EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Kristin M. Perry, et al.,

Plaintiffs,

v.

Arnold Schwarzenegger, et al.,

Defendants.

/

NO. C 09-02292 JW

ORDER GRANTING PLAINTIFFS' MOTION TO UNSEAL DIGITAL RECORDING OF TRIAL; GRANTING LIMITED STAY

I. INTRODUCTION

Foremost among the aspects of the federal judicial system that foster public confidence in the fairness and integrity of the process are public access to trials and public access to the record of judicial proceedings. Consequently, once an item is placed in the record of judicial proceedings, there must be compelling reasons for keeping that item secret. In the course of the non-jury trial of this case, at the direction of the presiding judge, court staff made a digital recording of the trial. After the close of the evidence, the judge ordered the clerk of court to file that digital recording under seal. The trial record is closed and the case is currently on appeal to the Ninth Circuit.

Presently before the Court is a Motion by Plaintiffs to unseal the recording.[1] The Motion is opposed by Defendant-Intervenors. Upon review of the papers and after a hearing conducted on August 29, 2011, the Court concludes that no compelling reasons exist for continued sealing of the

[1] (hereafter, "Motion," Docket Item No. 771-4.) This Motion was originally brought before the Ninth Circuit, which currently has appellate jurisdiction over the merits of the underlying decision in this case, including the judgment. (See Order at 2, Docket Item No. 771.) On April 27, 2011, the Ninth Circuit transferred the Motion to this Court, on the ground that this Court still has jurisdiction over "ancillary matters" associated with this case. (Id. at 2-3.)

digital recording of the trial. Accordingly, the Court GRANTS Plaintiffs' Motion to Unseal and ORDERS the Clerk of Court to place the digital recording in the publicly available record of this case.

II. BACKGROUND

The digital recording at issue in this Motion is of a trial over which former Chief Judge Vaughn Walker (retired) presided. A detailed summary of the background of the case and its procedural history can be found in the Order issued by Judge Walker on August 4, 2010.[2] Here, the Court reviews the procedural history relevant to the present Motion.

On December 21, 2009, a coalition of media companies requested Judge Walker's permission to televise the trial.[3] (See Docket Item No. 313.) On January 6, 2010, Judge Walker held a hearing regarding the recording and broadcasting of the trial at which he announced that an audio and video feed of the trial would be streamed to several courthouses in other cities, and that the trial would be recorded for broadcast over the Internet. Hollingsworth, 130 S. Ct. at 708-09. On January 7, 2010, Judge Walker notified the parties that the Court had made a formal request to Ninth Circuit Chief Judge Kozinski that the trial be included in a pilot program being conducted by the Ninth Circuit that allowed audio-video recording and transmission of non-jury trial court proceedings. (See Docket Item No. 358.) On January 8, 2010, Chief Judge Kozinski issued an order approving real-time streaming of the trial to certain courthouses, pending the resolution of technical difficulties. Hollingsworth, 130 S. Ct. at 709.

On January 9, 2010, Defendant-Intervenors applied to the Supreme Court for a stay of the Court's order approving the broadcasting of the trial, which the Supreme Court granted on January 13, 2010. See id. at 709-10 (staying the broadcast because the Northern District of California's amendment of its Local Rules to permit broadcast of the trial "likely did not" comply with federal

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[2] (See Pretrial Proceedings and Trial Evidence; Credibility Determinations; Findings of Fact; Conclusions of Law; Order, hereafter, "August 4 Order," Docket Item No. 708.)

[3] A detailed discussion of the factual background of the Court's consideration of whether the trial should be recorded or broadcast may be found in the Supreme Court's opinion staying the broadcast of the trial. See Hollingsworth v. Perry, 130 S. Ct. 705 (2010).

law). On January 15, 2010, Judge Walker notified the parties that, in compliance with the Supreme Court's January 13, 2010 Order, he had formally requested Chief Judge Kozinski to withdraw the case from the pilot project. (See Docket Item No. 463 at 2.)

Although he did not commence broadcasting of the trial, Judge Walker notified the parties that digital recording of the trial would continue "for use in chambers." (See Docket Item No. 463 at 2.) Later, on May 31, 2010, Judge Walker expanded the use of the recording. He notified the parties that "[i]n the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party." (Docket Item No. 672 at 2.) He ordered that the parties "to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order."[4] (Id.) On June 2, 2010, both Plaintiffs and Plaintiff-Intervenor City and County of San Francisco requested a copy of the digital recording, pursuant to the Court's May 31, 2010 Order.[5] In the August 4 Order, Judge Walker noted that the "trial proceedings were recorded and used by [the Court] in preparing the findings of fact and conclusions of law" and directed the Clerk to "file the trial recording under seal as part of the record." (August 4

[4] On January 12, 2010, the parties entered into an Amended Protective Order. (hereafter, "Protective Order," Docket Item No. 425.) The Protective Order was entered because disclosure and discovery activity in the case would be "likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted." (Id. at 1.) Paragraph 7.3 of the Amended Protective Order addresses items that are designated as "HIGHLY CONFIDENTIAL–ATTORNEYS' EYES ONLY," and states that such items may only be disclosed to the parties' counsel of record, certain experts, the Court and its personnel, "court reporters, their staffs, and professional vendors" who have signed an agreement to be bound by the Protective Order and the author of the item. (Id. at 8-9.) The Protective Order specifies that "[e]ven after the termination of this litigation, the confidentiality obligations imposed by [the Order] shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs." (Id. at 2.)

[5] (See Notice to Court Clerk from Plaintiff-Intervenor City and County of San Francisco Re Use of Video, Docket Item No. 674 (stating that Plaintiff-Intervenor "wishes to obtain a copy of [certain portions] of the trial video to review for possible use at closing argument"); Notice to Court Clerk Re Plaintiffs' Request for a Copy of the Trial Recording, Docket Item No. 675 (stating that Plaintiffs "respectfully request a copy of the trial recording for possible use during closing arguments").)

Order at 4.) The Order also provided that the "parties may retain their copies of the trial recording pursuant to the terms of the protective order."[6] (Id.)

After judgment was entered, an appeal from the Judgment was taken to the Ninth Circuit. (See Docket Item Nos. 719, 728.) During the course of the appeal, Defendant-Intervenors moved to prevent Judge Walker from showing snippets of the recording from a copy which he took as part of his judicial papers upon his retirement and to compel Judge Walker, as well as Plaintiffs and Plaintiff-Intervenor, to return the recording. Along with their opposition to that motion, Plaintiffs filed what the Ninth Circuit deemed a Cross-Appeal to unseal the recording. On June 14, 2011, the Court denied Defendant-Intervenors' Motion. (June 14 Order at 1.) This Order addresses Plaintiffs' Cross-Motion to Unseal the recording.

Plaintiffs, joined by a non-party coalition of media companies,[7] move the Court to unseal the digital recording of the trial on constitutional and common law grounds. (Motion at 9-10.) Defendant-Intervenors oppose unsealing the recording on multiple grounds.[8] As their principal grounds for maintaining the seal, they rely on a statement made by Judge Walker about how the

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[6] On June 14, 2011, after the case was assigned to Chief Judge Ware, the Court issued an order denying Defendant-Intervenors' Motion for Order Compelling Return of Trial Recordings. (hereafter, "June 14 Order," Docket Item No. 798.) In its June 14 Order, the Court explained that copies of the digital recording of the trial had been made available to both parties for use during the trial, and held that because "there is no indication that the parties have violated the Protective Order, and because appellate proceedings in this case are still ongoing, the parties may retain their copies of the trial [digital recording]." (Id. at 4.)

[7] Plaintiffs' Motion has been joined by the Non-Party Media Coalition, which is comprised of Los Angeles Times Communications, LLC; The McClatchy Company; Cable News Network, In Session; The New York Times Co.; FOX News; NBC News; Hearst Corporation; Dow Jones & Company, Inc.; The Associated Press; KQED Inc., on behalf of KQED News and the California Report; The Reporters Committee for Freedom of the Press; and the Northern California Chapter of the Radio & Television News Directors Association. (See Joinder of Non-Party Media Coalition in Plaintiffs-Appellees' Motion to Unseal at 1, Docket Item No. 771-6.) Like Plaintiffs, the Non-Party Media Coalition contends that there is a First Amendment right of access to judicial proceedings, and that the right applies to the digital recording in this case. (Id. at 4-10.)

[8] (Appellants' Opposition to Appellees' Motion to Unseal at 5-7, hereafter, "Opp'n," Docket Item No. 771-7.) In addition, the State Defendants have filed a Statement of Non-Opposition stating that they "do not oppose the Plaintiffs' motion to publicly release the videotapes of the trial of this matter." (Docket Item No. 805 at 2.)

recording would be used, a ruling by the United States Supreme Court and various Judicial Council statements and Northern District Local Rules.

III. DISCUSSION

A. The Digital Recording of the Trial Is in the Record

Before discussing the specific grounds urged in favor and in opposition to unsealing the recording, the Court discusses the significance the Court gives to the fact that the digital recording is part of the judicial record.

It is undisputed that on August 4, 2010, Judge Walker ordered the Clerk to file the digital recording of the trial under seal "as part of the record." (August 4 Order at 4.) District court judges have wide discretion to note adjudicative facts and occurrences for the record. (See, e.g., Fed. R. Evid. 201.) While a digital recording of a trial might be an unusual item, district court judges have the authority to order the clerk to include as part of the record any item indicative of the proceedings. At the time Judge Walker ordered the recording filed as part of the record, none of the parties, including Defendant-Intervenors, made an objection. Moreover, here and now, in their Opposition to unsealing the recording, Defendant-Intervenors do not contend that Judge Walker committed a legal error or abused his discretion when he ordered the digital recording to be filed as part of the record. Furthermore, no party has filed a motion either to vacate the portion of the Court's August 4 Order that directed the Clerk to file the recording as part of the record or to strike the digital recording from the record.[9] Instead, the parties, including Defendant-Intervenors, proceed from the common premise that the digital recording is unquestionably part of the record.[10] The

[9] At the August 29 hearing, the Court brought this issue to the attention of the parties, and was informed by Defendant-Intervenors' counsel that Defendant-Intervenors, to counsel's knowledge, have not considered bringing such a motion. By raising this issue however, the Court is not commenting whether if such a motion were to be made, it would be timely or appropriate.

[10] (See Opp'n at 5-6 (asserting that "the [digital recording is] now part of the record of the case," but contending that this fact "does not matter" because the common law right to access trial records "has no purchase" in this case, insofar as the digital recording was created "only on condition that [it] not be publicly disseminated outside the courthouse").)

parties have limited their argument solely to whether the digital recording should remain sealed. The Court now proceeds to consider the legal standard for maintaining the recording under seal.

B. Legal Standards for Maintaining an Item in the Record Under Seal

Plaintiffs move to unseal the recording on constitutional and common law grounds. Although a number of circuits have explicitly held that there is a First Amendment right of access to court records in civil proceedings,[11] the Ninth Circuit has declined to reach such a conclusion. See San Jose Mercury News v. U.S. Dist. Court, 187 F.3d 1096, 1101-02 (9th Cir. 1999) ("We leave for another day the question of whether the First Amendment . . . bestows on the public a prejudgment right of access to civil court records."). Accordingly, the Court only evaluates Plaintiffs' Motion to Unseal under the common law.

There is a common law right of public access to records in civil proceedings. Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995) (citing Nixon v. Warner Comm., Inc., 435 U.S. 589, 597 (1978)). The common law right of access is "a general right to inspect and copy public records and documents, including judicial records and documents." Nixon, 435 U.S. at 597. This right of access is generally not conditioned "on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." Id. Rather, the kinds of public interest that have been found to support the issuance of a writ compelling access to public records include "the citizen's desire to keep a watchful eye on the workings of public agencies" and "a newspaper publisher's intention to publish information concerning the operation of government." Id. at 598.

Transparency "is pivotal to public perception of the judiciary's legitimacy and independence."[12] As the Second Circuit has explained, while the political branches of government can "claim legitimacy by election," judges can only do so by way of their reasoning; thus, "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision

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[11] See, e.g., Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91-92 (2d Cir. 2004) (observing that the Second Circuit recognizes a First Amendment right of access to civil proceedings, and discussing similar caselaw in the Third and Fourth Circuits).

[12] United States v. Aref, 533 F.3d 72, 82 (2d Cir. 2008).

look more like fiat and requires rigorous justification."[13] Therefore, because the Constitution "grants the judiciary 'neither force nor will, but merely judgment,'" it is imperative that courts "impede scrutiny of the exercise of that judgment only in the rarest of circumstances."[14]

This is not to say that transparency must never yield to other interests.[15] There are undoubtedly circumstances in which the damage that would be caused by making public certain aspects of judicial proceedings is so significant that it must override the public's interest in being able to freely scrutinize those proceedings. In determining whether access to the record is appropriate, courts should consider "the interests advanced by the parties in light of the public interest and the duty of the courts." Hagestad, 49 F.3d at 1434 (quoting Nixon, 435 U.S. at 602).

