IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor-Appellee,

vs.

EDMUND G. BROWN JR., et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

No. 10-16696

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

PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO MOTION FOR ORDER COMPELLING RETURN OF TRIAL RECORDINGS

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

The Honorable Chief District Judge James Ware

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

Attorneys for Plaintiff-Intervenor-Appellee
CITY AND COUNTY OF SAN FRANCISCO

Proponents' motion asks this Court to order the return and sealing of digitized video recordings of a civil rights trial that is a matter of tremendous current interest. They seek to compel Judge Walker to return a portion of his personal judicial records, contending that his use of a snippet of the video in connection with an academic presentation violated court rules and orders. That is not accurate, for the reasons set forth in Plaintiffs' opposition to Proponents' motion, which San Francisco joins. But even if Proponents' contentions were correct, they overreach. Not only do they ask for an order requiring Judge Walker to return his copy of the video recording, they seek to compel Plaintiffs and San Francisco to return the copies provided to them for use in connection with the case, while the case is still pending, without any basis. Certainly there is no reason to believe Plaintiffs or San Francisco have violated or will violate the protective order subject to which the video recording was made available to them, and that portion of their motion should be denied as baseless.

In the end, Proponents' motion raises the larger issue of whether the trial video—the best, most accurate record of a trial of significant public importance—should be kept secret at all. No party currently seeks to use the video footage and thus this Court may wish to reserve this question for a later day, and indeed leave it to the district court to determine in the first instance, but in the meanwhile no credence should be given to Proponents' continuing narrative in this case and beyond: the myth that they, rather than gay men and lesbians whose equal citizenship they have continued to deny, are the victims here; that they or their witnesses are at risk of persecution or harassment because of their speech or religious beliefs. There is simply no reason to believe that the release of the trial video poses any risk to Proponents or their witnesses—particularly when, as discussed below, all of the information captured in the video is already public.

And any such risk is negligible compared to the harm to the public interest from keeping the trial video secret.

I. PROPONENTS CANNOT SHOW THAT RELEASE OF THE TRIAL VIDEOS WOULD HARM THEM OR ANYONE.

In this and other cases, Proponents have repeatedly asserted, with negligible supporting evidence, that there was terrible harassment and intimidation during the campaign directed at those who supported Prop 8. Indeed, Proponents sought to cloak their campaign messaging in secrecy by claiming, among other things, that making it public would "chill" their previously associational rights by exposing them to criticism and worse. See, e.g., Doc. 187 (Defendants-Intervenors' Motion for Protective Order).[1]

When the hearsay and secondhand accounts in Proponents' supporting evidence is set aside, however, their evidence amounts to little more than the hurly-burly of a hard-fought political campaign—one in which opponents of Prop 8 were also subject to intimidation and abuse. *See, e.g.*, Trial Transcript 1219-21 (testimony of Helen Zia) ("And when we would be out there on the streets . . . handing out fliers people would just come up to us and say, you know, `you dike.' And excuse my language, Your Honor, but `You fucking dike.' Or `You're going to die and burn in hell. You're an abomination.'" "I also felt endangered . . .")).

Moreover, Proponents' own conduct belies any assertion that secrecy about the Prop 8 campaign is necessary to protect them. Proponents have voluntarily and repeatedly injected themselves and their views into the public sphere. They did so first by becoming official proponents of Proposition 8. They willingly spoke out in very public ways to advocate the enactment of a law that would govern the entire State and made no attempt to hide their identities or their views at that time. Even

[1] Docket number references are to the District Court's ECF docket.

Proponents' ugliest messaging that was the most openly hostile toward gay people was made available during the campaign on the internet and, indeed, continued to be available long afterward.[2] After Proponents succeeded in getting Prop 8 enacted into law, Proponents' consultants bragged about their campaign strategy and messaging in magazine articles and presentations that were available to the public at large. SER at 350-54. And Proponents have chosen twice after Proposition 8 was enacted to thrust themselves back into the public sphere, intervening first in the California Supreme Court proceedings challenging Proposition 8 as an improper amendment and subsequently in this case. And in both of those efforts, they communicated to the public via press release and press conference, on their internet websites and in pleadings they filed in open court their views that treating gay men and lesbians equally poses a threat to the rest of society. Any claim by Proponents that public discussion of their views of the rights of gay men and lesbians places them in harm's way is squarely refuted by their own conduct.

Even if Proponents' account that supporters of the Prop 8 campaign were at risk of harassment could be credited, however, there is no reason whatsoever to credit their separate assertion that the only two witnesses they called in the trial court (who were compensated experts) or Proponents themselves are placed at risk of harassment or abuse by the public release of trial videotapes. Not one piece of

[2] Examples of exhibits that were not produced but that Plaintiffs obtained from the internet are the videos of three simulcast events, presentations in favor of Prop 8 held in churches and broadcast across the state during the campaign, which it was undisputed were paid for by ProtectMarriage.com and sold on the internet during the campaign and thereafter. *See* Trial Transcript 2341-42; 2358 (Ex. 506); 2360-76 & Exs. 421, 503 504, 505; see also excerpts shown in open court as Ex. 504A and transcripts admitted in evidence as Exs. 506, 1867, 1868.

evidence has been presented to support this claim.[3] This contention is all the more absurd since, apart solely from the video recording of the trial in this case, the record of the proceedings is already public. This includes the briefs and declarations submitted by Proponents in opposition to the motion for preliminary injunction and in support of their motion for summary judgment. It includes their case management statements, discovery pleadings and motions, the majority of the documents they produced, and the myriad documents they created that Plaintiffs and the City were able to obtain from the internet. It includes the transcripts and the video recordings of the depositions of Proponents, ProtectMarriage.com's Executive Director and executive committee members, and the expert witnesses designated by Proponents before trial. It even includes the transcripts of the trial itself. And finally, the notes and memories of hundreds of people, including press, who attended the court proceedings in the case, and their public tweeting and blogging about the trial, the press coverage generated by press conferences at which Proponents and their lawyers spoke daily during the trial and after many of the pretrial proceedings, and the almost real-time YouTube reenactments of the trial created from the written transcripts that were made public on a daily basis already document every aspect of the case in a way that refutes any claimed need for continued secrecy of the actual video recording of the trial.

