IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor-Appellee,

MEDIA COALITION,

Intervenor-Appellee,

vs.

EDMUND G. BROWN JR., et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

No. 11-17255

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

PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S REPLY BRIEF

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

The Honorable Chief District Judge James Ware

DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #104930
Chief Deputy City Attorney
CHRISTINE VAN AKEN, State Bar #241755
MOLLIE M. LEE, State Bar #251404
Deputy City Attorneys
City Hall, Room 234, One Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4708
Attorneys for Plaintiff-Intervenor-Appellee
CITY AND COUNTY OF SAN FRANCISCO

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INTRODUCTION

Proponents offer no persuasive reasons for hiding the video portion of the record from public view. Their evidence of alleged harm is the same set of hearsay documents introduced almost three years ago coupled with the same speculative inferences that the extended period of time without incident has now wholly refuted. And their primary legal argument turns on a strained reading of Local Rule 77-3 that was carefully considered and soundly rejected by the district court.

Meanwhile, the recent decision of the California Supreme Court amplifies the public interest in viewing the proceedings. According to that decision, Proponents have litigated this case as authorized representatives of the People of California. The People are entitled to know the arguments made on their behalf, and unsealing the video recordings is the best way of giving the public meaningful access to the trial proceedings that are now the subject of appeal to this Court.

ARGUMENT

Both the common law and the First Amendment establish a presumption of access to court proceedings, including to video recordings placed in the record. *See* San Francisco's Principal Brief ("CCSF Br."), Doc. 29-1 at 11, 17-19; Plaintiffs' Principal Brief, Doc. 30 at 11-17, 23-25; Media Coalition's Principal Brief, Doc. 28-1 at 13-15, 34-37. Proponents identify no compelling reasons for sealing these records, instead relying on stale evidence that does not relate to their stated concerns about witness testimony. Not only is this evidence irrelevant and out-of-date, but a district court recently held that it fails to support Proponents' broader allegations of widespread harassment during the Proposition 8 campaign. *See ProtectMarriage.com v. Bowen*, No. 09-00058, Doc. 295 (E.D. Cal. Nov. 4, 2011).

Proponents fail to mention the *Bowen* decision, with which they are of course familiar since ProtectMarriage.com is the plaintiff in that case. Nor do they explain why the entire video record should be sealed, when their stated concerns relate only to two witnesses who testified a year and a half after the campaign and almost two years ago now without incidence of any reprisals. Proponents' silence on this point is deafening. Proponents' principal brief is also notably silent on the First Amendment: it neither argues against finding a First Amendment right of access to court proceedings nor suggests that Proponents can meet the constitutional standard for imposing a permanent seal on the records.

Instead, Proponents focus on Local Rule 77-3, Judicial Conference policy, and the Supreme Court's discussion of these matters in *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010). As discussed below, none of these authorities speak to the issue of video recordings placed in the record, and they do not supersede the public right of access to the record. Proponents are not able to identify any statute, policy, or case that directly considers the disposition of recordings placed in the record, and the public interest weighs heavily in favor of unsealing the recordings.

I. PROPONENTS HAVE MADE NO EVIDENTIARY SHOWING IN SUPPORT OF SEALING THE VIDEO RECORD OF THE TRIAL.

Despite the passage of almost two years since the highly publicized trial in this case, Proponents submit no evidence that any witness has suffered any adverse consequence as a result of his testimony. Nor do they submit any evidence supporting their claims that witnesses were concerned about security or testified in reliance on a belief that the video recordings would never see the light of day. *See* Brief of Defendant-Intervenors-Appellants ("Proponents' Br."), Doc. 31 at 39. Instead, Proponents continue to rely on documents about the Prop 8 campaign first

submitted in September 2009. These include briefs from an unrelated case, ER 717-41; self-serving declarations by leaders of the Prop 8 campaign, ER 742-46, 747-60, 1016-18; and hearsay media reports about events that purportedly occurred three years ago during the campaign, ER 761-1014.

Proponents also cite a handful of exhibits added to the record in January 2010, but they mischaracterize the trial proceedings in arguing from these exhibits that the "record of harassment of supporters of the traditional definition of marriage has only grown stronger since the Supreme Court stayed the original broadcast order." Proponents' Br. at 40. The additional exhibits are media stories that were added to the record after the Supreme Court stay, but the stories themselves are of the same type and vintage considered by the court in its stay order. *See Hollingsworth*, 130 S. Ct. at 713 (citing "71 news articles detailing incidents of harassment related to people who supported Proposition 8").

