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)

REPLY BRIEF OF DEFENDANT-INTERVENORS-APPELLANTS

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

The order unsealing the trial recording to permit its public broadcast is directly contrary to the commitment made in open court by Chief Judge Walker, who ordered, over Proponents' objection, that the trial be recorded. Judge Walker's commitment that the recording would not be publicly broadcast was necessary to comply with binding local rule, longstanding judicial policy, and the Supreme Court's decision enforcing these authorities in this very case. Unsealing the record to permit public broadcast would violate the same authorities. *See* Prop. Br. 20-29. Plaintiffs and their allies' attempts to evade the clear import of these authorities all lack merit.

1. Plaintiffs simply repeat, without analysis or supporting authority, the district court's conclusory, unsupported assertions that that N.D. Cal. Civ. L.R. 77-3 "speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes and uses," and "neither informs nor limits what may be entered into the judicial record." Pls. Br. 30-31. As Plaintiffs conceded below, however, the Rule's "plain language goes to broadcasting and televising *or* recording for the purpose of broadcasting," ER 1074 (emphasis added), and nothing in the Rule places any temporal limitation on its distinct prohibition on "public broadcasting or televising" of trial proceedings outside "the confines of the courthouse," Rule 77-

3.[1] Accordingly, regardless of whether Chief Judge Walker's *recording* of the trial was lawful, *see* Pls. 30, his placement of the recording in the record would have violated the Rule but for his order sealing the recording to prevent its public dissemination. *See* Prop. Br. 23-24. And unsealing that recording to permit its public broadcast plainly contravenes Rule 77-3. *Id*.

The Media Coalition does not dispute that unsealing the trial recording will directly and intentionally lead to its public broadcast, *see* Prop. Br. 20—indeed it intervened in this appeal because its members desire to broadcast the recording. It nevertheless argues that regardless of "the practical effect" of unsealing the trial recording, that action does not violate Rule 77-3 so long as the court itself does not "authorize their broadcast." MC Br. 30 n.13. Rule 77-3, however, bars *all* public

[1] As we have demonstrated, *see* Prop. Br. 21-28, the district court's crabbed interpretation of Rule 77-3 is contrary not only to the plain language of that Rule but also the unequivocal judicial policies it was adopted to implement and the Supreme Court's authoritative interpretation of the Rule. Accordingly, even if it were entitled to deference, *see* MC Br. 10, 29, the district court's interpretation of Rule 77-3 still could not stand. *See In re Sony BMG Music Entm't*, 564 F.3d 1, 7-8 (1st Cir. 2009). In all events, the cases cited by the Media Coalition do not establish that deference is appropriate here. *United States v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996)—which, contrary to the Media Coalition, *see* MC Br. 10 n.2, was itself a sanctions case—contrasted cases applying differing standards of review to district court interpretations of their local rules and expressly declined to decide "the appropriate standard of review" in this context. 84 F.3d at 1114. And although *Simmons v. Navajo County*, 609 F.3d 1011 (9th Cir. 2010), stated in dictum that "[d]istrict courts have broad discretion in interpreting and applying their local rules," *id*. at 1017, that dictum addressed a district court's authority to impose sanctions to *enforce* a local rule; the *interpretation* of the rule was not disputed.

broadcasting of trial proceedings outside the courthouse, not just public broadcasting "authorized" by the court. Just as the Rule would not permit a trial judge to allow reporters to bring television cameras into the courtroom so long as the court did not itself televise or "authorize" the televising of the trial, a court may not video record a trial on the explicit assurance that it will not be broadcast outside the courthouse and then unseal the recording to facilitate its public broadcast by others. In all events, by directing that the trial recording be unsealed and placed on its internet-accessible public docket, *see* ER 2, the district court itself directly authorized the recording's public broadcast outside the courthouse in plain violation of Rule 77-3.

2. Plaintiffs likewise merely parrot the district court's claim that the Supreme Court's prior decision in this case "solely address[ed] procedural issues" and "did not express any views on the propriety of broadcasting court proceedings generally." Pls. Br. 8, 28-29 (quotation marks omitted). They simply ignore the Supreme Court's clear holding that Judge Walker's attempt to broadcast the trial proceedings in this case violated "existing rules" and "policies," *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010)—a holding necessary, as we have explained, Prop. Br. 28, to its decision to stay the broadcast. They likewise ignore the Court's conclusion that even "[i]f Local Rule 77-3 had been validly revised" to allow

public broadcast of trial proceedings pursuant to a pilot program, "*This case* is . . . not a good one for a pilot program." *Id*. at 714 (emphasis added).

