NO. 10-16696
Argued December 6, 2010
(Reinhardt, Hawkins, N. Smith)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,
vs.
EDMUND G. BROWN, Jr., et al.,
Defendants,
and
DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

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

JOINDER OF NON-PARTY MEDIA COALITION IN PLAINTIFFS-APPELLEES' MOTION TO UNSEAL

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1. INTRODUCTION

The issue before this Court is straight-forward and governed by settled law. The video recordings of the trial publicly held below are part of the district court's file. The parties were given access to the recordings and used portions in their closing arguments. The district court had the discretion to decide whether or not to allow the video recordings to be created in the first instance. Once the recordings were made and became part of the court's file, the presumption of access to judicial records attached to the recordings as it would to any other part of the court file. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (noting that

"historically both civil and criminal trials have been presumptively open"). Section 2.A, *infra*.

Proponents of Proposition 8 invoke inapposite authority in demanding that the video recordings be returned, to be kept under seal and unavailable to the public. In its earlier decision in this case, the Supreme Court addressed the narrow issue of the amendment of a local rule involving the possible effect of *contemporaneous* broadcast of trial testimony. The Supreme Court did not address the straightforward access question now before this Court. These court records should be made public unless Proponents can meet the demanding test mandated by the First Amendment. As this Court has explained, "in this circuit, we start with a strong presumption in favor of access to court records." *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). This strong presumption only may be overcome on a showing of "compelling reasons," *Foltz*, 331 F.3d at 1135, articulated in specific, on-the-record findings that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.*, *quoting Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*"). Proponents cannot possibly meet that burden. The only purported interest they offer – the unsupported claim that a single expert witness now regrets having testified because part of the public testimony he gave at trial has become *more publicly available* – does not come close to establishing the "compelling

reasons" that must be shown to justify closure. And even if Proponents could establish an adequate interest to protect this single professional witness – a demanding test, that the Media Coalition submits Proponents cannot meet – it certainly does not justify the continued sealing of the entire video record of the 12-day *public* court trial. In stark contrast, a substantial public interest exists in allowing public access to the video recordings of the trial in this case. As this case winds its way through the state and federal court systems, it continues to be closely watched because the legality of California's Proposition 8 ban on same sex marriage is of profound interest to millions. Permitting public access to the video recordings of the trial proceedings will only enhance the public's understanding of and provide confidence in the Court's ultimate resolution of this matter. Section 2.B, *infra*.

2. THE COURT SHOULD ORDER RELEASE OF THE VIDEO RECORDINGS BECAUSE PROPONENTS CANNOT MEET THE HEAVY TEST TO JUSTIFY ONGOING SEALING OF THESE COURT RECORDS.

Proponents try to force a round peg into a square hole in arguing that the Judicial Council's Policy, former Local Rule 77-3 or the Supreme Court's decision in *Hollingsworth v. Perry*, 130 S.Ct. 705 (2010), mandate the perpetual sealing of the video recordings made by the district court of the historic trial below. By their plain language, the Judicial Council Policy and former Local Rule 77-3 do not apply here because they only preclude recording for *the purpose of* public

broadcasting or television – not what occurred here. Similarly, the Supreme Court's earlier decision in this case was expressly limited, simply holding that the district court did not correctly amend its Local Rules and consequently that the anticipated contemporaneous simulcast of the trial proceedings outside of the San Francisco courthouse was improper. The Supreme Court did not purport to address the very different issue presented here – whether the First Amendment presumptive right of access applies to video recordings of trial proceedings that have concluded and that are now part of the court's file. As set forth below, clear law governs the question before this Court. Under that law, there can be no question that the right of access to these video recordings does apply and Proponents cannot meet its heavy test.

A. The First Amendment Presumption of Public Access Applies to All Court Records, Including the Video Recordings of the Trial.

Under the First Amendment to the United States Constitution and the federal common law, court proceedings and records are presumptively open to the public.[1] As the United States Supreme Court has noted, "[f]or many centuries, both civil

[1] *E.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (right of public/press access applies to criminal trials); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-508 (1984) ("*Press-Enterprise I*") (voir dire); *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (suppression hearings); *Press-Enterprise II*, 478 U.S. at 12-13 (preliminary hearings); *see also CBS, Inc. v. United States District Court*, 765 F.2d 823, 825 (9th Cir. 1985) ("*CBS II*") ("[t]he right of access is grounded in the First Amendment and in common law, and extends to documents filed in pretrial proceedings as well as in the trial itself") (citation omitted).

and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so 'that the truth may be discovered in civil as well as criminal matters.'" *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979), *citing Remarks upon Mr. Cornish's Trial*, 11 How. St. Tr. 455, 460. This tradition of openness "is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers*, 448 U.S. at 569, 580 n.17 (noting that "historically both civil and criminal trials have been presumptively open").

