NO. 10-16696

ARGUED DECEMBER 6, 2010
(CIRCUIT JUDGES STEPHEN REINHARDT, MICHAEL HAWKINS, & N.R. SMITH)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr., et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

On Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James Ware)

APPELLANTS' MOTION FOR ORDER COMPELLING RETURN OF TRIAL RECORDINGS

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Appellants Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com (hereinafter, "Proponents") respectfully move the Court to order that former district judge Vaughn Walker cease further disclosures of the video recordings of the trial proceedings in this case, or any portion thereof, and that all copies of the trial recordings in the possession, custody, or control of any party to this case or of former judge Walker be returned promptly to the Court and held by the court clerk under seal.[1]

INTRODUCTION

On February 18, 2011, Judge Walker delivered a speech at the University of Arizona in which he played a portion of the video recording of the cross-examination of one of Proponents' expert witnesses in the trial of this case. The speech was video taped by C-SPAN, and it was subsequently broadcast on C-SPAN several times beginning on March 22. *See* http://www.c-spanvideo.org/program/Vaugh, "Details – Airing Details." The speech is available for viewing on C-SPAN's website. *See id.*

By publicly displaying the video recording of a portion of the trial testimony, Judge Walker (1) violated his own order placing the video recording of the trial under seal; (2) ignored the clear terms of the district court's Local Rule 77-

[1] Counsel for both Appellees oppose this motion. As indicated in the Certificate of Service, a copy of this motion has been served upon former judge Walker.

3, which prohibits the broadcast or other transmission of trial proceedings beyond "the confines of the courthouse"; (3) contravened the longstanding policies of the Judicial Conference of the United States and the Judicial Council of this Court prohibiting public broadcast of trial proceedings; and (4) defied the United States Supreme Court's prior decision in this case ruling that an earlier attempt by then-Chief Judge Walker to publicly broadcast the trial proceedings "complied neither with existing rules or policies nor the required procedures for amending them." *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010). Thus, Judge Walker "'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.'" *In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009) (Easterbrook, C.J.) (quoting 28 U.S.C. § 351(a)).

But even more regrettable, perhaps, than all of this is the fact that Judge Walker's use of the trial recording repudiated his own solemn commitment to Proponents in open court that, despite Proponents' objection, the trial was being video recorded "simply for [his] use in chambers," because it "would be quite helpful to [him] in preparing the findings of fact." Ex. 1 at 754:18-19, 755:4. In reliance on this assurance, Proponents took no action to prevent the recording of the trial. One of Proponents' expert witnesses also relied on this assurance, deciding to testify after then-Chief Judge Walker had made clear that the trial

recording would not be broadcast. Now a portion of his testimony has appeared on national television, and he regrets his decision to trust this assurance.

What's done is done. Judge Walker's speech, and C-SPAN's public dissemination of it, cannot be undone, and given that Judge Walker has recently retired from the federal bench, he cannot be disciplined. *See In re Charge of Judicial Misconduct*, 91 F.3d 90, 91 (9th Cir. Judicial Council 1996). But he can be ordered to cease further unlawful and improper disclosures of the trial recordings, or any portion thereof, and to return to this Court any copies of the trial recordings in his possession, custody, or control. We respectfully request that he be ordered to do so. We also request that Appellees be ordered to return their copies of the trial recordings, which were provided to them by then-Chief Judge Walker for their use in closing argument below and in the appeal to this Court. Putting aside that providing copies of the trial recordings to Appellees also violated Local Rule 77-3, the policies of the Judicial Conference and this Court's Judicial Council, and then-Chief Judge Walker's assurances in open court, the purpose for which they were provided has now been fulfilled, and Appellees' continued possession of the recordings can no longer be justified.

STATEMENT

A. Policies and Rules Governing Broadcast of Trial Proceedings

"In 1996, the Judicial Conference of the United States adopted a policy

opposing the public broadcast of [trial] court proceedings." *Hollingsworth v. Perry*, 130 S. Ct. 705, 711 (2010); *see also* Ex. 2 at 54. This policy, which remains in place today, *see Hollingsworth*, 130 S. Ct. at 712, is rooted in "decades of experience and study" showing the potentially negative impact of broadcasting on trial proceedings. Ex. 3 at 1; *see also Hollingsworth*, 130 S. Ct. at 711-12; Ex. 4 at 46-47. Indeed, in July 2009 the Judicial Conference forcefully reiterated to Congress its conclusion that the "negative [e]ffects of cameras in trial court proceedings far outweigh any potential benefit." Ex. 3 at 1.

