No. 11-17255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR., et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 JW (Honorable James Ware)

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL OF PLAINTIFFS-APPELLEES KRISTIN M. PERRY ET AL.

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INTRODUCTION

This Court should deny Proponents' emergency motion for a stay pending appeal. To warrant a stay, Proponents must demonstrate both a strong likelihood of success on the merits and that they will suffer irreparable injury absent a stay. *Nken v. Holder*, 129 S. Ct. 1749, 1761-62 (2009). They can demonstrate neither.

As Chief Judge Ware found, the digital recording of the trial proceedings is a "judicial record" subject to the "strong presumption in favor of access to court records," *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003), and Proponents failed to offer any "compelling reasons" sufficient to overcome this presumption. Order at 1. Proponents have no reasonable likelihood of success in their challenge to this ruling—which is reviewed only for abuse of discretion (*Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995))—because the district court unquestionably made the trial recording "part of the record" in this case (U.S.D.C Doc #708 at 4), Proponents did not object to its inclusion in the record or move to strike it from the record, and Proponents have failed to "articulate compelling reasons supported by specific factual findings" that "outweigh the general history of access and the public policies favoring disclosure." Order at 7 (quoting *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)). Indeed, Proponents have presented no evidentiary support whatsoever to substantiate their arguments in

favor of suppressing the trial recordings.

Nor can Proponents demonstrate that irreparable—or, in fact, any—harm will result absent a stay. As Chief Judge Ware found, Proponents' claim that they—or their professional expert witnesses—might be harmed by release of the video is "unsupported hypothesis or conjecture." Order at 11 (internal quotation marks omitted); *see also* U.S.D.C. Doc #708 at 37-38 (Proponents' assertion that their witnesses "were extremely concerned about their personal safety" was not credible). Proponents' speculative assertion of irreparable harm is also implausible. The substance of the sealed digital recording is already public and has been widely disseminated—through the trial transcript, reenactments posted on the internet, and even a Broadway play. The substance of the video recordings is the same as the transcript—a record of the trial proceedings—but in a different and richer format. There is no evidence that Proponents' witnesses have suffered *any* harassment or harm as a result of their involvement in this case, or that unsealing the digital recording post-trial would open the floodgates to such harassment or harm in the future.

Moreover, a stay would constitute a serious violation of the public's common law and First Amendment rights of "contemporaneous access" to judicial records. *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). Indeed, this Court

has held that even a 48-hour delay in unsealing judicial records "is a total restraint on the public's first amendment right of access." *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983). Here, the public has an overriding interest in immediate access to the video recordings so that it can scrutinize for itself the full trial record as this closely watched case progresses through the appellate process.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are gay and lesbian Californians who are in serious, long-term relationships and who wish to marry. U.S.D.C. Doc #708 at 56-57 (FF #1-4). As a direct result of Proposition 8, Plaintiffs were denied this right solely because their prospective spouses are of the same sex. *Id.* They filed the underlying suit to restore their right to marry the person of their choice. *Id.* at 27-29, 115.

In January 2010, the United States District Court for the Northern District of California conducted a historic, 12-day *public* trial on an issue of great legal importance and public interest: whether the State of California violated the due process and equal protection guarantees afforded gay men and lesbians by the Fourteenth Amendment when it stripped them of the fundamental right to marry by passing Proposition 8. At trial, the district court informed the parties that it would digitally record the proceedings for use in chambers and that the recording "would be quite helpful to the Court in preparing the findings of fact." Tr. 754:15-23. The

district court explained that Local Rule 77-3 permits "recording for purposes of use in chambers" and informed the parties "that's the purpose . . . for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising." *Id.* at 754:21-23. Shortly before closing arguments, the district court notified the parties that "[i]n the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party." U.S.D.C. Doc #672 at 2. The district court ordered the parties "to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order." *Id.* No party objected to the use of the digital recording in closing arguments, which were open to the public, and both Plaintiffs and Plaintiff-Intervenor City and County of San Francisco requested and received a copy.

On August 4, 2010, the district court ruled in favor of Plaintiffs, declared that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and permanently enjoined its enforcement. U.S.D.C. Doc #708 at 138. In its decision, the district court explained that the digital recording of the trial was "used by the court in preparing the findings of fact and conclusions of law," just as it had informed the parties it would be used. *Id.* at 6. The district court expressly directed the clerk "to file the trial recording under seal *as part of the record*." *Id.*

(emphasis added). No party objected to the digital recording being made part of the record, no party moved to strike the digital recording from the record, and no party has contended that it was error for the district court to make the digital recording part of the record.

