No. 09A648

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,

Applicants,

v.

KRISTIN M. PERRY, ET AL.,

Respondents.

SUPPLEMENTAL APPENDIX OF KRISTIN M. PERRY ET AL.

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Exhibit 1

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Appellate Commissioner

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GUIDELINES FOR PHOTOGRAPHING, RECORDING, AND BROADCASTING IN THE COURTROOM

1. General Provisions

(a) Coverage of proceedings in open Court is permissible only in accordance with these guidelines.

(b) A three business day advance notice is required from the media of a request to be present to broadcast, televise, record electronically, or take photographs at a particular session. Such requests must be submitted to the Clerk of Court using the form attached to these guidelines. The panel may waive the three business day requirement under appropriate circumstances.

(c) Upon receipt of a media request, the Clerk of Court will notify the panel and counsel of record of such request. The panel will retain the authority, in its sole discretion, to prohibit camera coverage of any proceeding.

(d) The presiding judge of the panel may limit or terminate media coverage, or direct the removal of camera coverage personnel when necessary to protect the rights of the parties or to assure the orderly conduct of the proceedings.

(e) No direct public expense is to be incurred for equipment, wiring, or personnel needed to provide media coverage.

(f) These guidelines take effect June 21, 1996.

2. Limitations

(a) Coverage of all proceedings in open court is permitted unless prohibited by rule or statute. Camera coverage must be conducted in conformity with applicable statutes and rules.

(b) There shall be no audio pickup or broadcast of conferences between attorneys and their clients, between co-counsel, or among members of the panel.

3. Equipment and Personnel

(a) Only two television cameras, with one operator per camera, and one still photographer will be permitted in the courtroom. The Clerk of Court, or designee, shall identify the location in the courtroom for the camera equipment and operators.

(b) Equipment shall not produce distracting sound or light. Signal lights or devices to show when equipment is operating shall not be visible. Motorized drives, moving lights, flash attachments, or sudden light changes shall not be used. Still cameras that do not operate quietly will not be used at any time when court is in session.

(c) Except as otherwise approved by the Clerk of Court or designee, existing courtroom sound and light systems shall be used without modification. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility, or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance by the Clerk or designee.

(d) All equipment must be set up prior to the opening of the court session and may not be removed until after the conclusion of the court sessions, or during a court recess. Camera operators shall wear suitable attire in the courtroom.

(e) Media personnel shall also adhere to the direction of the Clerk of Court or designee in such matters as security, parking, noise avoidance, and other related issues.

(f) Media personnel may not interview participants in the courtroom until the conclusion of the court session, and the judges have left the bench. The court may, where space is available, make available a separate room where news reporters and photographers may conduct their business with the consent of persons willing to participate in such interviews.

4. News Media Pooling

(a) Camera coverage will be permitted by any person or entity regularly engaged in the gathering and dissemination of news. If coverage is sought by more than one person or entity, a pool system must be used. Each media representative must submit an application on behalf of its organization.

(b) It will be the responsibility of the news media to agree upon a pooling arrangement for their respective news medium. Such pooling arrangements shall include the designation of pool operators, procedures for cost sharing, access to and dissemination of material, and selection of a pool representative if appropriate.

(c) The court may not be called upon to mediate or resolve any dispute as to such arrangements. The Clerk of Court shall be notified of any pooling arrangements at least 24 hours prior to the court proceeding.

5. Educational Institutions

The Court may also authorize the coverage of court proceedings and access to pooled coverage by educational institutions.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____)

Appellant,) APPLICATION FOR PERMISSION
) TO PHOTOGRAPH, RECORD, OR
) BROADCAST FROM THE COURTROOM

v.)

) Court of Appeals Docket No.

_____)
)

Appellee.)

_____)

TO THE COURT:

The undersigned hereby applies for permission to photograph, record or broadcast the above judicial proceeding.

