UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 11-17255

KRISTIN PERRY, *et al*.,
Plaintiffs-Appellees,

vs.

EDMUND G. BROWN, JR., *et al*.,
Defendants,

and

DENNIS HOLLINGSWORTH, *et al*,
Defendant-Proponents-Appellants.

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

Civil Case No. 09-CV-2292 JW (Hon. Chief Judge James Ware)

INTERVENOR NON-PARTY MEDIA COALITION'S ANSWER BRIEF ON APPEAL

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Pursuant to this Court's Order entered October 24, 2011, the Non-Party Media Coalition[1] respectfully submits its Answer Brief on Appeal. For the reasons explained below, the Non-Party Media Coalition respectfully urges the Court to reject the arguments made by Appellants Proponents of Proposition 8, Dennis Hollingsworth, *et al.* ("Proponents") in their "Brief of Defendant-Intervenors-Appellants" (Proponents' "Opening Brief" or "O.B."), that advocate perpetual sealing of the court records at issue here and, instead, to affirm the district court's order that the records be unsealed immediately.

1. ARGUMENT

Proponents' Opening Brief largely rehashes their arguments made earlier in these proceedings, to which the Media Coalition already has responded in its Principal Brief. Docket No. 28. Thus, the Media Coalition addresses only a few issues in this Answer Brief.

1. In their Opening Brief, Proponents make clear that they are asking the Court to assist them in controlling the content of the ongoing debate and discussion about the events that transpired in public court proceedings during the historic trial

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[1] Los Angeles Times Communications, LLC; The McClatchy Company; Cable News Network; In Session (formerly known as "Court TV"); The New York Times Co.; Fox News; NBC News; Hearst Corporation; Dow Jones & Company, Inc.; The Associated Press; KQED Inc., on behalf of KQED News and the California Report; The Reporters Committee for Freedom of the Press; and, The Northern California Chapter of Radio & Television News Directors Association.

of this matter. Proponents ask the Court to constrain the public debate by controlling dissemination of information to the public. But the question presented in this case – whether the public is entitled to access video recordings that were actually used by the Court in preparing its Findings of Fact and Conclusions of Law – is settled. The Court should not disturb this settled law based on speculation about what *might* happen to the video recordings once they are made public. Unquestionably, the public's vital interest in the transparency of the judicial process warrants the unsealing of these video recordings. Indeed, the media have a broad privilege to report on these proceedings – which can only be enhanced by release of the video recordings. Civil Code § 47(d). This Court should refuse to participate in Proponents' attempt to curtail and censor the ongoing public debate about the events that transpired in open court during this trial.

2. To make their argument, Proponents misstate the standard of this Court's review. As the Supreme Court made clear in its first case addressing the common law right of access to court records, "[t]he few cases that have recognized such a right do agree that ***the decision as to access is one best left to the sound discretion of the trial court***, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon v. Warner Comm'n, Inc.*, 435 U.S. 589, 599 (1978) (emphasis added). That deference is particularly

appropriate here, where the Court remanded this precise question to the district court to be resolved (ER 1 n.1), and the trial court then gave the parties an opportunity to improve the record (ER 22) – which Proponents did not do (ER 1538-1539). This Court should follow the Supreme Court's directive and review this case for abuse of discretion.

3. Proponents also misstate the terms of Local Rule 77-3 in their attempt to convince the Court to set aside the common law right of access. O.B at 22-23. They conflate the *separate* prohibitions in Local Rule 77-3 – a Rule that governs the administrative activities of the court – to give it an unintended, unreasonable construction that is outside of its plain terms. Specifically, Proponents ignore the "or" that separates the first phrase from the second phrase, and pretend that the first phrase qualifies the second phrase. But it does not. The phrases are distinct. The Rule prohibits [1] "the taking of photographs, public broadcast or televising or [2] recording for those purposes." It is undisputed that the trial was *not* broadcast and that if any broadcast of the video recordings occurs, it will not be under the auspices of the court. Local Rule 77-3 does not purport to control the disposition of recordings that are used by the trial court and entered into the record. It has no relevance here.

4. Proponents also mis-cite this Court's recent decision in *In re Roman Catholic Archbishop*, -- F.3d --, No. 10-35206, 2011 WL 5304130 (9th Cir. Sep.

21, 2011) , which holds that 11 U.S.C. § 107(b) supplants the common law right of access. Proponents' O.B. at 17, 30, 31. This case does not help Proponents. To the contrary, it makes clear that a statute can only supplant the common law "if it 'speak[s] directly to the question addressed by the common law,' … and indicates a statutory purpose not to apply the common law." *Id.* at 10-11. But that certainly is not the case here. As explained in the preceding paragraph, Local Rule 77-3 does not address access to judicial records at all. It does not purport to supplant the common law.

