

No. 10-_____

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ,
MARK A. JANSSON, AND PROTECT-MARRIAGE.COM—YES ON 8, A
PROJECT OF CALIFORNIA RENEWAL

DENNIS HOLLINGSWORTH, et al., *Petitioners*

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, *Respondent*,

KRISTEN M. PERRY, SANDRA B. STIER, PAUL K. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, NON-PARTY THE MEDIA COALITION, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics, LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, and HAK-SHING WILLIAM TAM, *Real Parties in Interest*.

United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

**APPENDIX TO THE EMERGENCY PETITION UNDER CIRCUIT
RULE 27-3 FOR A WRIT OF MANDAMUS OR PROHIBITION
TO THE NORTHERN DISTRICT OF CALIFORNIA**

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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER,
PAUL T KATAMI and JEFFREY J
ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

V

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as registrar-recorder/county clerk for the County of Los Angeles,

No C 09-2292 VRW

NOTICE TO PARTIES

Defendants,

DENNIS HOLLINGSWORTH, GAIL J
KNIGHT, MARTIN F GUTIERREZ,
HAKSHING WILLIAM TAM, MARK A
JANSSON and PROTECTMARRIAGE.COM —
YES ON 8, A PROJECT OF
CALIFORNIA RENEWAL, as official
proponents of Proposition 8,

Defendant-Intervenors.

1 After hearing the parties and counsel for media regarding
2 the suggestion that the above action be included in the Ninth
3 Circuit pilot project on audio-video recording and transmission
4 announced on December 17, 2009, the undersigned on January 6, 2010
5 formally requested the Chief Judge of the Ninth Circuit to approve
6 inclusion of the trial in the pilot project on the terms and
7 conditions discussed at the January 6, 2010 hearing and subject to
8 resolution of certain technical issues.

Mark

VAUGHN R WALKER
United States District Chief Judge

Exhibit 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY,)
SANDRA B. STIER, PAUL T. KATAMI,)
and JEFFREY J. ZARRILLO,)
)
Plaintiffs,)
)
VS.) NO. C 09-2292 VRW
)
ARNOLD SCHWARZENEGGER, in his)
official capacity as Governor of)
California; EDMUND G. BROWN, JR.,)
in his official capacity as)
Attorney General of California;)
MARK B. HORTON, in his official)
capacity as Director of the)
California Department of Public)
Health and State Registrar of)
Vital Statistics; LINETTE SCOTT,)
in her official capacity as Deputy)
Director of Health Information &)
Strategic Planning for the)
California Department of Public)
Health; PATRICK O'CONNELL, in his)
official capacity as)
Clerk-Recorder for the County of)
Alameda; and DEAN C. LOGAN, in his)
official capacity as)
Registrar-Recorder/County Clerk)
for the County of Los Angeles,)
) San Francisco, California
Defendants.) Wednesday
) January 6, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By: *Katherine Powell Sullivan, CRR, CSR 5812*
Official Reporter - U.S. District Court

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PROCEEDINGS

JANUARY 6, 2010

10:05 A.M.

THE CLERK: Calling civil action C 09-2292, Kristin M. Perry, et al. versus Arnold Schwarzenegger, et al.

MR. RICO: Good morning, everyone. My name is Buz Rico. I'm the IT manager for the District Court here.

Judge Walker asked me to give a brief presentation to you all, and allow for some questions and answers afterwards, discussing the cameras that you see here in the courtroom.

11 I'm going to give you a demonstration of a test video
12 that we made the other day, to show you the concept that we
13 came up with, and give you an impression on how we're going to
14 allow for public access, how we would like to allow for public
15 access.

16 You will be able to see the presentation on the video
17 monitors there as well as hear it through the sound system. I
18 will be happy to repeat the little one-minute video that we
19 have, if you like.

20 To give you a brief overview to begin with, we have
21 three cameras, stationary cameras, that are dedicated viewing:
22 The counsel, the judge, and the witness.

23 There are no other room cameras. And the cameras do
24 not move, zoom, pan, or anything like that. They are merged
25 into a single video image that I'll bring up on the screen

1 right now. Looks like that.

2 (Image displayed)

3 There's a clock running in the upper right-hand
4 corner, notation at the actual case name and number, the court
5 logo. And then you see an actual video from that.

6 I'm going to run the video right now so you can see
7 what happens. We're able to moot the sound that's recorded and
8 is also streamed over to the ceremonial courtroom on the 19th
9 floor which we will be using for overflow purposes and down to
10 the media center that's on the first floor.

11 In addition to being able to moot the sound, we can
12 black out any of the cameras upon request of the judge. So if
13 we have a witness who does not wish to appear on camera, the
14 judge can specifically request that to the IT department, where
15 I will be sitting at my desk ready to moot any camera he
16 wishes.

17 So here runs the demo.

18 (Demonstration video played in open court.)

19 **MR. RICO:** You can see he's talking now.

20 (Demonstration video played in open court.)

21 **MR. RICO:** So, as you can see, we can moot any aspect
22 of this. We can continue to hear the audio if the camera is
23 turned off, if you wish. The only thing we can't do is, we
24 can't turn off individual microphones. There also would be no
25 point to doing that because the other microphones in the room

1 would pick up anybody else talking.

2 Also, there's really no point in turning off the
3 audio for the other rooms or the video for the other rooms,
4 necessarily, unless the courtroom is also cleared out, because
5 there will be public here from the courtroom.

6 Nevertheless, the intent right now is to record the
7 video of the hearing and then make that available to the public
8 at a slightly later time.

9 So to enact that, we've started up a YouTube channel,
10 where we are able to upload -- we already have uploaded the
11 same video you just saw.

12 We are really proud of that video, as you can tell.

13 (Laughter)

14 **MR. RICO:** So the idea is basically that.

15 We'll be recording the session. There's some
16 technical issues we have to get through to be able to get the
17 video ready for YouTube, uploaded to YouTube. And then YouTube
18 has a processing time, so odds are videos won't be available
19 until many hours, or possibly the next morning, after the
20 hearing or the session is over.

21 We're going to try to make that as quickly as
22 possible. The judge specifically did not want it broadcast
23 live. He did want the delay involved in it.

24 And, again, anything that is mooted, audio or video,
25 is then the same way recorded that way and sent to the overflow

1 chambers and to the -- the overflow courtroom, excuse me, and
2 to the media center.

3 So with that, does anybody have any questions? In
4 the back.

5 **UNIDENTIFIED SPEAKER:** There is a TV truck that we
6 were told is plugging into this. Is there a live feed out for
7 us to record, as well?

8 **MR. RICO:** The question was: There's a TV truck with
9 a live feed coming out.

10 The television stations actually do have a fiberoptic
11 link that goes to the media center. The purpose of that link
12 is so that they can connect to their own cameras down in the
13 media center for the purposes of recording interviews. It's
14 not for the purpose of patching into the system. They do not
15 have any type of patch, nor are they allowed to record what
16 they actually see on the screen, which I think is probably
17 below the quality they wish anyway. But, yeah, the purposes of
18 that patch is not for feeding out this link directly.

19 Any other questions?

20 Here in the front.

21 **MR. BURKE:** I have a number of questions for the
22 Media Coalition, but I assume the judge is also going to answer
23 questions.

24 **MR. RICO:** Yes. I'm just here for the technical
25 aspect of this.

1 There's another question over here.

2 **UNIDENTIFIED SPEAKER:** Did I take it from what you
3 said, the judge is determined -- is not inclined to telecast
4 any of the trial live?

5 **MR. RICO:** I'll leave that answer to the judge. But,
6 at this point, my direction is to record and then make
7 available later; not to make it available outside of this
8 building live.

9 We are looking into the possibility of streaming live
10 to other courthouses in the Ninth Circuit, possibly outside the
11 Ninth Circuit, which may allow the public to come to those
12 courts to see the video live, but not to allow the streaming
13 live to the media or to the public or Internet directly.

14 Yes, here in front.

15 **UNIDENTIFIED SPEAKER:** Will YouTube carry the entire
16 proceeding?

17 **MR. RICO:** The question is: Will YouTube carry the
18 entire proceeding?

19 Their only limitation, per our contract with them, is
20 a file-size limit. We don't have a limitation on the number of
21 files we can do. Our intent is to upload the entire thing.
22 There is some technical issues on that because your average
23 movie may be two hours long and we've got eight hours a day of
24 this stuff. So we are going to try to get as much of it up
25 there as we can, if not all.

1 Yes.

2 **UNIDENTIFIED SPEAKER:** What's the YouTube address?

3 **MR. RICO:** The YouTube address right now is
4 youtube.com/usdccand. So it's like U.S. District Court
5 California Northern District.

6 **UNIDENTIFIED SPEAKER:** Are you going to be recording
7 it and streaming it out in HD quality, at the very least? Or
8 do you know what quality you are sending it out?

9 **MR. RICO:** We are going to try to record this at the
10 highest possible quality. The higher the quality, the longer
11 it takes to process everything. So if speed is of the issues,
12 we might drop down the quality so we can upload it to YouTube
13 faster. Right now, we are still working out the kinks. We are
14 going to try to do the best we can.

15 Another question in front?

16 **MR. BURKE:** Are those the cameras that you plan to
17 use?

18 **MR. RICO:** Yeah. The equipment that you see in the
19 courtroom right now are the cameras we are using. They are
20 standard cameras. They are running all in HD.

21 And the video feed you see on the screen here in this
22 movie is also HD. The images that are seen in the ceremonial
23 courtroom and media center are also all HD.

24 **UNIDENTIFIED SPEAKER:** Do you happen to know if
25 YouTube has had this arrangement in other courts in the past?

1 **MR. RICO:** The question was: Does YouTube have this
2 arrangement? There are other arrangements with other courts.
3 There's a federal contract between YouTube and the federal
4 government and individual entities within the government. The
5 most noted one is, if you go to youtube.com/whitehouse, all of
6 the White House videos are there. They look really good. We
7 are trying to match them.

8 Yes.

9 **UNIDENTIFIED SPEAKER:** What do we have to worry about
10 as far as licensing is concerned? Do we have to ask anyone for
11 permission to rebroadcast, or is this public domain for the
12 government?

13 **MR. RICO:** The question was asked: Do we have any
14 issues about licensing?

15 I'm not an expert in that, but, as far as I know,
16 this is a matter of public record.

17 **UNIDENTIFIED SPEAKER:** Can we quote you as saying
18 that?

19 (Laughter)

20 **MR. RICO:** I guess whatever I say is a matter of
21 public record. I'm just the IT guy here.

22 (Laughter)

23 **MR. RICO:** I believe the judge can overrule that or
24 accept that.

25 This is also an experiment, as was noted by the

1 announcement in the Ninth Circuit. We are trying our best at
2 this.

3 This is the first time this has been done, and we
4 didn't have a lot of time to prepare. So the whole thing might
5 be cancelled or put in some kind of degraded state in some kind
6 of way, if we can't manage to keep up this full workload.

