

1 THOMAS R. BURKE (State Bar No. 141930)
 2 JEFF GLASSER (State Bar No. 252596)
 3 DAVIS WRIGHT TREMAINE LLP
 4 505 Montgomery Street, Suite 800
 5 San Francisco, California 94111-6533
 6 Telephone: (415) 276-6500
 7 Facsimile: (415) 276-6599
 8 E-mail: thomasburke@dwt.com; jeffglasser@dwt.com

9 Attorneys for Non-Party Media Coalition
 10 ABC NEWS; KGO TV; KABC TV; CABLE NEWS NETWORK;
 11 IN SESSION (formerly known as "COURT TV"); FOX NEWS;
 12 NBC UNIVERSAL, INC.; CBS NEWS; HEARST
 13 CORPORATION; DOW JONES & COMPANY, INC.; THE
 14 ASSOCIATED PRESS; and NORTHERN CALIFORNIA
 15 CHAPTER OF RADIO & TELEVISION NEWS DIRECTORS
 16 ASSOCIATION

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA

DAVIS WRIGHT TREMAINE LLP

19 KRISTIN PERRY; SANDRA B. STIER;
 20 PAUL T. KATAMI; JEFFREY J. ZARRILLO,

) Case No. C 09-2292
) Assigned to the Hon. Vaughn R. Walker

21 Plaintiffs,
 22 vs.

) **NON-PARTY MEDIA COALITION'S**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **REQUEST FOR ORDER PERMITTING**
) **TELEVISION COVERAGE OF THE**
) **TRIAL**

23 ARNOLD SCHWARZENEGGER, in his
 24 official capacity as governor of California;
 25 EDMUND G. BROWN, JR., in his official
 26 capacity as attorney general of California;
 27 MARK B. HORTON, in his official capacity as
 28 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,

) Date: 10 a.m.
) Time: January 6, 2010
) Ctrm.: 6

Defendants.

DENNIS HOLLINGSWORTH, GAIL J.
 KNIGHT, MARTIN F. GUTIERREZ,
 HAKSHING WILLIAM TAM, and MARK A.
 JANSSON, as official proponents of
 Proposition 8,

Defendant-Intervenors.

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1 The Non-Party Media Coalition respectfully submits the following memorandum of points
2 and authorities in support of the Media Coalition's request for an order permitting television
3 coverage of the trial.
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MEMORANDUM OF POINTS AND AUTHORITIES

1.
INTRODUCTION

On December 17, 2009, the Judicial Council of the Ninth Circuit voted unanimously to permit live television coverage of some proceedings in civil non-jury cases. Burke Decl. Ex. A. In announcing this experiment, Chief Judge Alex Kozinski stated that the Judicial Council of the Ninth Circuit “hope[s] that being able to see and hear what transpires in the courtroom will lead to a better public understanding of our judicial processes and enhanced confidence in the rule of law.” *Id.* On December 22, 2009, Local Rule 77-3 was amended to allow the use of television cameras in civil cases approved under test programs. See Civil Local Rule 77-3 (providing 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 emphasized.). This civil bench trial presents an excellent opportunity for the Court to test its new policy and allow televised proceedings, because it involves important constitutional issues on a matter of substantial public interest – whether California’s constitutional amendment (Proposition 8) prohibiting same sex couples from marrying violates the due process and equal protection clauses of the federal Constitution.

The dozens of decisions during the modern era that consistently have expanded the public’s rights to obtain information about trials and the judiciary have rested on the public’s “right to observe the conduct of trials.” Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (emphasis added). This right of observation guarantees not just that members of the public may visit courtrooms, but that all members of the public have the right to view trials. See id. at 594 (Brennan, J. concurring) (citing Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.) (“It is desirable that the trial of causes should take place under the public eye [so that] every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed”)). By logical extension, if the public’s First Amendment right to observe proceedings is to be fully realized in the modern, urbanized world, it must presumptively

1 encompass not just attendance in the courtroom, but also observation of these judicial proceedings
 2 by citizens watching on television or accessing the proceedings via the Internet or other electronic
 3 means. Presumably that is why the Ninth Circuit is permitting its district courts to join all 50
 4 states and several other federal courts that allow live television coverage of at least some of their
 5 proceedings.

