No. 20-16375

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff-Appellee,

KQED, INC.,

Intervenor-Appellee,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, 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.

Appeal From United States District Court For The Northern District Of California
Case No. 3:09-cv-02292-JW (WHO) (Honorable William H. Orrick)

PLAINTIFFS' ANSWERING BRIEF

THEODORE J. BOUTROUS, JR.
CHRISTOPHER D. DUSSEAULT
THEANE EVANGELIS
ABBEY J. HUDSON
JILLIAN N. LONDON
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

THEODORE B. OLSON
MATTHEW D. MCGILL
AMIR C. TAYRANI
ANDREW WILHELM
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Plaintiffs-Appellees Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

[Additional Counsel Listed on Inside Cover]

ETHAN DETTMER
ELIZABETH A. DOOLEY
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
(415) 393-8200

DAVID BOIES
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(917) 749-8200

Attorneys for Plaintiffs-Appellees Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

Statutes

Rules

INTRODUCTION

At stake in this appeal is whether the public will ever have access to the single most comprehensive and accurate record of the legal battle for gay and lesbian equality—a recording of a 2010 trial to decide whether gay men and lesbians would be recognized as equal citizens or whether they would remain relegated to second-class status and denied the fundamental right to marry.

In 2010, only a handful of states permitted same-sex couples to marry, the federal Defense of Marriage Act prevented any federal recognition of even those permissible state marriages, and the people of the State of California had recently voted to approve Proposition 8, a state ballot initiative that stripped gay men and lesbians of the right to marry that had just been recognized by the California Supreme Court. Recognizing that only the United States Constitution could restore to them this fundamental right to marry, and undaunted by the odds against them, two same-sex couples—Kristin M. Perry and Sandra B. Stier, and Paul T. Katami and Jeffrey J. Zarrillo—acted courageously, filing a first-of-its kind federal lawsuit challenging a ban on same-sex marriage as unconstitutional under the United States Constitution.

The district court conducted a three-week trial of Plaintiffs' constitutional challenge to Proposition 8 in January 2010, and recorded the proceedings for use as an aid when reaching its decision. Nineteen fact and expert witnesses testified over

the course of 13 days. Plaintiffs and other fact witnesses testified on subjects including the discrimination they experienced in their daily lives, the harms of conversion therapy, and their simple desire to be treated equally under the law and to marry the person they love. Renowned scholars in a range of fields provided expert testimony on issues critical to the constitutional question presented, including the history of marriage, the devastating economic and psychological impact of state-sanctioned discrimination, and the political powerlessness of gay men and lesbians. On August 4, 2010, after considering the complete record including the video recordings of the live witness testimony, the court issued its landmark ruling finding Proposition 8 unconstitutional. The court also placed the recordings of the trial into the record under seal, without objection from the official proponents of Proposition 8 ("Proponents"), who had voluntarily intervened in the trial court proceedings to defend the ballot measure they had championed. Ten years later—and five years after the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), finally settled the question of whether same-sex couples nationwide are entitled to the equal right to marry under the law—the time has come to unseal this unparalleled record of the fight for gay and lesbian equality.

Earlier this year, the district court agreed. It denied Proponents' motion to extend the sealing of the trial video beyond the 10-year duration provided for in the Northern District's local rules and to *permanently* block the public from accessing

this important historical record. Appealing from that decision, Proponents assert that the district court abused its discretion.

The district court's decision was correct, for at least two reasons. First, the district court's local rules presumptively require unsealing after 10 years—a fact Proponents understood at the time Judge Walker placed the recordings in the record and a fact recognized by this Court in 2012. *See Perry v. Brown*, 667 F.3d 1078, 1084–85 & n.5 (9th Cir. 2012) (holding that the recordings should not be unsealed *shortly* after sealing based on Judge Walker's assurance that the recording would not be made public "at least in the foreseeable future," and citing as support to Local Rule 79-5(g) and its 10-year duration). Second, the common-law right of public access and the First Amendment require unsealing. Given the opportunity by the district court to identify some compelling reason to extend the sealing of the recordings and continue to deny public access, Proponents failed to do so, relying instead on a reinvented view of what they understood about the duration of the sealing and speculation about potential harms that they made no effort to prove with actual evidence.

No written transcript, reenactment, or third-party account can substitute for what is captured on the trial recordings, a point Proponents concede by arguing so strenuously—a decade after the trial—against lifting the seal, and a point further confirmed by Judge Walker's own reliance on the recordings in rendering his

decision. Hanging in the balance in this appeal is whether this perfectly accurate record of a tipping point in history—a record that unflinchingly displays the pain and harm engendered by systemic, government-sanctioned discrimination as well as the hope, courage, and determination of those who would not stand for it—will ever be available to the public. The district court answered this question correctly, and this Court should affirm.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the district court's July 9, 2020 order under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether the district court abused its discretion in denying Proponents' motion to continue the seal of decade-old video recordings of a public trial where: (i) the district court's local rules presume that sealed records will become public after 10 years; (ii) Proponents' counsel told this Court that Proponents were aware of the local rules and the default ten-year duration of sealing under those rules; (iii) Proponents did not offer a compelling reason to maintain the seal; and (iv) the common-law right of access and the First Amendment require unsealing.

