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JUST OUT OF CURIOSITY? PROPERLY WEIGHING THE PUBLIC'S INTEREST WHEN DECIDING WHETHER TO BROADCAST A CIVIL TRIAL

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I. INTRODUCTION

The marriage equality battle in the American courts has featured multiple trips to the United States Supreme Court, most notably 2013's *Hollingsworth v. Perry* (hereinafter "*Hollingsworth II*"), in which the Court let stand a District Court decision invalidating Cali-

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fornia's infamous Proposition 8[1] same-sex marriage ban,[2] and 2015's *Obergefell v. Hodges*, in which the Court ruled that same-sex couples have a fundamental right to marry under the Fourteenth Amendment.[3] In 2010, the litigants from *Hollingsworth II* found themselves before the Court in a case also captioned *Hollingsworth v. Perry*[4] (hereinafter "*Hollingsworth I*") arguing not over the merits of the case, but rather over whether the high-profile trial in the Northern District of California should be broadcast following a change in local rules that would have permitted such a broadcast.[5] The *Hollingsworth I* Court sided with defendant-intervenors in the case (hereinafter "Proponents"), and prevented the trial from being broadcast.[6]

Hollingsworth I gives rise to the issue that is the subject of this Note: what role should the public interest in a trial play when a court is balancing the equities to address a party's objection to the broadcast of civil trial proceedings? This Note accepts that a balancing of the equities test should typically apply, but takes the position that both the *Hollingsworth I* per curiam majority and dissent inappropriately considered the role of the public's interest in seeing the broadcast of a trial; in particular, the majority errs by failing to consider any public interest, and the dissent mischaracterizes the nature of the public interest that should actually weigh into the balancing test. This Note asserts that the public interest considered by the *Hollingsworth I* dissent—referred to herein as the public's "curiosity interest"[7]—is an improper factor to consider when bal-

1. In May 2008, the California Supreme Court ruled that same-sex couples had the right to marry in the state. *In re* Marriage Cases, 183 P.3d 384, 433–34 (Cal. 2008). Six months later, Californians amended their constitution, adding a provision stating that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. This amendment, commonly referred to as Proposition 8, passed by narrow margins after a long, and at times violent, campaign. Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009); Thomas M. Messner, *The Price of Prop 8*, THE HERITAGE FOUNDATION (Oct. 22, 2009), http://www.heritage.org/research/reports/2009/10/the-price-of-prop-8#_ftn73.

2. Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).

3. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

4. Hollingsworth v. Perry, 558 U.S. 183 (2010) (per curiam).

5. As the case was getting underway in the district court, public curiosity about the case was mounting. With this in mind, the district court amended its local rules, allowing the trial to be broadcast to other courthouses around the country. *Id.* at 188.

6. *Id.* at 199.

7. The term "curiosity interest" chosen for use in this Note derives from the writings of Sir Edward Coke on the subject of public access to court records and from how the treatise *American Jurisprudence* describes the right of the public to access court records. Coke notes that members of the public have a right to access

ancing the equities, but that the public's interest as a party to a litigation—referred to herein as the public's "party interest"—is a proper factor.[8] This Note concludes that had the framework outlined below been applied in *Hollingsworth I*, the outcome of the case might have been different.

Part II of this Note provides an overview of the *Hollingsworth I* per curiam decision and dissenting opinion. Part III argues that the public's curiosity interest should not be a factor considered in balancing the equities when a party to a civil case objects to the broadcast of a trial. Part IV argues that the public's party interest should factor into the calculus when the public is party to civil litigation because the state, or an agent of the state acting in his or her official capacity, is a party. Part V offers a summary and conclusions.

This Note does not purport to weigh in on the public policy debate about whether cameras should ever be allowed in courtrooms. This question is a source of much disagreement among scholars, and a healthy body of literature addresses the issue.[9] Rather, this Note focuses on the narrow question of if and how the public's putative interest in seeing a civil trial broadcast should factor into the calculus when a party in the litigation objects to such broadcast.[10]

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court records when they have a need to do so. *See infra* note 63. *American Jurisprudence* notes that there is no common law right to access court records out of mere curiosity. *See infra* note 71. Given this language used to describe the public's interest in accessing court records, "curiosity interest" seemed a natural way to describe the interest in seeing court proceedings based merely on a curiosity about the goings on of a trial (because it is newsworthy or otherwise interesting) as opposed to an interest in seeing a trial based on some other, legally-recognized interest, such as the interest in attending proceedings that directly affect the legal rights of the person seeking admittance to the courtroom.

8. The term "party interest" was chosen for use in this Note to contrast the public's "curiosity interest" in a litigation as defined in note 7, *supra,* with the public's interest in a litigation as a conceptual party to a litigation when its government is a party, as explained more fully in Part IV, *infra*. Put succinctly, governments are, conceptually, entities established by the public to administer their societal needs; therefore, when a government is a party to a litigation it stands in the shoes of the public, making the public, conceptually, itself a party to the litigation.

9. *See, e.g.*, Susan E. Harding, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. CAL. L. REV. 827 (1996); Audrey Maness, *Does the First Amendment's "Right of Access" Require Court Proceedings To Be Televised? A Constitutional and Practical Discussion*, 34 PEPP. L. REV. 123 (2006).

