Volume 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, JUDGE

KRISTIN PERRY, ET AL., Plaintiffs,	)	
VS.	)	NO. C 09-2292 VRW
ARNOLD SCHWARZENEGGER, ET AL., Defendants.	)	San Francisco, California Wednesday August 19, 2009 10:02 a.m.

TRANSCRIPT OF PROCEEDINGS

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Reported By: Belle Ball, CSR 8785, RMR, CRR
Official Reporter, U.S. District Court

WEDNESDAY, AUGUST 19, 2009

10:02 A.M.

P R O C E E D I N G S

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

Appearances on the Plaintiffs' side, please.

MR. OLSON: Good morning, Your Honor. Theodore B. Olson, Gibson, Dunn & Crutcher, on behalf of the Plaintiffs.

THE COURT: Good morning, Mr. Olson.

MR. BOIES: Good morning, Your Honor. David Boies of Boies, Schiller & Flexner, on behalf of Plaintiffs.

THE COURT: Mr. Boies, good morning.

MR. BOUTROUS: Theodore J. Boutrous, Jr., for the Plaintiffs. Good morning, Your Honor.

THE COURT: Mr. Boutrous, good morning.

MS. KAPUR: Good morning. Theane Kapur for the Plaintiff.

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

THE COURT: Good morning.

MR. GOLDMAN: Good morning, Your Honor. Jeremy Goldman of Boies, Schiller & Flexner, for the Plaintiffs.

MR. UNO: Good morning, Your Honor. Theodore Uno, Boies, Schiller & Flexner, for the Plaintiffs.

MR. McGILL: Good morning, Your Honor. Matthew

McGill, Gibson, Dunn & Crutcher, for the Plaintiffs.

THE COURT: Good morning.

MR. DUSSEAULT: Good morning, Your Honor. Christopher Dusseault, also of Gibson, Dunn & Crutcher, for the Plaintiffs.

THE COURT: Good morning. Any more on the Plaintiffs' side? Very well.

How about the other side?

MR. MENNEMEIER: Good morning, Your Honor. Ken Mennemeier on behalf of Governor Schwarzenegger and two members of his administration.

THE COURT: Good morning, Mr. Mennemeier.

MR. MENNEMEIER: Thank you.

MS. LINDEVALDSEN: Rena Lindevaldsen, Proposed Intervenor Defendant, Campaign for California Families.

THE COURT: Good morning.

MS. PACHTER: Good morning, Your Honor. Deputy Attorney General Tamar Pachter, for the Attorney General.

THE COURT: Good morning.

MR. BURNS: Good morning. Deputy Solicitor Gordon Burns for the Attorney General.

THE COURT: Good morning.

MS. WHITEHURST: Good morning, Your Honor. Judy Whitehurst with the Los Angeles County Counsel's office, on behalf of Dean C. Logan.

THE COURT: Good morning.

MR. KOLM: Good morning, Your Honor. Claude Kolm, Alameda County Counsel's Office, on behalf of Defendant Patrick O'Connell, the Alameda County Clerk Recorder.

THE COURT: Good morning.

MS. STERN: Good morning, Your Honor. Lindsey Stern, Alameda County Counsel's Office, on behalf of Defendant Patrick O'Connell.

MR. ESSEKS: Good morning, Your Honor. James Esseks from the American Civil Liberties Union, on behalf of Proposed Plaintiff Intervenors Our Family Coalition, Lavender Seniors of East Bay, and PFLAG.

THE COURT: I'm sorry.

MR. ESSEKS: And PFLAG.

THE COURT: Yes, all right.

MR. ESSEKS: Thank Your Honor.

MS. PIZER: Good morning, Your Honor. Jennifer Pizer, Lambda Legal Defense and Education Fund, also for the Proposed Plaintiff Intervenors, Our Family Coalition, et cetera.

THE COURT: Good morning.

MR. MINTER: Good morning. Shannon Minter, National Center for Lesbian Rights, also on behalf of Proposed Intervenor Plaintiffs.

THE COURT: Good morning.

MS. STEWART: Good morning, Chief Judge Walker. Terry Stewart and City Attorney Dennis Herrera, Erin Bernstein, and Christine Van Aken on behalf of the City and County of San Francisco.

THE COURT: Very well. Good morning.

MR. COOPER: Good morning, Mr. Chief Judge. Charles Cooper of Cooper & Kirk, for the Defendant Intervenors.

THE COURT: Good morning, Mr. Cooper.

MR. THOMPSON: Good morning, Your Honor. David Thompson from Cooper & Kirk, for the Defendant Intervenors.

MR. RAUM: Good morning, Your Honor. Brian Raum for Defendant Intervenor.

THE COURT: Good morning.

MR. CAMPBELL: Good morning, Your Honor. Jim Campbell from -- I'm sorry, on behalf of the Proposed Plaintiffs Intervenors -- or, I'm sorry, the Prop 8 proponent.

THE COURT: All right. Any other appearances? All right, that's quite a lineup.

Now, we have basically, I think, two things to do this morning. We have the motions to intervene which need to be addressed, and I think we should probably take up those issues first. And then after we address the motions to intervene, I want to talk to Counsel about case management. But because the case management issues may depend upon who's in the case and who's not in the case, and exactly what role

various parties have, I think we should take up the motions to intervene first.

My inclination is to hear the motions to intervene by the Our Family Coalition and the Campaign for California Families first. And then because I think there are somewhat different issues raised by the City and County of San Francisco, to take up that motion.

So, that would be the agenda that I would set for this morning. Do counsel have any alternatives that he or she would like to propose?

MR. OLSON: (Shakes head)

THE COURT: All right. Let's proceed, then. Who would like to lead off for the Our Family Coalition?

MR. ESSEKS: Your Honor --

THE COURT: Let's see, you are Mister --

MR. ESSEKS: Esseks.

THE COURT: Esseks.

MR. ESSEKS: Yes, Your Honor. I'm James Esseks from the ACLU. Together with my colleagues at Lambda Legal and the National Center for Lesbian Rights, we represent three LGBT community organizations, Your Honor, that wish to intervene in the lawsuit.

Those organizations are Our Family Coalition, which is an organization that consists of families headed by same-sex couples and LGBT individuals; Lavender Seniors of the East Bay,

which is an organization that is made up of LGBT seniors; and PFLAG, Parents, Friends and Families of Lesbians and Gays, which is an organization that consists both of the LGBT individuals and people who are their family and their supporters.

Your Honor, these three community organizations move to intervene here for three reasons. First off, the rights of these organizations' members will be significantly affected by the rulings of this Court.

Second, these organizations want to join the lawsuit in order to help illustrate the various different harms that Proposition 8 inflicts on same-sex couples throughout California.

And third, these organizations seek to intervene, Your Honor, because through their counsel, they bring expertise and -- a deep understanding of the issues and expertise in putting together the kind of factual record that the Court has indicated it is interested in developing in this case.

Given the liberal standards for intervention in the Ninth Circuit, Your Honor, we believe that these three organizations should be allowed to intervene. Either under intervention as of right, or intervention with the Court's permission.

THE COURT: Well, tell me what the significant protectable interest of these organizations is.

MR. ESSEKS: Your Honor, the significant protectable interests would be the interests of the organization's members. That is, each is these organizations has among its members same-sex couples who live in California who would like to marry. And Proposition 8 obviously makes that impossible at the moment.

THE COURT: But isn't that interest represented by the Plaintiffs?

MR. ESSEKS: That is an interest that is represented by the Plaintiffs, Your Honor. But in terms of getting to the adequacy-of-representation prong of the intervention-as-of-right analysis, they are -- first off, we do share the same ultimate objective with the Plaintiffs. That is, the objective of striking down Proposition 8.

That raises a presumption that indeed, the Plaintiffs will adequately represent the interests of our clients, the community organizations and their members. However, that presumption is easily rebutted if the interests of our organizations and the interests of the Plaintiffs' may diverge. And they may diverge in multiple ways, Your Honor.

First off, the community organizations, through their members, have experienced a range of harms from Proposition 8 that the two Plaintiffs -- and quite frankly, Your Honor, any two couples -- cannot have experienced.

THE COURT: Well, as a practical matter, it is not

going to be possible to bring in every individual, with his or her background, his or her socioeconomic status, views on these issues. So, it's simply going to be impossible to represent the entire mosaic of the backgrounds of the individuals who wish to marry but are precluded from doing so by Proposition 8.