Plaintiffs also argue that the Supreme Court addressed only the live streaming of court proceedings to other federal courthouses. Pls. Br. 29; *see also* SF Br. 19, MC 33. Because of technical difficulties, however, that was the only form of broadcasting requested by Judge Walker that Chief Judge Kozinski had approved at the time the Supreme Court issued its order. *See Hollingsworth*, 130 S. Ct. at 709. While the Supreme Court properly addressed the specific order before it, its *reasoning* was not limited to live streaming—to the contrary, it made clear that binding local rule "prohibited the streaming of transmissions, *or other broadcasting or televising*, beyond 'the confines of the courthouse.' " *Id*. at 711 (quoting Local Rule 77-3) (emphasis added). The Supreme Court's stay decision cannot plausibly be read to permit the public broadcast of the trial proceedings through means other than "live streaming" or to permit the recording of the trial for subsequent broadcast. *See* Rule 77-3 (prohibiting "public broadcasting or televising, or recording for those purposes").

It is likewise technically true, *see* Pls. Br. 29, that the Supreme Court had no occasion to address the *precise* question presented here—whether trial proceedings may be publicly broadcast outside the courthouse if the district court (1) video records them subject to the express understanding that the recording will not be

used for "purposes of public broadcasting or televising," (2) places the recording in the record under seal while reaffirming that "the potential for public broadcast" has been "eliminated," and (3) concludes that the common law requires that the trial recording be unsealed. But the Supreme Court left no doubt that binding local rule and longstanding judicial policy prohibited the public broadcast of the trial in this case and that this trial was not appropriate for public broadcasting in any event. That the Supreme Court made no attempt to anticipate and address every possible way in which litigants and lower court judges might attempt to circumvent its clear rulings is neither remarkable nor significant.

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

Any common-law right of access that might otherwise apply to the trial recording is displaced by Rule 77-3's clear prohibition on the public broadcast of trial proceedings outside the courthouse. *See* Prop. Br. 29-31. In addition, the trial recording is simply not the type of record to which the common-law right applies. *Id*. 31-33. None of the arguments offered by Plaintiffs or their allies establish otherwise.

1. It is well-settled that the common-law right of access must yield to applicable enactments of positive law, *see* Prop. Br. 29-30, and Plaintiffs do not seriously contend otherwise. The Media Coalition, however, argues that local

rules, unlike statutes and rules of procedure, cannot displace the common-law right of access. *See* MC Br. 31-32.

Local rules are expressly authorized by 28 U.S.C., section 2071, however, and they have "the force of law." *Hollingsworth*, 130 S. Ct. at 710. Further, section 2071 carefully and specifically articulates the metes and bounds of a district court's authority to prescribe local rules. Such rules must "be consistent with Acts of Congress and rules of practice and procedure prescribed under [28 U.S.C.] section 2072." 28 U.S.C. § 2071(a). In addition, such rules may be "modified or abrogated by the judicial council of the relevant circuit," *id*. § 2071(c)(1), and the Supreme Court has interpreted section 2071 to permit *that* Court to abrogate local rules pursuant to "its inherent supervisory power," *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). Contrary to the Media Coalition's naked assertion, however, *see* MC Br. 32 n.15, nothing in section 2071 states or in any way implies that local rules may not conflict with or displace common law, and there is no justification for engrafting such a limitation on Congress's carefully considered regime. Nor do any of the cases cited by the Media Coalition hold or suggest such a restriction.[2] In short, there is no plausible basis for treating properly

[2] In *Frazier*, the Supreme Court exercised its "supervisory power" to abrogate a local rule. 482 U.S. at 645-46. Here, far from abrogating Local Rule 77-3, the Supreme Court has specifically enforced that rule against the district court. *See, e.g.*, *Hollingsworth*, 130 S. Ct. at 713. The Media Coalition also invokes the *dissenting* opinion in *Frazier*, but that opinion suggested that a local

enacted local rules any differently from statutes or other enactments of positive law authorized by statute, such as regulations or procedural rules, any of which can plainly displace contrary common law. *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 310, 319-20 (1981) (regulation); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998) (rule). And because Rule 77-3 bars broadcasting the trial recording outside the courthouse, it also bars unsealing the trial recording to permit public broadcasting. It therefore plainly displaces any common-law right of access that might otherwise apply.