On April 13, 2011, Proponents filed a motion in this Court seeking the return of all copies of the digital recording. Plaintiffs cross-moved for an order unsealing the recording. Recognizing that "the district court issued the protective order and has the power to grant the parties all the relief they seek," this Court transferred the motions to the district court. The district court denied Proponents' motion for return of the digital recording, and on September 19, 2011, it granted Plaintiffs' motion to unseal. Exercising its broad discretion on the issue whether sealing of the digital recording was appropriate, the district court found that the recording was part of the judicial record in the case and "that no compelling reasons exist for continued sealing of the digital recording of the trial." Order at 1-2. The district court temporarily stayed the execution of its order until September 30, 2011, "[u]nless a further stay is granted by the Court on timely motion or by a higher court." *Id*. at 14.

On September 23, 2011, Proponents filed their emergency motion for stay in this Court along with a similar stay request in the district court. Three days later, this Court

granted a temporary stay of the district court's order pending consideration of the present motion. The following day, the district court denied Proponents' motion for stay as moot in light of this Court's decision temporarily to stay the unsealing order.

ARGUMENT

Proponents bear the heavy burden of proving that this Court should stay the order of the district court. *Nken*, 129 S. Ct. at 1761. In determining whether the moving party has met its burden, courts consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (internal quotation marks omitted). Proponents must establish *at least* the first two factors to obtain a stay. *Id.* Here, Proponents do not come close to meeting their burden of proving that a stay is justified.

I. Proponents Are Unlikely To Prevail On The Merits Of Their Appeal.

The district court's decision will be reviewed only for abuse of discretion. *Hagestad*, 49 F.3d at 1434. Here, the district court's holding that the digital recording is a judicial record to which the public has a protected right of access, and that no "compelling reason" exists to prevent that access, is not only within its sound discretion, it is absolutely correct.

A. The Digital Recording Is Part Of The Judicial Record.

The district court was clearly correct in finding that the digital recording of the trial proceedings is part of the judicial record in this case. *See* Order at 5-6. In his August 4, 2010 ruling, former Chief Judge Walker noted that the digital recording was "used by the court in preparing the findings of fact and conclusions of law," and he ordered the clerk to file the recording under seal "*as part of the record*." U.S.D.C. Doc #708 at 6 (emphasis added). Proponents did not object when former Chief Judge Walker released copies of the digital recording to the parties for use during closing arguments or to the order making the recording part of the record, they did not move to strike the recording from the record, and they have never contended that former Chief Judge Walker erred by directing the clerk to file it "as part of the record." Based on the above, the district court found that "the parties, including Defendant-Intervenors, proceed from the common premise that the digital recording is unquestionably part of the record." Order at 5. Therefore, review of the district court's decision to unseal the recording must start from the premise that it is part of the judicial record in this case.

B. The Common Law Right Of Public Access Requires That The Digital Recording Be Unsealed.

Equally uncontroversial is the district court's finding that "[t]here is a common law right of public access to records in civil proceedings," Order at 6, which "enhances

both the basic fairness of the . . . trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984); *see also Nixon v. Warner Commc'n Inc.*, 435 U.S. 589, 597 (1978). Courts addressing the common law right of access "start with a strong presumption in favor of access to court records." *Foltz*, 331 F.3d at 1135. To overcome this strong presumption, the party seeking to keep such records secret must "articulate compelling reasons supported by specific factual findings" that "outweigh the general history of access and the public policies favoring disclosure." *Kamakana*, 447 F.3d at 1178-79 (citations omitted). The strong presumption of access "may be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture." *Hagestad*, 49 F.3d at 1434 (citations omitted).

Proponents argue that the strong presumption of public access is overcome in this case because unsealing the digital recording would "subject Proponents' witnesses to a well-substantiated risk of harassment and would prejudice any further trial proceedings that may prove necessary in this case." Mot. at 15. However, the district properly rejected this argument as "mere 'unsupported hypothesis or conjecture.'" Order at 11. Proponents failed to present any evidence, in the form of live testimony, declarations, or otherwise, from either of their two professional expert witnesses to the

effect that they have faced any harassment as a result of their involvement in this trial, that they have reason to fear such harassment if the digital recording is unsealed, or that unsealing of the digital recording will lead them not to participate in some currently unforeseen, future trial proceedings. *See* U.S.D.C. Doc #708 at 37-38. The silence of Proponents' witnesses on this point is deafening. To his credit, one of Proponents' two professional expert witnesses—David Blankenhorn—recently even acknowledged that while he personally does not believe in televising trials, his reasons for holding that belief "have nothing to do with the physical safety of expert witnesses" and he "never felt physically threatened." *See* http://familyscholars.org/2011/09/10/8/.