PERTINENT STATUTES, RULES, AND REGULATIONS

Pursuant to Circuit Rule 28-2.7, all applicable statutes and rules are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. The Proposition 8 Trial

In 2009, Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo, along with the City and County of San Francisco, challenged the constitutionality of Proposition 8, which prohibited same-sex couples from marrying. Plaintiffs asserted that Proposition 8 violated their rights to equal protection and due process under the Fourteenth Amendment of the United States Constitution. When the government declined to defend Proposition 8, Proponents intervened to defend the law. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010). The parties "engaged in significant discovery, including third-party discovery, to build an evidentiary record." *Id.* at 932. Thirty-four individuals were deposed, including 16 experts, nine Plaintiffs and Defendants/Intervenors, and nine third-party witnesses. Twenty of the depositions were videotaped, and Proponents made no effort to seal the videotaped depositions from public view.[1]

In January 2010, Judge Walker held a public bench trial that lasted 13 days (approximately 77 hours) and included testimony from 19 fact and expert witnesses, including the four plaintiffs. All but three of those witnesses testified in support of

[1] Nineteen of the 20 videotaped depositions contain no confidentiality designation whatsoever. As for the 20th deposition, a mere four pages of the 302-page transcript were deemed confidential. SER10 n.1.

Plaintiffs and Plaintiff-Intervenor, accounting for over 48 hours of total trial time. In addition to Proponents' two trial witnesses,[2] Plaintiffs also entered into evidence the deposition testimony of two of Proponents' withdrawn expert witnesses, Katherine Young and Paul Nathanson. Proponents never requested that these depositions be kept confidential, and excerpts of both are available publicly on the Internet. SER11.

Given the historic nature of this trial and the impact it would have on countless lives, there was immense public interest in the trial before, during, and after it took place. Not only was the trial open to the public, it was also highly publicized, with individuals and organizations liveblogging from the courtroom, regular press conferences held by both sides, and news outlets throughout the country reporting on the trial on a daily basis. One such publication observed that "[the] courtroom doesn't have a spare inch. It's jammed with spectators, lawyers and media." SER11 (alteration in original). The trial also received worldwide news coverage, with BBC News comparing the trial "to landmark cases which ended segregation in US schools and overturned a ban on interracial marriage." *Id.*

[2] Proponents called two expert witnesses in their defense case at trial. One of the Proponents, Dr. William Tam, was called adversely by Plaintiffs during their case.

The testimony was emotional and powerful. As Plaintiff Kristin Perry described it later: "I willed myself to speak very personally about my hope to one day marry the woman I love, which I hoped would also highlight the universal themes of love and equality." ECF 8-2 at 99 (Perry Decl. ¶ 4). "I think this generation of politicians, community leaders, and lawmakers should see the tapes, so they can see the pain and suffering they inflict when unjust laws are put on the books." *Id.* (¶ 6).

Following the trial, on August 4, 2010, Judge Walker found Proposition 8 to be unconstitutional and enjoined its enforcement. *Perry*, 704 F. Supp. 2d at 927. Proponents appealed to the Ninth Circuit, which affirmed the trial court's ruling. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). Proponents then appealed to the Supreme Court, which held that Proponents lacked standing to appeal Judge Walker's decision. *See Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). The Court vacated the Ninth Circuit's decision and ordered it to dismiss Proponents' appeal for lack of jurisdiction. As a result, Judge Walker's decision finding Proposition 8 unconstitutional remained in place, *id.*, permitting tens of thousands of people, including Plaintiffs, to legally marry. This Court dismissed for lack of jurisdiction on August 6, 2013.

In the years following the Proposition 8 trial, a play based on the trial, titled "8," used the actual trial transcripts and was performed on Broadway and in Los

Angeles, and was reproduced at colleges, high schools, and community centers throughout the world. SER12. Celebrities reenacted the play on YouTube, reading from the trial transcript. *Id.* These YouTube reenactments were viewed nearly 100,000 times. *Id.* A documentary film about Proposition 8, *The Case Against 8*, was released in 2014. *Id.* Numerous books have been published about the trial, including one written by two of the Plaintiffs, Kristin Perry and Sandy Stier. *Id.*

In short, this trial was—and remains—the subject of intense public and historical interest. The testimony has been widely circulated and has become a part of popular culture. But except for the few individuals able to secure a seat in the courtroom, the public has been unable to actually see this historic trial firsthand, and to experience for themselves the witnesses' impassioned testimony and the opening and closing statements.

II. Chief Judge Walker Records The Trial, Considers It When Reaching His Decision, And Places The Video Recordings Into The Record Under Seal

Before trial commenced, Judge Walker ordered it to be broadcast to several courthouses under an amendment to Local Rule 77-3 that permitted certain broadcasting under a pilot program. *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010) (per curiam) ("*Hollingsworth II*").

On the first day of trial, the Supreme Court temporarily stayed the broadcast while it considered a stay motion by Proponents. *Hollingsworth v. Perry*, 558 U.S.

1107 (2010) ("*Hollingsworth I*"). Two days later, the Court extended its stay, holding that Judge Walker's "amendment" of the district court's local rules to permit broadcast likely violated federal law. *Hollingsworth II*, 558 U.S. at 189, 199. When the stay became permanent, Proponents asked Judge Walker to stop recording. Judge Walker responded:

> The local rule permits the recording for purposes . . . of use in chambers. . . . And I think it would be quite helpful to me in preparing the findings of fact to have that recording. So that's the purpose for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.

Perry, 667 F.3d at 1082 (omissions in original). Proponents then "dropped their objection." *Id.*

In his order finding Proposition 8 unconstitutional, Judge Walker explained that he used the recordings "in preparing the findings of fact and conclusions of law," and he directed that the clerk "file the trial recording under seal as part of the record." *Perry*, 704 F. Supp. 2d at 929. Judge Walker permitted the parties to retain copies of the recordings under a protective order. *Id.* On appeal, Proponents did not challenge the district court's entry of the recordings in the record. *Perry*, 667 F.3d at 1083.

III. Initial Motions Related To Sealing

While Proponents' appeal was pending, they moved to compel all parties to return their copies of the recordings. Plaintiffs—joined by media organizations

including KQED—cross-moved to unseal the recordings. In 2011, Chief Judge Ware granted Plaintiffs' motion. *Perry v. Schwarzenegger*, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011).

