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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 CHRISTA McAULIFFE INTERMEDIATE  
5 SCHOOL PTO, Inc., et al.,

6 Plaintiffs,

7 v.

18-cv-11657 (ER)

8 BILL DE BLASIO,  
9 *in his official capacity as*  
10 *Mayor of New York*, et al.,

11 Defendants.

Conference

12 -----x

13 New York, N.Y.  
14 April 19, 2019  
15 4:15 p.m.

16 Before:

17 HON. EDGARDO RAMOS

18 District Judge

19 APPEARANCES

20 PACIFIC LEGAL FOUNDATION  
21 Attorneys for Plaintiffs  
22 BY: CHRISTOPHER M. KIESER, ESQ.

23 ZACHARY W. CARTER  
24 Corporation Counsel for  
25 The City of New York  
BY: THOMAS B. ROBERTS, ESQ.  
Assistant Corporation Counsel

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APPEARANCES (Cont'd)

AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
Attorneys for Intervenor Defendants

BY: JENNESSA CALVO-FRIEDMAN, ESQ.  
-and-

NEW YORK LEGAL ASSISTANCE GROUP  
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BY: LILIANA ZARAGOZA, ESQ.  
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BY: STEFANIE D. COYLE, ESQ.  
-and-

LATINO JUSTICE  
Attorneys for Intervenor Defendants  
BY: JOSE PEREZ, ESQ.

(Case called)

THE CLERK: Counsel, please state your name for the  
record.

MR. KIESER: Christopher Kieser for plaintiffs.

MR. ROBERTS: Thomas Roberts for the defendants,  
Assistant Corporation Counsel.

MS. KLEINMAN: Rachel Kleinman for the proposed  
intervenors.

MS. ZARAGOZA: And Liliana Zaragoza for the proposed  
intervenors.

THE COURT: And good afternoon to you all.

This matter is on at the request of the proposed  
intervenors. So I'm happy to hear from either one of you.

MS. KLEINMAN: Thank you, your Honor.

The proposed intervenors are New York City public

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1 school students and families, along with community-based and  
2 educational advocacy organizations, all of whom stand to  
3 benefit directly from the changes to the Discovery Program at  
4 issue in this case. The organizations among the proposed  
5 intervenors represent students of all races -- Black, Latino,  
6 White, Asian-American. And all of them have direct experience  
7 with the application process, some of them, to the application  
8 process to the specialized high schools. All of them have  
9 experience with the New York City public school system and the  
10 stark racial segregation and racial isolation in the  
11 specialized high schools. And all of them have been given an  
12 increased opportunity to attend the specialized high schools,  
13 because of the policy changes that the city has made and the  
14 expansion and changes to the Discovery Program.

15 They seek to intervene in this action because, after  
16 decades of advocacy by some of our proposed intervenors and  
17 other organizations and individuals like them, they have had  
18 decades of advocacy trying to address the racial diversity  
19 crisis in the specialized high schools, and after all this  
20 time, many prior administrations, almost nothing has been done  
21 to address that problem. Finally under this admin --

22 THE COURT: Let me stop you there, because I think  
23 during the preliminary injunction briefing, I think I addressed  
24 the fact that the city has, over the last couple of decades,  
25 been trying assiduously to address that problem in any number

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1 of ways. I understand that they may not have been successful,  
2 clearly, but to say that they haven't done anything on or much,  
3 I think, is an overstatement. But obviously I will let  
4 Mr. Roberts speak for itself.

5 MS. KLEINMAN: No, I think that's fair, your Honor.  
6 There have been some steps taken. And yet the advocacy around  
7 this issue, as we're pointing out, is that larger steps really  
8 do need to be taken. As I think both of the parties pointed  
9 out in their briefing, there was a complaint filed with OCR a  
10 number of years ago that pointed to some of the ways that the  
11 city could address the issue. One of them was to expand the  
12 Discovery Program. And so I think the proposed intervenors are  
13 certainly appreciative that this administration did take that  
14 step. They feel like there are larger steps that could be  
15 taken to address it. But that one small step was taken, and  
16 immediately came under attack. And they believe that their  
17 interests are directly affected by the challenge to these small  
18 changes. They seek to fiercely defend these changes, while  
19 hoping that bigger ones are made. And they don't believe that  
20 the city can adequately represent their interests.

