No. 10-16696
Argued December 6, 2010
(Reinhardt, Hawkins, N. Smith)

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)

PLAINTIFFS-APPELLEES' OPPOSITION TO APPELLANTS' MOTION REGARDING TRIAL RECORDINGS AND PLAINTIFFS-APPELLEES' MOTION TO UNSEAL

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INTRODUCTION

"What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). In January 2010, the United States District Court for the Northern District of California conducted a historic, 12-day *public* trial on an issue of great legal importance and public interest: whether the State of California violated the Due Process and Equal Protection rights of gay men and lesbians when it stripped them of the fundamental right to marry by passing Proposition 8. Through the present Motion, the Proponents of Proposition 8 seek to sequester and forever conceal from the American people video that accurately and without adornment depicts the testimony and argument each party presented at trial, and that the trial court considered when reaching the decision that Proponents now challenge. Although Proponents neither appealed the trial court's decision to record the trial nor objected to the court's decision to allow the parties to use the video in closing arguments, Proponents now complain of an extremely limited use of a snippet of those tapes by the now-retired trial judge in an effort to educate the public about our judicial system and proceedings. Proponents' fierce determination to shield access by any member of the American public to the actual compelling evidence which demonstrated the unconstitutionality of Proposition 8 and the paucity of evidence that Proponents presented in its defense directly conflicts

with this Nation's constitutional commitment to public and open judicial process and serves no legitimate public end. This Court should deny Proponents' motion.

Although Proponents believe that it is somehow too dangerous to allow more of the public to see what transpired in a public trial in a public courtroom, public access to trials "protect[s] the free discussion of governmental affairs" that is essential to the ability of "the individual citizen . . . [to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (internal quotation marks omitted). Proponents' contention that, by showing an accurate recording of a small part of a public trial, Chief Judge Walker somehow engaged in conduct prejudicial to the administration of justice (*see* Pet. Mot. 14), stands the First Amendment on its head.

After the broadcast of just three minutes of a three-week public trial, and although Plaintiffs and Plaintiff-Intervenors have scrupulously adhered to the protective order in this case, Proponents ask this Court to require return of "all copies of the trial recordings in the possession, custody, or control of any party to this case or former judge Walker." Pet. Mot. 20. Thus, although Proponents expended tens of millions of dollars on a public campaign to restore discrimination in California that the state Supreme Court had struck down, they now seek to prevent the public from ever observing first-hand their efforts in a public courtroom to defend that discrimination and the

exposure of those efforts to the acid test of cross-examination in open court. The present motion is their latest attempt to prevent the public from witnessing that trial.

There was no reason to keep the video of this trial under the cover of darkness in the first place. Indeed, videos of two of the Proponents' experts and one of the official Proponents of Proposition 8 are already available on the district court's website. https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html. The 13-volume trial transcript is part of the public record and widely available on the internet. So too are reenactment videos of actors reading those transcripts widely available, including on YouTube. Accordingly, this Court should not only deny Proponents' motion, it should order the video's immediate release to allow the public to see the rest of the *actual* witnesses rather than being limited to actors' portrayals.

ARGUMENT

I. The First Amendment Mandates Public Access To Trial Records

Public trials are a cornerstone of our democracy. Access to judicial proceedings is necessary "to protect the free discussion of governmental affairs" essential to our democracy. *Globe Newspaper Co.*, 457 U.S. at 604. Public access to trials and trial records is so important that even a 48-hour delay in unsealing judicial records "is a *total restraint* on the public's first amendment right of access even though the restraint is limited in time." *Associated Press v. United States Dist. Court*, 705 F.2d 1143,

1147 (9th Cir. 1983) (emphasis added). Consequently, "[u]nder the first amendment, the press and the public have a presumed right of access to court proceedings and documents." *E.g., Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)).