1. Permission is requested to cover the following check all that apply:

_____oral argument _____other (specify)

2. The proceedings are expected to be (check all that apply):

___ televised live ___ radio (broadcast live)

___ videotaped for later broadcast ___ audio-recorded for later broadcast

___ photographed with still camera ___ other (specify)

3. The scope of coverage requested is (check as appropriate):

___ throughout entire proceeding
___ during the following portion(s) of proceeding (specify):

4. Date of coverage: _____

APPLICANT INFORMATION

Name: (Print)_____ Phone:_____

Media Organization: _____

Business Address: _____

Signature: _____ Date: _____

[This form must be submitted to Clerk of Court, at least three (3) business days before the date of requested coverage. Please fax to (415) 355-8551. Thank you.]

Site Map | Intranet (Judiciary Only) | Seminar Disclosures | Judicial Misconduct | Suggestions

Exhibit 2

GIBSON, DUNN & CRUTCHER LLP
LAWYERS
A REGISTERED LIMITED LIABILITY PARTNERSHIP
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December 29, 2009

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Client Matter No.
36330-00001

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

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW

Dear Chief Judge Walker:

I write in response to Proponents' letter of December 28, 2009, opposing the public broadcast of the upcoming trial in this case. Plaintiffs strongly support televising the trial in order to afford the public meaningful access to the proceedings in this exceptionally important case.

It is well within this Court's authority to televise the trial proceedings. The Judicial Council of the Ninth Circuit has expressly authorized district courts to televise civil non-jury matters. *See* News Release, Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts (Dec. 17, 2009), *at* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf. In accordance with that authorization, this Court revised its Local Rule 77-3 on December 22, 2009, to provide that, "[u]nless allowed by a Judge or a Magistrate Judge . . . *for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising . . . in connection with any judicial proceeding[ ] is prohibited." (Revisions italicized).

Proponents are therefore simply wrong when they assert that "Rule 77-3 flatly prohibits the broadcast or webcast of trial proceedings beyond the courthouse." Doc # 324 at 2. As amended, Rule 77-3 expressly affords district courts the discretion to televise proceedings when authorized to do so by the Judicial Council of the Ninth Circuit. Proponents are equally wrong when they contend that "video depiction of the trial proceedings in this case . . . would violate . . . this Court's General Order No. 58." *Id.* at 1. Although Proponents neglect to quote the

relevant language, General Order No. 58 explicitly authorizes this Court to deviate from the general prohibition on courtroom broadcasts imposed by that Order, which provides that, "*[e]xcept as may be otherwise ordered by a judge of this court*, . . . [p]hotographs may not be taken and images may not be captured by any means in the courthouse."

Moreover, while it is the position of the Judicial Conference of the United States that cameras should not be permitted in federal district courts, that policy is not binding on this Circuit or this Court. *See Armster v. United States Dist. Court*, 806 F.2d 1347, 1349 n.1 (9th Cir. 1986) ("Except for judicial disciplinary proceedings, the Judicial Conference does not have binding or adjudicatory authority over the courts."). The nonbinding nature of the Judicial Conference's camera policy is confirmed by the fact that both the Southern District of New York and the Eastern District of New York have policies expressly authorizing judges to broadcast civil proceedings. *See* S.D.N.Y. Local Civ. R. 1.8; E.D.N.Y. Local Civ. R. 1.8.

Televising the bench trial proceedings in this case would also promote deeply rooted First Amendment principles that favor broad public access to judicial proceedings. *See Phoenix Newspapers v. United States Dist. Ct.*, 156 F.3d 940, 946 (9th Cir. 1998) ("One of the most enduring and exceptional aspects of the Anglo-American justice system is an open public trial."). Indeed, the Supreme Court has recognized that a "trial is a public event" and that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Because "it is difficult for [people] to accept what they are prohibited from observing," (*Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980) (op. of Burger, C.J.)), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. Broad public access to judicial proceedings also "protect[s] the free discussion of governmental affairs" that is essential to the ability of "the individual citizen . . . [to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

In light of the overwhelming national public interest in the issues to be decided in this case, providing a broadcast of the proceedings is the most effective means of affording the public its constitutionally guaranteed right of access. More than 13 million Californians cast a vote for or against Prop. 8. And there are hundreds of thousands of gay and lesbian Californians who have a direct stake in the outcome of this case. Ultimately, however, the issues in this case are of such transcendent importance that *every* Californian should be afforded an opportunity to view the proceedings to the greatest extent practicable. Indeed, far from detracting from the right of public access (Doc # 324 at 6), the "highly contentious and politicized" character of the issues to be resolved in this case underscores the importance of providing the public with a meaningful window into the trial proceedings so it can see and hear what is happening in the courtroom. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed."). The "ability to see and to hear a proceeding as i[t] unfolds is a vital

component of the First Amendment right of access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004).

