Pages 1 - 120

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Wednesday December 16, 2009 10:00 a.m.

TRANSCRIPT OF PROCEEDINGS

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

APPEARANCES:

For Plaintiffs:

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
BY: THEODORE B. OLSON, ESQUIRE
MATTHEW D. MCGILL, ESQUIRE

GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
BY: THEODORE J. BOUTROUS, JR., ESQUIRE
CHRISTOPHER D. DUSSEAULT, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
BY: DAVID BOIES, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
BY: JOSHUA I. SCHILLER, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, California 94612
BY: JEREMY MICHAEL GOLDMAN, ESQUIRE

For Plaintiff-Intervenor:

CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CITY ATTORNEY
One Drive Carlton B. Goodlett Place
San Francisco, California 94102-4682
BY: THERESE STEWART, DEPUTY CITY ATTORNEY
DANNY CHOU, DEPUTY CITY ATTORNEY

For Defendant Gov. Schwarzenegger:

MENNEMEIER, GLASSMAN & STROUD
980 9th Street, Suite 1700
Sacramento, California 95814-2736
BY: ANDREW WALTER STROUD, ESQUIRE

For Defendant Edmund G. Brown Jr.:

STATE ATTORNEY GENERAL'S OFFICE
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004
BY: TAMAR PACHTER, DEPUTY ATTORNEY GENERAL

APPEARANCES (CONTINUED):

For Defendant-Intervenors:		COOPER & KIRK 1523 New Hampshire Avenue, N.W. Washington, D.C. 20036
	BY:	**CHARLES J. COOPER, ESQUIRE** **DAVID H. THOMPSON, ESQUIRE** **HOWARD C. NIELSON, JR., ESQUIRE** **JESSE PANUCCIO, ESQUIRE**
		ALLIANCE DEFENSE FUND 15100 North 90th Street Scottsdale, Arizona 85260
	BY:	**BRIAN W. RAUM, SENIOR COUNSEL**
For Defendant Dean C. Logan:		OFFICE OF LOS ANGELES COUNTY COUNSEL 500 West Temple Street, Room 652 Los Angeles, California 90012
	BY:	**JUDY WHITEHURST, DEPUTY COUNTY COUNSEL**
For Defendant Patrick O'Connell:		OFFICE OF ALAMEDA COUNTY COUNSEL 1221 Oak Street, Suite 450 Oakland, California 94612
	BY:	**CLAUDE F. KOLM, DEPUTY COUNTY COUNSEL** **MANUEL MARTINEZ, DEPUTY COUNTY COUNSEL**
For Proposed Intervenor Imperial County, et al.:		ADVOCATES FOR FAITH AND FREEDOM 24910 Las Brisas Road, Suite 110 Murrieta, California 92562
	BY:	**JENNIFER L. MONK, ESQUIRE**

P R O C E E D I N G S

DECEMBER 16, 2009 **10:00 A.M.**

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

Can I get the appearances from the plaintiffs' side, please.

MR. OLSON: Good morning, Your Honor.

Theodore B. Olson, Gibson, Dunn & Crutcher, on behalf of the plaintiffs.

THE COURT: Good morning, Mr. Olson.

MR. BOIES: Good morning, Your Honor.

David Boies, Boise, Schiller & Flexner, also on behalf of plaintiffs.

THE COURT: Good morning, Mr. Boies.

MR. BOUTROUS: Good morning, Your Honor.

Theodore Boutrous, also from Gibson, Dunn & Crutcher, for plaintiffs.

THE COURT: Good morning.

MR. DUSSEAULT: Good morning, Your Honor.

Chris Dusseault, Gibson, Dunn & Crutcher, on behalf of plaintiffs.

THE COURT: Good morning.

MR. MCGILL: Good morning, Your Honor.

Matthew McGill, Gibson, Dunn & Crutcher, for the

plaintiffs.

THE COURT: Good morning.

MR. GOLDMAN: Good morning, Your Honor.

Jeremy Goldman, Boies, Schiller & Flexner, for the plaintiffs.

THE COURT: Good morning, sir.

MR. SCHILLER: Good morning, Your Honor.

Josh Schiller, from Boies, Schiller & Flexner, on behalf of the plaintiffs.

THE COURT: Good morning.

I am sure Mr. Boies will tell you to keep your voice up when you are in the courtroom.

MS. STEWART: Good morning, Your Honor.

Therese Stewart for the City and County of San Francisco, plaintiff-intervenor.

THE COURT: Good morning.

MR. CHOU: Good morning, Your Honor.

Danny Chou for the City and County of San Francisco.

THE COURT: Good morning.

MR. COOPER: Good morning, Chief Judge Walker.

Charles Cooper, with Cooper & Kirk, for the defendant-intervenors, known here, I think, as the proponents.

THE COURT: Good morning.

MR. THOMPSON: Good morning, Your Honor.

David Thompson, from Cooper & Kirk, for the

defendant-intervenors.

THE COURT: Good morning.

MR. NIELSON: Good morning, Chief Judge Walker.

Howard Nielson, of Cooper & Kirk, for the defendant-intervenors.

THE COURT: Good morning.

MR. PANUCCIO: Good morning, Your Honor.

Jesse Panuccio, of Cooper & Kirk, for the defendant-intervenors.

THE COURT: Good morning.

MR. RAUM: Good morning, Your Honor.

Brian Raum, Alliance Defense Fund, defendant-intervenors.

THE COURT: Good morning.

MS. WHITEHURST: Good morning, Your Honor.

Judy Whitehurst, with the Los Angeles County Counsel's Office, representing Dean C. Logan, Los Angeles County Registrar-Recorder/County Clerk.

THE COURT: Good morning.

MR. KOLM: Good morning, Your Honor.

Claude Kolm, from the Alameda County Counsel's Office, representing Patrick O'Connell, the Alameda County Clerk Recorder.

THE COURT: Good morning.

MR. MARTINEZ: Good morning, Your Honor.

Manuel Martinez, also representing the County of Alameda.

THE COURT: Good morning.

MR. STROUD: Good morning, Your Honor.

Andrew Stroud, Mennemeier, Glassman & Stroud, on behalf of Governor Schwarzenegger and the Administration defendants.

THE COURT: Good morning.

MS. PACHTER: Good morning, Your Honor.

Tamar Pachter on behalf of the Attorney General.

THE COURT: Good morning. Any others?

Well, welcome back to the District Court. Delighted to have you.

(Laughter)

THE COURT: And we have an agenda of several items that I want to discuss with you this morning, and I'm sure you want to discuss with me. And there may be some other things that are not on my list.

And, in addition, I have some news that may be of interest. But, apart from the news which I'll relay to you in a moment, as I understand it, the issues that we need to deal with this morning are essentially three disputes or matters that require resolution.

The first is the motion to intervene, filed by Imperial County. And, on that, my inclination is not to hear

the merits of that motion at this time because plaintiffs have not had an opportunity to brief it.

But I think we can discuss and perhaps even resolve the motion for an order shortening time to hear that motion, and decide on what schedule that motion should proceed.

Then we have the motion to realign the Attorney General. And I believe that has been fully briefed, and we can address it and resolve that matter. And it would be helpful, I'm sure, to resolve that before the trial.

Then we have some outstanding discovery disputes that we can discuss, and motions in limine, and, finally, a trial schedule.

So those are the matters that, as I see it, we should and need to discuss today.

In addition, you should know that I have, just moments ago, received a telephone call from the Ninth Circuit, indicating that there has been a call for an en banc panel in connection with the discovery matter which was decided by the Ninth Circuit very recently.

My understanding from the Ninth Circuit is that you will receive an order later today indicating that the matter -- at least there has been a call for an en banc, and a request for expedited briefing. And the Court is going to attempt every effort to resolve the matter prior to the start of the trial date in this case.

So the Court of Appeals did an excellent job of expediting the matter, and hearing it and giving it full consideration when it went up the first time. And I understand that the Court of Appeals is going to make a similar good effort to move that issue along expeditiously.

So you'll know more about that later today. And so I guess it's fair to say that at least in one aspect of this case, you're just touching down here today, and you're soon going to be bouncing back to the Court of Appeals.

(Laughter)

THE COURT: But we are going to make every effort to bring you back here in time for our January 11 trial date.

Now, I've mentioned the things that I think need to be resolved and I think we can accomplish this morning. Are there any things that I've overlooked?

First, from the plaintiffs and the plaintiff-intervenors, any other items you'd like to add to the agenda? Mr. Olson?

MR. OLSON: I think these are mostly in the nature of trial issues and logistic or procedural things.

We had a reference earlier in these proceedings to the possibility of televising the trial. And I think that's still an open item. We expressed support for that, if it could be done. Our opponents were opposed.

And I don't know whether you wish to get into that or

not, but I wanted to mention it.

THE COURT: I appreciate that.

My understanding is that under current Ninth Circuit policy and rules -- and this is true of our local rules, as well -- that is not permitted; that is, dissemination of courtroom proceedings outside the courthouse is not permitted.

However, two years ago the Ninth Circuit Judicial Conference voted for a pilot or experimental program to permit dissemination of District Court proceedings that are nonjury proceedings in civil cases.

The Circuit Council has taken up the issue of whether it wishes to implement that resolution that was adopted by the Conference.

My understanding is that a proposal to implement that is pending before the Judicial Council of the Ninth Circuit, and may very well be enacted in the very near future.

And, if it is, then I think this is an issue that we should probably discuss and decide whether we are going to do it; if so, on what basis we're going to do it, and how we can do it consistent with the needs of the case, and to do it in a way that does not interfere in any way with the processing of this case.

But, at the moment, I don't think we have a green light for it. And I'm inclined to wait to discuss this with you after we get a green light, if in fact one comes through.

MR. OLSON: That's perfectly acceptable, of course, to us. And we're happy to address it whenas and if it's an appropriate time to do so.

THE COURT: Very well.

The Ninth Circuit, of course, has had a good deal of experience with this in appellate proceedings, and has broadcast or permitted broadcasting of appellate proceedings in quite a large number of cases.

That, of course, is somewhat different than a District Court proceeding, in that those proceedings last an hour, two hours, three hours at most.

Three hours won't do very much for us here in this proceeding, so --

MR. OLSON: Well, we have a great deal to say about it when it's appropriate and an a propitious time for us to do so. I won't attempt to get into our point of view on it at this time, then.

THE COURT: That's fine. I think it's probably something we should discuss, if it is possible.

There certainly has been a good deal of interest in the case. And it would appear to fit the formula that the Ninth Circuit Judicial Conference contemplated in 2007, when it adopted that resolution that I referred to.

MR. OLSON: One or two other items --

THE COURT: Certainly.

MR. OLSON: -- such as that.

We have been approached by a party interested in filing an amicus brief. I don't know if we'll be approached again or not about that. And I thought I'd ask whether the Court would entertain the filing of amicus briefs, and if and when the Court would want them, if you would entertain that.

THE COURT: Well, is there anything wrong with at least entertaining applications to file amici?

MR. OLSON: I think not. I mean, there is a widespread interest in this case for the reasons we all know.

Different parties who are not entities, or individuals who are not parties to the case have an interest in the outcome and a point of view, I'm sure, on both sides.

And I think that it may be -- add an additional burden to your responsibilities, but I -- from our point of view, the points of view and attitudes and information are probably something that should be welcome in this case.

They would certainly be filed in an appellate phase of this case, in any event. Now, but -- but I just wanted to raise that with you.

And I would guess you would want those at some point before the beginning of the trial, or certainly before the end of trial, so that it will not delay the deliberation that has to take place once the trial takes place.

THE COURT: Well, I can certainly see someone or some

entity that has an interest in these matters wanting to state its position both before trial but also observing the proceedings and perhaps adding something that they or it feels has not been adequately developed by the parties, and wishing to apply for amicus participation after the trial, in the post-trial briefing. So I have an open mind with respect to this.

I believe, at the time that I heard the motion by the group that wanted to intervene on behalf of the defendants, the proponents, the name of which escapes me, Ms. --

MR. OLSON: It happened so long ago, Your Honor.

THE COURT: In any event, I'm sure you all recall.

(Laughter)

THE COURT: I think I said -- the record may prove me wrong, but I think I said that I would certainly contemplate an amicus brief from that party.

MR. OLSON: The same dialogue occurred with respect to the parties that sought to intervene on the side of the plaintiffs. And you denied that motion. But we did discuss the possibility that those views could be expressed in amicus briefs.

THE COURT: Okay. That's a clue, isn't it, as to who the party is?

(Laughter)

THE COURT: All right. Well, I have an open mind

with respect to that. I will certainly entertain amici applications.

Well, before saying that, you've indicated from the plaintiffs' point of view that you would welcome amicus participation.

Mr. Cooper, what's your view? I realize that there may be some additional burden on the parties if we have a flurry of amici come into the case.

MR. COOPER: I think you're raising a very good point, and the thought was occurring to me as well, Your Honor, that if the Court basically opened itself to amicus participation, you might see replicated here what we saw in some of the other cases in this state, the marriage cases in particular, where the Court was literally inundated with amicus briefs and views.

In a normal circumstance, that -- that would be -- that would be not objectionable. But I have to say I have concerns about the kinds of demands that would place upon our side of the case and, I think, all sides of the case.

Perhaps the Court would entertain the possibility. But apart from that consideration -- and, normally, in this circumstance we would welcome amicus help on my side and would certainly not object to it on Mr. Olson's side.

With that consideration, perhaps there's a way to limit, for the Court's own burdens as well as the parties', the

amicus participation.

I don't know -- I don't have an idea on how that might be effectuated, but I don't -- by the same token, if the Court ends up effectively welcoming amici, it may well inundate the Court.

THE COURT: Perhaps a way to deal with this would be to set a deadline, as part of the case management order, that any amici who wish to file briefs, memoranda, prior to trial must do so by a date certain. And that, at least, would flush out any folks who have been observing the proceedings and wish to submit an amicus brief prior to trial.

Is that a sensible way to proceed?

MR. OLSON: I believe it is, Your Honor.

And with respect to -- because the pretrial conference filings have been so thorough in terms of identifying the witnesses, identifying factual contentions and exhibits, and the whole works, the -- there's been a very substantial preview of the trial available to parties who feel that something else needs to be said.

So I think that's a reasonable way to do it. Then someone else can come along and make some motion with -- if there's good cause later on, I suppose. I mean, that would be up to you.

THE COURT: How does that sound to you, Mr. Cooper?

