COOPER AND KIRK, PLLC
Charles J. Cooper (DC Bar No. 248070)*
ccooper@cooperkirk.com
David H. Thompson (DC Bar No. 450503)*
dthompson@cooperkirk.com
Howard C. Nielson, Jr. (DC Bar No. 473018)*
hnielson@cooperkirk.com
Nicole J. Moss (DC Bar No. 472424)*
nmoss@cooperkirk.com
Peter A. Patterson (OH Bar No. 0080840)*
ppatterson@cooperkirk.com
1523 New Hampshire Ave. N.W., Washington, D.C. 20036
Telephone: (202) 220-9600, Facsimile: (202) 220-9601

LAW OFFICES OF ANDREW P. PUGNO
Andrew P. Pugno (CA Bar No. 206587)
andrew@pugnolaw.com
101 Parkshore Drive, Suite 100, Folsom, California 95630
Telephone: (916) 608-3065, Facsimile: (916) 608-3066

ALLIANCE DEFENSE FUND
Brian W. Raum (NY Bar No. 2856102)*
braum@telladf.org
James A. Campbell (OH Bar No. 0081501)*
jcampbell@telladf.org
15100 North 90th Street, Scottsdale, Arizona 85260
Telephone: (480) 444-0020, Facsimile: (480) 444-0028

ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
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.

EDMUND G. BROWN, JR., in his official capacity as Governor of California; KAMALA D. HARRIS, in his official capacity as Attorney General of California; MARK B. HORTON, in his official

CASE NO. 09-CV-2292 JW

DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM'S MOTION FOR STAY PENDING APPEAL

Chief Judge James Ware

Date: October 28, 2011
Time: 9 a.m.
Location: Courtroom 9, 19th Floor

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,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

Defendant-Intervenors.

Additional Counsel for Defendant-Intervenors

ALLIANCE DEFENSE FUND
Timothy Chandler (CA Bar No. 234325)
tchandler@telladf.org
101 Parkshore Drive, Suite 100, Folsom, California 95630
Telephone: (916) 932-2850, Facsimile: (916) 932-2851

Jordan W. Lorence (DC Bar No. 385022)*
jlorence@telladf.org
Austin R. Nimocks (TX Bar No. 24002695)*
animocks@telladf.org
801 G Street NW, Suite 509, Washington, D.C. 20001
Telephone: (202) 393-8690, Facsimile: (202) 347-3622

* Admitted *pro hac vice*

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that, on October 28, 2011, or as soon as the matter may be heard, before the Honorable James Ware, United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Defendant-Intervenors Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com ("Proponents") will move the Court for a stay pending appeal.[1]

The issue to be decided is: Are Proponents entitled to a stay pending appeal?

"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 was 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. 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 benefits." 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, this Court adopted Local Rule 77-3, which prohibits 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." *Hollingsworth*, 130 S. Ct. at 710-11 (quoting Rule 77-3); *see also id*. at 707 (Rule 77-3 "forbid[s] the broadcasting of trials outside the courthouse in which a trial takes place"); Ex. 6.

Despite these authorities and the Supreme Court's decision in this very case enforcing them, this Court ordered that video recordings of the trial proceedings in this case be unsealed and made

[1] Although we have noticed this motion for the next available date on this Court's calendar that is at least 35 days from today, *see* Civ. L.R. 7-2(a), we are also filing a motion asking the Court to expedite its consideration of our stay motion. Specifically, we request that the Court rule on our stay motion before it is mooted by operation of the Court's order unsealing the video-recording on September 30, 2011.

available to the public. Ex. 1 at 13. And it did so even though these recordings owed their very existence to the Court's solemn assurance, in open court, that they would *not* be used for "purposes of public broadcasting or televising." Ex. 7 at 754:21-23. Not only was this assurance necessary to comply with Rule 77-3 and the policies of the Judicial Conference and this Court's Judicial Council, but it came on the heels of an emergency Supreme Court decision specifically enforcing Rule 77-3 after then-Chief Judge Walker had ordered the trial to be broadcast.

