No. 10-70063

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

KRISTIN M. PERRY, et al.,

Real Parties in Interest.

On Petition For Writ Of Mandamus To
The United States District Court
For The Northern District Of California

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Real Parties in Interest Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo file this response to the petition for writ of mandamus of Proposition 8 Official Proponents ("Proponents"). The petition should be denied because the district court's decision to distribute the trial proceedings in this case through YouTube is authorized by the Ninth Circuit Judicial Council and the district court's local rules, and the purported due process harm that Proponents allege they would suffer as a result of the public distribution of the trial could be fully remedied on appeal.

Mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of" mandamus. *Id.* (internal quotation marks omitted). The party seeking mandamus must make a "'clear and indisputable'" showing that these "exceptional circumstances" are present (*Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1146 (9th Cir. 2005) (quoting *Cheney*, 542 U.S. at 381)), including by demonstrating that "the district court's order is 'clearly erroneous as a matter of law'" and that adequate relief would not be available on

appeal. *Id.* (quoting *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Proponents cannot make either of those showings in this case.

The district court's decision to distribute the trial proceedings in this case through YouTube is authorized by the Ninth Circuit Judicial Council and the district court's local rules. On December 17, 2009, the Ninth Circuit Judicial Council announced its decision to establish a pilot program that "allow[s] the 15 district courts within the Ninth Circuit to experiment with the dissemination of video recordings in civil non-jury matters." Cases that will be included in the pilot program "will be selected by the chief judge of the district court in consultation with" Chief Judge Kozinski. News Release (Dec. 17, 2009).

In accordance with that authorization, the district court revised its Local Rule 77-3 on December 22, 2009, to provide that, "[u]nless allowed by a Judge or a Magistrate Judge . . . *for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising . . . in connection with any judicial proceeding[ ] is prohibited." (Revisions italicized). That amendment was validly enacted pursuant to 28 U.S.C. § 2071(e), which provides that, "[i]f the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall

promptly thereafter afford such notice and opportunity for comment." The impending start of the trial in this case on January 11, 2010—and the substantial public interest in this exceptionally important matter—unquestionably satisfy this "immediate need" provision.[1]

Moreover, as Chief Judge Walker made clear to the parties during a hearing on January 6, 2010, both the Ninth Circuit Judicial Council's decision to authorize the pilot camera program and the Northern District's amendment of Local 77-3

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[1] The district court's amendment of its local rules did not violate 28 U.S.C. § 2071, and certainly the district court's process was not the "clear abuse of discretion" necessary to warrant mandamus relief. *Cheney*, 542 U.S. at 380. Proponents locate *not one decision* in which a court of appeals has issued a mandamus writ to order a district court to comply with a superseded local rule on the ground that the process amending that rule was invalid. And this case is a far cry from *United States v. Terry*, 11 F.3d 110 (9th Cir. 1993), in which the Court reversed the denial of a motion to suppress on the ground that the defendant "received no actual notice" of a general order that made his motion untimely, but did not invalidate the general order or deem it unenforceable as to those that did have actual notice of it (as petitioners indisputably did here). *Id.* at 113. Indeed, *Terry* recognizes that "in promulgating local rules, a district court has considerable latitude in calibrating its public notice method to the individual needs of its jurisdiction." *Id.* (internal quotation marks omitted). Proponents complain that the opportunity for comment provided by the district court is "patently inadequate," Pet. 24, but, as they concede in their petition, they were first informed of the possibility that a video recording of the trial could be disseminated in September 2009 and have subsequently made their objections known at every available opportunity. *Id.* at 7.

were the product of lengthy and considered deliberation. Chief Judge Walker explained:

> Chief Judge Kozinski, in October, October 22nd, appointed a committee to evaluate the possibility of adopting a Ninth Circuit rule. And, clearly, you're correct, this case was very much in mind at that time because it had come to prominence then and was thought to be an ideal candidate for consideration. And the committee, which consisted of Judge Sidney Thomas, Chief Judge Audrey Collins, in the Central District of California, and myself, made a recommendation to the Ninth Circuit Judicial Council, which unanimously adopted the rule which you've seen, permitting a pilot project, an experimental—it was really a pilot project that was announced in the Ninth Circuit press release. Our court, in response to that, met and amended Local Rule 77-3, to permit participation in that Ninth Circuit pilot project. At the time, we considered that to be a conforming amendment. Our rules, of course, conform and must conform to the Federal rules and to the Ninth Circuit rules.

1/6/10 Tr. 44-45.