Proponents appealed. During oral argument, Judge Hawkins asked Proponents' counsel whether his clients were "under the impression that these tapes would be forever sealed." Proponents' counsel responded:

> No, your Honor, I believe that a seal lasts for—not necessarily, I guess, is the better answer. A seal lasts for ten years under the local rules of the Northern District of California, and at the end of the . . . case, then we would be entitled to go in and ask for an extension of that time, to a specific date, but it would be a minimum of ten years . . . .

Proponents' counsel further noted that they were "aware of the local rules."[3]

In its decision reversing Judge Ware's order, this Court considered "whether, given the unique circumstances surrounding the creation and sealing of the recording of the trial in this case, the public is entitled to view that recording some two years after the trial." *Perry*, 667 F.3d at 1080. This Court assumed without deciding "that the common-law presumption of public access applies" and "that it is not abrogated" by Local Rule 79-5. *Id.* at 1084. Nevertheless, it held that the "compelling reason" of "Judge Walker's specific assurances . . . that the recording would not be broadcast to the public, at least in the foreseeable future" overcame the common-law

[3] Oral Argument at 7:04–7:48, *Perry*, 667 F.3d 1078 (No. 11-17255), https://bit.ly/35toPvJ ("*Perry* oral argument").

presumption. *Id.* at 1084–85. After noting that Judge Walker's assurance was limited to the "foreseeable future," this Court cited Local Rule 79-5 and its 10-year duration. *Id.* at 1085 n.5.

IV. KQED Moves To Unseal The Video Recordings

In 2017, KQED again moved to unseal the recordings. ECF 8-2 at 1–24. In January 2018, the district court ruled that it would not unseal the video recordings at that time, but that, unless Proponents could demonstrate a compelling reason that the recordings should remain under seal, it would lift the seal at the 10-year mark from closure of the case as is standard practice under Local Rule 79-5. *Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047, 1058 (N.D. Cal. 2018). In so holding, the district court found that:

1) The doctrines of issue preclusion, law-of-the-case, and stare decisis did not preclude consideration of KQED's motion on the merits, *id.* at 1055;

2) Local Rule 79-5(g) "provid[es] a ten year presumptive mark for unsealing court records," *id.*;

3) There is "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," *id.*;

4) "Proponents make no effort to show, factually, how further disclosure of their trial testimony would adversely affect them," *id.*;

5) "[T]he compelling justification of judicial integrity identified in the Ninth Circuit's 2012 Order continues to apply and prevents disclosure of the video recordings through the presumptive unsealing ten year mark applicable under Civil Local Rule 79-5(g)," *id.*; and

6) The "analysis would be no different" under the "First Amendment right of access instead of the common-law right of access," *id.* at 1058.

Proponents appealed from the district court's January 2018 order, but this Court dismissed the appeal for lack of jurisdiction. *Perry v. Schwarzenegger*, 765 F. App'x 335 (9th Cir. 2019).

V. Proponents Move To Extend The Seal Beyond The 10 Years Provided For By The Local Rule

On April 1, 2020, Proponents moved to continue the seal permanently. ECF 8-2 at 25. Proponents urged the district court to reverse its earlier findings that Local Rule 79-5 presumptively requires unsealing after 10 years and that the common-law right of access and First Amendment also apply and require unsealing, absent compelling reasons to the contrary. Proponents submitted no evidence that they or their witnesses would suffer *any* harm from unsealing, or that any witness opposed unsealing. By contrast, 15 of Plaintiffs' witnesses submitted declarations supporting unsealing. *See* ECF 8-2 at 97–168. The ACLU and Reporters Committee for Freedom of the Press also submitted amicus briefs opposing Proponents' motion to maintain the seal. *See Perry v. Schwarzenegger*, No. 09-cv-02292, Dkts. 896, 899 (N.D. Cal. May 13, 2020).

The district court denied Proponents' motion. ER1–ER6. It found that Proponents relied "solely" on their "judicial integrity" argument as the compelling reason to continue sealing, but presented no "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." ER3. The district court further relied on "the guidance in *Perry v. Brown*, . . . the prior Ninth Circuit opinion on this subject," to "conclude[] that Northern District Civil Local Rule 79-5(g) and its ten year default for sealing court records set the reasonable limit for sealing the trial recordings." ER2. The district court acknowledged the "attorney argument" regarding reliance on Judge Walker's statements, but it found Proponents' counsel's "concessions" regarding Proponents' understanding of the Local Rules to be "a significant indication that even Proponents' counsel contemporaneously understood that sealing is typically limited in time." ER3–ER4.

The district court explained Proponents' failure to justify further sealing of the video recordings as follows:

> 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.

ER3. The court thus found "absolutely no[]" justification "presented on this record" to overcome the common-law presumption of unsealing. ER4. Because "there is no

justification, much less a compelling one, to keep the trial recordings under seal any longer," they "shall become public on August 12, 2020." *Id.* The court declined to stay its order because Proponents had two years since the last order to raise any additional concerns about the seal. ER5.

After failing to obtain a stay from the district court, Proponents requested a stay from this Court. ECF 2-1. In a per curiam order, this Court stayed the district court's order to maintain the status quo and expedited this appeal. ECF 14. Chief Judge Thomas noted that he would have denied the stay. *Id.* at 2 n.1.

STANDARD OF REVIEW

A district court's decision whether to unseal a record is reviewed for abuse of discretion. *Perry*, 667 F.3d at 1084; *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) ("We review a district court's decision to unseal court records for an abuse of discretion."). This Court similarly reviews the district court's interpretation of its own local rules for abuse of discretion. *See Qualls ex rel. Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 842 n.2 (9th Cir. 1994) ("District courts have broad discretion to interpret their local rules."); *United States v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979) (district court's discretionary application of local rules only "rare[ly]" questioned).