In the Ninth Circuit, the decision whether to unseal an item in the record is "one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Hagestad, 49 F.3d at 1434 (quoting Nixon, 435 U.S. at 599). Courts that consider the common law right of access are instructed to "start with a strong presumption in favor of access to court records." Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003). A party seeking to overcome this strong presumption bears the burden of meeting a "compelling reasons" standard, under which the party must "articulate compelling reasons supported by specific factual findings" that "outweigh the general history of access and the public policies favoring disclosure." Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (citations omitted). In determining whether the right of access should be overridden, courts should consider "all relevant factors," including "the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." Foltz,

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[13] Id. (citing Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 348 (7th Cir. 2006)).

[14] Id. (citing The Federalist No. 78 (Alexander Hamilton)).

[15] (See, e.g., id. (finding that the "legitimate national-security concerns at play" in a case made it appropriate for the district court to seal certain documents, despite the compelling public interest in a transparent judicial process).)

331 F.3d at 1135 (citing Hagestad, 49 F.3d at 1434). The presumption of access "may be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.'" Hagestad, 49 F.3d at 1434 (citations omitted). Further, a "judge need not document compelling reasons to unseal [a court record]; rather the proponent of sealing bears the burden with respect to sealing. A failure to meet that burden means that the default posture of public access prevails." Kamakana, 447 F.3d at 1182.

C. Whether the Digital Recording Should Be Unsealed

With a strong presumption in favor of unsealing the digital recording of the trial for the public to access it, the Court considers the grounds urged by Defendant-Intervenors for maintaining the seal. Defendant-Intervenors offer four justifications for maintaining the seal: (1) the circumstances under which the recording was made; (2) an injunction issued by the United States Supreme Court during the proceedings before Judge Walker; (3) unsealing would violate Civil Local Rule 77-3; and (4) public policy concerns. The Court considers each of these contentions in turn.

1. The Conditions Under Which the Digital Recording Was Created

Defendant-Intervenors contend that the digital recording should not now be made public, because it was originally created "on condition that [it] not be publicly disseminated outside the courthouse." (Opp'n at 6.) Defendant-Intervenors contend that Judge Walker's statement that he would use the digital recording during his deliberations constituted a guarantee that the recording would remain sealed. (See id. at 1, 7.) Upon review, the Court finds that the record does not support the contention that Judge Walker limited the digital recording to chambers use only. As discussed above, Judge Walker, without objection, made copies of the digital recording available to the parties for use during closing arguments. (See Docket Item No. 672 at 2.) At least two of the parties obtained copies of the digital recording, and one of the parties played segments on the record during closing argument in open court.

Moreover, Defendant-Intervenors offer no authority in support of the proposition that the conditions under which one judge places a document under seal are binding on a different judge, if a

motion is made to that different judge to examine whether sealing is justified; nor is the Court aware of any authority standing for that proposition.[16]

Accordingly, the Court finds that the conditions under which the digital recording was created do not constitute "compelling reasons" to overcome the strong presumption in favor of granting the public access to the recording.

2. The Injunction by the U.S. Supreme Court

Defendant-Intervenors contend that unsealing the digital recording would violate the injunction issued by the United States Supreme Court. (See Opp'n at 5-7.) However, the Court finds that Defendant-Intervenors' reliance on the Supreme Court's decision is misguided. In its decision staying the broadcasting of the trial, the Supreme Court stated that its "review [was] confined to a narrow legal issue: whether the District Court's amendment of its local rules to broadcast [the] trial complied with federal law." Hollingsworth, 130 S. Ct. at 709. Without "expressing any view on whether [federal] trials should be broadcast," the Supreme Court held only that the proposed "live streaming of [the] court proceedings" in this case should be stayed "because it appears that the [Northern District of California and the Ninth Circuit] did not follow the appropriate procedures . . . before changing their rules to allow such broadcasting." Id. at 706-09. Accordingly, in light of the Supreme Court's explicit statement that it was solely addressing procedural issues arising from the Northern District's amendment of its local rules regarding the broadcast of court proceedings, the Court finds that the Supreme Court's opinion does not provide

[16] In fact, caselaw suggests that a party's reliance on the confidentiality provisions of a protective order may not suffice to outweigh the strong presumption in favor of public access to court records. See Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 125 (2d Cir. 2006) (holding that the "mere existence of a confidentiality order says nothing about whether complete reliance on the order to avoid disclosure was reasonable"). In Lugosch, the court observed that the confidentiality order at issue specifically "contemplate[d] that relief from the provisions of the order may be sought" from the court, and concluded that it was therefore "difficult to see how the defendants can reasonably argue that they produced documents in reliance on the fact that the documents would always be kept secret." Id. Similarly in this case, the Protective Order states that "[n]othing in this Order abridges the right of any person to seek its modification by the Court in the future." (Protective Order at 11.)

"compelling reasons" to overcome the strong presumption in favor of public access to the digital recording, now that the trial is over and the digital recording has entered the court record.

3. Civil Local Rule 77-3

At the August 29 hearing, Defendant-Intervenors contended that the plain language of Local Rule 77-3's prohibition on "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" necessarily means that the digital recording may not be unsealed, because unsealing the recording would inevitably result in an unlawful "transmission" of the recording outside the environs of the courtroom.

Admittedly, digital recordings of trial proceedings come within the ambit of Local Rule 77-3.[17] However, Local Rule 77-3 speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes or uses.[18] At the time the digital recording at issue in this case was made, there was no objection that Local Rule 77-3 prohibited its creation; nor is such an argument being made now. Nothing in the language of Local Rule 77-3 governs whether digital recordings may be placed into the record. Nor does the Rule alter the common law right of access to court records if a recording of the trial is placed in the record of proceedings. The Court is unaware of any case holding that a court's local rule on recordings can override the common law right of access to court records. Accordingly, the Court finds that Local Rule 77-3 is not authority for superseding the common law right of access to court records, even for a digital recording of the trial itself.

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[17] The Court uses the version of Local Rule 77-3 that was in effect during the trial.

[18] The Court observes that the "plain language" of Local Rule 77-3 may give rise to several possible interpretations. Defendant-Intervenors, in effect, offer the interpretation that the Rule is intended to be a bridle on district court judges, constraining them from recording judicial proceedings and then entering those recordings into the court record. Another possible interpretation is that the Rule is intended to function as a protective cover for the court, shielding judicial proceedings from being photographed or recorded by outside parties or litigants. Defendant-Intervenors offer no caselaw indicating that the Court should adopt the former interpretation of the Rule. In the absence of any such authority, the Court declines to adopt the former, or any, interpretation of the Rule.

4. The Chilling Effect on Expert Witnesses and Other Public Policy Considerations

Defendant-Intervenors contend that "public dissemination of the [digital recording] could have a chilling effect on . . . expert witnesses' willingness 'to cooperate in any future proceeding.'" (See Opp'n at 7.) However, the Court finds that this contention is mere "unsupported hypothesis or conjecture," which may not be used by the Court as a basis for overcoming the strong presumption in favor of access to court records. Hagestad, 49 F.3d at 1434.

The Court is aware that many observers have expressed concerns that the broadcast of federal judicial proceedings may have detrimental consequences.[19] Indeed, it is because of such concerns that the Judicial Conference of the United States has urged that the circuits exercise caution with respect to the use of cameras in federal courtrooms.[20] Consistent with that advice, the Ninth Circuit has exhibited a willingness to allow the use of cameras in certain district court proceedings, and under certain limited circumstances. On December 17, 2009, the Judicial Council of the Ninth Circuit voted to allow district courts in the Ninth Circuit to "experiment with the dissemination of video recordings in civil non-jury matters only."[21] In accordance with that

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[19] (See, e.g., Opp'n at 3-4 (noting the concerns that broadcasting trial proceedings may, *inter alia*, "intimidate litigants, witnesses, and jurors" and "cause judges to avoid unpopular decisions or positions").)

[20] (See Report of the Proceedings of the Judicial Conference of the United States at 17, *available at* www.uscourts.gov/judconf/96-Mar.pdf (Mar. 12, 1996) (stating that the Conference "[s]trongly urge[d] each circuit judicial council to adopt an order . . . not to permit the taking of photographs and radio and television coverage of court proceedings in the United States district courts.").) On June 21, 1996, the Judicial Council of the Ninth Circuit voted to prohibit the "taking of photographs and radio and television coverage of court proceedings in the United States district courts," in accordance with the Judicial Conference's recommendation. (See Appellants' Motion for Order Compelling Return of Trial Recordings, Ex. 5, Docket Item 771-2.) On September 14, 2010, however, the Judicial Conference of the United States evinced a willingness to reconsider its stance on the propriety of recording district court proceedings by approving a pilot project to "evaluate the effect of cameras in district court courtrooms, video recordings of proceedings, and publication of such video recordings." (See Judiciary Approves Pilot Project for Cameras in District Courts, *available at* http://www.uscourts.gov/news/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx.)

[21] (See Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts, *available at* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf.) The Ninth

decision, the Ninth Circuit created a "pilot program" for recording certain district court cases. (Id.) It is true that the Supreme Court stayed the broadcast of this trial. However, as discussed above, the Supreme Court only stayed the broadcast on the grounds that the Northern District's revision of its Local Rules to permit the broadcast "likely did not" comport with federal law. Hollingsworth, 130 S. Ct. at 709-10. The Supreme Court did not invalidate the Ninth Circuit's policy in regard to the recording of civil non-jury district court proceedings. Thus, 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.[22] Accordingly, the Court finds that the policy concerns expressed by the Judicial Conference of the United States do not prevent the Court from unsealing the digital recording of this civil, non-jury trial.

Although the Court acknowledges that significant public policy concerns are implicated in allowing cameras in federal courtrooms, nothing in this Order speaks to the broader question of whether district court trials should be recorded or broadcast. Rather, this Order solely addresses the narrow question of whether the digital recording in this case, which is in the record, should now be unsealed pursuant to the common law right of access to court records. The Court answers that question in the affirmative, without addressing any of the larger questions that may potentially arise from circumstances similar to this case.

5. The Fairness of the Trial Is Not Part of This Consideration

In addition to relying on constitutional and common law bases for unsealing the recording, at the August 29 hearing, Plaintiffs argued that the digital recording of the trial should be unsealed in order to assist the litigants in rebutting arguments made by Defendant-Intervenors, including, *inter alia*, arguments about the fairness of the trial. The Court declines to base its decision on whether to

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Circuit explained that its decision "amend[ed]" the prior Ninth Circuit policy prohibiting the taking of photographs and radio and television coverage of court proceedings in the district courts. (Id.)

[22] See also Hollingsworth, 130 S. Ct. at 715-17 (Breyer, J., dissenting) (setting forth, as "context" for the Northern District's amendment of its Local Rules, the history of the Ninth Circuit Judicial Council's decision to permit "the use of cameras in district court civil nonjury proceedings" following the 2007 Ninth Circuit Judicial Conference, at which lawyers and judges voted to approve a resolution to that effect "by resounding margins").

unseal the digital recording because of their usefulness before the Ninth Circuit. That is a matter solely for the Ninth Circuit to decide.

Similarly, at the August 29 hearing Defendant-Intervenors argued that, because the digital recording is under seal and arguably must remain so, the Ninth Circuit judges hearing the appeal in this case are prohibited from playing the recording as part of their proceedings as prohibited by this district Local Rule 77-3.[23] The Court does not accept the validity of this argument. Regardless, the Court does not base its decision whether to unseal the recording on the effect that the decision would have on the availability of the recording to the Ninth Circuit. The Court reiterates that the *only* issue it is resolving in this Order is whether the digital recording of the trial should be unsealed pursuant to the common law right of access to court records, given that the recording is a court record.

IV. CONCLUSION

The Court GRANTS Plaintiffs' Motion to Unseal. Subject to the Stay Order issued below, the Clerk of Court is directed to place the digital recording of the trial into the public record.

When the digital recording is placed in the public record, the confidentiality obligations of the Protective Order, as applied to the digital recording of the trial, are LIFTED.

The Clerk of Court is directed to immediately return to Judge Walker the copy of the digital recording that was given to him as part of his judicial papers, which he subsequently lodged with the Court during the pendency of this Motion.[24]

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[23] The Court notes that Defendant-Intervenors mildly withdrew this contention at the end of the August 29 proceeding.