7 So, with that, the judge asked me to take about 15
8 minutes, and that's what I've taken. So thank you very much.

9 (Pause in proceedings.)

10 **THE CLERK:** Recalling civil action C 09-2292
11 Kristin M. Perry, et al. versus Arnold Schwarzenegger, et al.

12 Counsel, please step forward and state your
13 appearances along with whom you represent, for the record.

14 **MR. OLSON:** Good morning, Your Honor.

15 Theodore B. Olson, Gibson, Dunn & Crutcher, on behalf
16 of the plaintiffs.

17 **THE COURT:** Good morning, Mr. Olson.

18 **MR. BOUTROUS:** Good morning, Your Honor.

19 Theodore J. Boutrous, Jr., also for the plaintiffs,
20 also from Gibson, Dunn & Crutcher.

21 **THE COURT:** Mr. Boutrous, good morning.

22 **MR. DETTMER:** Good morning, Your Honor.

23 Ethan Dettmer, from Gibson, Dunn, on behalf of the
24 plaintiffs.

25 **THE COURT:** Mr. Dettmer.

1 couple of other issues.

2 One was the depositions and the scope -- some of the
3 deposition objections. I think the Court had mentioned them in
4 the order. We would like permission to reopen several of the
5 depositions, in light of the Ninth Circuit's amended opinion
6 which puts many documents back on the table, and the objections
7 which we think were baseless during the depositions that have
8 occurred so far.

9 **THE COURT:** Why don't we take that up at the time we
10 address the Swardstrom deposition.

11 **MR. BOUTROUS:** That makes sense, Your Honor.

12 We have a couple of housekeeping matters in
13 connection with the trial that I thought we could maybe raise
14 at the very end of the hearing.

15 **THE COURT:** That will be fine.

16 **MR. BOUTROUS:** Thank you, Your Honor.

17 **THE COURT:** There always are those housekeeping
18 details.

19 Any others? Any other items that we need to discuss
20 this morning, besides those that I mentioned?

21 Well, the first issue is, of course, the issue of
22 recording these proceedings. And you've had a demonstration by
23 the Court's IT manager, Mr. Rico, of what he is prepared to do
24 by way of recording these proceedings.

25 As you know, the Ninth Circuit Court of Appeals,

1 Ninth Circuit Council, has approved an experimental pilot
2 program to record District Court civil nonjury proceedings that
3 appear to be of public interest.

4 And this particular case has certainly been
5 identified as a case that is appropriate for that pilot
6 project.

7 Chief Judge Kozinski has authorized that these
8 proceedings today be recorded and be made available to the
9 Internet through the connection, the government contract that
10 the government has with Google YouTube.

11 Now, my understanding is that there is no objection,
12 and I think there can be essentially no objection, to the
13 streaming video and audio image of these proceedings into the
14 overflow courtroom, which is the ceremonial courtroom in this
15 building.

16 My understanding is that the Ninth Circuit would also
17 like that video to go to the Ninth Circuit courthouse here in
18 San Francisco, at 7th and Mission, and would propose to make
19 that available at Ninth Circuit courthouses in Pasadena,
20 Portland, and Seattle.

21 And my understanding, also, is that the Ninth Circuit
22 has received a request to make that streaming video available
23 to the Northern District of Illinois, at the federal courthouse
24 in Chicago.

25 I'm not aware, at this time, that there are requests

1 by any other courts, but it's conceivable there may be.

2 Those transmissions would, of course, be simultaneous
3 with the proceedings.

4 The matter which I think probably we have some reason
5 to discuss this morning is the second step of the process, and
6 that is, namely, the transmission of these proceedings on a
7 delayed basis to YouTube, for purposes of posting on the
8 Internet so the proceedings can be made generally available.

9 My understanding is that the plaintiffs do not object
10 to this. And we have Mr. Burke, from the Media Coalition, who
11 has submitted materials on this. We have some concerns that
12 Mr. Kirk and his clients have raised. And so I'm going to give
13 all parties an opportunity to add to what they have previously
14 submitted on this subject.

15 So, let me begin you with, Mr. Boutrous. What would
16 you like to add to the materials that have been submitted?

17 **MR. BOUTROUS:** Your Honor, first, I would like to say
18 that we strongly support the Court's plan, and the
19 demonstration was very helpful.

20 And we think that if ever there were a case that
21 would be perfect for this pilot program, it would be this case,
22 because of the extraordinary public interest, the effect on
23 millions of citizens in California and nationwide. It's a
24 constitutional issue.

25 I think, based on the demonstration, it confirms our

1 thinking that the Court would be able to protect privacy
2 interests to the extent they are raised, some of the concerns
3 that the proponents have raised about witnesses and reluctance
4 to be in a televised trial, with the ability to turn off the
5 camera or otherwise limit coverage as the Court deems
6 appropriate.

7 So we think this is an ideal situation to use this
8 pilot program. And, more broadly, I think the openness in
9 allowing people to see and hear what happens in the case as
10 close to simultaneously as possible really will relieve some of
11 the pressure of people wanting to come and be in the courtroom.

12 And, in the First Amendment context, not talking
13 about cameras specifically, the Supreme Court and the Ninth
14 Circuit have said that the value of openness gives people more
15 confidence in the system, whatever their views of the issues,
16 when citizens can see how things are proceeding in an orderly
17 way, with witnesses testifying, with the Court presiding. It
18 brings a confidence from the public in the results and in the
19 process. And we think that using cameras would foster those
20 values.

21 **THE COURT:** Well, televised court proceedings, of
22 course, have a checkered history.

23 What makes this case different? Why is this case not
24 going to suffer from some of the problems that have attended
25 these other cases that have been televised?

1 **MR. BOUTROUS:** Several things, Your Honor.

2 First, the fact that it is a bench trial, I think it
3 really eliminates a number of the concerns that have been
4 raised in -- regarding prior trials that have been televised,
5 and concerns about future televised trials, because it's the
6 Court. The Court can control the presentation and there aren't
7 the jury concerns.

8 Secondly, we are talking about constitutional issues,
9 not so much relating to individual circumstances. There are
10 some individuals, our clients' stories. But beyond that, we
11 are talking about issues of widespread importance and
12 constitutional questions, unlike other cases that are in trial,
13 if we are talking about a murder trial or some other type of
14 case that's very fact specific.

15 That's why I think it makes this case, really, an
16 ideal situation for having cameras in the courtroom. And I
17 think even though they object to the cameras, Counsel on the
18 other side and our team are, I think, ready to work with the
19 court to make it work smoothly and in a way that will be
20 informative to the public and, I think, for real public good.

21 **THE COURT:** Well, couldn't someone who is, say, a
22 witness in a case have some objection to having his or her
23 testimony recorded for purposes of posting on the Internet?

24 It's qualitatively different, isn't it, from getting
25 in the witness stand and testifying before a courtroom of

1 people?

2 **MR. BOUTROUS:** Theoretically, they might have an
3 objection. I don't think it's a valid one, in the sense that,
4 as the Supreme Court has said, what happens in the courtroom is
5 public property. This is the people's courtroom. And it
6 really is a mechanism for allowing people to see what is
7 happening in their courtroom.

8 That said, I do recognize that some individuals may
9 feel a shyness and a reluctance to be broadly disseminated on
10 the Internet. To the extent there is a real concern, I think
11 the Court has the ability to control that.

12 And we would certainly be -- work with the Court to
13 the extent there are real concerns and real issues regarding
14 particular witnesses.

15 Things like opening statements, closing arguments,
16 vast pieces of the case in terms of expert witnesses, I don't
17 think would raise any of those issues. That's why I think this
18 is really a good case for the pilot program. And we strongly
19 support the Court's proposal.

20 The other thing I wanted to raise was on the
21 rule-making issues that the proponents' counsel have raised.

22 It seems to me, one, this really isn't a change in
23 any of the court's rules. The General Order 58 says, "Unless
24 otherwise ordered by a judge of the court," when it's referring
25 to electronic devices.

1 And the Rule 77-3 is not being changed. The rule
2 still stands. The Ninth Circuit, which has authority in these
3 matters, has authorized a pilot program. And that's what is
4 being undertaken.

5 And, this court has invoked the immediate need
6 provision of the notice and comment statute regarding local
7 rules, and asked for comment.

8 So I think all of those procedural issues that have
9 been raised by the proponents are meritless, and, in any event,
10 have been addressed by the Court.

11 Thank you.

12 **THE COURT:** Very well. Thank you, Mr. Boutrous.

13 Mr. Burke, you have weighed in on behalf of a group
14 of media folks on this issues.

15 **MR. BURKE:** Yes, Your Honor.

16 And the Media Coalition appreciates the Court's
17 willingness to hear the concerns and perhaps enhancements that
18 the media coalition can give to the Court's consideration of
19 this particular case being the first of the Ninth Circuit's
20 trials to be televised.

21 We have submitted briefing for the Court which may
22 address some of the larger issues, and I'm happy to address
23 those. But I have three basic comments that I want to point to
24 the Court, and then talk specifically about the framework
25 that's been proposed for the camera coverage.

1 The first is, it goes to that question that these are
2 historic proceedings; and the issue that this Court will decide
3 will have profound importance to millions of people.

4 And to answer the Court's question about the
5 significance of this case versus some other case -- and the
6 nature of cases perhaps not to be named in the past, where
7 things have not gone as well as others would expect, in some
8 people's impressions -- millions have voted on this very issue
9 that the Court is going to decide. They voted recently on it.

10 And what happens in this federal court in
11 San Francisco is going to be closely followed not only in
12 California but throughout the nation and, indeed, the world.

13 So the question really is: What can more realtime TV
14 camera coverage provide to this case if it is, indeed, the
15 first case to be televised?

16 And, I think, most importantly, allowing TV camera
17 coverage will educate the public about how an independent
18 federal judiciary can effectively try, with rules of evidence
19 and procedure, complex and in this case politically sensitive
20 issues which will come up in this case, like this case.

21 It makes it, indeed, as Mr. Boutrous says, the ideal
22 case to be televised, given the issues, given the interest, and
23 given the role of the federal court in this particular issue.

24 And, of course, I guess I would be playing to the
25 audience here, both the Court and to counsel, but there is

1 tremendously experienced counsel ready to try this case and
2 zealously represent both sides. That's an ideal setting for
3 the Court to have a case where camera coverage is allowed.

4 There are, however, some concerns based on what we
5 had heard previously and certainly with what we have seen in
6 the presentation. And this is in no way to diminish the
7 extraordinary efforts that the Court's staff has clearly gone
8 to, to set up this program. But if you would grant me the
9 license to comment on certain aspects of that, the Media
10 Coalition would really like to offer potentially some
11 substantial enhancements to that.

12 But the key issue, and I would like to touch on it
13 initially, is the notion of whether or not there is going to be
14 a realtime broadcast. And the Court has outlined that there
15 may be, with respect to the overflow courtroom, the Ninth
16 Circuit courtroom and other courthouses around the country.

