

United States District Court  
Northern District of California  
Before The Honorable Vaughn R. Walker

Kristin Perry, et al., )  
)  
Plaintiff, )  
)  
vs. )  
)  
Arnold Schwarzenegger, )  
et al., )  
)  
Defendant. )  
)  
\_\_\_\_\_ )

No. C09-2292 VRW

COPY

San Francisco, California  
Thursday, July 2, 2009

Reporter's Transcript Of Proceedings

Appearances:

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By: Ethan D. Dettmer, Esquire

(Appearances continued on next page.)

Reported By: Sahar McVickar, RPR, CSR No. 12963  
Official Reporter, U.S. District Court  
For the Northern District of California

(Computerized Transcription By Eclipse)

1 Appearances, continued:

2 For Plaintiffs: Boies, Schiller & Flexner, LLP  
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 By: Theodore H. Uno, Esquire  
 Jeremy M. Goldman, Esquire

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 13 By: Tamar Pachter, Esquire

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 15 By: Claude F. Kolm, Esquire  
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17 For Intervenors: Cooper & Kirk  
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 By: Charles J. Cooper, Esquire  
 19 David Thompson, Esquire  
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20 For Amici: American Civil Liberties Union  
 21 Union Foundation of Northern California  
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 By: Alan L. Schlosser, Esquire  
 23 Elizabeth O. Gill, Esquire

24  
 25 (Appearances continued on next page.)

1 Appearances, continued:

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3  
4 By: **Therese M. Stewart, Esquire**  
5 **Chief Deputy City Attorney**

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1 Thursday, July 2, 2009

10:00 a.m.

2 P R O C E E D I N G S

3 **THE CLERK:** Calling our next case, Civil Docket No.  
4 09-2292, Kristin Perry, et al., versus Arnold Schwarzenegger,  
5 et al.

6 Counsel, please state your appearances for the  
7 record.

8 **MR. OLSON:** Theodore B. Olson, Your Honor, Chief  
9 Judge Walker, for the plaintiffs.

10 **THE COURT:** Good morning, Mr. Olson.

11 **MR. OLSON:** Good morning, Your Honor.

12 And thank you for the opportunity so early in the  
13 case, to appear before you and to move it along.

14 I would like to say --

15 **THE COURT:** Are we going to have other appearances?

16 Let's have all appearances.

17 **MR. MENNEMEIER:** Ken Mennemeier on behalf of the  
18 Governor and on behalf of Mark Horton in his capacity as  
19 Director of California Department of Public Health and on  
20 behalf of Linette Scott, who is named in her capacity as a  
21 Deputy Director in the California Department of Public Health.

22 **THE COURT:** Very well, Good morning, Mr. Mennemeier.

23 **MR. MENNEMEIER:** Yes, sir.

24 **THE COURT:** Very well.

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

1 Tamar Pachter on behalf of the Attorney General.

2 **THE COURT:** Good morning.

3 **MS. PACHTER:** Good morning.

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

5 Gordon Burns on behalf of the Attorney General.

6 **THE COURT:** Mr. Burns, good morning.

7 **MR. BURNS:** Good morning.

8 **MR. KOLM:** Good morning, Your Honor.

9 Claude Kolm on behalf of Alameda County Clerk  
10 Recorder.

11 **THE COURT:** Yes, Mr. Kolm, good morning.

12 **MR. COOPER:** Good morning, Judge walker.

13 Charles Cooper. I represent the intervenors in the  
14 case, the official proponents of Proposition 8. I'm here with  
15 my colleagues, David Thompson --

16 **MR. THOMPSON:** Good morning, Your Honor.

17 **MR. COOPER:** -- and Pete Patterson. We are here  
18 with the permission of the Court, and we were grateful for  
19 that.

20 **THE COURT:** Very well, good morning. Good morning,  
21 Mr. Cooper.

22 **MR. BOUTROUS:** Good morning, Your Honor.

