NO. 11-17255
ARGUMENT TO BE HEARD DECEMBER 8, 2011
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr. et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James Ware)

BRIEF OF DEFENDANT-INTERVENORS-APPELLANTS

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Corporate Disclosure Statement Under Fed. R. App. P. 26.1

Defendant-Intervenor-Appellant ProtectMarriage.com is not a corporation but a primarily formed ballot committee under California Law. *See* CAL. GOV. CODE §§ 82013 & 82047.5. Its "sponsor" under California law is California Renewal, a California nonprofit corporation, recognized as a public welfare organization under 26 U.S.C. § 501(c)(4).

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INTRODUCTION

Early last year, the Supreme Court found it necessary to exercise its supervisory power over the federal judicial system by staying an attempt by then-Chief Judge Walker to publicly broadcast the trial in this high-profile, controversial case. *See Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010). As the Supreme Court explained, Judge Walker's attempt to broadcast "complied neither with existing rules or policies nor the required procedures for amending them." *Id*. at 713. The Supreme Court further concluded that, even apart from the procedural and substantive illegality of Judge Walker's actions, this "high-profile trial that would include witness testimony about a contentious issue" was "not a good one" for public broadcast. *Id*. at 714-15.

Despite the Supreme Court's ruling, Judge Walker insisted on video-recording the trial over Appellants' objections. In so doing, however, he made an express commitment that the trial recording would *not* be used for "purposes of public broadcasting or televising." ER 1139. But for his assurance that the recording would not be publicly broadcast, Jude Walker's decision to continue video recording the trial would have violated Local Rule 77-3, which prohibits "public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceedings," N.D. Cal. Civ. L.R. 77-3; longstanding judicial policy against publicly broadcasting trial

proceedings; and the Supreme Court's prior decision in this very case requiring Judge Walker to comply with these authorities. Based on Judge Walker's unequivocal assurance, as well as the formal withdrawal of the order that had purported to authorize public broadcast of the trial proceedings, *see* ER 208, 365, Appellants did not take further steps to prevent the video recording, nor did they pursue their opportunity, invited by the Supreme Court itself, to seek further review of Judge Walker's original broadcast order.

After the trial, Judge Walker *sua sponte* placed the trial recording in the record of this case, under seal. ER 61-62. In the same order, he made clear that "the potential for public broadcast" of the trial proceedings "had been eliminated." ER 92-93. But for the seal, placing the recording in the record would have violated the same local rule and longstanding judicial policies discussed above.

Despite all this, on February 18, 2011, Judge Walker began to broadcast portions of the trial recording in connection with his teaching and public speaking. ER 336-37. In so doing, Judge Walker (1) violated his own order placing the video recording of the trial under seal; (2) defied the clear terms of Local Rule 77-3; (3) contravened the longstanding policies of the Judicial Conference of the United States and this Court's Judicial Council; (4) ignored the Supreme Court's prior decision in this very case; and (5) most regrettably, repudiated his own

solemn commitment that the recordings would not be used for the purpose of public broadcast.

Now Chief Judge James Ware, who has presided over this case since Judge Walker's retirement in February 2011, has held that he is not bound by his predecessor's commitments, ER 65, and that the "common-law right of access to judicial records" requires that the trial recording be unsealed. By entering an order that will permit public broadcasting of the entire trial, Judge Ware has exponentially compounded this deeply troubling course of events.

This case thus presents a simple question: may a district court, barred from publicly broadcasting a trial by binding rule, well-established judicial policy, and an express decision by the Supreme Court enforcing these authorities against it in this very case, nevertheless publicly broadcast that trial, simply by (1) video recording the trial on the express condition that the recording will not be used for "purposes of public broadcast or televising," (2) placing the video recording in the record under seal while reaffirming that "the potential for public broadcast" has been "eliminated," and (3) concluding a year later that the common law requires that the trial recording be unsealed? If the answer to that question is yes, then the proceedings in this case will have caused grave and lasting injury to the integrity and credibility of the federal judiciary. Fortunately, the answer is no, as demonstrated below, and this Court should reverse the order unsealing the trial

recording. As further demonstrated below, this Court should also direct that the chambers copy of the trial recording not be returned to former Judge Walker or, at a minimum, that an order issue requiring Judge Walker to refrain from further public broadcasts of the trial recording.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and this Court's Order of April 27, 2011. *See* Order, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 27, 2011) (Dkt. # 348-1). There are no further matters in this case pending in the district court. The district court's order granting Plaintiffs' motion to unseal the trial recording and directing that the chambers copy of that recording be returned to former Judge Walker is appealable either as a collateral order or a final order. *See, e.g.*, *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1129-30 (9th Cir. 2003). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered the order on September 19, 2011. Proponents timely noticed this appeal on September 22, 2011. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in concluding that the common-law right of access requires that the trial recording be unsealed.

2. Whether the district court erred in directing that the chambers copy of the trial recording should be returned without restriction to former Judge Walker.

PERTINENT LEGAL PROVISIONS

Pertinent legal provisions are included in an addendum to this brief.

STATEMENT OF THE CASE

1. Two same-sex couples filed this suit claiming that Proposition 8, which provides that "[o]nly marriage between a man and a woman is valid or recognized in California," Cal. Const. art. I, § 7.5, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The case was assigned to the Honorable Vaughn R. Walker, who at the time was Chief Judge of the Northern District of California. Correctly anticipating that the state officials named as defendants would refuse to defend Proposition 8, Appellants—the official proponents of the measure and their official campaign committee (collectively "Proponents")—successfully moved to intervene. The City and County of San Francisco was subsequently allowed to intervene as a party plaintiff.

As the case proceeded, Judge Walker expressed a strong desire to publicly broadcast the forthcoming trial, notwithstanding Proponents' repeated warning that several of their witnesses would decline to testify if the proceedings were broadcast. *See Hollingsworth*, 130 S. Ct. at 713; *see also, e.g.*, ER 695. On January 6, 2010 (five days before the start of trial), Judge Walker announced that an audio and video feed of the trial proceedings would be streamed live to several courthouses in other cities and that the trial would be recorded for daily broadcast

via the internet. ER 1150-51. On January 8, at Judge Walker's request, Chief Judge Kozinski approved the trial for inclusion in a pilot program (announced by this Court in a press release, without notice and comment, just a few weeks earlier) that purported to authorize public broadcast of trial proceedings. ER 224.

A more complete account of Judge Walker's determined effort to broadcast the trial, and the unlawful procedural irregularities it occasioned, is set forth in detail in the Supreme Court's decision granting Proponents' motion to stay Judge Walker's order and prohibiting the public broadcast of the trial. *See Hollingsworth*, 130 S. Ct. at 708-09, 711-12, 714-15. For present purposes, it suffices to repeat the Supreme Court's conclusion: "The District Court here attempted to revise its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States," solely "to allow broadcasting of this high-profile trial without any considered standards or guidelines in place." *Id.* at 713.

2. On the morning of January 11, 2010, just before commencement of the trial, the Supreme Court entered a temporary emergency stay, directing that Judge Walker's order "permitting real-time streaming is stayed except as it permits streaming to other rooms within the confines of the courthouse in which the trial is held" and that "[a]ny additional order permitting broadcast of the proceedings is also stayed." *Hollingsworth v. Perry*, 130 S. Ct. 1132 (2010). This temporary stay

was set to expire on Wednesday, January 13, when the Court would enter a decision on Proponents' stay application. *Id*.

At the opening of trial later that morning, Plaintiffs asked Judge Walker to continue video recording the proceedings for subsequent public broadcast "in the event the stay is lifted" on January 13. ER 1142. Judge Walker accepted this proposal over Proponents' objection that recording the proceedings was not "consistent with the spirit of" of the Supreme Court's temporary stay. ER 1143.

