

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

State of California by and)
through Attorney General Xavier))
Becerra,)

Plaintiff,)

VS.)

NO. C 19-02769 WHA

ALEX M. AZAR in his official)
capacity as Secretary of the)
U.S Department of Health &)
Human Services and U.S.)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES,)

Defendants.)

San Francisco, California
Thursday, February 13, 2020

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter

1 Thursday - February 13, 2020

8:00 a.m.

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

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4 **THE CLERK:** Calling Civil action 19-2769, State of
5 California versus Azar, et al.

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

8 **MS. PALMA:** Good morning, Your Honor. Neli Palma on
9 behalf of the plaintiff State of California.

10 **MR. TAKEMOTO:** And Ben Takemoto on behalf of the
11 Department of Health and Human Services.

12 **THE COURT:** All right. What would you like to say?

13 **MS. PALMA:** Yes, Your Honor. Good morning.

14 This Court has already determined that this case is ready
15 for appeal. Given the posture of California's case, Rule 54(b)
16 provides the only viable alternative and defendants have not --

17 **THE COURT:** You won. You won. You don't need to
18 appeal. You just want to be up there with the other people
19 when they appeal and you can be an *amicus*, or you can dismiss
20 your FOIA case and all those other claims, but you're just
21 trying to have it both ways. It irritates me that you're doing
22 that. You won the case. You don't need to appeal.

23 **MS. PALMA:** Your Honor, 54(b) is not a remedy that's
24 only available to a losing party. In *Continental Airlines*, the
25 moving party was McDonnell Douglas. They had prevailed and the

1 Ninth Circuit upheld the district court's decision to certify
2 this case for appeal to streamline further litigation even
3 though it recognized that *Continental Airlines* may never have
4 to appeal that case.

5 **THE COURT:** I agree with that principle, but the other
6 people are going to get the case resolved on appeal. They have
7 two other cases going up on appeal; right? So the
8 Ninth Circuit is going to get their crack at this issue.

9 You don't -- the Attorney General doesn't have to be there
10 for justice to be done. You have a case. You won. You've got
11 more claims to present here in this court, and my view is you
12 ought to stick down here and finish your case up; and then when
13 the Ninth Circuit decides those other cases, that guidance will
14 be there. And if you want to participate as an *amicus*, God
15 bless you, go participate.

16 **MS. PALMA:** Your Honor, in ruling on a 54(b) motion,
17 the Court looks at the equities. In this case this Court
18 already recognized that billions of dollars of federal funding
19 to the State of California were at stake. It recognized, for
20 example, that California receives approximately \$63 billion
21 annually and those funds help finance healthcare to one-third
22 of all Californians. The fact that California was recently
23 issued a notice of violation reminds us of what's at stake.

24 California should have party status so that it can
25 continue to protect those interests against this unlawful rule.

1 It is, in fact, a target of this rule. It's been a target
2 since day one, and it -- whereas, the localities may be before
3 the Ninth Circuit, California should have party status as well
4 to defend the interest not just of those two counties but of
5 the other 56 counties that will also be affected if California
6 loses federal funding under this rule. So it should be
7 permitted to continue its fight against this unlawful rule.
8 The equities dictate that, Your Honor.

9 **THE COURT:** Listen, I've already ruled that you've won
10 and this rule cannot be enforced. If there is something that
11 deserves a contempt, I will hold the Department of Justice and
12 the defendants in contempt of my order if they are out there
13 violating it. So you have a complete remedy to that problem.

14 The problem is you want to have it both ways. You don't
15 want -- you won at the district court and you want to be in the
16 appeal, but you -- other people's appeal, but you won't dismiss
17 those other claims. So we're going to proceed, and you'll
18 eventually get your day in court on appeal whenever the case
19 gets final judgment.

