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15 ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH,  
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 16 and PROTECTMARRIAGE.COM – YES ON 8, A  
 PROJECT OF CALIFORNIA RENEWAL

17 \* Admitted *pro hac vice*

18 **UNITED STATES DISTRICT COURT**  
 19 **NORTHERN DISTRICT OF CALIFORNIA**

20 KRISTIN M. PERRY, SANDRA B. STIER,  
 PAUL T. KATAMI, and JEFFREY J.  
 21 ZARRILLO,

22 Plaintiffs,

23 CITY AND COUNTY OF SAN FRANCISCO,

24 Plaintiff-Intervenor,

25 v.

26 EDMUND G. BROWN, JR., in his official  
 capacity as Governor of California; KAMALA  
 27 D. HARRIS, in her official capacity as Attorney

CASE NO. 09-CV-2292 JW

**SUPPLEMENTAL BRIEF IN  
 SUPPORT OF MOTION FOR ORDER  
 COMPELLING RETURN OF TRIAL  
 RECORDINGS OF DEFENDANT-  
 INTERVENORS DENNIS  
 HOLLINGSWORTH, GAIL J.  
 KNIGHT, MARTIN F. GUTIERREZ,  
 MARK A. JANSSON, AND  
 PROTECTMARRIAGE.COM**

Chief Judge James Ware

Date: August 29, 2011

Time: 9:00 a.m.

Location: Courtroom 5, 17<sup>th</sup> Floor

1 General of California; MARK B. HORTON, in  
2 his official capacity as Director of the California  
3 Department of Public Health and State Registrar  
4 of Vital Statistics; LINETTE SCOTT, in her  
5 official capacity as Deputy Director of Health  
6 Information & Strategic Planning for the  
7 California Department of Public Health;  
8 PATRICK O'CONNELL, in his official capacity  
9 as Clerk-Recorder for the County of Alameda;  
10 and DEAN C. LOGAN, in his official capacity  
11 as Registrar-Recorder/County Clerk for  
12 the County of Los Angeles,

13  
14 Defendants,

15 and

16 PROPOSITION 8 OFFICIAL PROPONENTS  
17 DENNIS HOLLINGSWORTH, GAIL J.  
18 KNIGHT, MARTIN F. GUTIERREZ, HAK-  
19 SHING WILLIAM TAM, and MARK A.  
20 JANSSON; and PROTECTMARRIAGE.COM –  
21 YES ON 8, A PROJECT OF CALIFORNIA  
22 RENEWAL,

23 Defendant-Intervenors.

24  
25 Additional Counsel for Defendant-Intervenors

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\* Admitted *pro hac vice*

1 In their motion for an order compelling return of the video recordings of the trial  
2 proceedings in this case, Proponents demonstrated that by playing a portion of these recordings  
3 in a public speech, former Chief Judge Walker (1) violated his own order placing those  
4 recordings under seal, (2) violated the clear terms of Local Rule 77-3, which prohibits the  
5 broadcast or other transmission of trial proceedings beyond the confines of the courthouse, (3)  
6 broadcast or other transmission of trial proceedings beyond the confines of the courthouse, (3)  
7 contravened the longstanding policies of the Judicial Conference of the United States and the  
8 Judicial Council of the Ninth Circuit prohibiting public broadcast of trial proceedings, (4) defied  
9 the spirit and precedential force of the United States Supreme Court’s decision staying Judge  
10 Walker’s earlier attempt to publicly broadcast these trial proceedings, and (5) repudiated his own  
11 solemn commitment in open court that the video recordings were being made solely for his  
12 judicial use in chambers – specifically, to assist him in preparing the findings of fact. *See* Doc.  
13 No. 771-1 at 1-2, 13-18; Doc. No. 771-7 at 1-4, 7-8.

15 In denying Proponents’ motion, this Court did “not reach any issue with respect to Judge  
16 Walker’s use of the trial recordings.” Doc. No. 798 at 4 n.6. Rather, because “Judge Walker  
17 voluntarily lodged his chambers copy of the video recording with the Court,” this Court denied  
18 Proponents’ motion as moot “insofar as it requests an order requiring Judge Walker to return his  
19 copy of the video recording.” *Id.* at 3-4 n.6. This Court nevertheless “g[ave] notice that it  
20 intends to return the trial recordings to Judge Walker as part of his judicial papers,” and invited  
21 “[a]ny party who objects” to “articulate its opposition in the supplemental briefing in accordance  
22 with the schedule outlined” in its order. *Id.* at 5.

24 For the reasons set forth in the briefs supporting Proponents’ motion for an order  
25 compelling the return of the trial recordings, and as briefly summarized below, Proponents object  
26 to the return of the trial recordings to Judge Walker. In the event that this Court nevertheless  
27 proceeds with its stated intention, it should enter an order making clear that Judge Walker may  
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1 not publicly broadcast or disseminate these recordings, but must strictly comply with the terms  
2 of the Protective Order governing the Parties' retention of the recordings.

3 1. In video recording the trial over Proponents' objections, Judge Walker solemnly  
4 represented on the record that the trial recordings would be would be used solely in chambers to  
5 assist with his preparation of his findings of fact. Doc. No. 771-1 at 2-3, 7-8, 16; Doc. No. 771-7  
6 at 1; Doc. No. 463 at 2. Had he indicated any intention to remove the trial recordings from "the  
7 confines of the courthouse," Local Rule 77-3, and to use them for personal purposes unrelated to  
8 his responsibilities as the trial judge—let alone an intention to publicly broadcast the trial  
9 recordings outside the courthouse—his recording of the trial would have been unlawful from the  
10 outset and Proponents would have taken action to enforce Local Rule 77-3 and the Supreme  
11 Court's stay that was in effect at that time. Under these circumstances, the video recordings of  
12 the trial proceedings cannot properly be regarded as personal property that may be removed from  
13 the courthouse and used for purposes for which the recordings could not lawfully have been  
14 created in the first place. If there were any room for doubt on this point, Judge Walkers'  
15 improper post-trial use of the recordings in a public speech confirms that the recordings should  
16 not be returned to him.

17 2. If this Court nevertheless decides to return the recordings to Judge Walker, it  
18 should make clear that he must refrain from further public dissemination of those recordings.  
19 For even if the recordings could properly be regarded as Judge Walker's judicial papers (and  
20 they cannot), "Judges whose papers contain notes or documents from sealed cases ought to  
21 consult their local court rules, and the access restrictions on the chambers files should parallel  
22 those imposed on the case files." Federal Judicial Center, *A Guide to the Preservation of*  
23 *Federal Judges' Papers* 15 (2d ed. 2009). Here, of course, the case file of these recordings is  
24 sealed pursuant to Judge Walker's own order. *See* Doc. No. 771-1 at 11-12. Indeed, given Judge  
25  
26  
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1 Walker's previous disregard of that order, the local rules, official judicial policies, the United  
2 States Supreme Court, and his own representations on the record, this Court should direct Judge  
3 Walker to maintain his copy of the trial recordings in strict compliance with the same terms of  
4 the Protective Order that apply to the parties to this case.  
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6 DATED: July 15, 2011

Respectfully Submitted,

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8 ATTORNEYS FOR DEFENDANT-INTERVENORS  
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10 MARTIN F. GUTIERREZ, MARK A. JANSSON, AND  
11 PROTECTMARRIAGE.COM – YES ON 8, A PROJECT  
12 OF CALIFORNIA RENEWAL

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By: /s/ Charles J. Cooper  
Charles J. Cooper