The district court's factual findings are reviewed for clear error. *Jones v. United States*, 127 F.3d 1154, 1156 (9th Cir. 1997). This Court "must accept the

district court's findings of fact unless [it is] left with the definite and firm conviction that a mistake has been committed." *Id.* "If the district court's account of the evidence is plausible in light of the record viewed in its entirety," this Court must affirm even if it is "convinced" that it "would have weighed the evidence differently." *Id.* (quotation marks and citations omitted).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Denying Proponents' Motion To Continue The Seal

The district court's decision is fully consistent with the evidence (or lack thereof) before it, and also with the law. Proponents offer no compelling reason to rebut Local Rule 79-5's presumption of unsealing after 10 years. Moreover, the common-law right of public access applies, and Proponents provide no compelling reason to deny public access here. Similarly, Proponents provide no compelling reason to overcome the First Amendment right of public access. The district court, therefore, did not abuse its discretion in denying Proponents' motion to continue the seal. This Court should affirm.

A. Local Rule 79-5 Presumptively Requires Unsealing After 10 Years

The district court's Local Rule 79-5 (both the version in force in 2010 and the current version) provides that, unless otherwise ordered by the court, any document filed under seal in a civil case shall be open to public inspection 10 years from the

date the case is closed.[4] Proponents previously conceded the applicability of this presumptive unsealing rule to the trial records. Having made that concession, the only remaining question is whether Proponents have demonstrated a compelling reason for the recordings to remain under seal. They have not.[5]

1. Proponents Conceded Both The Applicability And Their Awareness Of The 10-Year Sealing Rule

Proponents' counsel conceded the applicability of the 10-year rule during oral argument before this Court in 2011 and explained that his clients were aware of, and relied on, that rule. This concession is binding, or at the very least undermines their current lawyer argument that they relied on a promise of permanent sealing. During argument, Judge Hawkins asked: "Were your clients under the impression that these tapes would be forever sealed?" Proponents' counsel responded, "No, your Honor, I believe that a seal lasts for—not necessarily, I guess, is the better answer. A seal lasts for 10 years under the local rules of the Northern District of California, and at

---

[4] The version in force in 2010 provided: "Any document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed." Civil Local Rule 79-5(f) (in effect in 2010 <https://cand.uscourts.gov/superseded-local-rules>). The current version is substantively similar and provides: "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."

[5] Although the Local Rule refers to "any document," the commentary to other subdivisions of the Local Rule clarifies that "document" is an all-encompassing term that includes "documents or things." Commentary, N.D. Cal. Local Rule 79-5(a)-(b).

the end of the . . . case, then we would be entitled to go in and ask for an extension of that time, to a specific date, but it would be a minimum of 10 years . . . ." Proponents' counsel again conceded that "we were aware of the local rules, your Honor." *Perry* oral argument at 7:04–7:48.

Eight years later, Proponents argue the opposite, and contend that Local Rule 79-5(g) does not apply to the video recordings. *See* SER20. But Proponents' concession "[i]n oral argument before [the Ninth Circuit]" "is binding on it in any further proceedings in th[e] case." *Amberhill Props. v. City of Berkeley*, 814 F.2d 1340, 1341 (9th Cir. 1987); *see also Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1043 n.3 (9th Cir. 2004) (ruling that appellant was "judicially bound" moving forward by its concession at oral argument (citing *Amberhill*, 814 F.2d at 1341)).

Proponents' concession that they "were aware of the local rules" and that they did not expect the seal to last forever was not some immaterial "aside." It was given in direct response to Judge Hawkins's question, which went to the central issue of what "assurance" Judge Walker had provided with respect to whether the recordings could ever be unsealed. Thus, Proponents' concession was directly related to the issue at hand and was no mere "slip of the tongue." *See In re Adamson Apparel, Inc.*, 785 F.3d 1285, 1294 (9th Cir. 2015) (finding appellant's concession at oral argument binding and that the concession "was not simply a 'slip of the tongue'"); *United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991) (finding that

appellant's "straightforward" oral judicial admission was binding and noting that "[a] judicial admission is binding before both the trial and appellate courts"). Absent "egregious circumstances," parties "are generally bound by the conduct of attorneys." *Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986). No such circumstances exist here. Accordingly, Proponents' concession is binding.

As the district court explained, these "concessions" are, at minimum, "a significant indication that even Proponents' counsel *contemporaneously* understood that sealing is typically limited in time." ER4 (emphasis added). These concessions directly undermine Proponents' sole argument for maintaining the video recordings under seal—that they *relied upon* Judge Walker's representation that the recordings would remain under seal *permanently* and that judicial integrity would be undermined by their release. Proponents cannot expect this Court to accept their new argument, for which they provided no evidentiary support and which directly contradicts their earlier statements to this Court. Proponents also miss the point when they argue that the interest in judicial integrity is not limited to 10 years. The point is not that judicial integrity has a time limit. Rather, *there is not, and never has been, a judicial integrity interest* in sealing these recordings beyond the 10-year period provided in the local rule of which they were admittedly aware.

In any event, this Court recognized Local Rule 79-5(g)'s applicability in 2012 when it maintained the seal in light of Judge Walker's assurances that the recording

would not be publicly broadcast for "the foreseeable future" and cited to the local rule in support. *Perry*, 667 F.3d at 1084–85 & n.5 (citing Local Rule 79-5's 10-year rule). The applicability of Local Rule 79-5(g) has already been decided in this case, and that decision is binding. *See Folex Golf Indus., Inc. v. O-TA Precision Indus. Co.*, 700 F. App'x 738, 738 (9th Cir. 2017) ("Under the 'law of the case' doctrine, a district court is 'precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case,' unless [one of five exceptions] to depart from the law of the case exists." (quoting *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997))). No exception applies here.[6] *Alexander*, 106 F.3d at 876.

