IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor-Appellee,

MEDIA COALITION,

Intervenor-Appellee,

vs.

EDMUND G. BROWN JR., et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

No. 11-17255

U.S. District Court
Case No. 09-cv-02292 JW

PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S PRINCIPAL BRIEF

On Appeal from the United States District Court
for the Northern District of California

The Honorable Chief District Judge James Ware

DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #104930
Chief Deputy City Attorney
CHRISTINE VAN AKEN, State Bar #241755
MOLLIE M. LEE, State Bar #251404
Deputy City Attorneys
City Hall, Room 234, One Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4708
Attorneys for Plaintiff-Intervenor-Appellee
CITY AND COUNTY OF SAN FRANCISCO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

The issue before this Court is not whether cameras should generally be permitted in the courtrooms or in what sorts of cases they should be permitted. The question here is considerably narrower. In a case where the district court made a video recording of the trial for its own use in deciding the case, used the video recording in deciding the case, and made the video recording a part of the record with no party objecting, this Court must decide whether that part of the judicial record should be kept secret.

Based on the public interest in transparency with respect to all aspects of government, judicial records are presumed public. To overcome this presumption, Proponents must show specific and compelling facts or circumstances that justify withholding the record from the public.

This they have failed to do. As to facts that might justify sealing judicial records in this case, Proponents cynically invoke a narrative that supporters of Proposition 8 are victims of harassment and intimidation who will face threats if the video recording is made public—yet they never substantiate the claim. Indeed, in the district court, they *rejected* the opportunity to make a factual showing that their expert witnesses or any Proposition 8 supporters might suffer repercussions of any sort from release of the trial recordings, and in companion litigation brought by ProtectMarriage.com against the State of California and the City and County of San Francisco ("City"), the district court recently held that ProtectMarriage.com's evidence was " insufficient to support a finding that disclosure of [Prop 8 supporters' identities] will lead to threats, harassment or reprisals." *ProtectMarriage.com v. Bowen*, No. 09-cv-00058, slip op. at 38 (E.D. Cal. Nov. 4, 2011). Far from being an unpopular and persecuted minority, Proponents represent a powerful and successful group of people, churches, and other organizations.

They marshaled $40 million and an army of volunteers and persuaded a majority of California voters in the 2008 election to eliminate the right of a real minority group to marry. Their accounts of alleged campaign misconduct are sporadic at best and illustrate nothing more than the hurly-burly of a hard-fought political campaign. And even if they had admissible evidence demonstrating a few acts of campaign intimidation or violence, such proof would have nothing to do with whether the video recorded testimony of two paid experts—one of whom makes a living publicizing his views about marriage rights and practices—should be released nearly two years after the substance of that testimony has been reported, blogged, and reenacted in media venues throughout the country. There is no reason to believe any harm would come to anyone if the video recorded testimony were released, and no factual basis to maintain the seal.

Nor do the circumstances surrounding the creation of the recording provide justification to maintain the seal. Proponents rely on Local Rule 77-3 and the Supreme Court's stay order in *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010). But Local Rule 77-3 forbids only recording for the purpose of televising or broadcasting, not recording for use by judges in preparing their opinions. Nor does the Supreme Court's order on an emergency motion for stay, which addressed only the issue of live broadcast of the trial, constitute law of the case or purport to decide whether a recording made to aid the judge in making his decision may be kept secret long after the trial is over. Nothing in the Supreme Court's opinion relieves Proponents of their burden of proof to show a compelling reason for sealing court records. Because Proponents have failed to carry their burden, the district court's order should be affirmed, and the public's interest in viewing the best record of what transpired in the Proposition 8 trial should be vindicated.

ISSUES PRESENTED

Whether the district court abused its discretion in ordering a sealed judicial record to be unsealed, where the record was used by the district court in reaching its findings of facts and conclusions of law, where Proponents have offered only an attenuated factual showing to justify the seal, and where the creation of the record comported with Local Rule 77-3.

STATEMENT OF THE CASE

The district court conducted a bench trial in January 2010 of Plaintiffs' claims that Proposition 8, California's initial constitutional amendment that repealed the right of same-sex couples to marry, violates their federal constitutional rights. The district court recorded video of the proceedings for chambers use. The district court's judgment is presently under appeal. *Perry v. Brown*, No. 10-16696 (9th Cir. filed Aug. 5, 2010). In that appeal, Proponents moved to require Plaintiffs and the City to return their sealed copies of the trial video recordings. Plaintiffs then moved to lift the seal. This Court remanded the motion to the district court for determination. The district court determined that the video recordings were a judicial record, and that continued sealing of the video recordings would violate the common law public right of access to judicial proceedings. The court accordingly ordered the seal lifted. This Court has stayed the order pending this expedited appeal.

STATEMENT OF FACTS

I. THE VIDEO RECORDINGS

The trial of this important constitutional case was, of course, conducted in public, and members of the press and public lined up outside the courtroom to attend every day of it. In view of the huge public interest in the proceedings, the district court used video coverage to stream the proceedings into a second

courtroom, where members of the press and public who could not be accommodated in the trial courtroom could watch the proceedings live. While the trial was in progress, attendees reported on it via myriad outlets, from conventional print media to blogs, Facebook and Twitter. Daily transcripts of the trial were used as scripts for reenactments that were posted on YouTube.com during and after the trial. To say the case has been widely reported and widely followed would be an understatement.

