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

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Monday, August 29, 2011

(9:05 a.m.)

(In open court)

THE COURT: Please be seated.

DEPUTY CLERK: Calling Case C 09-2292, Perry, et al. versus Schwarzenegger, et al.

Counsel, please approach and state your name for the record.

MR. BOUTROUS: Theodore J. Boutrous Jr., representing the plaintiffs. And I'm joined by my colleague, Enrique Monagas; and also Jeremy Goldman from Boies, Schiller. All representing the plaintiffs.

THE COURT: Good morning.

MS. VAN AKEN: Christine Van Aken from the San Francisco City Attorney's Office for plaintiff-intervenor City and County of San Francisco. And I'm joined by Therese Stewart and City Attorney Dennis Herrera.

THE COURT: Good morning.

MR. THOMPSON: David Thompson of Cooper & Kirk for the proponents, defendant-intervenors; and I'm joined today by Brian Rahm and Holly Carmichael.

THE COURT: All right.

MR. BURKE: Good morning, your Honor. Thomas Burke of Davis, Wright, Tremaine on behalf of the Media Coalition.

THE COURT: Good morning.

Let me inquire whether any of my students in my federal courts class are out there in the audience? I invited them to come.

Okay. Their grade just went down a notch.

(General laughter)

THE COURT: Very well. So this is a continuation of a motion that was made to the Ninth Circuit, actually, and referred to this Court, and the issue before us now has to do with proceedings of the trial itself which were recorded and which were used, at least during the closing argument, and used apparently by Judge Walker who tried the case as part of his proceedings; and at the end of the case itself, or near the end, was made part of the record of the case, but placed under seal. And as I understand the motion made to the Ninth Circuit, it is a motion to allow those, that recording to be removed from being a sealed document. And if there's more to it than that, I hope that the parties will inform me about that. Because that is, as I understand it, all that I'm being asked to do.

Now, in doing that, and saying that that is all that I'm being asked to do, I want to highlight a couple of things that I've thought of that I could have been asked to do or the Ninth Circuit could have been asked to do but it was not asked to do. First of all, there's no motion made to the Ninth Circuit nor to this Court asking that the recording be stricken

from the record. Judge Walker made it a part of the record, and for my consideration I'm treating it as part of the record. Indeed, the parties argue that it's part of the record. And that has certain legal implications for how this document, like any other document, might be treated. Because as part of the record, it is -- since we are a court record, and that has legal implications. So there's no motion to strike it from the record, remove it from the record and treat it any differently.

Secondly, and perhaps I should have said initially, theirs is not a motion which is further to any objection to the recording itself. A lot of the -- since this is a -- this is actually a motion that was made and combined with an earlier motion having to do with the recusal of the trial judge, a lot of time and attention was spent here discussing the circumstances under which it was recorded. But I don't regard this as being a motion asking the Court to speak further to that issue. Only to whether or not a recording of the trial proceedings placed under seal shall now be removed from the seal and placed in the normal record.

As I say, that's my understanding, and I wanted to recite that so that if there's a different position, I'll know about it early on.

The motion is one that, as I understand it, are made by the plaintiffs. And so I will call on -- there are four parties who would wish to speak to this, I'm informed, and

we've allowed you about 20 minutes each. Don't feel obligated to use all that time. But let me call on the plaintiffs first.

MR. BOUTROUS: Thank you very much, your Honor.

May it please the Court: The Court has correctly described our motion. We request that the Court unseal the videotape of the trial because it is a quintessential, probably the best, the ultimate, judicial record. It's a verbatim recording, an audio and visual recording of what happened in a public trial. And it will allow the public to see exactly what led Judge Walker to strike down Proposition 8 as unconstitutional.

The First Amendment and the common law establish very high standards for keeping a judicial recording under seal. The First Amendment requires that the proponents who are opposing the unsealing of the --

THE COURT: Let's clarify our language. I draw a distinction between the judicial record, which is certified, and the transcript, is different. There is a Clerk's record, of which this is part, and I draw a distinction between the judicial record and a document that is part of the judicial record.

In other words, the "record" -- I just want to make sure we are clear to the language -- that perhaps the reporter's transcript is the only official record of the proceedings. But that's different than something that is a

document including a recording that is part of the record.

MR. BOUTROUS: That's how I'm using that phrase, your Honor. Exactly. And in the transcript, we had terrific court reporters doing the transcript, and it's the official record. But the video, it's in some ways a unique way for the public to see exactly what happened and hear what happened in the courtroom, and to serve the reasons and the grounds that the Supreme Court, the Ninth Circuit, this court, has found public access is so important: To insure confidence in the judicial system; to serve as a check on the Court, on the judges, on juries, on litigants; to make sure that the process is fair; and to allow people to participate in self-governance and democracy.

One of my favorite quotes from the Supreme Court is in the *Richmond Newspapers* case. Chief Justice Berger said: "It's difficult for people to accept what they are prohibited from observing."

Now, here we had a public trial, so whoever could make it into the courtroom or the overflow room could see what happened. But allowing -- releasing the video would allow everyone to view and make their own judgments about what happened -- and I'm going to come back to this.

But here it's particularly important because, as the Court will recall, the proponents have attacked the fairness of the trial. They've attacked chief Judge Walker, falsely we

think, but they've made challenges. They've tried to undermine the public's confidence in the judicial system, which is all the more reason -- they can't have it both ways. They can't say the trial was unfair; Judge Walker was unfair, and then when we say, Let's allow everyone to see how fair it was, to block that.

And under the First Amendment, the proponents must show compelling reasons why the judicial records -- here the videotape -- must remain under seal. They must -- the sealing can only be -- it must be narrowly tailored to protect those interests, and there has to be specific evidence backing up their claims.

They don't come close to meeting those standards, your Honor. This -- as I said, this was all public. Their main arguments are that their witnesses could have been subjected to harassment or reprisal for testifying. This is the argument they made 20 months ago, but none of that has come true.

I don't know if -- that the proponents have focused on this, but the testimony, the videotape testimony of two of their expert witnesses who they decided not to call as witnesses, we, the plaintiffs, used that testimony in our presentation of evidence. We played it in open court. And that testimony now is -- this is Drs. Young and Nathanson -- that testimony, without objection from the proponents, is posted on this Court's website along with all the other

evidence. They've never objected to that. If they're saying there's a compelling reason to keep the trial video under seal, then one would think they would have objected to that and said those witnesses whose testimony was used in court, that their videotape should never have been made public -- it's public --

THE COURT: Without wishing to sound ungenerous to the public's interest in courts, in our proceedings, I try to observe the discipline of the case or controversy requirement. And part of what Article III is designed to do is to give to courts the obligation to decide the case. And in doing so, I think we are admonished not to care so much about the public as the parties to the case and to decide that case. And this is not a circumstance where I'm accustomed to saying, All right, how would the public feel about this? In fact, I try to ignore the public for purposes of my decision.

Now, obviously I'm aware that there's a public interest in the court proceedings, but that's ancillary to those proceedings.

Sounds to me as though your argument is that the reason the unsealing should be done, the chief reason, is to benefit the public, not to benefit the litigants. The one thing you said having to do with the fairness of the trial, that does strike as something that affects the litigants. But there's nothing about the current state of affairs that would not allow the Ninth Circuit to view the portions that they --

you would wish to show them so they could judge whether the video helps them to decide the fairness of the trial. So I don't regard that as being affected by the sealed record.