Proponents' concerns about "the possibility of compromised safety, witness intimidation, and/or harassment of trial participants" (Doc # 324 at 6) are utterly unsubstantiated and groundless speculation. Indeed, Proponents willingly thrust themselves into the public eye by sponsoring Prop. 8 and orchestrating an expensive, sophisticated, and highly public multimedia campaign to amend the California Constitution. They certainly did not exhibit a similar fear of public attention when attempting to garner votes for Prop. 8 from millions of California voters, when touting their successful campaign strategy in post-election magazine articles and public appearances (*see* Doc # 191-2; http://www.youtube.com/watch?v=ngbAPVVPD5k), or when voluntarily intervening in this case. In any event, many aspects of the trial—including opening and closing arguments and testimony by the parties' experts (who were designated *after* the Court first raised the possibility of televising the proceedings)—will not even remotely implicate Proponents' purported witness-related concerns. To the extent that this Court determines that witness issues or other factors militate against permitting camera coverage of particular portions of the trial, the Court possesses broad discretion to decide, on a case-by-case basis, whether certain portions of the proceedings should not be televised and can control the format and timing of all broadcast transmissions.

This case is an ideal candidate for the pilot camera project authorized by the Judicial Council of the Ninth Circuit. Plaintiffs stand ready to assist the Court in developing and implementing broadcast procedures, and the Media Coalition has indicated that it is willing to do the same. If this case—which raises constitutional issues of vital importance and overriding interest to millions of Californians and citizens across the Nation—is not appropriate for broadcast under the pilot project, it is difficult to conceive of any case that would be.

Thank you for considering our views on this important issue.

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
Counsel for Plaintiffs

cc: Counsel of Record

Exhibit 3

JUDICIAL COUNCIL

OF THE NINTH CIRCUIT

IN THE MATTER OF PILOT DISTRICT COURT PUBLIC ACCESS PROGRAM APPROVED DECEMBER 16, 2009	No. 2010–2 **ORDER**

KOZINSKI, Chief Judge:

I have received a request from the Chief Judge of the Northern District of California to permit audio-video recording and transmission of pre-trial proceedings and trial in Perry v. Schwarzenegger, No. 3:09-cv-02292-VRW. The request is granted, limited to real-time live streaming to federal courthouses to be designated by the Circuit and Court of Appeals Executive, and subject to such procedures and limitations as the district judge presiding over the case may deem appropriate. The request for posting the files of the videos on the district court's website is still pending.

Exhibit 4

Public Information Office
United States Courts for the Ninth Circuit
Office of the Circuit Executive · 95 7th Street, San Francisco, CA 94103 · (415) 355-8800 · (415) 355-8901 Fax

NEWS RELEASE

January 8, 2010

Contact: David J. Madden (415) 355-8930
dmadden@ce9.uscourts.gov

Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial

SAN FRANCISCO – A live video and audio feed from the upcoming Proposition 8 trial in San Francisco will be available for public viewing in federal courthouses elsewhere in California, and in Oregon, Washington and New York, it was announced today. Video and audio of the trial, which is scheduled to begin Monday, January 11, 2010, at 8:30 a.m. (PDT), will be distributed via electronically secure means to the federal courthouses listed below.

The Proposition 8 case, officially known as *Perry v. Schwarzenegger*, is the first in which video will be recorded and disseminated by the court under a pilot program approved by the Judicial Council of the Ninth Circuit, governing body for federal courts in the western states. The civil, non-jury trial of a constitutional challenge to California's gay marriage ban will be presided over by Chief District Judge Vaughn R. Walker of the U.S. District Court for the Northern District of California.