The district court digitally recorded the trial, informing the parties that it would use the recordings in chambers "in preparing the findings of fact." Excerpts of Record ("ER") 1139. The court allowed the parties to obtain copies of the video recordings for use in closing arguments, provided they maintained the copies under seal. ER 207. Plaintiffs and the City received copies, and Plaintiffs used portions of the trial videos in closing argument. ER 1084-85. Proponents did not object to Plaintiffs' use of the trial videos for that purpose.

When the district court ruled in favor of Plaintiffs and the City and determined that Proposition 8 is unconstitutional, it stated that it had used the trial recordings to prepare its findings of fact and conclusions of law, and it directed that the trial recording be "file[d] … under seal as part of the record." *Perry v. Schwarzenegger ("Perry I")*, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010). Proponents did not move to strike the recordings from the record; indeed, they have expressly disavowed any argument that the recordings are not part of the record of this trial. ER 1057:8-20.

During the appeal of the district court's judgment, Proponents moved this Court for an order compelling all parties to return their copies of the video recordings. ER 1303. Plaintiffs cross-moved in the Ninth Circuit to unseal the video recordings of the trial, and the City joined their motion. ER 1286; 9th Cir.

No. 10-16696 Doc. 341. Proponents opposed the motion and made the factual assertion to this Court that one of their witnesses decided to testify in reliance on a commitment by former Chief Judge Walker that the recordings would not become public. ER 1279-80. Proponents did not, however, offer any evidence in support of their assertion, nor in support of their claim that unsealing the trial recordings would subject their witnesses to a risk of harassment. Indeed, they argued that whether to unseal the recordings was a "pure question[] of law." ER 1282. This Court nonetheless remanded Proponents' and Plaintiffs' cross-motions to the district court for consideration in the first instance.

On remand, the district court offered the parties the opportunity to further brief the issue of whether to unseal the video recordings. ER 22. Proponents put in no further evidence of witness intimidation. Nor did they take up the district court's suggestion that an evidentiary hearing might be appropriate to determine whether harm would result from post-trial dissemination of the video recordings. ER 1068:15-16. Instead, they contended that the possibility of harm to their witnesses from release of the video recordings is "law of the case." *Id.*

In a carefully considered order, the district court granted Plaintiffs' motion to unseal the trial recordings. It first determined that the recordings are part of the record; indeed, all parties assumed as much. ER 5. The court then held that the common law guarantees the public the right to access records of civil proceedings except where the strong presumption of public access is overcome by compelling reasons supported by specific factual findings. ER 6-7. Applying this test, the district court determined that Proponents had not shown reasons to overcome the strong presumption of access. It found no authority to support Proponents' argument that any conditions placed on sealed documents by one judge was binding on another judge or overrode the common law right of public access. ER

8-9. It determined that neither the Supreme Court's order in *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010), nor Northern District of California Civil Local Rule 77-3 governed whether digital recordings of trial could be placed in the judicial record or unsealed. ER 9-10. Finally, it held that Proponents' claims that release of the recordings would have a chilling effect on their witnesses were "'mere unsupported hypothesis or conjecture'" that did not overcome the common law right of access to judicial records. ER 11 (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)). Because the Ninth Circuit has not yet addressed whether the First Amendment also provides a public right to access court records in civil proceedings, the district court based its conclusion exclusively on the common law right of access. ER 6.

Proponents moved for an emergency stay in this Court. To establish their claim that they were likely to suffer irreparable harm absent a stay, and that releasing the video recordings would subject their witnesses to harassment, Proponents relied on media accounts and declarations concerning the alleged harassment of Proposition 8 campaign supporters that they had submitted during pre-trial discovery proceedings nearly two years ago. ER 1243, 1245. These materials are discussed in the next section. This Court granted a stay of the district court's order and expedited this appeal. ER 1153.

II. PROPONENTS' NARRATIVE PORTRAYING PROPOSITION 8 SUPPORTERS AND WITNESSES AS VICTIMS OF INTIMIDATION AND HARRASMENT IS NOT SUPPORTED BY EVIDENCE.

As discussed below, during the Prop 8 campaign and in this and other litigation, Proponents have deployed a narrative that seeks to portray supporters of Prop 8 as victims who are threatened by intimidating and violent acts of powerful gay people and their allies. In this case, Proponents have invoked that narrative repeatedly in an effort to cloak their campaign tactics and messaging in secrecy, to

justify their withdrawal of discredited expert witnesses, to explain why people voted in support of Prop 8, and most recently to keep the recording of the trial itself out of the public view.

For example, in the course of litigating the scope of discovery, Proponents claimed that Proposition 8 supporters had been subject to harassment and reprisals, and thus their campaign advocacy and communications should be kept secret. ER 242. In support of this contention, Proponents introduced in September 2009 four declarations by leaders of the Prop 8 campaign and a series of media accounts purportedly concerning reprisals against supporters of Proposition 8. ER 742 (Prentice dec.), 747 (Schubert dec.), 761 (exhibits), 848 (exhibits), 1016 (Tam dec.). They also introduced excerpts of briefs filed in *Citizens United v. Federal Elections Commission*, 130 S.Ct. 876 (2010), and cited 58 anonymous declarations filed in their separate case challenging California's campaign finance disclosure statute, *ProtectMarriage.com v. Bowen*, No. 09-00058 (E.D. Cal. filed Jan. 9, 2009). ER 717 (*Citizens United* excerpts); dist. ct. 187-13 (declaration describing anonymous declarations from *ProtectMarriage.com v. Bowen*). The district court found this evidence did not show that discovery of campaign communications would harm any Prop 8 supporter. ER 235. On appeal, this Court determined that Proponents were required to produce all campaign communications except for private, internal communications concerning the formulation of campaign strategy. *Perry v. Schwarzenegger ("Perry II")*, 591 F.3d 1147, 1165 n.12 (9th Cir. 2010). The opinion did not address the allegations of campaign harassment. *Id.* at 1163-65.