Despite their prior concessions that they knew of Local Rule 79-5's 10-year rule, and despite the Ninth Circuit's citation of the Rule, Proponents now attempt to evade the obvious application of the rule by myopically focusing on the term "party," to nonsensically argue that Rule 79-5 applies only to documents placed in the record by a party, which in their view excludes the district court. This interpretation is incorrect for two reasons. First, Proponents acknowledge (as they must) that Local

[6] "A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *Alexander*, 106 F.3d at 876.

Rule 79-5(g) does not expressly exclude materials placed under seal by the district court. *See* Op. Br. at 46. To the contrary, the rule about presumptive unsealing after 10 years applies to "[a]ny document filed under seal in a civil case" without mention of who filed the document. Local Rule 79-5(g). There is no dispute that these video recordings were filed under seal in this case.

Second, as Proponents concede, the rule applies to "registered e-filer[s]." Op. Br. at 46; Local Rule 79-5(a). Courts regularly e-file documents—most obviously court orders—and courts sometimes place material filed by a party under seal on its own motion, *see, e.g.*, *San Ramon Reg'l Med. Ctr., Inc. v. Principal Life Ins. Co.*, 2011 WL 89931, at *1 n.1 (N.D. Cal. Jan. 10, 2011) (*sua sponte* placing a party's potentially sensitive information under seal, citing to Local Rule 79-5).

The rule's plain text, therefore, compels its application. So does common sense. If the Northern District's sealing rule does not apply to these video recordings, then they should not have been sealed to begin with and the public should have had access to them a decade ago. If the sealing rule does apply, then its 10-year duration applies as well. Proponents cannot pick-and-choose the parts of the sealing rule that they like. The district court correctly rejected Proponents' illogical attempt to disown the sealing rule after years of enjoying its benefits, explaining that nothing in Rule 79-5 "limit[s] 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." ER18–ER19.

2. Proponents Fail To Show A Compelling Reason To Maintain The Seal

As the district court explained, to maintain the seal after the 10-year mark, Proponents would need to "show compelling reasons for the seal to remain in place." *Perry*, 302 F. Supp. 3d at 1049. Proponents offered not a shred of evidence, let alone "compelling" reasons, for maintaining the seal. On appeal, Proponents point to three alleged justifications for maintaining the seal—judicial integrity, a possible conflict with Local Rule 77-3 which prohibited public broadcast of trials, and speculation that witnesses for Proponents could be subjected to harassment. None is sufficient to meet Proponents' burden.

(a) A Compelling Reason Is Required To Maintain The Seal

Proponents appear to concede that they can meet Local Rule 79-5(g)'s "good cause" standard only by showing a compelling reason to unseal the recordings. *See* Op. Br. at 50–51. And for good reason: Courts have recognized that a lower "good cause" standard applies only to documents sealed as part of a non-dispositive motion; otherwise, the "compelling reasons" standard applies. *See, e.g.*, *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136–37, 1139 (9th Cir. 2003); *Plexxikon Inc. v. Novartis Pharm. Corp.*, 2020 WL 1233881, at *1 (N.D. Cal. Mar.

13, 2020) ("Civil Local Rule 79-5 *supplements* the [common law's] 'compelling reasons' standard." (emphasis added)); *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002) ("when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted" and thus the good cause standard applies). The lower standard for non-dispositive motions makes sense because records accompanying such motions "are often unrelated, or only tangentially related, to the underlying cause of action," and the public has less of an interest in them. *Plexxikon*, 2020 WL 1233881, at *1. That does not describe this situation.[7]

The reasons courts accept as sufficiently compelling to overcome the presumption are few and narrow: "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation" is not sufficiently compelling to defeat disclosure. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006); *see also Foltz*, 331 F.3d at 1137 (district court abused its discretion in maintaining seal when small amount of legitimately non-public information could be redacted). Ultimately, "the district court must weigh 'the interests advanced by the parties in the light of the public

[7] As discussed below, *infra* pp. 32–45, a compelling reason to maintain the video recordings under seal is the appropriate standard for a second reason—the usual presumption of the public's right of access applies.

interest and the duty of the courts'" in deciding whether to release particular material. *Valley Broad. Co. v. Dist. Court*, 798 F.2d 1289, 1294 (9th Cir. 1986) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 602 (1978)). The district court did exactly that.

(b) Proponents Demonstrate No Compelling Reason To Maintain The Seal

Proponents' arguments for maintaining the recordings under seal—judicial integrity, a possible conflict with Local Rule 77-3, and speculation that witnesses might be subject to harassment—fall woefully short of the compelling-reason standard required to maintain the seal.[8]

1. Proponents assert that because this Court previously recognized that the compelling interest in "judicial integrity" required maintaining the seal two years after the trial took place, it "has no power to depart from that holding now"—eight years later, and 10 years after the trial took place. Op. Br. at 35. But Proponents mis-frame the issue; Plaintiffs are not asking for unsealing two years after a trial,

[8] Proponents do not argue that sealing should be continued because the sealed material is confidential or highly sensitive, nor could they. Unlike sealed business records that might contain nonpublic, competitively sensitive information, the sealed material here is a video recording of a trial that was held in open court and is recorded in publicly available transcripts. But even material that was once truly confidential is subject to presumptive unsealing after 10 years under Local Rule 79.5.

they are asking for that unsealing to take place now, more than 10 years after the conclusion of the trial.