The U.S. District Court in San Francisco, which has installed cameras and obtained other equipment for video recording, will fully control the process. Because this is an experimental effort, the court cannot guarantee the reliability, accuracy or availability of the audio/video presentation. Further, Judge Walker has reserved the right to terminate any part of the audio, or video, or both, for any duration, or to terminate the complete experiment at any time.

The trial is expected to last about two weeks. While it is intended that the remote viewing locations would be available for the entire trial, adjustments may be made. Due to time zone differences, starting and ending times will differ and viewing hours may be limited at some remote viewing locations. Public access to the remote viewing locations will be on a first-come-first-served basis. No photographs or recording of the audio and video displayed at the remote viewing locations will be allowed.

Information about *Perry v. Schwarzenegger* is available online at the U.S. District Court for the Northern District of California: www.cand.uscourts.gov.

– *more* –

REMOTE VIEWING LOCATIONS

(Additional sites may be announced)

Perry v. Schwarzenneger
Case No. 3:09-cv-02292
U.S. District Court for the Northern District of California

James R. Browning United States Courthouse
95 7th St.
San Francisco, California
Library Conference Room, First Floor

United States Court of Appeals
Pioneer Courthouse
700 S.W. Sixth Avenue
Portland, Oregon
Courtroom, Second Floor

William K. Nakamura United States Courthouse
1010 Fifth Avenue
Seattle, Washington.
Courtroom One, Eighth Floor

Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, New York
Courtroom 8A South, Eighth Floor

Richard H. Chambers United States Courthouse
125 South Grand Avenue
Pasadena, California
Courtroom Three, First Floor

Contact: David J. Madden
(415) 355-8930
dmadden@ce9.uscourts.gov

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Exhibit 5

Magazine

Passing Prop 8: smart timing and messaging convin ced California voters to support traditional marriage.(CASE STUDY)(California Prop osition 8)

Politics Magazine | February 1, 2009 | Schubert, Frank; Flint, Jeff

When we signed our firm up to manage the Yes on Proposition 8 campaign to put the traditional definition of marriage--one man, one woman--into California's constitution, Frank Schubert's brother told him we had "no chance" to win the campaign. That view reflected conventional wisdom. After all, California is one of the most liberal states in the nation. It's a state whose Supreme Court had just legalized same-sex marriage. A state where the Democratic nominee for president hasn't had to aggressively campaign in nearly two decades. A state where millions of young, first-time voters were poised to go to the polls to send a message to George Bush and elect Barack Obama. And a state where for the first time in history, according to a major polling outfit, a majority of voters supported gay marriage.

[ILLUSTRATION OMITTED]

This is the story of how conventional wisdom was stood on its head and how Proposition 8 was enacted by a 700,000-vote margin.

The Early Campaign Period

Schubert Flint Public Affairs signed onto the Yes on Prop 8 campaign right before the first of what would eventually total 18,000 gay weddings took place after the California Supreme Court legalized gay marriage. We immediately faced our first important strategic challenge: How to respond to the marriages? We decided to withhold criticism of the same-sex couples who were getting married (after all, they were simply taking advantage of the rights the Court had granted them), and urged all our supporters to refrain from demonstrations, protests or rallies opposing the marriages. This initial strategic positioning, later validated in qualitative and quantitative research, recognized that passing Proposition 8 would depend on our ability to convince voters that same-sex marriage had broader implications for Californians and was not only about the two individuals involved in a committed gay relationship.

On the first day that same-sex marriages took place, June 16, we fielded nearly 300 media calls from reporters around the globe. Our message was calm and low-key: Our fight was not with the gay couples getting married, our fight was with the flawed reasoning of a narrow majority of the California Supreme Court.

Over the next three months, sympathetic news articles and television reports appeared daily across the state. Traditional marriage supporters were routinely portrayed as right-wingers holding onto outdated, bigoted ideas. Gay marriage backers spent $6 million airing a sympathetic 60-second issue advocacy ad. And state Attorney General Jerry Brown shamelessly rewrote the official summary of the measure in a way clearly designed to bias voters against the initiative.

