No. 11-17255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

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

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 JW (Honorable James Ware)

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INTRODUCTION

The First Amendment and the common law establish a strong presumption that judicial records are open to the public. The judicial record at issue in this appeal is a recording that accurately and completely depicts testimony and argument given in open court in a case in which Proponents, their lawyers, and their witnesses thrust themselves into a very public debate about "matters of the highest public interest and concern." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). First Amendment values are therefore at their zenith in these circumstances. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("[M]atters of public interest and concern" are "[a]t the heart of the First Amendment.").

Because Proponents can neither dispute that the trial recording is part of the judicial record nor meet the stringent requirements for keeping a judicial record under seal, Proponents instead devote most of their brief to arguing that the common law right of public access does not apply to the trial recording at all. Their contentions range from the immaterial (*e.g.*, the trial recording should in Proponents' view never have been created in the first place) to the incredible (*e.g.*, Northern District of California Civil Local Rule 77-3 supersedes longstanding

federal common law and prohibits unsealing the trial recording). None is persuasive.

In fact, having conceded that the trial video is part of the judicial record, and having failed to object to its inclusion in the record, Proponents cannot escape the applicability of the common law right of public access to judicial records. Thus, to rebut the strong common law presumption of public access, Proponents are required to prove that compelling interests require continued concealment. This they cannot do. The only interest Proponents claim in their effort to keep the entire recording of this trial secret is their purported, speculative fear that "public broadcast of the trial in this case would subject Proponents' witnesses to a . . . risk of harassment." Prop. Br. 18. But Proponents have offered no evidence whatsoever of such harm, either in the district court or in this Court, despite ample opportunities to do so, instead relying on unsupported hypothesis, conjecture, and a few irrelevant anecdotes. As this Court and the Supreme Court have made clear, such unsubstantiated speculation is insufficient to overcome the strong presumptive right of public access to judicial records. Nor can Proponents explain how this supposed fear on the part of their *two* witnesses, even if it had been properly proven, could possibly justify sealing the testimony of Plaintiffs and their experts or the arguments of counsel.

Proponents have failed to meet their burden of proving that the district court's decision to unseal the trial recording was erroneous in any way, let alone an abuse of discretion. This Court should affirm the district court's decision.

ARGUMENT

I. PROPONENTS DO NOT DISPUTE THAT THE FIRST AMENDMENT COMPELS PUBLIC ACCESS TO THE TRIAL RECORDING.

As Plaintiffs argued in their opening brief, the First Amendment compels public access to the trial recording in this case. *See Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (citing *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). The district court acknowledged that "Plaintiffs move[d] to unseal the recording on constitutional . . . grounds" but "declined" to reach that argument after finding the common law sufficed to compel unsealing of the recording. ER 6.

Both parties have argued the First Amendment issue repeatedly in their previous filings and hearings.[1] Yet, in their opening brief, Proponents do not even

[1] Plaintiffs argued the issue in their motion to unseal the trial recording (ER 1292-94), their reply brief in support of their motion (ER 1259-63), and their opposition in this Court to Proponents' emergency motion for a stay of the district court's ruling. The Media Coalition filed several briefs in further support of unsealing the trial recording in accordance with the First Amendment (*e.g.*, ER 293; ER 459-65; ER 466-87). Proponents argued in opposition to Plaintiffs' motion to unseal that the First Amendment did not compel unsealing the trial video (ER 1278-79), and

mention the First Amendment, let alone explain how they can overcome the public's First Amendment right to access the trial recording. For that reason alone, this Court should affirm the district court's decision unsealing the trial video. *See Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1034 n.4 (9th Cir. 2000) ("[W]e may affirm the district court on any ground supported by the record . . . . " (internal quotation marks omitted)).