[24] In its April 28, 2011 Order, the Court ordered "[a]ll participants in the trial," including Judge Walker, "who are in possession of a recording of the trial proceedings" to appear at the June 13, 2011 hearing "to show cause as to why the video tapes should not be returned to the Court's possession." (Order Setting Hearing on Motion at 2, Docket Item No. 772.) On May 12, 2011, Judge Walker voluntarily lodged his chambers copy of the digital recording of the trial with the Court, which filed the copy under seal. (See Docket Item Nos. 777, 781.) In its June 14 Order, the Court stated that it "intends to return the trial video tapes to Judge Walker as part of his judicial papers," and invited any party who objects to "articulate its opposition in . . . supplemental briefing." (June 14 Order at 5.) In accordance with the Court's June 14 Order, Defendant-Intervenors filed a supplemental brief opposing the return of the digital recording of the trial to Judge Walker, and requesting that the Court "direct Judge Walker to maintain his copy of the trial video tapes in strict compliance with the . . . terms of the Protective Order" sealing the recording,

The Court STAYS the execution of this Order until **September 30, 2011**. Unless a further stay is granted by the Court on timely motion or by a higher court, on September 30, 2011, the Clerk is ordered to execute this Order.

Dated: September 19, 2011

JAMES WARE
United States District Chief Judge

should the Court decide to return his copy of the recording to Judge Walker. (See Docket Item No. 806 at 2-3.) However, in light of the Court's disposition of the Motion to Unseal, Defendant-Intervenors' request for an order directing Judge Walker to comply with the Protective Order sealing the recording of the trial is DENIED as moot.

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Michael Wolf mwolf@nethere.com
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Theodore Hideyuki Uno tuno@bsfllp.com
Theodore J. Boutrous tboutrous@gibsondunn.com
Thomas R. Burke thomasburke@dwt.com
Timothy D Chandler tchandler@telladf.org

Dated: September 19, 2011

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Susan Imbriani
Courtroom Deputy

EXHIBIT 2

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

September 17, 1996

The Judicial Conference of the United States convened in Washington, D.C., on September 17, 1996, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

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

Second Circuit:

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

Third Circuit:

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

Fourth Circuit:

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

Fifth Circuit:

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

models discussed in the report, and, where appropriate, adopt more efficient structures for the provision of administrative services.

CAMERAS IN THE COURTROOM

The Judicial Conference approved a Court Administration and Case Management Committee recommendation that it adopt conforming revisions to the "Cameras in the Courtroom" policy and commentary to be printed in Volume I, Chapter III, Part E of the *Guide to Judiciary Policies and Procedures.* These revisions reflect Judicial Conference actions taken in September 1994 (JCUS-SEP 94, pp. 46-47) and March 1996 (JCUS-MAR 96, p. 17).

MISCELLANEOUS FEE SCHEDULES

After undertaking a review of the miscellaneous fees set by the Judicial Conference pursuant to 28 U.S.C. §§ 1913, 1914, 1926, and 1930, the Court Administration and Case Management Committee recommended that the Judicial Conference raise certain miscellaneous fees to account for inflation and rising court costs. The Judicial Conference approved the recommendation to raise miscellaneous fees as set forth below, provided that legislation is enacted to permit the judiciary to retain the resulting increase in fees:

Fee	Current Amount	Raised Amount
Power of Attorney	$ 20	$ 30
Filing and Indexing Misc. Papers	$ 20	$ 30
Misdemeanor Appeal	$ 25	$ 35
Registration of Foreign Judgment	$ 20	$ 30
Tape Duplication	$ 15/tape	$ 20/tape
Microfilm/Microfiche	$ 3/sheet	$ 4/sheet
Mailing Labels	$ 5/page	$ 7/page
Record Search	$ 15	$ 20
Certification	$ 5	$ 7
Returned Checks	$ 25/check	$ 35/check
Reproduction of Record	$ 25	$ 55
Ct. of Fed. Claims Filing Fee	$120	$150
Ct. of Fed. Claims List of Orders/Ops	$ 10	$ 15

EXHIBIT 3

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

July 23, 2009

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

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

Dear Mr. Chairman and Senator Sessions:

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

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

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

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

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

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

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

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

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

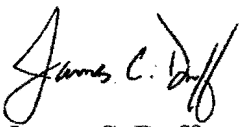
Finally, regarding the courts of appeals, in 1996 the Judicial Conference adopted the position that each circuit may decide for itself whether to permit photographic, radio, and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines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

* * *

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

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

Sincerely,



James C. Duff
Secretary

cc: Members, Senate Judiciary Committee

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

March 12, 1996

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

First Circuit:

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

Second Circuit:

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

Third Circuit:

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

Fourth Circuit:

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

Fifth Circuit:

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

CAMERAS IN THE COURTROOM

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

a. Strongly urge each circuit judicial council to adopt an order reflecting the Judicial Conference's decision to authorize the taking of photographs and radio and television coverage of court proceedings in the United States courts of appeals; and

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

COMMITTEE ON CRIMINAL LAW

UNIVERSAL PRETRIAL DRUG TESTING

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

EXHIBIT 4

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

September 20, 1994

The Judicial Conference of the United States convened in Washington, D.C., on September 20, 1994, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Juan R. Torruella
Judge Francis J. Boyle,
District of Rhode Island

Second Circuit:

Chief Judge Jon O. Newman
Judge Charles L. Brieant,
Southern District of New York

Third Circuit:

Chief Judge Dolores K. Sloviter
Chief Judge John F. Gerry,
District of New Jersey

Fourth Circuit:

Chief Judge Sam J. Ervin, III
Judge W. Earl Britt,
Eastern District of North Carolina

Fifth Circuit:

Chief Judge Henry A. Politz
Chief Judge Morey L. Sear,
Eastern District of Louisiana

COMMITTEE ON CODES OF CONDUCT

COMMITTEE ACTIVITIES

The Committee on Codes of Conduct reported that since its last report to the Judicial Conference, it received 47 new written inquiries (including one request for reconsideration) and issued 40 written advisory responses. The average response time was 21 days. The Chairman received and responded to 48 telephonic inquiries. In addition, individual Committee members responded to 72 inquiries from their colleagues.

ETHICS REFORM ACT REGULATIONS

The Judicial Conference approved the recommendations of the Committee to revise the Ethics Reform Act gift regulations. The principal substantive changes include the following: (1) definition of the term "gift" in a new section 3; (2) incorporation in a new section 4 of the existing statutory prohibition on solicitation of gifts; (3) clarification of the reach of sections 4(b) and 5(b) (formerly 3(c) and 3(a)(2)); (4) authorization in a new section 5(h) of the acceptance of *de minimis* gifts by persons other than judges and their personal staffs; (5) revision of section 6 (formerly 3(b)) prohibiting the acceptance of gifts in violation of other statutes and regulations, or where reasonable persons would believe that the public office is being used for private gain; and (6) description in a new section 9 of procedures for the return or disposal of gifts that may not properly be accepted.

Upon recommendation of the Committee, the Judicial Conference approved revisions to the Ethics Reform Act outside employment regulations, to incorporate useful provisions from the Executive Branch regulations and to make technical amendments designed to clarify the application of the regulations.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

CAMERAS IN THE COURTROOM

The Judicial Conference considered a report and recommendation of the Court Administration and Case Management Committee to authorize the

photographing, recording, and broadcasting of civil proceedings in federal trial and appellate courts. The Committee's report included an evaluation conducted by the Federal Judicial Center of a three-year pilot project in six district and two appellate courts, as well as an analysis of studies conducted in state courts. Based upon the data presented, a majority of the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern, and the Conference declined to approve the Committee's recommendation to expand camera coverage in civil proceedings. In light of this action, additional Committee recommendations relating to cameras in the courtroom in civil cases were determined to be moot. No action was taken with regard to the ongoing pilot program, which is scheduled to sunset on December 31, 1994 (see JCUS-MAR 94, p. 15). See also "Criminal Rules," *infra* p. 67.

MISCELLANEOUS FEE SCHEDULES

In September 1993, the Judicial Conference approved an amendment to the miscellaneous fee schedule promulgated under 28 U.S.C. § 1913 to provide a fee for electronic access to court data for the appellate courts, but reserved for future consideration the issue of whether to extend the fee to electronic access to slip opinions (JCUS-SEP 93, pp. 44-45). The Court Administration and Case Management Committee recommended that the Judicial Conference authorize collection of a fee for electronic access to slip opinions by amending the fee schedule to delete the sentence, "No such fee shall be charged for usage of ACES/EDOS." The Judicial Conference approved the amendment, which makes no change in the provision allowing courts to exempt, for good cause, persons or classes of persons from the fees.

In March 1993, the Judicial Conference eliminated the traditional federal agencies' exemption from court fees for electronic access to court data and, in limited circumstances, for reproducing court records and conducting searches of court records (JCUS-MAR 93, p. 11). Federal agencies funded from judiciary appropriations continue to be exempted from fees. On recommendation of the Committee on Court Administration and Case Management, the Conference agreed to a technical amendment of the miscellaneous fee schedules promulgated under 28 U.S.C. §§ 1913, 1914, 1926, and 1930, to clarify that government programs funded from the federal judiciary's appropriations, as well as government agencies so funded, were exempt from fees. The amendment reads as follows (new language is in italics):

EXHIBIT 5

United States Court of Appeals
For The Ninth Circuit
50 W. LIBERTY STREET, SUITE 600
RENO, NEVADA 89501

PROCTER HUG, JR.
Chief Judge
United States Court of Appeals

June 21, 1996

To: All Article III Judges

From: Chief Judge Hug

Re: **Judicial Council Policy Regarding the Use of Cameras in the Courtroom**

On May 24, 1996, the Judicial Council of the Ninth Circuit voted to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in the courts. Pursuant to 28 U.S.C. § 2071(c)(1), this policy is now binding on all courts within the Ninth Circuit. The policy states:

1. Each court of appeals may decide locally whether or not to permit cameras in the appellate courtrooms, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt.

2. The taking of photographs and radio and television coverage of court proceedings in the United States district courts is prohibited.

EXHIBIT 6

77. DISTRICT COURT AND CLERK

77-1. Locations and Hours

(a) **Locations**

(1) The Office of the Clerk of this Court which serves the San Francisco Courthouse is located at 450 Golden Gate Avenue, San Francisco, California 94102.

(2) The Office of the Clerk of this Court which serves the Oakland Courthouse is located at 1301 Clay Street, Oakland, California 94612.

(3) The Office of the Clerk of this Court which serves the San Jose Courthouse is located at 280 South First Street, San Jose, California 95113.

(b) **Hours**. The regular hours of the Offices of the Clerk are from 9:00 a.m. to 4:00 p.m. each day except Saturdays, Sundays, and Court holidays.

Commentary

See Civil L.R. 5-3 regarding after-hours drop box filing.

77-2. Orders Grantable by Clerk

The Clerk is authorized to sign and enter orders specifically allowed to be signed by the Clerk under the Federal Rules of Civil Procedure and these local rules. In addition, the Clerk may sign and enter the following orders without further direction of a Judge:

(a) Orders specifically appointing persons to serve process in accordance with Fed. R. Civ. P. 4;

(b) Orders on consent noting satisfaction of a judgment, providing for the payment of money, withdrawing stipulations, annulling bonds, exonerating sureties or setting aside a default;

(c) Orders of dismissal on consent, with or without prejudice, except in cases to which Fed. R. Civ. P. 23, 23.1, or 66 apply;

(d) Orders establishing a schedule for case management in accordance with Civil L.R. 16;

(e) Orders relating or reassigning cases on behalf of the Executive Committee; and

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

Cross Reference

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

77-3. Photography and Public Broadcasting

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes 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. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space

specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

77-4. Official Notices

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

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

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

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

(1) The Recorder; or

(2) The San Francisco Daily Journal; or

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

(4) The Times Standard, for matters pending before a Judge sitting in Eureka.

77-5. Security of the Court

The Court, or any Judge, may from time to time make such orders or impose such requirements as may be reasonably necessary to assure the security of the Court and of all persons in attendance.

77-6. Weapons in the Courthouse and Courtroom

(a) **Prohibition on Unauthorized Weapons**. Only the United States Marshal, Deputy Marshals and Court Security Officers are authorized to carry weapons within the confines of the courthouse, courtrooms, secured judicial corridors, and chambers of the Court. When the United States Marshal deems it appropriate, upon notice to any affected Judge, the Marshal may authorize duly authorized law enforcement officers to carry weapons in the courthouse or courtroom.

(b) **Use of Weapons as Evidence**. In all cases in which a weapon is to be introduced as evidence, before bringing the weapon into a courtroom, the United States Marshal or Court Security Officer on duty must be notified. Before a weapon is brought into a courtroom, it must be inspected by the United States Marshal or Court Security Officer to ensure that it is inoperable, appropriately marked as evidence and the assigned Judge notified

77-7. Court Library

The Court maintains a law library primarily for the use of Judges and personnel of the Court. In addition, attorneys admitted to practice in this Court may use the library where circumstances require for actions or proceedings pending in the Court. The library is

EXHIBIT 7

Volume 4

Pages 670 - 990

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs,	
VS.	NO. C 09-2292-VRW
ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	San Francisco, California Thursday January 14, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By: *Katherine Powell Sullivan, CRR, CSR 5812*
Debra L. Pas, CRR, CSR 11916
Official Reporters - U.S. District Court

P R O C E E D I N G S

JANUARY 14, 2010 8:42 A.M.

