No. 20-16375

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al., Plaintiffs-Appellees,
CITY AND COUNTY OF SAN FRANCISCO, Intervenor-Plaintiff-Appellee,
KQED INC., Intervenor-Appellee,

v.

GAVIN NEWSOM, Governor, et al., Defendants-Appellees,
DENNIS HOLLINGSWORTH, et al., Intervenors-Defendants-Appellants,
and
PATRICK O'CONNELL, in his official capacity as
Clerk-Recorder for the County of Alameda, et al., Defendants.

United States District Court for the Northern District of California
The Honorable William Orrick; Case No. 09-CV-2292 WHO

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor/Appellee KQED INC. hereby certifies that it has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

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1. PRELIMINARY STATEMENT

Over a decade ago, the Northern District of California heard one of the most socially and culturally significant trials in our nation's history, deciding the constitutionality of California's Proposition 8, which added a provision to the State Constitution providing that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5. That Court's ruling that Prop 8 was unconstitutional because the U.S. Constitution "protects an individual's choice of marital partner regardless of gender" (*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) (*Perry I*)) was upheld by the U.S. Supreme Court (*Hollingsworth v. Perry*, 570 U.S. 693, 697 (2013) (*Hollingsworth II*)), and five years later, the Supreme Court recognized the constitutional right of same-sex couples to marry nationwide. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

Though many people were able to attend and witness this landmark trial for themselves, there are many more across the country who had no such opportunity, including those who were only children at the time. Fortunately for those students, scholars, activists, historians, pundits, and concerned and affected citizens all over the country who were unable to witness this historic event in person, a videotaped recording of the trial was made and preserved. Yet, this historical trial record has been sealed from the general public for the past decade. *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012) (*Perry II*). This Court's decision, however, expressly found

that the reasons that justified sealing in 2012 would not endure in perpetuity. *Id.* at 1084-85. As the district court pointed out, Defendants knew that Local Rule 79-5 applied and the sealing of the videotapes was *not* in perpetuity. Appellants' Excerpts of Record ("E.R.") 4 n.9; *see* Oral Argument, *Perry v. Brown*, No. 11-17255, available at https://bit.ly/35toPvJ. Appellant's counsel was clear about their burden under that Local Rule:

> The Court: "Were your clients under the impression that these tapes would be forever sealed?"
>
> Mr. Thompson: "No, your Honor, I believe that a seal lasts for, not necessarily, I guess is the better answer, is the seal lasts for ten years under the Local Rules of the Northern District of California and at the end of the trial, at the end of the proceedings, at the end of the case, then we would be entitled to go in and ask for an extension of that time, uh, to a specific date, but it would be a minimum of ten years, your Honor."
>
> The Court: "And it's clear from the record your client under, understood that and acted on that basis?"
>
> Mr. Thompson: "There's, the record, I don't believe has anything one way or the other on that but yes, *we were aware of the Local Rules, your Honor, and that it was a minimum of ten years and that we would have the opportunity to ask for an extended seal if we could make a good cause showing of that*."

Id. at 7:04-7:58 (emphasis added). Thus, with this full support of Appellants, this Court affirmed in 2012 that after the Local Rule's presumptive 10-year limit for sealing orders, the recordings should be unsealed unless Defendants could establish good cause to extend the sealing. 667 F.3d at 1084-85 & n.5. Appellants'

protestations and claims fall flat in the face of this concession.

Given this, it is not surprising that the district court, in considering the ongoing sealing of the videotapes in 2018, found that this Court's 2012 sealing decision was "conditional as to time," and "careful to avoid" concluding that the then-existing reasons and Defendants' expectations regarding non-broadcast "would permanently preclude disclosure." E.R. 10, 15 (citing *Perry II*, 667 F.3d at 1084-85). This Court's 2012 Opinion—and the presumption that the recordings would be released at the expiration of ten years—is the law that governed the district court's decision that Defendants challenge in this appeal. Yet, the record includes nothing that might overcome that presumption. Defendants bore a heavy burden that they made no effort at all to meet, as the district court correctly found:

> [Appellants/the Proponents] again failed to submit any evidence by declaration that any Proponent or witness who testified on behalf of the Proponents wants the trial recordings to remain under seal. There is no evidence that any Proponent or trial witness fears retaliation or harassment if the recordings are released. *Nor is there any evidence that any Proponent or trial witness on behalf of the Proponents believed at the time or believes now that Judge Walker's commitment to personal use of the recordings meant that the trial recordings would remain under seal forever*.

E.R. 3 (emphasis added). The district court acted well within its broad discretion in reaching this conclusion, and Appellants have not come close to meeting their heavy burden to establish an abuse of that discretion. Appellants have given this Court no reason to reverse the district court's decision, which rests firmly on this

Court's prior Opinion and Appellants' empty showing. Their appeal should be rejected, the stay lifted, and the recordings finally made available to a public yearning to see for themselves the historical trial that changed the lives of so many people in this country.

2. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the District Court abused its discretion in concluding that the proponents of Proposition 8 failed to meet their burden to present a "compelling interest" in permanently sealing the videotaped recordings of the historic 2010 trial over the constitutionality of California's same-sex marriage ban more than 10 years after that trial, that is sufficient to override the plain language of Local Rule 79-5, as well as the common-law and First Amendment rights of public access to court records?

3. SUMMARY OF RELEVANT FACTS

This appeal is the latest proceeding in a decade-old controversy: whether the public may access the one-of-a-kind video recordings of the twelve-day trial that—for the first time in this country's history—presented competing testimony and evidence and ultimately determined that California's ban on same-sex marriage violated the United States Constitution.

A. The Trial Court Videotaped the Historic Prop 8 Trial for Use in Chambers.

In 2008, California voters passed "Proposition 8," the ballot initiative at the center of this dispute. "Prop 8," as it was frequently called, amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5. Plaintiffs sued to challenge the marriage ban in the Northern District of California, and then-Chief Judge Vaughn Walker was assigned the case. As trial approached, Chief Judge Walker expressed his interest in broadcasting the proceedings. Initially, he hoped to allow simultaneous broadcast to the public, but in a 5-4 ruling issued at the start of the trial, the U.S. Supreme Court ruled that the recording and broadcast of the trial was not permitted by the Local Rules in effect at the time. *Hollingsworth v. Perry*, 558 U.S. 183, 199 (2010) (per curiam) (*Hollingsworth I*).

Nonetheless, as the trial court and the parties recognized, the court was still permitted to videotape the trial, even if it could not simultaneously be broadcast. Instead, as this Court found, "the local rule permits the recording for purposes ... of use in chambers." *Perry II*, 667 F.3d at 1082. No party objected to the continued recording of the trial, given that it would not be simultaneously broadcast. *Id.* On August 4th, 2010, the Court issued a written opinion and order holding Prop 8 unconstitutional. *Perry I*, 704 F. Supp. 2d at 1003 (N.D. Cal. 2010). In its decision, trial court also ordered that the recordings be filed under seal:

> The trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law; the clerk is now DIRECTED to file the trial recording under seal as part of the record. The parties may retain their copies of the trial recording pursuant to the terms of the protective order herein.… Proponents' motion to order the copies' return … is accordingly DENIED.

Id. at 929. Neither party appealed the portions of the court's Order that (1) filed the trial recording in the court record or (2) placed it under seal.

B. After a 2011 District Court Order Unsealing the Recordings of the Historic Prop 8 Trial, this Court in 2012 Ordered them Sealed, While Recognizing that the Sealing Would Not Be Permanent.

In 2011, while the appeal of the merits of the court's decision was pending, the Appellants learned that Chief Judge Walker, who had retired from the bench, had been using excerpts of the videotapes of trial in public appearances. *Perry II*, 667 F.3d at 1083. The Appellants asked that the tapes be returned and the Plaintiffs, joined by a coalition of media organizations including KQED, filed a cross-motion that the videotapes be unsealed. *Id.* On September 19, 2011, Chief Judge Ware ordered the recordings unsealed, having "concluded that the common-law right of public access applied to the recording, that neither the Supreme Court's decision in *Hollingsworth [I]* nor the local rule governing audiovisual recordings barred its release, and that Proponents had made no showing sufficient to justify its sealing in the face of the common-law right." *Id.*

In 2012, this Court reversed Judge Ware's order unsealing the videotapes. *Perry II*, 667 F.3d at 1088-89. In doing so, the Court held that interests in judicial

integrity supported the continued sealing (*id.* at 1088), while also affirming that the sealing order it contemplated would not last forever (*id.* at 1084-85 & n.5). As to the latter point, the Court explained that Appellants "reasonably relied on Chief Judge Walker's specific assurances—compelled by the Supreme Court's just-issued opinion—that the recording would not be broadcast to the public, *at least in the foreseeable future*." *Id.* (emphasis added). In a footnote, the Court cited to Local Rule 79-5(f) (now (g)), which creates a presumption of access to a sealed record "10 years from the date the case is closed," unless good cause is shown for continued sealing. *Id.* n.5.