II. THE COMMON LAW COMPELS PUBLIC ACCESS TO THE TRIAL RECORDING.

In addition to the First Amendment, the common law provides "a strong presumption in favor of access to court records." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). And the trial recording at issue is undisputedly part of the judicial record in this case, as the district court found and Proponents concede. ER 5, 1278. Thus, the common law compels unsealing the trial recording unless Proponents can articulate "compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure." *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (internal quotation marks and citations omitted). Proponents seek to evade the common law rule entirely, but their efforts fail. Moreover, their purported "compelling reason" for keeping the entire recording under seal—

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both parties presented their First Amendment arguments in a hearing before the district court (ER 1019-80).

the supposed harassment their witnesses would suffer—is nothing but "unsupported hypothesis [and] conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (internal quotation marks omitted).

A. Proponents Cannot Circumvent The Common Law Right Of Access To The Trial Recording.

1. Local Rule 77-3 Does Not Prohibit Unsealing The Trial Recording.

In an effort to circumvent their common law burden entirely, Proponents devote much of their opening brief to arguing that Northern District of California Civil Local Rule 77-3 prohibits unsealing the trial recording and supersedes the common law right of public access to trial records. Prop. Br. 20-26, 29-31. The local rule, properly construed, does neither.

Local Rule 77-3 on its face says nothing about unsealing a judicial record. Thus, in an attempt to come within the ambit of a rule that prohibits "public broadcasting," Proponents treat this motion as if it were a "motion to broadcast the trial," rather than a motion to unseal. *See* Prop. Br. 3 ("This case thus presents a simple question: [M]ay a district court . . . publicly broadcast th[e] trial . . . ."). Proponents seek to equate the district court's decision allowing public *access* to the judicial record with a decision to actively *broadcast* the trial proceedings themselves. *See id.* at 20 (arguing that unsealing the record "will itself publicly broadcast the trial proceedings"); *id.* at 27-28 ("[P]lacing the recording on the internet-accessible

public docket would itself broadcast the trial proceedings outside the courthouse."). But merely unsealing a judicial record—removing the confidential designation so the public has an opportunity to view the record should it affirmatively choose to do so—is not tantamount to a "broadcast" of the trial proceedings.

By its own terms, Local Rule 77-3 prohibits certain actions "in connection with any judicial proceeding"—that is, *while the judicial proceeding is taking place*: "[1] the taking of photographs, [2] public broadcasting or televising, or [3] recording for those purposes in the courtroom or its environs." None of these things occurred here. What is plainly allowed under the rule, and what the district court did here, is recording a judicial proceeding for a purpose other than public broadcasting or televising. And try as Proponents might to invent such a provision, there is nothing in the rule that requires a recording made for a purpose other than public broadcasting or televising to be forever kept under seal.

Moreover, even if Local Rule 77-3 somehow purported to prohibit unsealing the trial recording in this case, that rule would not—and could not—supersede the common law right of public access. *See* Prop. Br. 29-31. As the First Circuit has explained, local court rules have extremely limited authority:

> Regardless of the source, local rulemaking authority is bounded. A local rule must be both constitutional and rational, and its subject matter must be within the ambit of the court's regulatory power. In this same vein, a local rule must be consistent with, but not duplicative of,

> Acts of Congress and nationally applicable rules of practice, procedure, and evidence. Even if a local rule does not contravene the text of a national rule, the former cannot survive if it subverts the latter's purpose. Then, too, local rules should cover only interstitial matters. They may not create or affect substantive rights or institute basic procedural innovations.

Stern v. U.S. Dist. Court, 214 F.3d 4, 13 (1st Cir. 2000) (internal quotation marks and citations omitted).

Proponents' inapposite cases, all of which involve federal laws enacted by Congress, or federal rules prescribed by the U.S. Supreme Court pursuant to congressional authority,[2] shed no light on the weight of local court rules. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (explaining that displacement occurs "when *Congress* addresses a question previously governed by . . . federal common law" (emphasis added)). Thus, as the district court held, Proponents have not pointed to "any case holding that a court's local rule on recordings can override the common law right of access to court records." ER 10.