Also in 1996, the Ninth Circuit Judicial Council "voted to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in the courts." Ex. 5. The Council's policy thus provided: "The taking of photographs and radio and television coverage of court proceedings in the United States district courts is prohibited." *Id.* "[T]his policy [was] … binding on all courts within the Ninth Circuit." *Id.* Accordingly, the Northern District of California adopted Local Rule 77-3, which "prohibited the streaming of transmissions, or other broadcasting or televising, beyond 'the confines of the courthouse.'" *Hollingsworth*, 130 S. Ct. at 711 (quoting Local Rule 77-3); *see also id.* at 707 (Local Rule 77-3 "forbid[s] the broadcasting of trials outside the courthouse in which a trial takes place"); Ex. 6.

B. The District Court's Efforts to Broadcast the Trial Proceedings

Former judge Walker has made no secret of his strong disagreement with the rules and policies prohibiting the broadcast of trial proceedings. Indeed, his February 18 speech was entitled "Shooting the Messenger: How Cameras in the Courtroom Got a Bad Rap." *See* http://www.c-spanvideo.org/program/Vaugh. His advocacy was no less fervent from the bench in this case. His determined effort, while Chief Judge, to broadcast the trial of this case, and the unlawful procedural irregularities that it occasioned, are recounted in detail in the Supreme Court's stay opinion, which put a stop to that effort. *See Hollingsworth*, 130 S. Ct. at 708-09, 711-12, 714-15. It suffices to repeat the Supreme Court's conclusion: "The District Court here attempted to revise its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States. It did so to allow broadcasting of this high-profile trial without any considered standards or guidelines in place. … [T]he order in question complied neither with existing rules or policies nor the required procedures for amending them." *Id*. at 713.

The Supreme Court was especially concerned about the effect on witnesses. Noting the Judicial Conference's determination that broadcasting trial testimony could have an "intimidating effect … on some witnesses," even in routine, non-controversial cases, the Court concluded that this "high-profile," highly divisive "case is … not a good one for a pilot program." *Id*. at 712, 714-15. Indeed, the

Court emphasized that "[s]ome of [Proponents'] witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment." *Id*. at 713. Thus, because public broadcast could have a chilling effect on witnesses' testimony and their willingness "to cooperate in any future proceedings," the Supreme Court determined that "irreparable harm will likely result from the denial of the stay." *Id*. at 712-13.

C. The Supreme Court's Decision Prohibiting Broadcast

On the morning of Monday, January 11, 2010, just before commencement of the trial, the Supreme Court entered a temporary emergency stay, "order[ing] that [then-Chief Judge Walker's] order … permitting real-time streaming is stayed except as it permits streaming to other rooms within the confines of the courthouse in which trial is to be held" and that "[a]ny additional order permitting broadcast of the proceedings is also stayed." *Hollingsworth v. Perry*, 130 S. Ct. 1132 (2010). The temporary stay on its face was set to expire on Wednesday, January 13, when the Court would enter a decision on Proponents' stay application. *Id*.

At the opening of trial later that morning, Appellees asked Chief Judge Walker to continue video recording the proceedings for the purpose of later public dissemination "in the event the stay is lifted" on January 13. Ex. 7 at 15:9. Chief Judge Walker accepted Appellees' proposal over Proponents' objection that recording the proceedings was not "consistent with the spirit of" the temporary

stay issued by the Supreme Court. *Id*. at 16:16.

Far from lifting the stay, on January 13, the Supreme Court instead "grant[ed] the application for a stay of the District Court's order of January 7, 2010, pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus." *Hollingsworth*, 130 S. Ct. at 715.

D. Chief Judge Walker's Creation of the Trial Recordings

During the trial proceedings later on January 13, Chief Judge Walker noted that the Supreme Court's "guidance" with respect to the issue of broadcasting the proceedings was "rather limited." Ex. 8 at 662:18-20. Early the next day, Proponents filed a letter with the district court "request[ing] that [Chief Judge Walker] halt any further recording of the proceedings in this case, and delete any recordings of the proceedings to date that have previously been made." Ex. 9 at 1. Proponents explained that, because of the Supreme Court's ruling on their stay application, the proceedings were governed by the unamended version of Local Rule 77-3, which "'banned the *recording* or broadcast of court proceedings.'" *Id*. at 2 (quoting and emphasizing *Hollingsworth*, 130 S. Ct. at 708).