In January 2010, three days before trial was to begin, Proponents filed a writ of mandamus or prohibition with the Ninth Circuit seeking to prevent the district court from including the trial in the Ninth Circuit's pilot program allowing cameras

in the courtroom and broadcast of the trial. ER 1345. When this Court denied the stay the following day, Proponents filed a stay application with the Supreme Court. In making their case that they were likely to suffer irreparable harm if the trial were broadcast, Proponents relied on the same factual presentation concerning campaign-related incidents as they rely on here, along with a Heritage Foundation Report entitled "The Price of Prop 8." ER 1350. The Supreme Court granted their application and stayed the district court's order to the extent it permitted live streaming of court proceedings to other federal courthouses. *Hollingsworth v. Perry*, 130 S. Ct. 705, 709 (2010).

At trial, Proponents again invoked their harassment narrative, this time attempting to prove that some California voters supported Proposition 8 "in reaction against the tactics—including violence and intimidation—engaged in by Proposition 8 opponents." ER 709 (Proponents' pretrial proposed findings of fact); ER 627 (Proponents' annotated proposed post-trial findings of fact). They addressed this issue by cross-examining Plaintiffs' political science expert, Professor Gary Segura, presenting him with some news accounts of reprisals against Proposition 8 supporters. Professor Segura stated that some reports of harassment of Proposition 8 supporters might diminish support for gays and lesbians. He also, however, stated that he "would not group boycotts of businesses in with violence and intimidation," ER 1095:14-15, and he contrasted Proponents' news reports with "sworn testimony in the courtroom" about harassment and vandalism experienced by Proposition 8 opponents. ER 1098:14-17; *see also* Trial Tr. 1219-21 (testimony of Helen Zia describing campaign against Proposition 8) ("And when we would be out there on the streets . . . handing out fliers people would just come up to us and say, you know, `You dike [*sic*].' And excuse my language, Your Honor, but `You fucking dike [*sic*].' Or `You're going to die and

burn in hell. You're an abomination.'" "I also felt endangered . . ."). Professor Segura also testified about the Heritage Foundation report concerning alleged reprisals against Proposition 8 supporters: "In fact, the Heritage Foundation report, which was introduced into evidence, makes no attempt to gather evidence of intimidation, vandalism, hostility; violence in the opposite direction. So the Heritage Foundation Report[,] I frankly find a little bit intellectually dishonest." ER 1098:18-23. He continued: "We also know from the Hate Crimes Reports that there were more than 100 acts of violence against gays and lesbians in 2007. . . . We know that[,] nationwide[,] gays and lesbians are more likely to be targeted for violent attack, rape and murder than any other American on the basis of their identity." ER 1098:24-1099:4.

Other than hearsay evidence presented to Professor Segura for his comment, Proponents introduced no other evidence at trial of any harassment of Proposition 8 supporters. The district court did not adopt Proponents' proposed finding of fact that tactics of Proposition 8's opponents led to votes in favor of Proposition 8, but it did credit Plaintiffs' extensive evidence that lesbians and gay men have suffered a long and pervasive history of discrimination and continue to be subject to hate crimes and discrimination. *Perry I*, 704 F. Supp. 2d at 981-82.

At the same time that the individual proponents and ProtectMarriage.com were defending the *Perry* case, ProtectMarriage.com was seeking to prove in another venue the same allegations of harassment and reprisal that Proponents have made here. In *ProtectMarriage.com v. Bowen*, No. 09-00058 (E.D. Cal. filed Jan. 7, 2009), ProtectMarriage.com sought an exemption from California's campaign finance reporting requirements, arguing that its contributors would face harassment if their identities were disclosed. The allegations made by ProtectMarriage.com in *Bowen* about campaign harassment are virtually identical to those made by

Proponents. *Compare* ER 1245, *with Bowen*, No. 09-00058, Doc 295 ("*Bowen* Order"), at 22. There is also substantial overlap between the evidence of campaign harassment submitted in *Bowen* and in this case. In both cases, ProtectMarriage.com relies on media articles from late 2008 and early 2009, the same Heritage Foundation Report and the same 58 anonymous declarations. The federal district court in *Bowen* recently ruled on cross-motions for summary judgment that the "limited evidence is simply insufficient to support a finding that disclosure of contributors' names will lead to threats, harassment or reprisals." *Bowen* Order at 38.

STANDARD OF REVIEW

Because a district court exercises an inherent supervisory power over its own files, *Hagestad*, 49 F.3d at 1433-34, a district court's order to unseal a portion of the record is reviewed for abuse of discretion. *Valley Broadcasting Co. v. U.S. Dist. Court for the Dist. of Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986).