23 Theodore Boutrous, also for the plaintiffs.

24 **THE COURT:** Mr. Boutrous.

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

1 Chris Dusseault Gibson, Dunn & Crutcher, also for  
2 the plaintiffs.

3 **MR. MONAGAS:** Good morning, Your Honor.

4 Enrique Monagas, representing plaintiffs.

5 **MR. GOLDMAN:** Good morning, Your Honor.

6 Jeremy Goldman from Boies, Schiller & Flexner, also  
7 for the plaintiffs.

8 **MR. UNO:** Good morning, Your Honor.

9 Theodore Uno from Boise, Schiller & Flexner, also  
10 for the plaintiffs.

11 **MR. DETTMER:** Thank you, Your Honor.

12 Ethan Dettmer of Gibson Dunn, on behalf of  
13 plaintiffs.

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

15 Sarah Piepmeier Gibson, Dunn, also for the  
16 plaintiff.

17 **MR. TAYRANI:** Good morning, Your Honor.

18 Amir Tayrani from Gibson Dunn for the plaintiffs.

19 **THE COURT:** Very well.

20 And, I understand we have some amici that has filed  
21 papers; are they just going to sit and listen this morning, or  
22 are they going to weigh in on anything?

23 (Laughter.)

24 **MS. STEWART:** Good morning, Your Honor.

25 Therese Stewart for the City of San Francisco.

1           We didn't view ourselves as needing to speak, but  
2 we'll happily do so, if the Court wants to hear from us.

3           **THE COURT:** All right, well, you know, simply  
4 because you appear doesn't mean you to have to talk.

5                           (Laughter.)

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

7           Alan Schlosser for the American Civil Liberties  
8 Union appearing for amicus ACLU, Randall V. Hoke and National  
9 Center for Lesbian Rights.

10          **THE COURT:** All right.

11          **MR. LORENCE:** Your Honor?

12          **THE COURT:** Yes?

13          **MR. LORENCE:** Jordan Lorence with the Alliance  
14 Defense Fund. And we are with Charles Cooper on Prop 8, too.

15          **THE COURT:** Very well, good morning, Mr. Lawrence.

16          **MR. NIMOCKS:** Austin Nimocks on behalf of the  
17 intervenor.

18          **THE COURT:** Anybody else?

19          **MR. RAUM:** Brian Raum on behalf of the proponents,  
20 as well, Your Honor.

21          **THE COURT:** Good morning.

22          **MR. CAMPBELL:** And finally, Your Honor, James  
23 Campbell on behalf of the intervenors.

24          **THE COURT:** All right.

25          Well, let's see, we have at least three matters to

1 deal with. And, as you know, on June 30, I issued a -- an  
2 order with some tentative rulings, and I would like, obviously,  
3 anybody who wishes to react to those to speak up. Those are  
4 tentative decisions, and so, if anybody has any difficulty that  
5 he or she wishes to present with respect to those, I'll be  
6 happy to hear and to consider whatever position a party wishes  
7 to present.

8 But the three matters, as I see it, that we have to  
9 deal with this morning are, first of all, the motion to  
10 intervene; second, the application for preliminary injunction;  
11 and then, third, how we are going to proceed in the case.

12 Now, with respect to the motion to intervene, that  
13 basically is unopposed and, it does seem to me, substantially  
14 justified in this case, particularly where the authorities, the  
15 defendants who ordinarily would defend the proposition or the  
16 enactment that is being challenged here, are taking the  
17 position that, in fact, it is constitutionally infirmed. And  
18 so, it seems to me, both for practical reasons and reasons of  
19 proceeding in this case in an orderly and judicial fashion that  
20 intervention is appropriate.

21 Certainly, under California law, as I understand it,  
22 proponents of initiative measures have the standing to  
23 represent proponents and to defend an enactment that is brought  
24 into law by the initiative process.

25 So first, are there any objections to granting the



1 motion to intervene?

2 (No response.)

3 **THE COURT:** Hearing none, that motion will be  
4 granted.