C. In 2017, the District Court Ordered the Recordings Unsealed on August 12, 2020, Unless Appellants Could Establish Good Cause for Continued Sealing.

On April 28, 2017, KQED moved the district court to unseal the videotaped trial record based on the considerable changes in circumstances after the passage of time, including final resolution of the underlying case. The district court declared that it had "no doubt that the common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches" (E.R. 15), but denied the motion, finding that the same compelling reasons justifying sealing of the records cited by this Court continued to apply, "*at this juncture*." E.R. 19 (emphasis added).

Thus, carefully interpreting this Court's 2012 Opinion, the court implemented Civil Local Rule 79-5(g)'s "presumptive unsealing" of the recordings ten years after the case is closed. E.R. 16. It held that no prior orders sealing the recordings were issued in perpetuity, explaining: (1) Defendants cannot indefinitely rely on then-Chief Judge Vaughn Walker's "implied" assurance that the video recordings would never be accessible to the public (E.R. 15 n.17); (2) this Court's opinion on the sealing was "conditional as to time," and "careful to avoid concluding that the then-existing compelling reason and the Proponents' reasonable expectations regarding non-broadcast would permanently preclude disclosure" (E.R. 15, 10); and (3) the Supreme Court's decision on the sealing was expressly limited to the narrow issue of whether "broadcast in this case should be stayed because it appears the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting" (E.R. 15 n.18 (citing *Hollingsworth I*, 558 U.S. at 184)); *see also* E.R. 15 (citing *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1181 (9th Cir. 2006) (determining whether justifications existed to continue sealing court records)). The court ordered release of the records on August 12, 2020—ten years from the functional closure of the case in the district court "for substantive proceedings on the merits" (E.R. 18 n.20)—unless any party established good cause for the continued sealing.

Pursuant to the district court's order and Civil Local Rule 79-5(g), on May 13, 2020, Defendants moved to continue the sealing of these records, making clear their position that they should be sealed in perpetuity. E.R. 550. In opposing KQED's Motion in 2017, Defendants had offered no new evidence as to why the records should be sealed beyond the presumptive 10 year expiration of any sealing order, prompting the district court to note then that Defendants "make no effort to show, factually, how further disclosure of their trial testimony would adversely affect them." E.R. 14. Yet—three years later, and having been warned that they were required to present facts to support any continued sealing—Defendants *again* did absolutely nothing to remedy this omission. As the district court pointed out in the Order at issue in this appeal (E.R. 3), Defendants offered not a shred of evidence to establish good cause for the sealing, continuing to rely on arguments they made a decade ago (E.R. 3-4). The district court found that although those arguments supported sealing of the videotapes for the ten years contemplated by the Local Rule, they do not justify "indefinite sealing of the trial recordings." E.R. 4. Instead, Defendants were required to present evidence demonstrating a "compelling" justification for the continued sealing. *Id.* They did not.

D. The Public's Enduring Interest in the Prop 8 Trial.[1]

The Prop 8 trial offered an unprecedented opportunity for the federal judiciary to conduct a trial in which opposing views on same-sex marriage were presented in a neutral public forum and subject to the rules of evidence. From the start, the public has demonstrated an intense interest in the Prop 8 trial. For example, when the Northern District of California changed its local rule to allow cameras, literally tens of thousands of people notified the court that they favored camera coverage of the trial proceedings, even though the feedback that the court invited was as to only the general local rule and not case-specific. *Hollingsworth I*, 558 U.S. at 202 (Breyer, J., dissenting).

After the U.S. Supreme Court banned live broadcast of the trial, interested parties had actors recreate each day of trial testimony and argument based on the transcripts, with actors playing the judge, lawyers, and witnesses.[2] These "re-enactments" of the trial were performed in cities—and sometimes on city streets—in various places across the country.[3] A database search of news stories returns

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[1] The references cited in this Section were cited to the district court in KQED's papers filed below. S.E.R. 39-42.

[2] http://www.marriagetrial.com, homepage archived at https://perma.cc/4E66-R76K.

[3] *See, e.g.*, "Testimony: Equality on Trial w/ Marisa Tomei and Josh Lucas," https://www.youtube.com/watch?v=CwBsnklZpwM (informal reenactment by actors in West Hollywood, California); "Prop 8 Trial Reenactment—Pershing Square, Downtown LA," https://www.youtube.com/watch?v=SVIS5_vao6E.

over 7,500 separate articles about "Proposition 8" from 2010 alone—and there were doubtless many thousands more stories that were broadcast on radio, television, posted on social media, or published in sources not captured.

In the years since, the public has continued to be keenly interested in the historic Prop 8 trial, though the intense, day-to-day scrutiny faded. For instance, in the last year, nearly a decade after the 2010 bench trial, "Proposition 8" still returned over 286 hits in a search of news sources. And the issue of gay rights and gay marriage broadly continues to be one of substantial public interest. The writers for the NBC series, Will & Grace, the first prime-time television series to feature openly gay lead characters, commented in an April 2020 interview, "You think about how different it feels than when Prop 8 was a really controversial thing, the idea of two [men] getting married in California."[4]

More importantly, over the past decade, the public has shown a continued interest in audio-visual depictions of the trial itself, not merely news accounts of the proceedings. The trial transcripts were used as the basis for a noted play, *8*, that was performed on Broadway in 2011, broadcast in 2012, and then adapted for

[4] White, Peter, 'Will & Grace' Finale: David Kohan & Max Mutchnick On Ending On Their Terms For The Final Time & Teasing Grace's Baby's Father, DEADLINE (April 23, 2020), available at https://deadline.com/2020/04/will-grace-finale-david-kohan-max-mutchnick-final-time-baby-father-1202915099/.

a radio play in Australia in 2014.[5] Multiple documentaries have been made about the case and the issue, including the acclaimed *The Case Against 8*, which was released in theaters and aired on HBO in 2014. On March 3, 2017, an episode of *When We Rise*, a docuseries that aired on ABC, featured an extended recreation of the Prop 8 trial, with acclaimed actors playing Chief Judge Walker, the noted attorneys on each side, and even the witnesses.[6] Both witnesses for Appellants have Wikipedia pages that extensively discuss their testimony,[7] and they have had their testimony dissected, discussed, and reenacted in a variety of venues.[8]

Others recognize other substantial value in unsealing the Prop 8 trial recordings. Erwin Chemerinsky, Dean of the Berkeley School of Law, the Jesse H. Choper Distinguished Professor of Law at the University of California, and prolific legal author and scholar, observes that "legal scholars await the opportunity to review and to use the recordings to provide greater understanding and a far richer appreciation of the legal issues and evidence presented during this landmark trial." Appellee's Supplemental Excerpts of Record ("S.E.R.") 60 ¶ 6. Professor Suzanne

[5] https://en.wikipedia.org/wiki/8_(play).

[6] http://www.imdb.com/title/tt5554612/?ref_=tt_eps_cu_n.

[7] https://en.wikipedia.org/wiki/Kenneth_P._Miller and https://en.wikipedia.org/wiki/David_Blankenhorn.

[8] http://afer.org/blog/witness-testimony-kenneth-miller/; http://afer.org/blog/trial-day-11-prop-8-proponents-witness-testimony-continues/; https://www.youtube.com/watch?v=MeZ0GIy8l4Q (extensive reenactment of testimony of David Blankenhorn from the play *8*).

B. Goldberg, Herbert and Doris Wechsler Clinical Professor of Law at the Columbia Law School and one of the nation's experts on gender and sexuality law, who was unable to attend the Perry trial, agrees that release of the video "would be invaluable to me as a scholar and to other legal scholars and others interested in better understanding the myriad of issues that were tried in this case" and she "envision[s] using the recordings to help students and scholars hear and watch the witness trial testimony to provide a deep and realistic understanding and appreciation for the many complex factual and constitutional issues that arose during this historic trial." S.E.R. 63 ¶ 5. The It Gets Better Project, which, among other things, publishes videos meant to inspire hope for young LGBTQ+ people ("lesbian, gay, bisexual, transgender, Queer") facing harassment, has determined that unsealing of the videos "will exponentially expand the audience that can view the evidence and arguments," which serves the It Gets Better Project's educational mission. S.E.R. 56 ¶ 6; *see also* S.E.R. 68 ¶ 4 (Declaration of McKenna Palmer); S.E.R. 65-66 ¶ 4 (Declaration of Michael Sabatino).

E. Intervenor KQED's Interest.

Intervenor KQED operates the nation's most listened to public radio station and the most popular public television stations in the San Francisco Bay Area. KQED also has its own news division, KQED News, which publishes and broadcasts "The California Report," providing daily coverage of news and culture

throughout the State of California. KQED serves more than a million listeners and viewers in the Bay Area, California, and around the world each week. S.E.R. 52 ¶ 2 (Declaration of Scott Shafer).

