UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 11-17255

KRISTIN PERRY, *et al.*,
Plaintiffs-Appellees,

vs.

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

and

DENNIS HOLLINGSWORTH, *et al*,
Defendant-Proponents-Appellants.

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

Civil Case No. 09-CV-2292 JW (Hon. Chief Judge James Ware)

NON-PARTY MEDIA COALITION'S OPPOSITION TO EMERGENCY MOTION TO STAY PENDING APPEAL

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Pursuant to Fed. R. App. Proc. 27(a)(3), the Non-Party Media Coalition[1] submits this Opposition to the Emergency Motion to Stay filed by Appellants Proponents of Proposition 8, Dennis Hollingsworth, *et al.* ("Proponents").

1. INTRODUCTION

In their request for a stay of the district court's order unsealing the video recordings of the historic trial in this matter, Proponents pretend that it is January 2010 and the purported harms that the Court is asked to consider flow out of a trial that has yet to occur, involving witnesses who have not testified. Their Motion ignores the substantial changed circumstances, including the fact that only two witnesses testified on their behalf at trial – both professional experts whose identities, testimony and views regarding same-sex marriage are publicly known. Proponents' Motion also ignores the very important fact that by recently asserting that former Chief Judge Vaughn R. Walker was unfit to impartially conduct the trial, Proponents heightened the need to allow the public access to these video recordings. Having made these claims – now on appeal to this Court – Proponents should not be allowed to simultaneously deny the public access to the videotapes

[1] Los Angeles Times Communications, LLC; The McClatchy Company; Cable News Network; In Session (formerly known as "Court TV"); The New York Times Co.; Fox News; NBC News; Hearst Corporation; Dow Jones & Company, Inc.; The Associated Press; KQED Inc., on behalf of KQED News and the California Report; The Reporters Committee for Freedom of the Press; and, The Northern California Chapter of Radio & Television News Directors Association.

that best demonstrate whether their charges hold any substance.

To justify 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 cannot do either.

First, the district court acted well within its broad discretion in evaluating the facts related to the proceedings below to determine that the video recordings are part of the district court's file. Indeed, this Court recognized the need for the fact-finding undertaken by the district court when it remanded this very issue to the district court to resolve. As the district court held, once the recordings were made and became part of the court's file, the presumption of access to judicial records attached to the recordings as it would to any other part of the court file. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). Section 2.A.1.a., *infra*.

Thus, the court also correctly held that the recordings, part of the court's file, must be made public unless Proponents can meet the demanding test mandated by the common law. "[I]n this circuit, we start with a strong presumption in favor of access to court records." *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). This strong presumption only may be overcome on a showing of "compelling reasons," articulated in specific, on-the-record findings that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id., quoting Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 9

(1986) ("*Press-Enterprise II*"). Section 2.A.1.b., *infra*.

Proponents did not meet this stringent standard. The only purported interests they offered – their concerns from nearly two years ago about what might happen at trial – do not come close to establishing the "compelling reasons" that must be shown to justify further sealing of the video recordings. In stark contrast, a substantial public interest exists in the video recordings of the trial proceedings, particularly in light of Proponents' charges that former Chief Judge Walker was biased. The legality of California's Proposition 8 ban on same sex marriage is of profound interest to millions. Permitting public access to the video recordings of the trial proceedings will only enhance the public's understanding of and provide confidence in the Court's ultimate resolution of this matter. Section 2.A.1.c., *infra*.

Local Rule 77-3 does not impact the court's analysis. Exercising its discretion – which is entitled to "great deference" by this Court (*U.S. v. Wunsch*, 84 F.3d 1110, 1116 (9th Cir. 1996)) – the district court properly found that the release is consistent with the terms of the Rule, which only applies to recordings made for the *purpose* of public broadcast and does not purport to restrict the release of recordings made for other purposes. Thus, Proponents' reliance on cases holding that *statutes* may override the common law right of access is a red herring. No rule or statute displaces the common law here. Section 2.A.1.d, *infra*.

Nor does the Supreme Court's decision in *Hollingsworth v. Perry*, 130 S. Ct.