5 Now, with respect to preliminary injunction, in the  
6 Ninth Circuit the test for the issuance of a preliminary  
7 injunction is generally described in one of two formulations.  
8 The one that I think is most applicable here is whether serious  
9 questions are raised and whether the balance of hardships tips  
10 in favor of the party seeking injunctive relief.

11 In this situation, we have a claim that  
12 constitutional rights have been violated. And, typically,  
13 those are regarded as weighty claims raising serious questions.  
14 And in addition, as I indicated a moment ago, the Attorney  
15 General of California has indicated that he believes the  
16 initiative measure at issue here is constitutionally invalid.  
17 And so, those facts would surely indicate that the Court is  
18 facing a situation in which serious questions are raised.

19 The more difficult issue is whether or not the  
20 balance of hardships tips in favor of granting an injunction.  
21 And I was particularly impressed by the Governor's submission,  
22 which I thought was quite a cogent one. He pointed out that in  
23 the periods of time in which the California Supreme Court had  
24 authorized same-sex marriages, a number of same-sex marriages  
25 were performed in the state. And during that period of time,

1 as well as the earlier period of time, after the City and  
2 Council of San Francisco issued marriage licenses to same-sex  
3 couples, that there was a good deal of uncertainty on the part  
4 of the county authorities with respect to the issuance of  
5 marriage licenses, and that created a confusion and  
6 administrative uncertainty, an important aspect of the work of  
7 these local agencies.

8           And, perhaps more importantly, there was a good deal  
9 of uncertainty on the part of the individuals who were  
10 involved, whether or not they were undertaking relationships  
11 that would be recognized at law, and would be continued to be  
12 deemed to be valid. And so, those uncertainties, I think,  
13 weigh very heavily in this situation against the issuance of a  
14 preliminary injunction prior to the fact -- prior to the  
15 ability, prior to the ability of the Court to consider the  
16 issues here on a full record.

17           The briefing that's been submitted so far is, is  
18 fine, in a preliminary way, but it is only preliminary. And a  
19 lot of factual assertions have been made in these statements.  
20 And briefing has been set forth, but it's hardly of an extent  
21 or nature that would enable the Court to make a decision on a  
22 full record.

23           And so, I'm inclined to think that a preliminary  
24 injunction should not be granted at this time, but rather, as  
25 the Court indicated in the June 30 order, we should proceed to

1 discuss how we're going to try this case, how we are going to  
2 handle this case, and deal with the issues that we confront.

3           And in that connection, there are, as indicated in  
4 the June 30 order, a lot of factual questions, a lot of factual  
5 assertions have been made. Now, this is a trial court, this is  
6 not the Supreme Court of the United States where we deal with  
7 these boxcar philosophical issues. We deal with facts; we deal  
8 with evidence; we deal with testimony of witnesses. And to the  
9 extent there are factual issues, I think we need to proceed in  
10 the way in which a trial court proceeds to deal with those  
11 issues, to present the facts, to present the evidence, and to  
12 make what determinations are necessary.

13           I realize that a good many of these questions are  
14 mixed questions of law and fact, but where there is a factual  
15 component, it does seem to me that we ought to address those  
16 facts in the traditional way in which courts have dealt with  
17 factual questions.

18           I realize, also, that a good many of these factual  
19 questions will depend upon expert testimony, opinion testimony,  
20 but I think we should deal with those the same way that the  
21 Supreme Court has counseled and guided us to deal with those  
22 kinds of questions, in accordance with the standards of the  
23 Daubert decision, Kumho Tire, and its progeny, or their  
24 progeny, and deal with those opinion issues in a manner  
25 consistent with the way that opinion testimony should be dealt

1 with.

2 I say all of this because I'm reasonably sure, given  
3 the issues involved and given the personnel that are in the  
4 courtroom, that this case is only touching down in this court,  
5 that it will have a life after this Court, and what happens  
6 here, in many ways, is only a prelude to what is going to  
7 happen later.