[3] Proponents' contentions that they withdrew expert witnesses because of fear of intimidation due to the planned transmission of the trial video was soundly rejected by Judge Walker, since the witnesses were withdrawn *after* the Supreme Court stayed the order allowing transmission of the proceedings beyond the confines of the District Court. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010). The real reason Proponents' withdrew their experts was likely because in their depositions the testimony they gave supported Plaintiffs' case and not Defendants, *see*, Trial Transcript 1497-1503 (playing excerpts of depositions of Proponents' withdrawn experts Paul Nathanson and Katherine Young), and because their witnesses could not stand up to robust cross examination. *See* Trial Transcript 2792 *et seq.* (cross-examination of David Blankenhorn).

In short, even if dissemination of Proponents' views once posed a credible threat of something other than public criticism of Proponents' views, that bridge has long since been crossed and it was willingly crossed by Proponents themselves. Proponents are not entitled to disseminate their views widely and vocally to influence lawmakers and courts and then attempt retroactively to cloak their participation in secrecy after their views have been (or failed to be) enacted into law or upheld.

II. THERE IS A STRONG PUBLIC INTEREST IN THE EVENTUAL RELEASE OF THE VIDEOTAPES.

What is really at stake here is not any threat of intimidation or chilling of First Amendment freedoms. Instead, Proponents would keep secret and sealed the most compelling evidence about the grievous harm gay people and society suffer from the long and continued history of unequal treatment of lesbians and gay men—the video footage of Kristin Perry, Sandy Stier, Paul Katami, Jeffrey Zarrillo, Ryan Kendall, Helen Zia and Jerry Sanders telling their personal stories. They would shield from public view as well the video footage of the powerful expert testimony proffered by Plaintiffs and the City, which thoroughly and convincingly refuted every canard on which Proponents have relied to argue that gay and lesbian people and relationships are different and inferior, unworthy of recognition and threatening to children and society. Likewise, Proponents' secrecy regime would lessen the likelihood that the public will see in living color the contrast between this evidence and the paucity of evidence supporting Proponents' point of view. They would prevent the public from witnessing the utter incoherence of the sole substantive witness they proffered to the Court concerning the institution of marriage, David Blankenhorn. And finally, they would keep public attention from being drawn to the ugly messages they deployed during the

campaign itself describing gay people as diseased and as pedophiles and comparing gay relationships to bestiality. Trial Transcript 1918-22, 1925-26, 1943, 1955-56, 1971, 1917; Ex. 506 at 12. But the facts are the facts, and they are already public. Proponents are not entitled to keep from the public eye the best record of the historical trial that exposed the vacuity of their position. Video footage, whether conveyed by broadcast or cable television or on the internet, remains the most compelling medium of our time. Indeed, Proponents used it heavily during the campaign and it was effective. The public should not be denied the opportunity now to see the trial in its recorded state, rather than be relegated to the dry transcripts or actors' rendition of the trial by reenactment.

As Justice Scalia observed in his concurring opinion in *Doe v. Reed*, 130 S.Ct. 2811, 2832 (2010) (Scalia, J., concurring in judgment): "Our Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect." Not only has "the exercise of lawmaking power in the United States," including the powers of initiative and referendum, "traditionally been public" (*id*. at 2833-35), so have trials been open to the public, as Plaintiffs' opposition demonstrates. Particularly in a civil trial of nationwide importance, the public has the strongest constitutional interest in observing it. Allowing them to see it will enhance their understanding of and respect for the judicial process and for constitutional democracy. It will demonstrate the legitimacy of a decision in favor of Plaintiffs, and if the Court rules against Plaintiffs and holds that the Constitution leaves this issue to the People, it will inform their own self-governance. And if making the video accessible to the public does subject those on either side of the debate to additional criticism, that is the price we pay for democracy. *Doe*, *supra,* 130 S.Ct. at 283 (2010) (Scalia, J., concurring in

judgment) ("harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").

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Respectfully submitted,

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

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

9th Circuit Case Number 10-16696

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO MOTION FOR ORDER COMPELLING RETURN OF TRIAL RECORDINGS** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 15, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Bailey, Arthur, Jr.
HAUSFELD LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104

Brejcha, Thomas
Thomas More Society
29 S. La Salle Street, Suite 440
Chicago, IL 60603

Mateer, Jeffrey
Liberty Institute
2001 W Plano Parkway, Suite 1600
Plano, TX 75075

Moses, Michael F.
United States Catholic Conference
3211 Fourth Street, Northeast
Washington, DC 02991-0194

Oliphant, Lincoln C.
Columbus School of Law
The Catholic University of America
Washington, DC 20064

Picarello, Anthony R., Jr., Attorney
United States Catholic Conference
3211 Fourth Street, Northeast
Washington, DC 02991-0194

Staver, Mathew D., Attorney
LIBERTY COUNSEL
1055 Maitland Center Commons, 2nd Floor
Maitland, FL 32751

Staver, Anita L.
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854

/s/ Catheryn M. Daly
Catheryn M. Daly