As a public broadcaster, KQED is uniquely situated to assess the desire its viewers, listeners, and readers have to view the unsealed videotapes of the historic Prop 8 trial. S.E.R. 52-53 ¶ 5. That desire remains extremely strong. San Francisco was not only the site of the Prop 8 trial; it also has a large gay and lesbian population, and the advocacy history of its residents—by both those who are LGBTQ+ and those who are not—makes it one of the most important cities in the history of the gay rights movement. Many members of the public have learned about the Prop 8 trial through other media—from news reports to documentaries to magazine articles—but there is no substitute for the insight and illumination that only the videotaped record of the trial can provide. *Id.* KQED is committed to making the recordings publicly available in a way that educates the public. In particular, if the videotapes are unsealed, KQED envisions producing an educational television special and a separate radio and podcast special, and also making available online key moments of the trial. S.E.R. 53 ¶ 6.

4. SUMMARY OF ARGUMENT

Local Rule 79-5(g) is unequivocal in its mandate for the issue raised in this appeal:

> Any document filed under seal in a civil case ***shall***, upon request***, be open to public inspection without further action by the Court 10 years from the date the case is closed***. However, a Submitting Party or a Designating Party may, ***upon showing good cause*** at the conclusion of a case, seek an order to extend the sealing to a specific date beyond the 10 years provided by this rule.

(Emphasis added.) In 2012, this Court protected the interests in judicial integrity, while also recognizing that under this Local Rule, the public's rights of access would attach in the future, and that those rights would prevail over the permanent secrecy Appellants seek unless Appellants "could show[] good cause" of the claimed need for an extended seal. *Perry II*, 667 F.3d at 1085 & n.5. The district court acted well within its broad discretion in applying the facts of this unusual case, and holding that this Court's sealing decision contemplated a presumption of access under the Local Rule that Appellants failed to overcome. E.R. 10, 15 (citing *Perry II*, 667 F.3d at 1084-85). Although Appellants continue to insist that the Supreme Court's decision in *Hollingsworth I* is binding authority, as the district court correctly held, that decision was limited to the narrow issue of whether the trial court had followed proper procedures to amend its local rules to allow for the live, contemporaneous broadcast of the 2010 trial. E.R. 15 n.18. This Court's decision in *Perry II* makes clear that Civil Local Rule 79-5 presumptively applies to unseal the recordings unless Appellants can show good cause necessitating continued sealing. *Perry II*, 667 F.3d at 1085 n.5; Section 6.A, *infra*.

This result also is required by the common law, which the district court

correctly found applies to the trial recordings that were filed as part of the court record a decade ago, without objection by either party (*Perry I*, 704 F. Supp. 2d at 929), as well as the First Amendment. As this Court has explained, courts in this Circuit "start with a strong presumption in favor of access to court records." *Foltz v. State Farm Mut. Auto. Ins. Co*., 331 F.3d 1122, 1135 (9th Cir. 2003). Not only have Appellants utterly failed to show any good cause why the recordings should *continue* to be sealed in light of their presumptive unsealing after the passage of ten years under Rule 79-5, Appellants have proffered not a single new piece of evidence nor a single new legal theory in support of perpetual sealing. E.R. 3. Instead, Appellants regurgitate the same theories they have relied since 2011—vague rhetoric but no evidence to demonstrate good cause for the continued sealing—to stridently but baselessly urge the Court to reverse the lower court's decision. The district court correctly found that Appellants did not make that showing as they have ***twice*** failed to provide any new evidence supporting the continued sealing. Sections 6.B, 6.C, *infra*.

In contrast to Appellants' utter lack of evidence supporting their position, KQED submitted multiple new declarations and easily demonstrated the changing circumstances and legal landscape that justify unsealing the records, especially after the passage of a decade. While the legal and political landscape surrounding the issue of same-sex marriage continues to change and embrace the decision in

this case, the clamor from the media and the public, including rights groups and legal scholars, to have access to the recording of this historic trial does not ebb. *See, e.g.*, S.E.R. 51-69 (Declarations of Dean Erwin Chemerinsky, Professor Suzanne Goldberg, Seth Levy, McKenna Palmer, Michael Sabatino, and Scott Shafter). The public's interest in and constitutional right to access the videotaped trial recordings is greater than ever. Section 6.D, *infra*.

KQED respectfully requests that the Court affirm the district court's Order, and finally allow the recordings to be unsealed so that the public may view the nuances and details of the historic Prop 8 trial that only its video recording could capture. Unsealing these trial records will allow the public to observe the legal process that the federal court followed as it heard evidence and arguments (on both sides)—a tangible public benefit that furthers judicial integrity and confidence in the nation's judicial system.

5. STANDARD OF REVIEW

As Appellants concede, "[a] district court's decision whether to unseal records or documents is subject to review for abuse of discretion." Brief of Intervenors-Defendants-Appellants ("A.B.") 22, citing *Perry II*, 667 F.3d at 1084. A reviewing court may not reverse unless it reaches a definite and firm conviction that the district court committed a clear error of judgment (*Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016)), and must uphold the decision if it

falls within a broad range of permissible conclusions (*Lam v. City of San Jose*, 869 F.3d 1077, 1085 (9th Cir. 2017)). In the context of sealing, "[t]he trial court is in the best position to weigh fairly the competing needs and interests of parties," and thus has "substantial latitude" in this area. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

6. ARGUMENT

As the Supreme Court observed in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980), "[I]t is difficult for [people] to accept what they are prohibited from observing." The "news media's right of access to judicial proceedings is essential not only to its own free expression, but also to the public's." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 589-90 (9th Cir. 2020) (citation omitted). For judicial proceedings, "the function of the press serves ... to bring to bear the beneficial effects of public scrutiny upon the administration of justice.... The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press." *Id.* Here, the public, through the press, has a critical right to access the videotaped trial records of the historic Prop 8 trial. Both the common-law and First Amendment rights of access to judicial proceedings and records cover the videotaped trial records. That issue is not in question. Rather, the question is whether the compelling interest that justified the

sealing of the records in 2011, 2012 and 2018 continues today and should, as Appellants contend, be permanent. The answer is no.

A. Local Rule 79-5 Requires Unsealing of the Videotaped Trial Records.

1. This Court and the District Court Previously Held that Local Rule 79-5(g) Applies to the Videotaped Recordings.

Local Rule 79-5(g) requires that the videotaped trial records be unsealed and "open to public inspection without further action by the Court 10 years from the date the case is closed"—on August 12, 2020—unless Appellants are able to show good cause why the records should continue to be concealed from the public, which Appellants make no effort to do. Civ. L.R. 79-5(g).

As the district court explained in its 2018 decision, in this Court's 2012 Opinion in *Perry II*, the Court "was careful to avoid concluding that the then-existing compelling reason and the [Appellants'] reasonable expectations regarding non-broadcast would permanently preclude disclosure." E.R. 10. The Court expressly conditioned its finding that Appellants "reasonably relied on Chief Judge Walker's specific assurances … that the recording would not be broadcast to the public," on the modifier, "*at least in the foreseeable future*," citing the district court's rules on the presumptive unsealing of records after 10 years. *Perry II*, 667 F.3d at 1084-85 & n.5 (emphasis added). The district court twice agreed with this Court's interpretation of its local rules, holding in 2018 that the compelling reason to keep the videotaped trial records under seal identified in this Court's 2012

Opinion continued to apply, but only "through the *presumptive* unsealing ten year mark applicable under Civil Local Rule 79-5(g)" (E.R. 15-16), and in 2020 that the records should be unsealed at that ten-year anniversary (E.R. 4).

All these years later, Appellants still fail to advance any *new* arguments or introduce any *new* evidence of good cause why the records should continue to be sealed a decade after the closure of this case, relying exclusively instead on their years-old judicial integrity argument. A.B. 51. Thus, Appellants simply repeat their prior challenges to the application of Local Rule 79-5, and alternatively argue that the compelling reason to seal the recordings found by this Court nearly a decade ago still inures as good cause why the recordings should remain under seal, even after the "presumptive 10 year period." *Id.*

But to claim that the same rationale for the sealing in 2012 continues today (and insist that the Court may not revisit the issue) flatly ignores both this Court's and the district court's opinions that "just because a compelling justification existed at one point in time does not mean that a compelling justification exists in perpetuity." E.R. 17 (citing *Kamakana*, 447 F.3d at 1181 (9th Cir. 2006) (there must be compelling "interests favoring *continued* secrecy")). If either court believed the compelling reason justifying sealing at the time of its decision would inure in perpetuity, it would have so ordered. Neither court did. Instead, both

courts used language expressly conditional as to time. E.R. 15, 17, 20; *Perry II*, 667 F.3d at 1084-85 & n.5.