6 In this case, the members of the Media Coalition are requesting permission to televise the
 7 trial – from the opening statements until the announcement of the verdict – as it occurs in court.
 8 Such gavel-to-gavel coverage provides the public with an accurate and comprehensive
 9 understanding of these judicial proceedings. Just as the chronicles of the trial concerning the
 10 place of teaching evolution in schools riveted the country in the 1920s, televising this modern-day
 11 Scopes trial would present viewers with a national civics lesson on a hotly contested issue that
 12 crosses social, political, educational, and religious boundaries. The California Supreme Court
 13 recently permitted live camera coverage of the oral argument on the constitutional challenge to
 14 Proposition 8, allowing millions to observe its proceedings. Many other courts have permitted the
 15 media to broadcast newsworthy judicial proceedings, including the Florida Supreme Court during
 16 the Bush v. Gore Florida recount. The recognition of these courts of the public’s right of access
 17 to televised proceedings has greatly enhanced the ability of the public to observe what transpires
 18 in the public courtroom and has demystified the judicial process for millions of people.

19 In addition to the enormous public interest in this matter, the parties opposing cameras in
 20 the courtroom have advanced no countervailing interests – nor could they – that would justify
 21 barring cameras from this trial. This is not a criminal trial that implicates Sixth Amendment
 22 rights, nor is there any concern about jury taint in a bench trial. Both sides are represented by
 23 experienced trial counsel. Any witnesses would be testifying in public at the trial with heavy
 24 accompanying publicity in the print and electronic media, so the presence of cameras is hardly a
 25 deterrent. As the many state and federal courts that allow television coverage have learned, the
 26 cameras used to televise trials in this digital age are unobtrusive, and members of the Media
 27 Coalition will fully cooperate with the Court to ensure that any requirements relating to
 28 equipment placement and “pooled” camera coverage are satisfied. Seasoned professionals from

1 In Session, formerly known as “Court TV”, are prepared to broadcast these proceedings gavel to
 2 gavel on a pooled basis. In recent days, this Court has already taken steps to address the
 3 significant media attention this trial will generate regardless of whether it is televised, but
 4 allowing camera coverage will provide the public with the most complete and accurate
 5 information about what transpires during this historic trial.

6 **2.**

7 **THE COURT SHOULD PERMIT TELEVISION COVERAGE OF THE ENTIRE TRIAL.**

8 **A. Public Policy Strongly Supports Permitting Televised Coverage Of These**
 9 **Proceedings.**

10 The presence of cameras in the courtroom confers numerous benefits on the public. The
 11 media – and, in particular, television – play an indispensable role in informing the public about
 12 the conduct of judicial proceedings. In Richmond Newspapers, 448 U.S. at 573, the United States
 13 Supreme Court noted that “[i]nstead of acquiring information about trials by first hand
 14 observation or by word of mouth from those who attend, people now acquire it chiefly through the
 15 print and electronic media.” 448 U.S. at 573. The Court explained that this development
 16 “validates the media claim of functioning as surrogates for the public.” Id. at 573. Full media
 17 access to judicial proceedings is especially important given the pace of modern life and the size of
 18 our metropolitan areas. With the myriad commitments and responsibilities that each person faces
 19 on a daily basis, there is simply no time to attend judicial proceedings in person.

20 While an individual may be available to attend trial proceedings, the sheer number of such
 21 interested observants in cases like this one guarantees that only a small fraction could be admitted
 22 at any given time. Even with the overflow courtrooms the Court has planned for this trial, the
 23 Court has limited physical space. This reality has not been lost on courts and legislatures that
 24 have considered the issue. As a committee of the California Legislature recognized in 1967, long
 25 before technological advances permitted the unobtrusive recording of court proceedings, because
 26 “sprawling urbanism has replaced concentrated ruralism,” and because “no courtroom in the land
 27 could hold even a minute fraction of the people interested in specific cases, ... a trial is not truly
 28 public unless news media are free to bring it to the home of the citizens by newspaper, magazine,

1 radio, television or whatever device they have.”¹ Similarly, the Third Circuit acknowledged the
 2 practical obstacles that prevent full public attendance at trials, asking rhetorically, “What exists of
 3 the right of access if it extends only to those who can squeeze through the [courtroom] door?”
 4 United States v. Antar, 38 F.3d 1348, 1360 (3d Cir. 1994). In other words, a courtroom is open
 5 only in theory when the general public has no opportunity to view the events transpiring therein.