MR. COOPER: Well, Your Honor, I think I would make a

friendly amendment to that, because it does seem to me that receiving amicus briefs after the trial and in connection with any post-trial filings the Court may want -- I'm sure that's one of the trial practice issues we're likely to raise and discuss here now, but, to my mind, that might make more sense.

I frankly --

THE COURT: Make more sense to do what?

MR. COOPER: It might make more sense to open -- consider the possibility of amicus filings after the trial.

THE COURT: After the trial, rather than before?

MR. COOPER: Rather than before.

I frankly don't want to, honestly, have to cope with an avalanche of amicus filings as we are preparing to make our presentations to the Court.

THE COURT: It's hard for me to believe, given the extensive work that's gone into this, that there's a stone left unturned.

(Laughter)

MR. COOPER: I'm sure there are, Your Honor. I'm sure there are.

MR. OLSON: If there are any, I think we would be perfectly fine with what Mr. Cooper suggested.

If there are unturned stones, it might be nice to know about them before the trial, in case, you know, it might affect either side's strategy with respect to covering

something in a question to a witness or something like that.

But I don't want to make this too much of a back-and-forth thing. I just wanted to raise it because there are interested groups or citizens who wish to have some sort of input, I'm confident, and so it needs to be resolved in some fashion.

THE COURT: What if we set a deadline for applications to participate as amici pretrial, with a 15-page limitation and the understanding that the participation would have to be based upon a showing of a particular interest in the case that is not otherwise being represented, to avoid an amicus brief that simply says amen to one side or the other?

And then leave open the possibility, after the conclusion of trial, that if a party believes that there is some issue that has not been adequately addressed in the trial, that party can apply for an amicus participation?

Does that help assuage your concern, Mr. Cooper?

MR. COOPER: Your Honor, that seems like a very sensible approach to me.

THE COURT: All right.

MR. OLSON: We are all in favor of page limitations, Your Honor.

(Laughter)

THE COURT: Now, let's see, you had another --

MR. OLSON: These are just housekeeping, and you may

have gotten to these later on, but our plaintiffs, our four plaintiffs, have jobs. And we were hoping that it would be understandable and permissible for them not necessarily to be here every day during the trial, because of those commitments; not because they are not interested, but because they do have responsibilities to their families.

THE COURT: That will be fine.

MR. OLSON: And we wanted to raise a question about seating in the courtroom. Because of --

THE COURT: Because of what?

MR. OLSON: Seating in the courtroom.

We were wondering whether it might be possible, and we've discussed this with Mr. Cooper's team, to set aside the first two rows in the courtroom, on either side, for the parties and relations of the parties and participants in our collective teams, so that we would have the availability of getting them in here.

That's a very minor -- that's a housekeeping thing, but it may be important when we --

THE COURT: Well, it is important.

And I have been dealing with our excellent staff here on the court, which has had a fair amount of experience, recently, with cases in which there's been widespread interest and the courtrooms are not large enough to accommodate all who are interested in participating.

And Joan Anyon, of the court's Clerk's Office, has worked out a procedure which limits the number of observers in the courtroom itself.

We are arranging for transmission to the overflow courtrooms -- I think you know that -- so that spectators and media people, as well, could either get a pass to come to the courtroom itself or to the overflow courtroom and observe the proceedings.

So there will be a limitation on the number of spectators in the courtroom itself, with adequate space for spectators who cannot get into the courtroom to observe the proceedings in the overflow courtroom.

And I would suggest that you let us know how many spaces you need for your teams here in the courtroom. And if you need the first two rows, that's what you'll have.

MR. OLSON: Thank you, Your Honor.

I think there were a couple of other items that Mr. Cooper's team has raised. But the points that were going to be housekeeping-type things, I'll let them mention those items because we've discussed those.

With respect to the open items that you mentioned that you will come back to, with respect to the open -- the discovery issues, I'd like my partner, Ted Boutrous, to address those, with the Court's permission.

THE COURT: Certainly.

MR. OLSON: And with respect to the in limine motions having to do with expert witnesses, Mr. Boies would be in a position to address that, also with the Court's permission.

THE COURT: That will be fine.

MR. OLSON: Thank you, Your Honor.

THE COURT: All right. Mr. Cooper.

MR. COOPER: Thank you again, Your Honor.

We do have, as Mr. Olson suggested, a number of other kind of trial-practice issues that we have been treating with our friends for the plaintiffs on. And my colleague, David Thompson, has been in that dialogue. And with the Court's permission, I would like him to address those issues to the Court.

Also, with respect to the motions in limine, Mr. Nielson, if the Court will permit, would like to address our side of those issues.

THE COURT: That would be fine.

MR. COOPER: And with respect to the discovery disputes that we still seem to have, sadly, Mr. Panuccio, will address the Court, with the Court's permission.

I should say, in light of the news that the Court has -- has brought to the parties, that obviously will have a direct bearing on, I suspect, the discovery issues that still divide us. And I'm not sure the extent to which we can resolve those in light of that, but, in any event --

THE COURT: Well, I fully understand. But I think it's imperative that we do our best to resolve all that we can resolve, and work together to move things along so that when we receive any additional guidance from the Court of Appeals, we're in a position to implement that guidance.

MR. COOPER: Certainly.

THE COURT: All right. Then shall we turn to the order for an application -- or an application for order shortening time by Imperial County, to hear their motion to intervene?

MR. COOPER: Your Honor, we are aware of the motion. We support the motion.

The counsel who represents Imperial County, I was informed before the Court took the bench that he's on his way here now.

THE COURT: Ah, well, maybe --

MR. COOPER: And if we could put that to the end of the list, I think it makes sense.

THE COURT: That will be fine.

If counsel is on his way, then let's move to the second item that I would like to discuss with you this morning, and that is the motion to realign the Attorney General.

MR. COOPER: Thank you, Your Honor. And I will address the Court on that issue.

Your Honor, I don't really have much to say beyond

our briefing on the issue. Our position is straightforward, and it can be stated quite succinctly.

Attorney General Brown has made clear in this case that he is a de facto plaintiff. He is adverse to the defendants in every significant respect, and allied with the plaintiffs in every significant respect.

In his filings before the Court, the Attorney General's Office has openly endorsed the plaintiffs' equal protection and due process claims, has made clear his belief that Proposition 8 is unconstitutional under those provisions.

He has admitted the material allegations of the complaint in his answers to the -- to both complaints.

He has provided admissions, Your Honor, to the overwhelming 64 of 68 requests for admissions proposed by the plaintiffs to the State; that is, to the Attorney General's Office. And the plaintiffs, of course, have cited those as binding, binding on the State. A proposition, of course, we disagree with.

THE COURT: But he is the chief law enforcement officer of the state.

MR. COOPER: Yes, Your Honor.

THE COURT: And my understanding from his papers is that he is implementing Proposition 8 as interpreted by the California Supreme Court.

That is to say, he is doing what the Attorney General

would do to prevent the issuance of marriage licenses to same-sex couples, and presumably he will comply with whatever directive results in the final judgment from this Court.

So isn't he required to be on the defense side, in that he would implement whatever judgment is entered in this case?

MR. COOPER: Well, Your Honor --

THE COURT: And how can he do so if he's the plaintiff?

MR. COOPER: Your Honor, he's implementing Proposition 8, we would submit, because he has no choice but to do so. It is the constitutional rule in this state. It has been upheld against state constitutional challenge by the California Supreme Court.

And we certainly resist the notion that the Attorney General could somehow unilaterally effectively repeal Proposition 8, by virtue of his power as a chief legal officer of the State.

The implementation -- and the plaintiffs have taken care to name county clerks and counties who are the ones who really actually implement the marriage-licensing process.

The question here is, he is the State's legal representative. And our submission is that -- is that his role in this courtroom is as an advocate. And he is an advocate for the plaintiffs' side.

THE COURT: How is that different from a situation in which a party is sued and admits the allegations in the complaint, and essentially accepts judgment on that basis?

That's -- that doesn't convert that individual from a defendant to a plaintiff. He's still a defendant.

MR. COOPER: Your Honor, the -- the cases that we have cited to you, we read them to say that a defendant -- and including a government -- a government official defendant, has to be -- his position within the case has to be tested based upon his position on the primary and controlling matter in dispute.

And there is no question here that -- and this, in fact, is, we think, a -- a support for our position. There's no question here that there will remain a dispute, notwithstanding the fact that the Attorney General is realigned.

We think the Court should follow, for example, the Larios case, which we have cited to the Court, in which a suit was brought by plaintiffs challenging a redistricting plan.

And one of the defendant governmental officials there was, as the Attorney General is here, thoroughly aligned with the plaintiffs' side. And the Court, in the light of that fact, concluded that that government official should be realigned to the plaintiffs' side.

There's another case, the Delchamps case, from a

District Court in Alabama, where the Attorney General of Alabama also took the position supporting the plaintiffs in that case.

THE COURT: This was the Republican senators in Alabama case?

MR. COOPER: That's the Larios case, I believe, Your Honor, the Georgia --

THE COURT: The Georgia. I'm sorry.

MR. COOPER: The Delchamps case involved the Alabama Attorney General.

And, to be sure, as the plaintiffs have noted and the Attorney General has noted, in that case, the Attorney General wanted to be realigned. But the motion to realign was opposed, and the judge had to decide whether or not, according to the applicable standards, that was the appropriate approach.

And the applicable standard was: What was the officer's primary -- position on the primary and controlling matter in dispute?

THE COURT: Let me ask a couple of other questions.

One, isn't this realignment procedure usually reserved for one of two situations?

One is a jurisdictional situation, where it's necessary either to maintain or defeat diversity.

And, secondly, in the patent context, where a party is seeking declaratory relief but in fact is claiming or

denying infringement, we do realign parties with some regularity.

MR. COOPER: Sure.

THE COURT: But isn't that the usual situation for realignment?

MR. COOPER: Your Honor, certainly, the jurisdictional context represents the most pressing situation for realignment, where jurisdictional issues may hinge on the issue. We don't --

THE COURT: But that's not present here, is it?

MR. COOPER: No, no, Your Honor, it's not.

But we haven't found any authority for the proposition that that is the only occasion on which realignment is proper.

In fact, Your Honor, we think the authority is to the contrary of that; that it is, even in a rising under case, as opposed to a diversity case or a case where the issue has direct jurisdictional implications, it is not just appropriate but it's essentially the Court's responsibility to align the parties in accordance with their -- their genuine positions.

THE COURT: How -- I'm sorry. Go ahead.

MR. COOPER: Not at all, Your Honor. Please.

THE COURT: Well, how are your clients prejudiced by the Attorney General being aligned as a defendant as opposed to a plaintiff?

MR. COOPER: Your Honor, I walked through, in my opening, the ways in which the Attorney General has effectively given aid and comfort to the case being advanced here by the plaintiffs.

It seems to me obvious why we want the Attorney General to be made a plaintiff. What I think is not at all obvious is why the plaintiffs don't want the Attorney General to be a plaintiff.

Normally, you would -- you would welcome the State's chief legal officer to your side of the case. He is more useful to the plaintiffs on the defendants' side of the case, offering positions that can then be advanced as binding positions on the State itself.

So it's easy to understand why this wolf in sheep's clothing is not something I want over on my side of the case. The real tough question is why -- and I think it's obvious on both sides, frankly --

THE COURT: An unfair, kind of an unkind cut to suggest that the Attorney General is in sheep's clothing?

(Laughter)

MR. COOPER: You put me in mind of Justice Scalia's quote, "Yes, this wolf comes as a wolf."

THE COURT: Well, we certainly face this kind of situation in criminal cases, from time to time, where there are multiple defendants, and one defendant is cooperating to one

degree or the other with the prosecution. There are all kinds of issues that come up in that context. But that doesn't result in a realignment of a cooperating defendant into the prosecution side.

And the Attorney General does have constitutional responsibilities which he is duty-bound to fulfill.

What is so special about this situation that perhaps different points of view, different interests on the defendants' side, necessarily requires that we take a defendant and put him on the other side of the courtroom?

MR. COOPER: Your Honor, it's -- I think it's an extraordinary situation that is before you on this.

It's an extraordinary situation where the State's chief legal officer not only is agnostic, as the Governor is, on the legal issues relating to a constitutional challenge to a constitutional provision duly and properly enacted by the people at large, but, in fact, not only refuses to defend it, and leaves that responsibility to others, but goes beyond that and is heard to say in the court, "I oppose this. I endorse the plaintiffs' side of the case. I agree with the plaintiffs' allegations. The admissions they have asked me as the chief legal officer of the State to make, that aid their case, I readily provide. The opposition to the summary judgment motion put in by those who have stepped forward to defend the constitutionality of the provision, I endorse and I embrace."

And, apparently, on a review that took place while the opposition that the plaintiffs filed was in its draft form.

The relationship between the plaintiffs and the Attorney General is one of alliance. And this brings us to our request that it be one of alliance formally, and not just de facto.

THE COURT: Fair enough.

Does the Attorney General wish to be heard? Or perhaps I should ask before, does anyone wish to weigh in on the side of realignment?

All right. Let me hear from the Attorney General.

MS. PACHTER: Good morning, Your Honor.

THE COURT: So you are wearing sheep's clothing.

MS. PACHTER: I have to admit, Your Honor, the motion was fascinating to research. It never occurred to me that outside the jurisdictional or patent context that this would come up.

And Your Honor has been very practical in the conduct of this case so far, so I guess what I'd like to do in my comments is limit myself to practical issues.

Since Mr. Cooper first and formally raised this with one of my colleagues following a hearing, I tried to talk to him about, What are the practical issues that you're trying to address?

And based on the reply brief, it seems to me that the

practical issues that the defendant-intervenors are trying to address are the admissions, and whether those admissions will be conclusive against them in the case.

And what I said to Mr. Cooper and what I believe is true now is, those admissions are before Your Honor as every other piece of evidence will be in this case; and it is really a question of weight, and what weight you will give to those admissions in considering all the evidence that is before you in this case.

And, otherwise, I really don't think there is any reason to realign the Attorney General in this case. I think we fully briefed the circumstances under which that would be a reasonable thing to do.

I think Mr. Cooper's argument would be a lot more compelling if the Attorney General had participated in any way in the depositions in this case in any really active way. But that just hasn't been the case. And there's no legal grounds for it.

THE COURT: Well, it's certainly true, isn't it, that the Attorney General would like to see the plaintiffs prevail? So why doesn't that make him in league with the plaintiffs?