17 But, truly, I think if there is a concern about
18 something more expansive than that -- and there can be, and it
19 can be far more realtime -- the Court's question has to be
20 about control.

21 And I can assure the Court that the Court will have
22 full control over whatever is televised, whatever is streamed,
23 however contemporaneous that can be.

24 I want to introduce from afar Grace Wong, along with
25 the crew from In Session, formerly known as Court TV. They

1 have flown in today. They are available to talk to the Court
2 and to demonstrate to the Court and to counsel, today or some
3 other time before the trial, various additional options that
4 might be available. And let me just touch on a few of them.

5 But before I do, please, understand that this very
6 crew that's prepared to do this work was hired by the Justice
7 Department to televise live to the world Saddam Hussein's trial
8 in Baghdad, which it did without incident. Worldwide audience.

9 And what's important there, from that experience, is,
10 not only did it happen, and the crew that is here to do this is
11 the crew that you would have at your disposal, there was a
12 half-an-hour delay. That was the only delay involved in that.
13 And that did not have to happen. That was something that was
14 requested as a part of their arrangement.

15 That is something the Court should bear in mind, in
16 terms of the bona fides of this group who have literally
17 thousands of hours of experience of California camera coverage,
18 more than 30 federal trials, principally through the trial
19 period in the early '90s. They have tremendous experience, and
20 they would make that available to the Court.

21 Let me just touch on four things, with respect to
22 what was outlined. One is TV camera quality.

23 And, Your Honor, no offense to the cameras who
24 obviously can't be offended, but those are consumer-quality
25 cameras. They are not broadcast production quality cameras.

1 And that significance, if this Court wants to
2 achieve, especially on a downloaded streaming basis, wants high
3 production values with respect to the camera coverage that it
4 would allow. It looks pretty good with respect to the
5 demonstration here in the court. But from the end of those
6 receiving at the end, perhaps on an Internet connection on the
7 download, that quality difference will be significant. So
8 replacing the cameras with broadcast-quality cameras would be
9 an important upgrade.

10 Secondly, these microphones work well, but these are
11 not broadcast-quality audio. There is no -- there doesn't
12 appear to be any separate broadcast-quality audio available for
13 the proceeding. That would be an important, yet very simple,
14 change that could be made to enhance what the Court has
15 proposed.

16 Third, the issue of split screens, we saw the
17 demonstration. And in practice that will work. But with a bit
18 of technology, referred to generally as a switch feed function,
19 if one person is speaking, the camera can -- the image that
20 people can see is of that person speaking as opposed to a
21 permanent breaking down of three different. So if no one is
22 speaking in two of the boxes, that person's image will not be a
23 tiny image.

24 And especially, again, for screening and streaming
25 online, that can be a critical distinction as to what can be

1 seen and what can't, in terms of the video.

2 There's also some technical support that could be
3 produced. And I did note Mr. Rico's comment that the coverage
4 that the staff might be able to provide -- and I'm not trying
5 to quote him; we tried to make him into a lawyer earlier, and
6 that wasn't fair -- the whole thing might be cancelled or
7 degraded if it can't be accomplished by the Court's staff.

8 And this is exactly what we're concerned about. And,
9 you know, with due respect, the in camera crew are the best in
10 the business. And this is what they do for a living. And that
11 will not happen on their watch, and it doesn't have to be a
12 concern for the Court.

13 **THE COURT:** You mean the In Session crew?

14 **MR. BURKE:** Correct. I apologize, especially to my
15 client.

16 Broadcast-quality footage is available in different
17 formats. And given the range of media that will be covering
18 this, there is definition, high-def, and digital, and various
19 formats will be requested. That's an issue that can be
20 addressed by the Media Coalition with technology. I do not
21 know that the court is prepared or the staff is prepared to
22 address that.

23 And, also, finally, the issue of distributed network
24 for Internet access. We've heard this morning about the
25 YouTube site. But, clearly, the downfall there, the

1 disadvantage there is that is not going to be instantaneous.

2 When In Session does its live coverage, In Session is
3 able to stream live that coverage on cnn.com/live. And it's
4 available.

5 And, in this instance, especially with the experience
6 of the California Judicial Council and its website, which saw
7 it crash for a few hours on March 5th, certainly the Court does
8 not want to be streaming on its own site.

9 So, certainly, the suggestion of YouTube is a change,
10 and an improved one, in terms of bandwidth capacity. But it
11 doesn't address the issue of instantaneous access. That is
12 something I really hope the Court would consider differently.

13 There is a substantial demand here, and there will be
14 heavy network use, which would call for a more distributed
15 network for Internet access.

16 I'm happy to address any of these particular points.
17 I'm happy to have Ms. Wong talk with the Court, answer the
18 Court's questions or provide a demonstration, including robotic
19 cameras, smaller cameras, cameras that you won't know are
20 there. And that's the technology that's available to the
21 Court. Please, just ask.

22 **THE COURT:** Very well. Thank you, Mr. Burke.

23 Mr. Kirk, do you want to weigh in on behalf of your
24 clients?

25 **MR. KIRK:** Thank you very much, Judge Walker.

1 And, may it please the Court, and let me emphasize,
2 first, how happy I am to be before Your Honor.

3 (Laughter)

4 **THE COURT:** Even though it's only once.

5 **MR. KIRK:** Even though it's only once.

6 I'd like to begin with Your Honor's introductory
7 comments concerning, sort of, the state of play, and, first,
8 confirm that Your Honor was correct that the
9 defendant-intervenors do not have an objection to providing
10 streaming coverage to the overflow courtroom here at the
11 courthouse.

12 This morning was, I think, the first we've heard of
13 the suggestion that other courthouses around the country, in
14 Chicago, Pasadena, Seattle, and Portland, and perhaps the Ninth
15 Circuit courthouse, as well, might be interested in having
16 streaming coverage there.

17 And while it's certainly not quite the same as a live
18 broadcast to the public, it does strike me, at least on first
19 hearing, at least a step in that direction as we, you know, add
20 five or six different sites where the material can be
21 broadcast. It at least is stepping in the direction of a
22 public broadcast.

23 So I would register an objection to that, that I
24 would just fold into our objection to the broader question of
25 whether the proceedings ought to be broadcast or recorded for

1 later broadcast, as I understand the suggestion that's on the
2 table.

3 We've laid out in our papers in, I think, two or
4 three letters that we've submitted to the Court, the basis for
5 our objections. And, largely, I just rest on those papers.

6 We believe the trial should not be televised largely
7 for the reasons that were stated in multiple proceedings over
8 the last 15 years by the Judicial Conference of the
9 United States.

10 We do think broadcast imperils proponents' right to a
11 fair trial before this Court, and we do think it will violate
12 their due process rights.

13 **THE COURT:** How so?

14 **MR. KIRK:** Probably the most compelling concern we
15 have, Your Honor -- and it's one that the Judicial Conference
16 has repeatedly emphasized -- is the unacceptable risk that
17 broadcasting will have an impact on witnesses' testimony. And
18 the Judicial Conference has kind of identified two different
19 ways. The one that, quite frankly, concerns us the most is the
20 potential for intimidating witnesses.

21 As the Court is aware, and as I think we've
22 documented in our papers, the Judicial Conference has voiced
23 particular concern about the possibility of intimidating
24 witnesses as a result of broadcasts.

25 And, Your Honor, we do believe that those concerns

1 are at their apex in this particular case. This is --

2 **THE COURT:** Aren't those concerns generally voiced in
3 connection with criminal trials? Whereas, here we have a group
4 of individuals, your clients, who organized and gathered to put
5 together a political campaign to change the constitution of
6 California; who undertook to raise a great deal of money to run
7 that campaign and run extensive advertisements and a very
8 extensive campaign. They assumed a public face, if you will, a
9 public responsibility in doing so.

10 And the witnesses on your witness list are academics,
11 for the most part, people who stand up before classrooms all
12 the time and express their views and opinions and so forth.

13 Aren't these folks different from the kind of
14 individuals that the Judicial Council has expressed concern
15 about, in connection with witness intimidation?

16 **MR. KIRK:** I don't believe so, Your Honor.

17 It's true that some of the Judicial Conference's
18 concerns are particular to criminal cases, but they have been
19 quite clear that those concerns carry over to testimony in
20 civil cases as well.

21 That's why their policy is not limited to opposing or
22 prohibiting the use of broadcast cameras in criminal cases. It
23 extends to civil cases as well.

24 In terms of the witnesses on our list, yes, our
25 experts, many of them are academics. Nevertheless, it's one

1 thing to stand up in the classroom. It's another thing to be
2 testifying across the country and across the world on camera in
3 a case like this, one that has raised passions on both sides.
4 It's a case that is contentious and highly politicized.

5 And, most importantly, Your Honor, the record is full
6 of instances in which individuals who have supported
7 Proposition 8 have been subjected to harassment and
8 intimidation.

9 **THE COURT:** How is the testimony of the witnesses
10 going to be different if the testimony is available on the
11 Internet?

12 **MR. KIRK:** The Judicial Conference's analysis to that
13 question -- which also drew on the Supreme Court's decision in
14 the *Estes* case, *Estes vs. Texas* --

15 **THE COURT:** That goes back a good many years.

16 **MR. KIRK:** It does, Your Honor. It's, I believe,
17 1965.

18 And I would also commend the Court, by the way, to
19 Justice Harlan's concurring opinion, which also addressed the
20 effect on witnesses. And all of those sources basically say
21 the same thing.

22 **THE COURT:** This was a criminal trial, wasn't it?

23 **MR. KIRK:** It was a criminal trial, Your Honor;
24 although, the discussion of the effect on witnesses didn't
25 appear to be -- certainly, the discussion in the Court's

1 opinions didn't appear to be focused on the fact that it was
2 criminal. But, yes, Your Honor is correct, it was criminal.

3 The points that were made in the Estes opinions in
4 the various materials that the Judicial Conference have been
5 published is that the effect on witnesses is twofold. On the
6 one hand, the knowledge that instead of just testifying to
7 those that are sitting in the courtroom you're testifying to
8 untold thousands and millions of people can have the impact of
9 causing some witnesses to be more timid, to be more retiring,
10 to testify differently than they would in a circumstance where
11 they are just in the courtroom.

12 Conversely, Your Honor, the Supreme Court's opinions
13 and the Judicial Conference's various reports and testimony
14 make the point that some witnesses adopt a bit more bravado or
15 overdramatization, knowing that what they are saying is on a
16 broader platform; it's going out across the world.

17 Now, in, I think the Estes case, if I'm recalling
18 correctly, the Court made the point that -- and, certainly, the
19 Judicial Conference has made this in its materials, that there
20 is no way to know in advance that Mr. Smith, who is going to
21 testify on Tuesday, will be in one category or the other. But
22 the conclusion that was reached was that the risk is just
23 unacceptable. The Judicial Conference's conclusion was that
24 and is that the risk to a fair trial is unacceptably high if
25 broadcast is permitted.

1 Now, Your Honor, I did want to respond to a point
2 that Mr. Boutrous made in this regard, and it was featured in
3 the technical presentation that we received this morning from
4 the Court's staff.