705 (2010), have any application here. The Court's decision narrowly addressed the district court's amendment of a local rule that would allow simultaneous broadcast of the trial proceedings. It did not sanction the sealing of recordings that now are unquestionably part of the court record. Section 2.A.1.e, *infra*.

Alternatively, this Court should join numerous other courts who have recognized a constitutional right of access to judicial records. All of the policy concerns that underlie a right of access to the trial proceedings themselves apply with equal force to the court records that are part of those proceedings. And that certainly is true here, where the parties used the recordings in their closing arguments and the trial court repeatedly noted that it relied on the recordings in preparing its findings of fact. Section 2.A.2, *infra*.

Second, Proponents did not meet their burden of establishing *any* harm, much less the substantial harm that must be shown to justify a stay. They offered no new evidence, choosing to rely on the concerns they raised before trial, despite the substantial changed circumstances. In contrast, "[t]he loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Access to these recordings has been delayed long enough. The public should, at long last, be given access to the most reliable information available demonstrating what occurred during these trial proceedings. Section 2.B, *infra*.

2. PROPONENTS DID NOT MEET THEIR HEAVY BURDEN TO JUSTIFY A STAY

Proponents' burden on their Stay Motion is high. Proponents must demonstrate both a strong likelihood of success on the merits and that they will suffer irreparable injury absent a stay. *Nken*, 129 S. Ct. at 1761-62. If Proponents do not meet their burden of demonstrating a strong likelihood of success, the Court should deny the motion without considering any harm that Proponents claim they may suffer. *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 558 (9th Cir. 1996). As shown below, Proponents cannot meet either prong of this test.

A. Proponents Cannot Establish a Probability of Success on Appeal.

1. The District Court Acted Well Within Its Broad Discretion in Holding that the Common Law Right of Access Requires Disclosure of the Videotape Recordings.

The district court evaluated the motion to unseal under the common law, explaining that because this Court has not yet decided if the First Amendment applies to court records, it would not do so. Order Granting Plaintiffs' Motion to Unseal Digital Recording of Trial; Granting Limited Stay ("Order") at 6. "[T]he common law right creates a strong presumption in favor of access," which "can be overcome by sufficiently important countervailing interests." *San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999). Importantly, "[w]here the district court conscientiously undertakes this balancing test, basing its decision on compelling reasons and specific factual findings, its

determination will be reviewed only for abuse of discretion." *Id.* Here, after being asked by this Court to decide this issue, the district court acted well within its broad discretion in ordering the recordings unsealed.

a. The Common Law Right of Access Applies to the Video Recordings of the Trial.

This Court has championed public access, observing that "in this circuit, we start with a strong presumption in favor of access to court records." *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). Indeed, the Court has a long history of ordering civil court documents unsealed and courtroom doors unlocked based on the common law right of access.[2] Significantly, this right of access includes the right to obtain copies of videotapes and audiotapes as they are introduced into evidence during a trial. *Valley Broad. Co. v. U.S. District Court*, 798 F.2d 1289, 1294 (9th Cir. 1986) (rejecting trial court's stated reasons for refusing to provide public with copies of tapes introduced into evidence).[3]

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[2] *E.g.*, *id.*; *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179, 1183-1185 (9th Cir. 2006); *San Jose Mercury News, Inc.*, 187 F.3d at 1102; *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

[3] Thus, Proponents' reliance on the Eighth Circuit's decision in *U.S. v. McDougal*, 103 F.3d 651, 656-657 (8th Cir. 1996) is misplaced. The videotaped deposition of then-President Clinton – introduced in lieu of live testimony, without any suggestion that a copy was placed in the court's records – was held not subject to the common law right of access. Here, in contrast, the video recordings were used by the court to prepare its findings of fact and indisputably placed in the court record. And to the extent *McDougal* can be read to hold that the common law right

At this Court's direction, after this Court remanded this case to the district court to decide if the video recordings should be unsealed (Order at 1 n.1), the court examined the unique facts of this case to find that access is required under the common law. In evaluating the Motion to Unseal, the district court found that the trial court judge exercised its discretion to create a video record that the parties used and the court relied on to prepare its detailed findings, which then became part of the court file available to this Court as it decides this appeal. Order at 5. As the district court held, after the court's discretion was exercised and the events committed to a record that became part of a court file, the common law "strong presumption" of access attached to the recordings, which must be unsealed unless Proponents satisfy the strict demands of the common law test.

b. The Test to Overcome the Common Law Right of Access Is Exceedingly Strict.