Far from lifting the stay, on January 13, the Supreme Court instead stayed Judge Walker's broadcast order "pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus." *Hollingsworth*, 130 S. Ct. at 715. As the Supreme Court explained, the district court's "eleventh hour" attempt to amend its rules to permit public broadcasting of the trial outside the courthouse was procedurally invalid. *Id*. at 714-15. The district court's attempt to broadcast the trial outside the courthouse was also contrary to the longstanding, considered policy of the Judicial Conference of the United States against such broadcasts, *see id*. at 711-12, as well as the unamended version of Local Rule 77-3, which had "the force of law" and prohibited "public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding." *Hollingsworth*, 130 S. Ct. at 710-11 (quoting Rule 77-3). While this rule contained

an exception permitting " 'electronic transmittal of courtroom proceedings . . . within the confines of the courthouse' " if authorized by the presiding judge, "[t]he negative inference of this exception" is, as the Supreme Court explained, that " the streaming of transmissions, or other broadcasting or televising, beyond 'the confines of the courthouse' " is prohibited. *Id*. (quoting Rule 77-3); *see also id*. at 707 (Rule 77-3 "forbid[s] the broadcasting of trials outside the courthouse in which a trial takes place"). Thus, as the Supreme Court concluded, the district court's attempt to broadcast the trial "complied neither with existing rules or policies nor the required procedures for amending them." *Id*. at 713. The Supreme Court further concluded that even had Rule 77-3 been validly amended to allow the public broadcast of selected trials pursuant to a pilot program, this "high-profile trial that would include witness testimony about a contentious issue" was "not a good one for a pilot program." *Id*. at 714-15.

3. Early the next day, Proponents filed a letter with Judge Walker "request[ing] that [he] halt any further recording of the proceedings in this case, and delete any recordings of the proceedings to date that have previously been made." ER 653. Proponents explained that the Supreme Court's ruling made clear that Local Rule 77-3 "banned the *recording* or broadcast of court proceedings." ER 654 (quoting *Hollingsworth*, 130 S. Ct. at 708).

A few hours later, Judge Walker opened that day's proceedings by reporting that, "in light of the Supreme Court's decision yesterday, . . . [he was] requesting that this case be withdrawn from the Ninth Circuit pilot project." ER 1137. Proponents then asked "for clarification . . . that the recording of these proceedings has been halted, the tape recording itself." ER 1138. When Judge Walker responded that the recording "ha[d] *not* been altered," Proponents reiterated their contention (made in their letter submitted earlier that morning) that, "in light of the stay, . . . the court's local rule . . . prohibit[s] continued tape recording of the proceedings." ER 1138, 1139 (emphasis added).

Judge Walker nevertheless insisted on video-recording the trial over Proponents' objections. *See* ER 1143, 653, 1138. In rejecting Proponents' objections, Judge Walker stated in open court that Rule 77-3 "permits . . . recording for purposes of use in chambers," and that the recording "would be quite helpful to [him] in preparing the findings of fact." ER 1139. He assured Proponents that "that's the purpose for which the recording is going to be made going forward. *But it's not going to be for purposes of public broadcasting or televising*." ER 1139 (emphasis added). Consistent with this assurance, on January 15, Judge Walker "formally requested Chief Judge Kozinski to withdraw this case from the pilot program" that had purportedly authorized public broadcast of the trial, *see* ER 209, and Chief Judge Kozinski promptly granted this request, *see* ER 365. In light

of Judge Walker's unequivocal assurances, and the withdrawal of the order purporting to authorize public broadcast, Proponents took no further action to prevent the recording of the trial.

4. On May 31, Judge Walker *sua sponte* invited the parties "to use portions of the trial recording during closing arguments" and made "a copy of the video . . . available to the part[ies]." ER 206. The parties were instructed to "maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order," *id.*, which restricts "highly confidential" material to the parties' outside counsel and experts and to the district court and its personnel. ER 218-19. Plaintiffs requested and were given a copy of the recording of the entire trial, *see* ER 558, brief excerpts of which they played during closing argument, *see* ER 1081. San Francisco requested and was given portions of the trial recording, ER 560, but did not play any excerpts of the recording during closing argument. Proponents neither requested nor received a copy of the trial recording. Separately, Judge Walker denied a request by the Media Coalition to broadcast closing argument outside the courthouse. *See* ER 204.

After closing argument, Proponents moved Judge Walker for an order directing Plaintiffs and San Francisco "to return to the Court immediately all copies of the trial video in their possession." ER 557. On August 4, 2010, Judge Walker denied this motion. Instead he "DIRECTED" the district court clerk to "file

the trial recording under seal as part of the record" and allowed Plaintiffs and San Francisco to "retain their copies of the trial recording pursuant to the terms of the protective order." ER 61. Elsewhere in the same order, Judge Walker stated that "the potential for public broadcast" of the trial proceedings "had been eliminated." ER 92-93.

5. Meanwhile, Proponents petitioned the Supreme Court for review and vacatur of this Court's ruling, issued before the Supreme Court's stay, denying Proponents' mandamus petition which had sought to prohibit Judge Walker from broadcasting the trial. Proponents argued that, in light of the withdrawal of the order purporting to authorize public broadcast of the trial in this case and Judge Walker's "unequivocal[] assur[ances] that [his] continued recording of the trial proceedings was not for the purpose of public dissemination, but rather solely for [his] use in chambers," this Court's order denying the mandamus petition should be vacated as moot. ER 426-28. The Supreme Court granted Proponents' petition and vacated this Court's ruling. *See* ER 430.

6. Despite Rule 77-3, the policies of the Judicial Conference and this Court's Judicial Council, the Supreme Court's prior decision in this case, the sealing order, and his own solemn commitment in open court, Judge Walker delivered a speech at the University of Arizona on February 18, 2011, in which he played a portion of the video recording of the cross-examination of one of

Proponents' expert witnesses, who had testified at trial in reliance on Judge Walker's promise that the recording would not be publicly broadcast outside the courthouse. *See* http://www.c-spanvideo.org/program/Vaugh, video at 33:12-36:52. The speech was videotaped by C-SPAN, and it was subsequently broadcast on C-SPAN several times beginning on March 22. *See* http://www.c-spanvideo.org/program/Vaugh, "Details – Airing Details." Less than two weeks later, Judge Walker resigned from the bench, but he continued to display excerpts from the trial recording in connection with his teaching and public speaking. *See* ER 336.

Upon learning of Judge Walker's activities, Proponents promptly moved this Court to order the return of all copies of the trial recording. Plaintiffs opposed this motion and filed a cross motion to unseal the trial recording. On April 27, this Court transferred both motions to the district court for resolution. Order, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 27, 2011) (Dkt. # 348-1). The next day, Judge Ware, who had replaced Judge Walker as the presiding judge below, issued an order requiring "[a]ll participants in the trial, including the presiding judge (now retired), who are in possession of a recording of the trial proceedings" to appear at a hearing on Proponents' motion to compel return of the trial recordings and to "show cause as to why the recordings should not be returned to the Court's possession." ER 52. Shortly thereafter, former Judge Walker voluntarily lodged

with the district court, pending resolution of Proponents' motion and Plaintiffs' cross-motion, the chambers copy of the trial recording that he had taken with him when he retired from the bench. *See* ER 291. "Having lodged his chambers copy of the video recordings and as a non-party to these proceedings," he asked that the April 28 order be discharged as applied to him. *Id*. On May 26, Judge Ware granted this request. *See* ER 46. Former Judge Walker did not further participate in the proceedings below.

7. Judge Ware denied Proponents' motion for the return of all copies of the trial recordings on June 14, 2011. ER 21. He found "no indication" that Plaintiffs or San Francisco "have violated the terms of the Protective Order by disclosing the video recordings of the trial." *Id*. For that reason, and "because appellate proceedings in this case are still ongoing," Judge Ware held that Plaintiffs and San Francisco "may retain their copies of the trial recordings." *Id*.