So, really, what does adding your group or groups to this lawsuit bring that is not otherwise presented by the Plaintiffs?

MR. ESSEKS: Your Honor, the -- the variety of interests that the members of the community organizations can present to the Court are directly relevant to legal questions that this Court is going to have to grapple with.

For example, one of the questions the Court is going to have to deal with is whether the registered domestic partnership system that California has set up is an adequate substitute for marriage or not. It goes to the core issue of whether there is inequality here, and the degree of that inequality.

THE COURT: Is that a legal question? Or a factual question?

MR. ESSEKS: I think it's both, Your Honor. But certainly, the facts that the community organizations can bring to the Court to show the full range of harms inflicted by on same-sex couples by Proposition 8, and how those harms are not remediated by access to the domestic partnership system can

help this Court grapple with the degree and the nature of the inequality that is prepared by Proposition 8.

So, for example, members of the community organizations have lived for a number of years with domestic partnership registries. And they have experienced how, in very concrete terms, that registry and that registration has not solved the problems that we expect the proponents to say they have solved.

For example, situations where, for example, older LGBT couples --

THE COURT: Well, but does -- is it necessary for your organizations to enter as parties in the litigation, for that evidence to be presented?

MR. ESSEKS: Well, Your Honor, certainly we would be hard-pressed to present that evidence ourselves if we were solely appearing before the Court amicus. It is possible, Your Honor, that the Plaintiffs could present similar evidence.

But, we don't have to show, in terms of the adequacy-of-representation prong of the intervention-as-of-right test, that they won't represent our interests. We simply need to show that the interests may diverge.

And these organizations, with their members, are very well-suited to bring to the Court and present the wide range of harms, and with very specific concrete detail, in a way that

will give the Court a better ability to grapple with the factual issues and the legal issues that the Court has to decide in the course of putting together the case.

A second example, Your Honor, of how the -- the myriad experiences of the members of our community organizations are relevant to legal issues is in the -- one of the in-process claims that is in both the Plaintiffs' complaint and the complaint that the community organizations would file. One.

Of those due-process claims, Your Honor, is based on not only the right to marry, but --

THE COURT: Not on what?

MR. ESSEKS: Not on the right to marry, but on the right to form intimate relationships, which is a right protected by the U.S. Supreme Court decision in *Lawrence versus Texas*.

In the Ninth Circuit's decision in *Witt versus Department of the Air Force*, Your Honor, which is a case about the don't ask, don't tell restriction on gay people in the military, the Ninth Circuit said that if a law intrudes upon the rights protected by the Supreme Court's decision in *Lawrence versus Texas*, that then this Court's job is to do a balancing act, to weigh two different competing interests. On the one hand, the interests of the government that undergird the law at question -- in that case it was don't ask, don't

tell; in this case, obviously, it would be Proposition 8 -- and to weigh thoughts interests against the interests of the individuals whose rights are compromised by that law.

And Your Honor, we submit that for this Court to adequately do that balancing, it needs to have or it would be helpful for it to have before it the full range of facts that our clients can provide about all the different ways in which Proposition 8 hurts those individuals.

And while it is possible, as I said earlier, that the Plaintiffs could present at least some of that evidence, our --

THE COURT: No, you're not presenting actual plaintiffs who have personal experience, and are able to present evidence based upon that personal experience. You -- you're a group of organizations. And whatever rights your organizations have are derivative of your members.

MR. ESSEKS: Indeed.

THE COURT: Whereas the Plaintiffs, of course, are directly affected by the law that is at issue here.

MR. ESSEKS: That's correct, Your Honor. But it's clear that organizations can bring claims on behalf of their members.

And one of the advantages -- and I think it's an advantages that the U.S. Supreme Court has identified of using organizations as plaintiffs, is -- that these organizations who have -- it's not a random collection of individuals. It's

people who have come together, for the express purpose of protecting certain rights and advancing certain agendas.

And so, these are organizations that collectively have the best interests of the community at heart, and can, you know, bring easily together a full range of the harms that are inflicted by Proposition 8.

THE COURT: So, basically what you're saying is that the factual record would be richer if your organizations were made parties to the litigation, as opposed to simply participating as amici.

MR. ESSEKS: Your Honor, I think that is -- that is absolutely correct, that is part of our argument. There.

Is a second way, Your Honor, in which the interests of the proposed community organization intervenors may diverge from the interests of the Plaintiffs. And that is that the Plaintiffs, obviously, are interested in this case because it's about marriage. And the community organizations are also interested in this case because of the core issues about marriage, and access to marriage for same-sex couples that the case will raise.

In the course of deciding the issues in this litigation, Your Honor, the Court will make rulings and factual findings that affect not just the question of whether restrictions on the right to marry for gay people violate the Constitution, but will also be relevant to other issues in gay

rights litigation and gay rights law. And these are issues that are directly relevant and of great concern to the community organizations, in a range of issues outside of marriage.

And there is a concern, Your Honor, that the arguments by the Plaintiffs may be pitched solely in terms of the right to marry, and without considering other issues that may affect other parts of LGBT rights law.

THE COURT: Very well. Thank you very much, Mr. Esseks.

And, let's hear from the Campaign for California Families. Is that Ms. --

MS. LINDEVALDSEN: Lindevaldsen, yes.

THE COURT: Yes, Lindevaldsen. Good morning.

MS. LINDEVALDSEN: Good morning, Your Honor. Rena Lindevaldsen.

The case management statement filed by the Proposition 8 Defendants makes very clear -- the one that was just filed on August 17th -- why it is the Campaign's motion should be grated, to intervene in this case.

In light of the stipulations that the Proposition 8 Defendants have indicated they're willing to agree in whole to, or in part, it is very clear that the interests of the Campaign, and in fact, those who voted to protect marriages between a man and a woman, are inadequately represented in this

litigation.

It bears emphasis at the outset that the motion to intervene is to be liberally construed in favor of intervention, but --

(Reporter interruption)

THE COURT: Well, are you saying -- are you saying that your client's interests go beyond those that are represented by the Intervenor Defendants, represented by Mr. Cooper? Is that what you're saying?

MS. LINDEVALDSEN: They include and go beyond those represented by the current Defendants, insofar as the Campaign for California Families has fought for 15 years in this state on behalf of voters to both protect the name of marriage, which is what Proposition 8 does, as well as the substantive rights of marriage and benefits.

THE COURT: Okay. Explain, then, to me where your client's interests go beyond those represented by Mr. Cooper's client.

MS. LINDEVALDSEN: Sure. The interests -- and probably the best way to show this is I've actually gone through the case management statement, and come up with eleven arguments or facts that the Proposition 8 Defendants are willing to stipulate to, in whole or part, that the Campaign, in order to vigorously defend marriage as between a man and a woman, which is what the voters so voted to protect in November

of 2008, they're willing to concede too much of Plaintiffs' case, both with regard to the similarly-situated aspect of the case, and the factors that Plaintiff have to show to be a suspect classification.

So, I can point those out to the Court, but with regard to the interests -- and in fact, this is the give-and-take --

THE COURT: Well, that would be interesting, if you would do so.

MS. LINDEVALDSEN: Sure. The Campaign --

THE COURT: Let me catch up with you, and get the case management statement.

MS. LINDEVALDSEN: The August 17th filing, yes.

THE COURT: Yes.

MS. LINDEVALDSEN: Exhibit B to the case management statement filed by Proposition 8 Defendants has a list of proposed stipulations by the Plaintiffs that the Proposition 8 Defendants are willing to agree, in whole or in part.

THE COURT: All right.

MS. LINDEVALDSEN: And I have gone through those, and can indicate where the Campaign stands ready to make arguments that the Proposition 8 Defendants are not ready to make arguments on, that are necessary to preserve marriage.

THE COURT: Okay. Well, give me have a couple of examples, here.

MS. LINDEVALDSEN: Sure. For example, Proposition 8 Defendants -- I'll start with No. 64.

THE COURT: Okay. Hold on.

MS. LINDEVALDSEN: -- are ready -- have agreed -- have agreed in whole that gays and lesbians, including Plaintiffs, have formed lasting, committed relationships. And, the Proposition 8 Defendants stand ready to agree to that one.

