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December 28, 2009

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

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

I write on behalf of Defendant-Intervenors ("Proponents") to reiterate our objections, conveyed in my letter of October 5, to televising the proceedings in this case beyond the confines of the courthouse. *See* Doc. No. 218.

Proponents respectfully submit that photographic or video depiction of the trial proceedings in this case is not authorized, and it would violate this Court's Local Rule 77-3, this Court's General Order No. 58, and the policy of the Judicial Conference of the United States. As explained in detail below, the concerns animating the policy adopted by the Judicial Conference – particularly the unacceptable danger that the right to a fair trial will be undermined and the potential for intimidation of witnesses and litigants – apply with particular force in this case.

The Media Coalition seeks leave to broadcast and webcast the trial proceedings in this case, relying upon a press release issued by the Ninth Circuit on December 17, 2009. *See* Doc # 313. However, the Judicial Council for the Ninth Circuit has not yet issued an order or resolution setting forth the policies and procedures that will govern the pilot program described in the press release (for example, the Ninth Circuit's press release does not specify whether a trial may be broadcast over the objection of one of the parties). More importantly, the Ninth Circuit has not yet provided notice and an opportunity to comment on the pilot program or the (as yet unpromulgated) policies and procedures that will govern it. As explained below, this Court is bound to comply with its Local Rule unless and until it either is amended by this Court following notice and an opportunity to comment or is abrogated by order of the Judicial Council following notice and an opportunity to comment. *See* FED. R. CIV. P. 83(a)(1); 28 U.S.C. § 2071(b) & (c)(1); 28 U.S.C. § 332(d).

1. Current Governing Policy

This Court's Rule 77-3 flatly prohibits the broadcast or webcast of trial proceedings beyond the courthouse: "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." Likewise, this Court's General Order No. 58 provides that the "[p]olicy of the Judicial Conference of the United States prohibits, in both civil and criminal cases in all district courts, broadcasting, televising, recording, or photographing courtroom proceedings for the purposes of public dissemination." *See also* United States District Court for the N.D. Cal., General Information Guide for Journalists at 4 (October 29, 2009) ("Broadcasting of proceedings is prohibited by policy of the Judicial Conference of the United States.").

The Judicial Conference of the United States adopted the current policy in 1996. *See* JCUS-SEP 96, p. 54, *available at* http://www.uscourts.gov/judconf/96-Sep.pdf. The policy is based upon the potentially negative impact that the public broadcast of federal trial court proceedings could have on the administration of justice. After an extensive study of the issue in 1994, the Judicial Conference rejected proposals for public broadcast of trial court proceedings. *See* JCUS-SEP 94, pp. 46-47, *available at* http://www.uscourts.gov/judconf/94-Sep.pdf. "Based upon the data presented, a majority of the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern, and the Conference declined to approve the Committee's recommendation to expand camera coverage in civil proceedings." *Id*.

In testimony before Congress in September 2007, the Chair of the Judicial Conference's Court Administration and Case Management Committee explained the Judicial Conference's position, in part, as follows:

> The Judicial Conference position is based on a thoughtful and reasoned concern regarding the impact cameras could have on trial proceedings. [Public broadcast] has the potential to undermine the fundamental rights of citizens to a fair trial. It could jeopardize court security and the safety of trial participants, including judges, U.S. attorneys, trial counsel, U.S. marshals, court reporters, and courtroom deputies. The use of cameras in the trial courts could also raise privacy concerns and produce intimidating effects on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding.
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> Because cameras in trial courts could profoundly and negatively impact the trial process, the Judicial Conference strongly opposes any legislation that would allow the use of cameras in the United States district courts.

Cameras in the Courtroom: The "Sunshine in the Courtroom Act of 2007," H.R. 2128: Hr'g Before the H. Comm. on the Judiciary, 110th Cong. (Sept. 27, 2007) (statement of The Honorable John R. Tunheim, Judge, United States District Court for the District of Minnesota and Chair of the Court Administration and Case Management Committee of the Judicial Conference), *available at* http://www.uscourts.gov/testimony/ Tunheim_cameras092707.pdf.