So why should this Court unseal the record with respect to its obligation to the litigants to assure they have a fair trial?

MR. BOUTROUS: Really, two reasons, your Honor. You're absolutely right: The Court -- the Court is focused on the litigants in the case before it. But the right of access, though -- and I think Mr. Burke for the media coalition will talk about this -- it's a right separate from the litigants. It's the public's right of access to judicial proceedings. The Supreme Court in the *Craig* case said, What happens in a courtroom is public property. And so it's the public's right, and it's not meant for the Court to focus on what would be good for the public, but the Supreme Court has recognized that as a First Amendment matter: The public had a right, and as a common law matter there's a strong presumption of openness and access so the public can see what the Court was doing, what the litigants were doing, how the case proceeded and how it led to the decision.

It does have an effect on the litigants. The Supreme Court has said that openness -- for example, in a criminal trial it's better for the defendant to have the public looking in to serve as a check, to make sure the proceedings are fair.

Here it's ironic that the proponents, who claim that they have been treated unfairly through the trial, don't want the public to be able to exert its access.

THE COURT: How do you jibe this interest in the public with the fact that federal trials and other proceedings, at least at the District Court level, are not recorded and are generally not available? It does seem to me that it's inconsistent.

MR. BOUTROUS: We have argued, and we thought here, that the public's interest would have been best served by the broadcasting of the trial so the public could see contemporaneously what was happening. But that's a separate issue.

The question of contemporaneous broadcast during the trial, with what happens once we have judicial records, briefs, motions, videotaped deposition testimony of evidence. Once it's evidence that's before the Courts that provide the predicate and the basis for decisions, then the First Amendment and common law presumptions of access, strong presumptions of access, apply in these higher standards. The need to show compelling reasons, important reasons.

THE COURT: Is this recording evidence?

MR. BOUTROUS: I believe it is, your Honor. It's -- for example, it's -- Judge Walker said the reason he was allowing the recording to proceed was so that he could refer to

it in making his decision.

THE COURT: But that's the same as his notes. They would not be evidence.

MR. BOUTROUS: That's correct, your Honor. That would be different. But here we have a record made by the Court itself that depicts exactly what happened. And it's material we were allowed to use during the closing arguments.

THE COURT: Does that make it evidence, that it was used during closing arguments?

MR. BOUTROUS: I think it does, your Honor. And it's evidence in the sense that it's a record of the evidence. But it's material that the Court can refer to in deciding the case. And I've thought about this point, your Honor, because it's interesting, because we have the transcript, which reflects what the evidence says, what the evidence was. We have exhibits that are the actual evidence. We have a recording that shows exactly what the evidence is. So -- it's not quite the same thing as an exhibit or the actual testimony, but it's --

THE COURT: But that does make a difference. In other words, if -- we often will have video that is offered as an exhibit and marked into evidence. And the transcript is indeed a transcript of evidence, because it's the transcript of what questions and answers are given and documents are evidence.

I have a hard time putting this in the category of

evidence. What rule of evidence would have applied?

Now, it does seem to me that it is part of the record. And I am bothered by the question of what to do with something that is made a part of the record by the judge's actions. Can you speak to that?

MR. BOUTROUS: Yes, your Honor. And I do think you're right: It's not quite the same thing as evidence. Because it's reflecting and mirroring and depicting what the evidence was, the testimony. But in part, the right of public access is separate from what the courts did, what the litigants did. It's to see what happened. And because this is -- it's like the transcript. And I don't think the proponents would have ever been able to argue that the transcript of the trial could be -- remain secret and that the public could be barred from it. This is the transcript plus. Plus audio, plus visual. And so I think it's part of the judicial record, and there's nothing in it that will harm anyone. It's the actual evidence that was in open court.

THE COURT: Well, it's part of the judicial record because Judge Walker made it part of the record. Is it your position that he has or had unfettered discretion in doing that?

MR. BOUTROUS: Your Honor, we believe that under the local rules, the old rule, the new rule, that the Court had discretion -- perhaps not unfettered discretion, but discretion

to take reasonable actions to record for use as a record and for part of the record in this case.

THE COURT: Why do you take away "unfettered"? What is it that would control his discretion?

MR. BOUTROUS: Well, I think if the Court had announced that he was going to make a recording because he wanted to make a movie or do something that was distinct from the judicial function.

THE COURT: What about saying, I will make it part of the record as a sealed record, with argument coming from your opponents being, Because he did that, we relaxed our vigilance about objecting to it and therefore it became part of the record with the condition that it would never be seen by anyone else.

MR. BOUTROUS: That -- your Honor, the proponents know what the standards are for judicial records. So that rule was not a new rule: That once something is a judicial record, there's a strong presumption of access. They, the proponents, were on top of all of the principles relating to the First Amendment. So it should have been clear to them that once something became a judicial record, then we would have this debate about whether there would be public access pursuant to those principles. So I don't think they were lulled into anything.

And in terms of their witnesses, your Honor, there is

not one piece of evidence, one whit of evidence, that any of their witnesses relied on any statement by Judge Walker, were concerned about the cameras. This all came from the lawyers. And the Oregonian case from the Ninth Circuit that we relied on on Page 1468 talked about something almost exactly like this. There the question -- this was on Page 1468 -- the question was whether a criminal defendant, his plea agreement, could be made public. And he argued, his lawyers argued, that it would be a danger to the defendant, the defendant himself and his family, if the plea agreement was unsealed. And the Ninth Circuit said, There's no evidence of that. There's a statement by the lawyer, but there has to be factual support for those statements.

And here in the First Amendment arena where someone argues that a restriction on First Amendment rights is necessary, they must show substantial fit that their restriction furthers the interests they're promoting, and here there's no fit at all. Because sealing these records -- the transcript is public; the identities of all the witnesses are public. And the trial itself has been reenacted by actors, by citizens. And I thought, with the Court's permission, I would just give an example to show -- a few examples of showing what we played during the trial, a short clip, and then show some of these reenactments, because when you look at that, there's no basis for keeping the real thing secret.

With the Court's permission, I'd like to show, start with a clip.

THE COURT: Sure.

MR. BOUTROUS: The Courage Campaign encouraged citizens to reenact parts of the trial, which is a worthy endeavor. And to kick things off, it had actress Marisa Tomei and actor Josh Lucas reenact a portion of Kris Perry's testimony from the first day of trial.

I'd like to start with a short clip of that. And this is one of the clips we played during the closing.

(Videotape played)

MR. BOUTROUS: So your Honor, that was an Academy Award-winning actress.

With the Court's permission, I'd like to play the real thing, just to compare. She was powerful, but here's the clip we played from the actual trial, Kris Perry testifying.

(Videotape played)

MR. BOUTROUS: So your Honor, I can't think of a reason why the public shouldn't be able to see the real thing, the real testimony, when the content and the substance is publicly available.

With respect to proponents' own witnesses, I'd like to show just a brief clip of Mr. Blankenhorn's testimony. He was the witness on marriage the proponents put on the stand. And then show the reenactment of that and show the Court why

there's no basis for keeping any of this secret.

So with that, we'll play Mr. Blankenhorn's testimony at the trial.

(Videotape played)

MR. BOUTROUS: So that was the proponents' own expert admitting it would be more American the day the nation recognized same-sex marriage, which was a significant moment in the trial.