Based -- first of all, there's no -- there's no evidence in the sociological research that's out there that indicates this should be agreed to, in whole. Perhaps in part. And this goes to the similarly-situated aspect of Plaintiffs' case.

No. 19. Proposition 8 Defendants are willing to agree in whole that with the exception of, quote, "certain matters related to procreation," end quote, sexual orientation bears no relationship on the ability to contribute to society.

It does impact more than the ability to procreate. It impacts the ability to raise children, according to sociological research, educate them, and also given high-risk factors of certain pathologies, is going to go to the four factors necessary to show sexual orientations as suspect classification.

No. 21, "Same-sex sexual orientation does not result in any impairment of judgment..." Given the high risk factors that is out there right now in the scientific and psychological

research, concerning medical, psychological and relationship dysfunctions. This concedes too much to agree to this in whole. And this will relate to the suspect classification aspect.

One more that they've agreed in whole, Nos. 35 and 36, that lesbians and gays are unable to secure hate crimes in federal legislation protecting them in employment, housing, et cetera.

While it's true they haven't secured the legislation, it goes too far to agree to this in whole, because there is no evidence to indicate, as the Congressional testimony back and forth has indicated, that they need protecting in this area because there's no evidence of discrimination in this area.

Some of the other ones in particular that they indicate they are willing to agree in part go directly to the suspect classifications.

No. 14, that gays and lesbians have suffered severe discrimination. This will go to the history of discrimination. And the Campaign stands ready to make arguments that it appears the Proposition 8 Defendants are not.

That discrimination, including hate crimes, exists today, No. 29. Again, the Campaign is willing to make arguments Proposition 8 is not.

"Sexual orientation is the kind of distinguishing characteristic that defines gays and lesbians as a discrete

group." This practically gives away Factor 2 in the suspect classification.

And according to the research, there's no evidence for the Proposition 8 Defendants to agree to this, even in part.

MR. COOPER: Forgive me. I didn't follow --

MS. LINDEVALDSEN: Oh, that was No. 28. I apologize.

No. 27, again going to suspect classification, that sexual orientation is fundamental to a person's identity.

I have three more.

No. 26, "harmful to an individual to attempt to change sexual orientation." In light of the APA -- the American Psychological Association's task force report that just came out in August of 2009, even that report by the APA indicates that there is no research to show that it's harmful to attempt to change your sexual orientation.

And yet, No. 26, the Proposition 8 Defendants are willing to concede to some form of stipulation on this, which gives away part of Plaintiffs' case, that they will have to show that they are entitled to suspect classification.

There are two more, Nos. 20 and 59, that are related to this, again, that help to identify for suspect classification.

The medical and psychological communities do not consider sexual orientation to be an illness or disorder.

Again, the APA task force report just issued in the beginning of August admits that part of the reason the APA declassified homosexuality as a disorder was based in politics. The report admits that.

And there are major medical organizations today that believe that individuals should be entitled to treatment to change your sexual orientation, that it's not harmful. And in fact, two past presidents of the APA indicate that individuals should be able to change their sexual orientation.

And finally, No. 59, an individual's capacity to raise children does not depend on one's sexual orientation. Proposition 8 Defendants stand ready to stipulate in some form to this, when the sociological and psychological research suggests that it is relevant to raising children.

And, the Campaign stands ready to make argument, based on the scientific literature, that Proposition 8 Defendants apparently stand ready not to make.

Going back again, since one of the factors is the inability -- the -- there are arguments that are likely not to be made by existing parties, I went through those arguments on that factor.

Back to the interest just briefly -- and then I'll conclude, Your Honor -- the Campaign's interests includes in part defense of the definition of "marriage." But the Campaign has a broader interest it's fought for for years that if this

case goes the wrong way, it will not be able to pursue.

If the Plaintiffs win this case, the Campaign will not be able to pursue, as it has tried to do for the past 15 years, to fully protect the rights of marriage solely for a man and a woman.

THE COURT: How so?

MS. LINDEVALDSEN: If the Plaintiffs win their case here, and it's declared unconstitutional simply to define "marriage" as one man and one woman, it's going to impair the Campaign's ability to seek an even stronger amendment, as I would characterize it, that preserves the name and the rights of marriage.

Not only will the Campaign's interests be impaired if the Plaintiffs win, but the Campaign's interests will be impaired if the Plaintiffs lose, and the Defendants have conceded too much on sexual orientation and suspect classification.

This Court is being asked to be the first court in this -- federal court in this nation to declare sexual orientation to be a suspect classification. Proposition 8's case management statement makes very clear that they do not stand ready to make all of the available arguments based on the available sociological, psychological, and medical research to defend against a classification of sexual orientation as a suspect classification.

The Campaign stands ready do that, and it must be done, in order to preserve marriage in the state of California.

THE COURT: Very well. Well, thank you very much, Ms. Lindevaldsen.

Now let's hear from the City and County of San Francisco. Ms. Stewart?

MS. STEWART: Thank you, Your Honor.

As the Court's aware, the City has sought intervention under the permissive part of Rule 24, which really is, focuses on a bit of a different inquiry than 24(a).

Instead of really being about a movant's right to be at the table, the focus of the Rule 24(b) inquiry really is about whether the moving party will contribute to the development of a factual and legal record, and help assist the Court in arriving at a good and solid legal and factual decision.

THE COURT: You make an interesting argument that's a little different from those that we have heard from the Our Family Coalition or the Campaign for California Families.

And, that is that the City and County of San Francisco has a governmental interest in the outcome of this litigation that is different from the Plaintiffs, and different from any of the intervenors.

Just exactly what is that interest?

MS. STEWART: Thank you, Your Honor. It is a

perspective, number one, that comes from being a city that has one of the highest lesbian and gay populations -- in fact, the highest, I think -- of any city across the nation, and has been long involved in trying to eliminate sexual-orientation discrimination because of its experience with the very real economic and public health costs that come with discrimination against a part of its citizenry.

THE COURT: What are you prepared to show in that regard?

MS. STEWART: Well, we would put on, in addition to the experts that the Perry Plaintiffs Perry have listed in their case management statement, we would suggest that we might offer the testimony of someone like the controller, who can inform the Court about -- I mean, one of the key issues in the case, as the Court knows, is is there is a legitimate and very real government interest that supports this law. That's a key issue.

And what the controller of our city -- and it might not be from our city, but our experience is that the costs are very high on cities, and in fact, on the state and the federal government.

Now the State is here, and there are two other counties. But those entities have indicated that they don't plan to play an active role in the trial of this case. And I think we -- we bring, both because our work on these issues

goes quite far back, and in part also because of our work on the marriage cases --

THE COURT: Well, if there is a financial impact on the City and County of San Francisco, there should, I would think, be a similar impact on the State of California.

MS. STEWART: That's correct, Your Honor.

THE COURT: The Governor's represented here, and the Attorney General. Isn't that sufficient to bring these issues to the fore?

MS. STEWART: Well, for two reasons, I don't think it is, Your Honor. Most significantly, the Governor and the State have indicated they don't intend to play an active role in the litigation.

Secondly, the City has been studying these issues for quite a long time, and it has a developed body of evidence. And it is also familiar with the evidence that goes to the costs to the State and the federal government as well as to local government.

But remember that local governments really serve as the bottom-line social safety net for individuals and families who end up falling apart when they're not adequately recognized and supported.

And so, the City and the County, in a way that is different from the State, ends up being responsible when families fall apart if there are no obligations.

THE COURT: Well, explain to me the sequential facts that you're going to attempt to show that how the elimination of Proposition 8 would minimize or ameliorate these social costs that the City you allege has to bear.

MS. STEWART: Sure. The City would put on evidence to show that first of all, recent studies indicate that where same-sex couples are offered marriage, they are far more likely to marry than they are to enter into civil unions or domestic partnerships.

THE COURT: And how does that relieve the City of certain social costs of the kind that you are talking about?

MS. STEWART: When couples enter into marriage, they take on the reciprocal obligations, legal obligations, they get the social support that comes with marriage, and they take on obligations to the children of the couple that the couple is responsible for. What --

THE COURT: And they don't do this in a domestic partnership?

MS. STEWART: They can do it in a domestic partnership, but as -- again, as the evidence shows, couples are far more likely to enter into marriage where it's available.

