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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

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

VS.)

NO. C 09-2292-VRW)

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

Defendants.)

San Francisco, California)
Monday)
November 2, 2009)
2:30 p.m.)

TRANSCRIPT OF PROCEEDINGS

Reported By: Lydia Zinn, CSR #9223, RPR
Official Reporter - U.S. District Court

1 Appearances (via speaker telephone):

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21 **BY: TAMAR PACTER**

22
23
24
25 (Appearances continued on next page)

1 Appearances via speaker telephone (Cont'd.)

2 **For Defendant-**
3 **Intervenors:**

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4 **BY: CHARLES J. COOPER**
5 **JESSE PANUCCIO**
6 **HOWARD C. NIELSON, JR.**
7 **PETER A. PATTERSON**
8 **NICOLE MOSS**

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1 **THE COURT:** Good afternoon, counsel. This is
2 Judge Walker. I'm here with a court reporter; Ms. Delfin, the
3 court clerk, whom you know; and two law clerks.

4 Can we have the appearances of counsel, please?

5 **MR. DETTMER:** Good afternoon, your Honor.
6 Ethan Dettmer, Gibson, Dunn & Crutcher, on behalf the
7 plaintiffs.

8 **THE COURT:** Good afternoon, Mr. Dettmer.

9 **MS. LEE:** Good afternoon, your Honor. Mollie Lee, on
10 behalf of Plaintiff-Intervenor, City and County of
11 San Francisco.

12 **THE COURT:** Good afternoon.

13 **MR. COOPER:** Good afternoon, Chief Judge Walker.
14 This is Charles Cooper, Cooper & Kirk, representing the
15 Defendant-Intervenors.

16 Present with me here in my office on the phone, my
17 colleague, Jesse Panuccio, whom you've met previously.

18 **THE COURT:** Very well. Good afternoon, Mr. Cooper.

19 **MR. COOPER:** Thank you.

20 **THE COURT:** Who else?

21 **MR. STROUD:** Good afternoon, your Honor. This is
22 Andrew Stroud, Mennemeier, Glassman & Stroud, on behalf of
23 governor Arnold Schwarzenegger, and the Administration
24 defendants.

25 **THE COURT:** Good afternoon, Mr. Stroud.

1 **MS. PACHTER:** Good afternoon, your Honor. This is
2 Tamar Pachter, for the Attorney General.

3 **THE COURT:** Ms. Pachter, good afternoon.

4 **MR. MARTINEZ:** Good afternoon, your Honor.
5 Manuel Martinez, for the County of Alameda, representing
6 Defendant Patrick O'Connell.

7 **THE COURT:** Very well. Anyone else?

8 **MS. WHITEHURST:** Good afternoon, your Honor. This is
9 Judy Whitehurst, representing Dean C. Logan, the Los Angeles
10 County Registrar-Recorder.

11 **THE COURT:** Very well. Good afternoon.

12 Who else? Anybody?

13 **MR. NIELSON:** Good afternoon, Chief Judge Walker.
14 Howard Nielson, of Cooper & Kirk, representing the
15 Defendant-Intervenors.

16 **THE COURT:** All right. You're with Mr. Cooper?

17 **MR. NIELSON:** A different location, but yes.

18 **THE COURT:** I see. Anyone else on the line?

19 **MR. PATTERSON:** Good afternoon, Chief Judge Walker.
20 This is Pete Patterson, also with the Defendant-Intervenors,
21 from a different location.

22 **THE COURT:** All right.

23 **MS. MOSS:** And good afternoon, your Honor.
24 Nicole Moss, with Cooper & Kirk, also for
25 Defendant-Intervenors.

1 **THE COURT:** All right.

2 **MR. MC GILL:** Good afternoon, your Honor. This is
3 Matthew McGill, from Gibson, Dunn & Crutcher, for the
4 plaintiffs.

5 **THE COURT:** Very well.

6 **MR. DUSSEAULT:** Chris Dusseault, also with Gibson,
7 Dunn & Crutcher for the plaintiffs.

8 **THE COURT:** And good afternoon, your Honor. I think
9 I might be the last one. Enrique Monagas, Gibson, Dunn &
10 Crutcher, also for the plaintiffs.

11 **MR. FLYNN:** City and County of San Francisco, for
12 Plaintiff-Intervenor.

13 (Reporter interruption.)

14 **THE COURT:** I'm afraid we'll have to have that
15 appearance again. The reporter did not catch it.

16 **MR. FLYNN:** Ron Flynn, City and County of
17 San Francisco.

18 **THE COURT:** All right. Well, let's begin.

19 The subject of our discussion this afternoon is the
20 document request that the plaintiffs have made of the
21 Defendant-Intervenors, who I'll call "the proponents of
22 Proposition 8." That's a nomenclature that I think we've used
23 principally throughout the case.

24 Let me just make some general comments, and then
25 allow you to react to those comments.

1 I haven't had a chance to review in great depth the
2 issues that are before us, although the issue is really, I
3 think, not a terribly complicated one. It deals with the
4 proponents' assertion of a qualified First Amendment privilege
5 with respect to certain documents that have been requested by
6 the plaintiffs.

7 Concerning a privilege assertion, as I read the
8 cases, the Ninth Circuit, the Supreme Court, and other district
9 courts have essentially adopted three approaches to dealing
10 with the assertion of a privilege.

11 First, of course, is that provided about for in
12 Rule 26(b)(5): the preparation of what has come to be called a
13 "privilege log." The cases that have developed in accordance
14 with that describe some of the requirements of a privilege log.
15 And as we get into our discussion, we may find it appropriate
16 to deal with some of those specifics.

17 A second approach is that which the proponents, I
18 understand, have advanced. And that is some form of *in camera*
19 review by the Court to test the sufficiency of the privilege
20 assertion.

21 And a third approach, which is the production of
22 redacted portions of documents, or the production of documents
23 or materials that contain privileged matter but also contain
24 nonprivileged matter, and the privileged matter is redacted
25 from the material that is produced.

1 There may be other approaches, but those are the
2 three that have come to my attention in thinking about the
3 problem that we're going to be talking about this afternoon,
4 and, obviously, are three approaches that have been used in
5 cases that I'm familiar with. And it sometimes is the
6 situation where more than one of these approaches is
7 appropriate.

8 So I suppose the first question that comes at least
9 to my mind in thinking about this problem is whether the
10 material, Mr. Cooper, over which your client is asserting a
11 qualified First Amendment privilege embraces the entirety of
12 the material that you have discussed in your recent
13 correspondence, or whether only portions of those materials
14 are, in your view, privileged; because, obviously, if it's a
15 situation in which only a portion of the material is
16 privileged, then, obviously, the redaction approach may be an
17 appropriate way to proceed, and may make a lot of sense; but if
18 not, then perhaps one or two or some combination of the other
19 two approaches might be appropriate.