[2] *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (Presidential Recordings Act); *In re Roman Catholic Archbishop*, __ F.3d __, 2011 WL 5304130, at *10-11 (9th Cir. Nov. 7, 2011) (federal bankruptcy law, 11 U.S.C. § 107(a)); *Ctr. for Nat'l Sec. Studies v. U.S. DOJ*, 331 F.3d 918, 937 (D.C. Cir. 2003) (Freedom of Information Act); *United States v. Gonzales*, 150 F.3d 1246, 1263 (10th Cir. 1998) (Criminal Justice Act, 18 U.S.C. § 3006A); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998) (Fed. R. Crim. P. 6(e)). Proponents also point to Fed. R. Civ. P. 5.2(d). *See* Prop. Br. 30.

2. *Hollingsworth* Has No Application To This Motion.

Proponents also seek to evade the common law rule by arguing that the district court's order "directly circumvent[s] the Supreme Court's ruling staying public broadcast of the trial proceedings in this case." Prop. Br. 27. But the Supreme Court's "narrow" decision in *Hollingsworth v. Perry*, 130 S. Ct. 705, 709 (2010) (per curiam), only considered and addressed the procedural validity of an amendment to Local Rule 77-3. *See id.* ("[O]ur review is confined to a narrow legal issue: whether the District Court's amendment of its local rules to broadcast this trial complied with federal law."). It explicitly was not a substantive decision about the propriety of broadcasting this trial. *See id.* ("We do not here express any views on the propriety of broadcasting court proceedings generally. . . . We do not address other aspects of that order, such as those related to the broadcast of court proceedings on the Internet, as this may be premature."). Nor did the decision consider the First Amendment or common law right of access to judicial records. Accordingly, *Hollingsworth* has no application to this motion—which seeks unsealing of the trial recording based on settled common law and First Amendment principles, not based on a local rule. *See* ER 9-10.

3. The Common Law Presumption Of Public Access Applies To The Trial Recording.

Proponents further argue that even though the trial recording is undeniably part of the judicial record, it is not the *type* of record to which the common law rule applies. Prop. Br. 31-33. But the common law right of access applies to *every* part of the record of a public trial, not just the evidence. *See, e.g.*, *Press-Enter. Co.*, 464 U.S. at 513 (transcript of *voir dire* proceedings); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (docket sheets).

Proponents rely on *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989), for the proposition that "there is neither a history of access nor an important public need justifying access" to the trial recording at issue. Prop. Br. 33. In fact, *Times Mirror Co.* says nothing about the history or importance of a recording that is part of a civil trial record because that case involved something very different: *pretrial criminal* proceedings. In the context of "search warrants and supporting affidavits relating to an investigation which is ongoing and before any indictments have been returned," 873 F.2d at 1211, *Times Mirror Co.* held that public access could result in "damage to the criminal investigatory process" and was inappropriate in light of the long history of "maintaining the secrecy of grand jury proceedings." *Id.* at 1215-16; *see also id.* at 1215 ("[I]f the warrant proceeding itself were open to the public, there would be the obvious risk that the

subject of the search warrant would learn of its existence and destroy evidence of criminal activity before the warrant could be executed."). There are no such concerns and no history of "secrecy" with respect to publicly accessible civil trials.

Nor does the Ninth Circuit have a blanket policy against "cameras in trial court proceedings" that somehow removes the trial video from the purview of the common law right of access, as Proponents contend. Prop. Br. 33 (internal quotation marks omitted). In fact, the Ninth Circuit's policy explicitly prohibits only "[t]he taking of photographs and radio and television coverage of [district] court proceedings," neither of which is relevant to this case. ER 346. And, in any event, this case does not involve "the broader question of whether district court trials should be recorded or broadcast" as a public policy matter; it involves only "the narrow question of whether the digital recording in this case, which is [already] in the record, should now be unsealed." ER 12. The Ninth Circuit's only policy with respect to that issue is the federal common law rule favoring public access.