10. Criminal cases raise a different set of questions and considerations not explored in this Note. While the public is conceptually a party to a criminal case, as in the hypothetical case of *The People v. Criminal Defendant X*, there are additional considerations not present in civil trials, particularly the constitutional rights of defendants. Indeed, the Supreme Court has overturned convictions in the past for

II.
HOLLINGSWORTH I AND THE BALANCING OF THE EQUITIES TEST

While not the first time the Supreme Court addressed issues related to cameras in the courtroom and the broadcast of trials, including civil trials,[11] *Hollingsworth I* was the first time in the Court's history that it was presented with the question of whether to stay a federal trial court's order permitting a trial to be broadcast. The Court's limited body[12] of jurisprudence on issues related to cameras in the courtroom arises largely not from fact patterns like those in *Hollingsworth I*, but instead out of post-trial challenges to the presence of cameras in the courtroom where a criminal defendant asserts that media presence tainted trial proceedings.[13]

Because *Hollingsworth I* was a matter of first impression, it afforded the Court the opportunity to decide how to evaluate *ex ante* whether a trial, in particular a civil trial,[14] should be broadcast

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trials where cameras were allowed in the courtroom. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 535 (1965).

11. *E.g.*, Chandler v. Florida, 449 U.S. 560 (1981).

12. Only a handful of Supreme Court cases address issues related to cameras in the courtroom; other than *Hollingsworth I,* the three other cases that most directly address the issue of cameras in the courtroom arise out of criminal appeals fact patterns.

13. *E.g.*, *Estes*, 381 U.S. at 535.

14. Criminal trials present constitutional constraints and considerations different from and in addition to those present in civil trials, and therefore are not addressed in depth in this Note. However, the analysis presented here would likely inform a debate about the proper way to evaluate whether to permit the broadcast of a criminal trial. As a general matter, however, it would be expected that objections to the broadcast of a criminal trial would be more likely to be sustained than objections in a civil context. The Supreme Court has weighed in somewhat on the propriety of broadcasting criminal proceedings, and while the Court has not said that the broadcast of a trial will *per se* impair a criminal defendant's constitutional rights, *see Chandler*, 449 U.S. at 583 (Stewart, J., concurring), the Court has, in some circumstances, held that the presence of cameras in a courtroom during a criminal proceeding violated a defendant's due process rights to a fair trial, *see Estes*, 381 U.S. at 552. The assertion made in Part III of this Note that the public's interest in seeing the broadcast of a trial proceeding, simply out of curiosity's sake, should apply just as much in the criminal context as in the civil context; indeed, much of the support for this claim in the civil context is informed by court decisions holding that there is no public right to see a trial broadcast in a criminal context. *See id.* at 541-44. Likewise, the assertion made in Part IV of this Note that the public's interest *as a party to the case* would also likely weigh in in the criminal context since the public is, of course, a named party to any criminal case (these cases are, after all, often captioned *The People v. Criminal Defendant*). However, the relative weight given to the public's interest in a criminal case as a party would be significantly less in a criminal context because of constitutional constraints and

when a party objects. The majority offered relatively little in-depth guidance to lower courts, opting instead to save such guidance for another day by deciding the matter on other grounds.[15] The Court did offer some insight, though, particularly that a court should balance the equities presented in reaching such a decision, or at least that a court hearing an appeal of a trial judge's decision to broadcast a trial should balance the equities.[16]

A. Factual and Procedural History

The question in *Hollingsworth I* was whether the District Court trial proceedings could be broadcast under a Ninth Circuit pilot program allowing broadcasts of civil, non-jury trials in certain cases.[17] When the challenge to Proposition 8 was filed, the Ninth Circuit allowed broadcast of some appellate level proceedings, but did not permit district courts to broadcast trials.[18] During the preliminary stages of litigation in September of 2009, the trial judge notified the parties that there was interest in broadcasting the trial.[19] Neither party objected at the time, though there was no formal proposal in place.[20] In December of 2009, the Ninth Circuit started a pilot program allowing for the broadcast of certain trials.[21] The Proposition 8 litigation was eventually selected for this trial program.[22]

B. The Hollingsworth I *Per Curiam Majority Decision*

The Court sided with the Proponents and stayed the order that would have allowed broadcast of the trial.[23] The Court stated it was not making a judgment on the propriety of cameras in the courtroom as a general matter, and left for another day the question of whether permitting cameras in the courtroom is sound policy or

individual rights at issue in a criminal proceeding, and the potential for a broadcast to interfere with a criminal defendant's Fifth and Sixth Amendment rights.

15. *Hollingsworth*, 558 U.S. at 187 (per curiam) (holding that the district court violated federal law in changing its rules at the eleventh hour).

16. *Id.* at 190.

17. *Id.* at 187.

18. *Id.* at 186.

19. *Id.* at 200 (Breyer, J., dissenting).

20. *Id.*

21. *Hollingsworth*, 558 U.S. at 187 (per curiam).

22. *Id.* at 188. The case was selected for the program after rulemaking procedures the *Hollingsworth I* majority found unacceptable, the details of which are not germane to this Note. The *Hollingsworth I* majority opinion summarizes these procedures.

23. *Id.* at 199.

constitutionally required (or prohibited).[24] The Court also did not address the question of whether this particular trial should have been broadcast.[25] Instead, the Court disposed of the matter on the grounds that the procedure used to adopt the rule changes permitting the broadcast was in violation of federal law.[26] The majority also concluded that while the plaintiffs failed to demonstrate any harm from not having the trial broadcast,[27] the Proponents had demonstrated a likelihood of irreparable harm if it was broadcasted.[28] The Court sympathized with the Proponents' concerns that their case would be harmed because some of their witnesses might withdraw,[29] and in so doing noted the longstanding concerns about witnesses being intimidated if cameras are permitted in courtrooms.[30]

At no point in the majority decision did the Court acknowledge a public interest in seeing the trial broadcast. The dissenters latched onto this lack of discussion of the public's interest in their opinion.[31]

C. The Hollingsworth I *Dissent*

Justice Breyer, joined by Justices Stevens, Ginsburg, and Sotomayor, wrote a scathing dissent, criticizing every aspect of the per curiam majority opinion.[32] The very first sentence of the dissenting opinion noted that the order issued by the majority was preventing the broadcast of a "nonjury civil case of great *public interest*," setting up a recurring theme in the dissenting opinion that the majority failed to consider the public's interest when granting relief.[33]

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24. *Id.* at 189.