20 So let me ask you whether -- of the material that
21 you're asserting the privilege over, are you asserting the
22 privilege as to the entirety of these materials, or only a
23 portion of these materials?

24 **MR. COOPER:** Yes. Thank you, Chief Judge Walker.

25 Our assertion of privilege, your Honor, is, in fact,

1 over the entirety of this documents that we believe are
2 privileged. And a process of -- of redaction would not speak
3 to the nature of the privilege we've asserted.

4 And -- and even if there were some theoretical
5 possibilities that a document that was within and responsive to
6 the requests as they have now been revised in light of the
7 Court's October 1 ruling might contain information that was --
8 that was otherwise unobjectionable, the practical reality is
9 that, you know, we -- we expect to have and have now taken,
10 essentially, inventory of the -- of the universe of documents
11 from which responsive documents are being culled. And we would
12 be talking about thousands and thousands of documents that
13 would have to be reviewed for this redaction purpose, but the
14 real and, to our mind, disqualifying answer is that we do
15 assert a privilege over the entirety of these -- of these
16 confidential nonpublic communications and documents.

17 **THE COURT:** Well, that being the case, that would
18 appear to point us in the direction of either an *in camera*
19 review, or a privilege log with respect to -- to these
20 documents.

21 And I understand from your letter that you believe
22 that the preparation of a privilege log may be burdensome, and
23 you therefore offered to make a production of a sample of the
24 documents; but let's put that issue to one side for the moment.

25 **MR. COOPER:** Okay.

1 **THE COURT:** Are there approaches that we ought to be
2 considering, other than the two that I've mentioned: privilege
3 log, or *in camera* review? Is there some fourth or fifth
4 alternative that I haven't mentioned this afternoon that we
5 ought to put on the table for discussion?

6 **MR. DETTMER:** Your Honor, if I may. Ethan Dettmer,
7 on behalf the plaintiffs.

8 **THE COURT:** Yes, Mr. Dettmer.

9 **MR. DETTMER:** I'm sorry, your Honor.

10 **THE COURT:** Yes. You may proceed, sir.

11 **MR. DETTMER:** Thank you.

12 Your Honor, I think it's helpful to -- I do have --
13 the answer to your question is, yes, I do have another
14 alternative that I would like to propose and, in fact, have
15 proposed to the proponents --

16 **THE COURT:** All right.

17 **MR. DETTMER:** -- several weeks ago.

18 **THE COURT:** Let me interrupt you, Mr. Dettmer.
19 Before I hear from you, let me direct that question first to
20 Mr. Cooper, and then I'll come back to you. Is that okay?

21 **MR. DETTMER:** Certainly.

22 **THE COURT:** Mr. Cooper, do you have the question in
23 mind?

24 **MR. COOPER:** I think I do, your Honor.

25 And our efforts to think of an approach to having the

1 Court make a decision -- make a judgment with respect to the
2 validity of our First Amendment claim has -- we haven't been
3 able to come up with an alternative to essentially what we take
4 to have been at least your implied suggestion in your
5 October 23rd order. And we view that approach as combining the
6 elements of a privilege log, and *in camera* review; but as you
7 mentioned, a privilege log that attempted to log all of the
8 documents over which we are claiming a First Amendment
9 privilege would be a very, very labor-intensive, time-consuming
10 process.

11 **THE COURT:** All right. Well, let's -- let put -- as
12 I said, let's put the burdensome issue to one side, and come
13 back to that as it may be necessary to come back to it.

14 So I gather you would agree, then, that the two
15 alternatives that we should consider are either an *in camera*
16 review, or privilege log, or perhaps a combination of those
17 two; but those are the two that ought to be on the table for
18 discussion this afternoon. I gather that's your position?

19 **MR. COOPER:** Well, yes, your Honor. We've made our
20 proposal in my letter to the Court. And -- and, in light of
21 the Court's October 23rd order, we think that is a measured and
22 reasonable way now to proceed.

23 **THE COURT:** All right.

24 Now, Mr. Dettmer, you indicated that you have some
25 third alternative that you think ought to be put on the table

1 for discussion?

2 **MR. DETTMER:** Yes, your Honor. Thank you.

3 Ethan Dettmer.

4 And the proposal, I think --

5 If I may just step back a moment and look at the
6 nature of, I think, the problem that is presented to us all
7 jointly in trying to get to a trial date as it's set, and at
8 the same time address the concerns that Mr. Cooper and his
9 colleagues have raised on behalf of their clients -- the
10 concerns as I've read them in the papers and heard them in the
11 arguments are twofold.

12 One is that production of these documents would lead
13 to a chilling of their political speech, and a potential harm
14 of, I guess -- related harm of harassment and intimidation of
15 Proposition 8 supporters.

16 And I could sort of answer that several ways. One is
17 that the Court has already held that they have not made a
18 sufficient showing regarding that chilling and those harms.

19 And, I guess, as I had mentioned in my letter, the
20 additional answer to that is that these are the Official
21 Proponents of Proposition 8 whose documents we are most
22 interested in. And they are obviously central to this campaign
23 and, in fact, the architects of the campaign. And it seems to
24 me that chilling of their speech seems unlikely, given their
25 centrality to the case.

1 And certainly, the NAACP case and other cases have
2 not protected that: the identities or the speech of those
3 central players in campaigns.

4 **THE COURT:** Well, let me get you back on track here.

5 **MR. DETTMER:** Oh, of course, your Honor.

6 **THE COURT:** What are the approaches that I ought to
7 be considering?

8 **MR. DETTMER:** And -- I'm sorry.

9 **THE COURT:** Other than a privileged log or *in camera*
10 review or a combination of the two, is there --

11 **MR. DETTMER:** The --

12 **THE COURT:** -- is there some other approach that
13 ought to be put on the table for consideration?

14 **MR. DETTMER:** Yes, your Honor.

15 The approach that we proposed to the proponents, I
16 believe, on October 14th, but they have thus far not agreed to,
17 is that they produce these disputed documents under a
18 provisional attorneys'-eyes-only protective order until the
19 question of a stay of discovery is finally resolved at whatever
20 level they decide to stop seeking the stay of this discovery,
21 and that at that point, they may then go back and designate the
22 documents as appropriate under the Court's protective order
23 that we have proposed to be entered.