THE COURT: Very well. Good morning, Counsel.

(Counsel greet the Court.)

THE COURT: Let's see. First order of business, I have communicated to judge -- Chief Judge Kozinski, in light of the Supreme Court's decision yesterday, that I'm requesting that this case be withdrawn from the Ninth Circuit pilot project. And he indicated that he would approve that request. And so that should take care of the broadcasting matter.

And we have motions that have been filed on behalf of Mr. Garlow and Mr. McPherson. And the clerk informs me counsel for those parties are here present.

MR. MCCARTHY: Correct, Your Honor.

THE COURT: All right. Fine.

MR. MCCARTHY: Vincent McCarthy, Your Honor. I was admitted pro hac vice into this court very recently.

THE COURT: Yes. I believe I signed that yesterday, or the day before.

MR. MCCARTHY: I understand.

THE COURT: Well, welcome.

MR. MCCARTHY: Thank you.

THE COURT: You've got quite a lineup of lawyers here.

Q. Okay.

MR. PATTERSON: Your Honor, I would like to request a brief break, if I may?

THE COURT: How much longer do you have with this witness?

MR. PATTERSON: I would say I'm about halfway through, your Honor.

THE COURT: Okay. Maybe a break, like your colleague Mr. Thompson, will reduce the length somewhat.

MR. PATTERSON: Okay.

THE COURT: That I'm sure will be helpful to everybody.

All right. Shall we take until 15 minutes of the hour, or 10:45.

MR. COOPER: Your Honor, just before we break, may I ask one minor housekeeping matter?

THE COURT: Yes.

MR. COOPER: Point of clarification, actually, and it's further to your announcement as we opened the court day, that the Court was asking for withdrawal of this case from the pilot program.

I just ask the Court for clarification, if I may then understand that the recording of these proceedings has been halted, the tape recording itself?

THE COURT: No, that has not been altered.

MR. COOPER: As the Court knows, I'm sure, we have put in a letter to the Court asking that the recording of the proceedings be halted.

I do believe that in the light of the stay, that the court's local rule would prohibit continued tape recording of the proceedings.

THE COURT: I don't believe so. I read your letter. It does not quote the local rule.

The local rule permits remote -- perhaps if we get the local rule --

MR. BOUTROUS: Your Honor, I have a copy.

THE COURT: Oh, there we go.

(Whereupon, document was tendered to the Court.)

THE COURT: The local rule permits the recording for purposes the -- of taking the recording for purposes of use in chambers and that is customarily done when we have these remote courtrooms or the overflow courtrooms. And I think it would be quite helpful to me in preparing the findings of fact to have that recording.

So 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.

And you will notice the local rules states that:

"The taking of photographs, public

broadcasting or televising, or recording for those purposes."

So the recording is not being made for those purposes, but simply for use in chambers.

MR. COOPER: Very well, your Honor, and I appreciate that clarification.

THE COURT: All right.

(Whereupon there was a recess in the proceedings from 10:32 a.m. until 10:59 a.m.)

THE COURT: Very well, Mr. Patterson. Please continue.

MR. PATTERSON: Very well, your Honor.

BY MR. PATTERSON:

Q. Dr. Egan, we were speaking about the revenues you project San Francisco weddings, the out-of-state -- or out-of-San Francisco same-sex couples would generate.

And, again, one source of those revenues come from hotel taxes, is that correct?

A. Yes, it is.

Q. And you have basically -- you have assumed how long the non-San Francisco resident same-sex couples would stay in San Francisco when they got married, is that correct?

A. That's correct.

Q. And, once again, you have not done any study of how long non-San Francisco resident same-sex couples actually stay in

EXHIBIT 8

Pages 1 - 94

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

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

TRANSCRIPT OF PROCEEDINGS

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

couple of other issues.

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

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

MR. BOUTROUS: That makes sense, Your Honor.

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

THE COURT: That will be fine.

MR. BOUTROUS: Thank you, Your Honor.

THE COURT: There always are those housekeeping details.

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

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

As you know, the Ninth Circuit Court of Appeals,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I think, based on the demonstration, it confirms our

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

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

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

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

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

EXHIBIT 9

Cooper & Kirk
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January 14, 2010

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

I write on behalf of Defendant-Intervenors ("Proponents") to respectfully request that the Court halt any further recording of the proceedings in this case, and delete any recordings of the proceedings to date that have previously been made.

As the Court will recall, on Monday morning, just before trial commenced, the Court noted that its orders concerning public dissemination had been temporarily stayed by the Supreme Court. In response, Plaintiffs nonetheless asked the Court to record the proceedings for the purpose of later public dissemination if the stay was subsequently lifted:

> Since the stay is temporary and the Supreme Court is going to be considering these issues, and given the importance of the issues in this case, we would request that the Court permit recording and preservation of the proceedings today and through Wednesday …. [G]iven the fact that this is a temporary stay, and the stay order does not mention anything about restricting the ability of the court to capture the images on the cameras and preserve them in the event the stay is lifted and Judge Kozinski issues his order, we think that would be a good solution so then the materials could be posted when those -- those things happen.

Tr. of Proceedings at 14-15 (Jan. 11, 2010) (Attachment A). In response, Proponents objected to the recording of the proceedings as inconsistent with the Supreme Court's temporary stay, *see id.* at 16, but the Court accepted Plaintiffs' proposal.

The Supreme Court yesterday extended the stay indefinitely. *Hollingsworth v. Perry*, 558 U.S. __, No. 09A648, slip op. (Jan. 13, 2010) (*per curiam*). The Supreme Court's ruling removes all question that recording of the proceedings is prohibited. As the Supreme Court explained, prior to this Court's amendment to Local Rule 77-3 (which amendment, the Court concluded, was not properly adopted), Local Rule 77-3 "banned the *recording* or broadcast of court proceedings." *Hollingsworth*, slip op. at 4 (emphasis added). Unamended Local Rule77-3 thus governs these proceedings, and, as the Supreme Court held, it has "the force of law." *Id*. at 8 (quotation marks omitted).

In short, it is now clear that the Supreme Court's stay will remain in place indefinitely, and the prohibition against the recording of these proceedings remains binding. For these reasons, Proponents renew their objection to any further recording of the proceedings in this case, and request that the Court order that any recordings previously made be deleted.

Sincerely,

/s/ Charles J. Cooper

Charles J. Cooper
Counsel for Defendant-Intervenors

Cc: Counsel of Record

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

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

Defendants,

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

Defendant-Intervenors.
_____/

No C 09-2292 VRW

NOTICE TO PARTIES

In compliance with the Supreme Court's order in Hollingsworth v Perry, 558 US --, No 09A648 (January 13, 2010), as noted on the record at trial this date, the undersigned has formally requested Chief Judge Kozinski to withdraw this case from the pilot project on transmitting trial court proceedings to remote federal courthouse locations or for broadcast or webcast approved by the Ninth Circuit Judicial Council on December 17, 2009. Transmission of the proceedings to other locations solely within the San Francisco courthouse will continue along with recording for use in chambers, as permitted in Civ LR 77-3.

VAUGHN R WALKER
United States District Chief Judge

EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

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

Defendants,

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

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

In the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party. 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, Doc #425. Any party wishing to make use of the video during closing arguments is DIRECTED to inform the court clerk not later than June 2, 2010 at 5 PM PDT.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

EXHIBIT 12

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder 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.

CASE NO. 09-CV-2292 VRW (JCS)

AMENDED PROTECTIVE ORDER

(e) court reporters, their staffs, and professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Protective Order.

(g) the author of the document or the original source of the information.

7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" only to:

(a) the Receiving Party's Outside Counsel of record in this action, (or in the case of a government entity or government official sued in his or her official capacity, such entity's or official's counsel of record in this action), as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Agreement to Be Bound by Protective Order" that is attached hereto as Exhibit A, provided that it shall not be provided to any Counsel or employee who held an "official position" in any primarily formed ballot committee related to Proposition 8 (*see* http://cal-access.ss.ca.gov/campaign/measures/detail.aspx?id=1302602&session=2007) or now holds an official position in a similar committee that is now circulating petitions for a 2010 ballot initiative to repeal Proposition 8. For purposes of sections 7.3 and 7.5 an "official position" is defined as one which authorizes the holder of said position to contractually bind (either solely or in conjunction with others) the primarily formed ballot committee (or similar committee circulating petitions to place an initiative on the 2010 ballot) with respect to matters relating to communications disseminated by the committee or otherwise to spend funds exceeding $1,000 on behalf of the committee, provided, however, that notice of all such attorneys and employees to whom HIGHLY CONFIDENTIAL – ATTORNEYS'

EYES ONLY information will be disclosed shall be given not less than 24 hours in advance of disclosure to give the other parties the opportunity to object to the disclosure and seek relief from the court on grounds specific to the designated attorney or employee;

(b) Experts (as defined in this Order) (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A), provided that it shall not be provided to any expert who held an "official position" in any primarily formed ballot committee related to Proposition 8 (see http://cal-access.ss.ca.gov/campaign/measures/detail.aspx?id=1302602&session=2007) or now holds an official position in a similar committee that is now circulating petitions for a 2010 ballot initiative to repeal Proposition 8, provided, however, that notice of all such experts to whom HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY information will be disclosed shall be given not less than 24 hours in advance of disclosure to give the other parties the opportunity to object to the disclosure and seek relief from the court on grounds specific to the designated expert;

(c) the Court and its personnel;

(d) court reporters, their staffs, and professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A); and

(e) the author of the document or the original source of the information.

7.4 Disclosure Limited to Receiving Party. A Receiving Party shall not disclosure any materials designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" to any other party to the litigation unless the party has agreed to be bound by this Protective Order.

7.5 Use of Protected Material at Depositions. Before any deposition in which the noticing Party reasonably anticipates using any Protected Materials received in this matter, the noticing Party must inform all other parties. Thereafter, any party who wishes to participate in said deposition must staff the deposition with persons who neither have held an "official position" in any primarily formed ballot committee related to Proposition 8 (see http://cal-access.ss.ca.gov/campaign/measures/detail.aspx?id=1302602&session=2007) nor hold an official position in a similar committee that is now circulating petitions for a 2010 ballot initiative to repeal Proposition 8.

EXHIBIT 13

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

NOTICE TO COURT CLERK RE PLAINTIFFS' REQUEST FOR A COPY OF THE TRIAL RECORDING

Trial: January 11-27, 2010

Judge: Chief Judge Vaughn R. Walker
Magistrate Judge Joseph C. Spero

Location: Courtroom 6, 17th Floor

Pursuant to this Court's May 31, 2010 order, Doc #672, Plaintiffs respectfully request a copy of the trial recording for possible use during closing arguments.

Respectfully submitted,

DATED: June 2, 2010

GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson
Theodore J. Boutrous, Jr.
Christopher D. Dusseault
Ethan D. Dettmer
Matthew D. McGill
Amir C. Tayrani
Sarah E. Piepmeier
Theane Evangelis Kapur
Enrique A. Monagas

By: /s/
Theodore B. Olson

and

BOIES, SCHILLER & FLEXNER LLP
David Boies
Steven Holtzman
Jeremy M. Goldman
Roseanne C. Baxter
Richard J. Bettan
Beko O. Richardson
Theodore H. Uno
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Attorneys for Plaintiffs
KRISTIN M. PERRY, SANDRA B. STIER,
PAUL T. KATAMI, and JEFFREY J. ZARRILLO

EXHIBIT 14

Volume 13

Pages 2953 - 3115

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Wednesday June 16, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By: *Katherine Powell Sullivan, CRR, CSR 5812*
Debra L. Pas, CRR, CSR 11916
Official Reporters - U.S. District Court

With the Court's permission today, during closings Mr. Olson will be playing some of the video clips from the trial proceedings. We propose, if this works for the Court, that at the end of the day we would offer the transcript pages for the record, whenever it's convenient for the Court, rather than doing it for the closings. Then we'll have that for the record.

THE COURT: That would seem to make sense. Does it not, Mr. Cooper?

MR. COOPER: I'm sorry, Your Honor. I'm not sure I followed the proposal.

THE COURT: Maybe you can clarify.

MR. BOUTROUS: I can clarify.

We will be playing video clips from the trial proceedings during the closing arguments. At the end of the day, or whenever it is convenient for the Court, we would offer into the record the transcript pages of the clips that we have played in court, marked as exhibits for the record.

MR. COOPER: I understand. And I see no objection to that, Your Honor.