The district court certainly did not err in finding that the unsupported speculation of counsel with respect to potential future witness harassment is insufficient to overcome the strong presumption in favor of public access to judicial records. Indeed, this Court has recognized that mere argument about, or assertions of, potential harm—even grave, physical harm—are insufficient to overcome that presumption. *See Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (vacating an order denying public access to a plea agreement because the defendant's counsel did "not present *facts* demonstrating any danger to [the defendant] or his family") (emphasis added). Here, as in *Oregonian*,

Proponents have failed to present evidence or specific facts sufficient to establish a threat of harm to their witnesses, relying instead on lawyer argument and conjecture.[1]

Moreover, Proponents' argument that their witnesses would face harassment if the digital recording is released is not only unsupported, it is also illogical. The involvement of Proponents' witnesses in this case has been known and widely reported for years, yet Proponents do not even suggest that they have faced harassment or other harm as a result. Also, actual video of the depositions of experts originally designated by Proponents, but not called at trial, has been publicly available on the district court's website for many months (https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html), with no objection from Proponents and no evidence suggesting that disclosure of that video has led to any harassment.

Next, Proponents argue that unsealing the digital recording would violate "Chief Judge Walker's solemn assurances" that the recording would be used for his chambers only, thereby causing "grave damage to the integrity of the judicial process itself."

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[1] Proponents' demand that the entire trial video remain sealed based on the supposed, unsubstantiated fears of two professional expert witnesses is, at the very least, not "narrowly tailored to serve [their purported anti-intimidation] interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Proponents do not even attempt to explain how the purported concerns of the only two witnesses called by Proponents could possibly justify denying the public access to the testimony of Plaintiffs, Plaintiffs' experts, or other fact witnesses, or to the arguments of counsel.

Mot. at 15. But, as the district court found, "the record does not support the contention that Judge Walker limited the digital recording to chambers use only." Order at 8. Indeed, former Chief Judge Walker, without objection from Proponents, provided copies of the recording to the parties for their use, well outside his chambers and the courthouse. *Id*. The district court also noted that it was unaware of any authority for the proposition advanced by Proponents "that the conditions under which one judge places a document under seal are binding on a different judge, if a motion is made to that different judge to examine whether sealing is justified." Order at 8-9. Finally, because Proponents and their highly capable counsel were on notice that the district court intended to use the digital recording when making its decision, they were also on notice that the recording might well become part of the record in this case to which the public would have a right of access. Former Chief Judge Walker gave no "assurances" whatsoever that the long-standing rules governing public access to judicial records would be suspended in this case, nor could he have done so. *Cf. Foltz*, 331 F.3d at 1138 (a party could not reasonably rely on a sealing order where the party did not "mak[e] a particularized showing of good cause" when it obtained the order).

Lastly, Proponents argue that the digital recording is "not the type of judicial record to which the common-law right of access applies" because it is not "evidence or

even argument" and because it is "wholly derivative of the evidence offered, and the arguments made, in open court." Mot. at 13. This argument is wrong in several respects. First, the common law right of access is not limited to evidence or argument at trial—it applies to all judicial records—and Proponents cite to no authority for their contention that it is so limited. *See, e.g.*, *Press-Enterprise Co.*, 464 U.S. at 513 (transcript of *voir dire* proceedings); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (docket sheets); *see also United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994) ("True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source."). Second, items in a public record will often be "derivative" of one another—for example, a brief or proposed findings of fact summarizing the testimony at trial—yet Proponents cite no authority for the premise that they can pick and choose which items the public may access and which it may not. Third, the fact that Proponents have fought for nearly two years to suppress the video of this historic trial belies any suggestion that the digital recording provides no added value beyond the record items currently available to the public.