24 And that solution would allow both for their concerns
25 over these documents to be addressed by the protective order,

1 and the agreement to have this as an attorneys'-eyes-only
2 protective order, and at the same time, our concerns about
3 moving this case forward promptly and being able to take
4 meaningful depositions. We'll also be able to go forward and
5 move toward a January trial date in an effective way.

6 **THE COURT:** All right. Well, that is a third
7 alternative that we can consider: Production under an
8 attorneys'-eyes-only protective order. Fair enough.

9 Now, does anybody else have any fourth approach that
10 the Court ought to put on the table for consideration?

11 Hearing none, it looks to me like we've got the
12 alternatives before us.

13 Now, let's talk about each of these. And let me
14 direct my initial comments to Mr. Cooper.

15 I've had a lot of experience recently with production
16 of *in camera* material. That experience has largely been in
17 cases involving the assertion of the state-secrets privilege by
18 the government in various cases.

19 I can tell you, Mr. Cooper, as a Judge who's called
20 upon to try to be impartial and fair to both sides to conduct
21 an evenhanded proceeding, there have been very few things in my
22 judicial experience which have left me with as unsatisfactory a
23 feeling as *in camera* review of materials; that is, review of
24 materials submitted by one side, but as to which access has
25 been denied to the other side.

1 And, able and experienced as you are, I'm sure you
2 can empathize with that comment.

3 It's just antithetical to our system of justice for
4 one side to furnish information to the Judge without the other
5 side having access to that material. And so, as between the
6 two -- well, as between the three alternatives that we are
7 discussing this afternoon, an *in camera* review isn't very
8 appealing to me.

9 Now, it may be the only practical alternative, but I
10 want to hear from you why we shouldn't consider one or the
11 other of the alternatives.

12 **MR. COOPER:** Certainly, your Honor. Your Honor, I am
13 certainly sympathetic to the concern that you've voiced about
14 the nature of *in camera* review.

15 We view it as, frankly, the next and perhaps only
16 step available to us to have a judicial determination of -- as
17 the Court suggested in the October 23rd order, of the First
18 Amendment -- of the validity of our First Amendment privilege
19 with respect to, now, specific documents.

20 And the case that the Court cited is the *Kerr* case,
21 obviously. And, you know, notwithstanding the limitations on
22 *in camera* review, it suggests that -- as the Court's
23 October 23rd order did, it suggests that process as, I guess,
24 essentially the only one available to now have the privilege
25 claim assessed in light of the Court's order rejecting our

1 claim of a categorical privilege; a "blanket privilege," as you
2 put it.

3 So long as there is a possibility that a
4 document-by-document review by the Court of the -- of the types
5 of documents over which we are making this claim is available,
6 it's -- it just seems to me, anyway, that -- and to us that
7 it's the only course really that now is left available for
8 ultimately deciding the First Amendment question.

9 **THE COURT:** Well, let's talk about the alternatives.
10 We have three on the table.

11 Let's talk about the one that Mr. Dettmer has
12 suggested here this afternoon; and that is production under an
13 attorneys'-eyes-only protective order; perhaps a fairly
14 restrictive attorneys'-eyes-only protective order; one in which
15 the attorneys are specifically identified by name, so that the
16 production doesn't become widespread, and we could track back
17 to an individual attorney a disclosure of any of the material
18 that is disclosed. What's wrong with that approach?

19 **MR. COOPER:** Your Honor, we don't think, frankly,
20 that that approach is a viable alternative to our claim of
21 privilege.

22 First, it would -- it would contemplate this limited
23 disclosure only until such time as the -- as the plaintiffs
24 made use of the information that was disclosed to them in the
25 context of the trial itself.

1 I mean, the only purpose for the plaintiffs to desire
2 disclosure of this information is on the theory that it is
3 relevant to issues they intend to prove up.

4 And so ultimately, the disclosure -- even if one
5 assumes that it can remain attorneys' eyes only during the
6 discovery process, its ultimate purpose would be to call upon
7 and to use and introduce at trial; but beyond that, your Honor,
8 it -- the disclosure, even at the level of
9 attorneys'-eyes-only, we believe, would -- notwithstanding
10 Mr. Dettmer's very able argument, it would -- it would -- it
11 would constitute an invasion of the First Amendment freedoms of
12 my clients and -- and the individuals who were the volunteers;
13 ordinary citizens who volunteered to -- to undertake this
14 initiative campaign, and to commit their time and their efforts
15 and their resources and engage as professional -- professional
16 political consultants and campaign experts, but -- but again,
17 ordinary citizens who came forward and who -- who engaged in
18 the political process, formed associational funds with -- with
19 their colleagues who had volunteered to join them, and -- and
20 who engaged in the freest kinds of exchange of ideas and
21 political expression.

22 If you were to tell those people that -- if you
23 hadn't told those people, I would submit to the Court, before
24 this campaign got under way that everything that they said in
25 their e-mails and in their -- and in their conversations and --

1 and in their counseling with their volunteer colleagues in this
2 campaign -- that all of that information would, after the
3 election, in litigation, be open to and available to their
4 political opponents or even just the lawyers of their political
5 opponents in postelection litigation over the referendum, it is
6 our submission that many of those volunteers either would not
7 have engaged in the process at all or they would certainly have
8 censored their communications and their expression of their
9 political speech.

10 And I believe that to be true not just of the
11 ordinary citizen volunteers. I believe it surely also to be
12 true of the professional political, you know, campaign people
13 who these -- who the proponents and the members of the ad hoc
14 executive committee and others hired to assist them in their
15 effort to wage this political campaign.

16 **THE COURT:** Well, let me respond to that.

17 And you've certainly made a good points, but let me
18 modify the alternative that Mr. Dettmer has advanced. And that
19 is that the disclosure of these materials subject to an
20 attorneys'-eyes-only privilege order [sic] -- protective
21 order -- excuse me -- the production of this material subject
22 to an attorneys'-eyes-only protective order would not be
23 production for all purposes in the litigation, but only for
24 purposes of testing the privilege assertion.

25 And if the privilege assertion is sustained with

1 respect to those documents, then the documents could not be
2 used for any purpose in the litigation; but the idea which I am
3 now advancing is a production of these documents on an
4 attorneys'-eyes-only basis, simply so we can get both sides in
5 the litigation sufficiently well informed about the materials
6 so that we can -- well, so that the Court can have two sides of
7 the issue, whether or not the privilege actually should apply
8 to these materials.

9 What's your reaction to the idea of, thus, an
10 attorneys'-eyes-only protective order, and a limitation that
11 the production would be simply for purposes of testing the
12 privilege assertion?