5. Proponents misunderstand the significance of the Judicial Conference guidelines for the Cameras Pilot Project. O.B. at 31. It is true that the Guidelines state, "The digital recordings emanating from the pilot (as well as any transcripts made from the recordings) are not the official record of the proceedings, and should not be used as exhibits or part of any court filing." "Judicial Conference Committee on Court Administration and Case Management Guidelines for the Cameras Pilot Project in the District Courts," available at http://www.uscourts.gov/uscourts/News/2011/docs/CamerasGuidelines.pdf. But this recognizes the significance of a court's actual use of a recording, as occurred here. As the Media Coalition explains, once a document – including the video recordings at issue here – is actually used by the court in resolving a dispositive

issue before the court, its character changes and it becomes a court record subject to a presumptive right of access. Media Coalition Opening Brief at 17-20.

6. Proponents also continue to insist that this case is controlled by *United States v. McDougal*, 103 F.3d 651, 656-657 (8th Cir. 1996). O.B. at 32-33. But as the Media Coalition explains in its Opening Brief, *McDougal* does not help Proponents for a number of reasons. First – and dispositively – there is no suggestion in *McDougal* that the trial court used the recording in connection with a dispositive ruling, as unequivocally occurred here. ER 3. Thus, the recording in *McDougal* played a different role in the litigation than the video recordings at issue here. In addition, in *McDougal* the court made clear that the Eighth Circuit has "specifically rejected the *strong* presumption standard adopted by some circuits." *Id.* at 657 (citation omitted; emphasis in original). Thus, the common law right of access in the Eighth Circuit is much weaker than the common law right of access in this Court. And finally, the result in *McDougal* turned in part on the discretion afforded to the trial court. *Id.* at 657-658. That court affirmed the careful reasoning by the trial court there, just as this Court should affirm the careful reasoning by Chief Judge Ware here.

7. In the end, Proponents have not come close to meeting their burden of demonstrating an interest in maintaining secrecy that can outweigh the public's strong interest in access to these court records. They claim that "[t]he record of

harassment of supporters of the traditional definition of marriage has only strengthened since the Supreme Court stayed the original broadcast order." Proponents' O.B. at 40 & n.8. But they do not cite a single piece of admissible evidence, choosing to instead rely on newspaper articles and other media reports, although they are inadmissible to prove the contents of the articles. *Larez v. City of Los Angeles*, 946 F.2d 630, 641-642 (9th Cir. 1991) (reversing district court's introduction of newspaper articles to prove contents of communications relayed). Instead, the only empirical evidence of any relevance is the fact that Proponents' two paid expert witnesses testified with full knowledge that the trial was being recorded and yet they offered *nothing* to suggest that any harm has flowed to them as a result.[2] The transcripts in this matter have been publicly available for nearly two years, the trial testimony has been reenacted online (www.marriagetrial.com) and it has been also been the subject of a Broadway play (http://blogs.wsj.com/law/2011/09/20/broadway-tackles-gay-marriage-trial-in-8/). Nonetheless, Proponents can offer no reliable evidence that their experts have a legitimate concern about harassment – much less harm – should the video recording of their testimony be publicly released. Their purported concern about a

[2] Indeed, Proponents' claim that other witnesses withdrew because the trial was being recorded (O.B. at 39 n.7) – a claim that Judge Walker found to not be credible (ER 772-773) – only proves that Proponents' witnesses took the stand with full knowledge that the trial was being recorded.

future trial is equally speculative. If such a trial is required, the court can address camera issues then. Thus, the trial court acted well within its broad discretion in holding that Proponents' contentions are "mere 'unsupported hypothesis or conjecture,' which may not be used by the Court as a basis for overcoming the strong presumption in favor of access to court records." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)."

2. CONCLUSION

Proponents struggle to avoid the dispositive fact that the video recordings at issue here necessarily are part of the court record and that, as such, the Court's strong presumption of access attached to them. They pretend that they have established that harm would flow out of the release of the videotapes, but their only "evidence" consists of newspaper articles and a court decision based on a preliminary record and facts nearly two years old. The Proponents utterly failed to present any evidence of the harm they claim. Exercising its discretion, the district court properly considered this record and its decision to unseal the video recordings should not be disturbed by this Court.

For these reasons and the reasons set forth in the Media Coalition's Opening Brief, the Media Coalition respectfully requests that the Court allow the immediate unsealing of the video recordings.

RESPECTFULLY SUBMITTED this 28th day of November, 2011.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Circuit Rule 32. The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 1,784, not including the corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of compliance, statement of related cases, and any addendum containing statutes, rules or regulations required for consideration of the brief.

DATED this 28th day of November, 2011.

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