Further, because "it is difficult for [people] to accept what they are prohibited from observing" (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. Indeed, "[o]ur national experience instructs us that except in rare circumstances openness preserves, indeed, is essential to, the realization of that right and to public confidence in the administration of justice. The burden is heavy on those who seek to restrict access to the media, a vital means to open justice . . . ." *ABC, Inc. v. Stewart*, 360 F.3d 90, 105-06 (2d Cir. 2004). A trial adjudicating an issue as important and as closely-watched as California's elimination of the constitutional right of gay men and lesbians to marry requires the maximum public access guaranteed by these First Amendment values.

Despite the strong public policy favoring public trials and disfavoring sealing court records, Proponents seek to bar the public from seeing and considering for itself a true and accurate recording of court proceedings that were themselves public and re-

lied on by the District Court in adjudicating this case, including in making its findings of fact and conclusions of law. The recording is a quintessential judicial record of the utmost public importance. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1181 (6th Cir. 1983) ("The public has an interest in ascertaining what evidence and records the District Court . . . relied upon in reaching [its] decisions."); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999). It bears emphasizing that *nothing* on these tape recordings can conceivably be characterized as confidential or private information because they merely depict court proceedings that were *themselves* open to the public. Proponents' asserted reason to keep the trial video under seal is to protect their witnesses—two experts, who were paid for testifying in open court and whose identities as witnesses in this case are widely known—from "intimidation." Prop. Mot. 5-6. But this rationale, which Proponents also advanced before the district court and which the court ultimately concluded was baseless (ER 70-71), plainly cannot carry any weight, especially given that the trial ended 15 months ago and no more witnesses will be called. In fact, Proponents failed to submit *any* evidence in the trial court to support their witness intimidation claims. ER 71 ("The record does not reveal the reason behind proponents' failure to call their expert witnesses.").

II. This Motion Is Otherwise Deficient And Improper

Neither the Plaintiffs nor the Plaintiff-Intervenors nor Chief Judge Walker have violated any rule or directive with respect to the video in question. Proponents' request that this Court order return of the tapes should be rejected.

As a threshold matter, while this Court has jurisdiction over the "final decision[] of the district court[]," (28 U.S.C. § 1291), Proponents' motion "For Order Compelling Return of Trial Recordings" does not challenge any decision of the district court. Indeed, Proponents do not challenge the only aspect of the district court's decision that addressed the trial video: its decision to include it in the record under seal. ER 39.

Proponents also have a venue to seek redress of their asserted grievance. The District Court retains jurisdiction over all matters not involved in the appeal. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). And the case has been reassigned to a District Judge who did not preside over the trial and did not decide any of the matters currently challenged. U.S.D.C. Doc #765. Tellingly, Proponents' only source for this Court's authority to afford their desired relief, mentioned only in passing, is this Court's inherent authority to "control the record." Pet. Mot. 15. But Proponents' motion does not, in any way, affect the record. It seeks to control copies of videotapes in the possession of the parties and former Chief Judge

Walker. At a minimum, the district court should be permitted to rule on this issue in the first instance.

Even if this issue were properly before this Court, as Chief Judge Walker's letter to this Court explains, the few minutes of testimony that he played before students at two universities and the Federal Bar Association came from a disk drive that he received with his other judicial papers. Letter from Vaughn R. Walker, Apr. 14, 2011, ECF No. 339. During these lectures, Chief Judge Walker has drawn from his experience over more than two decades of public service to promote public discourse regarding access to judicial proceedings. *Id*.; *see also* Library of Congress Online Catalog, http://catalog.loc.gov (containing public, historical archive of numerous judicial papers including those of Chief Justices Marshall, Taney, Taft, and Hughes, Justices Brandeis, Holmes, Frankfurter, and Van Devanter). Contrary to Proponents' assertions, the very purpose of Chief Judge Walker's lectures has been to "promote[] public confidence in the integrity and impartiality of the judiciary." *See* Pet. Mot. 14-15 (quoting Code of Conduct for United States Judges, Canon 2A); ECF No. 339. That he has sought to improve the public's knowledge of the federal government by displaying a brief snippet of his experience rather than summarizing it or sharing his notes or that his judicial papers take the form of a video file on a hard disk rather than words on a printed page is of no moment. ECF No. 339.