20 **MS. PALMA:** Your Honor --

21 **THE COURT:** I have a docket to run. Listen, you know,
22 the Attorney General of the State of California does not
23 control my docket. I have a docket to run, a case to get rid
24 of. I'm not going to let it languish here. You either dismiss
25 it and go up on appeal now, or I will just -- you're making

1 life very hard for me to try to do it this way.

2 So, all right, what else would you like to say? Let me
3 hear from the federal government.

4 **MR. TAKEMOTO:** Your Honor, I have nothing more to add.
5 I completely agree with what you said.

6 **THE COURT:** Is it true that you're out there sending
7 threatening letters and violating the Court's order in this
8 case?

9 **MR. TAKEMOTO:** No, Your Honor. Your Honor is
10 absolutely correct that the rule has been set aside and the
11 Department of Health and Human Services is not enforcing that
12 rule.

13 **THE COURT:** All right. Good. Then what the AG told
14 me is not true then; right?

15 **MS. PALMA:** Your Honor, may I speak further?

16 The purpose of Rule 54(b) is to avoid piecemeal appeals.
17 It makes little sense from a judicial standpoint for the
18 Ninth Circuit to hear Washington's case and wait to hear
19 California's case.

20 This Court issued one order related to California's
21 cases -- California's claims, San Francisco's claims, and
22 Santa Clara's claims. Rule 54(b) presents the Ninth Circuit an
23 option to look at this court's appeal cleanly by looking at the
24 arguments that were presented by all three plaintiffs in this
25 case.

1 **THE COURT:** In the other two cases did the plaintiffs
2 dismiss their unresolved claims?

3 **MS. PALMA:** Your Honor --

4 **THE COURT:** I think they did, didn't they?

5 **MS. PALMA:** Well, but, Your Honor, recall that
6 California is in a very different posture. Those two other
7 cases did not include a FOIA claim.

8 And I'll just remind the Court that, you know, the
9 defendants suggest that perhaps there was some strategic error
10 on the part of California in not moving on the FOIA claim.
11 You'll recall that when the plaintiffs filed this case, all
12 parties immediately moved for preliminary injunction to avoid
13 this harmful rule from taking effect. This --

14 **THE COURT:** No. You gave that up in favor of summary
15 judgment, didn't you? It seemed to me that you came in and
16 said, "We're going to stipulate to it not going into effect and
17 we will have a summary judgment," that we wound up doing last
18 October. That's what happened. We never had a preliminary
19 injunction.

20 **MS. PALMA:** That is correct, Your Honor.

21 **THE COURT:** I ruled it out by concession by the
22 defendants not to enforce the rule pending summary judgment.
23 So then we finally got the summary judgment out before the rule
24 went into effect. So the rule has never gone into effect.

25 **MS. PALMA:** That is correct, Your Honor. But the

1 State of California in July, the same month that this Court
2 entered the order to delay implementation of the rule, reached
3 out to defendants to try to meet and confer regarding the
4 outstanding FOIA claim. So we have moved very expeditiously.

5 We have endeavored to try to settle this claim with
6 defendants without need to resort to the court. We shouldn't
7 be penalized for wanting to resolve this and giving them the
8 opportunity to come into voluntary compliance.

9 Your Honor, if the Court were to rule against us, that
10 would be the harsh and unjust result that the Court warned
11 against even under the traditional standards of
12 *Morrison-Knudsen*.

13 **THE COURT:** Let me ask you this: Would you agree to
14 allowing them to dismiss the FOIA claim and then to reassert
15 the FOIA claim later on or to reassert it in a separate case?

16 **MR. TAKEMOTO:** Absolutely, Your Honor. And, in fact,
17 that's what we suggested if California wished to appeal just
18 the claim that the rule is invalid. We suggested to California
19 that one option would be to dismiss the FOIA -- voluntarily
20 dismiss the FOIA claim and then reassert it at a later date.

21 **THE COURT:** Or reassert it in a separate case.

22 **MR. TAKEMOTO:** Or in a separate case.