Another group did reenactments of every frame, every moment of the trial, and it's at MarriageTrial.com, and they included a reenactment of that scene, and the actor playing Mr. Blankenhorn is Mr. Itzin from "24" fame. It's pretty good, but it's not quite the same thing.

(Videotape played)

MR. BOUTROUS: So it's word-for-word. I think in the real version, Mr. Blankenhorn seemed more sincere. Obviously the actor hadn't seen him testify. But why shouldn't the public be able to see exactly what happened? It doesn't serve any purpose.

If I could show two more clips -- I know I'm probably running out of time. Mr. Blankenhorn on the stand. The big argument, your Honor, from the proponents, was that allowing same-sex marriage would cause the deinstitutionalization -- deinstitutionalization of marriage, and that that was one of their main predicates. During his testimony, direct testimony,

being examined by proponents' counsel, Mr. Blankenhorn volunteered and explained something in a very vivid moment. Again, we used this during closing.

(Videotape played)

MR. BOUTROUS: And then the reenactment, please. This is the same group, MarriageTrial.com.

(Videotape played)

MR. BOUTROUS: So from a First Amendment perspective we have to ask what purpose is being served, what compelling reason is being served by sealing the actual testimony of the transcript, the exhibits -- I think proponents would say that didn't show the actual Mr. Blankenhorn, for example, but the problem with that argument is Mr. Blankenhorn is a public figure. He's spoken widely. He's lectured; he's written articles. It took me less than two seconds literally on Google to find a clip of him talking about same-sex marriage, and I'll finish with that clip. It's on C-SPAN.

MR. THOMPSON: We object to any new evidence about Mr. Blankenhorn that was not introduced during his cross-examination. We will cheerfully stipulate that he has appeared on national TV debating these issues. Our other expert witnesses have not. And this argument was made to the United States Supreme Court which noted there is a qualitative difference between making public appearances regarding an issue and one's testimony broadcast throughout the country, so we

think it's inappropriate for the plaintiffs now to try to cross-examine Mr. Blankenhorn in absentia by playing clips from YouTube.

THE COURT: I'll sustain the objection. You should know, however, that a copy of what was going to be played was submitted to the Court, and I did play it. It was perhaps the poor quality of the Court's computer -- I couldn't see what was being displayed, the colors were all off, so I actually haven't seen all of it, but it was submitted to the Court. But I'm going to sustain the objection.

Because I think it is helpful to the Court to hear your argument about what was actually played during the trial -- I have a question of your opponents on that score -- but let me ask this of you:

Your clients won, and -- though I'm not sure what it is about the further dissemination that serves their interest, and that's why I worry about the role the Court has. If you say, Judge, you have a role of educating the public about these matters -- and as a court we'd like for courts to become more involved in the dissemination of its proceedings for educational purposes, I more likely than not would kick that upstairs to the policymakers and, as a judge, wait for that policy to come to me and say, This is what you ought to do, because that gives me some assurance as a court that I'm following the rules, and everybody ought to know the rules and

everyone ought to follow the rules, including me.

What's the rule that I can look to as allowing the Court to unseal this record for the purpose that you're urging?

MR. BOUTROUS: Your Honor, from my clients' perspective -- put aside the public's interest and the public's right of access -- here we had a 12-day trial. The proponents were allowed to put on any evidence they wanted. We had open court. They had a strategy, which was to attack Judge Walker. They tried to recuse him. They attacked him during the trial. Their lawyers made public statements that the idea of a trial was outrageous, something I've never heard before. That the judge was ruling against them in ways that showed that he was biased. They tried to undermine the integrity of this court by attacking the proceedings that took place in this court. And -- it's an extraordinary situation. They've appealed the ruling where they argue that Judge Walker should have -- should not have heard the case. Under those circumstances, they should be precluded from arguing that the public should be barred from seeing exactly what happened. Without any argument that goes beyond the fact that they don't want the public to see Mr. Blankenhorn. The C-SPAN clip I was going to play wasn't cross-examining Mr. Blankenhorn. It was him giving a speech, laying out his views. Yet now Mr. Thompson doesn't want us to play that.

So from my clients' perspective, it goes right to

the -- one of the reasons the Supreme Court has talked about the need for access, which is public confidence in the judicial system. But more importantly here, the proponents are trying to undermine Judge Walker's ruling, which is correct, which tracks through all the evidence and gets it right on the law, by challenging the very trial itself. That I think is a special reason and a narrow reason for releasing this quintessential judicial record in this case, quite aside from all the general principles that normally would apply.

For those reasons, we would ask the Court to unseal the video.

THE COURT: Well, you know part of what we as judges face is that parties will become focused on the judge. And I have had some 20 more years on the bench, and lots of parties attacked me and trying to convince me to make a mistake because they feel they can make a better record or get a better decision elsewhere. There's nothing unusual about that. And as I said, with the Ninth Circuit having the ability to see this tape and to use it if they would wish in their own deliberations, I don't know that there's anything you're asking me to do that would enhance your capability of sustaining your judgment on appeal.

Sounds to me as though the real argument that is being made is the one that, as you say, comes from the public's right, and perhaps the media representative here's argument

might be a point of view that is better carried by the media themselves.

But thank you very much for your argument. There might be occasion for you to wish to say something in rebuttal. Just let me know.

MR. BOUTROUS: Thank you so much, your Honor.

THE COURT: What I'm interested to do is to continue to hear from this side, and then we'll call from the other side. There's a little bit of ganging up that can appear to be, since there are three spokesmen in one, and perhaps one or two on the other, but I don't worry about that.

MS. VAN AKEN: Thank you, your Honor. I promise not to gang. Up my name is Christine Van Aken from the San Francisco City Attorney's office. We join plaintiffs' motion. I wanted to just, in answer to the Court's question earlier about what exactly is this videotape, whatever it is, we know that Chief Judge Walker relied on it because he tells us that in his -- in Document 708, the Findings of Fact, at Page 4. So it is a part of what the Court considered in forming its Findings of Fact. And I think that, you know, the *Marisol* case, which is cited in the Media Coalition's excellent brief, is a 1997 Southern District of New York case where the Court indicates that because a report is prepared at court order for use by the Court, that whatever it is, it is not like a judge's notes but is -- nor like the evidence that was

introduced at trial. So in terms of the category question, I think that's an answer to that.

But what I want to focus on very briefly is the standard that *Foltz vs. State Farm* indicates, the Ninth Circuit case that the factual showing that must be made must be one without hypothesis or conjecture; must be a concrete factual showing. And I submit to the Court that proponents have not made that showing here, for three reasons:

The first is that the facts that proponents relied on, first in obtaining a sealing order, and second in going to the Supreme Court with a stay application, were very limited. It was media accounts, a few isolated instances, and some hearsay. I heard that this happened to someone else. Someone told me that this happened to someone else. And so it's extremely limited as a factual record in the first place.

But more importantly, that record elided instances of true intimidation, which are deplorable, with economic boycotts and economic pressure. And the latter is not intimidation at all. That is protected First Amendment activity. In fact, the United States Supreme Court told us that in *NAACP vs. Claiborne Hardware*, that boycotts are part of our political tradition. And Professor Segura at this trial under questioning by Mr. Boutrous indicated that the kinds of boycotts and economic pressure that proponents tried to show had happened to Prop 8 supporters were in fact simply part of that venerable political

tradition of economic pressure. So that is not something -- so it's protected First Amendment activity. It surely cannot be the kind of intimidation that would cause the Court to seal judicial records.