25. Though, in dicta, it did state that the case would likely not have been a good candidate for the Ninth Circuit's trial program. *Id.* at 198.

26. Hollingsworth v. Perry, 558 U.S. 183, 194 (2010) (per curiam). Title 28 of the U.S. Code prescribes local rulemaking procedures for federal courts; the rulemaking procedures are not unlike those prescribed under the Administrative Procedure Act for administrative agencies. The Court found the nine-day notice and comment window provided by the Ninth Circuit to be too short. Furthermore, the Court stated that there was no *bona fide* immediate need for the rule change under an exception to the notice and comment procedure. 28 U.S.C. § 2071 (2012).

27. *Hollingsworth*, 558 U.S. at 194.

28. *Id.* at 189.

29. *Id.* at 195.

30. *Id.* at 193.

31. *Id.* at 199 (Breyer, J., dissenting).

32. *Id.*

33. *Hollingsworth*, 558 U.S. at 199 (Breyer, J. dissenting) (emphasis added).

It should be noted that the term "public interest" carries multiple meanings. While the term is fairly vague, the *Hollingsworth I* dissent appeared to conceptualize "public interest" as an interest in seeing trial broadcasts to satisfy public curiosity about the proceedings.[34] At most, the dissent referred to an interest in public education about court proceedings.[35] This Note refers to this kind of public interest as a "curiosity interest." This is a different form of public interest from that considered in Part IV, which this Note refers to as the public's "party interest."

The dissenters first noted the highly unusual form of relief being granted, and then agreed with the majority that relief could only issue if the party seeking relief could meet six requirements.[36] Unlike the majority, the dissent felt that not only had the Proponents failed to meet one requirement, they failed to meet any of the requirements.[37]

The dissent elaborated on four of the six requirements. First, they disagreed that there was a fair chance the district court violated the law in adopting its rule change.[38] Second, they argued that the legal question at issue before the Court was not of the kind for which the Court would normally grant certiorari.[39] Third, they disagreed that the Proponents had demonstrated the requisite likelihood of irreparable harm.[40] Fourth, they argued that, on balance, the equities militated against issuance of the stay.[41]

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34. *Id.* at 207.

35. In asserting that "no fair balancing of the equities (including harm to the public interest) could support issuance of the stay" of the order permitting broadcast of the *Hollingsworth* trial, the dissent failed to elaborate on exactly what was meant by the term "public interest;" however, the dissenters did state that the "competing equities consist of not only respondents' interest in obtaining the courthouse-to-courthouse transmission that they desire, but also the public's interest in observing trial proceedings to learn about this case and about how courts work." *Id.*

36. *Id.* at 199. (Stating that the factors to be considered are

"(1) there is a fair chance the District Court was wrong about the underlying legal question, (2) that legal question meets this Court's certiorari standards, (3) refusal of the relief would work "irreparable harm," (4) the balance of the equities (including, the Court should say, possible harm to the public interest) favors issuance, (5) the party's right to the relief is "clear and undisputable," and (6) the "question is of public importance" (or otherwise "peculiarly appropriate" for such action)"). *Id.*

37. *Id.* at 200.

38. *Id.* at 201–03.

39. *Hollingsworth*, 558 U.S. at 203.

40. *Id.* at 204–05.

41. *Id.* at 207.

The balancing of the equities was perhaps the most important factor elaborated upon by the dissent given the opening line of its opinion. First, the dissenters suggested there was very little that would tip the scales in favor of the Proponents.[42] However, next, they found competing equities which, when balanced with the Proponents' claims, strongly tipped the scales against issuing the stay: the interest of the Plaintiffs in having the trial broadcast[43] and, most importantly for purposes of this Note, the public's interest in observing the trial proceedings.[44] While the dissenters did not discuss how much weight they were assigning either of these interests,[45] in context it seems as though they were giving more weight to the public's interest in the trial being broadcast. The dissenters did not discuss the plaintiffs' interest in the trial being broadcast after acknowledging its existence,[46] but they did discuss the public's interests in observing the trial proceedings at (relative) length.[47]

Ultimately, the dissent would not have granted the stay requested by the Proponents.[48] Salient throughout the dissenting opinion is a notion that there is a public interest in broadcasting trial proceedings that should weigh in when considering whether to broadcast a trial,[49] which leads to the topic of this Note: what role, if any, should the public interest in seeing a trial broadcast play when determining whether to broadcast a trial?