Furthermore, the media stories were not admitted in this case for the purpose of showing harassment of Prop 8 supporters, and they would not constitute admissible evidence for that purpose. As described in San Francisco's Principal Brief, Proponents introduced stories of alleged harassment during the cross-examination of Professor Segura in an attempt to show that some voters supported Prop 8 as a response to reports of harassment of Prop 8 supporters. CCSF Br. at 8-9. The trial court admitted these exhibits over Plaintiffs' objections, but it made clear that the exhibits were admitted for the limited purpose of eliciting testimony about the political impact of the reports. *See* SER 3 (The Court: "Well, we're not here adjudicating what happened in San Diego at this particular time. The witness's testimony is about the impact, politically, of reports of this kind. And so for that purpose, I think the video is admissible.").

In short, Proponents have added nothing to the stale evidence of purported harassment discussed in prior briefing. *See* CCSF Br. at 11-16. They failed to supplement this evidence when invited to do so by the district court. *See* ER 1068:11-16. And in the only new development since Proponents first raised this issue, another district court evaluated Proponents' evidence of harassment of Prop 8 supporters and found that it failed to support their claims of widespread harassment or reprisals that would justify exempting Prop 8 supporters from California's campaign disclosure law. *See ProtectMarriage.com v. Bowen*, No. 09-00058, Doc. 295 (E.D. Cal. Nov. 4, 2011). Proponents cannot reconcile that decision with their allegations in this matter, and indeed, they fail to even mention the *Bowen* decision.

Even if Proponents' evidence established real harassment or reprisals during the 2008 campaign—which it does not—it would provide no support for the assertion that release of the videos now would lead to reprisals against the witnesses who testified. The identities of those witnesses and the substance of their testimony has been known for almost two years, and Proponents have not offered any evidence of reprisals during that period. The two years without incident refutes Proponents' conjectural hypothesis that release of the video would pose any threat to their witnesses.

II. NEITHER LOCAL RULE 77-3, JUDICIAL CONFERENCE POLICY, NOR *HOLLINGSWORTH V. PERRY* REQUIRES SEALING THE RECORD.

Contrary to Proponents' repeated assertion, Local Rule 77-3 is not a permanent bar to broadcast of trial proceedings. By its plain language, the rule restricts three activities in the courtroom: "the taking of photographs, public broadcasting or televising, or recording for those purposes." Proponents do not

argue that release of the video portion of the record would implicate the prohibition against taking photographs. Instead, they focus on the broadcast prohibition and the recording restriction, reading these provisions to prohibit any public access to the video record that might result in its eventual broadcast. Neither provision supports this argument.

The broadcast prohibition bars transmission of judicial proceedings from inside the courthouse to an audience outside the courthouse, but it does not restrict the media's activities beyond the confines of the courthouse. For instance, it does not prohibit radio or television stations from running stories about judicial proceedings or purport to limit the content of those stories. Indeed, a broader restriction that forbade the media from reporting on or using publically available materials in their coverage of judicial proceedings would clearly run afoul of the First Amendment. *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) ("[T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."). Yet Proponents' argument that Local Rule 77-3 is a permanent bar to broadcast of trial proceedings comes dangerously close to advocating in favor of such a broad restriction on the press.

Similarly, the recording restriction governs conduct within the courtroom but does not limit later media coverage. Thus, the rule prohibits recording in the courtroom *for the purpose* of broadcasting or televising, but it does not impose a condition that recordings made for a permissible purpose may never be used in a public broadcast. As the district held, "Local Rule 77-3 speaks only to the *creation* of digital recordings," not to their disposition. ER 10. Uncontroverted record evidence establishes that the trial was not broadcast and that the videos were

created for the permissible purpose of "use in chambers." ER 3. Thus, the conduct of the trial— including the creation of the videos—complied with both the broadcast restriction and with the recording restriction. The local rule provides no further direction regarding the video recordings.