And the third point I'll make is that the factual showing that proponents have made was made at the beginning of trial, and it was made with regard to Prop 8 supporters, not with respect to these experts. Proponents' attorneys have repeated the claim that one of their experts would not have testified if the trial had been broadcast, and yet there is no declaration indicating this. Nor in the more than 18 months since the Court heard this case, in the extensive trial, has there been any indication that although Mr. Blankenhorn's testimony is public, although Professor Miller's testimony is public, that anyone has approached them, intimidated them, threatened them, indicated that something like that would happen. There's simply nothing that would show that right now, showing the record of the case that proponents put on to defend Prop 8 would result in any adverse consequences whatsoever.

So there's simply nothing more than hypothesis or conjecture here. The Ninth Circuit has told us that that's simply not something that courts can rely on in sealing judicial records.

THE COURT: One of my concerns is the integrity of the Court judicial process. And I understand the concern about the

parties, and I think it is well-said in a public trial that witnesses who come to testify and to participate in that process should expect public scrutiny. The public can watch the trial; the public can read the transcript; the public can reenact the trial. But the integrity of the judicial process is affected when a judge takes the position: I will seal this, and will use it only for a limited purpose. And then that is changed to a second judge, unsealing it and using it for a different purpose....

Speak to that. What do you say to me to convince me that something I'm being asked to do does not undermine the integrity of the process where the record is sealed for -- let me give you an example. I'm frequently put in a situation where the government will come before the Court because a witness is going to testify, and under the rules of criminal procedure they're required to give information about that witness to the other side so they can use it effectively to cross-examine. Among the kinds of things that they, the government, is required to give over is information if the witness has credibility problems. And let's say hypothetically this FBI special agent has been accused of falsifying a report. But, in camera to me, the U.S. Attorney comes in and shows me that that claim of falsification, although in the record, was investigated and it turned out to be a disgruntled employee who was making that claim and there was nothing to it. Totally

false claim. And so I decide: You don't have to reveal that to the other side. And in order, though, for the other side to question that judgment, I will take that information, that report, and seal it. And it won't ever be a part of the record that others can use against that agent. I'm going to seal it. And then, later on, some other judge says, Well, now, I want to unseal what Judge Ware has ordered sealed because I think the public would benefit from knowing that this is an FBI agent who has had credibility charges made against him or her.

Speak to that.

MS. VAN AKEN: Your Honor, I understand the Court's concern that -- the integrity concern appears to me to be something like Judge Walker said this and now circumstances have changed and yet the other side may have relied on that. I hear what -- the Court's concern about that. But that is not the way that courts traditionally make decisions. In the absence of a rule, they don't do something typically just because another judge sitting in the same position has made that decision.

And so in this case, what we have, we have a recording made, without objection, for the purpose of use in chambers. Judge Walker stated that to proponents, that he intended to use it in chambers. And then in his decision, Document 708, he reports that he did exactly what he said he would do: He used it in chambers. And I think what he said was that he relied on

it in -- he said it was used by the Court in preparing Findings of Fact.

And so again, without objection, and, as the Court indicates, there was no motion to strike that from the record. There was no motion by the proponents to take what was in the record sealed that went to the Ninth Circuit as part of the trial record and remove that. And that was an option that was available to them that they did not avail themselves of.

And so today what we have is we have a part of a trial record that is sealed. And so the integrity and concerns of the Court I think are best pursued in the long run by simply following what we -- if this is a trial record, then the First Amendment governs access to it, and there must be more than hypothesis or conjecture in order to maintain it under seal. I think the Court's integrity concern is best served simply by following what the cases tell us, if indeed this is a judicial record, which, in light of the Court's reliance, I don't see what else it could be.

So that's what I would say. And I do understand that there are policy implications to this decision, but I think, as you indicted, Mr. Boutrous, the Court, this court, is -- has case law, and has rules and attempts to apply those, and perhaps there will be a reconsideration of rules, but that is not something that we do today. So that -- I understand that that's an uncomfortable set of circumstances for the Court, but

I think that's the best answer that we have today.

THE COURT: All right. Anything further?

MS. VAN AKEN: No. Thank you, your Honor.

THE COURT: Thank you.

Mr. Burke?

MR. BURKE: Your Honor, I believe the Court's consideration can be informed by three brief points. And I would like to address some of the questions that were raised earlier where the media and the public's right of access was mentioned.

The first point is that there is no dispute that this recording is a part of the court record. That's a given. And that's actually a critical fundamental point, because that's where there is a question then that there's a First Amendment right of access and a common law right of access to the public to that recording. And that's a question now because it's currently under seal, and it's been under seal.

And so then the second point is: What is the standard, and has the standard for sealing access under common law right or a First Amendment right, has that been satisfied? And, as we've said in our papers earlier and as I would say today: I don't think it's even close. The compelling test that's required to preclude public access either under the common law or under the First Amendment is not met here. And the Court knows in practice, and of course the Court's

students, had they come here, they would hear the Court undoubtedly say that when you have a sealing order issue, you revisit the circumstances as to whether or not circumstances have changed with respect to the sealing. And in this case, it's very telling, it's very revealing, the circumstances that have changed since the sealing order was put in place.

The trial is over. The record is complete. That's hugely important. It's not as if the trial is going to be reopened, evidence is going to be reheard. The matter is pending, remarkably, in front of two courts. In one sense, it's going to be heard soon for the third time by the California Supreme Court. In the other sense, it's pending before the Ninth Circuit. And these trial recordings are a part of that record. That is a changed circumstance since the sealing order was first put in.

Secondly, the trial proceedings are entirely public. They were entirely public. And if you can have the transcripts publicly available and quote them verbatim and have them -- have a reenactment potential on the streets of Los Angeles or wherever they might be reenacted by actors and actresses, surely the public cannot be hurt by and would in fact, as I will explain later, be benefited by seeing the actual testimony, the actual people giving that testimony, the actual reactions, how they presented the evidence.

And that's principally because the last significantly

different changed circumstance is what the proponents of Prop 8 have done. In this very week that the issue about unsealing came about, the proponents challenged, and it's now also before the Ninth Circuit, former Chief Judge Walker's ability to have conducted this trial fairly and impartially. That's now, at the core, from the public's perception: Unfair trial; he should not have tried that case. And so by that act, that changed circumstance, this court should look differently and needs to look differently and take that into consideration because that's now at the core, from the public's perception. And perception is very important in this case.

The third, which I think the City has already well addressed, is that there's no harm for making the video recordings public. And you have to ask: How could making public the video equivalent of transcripts that are already publicly available of court proceedings that were publicly conducted, how that could remotely be something that's under seal? How you could have a case where the public's interest in seeing the proceedings is such that you have reenactments? The prospect of a Broadway performance? How could you have that and not understand that there's a substantial public interest in the proceedings? I think it is an extremely rare case that would attract such a response from the public. And the question, very plainly, is: Is the standard that the public enjoys and protects the public's interest in having access to

such court records is, is that standard satisfied?

