23 on which date?

24          **THE COURT:** I'm looking at the week of September 13th.  
25 Anytime during that week will be fine. We can put it Tuesday or

1 Wednesday. What's a good day?

2 **MR. WINSHIP:** Either is fine with us, Your Honor.

3 **THE COURT:** Either one?

4 **MR. GERSHENGORN:** Perhaps the Tuesday -- Your Honor, I  
5 apologize. One more time, Yom Kippur is on which date?

6 **THE COURT:** Yom Kippur begins Friday the 17th, which  
7 would be Friday of that week.

8 **MR. GERSHENGORN:** So either Tuesday or Wednesday is  
9 fine.

10 **THE COURT:** Either of those? Let's do it for Tuesday  
11 then. Tuesday, September 14th at nine o'clock. That's on the  
12 Motion to Dismiss.

13 As soon as I have ruled on that, then the Defendants  
14 will have -- what did I give you, 40 days?

15 **MR. GERSHENGORN:** 40 days.

16 **THE COURT:** 40 days. 40 days and 40 nights. Well,  
17 we'll give you the biblical period then, 40 days from whenever  
18 that comes for your response. And then there will be a reply,  
19 and then I think I've given you 21 days after to reply.

20 **MR. WINSHIP:** That will be fine, Your Honor. Thank  
21 you.

22 **THE COURT:** And then we'll set an argument after that.  
23 We'll set an argument once we get into that scheduling, once we  
24 see where we are, but that will be set so that it's convenient  
25 for everybody. All right. Have you got all of these dates?

1 Okay.

2 Now, can we talk about the size of the briefing and  
3 how that will be -- actually the mechanics of how that will be  
4 done? Mr. Gershengorn, if you want to start.

5 **MR. GERSHENGORN:** I guess one question, Your Honor,  
6 would be whether it would be more efficient for the Court to --  
7 we haven't talked about page lengths, I mean, to propose a  
8 length for the Court.

9 **THE COURT:** Well, obviously, I don't want a 100-page  
10 brief. Thirty pages may not be adequate.

11 **MR. GERSHENGORN:** That's what we were thinking, Your  
12 Honor, somewhere more on the order of 45 or 50 pages.

13 **THE COURT:** I don't know what your preference is, but  
14 I'm agreeable to anything up to 50 pages, if you want to do  
15 that.

16 **MR. GERSHENGORN:** I think that would be fine, Your  
17 Honor, from our perspective.

18 **MR. WINSHIP:** I think that would be fine. Let me ask  
19 you one question, Your Honor, and I know that it would differ  
20 from one federal judge to another.

21 In terms of Summary Judgment Motions, if we have  
22 multiple counts and we have multiple motions, we have a Summary  
23 Judgment with regard to this count and a Summary Judgment with  
24 regard to that count, would Your Honor be agreeable to us filing  
25 separate Summary Judgment Motions directed at different counts

1 or do you want --

2 **THE COURT:** I'm a great advocate of putting all the  
3 motions together. I don't like breaking up Summary Judgments  
4 because -- particularly timewise, but I like to have it all  
5 together so you can try to grasp the whole thing.

6 Now, I don't know what that does to your page count,  
7 though, because some of these issues I know are quite complex,  
8 but I still think 50 pages ought to be enough to do it for you.

9 **MR. WINSHIP:** That sounds reasonable at this stage,  
10 Your Honor. Let me just say that if it turned out that we  
11 thought that there was a need to have more than that, we would  
12 confer with other counsel first.

13 **THE COURT:** There are three counts in this complaint.  
14 I don't know if you're going to change that around in the  
15 amended complaint or not, but that ought to be enough to deal  
16 with that. It seems to me it should be.

17 Is that reasonable? If it's not, I'm open to  
18 suggestions.

19 **MR. GERSHENGORN:** I think it's reasonable. But as  
20 counsel said, if it turns out that --

21 **THE COURT:** Now, we're talking the principal brief.  
22 Now, the reply brief ought to be certainly no more than half  
23 that.

24 **MR. GERSHENGORN:** That's fair, Judge. But I would  
25 also say, Your Honor, that if counsel finds that it --

1 (Inaudible) --

2 **COURT REPORTER:** Judge, I can't hear.