23 **THE COURT:** Why can't you do that? Then it would just
24 be a FOIA case.

25 **MS. PALMA:** Your Honor, the purpose -- the purpose of

1 the FOIA claim is to shed light on agency action. There is no
2 authority to require California to dismiss its claim in order
3 for this to go up on appeal. For that there is 54(b). 54(b)
4 is the perfect remedy for the posture of this case without
5 having California dismiss its FOIA claim.

6 And, Your Honor, furthermore, there are additional claims
7 that weren't reached by this Court; for example, the spending
8 clause claim. And under the *Asante* case, the Court of Appeal
9 can affirm on any basis that's supported by the record.

10 Given the ongoing spending clause issues as evidenced by
11 the recent notice violation that was issued against California,
12 California does not want to enter into a stipulation dismissing
13 its spending clause claim. If it is left in the case and the
14 Court of Appeals wants to consider the spending clause at the
15 Ninth Circuit, it may do so because those claims are still in
16 the record. And, in fact, the case in Washington involves a
17 much broader scope of issues that were reached by this Court.

18 **THE COURT:** All right. Would the federal government
19 stipulate that if those spending clause and other attacks on
20 the rule itself that I didn't have to reach, that if those were
21 voluntarily dismissed without prejudice, I'm not talking about
22 FOIA now for a second, but that if the challenges to the rule
23 itself were dismissed, that in the event there was not
24 affirmance on the appeal and there was some kind of remand,
25 that the State of California could reallege and reassert all of

1 those alternative grounds?

2 **MR. TAKEMOTO:** Yes, Your Honor.

3 I would point out that the argument that the rule violates
4 the spending clause is, as we explained in our briefs, part of
5 the same claim against the rule and so the Court of Appeals on
6 appeal could consider the spending clause claim argument in
7 addition to the other arguments.

8 **THE COURT:** But there were some arguments I never
9 reached. I didn't have to reach them, and could any and all of
10 those that were challenges to the rule be reasserted on remand
11 if the Ninth Circuit sent it back? Would that be okay with
12 you?

13 **MR. TAKEMOTO:** Yes, Your Honor. If California was
14 willing to voluntarily dismiss those claims, yes.

15 **THE COURT:** All right. Without prejudice?

16 **MR. TAKEMOTO:** Yes.

17 **THE COURT:** All right. Now, with respect to the FOIA,
18 it seems to me that the thing would be to do would be also
19 dismiss that and without prejudice to reassert it in a
20 different case. Would you be okay with that?

21 **MR. TAKEMOTO:** Yes.

22 **THE COURT:** Why can't you do -- I don't see why that
23 doesn't satisfy you.

24 **MS. PALMA:** Your Honor --

25 **THE COURT:** Then I could close this case number.

1 **MS. PALMA:** Your Honor, two things. First, with
2 respect to whether the spending clause arises out of the same
3 facts as the APA claims, it's simply not the case. In *NFIB v.*
4 *Sebelius*, the Supreme Court assessed -- considered what the
5 amount of funding was that was at stake, the reliance interests
6 that were created by that, to determine that the threat to
7 rescind those funds posed constitutional issues under the
8 spending clause.

9 Two, what they are proposing has been rejected by the
10 Ninth Circuit in *Dannenberg v. Software Tools, Inc.* That's 16
11 F.3d 1073. In that case the defendants -- the parties
12 stipulated to exactly what is being suggested here, that the
13 claims would be dismissed without prejudice with the option of
14 reviving them if the appeal were successful.

15 That stipulation was approved by the Court. The
16 Ninth Circuit rejected that stipulation and they dismissed that
17 claim as being violative of the final judgment rule. That is
18 not an appealable order.

19 The Court in *Asante* --

20 **THE COURT:** All right. I find that hard to believe
21 because judges do that all the time. Give me the cite to that
22 so I can -- the Court of Appeals decision so I can see that.
23 That would be -- that's amazing to me to hear that. So give
24 me -- my law clerk should go get me that case.