8 So I am inclined to think that how we do things here  
9 is more important than what we do, that our job in this case,  
10 at this point, is to make a record. And I want to give the  
11 plaintiffs, the defendants, and the intervenors the opportunity  
12 to make the record that they think is appropriate for the  
13 decision. And so I think we've got our work cut out for us.  
14 But, I'd like to invite counsel to tell me how they wish to  
15 proceed.

16 First, I should turn to the plaintiffs with respect  
17 to the motion for preliminary injunction; anything further that  
18 you wish to say in support of that?

19 Mr. Olson?

20 **MR. OLSON:** Your Honor, thank you.

21 Let me say, preliminarily, that we understand and  
22 appreciate, respect the wisdom of Your Honor's June 30th order  
23 as you have articulated it again today. We accept it, and we  
24 are prepared to go forward on that basis.

25 I feel, however, it's imperative to just say a word

1 or two about the preliminary injunction matter, having said  
2 that we are accepting and perfectly willing to go forward, as  
3 you -- as you suggested, if I may.

4 **THE COURT:** Very well.

5 **MR. OLSON:** The -- every day that Proposition 8 is  
6 enforced perpetuates a tragic injustice on tens of thousands of  
7 Californians, including, specifically, the plaintiffs who are  
8 here, today, before you. Proposition 8 brands our citizens,  
9 our neighbors, our friends, our family members, and our  
10 co-workers as second class, unworthy, and different. The harm  
11 it does is incalculable, continuous, painful, irreparable, and  
12 without justification.

13 The United States Supreme Court has held again and  
14 again that the right to marry is the most important relation in  
15 life and a right of fundamental importance to all citizens.  
16 The Court has variously characterized marriage as a right of  
17 liberty, privacy, and association. And, as you have noted, the  
18 California Attorney General, to his great credit, squarely  
19 admits that taking from same-sex couples the right to civil  
20 marriage cannot be squared with the guarantees of the  
21 Fourteenth Amendment. Therefore, these individuals are  
22 suffering irreparable injury under a California law that the  
23 State of California, through its chief law enforcement officer,  
24 acknowledges is unconstitutional.

25 With respect to the point that the Governor made and

1 you referred to earlier this morning, Your Honor, with respect  
2 to the uncertainty of the effect of marriages, if a preliminary  
3 injunction was granted, my clients would prefer the uncertainty  
4 of the ultimate outcome in this case, to the certainty of daily  
5 irreparable harm.

6 Now, having said that, I think that it's important  
7 to have stated why we felt it was important to bring this  
8 Court's -- to this Court's attention the need for immediate  
9 injunctive relief; however, you have said, and we agree, that  
10 this is important, that this is a foundation for what might  
11 happen subsequently, and that it is in the interest of justice,  
12 to use your words, that this be given a full, prompt,  
13 expeditious, and efficient resolution of this case so that the  
14 foundation is there, to the extent it might be necessary to  
15 proceed.

16 I am prepared to address that part of the case  
17 management issue, but you may wish to hear from others before I  
18 do so.

19 **THE COURT:** I would, if anybody wishes to be heard  
20 on the preliminary injunction issue.

21 **MR. MENNEMEIER:** Your Honor?

22 **THE COURT:** Yes, Mr. Mennemeier?

23 **MR. MENNEMEIER:** Your Honor, I just briefly want to  
24 indicate that the Governor certainly supports the approach that  
25 you outlined in the June 30 order. We think that it is

1 important to have these important federal constitutional issues  
2 heard expeditiously. And so, we concur with the approach you  
3 outlined in that order.

4 That's all I have, Your Honor.

5 **THE COURT:** All right, very well. Thank you.

6 Anybody else?

7 (No response.)

8 **THE COURT:** Mr. Cooper?

9 **MR. COOPER:** Your Honor, thank you very much.