3 **MR. GERSHENGORN:** I'm sure we could work out -- I'm  
4 sorry, Your Honor.

5 **THE COURT:** Yeah, I need you to use the mic.

6 **MR. GERSHENGORN:** Counsel had suggested that 50 pages  
7 -- opposing counsel suggested that 50 pages would likely be  
8 enough but they might be pressed at the end, and we certainly  
9 would be amenable to working something out, if Your Honor is  
10 amenable if they need more. And we think as a general structure  
11 50/50/25 is certainly a good baseline.

12 **MR. WINSHIP:** And we would agree with that, Your  
13 Honor.

14 **THE COURT:** All right. Let's do that. And I don't  
15 think we're going to need any separate statements of facts in  
16 this case because both of you have indicated that the facts are  
17 really not contested, not an issue and really not all that  
18 material, it seems like.

19 **MR. WINSHIP:** If we -- Your Honor, if we do -- on our  
20 Motion for Summary Judgment, if we do need to do that, I will  
21 represent that we will be endeavoring only to delve into facts  
22 that are supportable of Summary Judgment, and that is to say,  
23 facts that we believe would be beyond reasonable dispute and yet  
24 nevertheless may not appear in the four corners of the pleading.

25 **THE COURT:** Well, you know, if you say a state has X

1 number of Medicaid patients, I don't think it really makes a  
2 difference if it's X minus 1 or X minus 100.

3           **MR. WINSHIP:** We agree with you, Your Honor. We're  
4 just saying that, technically speaking, in terms of complying  
5 with the requirement of Rule 56. And as I said, if we're  
6 getting into something that is outside the actual pleading  
7 itself, since this is something that is asking for affirmative  
8 relief as compared to asking for dismissal, which does target  
9 the pleading, I think it would behoove us to perhaps be  
10 satisfying the requirements of Rule 56. But I'm not purporting  
11 to indicate to Your Honor that we think that we would  
12 necessarily have a great amount of statement of material facts  
13 at this point that we would be putting in. But whatever we  
14 would be doing in that regard would be with an eye towards  
15 satisfying the Court that Summary Judgment is, in fact,  
16 appropriate.

17           **THE COURT:** Okay. Let me ask about one question that  
18 has arisen. We've had numerous Motions to Intervene or  
19 requests, none of them -- I don't think they've really got to be  
20 formal, but requests for leave to file an amicus filing of some  
21 nature.

22           I've already ruled on at least one of the motions to  
23 intervene, but I would like your suggestions on how to deal with  
24 these. I don't think they should be a part of the official  
25 court record if anybody wants to file anything that's in the

1 nature of an amicus filing, but I want to keep those so that  
2 they can be referenced by anyone who needs to, including you.  
3 So do either of you have any suggestions on how you would like  
4 to have those treated?

5 And I'm anticipating that at this point no one is  
6 going to really make a case for permissive intervention, but  
7 there may be some. But assuming that there are none, we have  
8 enough plaintiffs, I think, without bringing in a lot of  
9 intervenors. But I'm open to whatever you may want to feel is  
10 an appropriate way to deal with this.

11 Mr. Winship?

12 **MR. WINSHIP:** Yes, Your Honor. Well, I guess our view  
13 of it is that we agree with Your Honor. From what you've  
14 communicated in your order of last week, we believe that these  
15 issues are being properly presented and represented by the  
16 counsel that are already in this case for the named plaintiffs  
17 and for the defendants.

18 We certainly understand how many people in this nation  
19 are very galvanized about this action that has been filed as  
20 they are about the Act of Congress that has become law. It's  
21 not at all our desire to squelch in any way the desire of the  
22 people to be heard. We do have mechanisms for formal  
23 petitioning of the Court in order to file amicus briefs and  
24 such.

25 Our only concern, it's really more in a sense of that

1 we don't want the expeditious resolution of this litigation to  
2 be bogged down with a lot of extraneous voices that the Court  
3 might believe are not really helpful to the Court in terms of  
4 doing the best thing under the rule of law on behalf of the  
5 people of this country in this litigation.