2. The Position of the Ninth Circuit Judicial Council

Shortly after the Judicial Conference of the United States adopted its policy against the broadcast of federal district court proceedings, the Judicial Council of the Ninth Circuit followed suit, "vot[ing] to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in courtrooms on May 24, 1996." *See* Resolution 1: Instituting a Circuit Rule Permitting Photographing, Recording and Broadcasting in Non-Jury, Civil Cases Before the District Courts at 1 (copy submitted to the Judicial Conference of the United States on May 7, 2009) (attached as part of Exhibit A) at 3.

In July 2007, the Ninth Circuit Judicial Conference adopted a resolution recommending that the Judicial Conference of the United States change its policy to permit the broadcast of civil, non-jury trials. *Id*. at 2. The Ninth Circuit Judicial Conference also recommended that, "to the extent permitted by Judicial Conference [of the United States] procedures, this Circuit should adopt a Rule that would allow the photographing, recording, and broadcasting of non-jury, civil proceedings before the District Courts in the Ninth Circuit." *Id*. Despite these recommendations, no action was taken by the Ninth Circuit Judicial Council for nearly two years.

Finally, in May 2009, the Ninth Circuit Judicial Council forwarded the recommendation to the Judicial Conference of the United States. *See* Letter from Cathy A. Catterson to The Honorable John R. Tunheim (May 7, 2009) (attached as Exhibit A at 1). During the interim, "[t]he Ninth Circuit Judicial Council [had] considered the resolution at a number of meetings following the 2007 Judicial Conference but deferred action to await possible developments at the national level." *Id*. For reasons left unstated, the Ninth Circuit Judicial Council decided in May 2009 "that it is appropriate to forward the resolution now and ask that it [be] considered by [the Committee of the Judicial Conference of the United States on Court Administration and Case Management] at its June meeting." *Id*.

As noted above, the Judicial Conference of the United States has not retreated from its policy against the use of cameras in federal district court proceedings. Indeed, as recently as July 2009, the Judicial Conference of the United States strongly reiterated its concern about cameras in the courtroom in a letter to Congress. The Conference again stressed that "[t]he Federal Judiciary is . . . very concerned that the effect of cameras in the courtroom on participants would be to impact negatively on the trial process and thereby interfere with a fair trial." Letter from

James C. Duff to Senators Patrick J. Leahy and Jeff Sessions (July 23, 2009) (attached as Exhibit B) at 2. Among many other concerns, the Judicial Conference again emphasized its considered judgment that "[t]elevision cameras can intimidate litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast." *Id*.

On December 17, 2009, the Ninth Circuit issued a press release announcing that the Ninth Circuit Judicial Council "has approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit." *See* News Release, Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts, *available at* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf. The press release provided no details as to how the program will be implemented other than to state that "[c]ases to be considered for the pilot program will be selected by the chief judge of the district court in consultation with the chief circuit judge." *Id*. Nor has the Ninth Circuit adopted a Circuit Rule allowing the broadcast of non-jury civil trials as recommended by the 2007 Ninth Circuit Judicial Conference resolution. According to the Office of the Circuit Executive (the contact listed on the press release), there is no resolution, order, or other publicly available information setting forth the policies and procedures that will govern the new pilot program. Nor has the Ninth Circuit Judicial Council taken any action to abrogate this Court's Local Rule 77-3. And it has not yet provided notice and the opportunity to comment concerning the program.

In these circumstances, it is clear that this Court's Local Rule 77-3 "has the force of law," *Weil v. Neary*, 278 U.S. 160, 169 (1929), and therefore remains binding on this Court. *See, e.g.*, *United States v. Yonkers Bd. of Education*, 747 F.2d 111, 112 (2d Cir. 1984) ("So long as [local rule prohibiting television broadcasting of judicial proceedings] do[es] not conflict with rules prescribed by the Supreme Court, congressional enactments, or constitutional provisions, [it has] the force of law. Accordingly, [such local rule is] binding on the district judges until properly amended or repealed.") (citations omitted); *United States v. Hastings*, 695 F.2d 1278, 1279 nn.4-5 (11th Cir. 1983) (district court "was bound by" local rule "prohibit[ing] television cameras in the courtroom").