10 I do want to -- to offer some brief thoughts in  
11 response to what my friend, Mr. Olson, has -- has offered to  
12 the Court, but I want to preface it by saying this: The  
13 intervenors, the proponents of Proposition 8, are very  
14 sensitive to the issue of pace in this court and to the  
15 concerns that Mr. Olson has raised.

16 If, it is true that, as he says, that our  
17 constitution entitles gays and lesbians in California and  
18 elsewhere to marry, then we want to do everything that we can  
19 to move this proceeding along so that -- so that the plaintiffs  
20 and others can exercise their constitutional rights just as  
21 soon as possible.

22 But, Your Honor, before we proceed, I would like to  
23 take stock of the nature of the claim that Mr. Olson is  
24 advancing to the Court.

25 The constitutional right invoked by the plaintiff --

1           **THE COURT:** I'm just saying -- is this more related  
2 to case management, or is it more related to the preliminary  
3 injunction?

4           **MR. COOPER:** It is related to the kind of prefatory  
5 comments that Mr. Olson made.

6           **THE COURT:** All right.

7           **MR. COOPER:** But I certainly accept his statement  
8 that he is not going to contest the Court's order. And I'm not  
9 here, obviously, Your Honor --

10          **THE COURT:** I gather you are not contesting it,  
11 either.

12                           (Laughter.)

13          **MR. COOPER:** Not at all, Your Honor.

14          **THE COURT:** All right.

15          **MR. COOPER:** I'm simply offering some  
16 counter-thoughts to the points that --

17          **THE COURT:** All right.

18          **MR. COOPER:** -- that Mr. Olson has shared with the  
19 Court.

20                 And again, and I want the Court to simply step back  
21 for a moment and take stock of -- of the claim that is being  
22 advanced here.

23                 According to the plaintiffs, this is not new, this  
24 constitutional right, it's, as they put it in their motion  
25 papers, the long-standing right of all persons to exercise



1 freedom of personal choice and autonomy in deciding whom to  
2 marry.

3           And further, they say that the prohibition in  
4 Proposition 8 against the plaintiff's freedom to marry persons  
5 of the same sex is so devoid of any conceivable rational basis  
6 that it is explicable only in terms of naked animus against  
7 gays and lesbians and a bare desire to harm them.

8           Now, Your Honor, I want to suggest that to grasp the  
9 radical nature of this claim, it is enough to say that it  
10 would, if it were accepted, sweep away not only Proposition 8  
11 and the sovereign will of the people in the state, but the  
12 common definition of marriage and the laws of 43 other states  
13 and the Federal Government in the Defense of Marriage Act.

14           But, there is more to say than that, for the  
15 plaintiff's claim also condemns as irrational, as bigoted, the  
16 universal definition of marriage that has hitherto prevailed by  
17 law in America and in virtually every known society for as long  
18 as the subject of marriage has been governed by law.

19           Now, the closest thing that the plaintiffs offer,  
20 thus far, to this point is that tradition alone is a manifestly  
21 insufficient basis for a state to impair a person's  
22 constitutionally protected right to marry. And there, Your  
23 Honor, they are simply not coming to grips with the fact that  
24 tradition is a definitional element of the Supreme Court's test  
25 for identifying fundamental constitutional rights.

1           As the Court said in Gluxberg, "The due process  
2 clause specially protects those fundamental rights and  
3 liberties which are objectively deeply rooted in the nation's  
4 history and tradition."

5           And it's at that threshold level, Your Honor, of  
6 identifying the fundamental right at issue, the plaintiffs due  
7 process claim ultimately we will advance here, fails. For it's  
8 really patently clear that the right to marry recognized by the  
9 Supreme Court in every one of its cases is defined by the  
10 marital institution that it protects, the right of a man and a  
11 woman to marry.

12           Every Supreme Court case that describes marriage and  
13 speaks to its fundamental constitutional protected nature  
14 identifies its central procreative purpose. And, regarding the  
15 freedom of choice on that, Your Honor, there simply can be no  
16 doubt that those opinions would not have been written in the  
17 same formulations had -- had the claim that is being advanced  
18 here, been advanced there.