ARGUMENT

Proponents have aimed mightily to conflate this appeal concerning the sealing of the video recording with the controversy over the district court's and Ninth Circuit's selection of this case for a pilot program in broadcasting civil trial proceedings. But the issues are separate. This appeal does not concern whether the district court should have created the video recordings in the first place (it did), or whether it should have made the video recording a part of the record (it did).[1] Instead, this appeal presents a simple question: whether a video recording that is

[1] In their appeal from the judgment in this case, Proponents did not challenge the district court's decision to create, use in chambers, allow use at closing arguments, or place the video recording of the trial in the record. ER 5-6. They have disavowed any claim that the video should not have been made part of the record. *See supra* at 4.

indisputably part of the judicial record in a case should be unsealed where no facts support any claim that unsealing it would cause harm, and no law prohibited the creation of the record—but where denial of the public's common law right of access would mean that the public will never see the story of Proposition 8 that was told at trial.

The common law right of public access to civil court records requires courts to apply "a strong presumption in favor of access." *Hagestad*, 49 F.3d at 1434. "This presumption of access may be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.'" *Id.* (quoting *Valley Broadcasting*, 798 F.2d at 1293). Here, Proponents have not shown any facts or circumstances that would overcome the strong presumption.

I. PROPONENTS HAVE SHOWN NO FACTS THAT PROVIDE A COMPELLING REASON TO KEEP THE VIDEO RECORDINGS UNDER SEAL.

To overcome the strong presumption of public access to judicial records, Proponents have relied exclusively on the factual showing that they made in September 2009 and January 2010: anonymous declarations, media accounts, and a handful of personal stories in support of a claim of backlash against Proposition 8 supporters. Tellingly, Proponents have rehearsed this narrative before appellate courts repeatedly—such as in their stay application to the United States Supreme Court, and in their stay motion to this Court—but when the district court offered Proponents the opportunity to develop their hearsay accounts into evidence, they declined it. ER 1068. And for good reason: Proponents' claims of harassment of Prop 8 supporters are stale, exaggerated, and beside the point.

First, Proponents conflate incidents of alleged harassment against Proposition 8 supporters—in the midst of a hotly contested political campaign—

with the threat of reprisal against paid expert witnesses. Yet one of these experts, David Blankenhorn has by his own account been a public opponent of marriage rights for same-sex couples for years and has engaged in numerous public debates on the issue both before and after he testified at trial. ER 1090:9-14. His words, face, and opinions are easily accessible on the internet to anyone who is interested in hearing his opinions. The other of Proponents' experts, political scientist Kenneth Miller, testified only about the political power of gay men and lesbians, not about whether Proposition 8 ought to have passed or ought to be invalidated by the courts. Professor Miller did not testify that he voted for Proposition 8 or that he favored it. In any event, it is sheer speculation for Proponents to contend, because some Prop 8 supporters purportedly faced reprisals, that Professor Miller, whose testimony has been publicly available for nearly two years in written form, would face any harm at all from the unsealing of the videos, when he and Mr. Blankenhorn have faced no reprisals from their public testimony nearly two years ago. Nor have Proponents proffered any evidence even of concern on his part about such hypothetical risk.

Proponents also contended, in their motion for all parties to return the sealed video recordings to the Court, that Professor Miller would not have testified in the trial if he had believed his testimony could be broadcast. Proponents appear to have abandoned this contention, and it was never supported by any evidence in the district court. In any event, it is well established that reliance on a protective order, in the absence of a compelling reason to preserve the secrecy of records, will not in itself create good cause to maintain a sealing order. *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003).

Second, even assuming that Proponents' evidentiary showing about campaign reprisals bore any relationship at all to threats against *trial witnesses*

more than three years after the campaign was over, Proponents' evidence would fail on its own terms. Proponents have made no showing of any harassment of either of their witnesses who testified at trial notwithstanding the fact that their identities are public, their testimony is in public transcripts that have been reenacted by world-famous actors, and two years have passed since the trial was completed. Indeed, Plaintiffs put Prop 8 Proponent William Tam on the stand and elicited his testimony admitting that he and organizations he led engaged in extremely anti-gay messaging in support of Prop 8 in emails and on websites during the campaign,[2] yet Proponents have never offered any evidence that Mr. Tam suffered any harassment as a result of the trial. Instead, Proponents largely offer hearsay media accounts, these accounts are vague and duplicative, and they rely on facts Proponents characterize as "harassment"" but that in reality amount to mere criticism and expression of opinion. For instance, when testifying on behalf of ProtectMarriage.com in *Bowen*, Ronald Prentice defined harassment as "just an attempt to either influence me directly or people—to influence their opinion about me through phrases and comments." *Bowen*, No. 2:09-00058, Doc. 263, Exh. J at 75:18-76:5. Similarly, ProtectMarriage.com political strategist Frank Schubert describes protests and boycotts as harassment. *See* ER 750-51. While Proponents

[2] Tam admitted to making and approving of statements on websites, fliers and emails that " homosexuality is linked to pedophilia," "[h]omosexuals are 12 times more likely to molest children" (Trial Tr. 1918-21), "[a]fter legalizing same-sex marriages they [homosexuals] want to legalize prostitution" (*id*. at 1924-25), "[o]n their [gay people's] agenda list is legalizing having sex with children" (*id*. at 1926), "gay marriage will encourage more children to experiment with the gay lifestyle, and that that lifestyle comes with all kinds of disease" (*id*. at 1943; see also id. at 1968), "Proposition 8 protects against social moral decay" referring to homosexuality (*id*. at 1954-55), "[i]f same-sex marriage is characterized as a civil right, then so would pedophilia, polygamy and incest" (*id*. at 1955-56), He also admitted that he and his organization were involved in a rally for Prop 8 for which a flyer exhorted invitees that the church should "rise up against the forces of evil that are destroying families and young souls." (*Id*. at 1947-53).

may consider boycotts, criticism or disagreement to be harassment, this is protected First Amendment activity that is merely the consequence of their decision to thrust themselves into the political sphere. *See generally NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-15 (1982).