2. Plaintiffs, *see* Pls. Br. 22, identify cases holding that the common-law right of access applies to *transcripts* of trial court proceedings. *See Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 513 (1984) (voir dire transcript); *cf. United States v. Antar*, 38 F.3d 1348, 1359-60 (3d Cir. 1994) (*First Amendment* right of access "encompasses equally the live proceedings and the transcripts

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rule is valid unless it (a) "conflicts with an Act of Congress," (b) "conflicts with the rules of procedure promulgated by this Court," (c) "is constitutionally infirm," or (d) "is not within the power of the lower federal court to regulate." 482 U.S. at 654. Here there is no claim that Rule 77-3 conflicts with a statute or the rules of procedure prescribed by the Supreme Court. *See Hollingsworth*, 130 S. Ct. at 712 ("No federal law requires that the District Court broadcast some of its cases."); *cf. United States v. Mink*, 476 F.3d 558, 564 (8th Cir. 2007) (invalidating local rule that contravened federal statute). Nor is there any plausible claim that Rule 77-3—which implements longstanding judicial policy and has an analog in the local rules of virtually every federal district court in this Nation—addresses matters outside the scope of the district court's power to regulate. Finally, as demonstrated below, *see infra* Part IV, Rule 77-3 is not constitutionally infirm.

which document those proceedings").[3] And the Media Coalition, *see* MC Br. 13-15, identifies cases holding that the common-law right applies to recordings of primary conduct that occurred outside the courtroom and are introduced as relevant evidence at trial. *See Valley Broad. Co. v. United States Dist. Court*, 798 F.2d 1289, 1291 (9th Cir. 1986) (covert recordings of "conversations occurring during the planning and commission of residential burglaries"); *In re Nat'l Broad. Co.*, 653 F.2d 609, 611 (D.C. Cir. 1981) (covert recordings of "defendants' statements, conduct, and response to the offers" of bribes).

Plaintiffs and their allies fail, however, to identify any authority holding that the common-law right of access applies to a video recording of trial proceedings or any similar unofficial depiction or account of the testimony and arguments made at trial. And the Eighth Circuit has squarely held that, "as a matter of law," even a

[3] The Media Coalition also cites a decision of the California Court of Appeals holding that "rough minutes" of court proceedings prepared by court clerks to assist with their preparation of the "official minutes" were subject to public access under the First Amendment and the California Constitution. *See Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111, 115 (1992). The clerks were required by statute to "keep the minutes and other records of the court," *id*. at 112, and an administrative directive "required retention of the rough minutes for a period of two years, because occasionally upon loss of the official minutes 'the rough minutes are needed to reconstruct the record,' " *id*. at 115. In holding that the rough minutes were subject to public access, the court emphasized that the rough minutes "constitute[d] the only easily accessible source of the daily chronology of court activities," *id*. at 109, and that they were produced "for the use of the court, and very possibly for the benefit of parties and others interested in the litigation," *id*. at 115. While this unusual decision, if sound, might by analogy support access to draft transcripts prepared by the court recorder, it has no bearing on the trial recording here.

videotape of deposition testimony played in court in lieu of live testimony is "not a judicial record to which the common law right of access attaches," because it "is merely an electronic recording of witness testimony." *United States v. McDougal*, 103 F.3d 651, 656-57 (8th Cir. 1996).

Although the Media Coalition attempts to distinguish this decision, *see* MC Br. 14, the Eighth Circuit made clear that its holding turned on the nature of the recording itself, not "on whether or not the videotape itself was admitted into evidence" or otherwise played a role in the judicial process. 103 F.3d at 656. Nor was that court's holding that the videotape was "*not* a judicial record to which the common law right of public access attaches" in any way dependant on whether that court applies "a strong presumption of access" to records that *are* subject to the common law right. MC Br. 15.

Contrary to the Media Coalition's further assertion, this Court's decision in *Valley Broadcasting* neither contradicts *McDougal* nor suggests that the trial recording in this case is subject to the common-law right of access. For as the Eighth Circuit recognized in *McDougal*, recordings of "primary conduct" which themselves constitute evidence—such as the recordings of criminal conversations introduced in *Valley Broadcasting*—are different in kind from mere "recording[s] of witness testimony." 103 F.3d at 657.

3. More fundamentally, Plaintiffs are simply wrong that the common law right of access "applies to all judicial records." Pls. Br. 22. Indeed, far from "recognizing a common law right of access to all judicial and quasi-judicial documents," this Court has never "recognized a common law right of access to judicial records 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).[4]

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

The circumstances surrounding the creation of the trial recording and its placement in the record, as well as the harm that the Supreme Court has recognized would flow from public broadcast of the trial in this case, weigh strongly against unsealing the trial recording. Prop. Br. 34-43. These factors plainly outweigh any marginal countervailing public interest in additional access to the public trial in this case. Prop. Br. 43-44.