This was not arbitrary. Both courts acknowledged the principle underlying Local Rule 79-5(g)—that the passage of time presumptively will diminish any compelling reason to conceal judicial records from the public. The Rule itself recognizes the overriding public interest in access to judicial records and the need to take the *minimum* actions necessary to protect the narrow category of sealable information. Civ. L.R. 79-5, Commentary ("*As a public forum, the Court has a policy of providing to the public full access to documents filed with the Court…. and that a redacted copy is filed and available for public review that has the minimum redactions necessary to protect sealable information*."). The "strong presumption in favor of access" recognized by this Local Rule dictates that the videotaped trial records should be finally unsealed, especially since Appellants proffer no new cause whatsoever why the records should continue to be sealed. *Kamakana*, 447 F.3d at 1178.

2. The Plain Language of Local Rule 79-5 Includes the Videotaped Trial Records.

In addition to insisting that the Court should not revisit Appellants' compelling interest argument (A.B. 35-39) (despite the district court's 2018 *order* instructing the parties to do just that), Appellants incorrectly argue that the district court was wrong in finding that Rule 79-5 applies to "video-recordings lodged in

the record *by the court itself*." A.B. 46. Appellants contend that Local Rule 79-5 only applies to documents "that *a party files under seal*," and not materials created and placed in the record by the Court because certain provisions in Local Rule 79-5 use the term "party": "a registered e-filer" or "a party that is not permitted to e-file" or "a *Submitting Party or a Designating Party*." *Id.* This argument should be flatly rejected.

First, the Rule itself contains no such limitation, and in fact rejects any attempt at narrowing, providing that "[u]nless otherwise ordered by the Court, ***any document filed under seal*** shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. ***Any document filed under seal*** in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed." Local Rule 79-5(g) (emphasis added). The district court properly rejected this argument noting that "Rule 79 applied generally to 'BOOKS AND RECORDS KEPT BY THE CLERK'[;] Rule 79-5 applied to 'Filing Documents Under Seal'[;] … [and, t]here was and is nothing in Rule 79-5 limiting the presumptive unsealing to materials filed by the parties as opposed to materials created and filed by the Court, like transcripts of judicial proceedings or the video recordings at issue." E.R. 18-19.

Second, this argument rests on a false premise that a video recording of trial is a material "created by the court," and thus somehow distinct from any other judicial record, like a trial transcript, which may be subject to a sealing order. *E.g.*, *TVIIM, LLC v. McAfee, Inc.*, No. 13-cv-04545-HSG, 2015 U.S. Dist. LEXIS 102121, at *5 (N.D. Cal. Aug. 4, 2015) (granting request to seal portions of trial transcript); *United States v. Zhang*, No. CR-05-00812 RMW, 2013 U.S. Dist. LEXIS 1054, at *1-2 (N.D. Cal. Jan. 3, 2013) (granting request by *non-party* to seal portions of the trial transcript). This premise is nonsensical, but also irrelevant. Materials "created by the court," such as court orders, may be filed under seal. *E.g.*, *City of Birmingham Relief & Ret. Sys. v. Hastings*, No. 18-CV-02107-BLF, 2019 WL 3815720, at *1 (N.D. Cal. Mar. 4, 2019) (sealing unredacted court order), *redacted opinion issued*, No. 18-CV-02107-BLF, 2019 WL 3815722 (N.D. Cal. Feb. 13, 2019); *In re Myford Touch Consumer Litig.*, No. 13-CV-03072-EMC, 2016 WL 7734558, at *30 (N.D. Cal. Sept. 14, 2016) (same), *on reconsideration in part*, No. 13-CV-03072-EMC, 2016 WL 6873453 (N.D. Cal. Nov. 22, 2016); *Bayer Corp. v. Roche Molecular Sys., Inc.*, 72 F. Supp. 2d 1111, 1115 (N.D. Cal. 1999) (noting separate order filed under seal to protect details of alleged trade secrets).

Third, the argument misconstrues the Rule's use of the term "party" and its general application. The term "party" as used in the Local Rule is not limited to

the plaintiffs and defendants in an action as Appellants insist. For example, Local Rule 79-5 refers to the use of protective orders and includes terminology from the Northern District's Stipulated Protective Order for Standard Litigation,[9] such as "designating party," a term on which Appellants also rely in their argument. The Stipulated Protective Order clarifies, however, that the term "designating party" is not limited to the actual parties in the action, but rather defines that term as "a Party *or Non-Party* that designates information or items that it produces in disclosures or in responses to discovery as 'CONFIDENTIAL.'" And a Non-Party includes "any natural person, partnership, corporation, association, or other legal entity *not named as a Party to this action*" and thus includes the court. *Id.* (emphasis added). Rule 79-5 itself recognizes that non-parties may designate records confidential and submit declarations to support the sealing of such records. Civ. L.R. 79-5(e); *and see, e.g.*, *Zheng-Lawson v. Toyota Motor Corp.*, No. 17-cv-06591-BLF, 2019 U.S. Dist. LEXIS 126175, at *3 (N.D. Cal. July 29, 2019) ("Where the moving party requests sealing of documents because they have been designated confidential by another party or a non-party under a protective order, the burden of establishing adequate reasons for sealing is placed on the designating party or non-party. Civ. L.R. 79-5(e).").

[9] https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND_StandardProtOrd.pdf.

Finally, the cases Appellants cite departed from the plain statutory language only where that language renders compliance with the overall purpose or structure of the law impossible or results in an absurd outcome. A.B. 47-48, citing *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015); *Yates v. United States*, 135 S. Ct. 1074, 1083-88 (2015). Here, in contrast, applying a consistent treatment to sealed documents no matter their source does not even arguably approach that high bar.

Rule 79-5 is not limited in application to "documents filed by a party." Appellants' argument should be rejected.

3. Local Rule 79-5 Does Not Conflict with Local Rule 77-3.

Appellants also are mistaken in their insistence that Local Rule 77-3[10] conflicts with and therefore bars application of Local Rule 79-5(g). Appellants base this argument on their *unsupported* assumption that Local Rule 77-3 not only prohibits the *contemporaneous* broadcast of trial proceedings, but "also

[10] **77-3. Photography and Public Broadcasting**. Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States, 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. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

encompasses the video-recording and *subsequent* broadcast of the proceedings." A.B. 48-49. They assert that Local Rule 79-5(g) cannot act to unseal a record that *could* result in a subsequent broadcast of the 10-year-old recording of the trial. But this argument falsely presupposes that Local Rule 77-3 applies indefinitely to any *subsequent* broadcast of a judicial proceeding, even those originally recorded for purposes other than "broadcasting or televising."

a. Local Rule 77-3 Is Limited to Contemporaneous Broadcasts.

By its plain language, Local Rule 77-3 imposes limitations only on the *contemporaneous* broadcasting or televising of court proceeding—limiting the taking of recordings "*for those purposes*," *i.e.* for public broadcasting and televising—circumstances that are now years removed from the issues in this case. Thus, including the term "recording" in the Rule does not imply its application to subsequent broadcasting. The Supreme Court's decision—which interpreted an earlier, more restrictive, version of the Local Rule—is fully consistent with this interpretation. *Hollingsworth I*, 558 U.S. at 189 (staying the district court's January 7, 2010 order "to the extent that it permits the *live streaming* of court proceedings") (emphasis added). And as this Court held, the Local Rule did not preclude Chief Judge Walker from recording the trial and later using it in preparing findings of fact. *Perry II*, 667 F.3d at 1082 ("the local rule permits the recording for purposes ... of use in chambers").

This reading of the plain language of Local Rule 77-3 is logical. The Rule was meant to prevent interference with the conduct of the trial, which could theoretically be influenced by the presence of news cameras and the specter of a live, national broadcast. *See, e.g.*, *United States v. Criden*, 648 F.2d 814, 829 (3d Cir. 1981) (noting that the Judicial Conference resolution prohibiting televising courtroom proceedings is based on apprehension about the effect that *contemporaneous* broadcast of trial proceedings might have on the conduct of the trial itself); *In re Nat'l Broad. Co.*, 635 F.2d 945, 952, n.5 (2d Cir. 1980) (distinguishing between copying of physical evidence and broadcasting of testimony of live witnesses). The same is not true of publications that may occur a decade later, long after witnesses have delivered their testimony and the case has been litigated through every level of the court system. In this respect, Rule 77-3 dovetails nicely with Rule 79-5(g), with both recognizing the strong presumption in favor of access to court records and the diminution of any countervailing interests with the passage of time. *Canatella v. Stovitz*, 365 F. Supp. 2d 1064, 1081 n.19 (N.D. Cal. 2005) ("In construing statutes, the Court is guided by the well-settled principle that, where possible, laws should be read to avoid conflict.") (citation omitted).

b. Appellants Misconstrue Local Rule 79-5.