United States v. McDougal, 103 F.3d 651 (8th Cir. 1996), on which Proponents rely, is readily distinguishable. First, the district court in *McDougal* "declined to

decide whether the videotape itself was a judicial record to which the common law right attaches." *Id.* at 656. Here, Chief Judge Walker specifically ordered the clerk to place the digital recording in the record, and Proponents neither objected nor moved to strike. Second, the Eighth Circuit held that even if the videotape at issue in that case were deemed a judicial record, it would hold "that the district court did not abuse its discretion in denying access." *Id.* at 657. Here, the district court exercised its sound discretion to hold that no compelling reason existed to deny public access. Third, to the extent *McDougal* holds that a video recording of judicial proceedings cannot be a judicial record, that holding is inconsistent with this Court's precedent. *See Valley Broad. Co. v. United States District Court*, 798 F.2d 1289 (9th Cir. 1986) (common law right of access extends to audio and video tapes moved into evidence at trial).

Because the district court correctly held that the digital recording is part of the judicial record in this case and that no "compelling reasons" exist to overcome the "strong presumption" of public access, Proponents have no likelihood of success on their appeal and their request for a stay should be denied.

C. The First Amendment Provides An Independent Right Of Access To The Digital Recording.

The trial court based its decision to unseal the digital recording entirely on the common law right of public access, and accordingly did not reach Plaintiffs' argument

that the First Amendment also provides a right of access to court records in civil proceedings. However, even if this Court were to find that the common law right of access does not support unsealing of the digital recording, this Court should join the numerous other circuits that have recognized a First Amendment right of access to court records in civil proceedings. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068-71 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983); *see also, e.g., Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984). "Openness of the proceedings will help to ensure [the] important decision is properly reached and enhance public confidence in the process and result." *Seattle Times Co. v. United States District Court*, 845 F.2d 1513, 1517 (9th Cir. 1988).

Under First Amendment principles, documents and proceedings may be closed to the public only if (1) closure serves a compelling interest; (2) there is a substantial probability that the compelling interest would be harmed in the absence of closure; and (3) there are no alternatives to closure that would adequately protect the compelling interest. *Oregonian*, 920 F.2d at 1466. A decision to seal the record may not be based on conclusory assertions, but must make specific factual findings. *Id.*

For the same reasons discussed above with respect to the common law right of access, Proponents have failed to identify any compelling interest to justify continued sealing of the digital recording, and they have failed to prove specific facts, through admissible evidence, that would justify continued sealing.

D. Neither Local Rule 77-3 Nor The Supreme Court's Decision In *Hollingsworth* Is Relevant To The Issue Whether The Digital Recording Should Be Unsealed.

Because they cannot demonstrate a compelling interest sufficient to overcome the strong presumption in favor of public access to a judicial record, Proponents try to side-step the question altogether by arguing that unsealing the digital recording would violate the Northern District's Civil Local Rule 77-3 and the Supreme Court's decision in *Hollingsworth v. Perry*, 130 S. Ct. 705, 711 (2010). Proponents are wrong on both fronts.

1. Local Rule 77-3 Does Not Bar The Recording Of A Trial For Purposes Of Use In Chambers Or The Unsealing Of A Recording That Is Part Of The Judicial Record.

Local Rule 77-3 prohibits, except under certain specified circumstances, "the taking of photographs, public broadcasting or televising, or *recording for those purposes* in the courtroom or its environs, in connection with any judicial proceeding." Civil Local Rule 77-3 (emphasis added). Proponents argue that unsealing a recording of a trial proceeding, regardless of the purpose for which the recording was made,

"plainly violates Rule 77-3" because unsealing would inevitably lead to public broadcast (presumably by third parties). The district court properly dismissed this distorted reading of Local Rule 77-3.

As the district court correctly held, "Local Rule 77-3 speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes and uses." Order at 10. It prohibits recording a judicial proceeding for the *purpose* of public broadcast. That is not what happened here. Former Chief Judge Walker expressly informed the parties that he was recording the trial proceedings for the purpose of use in chambers, not for purposes of public broadcasting or televising. Tr. 754:15-23. Former Chief Judge Walker did in fact use the digital recording in chambers when reaching his decision, he expressly stated in his decision that he had considered the digital recording, and he made the digital recording part of the judicial record without objection. The digital recording therefore was properly made, in full compliance with Local Rule 77-3.

The question that the district court confronted on Plaintiffs' motion to unseal had nothing to do with Local Rule 77-3, but rather concerned whether a digital recording of the trial proceedings, properly made and entered into the judicial record without objection, should remain under seal. The district court correctly held that

"[n]othing in Local Rule 77-3 governs whether digital recordings may be placed into the record. Nor does the Rule alter the common law right of access to court records if a recording of the trial is placed in the record of the proceedings." Order at 10.

2. The Supreme Court's "Narrow' Decision In *Hollingsworth* Says Nothing About Whether A Digital Recording That Is Part Of The Judicial Record Should Be Unsealed.