Sealing orders are subject to strict requirements and permitted only for "compelling reasons." *Foltz*, 331 F.3d at 1135. The "strong presumption of access" that applies to all court records 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. In deciding if a court record is properly sealed, the court should consider "the public interest in understanding the judicial

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of access does not apply to video and audio tapes, this Court already has rejected that argument. *Valley Broad.*, 798 F.2d at 1294.

process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *Id.* "After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture," to permit review by this Court. *Id.*

Sealing orders – to the extent they are permitted at all – also must be narrowly tailored. The Court has mandated that "any interest justifying closure must be specified with particularity, and *there must be findings that the closure remedy is narrowly confined to protect that interest*." *CBS, Inc. v. U.S. District Court*, 765 F.2d 823, 825 (9th Cir. 1985) (emphasis added).[4] For this reason, any sealing order must consider and use less restrictive alternatives that do not completely frustrate the public's rights of access. *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 512 (1984) ("*Press-Enterprise I*") (sealing order should be limited "to information that was actually sensitive," *i.e.*, "only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected"). As the Third Circuit explained, "[i]f an alternative would serve the

[4] In *CBS*, the Court relied on both the First Amendment and the common law, without distinguishing between the two. *Id.* However, the Court previously has made clear that the common law also requires careful analysis of any sealing order to ensure that it is limited to only the specific information that warrants sealing. *Valley Broad.*, 798 F.2d at 1296 (reversing sealing order as to all but a single tape); *Foltz*, 331 F.3d at 1137-1138 (same as to a few documents).

interest well and intrude less on First Amendment values, a denial of public access cannot stand." *United States v. A.D.*, 28 F.3d 1353, 1357 (3d Cir. 1994).

Finally, the presumptive right of access is even more important where – as here – the events in the courtroom will have a broad impact on the public. As one court explained, "the public's interest in access to a proceeding involving the State's allegations of harm to the public weighs especially heavily in favor of access." *California ex rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111, 1124 (C.D. Cal. 2005) (applying common law right of access to order that summary judgment papers be unsealed). Without public access, the court risks losing the public's confidence in the system. *See Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (applying common law right of access; "the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness").

c. Proponents Did Not Meet the Heavy Test to Justify Continued Sealing of the Video Recordings.

Proponents made no serious effort to meet their heavy burden of particularized evidence showing a compelling government interest in secrecy sufficient to override the strong presumption of public access to these judicial

records, *or* consideration of less restrictive alternatives to the perpetual blanket sealing order that currently exists. They relied exclusively on concerns enunciated nearly two years ago, before this matter was tried, pretending that those concerns have any sway without evidence about what actually happened.[5] Motion at 16-17.

The 12-day trial in this case was open to the public, the transcripts of the proceedings have been widely distributed and the names of their two witnesses are readily available. Importantly, "[t]he media already enjoy an incontestable first amendment right to publicize and editorialize on the contents of the tapes whether or not copies are available for transmission. … The only potential prejudice appropriate for consideration by the district court was, therefore, the added prejudice that might result from broadcasting excerpts of the tapes as opposed to simply describing their contents." *Valley Broadcasting*, 798 F.2d at 1295.