The Court's decision thus goes beyond simply violating a binding rule, disregarding longstanding judicial policies, and directly defying the Supreme Court's ruling in this very case (though any of these errors would alone be fatal). Rather, by setting at naught the solemn commitments made by a federal judge on which litigants and witnesses relied to their detriment, the decision threatens deep and lasting harm to the integrity and credibility of the federal judiciary. As explained more fully below, the ruling unsealing the video-recordings should be stayed pending appeal.

STATEMENT OF FACTS

Two same-sex couples filed this suit claiming that Proposition 8, which provides that "[o]nly marriage between a man and a woman is valid or recognized in California," Cal. Const. art. I, § 7.5, violates the Federal Constitution. The case was assigned to the Honorable Vaughn R. Walker, who at the time was Chief Judge of this Court. Correctly anticipating that the state officials named as defendants would refuse to defend Proposition 8, the official proponents of the measure and their official campaign committee (collectively "Proponents") successfully moved to intervene.

As the case proceeded, Chief Judge Walker expressed a strong desire to publicly broadcast the forthcoming trial, notwithstanding Proponents' repeated warning that several of their witnesses would decline to testify. *See, e.g.*, Ex. 26 at 7. On January 6, 2010, (five days before the start of trial) he ordered that it be broadcast daily via the internet. *Hollingsworth*, 130 S. Ct. at 707; Ex. 8 at 16-17. Chief Judge Walker's determined effort to broadcast the trial, and the procedural irregularities it occasioned, are recounted in detail in the Supreme Court's decision staying Chief Judge Walker's order and prohibiting the public broadcast of the trial. *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," solely "to allow broadcasting of this high-profile trial without any considered standards or guidelines in place." *Id.* at 713; *see also id*. (Chief Judge Walker's order "complied neither with existing rules or policies nor the required procedures for amending them").

Despite the Supreme Court's ruling, Chief Judge Walker insisted on video-recording the trial over Proponents' objection. *See* Ex. 8 at 16:12-18; Ex. 9 at 1; Ex. 7 at 753:22-754:6. In rejecting Proponents' objection, Chief Judge Walker stated that Rule 77-3 "permits . . . recording for purposes of use in chambers," and that the recordings "would be quite helpful to [him] in preparing the findings of fact." *Id*. at 754:15-19. He assured Proponents 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).

On May 31, Chief Judge Walker *sua sponte* invited the parties "to use portions of the trial recording during closing arguments" and made "a copy of the video . . . available to the part[ies]." Ex. 11. The parties were instructed 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 district court and its personnel. Ex. 12 at 8. Plaintiffs and Plaintiff-intervenor City and County of San Francisco requested and were given copies of the recording of the trial proceedings, *see* Ex. 13, portions of which were played during closing argument, *see* Ex. 14. Separately, Chief Judge Walker denied a request by a media coalition to broadcast closing argument outside the courthouse. *See* Ex. 16.

Proponents moved for the return of all videos to the Court after closing argument, but Chief Judge Walker denied the motion and "DIRECTED" the Court Clerk to "file the trial recording under seal as part of the record" and allowed Plaintiffs (and San Francisco) to "retain their copies of the trial recording pursuant to the terms of the protective order." Ex. 17 at 4. Elsewhere in the same order, Chief Judge Walker stated that "the potential for public broadcast" of the trial proceedings "had been eliminated." *Id*. at 35-36.

Meanwhile, Proponents petitioned the Supreme Court for review and vacatur of the Ninth

Circuit's ruling, issued before the Supreme Court's stay, denying their mandamus petition seeking to prohibit broadcast of the trial. Proponents argued that, in light of Chief Judge Walker's "unequivocal[] assur[ances] that [his] continued recording of the trial proceedings was not for the purpose of public dissemination, but rather solely for [this] court's use in chambers," the Ninth Circuit's mandamus ruling should be vacated as moot. Ex. 18 at 11-13. The Supreme Court granted the petition and vacated the Ninth Circuit's ruling. *See* Ex. 19.