19           So, Your Honor, the bottom line is that the  
20 plaintiffs are not seeking simply to have their right to marry  
21 enforced here, they are seeking to have it redefined here.

22           With that, Your Honor, I appreciate it.

23           **THE COURT:** Very well. Thank you, Mr. Cooper.

24           Anybody else want to make a prefatory statement  
25 before we roll up our sleeves and do a little bit of case

1 management?

2 (No response.)

3 **THE COURT:** All right, fine.

4 Now, when I talked about the various facts that we  
5 have to deal with here, I omitted to mention one other way of  
6 approaching facts. And I mentioned the traditional way of  
7 presenting evidence, subjecting witnesses to cross-examination  
8 at trial, and so forth; there may be, in addition to mixed  
9 questions of law and fact and opinion testimony, there may be  
10 facts as to which there is no genuine dispute and as to which  
11 we should deal with those facts by way of summary judgment  
12 motion. And so, we might want to consider building that into  
13 whatever schedule we talk about.

14 I don't know, maybe -- maybe the parties are not  
15 interested in motion practice before the trial, maybe they are,  
16 but, in any event, that is certainly a matter that we should  
17 consider.

18 Well, Mr. Olson, you are the plaintiff; tell me how  
19 you would like to proceed.

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

21 I have consulted briefly with my colleague,  
22 Mr. Cooper, which I think is contemplated by the Court's  
23 rule --

24 **THE COURT:** Certainly is.

25 **MR. OLSON:** We've talked about some of these issues.

1 And I do not purport to speak for him, but I will say what I  
2 think in reaction to your order and how we might assist one  
3 another and the Court in an expeditious resolution of this  
4 case.

5 As you have indicated, many of these issues, we  
6 think, can possibly be addressed by stipulated fact. Many of  
7 these might be addressed through the course of admissions.  
8 Many of these issues may be already adjudicated facts. There  
9 is a great deal on this subject that's been adjudicated with  
10 respect to the impact and the purport of Proposition 8 by the  
11 California Supreme Court in what we would regard as in a  
12 conclusive manner.

13 There may be many issues of --

14 **THE COURT:** There was no trial, was there, in the  
15 marriage cases?

16 **MR. OLSON:** Well, no, Your Honor, but --

17 **THE COURT:** Even at the Superior Court level.

18 **MR. OLSON:** But --

19 **THE COURT:** Am I correct, and by all means correct  
20 me if I'm in error, that the trial judge there did not conduct  
21 a trial.

22 **MR. OLSON:** I --

23 **THE COURT:** He proceeded on the basis of affidavits  
24 and declarations?

25 **MR. OLSON:** I believe that's correct.

1 (Cell phone rings.)

2 **THE COURT:** Okay, we have a cell phone going off  
3 somewhere. At least it's not quacking like --

4 (Laughter.)

5 **THE COURT:** -- they do in some courts.

6 **MR. OLSON:** I understand that point, Your Honor, but  
7 that is an appropriate way to reach conclusions of fact. And  
8 it's -- and, in fact, that may be part of the process that you  
9 might participate in through motion practice here.

10 We are not disagreeing that there may be some things  
11 at the end of the day that have to be resolved in that fashion,  
12 but there may be ways in which we can narrow the issues by  
13 agreement or turning to things that the United States Supreme  
14 Court said in the Romer case might be something that the trial  
15 court would have to accept as conclusive in terms of factual  
16 determinations by the highest court of the State, who has  
17 considered perhaps something concerning, for example, the  
18 effect of Proposition 8 and what it -- what it does, and the  
19 effect of denying the opportunity to marry same-sex  
20 individuals.

21 But, I'm not trying to argue that point now, I'm  
22 simply saying that we think that there are many things that can  
23 be resolved by agreement, by cross-motions, perhaps, for  
24 summary judgment, or perhaps some narrowing process.

