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)

INTERVENOR NON-PARTY MEDIA COALITION'S PRINCIPAL BRIEF ON APPEAL

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CORPORATE DISCLOSURE STATEMENT

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Pursuant to this Court's Order entered October 24, 2011, the Non-Party Media Coalition[1] respectfully submits its Principal Brief on Appeal. For the reasons explained below, the Non-Party Media Coalition respectfully urges the Court to reject the arguments made by Appellants Proponents of Proposition 8, Dennis Hollingsworth, *et al.* ("Proponents") advocating perpetual sealing of the court records at issue here and, instead, to affirm the district court's order that the records be unsealed immediately.

1. INTRODUCTION

At this Court's direction, the Honorable James Ware conducted an evidentiary hearing to evaluate the parties' competing claims regarding the video recordings of the trial in this case. As Judge Ware found, those video recordings were created by court staff at the direction of former Chief Judge Vaughn R. Walker "for use in chambers." Excerpts of Record ("ER") 3. The court further found that Judge Walker later "expanded the use of the recording," permitting the parties to obtain copies of the video recordings for possible use during closing arguments, which Plaintiffs and Plaintiff-Intervenor, the City and County of San

[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.

Francisco (the "City") did. Id. Two months later, in his Judgment entered in this case, Judge Walker included an order stating that he had used the video recordings in preparing the findings of fact and conclusions of law, and directing the Clerk to file the recordings under seal as part of the record. ER 61. Proponents have never challenged that aspect of the Judgment, ER 5, and their time to do so expired long ago.

In light of these undisputed facts, there can be no question that the district court acted well within its broad discretion in ordering the video recordings unsealed. Indeed, the Media Coalition submits that no other conclusion would have been consistent with this Court's case law. As this Court repeatedly has made clear, the Court starts with a "strong presumption in favor of access" to court records. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (citation, internal quotes omitted). A party seeking ongoing sealing of a court record must "articulate compelling reasons supported by specific factual findings" to overcome this strong presumption. *Id.* (citation, internal quotes omitted).

Proponents did not come close to meeting that test here. This is particularly true in light of the fact that Proponents ask this Court to either order these recordings removed from the court record – despite the undisputed fact that Judge Walker relied on them in performing his judicial function – or *perpetually* seal

them from the public. They offered no evidence to support their request, making no attempt to establish actual harm from the release of the video recordings. Nor could they. It is undisputed that the proceedings were open to the public and unsealing the video recordings at issue here would do nothing more than make available on a more widespread basis the testimony that a citizen could have seen were she able to attend the trial proceedings – as many citizens and journalists did. It also is undisputed that the trial transcript has been publicly available and widely distributed for the past eighteen months. Given these facts, it is difficult or impossible to conceive any possible harm from the unsealing of the video recordings.

Implicitly conceding these key facts, and the absence of any demonstrable harm, Proponents make no effort to substantiate their arguments on this point. Instead, 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. They ignore the substantial change in 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. They also attempt to dismiss the very important fact that by recently asserting that former Chief Judge Walker was unfit to impartially conduct the trial, Proponents heightened the need to allow the public

access to the video recordings of this public trial. Having made these claims – now on appeal to this Court – Proponents should not be allowed to simultaneously deny the public access to the videotapes that best demonstrate whether their charges against former Chief Judge Walker hold any substance. None of their arguments support the continued – indeed, never-ending – sealing of these court records.

2. STATEMENT OF JURISDICTION

This appeal arises from an Order Granting Plaintiffs' Motion to Unseal Digital Recording of Trial; Granting Limited Stay (the "Order"). ER 1. The district court has jurisdiction of the underlying action pursuant to 28 U.S.C. § 1331.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the appeal is from a final decision of the district court on the issue presented. Appellant timely appealed the Order on September 22, 2011, pursuant to Fed. R. App. P. 4. ER 257.

3. ISSUES PRESENTED FOR REVIEW

The issues presented for review are as follows:

1. Did the district court act within its broad discretion in holding that the video recordings at issue here are court records that must be disclosed because Proponents did not establish a compelling reason for perpetual sealing of these records?