Appellants misconstrue Rule 79-5(g) and the district court order in arguing that the result of Rule 79-5(g), as interpreted by the lower court, is to release records "for public dissemination *and broadcast*." A.B. 48-49. Local Rule 79-5(g) is silent as to how records may be used after they are unsealed and "open to public inspection." There are myriad ways the recordings of the trial may be used, in addition to potential public broadcast a decade later. As just one example, Berkeley School of Law Dean Chemerinsky and Colombia Law Professor Suzanne Goldberg agree that release of the recordings would be invaluable to legal scholars in better understanding the "dynamics of what led to a historic change in American law" and to "help students and scholars hear and watch the witness trial testimony to provide a deep and realistic understanding and appreciation for the many complex factual and constitutional issues that arose during this historic trial." S.E.R. 60 ¶¶ 6-7; S.E.R. 63 ¶ 5. Others who could not personally attend the trial proceedings should not be denied access to the recordings. *See* S.E.R. 64, 67 (Declarations of Palmer, Sabatino).

KQED does not seek to broadcast or to record a court proceeding; KQED seeks to *unseal* a recording made more than a decade ago that was used by the court to prepare the merits ruling and expressly incorporated into the court record. The recording was properly made pursuant to Local Rule 77-3 (*Perry II*, 667 F.3d

at 1082), entered into the record and used by the trial judge to prepare his ruling, and now may properly be unsealed and released to the public under Local Rule 79-5(g) for various worthy uses, such as KQED's intended uses, and by scholars and others to enrich their teaching and understanding of this "historic change in American law."

4. The District Court Did Not Miscalculate the Timing of Presumptive Release Under Local Rule 79-5(g).

Appellants again challenge this Court's 2018 Order by questioning its calculation of the 10-year period under Local Rule 79-5(g). A.B. 51-53. Again, they are simply wrong. Appellants include the central part of their argument in a footnote, attempting to brush aside the undisputed fact that the Court issued an order "to make its order of final judgment effective '*nunc pro tunc*' on August 12, 2010." *Id.* at 53 n.7 (citing E.R. 313). This *nunc pro tunc* order was necessary because, despite two district court orders in August 2010 directing the court clerk to "enter judgment forthwith" and issuance of a permanent injunction functionally ending the litigation in the trial court (E.R. 312)—the order that led to this Court's February 2012 Opinion affirming the trial court's decision (*Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012)) and the U.S. Supreme Court's June 2013 Opinion in *Hollingsworth II*—"no separate Judgment was issued." E.R. 312. The court corrected this error by entering judgment "*nunc pro tunc* to August 12, 2010, the date on which the Court directed that judgment be entered 'forthwith.'" E.R. 313.

Despite this clear history—and without any reason to believe that the court's 2012 order had anything at all to do with the trial recordings at issue in this appeal—Appellants claim without any legal support that "a court cannot manipulate Rule 79-5(g) by ordering that a case be deemed to have not been closed '*nunc pro tunc*' on a different date." A.B. 53 n.7. This assertion is wrong, and continues to falsely imply that the Hon. Judge James Ware entered the order to "manipulate Rule 79-5(g)."

Appellants ignore the controlling authority on this issue. As KQED has explained before, this Circuit has made clear that a district court may amend a filing date *nunc pro tunc* to correct its own error. *See, e.g.*, *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000). Judge Ware did nothing improper when he ordered the judgment be entered *nunc pro tunc* to August 12, 2010, "the date on which the Court directed that judgment be entered 'forthwith,'" to correct the court's own error. E.R. 312-313. And critically, Appellants never challenged Judge Ware's order that the judgment would be entered *nunc pro tunc*. They waived their right to do so, and the issue is therefore moot. The case was properly closed effective August 12, 2010, by the court's unchallenged 2012 Order, and the district court properly calculated the 10-year presumptive unsealing period from that date.

B. The Common Law Right of Access Requires that the Recordings Be Unsealed.

1. Under the Common Law, the Court Starts "with a Strong Presumption in Favor of Access."

Courts in this Circuit "start with a strong presumption in favor of access to court records." *Foltz*, 331 F.3d at 1135. The right of access to court records includes the right to obtain copies of videotapes and audiotapes as they are introduced into evidence during a trial. *Valley Broad. Co. v. United States Dist. Ct.*, 798 F.2d 1289, 1294 (9th Cir. 1986) (rejecting trial court's stated reasons for refusing to provide public with copies of tapes introduced into evidence); *see also United States v. Mouzin*, 559 F. Supp. 463, 463-64 (C.D. Cal. 1983) (permitting media to copy video and audio tapes used at trial). This is because "what transpires in the courtroom is public property." *In re Nat'l Broad. Co.*, 653 F.2d 609, 614 n.28 (D.C. Cir. 1981) (granting post-verdict access to video and audio tapes played to the jury; quoting, *inter alia*, *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

The recordings here—which form an audiovisual record of what occurred in open court during this historical trial held in San Francisco—are thus the very definition of "public property" to which the common-law right of access attaches. As the district court observed, the recordings are an "undeniably important historical record." E.R. 6. Every moment of what was recorded was open to the

public, and every line uttered by a participant was captured in the transcript. Additionally, it is undisputed that the recordings themselves were relied on by the court as it made its decision on the records, so the videotapes are no different than other documentary evidence or court transcripts that are also presumptively available for inspection by the public. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (recognizing "a general right to inspect and copy public records and documents, including judicial records and documents"); *Marisol A. v. Giuliani*, 26 Media L. Rep. 1151, 1154 (S.D.N.Y. 1997) (noting that a "strong" presumption of access attaches to a report prepared pursuant to court order because it was likely to play an important role in the Court's performance of its Article III function).

This Court did not call into question the district court's 2011 conclusion that the common-law right of access applied to the videotapes, *see Perry II*, 667 F.3d at 1084, and the district court confirmed that conclusion in 2018 and again in 2020. E.R. 1, 15. As the court explained, "[o]n the merits, I have no doubt that the common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches." E.R. 15. There can be no dispute that the videotapes are presumptively available for public access.

Fighting against this clear result, Appellants again rely on *United States v. McDougal*, 103 F. 3d 651 (8th Cir. 1996)—a non-binding decision from the Eighth

Circuit involving a request for access to a videotape of President Clinton's testimony in a criminal proceeding—to insist that the video recordings of the Prop 8 trial proceedings are merely derivative and akin to a video offered in lieu of live testimony, and therefore not within the common law right of access. A.B. 30-34. But *McDougal* conflicts with Circuit authority and is factually distinguishable. As the district court explained, "*McDougal* [] dealt with a markedly different situation and applied a different standard in assessing the public's right of access." E.R. 16. Appellants nevertheless insist that the lower court order "gets the matter exactly backwards," on the basis that the videotape in *McDougal* recorded a testimony preservation deposition and thus was, in essence, a court proceeding. A.B. 32. This argument fails for several reasons.

As a threshold matter, *McDougal* held that the videotape was "not a judicial record to which the common law right of public access attaches." *Id.* at 657. But the question in this case is not whether the common law right of access attaches (this Court agrees that it does, 667 F.3d at 1084), but whether the presumption of access should be overcome. *McDougal* also held that, even assuming the right attached to the record at issue, it should be overcome, but only because it "rejected the strong presumption" "in favor of public access" standard adopted by other circuits, including the Ninth. 103 F.3d at 657; *see also Foltz*, 331 F.3d at 1135 ("strong presumption in favor of access to court records"); *Mirlis v. Greer*, 952

F.3d 51, 60 n. 8 (2d Cir. 2020) (distinguishing *McDougal* as contrary to the law in many other circuits). Thus, *McDougal* denied access to the videotape, but under a legal standard at odds with the governing legal standard in this Circuit.

Moreover, *McDougal* is also factually distinguishable because the Prop 8 recordings served an entirely different purpose. They are a verbatim audio-visual record of the *full* trial proceedings that were entered into the record. Conversely, the videotape in *McDougal* recorded the deposition of a single prominent witness (the sitting president);[11] it was not entered into evidence; and the appellants asked the court to treat it differently from the other trial testimony.

The recording here is a quintessential judicial record of the utmost public importance. It is undisputed that the Prop 8 recordings themselves were used by the court as it made its decision, ultimately affirmed by the Supreme Court. *Perry*, 704 F. Supp. 2d at 929. As such, they should now presumptively be available for inspection by the public. *See Nixon*, 435 U.S. at 597.

Contrary to Appellants' claim (A.B. 23, 33), tradition also does not justify continuing the sealing beyond a decade. The common-law right of access is often not applied to traditionally private documents—such as grand jury records, *see In*

[11] The *McDougal* court also put considerable weight on the fact that "there has never been compelled in-court live testimony of a former or sitting president, nor has there ever been compelled dissemination of copies of a videotape recording of a sitting president's testimony." *McDougal*, 103 F.3d at 658.

re Special Grand Jury (for Anchorage, Alaska), 674 F.2d 778, 781 (9th Cir. 1982), and search warrants and related materials for an ongoing investigation, *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989)—but there is no tradition of secrecy for videotapes of complete judicial proceedings that were fully open to the public, particularly where those videotapes were filed in the court file without objection.