Despite Rule 77-3, the policies of the Judicial Conference and the Ninth Circuit's Judicial Council, the Supreme Court's prior decision in this case, the sealing order, and his own solemn commitment in open court, on February 18, 2011, Chief Judge Walker began to broadcast portions of the video recordings of the trial in connection with his teaching and public speaking. *See* Ex. 20 at 1-2. After learning of Chief Judge Walker's activities, Proponents promptly moved this Court to order the return of all copies of the trial recordings. The Court denied this motion, Ex. 21 at 4, and subsequently granted Plaintiffs' cross-motion to unseal the recordings, Ex. 1 at 13. At Proponents' request, *see* Ex. 23 at 54:14-18, the Court granted a temporary stay of its ruling that will expire on September 30, 2011, Ex. 1 at 14. [2] The Court did not, however, rule on Proponents' request for a stay pending appeal. Ex. 23 at 54:14-18. Proponents noticed an appeal on September 22, 2011.

This Court retains jurisdiction to stay its own order while an appeal is pending. *See In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000) ("[A] district court has jurisdiction to take actions that preserve the status quo during the pendency of an appeal.").

ARGUMENT

Four factors guide this Court's consideration of Proponents' emergency petition for a stay pending appeal: (1) Proponents' likelihood of success on the merits, (2) the possibility of

[2] Former Chief Judge Walker voluntarily lodged his copy of the recordings with this Court pending resolution of Proponents' motion and Plaintiffs' cross-motion. *See* Ex. 22. In its order granting Plaintiffs' cross-motion to unseal, this Court ordered that Chief Judge Walker's tapes be returned to him and, "in light of the Court's disposition of the Motion to Unseal," denied "as moot" Proponents "request for an order directing Judge Walker to comply with the Protective Order sealing the recording of the trial." Ex. 1 at 13-14 & n.24. Given that its denial of this request appears to rest on its disposition of the motion to unseal, Proponents' understand that this portion of the Court's ruling is subject to the temporary stay and would be subject to any stay pending appeal, as well.

irreparable harm absent a stay; (3) the possibility of substantial injury to other parties if a stay is issued; and (4) the public interest. *See Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008)). These factors all point to the same conclusion: This Court should "suspend[] judicial alteration of the status quo" by staying its unsealing order pending appeal. *Nken v. Holder*, 129 S. Ct. 1749, 1758 (2009).

I. Proponents' appeal is likely to succeed.

A. The unsealing order contravenes Rule 77-3, the policies of the Judicial Conference and the Ninth Circuit Judicial Council, and the Supreme Court's previous decision in this case.

As this Court implicitly recognized in grounding its ruling in the public's common law right of access to judicial records, unsealing the video-recordings will intentionally and inevitably lead to their public broadcast outside " 'the confines of the courthouse.' " *Hollingsworth*, 130 S. Ct. at 711 (quoting Rule 77-3). The order unsealing the recordings thus is contrary to Rule 77-3, as well as the longstanding policies of the Judicial Conference and the Ninth Circuit Judicial Council. It is also contrary to the Supreme Court's prior ruling in this case.

1. Rule 77-3, which "has the force of law," *Hollingsworth*, 130 S. Ct. at 711, provides in relevant part as follows:

> Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States, 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.

Ex. 6. As the Supreme Court recognized, this rule prohibits not only "public broadcasting or televising" of trial proceedings, but also "recording for those purposes." *Id*. at 710-11 (quoting Rule 77-3).[3] Accordingly, Chief Judge Walker's decision to record the trial proceedings over

[3] The version of Rule 77-3 in force at the time of the Supreme Court's decision in *Hollingsworth* did not contain an exception for public broadcast in connection with a pilot program (though the district court had attempted unlawfully to amend the rule to create (Continued)

Proponents' objection was lawful only on his representation that the recordings would not be publicly broadcast beyond "the confines of the courthouse."[4]