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[4] Citing cases holding that the right of access applies to video or audio recordings of relevant primary conduct submitted as evidence at trial, the Media Coalition argues that "absent a tradition of secrecy in the particular document at issue, the Court has not hesitated to apply the presumption of access to all types of documents, even those that did not exist when the common law was developed." MC Br. 14 & n.5. But recordings of relevant primary conduct introduced as evidence at trial are plainly akin to documentary evidence as to which there *is* a history of public access. Not only are recordings of trial proceedings different in kind from documentary evidence, their public broadcast has been widely prohibited for virtually as long as the potential for such recordings has existed. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 596-601 (Harlan, J., concurring).

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

In light of Rule 77-3, longstanding judicial policy against public broadcasting of federal trial proceedings, and the Supreme Court's decision requiring the district court to comply with these authorities, the trial recording could not have been created, let alone placed in the record, but for Judge Walker's solemn assurance that the trial recording would not be used "for purposes of public broadcasting or televising," ER 1139, and his order sealing the recording. Although Plaintiffs argue that these circumstances are irrelevant, *see* Pls. Br. 16, controlling Supreme Court precedent plainly mandates "a sensitive appreciation of the circumstances that led to [the trial recording's] production." *Nixon v. Warner Commc'n, Inc.*, 435 U.S. 589, 603 (1978). Here, any meaningful consideration of these circumstances makes clear that the trial recording may not be unsealed.

1. Plaintiffs fault Proponents for not appealing Judge Walker's decision to record the trial or objecting to his decision to allow Plaintiffs to use excerpts of the trial recording at closing arguments. *See* Pls. Br. 9, 14. But given Judge Walker's solemn assurance that the recording would not be used for purposes of public broadcast, his order that Plaintiffs (and San Francisco) "maintain as strictly confidential" their copies of the trial recording pursuant to a highly restrictive protective order, ER 207, and his denial of the Media Coalition's motion to

publicly broadcast closing arguments, these actions were not unlawful and Proponents had no reason to object to them. *See* Prop. Br. 36-37.

Contrary to Plaintiffs' contentions, *see* Pls. Br. 5, 15, Judge Walker's statement that he wished to use the trial recording in chambers because he believed it "would be quite helpful to [him] in preparing the findings of fact," ER 1139, did not suggest that it was any more likely that the recording would become part of the publicly accessible record in this case than other documents used in this way, such as the Judge's handwritten notes or a bench memo from a law clerk. Nor did Plaintiffs' use of brief excerpts from the recording at closing argument "practically ensure" that the recording would become part of the public record. Pls. Br. 15. The excerpts were not offered or admitted as exhibits, and Plaintiffs surely do not believe that a PowerPoint slide or other visual aid highlighting trial testimony would become part of the public record simply because it was used by counsel at closing argument.

2. Plaintiffs also fault Proponents for not objecting to Judge Walker's decision to place the trial recording in the record subject to seal. *See, e.g.*, Pls. Br. 14. But precisely (and only) because the record was subject to seal, its placement in the record did not violate Rule 77-3, the longstanding judicial policy it implements, or the Supreme Court's prior decision in this case. Accordingly, Proponents once again had no reason to object. Indeed, in the very same order

sealing the recording and placing it in the record, Judge Walker made clear that "the potential for public broadcast" had been "eliminated." ER 93.

To the contrary, it is Plaintiffs and the Media Coalition (which was closely following the case, *see, e.g.*, Supplemental ER 1, 3), who should have objected to Judge Walker's order if they wished to publicly broadcast the recording. Had they objected then that the video recording could not lawfully be placed in the record *under seal*, Proponents of course would have objected to the recording being placed in the record at all, and the propriety of Judge Walker's disposition of the trial recording could have been raised at that time. Instead, Plaintiffs and the Media Coalition waited until months after the appeal of Judge Walker's ruling on the merits had been briefed and argued—indeed until Proponents challenged Judge Walker's improper disclosure of segments of the recording—to challenge the disposition of the recording. Especially in light of their purported urgent desire to broadcast the trial proceedings, this long delay is simply inexplicable.