Proponents further argue that the Supreme Court's "narrow" decision in *Hollingsworth v. Perry*, 130 S. Ct. at 709, now controls whether the common law or First Amendment affords the public the right to access the digital recording in this case. But the district court properly considered and rejected this argument as well. Order at 2. As the district court noted, the Supreme Court's *Hollingsworth* decision was explicitly "confined to a narrow legal issue: whether the District Court's amendment of its local rules to broadcast this trial complied with federal law." *Id.* The Court did not "express any views on the propriety of broadcasting court proceedings generally." *Id.* And the *Hollingsworth* decision certainly took no position on when a properly made recording of trial proceedings that was placed in the judicial record without objection should be unsealed pursuant to common law and First Amendment principles of public access. Thus, as the district court correctly observed, Proponents' "reliance on the Supreme Court's decision is misguided." *Id.* at 9.

II. Proponents Have Not Proven That They Will Suffer Any Harm, Let Alone Irreparable Harm, In The Absence Of A Stay.

In addition to evaluating whether the party seeking a stay has made a "strong showing" of likelihood of success, courts also consider "whether the applicant will be irreparably injured absent a stay." *Nken*, 129 S. Ct. at 1761; *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). As discussed above, Proponents' assertion that "unsealing the record will place Proponents' witnesses at grave risk of harassment" and could possibly "prejudice future trial proceedings" (Mot. 16-18) is nothing more than "unsupported hypothesis or conjecture." Order at 11 (quoting *Hagestad*, 49 F.3d at 1434). In fact, rather than submitting a declaration regarding the harm allegedly suffered by its two witnesses, Kenneth Miller and David Blankenhorn, Proponents reiterate the same unsubstantiated and speculative allegations of harm that the district court previously rejected in findings of fact after the trial. *See* U.S.D.C. Doc #708 at 37-38 (finding not credible Proponents' assertion that their witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever."). The arguments of Proponents' counsel—which are devoid of any evidentiary support whatsoever—do not come close to proving that Proponents will suffer irreparable harm if the digital recording is unsealed.

Proponents also assert that unsealing the record will moot their appeal. Mot. 15-

16. Although mootness may constitute irreparable harm in some circumstances, it cannot do so where, as here, the mooted appeal has no realistic likelihood of succeeding on the merits.

III. The Public Interest Favors Immediate Enforcement Of The Order.

Public trials are a cornerstone of our democracy. Access to judicial proceedings is necessary "to protect the free discussion of governmental affairs." *Globe Newspaper Co.*, 457 U.S. at 604. Public access to trials and trial records is so important that a mere 48-hour delay in unsealing judicial records "is a *total restraint* on the public's first amendment right of access even though the restraint is limited in time." *Associated Press*, 705 F.2d at 1147 (emphasis added); *see also* Kenneth W. Starr, *Open Up High Court to Cameras*, N.Y. Times, Oct. 3, 2011 ("The benefits of increased access and transparency are many. Democracy's first principles strongly support the people's right to know how their government works.").

Indeed, because "it is difficult for [people] to accept what they are prohibited from observing" (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality)), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. "Our national experience instructs us that except in rare circumstances openness preserves, indeed, is

essential to, the realization of that right and to public confidence in the administration of justice. The burden is heavy on those who seek to restrict access to the media, a vital means to open justice." *ABC, Inc. v. Stewart*, 360 F.3d 90, 105-06 (2d Cir. 2004). A trial adjudicating an issue as important and as closely-watched as California's elimination of the constitutional right of gay men and lesbians to marry requires the maximum public access guaranteed by these First Amendment values.

In short, the public's overriding interest in public access to trials and trial records weighs decisively against issuance of a stay.

IV. In The Alternative, The Court Should Expedite This Appeal To Greatest Extent Possible.

Proponents have failed to meet their burden of proving that a stay is appropriate. In the event that the Court nevertheless decides to issue a stay, Plaintiffs respectfully request that this Court expedite this appeal to the greatest extent possible—as it has done in previous appeals in this very case (*see* Case No. 09-17241)—so as to minimize the amount of time that the public is denied its common law and First Amendment rights of access to the judicial record in this important matter of great public interest.

CONCLUSION

For the foregoing reasons, the Court should deny Proponents' emergency motion for stay pending appeal.

Dated: October 3, 2011

/s/ Theodore J. Boutrous, Jr.

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9th Circuit Case Number(s) 11-17255

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