This Court's remand to the district court gave the parties an opportunity to present evidence on this issue – if they had any. If Proponents' paid experts had any present concerns about the release of the videotapes – and how the release of the videotapes would affect them in a qualitative way, beyond the effect of having

[5] Proponents cite argument by counsel during trial, asserting that certain experts were withdrawn on the eve of trial, before the Supreme Court suspended the anticipated broadcasting of the trial, because those witnesses were purportedly concerned about their safety. Motion at 17 n.7, citing Exh. 33 at 1094:18-23. But argument of counsel is not evidence and cannot substantiate those purported concerns, which are otherwise undocumented.

testified publicly – they could have offered declarations regarding those concerns. Yet, Proponents offered nothing to substantiate their claims.[6] Thus, the district court was correct in holding that *no* interest exists to support the continued sealing of this portion of the court record. Order at 8-13.

In contrast, the public interest in unsealing the video recordings in this case cannot be overstated. The validity of the federal constitutional challenge to California's Proposition 8 that this case presents has the potential to fundamentally alter the lives of millions of gay men and lesbians who seek to marry. Regardless of the substantive outcome of the case, the public's understanding of – and confidence in – the resolution of this case will only be enhanced by allowing maximum transparency as the judiciary decides this issue. The millions of people following this social issue of the day seek permission to see the *public record* of the public trial proceedings that are now being reviewed by this Court.

Moreover, Proponents' recent actions have heightened the importance of affording public access to the videotapes. How this trial was conducted is a matter of considerable interest, as it has been for years. But now, Proponents' challenge to the judgment includes a claim that former Chief Judge Walker's sexual orientation influenced his ruling. Thus, Proponents insist that Judge Walker was

[6] Proponents' argument that this matter may be retried is another red herring. Motion at 18. If that occurs, the trial court can decide at that time whether or not to record those separate proceedings.

not objective, while at the same time demanding perpetual sealing of the best source for the public to evaluate their charges. Allowing the video recordings to remain under seal while this Court and the California Supreme Court review this case would permit Proponents to make these serious charges against former Chief Judge Walker in a cloaked setting.

This Court is not asked to decide whether the trial should be simultaneously broadcast. The trial is over and witnesses already have publicly testified. The question is whether the common law requires public access to a court record that is itself the best source possible to evaluate the proceedings before the trial court, including the serious charges of bias made by Proponents against Chief Judge Walker. Regardless of the outcome of the appeal to this Court and the anticipated decision of California Supreme Court, sealing the video recording of the trial creates an undeniable risk of fostering doubt in the judicial system, its impartiality, and the process in general. Proponents should not be permitted to make their serious charges against former Chief Judge Walker – questioning the legitimacy of his ruling – and at the same time deny the public access to the video recording of the public trial proceedings. In this unique setting – where the video recordings exist as part of the court record subject to settled law mandating public access – the strong public policies underlying the common law right of access should not be set aside. This Court has no reason to disturb the district court's ruling particularly

where, as here, the Court remanded this matter to that court for the very purpose of deciding this issue. Order at 1 n.1.

d. As the District Court Properly Held, Local Rule 77-3 Does Not Apply Here, but if It Did, It Could Not Overcome the Common Law Right of Access.

Exercising the discretion given it by this Court, the district court held that by its plain terms, Civil Local Rule 77-3 does not support Proponents' call for secrecy. Order at 10. That exercise of discretion must be given deference by this Court not only because the Court remanded this issue to the district court for resolution (Order at 1 n.1), but also because the district court's interpretation of its own Local Rules is entitled to "great deference." *Wunsch*, 84 F.3d at 1116.

As the district court explained, at the time of trial of this matter, Local Rule 77-3 prohibited "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." Order at 10 (emphasis added). While the court agreed that "digital recordings of trial proceedings come within the ambit of Local Rule 77-3," it pointed out that the Rule "speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes or uses." *Id.* But no party has argued that Local Rule 77-3 prohibited the creation of the video recordings for the purposes then contemplated – "for use in chambers." *Id.* at 3, 10. Nor does Local Rule 77-3 purport to govern whether digital recordings, once made, may be placed

in the court's record. *Id.* at 10.[7] Thus, the Local Rule has no application here.