MS. PACHTER: Well, while I agree, Your Honor, it is unusual, there are many cases, several of which we cited to you in the briefs, in which the chief law officer -- sometimes it is on the federal level -- agrees with the principal

contentions of the plaintiffs' case; and those courts never consider realignment, not unless the chief law officer actually seeks to be realigned in the case.

And, presumably, that's for the purpose of pursuing a case, of advancing a case. And that's not the position of the Attorney General here.

THE COURT: Well, if the Attorney General is taking the position that Proposition 8 is unconstitutional, doesn't that, if not formally, at least as a practical matter, since you put things in practical terms, if not undermine, at least it harms the proponents' position?

Doesn't it make their task in defending Proposition 8 all the more difficult?

MS. PACHTER: It certainly does, but that will not be addressed by moving the Attorney General to the plaintiffs' side.

Wherever he sits, the Attorney General is the chief law officer of the State, and will be a problem for the defendant-intervenors. But realigning the Attorney General is not going to solve that problem.

THE COURT: All right. Anything else?

MS. PACHTER: That's it. Thank you, Your Honor.

THE COURT: All right. Mr. Olson.

MR. OLSON: The Attorney General is being sued in his official capacity. We may have a different Attorney General

three months from now, if the incumbent Attorney General decides to run for a different office. Just a wild hypothetical speculation.

(Laughter)

MR. OLSON: But my point is that this is an action against the Attorney General as an officer of the State of California, not against an individual person.

The Attorney General is enforcing the law. A judgment is being sought against the Attorney General, against the State of California, in that forum, which would result, if we're successful, in an injunction.

The plaintiffs are suing --

THE COURT: Well, how are the plaintiffs hurt if the Attorney General is realigned?

Let's assume that you prevail here. You would still have a judgment that would be binding on the State of California; would you not?

MR. OLSON: Well, it's a little confusing as to whether or not a plaintiff bringing a case is going to get a judgment against another plaintiff in the case.

How would we be affected if the Court decides -- if a court decides to start putting other people in the position of the plaintiffs at this table, who can call witnesses and conduct the trial? It's the same thing we talked about with respect to the intervention.

The proper place for the State of California in this case is as a defendant.

Now, what Mr. Cooper doesn't like is that the Attorney General has made some admissions in the best tradition of law enforcement officials.

The government wins its case when justice is done. And so the Attorney General, in the tradition, the honorable tradition, having come to the conclusion that a law of the State of California is unconstitutional, has courageously, I suppose, said so. That does not make that Attorney General into a plaintiff.

The Attorney General is continuing to enforce the law, and a judgment is sought against him to prevent him from enforcing the law. That is the right position for a defendant in this case, as chief law enforcement official.

As you pointed out, if a plaintiff -- if a defendant in a tort case or in a contract case admits liability, that does not make the defendant a plaintiff. It makes that defendant an honest defendant.

(Laughter)

MR. OLSON: And he may concede facts that are frustrating to other codefendants, and so forth, but it doesn't require an realignment of the party.

The government, from time to time, confesses error, as it should, when it is wrong or when it believes it is wrong.

And that's all that's happened here.

I can understand Mr. Cooper's frustration that a law enforcement official says that, Well, this statute that we passed, I think, is unconstitutional. But that's not really making it any harder for Mr. Cooper to present all the arguments.

The Court has not defaulted the State of California. The Court allowed the proponents to intervene precisely so that they can make the case that they want, that Proposition 8 is constitutional.

I'm submitting that there isn't case law justification, and, certainly, the facts of this case don't justify moving the State of California to the other side of the ledger in this case.

And the plaintiffs are entitled to conduct their own case, without people being added against whom they are seeking a judgment.

THE COURT: All right. Thank you.

Anything further on this issue?

MR. COOPER: Just one quick point, Your Honor.

Certainly, if in a few months from now there is a new Attorney General, and that Attorney General takes our view of it, we will welcome that Attorney General with open arms, and Mr. Olson's effort to realign him.

(Laughter)

THE COURT: All right. Well, I'll issue a written order on this matter.

I am disinclined, I will say, Mr. Cooper, to realign the Attorney General formally. I think the Attorney General's counsel has well stated that this is a practical matter more than a legal matter.

And it's not at all unusual that there are different perspectives on one side of the case. And I don't believe that the fact that the Attorney General has made the admissions that you've referred to necessarily prejudices the proponents in any material way.

But, I will give you an order that will finally resolve this matter.

Now, discovery matters. Let's see. We have quite a number of these. How would you like to address them? What do you need the most, in order to move things along so that we can begin our trial on the 11th of January?

MR. BOUTROUS: Thank you, Your Honor. Theodore Boutrous for plaintiffs.

What we need the most, I think, are two things:

First, the privilege log that the Ninth Circuit has ordered in confirming this Court's order that plaintiffs' proponents must present. We still have not received that.

That, I think, will help us in all other respects, in a practical way and a speedy way, to get the documents we think

we are entitled to under the Ninth Circuit's order as it stands today.

Secondly, the Ninth Circuit in its opinion said, I think, at least a half a dozen times, that its ruling was limited to private internal communications regarding campaign strategy and messaging.

And it left on the table, we believe, all the public communications by the proponents to voters, to discreet voter groups, to individuals, communications that were meant to inspire people to go out and work to pass Proposition 8.

The proponents are taking an extraordinarily broad view of what -- of what this privilege means, at this point.

They are declining to produce documents that would be -- we attached it, I think, to the December 7 letter that we submitted to the Court, this document from Mr. Tam, the "What If We Lose" document that he signed in his official capacity as the head of the Traditional Family council.

They take the position that that type of document is privileged because it was sent to a smaller group of family and friends, even though it was urging those people to go out and vote and to work to pass Proposition 8.

And so I think what we need is a definition of what an internal communication really means in this context.

We have a proposal that I think is fair and reasonable. We made it to the proponents, and they rejected

it.

But it seems to us that the core group, the control group, we could sort of call them, the proponents themselves, and the top officers of protectmarriage.com, and basically the way the Court outlined it in the October 1 order, when talking about No. 8, our Request No. 8, those people, I would think, would be the folks who could generate internal documents, communications to each other, and the like.

I assume --

THE COURT: What about a communication from Mr. and Mrs. John Q. Public to either protectmarriage.com or to one of the officers or directors, managing agents of that entity, saying, "I'd like to have a neighborhood party in support of Proposition 8. What are the materials that I can distribute, and signs, and whatnot"? Is that an internal communication?

MR. BOUTROUS: No, Your Honor, I do not think it is, because it's a communication with someone in the public with whom there is no connection, no official connection or managerial capacity in the organization.

The way I'm starting to read the proponents' argument, it's that everyone is internal who voted for Proposition 8, at this point, who was part of the efforts to pass Proposition 8, which obviously is too broad.

So I think that would -- we could redact the names, if private citizens wrote in, and there were communications,

into the kind of protective order that we had talked about before.

But I don't think the Ninth Circuit was contemplating that that would be a private communication because, as the Court will recall, Mr. Cooper had used this phrase about an "associational bond." And I used the example in the Ninth Circuit argument that under their interpretation, if they asserted an associational bond, they could send documents to thousands of people as long as they claimed that they were doing it in this world of the bond.

The Court rejected that. And the proponents have seized on that language in Footnote 12, of the opinion, however, to argue to us that unless the documents were communicated to a large swath of the electorate, they are private.

And I don't think the meaning of the word "private" or the meaning of the word "internal" would support that interpretation.

And the Court, the Ninth Circuit, was very clear that, "Our holding is limited to private internal campaign communications concerning the formulation of campaign strategy and messages, not the messages themselves that were conveyed to voters."

So we think it's a very reasonable proposition that all the external communications to -- whether it be to one

voter or five voters or ten voters, where the campaign was seeking to inspire people to pass Proposition 8, are on the table and should be discoverable if they relate to efforts, and could reasonably be interpreted to be an effort to prompt the passage of the proposition.

THE COURT: Tell me what the proposal is that you have made to the proponents, that you say they have rejected.

MR. BOUTROUS: We -- essentially, what I've outlined.

One, that we would get a privilege log; that the privilege log could be limited to external communications; that --

THE COURT: External in what sense?

MR. BOUTROUS: External to the core group that we would define to include the individual proponents who have intervened in the case, the executive committee members of protectmarriage.com and other -- I think the Court talked about it as sort of individuals with managerial capacity.

So people who are actually part of the campaign itself and the proponents' group that intervened in this case.

And one other, I think, limiting factor, Your Honor, I presume that Mr. Cooper and his team, diligent lawyers that they are, conducted a search of all the people and all the individuals' documents who they believe are subject to this internal -- internal privilege.

And I think that would be another way to limit it.

The people that they view as part of the campaign and the people they view who were subject to our discovery requests, that group, communications amongst those people for present purposes, without regard to the Ninth Circuit proceedings, we would leave off the table for now. They would not have to do a privilege log.

This is what we proposed before we heard about the en banc issue.

And then the documents that we would seek would be communications outside of that group to individuals and citizens that could be reasonably interpreted to have it as their goal the prompting of a vote or some other form of support of Proposition 8.

And so I think that's a very targeted, limited interpretation.

The other issue we've had, Your Honor, is that proponents claim that now that we've got the ruling from the Ninth Circuit, that requests -- our Request No. 1, for example, which sought all communications with voters, are somehow resolved and they are not required to produce documents responsive to that document -- to document requests; which there's no support for that.

The only issue that was dealt with in this Court's November 11th order, which was before the Ninth Circuit and that they dealt with, was our No. 8 request as revised.

So a related issue to this, Your Honor, is the identity of the executive committee. This kind of puts in context, I think, the extreme nature of this privilege claim.

We've been fighting to find out the fifth person who was a member of this executive committee of protectmarriage.com, that ran this $40 million campaign.

This wasn't like Mrs. McIntyre, in the Supreme Court case, out there anonymously leafletting. This was this huge campaign.

The proponents have refused to disclose the name of this fifth person, claiming it's privileged and nonpublic.

Well, yesterday we received a document during production, which was an e-mail trail from the executive committee members of protectmarriage.com to the Wall Street Journal, asking the Wall Street Journal to publish a letter by the executive committee members.

And I can provide the Court with a copy, but it has -- it's signed. This is to the editors, asking this to be published to millions of people. It has the five members of the executive committee. But on our copy, they redacted the name of the fifth person.

So they are taking the position that somehow, under some version of the First Amendment, information they gave the Wall Street Journal is privileged and confidential and private.

And I just don't think the Ninth Circuit's ruling or

any case of this Court, the Ninth Circuit, or the Supreme Court supports that interpretation.

Once you communicate with someone outside the group that is private and confidential, First Amendment protection is waived in that context.

And that principle, I think, is being disregarded here. And we are simply getting blocked, in terms of any discovery regarding things that weren't broadcast on TV and the like.

THE COURT: One of the issues that the Ninth Circuit panel focused on was the availability of much of this information from other sources.

Why is it that you can't develop this information from sources outside the proponents' campaign?

MR. BOUTROUS: We are developing it to the extent we can, Your Honor, in terms of publicly-available information.

But we served, I think, 15 to 20 subpoenas on third-party groups during the argument that I think Judge Wardlaw made the point: Why can't you go to these other groups and get their documents?

They have all been refraining from producing documents because they are prepared to ride the First Amendment privilege, however it pans out, that the proponents are urging.

So I presume they would take the position that unless they were communications on television or very broad, public --

the "electorate at large" is the language that proponents have used -- their communications to voter groups and to individuals, and door-to-door communications from script would be privileged.

And so we are being blocked from that discovery. We served this discovery months and months ago, and so it really is hindering us.

As the Court knows, we have many, many arguments that do not depend on this information. So I'm not standing here telling the Court that we can't make our case without it. But it seems fair game. And it's clearly outside the narrow privilege, in terms of the documents that are covered by the Ninth Circuit's ruling, internal communications that were private.

THE COURT: What are the entities to which these subpoenas have been served?

MR. BOUTROUS: I think we have some church organizations, other advocacy groups or other organizations that were supporting Proposition 8.

And we're -- you know, we would limit it to the same sort of sphere of documents.

THE COURT: Were these entities all supporters of Proposition 8, as opposed to, say, the Wall Street Journal, which is obviously not involved in the campaign except as a media organization?

MR. BOUTROUS: They were organizations that were involved in the effort to pass Prop 8, and that supported the organization.

So we haven't subpoenaed the Wall Street Journal or other --

THE COURT: You have not?

MR. BOUTROUS: -- entities.

We have not, no.

And entities that might have accumulated this information, as well, we've limited ourselves there to public information, advertisements and things that we were able to find on the Internet.

We found some things on the Internet, like this document from Mr. Tam, which contains all kinds of inflammatory rhetoric and urges people to help --

THE COURT: Would it not be a fair interpretation of the Ninth Circuit Panel decision that a communication from protectmarriage.com to a church organization or some other group that is supporting the passage of Proposition 8 is one of these internal communications that the First Amendment privilege and the Ninth Circuit found implicates?

MR. BOUTROUS: No, Your Honor, I don't think so.

The court, the Ninth Circuit, cited the In Re Motor Fuels case, which is what they cited in Footnote 12. And the District Court in that case specifically rejected the notion

that communications between trade associations, which would be very analogous to our situation, would be covered by the First Amendment privilege that the District Court recognized there.

And the District Court in the Motor Fuels case said -- emphasized -- I am only talking about internal documents in evaluations of lobbying and legislation, and everything else is subject to normal discovery rules.

And then I think it's in a footnote the Court said, "When one trade association engaged in First Amendment advocacy communicates with another group, the confidentiality interests fade."

THE COURT: Well, the footnote, in its second sentence, states, "Proponents cannot avoid disclosure of broadly-disseminated material by stamping them 'private' and claiming an associational bond with large swaths of the electorate."

But would that foreclose the privilege covering a communication from protectmarriage.com to the governing body of a church organization, or some other organization that was supportive of Proposition 8, if that communication was not broadly disseminated?

MR. BOUTROUS: I don't think it would foreclose, Your Honor. I think the Court was giving an example. In part, I -- I mean, I maybe gave them the -- suggested this example,

because I said, well, under the proponents' interpretation, this sort of material would be covered. And they -- I'm glad they did -- said, no, it would not be covered by the privilege.

But Footnote 12 is connected to the sentence that says, "Proponents have already agreed to produce all communications actually disseminated to voters, including communications targeted to discreet voter groups."