THE COURT: Fine. That will be fine.

MR. BOUTROUS: Thank you.

THE COURT: Any other housekeeping? Good. Mr. Olson.

EXHIBIT 15

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City Attorney
THERESE M. STEWART, State Bar #104930
Chief Deputy City Attorney
DANNY CHOU, State Bar #180240
Chief of Complex and Special Litigation
RONALD P. FLYNN, State Bar #1841867
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Attorneys for Plaintiff-Intervenor
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor

vs.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California, et al

Defendants,

DENNIS HOLINGSWORTH, as official proponents of Proposition 8, et al,

Defendant-Intervenors,

Case No. 09-CV-2292 VRW

NOTICE TO COURT CLERK FROM PLAINTIFF-INTERVENOR CITY AND COUNTY OF SAN FRANCISCO RE USE OF VIDEO

Trial: Jan. 11-27, 2010

Judge: Chief Judge Vaughn R. Walker

Location: Courtroom 6, 17th Floor

NOTICE

Please take NOTICE that pursuant to the Court's Order [Doc #672], Plaintiff-Intervenor wishes to obtain a copy of the following portions of the trial video to review for possible use at closing argument:

Trial Date	**Witness**
January 14, 2010	Egan
January 15, 2010	Zia
January 19, 2010	Sanders / Badgett
January 20, 2010	Kendall

Plaintiff-Intervenor will maintain the video as strictly confidential pursuant to paragraph 7.3 of the protective order in this case [Doc #425].

Dated: June 2, 2010

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
DANNY CHOU
Chief of Complex & Special Litigation
RONALD P. FLYNN
VINCE CHHABRIA
ERIN BERNSTEIN
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys

By: /s/
THERESE M. STEWART

Attorneys for Plaintiff-Intervenor
CITY AND COUNTY OF SAN FRANCISCO

EXHIBIT 16

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

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

Defendants,

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

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

The court is in receipt of the letter dated May 18, 2010 from a coalition of media organizations informing the court of the media coalition's interest in recording, broadcasting and webcasting closing arguments in the above-captioned case. Doc #670.

The court removed the case from the Ninth Circuit pilot project on audio-video recording and transmission on January 15, 2010. Doc #463. No further request to include the case in the pilot program is contemplated. The media coalition's request is therefore DENIED.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

EXHIBIT 17

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G BROWN JR, in his official capacity as Attorney General of California; MARK B HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

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

Defendant-Intervenors.
_____/

No C 09-2292 VRW

PRETRIAL PROCEEDINGS AND TRIAL EVIDENCE

✦

CREDIBILITY DETERMINATIONS

✦

FINDINGS OF FACT

✦

CONCLUSIONS OF LAW

✦

ORDER

Defendant-intervenors, the official proponents of Proposition 8 under California election law ("proponents"), were granted leave in July 2009 to intervene to defend the constitutionality of Proposition 8. Doc #76. On January 8, 2010, Hak-Shing William Tam, an official proponent and defendant-intervenor, moved to withdraw as a defendant, Doc #369; Tam's motion is denied for the reasons stated in a separate order filed herewith. Plaintiff-intervenor City and County of San Francisco ("CCSF" or "San Francisco") was granted leave to intervene in August 2009. Doc #160 (minute entry).

The court denied plaintiffs' motion for a preliminary injunction on July 2, 2009, Doc #77 (minute entry), and denied proponents' motion for summary judgment on October 14, 2009, Doc #226 (minute entry). Proponents moved to realign the Attorney General as a plaintiff; the motion was denied on December 23, 2009, Doc #319. Imperial County, a political subdivision of California, sought to intervene as a party defendant on December 15, 2009, Doc #311; the motion is denied for the reasons addressed in a separate order filed herewith.

The parties disputed the factual premises underlying plaintiffs' claims and the court set the matter for trial. The action was tried to the court January 11-27, 2010. The trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law; the clerk is now DIRECTED to file the trial recording under seal as part of the record. The parties may retain their copies of the trial recording pursuant to the terms of the protective order herein, see Doc #672.

****

Proponents' motion to order the copies' return, Doc #698, is accordingly DENIED.

PLAINTIFFS' CASE AGAINST PROPOSITION 8

The Due Process Clause provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." US Const Amend XIV, § 1. Plaintiffs contend that the freedom to marry the person of one's choice is a fundamental right protected by the Due Process Clause and that Proposition 8 violates this fundamental right because:

1. **It prevents each plaintiff from marrying the person of his or her choice;**

2. **The choice of a marriage partner is sheltered by the Fourteenth Amendment from the state's unwarranted usurpation of that choice; and**

3. **California's provision of a domestic partnership —— a status giving same-sex couples the rights and responsibilities of marriage without providing marriage —— does not afford plaintiffs an adequate substitute for marriage and, by disabling plaintiffs from marrying the person of their choice, invidiously discriminates, without justification, against plaintiffs and others who seek to marry a person of the same sex.**

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Const Amend XIV, § 1. According to plaintiffs, Proposition 8 violates the Equal Protection Clause because it:

1. **Discriminates against gay men and lesbians by denying them a right to marry the person of their choice whereas heterosexual men and women may do so freely; and**

2. **Disadvantages a suspect class in preventing only gay men and lesbians, not heterosexuals, from marrying.**

Plaintiffs argue that Proposition 8 should be subjected to heightened scrutiny under the Equal Protection Clause because gays

b. Tr 1525:1-10: Segura and a colleague, through the Stanford Center for Democracy, operate the American National Elections Studies, which provides political scientists with data about the American electorate's views about politics;

c. Tr 1525:11-19: Segura serves on the editorial boards of major political science journals;

d. Tr 1525:22-1526:24: Segura's work focuses on political representation and whether elected officials respond to the voting public; within the field of political representation, Segura focuses on minorities;

e. PX2330; Tr 1527:25-1528:14: Segura has published about twenty-five peer-reviewed articles, authored about fifteen chapters in edited volumes and has presented at between twenty and forty conferences in the past ten years;

f. PX2330; Tr 1528:21-24: Segura has published three pieces specific to gay and lesbian politics and political issues;

g. Tr 1532:11-1533:17: Segura identified the methods he used and materials he relied on to form his opinions in this case. Relying on his background as a political scientist, Segura read literature on gay and lesbian politics, examined the statutory status of gays and lesbians and public attitudes about gays and lesbians, determined the presence or absence of gays and lesbians in political office and considered ballot initiatives about gay and lesbian issues.

PROPONENTS' WITNESSES

Proponents elected not to call the majority of their designated witnesses to testify at trial and called not a single official proponent of Proposition 8 to explain the discrepancies between the arguments in favor of Proposition 8 presented to voters and the arguments presented in court. Proponents informed the court on the first day of trial, January 11, 2010, that they were withdrawing Loren Marks, Paul Nathanson, Daniel N Robinson and Katherine Young as witnesses. Doc #398 at 3. Proponents' counsel stated in court on Friday, January 15, 2010, that their witnesses

"were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever." Tr 1094:21-23.

The timeline shows, however, that proponents failed to make any effort to call their witnesses after the potential for public broadcast in the case had been eliminated. The Supreme Court issued a temporary stay of transmission on January 11, 2010 and a permanent stay on January 13, 2010. See Hollingsworth v Perry, 130 SCt 1132 (Jan 11, 2010); Hollingsworth v Perry, 130 SCt 705 (Jan 13, 2010). The court withdrew the case from the Ninth Circuit's pilot program on broadcasting on January 15, 2010. Doc #463. Proponents affirmed the withdrawal of their witnesses that same day. Tr 1094:21-23. Proponents did not call their first witness until January 25, 2010. The record does not reveal the reason behind proponents' failure to call their expert witnesses.

Plaintiffs entered into evidence the deposition testimony of two of proponents' withdrawn witnesses, as their testimony supported plaintiffs' claims. Katherine Young was to testify on comparative religion and the universal definition of marriage. Doc #292 at 4 (proponents' December 7 witness list) Doc #286-4 at 2 (expert report). Paul Nathanson was to testify on religious attitudes towards Proposition 8. Doc #292 at 4 (proponents' December 7 witness list); Doc #280-4 at 2 (expert report).

Young has been a professor of religious studies at McGill University since 1978. PX2335 Young CV. She received her PhD in history of religions and comparative religions from McGill in 1978. Id. Young testified at her deposition that homosexuality is a normal variant of human sexuality and that same-sex couples possess

EXHIBIT 18

No. _____

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 8, 2010

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order denying the mandamus petition, and remand to the Ninth Circuit with instructions to dismiss the mandamus petition. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

I. Petitioners' Mandamus Petition Is Moot

An "actual controversy must be extant at all stages of review." *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (quotation marks omitted). Where there had been but "no longer [is] any actual controversy between the parties," the case is moot. *See id*. at 580-81. The district court's actions subsequent to the Court's issuance of the stay appear to have eliminated the controversy underlying Petitioners' mandamus petition and thus to have rendered that petition moot.

The district court has withdrawn its January 7 order allowing audio-video recording and public broadcast of the trial proceedings and, concomitantly, Chief Judge Kozinski has rescinded his order approving the district court's broadcast order. The district court has also withdrawn the amendment to Local Rule 77-3 that purportedly authorized its broadcast order. Most importantly, the district court repeatedly and unequivocally assured Petitioners that its continued recording of the trial proceedings was not for the purpose of public dissemination, but rather solely for that court's use in chambers. And the district court has stated that it has not requested

authorization to publicly broadcast the closing argument.

As a result of these post-stay actions by the district court, Petitioners have, in effect, obtained the relief they sought through their mandamus petition; namely, preventing the district court from enforcing its order to allow the trial proceedings to be broadcast publicly or to be recorded for later public dissemination. Indeed, Plaintiffs themselves have acknowledged the "fact that these proceedings would not be broadcast to the public in any form" after the district court "withdrew its request to broadcast the proceedings to other federal courthouses and made clear that no such broadcast would take place." App. 26-27.

Petitioners' mandamus petition, therefore, appears to be moot. *See Williams v. Simons*, 355 U.S. 49, 57 (1957) ("By vacating the temporary restraining order and dismissing the complaint, the District Court has brought to pass one alternative of the order petitioners would have this Court issue, thus rendering the petition for all practical purposes moot."); *Cotlow v. Emison*, 502 U.S. 1068 (1992) ("The order of January 10, 1992, having vacated the order from which the appeal is taken, the appeal is dismissed as moot.").

II. The Court Should Vacate the Ninth Circuit's Order Denying the Mandamus Petition and Remand for Dismissal

"The established practice of the Court in dealing with a civil case from a court in the federal system

which has become moot while on its way here or pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39; *see also Alvarez*, 130 S. Ct. at 581; 28 U.S.C. § 2106. Because Petitioners did not "*cause[ ]* the mootness by voluntary action," the Court "should follow [its] ordinary practice" in this case: vacate the Ninth Circuit's order denying the mandamus petition and remand to the Ninth Circuit with instructions to dismiss the mandamus petition as moot. *Alvarez,* 130 S. Ct. at 582-83 (quotation marks omitted); *see also, e.g.*, *Joint Sch. Dist. No. 241 v. Harris*, 515 U.S. 1154, 1155 (1995) ("The petitions for writs of certiorari are granted. The judgment is vacated and the cases are remanded to the United States Court of Appeals for the Ninth Circuit with directions to dismiss as moot.") (citing *Munsingwear*).

EXHIBIT 19

Supreme Court of the United States

No. **09-1238**

DENNIS HOLLINGSWORTH, ET AL.,

Petitioners

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

IT IS FURTHER ORDERED that the petitioners Dennis Hollingsworth, et al. recover from United States District Court for the Northern District of California, et al. Three Hundred Dollars ($300.00) for costs herein expended.

October 4, 2010

Clerk's costs: **$300.00**

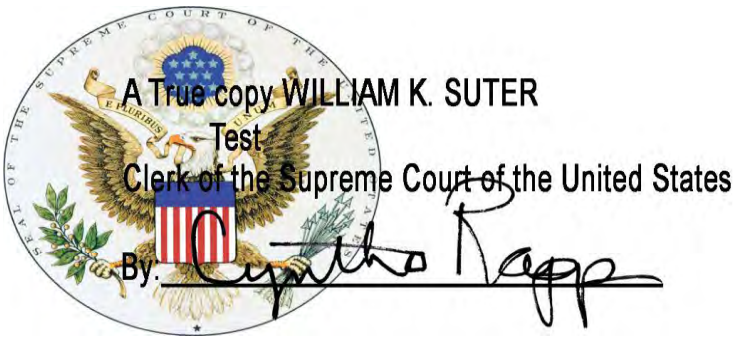

EXHIBIT 20

VAUGHN R WALKER
P O BOX 7880
SAN FRANCISCO, CA 94120
(415) 871-2888

April 14, 2011

Molly Dwyer, Clerk
United States Court Of Appeals
Ninth Circuit
95 7th Street
San Francisco, CA 94103

Dear Ms. Dwyer:

This responds to a motion filed on April 13, 2011, by appellants-defendant-intervenors in Perry v Schwarzenegger, No 10-16696. It should be presented to the panel considering the motion.