21 THE COURT: Tell me about that. Why is that?

22 MS. KLEINMAN: There are a few different ways. The  
23 first, I think, is hearkening back to what I was saying about  
24 the decades of advocacy and the feeling that the city, at least  
25 in prior administrations, has not taken the kinds of steps

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1 necessary to addresses the problem or to show the commitment to  
2 diversity that they typically need, certainly not from the  
3 perspective of looking at racial isolation within the  
4 specialized high schools. So I think there is the feeling  
5 that, especially if there were to be a change in  
6 administration, that they could not believe necessarily that  
7 that commitment to defending this program would necessarily  
8 stay.

9 THE COURT: I guess I'm not -- not that I'm not  
10 following it. I just don't see the basis for it. You seem to  
11 be suggesting that the city and the Board of Education are not  
12 willing to be robust defenders of the concept of diversity. Is  
13 that an argument that you're making?

14 MS. KLEINMAN: That is part of it. I would maybe  
15 rephrase it as that their interest in diversity, which I think  
16 is real and certainly has been exhibited in the case, that,  
17 while defending this case, could change based on the  
18 administration, and also might not necessarily be their top  
19 priority throughout the course of this litigation. One of the  
20 things that we pointed to in our letter was the interest that  
21 the city has more broadly representing all New York City public  
22 high school students and in making sure that the next round and  
23 the round after that of high school admissions goes efficiently  
24 and smoothly. And all of that is certainly an important value.  
25 But the proposed intervenors definitely worry that this case

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1 could be settled on grounds that don't necessarily represent  
2 their interests because of that, because of the timing issues  
3 and that extra issue in making sure, perhaps more importantly  
4 than diversity, that everybody knows where they're going to  
5 high school and the right schedule next year.

6 THE COURT: Isn't that an important decision to take?  
7 I mean, if you've got a school system made up of several  
8 hundred thousand students, it would be chaos otherwise,  
9 wouldn't it?

10 MS. KLEINMAN: Absolutely. I certainly don't fault  
11 the city for having that interest, and it's one that they  
12 absolutely should have as representing all public high school  
13 students and the mayor, more broadly all New Yorkers. But it  
14 is a different kind of interest that our proposed intervenors  
15 have. And we think certainly, if the interests had to be  
16 ranked, that there might be a change. And the proposed  
17 intervenors care very much, though, that this be, yes, resolved  
18 efficiently and in a quick matter -- that's always important --  
19 but also that it be correct, and that diversity and also very  
20 increased chances of going to these schools, which is something  
21 that the city does not have -- they do not have individual  
22 students -- will be directly affected and their chances of  
23 going to the specialized high schools affected.

24 THE COURT: OK. And you also state that you would be  
25 able to raise legal arguments regarding intentional racial

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1 discrimination in the creation of the admissions process. What  
2 do you mean by that?

3 MS. KLEINMAN: Yes, that's correct, your Honor. We  
4 believe strongly this is a race-neutral program, which I  
5 believe that the city agrees with us on, and that it will be  
6 subject to rational-basis review, in which case this defense  
7 would not be at issue, but were it to be the case that the  
8 Court were to be looking at strict scrutiny for this, we  
9 believe that the *Parents Involved* case leaves open the  
10 possibility of an argument that intentional discrimination,  
11 although not shown by court order -- obviously in this case,  
12 this is not a case where intentional discrimination has been  
13 found -- but that it could serve as a compelling basis for a  
14 narrowly tailored program such as the one at issue here. We  
15 don't believe the city will be interested in making those  
16 arguments about past discrimination or the effect that it had.

17 THE COURT: So you believe that you should be allowed  
18 to intervene as of right.

19 MS. KLEINMAN: We do believe that the present  
20 intervenors can meet that standard. But in the alternative,  
21 they are seeking permissive intervention and also feel that  
22 they have met the standards for that.

