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)

REPLY IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO UNSEAL

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INTRODUCTION

The First Amendment and the common law establish a strong presumption that judicial records are open to the public; those seeking to rebut that presumption must satisfy the heavy burden of proving that a compelling governmental interest requires secrecy, and any sealing of records must be narrowly tailored to serve that overriding governmental interest. The only interest Proponents claim in their campaign to keep the entire video recording of this trial secret is their speculative fear that "dissemination of the trial recordings could have a chilling effect" on witnesses' participation in trials, and that "witnesses in future controversial cases . . . would think long and hard before" testifying in a videotaped trial. Prop. Opp. 7. 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 and conjecture. As this Court and the Supreme Court have made clear, such unsupported speculation is insufficient to overcome the strong presumptive right of public access to judicial records and proceedings.

The public has long known Proponents' two witnesses who testified in this trial—their identities and the transcripts of every word they said have been available on the internet since they testified. In fact, these two paid expert witnesses had already written and published their views. They had purposefully thrust themselves and

their opinions into the public domain on highly visible and controversial subjects, and were actively engaged in a voluntary effort to convince the judicial system of the correctness of their opinions and to influence the outcome of a public trial on constitutional issues affecting hundreds of thousands of California citizens. At best, Proponents' argument amounts to a claim that allowing the public to see and hear that testimony, as opposed to just reading it, will somehow result in intimidation and harassment that might deter these or other expert witnesses from coming forward to testify for compensation in the future. This makes no sense. Indeed, video deposition testimony of one of the Proponents and two of their later-withdrawn expert witnesses has been available on the internet for more than a year. If any of them suffered harassment or intimidation, Proponents doubtless would have submitted evidence of it. Similarly, hundreds of people watched this testimony at the San Francisco Courthouse, both in the courtroom where the trial took place and in overflow courtrooms, yet Proponents offered no evidence that any witness suffered any harassment whatsoever. Neither evidence nor logic supports Proponents' speculative claims of threatened harm, which are nothing more than a guise for Proponents' true concern that the public will see for themselves the utter lack of evidence or persuasive argument they were able to offer in defense of Proposition 8 and its institutionalized discrimination against gay men and lesbians. Proponents make nothing like the showing necessary to

overcome the public's presumptive right of access to court records under the First Amendment and the common law.

Because they cannot refute the public's right to see the Court's records, Proponents claim that those records should not exist in the first place. Whatever the merits of that argument—and Plaintiffs submit it is meritless—it does not bear on the question of whether the public should have access to this Court's records that already exist: The video recording of the trial exists as part of this Court's official record of this case, it was used without objection in the closing arguments, and it was a basis for adjudication below. The Constitution and common law give the public the strong presumptive right to inspect judicial records in the absence of specific, powerful reasons to the contrary, which do not exist here.

ARGUMENT

I. Proponents Have Not Come Close To Rebutting The Strong First Amendment And Common Law Presumption In Favor Of Public Access To The Trial Video

The First Amendment and common law presumption of public access to judicial records is overcome only by a showing of "*compelling* reasons supported by *specific* factual findings." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (emphases added); *accord Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982). Contrary to Proponents' assertion that the public's right of

access applies only to criminal proceedings (Prop. Opp. 5 n.2), the right of access applies to civil trials as it does to criminal trials. *See, e.g.*, *Foltz*, 331 F.3d at 1135 (observing in a civil appeal, that this Court has "a strong presumption in favor of access to court records."). Indeed, "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (plurality); *see also id*. at 596 (Brennan, J., concurring in judgment) (emphasizing value of open civil proceedings); *id*. at 599 (Stewart, J., concurring in judgment) (First Amendment provides a right of access to civil trials). Unanimous circuit court authority holds that the same interests requiring presumptively open criminal trials also warrant presumptively open civil trials. *See, e.g.*, *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068-71 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983); *see also, e.g.*, *Rushford v. New Yorker Magazine, Inc*., 846 F.2d 249, 252 (4th Cir. 1988); *In re Continental Ill. Sec. Litig*., 732 F.2d 1302, 1308-09 (7th Cir. 1984).

While Proponents belittle this concern (Prop. Opp. 2), public access to judicial proceedings is crucial to public confidence in the judiciary. *Seattle Times Co. v. U.S. District Court*, 845 F.2d 1513, 1516 (9th Cir. 1988); *see also* Media Coal. Br. 4-10. "Public access creates a critical audience and hence encourages truthful exposition of facts, an essential function of a trial." *Brown & Williamson Tobacco Corp*., 710 F.2d

at 1178. But to satisfy their burden and defeat the public's interest, Proponents offer only the same wholly unsupported and speculative assertions of potential harm that the district court rightly rejected. ER 70-71.

Proponents' speculation that expert witnesses in some hypothetical future case would be intimidated if the public were permitted to view the testimony in this trial cannot be credited. Proponents offered no evidence to support it, and while Proponents' counsel baldly assert the supposed fears and concerns of their witnesses, there is absolutely no record evidence on that subject either. In any event, the Supreme Court has emphasized that robust public debate is paramount over harms far more concrete than those Proponents claim: "As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1220 (2011) (First Amendment right to protest outside a funeral carrying signs such as "God Hates Fags" and "You're Going to Hell"). Judicial proceedings are open to *enhance* the dependability of witness testimony with sunlight as the disinfectant. *See Brown & Williamson Tobacco Corp.*, 710 F.2d at 1178 ("Witnesses in an open trial may be less inclined to perjure themselves.").