2. Did the district court act within its broad discretion in interpreting the court's local rules to conclude that release of the video recordings does not violate those rules?

3. Did the district court correctly hold that the U.S. Supreme Court's decision in *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010), does not preclude release of the video recordings?

4. If the common law does not compel release of the video recordings, is the release nonetheless required by the First Amendment to the U.S. Constitution?

4. STATEMENT OF THE CASE

On April 13, 2011, Proponents filed a motion with this Court asking the Court to order former Chief Judge Vaughn R. Walker to return his chambers copies of the video recordings of the trial of this matter, which were created by court staff at Judge Walker's direction "for use in chambers." ER 3, 297. Portions of the videotapes were being displayed by Judge Walker during speeches and presentations. ER 303. Plaintiffs opposed that motion and filed a cross-motion to unseal the video recordings (ER 442) and the Media Coalition intervened to join in Plaintiffs' cross-motion to unseal (ER 459). On April 27, 2011, this Court entered its order transferring the motion to the district court, explaining that the district court "issued the protective order and has the power to grant the parties all the relief they seek, should relief be warranted." ER 295. The Court transferred all of

the papers filed in connection with the motion and the cross-motion to the district court. *Id.*

The district court did not rely exclusively on the papers filed in this Court. Instead, it issued an order (1) bifurcating the cross-motions, with Proponent's motion to compel return of videotapes to be resolved first; (2) setting a further briefing schedule on that motion; and (3) deferring any briefing schedule on the motion to unseal. ER 52. Judge Walker lodged his chambers copy of the video recordings with the court his use but none of the parties took the opportunity to improve the record before the court in connection with the motion to compel return of the videotape. ER 291, 1545-1548. The trial court denied that motion. ER 22.

After rejecting Proponents' motion to compel return of the videotapes, the court set a briefing schedule and hearing date on the motion to unseal. *Id.* Again, Proponents did not supplement their papers that had been filed in this Court. In particular, Proponents offered no evidence addressing the current status of the litigation or any possible or perceived harm given the change of events since issues related to the video recordings first were considered by the courts in January 2010. ER 1538-1539. The district court entertained argument on August 29, 2011, and entered its order unsealing the video recordings – the order on appeal to this Court – on September 19, 2011. ER 1. This appeal followed. ER 257.

5. SUMMARY OF FACTS

In January 2010, the trial court held a two-and-a-half week bench trial in this litigation challenging California's Proposition 8, which added Article 1, § 7.5 to the California Constitution, providing that "[o]nly marriage between a man and a woman is valid or recognized in California." ER 58, 61. That trial was recorded by the trial court "for use in chambers." ER 3. After careful consideration over a number of months, the trial court entered its decision on August 4, 2010. ER 56-193. The court ruled in Plaintiffs' favor, holding that the U.S. Constitution "protects an individual's choice of marital partner regardless of gender." ER 167.

In the August 4th Judgment, the court also ruled that "[t]he trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law; the clerk is now DIRECTED to file the trial recording under seal as part of the record." ER 61. As this Court well knows, that Judgment is the subject of proceedings in this Court and the California Supreme Court. However, Proponents have never challenged the aspect of the Judgment that directed that the video recordings be filed under seal as part of the record. ER 5.

On April 25, 2011, while the appeal from the Judgment was pending before this Court, Proponents filed a Motion to Vacate the Judgment on the grounds that former Chief Judge Walker should have disclosed, but did not, that he is in a committed same-sex relationship. ER 25, 1544. On April 27, 2011, the District

Court issued an Order scheduling the Motion to Vacate for an expedited hearing and setting a briefing schedule; numerous third parties participated as amici in connection with that Motion. ER 1544-1545. On June 14, 2011, the district court entered its order denying the Motion to Vacate. ER 25. That Order, also, is on appeal to this Court in a separate proceeding.

6. SUMMARY OF ARGUMENT

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. 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, relied on by the district court in performing its judicial function, 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. ER 5-6; *see Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). Section 7.A.1., *infra*.