A survey released by the Field Institute in mid-September showed that fully 55 percent of likely voters were opposed to Prop 8, with just 38 percent in favor. The political elite all but wrote off Proposition 8 as being dead once the Field Poll was published. To make matters worse for us, less than a week after the Field Poll came out, the No on 8 campaign began its television advertising in the state's major media markets.

We worked hard during this period to urge our supporters to have faith that Prop 8 could still be enacted despite what they saw on the news. We organized countless meetings and conference calls of pastors and other campaign leaders. And we restructured our online presence and delivered a stream of messages to supporters designed to keep them informed and engaged.

Define the Terms; Win the Debate

One of the most important aspects of our behind-the-scenes work during this critical early period was to develop messages that would result in voters casting a Yes vote for traditional marriage. To do so, we had to have messages that appealed to a much broader audience than the 40 percent or so of voters who made up our base.

The dynamics of the Proposition 8 campaign were unique. We were asking voters for a Yes vote to ban same-sex

marriage and restore traditional marriage. We strongly believed that a campaign in favor of traditional marriage would not be enough to prevail. We needed to convince voters that gay marriage was not simply "live and let live"--that there would be consequences if gay marriage were to be permanently legalized. But how to raise consequences when gay marriage was so recently legalized and not yet taken hold? We made one of the key strategic decisions in the campaign, to apply the principles of running a "No" campaign--raising doubts and pointing to potential problems--in seeking a "Yes" vote. As far as we know, this strategic approach has never before been used by a Yes campaign.

We reconfirmed in our early focus groups our own views that Californians had a tolerant opinion of gays. But there were limits to the degree of tolerance that Californians would afford the gay community. They would entertain allowing gay marriage, but not if doing so had significant implications for the rest of society.

We probed long and hard in countless focus groups and surveys to explore reactions to a variety of consequences our issue experts identified. The California Supreme Court ruling put gay couples in a protected legal class on the basis of sexual orientation, and then found that gay couples had a fundamental constitutional right to marriage. This decision significantly changed the legal landscape. No longer would it be enough for Californians to tolerate gay relationships, they would have to accept gay marriage as being equivalent to traditional marriage. Tolerance is one thing; forced acceptance of something you personally oppose is a very different matter.

Whenever a conflict occurred between the rights of a gay couple and other rights, the rights of the gay couple would prevail because of their "protected class" legal status. We settled on three broad areas where this conflict of rights was most likely to occur: in the area of religious freedom, in the area of individual freedom of expression, and in how this new "fundamental right" would be inculcated in young children through the public schools. And we made sure that we had very concrete examples we could share with voters of things that had actually occurred.

Of equal importance to developing "consequence" messages was assembling a massive grassroots campaign. In most ballot measure campaigns, volunteers and activists are generally not as inspired as they are in candidate campaigns, where they feel a personal connection to the cause. This is particularly true in California, a state with 40 million residents, 17 million registered voters and well over 20,000 voting precincts. But we knew from the petition phase, where we gathered more than 500,000 signatures, that this campaign could very well prove to be the exception.

Our ability to organize a massive volunteer effort through religious denominations gave us a huge advantage, and we set ambitious goals: to conduct a statewide Voter ID canvass of every voter; to distribute 1.25 million yard signs and an equal number of bumper strips; to have our volunteers re-contact every undecided, soft yes and soft no voter; and to have 100,000 volunteers, five per voting precinct, working on Election Day to make sure every identified Yes on 8 voter would vote. All of these goals, and more, were achieved.

We built a campaign volunteer structure around both time-honored campaign grassroots tactics of organizing in churches, with a ground-up structure of church captains, precinct captains, zip code supervisors and area directors; and the latest Internet and web-based grassroots tools. Our campaign website was rebuilt to serve as an incredibly effective organizing tool. Online volunteer sign-ups were immediately sent electronically to the appropriate ZIP code supervisor for follow up. We set up a statewide voter file with remote access for regional volunteer leaders, which allowed them to input results for canvassing efforts remotely, and then download and print updated voter lists.

