

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vaughn R. Walker, Chief Judge

Kristin Perry, et al.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 09-2292 VRW
)	
Arnold Schwarzenegger, et)	
al.,)	
)	
Defendants.)	
)	

San Francisco, California
Friday, September 25, 2009

TRANSCRIPT OF PROCEEDINGS

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1 Friday - September 25, 2009

10:05 a.m.

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THE CLERK: Calling Civil Case 09-2292, Kristin Perry, et al. versus Arnold Schwarzenegger, et al.

5

Can I get appearance for the plaintiffs, please.

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MR. DUSSEAULT: Good morning, Your Honor. Chris Dusseault of Gibson, Dunn & Crutcher on behalf of the plaintiffs.

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THE COURT: Good morning.

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MR. DUSSEAULT: Good morning.

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MR. MCGILL: Good morning, Your Honor. Matthew McGill of Gibson, Dunn & Crutcher for the plaintiffs.

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MR. MONAGAS: Good morning, Your Honor. Enrique Monagas for the plaintiffs.

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MS. PIEPMEIER: Good morning, Your Honor. Sarah Piepmeier also with Gibson, Dunn for the plaintiffs.

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MR. FLYNN: Good Morning, Your Honor. Ron Flynn, City and County of San Francisco, for plaintiff intervenor City and County of San Francisco.

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THE COURT: Good morning.

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MS. LEE: Good Morning, Your Honor. Mollie Lee, City and County of San Francisco, also for the plaintiff intervenor City and County of San Francisco.

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MR. GOLDMAN: Good morning, Your Honor. Jeremy Goldman, Boies, Schiller & Flexner.

25

1 **THE COURT:** Very well.

2 **MR. COOPER:** Good morning, Mr. Chief Judge. Chuck
3 Cooper of Cooper & Kirk for the defendant intervenors. I would
4 like to introduce the Court to my colleague, Mr. Jesse
5 Panuccio.

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

7 **MR. COOPER:** And I'd like to ask the Court's special
8 permission, since his pro hac motion is pending, that the Court
9 allow him to sit with me at counsel today above the bar.

10 **THE COURT:** Well, that would be fine. I trust that
11 you vouch for him.

12 **MR. COOPER:** Without reservation.

13 **THE COURT:** Good. All right. That will be fine.

14 **MR. RAUM:** Good Morning, Your Honor. Brian Raum,
15 Alliance Defense Fund, for the defendant intervenor.

16 **MR. CHANDLER:** Timothy Chandler, Alliance Defense
17 Fund, defendant intervenor.

18 **MR. BURNS:** Deputy Solicitor General Gordan Burns
19 for the Attorney General.

20 **THE COURT:** Good morning.

21 **MR. BURNS:** Good Morning.

22 **THE COURT:** Very well. And I believe we have
23 Mr. Mennemeier on the telephone representing the Governor; is
24 that correct?

25 **MR. MENNEMEIER:** Yes, Your Honor.

1 **THE COURT:** Very well. Mr. Mennemeier indicated
2 that he did not think that he needed to weigh in on this issue
3 and, to save money, which is a pressing concern of the State
4 these days, that he thought telephone appearance would be
5 appropriate, and I agreed to do that.

6 In thinking about the problem that you've presented,
7 I've done a little thinking and some research on something that
8 I've not heretofore been familiar with, that is the law in
9 California that applies to individuals and organizations that
10 sponsor initiative and referenda that are placed before the
11 voters, and have taken a look at the Political Reform Act of
12 1974, which is codified in the Government Code and some
13 provisions in the Election Code.

14 And, so, at the outset, before we get into the
15 specific arguments on the issue that is before us this morning,
16 I'd like a little help from both sides, since I'm sure you're
17 far more knowledgeable on these subjects than am I. And tell
18 me a bit about the requirements that apply to individuals and
19 organizations, in this case ProtectMarriage.com is the
20 organization as I understand it, that sponsor and put before
21 the voters an initiative measure.

22 Some of these questions probably should be directed
23 first to you, Mr. Cooper, since ProtectMarriage.com is your
24 organization. When was that entity organized?

25 **MR. COOPER:** Your Honor, the Court kindly assumes a

1 level of knowledge with these State Court provisions that I'm
2 frank to confess to the Court, with some embarrassment, that
3 I'm not an expert on, but I have at hand a genuine expert on
4 this in the courtroom. His name is Andy Pugno, Andrew Pugno.
5 He was the ad hoc general counsel to ProtectMarriage, and with
6 the Court's permission I think the Court would be edified very
7 much if I would call my colleague to the podium to treat to
8 these questions.

9 **THE COURT:** That certainly would be fine.

10 **MR. COOPER:** Thank you.

11 **THE COURT:** Mr. Cuneo, is it?

12 **MR. COOPER:** Pugno, P-U-G-N-O.

13 **THE COURT:** Thank you.

14 Good morning.

15 **MR. PUGNO:** Good morning, Your Honor. I cannot say
16 that I was expecting to have to visit with you this morning.

17 **THE COURT:** I beg your pardon?

18 **MR. PUGNO:** I cannot say that I was expecting to
19 visit with you and talk about this this morning.

20 **THE COURT:** Well, this is a discovery dispute and,
21 so, we don't need be too formal about it.

22 **MR. PUGNO:** ProtectMarriage.com, Yes on 8, is a
23 ballot, primarily formed Ballot Measure Committee. There are
24 different kinds of Ballot Measure Committees. One is primarily
25 formed when its sole purpose is the passage or defeat of one

1 ballot measure. And, so, ProtectMarriage.com is registered as
2 such a committee, as a creature of statute of the Political
3 Reform Act. And I would say that it was either -- I want to
4 say that it was October or November of 2007.

5 **THE COURT:** 2000 what?

6 **MR. PUGNO:** And '7.

7 **THE COURT:** Okay.

8 **MR. PUGNO:** Roughly one year before the election
9 date. It was roughly around the time that the official
10 proponents which, under the Elections Code, has a different
11 standing. Only a registered elector, a voter, can sponsor a
12 ballot measure. A nonprofit organization, a Ballot Measure
13 Committee cannot submit to the Attorney General to begin the
14 process an initiative. Only a registered voter can. So in
15 this case there were five registered voters that together
16 submitted the measure to begin the process.

17 **THE COURT:** And those five registered voters are the
18 intervenors here; is that correct?

19 **MR. PUGNO:** They're five of the six intervenors.

20 **THE COURT:** Five of the six.

21 **MR. PUGNO:** Yes.

22 **THE COURT:** So there were six?

23 **MR. PUGNO:** The sixth intervenor is the committee,
24 the creature of statute.

25 **THE COURT:** I see. But the registered voters for

1 purposes of putting the initiative on the ballot were the five
2 individual intervenors here; is that correct?

3 **MR. PUGNO:** That's correct.

4 **THE COURT:** All right.

5 **MR. PUGNO:** And then a Ballot Measure Committee
6 primarily formed can also be a vanilla variety or what's called
7 a sponsored committee. In this case it was sponsored in that
8 it's administrative.

9 The California Renewal, a California nonprofit
10 organization, basically said, "We're going to create this
11 creature of statute and that's going to be this campaign
12 committee." And, so, in this case you will see a project of
13 California Renewal in the name of the committee, which by law
14 the sponsor of the committee has to be named in the committee's
15 legal name as registered with the State. So that's why it has
16 a long name.

17 **THE COURT:** Okay. Now, once formed, how long does
18 one of these organizations have to remain in existence?

19 **MR. PUGNO:** Well, the committee can terminate at any
20 time. However, most of the time they go on, if the initiative
21 makes the ballot and the campaign proceeds and concludes,
22 generally speaking there is a postelection audit conducted by
23 the State to make sure that all the expenditures were correctly
24 reported and all the contributions were correctly reported, and
25 that all expenditures were authorized by law under the

1 Political Reform Act.

2 And then you get either a fine from the Fair
3 Political Practices Commission or a clean bill of health, and
4 at that point you're permitted to terminate the committee and
5 it ceases to exist.

6 So the lifespan of a committee, of a registered
7 committee, begins at the point that a statement of organization
8 is filed with the State and it ends when a statement of
9 termination is filed.

10 **THE COURT:** What is the present status of
11 ProtectMarriage.com?

12 **MR. PUGNO:** It is still a registered Ballot Measure
13 Committee, and it is awaiting the conclusion of that audit,
14 which often takes a year to a year and a half after the
15 election day.

16 **THE COURT:** I see. So that audit has not been
17 completed and, thus, the termination has not yet taken place.

18 **MR. PUGNO:** That's right. We're not permitted to
19 terminate the committee until we have that audit report from
20 the State.

21 **THE COURT:** Is that audit ongoing or what's the
22 status?

23 **MR. PUGNO:** The State asks for documents and then
24 they're supplied, and they may ask for more, it's a back and
25 forth. And if they find an irregularity, maybe a missing page,

1 they'll say, "Go look for that"; and, so, we're still in the
2 middle of that audit. We started but it is not completed.

3 **THE COURT:** Okay. Now, does one of these
4 organizations have officers and directors like a corporation?

5 **MR. PUGNO:** Unlike a corporation in California,
6 which has to have by law certain officers and directors, the
7 creature of statute, the Ballot Measure Committee, may have
8 multiple what are called responsible officers. In this case,
9 the only responsible officer, as far as the State is concerned,
10 is the Treasurer David Bauer. It only takes one person.

11 I guess the term "committee" is a misnomer because
12 it really is a vehicle for conducting a campaign, and in this
13 case the only officer of record in the filings with the Fair
14 Political Practices Commission and with the Political Reform
15 Division of the Secretary of State is David Bauer, the
16 treasurer of the committee.

17 **THE COURT:** Okay. Now he's not a party to this
18 action?

19 **MR. PUGNO:** That's correct.

20 **THE COURT:** And what is the relationship to the
21 committee as -- I'm sorry, to ProtectMarriage.com as it
22 presently exists of the individual intervenors here, the
23 individual defendant intervenors?

24 **MR. PUGNO:** Could you restate that question for me?

25 **THE COURT:** What is the relationship to

1 ProtectMarriage.com --

2 **MR. PUGNO:** Between the intervenors, the registered
3 voters?