III.
THE IMPROPRIETY OF WEIGHING THE PUBLIC'S CURIOSITY INTEREST

The majority and dissenters in *Hollingsworth I* apparently agree that balancing the equities is appropriate when a party objects to the broadcast of a civil trial,[50] but diverge when it comes to the question of which equities should be weighed. The majority does not mention the public's curiosity interest as a factor and instead only discusses the interests of the parties to the case.[51] The majority's silence about weighing any kind of public interest may suggest

42. *Id.*
43. *Id.* ("With these considerations in the balance, the scales tip heavily against, not in favor, of issuing the stay.").
44. *Id.*
45. *Hollingsworth*, 558 U.S. at 207.
46. *Id.*
47. *Id.*
48. *Id.* at 208.
49. *Id.* at 202–03, 207–08.
50. *Id.* at 190, 199.
51. *Hollingsworth*, 558 U.S. at 195–96.

it does not believe it should be a factor, though one cannot read too much into its silence. However, the dissent clearly believed the majority improperly ignored the public's curiosity interest in seeing the trial broadcast,[52] and considering the language used throughout the dissenting opinion, it appears the dissent believed that the public's curiosity interest should be given significant weight.[53]

The apparent disagreement between the majority and dissent in *Hollingsworth I* suggests that the role of the public's curiosity interest in a decision about whether to permit broadcast of a trial is not settled law. Unfortunately, neither the majority nor the dissent engaged in in-depth and thorough analysis of what role, if any, public interest should play. It would not be surprising if questions about how to evaluate whether to permit broadcasts of civil trials over the objection of a party arise in the future. Indeed, considering the increasing openness of courts to the broadcast of proceedings,[54] the prevalence of permissive broadcasting rules in the states,[55] and the establishment of permissive broadcasting rules in the federal courts,[56] it seems likely that disagreements will arise more frequently as trial broadcasts and webcasts become more commonplace.[57] Though the Court has not provided much guidance and analysis about the role the public's curiosity interest should play in such considerations, an analysis—undertaken below—of the common law presumption of access to court records, First Amendment jurisprudence, and the absence of legislative enactments permitting trial broadcasts lead to the conclusion that the public's curiosity interest is an improper factor to consider when deciding whether to broadcast a civil trial over the objection of a party.[58]

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52. *Id.* at 207 (Breyer, J., dissenting).

53. *Id.* at 199–208.

54. *See* Maness, *supra* note 9, at 150 (discussing the warming to broadcasting of trials in the federal judiciary following pilot programs).

55. *Id.* at 144–45 (discussing broadcast rules in several states).

56. *Hollingsworth*, 558 U.S. at 191 (per curiam) (discussing adoption of broadcast rules and the discretion of local courts to implement local rules).

57. *Cf. History of Cameras in Courts*, UNITED STATES COURTS, http://www.uscourts.gov/about-federal-courts/cameras-courts/history-cameras-courts (last visited Oct. 16, 2016).

58. This Note does not argue against the public's curiosity interest weighing into the broader policy debate about cameras in the courtroom. Instead, this Note asserts that, when a party objects to the broadcast of a trial, the curiosity interest should not be among the equities balanced in response to the objection. The public's curiosity interest likely should weigh into the broader policy debate, but until the legislature or the courts change the law, the current state of the law militates against weighing the curiosity interest when a party to a civil case objects to the broadcast of a particular trial.

A. The Common Law Presumption of Access to Court Records

The common law presumption of access to court records is the oldest and most instructive among the areas of law informing the conclusion that the public's curiosity interest in seeing a trial should not factor into the balancing of the equities when a party objects to a broadcast. While there is a presumption that citizens can access the records of the judiciary, the presumption is not absolute.[59] Two features warrant further discussion: first, the presumption does not apply to a purported interest that is no more than mere curiosity[60] and second, the presumption applies to records, not live proceedings.[61]

The common law presumption of access to court records—as distinguished from the limited First Amendment right to access courtrooms to view trial proceedings[62]—antedates the founding of the United States. Lord Coke referred to the presumption in his reports thusly: "These Records for that they containe great and hidden treasure, are faithfully and safely kept (as they well deserve) in the Kings treasurie: And yet not so kept but that any Subject may for his necessary use and benefite have accesse thereunto, which was the auncient Law of England . . . ."[63]

This ancient law of England was carried over into the common law in the United States: "[A]ny limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions."[64] Courts across the country have recognized this principle from the founding through today,[65] and "[t]he right of access to public records has been so firmly established that attempted restrictions of the right are seldom successful."[66]

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59. M. C. Dransfield, Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260, 1263 (1948).

60. *In re* Caswell, 29 A. 259, 259 (R.I. 1893).

61. *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 (1980); Estes v. Texas, 381 U.S. 532, 540 (1965) (discussing a presumption of access to courtrooms without invoking the common law presumption of access to court records).

62. *Richmond Newspapers*, 448 U.S. at 580.

63. 3 EDWARD COKE, REPORTS (1602), *reprinted in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 59, 60 (Steve Sheppard ed., 2003).

64. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 522 (Isaac F. Redfield ed., 12th ed. 1866).

65. *See, e.g.*, *Ex parte* Drawbaugh, 2 App. D.C. 404, 408 (D.C. Cir. 1894); Dahl v. Bain Capital Partners, LLC, 891 F. Supp. 2d 221, 224 (D. Mass. 2012).

66. M. C. Dransfield, Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260, 1262 (1948).

Despite the presumption of access, the right to inspect judicial records has never been deemed absolute.[67] Lord Coke made clear that there is a presumption, but not an unlimited right, of access: subjects have the right to access records for their necessary use and benefit.[68] Under the presumption, one seeking access to judicial records needs a legitimate interest in the records sought.[69] A legitimate interest typically involves accessing judicial records for use in subsequent judicial proceedings, regardless of whether a party seeking the documents was party to the suit in which the documents were originally created or entered the judicial record.[70] The general contours of the presumption are well encapsulated by *American Jurisprudence*:

> The right to inspect public records usually extends only to one who has a legitimate purpose that is not adverse to the public interest. Thus, no one has a right under the common law to examine or obtain copies of public records from mere curiosity, for the purpose of creating public scandal, from motives merely speculative, or to further any improper or useless end or purpose.[71]

There are some instances in areas such as criminal law or divorce law where the presumption is somewhat weaker, but exhaustive exploration of these areas is beyond the scope of this Note.[72]

For purposes of this Note, the most important aspect of the presumption is that it does not apply when a party seeks access to judicial records for mere curiosity: "[I]t is clearly within the rule to hold that no one has a right to examine or obtain copies of public records from mere curiosity . . . ."[73] Of course, this presumption, just like any other principle of common law, can be derogated by statute,[74] and courts have tended to require statutes with a clear purpose of derogating the common law to modify the common law presumption.[75]

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67. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978).

