

No. 10-_____

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ,
MARK A. JANNSON, AND PROTECT-MARRIAGE.COM—YES ON 8, A
PROJECT OF CALIFORNIA RENEWAL

DENNIS HOLLINGSWORTH, et al., *Petitioners*

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, *Respondent*,

KRISTEN M. PERRY, SANDRA B. STIER, PAUL K. KATAMI, JEFFREY J.
ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, NON-PARTY THE
MEDIA COALITION, ARNOLD SCHWARZENEGGER, in his official capacity as
Governor of California, EDMUND G. BROWN, JR., in his official capacity as Attorney
General of California, MARK B. HORTON, in his official capacity as Director of the
California Department of Public Health and State Registrar of Vital Statistics,
LINETTE SCOTT, in her official capacity as Deputy Director of Health Information &
Strategic Planning for the California Department of Public Health, PATRICK
O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda,
DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the
County of Los Angeles, and HAK-SHING WILLIAM TAM, *Real Parties in Interest*.

United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

**EMERGENCY PETITION UNDER CIRCUIT RULE 27-3 FOR
A WRIT OF MANDAMUS OR PROHIBITION TO THE
NORTHERN DISTRICT OF CALIFORNIA**

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 608-3065; (916) 608-3066 Fax

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020; (480) 444-0028 Fax

Charles J. Cooper
Michael W. Kirk
Jesse Panuccio
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600; (202) 220-9601 Fax

Attorneys for Petitioners

Circuit Rule 27-3 Certificate

Pursuant to Circuit Rule 27-3, Petitioners respectfully certify that their petition for a writ of mandamus or prohibition to the United States District Court for the Northern District of California in district court case number 09-CV-2292 (VRW) (the “mandamus petition”) is an emergency petition requiring at least temporary “relief ... in less than 21 days” in order to “avoid irreparable harm.”

Petitioners are a “primarily formed ballot committee” and the “official proponents” of Proposition 8 (“Proponents”), who were permitted to intervene in this case to defend that California ballot initiative. The mandamus petition concerns the district court’s decision to broadcast the trial proceedings in this case, beginning this coming Monday, January 11, 2010.

As elaborated in Proponents’ mandamus petition, the district court’s unlawful decision to broadcast the trial proceedings will cause immediate irreparable harm. Because the trial is set to begin on Monday, “relief is needed in less than 21 days”—and indeed by Monday morning—in order to prevent these irreparable injuries. Cir. R. 27-3(a). Accordingly, Proponents respectfully request that the Court immediately issue a writ of mandamus or prohibition barring the district court from proceeding with its plan to broadcast the trial, or in the alternative, at least temporarily stay the district court’s hand pending disposition of Proponents’ mandamus petition.

All of the grounds the mandamus petition were presented to the district court, and were rejected.

This morning, Proponents' counsel notified counsel for the other parties that they would file this mandamus petition presently and served counsel for the other parties with copies thereof by email.

The telephone numbers and addresses of the attorneys for the parties are as follows:

Attorneys for Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarillo:

Theodore B. Olson
 Matthew C. McGill
 Amir C. Tayrani
 GIBSON, DUNN & CRUTCHER,
 LLP
 1050 Connecticut Avenue, NW
 Washington, D.C. 20036
 (202) 955-8668
 Fax: (202) 467-0539
 toolson@gibsondunn.com

Theodore J. Boutrous, Jr.
 Christopher D. Dusseault
 Ethan D. Dettmer
 Theane Evangelis Kapur
 Enrique A. Monagas
 GIBSON, DUNN & CRUTCHER,
 LLP

333 S. Grand Avenue
 Los Angeles, CA 90071

Attorney for Defendant Clerk-Recorder Patrick O'Connell:

Claude Franklin Kolm
 Lindsey G. Stern
 COUNTY OF ALAMEDA
 1221 Oak Street, Suite 450
 Oakland, CA 94612-4296
 (510) 272-6710
 claude.kolm@acgov.org

Attorneys for Plaintiff-Intervenor City and County of San Francisco:

Dennis J. Herrera, City Attorney
 Therese Stewart, Chief Deputy City Attorney
 Danny Chou, Chief of Complex and Special Litigation
 Vince Chhabria, Deputy City Attorney
 Erin Bernstein, Deputy City Attorney
 Christine Van Aken, Deputy City Attorney

(213) 229-7804
 Fax: (213) 229-7520
 tboutrous@gibsondunn.com

David Boies
 Theodore H. Uno
**BOIES, SCHILLER & FLEXNER,
 LLP**
 333 Main St
 Armonk, NY 10504
 (914) 749-8200
 Fax: (914) 749-8300
 dboies@bsfllp.com

**Attorneys for Defendants
 Governor Arnold Schwarzenegger,
 Director Mark B. Horton, and
 Deputy Director Linette Scott:**

Kenneth C. Mennemeier
 Andrew Walter Stroud
**MENNEMEIER GLASSMAN &
 STROUD LLP**
 980 9th St, Ste 1700
 Sacramento, CA 95814
 (916) 553-4000
 Fax: (916) 553-4011
 kcm@mgslaw.com

**Attorneys for Defendant Attorney
 General Edmund G. Brown, Jr.:**

Gordon Bruce Burns
 Attorney General's Office, Dept. of
 Justice
 1300 I Street, 17th Floor
 Sacramento, CA 95814

Attorney
 Mollie M. Lee, Deputy City Attorney
**CITY AND COUNTY OF SAN
 FRANCISCO**
**OFFICE OF THE CITY
 ATTORNEY**
 1 Dr. Carlton B. Goodlett Place
 Room 234
 San Francisco, CA 4102-4682
 (415) 554-4708
 Fax: (415) 554-4655
 Therese.stewart@sf.gov.org

**Attorney for Defendant Registrar-
 Recorder Dean C. Logan:**

Judy Whitehurst
**OFFICE OF COUNTY COUNSEL –
 COUNTY OF LOS ANGELES**
 500 West Temple St
 Los Angeles, CA 90012
 (213) 974-1845
 JWhitehurst@counsel.lacounty.gov

**Attorneys for Defendant-
 Intervenor Dennis Hollingsworth,
 Gail J. Knight, Martin F.
 Gutierrez, Mark A. Jansson, and
 ProtectMarriage.com—Yes on 8, A
 Project of California Renewal:**

Charles J. Cooper
 Michael W. Kirk
 Jesse Panuccio
COOPER & KIRK, PLLC
 1523 New Hampshire Ave., NW
 Washington, D.C. 22036

(916) 324-3081
Gordon.Burns@doj.ca.gov

Tamar Pachter
Office of the California Attorney
General
455 Golden Gate Ave, Suite 11000
San Francisco, CA 94102-7004
(415) 703-5970
Fax: (415) 703-1234
Tamar.Pachter@doj.ca.gov

(202) 220-9600
Fax: (202) 220-9601
ccooper@cooperkirk.com
mkirk@cooperkirk.com
jpanuccio@cooperkirk.com

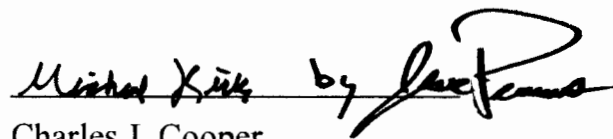
Andrew P. Pugno
LAW OFFICES OF ANDREW P.
PUGNO
101 Parkshore Dr., Ste. 100
Folsom, CA 95630
(916) 608-3065
andrew@pugnolaw.com

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
braum@telladf.org

January 8, 2010

Respectfully Submitted,

Andrew P. Pugno
LAW OFFICES OF ANDREW P.
PUGNO
101 Parkshore Dr., Ste. 100
Folsom, CA 95630
(916) 608-3065

Handwritten signature of Michael Kirk, with the name "Michael Kirk" written in cursive above the signature line.