Proponents also rely on an Eighth Circuit opinion that denied public access to a videotape of President Clinton's deposition testimony. Prop. Br. 32-33 (citing *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996)). But the district court in *McDougal* "declined to decide whether the videotape itself was a judicial record to

which the common law right attaches." 103 F.3d at 656. Here, Chief Judge Walker specifically ordered the clerk to place the digital recording in the record, and Proponents neither objected nor moved to strike. Further, the Eighth Circuit has "specifically rejected the strong presumption" favoring a common law right of access to judicial records that most other circuits, including the Ninth Circuit, recognize. *Id.* at 657 (emphasis omitted); *see also United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) ("We decline to adopt *in toto* the reasoning of the Second, Third, Seventh, and District of Columbia Circuits in recognizing a 'strong presumption' in favor of the common law right of access."). Indeed, this Court often disagrees with the Eighth Circuit on matters of public access to judicial records. *See Times Mirror Co.*, 873 F.2d at 1217 ("With all due respect, we cannot agree with the Eighth Circuit's reasoning."). Thus, the Eighth Circuit's rulings on this issue are inapposite. And courts that do recognize the strong common law presumption regularly grant the public access to videotaped deposition testimony. *See, e.g.*, *United States v. Poindexter*, 732 F. Supp. 170, 171-72 & n.2 (D.D.C. 1990) (granting media access to President Reagan's videotaped testimony); *cf. Valley Broad. Co. v. U.S. Dist. Court*, 798 F.2d 1289, 1293 (9th Cir. 1986) (common law right of access extends to audio and video tapes).

4. The Public's Common Law Right Of Access Does Not Turn On The Circumstances Of The Recording's Creation.

Finally, Proponents try to avoid the common law rule by arguing, as they did in the district court, that the trial recording should never have been made in the first place. Prop. Br. 34-37. But the district court already rejected this belated and factually incorrect argument. *See* ER 8 ("[T]he record does not support the contention" that the video was made for an improper purpose.); ER 5-6 ("The parties . . . limited their argument solely to whether the digital recording should remain sealed."); *see also* ER 1064 (Proponents conceding there was no objection when Judge Walker said he was "going to record [the trial] for [his] use" and no objection when "he placed it in the record").

This appeal asks only whether a video that already exists, and is already part of the judicial record, should remain hidden from public view. The "'circumstances that led to [the video's] production'" play no role in deciding whether to grant a motion to unseal. Prop. Br. 34 (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 603 (1978)). The decision whether to unseal a judicial record is a prospective inquiry, not a retrospective one. *See, e.g.*, *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990) (considering potential for "improper use"); *cf. Bartnicki v. Vopper*, 532 U.S. 514, 517-18 (2001) (holding

that even "an illegally intercepted cellular telephone conversation about a public issue . . . [is] protected by the First Amendment"); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (the First Amendment protects publication of "the contents of a classified study" once it has been leaked to the media); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (holding that First Amendment protections apply "where an independent news agency, having gained access to sealed documents, decides to publish them").

In *Nixon*, the only "circumstance" that required "sensitive appreciation" was the fact that the tapes in that case featured private conversations of the sitting President, which portended the *prospective* "danger" that releasing the tapes could result "in the use of the subpoenaed material to gratify private spite or promote public scandal." 435 U.S. at 603 (internal quotation marks omitted). The *Nixon* case ultimately turned not on a hindsight view of how the tapes were created, but on the Presidential Recordings Act, an "administrative procedure for processing and releasing to the public . . . all of petitioner's Presidential materials of historical interest." *Id.*

Proponents' other cases fare no better. *See* Prop. Br. 37 n.6. Like the *Nixon* decision, *Phillips ex rel. Estates of Byrd v. General Motors Corp.* turned on the prospective need for confidentiality, not a retrospective analysis of the record's

creation. 307 F.3d 1206, 1213 (9th Cir. 2002) (explaining that public access to judicial documents turns on "'whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets'" (quoting *Hagestad*, 49 F.3d at 1434)). And Proponents' final two cases involved a criminal defendant's right to review "the presentence report of a government witness," *United States v. Anzalone*, 886 F.2d 229, 233 (9th Cir. 1989), a unique situation in which there is "a strong presumption in favor of confidentiality." *United States v. Schlette*, 842 F.2d 1574, 1579 (9th Cir. 1988).