5 And that is, Mr. Boutrous suggested that, well, to
6 the extent a witness might feel concerned about it or
7 intimidated by it, the Court could order that that witness's
8 testimony or his picture would be blacked out. And the
9 presentation we saw showed that, indeed, the Court's staff has
10 that capability.

11 We don't think that solves the problem. And the
12 Judicial Conference, again, in -- I believe, in testimony
13 responding to proposed legislation, specifically addressed that
14 issue and concluded that that solution does not solve the
15 problem because, number one, in this particular case, a witness
16 who is identified as not wanting to appear and testify on
17 camera, that fact, in and of itself, will shine a spotlight on
18 that person and draw additional attention to that person that
19 otherwise would not be evoked if the witness was just one of
20 the dozens testifying in open court like all the other
21 witnesses.

22 And, second, that possibility of blacking out doesn't
23 address the other side of the coin that the Judicial Conference
24 was worried about; that is, the witness whose testimony is
25 altered in the overdramatization fashion that the -- that a

1 live broadcast or a recorded broadcast that goes up a day later
2 provides as a platform.

3 **THE COURT:** Since I left the practice of law 20 years
4 ago, it has become common for deposition testimony to be
5 videotaped.

6 **MR. KIRK:** That's true, Your Honor. That does
7 happen.

8 **THE COURT:** It does happen quite frequently.

9 And those videotapes are played in trials. That
10 process seems not to have affected deposition testimony in any
11 material way. The testimony is what it is. And, of course,
12 it's very helpful to a fact finder, whether it's a judge or a
13 jury, to be able to see the witness in deposition testifying.
14 It's proven to be a very powerful enhancement of this method of
15 discovery.

16 So why can you not say the same thing about trial
17 testimony? Seeing it, essentially, as it unfolds is much more
18 informative than reading a cold record or reading a newspaper
19 story about the testimony.

20 **MR. KIRK:** Judge Walker, I don't believe the impact
21 on a witness whose deposition is being videotaped is the same
22 as the impact on a witness who is testifying at trial knowing
23 that the video recording of that testimony will be broadcast
24 throughout the world.

25 In the deposition setting, the videotape is taken or

1 the digital -- I guess they are digital now -- is recorded and
2 kept, but it's not broadcast to the world. Instead, it's kept
3 in the lawyer's files. Maybe a clip of it will three years
4 later be shown at the trial. Maybe it won't. But it's not
5 broadcast worldwide.

6 As I said, we're not objecting to the physical
7 presence of the camera in the courtroom for the purpose of
8 showing the testimony in the overflow courtroom. And I would
9 submit that that's perhaps analogous to the deposition
10 scenario.

11 But the primary impact on the witness is the
12 knowledge that the testimony is going to be beamed or broadcast
13 to thousands if not millions around the country, and, indeed,
14 with the Internet around the world.

15 I did want to also, very briefly, Your Honor, respond
16 to a couple of the procedural points that Mr. Boutrous made.

17 First, Mr. Boutrous suggested that the Court's rules
18 that were in effect up until mid December perhaps haven't been
19 changed, and perhaps those might have authorized the broadcast
20 of these proceedings. We certainly don't agree with that
21 suggestion.

22 With regard to General Order 58, that order, I don't
23 believe, has been changed since 1995. And if the Court takes a
24 look at that, paragraph Roman numeral III is quite clear in
25 adopting the policy of the Judicial Conference of the

1 United States, which is again a policy against the broadcast of
2 civil proceedings.

3 Mr. Boutrous made reference to paragraph IV, Roman
4 IV, which begins with a "except as authorized by the presiding
5 judge." And, then, one of the exceptions it authorizes is, if
6 the judge authorizes it, photography can take place, for
7 various reasons, in the courtroom.

8 That provision in Roman IV does not eliminate the
9 policy position taken in paragraph 3 of General Order 58. And
10 any confusion on that, I think, was probably cleared up, if the
11 Court takes a look at the media guide that the clerk's office
12 here in the District Court published for this very case. That
13 media guide, at least as it stood in December, and I think it
14 was subsequently revised a bit, in light of the changes in the
15 local rules, but as it stood in December, and I think as it
16 stood today, it pointed out to the media and other interested
17 people the General Order 58 adopts the Judicial Council's
18 policy, and it prohibits the broadcast or televising of civil
19 proceedings.

20 Now, with regard to Local Rule 77-3, as I understand
21 the situation, the Court has amended that. And the amendment
22 does state that it authorizes the court -- it maintains the
23 prohibition against the broadcast of civil proceedings, but it
24 includes an exception in which the court can have a particular
25 case participate in the pilot program that the Ninth Circuit

1 had announced.

2 We have outlined, I think, most of our objections to
3 the procedures that led to the adoption of that rule, in our
4 papers, and I won't repeat those. The only new points I would
5 make is, I understand that either yesterday, or perhaps the day
6 before, the court posted a revised copy of the rule with a
7 notice that indicated the court was invoking the immediate need
8 exception that was set forth in 28 U.S.C. Section 2071E.

9 I would just note for the Court that we don't believe
10 that there is any immediate need for this particular case to be
11 broadcast.

12 It would be our view that to the extent the rules are
13 going to be changed on a going forward basis, and a pilot
14 program is proper and authorized, that that ought to be done
15 for another what we would submit would be more appropriate case
16 that could --

17 **THE COURT:** What would be an appropriate case?

18 **MR. KIRK:** Your Honor, our view would be there is
19 none, because we agree with the view taken by the Judicial
20 Conference that there is none.

21 But if that view is rejected, I would respectfully
22 submit, an appropriate case would be a more run-of-the-mill
23 sort of case that better captures the daily operations,
24 perhaps, of the Federal District Court. And certainly not a
25 case where any party has objected or any witness has objected.

1 And certainly not a case where there is already specific record
2 evidence demonstrating that because of the highly contentious
3 and politicized nature of the underlying issue, that
4 individuals have been subjected to harassment and intimidation.
5 If ever there was a case where it was appropriate, Your Honor,
6 we would respectfully submit, this isn't it.

7 So we would say, Your Honor, that we don't believe
8 that there is an immediate need that justifies changing the
9 rule without appropriate notice and comment.

10 And the one other point I'd like to make, in putting
11 the rule out for notice and comment, even as the immediate need
12 exception was invoked, the period that was authorized for
13 comment was exceptionally short. I think it was on the order
14 of five business days.

15 And it would be our view that, especially given the
16 magnitude of the change being proposed to the court's rules,
17 and the fact that it is contrary to a long-standing policy
18 adopted by the Judicial Conference of the United States that
19 the Conference believed was necessary to ensure fair trials, we
20 would submit that a longer comment period really is
21 appropriate.

22 And with that, Your Honor, we would be happy to rest
23 on the papers that we've submitted. And I thank you so much,
24 Your Honor, for taking the time to hear our argument.

25 **THE COURT:** Very well. Thank you, Mr. Kirk.

1 **MR. BOUTROUS:** Your Honor.

2 **THE COURT:** One last word, Mr. Boutrous, very
3 quickly.

4 **MR. BOUTROUS:** May I, Your Honor, very quickly? I
5 want to focus on this witness issue, very briefly.

6 These witnesses and the proponents are involved in a
7 case that will affect the rights of millions. The proponents
8 thrust themselves into this issue. As the Court noted, ran a
9 \$40 million campaign, highly public. They have their own
10 videos on YouTube. Dr. Marks, one of the proponents' experts,
11 links in his bio to a YouTube bio of himself. Schubert and
12 Flint have highly-publicized YouTube videos about this case.

13 And I think it's ironic that the proponents are
14 claiming that their witnesses have been subjected to harassment
15 and intimidation in a case where we're talking about stripping
16 away the rights of individuals who themselves have been subject
17 to a history of that kind of behavior.

18 So I think that the arguments about the witnesses and
19 the change in witness testimony are meritless, speculative, and
20 in some ways water under the bridge.

21 The Judicial Conference of the Ninth Circuit, when it
22 issued the release in the pilot program, addressed those issues
23 and wanted to experiment. This is the perfect case to do it
24 in, and we would ask the Court to move forward with this plan.

25 Thank you, Your Honor.

1 **THE COURT:** Very well. Well, thank you, Counsel.

2 With respect to how we proceed from here, let me make
3 the following comments:

4 First of all, this certainly is a case that has
5 sparked widespread public interest. The issues are issues that
6 have been widely debated in a variety of different forums.

7 Now, of course, the issues that we're going to try
8 here are not so much the policy issues, as the constitutional
9 issues that the plaintiffs have raised and that the
10 defendant-intervenors have joined.

11 And those issues, as I said, I think, at our very
12 first gathering, are highly fact laden. One need only pick up
13 the papers and start reading them to observe that there are a
14 lot of factual hypotheses that have been asserted on both
15 sides.

16 And the other cases that have involved this issue,
17 the issue that is the ultimate issue here, that I'm aware of,
18 have not been aired in the course of a trial, in which
19 witnesses get on the stand, testify, make their factual
20 assertions, and are subject to cross-examination.

21 Facts that are asserted in a declaration or affidavit
22 are quite different from facts that appear and that are voiced
23 in the witness stand and subjected to cross-examination.

24 So I think a trial can be highly informative. And
25 because of the high information content associated with these

1 proceedings, I think this is a case which merits very serious
2 consideration for widespread distribution.

3 And, of course, today we have the capability of
4 providing that kind of widespread distribution through,
5 essentially, the Internet.

6 There's, of course, another aspect of this. As the
7 lawyers here know far better than anyone else, trials sometimes
8 involve a lot of tedium. And I don't want to pop anybody's
9 balloon, but it may very well be that as the trial unfolds
10 there will be a lot less interest in the case than there may be
11 now. And, perhaps, if that's the situation, maybe that would
12 be an important lesson to be drawn from these proceedings.

13 (Laughter)

14 **THE COURT:** But, nonetheless, it does seem to me that
15 if we are able to show the public how these issues are dealt
16 with in a judicial proceeding, with some of the most capable
17 and skilled lawyers in the United States, and some of the most
18 responsible lawyers in the United States, who will not, I am
19 quite sure, engage in some of the unfortunate tactics that have
20 perhaps marred other cases in the past, that have been subject
21 to broadcast, so I think this case clearly merits a serious
22 consideration for distribution through the processes that have
23 been outlined.

24 I don't know, with all due respect, Mr. Kirk, that a
25 run-of-the-mill is the kind of case that will provide the civic

1 lesson that might be helpful. I think the only time that
2 you're going to draw sufficient interest in the legal process
3 is when you have an issue such as the issues here, that people
4 think about, talk about, debate about and consider.

5 The run-of-the-mill traffic accident or injury case
6 is simply not a case that is likely to draw the attention that
7 is necessary to provide that lesson to the public.

8 And I've always thought that if the public could see
9 how the judicial process works, they would take a somewhat
10 different view of it.