Proponents' evidence of harassment is also extremely stale. It is now three years since Proposition 8 passed. Proponents have put in no evidence at all that relates to more recent incidents, and they fail completely to bridge the analytical gap between the incidents of a hotly contested social issues election and the testimony of an expert witness released three years after the campaign and almost two years after the trial.

Perhaps most importantly, the only district court to which this "evidence" has been presented for factfinding has held that it failed even to create a triable issue of material fact as to whether Prop 8 supporters faced widespread threats, recriminations, or harassments. In its ruling granting summary judgment in favor of the State and its campaign finance disclosure regime, the district court in *ProtectMarriage.com v. Bowen* held that ProtectMarriage.com's showing fell short in multiple respects, beginning with the observation that much of it is hearsay and that duplicative media articles create the false impression that there were more incidents of harassment than actually occurred. *Bowen* Order at 6 n.3, 7 n.7. Even considering the hearsay evidence, the court found that there were relatively few incidents when compared to the huge number of people in California and nationwide who share ProtectMarriage.com's views about marriage. *Id*. at 31. The court also found that law enforcement was diligent in responding to the few more serious incidents described in the evidence, *id*. at 33, and that ProtectMarriage.com failed to prove that the more incendiary events were connected to Prop 8, *id*. at 36.

ProtectMarriage.com also failed to prove that the alleged harassment had any chilling effect. *Id*. at 37.

Furthermore, the contributor names that ProtectMarriage.com sought to shield in *Bowen* were disclosed almost three years ago, when the court denied ProtectMarriage.com's motion for a preliminary injunction. *See* 599 F. Supp. 2d 1197 (E.D. Cal. 2009). Yet counsel for ProtectMarriage.com admitted at oral argument on October 20, 2011, that he was aware of only one instance of purported post-election harassment. *Bowen* Order at 38. "From a practical perspective, it makes no sense to buy in to the argument that disclosure *may* result in repercussions when there is simply no real evidence in the record that such repercussions actually *did* occur in the past three years." *Id*. (emphasis in original). As the district court found, ProtectMarriage.com's "evidence is, quite simply, stale." *Id.*

Finally, the district court found that the vast majority of the incidents described in the evidence "do not necessarily rise to the level of 'harassment' or 'reprisals'" and are arguably "typical of any controversial campaign." *Bowen* Order at 34.[3] By relying on duplicative media articles and exaggerated accounts, Proponents have tried to parlay nothing into something. But this manufactured narrative does not, as the *Bowen* court found, stand up to serious scrutiny.

[3] Proponents of a ballot measure in Washington to repeal that State's expansion of its domestic partner law offered similar evidence in an attempt to avoid disclosing the names of signatories of the referendum petition. *See Doe v. Reed*, No. C09–5456BHS, -- F. Supp. 2d --, 2011 WL 4943952 (W.D. Wash. Oct. 17, 2011). The district court recently granted summary judgment against the ballot measure proponents in that case, finding that there was no issue of material fact that there was a reasonable probability that signatories of the referendum petition would face reprisals if their names were disclosed. *Id.* at *17-18. The court found that the evidence of alleged harassment presented by the ballot measure proponent was not "serious and widespread." *Id.* at *18.

All of the same is true of the "evidence" on with Proponents rely for their claims that the video recordings must remain sealed: it is stale and duplicative, and even if some of it suggests a few reprehensible incidents during the Prop 8 campaign, it does not come even close to showing such a pattern that this Court could infer from it a danger to anyone—much less to paid expert witnesses whose testimony would be released three years after the campaign and nearly two years after the trial.

But even if there were some shred of support for the proposition that the release of video recordings of witnesses who testified in support of Proponents at trial could result in some threat to those witnesses, there is no basis at all to retain under seal the testimony of the 17 witnesses called by Plaintiffs and the City. Although the City submits that the entire record should be unsealed, should this Court disagree, it should nonetheless affirm those parts of the district court's order that relate to Plaintiffs' and the City's witnesses and evidence and to the arguments of counsel. Unsealing these portions of the trial record would provide the public access to the personal accounts of discrimination suffered by plaintiffs and lay witnesses Ryan Kendall and Helen Zia; to the shameful and pervasive history of discrimination against lesbians and gay men in this country; to the economic and psychological harms inflicted on lesbians and gay men by institutionalized discrimination; and to the naked appeals to stereotype and prejudice that comprised the Proposition 8 campaign. Even releasing this limited video record of the Proposition 8 trial would serve the public's interest in transparency and in understanding this historic trial.

II. THE COURT SHOULD REJECT PROPONENTS' ARGUMENT THAT THE CIRCUMSTANCES SURROUNDING THE MAKING OF THE VIDEO RECORDINGS JUSTIFY DENYING THE PUBLIC ACCESS TO THEM.

