IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor-Appellee,

vs.

EDMUND G. BROWN JR., et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

No. 11-17255

U.S. District Court
Case No. 09-cv-02292 JW

PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

On Appeal from the United States District Court
for the Northern District of California

The Honorable Chief District Judge James Ware

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INTRODUCTION

In their Emergency Motion to stay the district court's order unsealing video recordings of the Proposition 8 trial, Proponents recount a narrative of threats and harassment against Proposition 8 supporters in an effort to show not only that there is substantial reason to retain the video recordings of the trial under seal, but also that a stay is required to prevent irreparable harm. Yet Proponents have repeatedly failed to substantiate this narrative of threats and harassment before the district court and fare no better before this Court. Nearly two years have passed since the trial of this case took place, Proponents' two expert witnesses testified, scores of people observed them testify, and their testimony was widely reported in the press. Nearly six months have passed since Plaintiffs first sought to unseal the recordings. Yet despite every opportunity to come forward with real evidence, if any existed, Proponents have failed to proffer an iota of support for their claim that either of their expert witnesses was subjected to threats, harassment or reprisals of any kind. Instead, they offer stale exhibits showing what they characterize as harassment of people who campaigned in support of Proposition 8 during the political campaign, three years ago.

But even this account—of harassment of Proposition 8's supporters—is inaccurate. Proponents seek to perpetuate a myth they have created out of whole cloth that *they* and other advocates of discrimination against gay people are the victims and that the perpetrators are the lesbians and gay men and their families who continue to be denied equal rights by laws. This narrative heaps insult upon the injuries that lesbians and gay men have long suffered as a result of the discrimination embedded in and invited by discriminatory laws like Proposition 8. The trial record is devoid of evidence demonstrating injury to Proposition 8's Proponents and advocates, but it is brimming with evidence that shows the

sustained animus and hostility that society and the government have long visited on gay people and of the stigma and harm that laws like Proposition 8 invite and perpetuate. Hate crimes against gay people, bullying of gay youth, depression, suicides and other serious health problems that result from anti-gay discrimination—all of this is demonstrated by the record in this case. In comparison, Proponents' characterization of a handful of campaign incidents as widespread "harassment" directed against advocates of Proposition 8 borders on the ridiculous. Most of these events amount to nothing other than debate, disagreement, and protected First Amendment speech and expression.

As a result, Proponents' flimsy factual showing fails to carry their burden on two points: (1) that they are likely to succeed on the merits in showing compelling reasons to overcome the presumption of public access to judicial records; and (2) that irreparable harm is likely in the absence of a stay. For these reasons, and the reasons set forth in Plaintiffs' opposition brief and that of the Media Coalition, both of which San Francisco joins, Proponents' motion should be denied.

FACTUAL BACKGROUND

Throughout this litigation, Proponents have repeatedly raised the claim that supporters of Proposition 8 have been subject to threats or harassment. They first raised this claim in September 2009 in support of their Motion for Protective Order to shield certain campaign communications from discovery. U.S.D.C. Doc. 187. They next presented the argument in briefing opposing the live broadcast of the trial. *See* Proponents' Emergency Motion at 3-4. Notably, although their counsel claimed that some witnesses would not testify if the trial were broadcast, Proponents did not support this assertion with a declaration or evidence of any sort.