11 I've noticed that in the last 20 years with juries,
12 how they find their experience listening to the process so very
13 revealing. And they come away from it with a much deeper and
14 keener appreciation of the judicial process.

15 So I think it's worth trying in this case.

16 With respect to the various rule changes, the subject
17 of broadcast or televising federal court proceedings is one
18 that has been debated in the judiciary and in the councils of
19 the judiciary, the federal judiciary, for many, many years.

20 There was a proposal for a pilot project as early as
21 1990, that was advanced. It was advanced in this court by the
22 late chief judge of this court, Robert Peckham, at one of the
23 very first judges meetings that I attended.

24 I recall thinking, if there was any motion that it
25 would be safe for a brand-new judge to make at a judges'

1 meeting, it would be a motion for supporting a recommendation
2 by Judge Peckham, for participation in a pilot project very
3 much like the pilot project we are now dealing with. So I made
4 the motion at the judges' meeting. The motion died for want of
5 a second.

6 Well, the subject continued to be debated. It was
7 debated at the Ninth Circuit Judicial Conference in 2007, and.
8 The Conference, at that time, adopted a resolution seeking a
9 change in Judicial Conference policy, to permit photographing
10 and recording and broadcasting in nonjury civil cases.

11 Now, not much was done on that for some period of
12 time. I think, primarily, because the Ninth Circuit Judicial
13 Conference was hopeful that Conference policy would change.

14 The Judicial Council of the Ninth Circuit forwarded
15 to the Judicial Conference Committee on Court Administration
16 the recommendation of the Ninth Circuit Conference, requested
17 action in May of this year. Nothing occurred. I understand
18 the court administration committee considered the Ninth
19 Circuit's request, but took no action.

20 And, so, in light of that, Chief Judge Kozinski, in
21 October, October 22nd, appointed a committee to evaluate the
22 possibility of adopting a Ninth Circuit rule. And, clearly,
23 you're correct, this case was very much in mind at that time
24 because it had come to prominence then and was thought to be an
25 ideal candidate for consideration.

1 And the committee, which consisted of Judge Sidney
2 Thomas, Chief Judge Audrey Collins, in the Central District of
3 California, and myself, made a recommendation to the Ninth
4 Circuit Judicial Council, which unanimously adopted the rule
5 which you've seen, permitting a pilot project, an
6 experimental -- it was really a pilot project that was
7 announced in the Ninth Circuit press release.

8 Our court, in response to that, met and amended Local
9 Rule 77-3, to permit participation in that Ninth Circuit pilot
10 project.

11 At the time, we considered that to be a conforming
12 amendment. Our rules, of course, conform and must conform to
13 the Federal rules and to the Ninth Circuit rules. And I think
14 our view, at the time, was that was simply conforming our local
15 rules to the Circuit rules.

16 And, then, the issue was raised as to whether or not
17 there was an adequate basis. And so I take responsibility for,
18 perhaps, a mixed signal with the court clerk, who did not have
19 the opportunity to consider that basis for the amendment. And
20 that may be the reason why the comment period started later
21 than it might otherwise have started.

22 But, in any event, I'm satisfied, after consideration
23 of the matter and discussions with those in the Circuit who
24 have views and authority on these matters, that the path is
25 clear for participation in a pilot project of this case, should

1 we determine that that is appropriate. And I think for the
2 reasons I mentioned a moment ago, that it is appropriate.

3 Now, with respect to the comments made by Mr. Burke,
4 I very much appreciate that In Session and other media may have
5 a great deal more experience than the court staff, may have
6 equipment advantages and superiorities over that that the Court
7 has. Might very well provide higher quality audio and video
8 images of the proceedings. And perhaps that would be -- would
9 perhaps be helpful.

10 But, I think, in view of the -- I don't want to say
11 the experimental nature, but the nature of these proceedings,
12 it's important for this process to be completely under the
13 Court's control, to permit the Court to stop it if that proves
14 to be a problem, if it proves to be a distraction, if it proves
15 to create problems with witnesses.

16 And, so, I think this is a process that must remain
17 under the Court's control. And, so, with whatever limitations
18 we may be working with, I'm not prepared, frankly, to permit a
19 third-party vendor to come in and to provide these services. I
20 think those steps must remain under the control of the Court.

21 And, as I say, if at any time the matter becomes a
22 distraction, it creates collateral problems, if we have
23 technical difficulties -- and we may very well have technical
24 difficulties, given the limitations that we confront -- I will
25 discontinue the program.

1 But I think it's worth attempting in a case of this
2 particular nature and this particular interest.

3 So I understand your concerns, Mr. Kirk, and respect
4 them, but I think we should proceed step by step.

5 Now, what I will do is to tell Chief Judge Kozinski
6 of my determination. And if he approves, then we will begin a
7 recording of the proceedings beginning on Monday; and the
8 distribution of those recordings in the manner that has been
9 described to you by Mr. Rico.

10 So I want to make it clear, this case is about
11 Proposition 8. It is not about television in the courtroom.

12 So let's turn to those issues. And I think the first
13 issue we ought to address is the motion to intervene by
14 Imperial County.

15 Ms. Monk, are you going to be dressing that?

16 **MR. TYLER:** Your Honor, I will. Thank you.

17 **THE COURT:** Let's see, you are Mr. --

18 **MR. TYLER:** Robert Tyler, Your Honor.

19 **THE COURT:** Tyler.

20 **MR. TYLER:** Your Honor, first, I'd like to thank you
21 and the Court staff for allowing this motion to proceed on the
22 expedited basis that it has.

23 First --

24 **THE COURT:** Well, I appreciate your prompt response.

25 **MR. TYLER:** Well, we did everything we can to avoid

Exhibit 3

available at: <http://www.usacourts.gov/testimony/exhibit4CameraTest05.pdf>

STATEMENT OF JUDGE DIARMUID O’SCANNLAIN

ON BEHALF OF

THE JUDICIAL CONFERENCE OF THE UNITED STATES REGARDING

S. 829 AS APPLIED TO FEDERAL TRIAL COURTS

Introduction

The Judicial Conference strongly opposes S. 829, a bill that would “allow media coverage of court proceedings,” so far as it applies to the federal trial courts. Of course, the Judicial Conference cannot and does not speak for the Supreme Court.

The federal judiciary has examined the issue of whether cameras should be permitted in the federal courts for more than six decades, both through case law and Judicial Conference consideration. The Judicial Conference in its role as the policy-making body for the federal judiciary has consistently expressed the view that camera coverage can do irreparable harm to a citizen’s right to a fair and impartial trial. On the other hand, since 1994 the Judicial Conference has permitted “the photographing, recording, or broadcasting of appellate arguments” in the Circuit Courts of Appeals. But, as to the trial courts, we believe that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly

negative impact on the trial process. Moreover, in civil cases cameras can intimidate civil defendants who, regardless of the merits of their case, might prefer to settle rather than risk damaging accusations in a televised trial. Cameras can also create security concerns in the federal courts. Finally, cameras can create privacy concerns for countless numbers of persons, many of whom are not even parties to the case, but about whom very personal information may be revealed at trial.

These concerns are far from hypothetical. Since the infancy of motion pictures, cameras have had the potential to create a spectacle around trial court proceedings. Obvious examples include the media frenzies that surrounded the 1935 Lindbergh baby kidnapping trial, the murder trial in 1954 of Dr. Sam Sheppard, and the more recent Menendez brothers and O.J. Simpson trials. We have avoided such incidences in the federal courts due to the present bar of cameras in the trial courts, which S. 829 now proposes to overturn.

The federal courts have shown strong leadership in the continuing effort to modernize the litigation process. This has been particularly true of the federal judiciary's willingness to embrace new technologies, such as electronic case filing and access, videoconferencing, and electronic evidence presentation systems. The federal courts have also established community outreach programs in which

several thousand students and teachers nationwide have come to federal courthouses to learn about court proceedings. Our opposition to this legislation, therefore, is not, as some may suggest, borne of a desire to stem technology or access to the courts. We oppose the broadcasting of federal trial court proceedings because it is contrary to the interests of justice, which it is our most solemn duty to uphold.

Today I will discuss some of the Judicial Conference's specific concerns with this legislation, as well as with the issues of cameras in the trial courtroom, generally. However, before addressing those concerns, I would like to provide you with a brief review of the Conference's experience with cameras, which will demonstrate the time and effort it has devoted to understanding this issue over the years. I must emphasize at the threshold that today, as in the past, the federal courts, both appellate and trial, are at all times open to the public.

II. Background on Cameras in the Federal Courts

Whether to allow cameras in the courtroom is far from a novel question for the federal judiciary. Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. That rule states that “[t]he taking of photographs in the courtroom during the progress of judicial

proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court.”

In 1972, the Judicial Conference adopted a prohibition against “broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto. . . .” The prohibition applied to criminal and civil cases. The Conference has, however, repeatedly studied and considered the issue since then.

In 1988, Chief Justice William Rehnquist appointed an Ad Hoc Committee on Cameras in the Courtroom, which recommended that a three-year experiment be established permitting camera coverage of certain proceedings in selected federal courts. In 1990, the Judicial Conference adopted this recommendation, and authorized a three-year pilot program allowing electronic media coverage of civil proceedings in six district and two appellate courts, which commenced July 1, 1991. The courts that volunteered to participate in the pilot project were the U.S. Courts of Appeals for the Second and Ninth Circuits, and the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and Western District of New York.

The Federal Judicial Center (FJC) conducted a study of the pilot project and

submitted its results to a committee of the Judicial Conference in September 1994.¹ The research project staff made a recommendation that the Conference “authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms. . . .” It is important to note that the recommendations included in the report were reviewed within the FJC but not by its Board.

The Conference disagreed with the conclusions drawn by the FJC staff and concluded that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern. The paramount responsibility of a United States judge is to uphold the Constitution, which guarantees citizens the right to a fair and impartial trial. Taking into account this considerable responsibility placed upon judges, the Conference concluded that it was not in the interest of justice to permit cameras in federal courtrooms.

Two years later, at its March 1996 session, the Judicial Conference again considered the issue. At that session, the Conference voted strongly to urge each circuit judicial council to adopt, pursuant to its rulemaking authority articulated in 28 U.S.C. § 332(d)(1), an order reflecting the Conference’s September 1994

¹In 1994, the Federal Judicial Center published a report entitled *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals*. The period used by the Federal Judicial Center for its study was July 1, 1991, to June 30, 1993.

decision not to permit the taking of photographs or radio and television coverage of proceedings in U.S. district courts. The Conference also voted strongly to urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

The Conference, however, made a distinction between camera coverage for appellate and district court proceedings. Because an appellate proceeding does not involve witnesses and juries, the concerns of the Conference regarding the impact of camera coverage on the litigation process were reduced. Therefore, the Conference adopted a resolution stating that “[e]ach court of appeals may decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt.”

The current policy, as published in the *Guide to Judiciary Policies and Procedures* states:

A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investigative, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:

- (a) for the presentation of evidence;
- (b) for the perpetuation of the record of the proceedings;
- (c) for security purposes;

- (d) for other purposes of judicial administration; or
- (e) for the photographing, recording, or broadcasting of appellate arguments.