A. Local Rule 77-3 Does Not Require Maintaining The Seal.

Proponents rely on Local Rule 77-3 to argue that the video recordings cannot be unsealed, but the version of Local Rule 77-3 in effect at the time the recordings were made stated only that "the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited." The district court's statement at the time it announced its decision to record the proceedings made clear that the video recordings were not created for the purpose of public broadcasting or televising, and Proponents do not argue to the contrary. The recording was therefore not prohibited by Local Rule 77-3, and the rule cannot provide a reason to overcome the presumption of public access.

B. This Court Should Hold That The First Amendment Guarantees Public Access To The Video Recording.

Even if Local Rule 77-3 could somehow be read as superseding the common law right of public access, the Court should hold nonetheless that the video recordings should be made public pursuant to the First Amendment right to access to civil trial records.

Although "[t]he Supreme Court has not yet considered whether the public right of access applies to civil trials, … 'six of the eight sitting Justices' in *Richmond Newspapers* [*v. Virginia*, 448 U.S. 555 (1980)] 'clearly implied that the right applies to civil cases as well as criminal ones.'" *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 652 F.3d 247, 258 n.9 (2d Cir. 2011) (quoting *Huminski v. Corsones*, 396 F.3d 53, 82 n.30 (2d Cir. 2005)). Moreover, while this Court has not yet addressed the issue, all of the Circuits that have considered it have

recognized the First Amendment right; none have held to the contrary. *See N.Y. Civil Liberties Union*, 652 F.3d at 258 ("[T]he First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and to their *related proceedings and records*") (emphasis added); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) ("We believe that the more rigorous First Amendment standard [for denial of access to litigation documents] should also apply to documents filed in connection with a summary judgment motion in a civil case."); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068-71 (3d Cir. 1984) (recognizing a First Amendment right of access to civil trials); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) ("The public's right of access to judicial records has been characterized as fundamental to a democratic state … [and r]ecently, we recognized that this presumption is of constitutional magnitude.") (internal quotation marks omitted); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983) (holding that "[t]he Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial."); *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981) (recognizing "the full scale First Amendment interest in reports of public judicial proceedings"); *cf. Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (recognizing First Amendment right to access to civil trials concerning civil proceeding regarding unconstitutional conditions of confinement); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983) ("[I]t is nonetheless true that the public has a great interest in the fairness of civil proceedings. Hence, we conclude that the protection of the First Amendment extends to proceedings for contempt, a hybrid containing both civil and criminal characteristics.").

If the First Amendment right of access applies, then any "denial of access must be necessitated by a compelling government interest and narrowly tailored to

serve that interest." *Rushford*, 846 F.2d at 253; *see also Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 606-07 (1982) (applying test to denial of access to criminal trial). Moreover, any reasons supporting closure must be articulated in specific factual findings. *Oregonian Publg. Co. v. U.S. Dist. Court for the Dist. of Or.*, 920 F.2d 1462, 1466-67 (9th Cir. 1990). Proponents do not come close to passing that test. As discussed in Part I above, they have not shown a compelling government interest in retaining the seal for their two witnesses, let alone for the 17 witnesses called by Plaintiffs and the City.

C. *Hollingsworth v. Perry* Does Not Justify Retaining The Seal.

Proponents also rely on *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010). In that case, the Supreme Court forbade the contemporaneous broadcasting of a video recording of the trial. But it "resolve[d] that question without expressing any view on whether such trials should be broadcast." *Id.* at 706. Nor did the Court pass on whether the trial could be recorded, or on the question presented here: whether, if such a recording were made part of the judicial record, it would be subject to the typical rule of access to judicial records. *Hollingsworth* simply does not address the question before this Court.

Proponents also rely on the Supreme Court's determination that that Proponents, in January 2010, in the early days of the trial, had shown a likelihood of harm from the contemporaneous broadcast of the trial based on the same media accounts they rely on here. *Hollingsworth*, 130 S. Ct. at 712-13. But a factual determination made in the context of a preliminary injunction motion is not the law of the case. *See, e.g., S. Or. Barter Fair v. Jackson Cnty.*, 372 F.3d 1128, 1136 (9th Cir. 2004). And the fact that nearly two years have passed since the trial, with no indication of any adverse consequences whatsoever to the witnesses who

testified in support of Proposition 8, demonstrates beyond doubt that no harm can come from lifting the seal.

III. THE PUBLIC INTEREST STRONGLY SUPPORTS UNSEALING THE TRIAL RECORDINGS.

The common law and First Amendment rights of public access to trial proceedings find their justification in "promoting the public's understanding of the judicial process and of significant public events." *Valley Broadcasting*, 798 F.2d at 1294. With regard to the historic trial of the constitutionality of Prop 8, both justifications are present in abundance.

In a 1996 Congressional hearing, Justice Kennedy testified, "You can make the argument that the most rational, the most dispassionate, the most orderly presentation of the issue is in the courtroom and it is the outside coverage that is really the problem. In a way, it seems somewhat perverse to exclude television from the area in which the most orderly presentation of the evidence takes place." *Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for 1997 Part 6: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 104th Cong., 30 (1996). As discussed in this section, that was certainly the case with the Proposition 8 trial: It provided a rational, dispassionate, and orderly presentation of evidence concerning a ballot measure of tremendous significance to millions of Americans. And the trial demonstrated two important facts that are essential to the public's understanding of Proposition 8.