In 2012, this Court recognized that judicial integrity was a compelling reason to maintain the seal *at that time*. *Perry*, 667 F.3d at 1082. But the Court did not issue a blanket conclusion that judicial integrity justified maintaining the seal on the recordings *forever*. It did quite the opposite by *limiting* the issue before it to "whether, given the unique circumstances surrounding the creation and sealing of the recording of the trial in this case, the public is entitled to view that recording *some two years after the trial*." *Id.* at 1080 (emphasis added); *see also id.* at 1081 (the question at issue is "whether a recording purportedly made for the sole purpose of aiding the trial judge in the preparation of his opinion, and then placed in the record and sealed, may *shortly thereafter* be made public by the court" (emphasis added)). Further, the Court explicitly recognized that "Proponents reasonably relied on Chief Judge Walker's specific assurances . . . that the recording would not be broadcast to the public, at least in the *foreseeable future*," and cited the district court's local rule that a sealing order is limited in duration to 10 years. *Id.* at 1084–85 & n.5.

Permitting release of the video recordings now, more than a decade after the trial took place and after the seal was set to expire in the ordinary course, is not a departure from this Court's 2012 decision and would not erode the integrity of the

judicial process in the way that it arguably might have eight years ago. Because Judge Walker's "assurances" were cabined by the 10-year limit in the local rule—something that Proponents' counsel conceded that they understood—the release of the recordings now would not undermine judicial integrity.

2. Proponents try to manufacture a conflict between Local Rule 77-3 and Local Rule 79-5. *See* Op. Br. at 23–29. But Local Rule 77-3, which prohibits the recording of court proceedings for broadcast, is inapplicable here. Judge Walker made clear that he was not recording the trial for broadcast. Instead, he recorded the trial so that he could evaluate the video recordings when reaching his decision, which he did. After he did so, Judge Walker made the video recordings part of the record and placed them under seal. The issue now before the Court is whether to continue that sealing. The *only* local rule that addresses unsealing a portion of the record is Local Rule 79-5(g), and, as the district court correctly found, "[n]othing in the Rules themselves creates an inherent conflict." ER19; *see also Qualls*, 22 F.3d at 842 n.2 ("District courts have broad discretion to interpret their local rules.").

The issue here is whether to *unseal* the recordings now that the 10-year presumptive sealing period has passed, not whether to broadcast the trial, which Judge Walker never did and Judge Orrick has not indicated he will do. Once unsealed, the public can access the video and use it for any lawful purpose. While *the public* may choose to publish some or all of the recordings, for example as part

of a documentary, they could do the same with any other unsealed material. The public also can use the records for personal review, scholarly research, or a visual aid in teaching about civil rights cases. *See, e.g.*, ECF 8-2 at 137 (Cott Decl. ¶ 7) ("The fullest possible historical record of the trial will prove invaluable to those who come after us, especially when firsthand recollections are no longer available."); *id.* at 163 (Peplau Decl. ¶ 7) ("[B]oth historians and social scientists would benefit from seeing the witnesses' demeanor and reactions rather than reading from a transcript."); *id.* at 141 (Badgett Decl. ¶ 7) ("It is my opinion that the trial recordings are of great historical value, and that they would be an invaluable teaching tool for students studying the issues of gay rights and marriage equality."); SER3 (Dean Erwin Chemerinsky describing how "[s]cholars would benefit greatly from being able to hear the trial and to gain a better understanding of the dynamics of what led to a historic change in American law"); SER6–SER7 (Seth Levy, President of the It Gets Better Project, describing how unsealing the recordings would offer "a remarkable glimmer of hope" to LGBTQ+ individuals around the world "for the possibility of one day having a meaningful adult relationship that's treated with the same level of respect as a heterosexual marriage"). Local Rule 77-3 says nothing about those lawful uses.

3. Proponents also raise purported privacy and harassment concerns. Op. Br. at 37–44. Yet, as the district court found, Proponents submitted absolutely no

evidence to support these supposed concerns. Proponents contend that they had no burden to produce evidence—that their attorneys' argument is sufficient. Op. Br. at 43 n.3. Indeed, the only document they cite is an email from their counsel to Plaintiffs' counsel, in which Proponents actually *prevented* Plaintiffs' counsel from contacting witnesses who had not submitted declarations to the district court in order to ascertain whether they really had any concerns about the release of the video recordings. ECF 8-2 at 87 (Dusseault Decl. ¶ 3 (email from Proponents' counsel stating that "we have now polled a critical mass of our clients and witnesses," that "no one supports a breach of the promise of confidentiality made by the trial court," and that "there appears to be no need for you to reach out to them, and we would prefer that you not do so.")).

Not only does this email exchange highlight the *absence* of evidence from Proponents' witnesses, it is at most attorney argument that is not evidence and may not serve as a substitute for admissible evidence. *See Carrillo-Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003) (arguments asserted "solely through the argument of . . . counsel . . . do[] not constitute evidence"); *United States v. Nunez-Carreon*, 47 F.3d 995, 999 (9th Cir. 1995) (rejecting "attorney's argument" that "was not supported by any evidence"); *see also* N.D. Cal. Civ. L.R. 7-5(a) (requiring that factual contentions made in opposition to any motion be supported by an affidavit or declaration). Proponents' characterization of what a "critical mass of our clients

and witnesses" purportedly believe is not evidence that can provide a compelling reason to extend sealing here.

And, even if considered on its merits, Proponents' "harassment" argument fails. Indeed, Proponents' "harassment" argument is not actually based on harassment at all: they say that "[t]he point is not that the risk of harassment to Proponents or others *itself* justifies maintaining the seal on the video recordings at issue." Op. Br. at 38. Instead, Proponents claim that "the past harassment of Prop 8 supporters simply illustrates . . . the *potential* real-world consequences of undermining the structural value of judicial integrity." *Id.* (emphasis added).