4 **THE COURT:** Yes. Between Mr. Hollingsworth,
5 Ms. Knight -- is it Gutierrez?

6 **MR. PUGNO:** Gutierrez, Tam, and Jansson.

7 **THE COURT:** -- Tam and Jansson.

8 **MR. PUGNO:** Sure. Those five electors had special
9 things that they -- and the responsibilities and duties and
10 rights and privileges under the Election Code that they carried
11 out as official proponents. They pointed to
12 ProtectMarriage.com and said, "This is who we would like to
13 manage this campaign."

14 **THE COURT:** So the way to think about them, from a
15 legal point of view, would be as directors of the organization;
16 is that fair?

17 **MR. PUGNO:** Not at all, Your Honor.

18 **THE COURT:** Okay. How is that incorrect?

19 **MR. PUGNO:** Well, because under California law, once
20 the official proponents -- the official proponents have a duty
21 and then responsibility and powers unto themselves. Any
22 organization or any group of people or any one person can go
23 out and form a Ballot Measure Committee. In fact there were
24 multiple committees formed and operated in support of the
25 Yes on 8 position. I think at least three or four, maybe more.

1 On the No on 8 side there was one principal
2 committee, but there were others, kind of free actors, that
3 started their own committees as well.

4 And, so, there is -- at this moment I cannot think
5 of a legally significant connection where a proponent points to
6 a committee and says, "We govern that committee," unless they
7 were to themselves go out and register the entity as
8 themselves.

9 In this case we have a very broad coalition, a lot
10 of people involved that work with the proponents; and the
11 proponents and the rest of the coalition said, "We want to form
12 a committee and we want this treasurer to form the committee
13 for us."

14 So the proponents by virtue of their status as
15 proponents do not have any legal authority over the campaign by
16 virtue of their status having submitted the measure for the
17 voters, just in the same way that they don't have any official
18 director status over any of the other five or six organizations
19 that went out and started a Ballot Measure Committee of their
20 own.

21 **THE COURT:** Well, is the implication of that that
22 ProtectMarriage.com is really an entity that's separate from
23 these five individuals or is there a connection here that --

24 **MR. PUGNO:** The connection is that they were all
25 working together, that this was a coalition, and that the

1 proponents acknowledged this committee as the vehicle, the
2 creature of statute, the vehicle selected for this broad
3 coalition of many people through and by which to conduct this
4 campaign.

5 **THE COURT:** Now who has possession of the books and
6 records of ProtectMarriage.com?

7 **MR. PUGNO:** Well, the financial books and records
8 are all in the possession of the treasurer, David Bauer.

9 **THE COURT:** Okay. And he would be responsible,
10 then, for maintaining those and presumably making those
11 available to the auditors who come in to do the postelection
12 audit?

13 **MR. PUGNO:** He has two responsibilities, both
14 dealing with the postelection audit and filing the periodic
15 statements that have to be filed for public disclosure.

16 **THE COURT:** Let's see, the audit is conducted by the
17 Fair Political Practices Commission; is that correct?

18 **MR. PUGNO:** Well, I'm going to have to plead a
19 little bit of ignorance. I think that it's handed over,
20 believe it or not, to auditors of the Franchise Tax Board who
21 come in and do this for Political Reform, the Political Reform
22 Division of the Secretary of State's Office. I blend the two
23 because the Fair Political Practices Commission also has
24 jurisdiction to investigate and prosecute failure to disclose
25 and things like that.

1 **THE COURT:** All right. Where are the books and
2 records of ProtectMarriage.com maintained and located?

3 **MR. PUGNO:** I would have to say, Your Honor, in many
4 places. I mean, there was a professional campaign manager that
5 was hired to conduct the campaign. Many of those records are
6 located there, and we have many volunteers and independent
7 contractors who work for the campaign and with the campaign.

8 And, so, depending on what the scope of the books
9 and records of the campaign is understood to be, that would
10 define how big the circle is of where those are located.

11 I mean, there were literally hundreds of people
12 involved in this campaign. This was a 40-million-dollar
13 campaign involving hundreds or thousands of volunteers and
14 workers all the way from the very minimal involvement to a
15 great deal of involvement. And, so, these campaigns are
16 typically conducted in this fashion where it's a coalition and
17 lots of people involved, and the records are enormous because
18 there's a lot of work associated with qualifying and passing a
19 ballot measure.

20 **THE COURT:** Okay. Well, this all bears on the
21 burden issue in a discovery dispute.

22 All right. We'll we may have some more questions on
23 this line as we go along --

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

25 **THE COURT:** -- but that was most helpful indeed, and

1 I appreciate your assistance.

2 **MR. PUGNO:** All right. Thank you, Your Honor.

3 **THE COURT:** You bet.

4 **MS. LEE:** Your Honor, may I make one clarification?

5 **THE COURT:** Yes. You are?

6 **MS. LEE:** I'm Mollie Lee, Deputy City Attorney for
7 the City and County of San Francisco, for plaintiffs
8 intervenors.

9 **THE COURT:** Tell me your name again.

10 **MS. LEE:** Mollie Lee.

11 **THE COURT:** Ms. Lee.

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

13 **THE COURT:** You didn't -- oh, yes, you did sign in.
14 All right.

15 **MS. LEE:** I want to clarify the relationship between
16 the primarily formed Ballot Measure Committee
17 ProtectMarriage.com, which you were inquiring about, and the
18 five individuals who are also listed as defendant intervenors.

19 The defendant intervenors state in their own papers
20 that ProtectMarriage.com was designated by these five
21 individuals who have an official status and act in a
22 legislative capacity in proposing a ballot measure and
23 submitting it for circulation and eventually advocating for its
24 passage.

25 And in thinking about this in the larger scheme of

1 California's direct democracy, system of direct democracy, you
2 see individuals take on the specific role under the California
3 Elections Code, and they then in this case say that they
4 designated ProtectMarriage.com as the official Proposition 8
5 campaign committee.

6 And, so, to the extent that defendant intervenors
7 are now attempting to sort of disaggregate that, I think that's
8 an unfair characterization of what's going on here, where we
9 see a clear link between five individual voters who assume a
10 legislative role and the campaign committee that they designate
11 to carry out that function.

12 **THE COURT:** What's the implication of that for
13 purposes of the discovery dispute before the Court this
14 morning?

15 **MS. LEE:** You know, I think the implication really
16 goes to the public interests that are at stake here. And, as
17 you note, the Political Reform Act recogni -- or you noted the
18 Political Reform Act may be relevant here; and the Political
19 Reform Act, as well as the California Constitution and other
20 open meeting and public records laws, recognize there's a
21 strong public interest in open government and in public access
22 to information about the conduct of government, which includes
23 the legislative -- access to legislative records that relate to
24 statutes and proposed constitutional amendments.

25 And, so, here when you see individuals who are

1 acting in a legislative capacity, they are assuming a
2 legislative role, and the general interest in open government
3 also extends to an interest in their activities in furtherance
4 of this legislative function.

5 **THE COURT:** Well, we are getting a little ahead of
6 ourselves, and I haven't heard from Mr. Cooper; but one of the
7 questions that occurred to me in reading these papers, and in
8 fairness to both sides I should probably put this on the table,
9 is the application of California's open meeting and open
10 records laws to individuals or organizations which undertake
11 what is, in essence, a legislative function.

12 And, obviously, it's a little different when you're
13 attempting to apply those to Boards of Supervisors or City
14 Councils or the State legislature or some State commission.
15 But when citizens organize to perform that same function, there
16 would seem to be some carryover to the activities of those
17 individuals, but I can well understand the carryover may not be
18 direct.

19 **MS. LEE:** Exactly, Your Honor, and if you'd like,
20 I'd be happy to speak to that later or now.

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

22 All right. Anything further on setting the
23 groundwork before we turn to Mr. Cooper for his argument?

24 (No response.)

25 **MR. COOPER:** Thank you, again, Chief Judge Walker.

1 I have nothing further on the terrain that this discovery
2 dispute is based on; and I'd like to, I guess, frame our
3 dispute by identifying what, at least by my reckoning, I think
4 we are agreed on.

5 The plaintiffs, as we understand it, are not seeking
6 production of any internal, private communications between and
7 among the defendant intervenors, which have been identified,
8 the five individuals and the committee ProtectMarriage.com,
9 number one.

10 Number two, the defendant intervenors are producing
11 and have produced and are continuing to search for and produce,
12 as we find them, all communications that were made or
13 distributed to members of the public at large, what we call
14 public communications; and that includes communications that
15 were targeted to particular types of members of the public at
16 large, such as members who have an affiliation with, say, the
17 Republican Party.

18 But what we're not producing, pending this Court's
19 consideration of our petition and its ruling, are
20 communications between and among the defendant intervenors and
21 the others that Mr. Pugno has described to you that have formed
22 an associational bond for purposes of this political activity,
23 this core political activity. And that obviously includes
24 people as close to the ground zero, if you will, of this
25 campaign as the ad hoc Executive Committee that gave it much of

1 its direction and management; and the campaign consultants,
2 Mr. Frank Schubert, whose name has been forwarded previously;
3 and other paid consultants and agents; the donors who step
4 forward to fund this very large campaign; and the people who
5 step forward to volunteer; and these can be some pretty large
6 numbers, as Mr. Pugno has indicated.

7 But, Your Honor, the lines aren't easy to draw in
8 this case but, by our lights anyway, we think that is the line
9 that is compelled by core First Amendment issues.

10 What the plaintiffs are seeking are communications
11 between and among the defendant intervenors and any third
12 party, any third party, including members of the ad hoc
13 Executive Committee as we understand it, individual donors,
14 e-mail communications that are one on one, all the
15 communications between the political consultant that gave the
16 strategy or at least informed the strategy of this campaign,
17 and the individuals who formed to manage and to give it its
18 direction and in the fuel of funding.

19 **THE COURT:** Who were the members of this ad hoc
20 committee?

21 **MR. COOPER:** Your Honor, that's never been
22 disclosed. I think I have seen -- we have admitted that
23 they're about six or eight members of the ad hoc Executive
24 Committee, some of whom had relationships with larger
25 organizations, including religious organizations, that had a

1 key and central interest in the campaign to advance
2 Proposition 8.