2. Appellants Do Not Assert Compelling Interests Sufficient to Overcome the Common Law Right of Access.

Both this Court and the district court made clear that the compelling reason identified in 2012 and 2018 to seal the videotaped trial records would not endure forever. E.R. 10; *Perry II*, 667 F.3d at 1084-85. The question left open by this Court's 2012 decision was not *if* the records will be unsealed, but *when*. *Perry II*, 667 F.3d at 1085 n.5. To that end, the district court invited Appellants to renew their motion to continue sealing in 2020, to show that compelling reasons exist *to continue* sealing the records after their presumptive release under Local Rule 79-5(g). E.R. 20.

When a party attempts to keep records secret, it "bears the burden of overcoming this strong presumption [of public access] by meeting the 'compelling reasons' standard." *Kamakana*, 447 F.3d at 1178 (citation omitted). Under this stringent standard, a court may seal records only when it finds "a compelling reason and articulate[s] the factual basis for its ruling, without relying on

hypothesis or conjecture." *Id.* at 1179 (citation omitted). The court must then "conscientiously balance[] the competing interests of the public and the party who seeks to keep certain judicial records secret." *Id.* (citations and internal quotation marks omitted). Appellants did not even try to meet that burden.

a. Appellants' Ongoing Reliance on Judge Walker's Statements Made in 2010 Does Not Justify Continued Sealing.

Appellants ignored the district court's invitation to establish an ongoing need for sealing of the videotapes (E.R. 20), failing to posit a single new or current compelling interest to justify the continued sealing of the records today. A.B. 35-45. Instead, Appellants rely on the same "evidence" submitted a decade earlier and rote speculation about "the passions surrounding a controversial social issue." A.B. 39. But permanent sealing of court records is rarely justified, and can typically only be permitted by express operation of law. *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 948 n.2 (9th Cir. 1998) (noting that "permanent sealing is justified … by law" in some instances, such as the "sealing of portions of hearing related to grand jury proceedings").

Appellants' argument, at bottom, is that they construed Judge Walker's statements as a promise to keep the tapes secret forever, and that they relied on this alleged interpretation in deciding not to challenge either the continued taping or the court's placing of the tapes in the judicial record. A.B. 28. Even if true (*but see*

Section 1, *supra*) that reliance was unreasonable. Judge Walker did not have the power to overturn the right of public access—a right which belongs to the people, including those not present at a court proceeding—by any comments he may have made. The Southern District of New York rejected a similar argument in *Greater Miami Baseball Club Ltd. P'ship v. Selig*, 955 F. Supp. 37, 39-40 (S.D.N.Y. 1997). There, Commissioner of Baseball Bud Selig attempted to prevent public access to his deposition testimony, arguing that he had only complied with his discovery obligations in that case because he had relied on the terms of a protective order which purportedly kept his testimony confidential. The Court ordered the depositions to be unsealed, concluding that "the argument is baseless" because any reliance was not "justifiable." *Id.*

The same is true here. While Appellants' reliance on Judge Walker's comments may have justified sealing for "the foreseeable future," *see Perry II*, 667 F.3d at 1084-1085, Appellants cannot justifiably have relied on his statements to support a permanent sealing. They have received the benefit of their reliance: the recordings of this historic trial will have remained under seal for 10 years after the conclusion of the case. However, they cannot now invoke the same record to transform the temporary sealing into a permanent one—particularly given the complete absence of evidence of any specific harms to the parties that could flow from unsealing. *Kamakana*, 447 F.3d at 1181 ("[u]nder our precedent, the City

was required to present 'articulable facts' identifying the interests favoring *continued secrecy*, …, and to show that these specific interests overcame the presumption of access by outweighing the 'public interest in understanding the judicial process'" (citing *Foltz*, 331 F.3d at 1136 and *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995))).

Consistent with those principles, Judge Orrick's decision comprehensively considered this Court's precedents and the unique facts of this case, and correctly determined that, while the 10-year presumptive sealing period set forth in the Northern District of California's Local Rules applied to keep the video recording private for the time being, there were no grounds for permanent sealing. E.R. 17-20. Despite Appellants' hyperbole, far from "caus[ing] lasting harm to our system of justice," A.B. 36, Judge Orrick's decision masterfully balanced a complex situation guided by logic and precedent, which is exactly the way in which our system of law is designed to work. The alternative proposition—that district courts are capable of permanently binding litigants (and the public) based on any real time comments they may happen to make during the course of a high profile trial, regardless of whether those comments are in compliance with law—is just the opposite. Courts are not kings, and this Court should reject Appellants' attempt to convert the judicial robes into royal scepters.

b. Appellants Did Not Offer a Shred of Evidence to Meet this Circuit's Demanding Standard for Continued Sealing.

The remainder of Appellants' arguments are equally ill-founded.

First, having failed to offer a shred of evidence to establish that a present risk of harassment exists—relying instead on the evidence that they submitted in 2009 (A.B. 37-38 & n.2)—Appellants nonetheless continue to insist that they face undefined "risks of harassment" from the release of the video. A.B. 37-38. But none of the evidence they invoke has any connection to any individual or entity involved in this case. *Id.* Nor do Appellants meet their burden with generic assertions from a study which found that, in other cases, other litigants may face undefined "privacy concerns," "security and safety issues" or threats. A.B. 37 (citing, incorrectly, to E.R. 355, as well as *Hollingsworth*, 558 U.S. at 193). Nothing about that study is tied in any way to any part of this particular case—as the Appellants admit by asking this Court to "imagine" potential outcomes. *Id.*[12]

As KQED has established, the public has received an array of information about the Prop 8 trial, over more than a decade. Section 3.D, *supra*. The names

[12] Moreover, the notion that their privacy interests are at stake is belied by the behavior of one of their two witnesses at trial, who voluntarily published an op-ed under his own name in the most widely read newspaper in the country describing the very testimony Appellants now seek to keep under seal. *See* David Blankenhorn, "How My View on Gay Marriage Changed," The New York Times (June 22, 2012), available at https://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html (accessed Oct. 4, 2020).

and testimony of every witness at trial (and names of and questions asked or arguments made by every lawyer) have been public knowledge for a decade. If a risk to the people involved in this suit existed, Appellants could have collected that evidence over the last decade—or even the last three years, after the district court made clear that Appellants would bear the burden to establish a compelling interest in continued sealing. E.R. 20. Instead, they came up empty, unable to offer a shred of evidence of any risk to any party to this suit. E.R. 11 n.12 (noting that "Proponents did not submit a declaration or other evidence in support of their opposition to the motion to unseal"). Appellants thus do not come close to meeting their heavy burden to show that a present risk of harassment exists, much less that it is weighty enough to overcome the strong presumption of public access. *See Kamakana*, 447 F.3d at 1179, 1181 (forbidding reliance on "hypothesis or conjecture" and explaining that the burden is to "present 'articulable facts' identifying the interests favoring continued secrecy" (citations omitted)).

Second, Appellants suggest that the fact that a transcript of the trial is publicly available undercuts the public's right to access the video of the same testimony. A.B. 31. This Court regularly recognizes the distinction between the value of a transcript and live testimony. *See, e.g.*, *United States v. Alston*, 974 F.2d 1206, 1212 (9th Cir. 1992) ("reading the dry pages of the record" does not allow readers to "experience the tenor of the testimony at trial" or make "personal

evaluations of witness demeanor"); *United States v. Bergera*, 512 F.2d 391, 393 (9th Cir. 1975) (noting that "dry records" cannot convey the same "immediate impressions" as live testimony, and so are often inferior tools for decision-making). Here too, there is substantial informational value in the video that remains hidden from public view. As Plaintiff Paul Katami explained below, those in the courtroom who watched him testify could "judge for themselves [his] commitment" to his now-husband Jeff and "hear the way [his] voice quivers when [he] talk[s] about what Jeff means to [him]." S.E.R. 27 ¶ 6. Likewise, Plaintiff Kristin Perry believes that those who saw her testify could "see how terrified [she] was," "how personal this was for her," and that those watching could "see on [her] face that [she] was carrying the weight of not only [her] family but the lesbian and gay community as well." S.E.R. 23-24 ¶ 7. *See generally* S.E.R. 15-37. In sum, the "video will uniquely show why marriage is important" to same-sex couples because only video will "capture the emotion that was part of every day of trial." S.E.R. 32 ¶ 7; *see also* S.E.R. 24-25 ¶ 10 (describing the "tears" and "emotion" of the testimony).