A few hours later, Chief Judge Walker opened that day's proceedings by reporting that, "in light of the Supreme Court's decision yesterday, … [he was] requesting that this case be withdrawn from the Ninth Circuit pilot project." Ex. 1

at 674:7-10. Proponents then asked "for clarification … that the recording of these proceedings has been halted, the tape recording itself." *Id*. at 753:22-24. When Chief Judge Walker responded that the recording "ha[d] *not* been altered," Proponents reiterated their contention (made in their letter submitted earlier that morning) that, "in light of the stay, … the court's local rule … prohibit[s] continued tape recording of the proceedings." *Id*. at 753:25, 754:4-6 (emphasis added).

Rejecting Proponents' objection, Chief Judge Walker stated that the unamended "local rule permits … recording for purposes of use in chambers and that is customarily done when we have these remote courtrooms or the overflow courtrooms," and that that the recording "would be quite helpful to [him] in preparing the findings of fact." *Id*. at 754:15-19. Thus, Chief Judge Walker said that "*that's* the purpose for which the recording is going to be made going forward. *But it's not going to be for purposes of public broadcasting or televising*." *Id*. at 754:21-23 (emphasis added). Chief Judge Walker then repeated his position that he was making the recordings only for limited, private use: after noting that "the [unamended] local rule[] [prohibits] '[t]he taking of photographs, public broadcasting or televising, or recording for those purposes,'" Chief Judge Walker stated: "So the recording is not being made for those purposes, but *simply for use in chambers*." *Id*. at 754:24-755:4 (emphasis added). In reliance on Chief Judge

Walker's assurances that he was recording the proceedings *solely* for his personal *use in chambers*, Proponents took no further action to prevent the recording.

On January 15, Chief Judge Walker "formally requested Chief Judge Kozinski to withdraw this case from the pilot project." Ex. 10 at 2. Chief Judge Kozinski promptly granted Chief Judge Walker's request and "rescinded" his January 8 order designating this case for the pilot program. Ex. 11.

The district court then withdrew the amendment to Local Rule 77-3 authorizing participation in the pilot program. *See* Ex. 12 (showing Local Rule 77-3 without amendment). Despite the Supreme Court's criticism that the amendment lacked "standards or guidelines," *Hollingsworth*, 130 S. Ct. at 713, the district court re-proposed its amendment to Local Rule 77-3 on February 4, 2010. Ex. 13. After a comment period, the renewed proposal to amend Local Rule 77-3 lay dormant until May 2010, when the district court – without any announcement or indication on its website – published a revised set of Local Rules, effective April 20, containing the amended Local Rule 77-3. *See* Ex. 14-16.

On January 27, trial was adjourned. Closing argument was then set for June 16, 2010. On May 18, 2010, the Media Coalition requested that Chief Judge Walker "formally ask Chief Judge Kozinski to again include this case in the pilot project approved by the Ninth Circuit Judicial Council on December 17, 2009, for the sole purpose of recording, broadcasting and webcasting" the closing argument

portion of the trial. Ex. 17. Proponents submitted a letter opposing the request, explaining that it would violate the stay entered by the Supreme Court. Ex. 18.

While the Media Coalition's request was pending, and although Chief Judge Walker had unequivocally assured Proponents that he was recording the proceedings solely for his own use in chambers, Chief Judge Walker *sua sponte* invited the parties "to use portions of the trial recording during closing arguments" and, to that end, made "a copy of the video … available to the part[ies]." Ex. 19. Chief Judge Walker added: "Parties will of course be obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order," *id*., which restricts "highly confidential" material to the parties' outside counsel and experts and to the Court and its personnel, Ex. 20 ¶ 7.3.

Appellees Perry *et al.* requested and were given a copy of the recording of the entire trial proceedings, *see* Ex. 21, portions of which they played during closing argument, *see* Ex. 22 at 2961. Appellee City and County of San Francisco requested and was given portions of the trial recording, *see* Ex. 23, but did not play them during closing argument. Chief Judge Walker denied the Media Coalition's request to "record[], broadcast[] and webcast[] closing arguments." *See* Ex. 24.