3. In all events, Judge Walker's entry of the trial recording in the record is, contrary to Plaintiffs' suggestion, hardly "outcome-determinative." Pls. Br. 13. Indeed, authorities relied on by Plaintiffs and their allies confirm that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *United States v. Amodeo*,

44 F.3d 141, 145 (2d Cir. 1995); *accord McConnell v. FEC*, 251 F. Supp. 2d 919, 931-32 (D.D.C. 2003).

Furthermore, if this Court determines that the trial recording was not properly placed in the record subject to seal, it can and should determine that the recording was "unnecessary to consideration of [Plaintiffs' constitutional claims] on the merits, was surplusage, and . . . was improvidently filed" and thus direct that the recording "in its entirety should be removed from the record." *CBS, Inc. v. United States Dist. Court*, 765 F.2d 823, 825-26 (9th Cir. 1985) (Kennedy, J.).[5]

4. Citing Judge Walker's statement that "[t]he trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law," ER 61, the Media Coalition contends that the trial recording *must* be included in the record and made available to the public. *See* MC Br. 17-18. But the precedents from this Court on which the Media Coalition relies hold only that the

[5] Plaintiffs argue that this Court cannot consider this course of action because it was not urged before the district court. *See* Pls. Br. 14. The district court likely lacked jurisdiction, however, to strike the recording from the record of a case pending on appeal before this Court. Further, this Court's decision in *CBS* makes clear that this Court may strike material from the record *on its own initiative*, even if that course of action is not suggested by any party, even on appeal. Indeed, Plaintiffs' own authority confirms that this Court has power to consider an issue raised for the first time on appeal, and may properly do so, *inter alia*, "to preserve the integrity of the judicial process." *Bolker v. Commissioner, IRS*, 760 F.2d 1039, 1042 (9th Cir. 1985). Contrary to the Media Coalition's suggestion, *see* MC Br. 16, this Court plainly has jurisdiction over the record of a case currently pending on appeal before it. *See, e.g., Nixon*, 435 U.S. at 598; *In the Matter of Sealed Affidavit(s)*, 600 F.2d 1256, 1257 (9th Cir. 1979); *cf.* Ninth Cir. R. 27-13.

common-law right of access extends to "dispositive pleadings, including motions for summary judgment and related attachments." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006); *accord Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003); *San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999). These cases neither hold nor suggest that *any* document or record of *any* type that plays *any* role in the disposition of a case must be included in the record and made public.

While the Media Coalition cites broader language from cases decided by other circuits, these cases address records and circumstances very different from those at issue here. *See In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (denying motions to seal "whole appeal—briefs, record, and presumably the oral argument"); *United States v. Amodeo*, 44 F.3d at 146 (sealed exhibit to report filed by "Court Officer . . . fulfilling the duties assigned to her by the Consent Decree in [that] case"). Nor can these decisions plausibly be read to require that any document of any type that plays any role in the disposition of a case be entered in the record and made public, for if they did, the common-law right of access would require public disclosure of judges' handwritten notes, bench memos, internal judicial correspondence, and numerous other types of documents that indisputably inform the disposition of cases but are properly excluded from the public record.

In all events, despite his cursory (and ambiguous) assertion that "[t]he trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law," ER 61, Judge Walker neither quoted nor cited any portion of the recording in his opinion. *Cf. McConnell*, 251 F. Supp. 2d at 923 (unsealing only evidence "cited or quoted by the Three-Judge District Court in its opinions"). Nor was there any need for him to do so, given the existence of the official transcript of the trial proceedings. Indeed, it would have been improper for Judge Walker to have cited the recording rather than the official transcript: as the Judicial Council has explained, even trial recordings made for public broadcast pursuant to its recently adopted pilot program "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.

5. Citing cases holding that a party who produces discovery documents pursuant to a stipulated protective order cannot reasonably expect that those documents will never be disclosed, Plaintiffs argue that Judge Walker's explicit assurances that the trial recording would not be made public were not to be trusted. Pls. Br. 15-16. But in the cases cited by Plaintiffs, the parties were required by law to produce the discovery documents and would have been compelled to do so even

absent a protective order. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 125 (2d Cir. 2006). Here, by contrast, the trial recording could not have been legally created absent Judge Walker's assurances nor could it lawfully be placed in the record but for his sealing order. Nor is this a case where documents have been designated by the parties for protection without individualized judicial scrutiny pursuant to a blanket protective order agreed upon by the parties. *See, e.g.*, *Foltz*, 331 F.3d at 1133; *McConnell*, 251 F. Supp. 2d at 926-27. To the contrary, here Judge Walker himself *sua sponte* determined that the recording should be sealed and subject to a protective order. Finally, although the trial recording is subject to a protective order in this case, its public broadcast is also prohibited by (1) Rule 77-3, (2) longstanding judicial policy, (3) the Supreme Court's decision enforcing these authorities in this very case, (4) Judge Walker's unequivocal assurances that the recording would not be used for purposes of public broadcasting (which was necessary to comply with these authorities), and (5) Judge Walker's order sealing the recording (which was likewise required by law). Thus, even if the protective order in this case contemplates judicial modification, *see* MC Br. 33, the other grounds prohibiting public disclosure do not.