One of the reasons for that, I think, Your Honor, is because when you enter into a domestic partnership, it's not a recognized institution. It gets questioned a lot. It is not

something that people immediately understand.

Furthermore, at this point in time, you are not getting even the whole thing that marriage conveys, in terms of the federal rights. So, without either of those two things, domestic partnership is less attractive.

Now, marriage today doesn't provide the federal benefits that come with marriage for heterosexual couples. But, the social valuation, the validation that the government gives and that society gives, induces people to marry.

There are many people who have indicated -- and in fact, that is probably why some of the Plaintiffs may have not married, and some of the people in the groups, that they are not going to do it until they get the entire social validation that comes with marriage equality.

And so, because of that, with couples not entering into those kinds of relationships where they're bound together and have mutual obligations, they then are much more likely to fall on the government.

There's a case, incidentally, that the California Supreme Court heard not too long ago that involved a couple that was in a domestic partnership, where one partner tried to walk away from the child. And, you know, the county ended up trying to sue for support, and in the end, did obtain support.

But the problem with relationships that are not fully recognized or relationships --

THE COURT: And that would have been different, had they been married?

MS. STEWART: It would have, Your Honor. I mean, I think there's no question that with marriage comes presumed family status, presumed parent status.

Now, that is true in California, but at every level, every time an issue like this comes up with domestic partnership, it gets litigated. And people question it.

And further, there are a number of public benefits that are determined, eligibility that is determined by marital status. So for all of those reasons, the City brings a unique perspective.

It also -- there's another aspect of it, Your Honor, besides the purely economic one. And that has to do with the fact that when society has a law, when the government has a law that makes this distinction between lesbians and gay men on the one hand and heterosexual people on the other, it sends the message that there is something different about them. And it is a difference that matters.

And that has tremendous public health consequences that go far beyond just the economic ones. The City of San Francisco is the home to literally hundreds, and I think thousands of lesbian and gay youth who come here from other states where they are kicked out of their homes, and from counties around California, because they are gay.

The message that something is wrong with being gay is still alive and well in California, because of Proposition 8. And so, the public health costs that counties like San Francisco have to incur to deal with discrimination and its effects on youth, its effects on the elderly, its effects on all levels of society are very real.

So, another area of testimony that we would bring would be someone from our Public Health Department, to talk about what those effects are.

We believe that this will go a long way to showing the utter lack of justification, any kind of government interests and in fact, the -- the counter interest, the interest of the government in eliminating discrimination.

THE COURT: All right.

MS. STEWART: So, in the *Romer* case, I wanted to remind the Court, *Romer versus Evans*, the city government, city and county local governments were the lead plaintiffs in this case.

And they actually put on testimony of the kind that I just described to the Court. They had public officials talking about --

THE COURT: That was in state court, wasn't it?

MS. STEWART: It started out in state court, that's correct, Your Honor. However, it went all the way to the U.S. Supreme Court, as the Court knows, and those cities remain --

THE COURT: (Inaudible) familiar with the intervention principals under Colorado law.

MS. STEWART: Correct, Your Honor. It wasn't an intervention matter, actually. They were party plaintiffs.

THE COURT: They were initial parties, were they?

MS. STEWART: Right. And they remained parties. And the Supreme Court did not suggest in any way that there was anything to question about that.

I am happy to address the arguments -- I would say that neither the state nor the local government entities object to our appearing. I think some of them, at least, support it.

The Plaintiffs have objected solely about a concern about delay, but I think that we have demonstrated, in the way that we have dealt with them and with the Court, that we won't delay the case.

We did not submit a case management statement because the Court had not decided that we were a party, and I didn't want to be presumptuous. If we were to submit one, it would be in many respects quite similar to the Plaintiffs'. It -- probably wouldn't even repeat it, but would join in theirs. I would add the witnesses I mentioned.

I would also suggest that an education expert of some sort may need to be called, because so much of the campaign focused on education issues and supposed changes to the curriculum that would be necessitated if same-sex couples were

permitted to marry.

And, one other area of difference we would have would concern the schedule. And I think that -- the schedule that the Perry Plaintiffs are arguing. It's very important obviously to get the case decided quickly, but the Court has to balance the need to have a really full factual record. And we think that it may be too ambitious a schedule.

THE COURT: All right. Anything further, Ms. Stewart?

MS. STEWART: I will leave it at that, Your Honor.

THE COURT: Very well.

Mr. Olson. Now, most, most folks who are in your situation and they have people who are trying to come in on the same side welcome intervenors. Why aren't you taking that attitude?

MR. OLSON: Well, I will explain. Thank you, Your Honor. And I know that the Court has read the briefs and knows the law, so I will try to be brief in response to your question.

First, it is very important for me to say that we have the greatest respect for counsel for the proposed intervenors. Particularly I'm focusing now on the Our Family Coalition. We have worked with them from the outset of this case. And we have the greatest respect for their experience, and their points of view.

However, experience and reputation of counsel is not a basis for intervention. And we are concerned that the consequent dilution of the rights of the Plaintiffs to control the strategy, timing, and issues in this case that they brought to this Court and the proposed intervenors chose not to bring to this Court to validate their constitutional rights can be affected by the addition of additional parties, no matter how much they might want to help.

THE COURT: How so, other than possibly slowing down the process?

MR. OLSON: Well, slowing down the process is very important, as you recognized on July 2.

I think you must have said five times in your June 30th order and a number of times during that hearing on July 2, that in -- in not granting the motion for a preliminary injunction, however serious these issues are, that it was important to have a prompt expeditious and efficient resolution of the merits of this case.

THE COURT: I'm glad that message got through.

MR. OLSON: It certainly got through to us, because we went along with -- and you may have come to the same conclusion anyway, what -- we agreed with Your Honor about proceeding to the resolution on the merits and not granting a preliminary injunction, although we fully felt the Plaintiffs were entitled to it because their constitutional rights are

being violated, the State of California admits. And that is irrepairable injury every day.

However, we were persuaded by your statement in your order of June 30th, that it is important to get to a resolution on the merits, and you were balancing the uncertainty that might come from a preliminary injunction with the importance of getting to a resolution on the merits.

Every additional party that the Court adds as intervenors will add to the complexity and the time that this case takes. And as you heard from Our Family Our Families Coalition, they say, they acknowledge, that their interests diverge. They talked about other issues besides the right to marry that they might want to have ventilated in this Court. I'm not sure that I know all of those issues.

Our Plaintiffs, our clients, are concerned with the right to marry. And they are concerned that they are being deprived of that right every single day. The State of California acknowledges that that's a violation of the Constitution.

Let me add that the intervenors Our Family -- I'm focusing on them for a moment -- assert the same injury, make essentially the same arguments, and seek the same relief, ultimate relief as the Plaintiffs. So they are adding nothing there. I think your question suggested that you are at least sensitive to that point.

The diversity of their membership adds nothing to the actual claims. It doesn't change the actual claims, it doesn't change the actual relief sought by the Plaintiffs. At bottom, they tender nothing new to this case, other than the talent and experience of the lawyers that they have selected. And, we respect that. But that is not a basis for intervention.

And the Plaintiffs chose lawyers whose talents and expertise they respected. And their choice should not be usurped by the proposed intervenors, by --

THE COURT: What about the other two intervenors, the Campaign for California Families, and then the City and County?

MR. OLSON: Well, the Campaign for California Families demonstrated today that it's going to be a great deal longer and more complicated case, because they are not willing to stipulate to things that the State of California implicitly agrees to by acknowledging that the statute -- the proposition is unconstitutional, that the proponents of Proposition 8 -- and they are very skilled individuals represented by very skilled lawyers -- they are willing to stipulate to certain things because, I'm confident, they believe that we could prove those things if we had to go through a six-month trial with expert witnesses and all of that.

To their credit, and as you suggested in your orders and in hearing on July 2nd, we need to work together to resolve those issues that don't need to be contested. This, this

intervening -- proposed intervening group wants to challenge virtually everything.

And I submit that you could find any number of groups, any number of permutations of groups in the United States that were willing to say "The proponents are not being adequately represented because they are admitting something that I'm not willing to admit, and I want to put them to their proof, and I'm going to bring in evidence and so forth."

And so I think that they only add delay which competent counsel -- very competent counsel are willing to avoid.

THE COURT: What about the City and County of San Francisco?