Proponents' new suggestion that the Court should simply order that the video recordings be removed from the record should be flatly rejected. Initially, Proponents have raised this issue for the first time in this Court. The Court has no jurisdiction in this appeal to reverse an order entered by the district court more than a year before the appeal was filed. And even if it did, Proponents waived this

argument by failing to raise it earlier in their motion to seal originally filed in this Court, or during their further briefing in the district court. In any event, Proponents' request ignores well-established law which mandates that documents be included in the record if the court relies on them in adjudicating a case. As the record makes clear, that is exactly what happened here. Section 7.A.2, *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 7.A.3., *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 perpetual sealing of the video recordings. And Proponents' unsubstantiated concerns about two expert witnesses certainly do not support their demand that the entire video record be sealed. 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. And perhaps more importantly, denying access notwithstanding the clear law prohibiting sealing on the thin showing made by Proponents threatens to cast a permanent cloud over the legitimacy of this historic trial. Section 7.A.4., *infra*.

Local Rule 77-3 does not impact the Court's analysis. Exercising its discretion – which is entitled to "great deference" by this Court (*United States v. Wunsch*, 84 F.3d 1110, 1116 (9th Cir. 1996))[2] – 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 alter the stringent test under the common law for maintaining court records under seal –

[2] In their Reply in support of their Stay Motion (Docket No. 12-1 at 2 n.2), Proponents claim that the Court has not decided the appropriate standard of review "in this context." But that is simply not true. In *Wunsch*, the Court found it unnecessary to decide the standard of review *for imposing sanctions* for violation of a local rule, in light of the conflicting authority regarding the standard of review for a decision *to impose sanctions*. 84 F.3d at 1114. The Court was clear, however, in holding that a district court's interpretation of its local rules must be afforded "great deference." *Id.* at 1116, *citing Guam Sasaki Corp. v. Diana's Inc.*, 881 F.2d 713, 715 (9th Cir. 1989).

nor could it. 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 settled common law here. Section 7.B, *infra*.

Nor does the Supreme Court's decision in *Hollingsworth*, 130 S. Ct. 705, 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. The Supreme Court did not sanction the permanent sealing of recordings that now are unquestionably and appropriately part of the court record. Section 7.C, *infra*.

Alternatively, this Court should join numerous other courts that 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 recordings were made available for the parties to use in their closing arguments (and were in fact, used by Plaintiffs), and the trial court included the recordings in the record only after declaring that it used them in preparing its findings of fact. Section 7.D, *infra*.

7. ARGUMENT

A. 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. ER 6 (Order Granting Plaintiffs' Motion to Unseal Digital Recording of Trial; Granting Limited Stay ("Order"). "[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. United States 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.*; *accord Kamakana*, 447 F.3d at 1178 n.3.[3] Here, after being asked by this Court to

[3] Proponents are wrong in their claim that "[t]he threshold question whether the common-law right of access applies at all to the trial recording is a question of law requiring *de novo* review." Stay Reply, Docket 12-1, at 5-6, *citing Times Mirror Co. v. United States*, 873 F.2d 1210, 1212 (9th Cir. 1989). As the case cited by the Court in *Times Mirror* holds, questions of fact are reviewed under the abuse of discretion standard, while questions of law are reviewed *de novo*. *United States v. McConney*, 728 F.2d 1195, 1200-1201 (9th Cir. 1984) (en banc), *implicitly overruled on other grounds*, *United States v. Ramirez*, 523 U.S. 65 (1998). Here, the district court analyzed the facts to find that the video recordings were relied on by the court and the parties, and are part of the court record. ER 5. That factual finding must be affirmed unless the court abused its discretion.

decide this issue and reviewing the evidence offered by the parties, the district court acted well within its broad discretion in ordering the recordings unsealed.