This Court is, of course, authorized to amend its local rules, but Congress has provided by law that "[a]ny rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 2071(b); *see also* FED. R. CIV. P. 83(a)(1) ("After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice."). This Court's own rules are to the same effect. *See* Local Rule 83-1 ("The local rules of this Court may be modified or amended by a majority vote of the active Judges of the Court in accordance with the procedures set forth in this rule."); Local Rule 83-3(a) ("Before becoming effective, any proposed substantive modification of the local

rules shall be subject to public comment in accordance with FRCivP 83."). This Court must also first "appoint an advisory committee for the study of the rules of practice … of such court," which "shall make recommendations to the court concerning such rules." 28 U.S.C. § 2077(b); *see also* Local Rule 83-1 ("Any proposed substantive modification or amendment of these local rules must be submitted to a Local Rules Advisory Committee for its review ….").

The circuit judicial council is authorized to modify or abrogate a district court's local rules. *See* 28 U.S.C. § 2071(c)(1); FED. R. CIV. P. 83(a)(1). But its authority to do so is limited in two significant respects. First, the Judicial Council is authorized to abrogate this Court's rules *only* if the Council determines that the rule is "inconsistent" with the Federal Rules of Civil Procedure. Congress has specified that "[e]ach judicial council shall periodically review the rules which are prescribed under section 2071 of this title by district courts within its circuit for consistency with rules prescribed under section 2072 of this title [i.e., the Federal Rules]. Each council may modify or abrogate any such rule found inconsistent in the course of such a review." 28 U.S.C. § 332(d)(4). Obviously, this Court's Local Rule 77-3 is entirely consistent with the Federal Rules – indeed, it adopts and applies the policy adopted by the Judicial Conference of the United States.

Second, even if the Ninth Circuit Judicial Council had the substantive authority to abrogate this Court's Local Rule 77-3, Congress has prescribed specific procedures that must be followed:

> Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public.

28 U.S.C. § 332(d)(1); *see also In re Sony BMG Music Entertainment*, 564 F.3d 1, 8 (1st Cir. 2009) (holding that notice and opportunity to comment are not required when circuit judicial council review did not result in resolution "to modify or abrogate any local rule but, rather, endorsed existing practice in the districts within the circuit").

Because none of these procedures has been followed (indeed, the Ninth Circuit Judicial Council has not as yet even purported to abrogate Local Rule 77-3), the Local Rule remains in force and binding on this Court. In similar circumstances, the First Circuit recently issued a writ of mandamus overturning an order entered by the District Court of Massachusetts permitting a webcast of a trial. *See In re Sony BMG Music Entertainment*, 564 F.3d 1 (1st Cir. 2009). As in this case, the governing Local Rule barred the broadcast. *See id.* at 10 (reprinting rule). The trial court had sought to read into the text discretionary authority to deviate from the rule, but the

First Circuit rejected that effort. In so holding, the Court of Appeals emphasized the importance of the policy adopted by the Judicial Conference of the United States based on its conclusion that " 'the intimidating effect of cameras' in the courtroom presented 'cause for concern.' " *Id*. at 7 (quoting JCUS-SEP 94, p. 46, *available at* http://www.uscourts.gov/judconf/94-Sep.pdf). The First Circuit held that "the Judicial Conference's unequivocal stance against the broadcasting of civil proceedings (save for those few exceptions specifically noted in the policy itself), is entitled to substantial weight." *Id*. The Court stressed its belief that "the district court, institutionally, would construe its rule to avoid a head-on clash with the national standard." *Id*.[1] *See also In re Complaint Against District Judge Billy Joe McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009) (Easterbrook, C.J.) (finding that district court judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" by permitting live broadcast of a civil trial with the agreement of the parties).