During trial, Proponents sought to introduce evidence of harassment of Proposition 8 supporters through cross-examination of Professor Gary Segura, Plaintiffs' expert on the political powerlessness of gay men and lesbians. Trial Tr. 1790:6 *et seq.* The district court admitted the evidence not for its truth but to permit Professor Segura to describe whether news reports of harassment of Proposition 8 supporters would increase the likelihood that voters would support Proposition 8. Trial Tr. 1791:10-1792:2. Professor Segura stated that some reports of harassment of Proposition 8 supporters might diminish support for gays and lesbians. He also, however, stated that he "would not group boycotts of businesses in with violence and intimidation," Trial Tr. at 1803:14-15, and he contrasted Proponents' news reports with "sworn testimony in the courtroom" about harassment experienced by San Francisco witnesses Helen Zia and Mayor Jerry Sanders. Trial Tr. 1806:14-17. Professor Segura also testified about the Heritage Foundation report that Proponents cite in their present motion (*see* Emergency Motion at 25): "In fact, the Heritage Foundation report, which was introduced into evidence, makes no attempt to gather evidence of intimidation, vandalism, hostility; violence in the opposite direction. So the Heritage Foundation Report[,] I frankly find a little bit intellectually dishonest." Trial Tr. 1806:18-23. He continued: "We also know from the Hate Crimes Reports that there were more than 100 acts of violence against gays and lesbians in 2007. . . . We know that[,] nationwide[,] gays and lesbians are more likely to be targeted for violent attack, rape and murder than any other American on the basis of their identity." Trial Tr. 1806:24-1807:4. Other than hearsay evidence presented to Professor Segura for his comment, and limited testimony from Proposition 8 supporter William Tam, Proponents introduced no other evidence at trial of any harassment of Proposition 8 supporters.

The entirety of the *Perry* trial was highly publicized. Every minute of the trial was open to the public, and journalists offered real-time coverage through live-blogging and tweets. Complete and unredacted copies of the trial transcripts were posted online as soon as they became available. And media outlets provided in-depth reporting and analysis in newspapers, radio stories, and television broadcasts. Notwithstanding this prolonged and extensive media attention, there is no indication that Proponents' witnesses were harassed due to this publicity or their participation in the trial.

On April 15, 2011, Plaintiffs moved in the Ninth Circuit to unseal the video recordings of the trial. 9th Cir. No. 10-16696, Doc. 340. Proponents opposed the motion and made the factual assertion to this Court that one of their witnesses decided to testify in reliance on a commitment by former Chief Judge Walker that the recordings would not become public. 9th Cir. No. 10-16696, Doc. 346 at 6-7. Although Plaintiffs' cross-motion to unseal the video recordings has been pending for nearly six months, Proponents have developed no further factual record about witness harassment—not even by obtaining a declaration from their own expert witness to support counsel's assertion that he would not have participated in a trial that was to be broadcast. And they affirmatively *rejected* Judge Ware's suggestion that an evidentiary hearing might be appropriate to determine whether harm would result from post-trial dissemination of the video recordings. August 29, 2011 Hearing Tr. 50:15-16.

During the pendency of the *Perry* litigation, Proponents and their affiliates have pursued their claims of harassment in at least two other district courts in this Circuit. *See ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009); *Doe v. Reed*, 661 F. Supp. 2d 1194 (W.D. Wash. 2009), *reversed by* 586 F.3d 671 (9th Cir. 2009), *reversal affirmed by* 130 S.Ct. 2811 (2010). Even in

those cases—where harassment is directly at issue on the merits of claims that campaign supporters should not have to reveal their identities—Proponents have submitted little admissible evidence in support of their claims and have relied in large part on the same type of hearsay media articles they submit here. Furthermore, despite Proponents' claims that there is an on-going risk of harassment, the very information that Proponents sought to shield in *Bowen*, campaign contributions to the Proposition 8 campaign, has been publicly available since February 2009 yet Proponents have submitted almost no evidence of harassment since that date.