1. 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.[4] 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 Broadcasting Co. v. United States 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). The Court has identified only a few exceptions to this right of access, for documents that traditionally have been treated as secret such as grand jury records (*In Re Special Grand Jury (For Anchorage, Alaska)*, 674 F.2d 778, 781 (9th Cir. 1982)), and search warrants and related materials for an ongoing investigation (*Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989)).

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

But absent a tradition of secrecy in the particular document at issue, the Court has not hesitated to apply the presumption of access to all types of documents, even those that did not exist when the common law was developed. *E.g.*, *Valley Broadcasting*, 798 F.2d at 1294.[5]

Proponents' heavy reliance on the Eighth Circuit's decision in *United States 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 the court later relied on the videotape itself in performing its judicial function – was held not subject to the common law right of access. Here, in contrast, the video recordings were used by former Chief Judge Walker to prepare the findings of fact and indisputably placed in the court record. ER 3-4, 61. And more importantly, the law in the Eighth Circuit differs from the law of this Circuit in two important respects. First, the court in *McDougal* made

[5] For this reason, Proponents' argument that the common law presumption of access does not apply because there is "no history of access to video recordings of federal trial proceedings" proves too much. Stay Reply, Docket No. 12-1, at 8. With new technologies, the question cannot be whether the public had access to them in the past – when they did not exist – but instead whether similar types of documents were traditionally treated as secret. *Cf. In Re Nat'l Broadcasting Co.*, 653 F.2d 609, 612 (D.C. Cir. 1981) (although the common law right of access "was first recognized at a time when records were documentary in nature, it is now settled that the right extends to records which are not in written form, such as audio and video tapes"; reversing district court's denial of access to video and audio tapes entered into evidence at trial) (footnotes omitted)). Proponents cannot and do not claim that any tradition of secrecy exists as to the trial proceedings that are accurately reflected in the video recordings.

clear that – unlike this Court – the Eighth Circuit does *not* apply a strong presumption of access to court records, and instead defers to the district court's decision. 103 F.3d at 657-658. And to the extent *McDougal* can be read to hold that the common law right of access does not apply to video and audio tapes, this Court already has rejected that argument. *Valley Broadcasting*, 798 F.2d at 1294.

At this Court's direction, after this Court remanded this case to the district court to decide if the video recordings should be unsealed (ER 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. ER 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.

2. The Court Should Reject Proponent's Eleventh-Hour Request That the Court Order the Video Recordings Removed from the Record.

In their Reply in support of their Stay Motion in this Court, Proponents suggested for the first time that the video recordings should be removed from the

court record and permanently sealed. Reply, Docket No. 12-1, at 5 (*citing CBS, Inc. v. United States District Court*, 765 F.2d 823, 825-826 (9th Cir. 1985)). But as the trial court expressly found, Proponents did not object when the video recordings were made part of the record and they have never contended that Judge Walker made that decision in error or moved to vacate the portion of the court's order that directed the clerk to file the video recordings in the court record. ER 5. "Instead, the parties, including [Proponents] proceed from the common premise that the digital recording is unquestionably part of the record." *Id.*

Proponents' challenge to this Order is barred for two reasons. First, and fundamentally, this appeal is *not* from the trial court's August 4th Judgment, which ordered that the video recordings be included in the record. Instead, in this appeal Proponents challenge an Order entered more than a year later, on September 19, 2011. This Court has no jurisdiction to review in this appeal a final judgment that was entered more than a year before the notice of appeal was filed. *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1096-97 (9th Cir. 2008), *aff'd United States v. Comprehensive Drug Testing*, 579 F.3d 989, 994 (9th Cir. 2009) (en banc). Thus, as this Court held in its *en banc* decision, "once the [] Order became final, the government became bound by the factual determinations and issues resolved against it by that order." 579 F.3d at 994.

Beyond that, as the district court found, Proponents never raised this challenge below. ER 5-6. Thus, Proponents have waived this argument and should not be allowed to raise it now. *United States v. Robertson*, 52 F.3d 789, 791-792 (9th Cir. 1995); *cf. Kamakana*, 447 F.3d at 1181 (party seeking continued sealing "squandered" opportunity to improve record by not offering evidence of compelling reasons for sealing when magistrate judge invited further briefing).