We held the campaign's first statewide precinct walk the weekend of Aug. 16. We had hoped for 20,000 volunteers, which would have been unprecedented in California ballot initiative politics, but were stunned when almost 30,000 people walked their neighborhoods that first weekend.

We produced campaign materials in more than 40 languages, and worked with church and community leaders to distribute these through the many ethnic networks that make up the fabric of California.

[ILLUSTRATION OMITTED]

This intense commitment to distributing materials throughout the state was the result of another key strategic decision. Supporting traditional marriage is not considered to be "politically correct. "We wanted voters who supported our position to know that they were not alone and so we made sure they saw our signs in their neighborhoods and our campaign materials at their church. And if they were part of an ethnic minority, all these were in their native language.

The final phase of the volunteer campaign, GOTV, was really a month-long operation. California allows early voting,

starting 29 days ahead of Election Day. From Day 1 of this period, we tracked voters who either appeared on the permanent absentee voter list, or had applied for a vote-by-mail ballot. Those who were identified as persuadable received additional volunteer and direct mail contacts. Definite Yes on 8 voters were reminded to return their ballots as early as possible. The effort paid off, as the early returns reported on Election Night--which consisted of votes cast before Election Day--showed us with a commanding 57 percent to 43 percent lead.

Fundraising was also a critical activity of this early period, the success of which enabled us to ultimately exceed our initial voter contact objectives. By this time, leaders of the Church of Jesus Christ of Latter Day Saints had endorsed Prop 8 and joined the campaign executive committee. Even though the LDS were the last major denomination to join the campaign, their members were immensely helpful in early fundraising, providing much-needed contributions while we were busy organizing Catholic and Evangelical fundraising efforts. Ultimately, we raised $22 million from July through September with upwards of 40 percent coming from members of the LDS Church. Our fundraising operation also relied heavily on small contributions from some 60,000 individual donors via an extensive direct mail operation, and an extraordinarily effective online fundraising campaign. When we filed our finance report electronically with the secretary of state, it was more than 5,000 pages thick and crashed the fishing system. We ultimately raised more than $5 million online, and $3 million from direct mail.

Our initial television ad began airing on Sept. 29, a week after the other side began its campaign ads, and six weeks after its issue advocacy spot began airing. We knew that this initial ad needed to be a home run--and boy was it! Our campaign's general counsel had alerted us to a press conference San Francisco Mayor Gavin Newsom held following the Supreme Court's marriage decision in May. Like Howard Dean once did, Newsom got increasingly excited the longer he addressed the crowd until, with a smirk on his face and his arms fully extended, he exclaimed, "This door's wide open now. It's gonna happen--whether you like it or not." That 7-second sound bite perfectly summarized for California voters why this issue was before them, reminding voters that four judges had overruled four million voters by imposing same-sex marriage on California. We then segued into potential consequences by featuring a prominent law school professor warning about implications for religious freedom and freedom of expression, and letting voters know that as a result of the court's decision, gay marriage would be taught in the public schools.

The "Whether You Like It or Not" television ad immediately solidified (and excited) our base and captured the attention of voters across the state. We invested heavily in airing this television ad and a companion radio spot. We had a lot of ground to make up (our internal polls had us behind by 6 points), but more importantly, it was critical for us to define Prop 8 on our terms. In a little over a week of advertising, we went from being significantly behind, to taking the lead in two published polls.

The Response Period

The gay community sounded the alarm by releasing to the gay media an internal poll showing them behind and telling their supporters they would lose unless more money was raised. This emergency cry for contributions was incredibly effective. Whereas they had raised $15 million in the previous nine months, they raised another $25 million in the ensuing seven weeks of the campaign.