Judge Ware did not, however, "reach any issue with respect to Judge Walker's use of the trial recordings." ER 21 n.6. Rather, because "Judge Walker voluntarily lodged his chambers copy of the video recording with the Court," Judge Ware denied Proponents' motion as moot "insofar as it requests an order requiring Judge Walker to return his copy of the video recording." ER 20-21 n.6. Nevertheless, the district court "g[ave] notice that it intends to return the trial recordings to Judge Walker as part of his judicial papers," and invited "[a]ny party

who objects" to "articulate its opposition" in supplemental briefing. ER 22. In response, Proponents filed a supplemental brief opposing the return of the trial recording to former Judge Walker and requesting, in the alternative, that if the trial recording was returned to him, the court "should enter an order making clear that Judge Walker may not publicly broadcast or disseminate these recordings," but must "maintain his copy of the trial recording in strict compliance with the same terms of the Protective Order that apply to the parties in this case." ER 285-86.

8. On September 19, 2011, Judge Ware ruled that the common-law right of access applies to the trial recording and requires that it be made public. *See* ER 6-13. Accordingly, he granted Plaintiffs' motion to unseal the recording and directed the Clerk "to place the digital recording in the publicly available record of this case." *See* ER 2. According to Judge Ware, the Supreme Court's previous ruling staying public broadcast was irrelevant to his decision because "it was solely addressing procedural issues arising from the Northern District's Amendment of its local rules" and did not "express any view on whether [federal] trials should be broadcast." ER 9. Judge Ware likewise disregarded Rule 77-3. He reasoned that the Rule "speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes or uses," does not "gover[n] whether digital recordings may be placed into the record," and could not "override the common law right of access to court records" in any event. ER 10. Accordingly, he concluded "that Local

Rule 77-3 is not authority for superseding the common law right of access to court records, even for a digital recording of the trial itself." *Id.*

Because Judge Walker had "made copies of the digital recording available to the parties for use during closing argument" and had permitted Plaintiffs to play "segments on the record during closing argument in open court," Judge Ware also rejected Proponents' contention "that the digital recording should not be made public, because it was originally created 'on the condition that [it] would not be publicly disseminated outside the courthouse.' " ER 8. Finally, he rejected as "mere 'unsupported hypothesis or conjecture' " Proponents' concerns that unsealing the trial recording to permit public broadcast would subject Proponents' witnesses to harassment and prejudice future proceedings in this case. ER 11.

In the same order, Judge Ware directed that a copy of the trial recording be returned to former Judge Walker. And, "in light of the Court's disposition of the Motion to Unseal," Judge Ware denied "as moot" Proponents' "request for an order directing Judge Walker to comply with the Protective Order sealing the recording of the trial." ER 13-14 & n.24.

Proponents timely appealed from Judge Ware's order, and this Court stayed that order pending appeal, *see* Dkt. ## 4, 16. This Court also granted the Media Coalition's unopposed motion to intervene in the appellate proceedings. *See* Dkt. # 15.

STATEMENT OF FACTS

The facts giving rise to the present appeal arise directly out of the proceedings in this case and are recounted in detail in the Statement of the Case. Accordingly, Proponents do not repeat them here.

SUMMARY OF ARGUMENT

1. Judge Ware's order unsealing the trial recording to permit its public broadcast violates the plain terms of Local Rule 77-3, which has "the force of law" and prohibits "the broadcasting of trials outside the courthouse in which a trial takes place." *Hollingsworth*, 130 S. Ct. at 707, 710. It is also contrary to the Judicial Conference's policy against public broadcast of trial proceedings, which is "at the very least entitled to respectful consideration," *id*. at 711-12 (quotation marks omitted), and to the similar policy of this Court's Judicial Council, which is "binding on all courts within the Ninth Circuit," ER 346. Further, the order unsealing the trial recording not only circumvents the Supreme Court's previous decision staying broadcast of the trial in this very case, it directly contradicts the Supreme Court's authoritative reading of Rule 77-3 and its conclusion that the trial in this high-profile, controversial case was not appropriate for public broadcast. *See Hollingsworth*, 130 S. Ct. at 707, 711, 712-14, 715.

2. Judge Ware's order unsealing the trial recording rested entirely on the common-law right of access to judicial records. The common-law right of access,

however, has no application here. Like every common-law rule, the common-law right of access is not absolute and may be displaced by statute, rule, or other positive enactment. *See, e.g.*, *In re Roman Catholic Archbishop*, ___ F.3d ___, No. 10-35206, 2011 WL 5304130, at *10-*11 (9th Cir. filed Sept. 21, 2011, amended Nov. 7, 2011). Because Rule 77-3 speaks directly to the question of whether the trial recording may be publicly broadcast outside the courthouse and categorically prohibits such broadcasts, it clearly displaces any common-law right of access that might otherwise apply. *See id*. Further, the trial recording, which merely reflects testimony given and arguments made at a public trial and documented in an official transcript, is simply not the sort of record to which the common-law right of access applies. *See United States v. McDougal*, 103 F.3d 651, 656-57 (8th Cir. 1996). More fundamentally, the common-law right of access has no application when, as here, "there is neither a history of access nor an important public need justifying access." *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989).

3. Even if the common-law right of access applied to the trial recording, it would not warrant unsealing that recording. In light of Rule 77-3, longstanding judicial policy, and the Supreme Court's decision enforcing these authorities against the district court in this very case, the trial recording could not have been created in the first place but for Judge Walker's unequivocal representation on the

record that the recording would not be used for "purposes of public broadcasting or televising." ER 1139. Nor could the recording lawfully have been placed in the record but for Judge Walker's order requiring that it be sealed. In addition, as the Supreme Court previously recognized, public broadcast of the trial in this case would subject Proponents' witnesses to a well-substantiated risk of harassment and would prejudice any further trial proceedings that may prove necessary. *See Hollingsworth*, 130 S. Ct. at 713. By contrast, because the trial in this case was open to the public and widely reported, and because the official transcript has been broadly disseminated and remains readily available to all, unsealing the trial recording would provide little if any countervailing benefit. Thus, neither the circumstances surrounding the creation of the trial recording and its placement in the record, nor the harm that would flow to Proponents and to the federal judicial process from public broadcast of the trial proceedings, nor the marginal benefit of public access to the trial recording can be reconciled with unsealing the recording.

4. In publicly broadcasting portions of the trial recording in connection with his public speaking and teaching, former Judge Walker (1) violated his own order placing that recording under seal, (2) contravened the clear terms of Rule 77-3, (3) disregarded the longstanding policies of the Judicial Conference and this Court's Judicial Council, (4) defied the Supreme Court's previous decision in this very case, and, perhaps most regrettably of all, (5) repudiated his own solemn

commitment, in open court, that the trial recording would not be used for purposes of public broadcast. Accordingly, this Court should direct the district court not to return a copy of the trial recording to Judge Walker or, at a minimum, should direct the court below to issue an order requiring Judge Walker to refrain from further public use of the trial recording.

STANDARD OF REVIEW

The District Court's ruling that the common-law right of access requires that the trial recording be unsealed, *see* ER 1-16 presents two questions, each of which is subject to a different standard of review. The threshold question whether the common-law right of access applies at all to the trial recording in this case is a question of law requiring *de novo* review. *See Times Mirror Co. v. United States*, 873 F.2d at 1212. If the common-law right applies, the district court's decision should be reviewed to determine whether it has "exercise[d] an informed discretion as to the release of the tapes, with a sensitive appreciation of the circumstances that led to their production." *Nixon v. Warner Commc'n, Inc.*, 435 U.S. 589, 603 (1978). "A district court by definition abuses its discretion when it makes an error of law." *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011). Proponents are unaware of any precedent clearly establishing the standard for reviewing the district court's ruling that the trial recording should be returned to Judge Walker without restrictions. *See* ER 13-14 & n.24. Because that ruling was based entirely on the

district court's erroneous conclusion that the trial recording should be unsealed, however, it cannot survive even the most lenient standard of review.

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS CONTRARY TO LAW.