Furthermore, although the Court suggested that "Rule 77-3 speaks only to the creation of digital recordings of judicial proceedings for particular purposes or uses," Ex. 1 at 10, the Rule's separate prohibition against "public broadcasting or televising" of trial proceedings outside "the confines of the court house," Ex. 6, applies by its plain terms regardless of when the public dissemination occurs. Indeed, the Rule's reference to "recording for these purposes" can only be understood as extending the prohibition against "public broadcasting or televising" to subsequent broadcasts of recorded proceedings. Accordingly, regardless of whether the act of recording a particular trial itself is contrary to Rule 77-3, the subsequent public dissemination of trial recordings clearly runs afoul of the distinct "prohibit[ion against] the streaming of transmissions, or other broadcasting or televising, beyond the 'confines of the courthouse.' " *Hollingsworth*, 130 S. Ct. at 711 (quoting Rule 77-3). Thus, contrary to the Court's suggestion that "[n]othing in the language of Rule 77-3 governs whether digital recordings may be placed into the record," Ex. 1 at 10, Chief Judge Walker's decision to place the trial recordings in the record would have violated this Rule but for his order sealing the recordings and thereby preventing their public dissemination. And lifting the seal to permit public broadcasting of the trial proceedings will likewise violate the Rule. Indeed, any other reading of Rule 77-3 would render it a nullity, for it would give judges determined to broadcast trial proceedings publicly a blueprint for doing so. That cannot be the law.

2. By permitting public broadcast of the trial in this case, the Court's order is also contrary

(Cont'd)
such an exception). *See Hollingsworth*, 130 S. Ct. at 712. As discussed below, the public broadcast of the trial proceedings in this case is plainly not authorized in connection with any pilot program.

[4] Chief Judge Walker's decision to permit Plaintiffs to play portions of these video-recordings during closing arguments may have violated his assurance that the recordings would be "simply for use in chambers," Ex. 7 at 754:24-755:4. The closing arguments themselves were not publicly broadcast outside the courthouse, however, and parties were required "to maintain as strictly confidential" their copies of the recordings "pursuant to . . . the protective order." Ex. 11 at 2. Accordingly, the use of the video-recordings in connection with closing arguments did not violate Rule 77-3's prohibition on public broadcast outside the confines of the courthouse. Nor did it violate Judge Walker's assurance, made with reference to this rule, that the recordings would not be used "for purposes of public broadcast or televising." Ex. 7 at 754:21-23.

to the express policy of the Judicial Conference, which is "at the very least entitled to respectful consideration," *Hollingsworth*, 130 S. Ct. at 711-12, and of the Ninth Circuit's Judicial Council, which is "binding on all courts within the Ninth Circuit," Ex. 5. This Court's disregard of these policies is plainly a serious matter. *See In re Complaint Against Dist. Judge Joe Billy McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009) (Easterbrook, C.J.); *In re Sony BMG Music Entm't*, 564 F.3d 1 (1st Cir. 2009).

Noting the Ninth Circuit's announcement, on December 17, 2009, of a pilot program "to allow the use of cameras in certain district court proceedings," this Court suggested that "at the time the digital recording was made, it was the policy of the Ninth Circuit that the recording of civil non-jury district court proceedings was permissible." Ex. 1 at 11-12. The Judicial Council, however, is authorized to make or amend "[a]ny general order relating to practice and procedure . . . only after giving appropriate public notice and an opportunity for comment," 28 U.S.C. § 332(d)(1), and, as the Supreme Court pointed out, the December 2009 program "was not adopted after notice and comment procedures," *Hollingsworth*, 130 S. Ct. at 712 (citing 28 U.S.C. § 332(d)(1)). Further, this case was formally withdrawn from the purported pilot program promptly after the Supreme Court's decision in this case. *See* Ex. 10; Ex. 24.[5]

3. This court's decision to unseal its recordings is also contrary to the Supreme Court's prior ruling in this case. While the Supreme Court did hold that this Court's attempt to amend Rule 77-3 was procedurally invalid, *see* Ex. 1 at 9, it also held that the Court's broadcast order violated the substance of that Rule (as well as Judicial Conference policy). *See, e.g.*, *Hollingsworth*, 130 S. Ct. at 713 (holding that Chief Judge Walker's broadcast order "complied *neither* with existing rules or policies *nor* the required procedures for amending them" (emphasis added)). Further, as discussed more fully below, the Supreme Court credited Proponents' witnesses' well-substantiated fears of harassment and intimidation, *see id*. at 713-14, and accordingly made clear that even if the

[5] Although the Judicial Conference recently adopted a pilot program permitting, in certain narrow circumstances, the broadcast of civil trial proceedings, *see* Ex. 1 at 11 n.20, it likewise provides no support for public broadcast given that (1) it did not exist at the time of the trial in this case, and (2) participation in the new program requires the consent of all parties, Ex. 25 at 11.