68. *See* COKE, *supra* note 63, at 59, 60.

69. *See* Cowley v. Pulsifer, 137 Mass. 392, 393 (1884).

70. *See* COKE, *supra* note 63, at 59, 60.

71. 66 AM. JUR. 2D, *Records and Recording Laws* § 23 (2016).

72. *See* Maness, *supra* note 9, at 143 (discussing the weaker presumption of "open courts" in sensitive cases involving criminal or divorce law).

73. *In re* Caswell, 9 A. 259, 259 (R.I. 1893).

74. *See* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908).

75. *Cf.* Ernest Bruncken, *The Common Law and Statutes*, 29 YALE L.J. 516, 519 (1920).

The common law presumption informs the question as to whether the public's curiosity interest in seeing a trial broadcast should factor into a balancing of the equities in two ways. First, that the presumption does not apply to those seeking records out of mere curiosity[76] militates strongly against considering the public's curiosity interest. Second, that access to *records* is a limited right and subject to restriction by the courts[77] suggests that public broadcasts, which would likely result in public recording of court proceedings, can likewise be limited.

That the presumption does not recognize a mere *curiosity* about judicial records as triggering a right of access[78] militates strongly against weighing the public's curiosity interest in seeing a trial when balancing the equities in the event a party to a case objects to broadcast. A trial broadcast would afford viewers access to more information than they would get from a trial transcript considering its audiovisual nature, and it would make no sense for a rule to require that public curiosity weigh in favor of a trial broadcast while simultaneously instructing that mere curiosity is an invalid reason to permit access to transcripts of the same proceedings after the fact. Furthermore, such a rule would undermine the ability of the courts to restrict access to court records. An "unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist."[79] A court can restrict access to transcripts under the presumption,[80] but permitting broadcast of trials would undermine this ability since broadcasts would contain all of the information that would be in transcripts, and more. A member of the public simply sitting in court would not be able to record the proceedings (unless a court so permits), unlike a person with access to a broadcast.

That access to court records, at least at the federal level, is fairly open nowadays, even to those with nothing more than a curiosity interest, does not undermine the assertions made above. The PACER system makes many court records and case files available to the general public; one does not need to demonstrate a legitimate interest[81] or even be a licensed attorney to access the system,[82]

76. *In re Caswell*, 29 A. at 259.

77. *Cf. id.* ("[T]here can be no doubt as to the power of the court to prevent such improper use of its records.").

78. *Id.*

79. *In re McLean*, 16 F. Cas. 237, 239 (C.C.S.D. Ohio 1879).

80. *In re Caswell*, 29 A. at 259.

81. *See* PACER: Public Access to Court Electronic Records, http://www.pacer.gov (last visited May 18, 2014).

82. *Id.*

which houses virtually all federal court records.[83] The development of the PACER system and the opening of judicial records to the general public is certainly a departure from the common law, which permits restriction of court records to those with legitimate interests in accessing them.[84] But just because there has been a general opening of court records to the general public for inspection at will, regardless of the reasons for inspecting such records,[85] does *not* require that the public's curiosity interest in seeing the broadcast of a trial weigh into the balancing of the equities. The presumption militates against considering the public's curiosity interest when balancing the equities to determine if a proceeding should be broadcast over the objection of a party to a case.

The common law in this area should continue to inform whether or not the public's curiosity interest should weigh in on these questions, unless the common law principles are clearly and unequivocally superseded by statute or equivalent.[86] Courts have routinely held that the common law presumption controls unless derogated by clear enactments.[87] It should not be assumed that by creating PACER, the Judicial Conference of the United States intended to override the common law as it informs the question of the public's curiosity interest in trial broadcasts. Not only would such an assumption violate the fundamental tenet that the common law can only be derogated by clear enactments doing so,[88] such an assumption would clearly be in conflict with the positions taken by the Judicial Conference—the same body that created PACER[89]—frowning on the broadcast of trials, and the presence of cameras in the courtroom in general.[90]

Additionally, as mentioned above, public broadcast would undermine the ability of the courts to control access to their own records. Courtroom doors can be closed in many situations, and

83. *Id.*

84. *In re McLean*, 16 F. Cas. at 239 .

85. *See* PACER, *supra* note 81.

86. *See* Bruncken, *supra* note 75, at 519.

87. *Id.*

88. *See id.*

89. *25 Years Later, PACER, Electronic Filing Continue To Change Courts*, USCOURTS.GOV (Dec. 9, 2013), http://news.uscourts.gov/25-years-later-pacer-electronic-filing-continue-change-courts.

90. *Judicial Conference Opposes Use of Cameras in Federal Trial Courts*, USCOURTS.GOV, http://www.uscourts.gov/news/TheThirdBranch/07-10-01/Judicial_Conference_Opposes_Use_of_Cameras_in_Federal_Trial_Courts.aspx (last visited May 18, 2014).

sensitive areas of transcripts redacted.[91] Even if a court could order broadcast cameras shut off when sensitive, privileged, or confidential information is expected to come out at trial, unexpected things happen, and once such information is out, it is out. Broadcasting a trial would interfere with a court's ability to redact transcripts before permitting public access.