Charles J. Cooper
Michael W. Kirk
Jesse Panuccio
COOPER & KIRK PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020

Counsel for Petitioners

Corporate Disclosure Statement Under Fed. R. App. P. 26.1

Defendant-Intervenors-Petitioners are not a corporation but a primarily formed ballot committee under California Law. *See* CAL. GOV. CODE §§ 82013 & 82047.5.

TABLE OF CONTENTS

CIRCUIT RULE 27-3 CERTIFICATEi

CORPORATE DISCLOSURE STATEMENTvi

TABLE OF AUTHORITIESix

INTRODUCTION1

JURISDICTION4

ISSUE PRESENTED.....4

STATEMENT.....4

ARGUMENT11

 I. Absent Mandamus, No Other Means of Review is Available.12

 II. Proponents Will Be Irreparably Harmed Absent Immediate Review.....13

 III. The District Court Clearly Erred as a Matter of Law.....21

 A. The Purported Revision of Local Rule 77-322

 B. Ninth Circuit Judicial Council Policy27

 C. The Lack of Guidelines Governing the Pilot Program.....28

 D. Public Broadcast of the Trial in This Case Would Violate Proponents’
 Due Process Right to a Fair Trial.29

 IV. The Question Presented Is One of First Impression but Is Capable of
 Creating a Persistent Disregard of the Federal Rules.30

CONCLUSION.....30

STATEMENT OF RELATED CASES32

TABLE OF AUTHORITIES

Cases

<i>Chandler v. Florida</i> , 449 U.S. 560 (1981).....	30
<i>Admiral Ins. Co. v. U.S. Dist. Court</i> , 881 F.2d 1486 (9th Cir. 1989);.....	12, 30
<i>Bauman v. United States District Court</i> , 557 F.2d 650 (9th Cir. 1977).....	23
<i>Estes v. Texas</i> , 381 U.S. 532 (1965).	14, 29, 30
<i>In re Cement Antitrust Litigation</i> , 688 F.2d 1297 (9th Cir. 1982).	12, 13, 16
<i>In re Complaint Against District Judge Billy Joe McDade</i> , No. 07-09-90083 (7th Cir. Sept. 28, 2009)	22
<i>In re Imperial “400” Nat’l, Inc.</i> , 481 F.2d 41 (3d Cir. 1973)	28
<i>In re McBryde</i> , 117 F.3d 208 (5th Cir. 1997).....	28
<i>In re Sony BMG Music Entertainment</i> , 564 F.3d 1 (1st Cir. 2009).....	13, 20, 21, 25
<i>Jinro Am., Inc. v. Secure Inv., Inc.</i> , 266 F.3d 993 (9th Cir. 2001)	30
<i>Miner v. Atlass</i> , 363 U.S. 641 (1960)	24
<i>NRDC v. Evans</i> , 316 F.3d 904 (9th Cir. 2003)	26, 27
<i>Perry v. Schwarzenegger</i> , No. 09-17241, slip op. at 15-16 (9th Cir. Jan. 4, 2010)	12, 30
<i>Petry v. Block</i> , 737 F.2d 1193 (D.C. Cir. 1984)	24
<i>Riverbend Farms, Inc. v. Madigan</i> , 958 F.2d 1479 (9th Cir. 1992).....	24
<i>Russell v. Hug</i> , 275 F.3d 812 (9th Cir. 2002)	28
<i>Star Editorial, Inc. v. United States District Court</i> , 7 F.3d 856 (9th Cir. 1993).....	12

<i>United States v. Carr</i> , 2006 U.S. Dist. LEXIS 74757 (E.D. Cal. 2006).....	26
<i>United States v. Edwards</i> , 785 F.2d 1293 (5th Cir. 1986).....	20
<i>United States v. Hastings</i> , 695 F.2d 1278 (11th Cir. 1983).....	21
<i>United States v. Hernandez</i> , 251 F.3d 1247 (9th Cir. 2001)	23
<i>United States v. Klubock</i> , 832 F.2d 664 (1st Cir. 1987)	25
<i>United States v. Terry</i> , 11 F.3d 110 (9th Cir. 1993)	25
<i>United States v. Yonkers Bd. of Education</i> , 747 F.2d 111 (2d Cir. 1984)	21
<i>Weil v. Neary</i> , 278 U.S. 160, 169 (1929).....	21
<i>Westmoreland v. Columbia Broadcasting System, Inc.</i> , 752 F.2d 16 (2d Cir. 1984)	20
Statutes	
5 U.S.C. § 553(b)(B).....	26
28 U.S.C. § 332(d)(1).....	2, 27
28 U.S.C. § 1651	1, 4
28 U.S.C. § 2071	2, 22, 25, 26
28 U.S.C. § 2077(b)	23, 25
Rules	
FED. R. APP. P. 21	1
FED. R. CIV. P. 83(a)(1).....	22, 24
N.D. Cal. L.R. 77-3	23, 27, 28

N.D. Cal L.R. 83-122

N.D. Cal L.R. 83-3(a)22

Constitutional Provisions

CAL. CONST. art. I, § 7.5.....1

Other Authorities

Notes of Advisory Committee on 1985 Amendments to FED. R. CIV. P. 83.....24

Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation, *available at*
www.heritage.org/Research/Family/bg2328.cfm.....17

www.youtube.com/usdccand.....11

<http://www.youtube.com/watch?v=hcKJEHrvwDI>.....17

Pursuant to 28 U.S.C. § 1651, FED. R. APP. P. 21, and this Court's Circuit Rule 21, Petitioners respectfully petition for an emergency writ of mandamus or prohibition barring the district court from broadcasting the trial in this case. With trial set to begin Monday, January 11, 2010, an immediate writ of mandamus or prohibition (or at least a temporary stay pending disposition of this petition, *see* Cir. Advisory Comm. Note to Rules 21-1 to 21-4) is necessary to stop the irreparable harm that will flow from the unlawful broadcast of the trial proceedings.