While Proponents point to the Supreme Court's statement in its stay ruling regarding the supposed fears of Proponents' witnesses (Prop. Opp. 6), that statement

was based on the very limited record before the Court at that time, which predated the trial and included only the assertions of Proponents' counsel and no evidence from the witnesses themselves. Proponents' counsel continued to make such claims during trial but never supported them with any actual evidence. Indeed, during trial Proponents sought to show that those who fight against marriage equality for gay men and lesbians are the real "victims" and are subject to harassment and abuse. They failed completely. Proponents best "evidence" of harm was a hearsay video from Fox's *O'Reilly Factor*. DIX2544. That excerpt featured a San Francisco resident, completely uninvolved in the litigation, who did not testify or submit to cross-examination. Proponents' only other evidence of the fear of intimidation consisted of advertisements, their own press releases, and press clippings (U.S.D.C. Doc #606 at 34), but the district court rejected Proponents' arguments based on this evidence (ER 71), and Proponents have not shown that that factual finding was clearly erroneous. Proponents did not offer a *single* sworn statement or live witness in the district court describing any fear of intimidation or harassment, which led the district court to find that "[t]he record does not reveal the reason behind proponents' failure to call their expert witnesses." ER 71. Even were such new evidence appropriate in this Court, Proponents offered none. This is a failure of proof at the most basic level that falls far short of proving an important, let alone compelling, governmental interest.

In short, all Proponents offer is rank speculation. But the strong presumption of access may be "overcome only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (citations and quotation marks omitted); *see also Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 15 (1986) ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [a fair trial]."); *NBC Subsidiary (KNBC-TV) v. Superior Court*, 980 P.2d 337, 370 (Cal. 1999) (same).

Finally, Proponents' demand for a wholesale ban on public access to the trial video is not "narrowly tailored to serve [their] interest." *Globe Newspaper Co.*, 457 U.S. at 607. In fact, while the only interest that Proponents identify as justifying keeping the trial video under seal is their witnesses' fears, Proponents identify no more narrowly tailored way to address this supposed fear than sealing the *entire* video. Proponents do not even attempt to explain how the supposed, unsubstantiated fears of their two expert witnesses justify sealing the testimony of Plaintiffs, Plaintiffs' experts or other fact witnesses, or the arguments of counsel.

II. Local Rule 77-3 Neither Affects Nor Informs The Public's Right Of Access To Judicial Records

Recognizing that no important interest justifies hiding this record, Proponents

insist that the trial proceedings should not have been recorded at all under the district court's Local Rule 77-3. For instance, they argue that the Supreme Court's "narrow" decision in *Hollingsworth*, which considered "whether the District Court's amendment of [Local Rule 77-3] to broadcast this trial complied with federal law," now governs whether "the First Amendment affords the public the right to access the *recordings* or *broadcast* of the trial proceedings in this case." Prop. Opp. 5. But the Supreme Court's *Hollingsworth* decision nowhere mentions the First Amendment, nor could it possibly have addressed uses of a trial video after the trial's completion because the Supreme Court ruled during the early days of the trial. *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010); *see* Prop. Opp. 2 (acknowledging "that was all that the order then under review authorized").

Further, whatever limits Local Rule 77-3 imposes on public broadcasting are immaterial because the present motion does not remotely question whether a trial should or must be publicly broadcast contemporaneously. Rather, because the trial video is a *judicial record*, as Proponents themselves concede (Prop. Opp. 5), the public should have the right to access, review, and evaluate that record. The issue is whether the public should be denied access to a classic verbatim judicial record: video recording of important testimony that took place in a public courtroom and has been captured and published in transcripts.

Proponents also argue that the common law presumption of access does not apply because allowing the public to see the trial video would violate Local Rule 77-3. Prop. Opp. 5-6. Proponents are wrong. The common law's "strong presumption in favor of access" to judicial records (*San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999)), does not depend on the circumstances under which the record was created. Rather, in deciding whether the presumption has been defeated, courts consider, among other things, whether the records sought may be used as "a vehicle for improper purposes," such as the promotion of "public scandal" or the disclosure of trade secrets. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (internal quotation marks omitted).

In any event, because the district court recorded the trial proceedings for use in chambers, the recording did not violate the district court's Local Rule 77-3, which prohibits recording trial proceedings with the intent to publicly broadcast but permits such recording for use in chambers. Proponents' argument that determining a judge's intent in recording trial proceedings would nullify Local Rule 77-3 is baseless and impractical. To the extent Proponents are concerned that district judges might abuse their discretion to record proceedings for use in their chambers, the proper course is revision of the local rule through appropriate processes (*see Hollingsworth*, 130 S. Ct.

at 710), not denying public rights of access afforded by the First Amendment and the common law.

CONCLUSION

"The ability to see and to hear a proceeding as [it] unfolds is a vital component of the First Amendment right of access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004). To suppress the First Amendment and common law rights of access in light of hypothetical, speculative, and utterly unproven harms is antithetical to the vision of this country as "the Home of the Brave." *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring in judgment). Accordingly, this Court should grant Plaintiffs' motion to unseal the trial video. *See* 9th Cir. R. 27-13(d).

Dated: April 25, 2011

Respectfully submitted,

/s/ Theodore B. Olson

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9th Circuit Case Number(s) 10-16696

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