In summary, the presumption of access strongly militates against considering the public's curiosity interest in seeing a broadcast of a civil trial when balancing the equities. Such an interest would not give rise to a presumption of access to court records, including transcripts, under the common law,[92] and giving significant weight to the public's curiosity interest when determining whether to broadcast a trial would undermine the ability of a court to restrict access to trial records. This is so because the broadcast would include all of the information, and more, that would be available in a transcript, completely undermining the ability to control access to transcripts in the first instance. PACER and the modern general policy permitting access to court records do not undermine these conclusions.

B. First Amendment Jurisprudence

First Amendment jurisprudence is another area of law supporting the conclusion that the public's curiosity interest in seeing a civil trial broadcast should not weigh into the balancing of the equities when a party to a case objects. While there is a limited First Amendment right of public and media access to courtrooms during trials,[93] the First Amendment does not entitle the public to media broadcasts from the courtroom.[94] Case law in this area is relatively

91. *See, e.g.*, NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 365 (Cal. 1999) ("[*B*]*efore* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." (internal citations omitted)).

92. *In re* Caswell, 29 A. 259, 259 (R.I. 1893).

93. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984).

94. *Cf. Richmond Newspapers, Inc.*, 448 U.S. at 599-600 (Stewart, J., concurring) (noting that while "the First and Fourteenth Amendments clearly give the press and the public a right of access *to trials themselves*, civil as well as criminal" that "this does not mean that the First Amendment right of members of the public and representatives of the press to attend civil and criminal trials is absolute. Just as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable

limited, though that is not particularly surprising considering the historical animosity of federal courts to the presence of cameras in the courtroom.[95] Indeed, cameras are still not allowed inside the Supreme Court[96] and are only allowed in certain instances in a few circuit and district courts.[97] Furthermore, the Judicial Conference still disapproves of their presence.[98]

To be sure, the public does have a recognized interest in accessing courtrooms during civil proceedings. It has long been established that

> [f]ree speech carries with it some freedom to listen. . . . What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the Amendment was adopted.[99]

But there is a big difference between the right to observe trials in person and the notion that the First Amendment entitles the public to the broadcast of courtroom proceedings. Access to courtrooms promotes a number of public policy interests, including free speech interests and an interest in monitoring the judiciary, but these goals can be accomplished—and indeed have been accomplished since the founding of the country—without the broadcast of trials.

While broadcasting civil trials would not necessarily interfere with the accomplishment of these public policy goals, broadcasts are not necessary for such goals to be realized. Permitting in-person access to trials while disallowing the broadcast thereof still accomplishes the policy goals of keeping courtrooms open and monitoring the judiciary. Members of the media, which courts acknowledge

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limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public.") (emphasis added)).

95. Maness, *supra* note 9, at 149.

96. SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/faq_visiting.aspx (last visited May 18, 2014).

97. *See, e.g.*, *Guidelines for Broadcasting, Recording, and Still Photography in the Courtroom*, THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Apr 7, 2014), http://cdn.ca9.uscourts.gov/datastore/uploads/news_media/camera.guidelines.pdf (providing one example of court guidelines on the use of photography).

98. *Judicial Conference Opposes Use of Cameras in Federal Trial Courts*, USCOURTS.GOV, http://www.uscourts.gov/news/TheThirdBranch/07-10-01/Judicial_Conference_Opposes_Use_of_Cameras_in_Federal_Trial_Courts.aspx (last visited May 18, 2014).

99. *Richmond Newspapers*, 448 U.S. at 576.

are often the public's surrogates for observing courtroom proceedings,[100] are largely free to report to the public what they observe during trials.[101] The status quo, which permits the public and the press to observe and report on judicial proceedings, accomplishes the recognized free speech interest in "listening" to trial proceedings.

At first blush it might seem that this argument proves too much: if allowing the media to report about trials advances the public's First Amendment interests, then trial broadcasts would advance these interests even more since proceedings would be presented in their entirety without a media filter. There are two reasons, however, that the argument does not prove too much. First, the public is arguably better served by filtered media reports than raw information since the media can condense and explain courtroom proceedings to a public that generally lacks an understanding of the complexities and intricacies of the judicial system.[102] More importantly, though, the public's freedom-to-listen interests are not the only interests at play. While a number of interests weigh into the First Amendment analysis, among the most salient is a court's interest in maintaining order in the courtroom.[103] Federal courts have long noted that cameras in the courtroom are a distraction and can interfere with the operation of a trial.[104] Indeed, in the criminal context, courts, including the Supreme Court, have overturned convictions because of distractions caused by the presence of cameras.[105] A limited right for the public and press to be physically present during trials and to report on their observations is a good compromise between closed courtrooms (allowing for the most control of the courtroom by judges) and a First Amendment requirement that the media be permitted to broadcast trials. Indeed, the Court has reached similar compromises in analo-

100. *Id.* at 573.

101. *Id.*

102. This is not to say that the public should not necessarily have access to the "raw information" that comes out of the courtroom, but rather that the press can often synthesize the information and present it in a more useful and comprehensible manner that better serves the First Amendment values. *See, e.g.*, John Schwartz, *Between the Lines of the the [sic] Proposition 8 Opinion*, N.Y. TIMES (June 26, 2013), http://www.nytimes.com/interactive/2013/06/26/us/annotated-supreme-court-decision-on-proposition-8.html.

103. *Cf. Estes*, 381 U.S. at 551-52; *see also Richmond Newspapers* 448 U.S. at 599-600 (Stewart, J., concurring).

104. *Estes*, 381 U.S. at 551-52.