And I would think that a church group or some other smaller unit of people, a group of family and friends and associates that one citizen is saying, "Go out there and pass this law, vote for it" -- Mr. Schubert, in his article which I know the Court is familiar with, in analyzing the campaign strategy, touted the grass roots strategy that really was crucial to the effort, which does not involve big rallies or public -- sort of the traditional campaign style event.

It would include smaller targeting of groups, telling one neighbor to go tell another neighbor, "Here's the message. Carry this with you out into the world and convince people to vote for this proposition."

And I do not think that is the kind of internal, private communication that the Ninth Circuit was concerned about.

And I think the opinion really focuses on the internal files of the group. "These are our files. This is what we are thinking of doing. This is why we are thinking of

doing it." That was the focus of the briefing and the focus of the Court's concerns in the opinion.

The other issue, Your Honor, that is related to this, in the depositions of the proponents, the proponents' lawyers have taken extreme positions in terms of the scope of the inquiry.

We are sensitive to the fact -- well, first of all, this Court ruled that unexpressed sentiments about why a proponent engaged in the battle for Proposition 8 were not something that were discoverable. We are very sensitive to that. But that's different than expressed sentiments.

In Mr. Tam's deposition, based on this First Amendment privilege and this notion of private communication, when we were questioning Mr. Tam about the document that was posted on the Internet, that was addressed to friends and signed by him in his official capacity, the counsel for proponents objected to this question:

"Was your goal in writing this letter to encourage people to vote in favor of Proposition 8?"

And that's a good example of the -- she objected that since the document was intended by him to be private, questions just about the foundation of the document, its purpose and meaning, and identifying what it was and what it was supposed to do, were off limits.

And, again, we think that is far broader than anything the Ninth Circuit was contemplating.

Senator Hollingsworth, the government official, when asked in the last sentence of the official materials, "Voting Yes Protects Our Children," counsel for the proponents objected and instructed him not to answer the question:

"What did that mean? What do you mean by that phrase?"

So it's really made the proponent depositions extraordinarily unhelpful and unilluminating. And the huge inquiries, huge swaths of inquiry have been blocked, we think, by asserting a vastly overbroad interpretation of the First Amendment.

THE COURT: Well, let me ask a couple of other questions. The first is focusing on the first footnote of the panel's decision.

As often is the case, really interesting stuff is in the footnote.

MR. BOUTROUS: It really is interesting.

THE COURT: In any event, the first footnote states, "The District Court observed that proponents had failed to produce a privilege log, as required by Federal Rule of Civil Procedure 26(b)(5)(A)(2). We agree that some form of a privilege log is required, and reject proponents' contention that producing any privilege log would impose an

unconstitutional burden."

Focusing now on that language, "some form of a privilege log," well, I know you're familiar with the general form of a privilege log when you're dealing with the attorney-client privilege. What's the appropriate form of a privilege log in this context?

MR. BOUTROUS: Your Honor, I think it would be tailored to the proposal I have made about a core group, in the way -- how I would propose we define "internal."

So it would include a description of the document along the lines that this Court used in its November 11 order, then giving us a sense of the nature of the document, what is the document.

Then, I think, in order to make a judgment call for us as to whether to go after the document, and for the Court a description of the recipients in a manner that gives us a sense who these people were, if their identities are confidential or it being asserted to be confidential, that could be redacted or not explicitly stated, but something that tells us how many people received the document; was there a confidentiality designation of the document when it was sent, unlike some of the documents we're seeing; something that just lets us look at the documents and make a judgment call as to whether it sounds like it's a valid claim of privilege.

If it were a document sent to 15 people at a

different organization, we would argue that is not covered by the privilege, and that sort of information would allow us to target our challenges, and if we have to bother the Court again with these issues, at least we could narrow the universe to the documents that really seem to be in play under the definition of --

THE COURT: So what you contemplate is, basically, a privilege log very much akin to the privilege log that you see in the attorney-client privilege context, from whom, to whom, date, and the general nature of the communication, without disclosing the communication itself.

MR. BOUTROUS: Essentially, Your Honor, and with some general description of the topics covered. And, again, we are for now limiting our requests and our inquiry with the Ninth Circuit issues pending to documents that were -- can reasonably be interpreted to have been intended to persuade people to support Proposition 8.

THE COURT: Now, another issue and a more strategic one, from the point of view of both parties, it's pretty clear this First Amendment issue is an important one and a very interesting one, and one that has implications that go far beyond this case.

To what degree should -- to what degree is it in plaintiffs' interest to mix this First Amendment issue with the merits of the equal protection and due process claim that

you're making against Proposition 8?

Could it be that if discovery goes too broad in this case, to impinge upon the First Amendment, you would jeopardize any judgment that you obtain adverse to the constitutionality of Proposition 8?

MR. BOUTROUS: We do want to be careful on that, Your Honor. We believe that we -- I want to be very clear. We believe we can -- we can prevail and will prevail, ultimately, on these issues, even if we don't have these documents; that the Romer test -- we think there are alternative ways to prevail under Romer and under the Supreme Court's other decisions, that, yes, if we have evidence that shows improper motivations, that adds to the case.

And so we would be sensitive to that, I think. And I think, though, that if we receive discovery, we receive documents, and the Court were to analyze the case as -- with the documents and with the information, and without it, there would be a way to ensure that any ruling that was favorable to us did not rise or fall on those documents. And the fact that they had been produced or compelled to be produced would not affect the judgment.

THE COURT: Well, under those circumstances, doesn't that undermine the position which the Ninth Circuit has told us the plaintiffs must demonstrate in order to obtain this discovery; that is, it must meet a higher than usual standard

of relevance and make a compelling showing of need?

MR. BOUTROUS: Absolutely, Your Honor, as to the documents that are covered by the privilege, the internal communications.

And right now, today, I'm only talking about our efforts to seek things that we think are clearly outside the privilege, which are subject to the normal rules because they are not private internal campaign communications.

But I do take your point. We are very sensitive to that fact. We want to build the best record for our clients we can, and don't want to take risks. And we have thought we have been well within the heart of the First Amendment, and very respectful of those interests. It's something we would take into account.

As for discovery, I don't think that having discovery on issues, particularly things that are clearly outside the privileges laid out by the Ninth Circuit, would jeopardize our arguments and jeopardize any judgment we might obtain.

THE COURT: Thank you. Anything further?

MR. BOUTROUS: I think that's it, Your Honor. Thank you very much.

THE COURT: All right. Let's see, Mr. Cooper, you said which of your colleagues, Mr. Thompson, is --

MR. COOPER: No, Your Honor. Mr. Panuccio.

THE COURT: What's that?

MR. COOPER: Mr. Panuccio.

THE COURT: Mr. Panuccio. All right. Fine.

MR. PANUCCIO: Thank you, Your Honor. Again, Jesse Panuccio for the defendant-intervenors.

What we have here today, I guess, is the latest iteration of plaintiffs' discovery request. This would be the third iteration of No. 8.

They now say that -- what happened in this court, if you remember, we had the October 1st order, the November 11th order. Each of those sort of narrowed what the Court felt would be relevant to this case.

On the First Amendment issue, we took it up to the Ninth Circuit on what was still left after that narrowing, and said we believe the First Amendment privilege is implicated there. And the Ninth Circuit vindicated us on that claim.

Now, what was left, after the November 11th order, was this -- what Mr. Boutrous is now calling this control group. It would have been this set of internal communications between or among a list of people that was in that revised request.

Having lost in the Ninth Circuit, they take that opinion -- and there was no cross-appeal. They take that opinion, and they say, Okay, we lost on that. We now want everything that is on the other side of the line that this Court already narrowed.

And their view is that everything this Court had previously done, even though they didn't cross-appeal, is now off the table and they can start anew, three weeks before trial, with a brand-new discovery request.

That's what we are facing. That is the practical nature of what we are facing.

They are asking us now to go back through the 90- to 100,000 documents we've had to look through in response to their request. "Look through it again and take out everything you sorted out based on the November 11th order, and give it to us."

And we'll have to litigate the First Amendment nature of that again because we didn't have to do that under the November 11th order.

THE COURT: Well, explain that to me. I'm not sure I follow that.

There were, basically, three elements to the Ninth Circuit opinion. One, they determined that these internal communications met the discoverability standard of Rule 26; two, that in order to preserve the First Amendment privilege, a privilege log is necessary; and, three, that a higher than usual standard, a high standard of relevance, is necessary in order to obtain that discovery, which went considerably beyond what the Supreme Court had provided in other cases, but it's certainly a fair reading of the First Amendment privilege.

So how does Mr. Boutrous's argument somehow or other run counter to that fundamental three-part holding of the Ninth Circuit?

MR. PANUCCIO: Yes, Your Honor. I think it's important to remember, again, what was -- what they say in their letter to us is, they say, you know, the Ninth Circuit ruled that the privilege is limited to the following. That's not actually what the sentence is.

The Ninth Circuit said our holding is limited, and the reason our holding is limited is because we appealed -- and if you look at both of our notices of appeal, we appealed the October 1st order and the November 11th order, to the extent they denied our claim of First Amendment privilege.

And what documents were at issue after the November 11th order? Well, only those documents that this Court said would be relevant and responsive.

Before the Ninth Circuit, Mr. Boutrous repeatedly endorsed this Court's limiting and said, yes, that limiting controls, that's what's before the Court.

So that's all the Ninth Circuit had to consider. There was no cross-appeal about the limiting that this Court engaged in.

The plaintiffs didn't say --

THE COURT: Well, I don't understand that the plaintiffs are challenging the determination which I made, that

purely internal expression of sentiments or even strategy documents such as, "Shall we hire such and such polling firm? Or shall we conduct canvassing of this group and that group?"

I'm not sure that the plaintiffs are seeking that kind of information, are they, if those are internal communications?

MR. PANUCCIO: So there were a few different aspects of the limiting between the Tuesday, October 1st, and November 11th orders.

One was the subject matter limiting. But another was -- well, you said it should be sufficient for this case to get documents from this group of people.

What they -- what plaintiffs said to us when they came back with revised requests, they said, We were just following exactly what the Court said in terms of the list we have given you here. So this is the list of people we are interested in and is sufficient to get the information we need for this case.

Having now lost on getting those documents, they are going back to original request No. 8 -- or, actually, to a third request now and saying, We want -- here's the basis for what they want: We want every communication you might have had with anyone who is a, quote, voter; anyone outside. And they say, And, by the way, "outside" means anyone who wasn't in this control group.

So their -- basically, their position now is if Dr. Tam or Mr. Jannson has a one-on-one communication with a family member, a friend, a known political associate, a church leader they have known for 20 years, and the church leader came to them and said, "I am on board. What can I do to help?" Those communications are now discoverable.

So there is no First Amendment right for individuals, is what they claim. You have to be a member of a 501c3, and then you get First Amendment protection if you have an official title. Which, by the way, in a volunteer campaign you often don't have.

But what they would say is, if Dr. Tam, who wasn't a member of protectmarriage.com, if he has individual communications, we get those.

And I suppose it would extend -- their own plaintiffs, Kristin Perry, has no First Amendment rights to talk about this issue, under the plaintiffs' view of the First Amendment, after the Ninth Circuit's order. It's remarkable.

THE COURT: Well, Mr. Boutrous pointed out Footnote 12 of the Ninth Circuit's opinion, which you pointed out.

The Court stated, "Our holding is limited to private, internal campaign communications concerning the formulation of campaign strategy and messages."

In fact, the November order that I issued was really

only directed to campaign messages. And of the 60 documents that I reviewed, I think I did not order the production of the strategy documents, but only those that referred or related in some manner to messages disseminated to the voters, and that that is what will form a universe of information from which we might determine voter intent.

But, in any event, it would appear that in some ways the Ninth Circuit might approve the disclosure, assuming you meet a high standard of relevance, of these campaign strategy documents, as well as those that relate to messages disseminated to voters.

MR. PANUCCIO: A few points on that, if I may respond.

The first point would be, the Ninth Circuit, yes, there is this footnote and, you know, we obviously have a competing view. They say it opened up whole new worlds. We say it basically confirmed the discovery we have already given you. We have agreed from the outset to give them materials disseminated to large swaths of voters.

What the Ninth Circuit also said is, you know, with respect to internal campaign documents, we are not saying that a party seeking discovery can never get internal campaign documents. But the request has to meet a heightened standard of relevancy, and must be narrowly tailored.

We have never received from the plaintiffs a

narrowly-tailored request. And we still don't. Now we just have this new request, which asks for all communications, again, back to the first request, No. 8, which this Court said was overbroad, both in the hearing and in its opinions.

So we have nothing to work from with this request that requires us to go through, sort, resort again and again and again these tens of thousands of documents, just draining untold resources from our side of the case.

So I don't think they have met, at any point now -- they also haven't issued a revised request. They just have a letter saying --

THE COURT: Well, if there are 10,000 or thousands upon thousands of these documents, how can they be internal documents?

MR. PANUCCIO: Well, so what we have --

(Simultaneously colloquy.)

THE COURT: I mean, they can't exchange that many documents in the course of a campaign.

MR. PANUCCIO: Well, if you think about it, if you have -- just talking about somebody's e-mail account, imagine the daily traffic of e-mail that goes -- someone who is running a campaign.

Now, they may have 20 messages that day about messaging. They may have 20 messages that day about whether they are going to hire a janitorial staff for the building.

We have to look at all of those, every time, to figure out their -- you know, if they say Prop 8, you know, the Prop 8, Yes on 8, building needs a new janitorial staff, we have to look at every one of those and sort and resort, to figure out whether they are responsive to the ever-shifting request for documents in this case.

The other response I would make, again with respect to the Ninth Circuit's opinion, when they say their holding is limited, the only thing before them was this set of documents that resulted from the November 11th order.

They actually looked at the 60 documents Your Honor looked at, and they quoted the language Your Honor --

THE COURT: I think they looked at 21, if I remember.

MR. PANUCCIO: I'm sorry. You're right. I stand corrected.

THE COURT: They requested only the 21 documents. They didn't look at the others.

MR. PANUCCIO: I stand corrected. I should know because I helped get that shipment out the door. Sorry.

But they basically -- they quote this Court's November 11th order, and what the universe of documents was restricted to. So I really don't think you can say the Ninth Circuit addressed this new universe that plaintiffs want to get into.

I also would think it's important to look at what is

out of the footnotes but actually in the core of the opinion.