Given this plain-language interpretation, Proponents' arguments are red herrings. The ruling does not "violate[] the policy of the Judicial Conference" because each Circuit establishes its own policy and this Court has established a policy to allow recording of civil non-jury proceedings. Order at 11-12 & nts. 20-22. Moreover, Proponents are simply wrong in arguing that this Court violated 28 U.S.C. § 332(d)(1) in adopting its pilot program without a notice and comment period. Motion at 10. As Justice Breyer explained, the policy permitting recording of civil nonjury proceedings was adopted in 2007 after a resolution was approved "by resounding margins." *Hollingsworth*, 130 S. Ct. at 716.

Moreover, as the district court found, no case supports Proponents' claim that a local rule can supplant the common law's strong presumption of access.[8] Order at 10. Rather, a district court's local rules must be examined under the same

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[7] Proponents' new claim, that the Local Rule also prohibits public broadcasting of proceedings, also misses the mark. Motion at 9. The question is whether the videotapes – part of the court record – must be made available to the public, not whether the court should authorize their broadcast.

[8] Proponents' cases do not help them. In *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 936-937 (D.C. Cir. 2003), the court held that the common law was displaced by the Freedom of Information Act. And both *U.S. v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009) and *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998), are premised on the long tradition of secrecy for grand jury proceedings, which is embodied in Federal Rule of Criminal Procedure 6. None of these cases involves a district court's local rules.

standard as other practices of the court, and set aside if they do not comply with the Constitution or common law rights. *In Re Providence Journal Co., Inc.*, 293 F.3d 1, 12-13 & n.5 (1st Cir. 2002). Local Rule 77-3 does not purport to restrict the public's right of access to court records but if it did, it could not stand.

Finally, and for the same reason, the Court should reject the argument that the district court made a "solemn commitment" that the recordings of the trial would never be broadcast. Motion at 3. The district court merely clarified that the *purpose* of making the recording – the key question under the Local Rule – was to assist the court in preparing the findings of fact. Motion, Exh. 7 at 754:21-23. But if the Court had made such a commitment, it would not matter. The protective order in this case contemplated the possibility of modification. Order at 9 n. 16, *citing Lugosch v. Pyramid Co.*, 435 F.3d 110, 125 (2d Cir. 2006). And a trial court may not alter a presumptive right of access by making promises of confidentiality that are contrary to law. *Foltz*, 331 F.3d at 1138. Even if, contrary to fact, the court had made such a promise here, it would not be enforceable in any event.

e. Disclosure Does Not Violate the Supreme Court's Opinion in *Hollingsworth*.

Proponents argue that the district court's Order "directly def[ies]" the Supreme Court's decision in *Hollingsworth*. Motion at 2. But as the Court made clear, recognizing that "reasonable minds differ" on the broad question of whether trial court proceedings should be broadcast, it addressed the narrow issue of the

amendment of a local rule involving the possible *contemporaneous* broadcast of trial testimony "without expressing any view on whether such trials should be broadcast." *Hollingsworth*, 130 S. Ct. at 706, 709. And while the Court discussed the possibility of harm from broadcast in this case, *id.* at 712-713, the Court's concerns were about a trial that had not yet occurred and witnesses who had not yet testified. *Id.* But this case already has been tried and those concerns have been proven unfounded. Neither of Proponents' two expert witnesses has offered any testimony to suggest that the potential harm occurred.[9]

In the end – and contrary to Proponents' claim – the Supreme Court's decision supports access to the video recordings at issue here. The heart of the Court's decision was that "[i]f courts are to require that others follow regular procedures, courts must do so as well." The settled, common law right of access mandates disclosure of these court records. This Court should follow that "regular procedure" to affirm the trial court's Order.

2. In the Alternative, the First Amendment Presumption of Public Access Applies to All Court Records, Including the Video Recordings of the Trial.