Over the last several months, I have on about a half dozen occasions given a lecture or talk on the subject of cameras in the courtroom. These presentations included slides and videos from actual trials and re-enactments of trials. These included the Scopes, Hauptmann, Estes, Simpson and Perry trials. The basic point of the presentations is that videos or films of actual trials are more interesting, informative, compelling and, of course, realistic than re-enactments or fictionalized accounts in portraying trial proceedings.

In preparing to leave the district court earlier this year, I began collecting judicial and personal papers. Most of these now are in digital format, so I asked the head of the court's automation unit to download these to an external disk drive. Because the videos of the Perry trial were used in connection with preparing the findings in that case, the videos were included in the judicial papers downloaded to the disk drive.

In the first several cameras in the courtroom lectures, I used a re-enactment of cross-examination from Perry. When given the disk containing the Perry videos as part of my judicial papers, I decided that in the presentation on February 18 at the University of Arizona it would be permissible and appropriate to use the actual cross-examination excerpt from Perry, instead of the re-enactment. I also used that same excerpt in a talk to a meeting of the Federal Bar Association in Riverside, California on March 8 and in a class I am

teaching at the University of California Berkeley School of Law. I am scheduled to give a similar talk at Gonzaga University Law School next week. The Perry excerpt is three minutes in length.

I should also note that the video of the entire Perry trial was made available to the parties in that case and portions were used in the closing arguments in the district court and made part of the record before the case went on appeal. If the court believes that my possession of the videos as part of my judicial papers is inappropriate, I shall, of course, abide by that or any other directive the court makes.

The Perry case involved a public trial. As Chief Justice Berger observed some years ago, "People in an open society do not demand infallibility in their institutions, but it is difficult for them to accept what they are prohibited from observing."

Respectfully submitted,

Vaughn R Walker /RJS

Vaughn R Walker

cc: All Counsel

EXHIBIT 21

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Kristin M. Perry, et al.,

Plaintiffs,

v.

Arnold Schwarzenegger, et al.,

Defendants.

_____/

NO. C 09-02292 JW

ORDER DENYING MOTION FOR ORDER COMPELLING RETURN OF TRIAL RECORDINGS

Presently before the Court is Defendant-Intervenors' Motion for Order Compelling Return of Trial Recordings.[1] The Court conducted a hearing on June 13, 2011. Based on the papers submitted to date and oral argument, the Court DENIES Defendant-Intervenors' Motion for Order Compelling Return of Trial Recordings.

A. Background

This Motion is related to the trial held by Chief Judge Vaughn Walker (retired) in this case. A detailed summary of the background to the case and its procedural history can be found in the

[1] (Appellants' Motion for Order Compelling Return of Trial Recordings, hereafter, "Motion," Docket Item No. 771-1.) This Motion was originally brought before the Ninth Circuit, which currently has appellate jurisdiction over the merits of the underlying decision in this case, including the judgment. (See Order at 2, Docket Item No. 771.) On April 27, 2011, the Ninth Circuit transferred the Motion to this Court, on the ground that this Court still has jurisdiction over "ancillary matters" associated with this case, such as the protective order regarding the trial recordings at issue in this Motion. (Id. at 2-3.)

Order issued by Judge Walker on August 4, 2010.[2] The Court reviews the procedural history relevant to the present Motion.

On December 21, 2009, a coalition of media companies requested the Court's permission to televise the trial.[3] (See Docket Item No. 313.) On January 6, 2010, the Court held a hearing regarding the recording and broadcasting of the trial at which the Court announced that an audio and video feed of the trial would be streamed to several courthouses in other cities, and that the trial would be recorded for broadcast over the Internet. Hollingsworth, 130 S. Ct. at 708-09. On January 7, 2010, the Court notified the parties that it had made a formal request to Chief Judge Kozinski that the trial be included in the Ninth Circuit's pilot project on audio-video recording and transmission. (See Docket Item No. 358.) On January 8, 2010, Chief Judge Kozinski issued an order approving of real-time streaming of the trial to certain courthouses, pending the resolution of technical difficulties. Hollingsworth, 130 S. Ct. at 709. On January 9, 2010, Defendant-Intervenors applied to the Supreme Court for a stay of the Court's order broadcasting the trial, which the Supreme Court granted on January 13, 2010. See id. at 709-10 (staying the broadcast because the Northern District of California's amendment of its Local Rules to permit broadcast of the trial "likely did not" comply with federal law). On January 15, 2010, the Court notified the parties that, in compliance with the Supreme Court's January 13, 2010 Order, it had formally requested Chief Judge Kozinski to withdraw the case from the pilot project on transmitting trial court proceedings to remote federal courthouse locations or for broadcast or webcast. (See Docket Item No. 463 at 2.) However, the Court notified the parties that it would continue recording the trial "for use in chambers." (Id.)

On May 31, 2010, the Court notified the parties that "[i]n the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party." (Docket Item No. 672 at 2.) The Court stated that the parties "will of course be

---

[2] (See Pretrial Proceedings and Trial Evidence; Credibility Determinations; Findings of Fact; Conclusions of Law; Order, hereafter, "August 4 Order," Docket Item No. 708.)

[3] A detailed discussion of the factual background of the Court's consideration of whether the trial should be recorded or broadcast may be found in the Supreme Court's opinion staying the broadcast of the trial. See Hollingsworth v. Perry, 130 S. Ct. 705 (2010).

obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order."[4] (Id.) On June 2, 2010, both Plaintiffs and Plaintiff-Intervenor City and County of San Francisco requested a copy of the video, pursuant to the Court's May 31, 2010 Order.[5] In its August 4 Order, the Court noted that the "trial proceedings were recorded and used by [the Court] in preparing the findings of fact and conclusions of law," and directed the Clerk to "file the trial recording under seal as part of the record." (August 4 Order at 4.) The Court stated that the "parties may retain their copies of the trial recording pursuant to the terms of the protective order." (Id.)

B. Discussion

Defendant-Intervenors move for an order as follows: (1) directing Judge Walker to cease 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 Judge Walker be returned to the Court;[6] and (2) directing that all copies of the trial recordings in the possession,

---

[4] On January 12, 2010, the parties entered into an Amended Protective Order. (hereafter, "Protective Order," Docket Item No. 425.) The Protective Order was entered because disclosure and discovery activity in the case would be "likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted." (Id. at 1.) Paragraph 7.3 of the Amended Protective Order addresses items that are designated as "HIGHLY CONFIDENTIAL–ATTORNEYS' EYES ONLY," and states that such items may only be disclosed to the parties' counsel of record, certain experts, the Court and its personnel, "court reporters, their staffs, and professional vendors" who have signed an agreement to be bound by the Protective Order, and the author of the item. (Id. at 8-9.) The Protective Order specifies that "[e]ven after the termination of this litigation, the confidentiality obligations imposed by [the Order] shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs." (Id. at 2.)

[5] (See Notice to Court Clerk from Plaintiff-Intervenor City and County of San Francisco Re Use of Video, Docket Item No. 674 (stating that Plaintiff-Intervenor "wishes to obtain a copy of [certain portions] of the trial video to review for possible use at closing argument"); Notice to Court Clerk Re Plaintiffs' Request for a Copy of the Trial Recording, Docket Item No. 675 (stating that Plaintiffs "respectfully request a copy of the trial recording for possible use during closing arguments").)

[6] In its April 28, 2011 Order, the Court ordered "[a]ll participants in the trial," including Judge Walker, "who are in possession of a recording of the trial proceedings" to appear at the June 13, 2011 hearing "to show cause as to why the recordings should not be returned to the Court's possession." (Order Setting Hearing on Motion at 2, hereafter, "April 28 Order," Docket Item No. 772.) On May 12, 2011, Judge Walker voluntarily lodged his chambers copy of the video recording with the Court, which filed the copy under seal. (See Docket Item Nos. 777, 781.) Accordingly,

custody or control of any party to this case be returned to the Court and held under seal, because, now that the trial is over, there is "no legitimate reason" for the parties to continue to have a copy of the recording. (Motion at 1, 20.) Plaintiffs respond as follows: (1) because no "prior orders or local rules barred" Judge Walker from disclosing portions of the video, and because Judge Walker's use of the video was "harmless," the Court should not order him to stop disclosing portions of the video or to return his copy to the Court; and (2) because "use of the trial video would aid the parties in connection with any additional proceedings," and because the parties "have dutifully complied with the protective order," the Court should not order the parties to return their copies of the video.[7]

Upon review, the Court does not find good cause to require the parties to return their copies of the video recordings of the trial to the Court. As discussed previously, the Court made copies of the video available to the parties, pursuant to the Protective Order, for use during the trial. Defendant-Intervenors' Motion does not contend that the parties have violated the terms of the Protective Order by disclosing the video recordings of the trial. Because there is no indication that the parties have violated the Protective Order, and because appellate proceedings in this case are still ongoing, the parties may retain their copies of the trial recordings.[8]

Accordingly, the Court DENIES Defendant-Intervenors' Motion for Order Compelling Return of Trial Recordings and discharges its Order to Show Cause regarding the return of the trial recordings.

Defendant-Intervenors' Motion, insofar as it requests an order requiring Judge Walker to return his copy of the video recording, is DENIED as moot. The Court does not reach any issue with respect to Judge Walker's use of the trial recordings.

[7] (Plaintiffs-Appellees' Opposition to Appellants' Motion Regarding Trial Recordings and Plaintiffs-Appellees' Motion to Unseal at 6-11, Docket Item No. 771-4.) In addition, the Opposition contends that the recordings of the trial should be unsealed. (Id. at 9-10.) However, in its April 28 Order, the Court stated that it would "bifurcate Plaintiffs' Cross-Motion to lift the protective order [on the video recordings] until it has the opportunity to resolve the underlying Motion." (April 28 Order at 1.) Accordingly, the Court does not consider at this time Plaintiffs' contention that the recordings should be unsealed. The Court, in conjunction with Plaintiffs' Cross-Motion to lift the Protective Order, will consider any request by Judge Walker for the return of the copy of the video recording that Judge Walker voluntarily returned to the Court.

[8] The video recordings of the trial continue to be subject to the Protective Order, pending the Court's resolution of the Cross-Motion to lift the Protective Order.

C. Conclusion

The Court DENIES Defendant-Intervenors' Motion for Order Compelling Return of Trial Recordings, and orders as follows:

(1) The Court sets **August 29, 2011 at 9 a.m.** for a hearing on Plaintiffs' Cross-Motion to lift the Protective Order on the video recording of the trial.

(2) Although it appears that Plaintiffs' Cross-Motion has been fully briefed at the circuit level, the Court invites anyone who wishes to file further responses to the Cross-Motion to do so in compliance with the following briefing schedule:

(a) On or before **July 15, 2011**, any party desiring to do so shall file their Opposition;

(b) On or before **August 1, 2011**, any party desiring to do so shall file their Reply.

The Court hereby gives notice that it intends to return the trial recordings to Judge Walker as part of his judicial papers. Any party who objects shall articulate its opposition in the supplemental briefing in accordance with the schedule outlined above.

Dated: June 14, 2011

JAMES WARE
United States District Chief Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Timothy D Chandler tchandler@telladf.org

Dated: June 14, 2011

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Susan Imbriani
Courtroom Deputy

EXHIBIT 22

LAW OFFICES OF
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EPHRAIM MARGOLIN
VICKI H. YOUNG

May 12, 2011

Chief Judge James Ware
U.S. District Court for the Northern District of California
Courtroom 5, 17th Floor
450 Golden Gate Avenue
San Francisco, California 94110

Re: Perry, et al. V. Schwarzenegger, et al.
Case No.: C-09-02292 JW

Dear Judge Ware:

Hon. Vaughn R. Walker (ret.) ("Walker"), by and through counsel, hereby responds to the Order Setting Hearing on Motion dated April 28, 2011, (U.S. District Court Docket 772). Walker lodges with the court his chambers copy of the video recordings made of the trial herein (Exhibit A) for the purpose of the court's consideration of the Motion for Order compelling Return of Trial Recordings (Docket 770). This is subject to, if necessary, Walker's request for return of the chamber's copy of the recordings. [1]

Having lodged his chambers copy of the video recordings and as a non-party to these proceedings, it appears that Walker has satisfied the April 28 order and we request that insofar as directed to Walker the order be discharged.

We appreciate the Court's attention to this matter.