First, the evidence about Prop 8 presented at trial was dramatically different from the messages of the campaign. In contrast to the ubiquitous campaign messages that lesbian and gay couples are immoral, disordered, and a threat to children and families, Proposition 8's proponents during the trial fought hard to obscure the ugly messages of the campaign. Indeed, as the district court found,

Proponents "abandoned" their arguments from the campaign during the trial. *Perry I*, 704 F. Supp. 2d at 931. Even the Proponents of Proposition 8 were unwilling to stand up in trial and defend the basis for Prop 8 that they sold to the voters. Second, the justification for Proposition 8 that Proponents in fact attempted to prove at trial—that social science showed that expanding marriage rights to same-sex couples would weaken the bulwarks of traditional marriage and that opposite-sex couples should be preferred as parents—was so flatly at odds with the social science evidence presented at trial that Proponents' justifications did not present a close question. These facts, and the public's right to full access to the trial record that demonstrates them, are discussed here.

A. Proponents' Campaign To Pass Proposition 8 Relied On Messages That Lesbian And Gay Couples Threaten Children And Families—Messages Proponents Abandoned At Trial.

In order to pass Prop 8, Proponents orchestrated a social issues campaign the likes of which California had never seen. The campaign was based around a series of messages that "asserted the moral superiority of opposite-sex couples" and "relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian." *Perry I*, 704 F. Supp. 2d at 931, 988. It argued that same-sex marriage is "radically anti-human," *id.* at 976, that same-sex marriage endangered gender roles in families, *id.* at 975, and that if Proposition 8 did not pass, children would be taught unwholesome messages such as that same-sex marriage is a "good thing." *Id.* Other campaign materials carried the message that gay men and lesbians are tainted and inferior—that allowing such couples to marry "destroy[s]" "the sanctity of marriage," ER 1364, and that "[i]f we have same-sex marriage legalized, it's … an affirmation that it's just as good. And then we're going to have this society that eventually is going to come to believe it …." ER 1377-78. Proponents' messages harkened back to pernicious and longstanding

stereotypes about lesbians and gay men, such as that they are incapable of forming loving relationships, that they are perverted and immoral, and that they are pedophiles who prey on and recruit children. *Perry I*, 704 F. Supp. 2d at 937. Indeed, some of those involved in the campaign were quite explicit about their anti-gay animus. *See, e.g.*, PX0506 at 12 (simulcast transcript claiming that if sexual attraction were the basis of marriage rights, pedophiles could marry children, incest would be allowed, and people could marry animals); PX1868 at 51 (simulcast transcript claiming that to compare sexual orientation discrimination to race discrimination is to " compare my skin with their sin"); *id.* at 77 (calling marriage rights for same-sex couples "a perversion").

But these messages were not the extraordinary thing about the Proposition 8 campaign. What set this campaign apart was the army Proponents built to carry their messages. Their "'unprecedented'" coalition included "'virtually the entire faith community in California,'" with a network of 1700 pastors to mobilize churchgoers. *Perry I*, 704 F. Supp. 2d at 955-56 (quoting Trial Tr. 1609:12-1610:6; PX0577). They hosted simulcasts, presentations that were broadcast simultaneously at faith events throughout California to enormous audiences. ER 1368-69; *see also* ER 1375, PX0504, PX0504A, PX0505, PX0506, PX1868. The campaign's precinct walks mobilized tens of thousands of people across the state. ER 1372 The official campaign raised approximately $40 million. ER 606. According to ProtectMarriage.com's chief strategists, they "activated [their] coalition at the grassroots level in a way that had never before been done." ER 1374. Plaintiffs' political science expert testified that, other than the movement against abortion rights, "I can't think of a minority group against whom such a coalition has been raised." ER 1127:5-9.

Proponents' message was ubiquitous. Indeed, in the final days of the campaign, Prop 8 ads appeared on every website across the internet with advertising supplied by Google. "Whenever anyone in California went online, they saw one of our ads," according to a Proposition 8 strategist. ER 1374. Supporters of Proposition 8 were also visible after they had achieved their victory at the ballot box. Frank Schubert and Jeff Flint, architects of the ProtectMarriage.com campaign, authored an article in Politics Magazine in February 2009, describing how they managed to bring together this unprecedented coalition and what messages they seeded with it. ER 1371.

At trial, however, Proponents "abandoned previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples." *Perry I*, 704 F. Supp. 2d at 931. Indeed, they "called not a single official proponent of Proposition 8 to explain the discrepancies between the arguments in favor of Proposition 8 presented to voters and the arguments presented in court." *Id.* at 944. Indeed, they attempted to hide from discovery the campaign's messages and even the identities of the leaders of ProtectMarriage.com. ER 242, 655. They also fought a pitched battle to shield all of the campaign's communications except for those communications that were mass broadcast. The Ninth Circuit ultimately rejected this effort, holding instead that Proponents could withhold only "*private, internal* campaign communications concerning the *formulation of campaign strategy and messages*." *Perry II*, 591 F.3d at 1165 n.12 (emphasis in original). The result is that Proponents were compelled to produce 20,000 pages of campaign messages and coalition communications on the eve of trial. ER 1104:4-6. Finally, after the evidentiary portion of the trial concluded, Proponents sought to strike from the trial record exhibits that displayed some of the most vivid examples of anti-gay bias from the Prop 8 campaign. ER 562, 570. This included emails that

characterized homosexuality as a "devilish perversion" and declared homosexuals to be "evil" and engaged in a "destructive program" whose "aim is domination." ER 1386, 1388. The district court rejected Proponents' motion to strike. ER 194.