105. *Id.*

gous situations.[106] The Court has simultaneously found a right to be present during trials to satisfy the right-to-hear yet no right to have a trial broadcast.[107] The Court has already determined there is no First Amendment right to a trial broadcast, so jurisprudence in the area does not support weighing the public's curiosity interest in seeing a civil trial when deciding whether to permit broadcast or streaming of trials over a party's objection.

C. Cameras in the Courtroom Legislation

The failure of Congress to pass "Cameras in the Courtroom" legislation is another indication that the state of the law weighs against considering the public's curiosity interest in seeing a trial broadcast when balancing the equities. Congress has long debated legislation permitting cameras in federal courtrooms, but has failed to enact such a law.[108] Had Congress simply never considered the matter, its lack of action may say very little about the state of the law and the position of the national legislature on the issue. Having considered and rejected such legislation, however, Congress has indicated three things: (1) the state of the law is that cameras are not permitted in courtrooms, (2) Congress believes it has the power to permit cameras in courtrooms, and (3) Congress has decided not to use its power to do so.

First, that Congress has considered legislation permitting cameras in federal courtrooms indicates that Congress recognizes the current state of the law as not requiring the broadcast of trial proceedings, the same conclusion reached by the courts.[109] That two branches of government have concluded that the law currently does not require the broadcast of courtroom proceedings lends some weight to the notion that the public's curiosity interest in observing trial broadcasts is not a proper consideration in determining whether to broadcast a trial over the objection of a party.

More telling is that Congress considers it within its power to enact such legislation. Whether Congress actually has such power is irrelevant for purposes of this Note; what matters for present purposes is that Congress has signaled it *believes* it has the power to require broadcast of federal court proceedings.[110] The fact that Congress—the most democratic of the three branches of govern-

106. *Cf.* Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978).

107. *Estes*, 381 U.S. at 539.

108. Maness, *supra* note 9, at 182 (discussing the failure of Congress to pass permissive broadcast legislation).

109. *Estes*, 381 U.S. at 539.

110. *See* Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 159 (1892).

ment—considers it within its power to pass "cameras in the courtroom" legislation, combined with the fact that Congress has failed to do so, is very telling. As a body elected directly by the people, Congress is in the best position to consider the question of whether the public's curiosity interest in seeing court proceedings is strong enough to warrant a change in the law. Congress has considered whether to require broadcast of federal trials and has declined to do so.[111] If Congress decides that the public's curiosity interest in seeing trials broadcast is of sufficient import to require a change in the law, it is fully capable of passing such legislation. Indeed, Congress has passed laws in the past intended to increase public access to government in the form of the Freedom of Information Act (FOIA),[112] which, it should be noted, only applies to the executive branch.[113] That Congress has declined to pass such legislation directed toward the judiciary implies that it has decided the public's curiosity interest in seeing trials broadcast—and, presumably, other considerations—is insufficient to change the status quo.

Congress's failure to pass "cameras in the courtroom" legislation, combined with the contours of the common law presumption of access and First Amendment jurisprudence, demonstrates that the public's curiosity interest in seeing a civil trial broadcast is not an appropriate factor to consider when balancing the equities in the event a party objects to such a broadcast. That being said, there is one instance where the public's interest in seeing a trial—albeit a different kind of public interest—should come into the balance: when the public or its agent is party to a civil case.

IV.
THE PUBLIC'S INTEREST AS PARTY TO A CASE

The arguments presented in Part III are rooted in the notion in American law that in a civil case a court is there to serve the parties before it.[114] While that notion, along with the arguments outlined in Part III, militates against considering the public's curiosity interest when determining whether to broadcast a trial over the objection of a party, that same notion provides the foundation for the argument that courts, in certain situations, should weigh a different kind of public interest, namely the public's interest as a party, or "party interest."

111. *See* Maness, *supra* note 9, at 182 (discussing the failure of Congress to pass permissive broadcast legislation).

112. 5 U.S.C. § 552 (2012).

113. *Id.*

114. *Cf.* Marbury v. Madison, 5 U.S. 137, 170 (1803).

When a government (or a government employee acting in his or her official capacity) is a party in a civil case, the public can be conceptualized as a party to the case. In our system of democracy, a government is an entity established by the people and for the people.[115] Governments are the systems set up by the people to administer the needs of society; we have elected to set up ours as a republican system, meaning our governments stand in the shoes of the body politic, like agents, during civil litigation.[116] Because of this governmental structure, it makes sense to say that when a government is party to a case, the people who formed the government are party to the case. This conceptualization of governments in litigation is evidenced by the way many courts caption criminal cases: *The People v. Criminal Defendant X* or *State v. Criminal Defendant X*.

Because the people themselves are conceptually a party to litigation when their government is a party, there are different interests at play compared to the case of a civil trial between two private parties. Unlike a civil suit between two private parties, a civil suit with a government as a party more directly implicates the interests of the general public. If the government is a defendant and is made to pay damages, any recovery paid will be out of the public fisc (the opposite is true if the government is a plaintiff).[117] The effect on individual citizens of a damages payment made by the government is likely *de minimis*, but there is an effect. And there is arguably a stronger effect on the general public when the government is a defendant in a suit seeking to enjoin enforcement of a law or government activity. In such cases, the democratic activity of self-governance by the people through their elected representatives—or direct democratic action, as was the case in *Hollingsworth II*—is being challenged. In such cases, decisions made by the people and their representatives are being removed from the hands of the democratic mechanisms of government and placed in the hands of the courts. The democratic decision-making process is interrupted, and

115. U.S. CONST. pmbl.

116. *Cf. Boyd*, 143 U.S. at 159 ("The words 'people of the United States' and 'citizens,' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.").