6 Furthermore, the media can best keep the public informed of events such as trials where
 7 the news organizations are permitted to provide live electronic access to proceedings. The ability
 8 to show the public exactly what happens in the courtroom is a crucial component of news
 9 coverage in the digital age. As Justice Marshall observed in Richmond Newspapers, “[i]n
 10 advancing the [] purposes [of open judicial proceedings], the availability of a trial transcript is no
 11 substitute for a public presence at the trial itself. As any experienced appellate judge can attest,
 12 the ‘cold’ record is a very imperfect reproduction of events that transpire in the courtroom.” 448
 13 U.S. at 597 n.22 (Marshall, J., concurring). To enable the media to perform its surrogate function
 14 most effectively, the maximum amount of information must be available to the public. The most
 15 effective means of making accurate, objective information available is through courtroom
 16 cameras.

17 **B. The First Amendment Presumptive Right In Favor Of Full Public Access To Judicial**
 18 **Proceedings Also Supports Electronic Access To Entire Trials.**

19 The Supreme Court has long recognized that a trial is a “public event.” Craig v. Harney,
 20 331 U.S. 367, 374 (1947). In 1980, the Supreme Court reaffirmed this principle, finding that the
 21 press and the public have a constitutional right to observe trials, absent compelling and clearly
 22 articulated reasons for closing such proceedings. Richmond Newspapers, 448 U.S. at 580. As the
 23 Court stated, “[T]he appearance of justice can best be provided by allowing people to observe it.”
 24 Id. at 571. The Court noted that the strong historical tradition in Western jurisprudence in favor
 25 of public observation of trials is a practice that predates the Norman Conquest. Id. at 565. This
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27
 28 ¹ Final Report Of The Subcommittee On Free Press – Fair Trial, Assembly Interim
Committee On Judiciary, January 5, 1967, at 9. See Burke Decl. Ex. B.

1 tradition of public access assumes even greater importance in our democratic system, where the
 2 government and all of its actions ultimately are held accountable by the voters. “People in an
 3 open society do not demand infallibility from their institutions,” the Court concluded, “but it is
 4 difficult for them to accept what they are prohibited from observing.” *Id.* at 572. For these
 5 reasons, the Court noted that “historically both civil and criminal trials have been presumptively
 6 open” to the public. *Id.* at 580 n.17 (emphasis added). *See also id.* at 598 (Stewart, J. concurring)
 7 (“stating that “the First and Fourteenth Amendments clearly give the press and the public a right
 8 of access to trials themselves, civil as well as criminal”).

9 The concept of observation – that members of the public ought to be allowed to see for
 10 themselves public trials – is a cornerstone of the constitutional right recognized in Richmond
 11 Newspapers. As Chief Justice Burger stated in tracing our historical tradition of open
 12 proceedings, “part of the very nature of a criminal trial was its openness to those who wished to
 13 attend.” *Id.* at 568. Members of the community always possessed the “right to observe the
 14 conduct of trials.” *Id.* at 572. In contemporary society, however, demographics preclude the
 15 overwhelming majority of Americans from physically attending trials, and therefore, from
 16 observing them. *Id.* at 572-573. Yet those societal changes do not mean that the constitutional
 17 right of access can be exercised only by the small number of citizens who actually fit into the
 18 courtroom. Through cameras in the courtroom, citizens again have a meaningful opportunity to
 19 exercise their constitutional right to observe trials. For that right to have meaning, the First
 20 Amendment right of access must include a presumptive right for the media (including the Media
 21 Coalition) to televise trials and for the public to observe trials on television.

22 The purposes of the constitutional rights to attend and observe trials are well established,
 23 and are promoted by the use of cameras in the courtroom. Not only does public observation of
 24 trials educate the public about the rule of law and the functioning of the justice system, it also
 25 serves to reinforce public acceptance – crucial in a democratic society – of “both the process and
 26 its results.” *Id.* at 571. As Justice Brennan declared:

27 Secrecy of judicial action can only breed ignorance and distrust of courts and
 28 suspicion concerning the competence and impartiality of judges; free and robust
 reporting, criticism, and debate can contribute to public understanding to the rule

1 of law and to comprehension of the functioning of the entire criminal justice
 2 system, as well as improve the quality of that system by subjecting it to the
 cleansing effects of exposure and public accountability.