The Ninth Circuit said --

THE COURT: Where are you?

MR. PANUCCIO: Well, you know, I neglected a couple of pin cites. One of the places will be at the slip opinion at page 30. And I will furnish you with the others immediately after I sit down. But I would like to just read the quotes, and then I can give you the pin cites right after.

The Ninth Circuit said, "The compelled disclosure of political associations can have just such a chilling effect." And the chilling effect they are referring to is an unconstitutional chilling effect.

They also said, "Disclosures of political affiliations and activities that have a deterrent effect on the exercise of First Amendment rights are, therefore, subject to exacting scrutiny."

So when they say that they can get, say, Mark Jannson's one-on-one communications with somebody he happens to associate with in his neighborhood on a political issue, I believe that would get to the type of chilling effect they were worried about in the opinion.

They were focused, I suppose, on protectmarriage.com as an entity because that's where the parties have often focused. But that is not the only thing implicated in this case. There are individuals. And it is the individual right

to associate, whether it be through a formal organization or informally, that is implicated.

THE COURT: They did say that Mr. Jannson's declaration was lacking particularity, and the chilling effect is not as serious as that involved in the *NAACP vs. Alabama* case and so forth. It's very definitely a measured approach to this problem.

MR. PANUCCIO: Measured. But, nonetheless, they credited it, and the holding went in our favor. So they may have stepped back and said, Well, this isn't *NAACP vs. Alabama*, but we are going to vindicate the First Amendment issues that proponents have raised in this case.

THE COURT: What about a privilege log?

MR. PANUCCIO: Okay. The issue of the privilege log --

THE COURT: It's pretty clear the Court of Appeals said in order to preserve this privilege, you have to prepare a privilege log.

MR. PANUCCIO: And, as you point out, I think, in a somewhat cryptic footnote about what that would look like, they did say there would be no unconstitutional burden.

If you're asking me from a factual standpoint where we stand on constructing a privilege log, based on if the Court's orders of October 1st and November 11th still stand in terms of the universe of documents we need to look at as

responsive and relevant in this case, then I believe we could have a privilege log probably by Monday of next week.

You know, that's with the qualification that if the Ninth Circuit orders very significant en banc briefing, that may adjust the schedule a little bit.

I do believe we are getting in a position to be able --

THE COURT: That undoubtedly would be most helpful.

MR. PANUCCIO: And, again, that would be if the universe of documents -- if we have to deal with the third request or letter that plaintiffs have issued revising their request, that burden and time would increase significantly.

I wanted to -- unless Your Honor would like more on the issue of documents, Mr. Boutrous brought up the issue of depositions, and I would like to address that if I may.

THE COURT: Very well. Please do so.

MR. PANUCCIO: With respect to deposition testimony, I would like to just read the Court a few examples of what it is plaintiffs' counsel is asking the deponents in this case. And I have listed more of these at document 297-1, Footnote 3.

But here are some of the questions:

Quote, "And do you believe that to be true, what is written there?" End quote.

Quote, "Do you believe that Satan is behind the same-sex marriage movement?" End quote.

THE COURT: Do you believe what, sir?

MR. PANUCCIO: "... that Satan is behind the same-sex marriage movement?" End quote.

Another one:

Quote, "Was your goal in writing this letter to encourage people to vote in favor of Proposition 8?" End quote.

Now I would like to read this Court's October 1st order. Quote, "Discovery directed to uncovering whether proponents harbor private sentiments that may have prompted their efforts is simply not relevant." End quote. That's document 214 at 16.

Now, let me read again, here's the question they're asking:

"Was your goal in writing this letter to encourage people to vote in favor of Proposition 8?"

What they are seeking to do in depositions is get to what they are not allowed to get to in document requests, which is the subjective, private views of individuals who engage in this political campaign, what this Court has said is irrelevant and what the Ninth Circuit has now said is protected.

And here's the practical implication of their view. If I were engaged in a campaign with Mr. Cooper, and I wrote to him in an e-mail, "I really think we need to do the following four things in the campaign, and the flier we put out should

have this language on it," and Mr. Cooper rejects that, and that never goes public, it's just our internal communication, under the Ninth Circuit's order that's protected.

But if, in my head, I rejected an idea because Mr. Cooper would think it's ridiculous, that they can get to in a deposition. So what's in my own head is less protected than what is in the private communications that I send to my political associates.

I don't think that follows both logically or legally from the Ninth Circuit's order and the cases they rely on there. And the Ninth Circuit said, in fact -- well, they cited *McIntyre*, and *ACLU vs. Heller*.

And they said, "Associations no less than individuals have the right to shape their own messages." Individuals have a right to shape a message to the public and let the public take it for what it is.

THE COURT: Well, but is there anything wrong with asking someone who has disseminated a message to the public what it was that he or she intended to accomplish? That would be permissible discovery; would it not?

MR. PANUCCIO: Well, I don't think so.

I think a good -- I think an analogous case here is the *Wisconsin Right to Life* case in the Supreme Court. And that's 551 U.S. And the pin cite would be 468.

And in that case, which was -- you know, it's one of

these campaign finance cases, and the question is: Were these electioneering communications?

Chief Justice Roberts said in his opinion that something that turns, that is a non-objective inquiry, subjective inquiry into the ad-maker's intent, would -- I believe the exact quote, "They declined to adopt such a test turning on speaker's intent because it would," quote, "chill core political speech and would also lead to bizarre results."

So if one speaker -- all that the public sees is what's on the face of the document. So if one deponent said, "Yeah, my intent was X,' and another deponent said, "My intent was Y," I guess the result in two cases with that testimony would be different, even though the public saw the same document and would have had the same reactions.

The Ninth Circuit also addressed this and said, Look, if that's the kind of information you're interested in, voter reaction, you can get that information from other sources.

THE COURT: Wouldn't it be fair for a lawyer in deposition to ask, "When you disseminated this message to the electorate or to this group of the electorate, you used certain words that we deemed to be code words; and weren't you seeking to elicit some response on the part of the electorate based upon the use of that particular word or phrase?"

Wouldn't that be an appropriate avenue of inquiry, once you deal with -- once you have a message that has, in

fact, been disseminated --

MR. PANUCCIO: Well --

THE COURT: -- as opposed to, say, a communication between people who are attempting to formulate strategy?

MR. PANUCCIO: If the question -- and, please, correct me if I'm wrong.

If the legal question the Court is trying to address is what would the voter reaction be --

THE COURT: Voter intent is, yes.

MR. PANUCCIO: The voter intent.

THE COURT: Correct.

MR. PANUCCIO: But, again, the question is the people who saw the document, what did the code word -- what motivations did it actuate for them?

The subjective intent of the person who made that document, who is a non-expert on psychology or voter intent or whatever the case may be, is not going to be probative of that reaction. You would have to have experts or just the Court bringing its judgment to bear on what's on the face of the document.

This is precisely Chief Justice Roberts' insight in *Wisconsin Right to Life*, is that that kind of inquiry would be chilling to the First Amendment because everybody who put out a poster and chooses their speech, and just wants to let it ride in the public as it is on the face of the document, would have

to worry -- if they got involved in a political campaign, would have to worry about facing depositions about what's in their own head about the document.

I think that would -- in many ways, that would be more chilling.

THE COURT: The question would not be, "What was in your head?" but, "What was your effort? What did you expect the voter reaction to be to the use of this phrase or word or formulation?"

MR. PANUCCIO: Well, I mean --

THE COURT: That would be a fair inquiry; would it not?

MR. PANUCCIO: Well, I think just under the law of the case here, under the October 1st order, the Court said discovery directed to uncovering whether proponents harbor private sentiments that may have prompted their efforts is simply not relevant.

And so if my effort is to put out a flier, it's just simply not relevant what prompted that, my private sentiment as to what I wanted that flier to do or why I posted it on the telephone pole. It isn't relevant. And, beyond being not relevant, it's highly privileged.

If communications between two people are privileged, certainly your own thoughts, your own inner thoughts about First Amendment speech are at the very core, you know, even

more privileged, even more chilling.

The disclosure would be even more chilling than the communications between two people because at least you've aired the thought to somebody. But if you've aired your thought to nobody, how could it possibly be that that doesn't violate the First Amendment privilege?

THE COURT: Well, but here you have a situation where there has been an airing of thoughts to somebody, and probably, in this instance, a large number of somebodies. And that would seem to open the door to the intent behind that dissemination.

MR. PANUCCIO: Well, I think Mr. Cooper put it well before the Ninth Circuit, citing to both the *McIntyre* case and *ACLU vs. Heller*, which was the Ninth Circuit's post-McIntyre iteration of that principle which is -- in *McIntyre*, there is a quote, and we've quoted it in our briefings. I don't have the exact language at hand. They say that individuals have the right to be their own editors.

So when you have a pamphlet and you leave snippets on the editing room floor, that state can't come in and pick up those snippets and say, "Give them to me. Air them to the public."

THE COURT: Are we dealing with Mrs. McIntyre, or are we dealing with the individuals who are the proponents of Proposition 8 --

MR. PANUCCIO: Well --

THE COURT: -- like Hollingsworth, like Tam, Jannson?

MR. PANUCCIO: We are dealing with those individuals, as well as all the other individuals that -- the over 20 third-party subpoenas that plaintiffs have issued in this case.

And we are also setting a principle of law that I guess would apply in every referendum campaign. And we are also dealing with outside organizations like the ACLU, who put in the amicus brief in the Ninth Circuit.

But I believe the Ninth Circuit -- I mean, that argument that the proponents are different because they are proponents, that was raised in the Ninth Circuit. Plaintiffs raised that. It was clearly rejected.

The Ninth Circuit did not bite on that argument. So I don't think that we can say there's a constitutional difference between status as a proponent and status as an individual.

Simply because you get involved in the referendum process, be it officially or unofficially, it cannot subject you to lesser First Amendment protection.

THE COURT: Well, but the proponents of Proposition 8, these individuals and others, and the organization itself is required to file a whole panoply of financial disclosure documents. And that has been consistently held not to violate the First Amendment privilege.

Those disclosures are very sweeping and detailed, as

I'm sure your clients don't need to be told that.

MR. PANUCCIO: Thank you, Your Honor. That's right. And you are perfectly right. And so those cases -- those laws, of course, in the robust campaign finance law that's out there, have been challenged multiple times in the Ninth Circuit and the Supreme Court. And every time they are upheld the Supreme Court says, The state has a compelling interest for the need to this information.

Now, plaintiffs -- we went to the Ninth Circuit, and plaintiffs took their case and said, Here is our compelling interest. And the Ninth Circuit said, I'm sorry, but that is not compelling. Come back with something more narrowly tailored and more compelling, and maybe you can have this stuff.

But they have not demonstrated that. So, you know, citing those laws, they met the standard. So far nothing in this case has met the standard of compelling interest and heightened relevance.

THE COURT: Very well.

MR. PANUCCIO: If I may, Your Honor, there was one more issue about this document that has surfaced with the last name -- the name of the last member of the executive committee.

THE COURT: All right. That would be helpful to address.

MR. PANUCCIO: And I just want to -- there are some

factual development, I think, that would be helpful to the Court. That surfaced as we have been culling our documents, creating a log, inevitably, in a discovery effort like this --

(Reporter interrupts.)

MR. PANUCCIO: Inevitably, in a discovery effort like this, you come up with more documents.

We found this document, and realized that the name was on it. But I believe, as the Court is aware, this particular Doe member is represented by separate counsel, and is asserting his privilege individually as well. And that document has not been disclosed to the public; although, it was sent to a reporter. And he instructed us that he would like to continue to assert his privilege to anonymity, at this point.

And we felt it was not our place to waive it --

THE COURT: Has that defendant been served? Has he entered an appearance? What's the status? I'm not aware there are any Doe defendants in the case.

MR. PANUCCIO: I'm sorry. It is a Doe member of the executive committee. And this issue has surfaced with the Court before that -- that that name we had asserted -- we have asserted, is privileged. It was -- has not been disclosed to the public.

But he has not entered a separate appearance as a separate party to the case, no.

THE COURT: So that individual is not before the

Court?

MR. PANUCCIO: I believe that's -- I mean, only in the sense of there -- he was a volunteer of the organization that is before the Court.

THE COURT: But he was a member of this executive committee of the campaign; was he not?

MR. PANUCCIO: Yes, Your Honor.

THE COURT: Well, how do you -- since you've raised that, how do you justify the failure to disclose someone who is an officer, director, managing agent of a corporate entity which is a party to the litigation?

MR. PANUCCIO: Well, Your Honor, as with other instances in which a third-party may have a privilege that is implicated, you know, they argue they have a privilege that is implicated in litigation, and they can come in and try to defend that privilege.

The parties who might be in a position to waive that privilege will, quite frequently, allow that third-party to come in and assert that privilege.

You know, now there will be this battle over this document, and we would allow this third-party, through his counsel, to defend that privilege as he sees -- he or she sees fit.

You know, an example is if a -- you know, all these third-party subpoenas in this case, you know, some of those --

an agent of the Yes On 8 or No On 8 campaign, a vendor who has documents that would, you know, fit within the Ninth Circuit's definition of these internal campaign communications, if the vendor were to simply say, "I am ready to turn these documents over," a No On 8 group or Yes On 8 group could come into court and say, "Well, now, hold on. This is my privilege and I would like a chance to litigate it." And that is the situation we would be faced with here.

THE COURT: That's an interesting wrinkle.

All right. Anything further, sir?

MR. PANUCCIO: That's all on discovery, sir. Thank you, Your Honor.

THE COURT: All right. Mr. Boutrous.

MR. BOUTROUS: Yes, Your Honor. Thank you.

I would just like to refocus things a bit. Mr. Panuccio is just simply wrong about the discovery requests that are on the table.

Our request for the public communications to voters -- and this is a narrow request that was meant to affect the election and prompt people to support Proposition 8 -- was Request No. 1.

And, as the Court will recall, the proponents filed a really broad motion for protective order. They proposed to the Court exactly the standard they are now articulating, that "nonpublic" basically means anything that wasn't broadcast on

TV or sent to the public at large.

The Court granted the protective order motion only as to No. 8, which was "all communications with third parties," which the Court, I think, correctly found was a little bit broad.

But Request No. 1 is still on the table. This isn't a new request. We've been seeking this information. Voter communications -- and Counsel points to the one-on-one, the truly private communications. We are not talking about that. We are talking about efforts by the proponents and this organization to sway and woo voters to vote for this proposition. And that's clearly encompassed in our request.