Even if the Court were to consider this issue, a critical – and dispositive – distinction exists between *CBS* and this case. In *CBS*, the Court directed that an affidavit "manufacture[d]" by the government be "removed from the record and returned to the government" because it "was unnecessary to consideration of Hetrick's motion on its merits, was surplusage, and in our view was improvidently filed." *Id.* at 825-826. But that is certainly not the case here.

As discussed above, the trial court ordered the video recordings at issue in this case to be entered into the record after expressly noting that "[t]he trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law." ER 61. Thus, under controlling law the recordings are part of the court record. As this Court has made clear, the common law right of access turns on whether the document at issue played a role in dispositive proceedings before the court. *San Jose Mercury News*, 187 F.3d at 1102 (citations omitted); *Foltz*, 331 F.3d at 1135; *cf. Phillips ex rel. Estates of Byrd v. G.M. Corp.*,

307 F.3d 1206, 1213 (9th Cir. 2002) (distinguishing between dispositive and non-dispositive motions for common law right of access). In *Kamakana*, this Court emphasized that the strong presumption of access applies to all dispositive papers "because the resolution of a dispute on the merits … is at the heart of the interest in ensuring the 'public's understanding of the judicial process and of significant public events.'" *Id.* at 1179 (citations omitted).

The Second Circuit has explained that the decision of whether something is a "judicial record" turns on the use made of it by the court:

> We think that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.

United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995) (confidential status reports filed by investigator appointed by court were judicial records subject to presumptive right of access).

Similarly, in a careful decision, Judge Easterbrook of the Seventh Circuit has explained that "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification." *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (rejecting request to seal briefs on appeal). Thus, he explained, "[i]nformation that is used at trial or otherwise becomes the basis of decision enters the public record." *Id.* (citation

omitted). Importantly, "[s]ecrecy persists only if the court does not use the information to reach a decision on the merits." *Id.* at 75-76 (citation omitted).

A decision of the California court of appeal is particularly instructive on the issue of whether the common law compels disclosure of the video recordings here. In *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106 (1992), the court considered a request for access to informal minutes taken by the courtroom clerks. The court started by finding that the minutes are not the official record of the court. *Id.* at 113.[6] The court went on to consider whether the minutes are nonetheless court records to which the common law right of access attaches by generally dividing the documents possessed by courts into two categories – (1) "documentation which accurately and officially reflects the work of the court" (to which the common law right of access attaches) and (2) documents created in the course of judicial work and for the purpose of carrying out judicial duties, such as personal notes, drafts, and similar documents (to which the public has no right of access). *Id.* at 113-114.

The court held that the clerk's notes fall into the first category. It explained that the clerk's duty is ministerial and "involves the exercise of no significant

[6] The court interpreted a statute that defines "judicial records" in California as the "official record" of the court, to find that the minutes are not "judicial records." *Id.* at 112-113. Thus, its definition of "judicial record" was driven by California law, and necessarily narrower than the "court records" to which the common law right of access attaches.

discretion on the part of the clerk." *Id.* at 115. More importantly, "[t]he clerk's rough minutes are made not only for his benefit but for the use of the court, and very possibly for the benefit of parties and others interested in the litigation." *Id.* For this reason, the court held that the minutes "constitute a court record which should be available for public inspection." *Id.* Supporting that decision, the court noted that "the clerk's minute book presumptively contains only accurate, descriptive and nondiscretionary information." *Id.* Thus, it varied drastically from the notes and drafts in the second category "which may contain tentative or erroneous information or conclusions the release of which to the press would be detrimental to the judicial process." *Id.*[7]

So too here. The video recordings at issue here are not judicial notes or drafts. They are a completely accurate record of the historic trial in this litigation. But more importantly, they were used by the court and the parties in resolving this case. ER 3-4, 61. Thus, they indisputably played a role in the court's decision-making process and the ultimate resolution of this case. As such, the district court was *required* to include the video recordings in the court record. The Media Coalition urges this Court to flatly reject Proponents' eleventh-hour request that the Court reach beyond the proper issues in this appeal and reverse an order

[7] The California Supreme Court has approved this reasoning. *People v. Lewis & Oliver*, 39 Cal. 4th 970, 1065 (2006).

entered more than a year ago, that appropriately recognized that the video recordings must be included in the judicial record.