THE COURT: You have your finger on a sensitive area that I'm trying to figure out here. And that is the fact of the recording and the fact that it's under seal is undisputed. But the circumstances under which it came into existence, as I have variously said, call into question whether or not I ought to regard this sealed record the same as the transcript of the trial or documents that are submitted during the course of the trial. Is there something about the nature of this document, the recording of the trial itself and its very existence being dependent upon it not being broadcast? Because that was the prohibition that was imposed by the Supreme Court to govern whether or not, now that the trial is over and the record is complete, that that same concern, that it not be broadcast -- can that be set aside?

MR. BURKE: Your Honor, I think this goes to -- as well as the Court's earlier question about the integrity of the system. I think, from the perspective of the public's right of access, media right of access, which is concomitant, it is all of the controversy. It is all of it. So in other words, the very fact that it's being kept secret is in and of itself a controversy and raises questions about why it is secret.

So I think it's actually not necessary to break it down into, is it more controversial -- is it more controversial because of the fact that the Supreme Court banned

contemporaneous live coverage to overflow federal courtrooms. Again, it is key, and I think the answer to the Court's question, that these are changed circumstances. That it is a sealed record that is a record still under seal now that those circumstances and after those circumstances have changed.

THE COURT: So your argument would be different. The Supreme Court made its decision January 13th, 2010.

MR. BURKE: Correct.

THE COURT: If this motion were made on January 14th 2010, to unseal that portion that had been recorded as of then, your argument would be the same or different?

MR. BURKE: Your Honor, at that point, the Court -- the trial would not have been over. The trial would still be in process. And I think those are circumstances that would be different than the circumstances that are here. This is a trial that's now been over for some time and the record is complete. And the question -- and the factors that the Court can consider, and it must consider, to determine whether or not the compelling reasons have been satisfied, are plain. There is no evidence. There's not even a declaration or something before the Court that says, today, that sealing order must still remain in place. If there was that showing, it might be close. There wasn't, and there isn't, that showing.

And I want to offer the Court at least a case from -- it's a state appellate court case from 1990, just to give the

Court some comfort that where a court promises confidentiality, and in this case it was to prospective jurors, the First Amendment right of access can still prevail over such a promise of confidentiality. That was in the context of juror questionnaires completed in a case in Contra Costa County, a capital murder case. And the Court of Appeal basically said promises of confidentiality as to those juror questionnaires do not trump the public's right of access to those questionnaires. It's *Lesher Communications vs. Superior Court* from the Court of Appeal, 224 Cal. App. 3d 774 from 1990.

It is not unprecedented, in other words, to have a difficult circumstance, but I don't think that -- you know, when the Court has to apply the standard that it is asked to in order to revisit a sealing order, this the Court can apply the test that is not in dispute from the Ninth Circuit and reach any outcome other than that this record must be unsealed.

The last point that I would want to go back to where the Court was questioning Mr. Boutrous about the Court's need to make sure -- whether or not the Court in the same way has the same need to make sure that the public's right of access is -- that the public can get the information that it needs, and the Court's legitimate concerns about the integrity of the process.

And I think that the most telling response to that is, there can be no question that there is heightened interest in

this trial and in these proceedings, and of course the recordings connected with them. The question is: When the Court ultimately makes a ruling in this case, and it's -- any number of courts are possibilities: California Supreme Court, Ninth Circuit, U.S. Supreme Court. Ultimately, however, there will be a finality to this case. And when that decision is reached, will it be a decision that is reached that will be fully understood to the extent that it can and respected by those who will have to follow it? It will be the rule of the law. And this videotape, basically, this videotape captures the process. It captures the process of extraordinary proceedings before this court. Advocates for both sides presenting evidence; not presenting evidence. Reviewed and scrutinized by the American judicial process. It's an extraordinary case. Very few cases go to the Ninth Circuit, to the Supreme Court of California three different times. And it obviously touches on an extraordinarily profound issue for millions of people. The idea that you would keep secret the proceedings of those, video proceedings of those, recordings of those proceedings, calls into question if there's some secret. What is the secret?

And the answer I would submit is in the sealing standard, which is not met. There is no reason to keep it secret. And the fact that it remains secret only causes those who, you know, now are potentially hearing in the public that

Judge Walker didn't conduct the trial the way he should, that he had a bias. And it is those questions that deserve, you know, sunlight. That deserve transparency. It is all that language in all of the U.S. Supreme Court decisions brought to bear on the importance of having a -- an open process. Particularly here, where there's no showing of harm if that transparency occurs.

If the Court has further questions...?

THE COURT: No. You can invite -- ask the Court to allow you rebuttal if you feel the need to, but thank you very much.

Counsel?

MR. THOMPSON: Good morning, your Honor. May it please the Court. David Thompson from Cooper & Kirk for the proponents.

Your Honor, there is been much discussion about the First Amendment and the public's right of access today, but there is something of more paramount -- a value of more paramount importance, and, to use the Court's phrase, it's the integrity of the court. Chief Judge Walker represented unequivocally and clearly to us in open court that this copy -- this video recording was being made solely for purposes of use in his chambers. He said it in court. He said it in his notice, written notice to the parties of January 15th. He said it in his written opinion where he said, quote, "The potential

for public broadcast in this case has been eliminated." He said that in the very same opinion where he sealed the record -- the tape and made it part of the record. And we were entitled to rely upon these ironclad assurances, and we did. And although some of our experts retained grave doubts about the videotaping, nevertheless one of our experts did step forward and did rely upon those assurances that this tape would be kept and used solely for purposes in chambers.

THE COURT: Let me test that. Is it your argument that it would be improper for the Ninth Circuit to play the videotape as part of its proceedings?

MR. THOMPSON: Yes, it would be, your Honor. It would be improper.

THE COURT: Where do you get that?

MR. THOMPSON: This goes to my second point.

THE COURT: No, where do you get that?

MR. THOMPSON: 77.3. We heard a lot of argument --

THE COURT: What does 77.3 say to the Ninth Circuit?

MR. THOMPSON: No electronic transmission outside of this courtroom. That's what it says. And the United States Supreme Court --

THE COURT: I don't understand how that would affect the Ninth Circuit.

MR. THOMPSON: Well, because that would be arguably transmission outside of this courtroom.

THE COURT: So that even though it's part of the record, it's sealed, even to the Ninth Circuit?

MR. THOMPSON: Yes, your Honor. That's what the United States Supreme Court -- let me read to you what the Supreme Court said. They said the rule, except from its general ban, the transmittal of certain proceedings, but it limited that exception to transmissions within the confines of the courthouse.

THE COURT: What about those portions that were played during the trial? Can the Ninth Circuit say, Let's see that portion of the tape that was played during the closing argument?

MR. THOMPSON: No, your Honor. Because under Rule 77.3, those were played in this courtroom. They were not transmitted electronically outside of this courtroom.

THE COURT: So when a record goes up on appeal, your argument would be anything that's sealed by the trial court is sealed to the Ninth Circuit?

MR. THOMPSON: Well, under Rule 77.3 -- I suppose if the court -- that the judges were to come and to watch it in this courtroom, then that would comply with --

THE COURT: Do you know of any case that supports that decision?

MR. THOMPSON: I have the plain language of the text, and I have the Supreme Court of the United States that supports

it.

THE COURT: That speaks to the Ninth Circuit's ability to see it?

MR. THOMPSON: Well, your Honor, I'm reading the text of this. I will concede that the concerns that the Judicial Conference of the United States and that our witnesses have and that we have as lawyers would obviously not obtain with any degree of force if the members of the panel were looking at it, so I'm not suggesting that we have policy argumentation about why the members of the panel should not be able to see this under seal.