In *Bowen*, ProtectMarriage.com and other supporters of Proposition 8 filed a facial and as-applied challenge to provisions of California's Political Reform Act, claiming in part that they should be exempt from generally applicable campaign finance disclosure provisions because their supporters face a "reasonable probability of threats, harassment and reprisal" if their identities are disclosed. On January 13, 2009, the *Bowen* plaintiffs sought a preliminary injunction to exempt them from post-election reporting and disclosure requirements. *See* E.D. Cal. Case No. 2:09-CV-00058, Doc. 16. In support of this request, they filed media articles quite similar to those filed here, as well as nine anonymous declarations. The district court carefully considered this evidence, *see* 599 F. Supp. 2d at 1200-04, and concluded that the as-applied challenge had a "very minimal chance of success in light of the relatively minimal occurrences of threats, harassment, and reprisals" that they had shown. *Id*. at 1216. The court also found no likelihood of irreparable injury and a strong public interest in enforcement of the State's disclosure laws, and denied plaintiffs' motion. *Id*. at 1226. Four months later, the *Bowen* plaintiffs moved for summary judgment, submitting 49 additional declarations from supporters of Proposition 8, most of whom claimed to have had yard signs stolen

or defaced, or to have been subject to criticism for their support of Proposition 8. *See* E.D. Cal. Case No. 2:09-CV-00058, Doc. 111. The court denied this motion as untimely and gave the parties time to fully develop the record. But ProtectMarriage.com and the other plaintiffs did not do so. Instead, on August 25, 2011, they filed a summary judgment motion that relies largely on inadmissible hearsay – primarily media reports about the Proposition 8 campaign, with no first hand testimony establishing the truth of these reports. *See id.*, Doc. 246. This hearsay evidence is the subject of a motion to strike currently pending before the Eastern District of California. *Id*. Doc. 271. The parties have also filed cross-motions for summary judgment, and oral argument is scheduled for October 20, 2011.

In *Doe v. Reed*, 661 F. Supp. 2d 1194 (W.D. Wash. 2009), ProtectMarriage Washington and Doe plaintiffs sought to prevent the public disclosure of referendum petitions submitted to the State in an effort to repeal a bill expanding the rights and responsibilities of domestic partners. The *Doe* plaintiffs brought a facial and as-applied challenge to provisions of the Washington Public Records Act, and the as-applied challenge includes similar allegations of threats, harassment, and reprisals as those asserted in *Bowen*. On September 10, 2009, the district court granted a preliminary injunction on the basis of plaintiffs' facial challenge. *Id*. The Ninth Circuit reversed the preliminary injunction, 586 F.3d 671 (2009), and the Supreme Court affirmed that reversal, 130 S.Ct. 2811 (2010). The higher courts did not consider the as-applied challenge, and the case returned to the district court for further proceedings on that claim. As in *Bowen*, however, the Doe plaintiffs failed to develop a factual record supporting their allegations of threats, harassment and reprisals. Instead, on June 29, 2011, they filed a motion for summary judgment that relies in large part on the same media articles filed in

Bowen, along with anonymous declarations specific to Washington. *See* Case No. 3:09-CV-05456, Doc. 213. Defendants filed a cross-motion for summary judgment, *see id*., Doc. 244, and oral argument is scheduled for October 3, 2011.

ARGUMENT

On a motion to stay a district court order pending appeal, Proponents bear the burden of showing, among other things, that they are likely to suffer irreparable harm absent a stay and that they are likely to succeed on the merits of their appeal. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). As discussed in the opposition briefs of Plaintiffs and the Media Coalition, in order to succeed on the merits and overcome 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), Proponents must offer a "compelling reason" with a "factual basis" beyond "hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). Proponents do not meet their burdens, first because the factual showing that they attempt to make—that Proposition 8 supporters suffered harassment during the political campaign—is flawed and unreliable, and, second, because it has nothing to do with what is at issue in this motion, whether Proponents' witnesses would suffer any harms at all if the trial recordings were unsealed.