3 But we've never seen where -- and I don't believe,
4 Your Honor, it's ever been publically disclosed who those
5 ad hoc members were, and the law requires that donors be
6 disclosed at least if they've given a hundred dollars or more;
7 and we have thousands of donors, Your Honor, who gave \$99 or
8 less, some of whom to avoid the disclosure that this very
9 discovery dispute would bring forward publically.

10 **THE COURT:** Well, those donors who gave more than a
11 hundred dollars names are already on some Web site. I don't
12 know whether it's an official Web site or one that's been
13 picked up in some fashion, but that information is already out
14 in the public; is it not?

15 **MR. COOPER:** Those names are out there, yes,
16 Your Honor.

17 And one other area where we have some very important
18 agreement is, and these are the proponents' words -- excuse me,
19 the plaintiffs' words themselves, and that is that the
20 proponents' communications concerning Proposition 8 referendum
21 campaign are core political speech and are undeniably entitled
22 to First Amendment protection.

23 There's also no dispute here that the disclosure of
24 the names of those donors brought forward widespread economic
25 reprisal, widespread harassment, widespread abusive practices

1 that are detailed in our motion papers and detailed graphically
2 in another case that we've called the Court's attention to also
3 brought by ProtectMarriage.com.

4 **THE COURT:** Is that the case in Sacramento before
5 Judge England?

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

7 **THE COURT:** I read that.

8 **MR. COOPER:** And that is the case that raises what
9 we believe are grave constitutional objections to the
10 disclosure requirement itself.

11 **THE COURT:** Let me go back for a minute to this ad
12 hoc Executive Committee. What role did it play in the
13 campaign?

14 **MR. COOPER:** Your Honor, I believe that it is most
15 accurate to say that it provided the executive direction to the
16 campaign. It made decisions relating to, for example, who the
17 campaign itself would engage for professional political
18 consulting services and such things as that, including --

19 **THE COURT:** So it hired the consultants?

20 **MR. COOPER:** That's among the things, yes, sir, but
21 also gave it its strategy direction in consultation with
22 obviously professional political advisers and others.

23 It was primarily responsible for giving management
24 and direction to the fundraising effort. Many of the members
25 of the ad hoc Executive Committee were themselves large --

1 responsible for large amounts of the funding.

2 So the ad hoc Executive Committee was a group of
3 volunteers just like anyone clicking a volunteer button on the
4 Web site, but they were -- they volunteered, you know, at a
5 very intensive level in order to assist this campaign and give
6 it direction and executive management.

7 But they really weren't any different from the
8 volunteers who came to lick envelopes and stamps and help in
9 the sense that these individuals, small groups like the ad hoc
10 committee and large groups like the whole of the volunteers,
11 formed an associational bond to advance this critical, to them,
12 political effort and engage in this political activity.

13 Your Honor, to put -- and I think the First
14 Amendment, elements of the First Amendment privilege balancing
15 test that the cases that we've cited to the Court go through
16 when this kind of claim is being made to resist a discovery
17 inquiry into core political activity, the First Amendment
18 elements of that are established by agreement to the parties.
19 The parties agree this is core political speech, that there has
20 been this widespread economic and other types of reprisal.

21 The next step for this Court is to examine, well,
22 okay, what compelling interest is there for requiring this
23 disclosure, for requiring the disclosure that the plaintiffs --

24 **THE COURT:** Before getting into exploring the First
25 Amendment privilege that you're claiming --

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

2 **THE COURT:** -- and dealing only with the issue you
3 just touched upon, namely, the concern about reprisals or
4 threats of one kind or another if there were disclosures, why
5 wouldn't a protective order that required the disclosure of
6 certain materials on an attorneys'-eyes-only basis be
7 sufficient to protect against those concerns?

8 **MR. COOPER:** Your Honor, that's a fair question.
9 It's come up -- it's come up before and in several cases, and
10 it is typically denied in the same way attorney-client
11 privilege isn't something that privileged materials are simply
12 provided to the other side on an attorneys'-eyes-only basis.

13 And this actually gets a little bit ahead of at
14 least the logic, it seems to us, of the First Amendment
15 interest at stake here, but there are three cases that have
16 permitted, that we've been able to find, a protective order
17 like the Court is suggesting. I think we've cited them all to
18 the Court.

19 **THE COURT:** Let's see, those cases are what?
20 They're cited in your papers?

21 **MR. COOPER:** They are cited in our papers,
22 Your Honor.

23 **THE COURT:** All right.

24 **MR. COOPER:** Yes. They're the *Christ Covenant* case
25 from the Southern District of Florida, *Anderson against Hale*

1 from the Northern District of Illinois, and *Dole against*
2 *Service Employees Union*, a Ninth Circuit case.

3 **THE COURT:** Okay.

4 **MR. COOPER:** And each one of those cases, and I
5 offer the *Christ Covenant* case that it seems to me is the most
6 elucidating on this point, all three of those cases involved an
7 eyes-only device but only after the Court concluded that the
8 information that was sought had overriding relevance to a
9 central issue in the case.

10 And even then, for example, in the *Christ Church*
11 case, the issue was whether or not the church should be allowed
12 to build a new facility because it claimed under a federal law
13 that its religious practices and exercise of its religious
14 freedoms were being burdened because its congregation wasn't
15 able to fit in the sanctuary anymore. They had to turn people
16 away.

17 And, Your Honor, the town that had denied them
18 authority to build a new building then sought discovery of
19 individual members. They wanted the members so they could go
20 and depose the members themselves. The Court denied that
21 request limiting it to only those members who had actually been
22 turned away from a sanctuary. The church had to identify those
23 members. And the attorney and only the attorney could ask
24 questions only about: Is it true you were turned away from a
25 sanctuary service?

1 The point I'm making here, Your Honor, is that the
2 circumstances which, in this balancing process, which made it
3 appropriate to invade those associational freedoms, those First
4 Amendment freedoms of protecting them, for example, the
5 membership, the names of members of a church, were overridden
6 because of the overriding relevance of the information.

7 This brings me back to a point, Your Honor, that
8 seems to me puts this into, you know, very, at least for me,
9 illuminating terms. Suppose that the California Legislature
10 enacted an election law requiring that the official proponents
11 of a referendum measure, any referendum, were required on a
12 realtime basis during the campaign to provide the internal,
13 nonpublic kind of information that the plaintiffs seek here to
14 the opponents of the referendum, something like this open
15 meetings law perhaps.

16 Your Honor, I would submit to you that a law like
17 that would not stand a moment's chance under a First Amendment
18 review because it would go to the core of, as these discovery
19 requests do, go to the core of political associational
20 activity.

21 **THE COURT:** Well, picking up on that and Ms. Lee's
22 point, a legislative committee, City Council that meets to
23 discuss some proposed policy must meet in open, the discussions
24 amongst the members must be on the record and open and
25 accessible to those who would oppose whatever policy is being

1 fostered.

2 Why wouldn't the same -- and that seems to not
3 interfere with the legislative process. Why wouldn't the same
4 principle apply here when citizens undertake what is, in
5 essence, a legislative process?

6 **MR. COOPER:** Your Honor, the first point I would
7 make is because the citizens themselves are engaged in this
8 democratic political activity themselves not as elected
9 representatives in public hearings or public mark-up sessions,
10 or things such as that.

11 Even in that context, Your Honor, I can't imagine
12 that the kind of information that plaintiffs are asking for
13 could be required of legislators even. Their e-mail exchanges
14 with fellow legislators, their written communications with
15 individual constituents, could those things be brought forward
16 in order to test, for example, what the real purpose was as
17 opposed to the public information that was available?

18 The law we have here does not place those kinds of
19 public disclosure burdens on one of these initiative
20 committees, and I suggest to you that it couldn't.

21 **THE COURT:** That touches on one of the reasons I was
22 interested in when ProtectMarriage.com was organized. It would
23 seem to me -- let me be the devil's advocate here. If you and
24 I engage in a discussion that some law ought to be changed or
25 there ought to be some initiative measure developed, of course

1 our discussions would be private discussions; but once we
2 organize a committee, register that committee with the State
3 authorities to promote that particular initiative or
4 legislative measure, then the activities associated with that
5 organization take on a different character; do they not? They
6 are no longer private discussions subject to the kinds of First
7 Amendment protections that you're speaking about.

8 **MR. COOPER:** Well, but, Your Honor, I believe that
9 they are.

10 **THE COURT:** Okay. Why?

11 **MR. COOPER:** They continue to be private discussions
12 because there's no law that has ever suggested that they're
13 not. And, so, the individuals who are involved in this
14 campaign, when they exchange their views and their thoughts and
15 their ideas about political strategy and things that are at the
16 very core of their freedom of political activity and speech,
17 they exchanged without any inkling of a notion that there might
18 be a statute that could be enacted, because certainly there had
19 never been, or that there might be a judge who could come along
20 and say, "Those communications that you engaged in, I want your
21 political opponents to hear them now."

22 It may well be that the law could, for future
23 political activity of this down the road, be crafted like the
24 law you're suggesting here, an open meetings kind of law. I
25 don't think so. I suggest to you that it would raise the

1 gravest First Amendment questions, but at least it wouldn't be
2 a retroactive disclosure of communications that were uttered in
3 a nonpublic way.

4 And communications, Your Honor, and this really is
5 also at the heart of our petition here to you as well as at the
6 heart of the First Amendment balancing test that the Courts go
7 through when this kind of discovery is sought. And that is,
8 what private communication or nonpublic communication that any
9 of the people who formed an associational bond with one another
10 to get this thing passed or, for that matter, people who formed
11 associational bonds on the other side of it to defeat it, what
12 nonpublic communication could possibly be relevant to the
13 central issues in this case?

14 **THE COURT:** That's quite a different argument, and
15 before we get into that, I think that's something we need to
16 talk about.

17 Is this First Amendment privilege that you are
18 contending applies here different in character from any other
19 privilege; attorney-client privilege, the priest-penitent
20 privilege, and so forth? Is it a different privilege in any
21 qualitative sense?

