

TUESDAY, JANUARY 19, 2010

## Cameras in Courts: Broadcast of Prop. 8 Trial

By order of the U.S. Supreme Court, the Proposition 8 trial now proceeding before the Honorable Vaughn Walker in the U.S. District Court for the Northern District of California will not be broadcast to other federal courthouses throughout the country. The Court's January 13 *per curiam* decision in the case of *Hollingsworth v. Perry* stayed the district court's January 7 order requesting that Chief Judge Alex Kozinski of the 9th Circuit approve the trial for video broadcasting as part of a pilot project. The Court split 5-4, with Justices Stephen G. Breyer, John Paul Stevens, Ruth Badar Ginsburg, and Sonia Sotomayor dissenting.

The plaintiffs in the underlying case, *Perry v. Schwarzenegger*, challenge the constitutionality of Proposition 8, passed by the California voters in November 2008. Proposition 8 added Section 7.5 to Article 1 of the California Constitution, providing that "[o]nly marriage between a man and a woman is valid or recognized in California." The challengers argue that Proposition 8 violates the U.S. Constitution's guarantees of due process and equal protection by singling out gay and lesbian individuals for different treatment.



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An impediment to broadcasting the trial was Civil Local Rule 77-3, which expressly banned public broadcasting of courtroom proceedings. To eliminate this impediment, the district court announced an amendment to the rule to allow participation in a pilot project authorized by the Judicial Council of the 9th Circuit. After soliciting public comment, the court announced the new rule was effective as of Dec. 22, 2009, pursuant to a federal statute that permitted expedited revision in cases of "immediate need."

After a hearing on January 6, the district court announced that an audio and video feed of the trial would stream live to certain federal courthouses. Pending approval from Chief Judge Kozinski, the trial would also be broadcast online on the popular Internet site YouTube, with some delay due to processing requirements. On January 8, Chief Judge Kozinski approved the request to broadcast the trial to other federal courthouses, but did not address the request to broadcast online, due to anticipated technical difficulties. This part of the controversy was not directly before the Supreme Court, and the Court did not purport to rule on it.

Defenders of Proposition 8 applied to the Supreme Court for a stay, arguing that video broadcasting would chill their witnesses' testimony and that the revision to Rule 77-3 was unauthorized. By federal statute, a local rule may not be amended without "appropriate" public notice and opportunity to comment, unless the change qualifies for an exception based on the "immediate need" for revision. To obtain a

stay, the Proposition 8 defenders had to show a fair prospect that a majority of the Court would vote to reverse the judgment below on a writ of certiorari, or vote to grant mandamus, and a likelihood that irreparable harm would result from denial of a stay.

The Supreme Court found the Proposition 8 defenders had shown a fair prospect that a majority of the Court would grant a petition for writ of certiorari or petition for mandamus. The Court held that the Rule 77-3 amendment likely violated federal law. Without specifically defining how much notice is "appropriate," the Court noted that, at most, the district court had provided five business days for notice and comment. The Court rejected the "immediate need" argument, noting that no party had alleged it would be imminently harmed if the trial were not broadcast. The Court further found the Proposition 8 defenders had shown that irreparable harm would likely result from denial of a stay, citing the risk that witness testimony might be chilled if it were broadcast throughout the country.

Justice Breyer authored a dissent questioning the majority's conclusion that "appropriate" notice had not been given. As early as September 2009, the district court had informed the parties of the possibility that the proceedings would be broadcast, and sought their feedback. Moreover, by January 8 the Court had received 138,574 comments on the issue. The Proposition 8 defenders had not identified any interested person who was unaware of the rule change, the dissent pointed out.

The dissent objected that this was not the kind of legal question the Court normally considered, as it did not involve a conflict among state and federal courts, implicate an important question of federal law, or clearly conflict with any Supreme Court precedent. The dissent also questioned the extent to which broadcasting to other federal courthouses would materially increase the risk of harassment. Noting that all of the witnesses in support of Proposition 8 were already publicly identified with the case, having "appeared on television or Internet broadcasts," "toured the State advocating a 'yes' vote on Proposition 8," or "engaged in extensive public commentary," the dissent rejected the notion that a closed-circuit broadcast to another federal courthouse would cause any harm that could not be managed effectively by the trial court.

As a practical matter, the Supreme Court's decision precludes any video broadcasting of the trial. Although the issue of broadcasting over YouTube was not before the Court, the majority's opinion effectively forecloses the possibility of changing the rule in time to permit online broadcasting. The trial, which began on January 11, is expected to last a matter of weeks. By the time the district court provides "appropriate" notice of the rule change, the trial will be over.

The Court's ruling also means that those who want to transmit up-to-date coverage of the constitutional issues being decided in the Proposition 8 trial must disseminate informa-

tion through alternate channels. For example, interested members of the public may receive updates on the trial by following "@NCLRights" or "@KateKendell" on Twitter. More in-depth news and commentary are also available on the blog of the National Center for Lesbian Rights at <http://nclrights.wordpress.com>, among numerous other blogs.

Though opposed to video broadcasting, defenders of Proposition 8 have also joined the online conversation at <http://www.protectmarriage.com/blog/> and "@ProtectMarriage" or "@AllianceDefense" on Twitter. On January 14, SF Weekly reported in its blog that same-sex marriage opponents were claiming their updates had been blocked from Twitter's search function, but at least some accounts seemed to have been restored. The post is available at [http://blogs.sfweekly.com/thesnitch/2010/01/same-sex\\_marriage\\_foes\\_accuse.php](http://blogs.sfweekly.com/thesnitch/2010/01/same-sex_marriage_foes_accuse.php).

Although one can still receive some contemporaneous impressions from the Proposition 8 trial, the fact remains that certain types of important information cannot be conveyed in a blog post, a 140-character tweet, or post-trial recorded interviews. A video recording of the entire trial broadcast over YouTube would have allowed a substantial number of people direct access to the evidence presented and the arguments of counsel, unfiltered by major media sources or the perceptions of those blogging or tweeting. A video broadcast to other federal courts would have reached significantly fewer people, but still would have addressed the public interest in viewing the trial more effectively than no video broadcast at all.

When it comes to trial testimony, the manner in which information is communicated makes a difference. Live testimony is invaluable in judging witness credibility. The witness' demeanor, physical reaction to questions, and tone of voice all weigh in this determination. Without the ability to observe witness testimony firsthand, members of the public have lost a valuable opportunity to form truly independent judgments about which side has the most persuasive case.

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Proponents of marriage equality have argued, among other things, that the issue is a matter of civil rights, to be determined according to principles of constitutional law. Opponents of same-sex marriage have argued that the people should decide the issue of who may marry, because in a democracy, ultimate sovereignty rests with the people. Yet, the strength of a democracy depends on an informed electorate. The Supreme Court's ruling gave the Proposition 8 defenders the result they wanted, but left the public without an important means of gathering information about the significant constitutional issues raised in the underlying lawsuit.