3. 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 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.*, 765 F.2d at 825

(emphasis added).[8] 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 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

[8] 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 Broadcasting*, 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).

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").[9]

4. Proponents Did Not Meet their Heavy Burden 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 they seek. They relied exclusively on concerns enunciated nearly two years ago, before this matter was tried, pretending that those concerns have

[9] Proponents cite *Nixon v. Warner Comm'n, Inc.*, 435 U.S. 589, 603 (1978), to argue that the circumstances surrounding the creation of the video recordings must govern this Court's decision. Stay Reply, Docket No. 12-1, at 8-9. But the Supreme Court's decision in *Nixon* was driven by the fact that the tapes at issue there were "obtained by subpoena *over the opposition of a sitting President*, solely to satisfy 'fundamental demands of due process of law in the fair administration of criminal justice.'" *Nixon*, 435 U.S. at 603 (emphasis added). And the Court's decision to deny access to the videotapes there turned on the fact that Congress resolved the issue when it enacted the Presidential Recordings Act, which governed access to the very tapes at issue in that case. *Id.* at 603 & n.15. Thus, the Court did not engage in any balancing of the competing interests at issue. *Id.*

any sway without evidence about the events that transpired at this public trial. Stay Motion, Docket No. 3-1, at 16-17.

The 12-day trial in this case was open to the public (and the attendance was such that the Court provided an overflow courtroom), the transcripts of the proceedings have been widely distributed and the names of their two expert 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. ER 22. 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 testified publicly – they could have offered declarations regarding those concerns. Yet, Proponents offered nothing to substantiate their claims.[10]

Instead, as they do in this Court, Proponents based their arguments on the Supreme Court's decision addressing the anticipated simultaneous broadcast of the trial to additional overflow courtrooms in other cities – which, due to the preliminary state of the proceedings then, relied on newspaper articles rather than actual testimony – and its concern that at the upcoming trial, witnesses might alter their testimony due to the fear of harassment resulting from broadcast. ER 498-499; *see also* Stay Reply, Docket No. 12-1, at 14-16, citing *Hollingsworth*, 130 S. Ct. at 713. But the trial is over, witnesses have testified, and there is no possibility that anything this Court may do will affect the testimony that Proponents' two witnesses gave nearly two years ago. Proponents have offered nothing to show that the possible harassment that Proponents decry (Stay Reply, Docket No. 12-1 at 16) would be exacerbated by unsealing the video recordings.[11] Thus, the district

[10] Proponents' argument that this matter may be retried is another red herring. Stay Motion, Docket No. 3-1, at 18. If that occurs, the trial court can decide at that time whether or not to record those separate proceedings.

[11] Demonstrating the lack of evidentiary support for their position, in their Stay Reply Proponents also invoked testimony by Justices Scalia and Breyer regarding their concerns with broadcast of the Court's proceedings. Stay Reply, Docket No. 12-1, at 17. This testimony does nothing to show how Proponents' professional witnesses will be harmed by unsealing the video recording of their trial court testimony, which has been publicly available from the day they testified in the public courtroom.

court was correct in holding that *no* interest exists to support the continued sealing of this portion of the court record. ER 8-13.

In contrast, the public interest in unsealing the video recordings in this case cannot be overstated. 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 Broadcasting*, 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 nearly two years 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 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 are entitled 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 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.[12] The public suffers significant, irreparable harm every day access to this judicial record is denied.