The public has a compelling interest in the entirety of the information relied on by the district court in reaching its historic decision—including the demeanor of the witnesses and other characteristics which are not captured by even the most able court reporters—and viewing what the District Court recognized as an

"undeniably important historical record." E.R. 6. As the court explained, the video will "carry significant and unique weight in showing what happened" during a "critical chapter in California legal history." E.R. 11 (summarizing evidence presented in favor of unsealing).

Third, Appellants speculate that the video may be abused by those who may "make one side look good and the other side look bad." A.B. 44. Again, they offer no evidence to support their conjecture. All of the evidence in the record shows that KQED and other entities who have expressed interest in obtaining these recordings, including the It Gets Better Project and the National Center For Lesbian Rights, intend to present the recordings in a way that enlightens and illuminates and does not merely sensationalize what happened in the courtroom. *See* S.E.R. 49-50 ¶¶ 3-4; S.E.R. 56-57 ¶ 6; S.E.R. 58-59 ¶¶ 4-7; S.E.R. 62-63 ¶¶ 4-5. And to the extent that Appellants fear that elements of the testimony of their own witnesses not captured in the trial transcript are subject to being taken out of context or would otherwise lead to some form of the abuses they fear, they could have moved to maintain the seal as to only those particular segments of the transcript. Having failed to do so, they cannot now both assert that the release of the video will lead to unique harms, while denying that the video contains unique historical value to the public.

Even taking these concerns at face value—which this Court should not do—Appellants do not even attempt to explain how their concerns outweigh the undeniable interest of KQED and the public in releasing these historic records, or to meet their demanding burden to establish that the district court abused its discretion. *See Kamakana*, 447 F.3d at 1179 (requiring courts to "conscientiously balance[] the competing interests of the public and the party who seeks to keep certain judicial records secret" (citation and internal quotation marks omitted)). And as explained above, Appellants' claims are unsupported by the kind of factual evidence of harm that they allege could flow from any unsealing, and their reliance on Judge Walker's statement is diminished by a proper understanding of his meaning combined with the passage of time and the concurrent development of both the law and the facts surrounding this litigation. The balance of interests here tips strongly in favor of permitting the seal to expire at the conclusion of the 10-year presumptive period.

At bottom, Appellants were aware of and accepted the presumptive ten-year expiration on sealing under the district court's Local Rules. *Perry II*, 667 F.3d at 1085 n.5; *see* Section 1, *supra*. By not appealing that aspect of the court's order placing the videotapes under seal in the same manner as any other court record, they implicitly accepted that the records would be subject to release at some point unless they could—at that time—establish a compelling interested in the continued

sealing of the videotapes. Now, having failed to marshal the evidence that they acknowledged in 2012 they would need, they resort to stubbornly insisting that the same reason they relied on in 2012 and 2018—judicial integrity— still applies and asserting that "[t]his Court has no power to depart from that [2012] holding" as the "law of this case" or "under ordinary principles of stare decisis." A.B. 35. But this argument correctly was rejected by the district court (E.R. 15) and as shown above, it cannot support a perpetual sealing.

3. Local Rule 77-3 Does not Displace the Common-Law Right of Access.

Appellants insist that Local Rule 77-3 is "positive law" that displaces the common-law right of access to judicial proceedings, records and documents. A.B. 20 (citing *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 430 (9th Cir. 2011)). This argument fails for two reasons.

First, there is no need to interpret Rule 77-3 and the common-law right of access as being in conflict. *See Pasquantino v. United States*, 544 U.S. 349, 349 (2005) ("Relying on the canon of construction that '[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident'" (citation omitted)). Any conflict between Rule 77-3 and the common-law right of access has long expired because the application of Rule 77-3 was limited to the time of trial. As explained above, the 2010 trial was properly

recorded in compliance with Rule 77-3 for use by Chief Judge Walker in chambers. Nothing in Rule 77-3 now precludes public access to that recording—which is part of the court file, trigging the presumption of access under Local Rule 79-5—as the potential for any contemporaneous broadcasting or televising was long ago "eliminated." *Perry*, 704 F. Supp. 2d at 929, 944.

While Judge Walker's pledge, along with other factors, may have created a compelling reason to seal the recording consistent with the time limits of the Local Rule, the district court properly held that any pledge could not justify sealing of the recordings in perpetuity. E.R. 17 ("I am not holding that the recordings must continue to be sealed simply because Judge Walker made a promise that movants argue was mistaken if not impermissible under the law. I agree that a record cannot continue to be sealed where a trial judge makes a mistake in characterizing the record at issue or the interests proffered to justify sealing. I also agree that just because a compelling justification existed at one point in time does not mean that a compelling justification exists in perpetuity." (footnote omitted)).

Second, even if Local Rule 77-3 were relevant to this discussion, Appellants have offered no case to support their claim that a Local Rule can displace the long-standing federal common-law right of public access to court records. Unlike the Presidential Records Act or the federal bankruptcy code, *see Nixon*, 435 U.S. 589 and *In re Roman Catholic Archbishop*, 661 F.3d 417—which are promulgated by

Congress or the Supreme Court—the Local Rule that Appellants trumpet was adopted by the judges of a single judicial district. To KQED's knowledge, no case permits a local rule to eliminate or alter federal common law (much less, as discussed in the following Section, the dictates of the First Amendment).[13]

This gap in the law makes sense: the judges of the Northern District of California do not have the power to abrogate binding precedent of this Court and the Supreme Court, including precedents creating and defining the common law right of public access to court records. Thus, their creation of local rules of procedure for their own judicial district must comply with—and may not override—the law as established by higher courts. *See, e.g., Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 94 (3d Cir. 1988) (local rule governing extrajudicial statements was invalid as applied because it "violate[d] [the parties'] rights to freedom of speech"); *United States v. Columbia Broad. Sys., Inc.*, 497 F.2d 102, 106-07 (5th Cir. 1974) (local rule banning all in-court sketches was unconstitutionally overbroad); *see Heckers v. Fowler*, 69 U.S. 123, 128 (1864)

[13] Appellants previously have cited *United States v. Gonzales*, 150 F.3d 1246, 1263 (10th Cir. 1998), for the proposition that even agency rules may displace the common-law right of access. But even if regulations were comparable to local rules—which Appellants have not established—*Gonzales* still does not help them because there the court evaluated a statute and regulations specifically implementing the statutory mandate, and the court found that statutory amendments "essentially codif[ied] the regulations." *Id.* at 1263-64. This is a far cry from 28 U.S.C. § 2071(a), which simply allows courts to adopt local rules.

(local rules may be adopted "provided such rules are not repugnant to the laws of the United States"). This is particularly true here because, as discussed in the following Section, the First Amendment also creates a strong presumption of public access to the court file, including the trial recording that has been part of that file for a decade.

C. The First Amendment Independently Requires the Unsealing of the Recordings.

At the conclusion of the trial, Judge Walker noted that "[t]he trial proceedings were recorded and ***used by the court*** in preparing the findings of fact and conclusions of law" and directed the clerk "to ***file*** the trial recording under seal as part of the record." *Perry II*, 667 F.3d at 1083 (emphasis added). While Appellants now claim that this inclusion of the videotapes in the recording violated the Local Rules, they admit that they "did not act to prevent the inclusion of the recordings as 'part of the trial record.'" A.B. 28. Thus, the video recording that was "file[d] … under seal as part of the record" (see *Perry II*, 667 F.3d at 1083), is subject to a strong presumption of access under the First Amendment. This constitutional mandate prevails over any Local Rule that might restrict that access.

1. As this Court Recently Held, the First Amendment Applies to Civil Judicial Records, as Well as Proceedings.

The district court correctly found that its analysis regarding the right of access "would be no different" under the "First Amendment right of access" (E.R.

19), but noted that this Court "has not squarely addressed which standard applies to access to civil proceedings as opposed to access to civil judicial records and documents." E.R. 12. Earlier this year, however, this Court squarely addressed this issue on the merits of the case, pronouncing:

> The Supreme Court has yet to explicitly rule on whether the First Amendment right of access to information reaches *civil judicial* ***proceedings and records***, *but the federal courts of appeals widely agree that it does*. [] Indeed, every circuit to consider the issue has uniformly concluded that the right applies to both civil and criminal proceedings…. We agree with the Seventh Circuit that although "the First Amendment does not explicitly mention a right of access to court proceedings and documents, 'the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents,'" and that this right extends to civil complaints…. Absent a showing that there is a substantial interest in retaining the private nature of a judicial record, ***once documents have been filed in judicial proceedings***, a presumption arises that the public has the right to know the information they contain….
>
> The press's right of access to ***civil proceedings and documents*** fits squarely within the First Amendment's protections.