I. PROPONENTS FAIL TO PROVIDE CREDIBLE EVIDENCE OF WIDESPREAD THREATS, INTIMIDATION OR HARASSMENT OF PROPOSITION 8 SUPPORTERS

Rather than present specific evidence relevant to the unsealing of the trial videos, Proponents renew a general narrative of threats, harassment and reprisals that they have repeated in various cases over the past three years that relates not to the unsealing of trial testimony but to the hard-fought political campaign to pass

Proposition 8 that they waged in California in 2008. Even setting aside the conjectural relationship between the campaign three years ago and any threats to witnesses today, Proponents' evidence fails on its own terms because, despite ample opportunities and incentives to develop this factual record over the past three years in three district courts, Proponents have never offered credible evidence in support of these allegations of widespread harassment and they again fail to do so here. Instead, Proponents support their present allegations of harassment only with reference to exhibits created over two years ago and originally filed in support of their Motion for a Protective Order. As we discuss in this section, these exhibits are of little or no evidentiary value and the Court should give them no weight in its consideration of Proponents' Motion.

Proponents cite briefs from *Citizens United v. Federal Elections Commission*, U.S. Supreme Court No. 08-205 (Exhs. 27, 27-A-1, & 27-A-2), but these briefs simply reflect arguments offered in another case involving different parties and issues. They do not reflect the arguments or positions of Plaintiffs in this case, and they are not party admissions. Proponents may endorse or adopt statements in the briefs, but those statements remain arguments, not evidence. Similarly, the fact that one of the briefs cites a *New York Times* article included by Proponents as Exhibit 27-A-3 confers no special weight to that article, which itself is only hearsay.

Proponents also cite self-serving declarations by leaders of the Proposition 8 campaign. *See* Exh. 28 (Declaration of Ronald Prentice, chair of the ProtectMarriage.com executive committee), Exh. 29 (Declaration of Frank Schubert, President of ProtectMarriage.com's public relations firm), Exh. 31 (Declaration of Hak-Shing William Tam, official proponent of Proposition 8). The limited portions of the declarations that discuss harassment are of questionable

value for several reasons. First, they were submitted two years ago and concerned events surrounding a political campaign. They say nothing about broadcast of the trial or harassment of trial witnesses. Second, the descriptions of alleged harassment are primarily second-hand stories and include few specific details based on personal knowledge. Third, even the firsthand testimony about harassment contained in these declarations is questionable because Proponents use an overly broad definition of harassment that includes protected First Amendment expression by others. For instance, when testifying on behalf of ProtectMarriage.com in *Bowen*, Mr. Prentice defined harassment as "just an attempt to either influence me directly or people—to influence their opinion about me through phrases and comments." E.D. Cal. Case No. 2:09-CV-00058, Doc. 263, Exh. J (Excerpts of Deposition of Ronald Prentice ("Prentice Depo.") at 75:18-76:5). In a similar vein, Frank Schubert describes protests and boycotts as harassment. *See* Exh. 29 at ¶¶ 6-7. While Proponents may consider boycotts, criticism or disagreement to be harassment, case law recognizes that they are instead protected First Amendment activity. *See generally NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-15 (1982).

Proponents also cite two attorney declarations, neither of which includes reliable evidence. The Declaration of Nicole Moss attaches 71 media articles downloaded from the internet in September 2009, as well as references to various websites active at that time. *See* Exh. 30. The Declaration of Sarah Troupis describes anonymous declarations submitted in the *Bowen* litigation. *See* Exh. 32. Yet these too substantiate nothing more than isolated incidents or protected First Amendment activity during the heated Proposition 8 campaign.

In sum, Proponents have sought repeatedly throughout this litigation and in other cases to substantiate an imagined narrative, that it is the supporters of

Proposition 8 who deserve the protection of the courts, rather than the lesbian and gay victims of discriminatory and animus-based enactments. But time and again their factual showing has fallen short. When the issue was first raised in their Motion for Protective Order and briefing to halt the live broadcasting of the trial, their failure to support their narrative of pervasive victimization with specific allegations or direct evidence may have been understandable. *See, e.g., University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (acknowledging that preliminary injunctions are often granted on partial records). Years later, it is no longer so.