22 **MR. COOPER:** I think it is, Your Honor, in the sense
23 that its origins come from the First Amendment. They don't
24 come from the common law the way the attorney-client privilege
25 does, even though it obviously is infused with due process

1 consideration, which are constitutional in nature; but at least
2 in that --

3 **THE COURT:** Let me put the cards on the table. The
4 reason I ask is, as you well know, assertion of a privilege or
5 work-product protection requires certain disclosures. You have
6 to disclose the items that you are withholding from production,
7 identify them sufficiently so that the individual on the other
8 side or the party on the other side is able to determine
9 whether the privilege is well taken.

10 Why would that requirement not apply to this First
11 Amendment privilege that you are asserting?

12 **MR. COOPER:** Your Honor, I don't think that
13 requirement could apply and I will put to the side the question
14 of burden the Court mentioned earlier, which would be
15 unimaginable. But the attorney-client privilege is designed to
16 protect an attorney's communications with his client; and if
17 those communications aren't with his client, then they're not
18 protected.

19 These communications, Your Honor, they go to the
20 very identity of the individuals with whom the communications
21 are taking place. That is the -- that is the font, if you
22 will, from which this whole line of First Amendment cases comes
23 from, the *NAACP against Alabama* case, the membership list. It
24 is the identity of the individuals, which a privilege log
25 requires understandably, that is itself at the essence of this

1 First Amendment privilege, the identity of the donors.

2 The point here is even under the existing law, which
3 we think raises gravely serious First Amendment concerns, the
4 existing law requiring simple disclosure of the name of donors
5 above a hundred dollars, that led to the very chill in the
6 associational privileges that the First Amendment is designed
7 to prevent.

8 **THE COURT:** I realize there are protections that the
9 cases have purported to membership lists, such as the *NAACP*
10 case many years ago and similar organizations.

11 But there's also a line of cases which holds that it
12 is quite relevant to the voters' consideration of initiative
13 and referendum to be able to identify the sponsors, the
14 individuals who are behind the particular initiative or
15 referendum.

16 So the identity of supporters of a particular
17 measure is a relevant consideration for voters, and the
18 Political Reform Act requires a fair amount of identification,
19 and that identification is consistent with the First Amendment.
20 It doesn't infringe on this First Amendment association
21 activity, does it?

22 **MR. COOPER:** Yes, Your Honor, I do believe that just
23 the disclosure requirement, even though it is indeed supported
24 by a strong interest in public and public information
25 concerning who are the sponsors of a particular campaign

1 initiative, referendum initiative, but I also believe that the
2 First Amendment interests that are at stake at that are of core
3 importance.

4 And this -- you know, I've called your attention to
5 my friend's very fine brief in the *Citizens United* case in
6 which they themselves have challenged the federal disclosure
7 requirements under the First Amendment citing the widespread
8 economic reprisals suffered by donors disclosed in California
9 in the Prop. 8 campaign. These implicate First Amendment
10 interests of the highest order.

11 And, Your Honor, when we are talking about more than
12 just disclosing a name, we're talking about disclosing the
13 actual content of speech like the private communication that
14 you and I might have if we were involved in this campaign, it
15 goes beyond, well beyond, in terms of its encroachment into
16 these First Amendment values, than just the name of a donor.

17 And I want to share with the Court a passage from
18 this *McIntyre* case, which I think speaks directly to the
19 issues, from the United States Supreme Court at 514 at
20 page 348. Your Honor, that case, and we describe it very
21 succinctly in our paper, our opening paper to the Court, dealt
22 with the validity of a law requiring one Mrs. McIntyre to
23 provide her name and address on a leaflet that she distributed
24 at a middle school which urged her fellow citizens there to
25 oppose a local referendum raising taxes for educational

1 purposes. And that's all it was, just a disclosure
2 requirement. She was fined a hundred dollars because her
3 leaflet didn't have that disclosure on it and she refused to
4 put it on there.

5 Here's what the majority of the Supreme Court said
6 as it struck down that requirement. And keep in mind this was
7 a woman who brought her own leaflet, nobody doubted who the
8 author was, to this gathering. Here's what they said in
9 striking down that disclosure requirement: (reading)

10 "We think the identity of the speaker is no
11 different from other components of the
12 document's content that the author is free to
13 include or exclude."

14 And they continue: (reading)

15 "The simple interest in providing voters
16 with additional relevant information does not
17 justify," again, "the simple interest in
18 providing voters with additional relevant
19 information does not justify a state requirement
20 that a writer makes statements or disclosures
21 she would otherwise omit."

22 So it's very clear that not only did she have a
23 First Amendment right not to disclose her name on her leaflet,
24 but she clearly had a First Amendment right to be her own
25 editor, to not disclose what she didn't want to disclose

1 publicly.

2 And, Your Honor, could the State in this case have
3 compelled Mrs. McIntyre to disclose her drafts of that leaflet?
4 Plaintiffs seek drafts of all of my information. Could they
5 have required Mrs. McIntyre to disclose her e-mail
6 communications with her own political confidants as she's
7 forming her own speech, her own strategy of how she will
8 persuade her fellow citizens to join her in opposing that
9 measure? Your Honor, we submit to the Court, no.

10 And, so, the question becomes: Is there a more
11 compelling reason in the context of this discovery? Because I
12 can't imagine that this could have been compelled of us, this
13 kind of information, just, you know, in the open political --
14 open political arena.

15 **THE COURT:** Well, that brings us to your relevancy
16 issue.

17 **MR. COOPER:** Yes, Your Honor. Yes, it does.

18 **THE COURT:** All right.

19 **MR. COOPER:** And in the cases, Your Honor, that have
20 gone through this balancing process, and I mentioned earlier
21 three cases that did find appealing your -- the idea you
22 suggested of a possible kind of attorneys' eyes only type of
23 protective order.

24 But, Your Honor, the key question in these cases is:
25 Well, is the information sought of overriding relevance to a

1 central issue in the case?

2 And, Your Honor, the plaintiffs haven't identified
3 any issue in this case other than voter motivation, other than
4 the purposes of this referendum, which is itself inseparable
5 from voter motivation, to say that their inquires are relevant;
6 and we would submit to Your Honor the nonpublic communications
7 of individuals involved on either side of this debate can't
8 possibly weigh.

9 **THE COURT:** How do we determine whether a
10 communication is public or not public, and who makes that
11 determination?

12 **MR. COOPER:** Well, you're going to make it.

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

14 **MR. COOPER:** You're going to make it.

15 **THE COURT:** Well, but that means I have to look at
16 each communication. I'm happy to work on this case, but I
17 don't know that I want to read all of those.

18 **MR. COOPER:** Well, here's the principle that I want
19 to submit to the Court, this is the principle and it doesn't
20 obey quantitative laws here because this principle does indeed
21 shield communications that were shared among large numbers of
22 people. But the principle I want to suggest to the Court is
23 that a communication is public when it is distributed and
24 intended to go to members of the general public, even if it has
25 some targeting theory.

1 But it isn't public if it's going to people and is
2 intended only for people with whom you have formed what I call
3 an associational bond, a political associational bond. These
4 rights flow from our right to associate for political purposes
5 and our right --

6 **THE COURT:** Let's try some examples. Obviously a
7 leaflet or a radio or television advertisement that is
8 broadcast, that clearly is a public communication.

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

10 **THE COURT:** There's no question about that.

11 **MR. COOPER:** And we've already produced those,
12 though with reservations of our right to suggest that some or
13 all of them may not be admissible when we get to our trial;
14 but, yes, Your Honor, we've produced them.

15 **THE COURT:** Admissibility, we're not at that stage
16 now.

17 **MR. COOPER:** True.

18 **THE COURT:** How about mailers to identified groups,
19 say members of the Republican Party you mentioned, or members
20 of a particular organization, a church, Boy Scouts, whatever,
21 Boy Scout leaders? We're going to send a mailer to all of the
22 Boy Scout leaders in California. Would that be a public
23 communication?

24 **MR. COOPER:** I believe that it would and,
25 Your Honor, the kind of inquiry we're going through right now,

1 we obviously have tried to think through and we've done a lot
2 of, you know, backing and forthing with our friends for the
3 plaintiffs; and, in fact, it was as a result of that backing
4 and forthing that our own position was adjusted.

5 Because we suggested early on in our conversations
6 with Mr. McGill, I'm told by my colleagues, that perhaps some
7 of those kinds of communications would not be public. We, as a
8 result of those discussions, we thought better of it and they
9 would. We do believe that they would.

10 **THE COURT:** Okay. What about a proponent, one of
11 the proponents meeting with a coffee klatch of some
12 organization, rather like the coffee klatches that political
13 candidates have? They go around to churches, groups, the
14 Kiwanis Club, and whatnot, and speak to members of that
15 organization. Is that a public communication?

16 **MR. COOPER:** It probably is, Your Honor. And I say
17 "probably" only because it is entirely conceivable to me that
18 it could be a gathering of people who have made known their
19 support for Proposition 8 and they want to hear how they can
20 help advance this campaign and convince their fellow
21 Californians to support it. I believe that would not be a
22 public discussion.

23 **THE COURT:** Would not be?

24 **MR. COOPER:** Would not be. If the individuals are
25 donors, for example, a coffee klatch with donors, a coffee

1 klatch with volunteers, here's -- those kinds of things; but a
2 coffee klatch of just some people who want to hear our side of
3 this and we're there to persuade, they're just members of the
4 public, yes.

5 **THE COURT:** That suggests that the distinction
6 between private and public is a communication to the converted
7 is private; to the unconverted, it's public.

8 **MR. COOPER:** Well --

9 **THE COURT:** Is that the distinction?

10 **MR. COOPER:** That is one way I think of, perhaps,
11 describing this principle I'm offering to the Court, which is:
12 Has there been some associational bond? Do we have a political
13 association? Are we in association one with another for First
14 Amendment purposes? Have we joined the NAACP together?

15 And, Your Honor, this is a hard -- these are hard
16 lines. I don't deny it. But if we have formed -- if we are in
17 political association one with another, even if it's one with a
18 thousand others, what we say to each other and the fact of our
19 membership in the association are protected by the First
20 Amendment. That's my submission to the Court.

21 And, as I mentioned earlier, it doesn't obey, you
22 know, quantitative lines here; and in the context of a
23 referendum fight in this state where you have, you know,
24 roughly 7,000 -- 7 million people on both sides, yes, the
25 people who have formed associational bonds can grow large.