Nor are Proponents persuasive in their argument, Proponents' Br. at 24, that unsealing the video portion of the record would violate a 1996 Judicial Conference policy against "the taking of photographs and radio and television coverage of court proceedings in the United States district courts." ER 340. This is so for two reasons. First, by its plain terms, the policy does not apply. It addresses *radio and television coverage in the courtroom*, not recording by and for the benefit of the court. Second, the primary concerns underlying the 1996 Judicial Conference policy, which was adopted verbatim by the Ninth Circuit Judicial Council, are not implicated here. The policy was adopted after a failed pilot program to permit *media* recording, broadcasting, and photography in the courtroom.[1] And it responds to concerns about "media frenzies" that have attached to certain trials involving public figures. Thus, in 2000, Judge Edward Becker testified before the Senate that the Judicial Conference's concerns about camera coverage in the courtroom "are far from hypothetical." ER 515. He explained:

> Since the infancy of motion pictures, cameras have had the potential to create a spectacle around court proceedings. Obvious examples include the media frenzies that surrounded the 1935 Lindbergh baby kidnapping trial, the murder trial in

[1] The 1996 Judicial Conference policy reflects a 1994 Judicial Conference decision. *See* ER 340. The 1994 decision was based, in part, on a Federal Judicial Center evaluation of a pilot program permitting the media to use cameras and recording devices in selected courtrooms. *See* ER 344 (noting Judicial Conference review of the pilot program); Mary Treadway Johnson and Carol Krafka, Federal Judicial Center, *Electronic Media Coverage of Federal Civil Proceedings, An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals* 1 and n.1 (1994) (describing pilot program), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf.

> 1954 of Dr. Sam Sheppard, and the more recent Menendez brothers and O.J. Simpson trials.

Id. Judge John Tunheim made the same observation when speaking on behalf of the Judicial Conference in 2007. *See Sunshine in the Courtroom Act of 2007: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 19 (2007) (written testimony of J. John R. Tunheim, U.S. District Court for the District of Minnesota, on behalf of the Judicial Conference of the United States). And Judge Nancy Gertner (D. Mass.), speaking on her own behalf, observed at the 2007 Senate hearing that "the debate has been characterized by the awful cases, by O.J. Simpson, by Lorena Bobbitt," *id*. at 39, adding, "I think that part of it is the O.J. Simpson case completely soured the Federal bench on this issue," *id*. at 126.

The concerns identified by the Judicial Conference lessen significantly when, far from the media circuses described by Judges Becker, Tunheim, and Gertner, a recording is made and controlled by the court itself and is not disseminated to the media while the proceedings are in process. Such a recording, with no media presence beyond the bar and no media cameras in the courtroom, is far less likely to intimidate witnesses or parties.[2] To the extent there are security concerns or privacy concerns, the court is well-positioned to manage those concerns. And when the court controls the recording, there is simply no possibility of an O.J. Simpson-style media circus.

Nor does the Supreme Court's discussion in *Hollingsworth* address recording for judicial use or later dissemination of such a recording. The issue presented to

[2] While some witnesses might prefer to avoid even the possibility of later airing of their testimony on television, that preference is not the type of concern addressed by the Judicial Conference policy. There is no indication that the Judicial Conference policy is designed to minimize media coverage generally; instead its concern is with the presence of media cameras in the courtroom itself and the potential for immediate coverage to affect the behavior of witnesses and jurors.

the Court was simultaneous broadcast, and the Court's discussion is limited to that question. Nowhere does the Court's opinion consider or address the proper disposition of video recordings. Furthermore, intervening events and the significant passage of time since the trial alleviate the Court's two stated concerns about broadcasting this particular trial. First, the Court relied on Proponents' assertions that their witnesses would not testify if the trial were broadcast. *Hollingsworth*, 130 S. Ct. at 713. Proponents never substantiated that assertion, and it has no purchase now, almost two years after the close of evidence. Second, the Court observed that even if the local rules had been properly amended, this "high-profile" case would not be a good selection for a pilot program. Yet the Judicial Conference's September 2010 cameras pilot program recognizes that high-profile proceedings might be candidates for broadcast in certain circumstances. *See* 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 (directing judges to "consider recording different types of proceedings," including "proceedings with varying levels of expressed public interest"). Such a policy makes eminent sense: high profile cases are those that the public is most likely to follow through televised recordings as well as through other channels. Indeed, as this case has shown, extensive media coverage of a high-profile trial—including tweeting and reporting in real time, as well as YouTube reenactments during the trial—means that witness testimony is already in the public domain. Adding video broadcast to this mix makes the testimony more accessible, with the result that a larger segment of the public may gain a better understanding of the trial

proceedings. And release of these recordings does not make public any substantive information that is not already the subject of extensive coverage and discussion.