MR. OLSON: The City and County of San Francisco I think is, as you suggested, a slightly different case. I listened to the presentation by Ms. Stewart this morning, and I read the materials very carefully.

We have the same concerns about additional parties and additional -- because it's a permutation thing, everything takes a little bit longer. But I do acknowledge that the City of San Francisco, because in a sense, it's a *parens patriae* kind of thing. They are looking out for citizens that are affected by an unconstitutional statute.

And they do indicate that they are capable of addressing and willing to address governmental perspectives

that cause this statute to be unconstitutional, and cause this statute to discriminate and hurt individuals in their city. Many -- so many individuals that are affected live in the City of San Francisco.

And they are apparently willing to present reasons that the State of California, through the Governor and the Attorney General's office, while they are willing to concede that Proposition 8 is unconstitutional, they are not willing to say why they think, as representative of the citizens of California, why it is unconstitutional. They want to play -- and I respect this, but they want to play a passive role.

The City of San Francisco seems to me willing to add something to this case that we probably, on behalf of the Plaintiffs, are not in a position very well to add. We don't see things from the perspective of a government being adversely affected by an unconstitutional constitutional provision.

So although we're not withdrawing our opposition, I do think it is a separate situation, that -- the other thing about The City and County of San Francisco is what they wish to add seems to me does not appreciably encumber the proceedings or delay the process.

They want to focus on certain narrow things about which they do have expertise. They're not interested in duplicating the things that the Plaintiffs are interested in doing. So, I do think it's a slightly different story.

I think at the end of the day, whatever you decide with respect to intervention, I can't stress enough that -- and again I'm turning back to the Coalition. These are individuals and attorneys who had the opportunity to raise federal constitutional questions in the Proposition 8 litigation in the California Supreme Court.

For reasons that --

THE COURT: So did the Attorney General.

MR. OLSON: Yes.

THE COURT: And the Attorney General is under an oath to uphold the Constitution of the United States. And he didn't raise these issues in the California Supreme Court.

MR. OLSON: And I'm not going to criticize the Attorney General of California, because the Attorney General of California -- particularly because the Attorney General of California has now recognized that it is an unconstitutional statute. And we welcome that.

But my point, I guess, is that the issues were not -- that were not raised before the California courts and then were not raised by the attorneys who wish to participate now, those decisions were made for tactical, strategic reasons. And we respect that, and we respect them.

But, these Plaintiffs are real people. They have announced their intention to get married now, if they possibly can. They're not groups. And I respect the fact that these

groups represent interests. But we represent real people with real concerns that are -- present, ripe for adjudication now, and represent issues. And they have demonstrated that they are going to present the issues responsibly, professionally, thoroughly and expeditiously.

We respectfully submit that whatever you decide with respect to intervention, the lawyers that were selected by the Plaintiffs should remain in control of this case.

And I refer to the *Stringfellow* case, which is a Ninth Circuit decision that went to the Supreme Court, where limitations were imposed.

And I simply request in closing that if there is any further intervention on the side of the Plaintiffs, at least, that the Plaintiffs' lawyers who were carefully selected by the Plaintiffs who are willing to take the chance by bringing this case remain in full control, unequivocal control, and undisputable control over the destiny of the case they choose to bring, and others chose not to bring.

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

Mr. Cooper, are you going to be speaking on behalf of the proponents of Proposition 8?

MR. COOPER: With the Court's permission, my colleague Mr. Thompson would like to address the Court on intervention. Thank you.

THE COURT: That's fine.

Well, Mr. Thompson, that was kind of an unkind cut that Ms. Lindevaldsen cast in your direction. What is your response?

MR. THOMPSON: Well, we saw vivid reflection and example, Your Honor, of the complexity that will be brought to trying to resolve this expeditiously if another Defendant Intervenor is permitted into the case.

In terms of negotiating stipulations, they don't become easier the more lawyers you put in a room, Your Honor. The experts will multiply like locusts, if they are permitted and other intervenors are permitted to come into this.

So we would respectfully suggest that in terms of permissive intervention, it would be a grave error.

In terms --

THE COURT: Well, Ms. Lindevaldsen says that you're not raising the issues, you're not adequately defending all of the interests at stake here.

MR. THOMPSON: Well, we are -- she -- they have not identified any interest that we are not going to vigorously pursue.

What they are saying is they disagree on tactics with us. They say it's a tactical mistake not to contest each one of these points that the Plaintiffs could make the rubber bounce on, and that we need to be in the trenches fighting every war, even battles that can't be won. And, that is a

tactical concern.

And under Rule 24(a), that is not sufficient to show inadequacy of representation. And moreover -- it's rather, which arguments should be advanced. They need to be able to show that there's some divergence of interests. They need to be able to establish under 24(a) that they have an interest that is different from ours. And they haven't done it.

In their brief, they try to conjure up the notion that, well, there are three other statutes that reference marriage is between a man and a woman. And, all those statutes are being challenged, and the proponents are only interested in upholding the validity of Proposition 8.

Your Honor, we will defend all -- all those three statutes and Proposition 8. And those three statutes raise or fall with Proposition 8. So there's just no separate interest. All we have heard are tactical concerns about what is well-advised and not advised to stipulate to.

So that, that would be our submission on the California Families. They were denied the right to intervene in the *Strauss* case in the California Supreme Court, and we would respectfully suggest they should be -- the same result should obtain here.

THE COURT: What about the other two intervenors?

MR. THOMPSON: With respect to the ACLU, the community organizations, we've read their briefs very

carefully, and listened very carefully this morning, looking for -- they say that their interests may diverge. But they never explain how that is so.

They talk about subjective reasons why their members may want to have Proposition 8 struck down, but when you look at how could there be a divergence of interest between what their members want and what the Plaintiffs want, you see nothing. So under 24(a), they haven't been able to show that they're inadequately represented.

And under 24(b), their case management statement shows that they want to bring on at least 14 new experts. In terms of delay, it will necessarily delay the trial, and the amount of discovery, if they can bring in 14 experts from different countries and different continents, as they promise to do in their case management statement. So, we would suggest, under 24(b), they should be kept out.

With respect to the City of San Francisco, they articulated this morning a governmental interest. And we would submit that binding Ninth Circuit precedent precludes their being able to intervene under 24(b).

We cited in our brief *EEOC versus Pan American,* which is 897 F.2d, 1499. And that in turn cited to *EEOC versus Nevada Resort,* 792 F.2d, 882. And those --

THE COURT: What is the logic of those decisions?

MR. THOMPSON: Those cases are very interesting, Your

Honor, because what they say is that when the EEOC is litigating and then an entity that has standing -- in the *Nevada Resorts* case, an organization that had a member that was injured, the injury was caused by the action, and it was redressable.

They nevertheless were -- and the District Court granted 24(b) intervention, and it was reversed by the Ninth Circuit. And the reason was is because there was no private right of action. The permissive intervenor that the show that there was a subject matter jurisdiction for their claim.

And because there was no private right of action under that provision of Title VII that was at issue, the Ninth Circuit said they're not allowed in.

And this is exactly the flip of it. There's no public right of action under the Supreme Court cases that we've identified. In other words, no one disputes that the plaintiffs have a private right of action under 1983 to bring this claim, but the City cannot turn on its creator like a Frankenstein monster and then try to challenge the constitutionality of its conduct.

And when they say, "Oh, but the Attorney General and the Governor aren't contesting it," it is the people of California that enacted Proposition 8. And they are sovereign in this matter. And they have not given San Francisco the right to come in and challenge their will.

So in terms of the governmental interest, it just doesn't hold water. And these two EEOC cases, especially *Nevada Resorts,* show quite conclusively that there is no subject matter jurisdiction, and they cannot be permitted in this case.

And with respect to the interests and the -- and the complexity, these issues about the public health effects of Proposition 8 will be very nuanced and complex, and will necessitate expert evidence on both sides, and we would respectfully suggest, are really a sideshow to the main issues in this litigation.

And if the Court were inclined to grant their intervention, we would at the very least ask the Court to confine their activity to the issues that are unique to the City, as opposed to allowing them to put on evidence on all the various issues.

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

MR. THOMPSON: Thank you.

THE COURT: Well, we have three motions to intervene presently before the Court. And, as we have discussed this morning, the speedy determination of this action requires that these motions be ruled upon promptly.