25 And what I was going to propose, and I mentioned

1 this to Mr. Cooper before the hearing, and he'll -- he'll speak  
2 in response to it, is that if we had, for example, possibly 30  
3 days to submit to Your Honor a written analysis of the facts  
4 that we think could be agreed upon or could -- or which could  
5 be dealt with my motion, and we could consult with one another  
6 in connection with preparing joint submissions along this  
7 ground, that might help to narrow the issues upon which there  
8 then might have to be expert testimony or opinion evidence and  
9 that sort of thing, in other words, to narrow the ballpark, the  
10 field.

11 **THE COURT:** That is certainly an invitation that I'm  
12 not going to refuse.

13 (Laughter.)

14 **MR. OLSON:** And it seems to me that that way, we  
15 could come back before you, after having submitted -- made  
16 submissions along those lines, and talk to you then about how  
17 we might proceed further in the most expeditious way.

18 Now, I mentioned 30 days, but we'd be willing to do  
19 it sooner. But it seems to me that that is not an unreasonable  
20 period of time, given the Court's interest and our interest in  
21 moving forward expeditiously and everyone's interest in doing  
22 this thoroughly.

23 **THE COURT:** What about -- I want to hear  
24 Mr. Cooper's response to that, but before doing so and while  
25 you're at the podium, what about discovery? There certainly is

1 some discovery that is going to be necessary here, isn't there?

2           **MR. OLSON:** Well, I'm not sure. And that's one of  
3 the reasons that I would think it would be important to  
4 communicate with co-counsel. Is there discovery necessary? If  
5 there is, what is it? What form would it take?

6           Discovery includes, as I understand it, request for  
7 admissions, interrogatories, depositions, and that sort of  
8 thing. I think that to the extent that there may be discovery  
9 that is necessary, we could maybe work that out and make a  
10 submission to Your Honor.

11           As I stand here today, we believe that an  
12 affirmative, powerful case can be made that the constitution is  
13 being violated based upon the fact -- based upon facts that are  
14 in the declarations of the plaintiffs, based upon matters of  
15 which the Court can take judicial notice, based upon facts that  
16 have been determined by the California Supreme Court and  
17 recognition that has occurred by the United States Supreme  
18 Court, but I may be wrong.

19           And Mr. Cooper might disagree with me or our other  
20 opponents might disagree, but we do know that the California  
21 Supreme -- the California Attorney General has already decided  
22 that this proposition is unconstitutional.

23           Now, I think that we could make a compelling case  
24 upon which you could reach a conclusion that Proposition 8  
25 denies due process to the plaintiffs and denies them the equal

1 protection of the laws. If there is discovery, I guess we will  
2 hear from others with respect to how much might be necessary,  
3 but I think that to the extent that there is the necessity of  
4 discovery, it doesn't have to be broad.

5 But we could also not only confer with one another  
6 and make submissions to you, but you might feel differently  
7 once we have done so and say that this is something that I need  
8 more from you.

9 **THE COURT:** All right.

10 Mr. Cooper, how does that proposal sound to you?

11 **MR. COOPER:** Well, Your Honor, we -- as Mr. Olson  
12 mentioned, we did have a chance very briefly to put our heads  
13 together, and we are very close to the same page on this,  
14 actually.

15 And the Court made a good point at the outset, that  
16 the California marriage cases, there was no trial in connection  
17 with that. And as far as our research has been able to turn  
18 up, we can't find that any of the marriage cases, the dozen or  
19 so of them that have proceeded around the country, actually  
20 submitted issues of fact to trial, as opposed to having gone  
21 off on summary judgment. I think the reason for that --

22 **THE COURT:** Isn't that -- isn't that a problem?

23 **MR. COOPER:** Well --

24 **THE COURT:** Isn't that a problem? I think you and  
25 Mr. Olson agree that what's going on here is basically a



1 prelude to further proceedings, and shouldn't those further  
2 proceedings be based upon a fully developed record here?