This Court has championed public access, observing that "in this circuit, we start with a strong presumption in favor of access to court records." *Foltz*, 331 F.3d at 1135. Indeed, the Court has a long history of ordering civil court documents to be unsealed and courtroom doors to be unlocked, relying both on the First Amendment to the United States Constitution and the common law right of access. *E.g.*, *id.* (extending the common law right of public access to civil court documents that are filed under seal as attachments to a dispositive motion, even though the documents are subject to a protective order; court held that sealing is permitted only for "compelling reasons," vacating sealing order and ordering some documents unsealed or redacted); *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179, 1183-1185 (9th Cir. 2006) (documents related to investigation of alleged police corruption could not be retained under seal based on a blanket

protective order, especially in the absence of "compelling reasons sufficient to outweigh the public's interest in disclosure"); *San Jose Mercury News, Inc. v. United States District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999) (public's common law right of access in civil cases "creates a strong presumption in favor of access"); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (extending common law rights of access to pretrial court documents in civil sexual abuse case; sealing is justified only for "compelling reasons"; vacating sealing order and remanding for reconsideration).

As the Supreme Court explained in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982), public access to court proceedings allows "the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government." The Court echoed Oliver Wendall Holmes' declaration that "the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

Courts around the country have further explained these policy considerations animating the strong presumption of openness in civil proceedings. In *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), for example, the Sixth Circuit vacated a sealing order and allowed public access to a Federal Trade Commission report and other documents filed with the trial court concerning the FTC's method of testing "tar" and nicotine levels of cigarettes. The court explained:

> The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases.... In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption. Finally, ... [o]penness in the courtroom [in civil cases] discourages perjury and may result in witnesses coming forward with new information regardless of the type of proceeding.

Id. at 1179.

The Third Circuit applied these same policy considerations, as well as the historical tradition of openness, in *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984). There, the court reviewed a lower court order sealing the transcript of a hearing which concerned supposedly "confidential" business information introduced in a court battle over alleged securities law violations. In vacating the sealing order, the Third Circuit ruled that the public has both a First Amendment and common law right of access to civil trials:

> A presumption of openness inheres in civil trials as in criminal trials. We also conclude that the civil trial, like the criminal trial, 'plays a particularly significant role in the functioning of the judicial process and the government as a whole.' ... Public access to civil trials, no less than criminal trials, plays an important role in the participation and free discussion of governmental affairs. Therefore, we hold that the 'First Amendment embraces a right of access to [civil] trials... to ensure that this constitutionally protected discussion of governmental affairs is an informed one.'

Id. at 1070 (citations omitted).

These important principles are served only if access is allowed to all facets of a case, including materials that are prepared *specifically* to assist the court in performing its function. As the court recognized in *Marisol A. v. Giuliani*, 26 Media L. Rep. 1151, 1154-1154 (S.D.N.Y. 1997), a "strong" presumption of access attaches to a report prepared pursuant to court order because it is likely to play an important role in the Court's performance of its Article III function, especially where both the parties and the subject matter of the litigation were of public interest. Based on this strong presumption of access, one district court unsealed the findings of an independent consultant in an action brought by the Securities and Exchange Commission seeking sanctions against a company that detailed then-New York Sen. Alfonse D'Amato's dealings with the company. *SEC v. Stratton Oakmont, Inc.*, 24 Media L. Rep. 2179 (D.D.C. 1996). Similarly, another district court stated that the news media "has a right to view the fruits of a document production" in a bankruptcy case since "the overriding public interest in

learning the facts about criminal misconduct allegedly committed by a debtor while currently serving as the Governor of Arizona … outweigh[ed] the interest of the debtor and his mother in preserving the confidentiality of personal financial records." *In re Symington*, 209 B.R. 678, 681 (D. Md. 1997).[2]

Those same principles apply here. The district court has broad leeway to control the events that occur in the courtroom and it was well within its discretion to decide whether to record the trial proceedings in the first instance. It exercised that discretion to create a video record that the parties used and the district court relied on to prepare its detailed findings, which then became part of the court file available to this Court as it decides this appeal.[3] But after the district court's

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[2] *See also Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984) (court granted newspapers access to report prepared by corporation and admitted into evidence in shareholders' derivative suit, stating that the "policy reasons for granting public access to criminal proceedings apply to civil cases as well"); *Copley Press, Inc. v. Peregrine Sys.*, 311 B.R. 679, 688 (D. Del. 2004) (holding that audit report investigating company's accounting problems filed under protective order in bankruptcy proceeding is judicial record subject to right of access); *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404 (1st Cir. 1987) (affirming order to unseal financial statements and finding that the common law right of public access attaches to financial records submitted for the court's determination of whether to approve a proposed consent judgment in a deceptive trade practices action filed by the FTC).

[3] This situation is thus similar to cases in which a court exercised its discretion to permit photography within the courthouse but then attempted to restrict use of the photographs. There, in exercising its discretion to allow photography in the first instance, the court lost the right to exercise control over the resulting photographs. *KFMB-TV Channel 8 v. Municipal Court*, 221 Cal. App. 3d 1362 (1990).

discretion is exercised and the events committed to a record that becomes part of a court file, constitutional principles apply. Indisputably, the video recordings are part of the court file in this proceeding. Under the firm constitutional law discussed above, they can only remain sealed if Proponents satisfy the strict demands of the First Amendment. As set forth below, they cannot.