THE COURT: Isn't Mr. Panuccio's statement that, We're going to have a privilege log by Monday, isn't that going to be a good first step toward the resolution of this?

MR. BOUTROUS: Absolutely, Your Honor. And I think that if it contains the information we need -- we're going to be -- we're going to be reasonable. And we want to get to trial. We're going to pick our spots.

If we get a privilege log that encompasses -- but I want to make clear, and I would request that the Court make clear, that documents responsive to our Request No. 1, this Court has not ruled in any way -- the Court denied the protective order motion on October 1, as to their complaints about Request for Production No. 1, which was, essentially, I

paraphrase, all documents constituting communications to voters, donors, potential donors, or members of the media regarding Proposition 8.

There's not a protective order. Their motion was denied. That was not the issue on appeal. It only related to private, internal communication.

So I would -- if the Court can make clear that the privilege log must cover all of the documents that are responsive to our requests that remain standing and remain viable, that would, I think, be helpful.

THE COURT: Well, it does seem to me that -- and, Mr. Panuccio, you might want to join into this conversation.

It does seem to me that if there is anything crystal clear in the Ninth Circuit panel's decision -- and it is, by and large, a very clear and thoughtful opinion -- it is that the preservation of this First Amendment privilege requires the production of a privilege log. And the proponents, I think, concede that. And that even these internal communications do meet the discoverability standard of Rule 26; although, they do not meet what the Court believes is the heightened relevancy standard that the First Amendment requires.

So if we have a privilege log with respect to all of the materials as to which the proponents are asserting a First Amendment privilege, I think that will help move this issue along to a reasonable resolution.

And, furthermore, in terms of case management, it's possible that this discovery can continue even as the trial proceeds.

I can understand there might be volumes of this information that might be difficult to compile in time for the January 11 trial date. But I'm not sure we have to wait for the last document to fall in response to the document request in order to wrap up the core issues that are before the Court.

So the first step, the order will be that the privilege log be produced.

You said on Monday?

MR. PANUCCIO: Well, there would be a qualification to that, Your Honor.

THE COURT: Well, I know, in case the Ninth Circuit throws you a curve.

MR. PANUCCIO: And one more, which is, as I said, if we are talking about sorting for responsiveness based on the November 11th order, then, yes, we could do that.

Significantly, as the Court said, you should cull your inventory of documents based on this order. That would be a log we could produce by Monday.

But if we are talking about opening up the world of documents to everything that had already been culled out, Monday would not be achievable.

THE COURT: Well, let's do the best we can on Monday,

and that will move things along considerably.

MR. BOUTROUS: Your Honor, may I just add one point?

I think it's a very serious matter that they are interpreting your October 1 order, denying the protective order motion, to take off the table all communications that were sent to voters.

And they have known for four months that we were requesting that information, and represented to us that they have been collecting those documents in the event they were ordered to be produced.

And so we feel very strongly that Monday -- well, we'll take what we can get, when we can get it. I agree -- we agree with Your Honor, that we don't have to hold anything up for this, but we feel very strongly that the privilege log -- they need to respond to the other preceding seven discovery requests, which this Court rejected their protective order motion on, including the one that goes to the communications that I'm asking for today, the communications to voters external to the campaign.

So we feel very strongly about that, but we appreciate the Court hearing us out on this.

MR. PANUCCIO: Your Honor, if I may have one chance to respond.

THE COURT: Well, what about these communications to voters?

MR. PANUCCIO: Yes. This is an important point, and I'm sorry I neglected to bring it up before.

They are now taking Request No. 1 -- we have said repeatedly we will produce the communications that went out to the electorate at large, that went to targeted groups of voters. But what they are doing now is, they are saying, We couldn't get it under Request No. 8, so let's define "voter" as any single person in California. And Mr. Boutrous now says, We are not talking about one-on-one communications. I would encourage the Court to go back to the transcript of what he said in his opening argument, where he said, We are talking about one-on-one communications.

That is how they are defining "voter" and "donor" now, or "potential donor," which is any communication you have with any third-party in California is discoverable. That was original request No. 8.

And the Court said, in its October 1st order, Discovery not sufficiently related to what the voters could have considered is not relevant and will not be permitted.

The October 1st order talked about what the relevant sphere of discovery in this case would be. And we think that applies.

I'm sorry.

THE COURT: Go ahead.

MR. PANUCCIO: Well, and to the extent they are

relying on the denial of our motion for protective order, of course, that was what was appealed to the Ninth Circuit. We said, To the extent the October 1st and November 11th order is denied, our motion, we are appealing.

And the Ninth Circuit said, We recognize the appeal; you prevail; and a protective order should be entered in the case below. That's the opinion.

So they can't well say -- rest on the denial, the overturned denial of our protective order -- motion for protective order.

THE COURT: Well, it does seem to me we need, first, a privilege log with respect to the documents as to which the proponents are seeking to assert the First Amendment privilege.

To the extent that there are communications to voters that are not internal communications but external communications from the campaign or the individual-named defendants, that the proponents are asserting some other objection to other than a First Amendment objection, that the documents that are being withheld on the basis of those objections need to be spelled out so that the plaintiffs and the Court can make a determination whether that's a proper objection, whether it's burdensomeness or whatever it may be.

MR. PANUCCIO: So -- I'm sorry. Are you talking about an attorney-client privilege type of --

THE COURT: Well, that would be one. There may be

some of those documents, as well, that you're -- you're asserting an attorney-client privilege about, but --

MR. PANUCCIO: It's hard to know what exactly we should log.

I mean, if a communication to seven friends who are political -- who have said, you know, "I want to be in this effort, I'm with you," we would not view that as a communication to voters. And if we have to log that type of document, we are talking about an exponential increase in the size of this log.

Again, that would get to -- basically that becomes --

THE COURT: Well, what would be the basis for withholding that document? It's not one of these internal documents to which the First Amendment privilege covers.

MR. PANUCCIO: Well, it is a -- we would contend the First Amendment privilege does extend to communications between people who have banded together, whether officially or unofficially, to advance a political cause.

I mean, again, this comes back to the plaintiffs saying, If you are a member of a 501c3 and you have internal communications, that's fine. But if you are Mrs. McIntyre and you and your neighbor get together in your home and make a flier, and you communicate about it, no privilege there.

THE COURT: What you're saying is that your assertion of the First Amendment privilege is going to embrace these

communications with the small, discreet voter groups; is that it?

MR. PANUCCIO: Well, we think the privilege would embrace that, but we also think it's a responsiveness point.

THE COURT: Did I understand you correctly? Are you saying that the First Amendment privilege extends to communications from the campaign to these, what you've described as discreet, small voter groups?

MR. PANUCCIO: I'm sorry. I misheard the question. What I'm saying is --

THE COURT: Yes or no?

MR. PANUCCIO: Well, I mean, when you say "the campaign," you know, for instance, when we are talking about Dr. Tam, he was not the campaign. He was an individual who engaged in some political activity of his own.

THE COURT: He is a defendant.

MR. PANUCCIO: Correct.

THE COURT: And the document request extends to him as a defendant.

MR. PANUCCIO: Right.

THE COURT: Okay. So we're talking about the defendants, the named defendants, protectmarriage.com and the individual-named defendants.

MR. PANUCCIO: And all I'm saying is that I don't think the individuals can be called "the campaign." They might

have engaged in -- and so it's --

THE COURT: All right. That's a fair point.

Communications to or from the defendants to what you describe as small, discreet voter groups, are those communications covered by this First Amendment privilege, in your view?

MR. PANUCCIO: I think what we need is a definition of what a "small, discreet voter group" is. If it was a group of unknown --

THE COURT: I didn't come up with that. You did.

MR. PANUCCIO: What's that?

THE COURT: I didn't come up with that phrase. You did.

MR. PANUCCIO: Well, what I'm saying -- I did not mean to say "voter group." I believe I said "political associates." And I would say that if it were to a group of known political associates, then, yes --

THE COURT: Known political associates?

MR. PANUCCIO: Yes.

But if you were sending them communication and just sending it out there to unknown -- saying, "Voters, come vote," I would agree that there is no privilege over that.

There is certainly a tension here. We have to figure out what is public and what is private. There is no doubt that we need to do that. But I think the Ninth Circuit gave us some

guidance on that, which said, Look, get discovery into what was sent to large swaths of the electorate. And we have repeatedly said from the beginning we will give them that; and we have given them that.

They have hundreds of e-mails that -- blast e-mails that the campaign sent, of the scripts and the video of the television and radio commercials, of the Robocalls, of the -- you know, anything like that, they have. They have all that. It's hard to see what is left.

I have -- we have asked them in letters repeatedly, Give us an example of what concerns you have, what types of documents. So they sent us five documents. All of them, but one, were nonresponsive.

The one that was responsive was Dr. Tam's website biography. And there was one line in it that mentioned Prop 8. It said, "I was a proponent for Proposition 8."

And we admit we missed that document, that website biography, in the tens of thousands of documents we were looking at.

The other documents they said we should have produced related to -- not to Prop 8, to the 2006 campaign for a similar ballot measure.

So we are trying to pin them down on what they want, and it's a constantly moving target.

THE COURT: It sounds like we are going to make some

progress when we see the privilege log and we see exactly how you log in those documents. And I have a feeling we are going to be discussing this further and more fully later.

MR. PANUCCIO: Thank you, Your Honor.

THE COURT: I think we probably made as much progress as we can on this issue, then.

The court reporter has requested a break. And it probably would be a good idea.

And I should advise counsel that we have a jury that's deliberating, and we may have an interruption for a verdict or a question from the jury at any time. So I'll check on that as well.

So why don't we take 15 minutes, and we'll resume at 12:15.

(Recess taken from 11:58 a.m. to 12:18 p.m.)

THE COURT: All right. Counsel --

MR. COOPER: Your Honor, I would just like to inform the Court that the lawyer representing the County of Imperial has arrived in the courtroom --

THE COURT: Oh, well, let's hear that matter.

Let's see. Would that lawyer identify herself.

MS. MONK: Good morning, Your Honor. I apologize for not being here earlier.

Jennifer Monk on behalf of the County of Imperial.

THE COURT: Welcome. Did you come all the way

from --

MS. MONK: Murrieta.

THE COURT: -- Imperial County?

MS. MONK: Murrieta, California.

THE COURT: Murrieta.

MS. MONK: Not quite as far.

THE COURT: Welcome.

MS. MONK: Thank you.

THE COURT: Now, what I told the lawyers at the outset, when we discussed this, is, I don't think it is appropriate, at this time, to discuss the merits of your motion because the parties have not had an opportunity to respond to your motion.

But it does seem to me that we can address the application for order shortening time to hear your motion --

MS. MONK: Thank you, Your Honor.

THE COURT: -- and would like to do that.

Let me begin with this question. You state that you do not intend to participate in the presentation of the evidence, to call any witnesses, and otherwise participate in the trial. Your primary interest is to preserve a right of appeal, in the event that a final judgment is entered in the case.

Well, under those circumstances, is it really necessary to hear this motion on an accelerated basis?

MS. MONK: Your Honor, it is our hope to get involved before the trial, so that the County can represent their interests just by being a party and being able to support, largely, the defendant-intervenors that have already been admitted.

We understand that we're not going to make a substantial difference at the trial, but the motion currently is set for in the middle of the trial, so it would seem, if nothing else, just to push it up slightly so that it can be heard before the trial would begin.

THE COURT: Well, you're not going to call witnesses. You're not going to present evidence.

Provide some moral support to the proponents. I'm sure that will be welcomed. But other than that, what do you plan to do?

MS. MONK: At the trial, Your Honor, we do not plan to have an active participation.

THE COURT: All right. But you would like to get into the case before the trial starts, and you think that might be helpful.

Let me ask the plaintiffs what their view is with reference to when we could hear the merits of the County of Imperial's motion to intervene.

Mr. Olson.

MR. OLSON: We will be opposing the motion. We will

be happy to accommodate schedule of counsel and the Court with respect to shortening time and having the hearing. We'll have someone here. I don't know whether it will be me, but we will have a representative of our team here. And we will put something together in writing as fast as is convenient for you.

I mean, we're entirely willing to accommodate whatever is convenient for the Court.

THE COURT: Okay. Who else? What about the Attorney General, any of the other government parties, do they have any view on this?

MS. PACHTER: Your Honor, the Attorney General is taking the same position with respect --

THE COURT: I'm sorry. You are going to have to come to the podium.

MS. PACHTER: The Attorney General is taking the same position on these proposed intervenors as on all the other intervenors who have sought to come into the case, which is we do not oppose.

MR. KOLM: Claude Kolm, for the Alameda County Clerk Recorder.

Same position for the Alameda County Clerk Recorder. We do not oppose.

MS. WHITEHURST: Judy Whitehurst, with Los Angeles County.

Same here, Your Honor. We do not oppose.

MR. STROUD: Andrew Stroud on behalf of the governor and administration defendants.

The governor and the administration defendants do not oppose, so long as there is no continuance of the trial date. We do want to see the trial date maintained, Your Honor.

THE COURT: All right. Well, let's see what would be a reasonable schedule.

Mr. Olson, you said that your team is going to oppose the motion. Let's say I grant an order shortening time. Could we have any opposition submitted -- could we get it in next week -- it's a very short week -- or early the following week? That would be --

MR. OLSON: Well, earlier the following week would be a little bit easier on the people who are going to have to do it.

(Laughter)

MR. OLSON: But as the person that's making the promise, I think it would be best early the following week, maybe two weeks from -- today is Wednesday. Maybe two weeks from today.

THE COURT: That's the 30th of December.

MR. OLSON: Is that okay? We'll try to do it sooner than that, if we can.

THE COURT: That's fine. 30th of December for the opposition.

And any reply, then, should be submitted -- can you submit that reply by not later than the 7th of January?

MS. MONK: Certainly, Your Honor.

THE COURT: All right.

And I'm inclined, unless -- unless I change my mind --

(Laughter)

THE COURT: -- I'm inclined to try to decide this on the papers, to obviate any further proceedings with reference to this issue.

All right. And I suppose, Mr. Cooper, you may want to weigh in on this as well; although, I don't know that you have to.

MR. COOPER: Your Honor, we will plan to support the motion, yes, Your Honor.

THE COURT: On the same schedule?

MR. COOPER: On the schedule you have set.

THE COURT: That will be fine.

All right. Anything else with reference to Imperial County?

MS. MONK: No. Thank you, Your Honor.