3 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J. concurring). Similarly, in
 4 Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982), the Court emphasized that
 5 public access to court proceedings allows “the public to participate in and serve as a check upon
 6 the judicial process – an essential component in our structure of self-government.”

7 Lower courts have found that this presumption of openness applies equally to civil
 8 proceedings because “[t]he community catharsis, which can only occur if the public can watch
 9 and participate, is also necessary in civil cases” and because “secrecy insulates the participants,
 10 masking impropriety, obscuring incompetence and concealing corruption.” Brown & Williamson
 11 Tobacco Corp. v. FTC, 710 F.2d 1156, 1179 (6th Cir. 1983). Numerous other federal and state
 12 courts have agreed with this assessment. As one judge in the Central District of California has
 13 explained:

14 The public interest at issue here has a venerable heritage rooted in the need for
 15 openness in a democratic society. The courts’ legitimacy in our system of
 16 government derives in large measure from our historical commitment to offering
 17 reasoned decisions publicly setting forth our rationale not only to litigants, but to
 18 the people in whose name we administer justice. As Oliver Wendell Holmes
 19 observed: ‘It is desirable that the trial of [civil] causes should take place under the
 public eye, not because the controversies of one citizen with another are of public
 concern, but because it is of the highest moment that those who administer justice
 should always act under the sense of public responsibility, and that every citizen
 should be able to satisfy himself with his own eyes as to the mode in which a
 public duty is performed.’ Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

20 California ex rel. Lockyer, 355 F. Supp. 2d 1111, 1125 (C.D. Cal. 2005). The district court also
 21 cited with approval a decision by the California Supreme Court that recognized a First
 22 Amendment right of access to civil trials because “the public has an interest in all civil cases in
 23 observing and assessing the performance of its public judicial system” NBC Subsidiary
 24 (KNBC-TV), Inc. v. Superior Court, 20 Cal.4th 1178, 1210 (1999) (emphasis added) (cited in
 25 California ex rel. Lockyer, 355 F. Supp. 2d at 1125).

26 The Third Circuit emphasized these same considerations in Publicker Industries, Inc. v.
 27 Cohen, 733 F.2d 1059, 1069 (3d Cir. 1984), underscoring that “the civil trial, like the criminal
 28 trial, plays a particularly significant role in the functioning of the judicial process and the

1 government as a whole,” and that “[p]ublic access to civil trials, no less than criminal trials, ‘plays
 2 an important role in the participation and free discussion of governmental affairs.’” Id. at 1070
 3 (citations omitted). Accordingly, the court “h[e]ld that the ‘First Amendment embraces a right of
 4 access to [civil] trials... to ensure that this constitutionally protected discussion of governmental
 5 affairs is an informed one.’” Id. (citations omitted). See also Matter of Continental Illinois
 6 Securities Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984) (stating that the “policy reasons for
 7 granting public access to criminal proceedings apply to civil cases as well”).

8 Taken together, these cases stand for the proposition that courts must maximize public
 9 access to judicial proceedings. Since television and electronic media serve as the primary news
 10 source today for most Americans, the only realistic way to vindicate the public’s right of access is
 11 to allow cameras in the courtroom. Electronic media coverage fulfills the educational function of
 12 enhancing public understanding of the judicial system. Moreover, cameras provide an opportunity
 13 for the public to experience the sights and sounds of a trial. As a federal district court in Georgia
 14 observed in Cable News Network v. American Broadcasting Cos., 518 F. Supp. 1238, 1245 (N.D.
 15 Ga. 1981), “visual impressions can and sometimes do add a material dimension to one’s
 16 impression of particular news events. Television film coverage of the news provides a
 17 comprehensive visual element and an immediacy, or simultaneous aspect, not found in print
 18 media.” The fact that television cameras provide the largest number of citizens with the best
 19 opportunity to see trial proceedings firsthand is a compelling reason for permitting, not denying,
 20 camera access. To conclude otherwise is inconsistent with the fundamental meaning of
 21 Richmond Newspapers and these other above-cited cases.