Proponents have failed, however, to adduce any evidence of these "potential real-world consequences" of unsealing. Certainly any "*past* harassment" could not have been a consequence of Proponents' *present* "judicial integrity" concerns. Nor have Proponents offered any evidence of harassment concerns—let alone evidence of actual harassment—that exist today rather than a decade ago. If such evidence existed, Proponents could have submitted it in support of their motion. They did

not.[9] Instead, the evidence and case law supports Plaintiffs' position.[10] During oral argument before this Court in 2011, Proponents' counsel conceded that one of their two witnesses, Mr. Blankenhorn, was not worried about his safety: "Mr. Blankenhorn is a well-known advocate and expert in this area, and he has said candidly that he was not concerned about harassment of himself." *Perry* oral argument at 10:00–10:23. And, Proponents' second witness, Dr. Miller, testified about the political power of gay men and lesbians; as a result, as Judge Reinhardt aptly put it: "It's not likely that [Dr. Miller] is going to be harassed or strung up" for his testimony. *Id.* at 14:32–14:36. Finally, Proponents have offered no evidence, not even a declaration by their third witness, Dr. Tam, to suggest that the release of

---

[9] Proponents' argument regarding the harassment faced by Proposition 8 supporters is devoid of specifics and does not concern any witnesses in this case. Proponents merely point to generalized harassment of Proposition 8 supporters with a series of citations that are in some cases more than a decade old and in no event more recent than 2013. *See* Op. Br. at 37 n.2.

[10] Proponents cite *National Abortion Federation v. Center for Medical Progress*, 2016 WL 454082 (N.D. Cal. Feb. 5, 2016) ("*NAF*"), but that case supports *Plaintiffs* because the only discussion of sealing records resulted in the district court *refusing* to seal portions of its order because doing so "would undermine my responsibility to the public as a court of public record to explain my decision." *Id.* at *6 n.10. Moreover, in that case, the video recordings that were sealed were of a confidential meeting that was secretly recorded in contravention of the parties' agreement, not recordings of a public trial. *Id.* at *11. And Proponents here submitted *no evidence* of potential harm from unsealing, unlike the declarants in *NAF*.

these recordings 10 years after trial would lead to harassment, let alone cause him to fear for his safety.[11] Finally, the passage of time since the ultimate resolution of this issue has *lessened*, not increased, the passions on both sides of the issue.[12] It has been seven years since the Supreme Court issued its decision in *Hollingsworth v. Perry*, 570 U.S. 693 (2013), and five years since the Supreme Court finally settled the constitutionality of bans on same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

---

[11] In fact, counsel for Plaintiffs asked counsel for Proponents for permission to reach out to Proponents' three witnesses to ask them if they had any such concerns. Proponents' counsel declined to grant permission, and without asserting that any particular witness expressed a fear, stated only that he "polled a critical mass of our clients and witnesses," none of whom supported unsealing. ECF 8-1 at 87 (Dusseault Decl. ¶ 3.) The district court was not persuaded by this "attorney argument." ER3–ER4.

[12] The point that any concern over harassment that might exist would be greatest at or around the time of the decision, and not years after, is another point that Proponents conceded during the argument before this Court in 2011 and now wish to take back: "To the extent that the Court is suggesting that, well, the passage of time, passions have ebbed . . . . the harassment and violence and vandalism that we saw in 2008 has ebbed down. With respect to this litigation, *we would submit that the intensity of interest and the passions will only grow into a crescendo as this case reaches its final conclusion, wherever that may be*." *Perry* oral argument at 9:23–9:46 (response to question from Judge Smith regarding the passage of time between the document incidents in 2008 and 2011) (emphasis added). That "final conclusion" was reached five years ago, and the accompanying crescendo has long since come and gone.

In short, Proponents fall far short of demonstrating a compelling reason to maintain the seal.[13]

3. Local Rule 79-5's 10-Year Period Began To Run On August 12, 2010 When Judgment Was Entered

Perhaps recognizing the weakness of their position, Proponents make one final attempt to avoid release of the recordings now based on a misunderstanding of the record below. Proponents claim judgment in this case was really entered on August 27, 2012, and therefore the 10-year sealing period does not actually expire until August 27, *2022*. *See* Op. Br. at 51–53. This argument makes little sense, as a quick recitation of the facts makes clear. On August 12, 2010, Judge Walker ordered that judgment be entered in this case. SER30–SER31, but "judgment in the case was not (apparently due to an oversight) entered in August 2010 as Judge Walker instructed," *Perry*, 302 F. Supp. 3d at 1057 n.20. On August 27, 2012, after realizing the clerical error, the district court entered judgment. ER316. And, two

---

[13] Proponents also argue (for the first time in this decade-long dispute) that unsealing the video recordings might make them "look bad." Op. Br. at 44. As an initial matter, Proponents did not make this argument before the district court and may not raise it for the first time on appeal. *See Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) (arguments "raised for the first time on appeal and . . . never argued before the district court" are "waived"). In any event, Proponents do not—and obviously cannot—cite any legal authority for the proposition that records must remain sealed for eternity if those records have the potential to make a party or their counsel look bad. *See Kamakana*, 447 F.3d at 1178 ("a litigant's embarrassment, incrimination, or exposure to further litigation" does not justify a seal).

days later, on August 29, 2012, the district court further corrected the record, directing that judgment in this case be entered "*nunc pro tunc* to August 12, 2010, the date on which the Court directed that judgment be entered 'forthwith.'" ER313. Because of that correction, not only was this case "functionally" closed as the district court previously noted, *Perry*, 302 F. Supp. 3d at 1057 n.20, it was *actually* closed on August 12, 2010. It was entirely appropriate for the district court to effectuate Judge Walker's clear direction that judgment be entered as of the date of his decision. Having done so, the 10-year period properly runs from August 12, 2010.