THE COURT: Certainly.

Now, let's talk about some of these other issues. We have motions in limine. Motions in limine, I confess, are not the favorite motions that I hear.

And how significant and important are these motions in limine in a bench trial?

And I see, Mr. Boies, you raising yourself to come to the podium.

MR. BOIES: Your Honor, I think --

THE COURT: Why shouldn't I just hear these folks, and allow cross-examination as to their credentials and their testimony, and simply make a determination based upon that?

MR. BOIES: I think with respect to three of the experts to which we have directed our motions in limine, that would be a perfectly sensible approach.

THE COURT: And you're talking now about Young, Marks and Blankenhorn; is that correct?

MR. BOIES: Yes. Exactly, Your Honor.

And I've always been ambivalent about what the rule, if any, was about motions in limine addressed to experts when you have a bench trial.

I think the only advantage of it is, sometimes, to make decisions ahead of time that will streamline the trial and make it more efficient. I think that's entirely something for the Court to consider.

I think we have put before the Court what our issues are with respect to these people's expertise. I think we can make those points on cross-examination. The Court can consider it in the context of the entire trial. And if that is a way

the Court would prefer to do it, I think that's entirely appropriate to do.

THE COURT: That is my preference.

MR. BOIES: I will then move only to the other one.

THE COURT: Obviously, this not being a jury trial, we don't have to be as concerned about bringing those folks -- deciding whether those folks are going to testify or not.

And it isn't going to materially streamline the case to grant these motions in limine, so ...

MR. BOIES: I don't disagree with that at all, Your Honor.

THE COURT: Fine. What about, let's see, Miller?

MR. BOIES: Miller. Miller is quite a different case. With respect to Miller, we're not moving against his testimony in its entirety. He has got 120 paragraphs. We're only moving against paragraphs 53 to 72.

And the issue there is an issue as to whether he is an appropriate rebuttal expert or not. If he's an appropriate rebuttal expert, then I think both we and the proponents would agree that he testifies on this.

If he is not an appropriate rebuttal expert, as opposed to an expert-in-chief, then I think we both agree that he is not timely identified, and he should not be permitted to testify as to these paragraphs.

The background is that they identified two experts in

religion. Particularly, a Dr. Paul Nathanson, whose expert report substantially was the same as paragraphs 53 to 72 of Mr. Miller's purported rebuttal report.

I took Mr. Nathanson's -- Dr. Nathanson's deposition, and he made a number of admissions that I suspect has led the proponents to decide maybe he's not their strongest expert and perhaps they don't even want to call him.

They have then made the tactical judgment that they would try to substitute in Mr. Miller, Dr. Miller, Professor Miller, to testify as to these paragraphs.

There is, I think, no room for doubt, at all, that they were totally aware of the subject matter of this testimony and the relevance, if any, of that testimony at the time they put in their expert reports in chief.

Indeed, that's what Dr. Nathanson addressed. And if you look at the materials -- and we cited this in our motion. If you look at the materials that Professor Miller relies on, they are essentially the same materials that Dr. Nathanson relied on.

And if you look at the materials that come from websites, the last date visited was, in general, September 27th, 2009, which was even before our expert reports went in, before there was any supposed need for rebuttal. And it was exactly the same date that they were visited in connection with Dr. Nathanson's report.

THE COURT: You referred me to specific paragraphs of Miller's rebuttal report. Now that I have that before me, remind me which paragraphs.

MR. BOIES: Paragraphs 53 through 72.

And they are the paragraphs that essentially deal with the role of religious organizations in the Proposition 8 campaign. This was the subject both of Dr. Nathanson's report and Dr. Young's report and testimony to a lesser extent.

But what is here in paragraphs 53 to 72 is essentially duplicated from what Dr. Nathanson was going to say.

The proponents say, We are using it for a different purpose. But that's not what the rule addresses. What the rule addresses is that a rebuttal witness's testimony must be limited solely -- and "solely" is in the rule -- solely to contradict or rebut evidence on the same subject matter identified by another party.

So in order to bring themselves within the rebuttal rule, they have got to come forward with something that they are putting forward solely to contradict or rebut evidence that we have offered in one of our expert reports.

And we think that's obviously not what's going on here. For one thing, they knew about it when they put in the Nathanson report. For another, the materials that -- here simply duplicate that Nathanson report. For another, they knew

about these materials prior to the time that the expert reports -- our expert reports were even put in.

That's what the relevance is of the website, that we've demonstrated. They pulled this stuff off the website before we even put our expert reports in. They pulled it off to support the Nathanson report.

THE COURT: Well, if the Miller paragraphs that you're moving to strike simply duplicate what's in the Nathanson report, what's the harm of leaving the Miller rebuttal report in?

MR. BOIES: Your Honor, there is a sense in which, with the various teams that we have, there's almost never harm in adding an additional witness to the --

THE COURT: I have noticed that.

(Laughter)

MR. BOIES: And I would be hard pressed to tell you that because he was added at the rebuttal stage, as opposed to the expert-in-chief stage, that's going to prevent us from getting ready to cross-examine him.

However, I think the purpose of having these rules in which you say, Here's when you identify certain witnesses, and if you don't identify them then you can't call them later, is to impose a certain discipline. I think that discipline is useful.

I don't think there's any prejudice to them. They

still have Dr. Nathanson. The only prejudice to them is they have decided, after Dr. Nathanson's deposition, that they don't want to rely on him. So it is something in which I think there is no prejudice to them in any normal sense of the word.

And they had complete notice that they needed to put in experts at a particular date. We had a pretrial schedule where each of us had to get certain things done. They knew they had to get it done. They didn't get it done. And now they're trying to add a new witness to testify to the same thing.

On the other hand, if the Court says, can we get ready to cross-examine him, the answer is, of course we can.

THE COURT: Well, Nathanson has been withdrawn?

MR. BOIES: No, they haven't formally withdrawn him. But -- and, of course, we have his deposition, and we can use his deposition to the extent we think it's useful to us.

But this is, as we indicated in our papers, so duplicative of what Nathanson's testimony is, that it's hard to believe that they would be trying to shoehorn in this testimony into Miller's report, if they really intended to call Nathanson. Indeed, if they tried to call Nathanson and Miller to testify to the same points, that seems to be probably something the Court might not --

THE COURT: Has Miller been deposed?

MR. BOIES: That is a question I don't know the

answer to, Your Honor.

PLAINTIFFS' COUNSEL: Yes.

MR. BOIES: He has been deposed. Because -- and in part, because he -- we weren't objecting at all to most of his testimony. In other words, from 1 through 52, and from 73 to 120, we didn't try to strike him even on our general motion in limine.

THE COURT: All right. Who is going to be arguing this, Mr. --

MR. NIELSON: Nielson.

THE COURT: Mr. Nielson.

MR. NIELSON: Good afternoon, Chief Judge Walker.

THE COURT: Good afternoon, sir.

MR. NIELSON: I want to clarify the record, if I may, first.

We put Miller in before Nathanson was deposed. And we have not withdrawn Nathanson. And I'll tell you that while they have similar testimony, the purposes are different.

Nathanson's testimony is directed to showing that religious opinion regarding Proposition 8 is not uniform. The religious opposition to Proposition 8 doesn't necessarily constitute animus or an inappropriate motive.

He is not being offered to testify to whether gays and lesbians have political power. That is what Professor Miller is prepared to testify to.

So while, on the one hand, it would not be prejudicial to the plaintiffs to have both of these experts testifying, it would be prejudicial to us not to have Professor Miller be able to testify to the fact that religious support for same-sex marriage demonstrates the political power of the gay and lesbian community.

Now, with those clarifications, I think if you actually look at Professor Segura's report, specifically page 12 --

THE COURT: Of Miller's report?

MR. NIELSON: No. Professor Segura's report.

THE COURT: Segura.

MR. NIELSON: That's the report that Miller was offered to rebut.

THE COURT: I see. All right. Hold on. I think I have that here.

MR. NIELSON: If Your Honor would look on page 12, there is two headings there. There is "Moral and Political Condemnation" -- excuse me. I will wait just a moment.

THE COURT: What page, sir?

MR. NIELSON: It's page 12.

THE COURT: I have it.

MR. NIELSON: Very good.

The testimony Professor Miller offers about religion is related to these two paragraphs that are headed, "Moral and

Political Condemnation," and "Powerful, Numerous and Well-funded Opposition."

Now, it's simply not the case that his report contains just a single line about the impact religion has on the political power of gays and lesbians.

These two headings are in a larger heading called, "The Political Powerlessness of Gays and Lesbians." And these are factors that contribute to that, according to Professor Segura.

But I'd call your attention to, for example, the second paragraph of the second heading -- the second sentence of the second heading. He quotes a statement that, "Opposition to same sex marriages united leadership and core believers across religious traditions."

He talks about, towards the bottom of that, after talking about the religious groups that oppose same-sex marriage, he talks about -- he ends that paragraph by saying, "Gay and lesbians lack the resources, numbers, and reach to counter this kind of committed organized opposition to their interests."

The clear inference here, Your Honor, is that religion is a unified, cohesive force pitted against the interests of gays and lesbians. And Professor Miller's testimony is directly responsive to that.

Also, more generally, the subject matter of

Professor Segura's report is the political power of gays and lesbians. He argues that gay men and lesbians do not have political power.

And, plainly, in discussing all of the groups that supported -- or that opposed Proposition 8 and supported same-sex marriage in California, Professor Miller demonstrates that gays and lesbians do have political power and that, in fact, many religious organizations and religious individuals are part of the coalition that has, by and large, successfully supported gay and lesbian rights in California.

So I would submit that Professor Miller's testimony is directly responsive both at a specific level and at the general level of political power.

Now, Dr. Nathanson uses the same material or similar material for a different purpose. And less to his -- Professor Nathanson's testimony was not intended to speak to political power and whether gays and lesbians constitute a suspect class. It was intended to go to the issue of whether Proposition 8 reflects improper animus of some sort.

And that is the purpose for which we offered Professor Nathanson's testimony.

So I would also -- and with regard to the suggestion that somehow, because we could have anticipated that plaintiffs would have put on this evidence, we should have put it in earlier, the advisory notes are quite clear, the advisory notes

to the Federal Rule of Civil Procedure 26, that governs that, where one party bears the burden of proof on an issue, the other party can wait and respond to that with their expert report. It says, quote, "In most cases, the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue."

And plaintiffs clearly bear the burden of proof on the proposition that gays and lesbians are a suspect class entitled to heightened scrutiny. So we were entitled to await their evidence so we could decide how to rebut it.

In fact, the courts have recognized that. I'll cite this court to the *Crowley vs. Chait* case. It's a District Court case. There isn't much in the way of precedent, except at the District Court level, on this issue.

But the Court rejected the argument that rebuttal information is improper simply because the expert, quote, "could have included it in his or her original report." And it went on to explain, "Such a rule would lead to the inclusion of vast amounts of arguably irrelevant material in an expert's report on the off chance that failing to include any information in anticipation of a particular criticism would forever bar the expert from later introducing the relevant material."

In other words, if we were required to anticipate

everything we might want to say in response to plaintiffs' case about political power, we would have had to put in something before, that would potentially contain all sorts of irrelevant material, things that just are not responsive to what their expert actually ends up saying.

So for all of those reasons, I would suggest that the motion in limine should be denied. And unless the Court has further questions, that's all I have.

THE COURT: Very well. Thank you, Mr. Nielson.

Last word, Mr. Boies? Anything further, or shall we submit the matter?

MR. BOIES: I think we can submit the matter, Your Honor.

THE COURT: Ordinarily, the rules of procedure with respect to putting in affirmative evidence and rebuttal evidence are important, and play a significant role in management of evidence and presentation of evidence in a case, and, typically, should be strictly adhered to.

In this case, however, the parties have been very ably and effectively proceeding with an accelerated trial preparation schedule. And under those circumstances, it's understandable that some of the formalisms that normally accompany the pretrial preparation process might be observed more informally than otherwise.

And so I don't believe the fact that the sequence of

the presentation of these pieces of -- pieces of testimony are at all unusual under the circumstances that we face here.

Further, the issues in this case, many of them, are obviously very broad-gauged. The issues that are highlighted in the Segura testimony or the Segura report and the Miller rebuttal report deal with an important issue in the case, having to do with the level of scrutiny to be applied to Proposition 8.

And so my inclination is not to exclude the paragraphs of the Miller expert rebuttal report, but to consider that information; to allow Mr. Miller to be cross-examined fully on his report; and to not be too punctilious in enforcing the scheduling rules with the preparation of expert testimony.

So, I don't want to send a signal that I'm not going to be punctilious in other regards --

(Laughter)

THE COURT: -- but in this area, I think maybe we will just kind of rise above the problem.

All right. What else?

Trial schedule. Any other issues before we deal with the trial schedule?

Yes, sir.

MR. THOMPSON: Your Honor, this relates to the trial schedule.

THE COURT: All right. Fine.

MR. THOMPSON: And there were a few issues that we wanted to seek some guidance from the Court from. And I've raised them with our friends, in at least a preliminary function, at Gibson, Dunn.

And one issue relates to the timing of disclosure of witnesses. And we're familiar with the Court's guidelines for the conduct of trials in which, in a typical case, disclosure must be 24 hours ahead of time.

But the plaintiffs have 32 witnesses, not including our experts, who are also on their expert report, but 32 witnesses. And if we are going to find out on the morning of January 10th who their first witness is going to be, we will have to show up in San Francisco, ready to cross-examine any of 32 individuals, and that would place an enormous burden on us. We are going to have hundreds of thousands of pages of binders for the 32 cross-examinations.

So we would request -- and we won't have all the lawyers here for the entire trial. So we would request that one week before a case -- the case-in-chief commences for each side, that they disclose the order of the witnesses that they're going to call, bearing in mind that they are free not to call every witness, and that there'll inevitably be scheduling issues where a professor can only testify on a particular day. And as long as there was reasonable notice, we

would have no problem with having there be a change in the order.

And we're not requesting that all the exhibits in connection with all 32 witnesses be disclosed a week before the case-in-chief.

But if we were permitted to have that order -- and we would, of course, extend the same courtesy to them -- it would dramatically alleviate the burdens of trying this case.

THE COURT: Well, I think that's a fair request. I don't know about a week, but -- particularly after we get into trial, but, certainly, I think you're perfectly entitled to know who the first few witnesses of the plaintiffs are going to be.