25 **MS. PALMA:** I actually have a copy of it here with me.

1 **THE COURT:** All right. Hand it up to me, please, the
2 Court of Appeals decision.

3 **MS. PALMA:** At least I think I have. Yes, I do.
4 There are some of my notes on there.

5 **THE COURT:** I'll ignore your notes.

6 (Pause in proceedings.)

7 **THE COURT:** Without reading the entire thing, I see
8 there's language in here that supports what you're telling me
9 so what does the -- this is a 1994 decision. Did you
10 Shepardized this to see how it's been treated?

11 I've got to tell you, a lot of judges do exactly this, and
12 in my 20 years on the bench I've done it at least a dozen
13 times, and I've never had the Ninth Circuit send a case back.
14 So I'm surprised by this decision but, nevertheless, it does
15 seem to say what you said. So have you checked to see if this
16 is still good law?

17 **MS. PALMA:** Yes, Your Honor. And, in fact, Judge Chen
18 very recently cited to the *Dannenberg* case in the *Asante* case,
19 which we've also cited to in our case. And in that case they
20 had proposed a similar situation and they proceeded for -- they
21 were attempting to revive an equal protection claim, and the
22 parties -- the other side moved to dismiss, and Judge Chen
23 said, "Well, no, under the *Dannenberg* case, you didn't preserve
24 that, you didn't tell the Court that you wished to preserve
25 your claim, your equal protection claim. Your options should

1 have been to seek Rule 54(b) certification."

2 I have that case as well if you would like to see it,
3 Your Honor.

4 **THE COURT:** That's a district court. That doesn't
5 count. I'm asking about Court of Appeals.

6 **MS. PALMA:** Yes, Your Honor, that --

7 **THE COURT:** This is still good law?

8 **MS. PALMA:** Yes, it is, Your Honor, and I have found
9 cases standing for that same proposition not just in the
10 Ninth Circuit but in circuits all around the country.

11 **THE COURT:** All right. Hang on.

12 What does the government say to -- the federal government
13 say to this *Dannenberg* case?

14 **MR. TAKEMOTO:** Your Honor is correct that, you know,
15 the government enters into these sort of stipulations and
16 agreements routinely but, you know, the defendants can only do
17 so much. California has already won this case. It's HHS's
18 case to appeal so if California, you know, wishes to
19 voluntarily dismiss certain claims and the Court of Appeals
20 decides to send those claims back to the district court, then
21 that's California's choice; but --

22 **THE COURT:** Are you appealing? It's been long enough
23 now the SG should have decided.

24 **MR. TAKEMOTO:** There's no final judgment in this case
25 so --

1 **THE COURT:** You have not appealed?

2 **MR. TAKEMOTO:** No.

3 **THE COURT:** So if I entered a final judgment -- well,
4 you're appealing the other cases or not, the other two cases?

5 **MR. TAKEMOTO:** The United States hasn't yet filed a
6 Notice of Appeal in the Santa Clara and San Francisco cases.
7 It has filed a Notice of Appeal in the Eastern District of
8 Washington case.

9 **THE COURT:** When will you decide on the other two
10 cases?

11 **MR. TAKEMOTO:** Before the time limit to file a Notice
12 of Appeal, which I believe is 90 days from the day of entry of
13 judgment.

14 **THE COURT:** When was judgment entered?

15 **MR. TAKEMOTO:** Off the top of my head, I don't know
16 when San Francisco and Santa Clara and the government
17 stipulated to final judgment.

18 **MS. PALMA:** Judgment was entered on January 8th in
19 those two cases.

20 **THE COURT:** That's Elvis Presley's birthday.

21 **MS. PALMA:** Is that right?

22 **THE COURT:** An important day.