1 We had, I'm not sure how many but 10s of thousands
2 of donors. They stepped forward. They sent money to support
3 this campaign. Yes, if they -- to me, Your Honor, they clearly
4 formed associational bonds by doing that, like joining a
5 membership organization; and if they contributed more than a
6 hundred dollars, they understood, presumably, that their
7 association with this cause would be disclosed publicly.

8 So, yes, I accept the Court's characterization that
9 it does in a sense, at least the principle I'm suggesting to
10 the Court, does in a sense turn on whether you're preaching to
11 the converted or you're trying to convert people to your -- to
12 form associational bond with you.

13 **THE COURT:** All right. Thank you very much,
14 Mr. Cooper.

15 **MR. DUSSEAULT:** Good morning, Your Honor. Chris
16 Dusseault of Gibson, Dunn & Crutcher on behalf of the
17 plaintiffs.

18 Just organizationally, the way we had intended to
19 present the argument to you is, if it's acceptable to
20 Your Honor, to divide. I would address the relevance issues
21 and the concerns that plaintiffs have raised in that regard,
22 and my colleague, Mr. McGill, would speak to the First
23 Amendment concerns.

24 **THE COURT:** Well, you know, ordinarily I enforce a
25 rule that this is not moot court. We have one lawyer on a

1 side. Now, we had a little help from Mr. Cooper on an issue
2 that he properly and I can well understand did not feel
3 comfortable speaking to; but going forward, this is not moot
4 court. So one lawyer argues each proceeding and no other
5 lawyer.

6 **MR. DUSSEAULT:** Understood, Your Honor. We'll
7 certainly observe that going forward. I appreciate your
8 diligence here.

9 Let me speak very briefly to the issue that we think
10 is really an antecedent issue to the First Amendment concern,
11 which is the fact that these requests are seeking relevant
12 information and that the proponents have not established
13 otherwise in a motion which they don't --

14 **THE COURT:** Let's begin not at the last point where
15 Mr. Cooper left off but his penultimate point.

16 What's the relevance of these third-party
17 communications? How is that something that is going to lead to
18 admissible evidence in this case?

19 **MR. DUSSEAULT:** Absolutely, Your Honor. I think
20 that's the key question, and there are a number of factual
21 issues that this Court has already recognized the Court may
22 need to resolve to reach the merits of the case.

23 **THE COURT:** Now remember, Counsel, I didn't make up
24 those factual issues.

25 **MR. DUSSEAULT:** Absolutely.

1 **THE COURT:** I got those out of the initial case
2 management statements that you all filed.

3 **MR. DUSSEAULT:** Absolutely. And we believe,
4 Your Honor, and we agree that those are issues that are
5 presented by our claims that may, depending on determinations
6 made on one issue or another, need to be reached.

7 But let me give an example. We believe that there
8 are factual determinations before the Court about the
9 applicable level of scrutiny that applies to these claims.
10 There are factors that the courts have addressed that involve
11 factual inquiries.

12 **THE COURT:** How does this discovery relate to those
13 factors?

14 **MR. DUSSEAULT:** The defendant intervenors are
15 parties to this case, Your Honor. They have chosen to become
16 involved in this case and to make factual and legal arguments
17 to the Court on particular issues; for example, the relative
18 political power of gay and lesbian individuals, immutability,
19 history of discrimination.

20 If they have documents, and I would submit public or
21 not public, that make statements that contradict the positions
22 they are taking in this case, how would that not be relevant
23 evidence?

24 And let me give you an example. Let's just assume
25 hypothetically --

1 **THE COURT:** Impeachment evidence.

2 **MR. DUSSEAULT:** Impeachment evidence or admissions,
3 Your Honor. Let's assume that --

4 **THE COURT:** To what degree is the intent of a
5 legislator relevant to the validity of the legislation that he
6 sponsors?

7 **MR. DUSSEAULT:** Your Honor, I believe that there are
8 cases that we have pointed to in our brief showing that the
9 intent of the proponents of the initiative is something that
10 courts should look to, in the initiative context, to discern
11 voter motivation, but my point I think is broader than that.

12 **THE COURT:** Different from an elected legislator?

13 **MR. DUSSEAULT:** Your Honor, honestly, I have focused
14 more on how it applies in the initiative context given that
15 that's where we are; but there are cases to which we pointed
16 the Court, including the *Washington* case, that have
17 demonstrated that in this sort of a context, the Court should
18 look at the overall campaign and the --

19 **THE COURT:** Which *Washington* case?

20 **MR. DUSSEAULT:** I'm sorry, Your Honor. Let me give
21 you the cite. The *Washington versus Seattle* case, looking at
22 statements of the proponents -- that was a Boston case I
23 believe, Your Honor -- looking at the statements of the
24 proponents to understand whether that was racially motivated.
25 It involved school integration.

1 I believe that it is relevant to that purpose, but
2 the point that I hope will be clear here is that there is
3 another maybe even more direct path to relevance here, and that
4 is admissions of particular facts.

5 And let me use as an example a fact like whether
6 sexual orientation is immutable. This is something that has
7 been briefed in the summary judgment brief. It's been talked
8 about.

9 Suppose hypothetically that one of the defendant
10 intervenors did or commissioned a study, a 60-page study, that
11 went through this issue and said, "We have determined that
12 sexual orientation is immutable and here's why, and we don't
13 want to get into this issue in the campaign because we're wrong
14 on it."

15 And now they're in this case and they're trying to
16 argue, as an element for not applying higher scrutiny, the
17 opposite side of exactly what their documents show. The notion
18 that their direct on-point admissions on factual issues before
19 the Court are not only not admissible, Your Honor, but not even
20 discoverable? We can't even go try to find out who did that
21 study, perhaps that person would be a good witness in this case
22 I think is unsupported.

23 And I would note in all the cases that the defendant
24 intervenors have offered, you don't see cases barring discovery
25 in the manner that they're seeking.

1 **THE COURT:** That's pretty speculative, isn't it,
2 Mr. Dusseault? Maybe you can find something a little closer to
3 home.

4 **MR. DUSSEAULT:** Your Honor, frankly, we are in
5 something of a difficult position in that we have been denied,
6 and Mr. Cooper I think has made quite clear today that he
7 intends to continue to deny, access to any of their nonpublic
8 documents. So, unfortunately, at this stage it is somewhat
9 difficult for us to be too specific because we have not seen
10 any of their particular documents.

11 **THE COURT:** Well, you have had access to, I believe,
12 at least understanding Mr. Cooper's comment to suggest that you
13 had access to a very substantial amount of public commentary
14 regarding Proposition 8 by the proponents; have you not?

15 **MR. DUSSEAULT:** Well, we have, Your Honor, been
16 provided, I think, in the last couple of weeks a body of
17 publicly disseminated documents. And our original
18 understanding, based on their representations, was that that
19 was not targeted, that would only be things available to the
20 public at large. Mr. Cooper now represents that they're
21 including in some of their production things to larger groups.

22 But I would submit, Your Honor, and I think the
23 defendant intervenors have shown this in their own
24 declarations, there is a real difference between what they
25 might say in their most cleansed, most public documents versus

1 what they say internally.

2 And on the issue of relevance --

3 **THE COURT:** But if you can find in the wealth of
4 public statements some inconsistencies of the kind that you
5 just described, that would be a pretty persuasive reason to
6 open the door for some of these nonpublic communications.

7 **MR. DUSSEAULT:** But, Your Honor, I would submit from
8 a discoverability perspective in this case, why should the
9 defendant intervenors have control over what we see? So if
10 they have had -- let's say they've done a good job and all the
11 bad stuff is private and only the good things come out.

12 **THE COURT:** In a campaign, it's a dream world if
13 anybody thinks cats don't come out of the bag in a political
14 campaign.

15 **MR. DUSSEAULT:** Understood, Your Honor, but I think
16 one of the fundamental premises of liberal discovery is the
17 notion that documents that are not public are very often the
18 ones that are most candid, most probative to a case.

19 And they have submitted declarations in this case,
20 in fact specifically saying under oath, "If I knew that this
21 discussion was going to be public, I would have been more,"
22 quote-unquote, "guarded."

23 I would submit that on fact issues before the Court
24 we have a right to unguarded admissions from a relevance and
25 discoverability perspective; and that goes, we believe, to

1 issues of voter intent and motivation, but it also goes to the
2 numerous issues that we've talked about, not just level of
3 scrutiny but let's say potential state interests. I think this
4 is a very important issue.

5 **THE COURT:** Potential what?

6 **MR. DUSSEAULT:** Potential state interests.

7 **THE COURT:** Okay.

8 **MR. DUSSEAULT:** Mr. Cooper's brief repeatedly says
9 that under their standard, the only question is whether there's
10 any conceivable basis for passing Prop. 8 and, therefore, the
11 actual intent of the voters is irrelevant. A couple strong
12 reactions to that.

13 One is that presumes the correctness of an issue
14 that has not yet been resolved, which is the level of scrutiny.
15 And in discovery we should be permitted to take discovery that
16 would apply to any standard.

17 But maybe even more importantly, documents may very
18 well go to even the narrow issue that the defendant intervenors
19 present which is, is there any conceivable basis.

20 Again, one thing that is unique about this case,
21 Your Honor, is there is almost a complete disconnect between
22 the justifications offered in the ads and the promotions in the
23 public discourse about Prop. 8 and the ones that they're now
24 presenting to you. They are --

25 **THE COURT:** That's what I was driving at. What can

1 you show in that regard?

2 **MR. DUSSEAULT:** Well, and if there are internal
3 documents -- and again, Your Honor, I admit that we are forced
4 to speculate to some degree because we have not seen the
5 documents -- if there are documents that say, for example, one
6 possible justification is this notion of responsible
7 procreation. Our testing and studies show that no rational
8 person could conceivably buy that. Don't do it. Don't talk
9 about it. Don't put it in the ads, because no one could
10 conceivably believe it. A statement like that is relevant even
11 to the issue as most narrowly presented by the defendant
12 intervenors.

13 Now we submit that that is, again, their best case
14 scenario. If there is a heightened level of scrutiny, then the
15 actual intent becomes relevant and I don't believe defendant
16 intervenors have even submitted for a moment that that sort of
17 information would not be relevant.