III. THE PEOPLE OF CALIFORNIA HAVE A RIGHT TO SEE THE ARGUMENTS BEING MADE ON THEIR BEHALF.

Finally, Proponents' request to shield the video record of the trial from public view must be considered in light of the California Supreme Court's recent decision that Proponents are authorized to defend Prop 8 on behalf of the State. *Perry v. Brown*, No. S189476, slip op. at 5 (Cal. Nov. 17, 2011). As they "assert legal arguments in defense of the state's interest," *id*. at 53, Proponents must respect State policy "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state." Cal. Gov't Code § 6250. Proponents may be authorized to conduct "the people's business" in defending Prop 8, but they are not authorized to conduct this business behind closed doors. To the contrary, three related interests in open government support the public interest in viewing these trial proceedings.

First, the right of public access to trial proceedings reflects the principle that "it is difficult for [people] to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Access furthers the "public interest in understanding the judicial process." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). This public interest is particularly strong in "proceeding[s] involving the State's allegations of *harm to the public*." *California ex rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111, 1124 (C.D. Cal. 2005) (emphasis in original). The determination that Proponents are defending Prop 8 on behalf of the State makes this such a case. Proponents spoke for the State when they argued that the public would be harmed by invalidating Prop 8, and the public

has a right to and an interest in viewing the presentation of this argument and the evidence (or lack of evidence) supporting it, as well as Plaintiffs' opposing presentation that invalidating Prop 8 would harm no one and would significantly benefit many Californians.

Second, there is a strong public interest in providing the electorate with information about ballot measures. "Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). While this interest in an informed electorate is generally discussed in the context of campaign finance disclosure requirements, it extends beyond the confines of a specific election:

> No legislation is carved in stone, incapable of repeal, nor do ballot initiatives, once passed, become a legacy that future generations must endure in silence. . . . Thus, the Court simply cannot say that the occurrence of an election moots the electorate's need for relevant information. Here, the battle over Proposition 8 continues to be waged, both in the state courts and state legislature. The Government's informational interest cannot be met without requiring the disclosure of all pertinent contribution information such that "uninhibited, robust, and wide-open" speech can continue to be had.

ProtectMarriage.com v. Bowen, Doc. 295 at 67.

Third, a broad public interest in open government supports transparency in almost every type of government action in California. "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." Cal. Gov't Code § 11120. This requirement of transparency is expressed in numerous public records and public meeting laws. *See, e.g.*, California Public

Records Act, *id*. §§ 6250-70 (providing for public access to files maintained by state agencies); Legislative Open Records Act, *id*. §§ 9070-80 (providing for public access to legislative documents); Bagley-Keene Open Meeting Act, *id*. §§ 11120-32 (providing for public access to state government meetings); Ralph M. Brown Act, *id*. §§ 54950-63 (providing for public access to local government meetings). Significantly, these laws establish a right of *meaningful* access. *See, e.g.*, *id.* § 6253.1 (imposing a duty to assist members of the public to make it easier for them to access public records). They also require that any recordings of public meetings made by a government agency be provided to the public upon request. *See id.* § 54953.5(b) (recording of an open meeting made by the agency is a public record). Although state court proceedings are not subject to these public meeting laws, those proceedings may be and frequently are recorded or broadcast with the permission of the Court, especially in high profile cases. *See* California Rules of Court, Rule 1.150. Indeed, all of the three California Supreme Court arguments and the Court of Appeal argument relating to marriage equality were recorded and made accessible to the public. *See* Broadcasts, California Courts, http://www.courts.ca.gov/2961.htm (last visited November 28, 2011); News Release, Judicial Council of Cal., Admin. Office of the Courts, Court of Appeal Approves Live Broadcast of Same-Sex Marriage Cases (Jul. 6, 2006), *available at* http://courts.ca.gov/documents/NR54-06.PDF.

In short, the public interest in viewing trial proceedings is at its zenith in cases where unelected and otherwise unaccountable private parties are defending a ballot measure adopted by the citizens of the state. Proponents' defense of Prop 8 is undertaken in the name of the People of California, and the People are entitled to view the arguments being made in their name.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court order unsealing the digital recordings of the trial.

Dated: November 28, 2011

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART,
Chief Deputy City Attorney
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys

By: / s/ Therese M. Stewart
THERESE M. STEWART
Chief Deputy City Attorney
Attorneys for Plaintiff-Intervenor-Appellee
CITY AND COUNTY OF SAN FRANCISCO

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 3,438 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 28, 2011.

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART,
Chief Deputy City Attorney
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys

By: / s/ Therese M. Stewart
THERESE M. STEWART
Chief Deputy City Attorney
Attorneys for Plaintiff-Intervenor-Appellee
CITY AND COUNTY OF SAN FRANCISCO