As this Court has done in the past, the trial court declined to decide whether the First Amendment applies to court records in civil proceedings. Order at 6,

[9] Thus, the Court's concern with the "qualitative differences between making public appearances regarding an issue and having one's testimony broadcast throughout the country," does not support Proponent's claim.

citing San Jose Mercury News, 187 F.3d at 1101-02. However, if this Court finds that the common law right of access does not support disclosure of the video recordings, it should affirm the district court's order under the First Amendment to the United States Constitution. As the Supreme Court repeatedly has recognized, court proceedings are presumptively open to the public.[10] Indeed, "[a]s early as 1685, Sir John Hawles commented that open proceedings were necessary so 'that the truth may be discovered in civil as well as criminal matters.'" *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) (citation omitted). This "is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers*, 448 U.S. at 569, 580 n.17.

The Supreme Court explained in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982), that public access to court proceedings allows "the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government." In language that is apt here, an early court echoed Oliver Wendell Holmes' declaration that "the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because ***... every citizen should be***

[10] *E.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise I*, 464 U.S. at 505-508; *Waller v. Georgia*, 467 U.S. 39, 47 (1984); *Press-Enterprise II*, 478 U.S. at 12-13; *see also CBS*, 765 F.2d at 825 ("[t]he right of access is grounded in the First Amendment and in common law, and extends to documents filed in pretrial proceedings …") (citation omitted).

able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (emphasis added).

This Court has not been required to directly address this question yet, consistently relying on the common law right of access to support access to court records. However, if the Court concludes that for some reason the common law does not apply here, it should resolve the question in this Circuit and hold that a constitutional right of access applies to court records in civil proceedings.[11]

B. Proponents Did Not Demonstrate That They Will Be Irreparably Harmed; Rather, The Balance Of Hardships Tips In Favor of Access.

As addressed above, Proponents offered no evidence of harm to support their demand for ongoing secrecy. Section A.1.c, *supra*. They now insist, without evidence, that they will be harmed if the Court does not stay the trial court's order because their appeal will be moot. Motion at 16, *citing Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986). Even the significant harm at issue in *Artukovic* – extradition – did not justify a stay because appellant failed to demonstrate a probability of prevailing on appeal or that the appeal presents a "serious legal question." *Id.* And the Supreme Court now has made clear that Proponents must

[11] Proponents cannot meet the constitutional standard for a sealing order, which requires them to show that "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives that would adequately protect the compelling interest." *Oregonian Publ'g Co. v. District Court*, 920 F.2d 1462, 1466 (9th Cir. 1990).

establish much more than a mere possibility of harm. *Nken*, 129 S. Ct. at 1760-1761. This is a high burden that Proponents did not meet here.

In contrast, the public will continue to suffer significant, irreparable harm so long as the video recordings remain under seal. The U.S. Supreme Court has made clear that "[t]he loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, in *Associated Press v. District Court*, 705 F.2d 1143, 1146-1147 (9th Cir. 1983), this Court vacated a district court order that sealed pretrial court documents in John DeLorean's criminal trial for "only" 48 hours, holding that the "effect of the order [wa]s a total restraint on the public's first amendment right of access." And in *Valley Broad.*, 798 F.2d at 1292, the Court emphasized the need for immediate relief "because the tapes [the news organization] seeks to copy will lose much of their newsworthiness during the pendency of the trial."

The same is true here. These recordings were created over a year ago. Since then – evidence of the profound public interest in this case – the public has resorted to the pale substitute of reenactments of the trial based on the transcripts. *See* www.marriagetrial.com. In the meantime, the appeal challenging the judgment below is pending before this Court and the California Supreme Court is again deciding an important question of California law, heightening the substantial public interest in these proceedings as they wind their way through two appellate

systems. The Proponents' recent challenge to the district court's partiality has only heightened the public's need to access the video recordings. The public suffers significant, irreparable harm every day access is denied.

3. CONCLUSION

To foster the public's confidence in the integrity of the judicial system that is fully engaged to decide this social issue of the day, the video recordings of the trial should be unsealed to ensure that the public has the information it needs to understand and accept the decisions ultimately rendered by the Court. Thus, the Non-Party Media Coalition respectfully requests that the Court deny the Stay Motion or, if the Court finds a stay is warranted, expedite this appeal to permit release of the video recordings as soon as practicably possible.

RESPECTFULLY SUBMITTED this 3rd day of October, 2011.

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