INTRODUCTION

This petition arises in a case presenting a federal constitutional challenge to a provision of the California Constitution ("Prop 8"), providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. Although the case concerns a question of law that can be answered solely by resort to controlling precedent and, if necessary, legislative facts, the district court has ordered a full-scale, multi-week trial. Dozens of witnesses are expected to testify on a range of topics related to the divisive issues of same-sex marriage and sexual orientation in general. Yesterday, the district court formally notified the parties that, subject to the approval of the Chief Judge of the Ninth Circuit, the trial would be broadcast daily on YouTube several hours after the completion of the day's proceedings. *See* Notice to Parties (Jan. 7, 2010) (Ex. 1); Tr. of Hr'g of Jan. 6, 2010 (Ex. 2) at 6, 46. Although there is no record that Chief

Judge Kozinski has yet acted, Petitioners feel compelled to seek relief now to afford this Court adequate time to rule before the trial begins Monday morning.¹

The district court's order is contrary to the long-established policy of the Judicial Conference of the United States—as well as the policies of both the Northern District of California and the Ninth Circuit in effect at least until late December 2009. The district court issued the order pursuant to (i) a purported revision, made on the eve of trial, to the district court's Local Rule 77-3, which had previously prohibited public broadcast, and (ii) a press release by the Ninth Circuit Judicial Council announcing a “pilot program” permitting broadcasting of district court proceedings within the Circuit. Both policies appear to have been changed with great haste solely to ensure that this case would be publicly broadcast.

Congress has mandated that the public be afforded notice and the opportunity to comment before a district court revises a local rule or a circuit judicial council revises a practice or procedure. *See* 28 U.S.C. § 2071(b) & (c)(1); 28 U.S.C. § 332(d). Nonetheless, the Ninth Circuit Judicial Council's announcement failed entirely to comply with this statutory mandate, while the Northern District first offered a belated, truncated opportunity to comment that foreclosed meaningful consideration of the public's views and then at the last minute shifted its rationale in an attempt to take refuge in a statutory exception for rule changes prompted

¹ Petitioners are simultaneously moving the district court to stay its order pending disposition of this petition.

by an “immediate need.” Neither process produced carefully considered or detailed guidelines about how a pilot program allowing public broadcast will operate or how it will address the many serious concerns this practice raises.

The questions of whether and how to publicly broadcast trial proceedings are weighty and have for years been the subject of study, debate, proposed legislation, and testimony from dozens of federal judges, including the justices of the Supreme Court. For fifteen years the Judicial Conference of the United States has “consistently” and repeatedly voiced its strong opposition because “camera coverage can do irreparable harm to a citizen’s right to a fair and impartial trial.” *Cameras in the Courtroom: Hr’g Before the S. Comm. on the Judiciary*, 109th Cong. (Nov. 9, 2005) (statement of Hon. Diarmuid O’Scannlain for the Judicial Conference of the United States) (Ex. 3) (“Testimony of Judge O’Scannlain”) at 40; *see also, e.g.*, Letter from James C. Duff (July 23, 2009) (Ex. 4) (“Duff Letter”) at 2.

Here, the district court, because it has before it a high-profile case, has decided to short-circuit the national debate on this issue, to change its controlling rules in a matter of days through a process that violates the letter and spirit of the law, and to broadcast on YouTube a trial that has the potential to become a media circus. It has done so without addressing the many concerns cited by the Judicial Conference and the parties in this case.

Indeed, the specific concerns underlying the Judicial Conference's firm opposition are present in spades here. The record is already replete with evidence showing that any publicizing of support for Prop 8 has inevitably led to harassment, economic reprisal, threats, and even physical violence. In this atmosphere, witnesses are understandably quite distressed at the prospect of their testimony being broadcast worldwide on YouTube. Whatever truth there may be to the notion that televising trials will better educate the public about the federal judiciary, "increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases." Testimony of Judge O'Scannlain, Ex. 3 at 48.

JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1651.

ISSUE PRESENTED

Whether the district court may broadcast the trial beyond the courthouse.

STATEMENT

Petitioners, a "primarily formed ballot committee" and the "official proponents" of Prop 8 ("Proponents"), intervened to defend the amendment to California's constitution because the State declined to do so. When they intervened in June 2009, the long-standing policy of the Ninth Circuit Judicial Council flatly prohibited public broadcast of district court proceedings. *See* Resolution of the

Ninth Circuit Judicial Conference (July 2007) (Ex. 5). Likewise, the Northern District of California's Local Rule 77-3 stated that "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." *See* Ex. 6; *see also* N.D. Cal. Gen. Order No. 58 (Ex. 7), ¶ III (adopting Judicial Conference's policy against broadcasting district court proceedings).

The Judicial Conference of the United States adopted its current policy in 1996. *See* JCUS-SEP 96, p. 54, *available at* www.uscourts.gov/judconf/96-Sep.pdf. The policy is based upon the potentially negative impact that the public broadcast of trial court proceedings could have on the administration of justice. After an extensive, multi-year study of the issue by the Federal Judicial Center ("FJC"), the Judicial Conference, in 1994, rejected proposals for public broadcast of trial court proceedings. *See* JCUS-SEP 94, pp. 46-47, *available at* 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 ... to expand camera coverage in civil proceedings." *Id.*

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. *See* Ex. 6. 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, the Ninth Circuit Judicial Council took no action for nearly two years. In the interim, “[t]he Ninth Circuit Judicial Council considered the resolution at a number of meetings following the 2007 Judicial Conference but deferred action to await possible developments at the national level.” Letter from Cathy A. Catterson (May 7, 2009) (Ex. 8). Finally, in May 2009, for reasons left unstated, the Ninth Circuit Judicial Council decided “that it is appropriate to forward [to the United States Judicial Conference] the [2007] resolution now and ask that it [be] considered by [the Committee on Court Administration and Case Management] at its June meeting.” *Id.*

The Judicial Conference of the United States has not retreated from its policy against the broadcast of district court proceedings. Indeed, as recently as July 2009 the Judicial Conference forcefully reiterated to Congress its concern that broadcasting would interfere with a fair trial. The Judicial Conference emphasized, *inter alia*, 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.” Duff Letter (Ex. 4) at 2.

On September 25, 2009, despite the local and national policies barring public broadcast of proceedings in the Northern District, the district court informed the parties that it had received inquiries about publicly broadcasting the trial and asked the parties for their position. Tr. of Hr’g of Sept. 25, 2009 (Ex. 9) at 70. The court acknowledged that “[t]here are, of course, Judicial Conference positions on this,” but stated that “[t]his is all in flux.” *Id.* at 72. Plaintiffs, Plaintiff-Intervenors, and the Attorney General (all of whom seek invalidation of Prop 8) stated their support for publicly broadcasting the trial. *See* Doc. No. 215 (Ex.10). Proponents opposed, explaining that it would violate the United States Judicial Conference’s policy and would threaten the fairness of the trial. *See* Doc. No. 218 (Ex. 11).