This Court is not asked to decide whether the trial should be simultaneously broadcast. The trial is over and witnesses already have publicly testified in the knowing presence of the court's cameras. 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, permanently sealing the video recordings 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 casting doubt in the public's mind about the validity of these historic trial proceedings – and at the same time perpetually deny the public access to the video recording of the public trial proceedings. In this unique setting – where the video recordings exist as part

[12] Proponents claim in their Stay Reply that the video recordings are not relevant to their claims of bias because their argument that Judge Walker was disqualified "is not in any way based on his courtroom demeanor or conduct." Stay Reply, Docket No. 12-1, at 11 n.7. But that in itself is relevant. If Judge Walker's demeanor and approach throughout trial were appropriate and reflected no partiality, that fact bears on Proponents' claim of bias.

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. ER 1 n.1.

B. 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 fact finding and 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; *see also Simmons v. Navajo County*, 609 F.3d 1011, 1017 (9th Cir. 2010) ("[d]istrict courts have broad discretion in interpreting and applying their local rules" (*quoting Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983))).

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." ER 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." ER 3, 10. Nor does Local Rule 77-3 purport to govern whether digital recordings, once made, may or must be placed in the court's record. ER 10.[13] Proponents' arguments are premised on their speculation that the trial court's unstated purpose in recording the trial was to broadcast it. Stay Reply, Docket No. 12-1, at 2-3. But exercising the discretion given it by this Court, the district court expressly found that the district court's purpose was for "use in chambers." ER 3. This factual finding must be affirmed unless the district court abused its discretion – and it did not. Local Rule 77-3 has no application here.

[13] Proponents' new claim, that the Local Rule also prohibits public broadcasting of proceedings, also widely misses the mark. Stay Motion, Docket No. 3-1, at 9; Stay Reply, Docket No. 12-1, at 2-3. The question is whether the videotapes – appropriately part of the court record – must be made available to the public, not whether the court should authorize their broadcast. It is irrelevant that the practical effect may be broadcast of the video recordings because the law that controls disposition of the video recordings shifted, and the common law strong presumption of public access took over, when the trial court relied on the video recordings in performing its judicial function and placed the video recordings in the court record.

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. ER 11-12 & nts. 20-22. As demonstrated above, the recording did not violate Local Rule 77-3, even before its December 2010 amendment, and thus no Judicial Conference policy was breached. And Proponents' argument that the December 2010 amendment "was not adopted after notice and comment procedures" (Stay Reply, Docket No. 12-1, at 2 n.1) misses the point. The Media Coalition does not rely on the December 2010 amendment to Local Rule 77-3 to support its motion to unseal. Instead, the Media Coalition agrees with the district court that under the plain language of the Local Rule *prior to its amendment*, that Rule has no application here because it does not purport to control the disposition of video recordings made for the purpose of use in chambers.

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.[14]

[14] Proponents' cases do not help them. In *Center for Nat'l Security Studies v. United States 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 *United States 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

ER 10. As the Supreme Court has explained, "[a] district court's discretion in promulgating local rules is not, however, without limits. This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with the principles of right and justice." *Frazier v. Heebe*, 482 U.S. 641, 645-646 (1987) (citations omitted).[15] In *Frazier*, the dissent discussed cases explaining that a local rule cannot stand if, among other things, "the subject matter governed by the rules is not within the power of a lower federal court to regulate." *Id.* at 654 (Rehnquist, C.J., dissenting); *see United States v. Mink*, 476 F.3d 558, 564 (8th Cir. 2007) (rejecting local rule inconsistent with federal law). 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. Stay Motion, Docket No. 3-1, 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. ER 330-

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Federal Rule of Criminal Procedure 6. None of these cases involves a district court's local rules.

[15] The Supreme Court's recognition in *Hollingsworth*, 130 S. Ct. at 711, that local rules have "the force of law" merely means that attorneys must follow them. It does not mean that a court may adopt a local rule that conflicts with other law.

331. But if the Court had made such a commitment, it would not matter. The protective order in this case contemplated the possibility of modification. ER 9 n.16, *citing Lugosch v. Pyramid Co.*, 435 F.3d 110, 125 (2d Cir. 2006)), ER 221. 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.

C. 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*. Stay Motion, Docket No. 3-1, 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.[16]

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.