II. PROPONENTS FAIL TO SHOW THAT THEIR WITNESSES WOULD LIKELY SUFFER ANY HARM IF THE VIDEO RECORDINGS WERE UNSEALED.

The factual showing that Proponents attempt to make relates to campaign incidents, not to whether trial witnesses would face harassment or intimidation years after their testimony and after the hard-fought Proposition 8 campaign. But Proponents never explain how or why the Court can make the analytical leap from Proponents' exhibits about the campaign to a conclusion that Proponents' witnesses who testified in support of Proposition 8 (much less Plaintiffs' and the City's witnesses, who testified against it) would likely suffer harm if the video recordings were released. Rather than offering analysis, Proponents appear to rely on *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) and the Supreme Court's determination that, based on the evidence presented to it in January 2010, Proponents had made a sufficient showing of likelihood of irreparable harm to halt the imminent live broadcast of the trial. *Id.* at 712-13. Indeed, at the hearing on Plaintiffs' motion to unseal the video recordings, Proponents' counsel argued that the district court did not need to conduct an evidentiary hearing on any threat to

Proponents' witnesses because "this is the law of the case." August 29, 2011 Hearing Tr. 50:15-16.

As Plaintiffs and the Media Coalition correctly argue, *Hollingsworth* does not control whether the video recordings should be unsealed. Nor does it control whether Proponents' factual showing, where they offer essentially the same declarations and media articles as they did to the Supreme Court nearly two years ago, is sufficient on either the question of likelihood of irreparable harm or of whether Proponents can overcome the presumption of access to judicial records. This is so for several reasons.

First, contrary to Proponents' counsel's assertion, preliminary injunction determinations are not the "law of the case" except as to pure questions of law. *See, e.g., S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004). Second, Proponents now must meet a test that the Supreme Court did not pass on in *Hollingsworth*, whether they have overcome the "strong presumption in favor of access to court records," *Foltz*, 331 F.3d at 1135, with a factual showing that is "compelling" and not sustained only by "hypothesis or conjecture." *Hagestad*, 49 F.3d at 1434. It cannot be that *Hollingsworth* controls a question that was not presented. Third, and perhaps most importantly, the circumstances are very different on this appeal. It is now nearly three years after the Proposition 8 campaign. Proponents have had ample time and opportunity to develop their factual record in the district court in the *Perry* case (including in proceedings on Plaintiffs' motion to unseal the videotapes, when their counsel rejected the notion of an evidentiary hearing) and in *Bowen* and *Doe v. Reed*. The fact that their evidence is no more substantial today than it was when they first sought a stay of the live broadcast in *Perry* in January 2010 speaks volumes. Also telling is the fact that their repeated claims that at least one of their two trial witnesses would not

have testified if he had known of the possibility of broadcast have *never* been substantiated. Indeed, Proponents fail to present any testimony from the expert witnesses who would allegedly suffer harassment if the videos were unsealed, and their decision not to present this testimony strongly suggests that it would not support their claims. *See Sparkman v. Commissioner*, 509 F.3d 1149, 1156 n.5 (9th Cir. 2007) ("Where the burden of production rests on a party, a court may, at its discretion, presume or infer from that party's failure to call a witness that the testimony the witness would have offered would not favor that party."). This inference is further supported by Proponents' witness David Blankenhorn, who recently publicly said his trial participation never led him to feel physically threatened. *See* Plaintiffs' Opposition at 9.

Proponents have wholly failed to substantiate the claim that their witnesses—whose testimony has been widely known for nearly two years—face any serious risk of threats or harassment. To leap from the stale declarations that Proponents present to the conclusion that they have overcome the common law and First Amendment rights of public access to judicial records would be to engage in precisely the kind of conjecture and speculation that *Foltz* and *Hagestad* forbid.

CONCLUSION

Because Proponents' claims of harassment of trial witnesses are based only on speculation and conjecture, they can show neither a likelihood of success on their appeal of the district court's order, nor a likelihood of irreparable harm if the order is not stayed pending appeal. This Court should deny their application for stay.

Dated: October 3, 2011

Respectfully submitted,

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