23 THE COURT: Mr. Kieser, why shouldn't these folks be  
24 allowed in as of right? Aren't they the same as your clients?

25 MR. KIESER: Your Honor, that's true. But in a case

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1 where a government action is challenged, courts generally  
2 presume the government is in the best position to defend it,  
3 and the Second Circuit has said repeatedly that just because a  
4 proposed intervenor might have a stronger or a different  
5 motivation to defend the challenged law or policy, that does  
6 not establish adversity of interest as a matter of law.

7 THE COURT: Yes, but the proposed intervenors point to  
8 a couple of areas where there is a divergence of interest,  
9 where they are more likely to be more zealous advocates and  
10 more willing to take positions that the city, as an  
11 institutional matter, can't take because they can't benefit  
12 one -- to their minds and maybe rightfully so -- benefit one  
13 race of kids over another.

14 MR. KIESER: Your Honor, that's certainly a valid  
15 point and it's certainly a reason that a proposed intervenor  
16 should want to contribute in the form of an amicus brief in  
17 this case. However, in the context of intervention as of  
18 right, the adversity of interest goes towards the particular  
19 issue at issue in the case, which here is the defense of the  
20 changes to the Discovery Program. And the city has shown that  
21 they will defend the changes vigorously and competently; they  
22 have prevailed at the preliminary injunction stage. So  
23 plaintiffs believe that while the proposed intervenors might  
24 have, and probably do have, a very good contribution to make in  
25 the litigation, that it could easily be made more efficiently



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1 through an amicus brief.

2 THE COURT: Why is that the case? This lawsuit has  
3 just started. I don't know that the discovery has even  
4 started.

5 MR. KIESER: We have exchanged requests for production  
6 of documents a couple of weeks ago.

7 THE COURT: OK. But essentially it's just started.  
8 So it's as though they are coming in with the city.

9 MR. KIESER: The proposed intervenors also do raise  
10 this issue about potential discrimination. It seems that they  
11 would like to argue that Hecht-Calandra, the law that  
12 authorizes the admissions process in specialized schools, was  
13 enacted for a discriminatory purpose. That law was passed in  
14 1971. So to prove that would require discovery of a lot of  
15 issues that are collateral to this case and could require the  
16 intervention of additional parties, such as the state.

17 THE COURT: So you're suggesting that their coming in  
18 and advocating for the impact of intentional discrimination  
19 would require going back and exploring the legislative history  
20 of the act?

21 MR. KIESER: It seems that way. If the city has  
22 simply been following Hecht-Calandra for the last 48 years, in  
23 order to prove that Hecht-Calandra was passed with  
24 discriminatory intent, you would have to scrutinize the actions  
25 of the legislators at issue in 1971, it seems to me.

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1 THE COURT: Well, if that were the case, wouldn't it  
2 just be a matter of looking into the legislative history?

3 MR. KIESER: That's probably true.

4 THE COURT: I assume that a lot of those legislators  
5 have passed, and so there's not going to be deposition  
6 testimony concerning that, right? Presumably.

7 MR. KIESER: That's true, your Honor. We still  
8 believe that the additional argument -- and I believe the city  
9 raised this in their letter -- the additional argument could  
10 change the course of the litigation and could possibly add to  
11 the discovery burden that's already heavy in this case.

12 THE COURT: Let me look. Ms. Kleinman, do you intend  
13 to go back and unearth Hecht-Calandra motivations?

14 MS. KLEINMAN: We could certainly, as your Honor  
15 mentioned, look at the legislative record. I do not foresee  
16 there being any need for much if any additional discovery. As  
17 you mentioned, I don't think we would try to be deposing any  
18 legislators. And we certainly -- the city mentioned this in  
19 their letter -- we certainly don't see the need for any  
20 additional parties to be added because of this claim, and we're  
21 not looking for the Court to make a finding of intentional  
22 discrimination. This is one of the defenses that is directly,  
23 in relation to the claims and defenses, already in this case,  
24 and we don't see that adding a considerable amount to the case.