13 **MR. COOPER:** Your Honor, my -- my admittedly
14 off-the-top-of-my-head reaction is, frankly, a negative one.

15 I remain concerned about the -- about -- I remain
16 concerned that that even limited type of production would be an
17 invasion of my clients' First Amendment freedoms.

18 And I -- and I'm also not clear if -- if the Court is
19 suggesting that all of our -- of the documents over which we
20 would claim privilege -- the responsive documents over which we
21 would claim privilege, which, you know, will be thousands and
22 thousands of them -- would be produced for this -- for this
23 purpose, or whether the Court is suggesting that the more
24 manageable -- at least, what we have suggested as being more
25 manageable sampling of documents that our proposal contemplates

1 in for *in camera* review would be shared for this -- for
2 purposes of -- of testing this issue on this -- on a limited
3 basis, such as we have proposed.

4 **THE COURT:** Well, it's true my suggestion didn't
5 distinguish between those alternatives, but let's consider,
6 just for the sake of our discussion, the limited sampling that
7 you've referred to; say, the 25 or so -- whatever the
8 appropriate number is -- of documents necessary for a true test
9 of the adequacy of the privilege assertion. Say we limited the
10 production of documents pursuant to an attorneys'-eyes-only
11 protective order to that number; and with the further
12 restriction that the purpose for which the production is made
13 is simply to test the adequacy of the privilege assertion.

14 In other words, putting to one side the issue of
15 burden, which does seem to me to be categorically a different
16 kind of objection --

17 **MR. COOPER:** Your Honor, I would ask the Court to
18 permit me to consider that. It is -- and it's with
19 appreciation for the Court's effort here with -- with the
20 parties before it to grope for a reasonable and measured
21 solution that I would ask the Court to permit me to consider
22 that; and in particular, to consider it with my client -- my
23 clients; but I -- but I'm obliged to say that I am concerned
24 that even that limited approach to disclosing these materials
25 would be -- would threaten to -- an unacceptable infringement

1 upon the confidential documents at issue here; but with that,
2 would the Court be -- would the Court be amenable to permitting
3 me to counsel with my clients on that?

4 **THE COURT:** Well, offhand, I'm hard pressed to deny a
5 lawyer the chance to communicate with his client. And I think
6 that's fair -- a fair request of you to make; but let's follow
7 our discussion on, and see if there might not be some other
8 alternative that we can explore. And possibly as we explore
9 other alternatives, you'll want to place before your client
10 more than one option.

11 So, without saying, "No, you can't," or, "Yes, you
12 can consult with your client about this" -- and I must say my
13 strong inclination will be to allow you to consult with your
14 client, of course -- but let's continue our discussion to see
15 where we go next. And that is to shift to the other
16 alternative. And that's the alternative that I opened with in
17 our discussion this afternoon. And that is the production of a
18 privilege log.

19 And, again, putting to one side whether we're talking
20 about a privilege log covering all of the thousands of
21 documents that you've mentioned -- putting that aside, and
22 focusing only on the 25 or so, the limited number of documents
23 that you think are a fair sample, what's wrong with the
24 production of a privilege log?

25 After all, a privilege log is generally required,

1 even for the assertion of the attorney-client privilege, which
2 is an absolute privilege; whereas here, we're dealing with a
3 qualified privilege. What's wrong with a privilege log?

4 **MR. COOPER:** Well, your Honor, there's nothing in --
5 in principle, wrong with a privilege log.

6 And, in fact, our proposal to the Court for this --
7 this 25-document selection for *in camera* review contemplates
8 that it would be accompanied with a privilege log, and that our
9 friends representing the plaintiffs and the
10 Plaintiff-Intervenors would have access to that -- to the
11 privilege log; but you know, a privilege log is -- is -- is
12 always nothing more than a tool and a prelude, a predicate to
13 ultimate determination of the privileged nature of the document
14 that it logs.

15 And there will certainly -- there -- you know, we
16 can't conceive of -- and our efforts to begin the process of
17 logging documents doesn't reveal to us any method by which
18 the -- by which logging the documents that are responsive and
19 privileged would -- would reveal information just on the face
20 of a log that could -- would allow the Court or even our -- our
21 friend for the plaintiffs to make any kind of determination
22 that a document either is or is not privileged.

23 In fact, to us, it simply confirms that each one of
24 the documents is within the description of the documents that
25 we believe are privileged; that is, they deal with -- as the

1 Court's October 1st opinion outlined, they deal with issues of
2 campaign strategy. They are documents exchanged between the --
3 I guess Mr. Dettmer used the term "architects"; that is, the
4 individuals in responsible, lead roles within the campaign
5 itself. And they are -- you know. And they are those types of
6 communications, mainly. I mean, the vast bulk of these
7 thousands and thousands, as I'm sure the Court suspected, are
8 e-mail messages with this kind of, you know, private
9 communication going back and forth among them.

10 So we don't oppose privilege logs on principle, but
11 it would not, it seems to us, in any way relieve the Court's --
12 you know, any burden on the Court or the parties to -- to
13 review actual documents to assess their privileged nature.

14 I guess the final point I want to make, your Honor,
15 if I may, is this. If -- preparing a privilege log that
16 covered all of these documents wouldn't be in anyone's
17 interest. It wouldn't be -- I mean, it would be a hugely
18 resource-intensive and costly enterprise for a party to this
19 case that is an intervenor party that is already -- believe me,
20 your Honor -- strained in terms of its resources and its
21 ability to, you know, deal with the pace and the demands of the
22 litigation, even apart from it. And to commit the resources
23 necessary to prepare that log would -- would just be -- it
24 would -- it would take a long time, and consume enormous
25 talents and resources.

1 And -- and it would just put off what -- what seems
2 to us to be inevitable anyway; and that is, in light of the
3 Court's determination in the October 23rd order, just put off
4 the inevitability of an *in camera* review and an ultimate
5 decision -- judicial decision whether, you know, a document or
6 these documents or perhaps, you know, this category of
7 documents is or is not protected by the qualified First
8 Amendment privilege in the context of the case.

9 **THE COURT:** Well, we are making some progress, it
10 seems to me.

11 You've indicated that there's nothing wrong with a
12 privilege log per se. And, indeed, you point out that that is
13 an alternative that you've suggested, along with *in camera*
14 review. And that seems fair enough.

15 And, indeed, I find that suggestion to be appealing,
16 because -- appealing in this sense, Mr. Cooper: it allays, at
17 least to some degree, the uneasiness that I have about
18 conducting an *in camera* review of materials produced by one
19 side in litigation, without access to that information by the
20 other.