But their failure to respond to the "consequences" messages (especially the education message) in a timely fashion ultimately led to their downfall. After blanketing the state with "Whether You Like It or Not," we focused our message on education. We ran an ad featuring a young Hispanic girl coming home from school, explaining how she had learned in class that a prince could marry another prince, and she could marry a princess! This ad was based on the actual experience in Massachusetts, the only state in the nation where gay marriage had been legalized long enough to see how it would be handled by the public school system. This was followed by another education ad, this one featuring a Massachusetts couple whose son had been introduced to gay marriage in second grade. The launch of that ad included a press conference with the Massachusetts couple and corresponded with the kick-off of a statewide bus tour designed to rally our supporters before the final push on Election Day.

The response to our ads from the No on 8 campaign was slow and ineffectual. They enlisted their allies in the education system to claim that we were lying. They held press conferences with education leaders to dismiss our claims. They got newspaper editorial boards to condemn the ads as false. What they never did do, because they couldn't do, was contest the accuracy of what had happened in Massachusetts.

Finally, three weeks after the Yes on 8 campaign had introduced education as a message, the No on 8 campaign

responded with what would be their best ad of the campaign. It featured State Superintendent of Public Instruction Jack O'Connell claiming that Prop 8 had nothing to do with education and that our use of children in our ads was "shameful." This in-your-face response, much delayed but very effective, foretold the final period of the campaign--it would be largely about education.

Even though our campaign clearly had the better ads and grassroots operation, the success of the No side's fundraising effort threatened to undo all our work. Voters were seeing their commercials at least twice as often as ours as the campaign headed into its final 12 days. Our lead evaporated. Frank Schubert wrote an e-mail to our 90,000 online supporters called "Code Blue for Marriage," letting them know we needed more money to be victorious. This e-mail, along with other emergency fundraising activities, helped produce $7.5 million in contributions from people of faith in the next 72 hours.

The Final Push

Our strategy had anticipated that the No on 8 campaign would label as "shameful lies" any claim that gay marriage had anything to do with schools, so we went to great lengths to document our ads. We were prepared to play this scenario out to the finish, trading our ads of what happened in Massachusetts, with the No side's ads saying it wouldn't happen in California. But then we got the break of the election. In what may prove to be the most ill-considered publicity stunt ever mounted in an initiative campaign, a public school in San Francisco took a class of first graders to City Hall to witness the wedding of their lesbian teacher. And they brought along the media.

Now we not only had an example of something that had happened in California (as opposed to might happen), we had video footage to prove it. Within 24 hours of the No side airing their best ad, the one featuring O'Connell claiming that Prop 8 had nothing to do with schools, we were on statewide TV showing bewildered six-year-olds at a lesbian wedding courtesy of their local public school.

There were multiple skirmishes in the press over the education issue during the final days of the campaign. The other side claimed the wedding episode wasn't really as we described it, while we defended the ad as accurate and highlighted other examples where gays had forced their agenda into the public schools (including an episode in Hayward where a school celebrated "coming out week" while urging kindergartners to sign pledge cards promising to be an ally of gay students).

After several days of dueling ads featuring Jack O'Connell and kids at the lesbian wedding, the No side effectively conceded they had lost the education debate. They pulled the O'Connell ad and went in a new direction in the final few days--attempting to equate a Yes vote with racial discrimination. One ad with U.S. Sen. Dianne Feinstein said that regardless of how people felt about gay marriage, "we must always oppose" discrimination. They even tried to compare banning gay marriage to interning Japanese Americans during World War II camps in an ad narrated by Samuel L. Jackson.

We decided to not respond to this line of attack, confident that it would backfire. The basic message that supporters of traditional marriage are bigots, guilty of discrimination, had never worked in focus groups. For liberal whites like Feinstein to lecture black Californians about discrimination was not a winning message. We brought into rotation a positive ad that reminded voters, in a non-threatening, calm way about the potential consequences to California, and especially children, if gay marriage was permanently legalized.

As the campaign headed into the final days, we launched a "Google surge." We spent more than a halfmillion dollars to place ads on every single website that had advertising controlled by Google. Whenever anyone in California went online, they saw one of our ads in the final two days of the election.