Neither the Ninth Circuit Judicial Council, nor the Northern District as a whole, nor the trial court in this case took any further public action with regard to this issue between September 25 and December 16, the date of the final pretrial conference. However, the presiding judge later informed the parties (on the eve of trial) that he sat on a Judicial Council committee of three judges created by Chief Judge Kozinski on October 22 “to evaluate the possibility of adopting a Ninth Circuit rule” regarding broadcast of district court proceedings, and he acknowledged that this “case was very much in mind at that time because it had come to promi-

nence then and was thought to be an ideal candidate for consideration.” Tr. of Hr’g of Jan. 6, 2009 (Ex. 2) at 43. Neither the parties nor the public received any notice or opportunity to comment on this proposed policy change.

At the final pre-trial conference, the court announced that although public broadcast was “not permitted” under “current Ninth Circuit policy and rules” or the Northern District’s local rules, the Ninth Circuit Judicial Council was considering implementation of a pilot program permitting broadcast of nonjury civil cases. Tr. of Hr’g of Dec. 16, 2009, at 10 (Ex. 12). The court explained that its “understanding [was] that a proposal to implement that is pending before the Judicial Council of the Ninth Circuit, and may very well be enacted in the very near future,” though the court did not yet “have a green light for it.” *Id.*

The next day, December 17, the Ninth Circuit Judicial Council issued a “News Release” announcing it “ha[d] approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit.” *See* Ex. 13. The press release provided no details as to how the pilot program would be implemented other than 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.* No Circuit rule or order permitting the broadcast of trials has been noticed, opened for public comment, or promulgated, nor has the Judicial Council issued any policies or procedures to govern the pilot program.

On December 21, a coalition of media companies (the “Media Coalition”) sought leave to televise the trial. Doc. No. 313. On December 23, the Northern District of California posted on its website “public notice” that the court “has approved a revision of Civil Local Rule 77-3, effective December 22, 2009.” *See* Ex. 14 (screenshot of the webpage on Dec. 29, 2009). The purported amendment carved out an exception to the ban on public broadcasting of proceedings, authorizing “a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom” to allow “the taking of photographs, public broadcasting or televising, or recording for [the] purpose[.]” of “participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit.” *Id.*

On December 28 and 29, Proponents opposed the Media Coalition’s request, explaining that any change in Ninth Circuit policy or local rules regarding broadcast of district court proceedings would require a sufficient public notice and comment period. Doc. Nos. 324, 326 (Exs. 15 & 16). Proponents reiterated that this case implicates the precise concerns that animated the Judicial Conference’s policy against broadcast of district court proceedings. Doc. No. 324 at 6-7.

On December 30, the district court set a hearing for January 6, 2010, on the issue of broadcasting the trial. Later that day, the court informed the parties that “in light of the recent change to the Ninth Circuit Judicial Council’s policy regarding cameras in district courts and the subsequent amendment of Civil LR 77-3 to

conform with Ninth Circuit policy, the court is considering seeking approval from Chief Judge Kozinski to record or webcast the January 6 hearing.” Doc. 332 at 2. The court ordered that any objections be filed by January 4. *Id.*

In the late afternoon on New Year’s Eve, the Northern District removed from its website the posting announcing that it had “approved a revision of Civil Local Rule 77-3, effective December 22, 2009.” In its place, the court put up an announcement of a “*proposed* revision of Civil Local Rule 77-3,” which it had “approved for public comment.” Ex. 17 (emphasis added). Any comments were to be submitted by today, January 8, 2010. *Id.*

On January 4, 2010, Proponents objected to public broadcast of the January 6 hearing for the reasons previously stated. Doc. No. 336 (Ex. 18). Proponents also explained that pursuant to the court’s New Year’s Eve announcement, it no longer appeared that the purported amendment to Local Rule 77-3 was operative. *Id.*

Later on January 4, the Northern District removed from its website the posting announcing the “proposed” revision of Rule 77-3 and replaced it with a notice announcing that the court had approved the revision “effective December 22, 2009.” Ex 19. The notice further stated that “[t]he revised rule was adopted pursuant to the ‘immediate need’ provision of Title 28 Section 2071(e).” *Id.*

On January 6, the court held a hearing that was recorded on video over Proponents' objections, for later posting on YouTube. *See* www.youtube.com/usdcccand. The court announced that the live broadcast of the trial would go not only to the overflow courtroom in the courthouse, but also to this Court's San Francisco courthouse and courthouses in Seattle, Portland, Pasadena, and Chicago. Tr. of Hr'g of Jan. 6, 2009 (Ex. 2) at 16-17. The court further ruled that this case was appropriate for public broadcast and held that if Chief Judge Kozinski approved, the trial would be recorded and broadcast beginning Monday January 11, 2010. *Id.* at 46. A court technician explained to the parties that proceedings would be recorded using three cameras and the resulting broadcast would then be uploaded for posting on YouTube, with a delay due to the website's processing requirements. *Id.* at 4, 6.

ARGUMENT

Five "guidelines aid this Court's determination of whether mandamus relief is appropriate in a given case: (1) whether the petitioner has no other means, such as an appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or is-

sues of first impression.” *Perry v. Schwarzenegger*, No. 09-17241, slip op. at 15-16 (9th Cir. Jan. 4, 2010) (citing *Bauman v. United States Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977)). “Satisfaction of all five ... is not required,” *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1491 (9th Cir. 1989); indeed, “it is unlikely that all of the guidelines will be met in any one case, and the decision often requires balancing of conflicting factors,” *Star Editorial, Inc. v. United States Dist. Ct.*, 7 F.3d 856, 859 (9th Cir. 1993). Moreover, where the Court is exercising its supervisory or advisory mandamus authority, rigid adherence to these guidelines is not required. *In re Cement Antitrust Litig.*, 688 F.2d 1297 (9th Cir. 1982).

I. Absent Mandamus, No Other Means of Review Is Available.

Appeal following an already televised trial cannot remedy the harm flowing from the broadcast. Many of the likely adverse effects of broadcasting this trial—harassment of witnesses, threats to the safety and security of trial participants, unnecessary public exposure and ridicule of trial participants—cannot be corrected on appeal. As Judge O’Scannlain explained to Congress in 2005 on behalf of the Judicial Conference, “camera coverage can do *irreparable harm* to a citizen’s right to a fair and impartial trial.” Ex. 3 at 40 (emphasis added).

Moreover, when, as here, the Court is called upon to exercise its “supervisory authority to insure the proper and orderly administration of the federal judicial system,” the Court is “concerned with far more than the injury to the[] particular

petitioners; [it is also] concerned ... with the effect of the challenged order on the operation of the courts.” *Cement Antitrust*, 688 F.2d at 1299, 1303. Thus, “as long as petitioners have demonstrated that they will suffer an actual injury not correctable on appeal, they have satisfied ... the injury requirement.” *Id.*

The First Circuit recently reaffirmed this insight, exercising its mandamus jurisdiction to address the very same issue raised here: public broadcast of trial court proceedings. *See In re Sony BMG Music Entertainment*, 564 F.3d 1 (1st Cir. 2009). The *Sony* court explained that immediate review through mandamus was appropriate because the issue was “systemically important and rife with implications for the public interest” and thus merited “prompt and authoritative resolution.” *Id.* at 4. The same, of course, is true here. *See Allowing Cameras and Electronic Media in the Courtroom, Hr’g Before the S. Judiciary Comm.* (Sept. 6, 2000) (statement of Hon. Edward R. Becker for the Judicial Conference of the United States) (“Testimony of Judge Becker”) (Ex. 21) at 1 (“The Judicial Conference maintains that camera coverage would have a notably adverse effect on court proceedings.”).