22 Given the increasing weight accorded to the public’s right of access, it is not surprising
 23 that some lower courts have recognized that the First Amendment guarantees the right to observe
 24 televised trial court proceedings. For example, in Katzman v. Victoria’s Secret Catalogue, 923 F.
 25 Supp. 580, 589 (S.D.N.Y. 1996), the federal district court noted that because of “advances in
 26 technology, the old objections to cameras in the courtroom – that they were obtrusive and would
 27 disrupt the trial – “should no longer stand as a bar to a presumptive First Amendment right of the
 28 press to televise ... court proceedings, and of the public to view those proceedings on television.”

1 Id. Similarly, a New York state court granted Court TV's request to televise the trial of four New
 2 York policeman charged in the shooting of an unarmed African immigrant, Amadou Diallo. See
 3 People v. Boss, 182 Misc. 2d 700, 705 (N.Y. Supreme Ct. 2000). Even though the case had been
 4 transferred because of pretrial publicity, the court in Boss held that there was a "presumptive First
 5 Amendment right of the press to televise court proceedings, and of the public to view those
 6 proceedings on television." Id. In spite of objections from the defendants, the court declared that
 7 televised coverage was warranted because the "denial of access to the vast majority will
 8 accomplish nothing but more divisiveness while the broadcast of the trial will further the interests
 9 of justice, enhance public understanding of the judicial system and maintain a high level of public
 10 confidence in the judiciary." Id. at 706.

11 By permitting camera coverage in this case, this Court may ensure that the public has the
 12 most complete and accurate account of the proceedings. The trial will be the subject of intense
 13 publicity regardless of whether the Court allows cameras into the courtroom. As the Florida
 14 Supreme Court acutely observed, "newsworthy trials are newsworthy trials, and ... they will be
 15 extensively covered by the media both within and without the courtroom," whether or not cameras
 16 are permitted. In re Petition of Post-Newsweek Stations, Inc., 370 So.2d 768, 776 (Fla. 1979).
 17 Written reports on trials can and do provide thoughtful, accurate and detailed accounts of what
 18 transpires in the courtroom. Yet only through allowing electronic coverage of the actual
 19 testimony in the courtroom may the Court ensure that the public receives the most complete
 20 account of the proceedings. Since citizens will judge the proceedings with whatever information
 21 they possess, public understanding will be enhanced by allowing all interested members of the
 22 public to observe through cameras what actually takes place in the trial concerning the
 23 constitutionality of Proposition 8, consistent with the media's presumptive right of access to
 24 judicial proceedings.

25 **C. There Are No Countervailing Interests That Overcome The Strong Public Policy**
 26 **Favoring Electronic Access To The Entire Trial.**

27 The public benefits achieved by allowing electronic camera access to these trial
 28 proceedings will further the fairness and efficiency of the proceedings, especially when there are

1 no countervailing interests to balance against the First Amendment presumptive right of access.
 2 Modern television equipment has evolved to the point where concerns about intrusive cables,
 3 microphones, and camerapersons are inapplicable. In fact, it has been nearly four decades since
 4 the United States Supreme Court overturned a conviction based on the “considerable disruption”
 5 of early-model television equipment. See Estes v. Texas, 381 U.S. 532, 536 (1965).² Even then,
 6 Justice Harlan, the dispositive concurring vote, recognized that the day might come when
 7 “television will have become so commonplace an affair in the daily life of the average person as
 8 to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.
 9 If and when that day arrives the constitutional judgment called for now would of course be subject
 10 to re-examination in accordance with the traditional workings of the Due Process Clause.” Id. at
 11 595–96 (Harlan, J., concurring).

12 Justice Harlan’s prescience was vindicated in 1981, when a unanimous Supreme Court
 13 held that televising a trial – over the objections of two criminal defendants – was not a violation
 14 of their due process rights. Chandler v. Florida, 449 U.S. 560, 576 (1981). Chief Justice Burger’s
 15 opinion emphasized that Estes had not established a rule banning states from experimenting with
 16 an “evolving technology, which, in terms or modes of mass communication, was in its relative
 17 infancy in 1964 . . . , and is, even now, in a state of continuing change.” Id. at 560. The
 18 unanimous Chandler opinion also observed that “the data thus far assembled was cause for some
 19 optimism about the ability of states to minimize the problems that potentially inhere in electronic
 20 coverage of trials.” Id. at 576 n.11. Therefore, in roughly fifteen years the technological advance
 21 that Justice Harlan had anticipated made televised coverage of trials acceptable as a matter of
 22 Supreme Court precedent.