But I am suggesting that Rule 77.3 is very specific. And it's very confined. And what you're suggesting would seem to violate the plain letter and language of that.

THE COURT: Well, I'm not suggesting. I'm asking it. It does seem to me that I have -- I need to re-examine this very carefully, because the Ninth Circuit referred this back to me. And it is a motion essentially having to do with unsealing it. But I did not contemplate that your answer would be that even though sealed -- because I've actually had state secrets cases going to the Ninth Circuit where I sealed the record and sent it to the Ninth Circuit, but in order to decide the case they had to see what I sealed. And so I understand they can open seals. Your argument is that because this record was sealed, it can't be seen.

MR. THOMPSON: No, your Honor. My argument is that under Rule 77.3, that videotape cannot be transmitted beyond the confines of this courtroom.

THE COURT: Well, has it been transmitted as part of the record?

MR. THOMPSON: Your Honor, I don't know whether the Ninth Circuit has it or has looked at it or not.

THE COURT: Well, don't you think that that would be important? In other words, I understood that the record of the case has gone forward. Your argument is that that tape is not part of the record.

MR. THOMPSON: No, that's not my argument. It is true, that Chief Judge Walker made it a part of the record on Page 4 of his opinion, and 32 pages later he again repeated, this has eliminated the possibility of public broadcast. And I want to be clear that our concern is not with the Ninth Circuit reviewing this under seal. Our concern is becoming, with the seal being lifted, and -- it being made public. That is our concern. But as to whether the Ninth Circuit reviewing this would comport with Rule 77.3, I think the answer is no.

THE COURT: Was there a request made by any of the parties to the case to have this record sealed?

MR. THOMPSON: The videotape?

THE COURT: Yeah.

MR. THOMPSON: No, your Honor.

THE COURT: So that was done by the judge on his own motion.

MR. THOMPSON: Yes, your Honor.

THE COURT: Sua sponte. Was there any request by the parties to have this document placed under the protective order?

MR. THOMPSON: Well again, the Court did that, I believe sua sponte, when it provided a copy of the tape to the plaintiffs -- to all the parties. We did not avail ourselves of that opportunity.

THE COURT: So Judge Walker put those things in place and did it on his own motion, but your argument would be that in doing so, he removed it from the ability of the appellate court to even look at it. I thought that the reason for sealing it was to keep it out of the public record, but that it didn't interfere at all with the judicial process. And hearing your argument as I do, I am somewhat concerned to at least articulate a difference in opinion from you with respect to that. Because it just seems to me that if I were to rule to keep it under seal to the inability of the Ninth Circuit to see it -- I would be concerned about such a ruling.

MR. THOMPSON: We agree with what you're saying, but the purpose of the seal was to keep it from the public. We agree with you 100 percent on that.

And I would also add that our concerns about what

would happen if it were made public do not obtain if the Ninth Circuit judges and their personnel view the tape. It's the making public that's our concern.

THE COURT: Frankly, the reason I asked is because I know that many of the Ninth Circuit's proceedings are themselves broadcast and disseminated, so if this were to be played during the course of the Ninth Circuit's considerations, you would object, I presume, since you object to the judges themselves seeing it. And you would think that the argument that you're making would be sustained: That they cannot play it in open court?

MR. THOMPSON: I certainly agree with you, your Honor. They cannot.

THE COURT: Was there an objection when the parties played it in open court?

MR. THOMPSON: Not in this courtroom, because under Rule 77.3 it says it cannot be transmitted outside of this courthouse. And it was not.

THE COURT: Doesn't it follow that it was made a part of the record?

MR. THOMPSON: Well, your Honor, to our knowledge, it has not been transmitted beyond this courthouse.

Again, your Honor, we're not concerned -- and perhaps candidly this isn't an issue I had thought about before stepping here, and perhaps there's an implied exception for the

Court of Appeals that would permit them, even though the rules, 77.3, doesn't appear to contemplate that. But certainly our concerns are not with this tape going to the Ninth Circuit.

THE COURT: Similarly, was there no consideration given to moving to strike it from the record?

MR. THOMPSON: Your Honor, there was not a motion to strike at that time, because again, in the very order --

THE COURT: I was asking whether it was considered. Did you think about it and say, Okay, let's not try and strike this from the record. Or was it just not thought about?

MR. THOMPSON: I'm not sure, your Honor. In other words -- I'm not the only person on my trial team.

THE COURT: To your knowledge, no one raised it as a --

MR. THOMPSON: That's right.

THE COURT: So having not stricken it from the record, and actually arguing that it is part of the record -- I deal with it as a record. And do you accept the burden to prove circumstances to keep it under seal? Or do you believe that burden belongs someplace else?

MR. THOMPSON: I guess I would make a couple of points, your Honor, about that. Number 1, we believe that 77.3 removes the question of burden. It says that the tape cannot be broadcast beyond the confines of the courthouse. Unless they can establish that 77.3 violates the First Amendment, or

the common law, they lose. That's the end of it. And there's no court and no case that has said a local rule like this is unconstitutional. They made these First Amendment arguments to the United States Supreme Court in opposition to our motion for stay, and it was flatly rejected. And Judge O'Scanlon, speaking on behalf of the Judicial Conference, has testified as follows:

Today, as in the past, federal court proceedings are open to the public. However, nothing in the First Amendment requires televised trials.

He adds that the relevant precedent, quote, "forcefully" make the point that while all trials are public, there is no constitutional right of media to broadcast federal district court or appellate proceedings.

Now they say, Well, all right -- perhaps they would answer Judge O'Scanlon by saying, Well, we're not relying on the First Amendment. We're relying on the common law. But it was telling -- Mr. Boutrous admitted during his remarks that this tape is, quote, not quite the same thing as evidence. It is not evidence. And the common law does not therefore apply to it.

The trial transcript was made public. I believe it was posted on the Internet within a day or two of the actual testimony. And that's all that the common law would require is to make the actual evidence that was submitted, pursuant to the

rules of evidence, and the trial transcript. Nothing more is required.

THE COURT: That's the marvelous thing about common law. It's not common law until the situation comes up and someone speaks to it.

Do you know any other circumstance like this that I could look to where there is a recording in the record and the judge looked at that and put it under seal, and the judge says, I am -- I cannot open the seal because the law won't allow me to? As opposed to, These are circumstances where I am persuaded, because of privilege or higher interest, to keep it under seal? Your argument is I cannot; that I'm legally foreclosed. Where is the common law for it?

MR. THOMPSON: I guess I would say two things: First of all, on your question about is there a case, I would refer the Court to *United States vs. McDougal*, which is 103 F.3d 651, and this was a case where there was a videotape of President Clinton's deposition testimony which was played in court in lieu of live testimony, and then there was an effort to obtain a copy of that tape. And the Court explained the videotape at issue in the present case is merely an electronic recording of a witness testimony. Although the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom, there was and is no additional right to obtain for purposes of coping the electric

recording of that testimony.

So that's the Eighth Circuit. It's not the Ninth Circuit. I'm not suggesting it's binding.

But I would also say that the common law has to yield to Rule 77.3. That where you have something that has the force of federal law, which is what the Supreme Court said about this very rule in this very case --

THE COURT: Well, does 77.3 speak to the record?

MR. THOMPSON: It speaks to the electronic transmission of this videotape. And it says that cannot happen.