18 But I just think it's important to note that they
19 don't get out of the relevance box that they're in by saying
20 that the question is whether a justification is rational.
21 These are political professionals who are working with this
22 campaign, working on this campaign in addition to volunteers.
23 If they have studies or documents that talk about the
24 rationality of a potential justification, the conceivability of
25 it, that is, I think, number one, admissible; and, number two,

1 at the very least something that we should be able to use as a
2 starting block.

3 The final point I'll make, Your Honor, on relevance,
4 and then I'll sit down, is the approach that the plaintiffs are
5 taking here really turns the discovery process on its head.
6 The way this works normally in the trial courts is there is
7 liberal discovery at the outset followed later, as Your Honor
8 stated earlier, by specific determinations about what's
9 admissible.

10 For the defendant intervenors to take the position
11 right now under their best view of the case we should be denied
12 virtually every document regardless of the substance -- and I
13 think that's really important. The defendant intervenors'
14 argument about internal documents in particular has nothing to
15 do with substance. There's just no statement they could make,
16 according to them, that could be relevant to any issue.

17 This is not the stage of a litigation where that
18 decision is made. The documents should be produced. If with a
19 specific document we discuss its admissibility, then we get to
20 that point.

21 We are not suggesting, as they say in their reply
22 brief, that somehow there's no limitations on discovery. The
23 limitation that is imposed is whether our requests are tailored
24 to lead to the discovery of admissible evidence.

25 **THE COURT:** Well, let's talk about tailoring. Your

1 request number 8 is exceedingly broad: (reading)

2 "Any communication by the proponents with
3 any third party."

4 Well, that could cover quite a lot of individuals
5 and organizations. And I can well understand that the
6 proponents might have a lot of this information and, in fact,
7 find it not only burdensome to respond to an inquiry that
8 broadly drafted, but to be in the position where they could not
9 reasonably be assured that they had complied with the discovery
10 request.

11 Any third party. Now, can you not focus and narrow
12 that inquiry? Could you address the burden objection which the
13 proponents have made?

14 **MR. DUSSEAULT:** Your Honor, I suspect that we could;
15 and, in fact, we set out in the meet-and-confer process to
16 negotiate, and that's what normally happens in a case like this
17 is, you say, "Okay. What do you really want? What can we get
18 you?"

19 But, frankly, we were told in no uncertain terms at
20 the outset that unless it went to every member of the public,
21 we were not getting it. So those discussions didn't go very
22 far.

23 I do think if --

24 **THE COURT:** I gather some progress has been made in
25 that regard.

1 **MR. DUSSEAULT:** Well, really just in the briefs,
2 Your Honor, but not really in the discussions. We're sort of
3 learning some of these concessions in the briefs and their
4 argument.

5 But we would, I think, be willing, according that we
6 can do it, like we're doing everything else in this case in an
7 expedited way so as not to affect the schedule, to talk about
8 some reasonable limitations of third-party communications that
9 would go after the issues in the case.

10 **THE COURT:** What limitations do you think would be
11 reasonable at least as a starting point?

12 **MR. DUSSEAULT:** Well, I think I made reference to
13 the factual issues and the category of factual issues that
14 we've already talked about a number of times in the case.
15 Generally the level of scrutiny, the potential state interests,
16 the presence of discriminatory intent, and whether there's a
17 fundamental right involved.

18 We may be able in a meet-and-confer process to
19 identify the specific subjects, for example, where we would
20 want any documents that address those issues. And I think we
21 can rule out -- and, again, if there's something about, and you
22 often do get documents like this in discovery, but if there's
23 something like, "Hey, let's meet at 5:00 o'clock before this
24 meeting," and they're talking to a third party, I'm not
25 suggesting that that's relevant, but the relevance is going to

1 turn on the subject matter of what they discuss. If they get
2 into factual subjects that are at issue in this case, we would
3 think it needs to be produced. If they don't, then we could
4 probably work out a limitation.

5 **THE COURT:** Well, we've had some discussion here
6 this morning about some of the relationships that exist.
7 Mr. Cooper has mentioned the ad hoc Executive Committee. The
8 consultants have been mentioned; and, indeed, the consultant,
9 whose name escapes me, but a speech I read in which he
10 described the campaign, which was quite forthcoming with
11 respect to various aspects of the campaign. I should think a
12 discussion along the lines of identifying who some of these
13 third parties are would be very helpful --

14 **MR. DUSSEAULT:** I think so, Your Honor.

15 **THE COURT:** -- in bridging the gap.

16 **MR. DUSSEAULT:** And the way we have approached
17 discovery is we started with the parties, the defendant
18 intervenors. We have since served requests on a narrow group
19 of entities and individuals who are the political consultants
20 and advisers to the parties for this case.

21 **THE COURT:** These are third-party subpoenas.

22 **MR. DUSSEAULT:** We have served third-party
23 subpoenas, although I would submit, Your Honor, particularly
24 based on some of what was said today, I think that some of
25 those documents should be deemed in the possession, custody,

1 and control of ProtectMarriage. I think if Mr. Schubert is
2 running the campaign, and I understood Mr. Pugno to say that
3 some of the documents may reside with him, I would think those
4 should be deemed to be in ProtectMarriage.com's possession,
5 custody, and control. But we have, in abundance of caution,
6 sought a subpoena for him.

7 What we have not yet done is served subpoenas to
8 third-party groups that also worked on the campaign, and I
9 think that is something that we have some intention of doing in
10 a narrow fashion to try to get documents that may be
11 discoverable and relevant, but we had not yet done that.

12 And we don't intend, Your Honor, I think to get out
13 to every individual by any means, but there are certain bodies
14 that threw themselves completely into running this campaign and
15 trying to get this initiative passed, and they may well have
16 documents that are at the very least discoverable.

17 **THE COURT:** Very well, Mr. Dusseault, anything else?

18 **MR. DUSSEAULT:** No, Your Honor. Thank you.

19 **THE COURT:** You are Mr. McGill?

20 **MR. MCGILL:** Yes, sir. Thank you, Your Honor.

21 **THE COURT:** Your Honor is usually the way you talk
22 to a judge.

23 **MR. MCGILL:** Thank you, Your Honor, for the
24 correction.

25 I want to address just three key points of

1 Mr. Cooper's First Amendment presentation. The first, it bears
2 noting at the outset that defendant intervenors have chosen to
3 be a part of this litigation and that, of course, sets them
4 much apart from many of the cases they cite, including the
5 NAACP line of cases.

6 I think Mr. Cooper in his reply brief actually
7 identifies the correct way to analyze this as a constitutional
8 matter, and that's the question of whether compliance with
9 normal discovery burdens, normal party discovery burdens in
10 effect constitutes an unconstitutional condition on their right
11 to proceed in this litigation.

12 And the cases that they cite as illustrative of the
13 fact that a plaintiff can also bring this kind of First
14 Amendment privilege claim -- the *Christ Church* case, the *Beinin*
15 case, the *Black Panther* case -- all those cases have in common
16 is that -- what they have in common is that the plaintiffs in
17 those cases had rights under federal law that they were seeking
18 to vindicate in that litigation.

19 So that the discovery basically did present them
20 with the Hobson's choice of either vindicating their rights
21 under federal law -- in the *Christ Church* case it was the
22 RyuPa, rights under RyuPa; in *Beinin* it was a copyright claim;
23 and the *Black Panther* case it was a Section 1985 claim --
24 either vindicate your rights under those federal laws or give
25 up your First Amendment rights.

1 And the key difference in this case is that the
2 defendant intervenors have no rights at stake in this
3 litigation. They have no rights that they are seeking to
4 vindicate of their own in this litigation, and that means that
5 it's not an unconstitutional condition to require them to
6 comply with normal discovery.

7 The second point would be, even under the typical
8 First Amendment privilege analysis, if they get in the First
9 Amendment door, then under the Ninth Circuit's decision in
10 *Dole*, it's their burden, they have to establish a prima facie
11 burden that the disclosure will result in harassment,
12 membership withdrawal, or discouragement of new members, or
13 other chilling of members' associational rights.

14 The declarations that appended to the motion simply
15 don't meet that burden. The Ninth Circuit emphasized the
16 evidence has to contain objective and articulable facts which
17 go beyond broad allegations or subjective fears. That's
18 page 1460 of 950 F.2d in the *Dole* case.

19 If you actually walk through what the declarations
20 say, for instance, the Prentice declaration, paragraph 14, he
21 says: (reading)

22 "I would have done things differently. My
23 communications would have been more guarded. We
24 would have warned people that their
25 communications might be subject to disclosure."

1 That doesn't make him appreciably different from
2 many other clients I have who are on the wrong side of
3 discovery; but above and beyond that, there's no allegation of
4 a chilling effect in that declaration. There's no allegation
5 that if he complies with the discovery burdens in this case,
6 that he is actually going -- that his speech will be -- that he
7 will not engage in the associational activities in which he's
8 currently engaged.

9 The Schubert declaration is actually
10 indistinguishable from the declaration the Ninth Circuit found
11 insufficient in the prior iteration of the *Dole* case. There in
12 the first version, or I believe at that point it was known as
13 SEU1, in SEU1, the Ninth Circuit said -- looked at a
14 declaration from the attorney of the union that basically
15 opined, based on his experience, that he -- that the union
16 members' associational rights would be burdened if they were
17 compelled to submit the minutes of these union meetings; and
18 the Ninth Circuit found that insufficient as a matter of law to
19 meet a prima facie burden, the prima facie burden that the
20 plaintiff has to -- or that the litigant has to establish.

21 Schubert goes on to say that he will change the way
22 he does business; but that, again, is not a statement that he
23 will -- he will reduce his speech. He's saying he will change
24 the way he communicates, he will change the way he does
25 business; but he's not saying, "I will not engage in this

1 speech anymore."

2 The Jansson declaration, paragraphs 2 and 5:

3 (reading)

4 "I will dramatically alter my speech. I
5 will be less willing. I will seriously
6 reconsider my speech."

7 This, again, is not the types of declarations that
8 the Court found sufficient in the *Dole* case where there the
9 union members said, "I will no longer go to union meetings. I
10 am not participating anymore."