The Our Family Coalition; Lavender Seniors of the East Bay; and Parents, Families and Friends of Lesbians and Gays move to intervene as of right under Rule 24(a), and

alternatively, seek permissive intervention under Rule 24(b).

The Campaign for California Families moves to intervene of right as a defendant, or alternatively, for permissive intervention.

In addition, the City and County of San Francisco seeks the Court's permission to intervene under Rule 24(b), permissive intervention.

All three of these motions were filed within the time frame provided in the Court's July 13 order. And accordingly, all three motions are timely.

Turning first to the motions to intervene as of right by the Campaign and by the Our Family Coalition, intervention as of right requires the applicants for intervention to make a four-part showing:

One, their motion is timely; two, they have a significant protectable interest relating to the transaction that is the subject matter of the action; three, they are so situated that the disposition of the action may practically impair or impede their ability to protect their interest; and four, their interest is not adequately represented by the parties to the action.

The applicants must demonstrate all four factors to intervene as of right. Although the motions are timely, neither the Campaign nor the Our Family Coalition demonstrate the remaining factors.

The second factor that must be shown for a party to intervene as of right is that the party seeking intervention must have a significant protectable interest in the controversy.

An interest is significantly protectable if: One, it is protected under some law; and two, applicants show a relationship between the legally protected interest and the claims at issue.

Applicants here need not assert a specific legal or equitable interest in the underlying action. And no bright line rule determines whether applicants have a significant interest.

The Campaign asserts that it has a significant protectable interest in assuring marriage is defined only as the union between one man and one woman. The Campaign argues that this interest arises from its work to ensure the passage of Proposition 8.

But because the Campaign is not the official sponsor of Proposition 8, its interest in Proposition 8 is essentially no different from the interest of a voter who supported Proposition 8, and is insufficient to allow the Campaign to intervene as of right. The Campaign's motion to intervene of right thus fails to demonstrate that the Campaign has a protectible interest in the action.

Indeed, the Campaign asserts that its interests are

broader than merely upholding Proposition 8 because it wishes to assure marriage is defined only as an opposite-sex union. But the Campaign fails to explain the practical effect of this broader interest, or to explain how the Court could protect this interest, or how Proposition 8, if upheld as constitutional, would fail to assure this claimed broader interest in defining marriage as only an opposite-sex union.

Accordingly, the Campaign's interest is not significantly protectible, and intervention of right is not appropriate.

Even if the Campaign had asserted a protectible interest in the litigation, however, the Campaign has failed to explain that its interest is not adequately represented by the Intervenor Defendants who are, after all, the official proponents of Proposition 8.

The Court considers several factors to determine whether representation is adequate, including whether the current parties will undoubtedly make all of the Intervenors' arguments appropriate to the case in controversy, whether the current parties are capable and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would otherwise be neglected.

And I'm essentially quoting from the *Sagebrush Rebellion* case in the Ninth Circuit, of 1983.

The burden of making this showing is minimal. But

where the existing party and the applicant have the same ultimate objective, the current representative is presumptively adequate.

The Campaign argues that the proponents of Proposition 8 will not make all of the arguments the Campaign wishes to present, because the Campaign has this broader interest it claims in not only upholding Proposition 8 but also in securing a definition of marriage as an opposite-sex union.

The Campaign attempts to distinguish this interest from that of the proponents of Proposition 8, who, according to the Campaign, seek only to uphold Proposition 8. But the Campaign does not explain how its interest is meaningfully distinct from the proponents' interest, or how the Court could fashion a remedy for this claimed broader interest.

Perhaps more importantly, the Campaign fails to counter proponents' assertions that they are willing and able to present all of the arguments the Campaign wishes to introduce that are consistent with the law and the facts. Accordingly, the Campaign's interest is represented adequately by the proponents of Proposition 8.

Because the Campaign has neither shown that it has a significant protectible interest in this litigation nor that the proponents of Proposition 8 would not adequately represent its claimed interest, the Campaign's motion to intervene as of right is denied.

Our Family's motion to intervene of right is similarly flawed, because the Our Family Coalition fails to identify an interest that is not adequately represented by the current Plaintiffs.

Unlike the Campaign, it appears that the Our Family Coalition may have a significant protectible interest in this litigation, because many of the organization's members are individuals who wish to marry a person of the same sex but cannot do so because of Proposition 8.

It is possible that this derivative or organizational interest may rise to the level of a protectible interest for purposes of intervention. This is, after all, the very interest that the Plaintiffs assert. But Plaintiffs possess this interest directly as they are the parties who allege that they seek to marry but are barred by Proposition 8 from doing so. The Our Family Coalition, if it possesses this interest, does so only indirectly or derivatively.

Nonetheless, the Our Family Coalition fails to overcome the presumption that the Plaintiffs' representation of the interests the Our Family Coalition alleges is adequate. The Our Family Coalition does not identify an interest that Plaintiffs are unwilling or unable to protect or an argument that Plaintiffs are unwilling or unable to make.

The Our Family Coalition argues that it represents a broad spectrum of individuals who wishes to enter same-sex

marriages, including individuals who may differ from the current Plaintiffs, based on age, race, parental status or socioeconomic class.

While the Our Family Coalition asserts that the effect on an individual of denial of same-sex marriage may be distinct, based in part on an individual's peculiar circumstances, the Our Family Coalition fails to identify the relevance of this distinction.

No doubt, those seeking to marry a person of the same sex possess a great variety of backgrounds and probably have varied reasons for seeking marital status. But both the Plaintiffs and the Our Family Coalition assert that the root of the harms they face is the alleged discrimination based on sexual orientation or sex worked by Proposition 8.

The remedy the Plaintiffs and the Our Family Coalition seek is identical. Accordingly, the Court finds that the interests identified by the Our Family Coalition can be adequately represented by the current Plaintiffs. And the Our Family Coalition's motion to intervene of right is therefore denied.

Next, the Court considers whether to permit any party to intervene under Rule 24(b), permissive intervention. Rule 24(b) permits the Court, in its discretion, to allow an applicant to intervene when its motion is timely and it has a claim or defense that it shares with the main action, in short,

possesses a common question of law or fact with that raised by the parties.

The Court considers several factors in making this determination. These include the nature and extent of the applicants' interest, their standing to raise relevant legal issues, the legal position they seek to advance and its probable relation to the merits of the case. These factors are explained by the Ninth Circuit in *Spangler versus Pasadena City Board of Education*, reported at 552 F.2d, a 1977 decision of our circuit.

Additional factors include whether the applicants' interests are adequately represented by the other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

In this case, in addition to the Campaign and the Our Family Coalition, the City and County of San Francisco seeks permissive intervention under Rule 24(b).

Turning first to the motions by the Our Family Coalition and the Campaign, the *Spangler* factors weigh against permitting Our Family Coalition and the Campaign to intervene. Their interests are represented by the current parties to the action.

While the Our Family Coalition and the Campaign appear capable of presenting evidence and developing a record on the factual issues at stake in this litigation, nothing in the record before the Court suggests that the current parties are not independently capable of developing a complete factual record encompassing all of the applicants' interests. Furthermore, permitting the Our Family Coalition and the Campaign to intervene might very well delay the proceedings, as each group would need to conduct discovery on substantially similar issues.

As noted, the interests asserted by the Campaign and the Our Family Coalition are indistinguishable from those advanced by the Plaintiffs. Hence, the participation of these additional parties would add very little, if anything, to the factual record, but in all probability would consume additional time and resources of both the Court and the parties that have a direct stake in the outcome of these proceedings.

Accordingly, the motions to intervene of the Our Family Coalition and the Campaign are denied. Of course, the Our Family Coalition and the Campaign may seek to file amicus briefs on specific legal issues that they believe require elaboration or explication that the parties fail to provide. Those applications will be considered, and if appropriate, granted.

Now, San Francisco's motion to intervene presents a

somewhat different circumstance. Unlike the Our Family Coalition and the Campaign's, San Francisco has identified an independent interest in the action: It claims a financial interest that it alleges is adversely affected by Proposition 8.

The City points out that it acts as a social and economic safety net for those individuals it asserts lay claim to City services who would not require those services if Proposition 8 were invalidated. Currently, San Francisco is the only governmental entity seeking to present evidence on the effects of Proposition 8 on governmental services and budgets. Despite Defendant Intervenors' argument to the contrary, San Francisco does not need independent standing to intervene permissively.