We always believed that if we went into Election Day tied, or even a point or two behind, that we would win. This was because of the superior nature of our GOTV effort and because the history of polling on the gay marriage issue always understated support for traditional marriage.

Our last pre-election tracking poll showed the race tied at 48 percent on Election morning. We won 52.3 percent to 47.7 percent, a 700,000-vote margin. Post-election polls showed that upwards of 70 percent of African American voters supported Prop 8. Latinos voted Yes by about 56 percent, as did a majority of Asian voters.

Members of the Mormon faith played an important part of the Yes on 8 coalition, but were only a part of our winning coalition. We had the support of virtually the entire faith community in California. Prop 8 didn't win because of the

Mormons. It won because we created superior advertising that defined the issues on our terms; because we built a diverse coalition; and, most importantly, because we activated that coalition at the grassroots level in a way that had never before been done.

The Prop 8 victory proves something that readers of Politics magazine know very well: campaigns matter.

Frank Schubert is president of Schubert Flint Public Affairs. Jeff Flint is a partner at the firm.

Exhibit 6

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTE ORDER

VAUGHN R. WALKER
United States District Chief Judge

DATE: August 19, 2009

COURTROOM DEPUTY: Cora Klein **Court Reporter:** Belle Ball

CASE NO. C 09-2292 VRW

CASE TITLE: KRISTIN PERRY et al v. ARNOLD SCHWARNEGGER et al

COUNSEL FOR PLAINTIFFS:
David Boies, Theodore B Olson
Theodore Boutrous, Christopher Dusseault
Theane Kapur, Enrique Monagas
Jeremy Goldman, Theodore Uno
Matthew D McGill

PLAINTIFF INTERVENORS:
Our Family Coalition:
Shannon P Minter, Christopher Stoll,
James Esseks, Elizabeth Gill,
Matthew Coles, Jennifer Pizer

PLAINTIFF INTERVENOR:
City and County of San Francisco:
Therese Stewart, Christine Van Aken
Erin Bernstein, Dennis Herrera

DEFENDANTS:
Arnold Schwarzenegger, Mark Horton, Linette Scott:
Kenneth C Mennemeier

Edmund G Brown- Attorney General of California:
Gordon Burns, Tamar Pachter

Patrick O'Connell - Clerk Recorder for County of Alameda:
Claude Kolm, Lindsey Stern

Dean C Logan - Registrar Recorder/County Clerk for the County of Los Angeles:
Judy Whitehurst

INTERVENOR DEFENDANTS:
Prop 8 Official Proponents and protectmarriage.com:
Charles J Cooper
David H Thompson
Campaign For California Families:
Rena Lindevaldsen

PROCEEDINGS and RESULTS:

The Court heard argument from counsels and ruled as follows:

1. Motion to intervene as party plaintiffs filed by the Our Family coalition, Doc #79 - denied.
2. Motion for intervention as intervenor-defendant filed by Campaign for California Families, Doc # 91 - denied.
3. Motion to intervene filed by City and County of San Francisco, Doc #109 - granted in part to allow San Francisco to present issue of alleged effect on governmental interests.
4. Trial setting and scheduling as follows:
   a. Designation of witnesses presenting evidence under FRE 702, 703 or 705 and production of written reports pursuant to FRCP 26(a)(2)(B): October 2, 2009;
   b. Dispositive motions to be served and filed so as to be heard on October 14, 2009 at 10 AM;
   c. Completion of all discovery, except for evidence intended solely to contradict or rebut evidence on the same subject matter identified by another party under FRCP 26(a)(2)(B): November 30, 2009;
   d. Completion of discovery on the same subject matter identified by another party under FRCP 26(a)(2)(B): December 31, 2009; see FRCP 26(a)(2)(C)(ii);
   e. Pretrial conference: December 16, 2009 at 10 AM;
   f. Trial: January 11, 2010 at 8:30 AM.
5. With respect to any disputes regarding discovery, counsel are directed to comply with Civ LR 37-1(b) and the court's standing order 1.5.
6. In the absence of the assigned judge, counsel are directed to bring any discovery disputes before Magistrate Judge Joseph C Spero.