On June 29, 2010, after closing argument, Proponents asked Appellees to return all copies of the trial recordings in their possession to the district court. Ex. 25 ¶ 2. When they refused, Proponents asked Chief Judge Walker to "order …

[Appellees] to return to the Court immediately all copies of the trial video in their possession." Ex. 26 at 1. Proponents argued that there was "no legitimate justification for permitting Plaintiffs and [San Francisco] to maintain possession of copies of the trial video" given that "the sole purpose identified by [Chief Judge Walker] for disseminating copies of the trial video to [them] – potential use at closing argument – ha[d] been satisfied." *Id*. at 1-2. Proponents added: "[E]ven with [Chief Judge Walker's] requirement that all copies of the trial video be 'maintain[ed] as strictly confidential,' it cannot be denied that dissemination beyond the confines of the Court has increased the possibility of accidental public disclosure," and thus of the "'irreparable harm'" that the Supreme Court acknowledged would "'likely result' from public broadcast of the trial." *Id*. at 2 (quoting *Hollingsworth*, 130 S. Ct. at 712). Appellees countered "that once judgment is entered, the parties and the Court [should] evaluate whether, and to what degree, the trial recording would be useful to the parties or to the Court in connection with any additional proceedings and/or appeal." Ex. 27 at 1.

On August 4, 2010, Chief Judge Walker denied Proponents' motion to order the return of all copies of the trial recordings. Ex. 28 at 5. Instead, he "DIRECTED" the district court clerk "to file the trial recording under seal as part of the record," and permitted Appellees to "retain their copies of the trial recording pursuant to the terms of the protective order." *Id*. at 4. After Proponents then

appealed Chief Judge Walker's final judgment, the district court clerk transmitted the certified record to this Court on October 22, 2010. Since then, the trial recordings have remained continuously under seal.

In the meantime, on April 8, 2010, Proponents petitioned the Supreme Court to grant review of this Court's earlier ruling denying their mandamus petition seeking to prohibit the district court from broadcasting or otherwise disseminating the trial proceedings. Proponents argued that, in light of Chief Judge Walker's withdrawal of his stayed broadcast order and his "unequivocal[] assur[ances] that [his] continued recording of the trial proceedings was not for the purpose of public dissemination, but rather solely for [his] use in chambers," this Court's order denying the mandamus petition should be vacated as moot. Ex. 29 at 11-13. Appellees opposed vacatur of this Court's order. On October 4, 2010, the Supreme Court granted the petition, vacated this Court's mandamus ruling, and "remanded to [this Court] with instructions to dismiss the case as moot," Ex. 30, which this Court did on October 15, 2010, Ex. 31.

E. Judge Walker's Unlawful Public Disclosure of the Trial Recordings Beyond the Confines of the Courthouse

On February 18, 2011, Judge Walker, having stepped down as Chief at the end of December 2010, gave his speech at the University of Arizona. *See* http://www.c-spanvideo.org/program/Vaugh. A substantial portion of the speech, in which Judge Walker advocated allowing trial proceedings to be broadcast,

concerned this case. *See id*., video at 4:40-8:08, 30:49-42:00. At one point, Judge Walker played for his audience, on a large projection screen, an excerpt from the trial recording of the cross-examination of one of Proponents' expert witnesses. *See id*., video at 33:12-36:52. Ten days later, on February 28, 2011, Judge Walker retired from the bench. Ex. 32.

At least four times in late March 2011, C-SPAN broadcast Judge Walker's Arizona speech, including the playback of the trial proceedings. *See* http://www.c-spanvideo.org/program/Vaugh. In fact, Proponents' counsel learned of Judge Walker's speech – and of the fact that he publicly showed a portion of the trial recordings during the speech – as a result of one of those broadcasts. C-SPAN also made its broadcast of Judge Walker's speech available for public viewing on its website. *See* http://www.c-spanvideo.org/program/Vaugh.

ARGUMENT

I. THE TRIAL RECORDINGS MAY NOT BE SHOWN BEYOND THE CONFINES OF THE NORTHERN DISTRICT OF CALIFORNIA COURTHOUSE

The video recordings of the trial in this case may not lawfully be shown publicly beyond the confines of the Northern District of California courthouse. The trial recordings remain under seal; then-Chief Judge Walker's unequivocal assurances that the trial recordings were only for his use in chambers remain on the record; the Supreme Court's decision in this case – if not its stay, which might well still be in force but for those assurances – and the duly enacted rules of the Judicial

Council and the district court remain binding and plainly bar public dissemination of the trial recordings beyond the confines of the courthouse; and the considered judgment of the Judicial Conference of the United States continues to strongly counsel against public dissemination of the trial recordings.