When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will be consistent with the rights of the parties, will not unduly distract participants in the proceeding, and will not otherwise interfere with the administration of justice.

Presently, only two of the 13 appellate courts, the Second and Ninth Circuits, have decided to permit camera coverage in appellate proceedings. This decision was made by the judges of each court. As for cameras in district courts, most circuit councils have either adopted resolutions prohibiting cameras in the district courts or acknowledged that the district courts in that circuit already have such a prohibition.

Finally, it may be helpful to describe the state rules regarding cameras in the courtroom. While it is true that most states permit some use of cameras in their courts, such access by the media is not unlimited. The majority of states have imposed restrictions on the use of cameras in the court or have banned cameras altogether in certain proceedings. Although it is somewhat difficult to obtain current information, it appears that approximately 31 states that permit cameras have restrictions of some kind written into their authorizing statutes, such as allowing coverage only in certain courts, prohibiting coverage of certain types of

proceedings or of certain witnesses, and/or requiring the consent of the parties, victims of sex offenses, and witnesses. Thirteen states do not allow coverage of criminal trials. In nine states, cameras are allowed only in appellate courts. The District of Columbia prohibits cameras altogether. Utah allows only still photography at civil trials. In fact, only 19 states provide the presiding judge with the type of broad discretion over the use of cameras contained in this legislation. It is clear from the widely varying approaches to the use of cameras that the state courts are far from being of one mind in the approach to, or on the propriety and extent of, the use of cameras in the courtroom.

III. Judicial Conference Concerns Regarding S. 829, As Applied to Trial Courts

I would now like to discuss some of the specific concerns the Judicial Conference has with S. 829, as well as the more general issue of media coverage in trial courtrooms.

A. Cameras Negatively Impact the Trial Process

Supporters of cameras in the courtroom assert that modern technology has made cameras and microphones much less obvious, intrusive or disruptive, and that therefore the judiciary need not be concerned about their presence during proceedings. That is not the issue. While covert coverage may reduce the bright

lights and tangle of wires that were made famous in the Simpson trial, it does nothing to reduce the significant and measurable negative impact that camera coverage can have on the trial participants themselves.

Proponents of cameras in the courtroom argue that media coverage would benefit society because it would enable people to become more educated about the legal system and particular trials. But even if this is true, increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases. While judges are accustomed to balancing conflicting interests, balancing the positive effects of media coverage against an external factor such as the degree of impairment of the judicial process that camera coverage would bring is not the kind of thing judges should balance. Rather, our mission is to administer the highest possible quality of justice to each and every litigant. We cannot tolerate even a little bit of unfairness (based on media coverage), notwithstanding that society as a whole might in some way benefit, for that would be inconsistent with our mission.

The Conference maintains that camera coverage would indeed have a notably adverse impact on trial court proceedings. This includes the impact the camera and its attendant audience would have on the attorneys, jurors, witnesses,

and judges. We believe, for example, that a witness telling facts to a jury will often act differently when he or she knows that thousands of people are watching and listening to the story. This change in a witness's demeanor could have a profound impact on a jury's ability to accurately assess the veracity of that witness. Media coverage could exacerbate any number of human emotions in a witness from bravado and over dramatization, to self-consciousness and under reaction. In fact, even according to the FJC study (which is discussed in more detail later in this statement), 64 percent of the participating judges reported that, at least to some extent, cameras make witnesses more nervous. In addition, 46 percent of the judges believed that, at least to some extent, cameras make witnesses less willing to appear in court, and 41 percent found that, at least to some extent, cameras distract witnesses.

Such effects could severely compromise the ability of jurors to assess the veracity of a witness and, in turn, could prevent the court from being able to ensure that the trial is fair and impartial. Likewise, television cameras could have a profound impact on the deliberations of a jury. The psychological pressures that jurors are already under would be unnecessarily increased by the broader exposure resulting from the broadcasting of a trial and could conceivably affect a juror's judgment to the detriment of one of the parties.

B. S. 829 Inadequately Protects the Right to a Fair Trial

The primary goal of this legislation is to allow radio and television coverage of federal court cases. While there are several provisions aimed at limiting coverage (*i.e.*, allowing judges the discretion to allow or decline media coverage; authorizing the Judicial Conference to develop advisory guidelines regarding media coverage; and requiring courts to disguise the face and voice of a witness upon his or her request), the Conference is convinced that camera coverage could, in certain cases, so indelibly affect the dynamics of the trial process that it would impair citizens' ability to receive a fair trial.²

For example, Section 1(a) and (b) of the bill would allow the presiding judge of an appellate or district court to decide whether to allow cameras in a particular proceeding before that court. If this legislation were to be enacted, we are confident that all federal judges would use extreme care and judgment in making this determination. Nonetheless, federal judges are not clairvoyants. Even the most straightforward or “run of the mill” cases have unforeseen developments. Obviously a judge never knows how a lawyer will proceed or how a witness or party will testify. And these events can have a tremendous impact on the trial

²We recognize that the legislation would sunset the authority for district court judges to permit cameras three years after the date of enactment of the Act. There is no comparable sunset provision for the appellate courts.

participants. Currently, courts have recourse to instruct the jury to disregard certain testimony or, in extreme situations, to declare a mistrial if the trial process is irreparably harmed. If camera coverage is allowed, however, there is no opportunity to later rescind remarks heard by the larger television audience. This concern is of such importance to the Conference that it opposes legislation that would give a judge discretion to evaluate in advance whether television cameras should be permitted in particular cases.

We also are concerned about the provision that would require courts to disguise the face and voice of a witness upon his or her request. Anyone who has been in court knows how defensive witnesses can be. Frequently they have a right to be. Witnesses are summoned into court to be examined in public. Sometimes they are embarrassed or even humiliated. Providing them the choice of whether to testify in the open or blur their image and voice would be cold comfort given the fact that their name and their testimony will be broadcast to the community. It would not be in the interest of the administration of justice to unnecessarily increase the already existing pressures on witnesses.

These basic concerns regarding witnesses were eloquently described by Justice Clark in *Estes v. Texas*, 381 U.S. 532:

The quality of the testimony in criminal trials will often be impaired.

The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward over dramatization. Furthermore, inquisitive strangers and ‘cranks’ might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot ‘prove’ the existence of such factors. Yet we all know from experience that they exist. . . .

Estes, 381 U.S. at 547.

It is these concerns that cause the Judicial Conference of the United States to oppose enactment of S. 829.

C. Threat of Camera Coverage Could be Used as a Trial Tactic

Cameras provide a very strong temptation for both attorneys and witnesses to try their cases in the court of public opinion rather than in a court of law. Allowing camera coverage would almost certainly become a potent negotiating tactic in pretrial settlement negotiations. For example, in a high-stakes case involving millions of dollars, the simple threat that the president of a defendant corporation could be forced to testify and be cross examined, for the edification of the general public, might well be a real disincentive to the corporation’s exercising its right to a public trial.

D. Cameras Can Create Security Concerns

Although the bill includes language allowing witnesses who testify to be disguised, the bill does not address security concerns or make similar provision regarding other participants in judicial proceedings. The presence of cameras in the trial courtroom is likely to heighten the level and the potential of threats to judges. The number of threats against judges has escalated over the years, and widespread media exposure could exacerbate the problem. Additionally, all witnesses, jurors, and United States Marshals Service personnel may be put at risk because they would no longer have a low public profile.

Also, national and international camera coverage of trials in federal courthouses would place these buildings, and all in them, at greater risk from terrorists, who tend to choose targets for destruction that will give their “messages” the widest exposure. Such threats would require increased personnel and funding to adequately protect participants in court proceedings.

E. Cameras Can Create Serious Privacy Concerns

There is a rising tide of concern among Americans regarding privacy rights and the Internet. Numerous bills have been introduced in both the Congress and state legislatures to protect the rights of individual citizens from the indiscriminate dissemination of personal information that once was, to use a phrase coined by the

Supreme Court, hidden by “practical obscurity,”³ but now is available to anyone at any time because of the advances of technology. Broadcasting of trials presents many of the same concerns about privacy as does the indiscriminate dissemination of information on the Internet that was once only available at the courthouse. Witnesses and counsel frequently discuss very sensitive information during the course of a trial. Often this information relates to individuals who are not even parties to the case, but about whom personal information may be revealed. Also, in many criminal and civil trials, which the media would most likely be interested in televising, much of the evidence introduced may be of an extremely private nature, revealing family relationships and personal facts, including medical and financial information. This type of information provided in open court, is already available to the public through the media. Televising these matters sensationalizes these details for no apparent good reason.

Involvement in a federal case can have a deep and long-lasting impact on all its participants, most of whom have neither asked for nor sought publicity. In this adversarial setting, reputations can be compromised and relationships can be damaged. In fact, according to the FJC study on live courtroom media coverage,

³United States Department of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749, 764 (1989).

56% of the participating judges felt that electronic media coverage violates a witness's privacy. This is not to say that the Conference advocates closed trials; far from it. Nevertheless, there is a common-sense distinction between a public trial in a public courtroom—typically filled with individuals with a real interest in the case—and its elevation to an event that allows and encourages thousands to become involved intimately in a case that essentially concerns a small group of private people or entities.

The issue of privacy rights is one that has not been adequately considered or addressed by those who would advocate the broadcasting of trials. This heightened awareness of and concern for privacy rights is a relatively new and important development that further supports the position of the Judicial Conference to prohibit the use of cameras in the courtroom.

F. S. 829 Does Not Address the Complexities Associated with Camera Coverage in the Trial Courts

Media coverage of a trial would have a significant impact on that trial process. There are major policy implications as well as many technical rules issues to be considered, none of which are addressed in the proposed legislation. For example, televising a trial makes certain court orders, such as those sequestering witnesses, more difficult to enforce. In a typical criminal trial, most

witnesses are sequestered at some point. In addition, many related technical issues would have to be addressed, including advance notice to the media and trial participants, limitations on coverage and camera control, coverage of the jury box, and sound and light criteria.

Finally, S. 829 includes no funding authorization for implementation of its mandates. Regardless of whether funding is authorized, there is no guarantee that needed funds would be appropriated. The costs associated with allowing cameras, however, could be significant. For example, costs would be incurred to retrofit courtrooms to incorporate cameras while minimizing their actual presence to the trial participants. Also, to ensure that a judge's orders regarding coverage of the trial were followed explicitly (*e.g.*, not filming the jury, obscuring the image and voice of certain witnesses, or blocking certain testimony), a court may need to purchase its own equipment, as well as hire technicians to operate it. When considering that these expenses may have to be incurred in each of the 94 districts, the potential cost could be significant. An additional considerable cost would be creation of the position of media coordinator or court administrative liaison to administer and oversee an electronic media program on a day-to-day basis. According to the FJC report, the functions of the media liaisons included receiving applications from the media and forwarding them to presiding judges,

coordinating logistical arrangements with the media, and maintaining administrative records of media coverage.