Plaintiffs acknowledge what they describe as the extraordinary factual record that San Francisco appends to its motion, and strongly suggests that San Francisco is well on its way to contributing to full development of the underlying factual issues in the suit.

Despite the timeliness of the City's motion to intervene, the factual record that San Francisco appends to its motion, standing alone, would probably not be sufficient to warrant intervention, with the additional complications that attend adding an additional party.

This is especially the case here, given that the

factual record the City seeks to present is largely, if not entirely, a record based upon testimony and evidence presented by expert witnesses. These witnesses are as available to Plaintiffs as well as the City. And to the extent the Plaintiffs believe such evidence is necessary, Plaintiffs can call these witnesses, and no doubt obtain cooperation of the City in the development of such evidence.

Rather, it seems to the Court that what distinguishes San Francisco as an intervenor, especially from the others seeking intervention, that is San Francisco claims a governmental interest that no other party, including the Governor and the Attorney General of California, has asserted.

Because of this interest, it appears that San Francisco has an independent interest in the proceedings, and the ability to contribute to the development of the underlying issues without materially delaying the proceedings.

The Court notes that the City has filed a proposed complaint in intervention that appears straightforward, and it should not require prolonged effort for the other parties to answer or otherwise respond to this pleading promptly.

Because it is San Francisco's governmental interest that warrants the decision to allow it to intervene, it seems that San Francisco shares interests with the State Defendants, the Governor and the Attorney General. Furthermore, as the Attorney General has taken the position that Proposition 8 is

unconstitutional, it would appear appropriate in the interest of a speedy determination of the issues that the Attorney General and San Francisco work together in presenting facts pertaining to the affected governmental interests.

Counsel for San Francisco and the Attorney General are therefore directed to confer, and if possible, agree on ways to present these facts so as to avoid unnecessary duplication of effort and delay.

But I want to emphasize that I believe on the general issues that pertain to the interests of Californians who seek to marry but are barred by Proposition 8 from doing so, it appears that Plaintiffs adequately represent those interests, and unnecessary duplication would be involved in San Francisco seeking to present those facts, especially under these circumstances, and that San Francisco should cooperate with the Plaintiffs and Plaintiffs' counsel in presenting whatever issues pertain to these general interests.

To the extent that San Francisco claims a government interest in the controversy about the constitutionality of Proposition 8, it may represent that interest and present such evidence as necessary for the Court to decide that issue.

Hence, San Francisco's involvement in this litigation may very well be quite limited. But as the City's interest does appear distinct from any other party except possibly the State Defendants, it is unclear at this point the extent to

which the -- and it is unclear at this point the degree to which the State Defendants may seek to defend these alleged governmental interests, San Francisco's motion for permissive intervention under Rule 24(b) will be granted.

And I would suggest, unless any of the parties object, that any answer or otherwise -- any answer or responsive pleading to the complaint and intervention by the City and County of San Francisco be answered in ten days.

Is that possible, Mr. Cooper, on your side?

MR. COOPER: It is, indeed, Your Honor.

THE COURT: Very well. Now, let's turn to case management. And first of all, I want to commend the parties, and particularly Mr. Olson and Mr. Cooper. You have obviously taken to heart the discussion that we had here last month, and the order that was issued in the wake of the earlier case management statements.

I thought that the specification of issues that the Plaintiffs proposed and the responses by the Intervenor Defendants was very helpful, very helpful indeed, in narrowing the issues, and defining what it is that is before us, in terms of how we are going to develop the record in this case.

Obviously, not every one of these facts is agreed to by the Intervenors, but a number of them were. And, quite understandable that in some instances Mr. Cooper might have a little different verbal formulation of some of them.

But nonetheless, I think we have made and you have made some very considerable progress in shaping up the issues so that we can proceed to a prompt determination of the cause that is before the Court.

Now, before telling you what schedule I have in mind, I gather, Mr. Cooper, at some point or other, it would be your intent to file a motion for judgment on the pleadings as to some -- perhaps more than some issues. Perhaps quite a number of issues. Is that a fair reading?

MR. COOPER: That is, Your Honor, yes, sir. We -- we believe that there are several issues on which -- on which this Court's not free to depart from binding precedent in the Ninth Circuit. And that -- and that if we are right on that, it would significantly skinny down the -- now the discovery burdens that will face the Plaintiffs and the Defendant Intervenors as we go forward.

We may not be right, but we -- we would certainly -- we believe we are, and we would like an initial opportunity to present those arguments to the Court.

THE COURT: I'm inclined to think that while we should, in view of your position, schedule a dispositive motion schedule with a hearing date, that at least some of the basic discovery in the case can and should go forward very promptly.

I assume you want to take the depositions of the Plaintiffs. And, Mr. Olson has indicated that he has some

depositions in mind of your folks. And, seems to me we can get those depositions out of the way very quickly. And, should do so.

What's your reaction to that?

MR. COOPER: Your Honor, I don't quarrel with that proposition.

I will say that some of the things that Mr. Olson would like to inquire into of my clients -- the official Proposition 8 proponents -- going to voter motivation are issues that we earnestly believe are not fit and appropriate for judicial inquiry, and that in fact, would raise the gravest possible First-Amendment issues.

And we -- we have cited to the Court a case called *Sasso* (Phonetic), but we would like an opportunity to fully brief that proposition before we get off in the direction of taking depositions of our clients and subpoenaeing their e-mails and the rest of it, going to their internal campaign strategies and the rest of it.

THE COURT: Disagreements as to the scope of discovery are not unusual.

MR. COOPER: No, Your Honor, they're not. But discovery that at least we believe we would be privileged against on a constitutional basis are pretty unusual.

And we think this is a -- this, at least as we understand their intentions, would be unprecedented insofar as

we have been able to tell. We have not been able to find a single case where this kind of discovery was taken of the proponents of a referendum measure in this state or in any other.

And, so we think it's gravely serious issue, Your Honor. We would urge the Court to give us an opportunity to fight this out in briefing to the Court before we get down that road.

And if we do go down that road, obviously we will want to take the same kind of deposition testimony, as well as document inquiries of those --

THE COURT: Who oppose Proposition 8.

MR. COOPER: Of course, Your Honor.

THE COURT: All right.

MR. COOPER: But --

THE COURT: What, in your view -- without getting too far down the road, in your view, what is the scope of appropriate discovery with reference to the proponents and the opponents of Proposition 8?

MR. COOPER: That -- and I don't want to get too far in front of myself, because to be quite honest with Your Honor, I'm not sure where that line can safely be drawn as a First-Amendment matter.

I do believe that when a judicial inquiry into the intendment and meaning and purpose of a voter referendum is

before the Court, that the one clear and certain analysis is to test the conceivable legitimate state interests that it might serve. And if it will serve none, the inference that flows from that is that there was some illegitimate purpose at work. That was the *Romer* case.

The *Romer* case concluded, the Court concluded that "We have assessed against the language of the statute, we have assessed against every conceivable purpose offered to us, or that we could think of ourselves," the Court. "And we've assessed it against its various impacts and effects."

And --

THE COURT: What discovery was taken in the *Romer* case on that issue?

MR. COOPER: Your Honor, the interesting thing, I understand there was a trial in this case. I don't understand there was any discovery taken into the --

THE COURT: Well, that's refreshing, a trial without discovery. That's like the old days.

MR. COOPER: Well, actually, there was discovery, but it -- but there was no discovery taken into -- that we've been able to find, in that case or any other, into the subjective motivations of the voters, which -- or into the subjective motivation presumably of their proxies, those that organized the referendum effort, and those who organized and provided the strategy for the campaign for the referendum, itself. We

haven't been able to find any evidence that a party was allowed to make inquiry into those things.

And, think of what that might mean. How could proposition proponents, future proposItion proponents, not be chilled in the exercise of their First-Amendment rights as they sought to bring forward for consideration by the people these types of propositions. So, Your Honor, we think that that's off the table.

Clearly, the kind of inquiry that *Romer* engaged in is plenty on the table. I think it is going to be hard for me probably to convince myself, let alone you, that -- that the types of public statements, official campaign literature, certainly the official ballot information and brochures that have the imprimatur of the state, and go to every voter, those things are, it would appear, legitimate sources of information about the purposes of the referendum.