Courthouse News Serv. v. Planet, 947 F.3d 581, 590-92 (9th Cir. 2020) (extending First Amendment right of access to newly filed *civil* complaints because a complaint is "an item filed with a court that is 'relevant to the judicial function and useful in the judicial process'" (emphasis added; citations omitted)). The Court thus confirmed application of the same standard to both civil judicial proceedings and records. *Id.*

Here as in *Courthouse News*, the videotaped trial record fits squarely within the First Amendment's right of access to "civil judicial proceedings and records." *Id.* The videotapes are items "filed with the court" that were "relevant to the judicial function and useful in the judicial process." *Id*. The recordings were used in rendering the court's decision in the bench trial and included in the record. *Perry I*, 704 F. Supp. 2d at 929. They are thus covered as proceedings and records by the First Amendment's "long presumed" right of access. *Courthouse News Serv.*, 947 F.3d at 591-92; *accord Oliner v. Kontrabecki*, 745 F.3d 1024 (9th Cir. 2014) (district court may not seal an entire court record absent "compelling reasons" for doing so).

Appellants' arguments cannot defeat the clear holding of *Courthouse News Service*. They cite *Valley Broadcasting Co.*, 798 F.2d at 1292-93 for the proposition that access to videos played at trial is not compelled by the First Amendment, "so long as the trial is open to the public and transcripts of the recordings as played at trial are publicly available." A.B. 53. But they make no effort to distinguish—nor do they even cite—this Court's more recent decision in *Courthouse News Services*. The videotape of the trial was entered into the trial record and considered by the Court in its evaluation of the case; it is a judicial record subject to the First Amendment right of public access.

They also insist that KQED's position is "startling" as it would purportedly "imply that the longstanding prohibition on the public broadcast of trial proceedings is unconstitutional." A.B. 54. It would imply no such thing. This action is *sui generis* because the district court used the videotapes in evaluating the case and then ordered them included in the public record ***without objection***. *Cf. Nixon*, 435 U.S. at 591 (addressing the different question of whether the public has a right to copies of audiotapes admitted into evidence at trial, but not separately filed in the court file); *Fisher v. King*, 232 F.3d 391, 396-97 (4th Cir. 2000) (same); *United States v. Beckham*, 789 F.2d 401, 408-09 (6th Cir. 1986) (same); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 426-28 (5th Cir. 1981) (same). The existence, use by the court, and (critically) ***filing*** of the videotapes in the court file changes this from an action addressing whether the public has a right to broadcast a trial or obtain copies of evidence admitted at trial—the strawmen Appellants are attempting to erect, to have something to knock down—into one in which the only question is whether a document filed in the court file should be maintained under seal in perpetuity.

In any event, KQED does not seek to live-stream the trial, which would be an impossibility nearly a decade after the trial concluded. Nor does it seek to make a video recording of the trial. Rather, this appeal is about public access to a recording of a historic trial that already exists. The decision here will have no

impact on any other case, as the unusual circumstances under which Judge Walker created this recording are unlikely to reoccur. *See, e.g.*, E.R. 16 (recognizing that "the current Northern District and Ninth Circuit rules and policies *allow* for public broadcast of proceedings"). Appellants' fear of a slippery slope is thus baseless.[14] They should not be allowed to evade the mandates of the First Amendment.

2. There Is No Longer a Compelling Interest in Sealing.

Under the First Amendment's compelling interest standard, to maintain the videotapes under seal, Appellants must establish that "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Oregonian Publ'g Co. v. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990) (citation omitted). Appellants did not meet this demanding standard.

This Court recognized in 2012 that preserving "the integrity of the judicial process" was "a compelling interest that in these circumstances would be harmed

[14] *In re Providence Journal Co.*, 293 F.3d 1, 15-16 (1st Cir. 2002), also does not assist them. There, the court permitted a temporary sealing of certain records pending resolution of related cases, after which the trial court was expected to proceed promptly to re-examine public access. And in *United States v. Antar*, 38 F.3d 1348, 1359-60 (3d Cir. 1994), the court held that "the right of access to voir dire examinations encompasses equally the live proceedings and the transcripts which document those proceedings." It did not purport to address the different question presented here regarding access to the contents of the court file.

by the nullification of the trial judge's express assurances" that the videotapes would not be publicly broadcast (*Perry II*, 667 F.3d at 1088), while noting the presumptive end to that interest under Local Rule 78-5 (*id.* at 1085 & n.5). As explained above, Appellants offer no new evidence or theory to support a compelling interest thus abandoning their burden here. Section B.2, *supra*. That is because the passage of ten years has diminished any risk of harm, as presumed by Local Rule 79-5. The First Amendment clearly attaches, now more than ever, to the videotaped trial records and there is no longer a compelling reason to keep them under seal. They should be released to the long-awaiting public.

Finally, *even if* the Court is persuaded that there is a reason to continue sealing some portion of the recordings, it must do so in the least restrictive manner possible. Local Rule 79-5 permits only the sealing of records that have "the minimum redactions necessary to protect sealable information." Civ. L.R. 79-5 Commentary; sub. (d)(1)(B) (requiring a "proposed order that is narrowly tailored to seal only the sealable material."); *see also Moussouris v. Microsoft Corp.*, No. 18-80080, 2018 U.S. App. LEXIS 27041, at *3 (9th Cir. Sept. 20, 2018) (reminding parties "'[t]his Court has a strong presumption in favor of public access to documents,' and any sealing motion 'shall request the least restrictive scope of sealing.'" (citation omitted)). The remaining portions of the videotaped trial

record should be unsealed pursuant to Rule 79-5(g), the common law and the First Amendment.

D. The Public Will Benefit from Making the Videotapes Public.

As this Court has made clear, "live testimony"—not a bare transcript—is the "indispensable" foundation of our adversary system. *United States v. Thoms*, 684 F.3d 893, 905 (9th Cir. 2012) (holding that a district court must see and hear live, in-person testimony before reversing the credibility determination made by a magistrate judge). "[T]rial judges and juries in our circuit and all over the country rely on the demeanor evidence given by live testimony every day, and they find it quite valuable in making accurate decisions." *Id.* The value to the public of viewing the full demeanor evidence the district court considered in this historic trial thus is hard to overstate.

The circumstances of the Prop 8 trial mean that these particular videotapes contain unique emotional and educational information that no transcript can provide. As discussed above, those who actually testified believe that video will uniquely show why marriage is important to same-sex couples because only video will "capture the emotion that was part of every day of trial." S.E.R. 32 ¶ 7 [Stier]. The actual video testimony differs substantially from the reenactments, because most reenactments have portrayed the witnesses as "brave and confident" when in fact the record will show them to be "vulnerable." *Id.* ¶ 8. And those who were in

the courtroom think it will be particularly revealing to watch the videotape of "other witnesses that spoke about their experiences dealing with Proposition 8 or living as a lesbian or gay person" so that the public can see the "tears" and "emotion" that no transcript can sufficiently convey. *See United States v. Bergera*, 512 F.2d at 393 (noting that "dry records" cannot convey the same "immediate impressions" as live testimony, and so are often inferior tools for decision-making).

Moreover, a variety of organizations plan to make productive, educational uses out of the videotapes and put them in context. KQED, legal scholars and educators, the It Gets Better Project, and others all intend to review and analyze the tapes and use them in a way that enlightens and illuminates and does not merely sensationalize what happened in the courtroom. *See* Section 3.D, *supra*; *see generally* S.E.R. 51-69 (Shafer, Chemerinsky, Goldberg, Levy, Palmer and Sabatino Declarations). There will thus be substantial public benefit, and no harm from unsealing the tapes.

As Professor Goldberg explained, "[t]his recording is the only one available of a federal trial in which extensive witness testimony and evidence was given on whether couples in same-sex relationships should be permitted to marry. Access to the recorded testimony of trial witnesses will provide an unprecedented and wholly unique perspective into the evidence that Judge Walker heard and considered

during his deliberations and then used to support his order striking down Proposition 8 and which later became the basis of landmark rulings by the Ninth Circuit Court of Appeals and the United States Supreme Court." S.E.R. 63 ¶ 5.

It is precisely this vivid testimony—the visual record that the public will only benefit from observing the witnesses—that ten years later, still remains under seal and should now be public.

7. CONCLUSION

Perpetually sealing the Prop 8 trial videos will do nothing to ensure "judicial integrity." Instead, the continued sealing of these court records undermines the public's confidence in and understanding of the factual underpinnings of the U.S. Supreme Court's rulings on marriage equality that were addressed in this historic federal trial. KQED respectfully requests that this Court affirm the trial court's Order and allow the videotapes of the historic Prop 8 trial to be unsealed.

Respectfully submitted this 9th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that the foregoing brief complies with the requirements of Circuit Rule 32. The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 13,598, not including the corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of compliance, statement of related cases, and any addendum containing statutes, rules or regulations required for consideration of the brief.

Dated this 9th day of October, 2020.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Intervenor-Appellee KQED Inc. states that it is not aware of any related cases pending in this Court within the meaning of that Rule.

Dated this 9th day of October, 2020.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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