As the district court implicitly recognized in grounding its ruling in the public's common-law right of access to judicial records, unsealing the trial recording will intentionally and inevitably lead to its public broadcast outside " 'the confines of the courthouse.' " *Hollingsworth*, 130 S. Ct. at 710-11 (quoting Rule 77-3). Indeed, the American Foundation for Equal Rights, the self-proclaimed "sole sponsor of [Plaintiffs'] federal court challenge to California's Proposition 8," has publicly stated that it stands "ready to instantly flood the Internet with some fascinating clips from trial" if the trial recording is unsealed. Marriage News Watch, *available at* http://www.lgbtqnation.com/2011/10/secret-anti-gays-unmasked-then-re-masked-defending-doma-costing-taxpayers/ (last visited Nov. 9, 2011). Moreover, placing the unsealed recording on the internet-accessible public docket will itself publicly broadcast the trial proceedings outside the courthouse. The order unsealing the recording thus plainly violates Local Rule 77-3's prohibition on such broadcasts, as well as the longstanding policies of the Judicial Conference and this Court's Judicial Council barring the public broadcast

of trial proceedings. It is also contrary to the Supreme Court's prior ruling enforcing these authorities in this very case.

A. The district court's order violates Rule 77-3 and contravenes longstanding judicial policy.

1. "In 1996, the Judicial Conference of the United States adopted a policy opposing the public broadcast of [trial] court proceedings." *Hollingsworth v. Perry*, 130 S. Ct. at 711; *see also* ER 333, 343-44. This policy is rooted in "decades of experience and study" demonstrating the negative impact of broadcasting on trial proceedings. ER 336; *see also Hollingsworth*, 130 S. Ct. at 711-12. In July 2009 the Judicial Conference forcefully reiterated to Congress its conclusion that the "negative [e]ffects of cameras in trial court proceedings far outweigh any potential benefit." ER 336.

Also in 1996, this Court's Judicial Council "voted to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in the courts." ER 346. The Council thus determined that "[t]he taking of photographs and radio and television coverage of court proceedings in the United States district courts is prohibited." *Id*. This policy was made "binding on all courts within the Ninth Circuit." *Id*. Accordingly, the Northern District of California adopted Local Rule 77-3, which provides in relevant part as follows:

> Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial

> Council of the Ninth Circuit or the Judicial Conference of the United States, 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, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge.

N.D. Cal. L.R. 77-3.[1]

2. Rule 77-3 is authorized by statute, *see* 28 U.S.C. § 2071, and has "the force of law," *Hollingsworth*, 130 S. Ct. at 710. Indeed, contrary to Judge Ware's suggestion that this rule serves only to "protect[]," but not to "bridle" or "constrai[n]" district court judges, ER 10 n.18, the Supreme Court's decision requiring Judge Walker to comply with the rule leaves no doubt that district judges are not free to disregard it. *See, e.g.*, *Hollingsworth*, 130 S. Ct. at 713 (staying Judge Walker's broadcast order because it "complied *neither* with existing rules or policies *nor* the required procedures for amending them") (emphasis added).

By its plain terms, Rule 77-3 expressly prohibits not only "public broadcasting or televising" of trial proceedings, but also "recording for those purposes." Accordingly, Judge Walker's decision to record the trial proceedings over Proponents' objection was lawful only on the basis of his unequivocal

[1] The version of Rule 77-3 in force at the time of the Supreme Court's decision in *Hollingsworth* did not contain an exception for public broadcast in connection with a pilot program (though the district court had attempted unlawfully to amend the rule to create such an exception). *See Hollingsworth*, 130 S. Ct. at 712. As discussed below, the public broadcast of the trial proceedings in this case is plainly not authorized in connection with any pilot program.

representation—confirmed by withdrawal of the order purporting to authorize broadcast, *see* ER 208, 365—that the recording would not be publicly broadcast beyond the confines of the courthouse.[2]

Furthermore, contrary to the district court's claim that "Rule 77-3 speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes or uses," ER 10, the Rule expressly imposes a separate prohibition on "public broadcasting or televising" of trial proceedings outside "the confines of the courthouse," N.D. Cal. L.R. 77-3; *see also Hollingsworth*, 130 S. Ct. at 707 (Rule 77-3 bars "the broadcasting of trials outside the courthouse in which a trial takes place"); ER 1074 (concession of Plaintiffs' counsel below that Rule 77-3's "plain language goes to broadcasting and televising *or* recording for the purpose of broadcasting") (emphasis added). Nor does the rule draw any distinction between live broadcasting during a trial and subsequent broadcasting of a video recording of the trial; rather, it applies by its plain terms regardless of when the public dissemination occurs. Indeed, the obvious import of the prohibition on "recording for these purposes" is to extend the prohibition against "public broadcasting or

[2] While Rule 77-3 contains an exception permitting the " '[e]lectronic transmittal of courtroom proceedings . . . within the confines of the courthouse' " if authorized by the presiding judge, "[t]he negative inference of this exception, of course, is that the Rule . . . prohibit[s] the streaming of transmissions, or other broadcasting or televising, beyond 'the confines of the courthouse.' " *Hollingsworth*, 130 S. Ct. at 710-11 (quoting Rule 77-3).

televising" to subsequent broadcasts of recorded proceedings. Accordingly, regardless of whether the act of recording a particular trial itself is contrary to Rule 77-3, the subsequent public dissemination of trial recordings clearly runs afoul of the distinct "prohibit[ion against] the streaming of transmissions, or other broadcasting or televising, beyond 'the confines of the courthouse.' " *Hollingsworth*, 130 S. Ct. at 711 (quoting Rule 77-3).

Thus, contrary to Judge Ware's naked assertion that "[n]othing in the language of Local Rule 77-3 governs whether digital recordings may be placed into the record," ER 10, Judge Walker's decision to place the trial recording in the record would have violated this Rule but for his order placing it under seal and thereby preventing its public dissemination. Nor do the plain terms of Rule 77-3 contain any sort of exception permitting public broadcast of trial recordings placed in the record. Accordingly, lifting the seal to permit public broadcasting of the trial proceedings will plainly violate the Rule. Indeed, any other reading of Rule 77-3 would render it a nullity, for it would give judges determined to broadcast trial proceedings publicly a blueprint for doing so.

3. By permitting public broadcast of the trial, Judge Ware's order also violates the Judicial Conference's policy against public broadcast of trial proceedings, which is "at the very least entitled to respectful consideration," *Hollingsworth*, 130 S. Ct. at 711-12 (quotation marks omitted), and the similar

policy of this Court's Judicial Council, which is "binding on all courts within the Ninth Circuit," ER 346; *see also* 28 U.S.C. § 332(d)(2). The district court's disregard of these policies is plainly a serious matter. *See In re Complaint Against Dist. Judge Joe Billy McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009) (Easterbrook, C.J.) (District judge who "contravene[d] policies adopted by the Judicial Conference and the Judicial Council" by "allow[ing] video recording and live broadcasting . . . of a civil proceeding" had " 'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.' ") (quoting 28 U.S.C. § 351(a)); *In re Sony BMG Music Entm't*, 564 F.3d 1, 7 (1st Cir. 2009) (issuing a writ of mandamus overturning a district court order permitting a webcast of a trial and explaining that "the Judicial Conference's unequivocal stance against the broadcasting of civil proceedings (save for those few exceptions specifically noted in the policy itself), is entitled to substantial weight").

Noting this Court's announcement, on December 17, 2009, of a pilot program purporting "to allow the use of cameras in certain district court proceedings, and under certain limited circumstances," Judge Ware asserted that "at the time the digital recording was made, it was the policy of the Ninth Circuit that the recording of civil non-jury district court proceedings was permissible." ER 11-12. The December 2009 program, however, "was not adopted after notice and

comment procedures," as is required by statute. *Hollingsworth*, 130 S. Ct. at 712 (citing 28 U.S.C. § 332(d)(1)); *cf. id*. at 711 (concluding that Judge Walker's attempt to amend Local Rule 77-3 "appears to be invalid" because the court failed to comply with the statutory notice and comment requirements"). As the Supreme Court explained:

> In the present case . . . over a span of three weeks the District Court and Ninth Circuit Judicial Council issued, retracted, and reissued a series of Web site postings and news releases. These purport to amend rules and policies at the heart of an ongoing consideration of broadcasting federal trials. And they have done so to make sure that one particular trial may be broadcast. Congress's requirement of a notice and comment procedure prevents just such arbitrary changes of court rules. Instead, courts must use the procedures prescribed by statute to amend their rules, 28 U.S.C. § 2071.