25 THE COURT: Mr. Kieser, I am a busy person and like to

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1 do things the easy way in any event. Why shouldn't I just let  
2 them in on a permissive basis?

3 MR. KIESER: In our view, added additional parties  
4 just adds more potential that the case might be distracted from  
5 its current path or, potentially, additional discovery or,  
6 potentially, additional issues might pop up. Other parties  
7 might seek to intervene if intervention is granted here. Both  
8 parties have an interest in timely resolution of this case  
9 because of the upcoming offers for 2020, and intervention  
10 possibly could slow this case down and possibly make it more or  
11 less likely that would happen.

12 THE COURT: Mr. Roberts.

13 MR. ROBERTS: Your Honor, as I said in the letter, our  
14 letter, we don't oppose intervention. But we do oppose, we do  
15 think there should be serious conditions imposed on the  
16 intervenor not to take this case in a different direction. And  
17 if we're going to challenge the state statute, then the state  
18 has to be brought in, and if the statutes then remain, the  
19 other intervenors who are in one of the schools who like the  
20 school, an alumni thing. And I just, really, there is a  
21 relatively narrow set of issues that are here.

22 The intervenors bring great expertise in the law and  
23 can bring some of their witnesses to possibly -- we could bring  
24 them, but they could also bring them. But we really want this  
25 case to be resolved. And the proposition that maybe there's a

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1 new administration implies to me they think this litigation is  
2 going to three years or more. I would really be upset if that  
3 were the case. This case should not be alive at the end of the  
4 de Blasio administration. And to hear that as a justification  
5 gives me real concern that we are going off and going to change  
6 what is a pretty concrete and narrow issue into something  
7 completely different.

8 THE COURT: Well, I'll let her speak for herself, but  
9 I didn't understand her to be making the argument that this  
10 litigation should go on for a number of years. I understood  
11 her to be making an argument that any change that is made  
12 should be sufficiently stable that it survives a change of  
13 administration. Again, I don't know what that means, in terms  
14 of policy determinations, but that's the argument, I believe,  
15 she was making. And, again, we'll go back to her. I guess I  
16 would tend to agree that this lawsuit was not meant to take on,  
17 head on, a challenge to Hecht-Calandra, and if the intervenors  
18 propose to do that, then maybe this is not the appropriate  
19 vehicle.

20 MR. ROBERTS: Well, that is my reaction. And as far  
21 as the intervention as of right or permissive, it seems to me  
22 we feel we will defend this case adequately from the city's  
23 point of view. Whether it's permissive, it seems to me, goes  
24 to this issue of, will the case get materially changed. Should  
25 it not get materially changed, we do not object to their

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1 intervention, but really would like to keep the fight confined  
2 to the issues that have been presented, which are pretty clean  
3 and narrow and can be resolved, I think, before the next year's  
4 admissions round. And that is indeed an important issue for  
5 us.

6 THE COURT: How would you define these? You said  
7 they're clean and narrow. How would you define the issues?  
8 And we'll get to Ms. Kleinman as to whether she agrees that  
9 those are the confines and that she would be willing to work  
10 within those confines.

11 MR. ROBERTS: My understanding of the plaintiffs'  
12 complaint is solely that a racially neutral policy, which was  
13 adopted with the thought that one of many advantages of it  
14 would be to diversify the schools, that that violates equal  
15 protection. I personally find that a shocking contention and  
16 would like to demonstrate that it's wrong. They narrowly  
17 brought that issue. And I think it's -- I don't dispute it's  
18 an important issue -- it should be killed -- but let's deal  
19 with that issue and dispose of it. This equal protection claim  
20 is to my mind very narrow, meritless, and should be disposed  
21 of.

22 THE COURT: Ms. Kleinman, so what about that? This  
23 case is basically about a challenge to a proposal, actually an  
24 actual implemented proposal now, to change some of the  
25 admissions criteria, expand the Discovery Program, and change

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1 some of the admissions criteria for that program. Is that what  
2 you're looking to come in here and help vindicate?