Thus, even if Proponents could establish that the video of this public trial was improperly created—which they cannot, as the district court found—they cannot point to a single authority explaining why that should matter.

B. Proponents Do Not Meet Their Substantial Burden Of Presenting Compelling Reasons For Maintaining The Video Under Seal.

The reason Proponents expend so much effort arguing that the common-law right of access does not apply to the trial recordings is self-evident: They cannot come close to articulating a compelling reason to seal a judicial record that consists *entirely* of testimony and argument given in open court and already available to the public—albeit in a less rich format—in the form of written transcripts and re-enactments. When they finally address their burden to present "compelling

reasons" for maintaining the trial recording under seal—38 pages into their 44-page brief—Proponents continue to rely primarily on the unsubstantiated risk that unsealing the trial recording "would subject Proponents' witnesses to a . . . risk of harassment." Prop. Br. 38.[3] At the same time, Proponents ignore a multitude of public benefits that would result from unsealing the trial recording. Proponents do not even come close to meeting their substantial burden to prove there are "compelling reasons" to continue sealing the record that "outweigh" the benefits of public access. *Kamakana*, 447 F.3d at 1178 (internal quotation marks omitted).[4]

1. There Is No Evidence That Proponents' Compensated, High-Profile Expert Witnesses Would Suffer Any Harm.

It has been almost two years since the *Perry* trial concluded, and after countless public reenactments, intense media attention, and publicly disseminated transcripts, Proponents still have offered no evidence whatsoever that their witnesses were in fact harmed as a result of their testimony in this case or would be harmed if the trial video were unsealed. Instead, they fall back on the same

[3] Proponents also say that unsealing the recording could "prejudice any further trial proceedings that may prove necessary in this case," Prop. Br. 38, but they later clarify that the alleged prejudice would be the result of witness intimidation. *Id.* at 42-43.

[4] Nor do Proponents explain in their brief how maintaining the entire trial video under seal would be narrowly tailored to alleviating their two witnesses' purported fear of harassment.

unsubstantiated claims of witness harassment and intimidation they have made before. But their purported "evidence" of harm to Proposition 8 supporters *generally*, Prop. Br. 39-41, cannot suffice to demonstrate their *witnesses'* alleged fears. *See Doe v. Reed*, __ F. Supp. 2d __, 2011 WL 4943952, at *10 (W.D. Wash. Oct. 17, 2011) (holding that the "evidence [must] be specifically and directly related to [the] group or organization" claiming fear of harassment). The witnesses themselves have never expressed any such fear or claimed to have suffered any actual harassment, even though their names, likenesses, and professional and educational affiliations have been publicly known all along. In fact, at least one of their two expert witnesses has publicly rejected Proponents' claim that he "voiced 'concerns for [his] own security'" as a result of his participation in the trial. *Compare* David Blankenhorn, Comment to *8*, Family Scholars.org (Sept. 14, 2011, 12:49 PM), http://familyscholars.org/2011/09/10/8/, *with* Prop. Br. 39. Proponents assert another of their expert witnesses "regretted his decision" to testify, Prop. Br. 46, but nowhere explain the *reason* for this newfound regret. It seems far more likely he regrets his decision because of his ineffectual testimony on cross-examination than because of any illusory safety concerns. Moreover, the fact that a witness later "regrets" the testimony that he gave under oath does not in any way diminish the public's right to access and scrutinize that regrettable testimony.