23 Now, almost thirty years after Chandler, further technological progress has removed any
 24 doubt that cameras can be present in the courtroom without any concomitant disruption. It is not
 25 surprising, therefore, that several lower courts recently have had little trouble distinguishing Estes,
 26

27 ² Unlike in Estes, 381 U.S. at 539, and many other criminal cases, this civil case does not
 28 involve any Sixth Amendment fair trial right to be balanced against the First Amendment
 presumptive right of access.

1 noting that the Court in that case “explicitly recognized that its holding ultimately relied on the
 2 then-state of technology[.]” Katzman v. Victoria’s Secret Catalogue, 923 F. Supp. at 589 ; see
 3 also People v. Spring, 153 Cal. App. 3d 1199 (1984) (presence of television camera during trial
 4 did not violate criminal defendant’s Sixth Amendment right to a fair trial); State of New
 5 Hampshire v. Smart, 622 A.2d 1197 (N.H. 1993) (televised coverage of high-profile murder trial
 6 did not prejudice defendant); Stewart v. Commonwealth of Virginia, 427 S.E.2d 394 (Va. 1993)
 7 (presence of video cameras during criminal trial did not violate defendant’s due process rights).

8 In fact, any concerns about the adverse impact of full-time camera coverage are belied by
 9 the research conducted in various states, including California, which have reached virtually
 10 identical conclusions concerning the impact – or lack of impact – on trial participants from the
 11 presence of cameras. At least a dozen states – including Arizona, California, Florida, Hawaii,
 12 Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, and
 13 Virginia – have studied the potential impact of electronic media coverage on courtroom
 14 proceedings, particularly focusing on the effect cameras have upon courtroom decorum and upon
 15 witnesses, attorneys and judges. See Burke Decl. Ex. C at 38-42. The results from the state
 16 studies were unanimous: the claims of a negative impact from electronic media coverage of
 17 courtroom proceedings – whether civil or criminal – are baseless. Id. For example, the state
 18 studies revealed that fears about witness distraction, nervousness, distortion, fear of harm, and
 19 reluctance or unwillingness to testify were unfounded. Id.

20 California’s 1981 report on the effect of electronic coverage of court proceedings is one of
 21 the most comprehensive of the state evaluations that have been completed. Burke Decl. Ex. D.
 22 The California study included observations and comparisons of proceedings that were covered by
 23 the electronic media, and proceedings that were not. Id. Not only did California’s survey results
 24 mirror those of other states – finding that there was no noticeable impact upon witnesses, judges,
 25 counsel, or courtroom decorum when cameras were present during judicial proceedings – the
 26 “observational” evaluations completed in California further buttressed these results. Id. For
 27 example, after systematically observing proceedings where cameras were and were not present,
 28 consultants who conducted California’s study concluded that witnesses were equally effective at

1 communicating in both sets of circumstances. Id. Not surprisingly, the California study also
 2 revealed that there was no, or only minimal, impact upon courtroom decorum from the presence
 3 of cameras. Id.³

4 The positive results of the state court evaluations were further bolstered by the Federal
 5 Judicial Center's 1994 study of a three-year pilot program that permitted electronic media
 6 coverage in civil proceedings in six federal district courts and two circuit courts. Burke Decl. Ex.
 7 C. The federal study concluded that no negative impact resulted from having cameras in the
 8 courtroom. Id. Thus, the extensive empirical evidence that has been collected on the impact of
 9 electronic coverage consistently has concluded that such coverage is not detrimental to the parties,
 10 to witnesses, to counsel, or to courtroom decorum. Id.