6 And I think the formal mechanisms with regard to the  
7 standards for intervention and for being heard as amicus curiae  
8 are in place probably for a pretty good reason. And I think  
9 beyond that, it's hard for us to say, other than to look at a  
10 case-by-case basis, with regard to who it is who wants to be  
11 heard in this action and why and in what form.

12 I mean, do they want to be filing motions? Do they  
13 want to be heard and depriving us perhaps of time before Your  
14 Honor to present our own arguments? These are considerations I  
15 think we would have to address as and when they are presented,  
16 sir.

17 **MR. GERSHENGORN:** Your Honor, I largely agree that we  
18 need to address when we're presented. I do think that --

19 **THE COURT:** And let me say that these are not just --  
20 these are on both sides of this issue.

21 **MR. GERSHENGORN:** Right, yes, Your Honor.

22 **THE COURT:** People have strong feelings.

23 **MR. GERSHENGORN:** I guess the one thing I would  
24 distinguish between intervenors and amici, I do think that there  
25 are going to be a number of amici who are, I suspect, on both

1 sides who are going to want to file. We're supposed to be on  
2 the electronic record. I don't know what Your Honor's practice  
3 is, but I do think that we may get -- we may get a host of  
4 people.

5 **THE COURT:** Well, there's a formal way to do that, and  
6 I would anticipate that those who are serious about wanting to  
7 do that will follow that procedure.

8 **MR. GERSHENGORN:** Correct. That's all I would  
9 suggest.

10 **MR. WINSHIP:** Your Honor, if I may ask one other  
11 related question with respect to that. We notice, as Your Honor  
12 does and as counsel for the Department of Justice does, that we  
13 are getting a number of filings that are coming in. Some of  
14 them are not complying with the rules, and the Court has been  
15 dealing with them accordingly. But in the days and weeks to  
16 come, we can't predict how many more of these we're going to be  
17 seeing. I think we just have had one or two within the last few  
18 business days, even postdating Your Honor's order of April 8th.

19 And in that respect, we would ask if we would be  
20 excused from having to actually direct our attention away from  
21 presenting the issues we need to get before the Court, be  
22 excused from having to respond to these various motions, unless  
23 we, for whatever reason, choose to do so.

24 **THE COURT:** I don't expect you to respond to any of  
25 those. If you want to respond, you certainly may, but I --

1 you're not obligated to respond to any of those.

2 **MR. GERSHENGORN:** So we can assume that unless the  
3 Court -- if the Court is interested in a particular response or  
4 particular filing, you'll let us know?

5 **THE COURT:** That's right. Unless you feel it's  
6 something that you want to respond to for whatever reason, you  
7 don't have to.

8 **MR. WINSHIP:** Thank you, Your Honor.

9 **MR. GERSHENGORN:** Thank you, Your Honor.

10 **THE COURT:** I'll take care of that.

11 Let me just make sure -- there's some required items  
12 that we're supposed to put into a scheduling order under the  
13 rules, and let me make sure that I've got all of those  
14 addressed.

15 The time to amend the pleadings we've addressed, but  
16 we haven't discussed joining or adding parties. I presume that  
17 same time would apply, and that would mean anybody who wants to  
18 join in officially would have to have done so by May 14th.

19 **MR. WINSHIP:** That is our expectation. That, by the  
20 way, Your Honor, is a time that's keyed into, roughly speaking,  
21 the amount of time that we would have in order to move to amend  
22 as a matter of course.

23 **THE COURT:** Yes.

24 **MR. WINSHIP:** If we needed after that or wanted after  
25 that to be able to add some other parties, we would ask for

1 leave of the Court to do so, of course.

2           **THE COURT:** You've also asked, and I certainly agree,  
3 that the disclosures under Rule 26 can be waived. You don't  
4 have to comply with those mandatory disclosures, but I think we  
5 need to at least put a discovery deadline in case there is some  
6 discovery that you see that you may want to do at some point.  
7 And I would propose that we use the Motion to Dismiss date as  
8 the discovery date. Is that adequate? That would be June 16th,  
9 or do you want to just put another date?

10           I don't have any feelings one way or the other. I  
11 mean, we can make this date as long as you want, but I would  
12 like to make sure that it's sufficiently in advance of the  
13 Summary Judgment time so that we have a record that's pretty  
14 well fixed.