Ninth Circuit's Judicial Council had successfully implemented a pilot program allowing public broadcast of trial proceedings, and even if Rule 77-3 had been successfully amended to permit participation in that program, this "high-profile, divisive" case, "involv[ing] issues subject to intense debate in our society," was "not a good one for a pilot program." *Hollingsworth*, 130 S. Ct. at 714.

B. The common law right of access to judicial records does not support the district court's ruling.

This Court rested its ruling solely on the common-law right "to inspect and copy public records and documents, including judicial records and documents." Ex. 1 at 6. As demonstrated below, however, this common-law right has no application to the video recordings at issue here. Even if it did apply, moreover, this qualified right would not support public access in this case, for the harms that would result from public broadcast far outweigh any potential benefits.

1. The common-law right of access is just that—a judge-made, common-law rule. It "is not absolute, and is not entitled to the same level of protection accorded a constitutional right." *San Jose Mercury News, Inc., v. U.S. Dist. Ct. for the N.D. Cal.*, 187 F.3d 1096, 1102 (9th Cir. 1999). Like every common-law rule, it may be displaced by statute or other positive enactment. *See Ctr. for Nat'l Sec. Studies v. U.S. DOJ*, 331 F.3d 918, 937 (D.C. Cir. 2003); *see generally Heck v. Humphrey*, 512 U.S. 477, 501 (1994). For example, the common-law right of access is supplanted by Fed. R. Crim. P. 6(e), governing recording and disclosure of grand jury proceedings. *See U.S. v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998). It is likewise displaced by Fed. R. Civ. P. 5.2, which does not permit documents containing minors' to be unsealed unless those names are redacted. *See* Rule 5.2(d). In short, where they are applicable, "[r]ules, not the common law, now govern." *In re Motions of Dow Jones & Co.*, 142 F.3d at 504.

As demonstrated above, Rule 77-3 would have prohibited the creation of the video-recordings at issue here but for Chief Judge Walker's unequivocal representation that they would not be publicly broadcast outside the courthouse. The Rule likewise would have barred the placement of these recordings in the record but for Chief Judge Walker's sealing order. The Court's

decision allowing the common-law right of access to trump a binding rule of the Court, *see* Ex. 1 at 10, is contrary to the well-established relationship between common-law and positive enactments.

2. In addition, the video recordings at issue here are simply not the type of judicial record to which the common-law right of access applies. As even Plaintiffs have conceded, *see* Ex. 23 at 12-13, the recordings are not themselves evidence or even argument; rather they are wholly derivative of the evidence offered, and the arguments made, in open court during the trial in this case. Further, the court reporter's transcript, not the video recordings, is the official record of the trial proceedings.[6] And as the Plaintiffs likewise conceded, the public was free to attend the trial in this case and continues to have access to the official trial transcript, which is "widely available on the internet." *See* Plaintiffs-Appellees' Opposition to Appellants' Motion Regarding Trial Recordings and Plaintiffs-Appellees' Motion to Unseal at 3, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 15, 2011). None of the authorities cited by this Court or the parties hold—or even suggest—that the common-law right of access requires more.

Indeed, in *U.S. v. McDougal*, 103 F.3d 651, 656-57 (8th Cir. 1996), the Eighth Circuit held that a videotape of President Clinton's deposition testimony (which was played in court in lieu of live testimony) was "not a judicial record to which the common-law right of public access attaches." As the Court explained, "the videotape at issue … is merely an electronic recording of witness testimony. Although the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom . . . there was, and is, no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony." *Id*.; *see also id*. (distinguishing recordings of "the primary conduct of witnesses or parties"); *cf. In re Sony BMG Music Entm't*, 564 F.3d 1, 8-9 (1st Cir. 2009) ("the venerable right of members of the public to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen"). In this case the video recordings are one step even further removed than in *McDougal* from the type of record to which the common-law right of

[6] *Cf*. Ex. 35 ("digital recordings emanating from the pilot [project] . . . are not the official record of the proceedings, and should not be used as exhibits or part of any court filing."); *supra* n.4.

access applies, for (with the exception of a few brief snippets played during closing arguments), the recordings simply depict the trial proceedings and were not themselves played at trial.