Id. at 714. In all events, this case was formally withdrawn from the purported pilot program promptly after the Supreme Court's stay decision issued, so that pilot program plainly cannot authorize public broadcast of the trial recording here. *See* ER 208, 365.[3]

B. The district court's order directly conflicts with the Supreme Court's decision in *Hollingsworth*.

In ordering the public release of the trial recording, Judge Ware also deliberately disregarded the Supreme Court's previous decision in this very case.

[3] Although the Judicial Conference recently adopted a pilot program permitting, in certain narrow circumstances, the broadcast of civil trial proceedings, *see* ER 11 n.20, it likewise provides no support for the ruling below given that (1) it did not exist at the time of the trial in this case, and (2) participation in the new program requires the consent of all parties, ER 437.

True, the stay entered by that Court expired when it granted Proponents' petition for certiorari and Proponents' request to vacate as moot this Court's ruling denying Proponents' earlier mandamus petition. But Proponents' petition for certiorari and request for vacatur was predicated on the understanding that Proponents' mandamus petition was moot *because* Judge Walker had "repeatedly and unequivocally assured [Proponents] that [his] continued recording of the trial proceedings was not for the purpose of public dissemination, but rather solely for [his] use in chambers." ER 426. But for Judge Walker's assurances, then, the video recording of the trial would plainly have violated the Supreme Court's stay and would surely have been halted.

In all events, while the Supreme Court's stay order is no longer in effect, that Court's stay decision of course retains its binding precedential force. And not only does Judge Ware's order directly circumvent the Supreme Court's ruling staying public broadcast of the trial proceedings in this case, it also flatly contradicts that Court's reading of Rule 77-3 and its conclusion that the trial in this case should not be publicly broadcast.

Specifically, Judge Ware held that Rule 77-3 "speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes or uses," and thus did not bar unsealing the trial recording, ER 10, even though that action would indisputably result in its public broadcast outside the courthouse. Indeed, placing

the recording on the internet-accessible public docket would itself broadcast the trial proceedings outside the courthouse. In *Hollingsworth*, however, the Supreme Court concluded that Rule 77-3, by its terms, "prohibited the streaming of transmissions, or other broadcasting or televising, beyond 'the confines of the courthouse.' " 130 S. Ct. at 711 (quoting Rule 77-3); *see also id*. at 707 (explaining that the Rule prohibited "the broadcasting of trials outside the courthouse in which a trial takes place").

The district court made no attempt to reconcile its narrow, self-negating reading of Rule 77-3 with the Supreme Court's reading of that rule, nor could it have done so. Rather, it dismissed the Supreme Court's decision as speaking only to the procedural validity of Judge Walker's attempt to amend that Rule. *See* ER 9. The invalidity of the purported amendment, however, would not have warranted a stay but for the Supreme Court's additional determination that the unamended Rule, by its terms, barred public broadcast of this trial. Indeed, the Supreme Court squarely held that Judge Walker's broadcast order "complied *neither* with existing rules or policies *nor* the required procedures for amending them." *Hollingsworth*, 130 S. Ct. at 713 (emphasis added). Thus, contrary to Judge Ware's ruling below, the Supreme Court concluded not only that Judge Walker's attempt to amend Rule 77-3 was procedurally invalid, but that his broadcast order violated the *substance* of that Rule (and Judicial Conference policy) as well.

Further, as discussed more fully below, *see infra* Part III.B, the Supreme Court credited Proponents' witnesses' well-substantiated fears of harassment and intimidation. *See id*. at 713-14. Thus, although the Supreme Court may not have expressed any views on whether trials should be publicly broadcast *as a general matter*, *see* ER 9, that Court made clear that even "[i]f Local Rule 77-3 had been validly revised" to allow public broadcasting of trial proceedings pursuant to a pilot program, *this* "high-profile, divisive" case, "involv[ing] issues subject to intense debate in our society," was "not a good one for a pilot program." *Hollingsworth*, 130 S. Ct. at 713-14. Judge Ware's cavalier dismissal of the same concerns as "unsupported hypothesis or conjecture," ER 11, cannot be squared with the Supreme Court's previous decision in this case.

II. THE COMMON-LAW RIGHT OF ACCESS TO JUDICIAL RECORDS DOES NOT APPLY TO THE TRIAL RECORDING.

The district court rested its ruling solely on the common-law right "to inspect and copy public records and documents, including judicial records and documents." ER 6 (quoting *Nixon v. Warner Commc'n, Inc.*, 435 U.S. 589, 597 (1978)). As demonstrated below, however, this common-law right has no application to the video-recording at issue here.

A. Rule 77-3 displaces any common-law right of access.

The common-law right of access is just that—a judge-made, common-law rule. It "is not absolute," *Nixon*, 435 U.S. at 598, and, like every common-law rule,

it may be displaced by statute, rule, or other positive enactment, *see*, *e.g.*, *In re Roman Catholic Archbishop*, 2011 WL 5304130, at *10-*11; *Center for Nat'l Sec. Studies v. U.S. DOJ*, 331 F.3d 918, 937 (D.C. Cir. 2003); *United States v. Gonzales*, 150 F.3d 1246, 1263 (10th Cir. 1998).[4] For example, the common-law right of access is supplanted by Fed. R. Crim. P. 6(e), governing recording and disclosure of grand jury proceedings. *See*, *e.g.*, *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998). It is likewise displaced by Fed. R. Civ. P. 5.2, which does not permit documents containing minors' names to be unsealed unless those names are redacted. *See* Rule 5.2(d). In short, where applicable, "[r]ules, not the common law, now govern." *In re Motions of Dow Jones & Co.*, 142 F.3d at 504.

As demonstrated above, Rule 77-3 would have prohibited the creation of the video-recording at issue here but for Judge Walker's unequivocal representation that it would not be publicly broadcast outside the courthouse. The Rule likewise would have barred the placement of the recording in the record but for Judge Walker's sealing order. Because Rule 77-3 speaks directly to the question of whether the trial recording may be publicly broadcast outside the courthouse and imposes a categorical prohibition on such broadcasts that is different from the rule

[4] The Supreme Court's decision in *Nixon* has also been interpreted as an example of a positive enactment supplanting the common-law right of access. *See*, *e.g.*, *Center for Nat'l Sec. Studies*, 331 F.3d at 936-37.

that would govern if the common law applied, it clearly preempts any common-law right of access that might otherwise apply. *See In re Roman Catholic Archbishop*, 2011 WL 5304130, at *10-*11. Judge Ware's conclusion that Rule 77-3 cannot "override the common law right of access to court records," ER 10, turns the well-established relationship between common-law and positive enactments on its head.

B. The trial recording is not the type of record to which the common-law right of access applies.

1. As even Plaintiffs have conceded, *see* ER 1030-31, the trial recording is not itself evidence or even argument; rather it is wholly derivative of the evidence offered, and the arguments made, in open court during the trial in this case. And as Plaintiffs have also conceded, ER 1025, the court reporter's transcript, not the video-recording, is the official record of the trial proceedings. That is why Judge Walker's opinion and the parties' briefs to this Court on appeal from that decision cited the transcript, not the trial recording. Indeed, the Judicial Conference has made clear that even trial recordings made for public broadcast pursuant to the pilot program it recently adopted "are not the official record of the proceedings, and should not be used as exhibits or part of any court filing." Judicial Conference Committee on Court Administration and Case Management, Guidelines for the Cameras Pilot Project in the District Courts, *available at* http://www.uscourts.gov/uscourts/News/2011/docs/CamerasGuidelines.pdf.