Very truly yours,

LAW OFFICES OF EPHRAIM MARGOLIN

/s/ Ephraim Margolin
/s/ Vicki H. Young
EPHRAIM MARGOLIN
VICKI H. YOUNG
Attorneys for Vaughn R. Walker

[1] "The chambers papers of a federal judge remain the private property of that judge or the judge's heirs, and it is the prerogative of the judge or the judge's heirs to determine the disposition of those papers." A Guide to the Preservation of Federal Judges' Papers, Second Edition, Federal Judicial Center (2009).

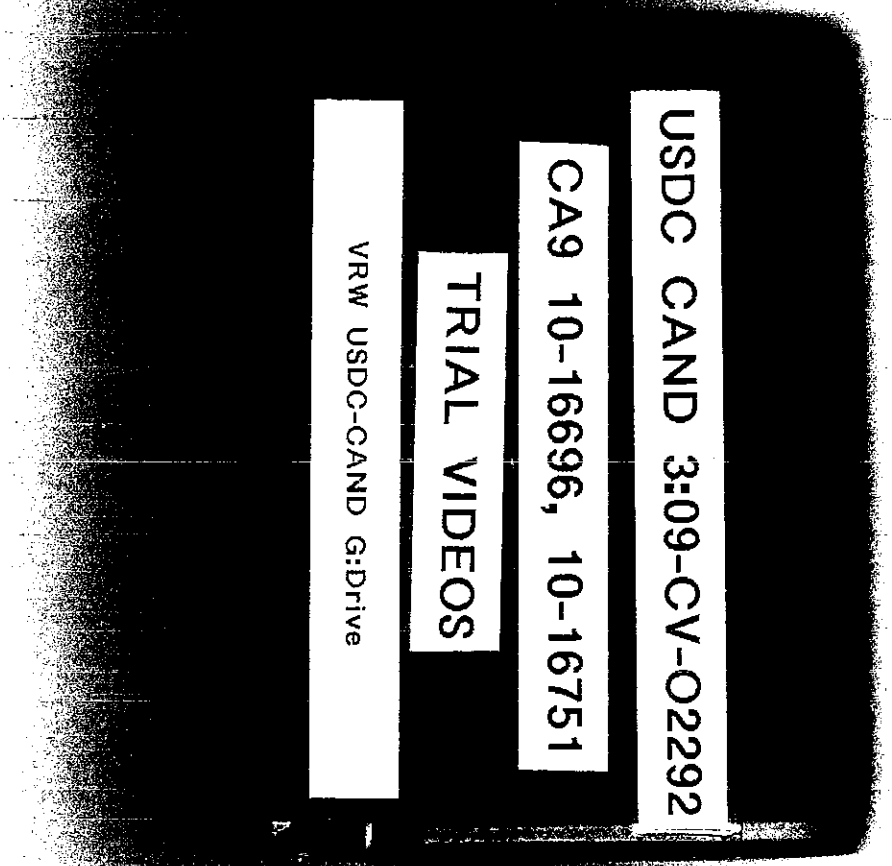
USDC CAND 3:09-CV-02292
CA9 10-16696, 10-16751
TRIAL VIDEOS
VRW USDC-CAND G:Drive

EXHIBIT A

EXHIBIT 23

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JAMES WARE, JUDGE

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI and JEFFREY J. ZARRILLO, **Plaintiffs,**	
v.	**No. C 09-2292 JW**
EDMUND G. BROWN, JR., in his official capacity as Governor of California; KAMALA D. HARRIS, in her official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California 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.**	**San Francisco, California Monday, August 29 2011 (62 pages)**

TRANSCRIPT OF PROCEEDINGS

THE COURT: So the narrow issue that you're raising is there's something that would be intimidating by the video of those same words.

MR. THOMPSON: Yes, your Honor.

THE COURT: What?

MR. THOMPSON: One of the things, you know what the person looks like. You know what they sound like. And this is all laid out in our attachments to our Ninth Circuit pleadings where the Judicial Conference of the United States at great length goes through and talks about the special concerns that are implicated by making a video available that aren't implicated where the printed word is made available.

THE COURT: Well, you do raise an issue, because not only -- well, you'll know what they look like and sound like if you're there, and there's no prohibition against this having been in a very large court, and indeed it was connected to other courtrooms, but it's the permanence of it that is different by the video. In other words, that can be displayed repeatedly as opposed to the real time trial of the case.

Anything further?

MR. THOMPSON: Two very quick points. Number 1, as I've been up here, I've been thinking more about whether there would be a prohibition on the Ninth Circuit viewing the videotape, and I'm just not prepared to give you an answer to that, your Honor, as I stand here today. I had not thought

about that before.

THE COURT: No, I won't quote you in my order. It just seems to me that I would have to speak to that because I can't conceive of circumstances where any part of what was placed before the Court for its decision, under seal or not, would be somehow unavailable to the reviewing court. And so I assumed -- and I started the question for another purpose. I was surprised by your answer, but it sounds like you've moved from, It's not available, to, I don't take a position on it at this time.

MR. THOMPSON: Yes, your Honor.

THE COURT: I appreciate that.

MR. THOMPSON: And the last thing, your Honor, is this conclusion: If the Court were to decide to unseal the video, we would ask that a stay of that decision be put in place pending an appeal, or at the very least a stay pending two weeks, such that the appellate courts would have a reasonable opportunity to consider this matter.

And we thank you, your Honor.

THE COURT: Thank you. Any rebuttal?

MR. BOUTROUS: Yes, your Honor. Thank you.

First, I want to start with the last couple -- one of the last points Mr. Thompson made. He said the big difference between the transcript and the video of the trial would be, you wouldn't know how they sounded, you wouldn't know how the

witness looked from the transcript. That is the flimsiest argument I could have imagined Mr. Thompson making. As I was going to show, Mr. Blankenhorn is not shy. He is easily accessible. Someone read the transcript -- and in the wide reporting of this case, there are the reenactments. It would take literally two seconds to see Mr. Blankenhorn talk for hours on his views about same-sex marriage. So that's not a compelling reason to keep this secret.

Same with Dr. Miller -- Mr. Miller, their other witness. He's online. You can find him speaking at panels and discussing the issues. These are people who speak publicly. They're engaged in public debate.

One of the things that's changed from the Supreme Court's ruling is the Court decided the case called *Doe vs. Reed*, which the City cited. And Justice Scalia, who joined the stay order in this case, issued his opinion, the concurring opinion. There was ballot initiatives on whether people who signed ballot initiatives to give same-sex partners benefits in Washington could remain anonymous, and Justice Scalia said, When ordinary citizens on the street enter into the public debate about issues, thrust themselves in, then they have to have the courage to be in public debate. There are rules against intimidation and harassment.

And that takes me back -- I thought Mr. Thompson would have something, some -- he kept talking about their concerns.

EXHIBIT 24

JUDICIAL COUNCIL

OF THE NINTH CIRCUIT

IN THE MATTER OF PILOT DISTRICT COURT PUBLIC ACCESS PROGRAM APPROVED DECEMBER 16, 2009	No. 2010–3 **ORDER**

KOZINSKI, Chief Judge:

I have received a request from the Chief Judge of the Northern District of California to remove Perry v. Schwarzenegger, No. 3:09-cv-02292-VRW, from this pilot program. The request is granted.

Order No. 2010–2 is rescinded.

EXHIBIT 25

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

September 14, 2010

The Judicial Conference of the United States convened in Washington, D.C., on September 14, 2010, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge William K. Sessions III,
District of Vermont

Third Circuit:

Chief Judge Theodore A. McKee
Chief Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Judge Sim Lake III,
Southern District of Texas

cost-containment initiatives to date and noted that the long-term financial health of the judiciary will be aided by future cost-containment efforts that provide tangible cost savings or avoidances.

COMMITTEE ON CODES OF CONDUCT

COMMITTEE ACTIVITIES

The Committee on Codes of Conduct reported that since its last report to the Judicial Conference in March 2010, the Committee received 17 new written inquiries and issued 17 written advisory responses. During this period, the average response time for requests was 22 days. In addition, the Committee chair responded to 159 informal inquiries, individual Committee members responded to 133 informal inquiries, and Committee counsel responded to 358 informal inquiries.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

CAMERAS IN THE COURTROOM PILOT PROJECT

On recommendation of the Committee on Court Administration and Case Management, the Judicial Conference authorized 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. The pilot project will proceed in accordance with the tenets outlined below, and is subject to definition and review by the Committee. In addition, the Committee will request that a study of the pilot be conducted by the Federal Judicial Center.

a. The pilot will be national in scope and consist of up to 150 individual judges from districts chosen to participate by the Federal Judicial Center, in consultation with the Court Administration and Case Management Committee. The pilot project should include a national survey of all district judges, whether or not they participate in the pilot, to determine their views on cameras in the courtroom.

b. The pilot will last up to three years, with interim reports prepared by the Federal Judicial Center after the first and second years.

c. The pilot will be limited to civil cases only.

d. Courts participating in the pilot will record proceedings, and recordings by other entities or persons will not be allowed.

e. Parties in a trial must consent to participating in the pilot.

f. Recording of members of a jury will not be permitted at any time.

g. Courts participating in the pilot should – if necessary – amend their local rules (providing adequate public notice and opportunity to comment) to provide an exception for judges participating in the Judicial Conference-authorized pilot project.

h. The Court Administration and Case Management Committee is authorized to issue and amend guidelines to assist the pilot participants.

I. The Administrative Office is authorized to provide funding to the courts with participating judges – if needed – for equipment and training necessary to participate in the pilot.

PACER ACCESS TO CERTAIN BANKRUPTCY FILINGS

Under the Judicial Conference policy on privacy and public access to electronic case files, bankruptcy filings should include only the last four digits of filers' social security numbers on their petitions and other public documents (JCUS-SEP/OCT 01, pp. 48-50). However, documents filed prior to implementation of the policy in 2003 are still available on the Public Access to Court Electronic Records (PACER) system and contain the debtors' full social security numbers, creating privacy concerns. To address those concerns, on recommendation of the Committee, the Judicial Conference agreed to amend its privacy policy to restrict public access through PACER to documents in bankruptcy cases that were filed before December 1, 2003 and have been closed for more than one year, with the following conditions:

EXHIBIT 26

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December 28, 2009

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the
Northern District of California
450 Golden Gate Ave.
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

I write on behalf of Defendant-Intervenors ("Proponents") to reiterate our objections, conveyed in my letter of October 5, to televising the proceedings in this case beyond the confines of the courthouse. *See* Doc. No. 218.

Proponents respectfully submit that photographic or video depiction of the trial proceedings in this case is not authorized, and it would violate this Court's Local Rule 77-3, this Court's General Order No. 58, and the policy of the Judicial Conference of the United States. As explained in detail below, the concerns animating the policy adopted by the Judicial Conference – particularly the unacceptable danger that the right to a fair trial will be undermined and the potential for intimidation of witnesses and litigants – apply with particular force in this case.

The Media Coalition seeks leave to broadcast and webcast the trial proceedings in this case, relying upon a press release issued by the Ninth Circuit on December 17, 2009. *See* Doc # 313. However, the Judicial Council for the Ninth Circuit has not yet issued an order or resolution setting forth the policies and procedures that will govern the pilot program described in the press release (for example, the Ninth Circuit's press release does not specify whether a trial may be broadcast over the objection of one of the parties). More importantly, the Ninth Circuit has not yet provided notice and an opportunity to comment on the pilot program or the (as yet unpromulgated) policies and procedures that will govern it. As explained below, this Court is bound to comply with its Local Rule unless and until it either is amended by this Court following notice and an opportunity to comment or is abrogated by order of the Judicial Council following notice and an opportunity to comment. *See* FED. R. CIV. P. 83(a)(1); 28 U.S.C. § 2071(b) & (c)(1); 28 U.S.C. § 332(d).

1. Current Governing Policy

This Court's Rule 77-3 flatly prohibits the broadcast or webcast of trial proceedings beyond the courthouse: "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." Likewise, this Court's General Order No. 58 provides that the "[p]olicy of the Judicial Conference of the United States prohibits, in both civil and criminal cases in all district courts, broadcasting, televising, recording, or photographing courtroom proceedings for the purposes of public dissemination." *See also* United States District Court for the N.D. Cal., General Information Guide for Journalists at 4 (October 29, 2009) ("Broadcasting of proceedings is prohibited by policy of the Judicial Conference of the United States.").

The Judicial Conference of the United States adopted the current policy in 1996. *See* JCUS-SEP 96, p. 54, *available at* http://www.uscourts.gov/judconf/96-Sep.pdf. The policy is based upon the potentially negative impact that the public broadcast of federal trial court proceedings could have on the administration of justice. After an extensive study of the issue in 1994, the Judicial Conference rejected proposals for public broadcast of trial court proceedings. *See* JCUS-SEP 94, pp. 46-47, *available at* http://www.uscourts.gov/judconf/94-Sep.pdf. "Based upon the data presented, a majority of the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern, and the Conference declined to approve the Committee's recommendation to expand camera coverage in civil proceedings." *Id*.