23 So that will be April 8th, maybe 9th.

24 Well, look, if you're not going to appeal any of these
25 cases, what are we fighting about? I thought you wanted to --

1 I thought -- look, you've already won. Why do you even need to
2 be up on appeal?

3 **MS. PALMA:** Your Honor --

4 **THE COURT:** I mean, they would have to take the
5 appeal, not you, anyway.

6 **MS. PALMA:** Your Honor, under --

7 **THE COURT:** They're not even asking for it.

8 **MS. PALMA:** Well, they have filed an appeal in the
9 New York case, they have an appeal in the Washington case, and
10 they've stipulated to entry of judgment in the San Francisco
11 and Santa Clara case. One could infer from that that the
12 purpose of stipulating to entry of judgment is to allow them
13 the opportunity to appeal. So we believe that that is -- just
14 based on what has happened to date, that that will happen here
15 as well.

16 Under *Continental Airlines* and *Curtiss-Wright*, cases we
17 have cited to, it doesn't matter that California was,
18 quote/unquote, "the prevailing party." If judicial economy is
19 served by avoiding piecemeal appeals, which is the case here,
20 54(b) provides an avenue so that the Ninth Circuit can receive
21 and consider these issues cleanly involving Washington's case,
22 California's case, San Francisco's case, and Santa Clara's
23 case. It is the piecemeal-appeal approach that they are
24 proposing that is remedied by a Rule 54(b) order.

25 And I disagree that California is trying to have it both

1 ways. California is moving to defend the billions of dollars
2 that defendants are threatening to rescind from the State of
3 California. Under *Morrison-Knudsen*, the traditional standard
4 for the appropriateness of 54(b), 54(b) order is appropriate in
5 order to avoid an unjust and harsh result. That's what we're
6 trying to avoid. And under the new standard in *Texaco* and
7 *Continental Airlines*, a 54(b) order is appropriate to avoid an
8 inequitable result.

9 **THE COURT:** All right. Just a second. Let's say we
10 get to April 8th or 9th and the attorney -- I'm sorry -- the
11 Justice Department decides not to appeal any of these three
12 cases. They don't want to appeal. So what good would it do to
13 do a 54(b)? If I do a 54(b), they're the ones -- the federal
14 government is the one that would have to appeal, not you.

15 **MS. PALMA:** Correct, Your Honor, and --

16 **THE COURT:** So what if they don't appeal? Then you're
17 still languishing down here in the district court.

18 **MS. PALMA:** Under *Continental Airlines*, they would
19 appeal and then this --

20 **THE COURT:** How can you force them to appeal?

21 **MS. PALMA:** That's my reading of *Continental Airlines*,
22 Your Honor.

23 **THE COURT:** I don't believe you can force somebody to
24 do something against their will.

25 **MS. PALMA:** In *Continental Airlines* it was McDonnell

1 Douglas, the prevailing party, who moved for a 54(b) judgment.
2 The Ninth Circuit upheld the certification under 54(b) even
3 though it recognized that had the case proceeded along its
4 natural course, Continental Airlines may never have had to
5 appeal. The Ninth Circuit already has the rule before it.

6 **THE COURT:** What if the nonmoving party says, "We
7 don't want to appeal. We've run out of money," or whatever the
8 reason is --

9 **MS. PALMA:** My understanding of --

10 **THE COURT:** -- then what is the consequence of that?

11 **MS. PALMA:** My understanding of 54(b) is that they
12 would have to appeal or the judgment would stand as is.

13 **THE COURT:** So, in other words, it could not be
14 appealed later. In other words, either appeal now or never.

15 **MS. PALMA:** Yes, that is my understanding --

16 **THE COURT:** Is that what you're saying?

17 **MS. PALMA:** -- that it forces their hand.

18 **THE COURT:** Has it ever happened? Is there some law
19 that says it's now or never if you do 54(b) and you don't want
20 to appeal? I've never had this problem before so I'm asking
21 you for some guidance here.