21 It's true that the plaintiffs would not have access
22 to the documents that were subject to *in camera* review, but
23 they would have the information produced by a privilege log,
24 and enable them to attempt to make a case that the assertion of
25 privilege should not extend to the documents at issue.

1 So that does seem to me to be a reasonably practical
2 step in the direction of resolving this. And I gather that
3 that is something that your side is prepared to do promptly.

4 **MR. COOPER:** Yes, your Honor, we -- we would. You
5 know, we would be prepared to do that whenever the Court gave
6 us permission to do so.

7 **THE COURT:** Now, I did take a look at, at least, a
8 couple of cases with respect to the content of a privilege log.

9 And, of course, the federal rules describe that when
10 a party withholds information otherwise discoverable by
11 claiming that the information is privileged or subject to
12 protection as trial preparation material, the party must
13 expressly make the claim, and then describe the nature of the
14 documents, communications, or tangible things not produced or
15 disclosed, and do so in the manner, without revealing the
16 information itself privileged or protected, that will enable
17 other parties to assess the claim.

18 In reviewing a fairly old Ninth Circuit case -- 1992.
19 That doesn't seem old to me, but I'm sure to some of the
20 younger lawyers who may be listening in, it seems old.

21 **MR. COOPER:** Nor to me, your Honor.

22 **THE COURT:** All right. We're on the same wavelength,
23 then.

24 This is *In re: Grand Jury Investigation*, at
25 974 F. 3d. 1046.

1 And the content of the privilege log that is
2 described by the Ninth Circuit in that case identifies, one --

3 And parenthetically, of course, they're talking here
4 about an attorney-client privilege, but we can extend that to
5 our context.

6 One, the attorney and client involved;
7 two, the nature of the document; three, all
8 persons or entities shown on the document
9 to have received or sent the document;
10 four, all persons or entities to have been
11 furnished the document or informed of its
12 substance; and, five, the date of the
13 document -- the date the document was
14 generated, prepared, or dated.

15 Now, the privilege log that you contemplate, I
16 assume, Mr. Cooper, would follow that general pattern, adapted,
17 of course, to the specifics of this privilege. Is that a fair
18 assumption?

19 **MR. COOPER:** Your Honor, it is a fair assumption.

20 I want to quickly add that, however, the privilege
21 log we would contemplate would not be able to identify all of
22 the addressees, as it is our, you know, view, as the Court
23 knows, that there are volunteers who were involved in this
24 whose -- whose anonymity has -- has never been -- has never
25 been compromised, and whose -- and for whom anonymity was

1 important from the beginning.

2 And so, apart from -- apart from that caveat, we
3 would contemplate that the privilege log would -- would contain
4 the information that you have referenced, but it would -- what
5 we had contemplated was that it would list as Does, which is
6 what we've done in our previous -- our previous dealings with
7 the counsel for the plaintiffs -- list as Does individuals who
8 may have been addressees on a particular document whose --
9 whose identities have not -- have never come forward.

10 **THE COURT:** Well -- hold on. Hold on.

11 **MR. DETTMER:** Certainly.

12 **THE COURT:** You say "volunteers." Can you tell me
13 who you mean by "volunteers"?

14 I assume that a lot of people who were involved in
15 the campaign were not compensated, and therefore, might fall
16 under the rubric of a volunteer; but they might, nonetheless,
17 have had a significant role in the management and direction of
18 the campaign.

19 **MR. COOPER:** That's certainly true, your Honor.
20 There were -- but the campaign was -- was really, apart from
21 the compensated political consultants and other -- and other
22 political professionals who were engaged by the -- by the
23 campaign, the Proposition 8 campaign was, in fact, managed,
24 and -- and staffed by volunteers. No one was -- no one was
25 compensated.

1 And, yes, the volunteers had roles that ranged from
2 being members of the ad hoc executive committee, to licking
3 stamps.

4 And -- and the -- however, the documents that we're
5 talking about here, as Mr. Dettmer has made clear previously,
6 are -- are documents that -- that, by and large, had
7 individuals who had, you know, responsible volunteer positions
8 in the campaign.

9 I would -- I would also like to note that in the
10 context of an attorney-client privilege, the identity of
11 addressees is a crucial feature of the -- of whether the
12 privilege itself applies or not; perhaps even the most crucial;
13 but that is not the case, we would submit, with respect to the
14 privilege we're talking about.

15 The identity of individuals who -- whose anonymity
16 has never been compromised is -- is not really a necessary
17 piece of information to determine whether or not the
18 communication itself is within the privilege, at least, that we
19 are advocating for.

20 **THE COURT:** Well, let's talk about that for a minute.

21 I wonder if there isn't an analogy here. Looking at
22 the cases which have crafted this First Amendment qualified
23 privilege, it appears that the cases have drawn a distinction
24 between individuals who were rank-and-file members of the
25 various organizations -- principally, the NAACP, which is the

1 organization that was involved in most of the cases from which
2 this doctrine has arisen -- and those who were officers or
3 directors or managers of the NAACP, who may very well have
4 included people who were, in your phrase, "volunteers," or who
5 may not have been compensated monetarily for their efforts.

6 So there is a distinction -- isn't there? -- between
7 managers, directors, individuals who have had responsibility
8 for directing the organization, and those who were
9 rank-and-file members, such as those, as you put it, who lick
10 stamps or distribute fliers or do activities of that kind.

11 So isn't there an analogy with the attorney-client
12 privilege, at least, in this, at least, as far as this context
13 is concerned?

14 **MR. COOPER:** Your Honor, I agree with you that in the
15 NAACP case, the issue of the directors and officers of that
16 branch of the NAACP was not an issue, but I would submit that
17 it wasn't an issue because there was never a claim in that case
18 over the -- over the identities of those individuals. Either
19 they had been made public, as a number of individuals in the
20 Proposition 8 campaign have been, and whose identities we are
21 not in any way seeking to protect, or, for whatever reason, the
22 NAACP did not assert any kind of privilege over them.

23 **THE COURT:** Well, are there individuals who were
24 involved in the management of the campaign, whether compensated
25 or not, who were equivalent to officers, directors, managing

1 agents; individuals who sat on the executive committee, and who
2 otherwise were charged with directing the campaign? Are there
3 individuals in that role whose identity you are seeking not to
4 disclose?

5 **MR. COOPER:** Yes, your Honor. There are a couple of
6 members of the executive committee -- the ad hoc executive
7 committee -- whose -- whose identities have never been
8 disclosed, and who we have not disclosed before, and over whom
9 we have -- we have asserted a First Amendment privilege, yes.