11 These recent court decisions and empirical studies are consistent with the Ninth Circuit's
 12 recent decision to experiment with allowing federal district courts to allow camera coverage of
 13 civil, non-jury trials. The parties here are represented by experienced counsel. Any concerns
 14 about "privacy" are undermined by the fact that witnesses at the trial would be testifying publicly,
 15 and would be the subject of intense media attention regardless of whether the proceedings were
 16 broadcast on television. In any event, absent "'exceptional circumstances,' the public's right of
 17 access to court proceedings and records trumps individual privacy interests." Copley Press, Inc.
 18 v. Superior Court, 63 Cal. App. 4th 367, 376 (1998) (not even a 15-year-old high school student's
 19 interest in maintaining the confidentiality of court documents detailing a sexual assault against
 20 him outweighed the public's right of access to the documents); see also New York Times Co. v.
 21 Superior Court, 52 Cal. App. 4th 97, 104 (1997) ("[f]ear of possible opprobrium or
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 23

24 ³ These findings were reinforced by the final report of a special task force appointed after
 25 the O.J. Simpson criminal trial to evaluate whether television coverage of trials should be
 26 continued in California. Based on all the evidence it gathered, the task force concluded in May
 27 1996 that cameras should remain in the California courtrooms. Strikingly, the task force found
 28 that judges who actually had presided over televised trials favored allowing cameras in the
 courtroom. Ninety-six percent of those judges reported that the presence of a video camera did
 not affect the outcome of a trial or hearing in any way. In addition, the overwhelming majority of
 them reported that a camera did not affect their ability to maintain control of the proceedings, nor
 did it diminish jurors' willingness to serve. See 1996 Report of Task Force on Photographing,
Recording, and Broadcasting in the Courtroom (attached as Burke Decl. Ex. E).

1 embarrassment is insufficient to prevent disclosure” of public records); United States v. Posner,
 2 594 F. Supp. 930, 935-936 (S.D. Fla. 1985) (individual’s privacy interest in income tax return
 3 could not overcome public’s right of access because return already had been admitted in evidence
 4 at trial). There has been no showing in this case that any such exceptional circumstances are
 5 present that would require prohibiting the public from viewing the trial firsthand on television.
 6 Even if this showing could be made, the Court obviously has numerous safeguards at its disposal
 7 that can address any issues that arise and any such concerns are not a legitimate basis for
 8 completely barring television cameras from these historic proceedings.

9 **3.**

10 **CONCLUSION**

11 As Supreme Court Justice Anthony Kennedy told Congress, in discussing whether
 12 electronic access of court proceedings should be permitted:

13 You can make the argument that the most rational, the most dispassionate, the most
 14 orderly presentation of the issue is in the courtroom, and it is the outside coverage
 15 that is really the problem. In a way, it seems perverse to exclude television from
 16 the area in which the most orderly presentation of the evidence takes place.

17 Hearings Before a Subcm. Of the House Comm. on Appropriations, 104th Congress, 2d Sess. 30
 18 (1996). Justice Kennedy is right. If there is a public benefit to public trials – and there is – then
 19 there also is a public benefit to complete access to public trials. Two hundred years ago, the court
 20 accommodated the public’s interest in court proceedings by moving high profile proceedings to a
 21 larger building. As the Supreme Court noted in Press Enterprise v. Superior Court (Press
 22 Enterprise II), 478 U.S. 1, 10 (1986), the probable cause hearing in the Aaron Burr trial “was
 23 held in the Hall of the House of Delegates in Virginia, the courtroom being too small to
 24 accommodate the crush of interested citizens.” Through the use of cameras in the courtroom,
 25 today’s technology affords a much easier way to provide access to members of the public who are
 26 interested in following this important case, in which the Court will adjudicate the constitutionality
 27 of California’s constitutional ban prohibiting same sex couples from marrying. To promote
 28 public confidence in and understanding of the judicial system and the outcome of this closely

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1 watched case, the Media Coalition respectfully requests that the Court issue an order permitting
2 live electronic coverage of these historic trial proceedings.

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5 DATED: December 31, 2009

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
JEFF GLASSER

6
7
8 By: : _____ /s/
Thomas R. Burke

9 Attorneys for Non-Party Media Coalition
10 ABC NEWS; KGO TV; KABC TV; CABLE
11 NEWS NETWORK; IN SESSION (formerly
12 known as "COURT TV"); FOX NEWS; NBC
13 UNIVERSAL, INC.; CBS NEWS; HEARST
14 CORPORATION; DOW JONES & COMPANY,
15 INC.; THE ASSOCIATED PRESS; and
16 NORTHERN CALIFORNIA CHAPTER OF
17 RADIO & TELEVISION NEWS DIRECTORS
18 ASSOCIATION
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