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

Not only would unsealing the trial recording cause grave injury to the credibility and integrity of the federal judiciary, *see* Prop. Br. 34-37, it 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* Prop. Br. 38-43. Indeed, the Supreme Court has already rejected Plaintiffs' argument that "Proponents' concerns about the possibility of compromised safety, witness intimidation, or harassment of trial participants are utterly unsubstantiated and groundless speculation," Response of Kristin M. Perry, et al. to Application for Immediate Stay at 14, *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) (No. 09A648) (filed Jan. 10, 2010) ("Perry Resp."); *see also id*. at 17, holding instead that Proponents and their witnesses "have substantiated their concerns by citing incidents of past harassment," *Hollingsworth*, 130 S. Ct. at 713. Neither Plaintiffs nor their allies present any substantial basis for revisiting or second guessing that Court's conclusion.[6]

1. Contrary to the Media Coalition's contentions, *see, e.g.*, MC Br. 25, the harms recognized by the Supreme Court were not limited to witnesses altering their testimony or other uniquely probable effects of *contemporaneous* broadcast. Rather, that Court credited the concern that Proponents' witnesses would face

[6] Plaintiffs argue that Judge Walker refused to credit our explanation that several of our witnesses refused to testify with any sort of recording. *See, e.g.*, Pls. Br. 17. But Judge Walker dismissed Proponents' explanation based on his conclusion that "the potential for public broadcast in the case had been eliminated." ER 93. And, contrary to the Media Coalition's assertion, this Court's order transferring this motion to the district court said nothing about a need for additional "fact finding." *E.g.*, MC Br. 29.

harassment if their testimony were broadcast outside the courthouse, *see Hollingsworth*, 130 S. Ct. at 713—a concern that is plainly not limited to contemporaneous broadcast—and expressly recognized that "witnesses subject to harassment as a result of broadcast of their testimony might be less likely to cooperate in any future proceedings," *id*.

2. Plaintiffs attempt to discount the concerns of harassment voiced by Proponents' witnesses and credited by the Supreme Court on the ground that "the transcripts of every word they said on the stand have been available on the Internet since they testified." Pls. Br. 18. But our position, in the words of the Supreme Court, is that our witnesses will be "subject to harassment *as a result of the broadcast* of their testimony." *Hollingsworth*, 130 S. Ct. at 713 (emphasis added). The trial in this case has not been broadcast, and the purpose of Proponents' appeal is to prevent that harm that will surely result *if the trial is broadcast*. Any harassment or other harm already suffered by our witnesses or other participants in this litigation is obviously not something that we, or this Court, can prevent.

Further, there are qualitative differences between the mere disclosure of one's name and a written transcript of one's testimony, and having selective (and almost certainly unfavorable) portions of a video recording of one's testimony prominently played on television and plastered on the Internet and YouTube, as would no doubt occur if the trial recording is unsealed in this case. Indeed, Rule

77-3 and the longstanding judicial policies it implements—as well as similar policies, such as the Supreme Court's prohibition on televised proceedings, *see* Prop. Br. 41—are premised on just this distinction.

Similarly, neither the fact that Proponents' witnesses were paid experts nor the fact that they have discussed issues relating to redefining marriage in other fora, *see* Pls. Br. 19,[7] provides any basis for discounting the harms that will flow from public broadcast of the trial proceedings. As the Supreme Court explained in rejecting the same argument when made by Plaintiffs in opposition to our stay request, *see* Perry Resp. at 14-15, concerns of harassment "are not diminished by the fact that some of [Proponents'] witnesses are compensated expert witnesses. There are qualitative differences between making public appearances regarding an issue and having one's testimony broadcast throughout the country." *Hollingsworth*, 130 S. Ct. at 713.