11 I think that based on the *Dole* case, it's difficult
12 to see how the declarations appended to the -- appended to the
13 motion satisfy their prima facie burden of their First
14 Amendment privilege.

15 The final point is that they've asserted the First
16 Amendment privilege in gross, and they urge the application of
17 a balancing test. They urge the application of an examination
18 of relevance versus our need for the evidence versus the costs
19 it will exact on their associational freedoms, but there's no
20 way to meaningfully analyze that when you're talking about an
21 assertion that every relevant document is privileged.

22 So I don't understand how we could meaningfully
23 engage in any kind of balancing at this juncture.

24 If, Your Honor, has no questions....

25 **THE COURT:** Very well. Mr. Cooper, I suspect you

1 want a very brief rebuttal; is that correct?

2 And then what I would like to do is to take a very
3 brief break and then meet in chambers with a court reporter and
4 one lawyer from each of the parties about a case-management
5 issue that we may confront in the case, and that will be simply
6 an informal discussion not on any of the merits or any of the
7 issues but simply how we organize going forward.

8 But the floor is yours, Mr. Cooper.

9 **MR. COOPER:** Certainly, Your Honor. Thank you very
10 much, Your Honor.

11 And also I would like now to ask the Court's
12 permission that Mr. Pugno may come back to the podium after
13 you're finished with me because there's something that he
14 believes he needs to correct.

15 **THE COURT:** All right. Fine. I appreciate that.

16 **MR. COOPER:** Your Honor, I'm going to begin with
17 this notion that the defendant intervenors did not meet their
18 prima facie First Amendment showing.

19 We have, out of the plaintiffs' counsel own mouth,
20 the acknowledgment of the widespread economic reprisals,
21 reprisals, Your Honor, that continue to go on to this day as
22 was dramatically illustrated on the Web site of Equality
23 California earlier this week; that is, the main No on 8 group.
24 Earlier this week, as they reiterated on this Web site, they
25 are called to continue a boycott against a prominent business

1 owned by a man who was a No on 8 donor, and for that reason
2 because -- he was a Yes on 8 donor.

3 Your Honor the declarations that we've submitted and
4 the declarations that were submitted and that we've referred
5 the Court to and we'll be -- you know, hopefully we won't have
6 to redo them and submit them here, but that were submitted in
7 this other case that we discussed earlier --

8 **THE COURT:** Well, these disclosure requirements have
9 already passed constitutional muster and those are the
10 disclosures that would, it seems to me, to have the chilling
11 effect that you're concerned about. That's already been found
12 to be acceptable under the First Amendment. So why cannot, if
13 there are these concerns, a protective order be fashioned along
14 the lines that we discussed earlier to avert any further harm
15 that may result from additional disclosure?

16 **MR. COOPER:** Well, those disclosures, yes, they have
17 created harm and they continue to do so, but that harm would
18 be -- would only be, we submit to the Court, increased if
19 additional individuals, those, for example, donated less than
20 99, \$100, were brought forward publicly as a result of this, of
21 this discovery; or the internal actual speech that was used by
22 these donors in their associational -- in exercising their
23 associational free speech freedoms was disclosed publicly.

24 *NAACP against Alabama* held that: (reading)

25 "Past showings of economic reprisal," this

1 is quoting, "economic reprisal, loss of
2 employment, threat of physical coercion, and
3 other manifestations of public hostility are
4 sufficient to trigger First Amendment past."

5 Your Honor, the record is replete with, and admitted
6 by the plaintiff -- the plaintiffs here, of this type of -- of
7 this type of chill activity by virtue of those disclosures. It
8 is simply a fortiori that that chill and that type of activity
9 will not -- somehow not attend additional disclosures that come
10 forward as a result of this discovery.

11 But, Your Honor, I want to go back to this question
12 of relevance and my friend Mr. Dusseault, some of his points.
13 I want to keep in mind that the issues that he has identified
14 are issues of legislative fact. For example, immutability.
15 Let's assume there's some kind of internal discussion about the
16 immutability of sexual orientation; that the proponents decided
17 not to share with the electorate. How could that somehow weigh
18 or bear on any issue this Court has to decide?

19 Could it be that some study saying, "There's no
20 question that sexual orientation is immutable, that it is
21 internal," could be binding, that could be an admission by the
22 defendant intervenors? Could we bind the State of California?
23 Could we bind the electorate? Of course not.

24 Could it -- really, could it help this Court's
25 analysis of that legislative fact on which expert witnesses

1 will be brought forward? I suggest not. And I think the Court
2 was quite correct, that is an extraordinary stretch for
3 relevance.

4 You know, the closer is the notion that there's some
5 type of nonpublic internal documents going to the issue of
6 voter motivation or going to the issue of some of the plausible
7 purposes that Proposition 8 could serve.

8 Those are --

9 **THE COURT:** Well, he also touched upon the
10 governmental interest in marriage, and the governmental
11 interest in limiting the privileges and responsibilities of
12 marriage to opposite sex couples. So that's something that may
13 very well come out in these kinds of communications.

14 **MR. COOPER:** Well, Your Honor, it could.

15 **THE COURT:** And that's going to be an issue in our
16 case.

17 **MR. COOPER:** It will be very much an issue in our
18 case; and the issue will be, Your Honor, we submit, under
19 binding Ninth Circuit precedent, again we submit respectfully,
20 whether or not there is any conceivable legitimate state
21 interest supporting or state purpose supporting Proposition 8.

22 But, Your Honor, regardless of the level of
23 scrutiny, and we're obviously suggesting it will be rational
24 basis, but regardless of what level of scrutiny it is, the
25 information they seek, nonpublic information that never got to

1 a voter, that could not have weighed on the mind of the
2 electorate itself has -- is simply irrelevant to that question
3 whether or not the electorate embraced any particular purpose,
4 and it doesn't matter.

5 And the other thing, Your Honor, is I do believe I
6 have to disagree with Mr. Dusseault in terms of whether any
7 Court, any Supreme Court case has looked at that. Our
8 submission to you is that no Supreme Court case, not one, in
9 which the purpose or intent of a referendum measure was at
10 issue has considered the type of information, nonpublic
11 information, never disclosed or presented to the electorate
12 that the plaintiffs seek to discover in this case, not one.

13 *Romer* is their key case, is a perfect example of
14 what the Court really does. It examines the purpose of the
15 legislation on the basis of its text known to the voters, on
16 the basis of its historical context, on the basis of how it
17 fits into the rest of the legislative scheme, and on the basis
18 of its effect.

19 In that case those, in *Romer*, those elements, no
20 internal information whatsoever but those elements concluded --
21 brought the Court to conclude that all conceivable legitimate
22 purposes could be excluded. It only had one and one evil and
23 bad purpose.

24 *Washington versus Seattle* Mr. Dusseault cites. That
25 case is a good example of exactly what I'm talking about.

1 Proposition I think it was 350 there, Initiative 350 in the
2 State of Washington, the only thing that any of the Courts
3 involved in that case looked at were public information like
4 the text of the statute, the official ballot information
5 provided to the voters, information in the media openly and at
6 large.

7 There is -- not only is there no Supreme Court case,
8 there's no Ninth Circuit case that looks at this kind of
9 material in determining the purpose or intent, not one; and --

10 **THE COURT:** How about that Eighth Circuit case, the
11 *South Dakota Farm Bureau* case?

12 **MR. COOPER:** Well, that's his case. That's his case
13 and it's wrong.

14 **THE COURT:** We all have our cases.

15 (Laughter)

16 **MR. COOPER:** That's his case, okay, and I'm going to
17 trudge through all of my cases and, Your Honor, I've got lots
18 of them. And I simply submit to you that the issue never was
19 really examined by Judge Bowman in that case, that South Dakota
20 case. It appears that there wasn't any dispute among the
21 parties in terms of this type of internal stuff that was indeed
22 called upon, although I would simply hasten to add that even
23 the Eighth Circuit in that case acknowledged that the most
24 important, the most relevant material were the official ballot
25 materials submitted to the voters themselves.

1 The *SASSO* case in this circuit, though, Your Honor,
2 we think is the most directly on point case that we have; and,
3 of course, the en banc decision, my friends correctly noted
4 went en banc, as we had discussed the panel decision to the
5 Court, but that case, too, looked only at these publicly-
6 available-and-presented-to-the-voters-themselves information.

7 Finally, Your Honor, there's no California Supreme
8 Court case. When the California Supreme Court is interpreting
9 or identifying the purpose and the intent of a referendum in
10 this state, it looks only at the text of the referendum, the
11 official ballot literature, and the effect its context, its
12 historical placement in context, and here's why. In fact, in
13 the *Straus* case, when this very initiative was before the
14 California Supreme Court and it had to be interpreted, that's
15 all they looked at and here's why.

16 The Court explained, not in *Straus* but in another
17 case, my colleague can remind me which case this comes from,
18 but the opinion of the drafters who sponsor an initiative is
19 not relevant since it does not represent the intent of the
20 electorate. And we cannot say with assurance that the voters
21 were aware of the drafters' intent. Yes, they have the South
22 Dakota case. I suggest to you it just doesn't provide either
23 binding authority or, for that matter, persuasive authority.

24 The final point I want to make before Mr. Pugno
25 comes -- and thank you for your indulgence, Your Honor -- is

1 that this -- these inquiries to whatever extent, you know,
2 these materials are relevant to the plaintiffs' case, these
3 materials from the other side are relevant to our case, and
4 this -- this dispute I hope will not degenerate into --

5 **THE COURT:** Nope. I think that's why I was
6 exploring with Mr. Dusseault some of the alternatives that we
7 might pursue here.

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

9 **THE COURT:** Very well. Yes, Mr. Pugno?

10 **MR. PUGNO:** Thank you, Your Honor. Andrew Pugno.

11 And just to clarify, I'm not just wandering in. I
12 am counsel of record in this case, and it just so happens that
13 I have published and done some teaching on the Political Reform
14 Act and the open meeting laws, both of which were brought up by
15 the Court today, so I wanted to address those two items.

16 **THE COURT:** All right.