II. Proponents Will Be Irreparably Harmed Absent Immediate Review.

As noted above, “decades of experience and study,” including the FJC study of a multi-year, multi-district pilot program, have demonstrated a variety of harms that arise from public broadcast of district court proceedings, leading the Judicial

Conference of the United States to “consistently” conclude “that camera coverage can do irreparable harm to a citizen’s right to a fair and impartial trial.” Testimony of Judge O’Scannlain (Ex. 3) at 40; Duff Letter (Ex. 4) at 1.²

(i) *Effect on Witnesses*. The Supreme Court has long recognized that “[t]he impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable.” *Estes v. Texas*, 381 U.S. 532, 547 (1965). The *Estes* Court concisely summarized many of the potential adverse effects on witnesses:

Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and “cranks” might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot “prove” the existence of such factors. Yet we all know from experience that they exist.

Id.; see also *id.* at 591 (Harlan, J., concurring).

² See also *Cameras in the Courtroom, The “Sunshine in the Courtroom Act of 2007,” H.R. 2128, Hr’g Before the H. Judiciary Comm.* (Sept. 27, 2007) (statement of Hon. John R. Tunheim for the Judicial Conference of the United States) (“camera coverage can do irreparable harm to a citizen’s right to a fair and impartial trial”) (Ex. 20); Testimony of Judge Becker (Ex. 21) (public broadcast of district court proceedings “can result in real and irreparable harm”). The United States Department of Justice—the federal courts’ most frequent litigant—also opposes broadcasting district court proceedings. See, e.g., *Cameras in the Courtroom, The “Sunshine in the Courtroom Act of 2007,” Hr. 2128, Hr’g Before the H. Judiciary Comm.* (Sept. 27, 2007) (statement of John C. Richter for the Dep’t of Justice) (Ex. 22).

Although *Estes* involved a criminal trial, the Judicial Conference of the United States has recognized that its insights apply equally to civil proceedings. The FJC study of its three-year pilot program found, *inter alia*, that “64 percent of the participating trial judges and 40 percent of the participating attorneys reported that at least to some extent cameras make witnesses more nervous than they otherwise would be” and that “46 percent of the trial judges believed that at least to some extent cameras make witnesses less willing to appear in court.” Testimony of Judge Becker (Ex. 21) at 1-2. Based on these results, the Judicial Conference has repeatedly and consistently concluded that a witness “will often act differently when he or she knows, or even believes that thousands of people are watching and listening to the story.” *Id.*; *see also* Duff Ltr. (Ex. 4) at 2 (“the presence of cameras in a trial court will encourage some participants to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience, or to lengthen their appearance on camera”).

Most troubling, public broadcast “can intimidate ... witnesses,” who might “refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast.” Duff Letter (Ex. 4) at 2; *see also Estes*, 381 U.S. at 591 (Harlan, J., concurring) (“there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he

finds that he will also be appearing before a ‘hidden audience’ of unknown but large dimensions”); Testimony of Judge O’Scannlain (Ex. 3) at 44. Further, the Judicial Conference has found these “disquieting” insights likely to be far more pervasive and problematic in “truly high-profile cases,” like this one. Testimony of Judge Becker (Ex. 21).³

Plaintiffs contended below that any concerns a particular witness might have can be addressed by the district court’s discretion to bar public broadcast of specific testimony or “control the format and timing of all broadcast transmissions.” Doc. 327 at 3. This argument fails for several reasons. First, any control the judge exercises over the format and timing of the broadcast is illusory, for once the video is released, it could easily be altered and disseminated widely by those with modest technical skill and an agenda. Second, barring public broadcast of a particular witness, or blurring his or her face or voice, only serves to shine an even brighter spotlight on that particular witness. As Judge Becker observed on behalf of the Judicial Conference, “[p]roviding [a witness] with the choice whether to testify in the open or blur their image and voice would be cold comfort indeed.” Ex. 21 at 2. Third, Plaintiffs’ contention ignores that the effect of public broadcast is a two-edged sword: some witnesses will shy away from cameras, others will crave the

³ The Judicial Conference has also repeatedly expressed concerns about the effect of public broadcast on witness privacy. *See* Testimony of Judge O’Scannlain (Ex. 3) at 54-55; Testimony of Judge Becker (Ex. 21) at 8-9; Duff Letter (Ex. 4) at 2.

spotlight and shade their testimony for dramatic effect. A trial judge cannot determine in advance whether a witness will fall into this latter category. Finally, Judge Becker explained that a district court's discretion is no certain salve for the wounds of public broadcast, for they often arise unexpectedly. "Federal judges are not clairvoyants"; one never knows "what is going to happen in a trial." *Id.*

In this case, these concerns are not just hypothetical. *All* of Proponents' witnesses have expressed concern over the potential public broadcast of trial proceedings, and some have stated that they will refuse to testify if the district court goes forward with its plan. Their distress is not unreasonable, as the record reflects repeated harassment of Prop 8 supporters. *See* Doc. Nos. 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*, available at www.heritage.org/Research/Family/bg2328.cfm; www.youtube.com/watch?v=hcKJEHrvwDI (documenting instance of harassment). This campaign of harassment and reprisal has often been "targeted and coordinated," Messner, *supra*, and the retaliation has often been quite serious. *See, e.g.*, Doc No. 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"). Broadcasting the trial would vastly increase the likelihood that trial participants would face similar experiences.

Broadcasting this trial would also 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.” Duff Letter (Ex. 4) 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 No. 187-11 at 81. Another website published 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.

(ii) *Effect on Attorneys.* The FJC study revealed that “twenty-seven percent of the attorneys reported that the cameras distracted them.” Testimony of Judge Becker (Ex. 21) at 2. And “[f]ifty-six percent of the appellate judges found that, to some extent or greater, cameras cause attorneys to change the emphasis or content of their oral arguments.” *Id.* Many judges also concluded that “cameras caused attorneys to be more theatrical in their presentations.” *Id.* As Judge O’Scannlain explained to Congress, “[c]ameras provide a very strong temptation for ... attorneys ... to try their cases in the court of public opinion rather than in a court of law.” Ex. 3 at 52; *see also* Duff Letter (Ex. 4) at 2.

(iii) *Effect on Judges.* The Judicial Conference has also cited “disturbing reports about the effect of ... cameras on judges,” with “[n]ine percent of ... trial

judges report[ing] that at least to some extent the cameras caused judges to avoid unpopular decisions or positions.” Testimony of Judge Becker (Ex. 21) at 2. And “34 percent [of appellate judges] reported that at least to some extent cameras cause judges to change the emphasis or content of their questions at oral argument.” *Id.* And these are judges who *self-reported* their views.