G. There is No Constitutional Right to have Cameras in the Courtroom

Some have asserted that there is a constitutional “right” to bring cameras into the courtroom and that the First Amendment requires that court proceedings be open in this manner to the news media. The Judicial Conference responds to such assertions by stating that today, as in the past, federal court proceedings *are* open to the public; however, nothing in the First Amendment *requires* televised trials.

The seminal case on this issue is *Estes v. Texas*, 381 U.S. 532 (1965). In *Estes*, the Supreme Court directly faced the question whether a defendant was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. The Court held that such broadcasting in that case violated the defendant’s right to due process of law. At the same time, a majority of the Court’s members addressed the media’s right to telecast as relevant to determining whether due process required excluding cameras from the courtroom. Justice Clark’s plurality opinion and Justice Harlan’s concurrence indicated that the First Amendment did not extend the right to the news media to televise from the courtroom. Similarly, Chief Justice Warren’s concurrence, joined

by Justices Douglas and Goldberg, stated:

[n]or does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. . . . So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgement of the freedom of press.

Estes, 381 U.S. at 584-85 (Warren, C.J., concurring).

In the case of *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984), the Second Circuit was called upon to consider whether a cable news network had a right to televise a federal civil trial and whether the public had a right to view that trial. In that case, both parties had consented to the presence of television cameras in the courtroom under the close supervision of a willing court, but a facially applicable court rule prohibited the presence of such cameras. The Second Circuit denied the attempt to televise that trial, saying that no case has held that the public has a right to televised trials. As stated by the court, “[t]here is a long leap . . . 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. It is a leap that is not supported by history.” *Westmoreland*, 752 F.2d at 23.

Similarly, in *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986), the court discussed whether the First Amendment encompasses a right to cameras in

the courtroom, stating: “No case suggests that this right of access includes a right to televise, record, or otherwise broadcast trials. To the contrary, the Supreme Court has indicated that the First Amendment does not guarantee a positive right to televise or broadcast criminal trials.” *Edwards*, 785 F.2d at 1295. The court went on to explain that while television coverage may not always be constitutionally prohibited, that is a far cry from suggesting that television coverage is ever constitutionally mandated.

These cases forcefully make the point that, while all trials are public, there is no constitutional right of media to broadcast federal district court or appellate court proceedings.

H. The Teachings of the FJC Study

Proponents of S. 829 have indicated that the legislation is justified in part by the FJC study referred to earlier. The Judicial Conference based, in part, its opposition to cameras in the courtroom on the same study. Given this apparent inconsistency, it may be useful to highlight several important findings and limitations of the study. As I noted earlier in the statement, the recommendations included in the FJC report, which were proposed by the research project staff, were reviewed within the FJC but not by its Board.

First, the study only pertained to civil cases. This legislation, if enacted,

would allow camera coverage in both civil and criminal cases. As this Subcommittee is acutely aware, the number of criminal cases in the federal courts continues to rise. One could expect that most of the media requests for coverage would be in sensational criminal cases, where the problems for witnesses, including victims of crimes, and jurors are most acute.

Second, the study's conclusions ignore a large amount of significant negative statistical data. For example, the study reports on attorney ratings of electronic media effects in proceedings in which they were involved. Among these negative statistics were the following:

- 32% of the attorneys who responded felt that, at least to some extent, the cameras distract witnesses;
- 40% felt that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;
- 19% believed that, at least to some extent, the cameras distract jurors;
- 21% believed that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 27% believed that, at least to some extent, the cameras have the effect of distracting the attorneys; and
- 21% believed that, at least to some extent, the cameras disrupt the courtroom proceedings.

When trial judges were asked these same questions, the percentages of

negative responses were even higher:

- 46% believed that, at least to some extent, the cameras make witnesses less willing to appear in court;
- 41% found that, at least to some extent, the cameras distract witnesses;
- 64% reported that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;
- 17% responded that, at least to some extent, cameras prompt people who see the coverage to try to influence juror-friends;
- 64% found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 9% reported that, at least to some extent, the cameras cause judges to avoid unpopular decisions or positions; and
- 17% found that, at least to some extent, cameras disrupt courtroom proceedings.

For the appellate courts, an even larger percentage of judges who participated in the study related negative responses:

- 47% of the appellate judges who responded found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 56% found that, at least to some extent, the cameras cause attorneys to change the emphasis or content of their oral arguments;
- 34% reported that, at least to some extent, cameras cause judges to change the emphasis or content of their questions at oral arguments; and
- 26% reported that, at least to some extent, the cameras disrupt courtroom

proceedings.

While the Conference did allow each United States court of appeals to determine whether to permit the use of cameras in that circuit, these high negative responses give us a very real indication as to why only two out of 13 courts of appeals have allowed their proceedings to be televised. The two courts that do allow camera coverage are the Second and Ninth Circuits, which voluntarily participated in the pilot project.

These negative statistical responses from judges and attorneys involved in the pilot project dominated the Judicial Conference debate and were highly influential in the Conference's conclusion that the intimidating effect of cameras on witnesses and jurors was cause for alarm. Since a United States judge's paramount responsibility is to seek to ensure that all citizens enjoy a fair and impartial trial, and cameras may compromise that right, allowing cameras would not be in the interest of justice. For these reasons, the Judicial Conference rejected the conclusions made by the FJC study with respect to cameras in district courts.

Carefully read, the FJC study does not reach the firm conclusions for which it is repeatedly cited. The negative responses described above undermine such a reading. When considering legislation affecting cameras in the courtroom with such permanent and long-range implications for the judicial process, the negative

responses should be fully considered. Certainly that is what the Conference focused on. In reality the recommendations of the study reflect a balancing exercise which may seem proper to social scientists but which is unacceptable to judges who cannot compromise the interests of the litigants, jurors, and witnesses, even for a public benefit.

IV. Conclusion

When almost anyone in this country thinks of cameras in the trial courtroom today, they inevitably think of the O.J. Simpson case. I sincerely doubt anyone believes that the presence of cameras in that courtroom did not have an impact on the conduct of the attorneys, witnesses, jurors, and judge—almost universally to the detriment of the trial process. Admittedly, few cases are Simpson-like cases, but the inherent effects of the presence of cameras in the courtroom are, in some respects, the same, whether or not it is a high-publicity case. Furthermore, there is a legitimate concern that if the federal courts were to allow camera coverage of cases that are not sensational, it would become increasingly difficult to limit coverage in the high-profile and high-publicity cases where such limitation, almost all would agree, would be warranted.

This is not a debate about whether judges would be discomfited with camera coverage. Nor is it a debate about whether the federal courts are afraid of public

scrutiny. They are not. Open hearings are a hallmark of the federal judiciary. It is also not about increasing the educational opportunities for the public to learn about the federal courts or the litigation process. The judiciary strongly endorses educational outreach, which could better be achieved through increased and targeted community outreach programs.

Rather, this is a decision about how individual Americans—whether they are plaintiffs, defendants, witnesses, or jurors—are treated by the federal judicial process. It is the fundamental duty of the federal judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. For the reasons discussed in this statement, the Judicial Conference believes that the use of cameras in the trial courtroom could seriously jeopardize that right. It is this concern that causes the Judicial Conference of the United States to oppose enactment of S. 829 as applied to federal trial courts. As the Supreme Court stated in *Estes*, “[w]e have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.” 381 U.S. at 540.

I have mentioned in my oral testimony that there is a fundamental distinction between appellate and trial proceedings. The Judicial Conference has serious concerns, which I share, that cameras are inappropriate in the trial court

setting, while acceptable, with discretion, in the Circuit Courts of Appeals.

Exhibit 4

EXHIBIT B



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

July 23, 2009

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Sessions:

The Judicial Conference of the United States strongly opposes the "Sunshine in the Courtroom Act of 2009," S. 657 (111th Cong.), because it provides for the use of cameras in federal trial court proceedings. Cameras can affect behavior in court proceedings. Cameras can even affect whether a case goes to trial. Cameras can also affect courtroom security of judges, witnesses, employees, and U.S. marshals. This is of particular concern in light of recent increased threats to federal judges. The Judicial Conference believes that these and other negative affects of cameras in trial court proceedings far outweigh any potential benefit. The Judicial Conference also opposes the legislation because it would empower any appellate court panel to permit cameras in their courtroom rather than retain that power within the management of each circuit.

The Judicial Conference bases its policy and opposition to the use of cameras in the federal trial court proceedings on decades of experience and study. The Conference considered the issue in a number of different situations and contexts – including a pilot project – and concluded that the presence of cameras in federal trial court proceedings is not in the best interest of justice. Federal judges must preserve each citizen's right to a fair and impartial trial. Of course, federal trials have long been open to the media and public. But it is the studied judgment of the Judicial Conference that cameras can

Honorable Patrick J. Leahy

Honorable Jeff Sessions

Page 2

interfere with a fair and impartial trial. Thus, the use of cameras in trial courts would differ substantially from the impact of their use in legislative, administrative, or ceremonial proceedings.

Cameras can interfere with a fair trial in numerous ways. First, broadcasting proceedings can affect the way trial participants behave. Television cameras can intimidate litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast.

Second, and similarly, camera coverage can create privacy concerns for many individuals involved in the trial, such as witnesses and victims, some of whom are only tangentially related to the case but about whom very personal and identifying information might be revealed. For example, efforts to discredit a witness frequently involve the revelation of embarrassing personal information. Disclosing embarrassing facts or accusations in a courtroom already creates challenges in court proceedings. Those challenges would be multiplied enormously if that information were aired on television with the additional possibility of taping and replication. This concern can have a material effect on a witness's testimony or on his or her willingness to testify at all.

Third, and as a consequence of the aforementioned points, camera coverage could also become a potent negotiating tactic in pretrial settlement discussions. Parties may choose not to exercise their right to trial because of concerns regarding possible camera coverage. Thus, allowing cameras could cause a "chilling effect" on civil rights litigation; plaintiffs who have suffered sex or age discrimination may simply decide not to file suit if they learn that they may have to relive the incident and have that description broadcast to the public at large. Or, parties litigating over medical issues may not wish to reveal their personal medical history and conditions to a broad audience.

Fourth, the presence of cameras in a trial court will encourage some participants to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience, or to lengthen their appearance on camera. Such grandstanding is disruptive to the proceedings and can delay the trial.

The Federal Judiciary is therefore very concerned that the effect of cameras in the courtroom on participants would be to impact negatively the trial process and thereby interfere with a fair trial.