While Proponents claim otherwise, neither prior orders nor local rules barred Chief Judge Walker's use of the trial video. First, while Chief Judge Walker directed the parties to maintain their copies of the trial video tapes pursuant to the terms of the protective order in this action, there is no dispute that they have faithfully done so. Proponents cannot convert that direction, or the fact that the video tapes were submitted to this Court under seal, into an absolute bar on any use of those tapes by the trial judge. Nor did Chief Judge Walker's use of a brief excerpt of video violate the Supreme Court's ruling staying the live broadcast of the trial. *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010)) (per curiam). That decision was explicitly limited to "the live streaming of court proceedings to other federal courthouses" and did not address other uses, such as the "broadcast of court proceedings on the Internet," let alone the very limited use challenged here. *Id.* at 709.

Further, because the district court recorded the trial proceedings for use "in connection with preparing the findings" (ECF. No. 339 at 1), Chief Judge Walker did not violate the district court's Local Rule 77-3, which prohibits recording trial proceedings with the intent to publicly broadcast. Proponents argue that they were somehow harmed because Chief Judge Walker has now used a small portion of the video for purposes other than use in his chambers. *See* Pet. Mot. 8-9. However, inasmuch as they never appealed the district court's decision to record the trial or objected to Plain-

tiffs' use of the trial video in closing arguments, which clearly was not a use solely in Chief Judge Walker's chambers, Proponents' argument is not only too little, but too late.

In all events, Chief Judge Walker's use of the trial video was harmless. The video ran approximately three minutes and showed the cross-examination of Proponents' paid expert, Kenneth Miller, a professor at Claremont McKenna College who is publicly known. *See, e.g.*, Kenneth P. Miller, Claremont McKenna College, www.claremontmckenna.edu/academic/faculty/profile.asp?Fac=406. In fact, rather than submitting a declaration regarding the harm allegedly suffered by Dr. Miller or its only other witness, David Blankenhorn, Proponents reiterate the same unsubstantiated and speculative allegations of harm that the district court previously rejected in findings of fact after the trial. ER 70-71 (finding as not credible Proponents' assertion that their witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever.").

III. The Recordings Of The Trial Should Be Unsealed

Because trials are presumptively public affairs, this Court should unseal the video of this public trial. *See* 9th Cir. R. 27-13(d); *Publicker Indus, Inc. v. Cohen*, 733 F.2d 1059, 1068-71 (3d Cir. 1984) (First Amendment right of access to judicial proceedings applies to civil trials); *Brown & Williamson Tobacco Corp.*, 710 F.2d at

1178 (same); *see also, e.g.*, *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984). The First Amendment right of access to judicial proceedings exists because "[o]penness of the proceedings will help to ensure [the] important decision is properly reached and enhance public confidence in the process and result." *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513, 1516 (9th Cir. 1988).

In addition to the First Amendment interest, the public has a common law right to view judicial records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.") (footnote omitted). This right cannot be abridged absent "a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." *Publicker Indus.*, 733 F.2d at 1070. Where, as here, the subject of the trial is a matter of great public importance, the public's right to see the trial is heightened. Moreover, Proponents cannot and do not argue that the subject of the trial was in any way confidential or contained sensitive, proprietary information of any party, given that the live proceedings were themselves public.

Alternatively, because use of the trial video would aid the parties in connection with any additional proceedings before this or any other court, and because the parties

have dutifully complied with the protective order, the Court should reject Proponents' demand that Plaintiffs return their copy of the trial video. In the meantime, the protective order remains in place and ensures that the trial video will not be publicly disclosed, unless the Court determines that it should be unsealed.

CONCLUSION

Proponents have not remotely overcome the exacting burdens imposed by the First Amendment and the common law as prerequisites for throwing a blanket over a true, accurate and unedited record of a widely publicized public trial of an exceedingly important constitutional issue affecting millions of Americans. The Court should deny Proponents' motion and grant Plaintiffs' request to unseal the trial video.

Dated: April 15, 2011

Respectfully submitted,

/s/ Theodore B. Olson

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9th Circuit Case Number(s) 10-16696

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