(iv) *Security Concerns.* The Judicial Conference has repeatedly stressed:

[T]he presence of cameras in a trial courtroom ... increases security and safety issues. Broadcasting the images of judges and court employees, such as court reporters, courtroom deputies, and law clerks, makes them more easily identified as targets by those who would attempt to influence the outcome of the matter or exact retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase even beyond the current disturbing level. Cameras create similar security concerns for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

Duff Letter (Ex. 4) at 3; *see also* Testimony of Judge O’Scannlain (Ex. 3) at 52-53. Security is particularly important today, as annual “[t]hreats against federal judges, U.S. Attorneys, Assistant U.S. Attorneys ..., and other court officials ... have more than doubled during the past several years, increasing from 592 in fiscal year (FY) 2003 to 1,278 in FY 2008.” U.S. Dep’t of Justice, Office of the Inspector General, *Review of the Protection of the Judiciary and the United States Attorneys* (Ex. 23) at 1 (Dec. 2009).

* * *

Finally, as Judge Becker explained, all of these concerns arose just from a study of low-profile cases. He warned that in “truly high-profile cases” one can “[j]ust imagine what the findings would be.” Ex. 21 at 2.

Plaintiffs discount all of the Judicial Conference’s concerns, claiming that the First Amendment grants a right to public broadcast of this trial. *See* Doc Nos. 327, 334. This contention is without foundation. As Judge O’Scannlain explained, “increased public education cannot be allowed to interfere with the judiciary’s primary mission, which is to administer fair and impartial justice to individual litigants in individual cases.” Ex. 3 at 48. And “today, as in the past, federal court proceedings *are* open to the public; however, nothing in the First Amendment *requires* televised trials.” *Id.* at 57. Judge O’Scannlain noted that *Estes, Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984), and *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986), all “forcefully make the point that, while all trials are public, there is no constitutional right of media to broadcast federal district court or appellate court proceedings.” *Id.* at 57-59. And just last year, the First Circuit rebuffed this very argument when made by broadcasters in another case that elicited significant public interest. *See Sony*, 564 F.3d at 8-9 (“the venerable right of members of the public to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen”).

III. The District Court Clearly Erred as a Matter of Law.

At the December 16, 2009, pretrial conference, the district court correctly acknowledged that it lacked authority to permit public broadcast of the trial in this case. *See* Tr. of Hr'g of Dec. 16, 2009 (Ex. 12) at 10. Local Rule 77-3 unambiguously prohibited it, as did the policy of the Ninth Circuit Judicial Council and the Judicial Conference of the United States. Local Rule 77-3 “has the force of law,” *Weil v. Neary*, 278 U.S. 160, 169 (1929), and therefore bound the trial court. *See, e.g., United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 112 (2d Cir. 1984) (district judge bound by local rule prohibiting recording of proceedings); *United States v. Hastings*, 695 F.2d 1278, 1279 nn.4-5 (11th Cir. 1983) (same).

In similar circumstances, the First Circuit recently issued a writ of mandamus overturning an order permitting a webcast of a trial. *See Sony*, 564 F.3d 1. Although a local rule barred the broadcast, *see id.* at 10, the trial court had sought to read into the rule discretionary authority to allow it. Declaring that “the Judicial Conference’s unequivocal stance against the broadcasting of civil proceedings ... is entitled to substantial weight,” the First Circuit held the trial court lacked discretion to broadcast the trial. *Id.* at 7. The court of appeals emphasized “ ‘that the intimidating effect of cameras’ in the courtroom presented ‘cause for concern.’ ” *Id.*; *see also In re Complaint Against District Judge Billy Joe McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009) (Easterbrook, C.J.) (district judge “engaged in con-

duct prejudicial to the effective and expeditious administration of the business of the courts” by permitting broadcast of civil trial contrary to local rule and policies of Judicial Conference and Seventh Circuit Judicial Council).

The district court thus rests its order permitting public broadcast of the upcoming trial entirely upon the revision to Local Rule 77-3 promulgated on January 4 and the Circuit Judicial Council’s December 17 press release announcing the pilot program. But neither policy change was made with statutorily required public notice and opportunity for comment and thus neither authorized the district court’s order. Moreover, the district court’s order violates Proponents’ due process rights.

A. The Purported Revision of Local Rule 77-3

Federal district courts have the power to promulgate local rules and to amend those rules, but “[a]ny rule prescribed by a court, other than the Supreme Court, ... 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) (district court may amend rules only “[a]fter giving public notice and an opportunity for comment”); N.D. Cal L.R. 83-3(a) (“Before becoming effective, any proposed substantive modification of the local rules shall be subject to public comment ...”); *United States v. Hernandez*, 251 F.3d 1247, 1251 (9th Cir. 2001).⁴

⁴ Before prescribing a local rule, a district court must also “appoint an advisory committee for the study of the rules of practice ... of such court.” 28 U.S.C. § 2077(b); *see also* Local Rule 83-1 (“Any proposed substantive modification or

On December 23, 2009, the Northern District announced on its website that it had revised Local Rule 77-3, effective December 22. *See* Ex. 14; Doc. No. 332 (order of Dec. 30, 2009) (recognizing the “recent ... amendment of Civil LR 77-3”). However, after Proponents objected to the lack of prior public notice and opportunity for comment, *see* Doc. Nos. 324, 326, the district court, late in the day on New Year’s Eve, removed from its website the notice of the completed revision and substituted a notice of “proposed” revision. Exs. 15 & 16. The notice stated that a comment period would be open through Friday, January 8, 2010—a total of five business days following the New Year’s holiday weekend for interested persons to submit comments on the proposed revision to Local Rule 77-3.

On January 4, 2010, the district court again revised its posting, this time removing the “proposed” revision to Local Rule 77-3 and substituting a notice stating that the revision had been “adopted” effective December 22, 2009. *See* Ex. 19. The notice stated that the “[t]he revised rule was adopted pursuant to the ‘immediate need’ provision of Title 28 Section 2071(e).” *Id.*

This haphazard process does not come close to satisfying the statutory requirement of appropriate advance public notice and an opportunity for comment. *Cf. Miner v. Atlass*, 363 U.S. 641, 650 (1960) (procedure for promulgating federal civil rules is “designed to insure that basic procedural innovations shall be intro-

amendment of these local rules must be submitted to a Local Rules Advisory Committee for its review”).

duced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords”). Courts ordinarily allow at least 30 days for comment on a proposed local rule.⁵ That conforms to the agency practice under the Administrative Procedure Act, which was intended to guide judicial rulemaking. *See* Notes of Advisory Committee on 1985 Amendments to FED. R. CIV. P. 83. Agencies “usually” provide a comment period of “thirty days or more.” *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992); *see also* *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984) (Administrative Conference suggests 60 days, and concludes that “the shortest period in which parties can meaningfully review a proposed rule and file informed responses is thirty days”) (quotation marks omitted).