10 **THE COURT:** Well, how does the First Amendment
11 privilege extend to those individuals, as distinguished from
12 people in the position of, say, a Mrs. MacIntyre, who I'm sure
13 you remember from that case that reached the Supreme Court;
14 that is, someone who licked envelopes or who passed out
15 leaflets? How does this First Amendment qualified privilege
16 extend to people who had a role in managing and directing the
17 Proposition 8 campaign?

18 **MR. COOPER:** Well, your Honor, I think that our view,
19 your Honor, is that it extends to those individuals to ensure
20 that they are willing to engage in the First Amendment
21 political expression and associational activity of a campaign
22 of this kind.

23 I mean, they are -- we, frankly, don't see why or how
24 the purposes of the First Amendment privilege would not apply
25 equally to those who step forward to take and volunteer for a

1 substantial role, even a leadership role or some type of
2 volunteer managerial role, than those who -- who volunteer to
3 associate themselves with this campaign or with any type of
4 referendum campaign on some lesser basis.

5 I think the concern of the First Amendment is that
6 the type of consequences that flowed, for example, as a result
7 of the disclosure of donors who -- who donated more than a
8 hundred dollars to the campaign -- the kind of unfortunate
9 harassment and other kinds of consequences that flowed to them
10 are -- are the very kinds of things that -- that make,
11 oftentimes, individuals desire to -- desire to involve
12 themselves and associate with political efforts of -- of this
13 controversial kind only on an anonymous basis. And it's our
14 submission that the First Amendment entitles them to do that,
15 and that if it didn't, the prospect that they would step
16 forward to take a leadership role, as opposed to some, you
17 know, lesser type of role, would, we think, be dramatically
18 reduced and chilled.

19 **THE COURT:** Now, the campaign for Proposition 8
20 raised a substantial amount of money. And, of course, there
21 was a substantial amount of money raised in opposition. Did
22 this ad hoc committee that you've mentioned, Mr. Cooper, have
23 the responsibility of managing those funds?

24 **MR. COOPER:** To be quite honest with you, your Honor,
25 I am not sure what level of -- what level of responsibility the

1 ad hoc executive committee had to that. I feel confident in
2 telling you that it had ultimate responsibility, but I do
3 believe that there was a different group with -- with, perhaps,
4 you know, a cross membership, but a different group of -- and a
5 different committee that had particular responsibility for
6 handling of the financial issues.

7 And, of course, as the Court knows from previous
8 hearings, the Protect Marriage organization itself had a
9 treasurer who was responsible for financial -- had financial
10 responsibilities as well.

11 **THE COURT:** Did the treasurer report to and answer to
12 the ad hoc executive committee?

13 **MR. COOPER:** My recollection is that that is so, yes,
14 your Honor.

15 **THE COURT:** Okay. All right. Well, we've covered a
16 lot of ground. And I've held you off, Mr. Dettmer. And I'm
17 sure you would like to join in this discussion, so let me give
18 you the floor.

19 **MR. DETTMER:** Thank you very much, your Honor. I
20 appreciate it.

21 And I do have a number of comments, but I'd like to
22 keep them as brief as possible; but the ultimate problem that I
23 see that we all collectively face right now is trying to meet
24 the deadlines that exist in this case, while still getting
25 these documents in this litigation that your Honor has found

1 are at least potentially relevant to the litigation.

2 And I'm concerned that a privilege log or an *in*
3 *camera* review of all of these documents would use up all of the
4 time that we have left before trial and, thus, these documents
5 would not be used in the trial or certainly in the discovery
6 process.

7 **THE COURT:** Well, let's put that issue to one side
8 for a moment. We can deal with that. I understand your
9 concern and, indeed, I share your concern; but put that to one
10 side, and address these other topics that I've discussed and
11 had a nice discussion with Mr. Cooper about.

12 **MR. DETTMER:** Certainly, your Honor.

13 Well, maybe I can address the privilege-log issue
14 first.

15 I think that, first of all, it was a little unclear
16 from the discussion about whether we were talking about a
17 privilege log that encompassed all or a substantial portion of
18 these documents, or just 25 documents. Obviously, we would
19 have a serious concern about any *in camera* review or privilege
20 log that had such a small subset of documents that were
21 hand-selected by counsel for the proponents.

22 I think that that procedure takes the problems of an
23 *in camera* review that your Honor had mentioned, and amplifies
24 them dramatically, given that the Court is only seeing the
25 documents that the proponents' counsel have picked for that

1 purpose. And obviously, if we're seeing a privileged log for
2 only 25 documents, that even further amplifies that concern.

3 So I -- I think that the privilege-log issue becomes
4 very difficult for that reason. And it would be very difficult
5 for us to, based on the information that Mr. Cooper had
6 identified as being something that he'd be willing to put on a
7 privilege log, and other items, such as names, that he would
8 not -- it would be of, I think, limited value for us in
9 determining how to argue with Mr. Cooper to your Honor about
10 that privilege, and whether it is, indeed, valid.

11 With respect to the *in camera* review, your Honor has
12 mentioned that -- the concerns that we would have about that,
13 and that I think any litigant would have in having items
14 presented to the Court without them having an opportunity to
15 comment on them.

16 And I think what all of this pulls me back to is --
17 is the fundamental issue here which both you and Mr. Cooper
18 spoke about, your Honor, which is the point that this is not
19 the attorney-client privilege; this is a qualified privilege
20 that is based on very specified concerns that have been laid
21 out in a number of cases.

22 And those concerns are, as Mr. Cooper mentioned,
23 intimidation and harassment of participants in the political
24 process, and the concern that there will be a chilling of their
25 speech based on that.

1 And Mr. Cooper has also raised the issue of sharing
2 campaign strategy with the campaign's opponents.

3 And I would put a footnote there, and say: my
4 clients are not the campaign's opponents; they're individual
5 people. And we're not part of the campaign against
6 Proposition 8, except in, you know, the most -- the most
7 attenuated way.

8 So I guess the point of this is that those concerns
9 that are the basis for all of this case law that protects these
10 types of things from disclosure, I think, are very amply
11 protected by a good protective order.

12 And the notion that Mr. Cooper's clients are going to
13 be harmed or their speech is going to be chilled by some
14 handful of lawyers looking at these documents seems to me
15 far-fetched.

16 And, as your Honor has pointed out, there's already
17 been substantial exposure by Mr. Schubert and Mr. Flint, the
18 campaign -- the Yes on 8 campaign's political strategists, of
19 their strategy. And they've talked about it and -- and
20 broadcast it in several different venues. Your Honor has seen
21 one of them, and commented on it in the October 1st order.