17 **MR. PUGNO:** I want to submit, the current Political
18 Reform Act in California marks the outer boundaries of what can
19 constitutionally be compelled in the way of disclosure with
20 regard to political activity. It all traces back to *Buckley*
21 *versus Valeo* and that is when we're dealing with core
22 protective First Amendment interests, there is a compelling
23 interest, public interest in the knowing, in the disclosure of
24 public information about the source of money and its corrupted
25 influence -- because of its corrupted influence in politics.

1 And so all of the political --

2 **THE COURT:** Money is the only corrupting influence
3 in politics?

4 **MR. PUGNO:** Well, I am sure there are others, but
5 the special corruptive influence of money and politics
6 underpins what had to be a compelling of public interest to
7 justify forcing disclosure of political speech and political
8 information.

9 The -- and really the entire Political Reform Act
10 flows from that. Everything that it requires has to do with
11 the source of money in campaigns. We haven't really talked
12 about that today, but really everything from a hundred dollars
13 plus, that has to be -- a donor has to be disclosed. When a
14 campaign has received \$50,000 or more from a donor, its
15 advertisements have to say, "Major funding by," and then
16 identify the top two donors to a ballot measure campaign. We
17 see that at the bottom of television commercials now when
18 they're run in California.

19 The paid political spokesperson who's paid \$5,000 or
20 more, the Political Reform Act requires the campaign to
21 disclose and to put a disclaimer on saying, "This is a paid
22 spokesperson."

23 The identity of a sponsor who provides funding and
24 infrastructure, like a labor union or a corporation that
25 provides the infrastructure and covers the overhead of a

1 political action committee, has to be disclosed.

2 **THE COURT:** Why would that be a good model for
3 fashioning the limitations on third parties in this case?

4 **MR. PUGNO:** Our submission is the disclosure that's
5 permissible with regard to the sources of funding has already
6 all been made in compliance with the Political Reform Act
7 through the periodic disclosures that are made, all of which
8 are public documents, all of which the plaintiffs, intervenor
9 plaintiffs, have.

10 What they seek in this case today is far beyond all
11 of that, and it would be completely foreign to the Political
12 Reform Act because the Political Reform Act nowhere requires
13 the disclosure of who's making the decisions, what -- their
14 internal communications, their deliberative process, anything
15 that is not 200 or more pieces of mail, a billboard, a,
16 television commercial, and so on, those don't even have to have
17 disclaimers on them unless they are communicated to the public
18 at large.

19 In other words, what I'm trying to say is that the
20 Political Reform Act, and it didn't really occur to me until
21 the Court brought it up today, really is the measuring stick
22 for what constitutionally can be compelled in the way of
23 disclosure; and it all traces back to the compelling government
24 interest, public interest, in knowing the source of money in
25 politics, and all of that has been disclosed. What is being

1 sought here is far beyond that. So I think that's very
2 instructive.

3 The second point on the open meeting laws, on the
4 open meeting laws, the Brown Act in California, the whole
5 purpose is that public decisions be made in open and public.

6 **THE COURT:** This is the Ralph M. Brown Act; right?

7 **MR. PUGNO:** Yes, the Brown Act, that's correct.

8 There are really three purposes of the Act and that
9 is that the public be given notice when a decision is going to
10 be made, that the public be given a chance to be heard by the
11 decision makers before the decision is made; and, third, that
12 the decisions be made in an open and public forum with
13 exceptions.

14 Okay. Private conversations among City Council
15 members, members of the governing enacting body are not subject
16 to the open meeting laws. A meeting with a constituent, the
17 content of that meeting is not covered by the Ralph M. Brown
18 Act.

19 So that tells us that that has nothing to do with
20 this case, because there the decision makers are the City
21 Council members or the County Board of Supervisors, and the
22 public has an interest in seeing public decisions made in a
23 noticed forum where there's an opportunity to be heard by the
24 public and the decision is made publicly.

25 In this case, the enacting body is the electorate,

1 the people of California. And, so, it cannot be said that
2 anything that bears on the decision of the electorate was not
3 available to the electorate; or I should say that anything that
4 is relevant to -- went into the voters' decision making was not
5 available because it was public.

6 In other words, if our proponents, if our
7 intervenors were City Council and they tried to make this
8 decision to pass or not pass Proposition 8 in the backroom,
9 that would violate the open meeting laws. But because they are
10 not the decision makers, they're the proponents, the decision
11 maker is the electorate, the open meeting law actually tells us
12 that all of the public interest in notice and opportunity to be
13 heard and that the decision is made publicly, all of that is
14 satisfied in the open initiative process where the people
15 themselves are the enacting body.

16 **THE COURT:** All right.

17 **MR. PUGNO:** Thank you.

18 **THE COURT:** Thank you.

19 Now may I take a brief break and then we'll set up
20 in the jury room? And can I see Mr. Cooper, Mr. Burns, and
21 Mr. Dusseault and Ms. Lee. Just an organizational matter going
22 forward.

23 (Recess taken at 11:49 a.m.)

24 (Proceedings resumed at 11:54 a.m.)

25 (The following proceedings were heard in chambers:)

1 **THE COURT:** Ordinarily, Counsel, this is something
2 we just discuss off the record; but given this case, I thought
3 we better have it on the record in case anybody asks what we're
4 talking about.

5 I wanted to alert you. There has obviously been a
6 lot of public interest in this case. I was, therefore, pleased
7 to see a rather sparse turnout in the courtroom this morning.
8 I suppose discovery disputes don't generate the kind of
9 interest that we've had in the past.

10 **MR. COOPER:** I actually thought I was in the wrong
11 place.

12 **THE COURT:** But I don't think we can count on that
13 going forward. And what we have done in similar situations
14 where there has been more interest in the case than there are
15 seats in the courtroom, is to set up an arrangement whereby the
16 images of counsel, the witness, and the judge can be relayed
17 into another courtroom. We use the ceremonial courtroom on the
18 19th floor of this building, which has a substantial amount of
19 seating capacity.

20 So we can accommodate a lot more people in a case
21 that has widespread public interest, and that proves to be of
22 some value and interest to the media as well because they're
23 able to come and go a lot more readily than they can in a
24 courtroom where the proceedings are actually transpiring.

25 You saw in the courtroom today three cameras and

1 they aren't positioned where they would be, but they were
2 approximately where they would be. I assume that none of you
3 have any objection to that procedure.

4 **ALL:** No objection. None at all.

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

6 And we've also received some inquiries, although I
7 have not responded to these inquiries, about projecting this
8 image even beyond an overflow courtroom, and you might consider
9 what your position is with respect to that.

10 I haven't acted on that in any way. I haven't even
11 responded, but you might consider whether you have a concern
12 about that, or you don't object to it, what limitations, if
13 any, you think ought to be placed on it.

14 The case is going to generate the kind of attention
15 that this case has already generated, will generate, is
16 something that we ought to be aware of. So give it some
17 thought, confer amongst yourselves.

18 Obviously, what we do is open and public and should
19 be, but we want to do it in a way that's consistent with the
20 rights of the parties and the appropriate decorum and dignity
21 of the judicial process.

22 So, anyway, that's what I wanted to talk to you
23 about.

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

25 How would you like us to get back to you on our

1 thoughts about that?

2 **THE COURT:** I suspect you can confer amongst
3 yourselves and either get back to me in writing, a joint
4 letter; or, perhaps, if you have separate positions, you can do
5 that.

6 And maybe you don't need to. Maybe if you're
7 perfectly happy with what I've told you about the overflow
8 courtroom and you don't have any concern about, say, this image
9 being broadcast beyond that, then you don't have to respond. I
10 just wanted to give you a heads up. I didn't want you to be
11 surprised.

12 **MR. COOPER:** Your Honor, may I ask you --

13 **THE COURT:** Sure.

14 **MR. COOPER:** -- what the display of the image beyond
15 the overflow courtroom might contemplate? A public broadcast?

16 **THE COURT:** The image itself would be counsel, the
17 witness, and the judge on a split screen, and that's what would
18 be shown in the overflow courtroom; and if it extended beyond
19 that, that's what would be shown.

20 **MR. COOPER:** I see. And do you contemplate that it
21 might be shown on a public television station or something like
22 that? I mean --

23 **THE COURT:** I certainly received an inquiry about
24 that.

25 **MR. COOPER:** Okay. No surprise.

1 **THE COURT:** No, it isn't a surprise. It isn't a
2 surprise. There are, of course, Judicial Conference positions
3 on this. This is all in flux. As you know, the Ninth Circuit
4 has broadcast certain arguments. I'm sure you know the recall
5 litigation in, what was that, 2003?

6 **MR. BURNS:** Actually the *In Re: Marriage* and the
7 *Straus* cases were televised.

8 **THE COURT:** Well, I was thinking of the Ninth
9 Circuit, the challenge to the Governor Davis recall, that was
10 broadcast in Ninth Circuit.

11 No, the State is far ahead of the Federal courts in
12 both the technology and the sophistication in handling these
13 issues; but the Ninth Circuit has, at least in that case, and I
14 think in some other cases, permitted broadcast of those
15 proceedings.

16 **MR. FLYNN:** And the Ninth Circuit also pretty
17 regularly has the close-circuit to deal with overflow rooms
18 because their rooms are much smaller.

19 **THE COURT:** Yes. So, anyway, I wanted to give you a
20 heads up.

21 **MR. COOPER:** Thank you very much, sir. I appreciate
22 that.

23 (Pause in proceedings.)

24 **MR. DUESSEAU:** May I clarify one more thing,
25 Your Honor?

1 **THE COURT:** Sure.

2 **MR. DUESSEAU:** Your moot court rule, no moot court
3 rule, if we have, for example, on the motion for summary
4 judgment that's coming up, we've got one moving party, two
5 opposing parties on the same brief, one person --

6 **THE COURT:** Well, each party gets to speak, but what
7 I don't like are seriatims.

8 **MR. COOPER:** We appreciate the patience today.

9 **THE COURT:** One lawyer takes one issue, another
10 lawyer takes another issue, and so forth.

11 **ALL:** Thank you.

12 **THE COURT:** Thank you very much, Counsel.

13 (Proceedings adjourned at 12:01 p.m.)

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CERTIFICATE OF REPORTER

I, KELLY BRYCE, Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 VRW, Kristin Perry, et al v. Arnold Schwarzenegger, et al., were reported by me, a shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

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Kelly Bryce, CSR No. 13476

Monday, September 28, 2009