The trial recordings were not the personal property of Judge Walker, for him to use as he pleased; he had access to them only by virtue of his role as the judicial officer presiding in this case. So, when he played a portion of the trial recordings during his February 18 speech (which was then disseminated nationally by C-SPAN), he violated all of these prohibitions. As Chief Judge Frank Easterbrook of the Seventh Circuit Court of Appeals stated recently in a disciplinary proceeding against a district judge who "allowed video recording and live broadcasting … of a civil proceeding": A district court "judge who contravenes policies adopted by the Judicial Conference and the Judicial Council has 'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.'" *In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (quoting 28 U.S.C. § 351(a)).

The setting for Judge Walker's public dissemination of the trial recordings – a speech outside the performance of his official duties – did not exempt him from any of these prohibitions. Rather, he was obligated to "respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the

integrity and impartiality of the judiciary." Code of Conduct for United States Judges, Canon 2A; *see also* Ninth Circuit Rules of Judicial Conduct art. I, § 3(h)(2) (judge engages in "[c]ognizable misconduct" if his "conduct occurring outside the performance of official duties … might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people"); *cf. United States v. Lang*, 364 F.3d 1210, 1212, 1221-22 (10th Cir. 2004) (court clerk who "took home" copy of "sealed affidavit" convicted under 18 U.S.C. § 2071(a)), *vacated on other grounds*, 543 U.S. 1108 (2005), *reinstated in relevant part*, 405 F.3d 1060, 1061 (10th Cir. 2005).

To ensure that the confidentiality of the trial recordings is not breached again, as well as to restore public confidence in the judiciary, this Court should exercise its inherent power to control the record of this case by ordering that former district judge Walker cease further disclosures of the trial recordings, or any portion thereof, and that all copies of the trial recordings that are in the possession, custody, or control of any party to this case or of former judge Walker be returned promptly to the Court and held by the court clerk under seal.

A. The Recordings of the Trial Proceedings Are Under Seal

Then-Chief Judge Walker "DIRECTED" the district court clerk "to file the trial recording under seal as part of the record." Ex. 28 at 4. Since then, the trial

recordings have remained continuously under seal. *See* Circuit Advisory Comm. Note to R. 27-13 ("Absent an order to the contrary, any portion of the district court … record that was sealed below shall remain under seal upon transmittal to this court."). The purpose of the seal is to preserve the confidentiality of the sealed record. *See United States v. Nixon*, 417 U.S. 960, 960-61 (1974).

B. Chief Judge Walker Unequivocally Assured Proponents That the Trial Recordings Would Be for His Exclusive Use in Chambers

Although the Supreme Court had just stayed his broadcast order, then-Chief Judge Walker insisted on recording the trial proceedings anyway. In doing so over Proponents' objection, Chief Judge Walker assured Proponents on the record that the recording was "*not going to be for purposes of public broadcasting or televising*," but rather "*simply for use in chambers*." Ex. 1 at 754:22-23, 755:3-4 (emphasis added). In reliance on Chief Judge Walker's assurances, Proponents took no further action to prevent him from recording the trial proceedings. One of Proponents' witnesses also relied on those assurances, and now the recording of a portion of his testimony has been shown by Judge Walker to a large public audience and, in turn, has been disseminated nationally by C-SPAN.

C. The Supreme Court's Stay, the Judicial Council's Policy, and the District Court's Local Rule Prohibit Showing the Trial Recordings Beyond the Confines of the Courthouse

The Supreme Court ruled that then-Chief Judge Walker's order authorizing "the broadcast of [this] federal trial" did not comply with "existing rules or

policies." *Hollingsworth*, 130 S. Ct. at 706, 713. True, the Supreme Court's stay later expired when the Court granted Proponents' petition for certiorari and vacated this Court's ruling denying Proponents' earlier mandamus petition. But the certiorari petition, and thus the Supreme Court's disposition thereof, were predicated on the fact that the mandamus petition was moot in light of Chief Judge Walker's unequivocal assurances that the trial recordings were solely for his use in chambers. But for those assurances, the recording of the trial would plainly have violated the Supreme Court's stay and would surely have been halted.