B. Proponents Cannot Meet the Heavy Test Mandated by the First Amendment to Justify Continued Sealing of the Video Recordings.

Sealing orders are subject to strict constitutional requirements. In *Oregonian Publ'g Co. v. District Court*, 920 F.2d 1462, 1466 (9th Cir. 1990), this Court held in a criminal case that court records may be sealed only if it is established that "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives that would adequately protect the compelling interest." Similarly, in *Foltz*, the Court made clear that the sealing of civil court records is permitted only for "compelling reasons." 331 F.3d at 1135.

Because of the strong presumption of access to records in this Circuit, before a court may enter a sealing order, it also must make "specific, on the record findings" of the extraordinary need to keep a particular document or particular testimony secret. *Press-Enterprise II*, 478 U.S. at 13-14; *see also Oregonian Publ'g*, 920 F.2d at 1467. General findings will not suffice. "[P]articularized findings of compelling interest must be placed on the record before a hearing is

closed or a record is sealed" to assure that the court carefully analyzes the issue before removing records from the public view. *United States v. Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994). These findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.

Sealing orders – to the extent they are permitted at all – also must be narrowly tailored. The Court has mandated that "any interest justifying closure must be specified with particularity, and *there must be findings that the closure remedy is narrowly confined to protect that interest*." *CBS II*, 765 F.2d at 825 (emphasis added). For this reason, any sealing order must consider and use less restrictive alternatives that do not completely frustrate the public's First Amendment and common law rights of access. *See, e.g.*, *Press-Enterprise I*, 464 U.S. at 512 (concluding that sealing order should be limited "to information that was actually sensitive," *i.e.*, "only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected"). As the Third Circuit explained: "[i]f an alternative would serve the interest well and intrude less on First Amendment values, a denial of public access cannot stand." *United States v. A.D.*, 28 F.3d 1353, 1357 (3d Cir. 1994).

Moreover, the presumptive right of access is even more important where the events in the courtroom will have a broad impact on the public. As one federal

district court has explained, "the public's interest in access to a proceeding involving the State's allegations of harm to the public weighs especially heavily in favor of access." *California ex rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111, 1124 (C.D. Cal. 2005) (emphasis in original). Without that public access, the Court risks losing the public's confidence in the system. *See Leucadia v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (stating that "the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness").

In this case, Proponents cannot establish the constitutional requirements of particularized findings showing a compelling government interest in secrecy sufficient to override the strong presumption of public access to these judicial records, *or* consideration of less restrictive alternatives to the perpetual blanket sealing order that currently exists. Proponents make no serious effort to meet this heavy burden. They proclaim – without support – that a paid, professional witness regrets having agreed to testify because a portion of his public testimony was displayed during a speech and shown on C-SPAN. Appellants' Motion for Order Compelling Return of Trial Recordings ("Proponents' Motion") at 2-3. Yet, as

Plaintiffs point out in their Opposition to Proponents' Motion, the district court rejected the factual basis for the expert witness' purported fears of intimidation. Opposition at 5, citing ER 70-71. The 12-day trial in this case was open to the public and since its conclusion, the transcripts have been publicly available and widely distributed. And even if Proponents could meet their heavy burden to protect this particular witness, Proponents cannot use the unsupported concerns of a single witness to justify the continued sealing of the video record of the entire trial. Thus, the Media Coalition submits that, particularly in light of the absence of any evidence to support Proponents' arguments, *no* interest exists to support the continued sealing of this portion of the court record.

In contrast, the public interest in unsealing the video recordings in this case cannot be overstated. The validity of the federal constitutional challenge to California's Proposition 8 that this case presents has the potential to fundamentally alter the lives of millions of gay men and lesbians who seek to marry. Regardless of the substantive outcome of the case, the public's understanding of – and confidence in – how the courts resolve this case will only be enhanced by allowing maximum transparency in the process. The millions of people following this social issue of the day seek permission to see the *public record* of the public trial proceedings that are now being reviewed by this Court. Certainly, they have that right as does the public generally. This Court should follow the settled case law

from this Court and the United States Supreme Court mandating that judicial records be available to the public and order that the video recordings of the trial court proceedings be unsealed immediately.

3. CONCLUSION

The question presented to the Court is not whether the trial in this matter should have been recorded. Video recordings of this public trial were created, the parties later used them and the trial court relied on them to reach the decision below. Indisputably, the recordings are part of the court's file and now available for this Court's use and consideration. Thus the question instead is whether this recording should be publicly available. Well-established law answers this question. A presumptive right of access attaches to the video recordings and the Proponents of Proposition 8 bear a heavy burden to support the ongoing sealing of this court record. They cannot meet that burden.

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Therefore, for the reasons set forth in this Joinder and in Plaintiffs-Appellees' Motion to Unseal, the Media Coalition respectfully request that this Court enter its Order unsealing the video recordings of the trial, permitting public access to those recordings.

RESPECTFULLY SUBMITTED this 18th day of April, 2011.

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9th Circuit Case Number(s) 10-16696

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