What have they told you they will tell you, and when will they tell that to you?

MR. THOMPSON: They like your rule, Your Honor, of 24 hours beforehand, precisely because of the enormous burden that it places on our side, I suspect, even though they didn't give voice to that. So that's why we've had to raise the issue with the Court --

THE COURT: I see.

MR. THOMPSON: -- but if they would like to speak to it ...

THE COURT: Well, Mr. Olson told me a minute ago that the named plaintiffs have jobs and occupational obligations. I

assume, therefore, that they would like to pin down precisely when they are going to testify.

And perhaps they are going to be the first witnesses; are they?

MR. OLSON: I don't know for sure; but, yes, that's probably correct.

And I think -- we take the point, your point on it as well. I don't see any reason why we couldn't give -- we're starting on the 11th of January. I don't see any reason why we couldn't, several days before that, identify the first two days worth of witnesses, Your Honor.

The need for flexibility and the reason that the rule has 24 hours in it is -- there are lots of good reasons for that, and we would prefer adhering to that with respect to the balance of the trial.

But I do think that we could accommodate counsel, our opponents, in the manner in which you suggested.

THE COURT: Can you tell them who the first two days of testimony are going to be coming from on the 6th of January?

MR. OLSON: Yes.

THE COURT: Okay.

MR. THOMPSON: And that would be extremely useful, Your Honor, as a start, but, you know, we have this sort of continuing issue.

Would it be possible to maintain this kind of on a

rolling basis, so that if they say, well, here -- out of our 32 witnesses, here are the first two, you know, or three, for the first two days, we still have the problem of not knowing, okay, well, who are the next 29?

And I strongly suspect, Your Honor, if their witnesses are like our witnesses, they are very busy academics, with many different obligations, that they have some sense as to roughly the week or the days -- many of the witnesses, at least on our side, have very specific availability.

So we would appreciate if there could be that continuing rolling at least 72 hours beforehand, to know who's --

THE COURT: I think after we get started, 48 hours would be more reasonable than 72, given the schedule.

One of the things that I happily gave up when I stopped practicing law was managing witnesses at trial. So I don't want to be too strict about that.

I understand you both have problems. This is a bench trial. We can accommodate unexpected events to the extent necessary.

But I think 48 hours should probably be sufficient after we get started.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: And, of course, the same is going to apply to your side.

MR. OLSON: We accept that, Your Honor.

THE COURT: Fine.

Now, there is one witness that appears on the plaintiffs' witness list, that raises some concern on my part, and that is Mr. Pugno, who is designated on the plaintiffs' witness list.

He is an attorney in the case, is he not? Is he not -- has he not appeared in the case, representing the proponents?

MR. THOMPSON: He has, Your Honor.

THE COURT: Is it your intent to call one of the lawyers on the other side?

MR. OLSON: May I ask Mr. Boutrous to respond to that?

THE COURT: Of course.

Mr. Boutrous.

MR. BOUTROUS: Yes, Your Honor. He is an attorney. We're cognizant and sensitive to that.

He does appear, for example, in the Wall Street Journal letter to the editor as a member of the executive committee. So some of these issues we're just exploring.

To the extent we call him as a witness, it would be on non-privileged, and -- and efforts by him that did not involve providing legal advice. We would be very careful of that. We listed him in an abundance of caution and would,

going forward, be very careful that we respect the attorney-client relationship.

THE COURT: I would urge you to make every effort to obtain whatever information you think Mr. Pugno can offer from other witnesses, so that it's not necessary to call him.

MR. BOUTROUS: We will do that, Your Honor. Thank you.

THE COURT: All right.

MR. THOMPSON: Your Honor, three more issues, if I may, that have practical significance. I apologize. I will be very brief.

THE COURT: Don't apologize. Let's get this out on the table.

MR. THOMPSON: The second issue is whether we need a sponsoring witness to move documentary evidence into the record of the case.

As we have submitted previously, there are legislative facts that are at issue in this case. And, as a consequence, the Court is free to consider materials that amici discuss but the parties don't discuss. And the Court is free to analyze materials that none of the parties bring to it. And that is true of the appellate courts, as well.

And, so, the reason I make that point is, it's clear that there's no requirement that, for legislative facts, that a sponsoring witness speak to a document in order to get it into

record. It's distinct from adjudicated facts in that way.

And I raise this because the trial will be at least twice, if not three times, as long if every document that we want into this record has to be used with a witness.

We oftentimes will want to establish a proposition, and will use one or two documents, but we might have a hundred that say the same thing. And we want to show that this is a point that was well-understood and there's a depth to it. And we wouldn't want to waste the Court's time with moving these documents in one at a time.

We have raised this with plaintiffs, and they -- I'll let them speak for themselves as to what their position is, but, as I understand it, they agree that we don't need to have a sponsoring witness for each document that would come into the record. But they're proposing that the lawyers get up and then identify why each document is relevant. That might be slightly less time consuming than using a witness, but not much.

We have entire books that we want to have moved into the record. And if we have to explain, on this page there's this relevance, and on that page there's that relevance, we don't think that makes sense.

THE COURT: Well, I must say, you both have submitted pretty awesome exhibit lists; 1500 for the plaintiff, and over 3,000 for the proponents. I trust that we are not going to have all of these admitted into evidence; there is going to be

some selectivity as the case is presented.

MR. THOMPSON: There may be some, Your Honor. But, quite frankly, you know, given the magnitude and the sorts of issues that are at stake in this, and the numerosity of those issues and the amount of evidence that pertains into it, I would think that, at least speaking for ourselves, the majority of our exhibit list we intend to move into evidence.

We put a little asterisk next to, you know, what we thought we were required to under Rule 26, of what we intend to move into evidence and --

THE COURT: Including the vital statistics from Iceland?

MR. THOMPSON: Exactly. And Denmark. Don't forget that.

So we do intend to move a lot of the evidence into the record. And we don't mean to burden the Court with a huge mountain of evidence that hasn't been explained. Rather, we would say for most of it we think it will be clear why we're moving it in.

And if it's not, in our post-trial findings of fact we will then, for each finding of fact, you know, specify which piece of evidence relates to which finding, so that we think that would alleviate any burden on the Court.

THE COURT: Well, I suspect that if you're moving in materials that have some very generalized application to the

issues here, there will not be an objection by the plaintiffs, and this shouldn't be a problem.

What, in your discussions, have you determined you think is going to be a problem? Are there particular documents on this exhibit list that you anticipate there may be an objection to without a sponsoring witness?

MR. THOMPSON: Well, that relates, actually, to the third issue, which is, we would like -- we have had dialogue with Gibson, Dunn about trying to identify the extent to which we have problems with the other parties' exhibits, to their admissibility and authenticity.

And we would like the Court to impose a deadline on the parties by which we would identify problems we have with authenticity, for example, and admissibility, so that if we have to bring in witnesses to authenticate hundreds and hundreds of documents, we know that in advance.

I can tell the Court, having looked very carefully at many of the exhibits on their exhibit list, we don't anticipate that sort of objection from us, especially given these are legislative facts. And we believe the Court is entitled to look at whatever it chooses to, with respect to these legislative facts, unless --

THE COURT: Well, why don't you point out an exhibit on your exhibit list that you believe falls within that category of a legislative fact, so that I have some idea of

what we are dealing with here.

MR. THOMPSON: I've opened at random, but happily, since almost everything is legislative -- so page -- if we looked at Exhibit DIX8 -- this is page 55. And -- all right. We could look at DIX eight five zero.

THE COURT: This is an article from what appears to be a journal; is that correct?

MR. THOMPSON: Yes, Your Honor. And there are hundreds of journals or articles. And they go -- many of them go to the issue of whether the optimal environment to raise a child is a married biological mother and father. And I believe that this is one of those articles that has some relevance to that issue.

And the point is, if we have an expert, Dr. Marks, for example, who is going to speak to the importance of having a married biological parent, and he's got a hundred articles that support him, we don't think it's a beneficial use of the trial time to say, "And now what's the next report, Dr. Marks, that supports this proposition or that?"

THE COURT: Well, if that's how these are going to come in, could he not simply refer to the group of documents, and those documents could be included within one exhibit, what we used to call a "banker box exhibit"?

MR. THOMPSON: We could do that, Your Honor. And as long as that's permitted, where we in bulk are allowed to move

in documents, without having to sift through them one by one, then I think that would alleviate our concerns.

But we still would maintain that there's no support for the notion that legislative facts have to have a sponsoring witness to get a document into evidence because, of course, the Court is free to examine materials that the parties have not brought to its attention. And the Court of Appeals and the United States Supreme Court are, as well.

So we want clarity on how the process would work, but I think we have a shared premise that it's not necessary.

THE COURT: I understand your -- I appreciate your concern.

My objective in this proceeding, as much as any other objective, is the preparation of a record which will allow appellate review of this issue.

And so while I appreciate that the range of issues is very broad-gauged, and may cover a lot of material of the kind that you've described, I do think we want to, if not be too strict about the introduction of this material, nevertheless, enforce rules of authenticity and reliability, so that we've got a pretty concrete record when the case takes the next step.

So I'm rather disinclined just to let in wholesale materials that deal with some of these issues, unless there is a witness who can say, "These are materials that are pertinent to the question. These are materials that I have relied upon.

These are materials that I believe are reliable to establish or to refute whatever proposition is at issue."

So ...

MR. THOMPSON: May I propose, perhaps, what might be a compromise -- because we certainly don't want to flout, in any way, the rules of evidence -- but would be, a week before each party's case-in-chief they would identify, Here are the documents we intend to move into evidence, and we may or may not use a witness.

And they'd only have to disclose the ones they knew they weren't going to use a witness with. And the other side would have an opportunity to object, These aren't authentic, you know.

THE COURT: I understand when a witness is identified for testimony that, along with the designation of a witness and when he or she is going to testify, that the other side is alerted as to the documents or exhibits that that witness is going to sponsor in his or her affirmative testimony.

I think that's a standard part of this two-day alert that you're going to have as to the first two days of trial, and then the 48-hour alert that you are going to have thereafter.

MR. THOMPSON: And we appreciate that, Your Honor. So this would be in addition to that, for those documents that the parties were not planning on using with a witness, to

encompass those at the beginning of a parties' case-in-chief, maybe a week beforehand, so the other side, if they wanted to use that document in cross-examination, they would know about it. If the other side wanted to object to authenticity or admissibility, they would be put on notice that this is coming into the record, if there is an objection lodged.

THE COURT: Here's my inclination. Let me see what your reaction to that is. And that is, if we pretty much enforce the rule that every document or every exhibit to be introduced in the course of a trial must have a sponsoring witness, but at the conclusion of the testimonial part of the trial, if one side or the other believes that there are additional materials that are necessary, as to which it did not have an opportunity to present a sponsoring witness or a sponsoring witness would not be brought to court without undue expense or inconvenience, then I will permit that party to seek to move into evidence that additional exhibit or group of exhibits.

MR. THOMPSON: And we appreciate that, Your Honor, because I think that resolution of this issue is consistent with our point, which is that the Federal Rules of Evidence are clear that it's not required to have a sponsoring witness for a legislative fact.

THE COURT: Well, we'll make a good-cause determination at the end of the trial.

What's the plaintiffs' view with respect to that, Mr. Boies?

MR. BOIES: Your Honor, we think that's a sensible approach.

We do think there needs to be some good cause shown at the end, rather than just laying -- dumping all the documents in. And we believe that part of that good cause will be to show what the relevance is of the documents.

We think it would be unfortunate if we had a record that went up to the appellate courts with three or four thousand documents. That's an unmanageable record, particularly if there is no tether that demonstrates the reliability or relevance of all the documents that are in the record.

So, we basically agree with what the Court proposes.

THE COURT: Then that will be the order, that exhibits to be received during the course of the trial will require a sponsoring witness.

The Court will consider the admission of additional materials for good cause shown based on unavailability, undue expense or burden, and a showing of relevance to the issues that need to be adjudicated.

MR. THOMPSON: Your Honor, thank you.

Two more of these points.

THE COURT: Okay.

MR. THOMPSON: The third one is, we would appreciate -- we think both parties would be served by having a deadline by which we had to at least identify concerns over authenticity of these documents.

Because if we're going to have to call witnesses in to authenticate, one by one, different documents, it would certainly be beneficial, I think, to the parties to know that. Hopefully, we can avoid that. But --

THE COURT: It's been years since I've had a serious authenticity objection.

MR. THOMPSON: Okay. Very well, Your Honor.

And then the last issue, Your Honor, is post-trial briefing. And I know --

THE COURT: Oh, my goodness gracious, are you getting --

(Laughter)

MR. THOMPSON: The cart before the horse, I know, Your Honor.

We are entirely at the Court's pleasure on whatever the Court would find most helpful. But if there were going to be post-trial briefing, and if it were going to be a highly-compressed schedule, we would like to know about that beforehand so that we can do something that's meaningful.

But, our view is that we could not do anything meaningful in less than 30 days.

THE COURT: All right. Well, we'll deal with that when we need to. I've already, by setting this schedule, ruined your holiday plans, so I'm not going to ruin any other at this juncture.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: Absolutely. Anybody else?

Does that mean we're done?

MR. OLSON: Thank you, Your Honor.

MR. BOIES: Thank you, Your Honor.

THE COURT: Thank you, Counsel.

Let me give you one other piece of advice, because I don't think -- except as we may have some discussions with regard to further discovery, I think it's unlikely that we will all be together again until the 11th of January.

It would be my plan to proceed beginning at 9 o'clock on January 11. And we'll go until approximately the noon hour, and then we'll take about an hour or so for lunch, and then go until about 4 o'clock in the afternoon.

But after the 11th, we'll probably start about 8:30 in the morning. But you may need a little more time to get organized on that first day, so I will be happy to accommodate that.

Now, if you have additional problems that you need to discuss with me, and if the proceedings at 7th and Mission Street, or wherever the Court of Appeals deals with some of

these discovery disputes, necessitates you discussing further issues with me, I'm available and happy to accommodate you. I will be around. So I should have no problem in trying to move these issues along so we tee off on the 11th of January.

MR. BOIES: Great.

THE COURT: All right.

(Counsel thank the Court.)

THE COURT: Thank you. And happy holidays to everybody.

(Counsel respond.)

(At 1:09 p.m. the proceedings were adjourned.)

- - - -

CERTIFICATE OF REPORTER

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

DATE: Tuesday, December 22, 2009

s/b Katherine Powell Sullivan

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