22 In light of all of that, it seems to me that there is
23 a good way to cut this knot, which is to produce these
24 documents right away to a limited group of lawyers who can look
25 at them and analyze them and move forward. And, at the same

1 time, Mr. Cooper's clients will be protected from the harms
2 that they've articulated until such time as there's no longer a
3 stay of discovery that can be gotten.

4 And I think the final point -- and then I'll stop,
5 your Honor -- is the notion that at some point -- and these are
6 going to be introduced in the record -- is something that -- as
7 your Honor knows, there's a whole series of rules in the
8 Court's local rules about how that happens once we get to the
9 point after we've reviewed these documents and looked at them
10 and seen which ones we may want to use at trial or to submit to
11 your Honor.

12 Then the question of whether they will be in the
13 public record or not is something that I think we could then
14 have a manageable discussion about between Mr. Cooper's team
15 and our team. And then, if we have disagreements at that
16 point, we can bring them to your Honor and get them resolved in
17 advance of anything being submitted in the public record.

18 **THE COURT:** Anybody else want to speak up before I go
19 back to Mr. Cooper with a little further discussion on another
20 aspect of this?

21 Ms. Lee? Mr. Stroud? Ms. Pachter? Martinez?
22 Whitehurst? Who else wants to speak? Anybody?

23 **MS. LEE:** This is Mollie Lee, from San Francisco. I
24 have just one quick additional comment.

25 San Francisco agrees with Plaintiff that a protective

1 order would adequately -- is the right solution to this
2 problem, and that an attorneys'-eyes-only protective order is
3 more than sufficient to address any concerns that proponents
4 might have about possible harm or chill resulting from
5 disclosure.

6 And on that line, I wanted to note that in another
7 case, *Protect Marriage v. Mullen*, which is pending in the
8 Eastern District of California, proponents raised similar
9 concerns about disclosure of information that they believed was
10 highly sensitive. And in that case, they did stipulate to a
11 protective order that provided access to sensitive information.
12 And it provided it, I think, particularly as relevant to some
13 of the timing issues in this case -- the protective order was
14 entered, and governed the production and disclosure of
15 confidential information through discovery in all pretrial
16 processes.

17 So I guess to me, that suggests that that's a very
18 workable solution with respect to these particular parties and
19 the particular concerns that opponents have raised here.

20 **THE COURT:** All right. Anyone else?

21 All right. Let me come back to you, Mr. Cooper. One
22 subject we didn't cover in our discussion, which I thought was
23 very helpful, is the category of the various documents or
24 information that we're talking about.

25 You mentioned e-mails.

1 In thinking about the qualified privilege as it has
2 been developed in the case law, various kinds of documents or
3 materials have been discussed: member lists, financial
4 records.

5 What are we talking about here? Are we talking about
6 membership lists? Members of the campaign? Volunteers who
7 have agreed to walk precincts? Are we talking about financial
8 records? Are we talking about letters from persons in a
9 management position?

10 And by "letters," I mean not just letters, but also
11 e-mails, telephone calls, documents, as defined in the Federal
12 Rules of Evidence.

13 Are we talking about communications between those in
14 a management position in the campaign, and the paid political
15 consultants? Just exactly what are we talking about here?

16 **MR. COOPER:** Your Honor, we're talking about most of
17 the things that you've identified.

18 We're talking about, for example, e-mails that --
19 that discuss campaign finance strategy and fund-raising
20 strategy.

21 We're talking about -- we're talking about
22 communications back and forth with respect to advertising
23 strategy, and the actual content of ads, and how those ads
24 should be -- or whether they should be revised in some fashion.

25 We're talking about communications dealing with the

1 results of focus groups, and the kind of things that -- you
2 know, just the kinds of things you would expect, I think, in
3 any kind of political effort of this kind.

4 We're talking about drafts of -- of everything from,
5 you know, advertisements to -- to letters.

6 **THE COURT:** Hello?

7 **MR. COOPER:** Yes.

8 And I'm just -- there are probably other -- others on
9 my team who are better -- even better acquainted to a level
10 with the kinds of -- with the kinds of internal confidential
11 communications and documents that -- that we're talking about
12 here.

13 I -- we're not -- we -- we do not have any longer --
14 as a result of the Court's October 1 ruling, we're not talking
15 about membership lists of, you know, rank and file volunteers
16 or, you know, members of ProtectMarriage.com, or donors that --
17 whose names haven't been already disclosed, because, you know,
18 we no longer understand that to be even responsive.

19 So that's not among the information that we have now.
20 You know, we're deep into the culling process, but the kinds of
21 things are along the lines of what I've just -- what I've just
22 described.

23 And I could perhaps describe a few more kinds of
24 things, if the Court would permit me to confer with my
25 colleagues -- my colleagues here.

1 **THE COURT:** Sure, sure. You have some colleagues on
2 the line. Maybe -- maybe they've gotten down to a somewhat
3 more granular level in the pretrial discovery, and they might
4 be able to be helpful. Any of those individuals? Let's see.
5 That's Nielson, Moss. I think there was one other name that I
6 missed: Mr. Panuccio.

7 **MR. COOPER:** Mr. Panuccio; but actually, I would ask
8 my colleague, Nicole Moss, who has a much more granular-level
9 understanding of the kinds of documents we're talking about.
10 Nikki, would you like to add to what I've -- what I've
11 described?

12 **MS. MOSS:** Certainly. This is Nicole Moss.

13 I think Chuck has very well stated the sorts of
14 documents that are at issue.

15 I would note that, while membership lists are not
16 encompassed in light of the October 1 ruling, that is not to
17 say that there are not volunteers' and members' names revealed
18 in these documents. There -- there certainly are references to
19 individuals. And their names are in these documents; but
20 primarily what we're dealing with, as Mr. Cooper noted, is
21 e-mail communications which go to the heart of strategy;
22 discussing specific messaging; what language to use; how to
23 craft a message; the timing of messaging; both language to use,
24 and suggesting things not to be said. That goes to sort of the
25 heart of the strategy.

1 In addition, there is a great deal of information
2 about fund-raising. And where strategic -- you know, strategic
3 plans for the entire fund-raising plan for the campaign is
4 reflected in some of these documents. The communications plan
5 for the campaign is reflected in these documents.

6 I mean, on a general basis, that is what we're
7 dealing with primarily here.

8 **THE COURT:** All right that's very helpful. Very
9 helpful indeed.

10 Let me, before drawing this to a close, ask: does
11 anyone have anything that he or she would like to add before I
12 make a suggestion, and see how we proceed from this point?
13 Anybody have anything that he or she thinks ought to be
14 expressed before I try to draw this matter to a close?