15           **MR. GERSHENGORN:** I guess one question would be, does  
16 it make sense to see where we are after the Motions to Dismiss?  
17 Does it make sense -- I mean, I don't think either side is  
18 anticipating discovery, although I don't think either side has  
19 foreclosed it. I guess the question is, does it make sense to  
20 see where we are after the Motion to Dismiss and have a brief  
21 time for discovery after that?

22           **THE COURT:** We can do that. I will simply say that  
23 the discovery must be completed by September 14th. That's the  
24 oral argument. If we need more time, just ask for it, and we'll  
25 deal with it, but I don't contemplate that you will. So let's

1 just put that date in, and we can move it if necessary.

2 Is that all right?

3 **MR. WINSHIP:** That would be acceptable if Your Honor  
4 feels we have to have a date in. I just wanted to note that the  
5 nature of our Summary Judgment is such that we actually expected  
6 it -- as I said earlier, when the dust settles and Your Honor  
7 has ruled that you're not granting their motion and you're not  
8 granting our motion, it would give us an opportunity at that  
9 time to be framing where we need to go with regard to discovery.

10 So if Your Honor is uncomfortable with what is really  
11 paragraph No. 2 of what I presented to Your Honor, then if you  
12 feel we need to put a date in but with the understanding that  
13 that would be revisited, then that would be fine. But we still  
14 would prefer to just basically all understand that this is not  
15 your typical sort of Motion to Dismiss and then discovery and  
16 then at the close of discovery a Motion for Summary Judgment.  
17 This isn't that typical kind of sequence.

18 **THE COURT:** It isn't. This is -- you know, this is a  
19 rule that's -- I mean, a case that's extraordinary in a number  
20 of ways, and the rules don't neatly fit it. But I would prefer  
21 to put a deadline for discovery just to have it in there. So  
22 we'll use that. And as I said, it's a flexible date and, if  
23 necessary, we can change it.

24 **MR. WINSHIP:** Thank you, Your Honor.

25 **THE COURT:** I don't know if there are any other

1 motions that you may contemplate filing other than the Motions  
2 to Dismiss and the Summary Judgment Motion.

3 Any other motions that may be out there?

4 **MR. GERSHENGORN:** Not at the current time, Your Honor.

5 **THE COURT:** I can't think -- if there are, just put it  
6 in a motion, file a motion.

7 Let's see if there are some other things that we need  
8 to discuss. I think I've exhausted my list.

9 Do you have anything else?

10 **MR. WINSHIP:** Not at this time, Your Honor.

11 **MR. GERSHENGORN:** Not at this time, Your Honor.

12 **THE COURT:** All right. Then I will enter the  
13 scheduling order, and it will come out this week. And it will  
14 set out these dates and the procedure that we've outlined, and  
15 that's the schedule we will endeavor to follow.

16 There are always things that are unanticipated, so  
17 don't be reluctant if there's something that comes up and you  
18 can't seem to work it out between the two of you. I'm available  
19 for a telephone conference on short notice, and we can certainly  
20 address whatever issues may come up.

21 Let's see, we have the participants from Arizona, and  
22 I don't think we had those formally identified on the record.  
23 And you may have to spell your name so that our court reporter  
24 can get that.

25 Would you do that for us, please? Are the

1 representatives from Arizona still on the telephone line?

2 **MR. KANEFIELD:** Yes, Your Honor. I'm sorry. Joseph  
3 Kanefield, J-O-S-E-P-H, K-A-N-E-F-I-E-L-D.

4 **THE COURT:** And your title, sir?

5 **MR. KANEFIELD:** General counsel to Arizona Governor  
6 Jan Brewer.

7 **THE COURT:** Is there anything further we need to  
8 discuss this morning?

9 If not, thank you very much. We're adjourned.

10 *(Proceedings concluded at 10:06 a.m.)*

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12 *I certify that the foregoing is a correct transcript from the*  
13 *record of proceedings in the above-entitled matter. Any*  
14 *redaction of personal data identifiers pursuant to the Judicial*  
*Conference Policy on Privacy are noted within the transcript.*

15 *s/Donna L. Boland*

*5-19-10*

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17 *Donna L. Boland, RPR, FCRR*  
18 *Official Court Reporter*

*Date*

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