THE COURT: Is that, no, it does not speak to the record; or yes, it does speak to the record? In other words, is 77.3 a control about the dissemination of the record?

MR. THOMPSON: It's about the electronic recording -- whether it be a part of the record or not, the fact that it's part of the record does not change 77.3. That applies whether he made it -- Chief Judge Walker made it a part of the record or not.

THE COURT: So your real argument comes to whether or not this is legitimately a part of the record. Not that the record is something that I can't order placed in the public domain. In other words, it seems to me that -- I concede your concern that when it was initially recorded, there were objections to the broadcast. And then when the judge says, I'm

going to simply record it, were there objections then?

MR. THOMPSON: When he said he was going to record it? Yes, your Honor, we did object.

THE COURT: And that's when he said, I'm going to record it for my use. Was there an objection then?

MR. THOMPSON: No, there was not, when he said, I'm going to record it simply for purposes of use in my chambers.

THE COURT: So the notion was recording it for his use --

MR. THOMPSON: Because it comported with 77.3.

THE COURT: But his recording it for his use -- then he placed it in the record. Was there an objection to that?

MR. THOMPSON: There wasn't, your Honor. But we think that's immaterial.

THE COURT: There was not.

MR. THOMPSON: Under 77.3. Whether he put it in the record or not, 77.3 doesn't say you can't transmit this beyond the courthouse unless you put it in the record.

THE COURT: Well, it's not transmission from the courthouse. I thought the language was broadcast or televise.

MR. THOMPSON: It says that it cannot be -- 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. And then the Supreme Court says, quote, "Of course, the negative inference

is that those are the -- the rule prohibits the streaming of transmission or other broadcasting or televising." And what they're seeking to do is definitely broadcast this.

THE COURT: Well, no, that's what -- I tried to articulate what my issue is. Is this an order to say, You are ordered to broadcast? Or this removes it from the seal.

MR. THOMPSON: It would remove it from the seal, and that would be certainly tantamount to electronically transmitting it beyond the courtroom.

THE COURT: Why?

MR. THOMPSON: Because then anyone would be able to get it, whether they're in the courtroom or not.

THE COURT: So the same would be true if I were to remove the protective order. The parties have copies under the protective order.

MR. THOMPSON: Yes, your Honor.

THE COURT: So the removal of the protective order would leave the parties free to do what they wished with the videotape?

MR. THOMPSON: Yes, your Honor.

THE COURT: So as a corollary to this motion, I also need -- I would be, in effect, removing the material from the protective order.

MR. THOMPSON: If the Court were to unseal it, yes. At that point, it would be immaterial, I believe. In other

words, if the entire world is able to see it, then whether the plaintiffs' lawyers keep it under the protective order would be moot.

THE COURT: Let's assume that I need more than what you've given me as -- to keep it under seal, and you have the burden to show me that it's like a trade secret or some of these other things that we seal as part of our court process so as to protect a higher interest. What do you cite to me, other than the circumstances under which it was made, mainly the judge saying, I will use it for my personal use?

MR. THOMPSON: What I would refer the court to is the Supreme Court's opinion in this very case on this very issue where it had to find that there would be a threat of irreparable harm to my clients, and it found that based on the fact that there are qualitative differences between making public appearances regarding an issue and having one's testimony broadcast through the country.

THE COURT: Let me go back to that. Because as I understood it, the reason the Supreme Court decided the way it did was because the Ninth Circuit's rule, which allowed the recording and televising and broadcasting of the proceedings, was then incorporated into an amendment to the local rules of the Court, an amendment to 77.3. The Supreme Court felt that the timing of that dissemination to the public or that change in the rules had not been sufficient. It did not say, Even if

it had been sufficient, we would have found that rule to be improper. In other words, your argument is there's no circumstance under which the Supreme Court would have allowed the Ninth Circuit to promulgate the rule. Correct?

MR. THOMPSON: No. What I'm saying, your Honor, is the Supreme Court found two things:

The first one, which you just articulated, that the timing had -- and that was on likelihood of success on the merits. But to get our stay we had to do more than show we were likely to succeed on the merits on the timing of this issue. We also had to establish irreparable harm. That if it went through, we would be irreparably injured, and the Supreme Court found we had made that showing.

THE COURT: Based upon contemporaneous broadcast.

MR. THOMPSON: Yes, your Honor.

THE COURT: And what was the Court's ruling with respect to later dissemination, noncontemporaneous? What if this were a case before us five years after the trial were over? Is it your argument that the Supreme Court's decision reached that far?

MR. THOMPSON: Well, the reasoning -- if I may read the relevant sentence. It says, "Witnesses subject to harassment as a result of broadcast of their testimony might be less likely to cooperate in any future proceedings," close quote.

In other words -- and there are a -- I might add, this is just one of the things the Judicial Conference of the United States has pointed to, but one of the things is that witnesses may not be willing to step forward and testify in court if they're going to be broadcast on nationwide TV. And the Supreme Court credited the fact that, given the evidence we had submitted, including 71 articles dealing, detailing incidents of harassment, that we had met our burden to show irreparable injury if they were broadcast. And this case is not over. And the threat that they are -- that they identify.

THE COURT: Don't I need an evidentiary hearing or something to decide that? Sounds like I carry the burden by wishing to prove that would be irreparable harm from even later dissemination. And how can I do that?

MR. THOMPSON: We submit this is the law of the case. It's been litigated. They made the exact same arguments they're making today to the United States Supreme Court.

THE COURT: But that issue was not before the Court. The Court was not then dealing with a situation where the record was complete, as the media lawyer argued, and is closed. They were dealing with a situation where the court intended to broadcast to other courthouses, with later broadcast perhaps on C-SPAN or some other process, delayed broadcast, and that was the circumstance before the Court.

MR. THOMPSON: Well, your Honor, it's true that it was

during the beginning of the trial. It was during the trial that the Supreme Court ruled.

Your Honor, you make reference to the argument of the Media Coalition saying that the trial -- they tried to point to several circumstances that they said had changed since the sealing. They said the trial is complete. Well, this was sealed on -- in August of 2010. The trial was complete when Chief Judge Walker sealed it. That's not a change in circumstance.

They say, Number 2, the record was closed. Well, footnote, they're wrong. These are legislative facts. The record never closes. But even if they were right --

THE COURT: Why wouldn't it be appropriate under this circumstance, given the argument that you're making, to have the transcript sealed?

MR. THOMPSON: Your Honor, two points: Number 1, 77.3 says nothing about transcripts.

THE COURT: No, but there are rules which would allow you to seal transcripts. And I wonder why this, if it is that harmful, why wouldn't the transcript carry that harm?

MR. THOMPSON: Because the Judicial Conference of the United States has found that there are qualitative differences between the printed word and broadcasting nationwide a video. And that there are just a litany of different circumstances and concerns that are implicated by these different means and

technology. And there isn't any case that says that there's a common law right to a video recording of a trial. So this is not -- this is something the people have thought long and hard about.

THE COURT: But is there something about the video that is different from a broadcast of the transcript?

MR. THOMPSON: No, your Honor, in that once the video -- if it were to be made public, then it could be posted on YouTube. And all the concerns about witness intimidation and security and whatnot.

THE COURT: So there's something about the video of witnesses as opposed to the transcript that you're trying to convince the Court it should have in mind, as it can allow the broadcast of the transcript, and even reenactments, that doesn't harm those same interests as the actual video.