In any event, Proponents' claims did not withstand scrutiny when the district court considered the facts at trial. Although Proponents claimed they "elected not to call the majority of their designated witnesses to testify at trial" because of their witnesses' "concern[s] about their personal safety" and apprehension about "any recording of any sort, whatsoever," the district court concluded the record did not support Proponents' contention. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010) (internal quotation marks omitted). Rather, the district court explained that "[t]he record does not reveal the reason behind [P]roponents' failure to call their expert witnesses." *Id.*

Further, other courts that have considered similar speculative claims of harassment and intimidation, backed only by unsubstantiated argument and anecdote, have uniformly rejected them as unsupported by the evidence. *See, e.g.*, *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 71-72 (1st Cir. 2011) (rejecting, for "lack [of] support," argument that unsealing the trial record would subject marriage equality opponents to harassment); *ProtectMarriage.com v. Bowen*, No. 2:09-cv-00058-MCE-DAD, slip op. at 38 (E.D. Cal. Nov. 4, 2011) ("[I]t makes no sense to buy in to the argument that disclosure *may* result in repercussions when there is simply no real evidence in the record that such repercussions actually *did* occur in the past three years. [ProtectMarriage.com's] evidence is, quite simply,

stale."); *Doe*, 2011 WL 4943952, at *10 (finding insufficient the "mountain of anecdotal evidence from around the country that offers merely a speculative possibility of threats, harassment, or reprisals").

With no evidence to support their expert witnesses' supposed fears of physical harm, Proponents argue that their witnesses should be protected from "economic reprisals." Prop. Br. 40 & n.8. As a threshold matter, Proponents do not explain how unsealing the record two years after trial would lead to any "economic reprisals" against their witnesses, whose identities and testimony have long been public. Regardless, neither Proponents nor their expert witnesses, all of whom have voluntarily and publicly proclaimed their views on same-sex marriage, have a right to be free from "economic reprisals," which themselves constitute constitutionally protected activity. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) ("[A] boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments."). To the extent Proponents' *law firm* fears it will be targeted with economic reprisals for its representation in this matter, *see* Prop. Br. 40 n.8, Proponents' counsel has already participated in two live broadcasts of arguments before this Court and the California Supreme Court, and any pretense of that concern is belied by the firm's website, which advertises its advocacy in this very case to *attract* new clients. *See*

Cooper & Kirk, PLLC, Briefs, http://www.cooperkirk.com/briefs.php (last visited Nov. 28, 2011) (listing brief entitled "Perry v. Schwarzenegger ('Prop 8') - Summary Judgment").

2. Access To The Trial Recording Would Provide Significant Public Benefits That Proponents Ignore.

Proponents contend that "[u]nsealing the trial recording will provide little public benefit" because "the official transcript remains readily available to anyone who wants it." Prop. Br. 43. Of course, this very argument begs the question how a video recording can possibly meet the stringent requirements of sealing when the official transcript of the very same testimony and argument already is publicly available. But in any event, a cold transcript is a poor substitute for a video recording of live testimony and argument. *See ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004) ("The ability to see and to hear a proceeding . . . is a vital component of the First Amendment right of access—not . . . an incremental benefit."). A transcript, for example, fails to provide the reader "the opportunity to observe the demeanor of the witness while testifying." *United States v. Yida*, 498 F.3d 945, 950 (9th Cir. 2007); *see also United States v. Antar*, 38 F.3d 1348, 1360 n.13 (3d Cir. 1994) ("[A] transcript would not fully implement the right of access because some information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the translation of a live proceeding to a cold transcript.").

"Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words." *Gov't of the V.I. v. Aquino*, 378 F.2d 540, 548 (3d Cir. 1967).