3. The Judicial Conference's Fair Trial Concerns Apply With Great Force in This Case

Publicly televising the proceedings in this case would give rise to the Judicial Conference's consistent and oft-repeated concerns "that the effect of cameras in the courtroom on participants would be to impact negatively the trial process and thereby interfere with a fair trial." Letter from James C. Duff to Senators Patrick J. Leahy and Jeff Sessions (July 23, 2009) (attached as Exhibit B) at 2. Most importantly, given the highly contentious and politicized nature of Proposition 8 and the issue of same-sex marriage in general, the possibility of compromised safety, witness intimidation, and/or harassment of trial participants is very real. Indeed, lead counsel for Plaintiffs has acknowledged that "widespread economic reprisals against financial supporters of . . . Proposition 8" resulted from public disclosure of the names of donors during the campaign. Doc #187-1 at 6-7.

And the record of other forms of harassment against Proposition 8 supporters is well documented. *See* Doc #s 187-1, 187-2 at ¶¶ 10-12; 187-9 at ¶¶ 6-8; 187-9 at 12-15; 187-11; 187-12 at ¶¶ 5-6; 187-13 at ¶ 8; *see also* Thomas M Messner, *The Price of Prop 8*, The Heritage Foundation, *available at* www.heritage.org/Research/Family/bg2328.cfm ("expressions of support for Prop 8 have generated a range of hostilities and harms that includes harassment, intimidation, vandalism, racial scapegoating, blacklisting, loss of employment, economic hardships, angry protests, violence, at least one death threat, and gross expressions of anti-

[1] The *Sony* Court also found support in the 1996 resolution of the First Circuit Judicial Council embracing the position taken by the Judicial Conference. *See Sony BMG*, 564 F.3d at 7-8. The Ninth Circuit Judicial Council adopted a similar resolution in 1996, and has not as yet issued an order or resolution formally rescinding it, though the December 17 press release does indicate that the Council has taken a different stance. As demonstrated above, the press release standing alone is insufficient to override this Court's Local Rule and the policy adopted by the Judicial Conference of the United States.

religious bigotry"). This campaign of harassment and reprisal has often been "targeted and coordinated," *id.*, and the retaliation has often been quite serious. *See, e.g.*, Doc # 187-11 at 81 (Brad Stone, Disclosure, Magnified on the Web, N.Y. Times (Feb. 8, 2009) ("Some donors to groups supporting the measure have received death threats and envelopes containing a powdery white substance….").

Relatedly, as the Judicial Conference has emphasized, televising the trial would impinge upon the privacy interests of witnesses, "some of whom are only tangentially related to the case, but about whom very personal and identifying information might be revealed." Letter from James C. Duff to Senators Patrick J. Leahy and Jeff Sessions (July 23, 2009) (attached as Exhibit B) at 2. Already, one website "takes the names and ZIP codes of people who donated to the ballot measure … and overlays the data on a Google map." Doc # 187-11 at 81. Another website was set up with the name, hometown, home phone numbers, workplace, workplace contact information, and pictures of Prop 8 supporters so that "whenever someone Googles them this [website] will come up." *Id*. at 55, 62, 65-66, 73, 77.

With this background, it is not surprising that potential witnesses have already expressed to Proponents' counsel their great distress at the prospect of having their testimony televised. Indeed, some potential witnesses have indicated that they will not be willing to testify at all if the trial is broadcast or webcast beyond the courthouse.

Finally, permitting the recording and broadcast of these proceedings over Proponents' objections would be particularly unfair in view of the fact that the governing rules unequivocally forbade cameras in the courtroom at the time Proponents voluntarily intervened in this case.

For these reasons, Proponents must respectfully object to any departure from this Court's Rule 77-3 and the policy of the Judicial Conference of the United States.

Sincerely,

/s/ Charles J. Cooper

Charles J. Cooper
Counsel for Defendant-Intervenors