In testimony before Congress in September 2007, the Chair of the Judicial Conference's Court Administration and Case Management Committee explained the Judicial Conference's position, in part, as follows:

> The Judicial Conference position is based on a thoughtful and reasoned concern regarding the impact cameras could have on trial proceedings. [Public broadcast] has the potential to undermine the fundamental rights of citizens to a fair trial. It could jeopardize court security and the safety of trial participants, including judges, U.S. attorneys, trial counsel, U.S. marshals, court reporters, and courtroom deputies. The use of cameras in the trial courts could also raise privacy concerns and produce intimidating effects on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding.
>
> * * *
>
> Because cameras in trial courts could profoundly and negatively impact the trial process, the Judicial Conference strongly opposes any legislation that would allow the use of cameras in the United States district courts.

Cameras in the Courtroom: The "Sunshine in the Courtroom Act of 2007," H.R. 2128: Hr'g Before the H. Comm. on the Judiciary, 110th Cong. (Sept. 27, 2007) (statement of The Honorable John R. Tunheim, Judge, United States District Court for the District of Minnesota and Chair of the Court Administration and Case Management Committee of the Judicial Conference), *available at* http://www.uscourts.gov/testimony/ Tunheim_cameras092707.pdf.

2. The Position of the Ninth Circuit Judicial Council

Shortly after the Judicial Conference of the United States adopted its policy against the broadcast of federal district court proceedings, the Judicial Council of the Ninth Circuit followed suit, "vot[ing] to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in courtrooms on May 24, 1996." *See* Resolution 1: Instituting a Circuit Rule Permitting Photographing, Recording and Broadcasting in Non-Jury, Civil Cases Before the District Courts at 1 (copy submitted to the Judicial Conference of the United States on May 7, 2009) (attached as part of Exhibit A) at 3.

In July 2007, the Ninth Circuit Judicial Conference adopted a resolution recommending that the Judicial Conference of the United States change its policy to permit the broadcast of civil, non-jury trials. *Id*. at 2. The Ninth Circuit Judicial Conference also recommended that, "to the extent permitted by Judicial Conference [of the United States] procedures, this Circuit should adopt a Rule that would allow the photographing, recording, and broadcasting of non-jury, civil proceedings before the District Courts in the Ninth Circuit." *Id*. Despite these recommendations, no action was taken by the Ninth Circuit Judicial Council for nearly two years.

Finally, in May 2009, the Ninth Circuit Judicial Council forwarded the recommendation to the Judicial Conference of the United States. *See* Letter from Cathy A. Catterson to The Honorable John R. Tunheim (May 7, 2009) (attached as Exhibit A at 1). During the interim, "[t]he Ninth Circuit Judicial Council [had] considered the resolution at a number of meetings following the 2007 Judicial Conference but deferred action to await possible developments at the national level." *Id*. For reasons left unstated, the Ninth Circuit Judicial Council decided in May 2009 "that it is appropriate to forward the resolution now and ask that it [be] considered by [the Committee of the Judicial Conference of the United States on Court Administration and Case Management] at its June meeting." *Id*.

As noted above, the Judicial Conference of the United States has not retreated from its policy against the use of cameras in federal district court proceedings. Indeed, as recently as July 2009, the Judicial Conference of the United States strongly reiterated its concern about cameras in the courtroom in a letter to Congress. The Conference again stressed that "[t]he Federal Judiciary is . . . very concerned that the effect of cameras in the courtroom on participants would be to impact negatively on the trial process and thereby interfere with a fair trial." Letter from

James C. Duff to Senators Patrick J. Leahy and Jeff Sessions (July 23, 2009) (attached as Exhibit B) at 2. Among many other concerns, the Judicial Conference again emphasized its considered judgment that "[t]elevision cameras can intimidate litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast." *Id*.

On December 17, 2009, the Ninth Circuit issued a press release announcing that the Ninth Circuit Judicial Council "has approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit." *See* News Release, Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts, *available at* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf. The press release provided no details as to how the program will be implemented other than to state that "[c]ases to be considered for the pilot program will be selected by the chief judge of the district court in consultation with the chief circuit judge." *Id*. Nor has the Ninth Circuit adopted a Circuit Rule allowing the broadcast of non-jury civil trials as recommended by the 2007 Ninth Circuit Judicial Conference resolution. According to the Office of the Circuit Executive (the contact listed on the press release), there is no resolution, order, or other publicly available information setting forth the policies and procedures that will govern the new pilot program. Nor has the Ninth Circuit Judicial Council taken any action to abrogate this Court's Local Rule 77-3. And it has not yet provided notice and the opportunity to comment concerning the program.

In these circumstances, it is clear that this Court's Local Rule 77-3 "has the force of law," *Weil v. Neary*, 278 U.S. 160, 169 (1929), and therefore remains binding on this Court. *See, e.g.*, *United States v. Yonkers Bd. of Education*, 747 F.2d 111, 112 (2d Cir. 1984) ("So long as [local rule prohibiting television broadcasting of judicial proceedings] do[es] not conflict with rules prescribed by the Supreme Court, congressional enactments, or constitutional provisions, [it has] the force of law. Accordingly, [such local rule is] binding on the district judges until properly amended or repealed.") (citations omitted); *United States v. Hastings*, 695 F.2d 1278, 1279 nn.4-5 (11th Cir. 1983) (district court "was bound by" local rule "prohibit[ing] television cameras in the courtroom").

This Court is, of course, authorized to amend its local rules, but Congress has provided by law that "[a]ny rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 2071(b); *see also* FED. R. CIV. P. 83(a)(1) ("After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice."). This Court's own rules are to the same effect. *See* Local Rule 83-1 ("The local rules of this Court may be modified or amended by a majority vote of the active Judges of the Court in accordance with the procedures set forth in this rule."); Local Rule 83-3(a) ("Before becoming effective, any proposed substantive modification of the local

rules shall be subject to public comment in accordance with FRCivP 83."). This Court must also first "appoint an advisory committee for the study of the rules of practice … of such court," which "shall make recommendations to the court concerning such rules." 28 U.S.C. § 2077(b); *see also* Local Rule 83-1 ("Any proposed substantive modification or amendment of these local rules must be submitted to a Local Rules Advisory Committee for its review ….").

The circuit judicial council is authorized to modify or abrogate a district court's local rules. *See* 28 U.S.C. § 2071(c)(1); FED. R. CIV. P. 83(a)(1). But its authority to do so is limited in two significant respects. First, the Judicial Council is authorized to abrogate this Court's rules *only* if the Council determines that the rule is "inconsistent" with the Federal Rules of Civil Procedure. Congress has specified that "[e]ach judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title [i.e., the Federal Rules]. Each council may modify or abrogate any such rule found inconsistent in the course of such a review." 28 U.S.C. § 332(d)(4). Obviously, this Court's Local Rule 77-3 is entirely consistent with the Federal Rules – indeed, it adopts and applies the policy adopted by the Judicial Conference of the United States.

Second, even if the Ninth Circuit Judicial Council had the substantive authority to abrogate this Court's Local Rule 77-3, Congress has prescribed specific procedures that must be followed:

> Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public.

28 U.S.C. § 332(d)(1); *see also In re Sony BMG Music Entertainment*, 564 F.3d 1, 8 (1st Cir. 2009) (holding that notice and opportunity to comment are not required when circuit judicial council review did not result in resolution "to modify or abrogate any local rule but, rather, endorsed existing practice in the districts within the circuit").

Because none of these procedures has been followed (indeed, the Ninth Circuit Judicial Council has not as yet even purported to abrogate Local Rule 77-3), the Local Rule remains in force and binding on this Court. In similar circumstances, the First Circuit recently issued a writ of mandamus overturning an order entered by the District Court of Massachusetts permitting a webcast of a trial. *See In re Sony BMG Music Entertainment*, 564 F.3d 1 (1st Cir. 2009). As in this case, the governing Local Rule barred the broadcast. *See id.* at 10 (reprinting rule). The trial court had sought to read into the text discretionary authority to deviate from the rule, but the

First Circuit rejected that effort. In so holding, the Court of Appeals emphasized the importance of the policy adopted by the Judicial Conference of the United States based on its conclusion that " 'the intimidating effect of cameras' in the courtroom presented 'cause for concern.' " *Id*. at 7 (quoting JCUS-SEP 94, p. 46, *available at* http://www.uscourts.gov/judconf/94-Sep.pdf). The First Circuit held that "the Judicial Conference's unequivocal stance against the broadcasting of civil proceedings (save for those few exceptions specifically noted in the policy itself), is entitled to substantial weight." *Id*. The Court stressed its belief that "the district court, institutionally, would construe its rule to avoid a head-on clash with the national standard." *Id*.[1] *See also In re Complaint Against District Judge Billy Joe McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009) (Easterbrook, C.J.) (finding that district court judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" by permitting live broadcast of a civil trial with the agreement of the parties).

3. The Judicial Conference's Fair Trial Concerns Apply With Great Force in This Case

Publicly televising the proceedings in this case would give rise to the Judicial Conference's consistent and oft-repeated concerns "that the effect of cameras in the courtroom on participants would be to impact negatively the trial process and thereby interfere with a fair trial." Letter from James C. Duff to Senators Patrick J. Leahy and Jeff Sessions (July 23, 2009) (attached as Exhibit B) at 2. Most importantly, given the highly contentious and politicized nature of Proposition 8 and the issue of same-sex marriage in general, the possibility of compromised safety, witness intimidation, and/or harassment of trial participants is very real. Indeed, lead counsel for Plaintiffs has acknowledged that "widespread economic reprisals against financial supporters of . . . Proposition 8" resulted from public disclosure of the names of donors during the campaign. Doc #187-1 at 6-7.

And the record of other forms of harassment against Proposition 8 supporters is well documented. *See* Doc #s 187-1, 187-2 at ¶¶ 10-12; 187-9 at ¶¶ 6-8; 187-9 at 12-15; 187-11; 187-12 at ¶¶ 5-6; 187-13 at ¶ 8; *see also* Thomas M Messner, *The Price of Prop 8*, The Heritage Foundation, *available at* www.heritage.org/Research/Family/bg2328.cfm ("expressions of support for Prop 8 have generated a range of hostilities and harms that includes harassment, intimidation, vandalism, racial scapegoating, blacklisting, loss of employment, economic hardships, angry protests, violence, at least one death threat, and gross expressions of anti-

[1] The *Sony* Court also found support in the 1996 resolution of the First Circuit Judicial Council embracing the position taken by the Judicial Conference. *See Sony BMG*, 564 F.3d at 7-8. The Ninth Circuit Judicial Council adopted a similar resolution in 1996, and has not as yet issued an order or resolution formally rescinding it, though the December 17 press release does indicate that the Council has taken a different stance. As demonstrated above, the press release standing alone is insufficient to override this Court's Local Rule and the policy adopted by the Judicial Conference of the United States.

religious bigotry"). This campaign of harassment and reprisal has often been "targeted and coordinated," *id.*, and the retaliation has often been quite serious. *See, e.g.*, Doc # 187-11 at 81 (Brad Stone, Disclosure, Magnified on the Web, N.Y. Times (Feb. 8, 2009) ("Some donors to groups supporting the measure have received death threats and envelopes containing a powdery white substance….").

Relatedly, as the Judicial Conference has emphasized, televising the trial would impinge upon the privacy interests of witnesses, "some of whom are only tangentially related to the case, but about whom very personal and identifying information might be revealed." Letter from James C. Duff to Senators Patrick J. Leahy and Jeff Sessions (July 23, 2009) (attached as Exhibit B) at 2. Already, one website "takes the names and ZIP codes of people who donated to the ballot measure … and overlays the data on a Google map." Doc # 187-11 at 81. Another website was set up with the name, hometown, home phone numbers, workplace, workplace contact information, and pictures of Prop 8 supporters so that "whenever someone Googles them this [website] will come up." *Id*. at 55, 62, 65-66, 73, 77.

With this background, it is not surprising that potential witnesses have already expressed to Proponents' counsel their great distress at the prospect of having their testimony televised. Indeed, some potential witnesses have indicated that they will not be willing to testify at all if the trial is broadcast or webcast beyond the courthouse.

Finally, permitting the recording and broadcast of these proceedings over Proponents' objections would be particularly unfair in view of the fact that the governing rules unequivocally forbade cameras in the courtroom at the time Proponents voluntarily intervened in this case.

For these reasons, Proponents must respectfully object to any departure from this Court's Rule 77-3 and the policy of the Judicial Conference of the United States.

Sincerely,

/s/ Charles J. Cooper

Charles J. Cooper
Counsel for Defendant-Intervenors