Further, it is undisputed that the trial in this case was open to the press and public and that the official transcript is readily available to all. Neither the district court, Plaintiffs, nor their allies have identified any authority holding that the common-law right of access applies to a video recording of trial proceedings or any similar record that is nothing more than an unofficial depiction or account of the testimony and arguments made at a public trial and memorialized in an official, publicly available transcript.

To the contrary, in *United States v. McDougal*, the Eighth Circuit held that, "as a matter of law," even a videotape of deposition testimony played in court in lieu of live testimony is "not a judicial record to which the common law right of public access attaches," because it "is merely an electronic recording of witness testimony." 103 F.3d at 656-57. As the court of appeals explained, "Although the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom . . . there was, and is, no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony." *Id*. at 657; *see also id*. (distinguishing recordings of "the primary conduct of witnesses or parties" from mere recordings of "witness testimony"). And the court made clear that its holding did not turn in any way "on whether or not the videotape itself was admitted into evidence." *Id*. at 656.

In this case the video-recording is one step even further removed than the videotape in *McDougal* from the type of record to which the common-law right of access applies, for (with the exception of a few brief snippets played during closing arguments), the recording simply depicts the trial proceedings and was not itself played at trial. Indeed, because *McDougal*'s holding was intended to ensure that "deponents are treated equally to witnesses who testify in court, in person," it applies *a fortiori* to an "electronic recording of live witness testimony in the courtroom," such as the trial recording here. *Id*.

2. More fundamentally, far from applying "to all judicial and quasi-judicial documents," the common-law right of access has no application "when there is neither a history of access nor an important public need justifying access." *Times Mirror Co. v. United States*, 873 F.2d at 1219. There is, of course, no history of access to video recordings of federal trial proceedings. To the contrary, the recording and broadcast of such proceedings has traditionally been barred pursuant to the federal judiciary's longstanding, considered judgment that the "negative [e]ffects of cameras in trial court proceedings far outweigh any potential benefit." ER 336. Nor is there "an important public need justifying access" where, as here, the trial itself was open to the press and public and the official transcript is readily available to all.

III. EVEN IF THE COMMON-LAW RIGHT OF ACCESS APPLIED, IT WOULD NOT WARRANT UNSEALING THE TRIAL RECORDING.

Even if the common-law right of access applied to the trial recording (and it does not), the question whether it should be released publicly would turn on "a sensitive appreciation of the circumstances that led to [its] production." *Nixon v. Warner Commc'n, Inc.*, 435 U.S. at 603. Thus, the common-law right "does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the [disputed records] to gratify private spite or promote public scandal with no corresponding assurance of public benefit." *Id.* (internal citation and quotation marks omitted). As demonstrated below, any meaningful analysis of these considerations makes clear that the trial recording should not be released in this case.

A. The circumstances surrounding the creation of the trial recording and its placement in the record bar public access.

Again, the video recording of the trial proceedings in this case owes its very existence to Judge Walker's solemn assurance, in open court, that the recording would *not* be used for "purposes of public broadcasting or televising." ER 1139. Judge Walker further assured the parties that only "some further order of the Supreme Court or the Court of Appeals" could permit transmission beyond the courthouse, ER 1142, and the order that had purported to authorize public broadcast of the trial in the first place was promptly withdrawn at Judge Walker's

request, *see* ER 209, 365. Proponents took Judge Walker at his word. They took no action to enforce the Supreme Court's stay or otherwise prevent the recording of the trial. Indeed, in express reliance on Judge Walker's promise, Proponents' certiorari petition advised the Supreme Court that the Court's stay order temporarily barring broadcast of the trial could be allowed to expire, for the Proponents' mandamus petition seeking a permanent stay had become moot. *See* ER 426-27. The Supreme Court, in turn, granted Proponents' certiorari petition, vacated this Court's judgment denying Proponents' mandamus petition, and ordered the matter dismissed as moot. ER 430.

Consistent with his previous assurances, Judge Walker specifically "directed," on his own initiative, that the recording be subject to a highly restrictive protective order and filed under seal. *See* ER 207, 61. Again, but for this direction, the release of the trial recording to Plaintiffs and San Francisco and its placement in the record would have violated Rule 77-3, and Proponents would have taken immediate steps to prevent these actions. Indeed, in deciding not to appeal Judge Walker's order placing the recording in the record *under seal*, Proponents relied not only on Judge Walker's previous assurances, but also on his unequivocal determination—made in the very same opinion placing the recording in the record—that "the potential for public broadcast" of witness testimony "had been eliminated." ER 93.

For these reasons, the decision below unsealing the trial recording goes beyond simply violating a binding rule, disregarding longstanding judicial policies, and circumventing the Supreme Court's prior ruling in this very case. Rather, by setting at naught a solemn commitment made by a federal judge on which Proponents relied to their detriment, the decision below threatens deep and lasting harm to the integrity and credibility of the federal judiciary. For if that decision is permitted to stand, future litigants and witnesses will be on notice that judicial promises cannot be trusted.

Judge Ware, however, suggested that Proponents should not have relied on Judge Walker's promises and determinations. *See* ER 8. But he failed to identify any statement made or action taken by Judge Walker during the trial proceedings that called into question his assurance that the recording would not be publicly broadcast outside the courthouse. True, Judge Walker allowed Plaintiffs to play brief snippets of the recording *in the courtroom* during closing arguments. But he also required Plaintiffs (and San Francisco) "to maintain as strictly confidential" their copies of the trial recording pursuant to a highly restrictive protective order, ER 207, and he denied the Media Coalition's request to publicly broadcast the closing arguments outside the courthouse, *see* ER 204. Accordingly, as Plaintiffs themselves represented to the Supreme Court, "the trial [was] completed without any of the proceedings having been transmitted outside the confines of the

courthouse in which they took place." Brief in Opposition for Kristin M. Perry et al. at 4, *Hollingsworth v. United States Dist. Ct. for the N.D. Cal.*, 131 S. Ct. 372 (2010) (No. 09-1238).[5]

In short, the circumstances surrounding the creation of the trial recording and its placement in the record simply cannot be reconciled with unsealing the recording to permit public access.[6]

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[5] The use Judge Walker permitted to be made of the trial recording in connection with closing argument did violate his assurance that the recording would be "simply for use in chambers." ER 1139-40. But, as explained in the text, closing arguments were not publicly broadcast outside the courthouse and Plaintiffs and San Francisco were required "to maintain as strictly confidential" their copies of the trial recording "pursuant to . . . the protective order." ER 207. Accordingly, the use of the trial recording in connection with closing argument violated neither Rule 77-3's prohibition on public broadcast of trial proceedings outside the confines of the courthouse nor Judge Walker's assurance, made in reference to this rule, that the recordings would not be used "for purposes of public broadcast or televising." ER 1139.

[6] In establishing common-law presumptions of confidentiality or access, this Court has shown sensitivity to the circumstances surrounding documents' creation, production, and placement in the record. *See, e.g.*, *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002) (parties seeking access to documents filed under seal pursuant to a valid protective order in support of a nondispositive motion "must present sufficiently compelling reasons why the sealed discovery document should be released"; "[a]pplying a strong presumption of access to documents a court has already decided should be shielded from the public would surely undermine, and possibly eviscerate, the broad power of the district court to fashion protective orders"); *United States v. Anzalone*, 886 F.2d 229, 233 (9th Cir. 1989) ("When a court is called upon to release a presentence report, the court must balance the desire for confidentiality of the reports against the need for their disclosure, with a strong presumption in favor of confidentiality. The [party seeking access] must show a large compelling need for disclosure in order to meet the ends of justice.") (quotation marks omitted); *United States v.*

B. The harm that would result from unsealing the trial recording counsels strongly against public access.

As the Supreme Court recognized, public broadcast of the trial proceedings would subject Proponents' witnesses to a well-substantiated risk of harassment and would prejudice any further trial proceedings that may prove necessary in this case. *See Hollingsworth*, 130 S. Ct. at 713. Since the Supreme Court issued its decision, the record supporting its concerns has only increased. The serious risk of harm posed by public broadcast of the trial proceedings thus weighs strongly against public access here. Indeed, there is a grave risk that the trial recording will be used "to gratify private spite" and "promote public scandal." *Nixon*, 435 U.S. at 603.