3. Even where the common-law right of access does apply, it "does not mandate disclosure in all cases." *San Jose Mercury News, Inc.*, 187 F.3d at 1102. It merely creates a presumption in favor of access that "can be overcome by sufficiently important countervailing interests." *Id.* Here, as recognized by the Supreme Court, public broadcast of the trial proceedings would subject Proponents' witnesses to a well-substantiated risk of harassment and would prejudice any further trial proceedings that may prove necessary in this case. *See Hollingsworth*, 130 S. Ct. at 713. In addition, public broadcast of the trial in violation of Chief Judge Walker's solemn assurances (and contrary to the Supreme Court's stay, the local rules, and well-settled judicial policy) threatens grave damage to the integrity of the judicial process itself. These threatened injuries are discussed more fully below. Further, this is not a case where the public seeks access to evidence or proceedings hidden from public view: the trial in this case was open to the public, widely reported, and memorialized in an official public transcript. Thus, balanced against the serious risks to Proponents, their witnesses, and the integrity of the judicial process posed by the public broadcast of the video-recording, any applicable common-law right of access must surely yield.

II. Proponents will suffer irreparable harm absent a stay.

A. Unsealing the record now will moot Proponents' appeal.

Absent a stay pending appeal, the video-recording of the trial will be unsealed and its widespread dissemination will be immediate. Once that happens, Proponents' appeal will be moot. They will "not be able to obtain adequate relief through an appeal," for "[t]he trial will have already been broadcast." *Hollingsworth*, 130 S. Ct. at 713. Mootness is by definition an irreparable harm to a party seeking appellate review. *See Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986). This Court should issue a stay pending appeal to preserve Proponents' ability to seek effective appellate review of the unsealing order.

B. Unsealing the record will lead to harassment of Proponents' witnesses.

Based on "decades of experience and study," the Judicial Conference has repeatedly found that the public broadcast of trial proceedings "can intimidate litigants [and] witnesses," "create

privacy concerns," and "increase[] security and safety issues." *E.g.*, Ex. 3 at 1 -3; *see also Hollingsworth*, 130 S. Ct. at 712-13. "Threats against judges, lawyers, and other participants could increases even beyond the current disturbing level." Ex. 3 at 3. Significantly, these findings are based on the Judicial Conference's study of ordinary, run-of-the-mine cases. "[I]n 'truly high-profile cases' one can '[j]ust imagine what the findings would be.' " *Hollingsworth*, 130 S. Ct. at 714.

As Proponents repeatedly advised Chief Judge Walker before the trial in this "high-profile, divisive" case, *id*., several of Proponents' expert witnesses voiced "concerns for their own security," *id*. at 714, and made clear "that they [would] not testify if the trial [were] broadcast," *id. at* 713. Chief Judge Walker appeared indifferent to this fact and to its obvious implications for the fundamental fairness of the trial itself, for he never even mentioned this consideration as bearing on his decision to broadcast—and when that was stayed, to video-record—the trial.[7] The Supreme Court however, was acutely concerned that Proponents' witnesses had "substantiated their concerns by citing incidents of past harassment." *Id*. at 713. Indeed, the record reflects repeated harassment of Prop 8 supporters. *See* Ex. 27; Ex. 28 at ¶¶ 10-12; Ex. 29 at ¶¶ 6-8, 12-15; Ex. 30 ; Ex. 31at ¶¶ 5-6; Ex. 32 at ¶ 8; *see also* Thomas M. Messner, *The Price of Prop 8*, *available at* www.heritage.org/Research/Family/bg2328.cfm; www.youtube.com/watch?v=hcKJEHrvwDI. For example, "donors to groups supporting Proposition 8 'have received death threats and envelopes containing a powdery white substance,' " and "numerous instances of vandalism and physical violence have been reported against those who have been identified as Proposition 8 supporters." *Hollingsworth*, 130 S. Ct. at 707. Even Plaintiffs' lead counsel has acknowledged "widespread economic reprisals" against supporters of Proposition 8. Ex. 36 at 28-29 (*cited in Hollingsworth,* 130 S. Ct. at 707). There can thus be little doubt that unsealing the trial recording for public broadcast would expose Proponents' witnesses to a serious and well-substantiated risk of harassment or worse.