The five business days commencing on New Year’s Eve afforded by the Northern District for comment was therefore patently inadequate—especially for an issue that the Judiciary and Congress have spent years debating. It is doubtful that many interested persons will have become aware of the New Year’s Eve notice before the comment period expires today. And given the haste and determination with which the district court has sought to revise the local rule—an effort that,

⁵ *See, e.g.*, United States Court of Appeals for the Ninth Circuit, *Opportunity for Comment – Rules Governing Judicial Misconduct Complaints* (Dec. 21, 2009) (30-day comment period) (Ex. 24).

as discussed below, reached its zenith when the court implemented the revision even before the truncated comment period had ended—it appears no serious consideration would have been or will be given to the views of the commenters who manage to meet the deadline. Especially given the seismic shift in policy effected by the revision—contravening the long-established policy of the Judicial Conference of the United States based on the fear that broadcasting would deprive litigants of a fair trial (which policy is “at the very least entitled to respectful consideration,” *Sony*, 564 F.3d at 6)—this process was woefully inadequate.

A local rule adopted without appropriate notice and a meaningful opportunity for comment is invalid and unenforceable. *United States v. Terry*, 11 F.3d at 110, 113 (9th Cir. 1993); *see also United States v. Klubock*, 832 F.2d 664, 671-75 (1st Cir. 1987) (Breyer, J., dissenting) (local rule “is too important, its ramifications too complex, its contours too uncertain” to be adopted without “ ‘appropriate public notice and an opportunity to comment’ ”).

Finally, the district court’s last-minute invocation of the “immediate need” exception to the notice and comment mandate, *see* 28 U.S.C. § 2071(e), does not save the revision. There is little case law applying the § 2071(e) “immediate need” exception, *cf. United States v. Carr*, 2006 U.S. Dist. LEXIS 74757, at *3-7 (E.D. Cal. 2006) (invoking § 2071(e) “immediate need” exception to promulgate rule requiring criminal defendants to be fully shackled at initial appearances in light of

recent history of threats against judges and other court personnel and participants), but the APA again provides useful guidance. An agency may dispense with the comment period “when [it] for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B). Courts “construe” the APA’s exception “narrowly”; “notice and comment procedures should be waived only when delay would do real harm.” *NRDC v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003) (quotation marks omitted).

The district court failed to provide any statement of its reasons for invoking the immediate-need exception here. The Circuit Judicial Council took two years to act on its 2007 resolution in favor of allowing cameras in district courtrooms, and none of the other fourteen district courts in this Circuit has yet taken any public action to implement the pilot program. As the timeline of events detailed above suggests, the only conceivable “immediate need” was to amend the local rule in time to publicly broadcast this case. In reality, this is not an instance in which a particular case has been selected for televising under a pilot program; it is an instance of a pilot program being created for televising a particular case. No harm could result from delaying the amendment in order to receive and consider comments. The court has an unending stream of cases from which to find a suitable guinea pig. Certainly, such delay would not preclude the court from “execut[ing] its ... du-

ties.” *NRDC*, 316 F.3d at 911. On the contrary, as explained above, the district court’s precipitate amendment of Local Rule 77-3 so that it could broadcast this controversial case threatens to harm Defendant-Intervenors by interfering with “the judiciary’s primary mission, which is to administer fair and impartial justice to individual litigants in individual cases.” Testimony of Judge O’Scannlain, Ex. 3 at 48.

B. Ninth Circuit Judicial Council Policy

Even if the revision to Local Rule 77-3 were otherwise valid, it could not authorize the public broadcast of district court proceedings because the Ninth Circuit Judicial Council has not validly authorized such broadcasts as yet. The court below clearly erred by concluding that the December 17 press release constituted a valid revision of Judicial Council policy.

Congress has authorized the Council to “make all necessary and appropriate orders for the effective and expeditious administration of justice within” the Ninth Circuit. 28 U.S.C. § 332(d)(1). But “[a]ny general order relating to practice and procedure shall be made or amended *only after* giving appropriate public notice and an opportunity for comment.” *Id.* (emphasis added). This notice and comment procedure is a “check” placed by Congress on “the delegation of power to [the Council] under § 332(d)(1).” *Russell v. Hug*, 275 F.3d 812, 818 (9th Cir. 2002).

Other than the December 17 press release announcing the Council's vote in favor of a pilot program permitting public broadcast, the Council has not issued anything formally revising its 1996 policy prohibiting the public broadcast of civil trials—no general order, rule, or other official statement of policy. Standing alone, the Circuit Council's vote and subsequent press release do not represent a valid amendment of the 1996 policy and that policy remains in effect.

The invalidity of the Council's action renders the district court's order invalid, for it means that the 1996 Judicial Council policy remains in place and is binding on the trial court. This Court can correct the error through exercise of its mandamus jurisdiction. *See In re McBryde*, 117 F.3d 208, 221-22 (5th Cir. 1997); *In re Imperial "400" Nat'l, Inc.*, 481 F.2d 41, 42 (3d Cir. 1973). Moreover, the invalidity of the Council's purported revision also renders the district court's order invalid under the direct terms of *revised* Local Rule 77-3 (assuming *arguendo* that the revision was valid). If the Council has not validly launched a pilot or other program, then the new exception in revised Local Rule 77-3 does not apply.

C. The Lack of Guidelines Governing the Pilot Program

In light of the significant concerns raised by the Judicial Conference regarding public broadcast of district court proceedings and the lengthy guidelines that govern broadcast of Ninth Circuit proceedings, it is highly problematic that neither the Northern District nor the Circuit Judicial Council has promulgated or even no-

ticed any rules or guidelines to govern the pilot program. *See Estes*, 381 U.S. at 537, 551 (holding that public broadcast of a trial violated due process where “the rules governing live telecasting ... were changed as the exigencies of the situation seemed to require” and the “day-to-day orders made the trial more confusing to ... the participants”). Even if the *per se* objections to public broadcast are to be ignored, such guidelines are needed to regulate the trial court’s discretion in selecting cases for broadcast and placing restrictions on broadcasts. At a minimum, such regulations should provide that public broadcast should be permitted only if all parties and all witnesses consent.

**D. Public Broadcast of the Trial in This Case Would
Violate Proponents’ Due Process Right to a Fair Trial.**

Public broadcast of this trial would violate Proponents’ due process right to a fair trial. In *Estes*, the Supreme Court held that “the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.” 381 U.S. at 540.⁶ There, the Court found public broadcast of a trial violated “the basic requirement of due process”—a “fair trial”—because, *inter alia*, public broadcast might have (i) “impaired” the “quality of the testimony,” (ii) affected the responsibilities and demeanor of the judge, and (iii) created “mental—if not physical—harassment” of the defendant. *Id.* at 543, 547, 549 (quotation

⁶ *Estes* involved a criminal trial, but civil litigants have no less of a Fifth Amendment due process right to a fair trial. *See, e.g., Jinro Am., Inc. v. Secure Inv., Inc.*, 266 F.3d 993, 1007 (9th Cir. 2001).

marks omitted). In this high-profile, highly contentious case, the potential for all these harms and many more is great. Thus, Proponents respectfully submit that in the specific circumstances presented here, public broadcast would violate their due process rights to a fair and impartial trial.⁷

IV. The Question Presented Is One of First Impression but Is Capable of Creating a Persistent Disregard of the Federal Rules.