1. Based on "decades of experience and study," the Judicial Conference has repeatedly found that the public broadcast of trial proceedings "can intimidate litigants [and] witnesses," "create privacy concerns," and "increase[] security and safety issues." *E.g.*, ER 336-38; *see also Hollingsworth*, 130 S. Ct. at 712-13; *cf. Estes v. Texas*, 381 U.S. 532, 547 (1965). "Threats against judges, lawyers, and other participants could increase even beyond the current disturbing level." ER 338. Significantly, these findings are based on the Judicial Conference's study of ordinary, run-of-the-mine cases. "[I]n 'truly high-profile cases' one can '[j]ust imagine what the findings would be.' " *Hollingsworth*, 130 S. Ct. at 714. Even

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Schlette, 842 F.2d 1574, 1581 (9th Cir. 1988) (presentence reports are "prepared primarily for court use").

apart from the specific circumstances presented by this case, these longstanding, empirically based concerns of the Judicial Conference, standing alone, counsel strongly against unsealing the trial recording to permit public broadcast here.

Further, as Proponents repeatedly advised Judge Walker before the trial in this "high-profile, divisive" case involving "issues subject to intense debate in our society," *id.*, several of the expert witnesses that Proponents had planned to call at trial voiced "concerns for their own security," *id*. at 714, and made clear "that they [would] not testify if the trial [were] broadcast," *id. at* 713; *see also, e.g.*, ER 695. Judge Walker was wholly indifferent to this fact and to its obvious implications for the fundamental fairness of the trial itself, for he never even mentioned this consideration as bearing on his decision to broadcast—and when broadcast was stayed, to video record—the trial.[7] The Supreme Court however, was acutely concerned that Proponents' witnesses had "substantiated their concerns by citing incidents of past harassment." *Id*. at 713. Indeed, the record is replete with evidence of repeated, and frequently extremely serious, harassment of Proposition 8 supporters. *See, e.g.*, ER 717; ER 745-46; ER 750-51; ER 761; ER 1017-18; ER 1397; www.youtube.com/watch?v=hcKJEHrvwDI. For example, "donors to

[7] Despite Judge Walker's subsequent assurance that the video-recording would not be publicly broadcast, all but two of Proponents' experts ultimately did not testify. As counsel for Proponents advised Judge Walker early in the trial, the witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever." ER 1134.

groups supporting Proposition 8 'have received death threats and envelopes containing a powdery white substance,' " and "numerous instances of vandalism and physical violence have been reported against those who have been identified as Proposition 8 supporters." *Hollingsworth*, 130 S. Ct. at 707; *see also* ER 1397 ("expressions of support for Prop 8 have generated a range of hostilities and harms that includes harassment, intimidation, vandalism, racial scapegoating, blacklisting, loss of employment, economic hardships, angry protests, violence, at least one death threat, and gross expressions of antireligious bigotry"). Even Plaintiffs' lead counsel has decried, on behalf of a different client, the "widespread economic reprisals" against supporters of Proposition 8. ER 721-22; *see also* *Hollingsworth*, 130 S. Ct. at 707 (citing this brief on this point). The record of harassment of supporters of the traditional definition of marriage has only strengthened since the Supreme Court stayed the original broadcast order. *See* ER 1414; ER 1415; ER 1418; ER 1421; ER 1428; ER 1425; ER 1430 (*available at* http://www.youtube.com/watch?v=TqCXONxwqPs&feature=); ER 1431.[8] There

[8] Indeed, a recent incident provides a chilling supplement to the record of economic reprisals directed against defenders of the traditional definition of marriage. In April a highly respected national law firm, King & Spalding, abruptly withdrew from its representation of the United States House of Representatives ("House") in several cases involving the constitutionality of the Defense of Marriage Act ("DOMA"). It has been widely reported that when the firm's representation of the House in defending DOMA was publicly announced, it "immediately came under assault from gay rights groups, including the Human

can thus be little doubt that unsealing the trial recording to permit its public broadcast would expose Proponents' witnesses to a serious and well-substantiated risk of harassment or worse.

The risk of harm to Proponents and their witnesses is further illuminated by recent testimony to Congress by Justices Scalia and Breyer addressing the question of televising proceedings in the Supreme Court. Justice Scalia emphasized that only a tiny fraction of the public would sit through video programming of the Court's proceedings "gavel to gavel," while the rest "would see nothing but a 30 second take-out from one of the proceedings, which I guarantee you would not be representative of what we do." *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the Senate Judiciary Committee* at 130:49, 131:32 (Oct. 5, 2011), *available at* http://www.senate.gov/fplayers/jw57/urlMP4Player.cfm?fn=judiciary100511&st=1170&dur=9752. Justice Breyer echoed this concern: "[Y]ou can make people look good or you can make them look bad, depending on what 30 seconds you take." *Id.* at 135:05; *see also Nixon*, 435 U.S. at 601-02 (noting similar concerns); *Estes*, 381 U.S. at 574 (Warren, C.J., concurring) (same).

Rights Campaign, which began contacting the firm's clients and urging students at top law schools to push the firm to drop the case." Sandhya Somashekhar, *Firm Defending Defense of Marriage Act Withdraws from Case*, Washington Post, April 25, 2011.

These concerns apply with even greater force to video recordings of trial court proceedings in highly controversial federal cases, such as this one. Video recordings of such proceedings would present limitless opportunities for partisans to unfairly make one side look good and the other side look bad, and that alone is ample reason for the federal judiciary not to permit "the streaming of transmissions, or other broadcasting or televising, beyond 'the confines of the courthouse.' " *Hollingsworth*, 130 S. Ct. at 711 (quoting Rule 77-3). Indeed, Plaintiffs' sponsoring organization has made no secret of its intention to make precisely such use of the trial recording, openly vowing "to instantly flood the internet with some fascinating clips from trial" if the recording is unsealed.

In addition, Proponents are currently appealing both the judgment invalidating Proposition 8 and the district court's subsequent denial of our motion to vacate that judgment. Accordingly, it is quite possible that this case will be retried in the future. As noted above, *see supra* note 7, despite Judge Walker's unequivocal assurances that the trial recording would not be publicly broadcast, only two of Proponents' scheduled expert witnesses appeared at trial. If the video-recording of the trial is now unsealed and made public, Proponents will likely have great difficulty finding any witnesses willing to participate in any further trial proceedings in this case. For, as the Supreme Court explained, "witnesses subject to harassment as a result of broadcast of their testimony might be less likely to

cooperate in any future proceedings." *Hollingsworth*, 130 S. Ct. at 713. Unsealing the recording would thus threaten to prejudice any future trial proceedings.

2. Despite all this, Judge Ware brushed aside, in a single sentence, Proponents' concerns about the harms that would certainly flow from unsealing the trial recording as "mere unsupported hypothesis or conjecture." ER 11. Judge Ware's peremptory disregard of Proponents' well-substantiated concerns can be reconciled neither with the Supreme Court's previous ruling in this case specifically crediting these concerns nor with the extensive documentation of harassment of Proposition 8 supporters that Proponents have provided throughout the course of this litigation. More fundamentally, Judge Ware's rejection of these concerns as "unsupported hypothesis" is refuted by the very existence of Rule 77-3, for its sole purpose is to prevent the very harms that would be threatened in *any* case in which "public broadcasting or televising" of trial proceedings was permitted.