MR. THOMPSON: You said the broadcast of the transcript.

THE COURT: There's no prohibition against broadcasting this transcript, correct?

MR. THOMPSON: If by "broadcast" you mean making the printed word available, I agree with you.

THE COURT: All right. So the entire trial transcript can be put and is in the public domain.

MR. THOMPSON: And that's fully consistent with Rule 77.3.

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.

They need to have evidence. They need to have proof that something happened to Mr. Blankenhorn or Dr. Miller or the other two witnesses whose testimony is posted on the Court's website. They have made absolutely no showing that there is any reason to keep this secret.

The other grounds he gave the Court were Rule 77.3. I respect the rules of this court. Greatly. But Rule 77.3 Mr. Thompson has elevated beyond the First Amendment. And I think the Court's questions were probing this. That rule doesn't go to access to judicial records. The plain language goes to broadcasting and televising or recording for the purpose of broadcasting. Judge Walker made very clear that was not his purpose. He was making a recording for use by the Court. Once it's a judicial record, that triggers a whole new set of legal principles. The Supreme Court don't confront these issues.

We didn't argue in the Supreme Court that we had a First Amendment right -- or that anyone did -- to access to the recordings over a year after the fact. That's a completely different issue. And Mr. Thompson's right: The courts have not held that there's a First Amendment right to televise yet -- at least, this court hasn't.

But this court, the Ninth Circuit, the Supreme Court, have said there's a First Amendment and common law right of access to judicial records. The common law right Mr. Thompson

suggests only applies to evidence. That's incorrect. The -- both rights apply to all records that relate to the decisions of the Court and records that the court will allow: Briefs, video, exhibits, transcripts, everything -- unless there's a compelling reason, and there has to be narrow tailoring. Mr. Thompson does not mention anything, any basis for keeping the testimony of our witnesses secret, or of the legal arguments. They didn't object from -- the Ninth Circuit broadcast the arguments of this case on appeal. So First Amendment arguments of this type have to be much more precise and have to make a showing as to each piece of the record that must be kept secret.

And I'll finish with two points, your Honor:

On this question of whether there were reliance -- and again, there's no evidence of any reliance whatsoever on anything -- but the Foltz case that has been cited and Ms. Van Aken mentioned -- it's at Page 1138 -- State Farm was arguing that the protective order, the blanket protective order in that case had caused them to rely on documents that they produced and that were then made part of the summary judgment record. And the Ninth Circuit said, Because the protective order itself did not have the particularized showing that was necessary to justify sealing, that was not a legitimate reliance in interest.

It's the same thing here.

And Mr. Thompson suggests that Rule 77.3, that dealing with broadcasting, that his interpretation was a -- could only be used in the courthouse. Well, when we -- when Judge Walker issued his order allowing the parties to request a copy of the tape, they didn't object. We received our copy of the tape outside the courthouse. We have been reviewing it and, consistent with the Court's orders and in preparing for the trial and preparing for the closings and preparing for today, they never objected to that. So this ironclad black letter Rule 77.3 interpretation that Mr. Thompson is articulating is incorrect. It's inconsistent with their approach earlier.

THE COURT: But, in fairness, you have used it outside subject to the protective order.

MR. BOUTROUS: Exactly. Yes, your Honor.

And one final point on the Supreme Court: The Supreme Court does not talk about whether or not -- what Rule 77.3 said or didn't say about access, public access to judicial records with sealing orders. That's a common confusion that -- I've dealt with a lot of these, a lot of these access cases when I'm dealing with news organizations. It's a different set of principles. Once we're talking about judicial records as opposed to broadcasting in real time, it's a different issue, and strong presumptions of access are triggered.

And to give the Court one example: The Supreme Court itself treats the two things differently. It has, for 50

years, has been recording the oral arguments of the Supreme Court. But only recently did the court start releasing them publicly. But they don't release them the same day of the argument. Once in a while they will, but they have a delayed release of the recording. Because then the considerations that in the heat of the moment during the trial the Court acted very quickly on stay applications -- those are very different issues that have long since faded. And the fact that Mr. Thompson cannot bring forth one scrap of evidence that any witness or any person related to this trial that he knows of who's been harassed or intimidated is fatal to the argument that there are compelling reasons justifying the sealing.

So we request the Court release the trial videotape, and very much appreciate the Court's time. Thank you, your Honor.

THE COURT: Any others?

MS. VAN AKEN: No.

THE COURT: As I walked into the building today, there was a small group standing out front, and one of the members displayed a sign that says, "Free the tape".

(General laughter)

THE COURT: It's not lost on the Court how important the kinds of arguments that are being made here are. As I hear it, not so much to these litigants and this case, but to a higher interest about how courts operate and how we ought to

treat things that are part of the record. So I will take this under submission and give consideration to those matters.

We live in a world where the media has found its way into the courtroom. And I generally think that is for good, because it is a part of our government that is very important to our form of government, and important to an educated citizenry. And even our court has recently approved changes in our local rules that will open our court proceedings up to cameras so that the public can participate in that way.

But as I started out, this is an issue, not so much about cameras as it is about this record that has been made. And I do appreciate that the subject matter of the trial and the decision itself is a matter of high public interest. And the use of the tape might heighten the public knowledge about various aspects of the case itself.

I don't -- there's an old logical fallacy called *argumentum ad baculum*, which is -- parents use it all the time -- and the kid says, Why should I do that? And the answer is, Because I said so. And there is a little bit about the appellate courts opening themselves up in ways that they are not at this point allowed, the -- to the district courts. And there is a little bit of concern that I have, as I've expressed it, about not being careful to obey the rules as they are. And the one conflicting set of principles that you've presented to me in the motion is the conflict between the record, which

should be open, unless there are compelling reasons not to, and the tradition, for lack of a better term. Because I don't know that there's any federal statute passed by Congress that says court proceedings shall not be televised or broadcast. Nor am I aware of any Supreme Court or judicial council ruling to that effect. They've left it to a very careful set of principles and admonitions and advisories, and so I want to study those and put this case in the context of that.

I'm unlikely -- the recusal motion that I have before me that I thought needed very quick action, I don't feel the same urgency with respect to this motion, but I won't delay very long in giving you a ruling.

I do respect the fact that this is referred to me by the Ninth Circuit, and I do want to figure out for myself, whether or not they have the record, that -- that was a little bit of a surprise in my own understanding of what the status is.

The reason I focus on that is in the good old days when the record went up on appeal, the Clerk of Court in the district court didn't have anything. The whole thing went. In today's society, we share information, and so the record being certified and placed on appeal doesn't mean that we don't have it. Part of my concern is to educate myself a little bit about whether or not I'm ordering the Clerk of Court here in the district court to change the status of a record that is on

appeal. Or whether or not I'm directing my order to the clerk of the Ninth Circuit that has the record. And maybe I'm doing both. But that's another matter, and if you want to submit supplemental materials on that and I decide I need it, I'll let you know about that.

I do always appreciate the time and attention that the parties devote to this. And that your clients or your own offices give you the freedom to devote the kind of energy and expense that it takes to bring these matters to the Court.

The matter's submitted.

DEPUTY CLERK: All rise.

Court is in recess.

(Adjourned)

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CERTIFICATE OF REPORTER

I, Connie Kuhl, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into written form.

Connie Kuhl

Connie Kuhl, RMR, CRR
Thursday, September 1, 2011