Honorable Patrick J. Leahy

Honorable Jeff Sessions

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In addition to affecting the fairness of a trial, the presence of cameras in a trial courtroom also increases security and safety issues. Broadcasting the images of judges and court employees, such as court reporters, courtroom deputies, and law clerks, makes them more easily identified as targets by those who would attempt to influence the outcome of the matter or exact retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase even beyond the current disturbing level. Cameras create similar security concerns for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

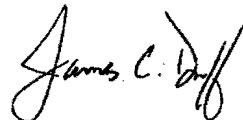
Finally, regarding the courts of appeals, in 1996 the Judicial Conference adopted the position that each circuit may decide for itself whether to permit photographic, radio, and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt. This policy ensures consistency within each circuit. The Sunshine in the Courtroom Act of 2009 would allow panels within the circuits to determine whether cameras will be allowed at their proceedings, rather than leaving the initial decision to the circuit's management. This will result in differing treatment of litigants within each circuit. Currently, the circuit-wide policies avoid piecemeal and ad hoc resolutions of the issue among the various panels convened within a court of appeals, and that approach is therefore better than the proposed legislative change.

* * *

For the foregoing reasons, the Judicial Conference of the United States strongly opposes legislation that allows the use of cameras in federal trial court proceedings and permits individual panels to use of cameras in all courts of appeals instead of deferring to each circuit's rules on such use.

Thank you for the opportunity to provide the position of the Judicial Conference on this legislation. The legislation raises issues of vital importance to the Judiciary. If we may be of additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,



James C. Duff

Secretary

cc: Members, Senate Judiciary Committee

**REPORT OF THE PROCEEDINGS
OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES**

March 12, 1996

The Judicial Conference of the United States convened in Washington, D.C., on March 12, 1996, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Juan R. Torruella
Chief Judge Joseph L. Tauro,
District of Massachusetts

Second Circuit:

Chief Judge Jon O. Newman
Chief Judge Peter C. Dorsey,
District of Connecticut

Third Circuit:

Chief Judge Dolores K. Sloviter
Chief Judge Edward N. Cahn,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge J. Harvie Wilkinson, III
Judge W. Earl Britt,
Eastern District of North Carolina

Fifth Circuit:

Chief Judge Henry A. Politz
Chief Judge William H. Barbour,
Southern District of Mississippi

CAMERAS IN THE COURTROOM

The Judicial Conference agreed to authorize each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt. The Conference further agreed to—

- a. Strongly urge each circuit judicial council to adopt an order reflecting the Judicial Conference's decision to authorize the taking of photographs and radio and television coverage of court proceedings in the United States courts of appeals; and
- b. Strongly urge each circuit judicial council to adopt an order pursuant to 28 U.S.C. § 332 (d)(1), reflecting the September 1994 decision of the Judicial Conference (JCUS-SEP 94, pp. 46-47) not to permit the taking of photographs and radio and television coverage of court proceedings in the United States district courts. In addition, the Judicial Conference agreed to strongly urge the judicial councils to abrogate any local rules of court that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

COMMITTEE ON CRIMINAL LAW

UNIVERSAL PRETRIAL DRUG TESTING

In December 1995, President Clinton directed the Attorney General to develop a "...universal policy providing for drug testing of all federal arrestees before decisions are made on whether to release them into the community pending trial." In February 1996, the Attorney General submitted a pretrial drug testing proposal to the Executive Committee, which referred the matter to the Committee on Criminal Law for recommendation to the March Judicial Conference. Reporting on the proposal to the Conference, the Criminal Law Committee recommended that the issue be referred back to that Committee. The Judicial Conference voted to refer the Attorney General's proposal regarding universal pretrial drug testing to the Criminal Law Committee for expeditious consideration and report to the Executive Committee, which is authorized to act on the matter on behalf of the Conference.

Exhibit 5

RESOLUTION 1

INSTITUTING A CIRCUIT RULE PERMITTING PHOTOGRAPHING, RECORDING AND BROACASTING IN NON-JURY, CIVIL CASES BEFORE THE DISTRICT COURTS

WHEREAS, a study conducted by the Federal Judicial Center from July 1, 1991, to June 30, 1993, using the guidelines approved by the Judicial Conference of the United States, resulted in a recommendation that district judges be allowed to permit photographing, recording, and broadcasting of civil proceedings consistent with those guidelines; and

WHEREAS, the Judicial Conference of the United States has authorized each court of appeal to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments since 1996, but specifically urged each circuit judicial council to adopt an order to prohibit such electronic coverage in the United States District Courts; and

WHEREAS, the Judicial Council of the Ninth Circuit voted to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in courtrooms on May 24, 1996; and

WHEREAS, the Chief Judge of the Ninth Circuit issued an Order in June 1996 to allow photographing, recording and broadcasting in its appellate courtrooms, subject to the discretion of the presiding judges, and under guidelines approved by the Judicial Conference of the United States, but specifically prohibited similar electronic coverage in the United States District Courts; and

WHEREAS, Ninth Circuit panels have permitted electronic coverage more than 130 times between 1991 and 2005 in appellate proceedings; and

WHEREAS, an overwhelming majority of the Ninth Circuit judges who have allowed photographing, recording and broadcasting of their proceedings have had a positive experience with such coverage; and

WHEREAS, significant technological advances have been made to allow electronic coverage of courtroom proceedings with minimally invasive equipment since the Ninth Circuit last considered whether to permit electronic coverage in the United States District Courts; and

WHEREAS, it is recognized that providing the public with greater access to the working of the courts through electronic coverage of civil court proceedings would promote greater public understanding of the role and function of the federal judiciary; and

WHEREAS, the Lawyer Representatives Coordinating Committee (“LRCC”) supports a rule that would permit the photographing, recording and broadcasting of non-jury, civil proceedings before the District Courts of the Ninth Circuit, subject to the discretion of the presiding judge and under guidelines similar to those approved by the Judicial Conference.

Now, therefore, be it **RESOLVED**:

- 1) The Ninth Circuit should encourage the Judicial Conference of the United States to reconsider its prior position concerning the photographing, recording, and broadcasting of non-jury, civil proceedings before District Courts, and to the extent permitted by Judicial Conference procedures, this Circuit should adopt a Rule that would allow the photographing, recording, and broadcasting of non-jury, civil proceedings before the District Courts in the Ninth Circuit.
- 2) The proposed Rule would apply guidelines consistent with those already in place and used by the Ninth Circuit in its appellate proceedings.
- 3) Before the next Circuit Conference, a committee should be appointed by the Chief Judge of the Ninth Circuit to prepare a presentation to the Judicial Conference of the United States setting forth this position and recommendation for change.

Exhibit 6

(f) Orders taxing costs pursuant to Civil L.R. 54-4.

Cross Reference

See ADR L.R. 4-11(d) "Nonbinding Arbitration; Entry of Judgment on Award."

77-3. Photography and Public Broadcasting.

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

77-4. Official Notices.

The following media are designated by this Court as its official means of giving public notice of calendars, General Orders, employment opportunities, policies, proposed modifications of these local rules or any matter requiring public notice. The Court may designate any one or a combination of these media for purposes of giving notice as it deems appropriate:

(a) Bulletin Board. A bulletin board for posting of official notices shall be located at the Office of the Clerk at each courthouse of this district.

(b) Internet Site. The Internet site, located at <http://www.cand.uscourts.gov>, is designated as the district's official Internet site and may be used for the posting of official notices.

(c) Newspapers. The following newspapers are designated as official newspapers of the Court for the posting of official notices:

(1) The Recorder; or

(2) The San Francisco Daily Journal; or

(3) The San Jose Post-Record, for matters pending in the San Jose Division, in addition to the newspapers listed in subparagraphs (1) and (2); or

Exhibit 7

GENERAL ORDER No 58
REGULATING POSSESSION AND USE OF
ELECTRONIC DEVICES IN THE COURTHOUSE

The purposes of this General Order are to promote security for all persons who enter federal courthouses (or the portions of federal buildings occupied by the District Court), to protect the integrity of judicial proceedings, to facilitate legitimate use of electronic devices for communication or for the storage, retrieval, or presentation of information, and to comply with the mandates of the Federal Rules of Criminal Procedure and the policies of the Judicial Conference of the United States.

I. Definition: "Electronic Device"

As used in this General Order, the phrase "electronic device" embraces all equipment (regardless of how it is powered or operated) that can be used for

- A. wireless communication; or
- B. receiving, creating, capturing, storing, retrieving, sending, or broadcasting any signals or any text, sound, or images; or
- C. accessing the internet or any other network or off-site system or equipment for communicating or for storing or retrieving information.

II. Federal Rule of Criminal Procedure 53 prohibits "the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."

III. Policy of the Judicial Conference of the United States prohibits, in both civil and criminal cases in all district courts, broadcasting, televising, recording, or photographing courtroom proceedings for the purpose of public dissemination.

IV. Additional Rules in this District.

Except as may be otherwise ordered by a judge of this court, possession and use of electronic devices and cameras in federal courthouses in this district, and in the portions of buildings in which judicial proceedings are held, shall be governed by the following rules and policies:

A. Court security personnel will screen all electronic devices and cameras before permitting them to be brought into the courthouse or into any facility or portion of any facility in which a judicial proceeding is held. The purpose of this screening is to make sure that the items do not contain weapons, dangerous devices or materials, or contraband.

1. Court security personnel may bar from the courthouse, or from portions of a building in which judicial proceedings are held, any item that appears to pose a threat to security or safety.
2. In response to a violation of any provision of this General Order, or of any court order addressing matters covered by this General Order, court security personnel may order immediate compliance, direct the offender to leave the courtroom or the building,

temporarily confiscate the device(s) used in violation of these rules, and/or report the violation to the presiding judge, the Chief Judge, and/or the United States Attorney.

B. Subject to the screening described in the preceding paragraph and to other provisions of this General Order, electronic devices may be brought into the courthouse and may be used in a non-disruptive manner in the common areas of the building.

C. Photographs may not be taken and images may not be captured by any means in the courthouse or in the courthouse portions of the building (this prohibition does not apply to sketch artists).

D. Except as may be permitted pursuant to paragraph E, below, or as authorized for the taking of the official record of judicial proceedings or grand jury deliberations by a court reporter or court recording operator, or as necessary to facilitate necessary language translations, no part of any judicial proceedings or of any deliberations by a petit jury or a grand jury may be recorded, or transmitted.

E. With the exception of court personnel and court reporters, and with the further exception of laptops, PDAs or their equivalent used by counsel during and in connection with judicial proceedings, no electronic device may be used in any courtroom without express permission, in advance, from the presiding judge.

1. Counsel who wish to use electronic devices other than laptops, PDAs or their equivalent during and in connection with judicial proceedings must secure permission, in advance, from the judge presiding over those proceedings.

2. Cell phones, pagers, and other electronic communication devices may be activated only in the 'vibration' mode inside courtrooms or jury rooms. Such devices may not be activated in courtrooms or jury rooms in any mode that uses any sound to alert the user to incoming communication.

F. Jurors may not use any electronic device in a courtroom during judicial proceedings or in a jury room during or in connection with deliberations. Grand jurors may not use any electronic device during or in connection with any proceedings before or deliberations by the grand jury. Cell phones, pagers, and their equivalent may be activated in courtrooms or jury rooms only in the 'vibration' mode.

ADOPTED: October 20, 2005

FOR THE COURT:



Vaughn R Walker
United States District Chief Judge