22 **MS. PALMA:** Your Honor, I think that *Continental*
23 *Airlines* stands for that proposition that, yes, you can force
24 the hand to create an appealable order. That's exactly what
25 Rule 54(b) does, and I can --

1 negatives in that, I can't understand it.

2 **MS. PALMA:** Would you like me to show you the case so
3 that you can read it at --

4 **THE COURT:** Have you briefed this point that you can
5 force the hand of the government to appeal now or forever hold
6 your piece by a 54(b)? That's possible that the law would go
7 that way, but I am not familiar with that rule.

8 **MS. PALMA:** Yeah, we can certainly brief the Court on
9 that issue, Your Honor. I believe that this case stands for
10 that, but we can hone in on that specific issue.

11 You know, just to continue reading on, it does state that
12 (reading):

13 "Nevertheless, given the size and complexity of this
14 case, we cannot condemn the district court's efforts to
15 carve out threshold claims and, thus, streamline further
16 litigation."

17 That is exactly what we're asking the Court to do here.

18 **THE COURT:** Well, I see that a district court could do
19 a 54(b) maybe in their discretion and try to streamline it. I
20 understand that motivation, but that's not the same thing as
21 saying that if the appellant decides, "No, we would rather do a
22 final judgment on appeal, not an interim judgment," that the
23 effect of a 54(b) certification is to make *res judicata* out of
24 anything that was in that summary judgment order.

25 **MS. PALMA:** Your Honor, if that is an issue that the

1 Court would like us to brief, we're more than happy to do that.

2 **THE COURT:** I think you should brief that. That could
3 be a factor in weighing all of this if I had that.

4 Another factor is whether or not -- I was under the
5 impression that the government was already appealing the other
6 two cases. If that's not true, that's also a factor I need to
7 know.

8 So it could turn out that the government doesn't want to
9 appeal any of these cases and so then a 54(b), if you're
10 correct on the law, would put the onus on the government to
11 take an appeal they don't want to take or forever hold their
12 peace.

13 So have you two briefed this? Have you briefed it?

14 **MR. TAKEMOTO:** Not the issue of -- not this specific
15 issue of whether it would force the hand.

16 **THE COURT:** I think you both should. How many days do
17 you want to give me a brief on that?

18 **MS. PALMA:** Your Honor, we can provide the Court that
19 briefing within a week or if you want it within fewer days,
20 we're happy to --

21 **THE COURT:** How about one week from today?

22 **MS. PALMA:** Okay.

23 **THE COURT:** Noon on Thursday of next week.

24 I would also like to know sooner, if I can, from the
25 government whether you plan to appeal the other two decisions.

1 **MR. TAKEMOTO:** All right, Your Honor. As I said, the
2 Solicitor General has not made any decisions.

3 **THE COURT:** Yes, I know how it works. I was in the
4 SG's office once. I understand how it works and I respect that
5 process; but, nevertheless, sometimes you do know sooner and
6 you can tell me -- help me figure out what to do here.

7 **MR. TAKEMOTO:** May I ask, Your Honor, on the
8 supplemental briefing, would you like simultaneous briefing or
9 staggered briefing?

10 **THE COURT:** Simultaneous would be better.

11 **MR. TAKEMOTO:** Okay.

12 **THE COURT:** I don't think -- this is a single issue.
13 How about five pages max?

14 **MS. PALMA:** Yes, Your Honor.

15 **THE COURT:** Okay.

16 **MS. PALMA:** And, Your Honor, is it my understanding
17 that the Court is requesting defendants to inform the Court
18 within its briefing whether or not it will appeal?

19 **THE COURT:** No, not within the briefing.

20 **MS. PALMA:** Or --

21 **THE COURT:** Just if they -- if the government -- if
22 the defendants learn sooner than April 8th -- like, for
23 example, in mid-March -- that they're going to take an appeal,
24 I would like to know that. I may hold up on this whole thing
25 until I find out what the government is going to do. I may

1 not. I may just decide it next week.