3. Nor does the district court's unreviewed decision in *ProtectMarriage.com v. Bowen*, No. 09-00058, 2011 WL 5507204 (E.D. Cal. Nov. 4, 2011) provide any basis for revisiting the Supreme Court's conclusion that public broadcast of the trial in this case would threaten Proponents' witnesses with a well-substantiated risk of harassment. As an initial matter, the district court's

[7] Professor Miller has rarely discussed this topic publicly and, apart from Judge Walker's illegal broadcasts of brief excerpts of his testimony in this case, has never done so via television or other video broadcast.

recent opinion largely reiterates the conclusions it reached in January, 2009, almost a year *before* the Supreme Court's decision in this case. *See e.g.*, *id*. at *7, *9, *15. Second, the question in *Bowen*—whether the plaintiffs there met the requirements for exemption from disclosure of campaign contributions under *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny, *see Bowen*, 2011 WL 5507204, at *9-*12—is very different from the issue presented here. Indeed, in ruling against the plaintiffs in *Bowen*, the district court held that the *Buckley* exemption was limited to "minor" parties promoting "reviled cause[s] or candidates," *see id*. at *14-*15, and placed great emphasis on the lack of "governmental backlash" against supporters of traditional marriage akin to the "systematic governmental discrimination, persecution, and abuse" suffered by groups previously held to be entitled to the *Buckley* exemption, *id*. at *18. Obviously none of these legal restrictions on the scope of the *Buckley* exemption have any relevance here. Further, even if the district court were correct that minor contributors to a campaign face little risk of harassment and harm from the continued disclosure of their names and contributions three years after an election takes place, it hardly follows that prominent participants in ongoing, controversial, and extremely high-profile litigation face no risk of harassment and harm from the public broadcast of video recordings of their testimony throughout the Country. In all events, an unreviewed

district court decision in a separate case presenting different issues cannot possibly countermand the Supreme Court's previous decision in this case.

4. More generally, Plaintiffs' claim that Proponents "have never offered any evidentiary support whatsoever to support their alleged concern about witness intimidation," Pls. Br. 18, has not only already been rejected by the Supreme Court, as discussed above, it is also false. Indeed, the record in this case contains sworn declarations documenting death threats; other threatening emails, phone calls, and statements; physical assaults; and vandalism directed against supporters of traditional marriage. *See* ER 745, 750-51, 1017-18. These declarations are corroborated by numerous similar reports of death threats, *see, e.g.*, ER 1408-09, 1418, 781, 783, 786-87, 811, 859, 899, other serious threats, *see, e.g.*, ER 1408, 1418, 790, 807, 811, 838, 940, 943, physical assaults, *see, e.g.*, ER 1405, 1408-09, 1414, 789, 790, 796, 810, 811, 844, 847, 879, and vandalism, *see, e.g.*, ER 1402-03, 1415, 783, 796, 810, 811, 858-59, 861, 865, 867-68, 870, 872, 874, 889, 891, 902, 943, 945, 997, 1006. Contrary to the suggestion of Plaintiffs and their allies, these unlawful acts of harassment and intimidation simply cannot be dismissed as "verbal criticism," Pls. Br. 26, "public rebukes," *id.*, the "hurly-burly of a hard-fought political campaign," SF Br. 2, the "expression of opinion," *id.* 13, or "protected First Amendment activity," *id.* 14.

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

As Plaintiffs and their allies concede, the trial in this case was open to the public and widely reported, and the official transcript is part of the public record and widely available on the internet. *See* Pls. Br. 20-21; SF Br. 3-4; MC Br. 3, 24. The parties' arguments and evidence, as well as all of the district court orders and opinions, are likewise available to all. Thus, contrary to Plaintiffs' hyperbole, *see* Pls. Br. 12, 25, this is simply not a case where any "element of the judicial process" has been "withdraw[n] . . . from public view," *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006), nor is it a case where the public is unable to "ascertain[n] what evidence and records the District Court . . . relied upon in reaching [its] decisions," *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1181 (6th Cir. 1983). Accordingly, the public interest in access to the trial recording is marginal—at most. Prop. Br. 43-44. Certainly it cannot justify unsealing that recording in the teeth of the circumstances surrounding its creation or the well-substantiated risk of harm that would flow from public broadcast of the trial.

To be sure, Plaintiffs wax eloquent about the public's supposed interest in "view[ing] the actual trial proceedings with their own eyes" rather than being forced "to read a cold written record," Pls. Br. 21-22, and San Francisco denounces Proponents for seeking to "deny the right to observe the trial to all except those

who were in San Francisco in January 2010." SF Br. 26. The Media Coalition adds its view that "[t]he millions of people following this social issue of the day" are entitled to see the trial proceedings. MC Br. 27. But these are simply policy arguments that can be (and often are) raised in support of publicly broadcasting *any* high-profile trial. And they are arguments that have failed to persuade the federal judiciary which, to date, has taken the position that the "negative effects of cameras in trial court proceedings far outweigh any potential benefit." ER 336. More relevant still, the same arguments failed to persuade the Supreme Court *in this very case*, when raised by Plaintiffs in opposing Proponents' application to stay the broadcast of the trial in the first place. *See* Perry Resp. at 18-19.