D. 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. ER 6, *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 nonetheless 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. Indeed, "[a]s early as 1685, Sir John Hawles commented that open proceedings were

[16] 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.

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 tradition of openness "is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 580 n.17 (1980) ("historically both civil and criminal trials have been presumptively open").

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 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).[17]

[17] In *Nixon*, 435 U.S. at 608-609, the Supreme Court held that the First Amendment guarantee of a free *press* did not require release of the audio recordings at issue there. However, the Court did not consider whether release was required by the First Amendment's guarantee of free speech, and instead merely held that the press has no greater access to court records than the general public. *Id.*

Courts around the country have further explained these policy considerations animating the strong presumption of openness in civil proceedings. In *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), for example, the Sixth Circuit vacated a sealing order and allowed public access to a Federal Trade Commission report and other documents filed with the trial court concerning the FTC's method of testing "tar" and nicotine levels of cigarettes, explaining:

> The policy considerations discussed in Richmond Newspapers apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases…. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.

Id. at 1179. *Accord Publicker Ind., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984).[18]

These important principles are served only if access is allowed to all facets of a case, including materials that are prepared specifically to assist the court in performing its function. As the court recognized in *Marisol A. v. Giuliani*, 26 Media L. Rep. 1151, 1154-1154 (S.D.N.Y. 1997), a "strong" presumption of

[18] Similarly, one district court stated that the news media "has a right to view the fruits of a document production" in a bankruptcy case since "the overriding public interest in learning the facts about criminal misconduct allegedly committed by a debtor while currently serving as the Governor of Arizona … outweigh[ed] the interest of the debtor and his mother in preserving the confidentiality of personal financial records." *In re Symington*, 209 B.R. 678, 681 (Bankr. D. Md. 1997).

access attaches to a report prepared pursuant to court order because it is likely to play an important role in the Court's performance of its Article III function, especially where both the parties and the subject matter of the litigation were of public interest. Based on this strong presumption of access, one district court unsealed the findings of an independent consultant in an action brought by the Securities and Exchange Commission seeking sanctions against a company that detailed then-New York Sen. Alfonse D'Amato's dealings with the company. *SEC v. Stratton Oakmont, Inc.*, 24 Media L. Rep. 2179 (D.D.C. 1996).

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.

Proponents cannot meet the constitutional standard for a sealing order. To support the *perpetual* sealing of the recordings, Proponents must establish 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). But here, as demonstrated above, Proponents have not established any compelling

interest, resting their arguments exclusively on the possible harms enunciated by the Supreme Court in *Hollingsworth*, without making any effort to substantiate those speculative concerns in light of the changed circumstances.

And even if – contrary to fact – Proponents had established some possibility of harm, they certainly have not met their burden of demonstrating that no alternatives would adequately protect the interest claimed. Indeed, the Media Coalition submits that such a showing would be impossible here, where Proponents seek *perpetual* sealing of the *entire* video record of the trial – Plaintiffs' and the City's witnesses as well as their own. While the Media Coalition contends that no sealing is appropriate, and certainly not the permanent sealing that Proponents seek, at a minimum the Court should limit ongoing sealing to the two witnesses who testified on Proponents' behalf. Moreover, even that sealing should be limited to any specific testimony that Proponents have established that will result in harm.

8. CONCLUSION

To foster the public's confidence in the integrity of the judicial system that is fully engaged to decide legal challenges regarding 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 affirm the district court's order unsealing the video recordings, to permit release of those recordings as soon as practicably possible.

RESPECTFULLY SUBMITTED this 14th day of November, 2011.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Circuit Rule 32. The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 10,009, not including the corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of compliance, statement of related cases, and any addendum containing statutes, rules or regulations required for consideration of the brief.

DATED this 13th day of November, 2011.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Intervenor the Non-Party Media Coalition is aware of the following related cases currently pending in this Court.

Perry v. City & County of San Francisco, Case No. 10-16696

Perry v. Brown, Case No. 10-16751

Perry v. Brown, Case No. 11-16577