2 I've got to think about this. You've raised some points I
3 had not considered, both of you.

4 All right. I've got other cases to go to. Do you have --
5 if you've got one last thing you're dying to say, I'll let you
6 say it.

7 **MS. PALMA:** Again, Your Honor, we believe that 54(b)
8 certification is appropriate both under the traditional
9 standard under *Morrison-Knudsen* to avoid an unjust and harsh
10 result; under the current standard in *Texaco* and *Continental*
11 *Airlines*, Rule 54(b) certification is also proper to avoid an
12 inequitable result.

13 Here the State of California is endeavoring to defend
14 against a rule that targets California and threatens it with
15 billions of dollars of federal -- with rescinding billions of
16 dollars of federal funds. California should not be forced to
17 give up its spending clause claim when there are ongoing
18 spending clause issues in order to have a seat at the table of
19 the Ninth Circuit.

20 **THE COURT:** See, now you come back to this and you're
21 hurting my feelings because I am the district court. I speak
22 for the entire judiciary until I get reversed, and the
23 U.S. District Court has ruled in your favor and thrown that
24 rule out. O-U-T, out. It's dead, that rule, unless the
25 government appeals and gets it reinstated somehow, and somehow

1 it's like what I say doesn't count.

2 I guess what you're telling me is that I have to somehow
3 force them to take an appeal when I've already ruled in your
4 favor like what the U.S. district judge has said is
5 meaningless. I just don't get your whole argument about why
6 you have such a critical need to force them to take an appeal
7 when you've totally won.

8 **MS. PALMA:** Your Honor, we appreciate the Court's
9 efforts on this case and we appreciate the Court's ruling. We
10 would also want to make sure that we preserve the other viable
11 claims that we have, including the spending clause claim.
12 That's what California is attempting to do and to continue to
13 protect against an unlawful rule that targets California and
14 its critical federal funding.

15 Thank you, Your Honor.

16 **THE COURT:** All right. Do you have anything you're
17 dying to say?

18 **MR. TAKEMOTO:** Yes, very briefly.

19 Regardless of whether the Government's hand would be
20 forced into appealing or not, I just reiterate Your Honor's
21 point that California has already won. It is preserving all of
22 its claims. If there is a final judgment and if the government
23 appeals, California can raise all those claims.

24 This is merely the result of California deciding to bring
25 its FOIA claim with the rest of its claim. It won on one of

1 them. The Court should follow the ordinary course and await a
2 final judgment.

3 **THE COURT:** Well, let's -- yes. I'm just going to
4 make one last comment.

5 Let's assume for the sake of argument that there had not
6 been any other claims and no FOIA, none of those other claims,
7 so that there still could be a final judgment. So let's say I
8 had a final judgment already. That still doesn't force the
9 government to take an appeal they don't want to take. They may
10 be willing to accept my judgment.

11 And that, to me, is a -- it's within the rights of the --
12 within the rights, I guess, of the government to decide whether
13 to appeal my order or appeal the one in Washington. That's
14 what the SG is good at. They can figure out which case is the
15 best one -- quote, "best vehicle" to take the issue up on; and
16 then if they chose the other one, you could appear by *amicus* --
17 ask for permission to appear by *amicus*, and the Ninth Circuit
18 would surely allow you to do that.

19 I think I'm getting drawn into stratagems here.

20 All right. I don't know. I don't know. You've raised
21 points I need to think about, and I thank you for that. I'll
22 look forward to reading your briefs in one week.

23 And, please, let me know as soon as the government has
24 made a decision. Don't wait the full 90 days if you don't have
25 to.

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

2 **THE COURT:** All right. Thank you.

3 **MS. PALMA:** Thank you, Your Honor.

4 (Proceedings adjourned at 8:35 a.m.)

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8 **CERTIFICATE OF REPORTER**

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled matter.

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12 DATE: Friday, February 14, 2020

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18 Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
19 U.S. Court Reporter
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