3 MS. KLEINMAN: That is, and, as I mentioned earlier,  
4 your Honor, I think we are in agreement with the city that this  
5 is a program that should be evaluated on a rational basis  
6 review, and that it is a race-neutral program. Unfortunately  
7 the plaintiffs in this case aren't viewing that strict scrutiny  
8 is applicable here. And so when we are talking about the  
9 possibility of raising the intentional discrimination that may  
10 have been behind the passage of the original law and its  
11 results, and the discriminatory impact it has had since, we're  
12 only talking about raising that as a defense, as a compelling  
13 interest that the city had in remedying the past intentional  
14 discrimination. We do not plan on, I think, again, bringing in  
15 the state to try to get a finding of intentional  
16 discrimination, but instead that would be part of a larger  
17 argument about how the current conditions, which include, we  
18 believe, a past of intentional discrimination, leads to the  
19 city's compelling interest to make these kind of changes. But  
20 we agree, again, with the city that we shouldn't have to get to  
21 that defense and that this is clearly a race-neutral program  
22 and is clearly applicable.

23 THE COURT: Let me ask you this. Have you seen the  
24 parties' request for production?

25 MS. KLEINMAN: We have not.

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1 THE COURT: OK. Mr. Kieser?

2 MR. KIESER: I would just reiterate that, as far as  
3 intervention as of right, the proposed intervenors bear the  
4 burden of rebutting the adversity interest, the presumption  
5 that they share the same interest with the city. They haven't  
6 done that because they are saying they are going to make the  
7 same defense of the Discovery Program expansion as the city is.

8 With respect to this argument about Hecht-Calandra, I  
9 don't see how -- I don't recall a case -- in *Parents Involved*,  
10 I think was pretty clear that it would have to be based on a  
11 prior finding of intentional discrimination. So I don't recall  
12 a case where a party raised intentional discrimination in the  
13 same case as a challenge in order to raise a compelling  
14 interest defense.

15 THE COURT: But they are saying, I think, that they're  
16 not raising that claim. They're suggesting that it might be a  
17 defense.

18 MR. KIESER: Certainly, if intentional discrimination  
19 were proven, then it's possible that that could serve as a  
20 compelling interest if this case were evaluated under strict  
21 scrutiny. Your Honor, I'm just saying that I don't recall a  
22 case where that was raised in this posture. Normally, the  
23 intentional discrimination is found earlier and the remedy is  
24 done at a later date and then the remedy is challenged as  
25 violating the protection clause, and when *Parents Involved*

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1 spoke about that, it was in that context of, we now have  
2 unitary schools, therefore, there is no past discrimination.  
3 But if they were under a desegregation order, for instance,  
4 then certainly the remedial interest would be compelling.

5 THE COURT: OK. Well, look, I think that the proposed  
6 intervenors do have at least a colorable claim, certainly to  
7 permissive intervention if not intervention as of right. So  
8 I'm going to let them make the motion.

9 Ms. Kleinman, how much time do you want?

10 MS. KLEINMAN: I am out next week. If we could have  
11 till the end of the following week?

12 THE COURT: Two weeks?

13 MS. KLEINMAN: Right, yes.

14 THE COURT: How much time to respond, Mr. Kieser?

15 MR. KIESER: Two weeks is fine after that, if it's OK.

16 THE COURT: OK. And Mr. Roberts, if you wish you  
17 can --

18 MR. ROBERTS: I'm sure we would be able to respond if  
19 we choose to at the same time as the plaintiffs.

20 THE COURT: Very well. And then one week to reply?

21 MS. KLEINMAN: That's fine.

22 THE COURT: So two weeks, two weeks, one week. We'll  
23 get you those dates. But in the meantime, Mr. Roberts, what  
24 can you tell the Court about the actual results of the  
25 Discovery Program and assignments for the coming year? I saw a



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1 couple of newspaper articles that were disheartening, in terms  
2 of the numbers.