Thus, contrary to Proponents' bald assertion, Prop. Br. 43, unsealing the trial recording will unquestionably provide a "corresponding assurance of public benefit." *Nixon*, 435 U.S. at 603. More than 13 million Californians cast a vote for or against Proposition 8. Those voters, along with the rest of the public, deserve access to the recording so they can better understand and appreciate what transpired in this historic trial. Proponents say this benefit is "marginal, at most," because the transcript of the trial is already public. Prop. Br. 44 (internal quotation marks omitted). But unsealing the recording will allow the public to witness the trial firsthand, to hear from the parties' experts, to see the parties' exhibits, and to better evaluate the arguments each side advanced so they can determine their agreement or disagreement with the district court's decision. *See Press-Enter. Co.*, 464 U.S. at 508 ("Openness . . . enhances both the basic fairness of the . . . trial and the appearance of fairness so essential to public confidence in the system."); *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) ("Any step that

withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.").[5]

Proponents also express, for the first time, newfound concern that the public might view only "some fascinating clips from trial," rather than watch the 12-day trial from start to finish. Prop. Br. 41-42 (internal quotation marks omitted). This, they say, "would present limitless opportunities for partisans to unfairly make one side look good and the other side look bad." *Id.* at 42. But the potential for—even the likelihood of—*editing* is a preposterous ground for keeping the video under seal. Indeed, digital recordings of the depositions of Proponents and their expert witnesses have been publicly available for close to two years now. Tellingly, Proponents do not point to any untoward or "partisan" outtakes of those videos, as

[5] The meager authority mustered by Proponents on this point is unconvincing. As explained *supra*, pp. 10-11, the court that rendered the *McDougal* decision "specifically rejected the strong presumption" favoring a common law right of access to judicial records that most other circuits, including the Ninth Circuit, recognize. *McDougal*, 103 F.3d at 657 (emphasis omitted). Moreover, the decision to deny public access to the recording of President Clinton's deposition testimony turned, in part, on the "strong judicial tradition of proscribing public access to recordings of testimony given by a sitting president." *Id.* at 659. Similarly, *In re Providence Journal Co.*, 293 F.3d 1, 17 (1st Cir. 2002), presented another "unique twist" on the common law right to public access because the evidence sought by the media no longer existed in the form it was used at trial. "Consequently," the court was required to "decide whether the common-law right of access compels a court to create (or order the creation of) a new medium" that replicates the evidence received at trial, for dissemination to the media. *Id.* ("We are reluctant to hold that the common-law right of *access* necessarily compels the *creation* . . . of such materials." (emphasis added)). That question is not presented here.

none exists. Rather, it is Proponents who have attempted to "make one side . . . look bad" by moving to vacate the district court's decision on the ground that Chief Judge Walker was biased against them because he is gay and in a same-sex relationship. Unsealing the trial video would allow the public to judge for itself the fair and evenhanded manner in which Judge Walker presided over the trial. *See Press-Enter. Co.*, 464 U.S. at 508 ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed.").

Proponents' argument that the trial recording should be sealed lest members of the public use portions of it to "make one side . . . look bad" is an argument that, taken to its logical extension, would counsel against the right of public access to court proceedings altogether. The public is every bit as free to use a single statement or argument out of a written transcript, or out of a brief submitted to the Court, as it would be to use a statement or argument from the trial recording, yet we do not seal all transcripts and briefs. Indeed, one direct and critical benefit of a broad and vigorously protected right of public access to judicial records is that, in the event someone does use a particular piece of the judicial record out of context or in a misleading manner, someone else may draw on the complete judicial record to set forth the truth. It is both remarkable and telling that Proponents seek to

protect themselves from "look[ing] bad" not by publishing the truth, but by hiding it. *Cf. Hustler Magazine, Inc.*, 485 U.S. at 50 ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); *N.Y. Times Co. v. Sullivan*, 376 U.S. at 270 (the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on matters of public concern).

In light of the overwhelming national public interest in the issues decided by the district court, and the public's longstanding common law right of access to court records like the trial recording at issue, Proponents' unsubstantiated concerns cannot possibly constitute a compelling interest in keeping the truth hidden any longer.

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CONCLUSION

For the reasons set forth above and in Plaintiffs' opening brief, this Court should affirm the district court's decision granting Plaintiffs motion to unseal the trial recordings.

Dated: November 28, 2011

/s/ Theodore J. Boutrous, Jr.

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/s/ Theodore J. Boutrous, Jr.

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9th Circuit Case Number(s) 11-17255

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