But again, Your Honor, the -- the inquiries that we think neither side should be allowed to take of the other are those that go to -- and we believe would encroach and gravely threaten First-Amendment freedoms.

THE COURT: Mr. Olson, what are your views on this subject?

MR. OLSON: I would like to have my colleague, Mr. Boies, address the case management issues.

THE COURT: All right. Mr. Boies? You've taken a

lot of discovery in your life.

MR. BOIES: I have, Your Honor. And one of the things that I think it underscores is what the Court said, which is that discovery disputes are not uncommon, and that they ordinarily are worked out in the course of discovery.

I think the very issue that Mr. Cooper candidly addresses, which is the difficulty of finding exactly where that line is, is something that experiences counsel can try to work out among themselves, and if there's a problem, bring to the Court.

I frankly do not believe that we will have a problem, at least at the initial stages of the discovery, in limiting discovery in a way that does not impermissibly infringe on any First-Amendment issues. I think --

THE COURT: But I gather that you are planning some discovery of the proponents.

MR. BOIES: Yes, Your Honor. And for example, I think Mr. Cooper's exactly right, that there is some stuff that is clearly on the table; there's some stuff that I think is probably not on the table unless we were to make a showing that we have not yet made; and then there's a number of things that are in the middle.

I think that in terms of their official statements, the statements that were made publicly, none of those, I think, are something that can be plausibly argued should not be

subject to discovery. Certainly, there are subjective, unexpressed motivations. Those things I think we would not be inquiring into, because we do not believe that those would actually go to the issues that we are presenting to the Court.

So, I think that if there is a -- if there's a gray area, there will be some objectively-stated assertions, propositions, that may be encompassed in documents and the like that may or may not have become public, and there may be some issue as to what it means to say something has become public. How broad does have it to be distributed in order to be classified as public?

Those are all the kinds of gray-area discovery decisions that we will make along the way. And I don't think that any of those ought to hold up the commencement of discovery, because no matter whose view you take, and -- and it may be that we're not even in disagreement as to where the line will ultimately be drawn, we are in agreement that there are many areas that are going to be subject to discovery.

And if we are going to get this process going, and really achieve what I know the Court's objective is and what all of our objective is, which is a prompt resolution of this, I think we need to get started. And I think that we can get started on fact discovery, we can get started in preparing expert reports now.

That doesn't mean that you can't have dispositive

motions. But what it means is that we don't have to delay the commencement of the work towards trial until we go through the dispositive motions.

THE COURT: Well, with that in mind, let me discuss with you and Mr. Cooper a schedule that I have in mind, based upon what lies before me in the next several months.

And, that would be that we commence discovery in this case today. That by the 2nd of October, experts, expert witnesses, opinion witnesses, will be designated. We will have a close of discovery by November 30, except for rebuttal witnesses, which will be designated at that time, rebuttal expert witnesses.

We will have a pretrial conference on the 17th of December, a close of rebuttal expert recovery on the 31st of December, and a trial beginning January 11.

Is that --

MR. BOIES: Your Honor, I think that is easily doable.

THE COURT: Good. Mr. Cooper?

MR. COOPER: Your Honor, I wasn't able, honestly, to get all of that down, but --

THE COURT: Well, let's go through it again.

MR. COOPER: Yeah, thank you.

THE COURT: Close of all discovery except expert rebuttal discovery, November 30. Designation of experts,

October 2. Pretrial conference, December 17. We will have to pick a time. The Clerk will remind me, that's a Wednesday, I believe. Is it not?

THE CLERK: December 17, Your Honor?

THE COURT: No, it's a Thursday.

THE CLERK: That's a Thursday.

THE COURT: Maybe we ought to --

THE CLERK: Move it up to 16?

THE COURT: Why don't we make that the 16th. That is a Wednesday, I believe.

THE CLERK: It is a Wednesday, Your Honor.

THE COURT: And what does the calendar look like on the 16th?

(Off-the-Record discussion)

THE COURT: Well, we're in trial on the 16th. Let's set it for the 16th, in any event. I may be in trial that week, but we can work around that in some fashion.

And in any event, in any event, if you have to wait and listen to the evidence in that case, it is an interesting case.

MR. COOPER: Well, that's a relief, Your Honor.

THE COURT: All right.

MR. COOPER: Your Honor, this schedule, while a bit -- a bit more relaxed than the one which the Plaintiffs initially offered, is quite an aggressive schedule. I don't

think it's impossible. I think it is something we may be able to cope with.

I am mainly concerned, frankly, about the expert witness and expert discovery element of this. And in all candor, Your Honor, we -- we have been in a reactive profile, of course, as -- as is typical of Defendants, especially Defendant Intervenors.

And so, it isn't -- it hasn't been, honestly, until we received the supplemental case management papers from Plaintiffs, which were, as you say, very -- very helpful, that we became clear on -- on exactly where the Plaintiffs were going, and -- and came to our own resolves, that okay, we are going to now need to really hurry up and line up expert analysis -- experts, in order to help us analyze some subject matters that we weren't altogether clear we were going to be involved with.

And so the truth is, we haven't done the hundreds and hundreds of hours or had a chance to do the hundreds and hundreds of hours that the City of San Francisco, in their papers, indicated it took them to identify potential experts, interview those experts, assess their backgrounds, and all the things that you know, as a litigator, one has to do before one commits oneself to designating an expert.

But with all that having been said, Your Honor, I have -- I -- we will commit all the resources that we have

available to us to comply with this schedule, with the hope that the Court will keep an open mind as this thing unfolds.

THE COURT: Well, I do remember what it is like to practice law, so --

MR. COOPER: Yes, Your Honor.

THE COURT: But I think if I were to set anything other than an ambitious schedule, why, this case might metastasize into something that would be un- --

MR. COOPER: I don't think so with these guys, but -- I might also add, I very much welcome Mr. Boies's clarification, perhaps, of some of the points that were made in their supplemental case management order, in terms of what they intended to inquire of the proponents.

And with the comments that he's made, which I accept, it may well be possible --

THE COURT: I suspect most of these issues, you will be able to work out between yourselves. But, I'm prepared to rule on any discovery disputes that you have, to do so informally. I commend to you our local rules with respect to how those are handled, on the telephone or a short letter.

And in the event you have a dispute and I'm unavailable, I'm going to appoint Magistrate Judge Spero to handle any of those discovery disputes, so that you get a very prompt resolution. And so the discovery can move on and not be impeded by having to wait for some kind of a decision on a

discovery dispute.

So, I'm sure you will have some disputes on discovery, but probably less than in the hands -- in less-capable hands would arise.

MR. COOPER: Very well, Your Honor. Thank you.

THE COURT: All right? Now. I have not built in a dispositive motion hearing date. The date that I had in mind for that -- and Mr. Cooper, this is probably of more interest to you than it is to the Plaintiffs, although the Plaintiffs may have some issues that they want to bring forward by a motion -- I was thinking about October 14th.

I don't know whether that's too soon, or whether that date works on your calendars, but we can build in that date.

MR. BOIES: We can do that, Your Honor.

THE COURT: Mr. Cooper?

MR. COOPER: Your Honor, that should work fine.

THE COURT: All right. Fine. Now, what else do we have to do this morning?

MR. BOIES: I don't think anything, from our standpoint, Your Honor.

THE COURT: Mr. Cooper?

MR. COOPER: We have no further business, Your Honor.

THE COURT: Very well. Mr. Mennemeier, anything further on behalf of the Governor?

MR. MENNEMEIER: Nothing, Your Honor. Thank you.

THE COURT: I must say I'm surprised at the Governor's position in this case. I know he has a budget to worry about, and water, and fires, and other things, but this is a matter of some importance to the people of the state.

And you're his lawyer, and I'm sure you have his attention, and it would be quite useful to have his input on a constitutional issue of this magnitude that affects the state in the way that it does. The Governor's thoughts and views would be very helpful, and very much appreciated.

MR. MENNEMEIER: I will share that, Your Honor.

THE COURT: Very well. If there's nothing further, Counsel, thank you. And I will see you at our next proceeding.

(Conclusion of Proceedings)

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 VRW, Perry, et al. v. Schwarzenegger , et al., 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/ Belle Ball_____

Belle Ball, CSR 8785, CRR, RMR

Friday, August 21, 2009