3 MR. ROBERTS: Yes, your Honor. In terms of diversity  
4 numbers with regard to the students who were admitted just on  
5 the SHSAT, your characterization is quite fair. With regard to  
6 the diversity program, we don't have all the results, but what  
7 we're seeing is, it looks like it's having virtually no impact  
8 on Asian Americans. Their numbers will be -- their percentage  
9 success of admissions looks like it's going to be very much the  
10 same if not slightly higher than last year's diversity  
11 admissions. But we are still doing some comparisons. I would  
12 think within another week or so we'll have more definitive  
13 numbers. One of the -- I don't know how much you want me to  
14 get into the details of figuring out how -- do you want me to  
15 talk a little bit about how the diversity invitations went?

16 THE COURT: At a high level, if you don't mind.

17 MR. ROBERTS: Well, in essence, there were three  
18 groups. There's one group of students who are already our  
19 students who we know, because they already are getting free or  
20 reduced-price lunch and they already are in a school with ENI,  
21 we know that essentially they qualify. And we've sent out  
22 about 600 invitations to them to see whether they're willing to  
23 go to summer school and take the plan. Of those 600, that  
24 group that we already knew qualified, about 59 percent of them  
25 are Asian-American, and last year, of that group -- a smaller

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1 group, because there were fewer students -- but, again, that  
2 was about 59 percent Asian students.

3 Then we have another group, it's now about 300, who  
4 are students who we don't know whether they qualify. We know  
5 they go to the right school, but we don't know whether their  
6 family financial situation or other matters results in their  
7 qualifying. Many of them do not go to public schools, is why  
8 we don't know. And we have sent out invitations to all the  
9 kids who go to the right schools, or live in a district that's  
10 right, and have the right scores, but we don't know whether  
11 they're qualified. There are about 300 of them. And we've  
12 asked them to apply. And if they do apply, they need to submit  
13 some financial information to us. We haven't gotten that back  
14 yet. And when we get that back, then we will have sort of a  
15 firmer number of who actually qualifies.

16 So we invited, we sent invitations to a lot of  
17 students who in fact don't qualify, because we don't know  
18 whether their finances are right. And it will take another few  
19 weeks to get their responses back and sort that out. But the  
20 preliminary indication is, that group also had, if anything, a  
21 larger percentage of Asian-Americans than the parallel group a  
22 year ago.

23 So it's all looking -- we may conceivably write you a  
24 letter in a month or so saying, hey, we want to make a summary  
25 judgment motion that in fact this case, which was brought on

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1     behalf of Asian-Americans, there's no impact and it should be  
2     dismissed for that reason. I'm not there yet, I'm not  
3     committing to that, but that is a very real possibility, that  
4     we do see a motion or a letter like that.

5             THE COURT: Thank you.

6             And Mr. Kieser, I don't know if you had any insight  
7     into the numbers, whether there's anything you want to put on  
8     the record?

9             MR. KIESER: I would rather wait to see the entire  
10    picture before I comment on it.

11            THE COURT: Very well.

12            Ms. Rivera.

13            THE CLERK: The motion is due May 3. The response is  
14    due May 17. And the reply is due May 24.

15            THE COURT: Does everyone have those dates?

16            Anything else?

17            MS. KLEINMAN: Your Honor, if I could add one thing.  
18    Since we sent the letter, we have actually been retained by one  
19    additional client, the Coalition for Asian American Children  
20    and Families. They were not mentioned in the letter as part of  
21    the proposed intervenor group, but we would like to include  
22    them in the motion.

23            THE COURT: I don't see why not. The motion hasn't  
24    been made, so sure.

25            MS. KLEINMAN: And I additionally wanted to ask if we

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1 could have five additional pages for that motion.

2 THE COURT: 30 pages total?

3 MS. KLEINMAN: Yes.

4 THE COURT: OK.

5 MS. KLEINMAN: Thank you.

6 THE COURT: Mr. Kieser, do you want any additional  
7 pages?

8 MR. KIESER: Sure. 5 additional pages is --

9 THE COURT: OK. Mr. Roberts, you're not getting any  
10 additional --

11 MR. ROBERTS: I can't imagine that we would exceed the  
12 minimum that you normally speak of.

13 THE COURT: Very well. Anything else?

14 MR. KIESER: No, your Honor.

15 THE COURT: There being nothing else, we're adjourned.  
16 Have a nice holiday.

17 (Adjourned)