Nor does the fact that Proponents have moved to vacate Judge Walker's ruling increase the need for public access to the trial recording. Proponents' argument that Judge Walker was disqualified from hearing the case is premised on his undisclosed, long-term, same-sex relationship—which was *never* discussed during the trial—and is not in any way based on his courtroom conduct or demeanor. *See* Dkt. Entry No. 9, *Perry v. Brown*, No. 11-16577.

IV. THE FIRST AMENDMENT RIGHT OF ACCESS HAS NO APPLICATION HERE.

Plaintiffs' alternative argument, that the First Amendment requires public access to the trial recording, is foreclosed by binding precedent. Indeed, even with respect to audio or video recordings offered as evidence of illegal conduct during

criminal trials, both the Supreme Court and this Court have squarely held that the First Amendment is satisfied so long as the trial is open to the press and public and transcripts of the recordings as played at trial are publicly available. *Nixon*, 435 U.S. at 608-09; *Valley Broadcasting*, 798 F.2d at 1292-93. Other Circuits that have addressed this question agree. *See In re Providence Journal Co*., 293 F.3d 1, 16 (1st Cir. 2002); *Fisher v. King*, 232 F.3d 391, 396-97 (4th Cir. 2000); *United States v. Beckham*, 789 F.2d 401, 408-09 (6th Cir. 1986); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 426-28 (5th Cir. 1981). The same is true of recorded witness testimony offered at criminal trials, *see McDougal*, 103 F.3d at 659, and of live criminal proceedings generally, *see Antar*, 38 F.3d at 1359-60 (First Amendment requires access to "the live proceedings" and "the transcripts which document those proceedings").[8]

More generally, it would follow from Plaintiffs' argument that the First Amendment requires the public broadcast of trial proceedings and that the longstanding prohibition of such broadcasts is unconstitutional. But the Supreme

[8] The Media Coalition argues that *Nixon* addressed only "the First Amendment guarantee of a free press" and not its "guarantee of free speech." MC Br. 35 n.17. But in holding *both* that the press had no greater right of access to court records than the general public *and* that the press had no First Amendment right of access to the recording at issue there, *Nixon* necessarily held that the general public likewise had no First Amendment right of access to the recording. Not surprisingly, the Media Coalition's strained reading of *Nixon* finds no support in the precedents of this Court and other Circuits following *Nixon*, which uniformly reject *any* sort of First Amendment right of access even to recordings introduced as evidence at trial.

Court has already rejected this argument by necessary implication in this very case when raised by the Plaintiffs in opposition to Proponents' successful application for a stay of Judge Walker's initial broadcast order. *See* Perry Resp. at 18-19. Other decisions by the Supreme Court and the federal courts of appeals have uniformly and repeatedly rejected the same argument. *See, e.g.*, *Estes v. Texas*, 381 U.S. at 539 (rejecting claim "that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom"); *id.* at 584-85 (Warren, C.J., concurring) ("Nor does the exclusion of television cameras from the courtroom in anyway impinge upon the freedoms of speech and press."); *id*. at 588 (Harlan, J., concurring) ("No constitutional provision guarantees a right to televise trials."); *In re Sony BMG*, 564 F.3d at 9 ("the venerable right of members of the public to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen"); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988); *United States v. Edwards*, 785 F.2d 1293, 1295 (5th Cir. 1986) ("No case suggests that this right of access includes a right to televise, record, or otherwise broadcast trials."); *United States v. Kerley*, 753 F.2d 617, 621 (7th Cir. 1985) ("there is a general consensus that … the exclusion of cameras from federal courtrooms is constitutional"); *Westmoreland v. Columbia Broad. Sys.*, 752 F.2d 16, 23 (2d Cir. 1984) ("There is a long leap, however, between a public right under the First

Amendment to attend trials and a public right under the First Amendment to see a given trial televised."); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983); *cf. Rice v. Kempker*, 374 F.3d 675, 679 (8th Cir. 2004) ("courts have universally found that restrictions on videotaping and cameras do not implicate the First Amendment guarantee of public access").

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, this Court should reverse the order below.

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Respectfully Submitted,

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