C. Unsealing the trial recording will provide little public benefit.

Further, unsealing the trial recording will provide "no corresponding assurance of public benefit." *Nixon*, 435 U.S. at 603. This is not a case where the public seeks access to evidence or proceedings hidden from public view. To the contrary, the trial in this case was open to the public and the official transcript remains readily available to anyone who wants it. Even assuming any applicable

common-law right of access requires more—and it does not—the already extensive public access to the trial in this case surely renders "the public's interest in gaining access to the videotape recording … only marginal," at most. *McDougal*, 103 F.3d at 658; *see also In re Providence Journal Co.*, 293 F.3d 1, 17-18 (1st Cir. 2002) ("the fact that the public and press have had ample opportunity to see and hear the evidentiary tapes when those tapes were played in open court during trial takes much of the sting out of the [denial of access to those tapes]"); *cf. United States v. Hastings*, 695 F.2d 1278, 1283 (11th Cir. 1983) (similar).

IV. A COPY OF THE TRIAL RECORDINGS SHOULD NOT BE RETURNED TO FORMER JUDGE WALKER.

In directing that the chambers copy of the trial recording be returned to Judge Walker, Judge Ware relied exclusively on his erroneous conclusion that the recording should be unsealed. ER 13-14 & n.24. He did not address the merits of Proponents' argument that the recording should not be returned to Judge Walker and denied "as moot" Proponents' alternative "request for an order directing Judge Walker to maintain his copy of the trial tapes in strict compliance with the . . . terms of the Protective Order." *Id*. Accordingly, Judge Ware's rulings on the disposition of the chambers copy of the trial recording cannot survive reversal of his ruling that the trial recording should be unsealed. For the reasons set forth below, if this Court reverses the order unsealing the recording, it should direct the district court not to return the chambers copy to Judge Walker. If this Court

nevertheless determines that the recording should be returned to Judge Walker, it should direct the district court to enter an order making clear that Judge Walker may not publicly broadcast or disseminate the trial recording, but must strictly comply with the same protective order governing retention of the recording by Plaintiffs and San Francisco.

As demonstrated at length above, in broadcasting portions of the trial recording in connection with his teaching and public speaking, former Judge Walker (1) violated his own order placing that recording under seal, (2) contravened the clear terms of Rule 77-3 prohibiting the public broadcast of trial proceedings beyond the confines of the courthouse, (3) disregarded the longstanding policies of the Judicial Conference and this Court's Judicial Council against such broadcasts, and (4) defied the Supreme Court's previous decision staying Judge Walker's earlier attempt to publicly broadcast these trial proceedings. Thus, Judge Walker deliberately " 'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.' " *In re Complaint Against Dist. Judge Joe Billy McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009) (Easterbrook, C.J.) (quoting 28 U.S.C. § 351(a)).

Even more regrettable, however, than all of this is the fact that Judge Walker's use of the trial recording repudiated his own explicit commitment, in open court, that the trial recording would not be used for purposes of public

broadcast. Proponents relied on this assurance and took no action to prevent the recording of the trial. Indeed, the Supreme Court relied on it, at Proponents' urging, in finding that Proponents' mandamus petition seeking to bar broadcast of the trial had become moot. And, most importantly, the witness whose testimony Judge Walker excerpted in public speeches and lectures also relied on this assurance, deciding to testify only after Judge Walker had made clear that the trial recording would not be publicly broadcast. That witness subsequently regretted his decision to take Judge Walker at his word, as he watched portions of his testimony displayed on national television by Judge Walker himself.

What's done is done. Judge Walker's speech, and C-SPAN's public dissemination of it, cannot be undone. And given that Judge Walker has recently retired from the federal bench, he cannot be disciplined. *See In re Charge of Judicial Misconduct*, 91 F.3d 90, 91 (9th Cir. Judicial Council 1996). But he can be barred from further unlawful disclosures of the trial recordings.

In lodging the chambers copy of the trial recording with the district court, Judge Walker reserved the right to request the recording's return and asserted that " '[t]he chambers papers of a federal judge remain the private property of that judge or the judge's heirs, and it is the prerogative of the judge or the judge's heirs to determine the disposition of those papers.' " ER 291 n.1 (quoting Federal Judicial Center, *A Guide to the Preservation of Federal Judges' Papers* (2d ed.

2009)). As demonstrated above, however, *see supra*, pp. 22-23, Judge Walker's decision to video record the trial over Proponents' objections was lawful only on the condition, unequivocally affirmed by Judge Walker in open Court, that the trial recording would not be made or used for purposes of public broadcast. Had Judge Walker indicated any intention to remove the trial recording from "the confines of the courthouse," Rule 77-3, and to use it for personal purposes unrelated to his responsibilities as a trial judge—let alone an intention to publicly broadcast the trial recording outside the courthouse—his recording of the trial would have been unlawful from the outset and Proponents would have taken action to enforce Rule 77-3 and the Supreme Court stay that was in effect at that time. Under these circumstances, the trial recording cannot properly be regarded as personal property that may be removed from the courthouse and used for purposes for which the recording could not lawfully have been created in the first place. If there were any room for doubt, former Judge Walker's improper post-trial use of the recording in his public speaking and teaching confirms that the trial recording should not be returned to him.

At a bare minimum, Judge Walker should be directed to refrain from further public broadcast or dissemination of the trial recording. For even if that recording could properly be regarded as part of Judge Walker's personal judicial papers (and it cannot), "Judges whose papers contain notes or documents from sealed cases

ought to consult their local court rules, and the access restrictions on the chambers files should parallel those imposed on the case files." Federal Judicial Center, *A Guide to the Preservation of Federal Judges' Papers* 15 (2d ed. 2009). Here, of course, the case file of the trial recording is sealed pursuant to Judge Walker's own order. *See* ER 61. Given Judge Walker's previous disregard of that order, the local rules, official judicial policies, the United States Supreme Court, and his own unequivocal representations in open court, if the chambers copy of the trial recording is returned to him, Judge Walker should be directed to maintain the recording in strict compliance with the same protective order that applies to the parties to this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order unsealing the trial recording and directing the clerk to place the recording in the publicly accessible record of this case. This Court should also direct the district court not to return the chambers copy of the trial recording to former Judge Walker or, at a minimum, direct that court to issue an order making clear that Judge Walker may not publicly broadcast or disseminate the trial recording, but must strictly comply with the same protective order governing the parties' retention of the recording.

Dated: November 14, 2011

Respectfully Submitted,

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STATEMENT OF RELATED CASES

This Court has already ruled on one appeal and three mandamus petitions arising out of the same trial court proceeding. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947 (9th Cir. 2009) (No. 09-16959); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (Nos. 09-17241 & 09-17551); Order, *Hollingsworth v. United States Dist. Ct. for the N. Dist. of Cal.*, No. 10-70063 (9th Cir. Jan 8, 2010), *vacated by* No. 09-1238 (U.S. Oct. 4, 2010); *Perry v. Schwarzenegger*, 602 F.3d 976 (9th Cir. 2010) (No. 10-15649). In addition, three appeals arising out of the same trial court proceeding are currently pending before this Court. *See* No. 10-16696; No. 10-16751; No. 11-16577.

Dated: November 14, 2011

s/ Charles J. Cooper
Charles J. Cooper

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Signature s/ Charles J. Cooper

Attorney for Defendant-Intervenors-Appellants

Date Nov 14, 2011

ADDENDUM

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ADDENDUM

Local Rule 77-3 of the United States District Court for the Northern District of California provides in relevant part as follows:

> Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States, 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, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge.

N.D. Cal. L.R. 77-3.

The Judicial Council of the Ninth Circuit's Policy Regarding the Use of Cameras in the Courtroom provides as follows:

> The taking of Photographs and radio and television coverage of court proceedings in the United States district courts is prohibited.

ER 346. This policy "is binding on all courts within the Ninth Circuit." *Id.*[*]

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[*] This Court issued a press release in December 2009 reporting that this Court's Judicial Council had approved an amendment this policy to allow public broadcasting of trial proceedings pursuant to a newly announced pilot program. *See* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf. This purported amendment "was not adopted after notice and comment procedures," which is required by statute. *Hollingsworth v. Perry*, 130 S. Ct. 705, 712 (2010) (citing 28 U.S.C. § 332(d)(1)). Accordingly, it is invalid.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 14, 2011. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that I have mailed the foregoing document by First Class Mail, postage prepaid, to the following:

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