Thus, one overarching fact that emerged from the trial was that the case Proponents made to California voters was one that they were unwilling to stand and defend at trial—indeed, one that they fought to hide from public view. The public is entitled to access to the trial videos so that they can compare the justifications they were offered during the Proposition 8 campaign and those offered at trial.

B. Proponents Failed At Trial To Establish The Legitimate Justification For Proposition 8.

Proponents focused at trial on sanitizing the animus from the Prop 8 campaign messages and establishing the more polite-seeming claims that permitting only opposite-sex couples to marry serves society's interest in maintaining stable relationships among the couples who can "naturally" produce children and that children are better off in households where they are biologically related to both of their parents. *Perry* I, 704 F. Supp. 2d at 931. But, as the district court held, they wholly failed to establish these claims. In a factual presentation "dwarfed by that of plaintiffs," *id.* at 932, Proponents presented only two witnesses. One was think tank founder David Blankenhorn, who testified that as a public opponent of same-sex marriage, he frequently engages in public speaking and debates about the topic. ER 1090:9-14. Blankenhorn testified that recognition of same-sex relationships as marriage would weaken marriage as an institution and harm children, opinions the district court ultimately determined were unreliable and entitled essentially to no weight because Blankenhorn lacked relevant education and training, his opinions were not supported by any evidence, he had

not used a reliable methodology to arrive at those opinions, his opinions were tautological and internally contradictory, and his demeanor undermined his credibility. *Perry I*, 704 F. Supp. 2d at 947-50.

The other witness Proponents called was Kenneth Miller, a professor of government. Miller testified that lesbians and gay men have political power because they are able to attract the opinion of lawmakers. *Id.* at 951. The district court ultimately gave Miller's opinions little weight, finding that he had made only a limited study of lesbian and gay political power before his testimony and that his testimony contradicted his previous writings about the vulnerability of lesbians and gay men in California's initiative process. *Id.* at 952.[4] Ultimately, the district court determined that Proponents "failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest." *Id.* at 932.

[4] Proponents originally disclosed that they intended to call two religious studies professors, Katherine Young and Paul Nathanson. *Id.* at 944. They withdrew these experts, however, because their deposition testimony was helpful to Plaintiff's case and undermined Proponents' case. Indeed, *Plaintiffs* entered excerpts of Young's and Nathanson's deposition testimony into evidence at trial. In these excerpts, available on video at the district court's website, https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html (last visited 11/11/2011), Young testified, for example, that same-sex couples possess the same desire for love and commitment as opposite sex couples, and that several cultures around the world have recognized variants of same-sex marital relationships. *Perry I*, 704 F. Supp. 2d at 944-45. Nathanson testified that religion lies at the heart of hostility and violence directed at same-sex couples and their children and that there is no evidence of harm to children by same-sex couples. *Id.* at 945.

Proponents also designated and then withdrew the testimony of two other experts after they were deposed for what we believe are similar reasons: they were discredited in their depositions and provided testimony helpful to Plaintiffs. For example, Loren Marks, a professor with a Masters degree in "family science," gave an opinion that families with children who are the biological offspring of both parents have better child outcomes than families with non-biological children, but then conceded that none of the studies on which he relied actually distinguished between biological and adopted children.

Proponents have claimed that certain of these experts (not identified) were withdrawn because of fears associated with the trial being broadcast, but they never supported those bald assertions with any evidence. The district court rejected this contention as unsupported by the record. *Perry I*, 704 F. Supp. 2d at 944.

* * *

The district court's judgment reached as a result of these findings is presently on appeal, of course, and the ultimate conclusion of the courts about Proposition 8 is yet unknown. But the importance of public knowledge and debate on the issues aired at the trial cannot be denied.

Proponents would keep sealed, permanently, the most accessible record of the grievous harm that gay people and society suffer as a result of discrimination, and the orderly and thorough refutation by social scientists, whose opinions are shared by every major national organization of social science professionals, of every canard on which Proponents have relied to argue that gay and lesbian people and relationships are inferior or unworthy of recognition. They would deny the right to observe the trial to all except those who were in San Francisco in January 2010. But the public should have access to the best, most accessible record of what happened at trial, not be relegated to dry transcripts or video reenactments. Allowing them to see the video recording of the trial itself can only enhance their understanding of and respect for the issues that were tried, the judicial process and constitutional democracy. Allowing the public to view the trial recording will demonstrate the legitimacy of the district court's judgment, and allowing the public to view the trial will inform their own self-governance. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. Regardless of the outcome of this case, the public should see what occurred.

//

//

CONCLUSION

This Court should affirm the order of the district court.

Dated: November 14, 2011

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART,
Chief Deputy City Attorney
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys

By: / s/ Therese M. Stewart
THERESE M. STEWART
Chief Deputy City Attorney
Attorneys for Plaintiff-Intervenor-Appellee
CITY AND COUNTY OF SAN FRANCISCO

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 8,906 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 14, 2011.

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART,
Chief Deputy City Attorney
CHRISTINE VAN AKEN
MOLLIE M. LEE
Deputy City Attorneys

By: / s/ Therese M. Stewart
THERESE M. STEWART
Chief Deputy City Attorney
Attorneys for Plaintiff-Intervenor-Appellee
CITY AND COUNTY OF SAN FRANCISCO