The district court's broadcast order clearly presents "new and important [questions] of first impression." *Perry*, slip op. at 16. The fifth *Bauman* factor is thus satisfied. The fourth *Bauman* factor—whether the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules—need not, and usually cannot, be met where the fifth factor is present. *Admiral*, 881 F.2d at 1491. The order is nonetheless capable of creating such disregard.

CONCLUSION


For the foregoing reasons, this Court should issue a writ of mandamus or prohibition barring the district court from broadcasting the trial in this case. To the extent the Court requires additional time to consider the merits of this Petition, we respectfully request that it issue a temporary stay to prevent the broadcast of trial proceedings on Monday, January 11.

⁷ In *Chandler v. Florida*, the Supreme Court held that *Estes* did not announce a *per se* due process ban on public broadcast, but left open an as-applied due process challenge in an appropriate case. 449 U.S. 560, 573, 582 (1981).

January 8, 2010

Respectfully Submitted,

Andrew P. Pugno
LAW OFFICES OF ANDREW P.
PUGNO
101 Parkshore Dr., Ste. 100
Folsom, CA 95630
(916) 608-3065


Michael Kirk by Jesse Panuccio

Charles J. Cooper
Michael W. Kirk
Jesse Panuccio
COOPER & KIRK PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

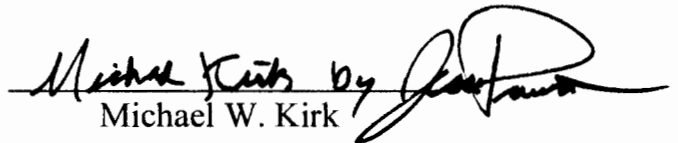
Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020

Counsel for Petitioners

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Petitioners hereby advise the Court that there is currently a related case pending in this Court. Consolidated Case Nos. 09-17241 and 09-17551 were decided on December 11, 2009, and an amended opinion was issued on January 4, 2010. The mandate issuing a writ of mandamus to the district court has not yet been transmitted. Petitioners here were also Petitioners in Case Nos. 09-17241 and 09-17551.

Dated: January 8, 2010


Michael W. Kirk

DECLARATION OF SERVICE

I hereby certify that on the 8th day of January, 2010, I caused to be served on the following counsel a true and correct copy of the foregoing via FedEx Express:

Kenneth C. Mennemeier
 Andrew W. Stroud
 MENNEMEIER, GLASSMAN &
 STROUD LLP
 980 9th Street, Suite 1700
 Sacramento, CA 95814-2736
kcm@mgsllaw.com
gosling@mgsllaw.com
aknight@mgsllaw.com
stroud@mgsllaw.com
lbailey@mgsllaw.com

*Attorneys for the Administration Defen-
 dants*

Dennis J. Herrera
 Therese M. Stewart
 OFFICE OF THE CITY ATTORNEY
 City Hall, Room 234
 One Dr. Carlton B. Goodlett Place
 San Francisco, California 94102-4682
therese.stewart@sfgov.org
erin.bernstein@sfgov.org
vince.chhabria@sfgov.org
danny.chou@sfgov.org
ronald.flynn@sfgov.org
mollie.lee@sfgov.org
Christine.van.aken@sfgov.org
catheryn.daly@sfgov.org

*Attorneys for Plaintiff-Intervenor City
 and County of San Francisco*

Gordon Burns
 Tamar Pachter
 OFFICE OF THE ATTORNEY
 GENERAL
 1300 I Street, Suite 125
 P.O Box. 944255
 Sacramento, CA 94244-2550
Gordon.Burns@doj.ca.gov
Tamar.Pachter@doj.ca.gov

*Attorneys for Defendant Attorney
 General
 Edmund G. Brown, Jr.*

Elizabeth M. Cortez
 Judy W. Whitehurst
 THE OFFICE OF CITY COUNSEL
 648 Kenneth Hahn Hall of Admini-
 stration
 500 West Temple Street
 Los Angeles, CA 90012-2713
jwhitehurst@counsel.lacounty.gov

*Attorneys for Defendant Dean C. Lo-
 gan
 Registrar-Recorder/County Clerk,
 County
 of Los Angeles*

Richard E Winnie
Brian E. Washington
Claude F. Kolm
Manuel F. Martinez
THE OFFICE OF CITY COUNSEL
1221 Oak Street, Suite 450
Oakland, California 94612
Brian.washington@acgov.org
Claude.kolm@acgov.org
Lindsey.stern@acgov.org
Judith.martinez@acgov.org

*Attorneys for Defendant Patrick
O'Connell
Clerk Recorder of the County of Alameda*

Ted Olson
Matthew McGill
Amir Tayrani
GIBSON, DUNN & CRUTCHER
LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
T: (202) 955-8500
F: (202) 467-0539
TOlson@gibsondunn.com
MMcGill@gibsondunn.com
ATayrani@gibsondunn.com

Theodore Boustrous, Jr.
Christopher Dusseault
Theane Kapur
GIBSON, DUNN & CRUTCHER
LLP
333 South Grand Avenue
Los Angeles, CA 90072-1512
T: (213) 229-7000
F: (213) 229-7520
TBoutrous@gibsondunn.com
CDusseault@gibsondunn.com
TKapur@gibsondunn.com
SMalzahn@gibsondunn.com

Ethan Dettmer
Enrique Monagas
GIBSON, DUNN & CRUTCHER
LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105
T: (415) 393-8200
F: (415) 393-8306
EDettmer@gibsondunn.com

SPiepmeier@gibsondunn.com
EMonagas@gibsondunn.com
RJustice@gibsondunn.com
MJanky@gibsondunn.com

Theodore Uno
BOIES, SCHILLER & FLEXNER
LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
T: (510) 874-1000
F: (510) 874-1460
jgoldman@bsflp.com
tuno@bsflp.com
brichardson@bsflp.com
rbettan@bsflp.com
jischiller@bsflp.com

*Attorneys for Plaintiff Kristin M.
Perry*

I hereby certify that on the 8th day of January, 2010, I caused to be served on the following counsel a true and correct copy of the foregoing via United States Postal Service express mail overnight delivery:

Terry L. Thompson
LAW OFFICE OF TERRY L. THOMPSON
P.O. Box 1346
Alamo, CA 94507
T: (925) 855-1507
F: (925) 820-6035
tl_thompson@earthlink.net

Attorney for Defendant-Intervenor Hak-Shing William Tam

s/Jesse Panuccio
Jesse Panuccio