The "rules" and "policies" enforced by the Supreme Court's stay were those governing the issue in this Circuit and the district court. The long-standing policy of the Ninth Circuit Judicial Council still prohibits the "taking of photographs and radio and television coverage of court proceedings in the United States district courts." Ex. 5. This policy is binding on all judges within the Ninth Circuit. 28 U.S.C. § 332(d)(2); *see In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083; *In re Sony BMG Music Entm't.*, 564 F.3d 1, 7-9 (1st Cir. 2009).[2]

Likewise, the district court's Local Rule 77-3 still "prohibit[s] the streaming

[2] The Council purported to "amend" its policy to authorize a pilot program for broadcasting trial proceedings. Even if that amendment were validly adopted, *but see Hollingsworth*, 130 S. Ct. at 708, 713-14 (noting lack of statutorily required "notice and comment procedures" and lack of "considered standards or guidelines … for broadcasting"), the Council's policy would still bar Judge Walker's public dissemination of the trial recordings beyond the confines of the courthouse because this case was not part of the pilot program.

of transmissions, or other broadcasting or televising, [of district court proceedings] beyond 'the confines of the courthouse.'" *Hollingsworth*, 130 S. Ct. at 711. That "rule[] ha[s] the force of law." *Id*. at 710 (quotation marks omitted).[3]

Finally, the policy of the Judicial Conference of the United States, which is "at the very least entitled to respectful consideration," strongly counsels against public dissemination of the trial recordings beyond the confines of the courthouse. *Id*. at 711-12 (quotation marks omitted).[4]

II. THE COURT SHOULD ORDER THE IMMEDIATE RETURN OF ALL COPIES OF THE TRIAL RECORDINGS

This Court "has supervisory power over its own records and files, and access [may be] denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *Matter of*

[3] To be sure, the district court again purported to amend Local Rule 77-3 in April or May 2010 to "create[] an … exception to Rule 77-3's general ban on the broadcasting of court proceedings 'for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit.'" *Hollingsworth*, 130 S. Ct. at 711. But even if the amendment were valid, *but see id.* at 708, 713-14 (noting lack of "considered standards or guidelines … for broadcasting"), the rule would still bar public dissemination of these trial recordings beyond the confines of the courthouse because this case was not, and could not have been, designated for inclusion in the pilot program after the renewed amendment to Local Rule 77-3 was adopted. The only order designating the case for a pilot program was withdrawn long before that amendment was adopted. Ex. 10-11.

[4] In September 2010, the Conference announced a "pilot project to evaluate the effect of cameras in district court courtrooms, of video recordings of proceedings therein, and of publication of such video recordings." Ex. 33 at 11. This pilot project would not have authorized broadcast of the trial proceedings here because it requires the "consent" of the "[p]arties." *Id*. at 12.

Sealed Affidavit(s), 600 F.2d 1256, 1257 (9th Cir. 1979) ("courts have inherent power, as an incident of their constitutional function, to control papers filed with the courts within certain constitutional and other limitations"); *see also* Circuit R. 27-13(d). The record in this case, which includes the trial recordings, is now before this Court, having been transmitted by the district court clerk.

As noted earlier, Proponents previously asked then-Chief Judge Walker to order Appellees to return all copies of the trial recordings. As Proponents explained then, "even with [Chief Judge Walker's] requirement that all copies of the trial video be 'maintain[ed] as strictly confidential,'" the "dissemination [of the trial recordings] beyond the confines of the Court" would unduly increase the risk of "public disclosure" of the recordings. Ex. 26 at 2. Chief Judge Walker denied Proponents' request, but his subsequent use of the trial recordings during his Arizona speech proves that Proponents' concern was well founded. Neither the seal, nor Chief Judge Walker's commitment in open court to use the recordings only in chambers, nor the Supreme Court's decision staying his broadcast order, nor the policy of the Ninth Circuit Judicial Council, nor the district court's local rule, nor the policy of the Judicial Conference of the United States prevented him from publicly showing the trial recordings beyond the confines of the courthouse. Former judge Walker should therefore be ordered to return to this Court all copies of the trial recordings and to cease any further use of any portion thereof. *See*

United States v. New York Tel. Co., 434 U.S. 159, 174 (1977) ("The power conferred by the [All-Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.").

And now that the trial is over and the appeal has been briefed and argued to this Court, there is no legitimate reason for Appellees to continue to have a copy of the trial recordings. They too, therefore, should be ordered to return them to eliminate the risk of accidental disclosure.

CONCLUSION

For the foregoing reasons, the Court should order that former judge Walker cease further disclosures of the trial recordings in this case, or any portion thereof, and that all copies of the trial recordings in the possession, custody, or control of any party to this case or former judge Walker be returned promptly to the Court and held by the court clerk under seal.

April 13, 2011

Respectfully submitted,

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9th Circuit Case Number(s) 10-16696

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