[7] Despite Chief Judge Walker's subsequent assurance that the video-recordings would not be publicly broadcast, all but two of Proponents' experts ultimately did not testify. As counsel for Proponents advised Chief Judge Walker early in the trial, the witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever." Ex. 33 at 1094:18-23; *see* Ex. 26 at 7.

C. Unsealing the record could prejudice future trial proceedings.

Given that Proponents are currently appealing both the judgment invalidating Proposition 8 and the subsequent denial of our motion to vacate that judgment, it is likely that this case will be retried in the future. As noted above, *supra* note 7, only two of Proponents' six scheduled expert witnesses were willing to rely on Chief Judge Walker's unequivocal assurances that the trial recordings were solely for his judicial use in chambers, and to testify at trial. One of those witnesses soon regretted his decision to take Chief Judge Walker at his word, as he watched excerpts of his testimony displayed on national television by Chief Judge Walker himself. *See Judge Walker on Cameras in the Courtroom*, C-SPAN, http://www.c-spanvideo.org/program/298109-3. If the video-recording of the trial is now unsealed and made public, these witnesses and others would almost certainly refuse to participate in any further trial proceedings in this case, or in any other case raising such highly divisive issues. *See Hollingsworth*, 130 S. Ct. at 713 ("[W]itnesses subject to harassment as a result of broadcast of their testimony might be less likely to cooperate in any future proceedings.") Unsealing the recordings would thus surely prejudice any future trial proceedings and thus cause "irreparable harm." *Id*. at 712.

III. A stay will not subject Plaintiffs to substantial harm.

Here, as before, "[t]he balance of equities favors" a stay, for "[w]hile applicants have demonstrated the threat of harm they face if the trial is broadcast, [Plaintiffs] have not alleged any harm if the trial is not broadcast." *Hollingsworth*, 130 S. Ct. at 713. And they certainly have identified no harm that they will suffer *during the pendency of this appeal* if a stay is entered.

IV. The public interest is served by staying the district court's order.

As the Court recognized, *see* Ex. 23 at 24-25, nothing less than the integrity and reputation of the judiciary is at stake in this case. Chief Judge Walker solemnly and unambiguously represented in open court that the recording of the trial would not be used "for purposes of public broadcasting or televising." Ex. 7 at 754:21-23. He assured the parties that only "some further order of the Supreme Court or the Court of Appeals" could permit transmission beyond the courthouse. Ex. 34. Proponents took him at his word (as did their witnesses who took the stand) and thus took no action to enforce the Supreme Court's stay or otherwise prevent the recording of the trial.

Indeed, in express reliance on Chief Judge Walker's promise, *see* Ex. 18 at 11-12, Proponents forwent their opportunity, invited by the Supreme Court itself, to seek further review from that Court of Chief Judge Walker's broadcast order. And in deciding not to appeal the subsequent order placing the recording in the record *under seal*, Proponents relied on Chief Judge Walker's unequivocal determination—made in the very same opinion placing the recording in the record—that "the potential for public broadcast" of witness testimony "had been eliminated," Ex. 17 at 35-36. Despite all of this, Chief Judge Walker himself later reneged on his commitment, violated his seal, and ignored Local Rule 77-3 and judicial conference policy by broadcasting excerpts of the trial recording.

Although the Court has suggested that it is not bound by the former presiding judge's commitments, its ruling may persuade future litigants and witnesses that judicial promises are unworthy of confidence, and cause grave and lasting injury to the integrity and credibility of the federal judiciary.

As discussed above, any countervailing public interest in access to the video-recording of the public trial in this case is small. And any public interest in *immediate, pre-appeal access* is surely negligible. The public interest, like the other equities, thus weighs heavily in favor of a stay.

CONCLUSION

For the foregoing reasons, this Court should stay its unsealing order pending appeal.

Dated: September 23, 2011

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

By: /s/Charles J. Cooper
Charles J. Cooper