117. Ardestani v. I.N.S., 502 U.S. 129, 147 (1991) (noting the canon of "statutory interpretation that waivers of sovereign immunity must be strictly construed," and explaining "The purposes of the canon are to protect the public fisc and to provide breathing space for legitimate Government action that might be deterred by litigation.").

the people have an interest in seeing the proceedings that will decide the fate of democratically formed policy.

Because civil suits involving governments affect the general public, there is a public policy argument that the public has an interest in seeing such trials broadcast. Broadcasts of such trials allow the public, as a party to a case, to monitor their own interests which are at stake (such as the public fisc and the implementation of public policy), as well as to monitor the activities of those they have entrusted to represent their interests in the courtroom. This policy of democratic monitoring should weigh into a court's balancing of the equities when determining whether to broadcast a trial to which the government is a party. This normative argument is bolstered by longstanding jurisprudential values that people have a right to be in the courtroom when their interests are at stake and by the public policy behind the Freedom of Information Act.

A. The Right To Be in Court when One's Interests Are at Stake

There is a long-recognized principle and right in our legal system that a party whose interests are at stake in a court proceeding has the right to be present in court.[118] For example, there are strict limits on *ex parte* proceedings,[119] and the Federal Rules of Civil Procedure afford members of a certified class in a class action the right to make an appearance in court.[120] This principle lends support to the notion that, when a government is party to a civil case, the public's party interest in seeing the trial broadcast should weigh into the calculus when a court decides whether to broadcast such a trial.

As a technical matter, the public's right to appear in court is satisfied by the appearance of the public's agents and attorneys. During a civil suit a government is more analogous to a corporate entity than a certified class. However, our governments are not like typical corporate entities; they are sovereign entities[121] created by the people (or entities chartered by the sovereign powers of the state in the case of municipalities). Because of their status as sovereign entities, there are different values at stake when a government is in court than when a corporation is. When a government is party to a civil case, the outcome of the trial affects the general public in a general way, as described above. These generalized effects on the public would certainly not give individual members of the public a

118. Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008).
119. 56 AM. JUR. 2D, *Motions, Rules, and Orders* § 45.
120. FED. R. CIV. P. 23.
121. U.S. CONST. pmbl.

right to appear before a court.[122] However, considering the special status of a government and the public policy interests of open government and democratic monitoring, the notion that a party has a right to be in court when its interests are at stake adds some weight to the argument that when a government is party to a case, the public's interest as party in seeing a trial broadcast should weigh into a decision about whether to broadcast such a trial. The interests at stake in such a situation are greater than the mere curiosity interests discussed in Part III of this Note; the public has a strong generalized self-interest—as well as a democratic supervisory interest—in observing the proceedings of a trial to which it is conceptually a party.

How much weight should be afforded the public's party interest is another question—one beyond the scope of this Note—but it should at least be given some weight in the calculus when deciding whether to broadcast a trial to which a government is a party. It is possible that there should be a presumption of broadcastability given the strength of the normative arguments in favor of broadcasting civil trials when the public is a party, or it may be that the public's party interest should simply be a factor weighing in the totality of the circumstances. Regardless of the weight given, it is clear that the public's interest as a party to a case in which their government is party deserves some weight, unlike in cases between private litigants.[123]

B. Public Policy and the Freedom of Information Act

The Freedom of Information Act (FOIA) is an act of Congress requiring disclosure upon request of information not previously provided to the general public.[124] Several of the states have similar laws in place.[125] Though FOIA only applies to executive agencies, it demonstrates Congress' strong public policy of openness and transparency in government and monitoring of the government by the citizenry. While FOIA itself does not compel the broadcast of trials to which a government is a party, the public policies behind it bolster the argument that, when a government is party to a civil case, the public's supervisory interest as party to the litigation should weigh in a court's decision about whether to broadcast such a trial. Congress has demonstrated a strong public policy favoring demo-

122. United States v. Richardson, 418 U.S. 166, 174 (1974).

123. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994).

124. 5 U.S.C. § 552 (2012).

125. *State Freedom of Information Act Map*, PBS.ORG: NOW WITH DAVID BRANCACCIO, http://www.pbs.org/now/politics/foiamap.html (last visited May 18, 2014).

cratic monitoring and openness in the passage of FOIA, and the broadcast of a trial to which 'the government is a party' furthers that public policy goal. Such broadcasts allow the people to monitor not only their interests at stake in the litigation, but also the agents they have democratically entrusted to represent their interests in court.

V.
CONCLUSION

The dissent in *Hollingsworth I* seemed to use the term "public interest" to refer generally to one of two conceptually distinct interests at stake when determining whether to broadcast a civil trial: a curiosity interest arising from the public's mere curiosity in observing proceedings between two litigants in civil court, and the public's party interest arising from the fact that, in some cases, the public—through its government—is a party to a case. Under the current state of the law, the former is an invalid consideration to weigh when deciding whether to broadcast a particular civil trial. However, the democratic foundations of our system of governance and our jurisprudence suggest that the latter form of public interest—the party interest—is a valid consideration to weigh in such a decision.

The weight assigned this interest is a topic for a separate discussion, but one thing is clear: both the majority and dissent in *Hollingsworth I* got it wrong. The public's interest in seeing a civil trial broadcast is a valid consideration, but only its party interest, not its curiosity interest. Had the proper framework been used in *Hollingsworth I*, the outcome may have indeed been different, not because of the public's curiosity interest in the litigation, but because the people of California were, themselves, party to the case, and as such, had a party interest in observing the proceedings.