Under the Ninth Circuit Judicial Conference's pilot program and amended Local Rule 77-3, the district court therefore possesses the authority to order the broadcast distribution of the trial proceedings in this case. And, while it is the position of the Judicial Conference of the United States that cameras should not be permitted in federal district courts, that policy is not binding on this Court or the district court. *See Armster v. United States Dist. Court*, 806 F.2d 1347, 1349 n.1 (9th Cir. 1986) ("Except for judicial disciplinary proceedings, the Judicial Conference does not have binding or adjudicatory authority over the courts."). The

nonbinding nature of the Judicial Conference's camera policy is confirmed by the fact that both the Southern District of New York and the Eastern District of New York have policies expressly authorizing judges to broadcast civil proceedings. *See* S.D.N.Y. Local Civ. R. 1.8; E.D.N.Y. Local Civ. R. 1.8.[2]

There is no basis for this Court to use the "extraordinary remedy" of mandamus to disturb the district court's discretionary decision to invoke its authority to broadcast the trial proceedings in this case. Indeed, this Court has emphasized that it "gives district courts broad discretion in interpreting, applying, and determining the requirements of their own local rules and general orders," and that it therefore does "not review independently a district court's determination of the scope and application of local rules and general orders." *United States v. Gray*, 876 F.2d 1411, 1414 (9th Cir. 1989).

The district court acted well within its discretion when it authorized the broadcast of the trial proceedings in this case because televising this bench trial

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[2] *In re Sony BMG Music Entertainment*, 564 F.3d 1 (1st Cir. 2009), does not aid Proponents. In that case, a "controlling" local rule explicitly prohibited broadcast of "any proceedings," and the district court's interpretation of that rule to *permit* a broadcast was "palpably incorrect." *Id.* at 4, 5, 10. Here, quite unlike *Sony*, the "controlling" local rule explicitly permits broadcast of nonjury civil trials designated as appropriate by the Chief Judge of the district court and the Circuit. Proponents' argument—that the "controlling" local rule was invalidly amended—

will promote deeply rooted First Amendment principles that favor broad public access to judicial proceedings. *See Phoenix Newspapers v. United States Dist. Ct.*, 156 F.3d 940, 946 (9th Cir. 1998) ("One of the most enduring and exceptional aspects of the Anglo-American justice system is an open public trial."). Indeed, the Supreme Court has recognized that a "trial is a public event" and that "[w]hat transpires in the court room is public property." *Craig v. Harney,* 331 U.S. 367, 374 (1947). Because "it is difficult for [people] to accept what they are prohibited from observing" (*Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980) (op. of Burger, C.J.)), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. Broad public access to judicial proceedings also "protect[s] the free discussion of governmental affairs" that is essential to the ability of "the individual citizen . . . [to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

In light of the overwhelming national public interest in the issues to be decided in this case, providing a broadcast of the proceedings is the most effective means of affording the public its constitutionally guaranteed right of access. More

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was not remotely presented in *Sony*.

than 13 million Californians cast a vote for or against Proposition. 8. And there are hundreds of thousands of gay and lesbian Californians who have a direct stake in the outcome of this case. Ultimately, however, the issues in this case are of such transcendent importance that *every* Californian should be afforded an opportunity to view the proceedings to the greatest extent practicable. Far from detracting from the right of public access, the "highly contentious and politicized" character of the issues to be resolved in this case underscores the importance of providing the public with a meaningful window into the trial proceedings so it can see and hear what is happening in the courtroom. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed."). The "ability to see and to hear a proceeding as i[t] unfolds is a vital component of the First Amendment right of access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004).

Proponents' concerns about the possibility of compromised safety, witness intimidation, or harassment of trial participants are utterly unsubstantiated and groundless speculation. As an initial matter, the only witnesses of their own Proponents have identified as witnesses they intend to call are *paid experts*. To the extent Proponents' concern is for adverse witnesses Plaintiffs may call, those

persons willingly thrust themselves into the public eye by sponsoring Prop. 8 and orchestrating an expensive, sophisticated, and highly public multimedia campaign to amend the California Constitution. They certainly did not exhibit a similar fear of public attention when attempting to garner votes for Prop. 8 from millions of California voters, when touting their successful campaign strategy in post-election magazine articles and public appearances (*see* Doc # 191-2; http://www.youtube.com/watch?v=ngbAPVVPD5k), or when voluntarily intervening in this case. In any event, many aspects of the trial—including opening and closing arguments and testimony by the parties' experts (who were designated *after* the Court first raised the possibility of televising the proceedings)—will not even remotely implicate Proponents' purported witness-related concerns. Moreover, the district court indicated that, to the extent that it determines that witness issues or other factors militate against permitting camera coverage of particular portions of the trial, it will prohibit the transmission of those parts of the trial. 1/6/10 Tr. 44-45.

Finally, even if the transmission of the trial proceedings in this case did raise due process concerns—and it does not—mandamus still would not be the appropriate remedy because the purported harm to Proponents' due process rights would be fully "correctable on appeal." *Bauman*, 557 F.2d at 655. If, as

Proponents allege, the YouTube transmission of the trial proceedings would impair their right to a fair trial, Proponents—like any other litigant who has been prejudiced by deficient trial procedures—would have the opportunity to seek full relief on a motion for a new trial and subsequent appeal. The mandamus relief sought by Proponents is therefore unnecessary and unwarranted.

CONCLUSION

The petition for a writ of mandamus should be denied.

Dated: January 8, 2010

By /s/ Theodore B. Olson

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