15 Hearing nothing --

16 **MR. COOPER:** Nothing more from the proponents,
17 your Honor.

18 **MR. DETTMER:** No, your Honor. Thank you.

19 **THE COURT:** Well, I think this has been a very
20 helpful discussion. And I certainly share Mr. Dettmer's
21 concern about getting discovery wrapped up in time to meet the
22 scheduled trial date.

23 And I have some empathy for you all on the other end
24 of this telephone conversation. Although I have been on this
25 side of the bench for almost 20 years, I haven't completely

1 forgotten what it's like to be on the other side, and know what
2 it's like to be dealing with discovery deadlines.

3 And I will say that, having not forgotten what it's
4 like, I'm going to try to work with you, because of the
5 schedule that we've set, which I think is a practical schedule,
6 and one that the nature of the case warrants; but I'm going to
7 try to work with you so that we can get the discovery completed
8 in an orderly fashion in time to beat the case schedule, as
9 well as to allow a full and fair opportunity to conduct the
10 discovery that's necessary, so that the case can be adequately
11 presented.

12 It seems to me that Mr. Cooper's suggestion of
13 combining a privilege log with the *in camera* disclosure of
14 documents is worth a try, to see if that is not sufficient to
15 begin sorting out this issue.

16 I'm reasonably sure that it's not going to deal with
17 all aspects of the discovery concerns that we have on both
18 sides here, but I think it is a good start.

19 So -- and I understand also Mr. Cooper's concern
20 about requiring a privilege log as to the entire universe of
21 documents that he or his clients feel are covered by the
22 qualified First Amendment privilege that his clients are
23 claiming.

24 So a privilege log and an *in camera* review of a
25 limited number of those documents, I think, is an appropriate

1 way to proceed.

2 Now, however, in order to make that meaningful and to
3 ensure fairness in the selection of the documents listed on the
4 privilege log and included within the documents offered up for
5 *in camera* review, I think there are a couple of additional
6 elements that we need to flesh out at this point. And that is
7 a bit more detail about the nature or category of the documents
8 that are involved in the privilege assertion.

9 Certainly, that is consistent with a requirement of a
10 privilege log, which requires that the nature of the document
11 be described; but it seems to me that if there are a limited
12 number of documents -- whether it's 25, 50, or a hundred -- it
13 may not cover all categories of the kinds of documents that the
14 proponents are asserting the privilege over. And so I think a
15 fuller description of those categories than we've had the
16 opportunity to include today would be very, very helpful.

17 Mr. Cooper has mentioned e-mails and other
18 communications involving finance of a campaign, campaign
19 strategy, advertising strategy, focus-group results, drafts of
20 advertisements, advertisements or appeals that the campaign
21 decided not to make, and internal communications. That's, I
22 think, a helpful first start of categorizing these kinds of
23 documents, but I think in addition to a privilege log, a fuller
24 description of those kinds of materials would be extremely
25 helpful in deciding whether or not we should pursue discovery

1 of those categories of documents.

2 And the other issue that I find still to be troubling
3 is this issue of the identity of the individuals who were in
4 management responsibility for the campaign.

5 And perhaps a way to deal with that, Mr. Cooper,
6 would be for -- and I'll throw this out for your reaction --
7 would be for you to disclose the identity of all of those who
8 were in a position of management responsibility as part of the
9 *in camera* disclosure, so that I could make some kind of a
10 determination whether it seems reasonable that the identity of
11 such individuals would have the kind of chilling effect that
12 you contend applies to this situation.

13 It does seem to me that, in reading the cases -- four
14 to five in this view -- there is a pretty clear distinction
15 that is drawn between those who are running the campaign, and
16 those who were simply supporting or opposing a campaign. And I
17 am -- I am troubled that individuals who have management
18 responsibility for a political campaign should be shielded from
19 disclosure, given all of the case law and all of the other law
20 that applies to running initiative and referendum campaigns.

21 I'm not by any means saying that I reject the
22 argument that the identity of these individuals may not
23 implicate First Amendment privileges that are important here;
24 but frankly, I do need to be persuaded of that. And maybe the
25 only way to -- to achieve that would be for an *in camera*

1 disclosure of those individuals. So that's what I would
2 propose.

3 And I would propose further that, with respect to the
4 preparation of a privilege log, the full list of the categories
5 of documents that you think are covered by the qualified
6 privilege and the identity of those in management positions or
7 with management responsibility for the campaign -- that if at
8 all possible, to meet Mr. Dettmer's concern about the pace of
9 discovery, that we have that production *in camera* together with
10 the log and the other disclosures that I've mentioned not later
11 than the end of this week.

12 Now, is that possible?

13 **MR. COOPER:** Your Honor, that is possible.

14 With respect to fleshing out the categories, I hear
15 you. We will do that. We will do our level best to -- to make
16 the descriptions as -- as thorough and as granular as we can.

17 And with respect to the *in camera* review of all
18 identities, we will -- we will provide that information for the
19 Court's *in camera* review. And -- and, yes, sir, we will commit
20 ourselves to get that to you by the end of the week.

21 In light of this -- the Court's further guidance on
22 this, it may be well -- and I suspect that it will be well --
23 for us to perhaps enlarge the sampling a bit; but it's been our
24 idea that -- that, you know, we didn't want to overburden the
25 Court; but I think in light of the Court's further guidance

1 here this evening, that we may want to add some number of
2 documents to the sampling that -- just to ensure that we --
3 we -- we have addressed all of the categories that we can
4 identify discretely.

5 **THE COURT:** Good. Well, I think that probably would
6 be helpful to you, and would certainly be helpful and
7 informative to the Court.

8 Well, counsel, I appreciate your willingness to have
9 this discussion this afternoon or evening. And I will express
10 the hope that this may be the last time that we'll have a
11 discovery discussion, but I will not be surprised if it is not
12 the last time; but I do appreciate the good work on both sides
13 of the case. And I think we've made some fairly significant
14 progress this afternoon.

15 So, if no one has anything further, I'll let you all
16 go.

17 **MR. DETTMER:** Thank you very much, your Honor.

18 **THE COURT:** Mr. Dettmer, Ms. Lee, Mr. Stroud, any of
19 the others? Anything further?

20 **MS. LEE:** Nothing further, your Honor.

21 **MR. STROUD:** No thank you, your Honor.

22 **MR. DETTMER:** Nothing further, your Honor. Thank
23 you.

24 (At 3:55 p.m. the proceedings were adjourned.)

25 - - - -

CERTIFICATE OF REPORTER

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

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Lydia Zinn, CSR 9223, RPR

Tuesday, November 3, 2009