3 **MR. COOPER:** Your Honor absolutely. And --

4 **THE COURT:** We develop records with trials.

5 **MR. COOPER:** Well, Your Honor, and what I want to  
6 submit for your consideration is -- is the proposition that the  
7 factual issues that the Court has identified, or at least by my  
8 lights, a large number of them, really concern legislative  
9 facts rather than adjudicatory facts.

10 And I want to submit to you a description of this  
11 point I'm making from Judge Posner in the Seventh Circuit. He  
12 said the distinction between adjudicatory and legislative  
13 facts, the distinction is between facts germane to the specific  
14 dispute, which often are best developed through testimony and  
15 cross-examination, and facts relevant to shaping a general rule  
16 which has the discussion in this opinion and illustrates more  
17 often, are facts reported in books and other documents not  
18 prepared specially for litigation or refined in its fires.

19 And the Ninth Circuit has also, in a couple of, I  
20 think, relevant opinions, drawn forward this -- this  
21 distinction between an adjudicatory fact, that is, facts that  
22 relate specifically to, for example, these plaintiffs, or  
23 larger legislative facts that go to the, for example, the  
24 rational basis, or lack thereof, for -- and by the way, the  
25 test here would be any conceivable rational basis -- whether or

1 not that legislative fact has been developed and demonstrated.

2 And that can be done with literature, the decisions  
3 of the -- of the relevant state courts, the social science  
4 literature, and what have you, things that are not, for  
5 example, an expert who is specifically engaged by one of the  
6 parties to treat with, expert testimony that pertains  
7 specifically to the facts here as opposed to -- the adjudicated  
8 facts here as opposed to the legislative facts treating with  
9 legislation itself or the rule of law that will govern going  
10 forward. And that case, Your Honor, is Indiana Harbor Belt  
11 versus American Sign, (phonetic) at 916 F.2d, 1174.

12 Beyond that, Your Honor, I think Mr. Olson is making  
13 a useful suggestion that the two of us and our friends  
14 representing the Government defendants I do believe ought to  
15 make the effort to try to identify some -- some of these facts  
16 that you've -- that you've listed as well as perhaps others  
17 that we know are going to be relevant to our cases and attempt  
18 to stipulate to them or perhaps agree that they are controlled  
19 in some fashion by a previous decision, a Ninth Circuit case,  
20 or a California Supreme Court case, and take that first step to  
21 narrow this down and make it as manageable as possible.

22 What I would submit is that -- is that the parties  
23 ought, well then try, through cross-motions for summary  
24 judgment to either resolve the case -- and I frankly think it  
25 can be resolved on -- on cross motions -- but even if it can't

1 be, and the Court does determine that, yes, a more developed  
2 record would be helpful to the Court, and that is what we will  
3 be here to do, Your Honor, is ensure that the record that the  
4 Court believes it needs to resolve this gravely important  
5 question correctly, is before it. And we'll do anything and  
6 everything in our power to assist the Court in that fashion.

7 But -- but, I guess what I'm saying is that through  
8 those methods, we can skinny down as much as possible what we  
9 may have to try up, and may end up not having to actually have  
10 a trial.

11 On discovery, I agree also with Mr. Olson that that  
12 may be minimized. It's going to depend on what he -- for  
13 example, if we do go cross-motions for summary judgment, it  
14 will depend on what he attaches to it. If he has some expert  
15 reports, then, of course, I want to depose those experts. And  
16 the same, I'm sure, is true of -- of him, depending on what we  
17 would provide to the Court by way of illumination.

18 But I don't think -- I don't think the discovery,  
19 necessarily, is going to have to be -- be onerous in this case.

20 **THE COURT:** Well, I'm not sure that this is like an  
21 antitrust case, where we are going to have reams and reams and  
22 reams of documents.

23 **MR. COOPER:** And e-mails.

24 (Laughter.)

25 **THE COURT:** Well --