B. The Right Of Access Requires Unsealing

The district court correctly held that the right of public access applies to the video recordings and supports unsealing here. Federal common law recognizes a "general right to inspect and copy . . . judicial records and documents." *Nixon*, 435 U.S. at 597. Under the right of access, as under the local rules, Proponents cannot demonstrate a compelling reason to continue to deny public access to these important records. The First Amendment right of access is even "stronger" than the common-law right of access. *United States v. Carpenter*, 923 F.3d 1172, 1179 (9th Cir. 2019).

1. The Common-Law Right Of Access Requires Unsealing

The common-law right of access applies here. Although the presumption in favor of public access does not attach to certain categories of documents that "have traditionally been kept secret for important public policy reasons," *Times Mirror Co.*

v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989), this Court repeatedly has held that these categories are few and "narrow," *Kamakana*, 447 F.3d at 1178; *Carpenter*, 923 F.3d at 1178–79 (refusing to expand categories of documents immune from presumptive access). Indeed, this Court has recognized only "two categories of documents that fall in this category: grand jury transcripts and warrant materials in the midst of a pre-indictment investigation." *Kamakana*, 447 F.3d at 1178.[14] The video recordings at issue are neither, and Proponents' arguments against the common-law presumption are meritless.

Proponents do not (and cannot) dispute that the common-law right of access presumptively applies to judicial records. Instead, they offer various reasons why the right of access does not apply in this particular case. None is persuasive.

First, Proponents argue that the common-law right of access is displaced by the Northern District's Local Rule 77-3, which prohibits the public broadcast of trials. Op. Br. at 23–29. Proponents cite several cases for the proposition that where a particular statute specifically addresses a different procedure for the disclosure of

[14] This Court later confirmed that *only* those two categories are immune from presumptive access when it held that post-investigation warrant materials should presumptively be made public. *United States v. Bus. of Custer Battlefield Mus. & Store*, 658 F.3d 1188, 1192 (9th Cir. 2011).

certain materials, that procedure governs in lieu of the common-law right of access.[15] Those cases, however, are distinguishable because Local Rule 77-3 does not "speak[] directly to the question addressed by the common law," *i.e.* whether a record should be unsealed. *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 430 (9th Cir. 2011) (internal quotation marks omitted).

Binding authority demonstrates that the displacement of the common law is more nuanced than Proponents state. In *Nixon*, 435 U.S. 589, the Court evaluated the interplay between the procedures for making a president's documents public, codified in the Presidential Recordings Act ("PRA"), and the common-law right of access. The Court explained that the PRA "provides for legislative and executive appraisal of the most appropriate means of assuring public access to the material, subject to prescribed safeguards." *Id.* at 604–05. "Because of this congressionally prescribed avenue of public access," the Court did "not weigh the parties' competing arguments as though the District Court were the only potential source of information

---

[15] *See* Op. Br. at 24–25 (citing *United States v. Mouzin*, 559 F. Supp. 463, 464 (C.D. Cal. 1983) (discussing Presidential Recordings Act); *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 430 (9th Cir. 2011) (discussing 11 U.S.C. § 107(b)); *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (discussing Freedom of Information Act); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998) (discussing Federal Rule of Criminal Procedure 6(e)); *Offor v. Mercy Med. Ctr.*, 167 F. Supp. 3d 414, 447 (E.D.N.Y. 2016) (discussing Federal Rule of Civil Procedure 5.2), *aff'd in part, vacated in part*, 676 F. App'x 51 (2d Cir. 2017)).

regarding these historical materials. The presence of an alternative means of public access tips the scales in favor of denying release." *Id.* at 605–06. Thus, rather than holding that the PRA "displaced" the common-law right of access, the Court concluded that the more appropriate *method* of release to the public was through the procedures set forth in the PRA. No similar procedures for public disclosure of the video recordings exist here.

For a law to "displace" the common-law right of access, this Court requires that it both "speak directly" to the question addressed by the common law *and* "indicate[] a statutory purpose not to apply the common law." *Roman Catholic Archbishop*, 661 F.3d at 430. Local Rule 77-3 does neither.

First, Local Rule 77-3 says nothing about whether documents, including recordings, that were placed into the record *without objection* must be kept from the public view for all time. As such, it does not "speak directly" to the question of whether the recordings should be unsealed. Second, Local Rule 77-3 does not indicate a purpose not to apply the common law for a very simple reason: no party to this action is arguing that there is a common-law right of access to a live broadcast or to recordings made for the intended purpose of broadcast.[16] Rule 77-3 *only* prohibits broadcasting of proceedings or recording such proceedings for the purpose

[16] And of course, Judge Walker did not record the trial *for the purpose* of public broadcast. *See supra* p. 9.

of broadcasting. Because the common-law right of access does not apply to these activities, Rule 77-3 cannot indicate a "purpose not to apply the common law."

Proponents attempt to evade this straightforward analysis by arguing that Rule 77-3 applies here because once the video recordings are unsealed, they might eventually be broadcast to the public. *See* Op. Br. at 27. But Rule 77-3 does not purport to limit what private citizens ultimately do with court records that have been made public, nor could it.

Finally, Proponents' assertion that this case would "give judges determined to broadcast trial proceedings a blueprint for doing so" (Op. Br. at 27) is unfounded. The Court is not "broadcasting" anything here. Rather, the district court, on its own motion, sealed the video recordings it had considered when making its decision. Proponents did not object to the Court doing so. Now, it is the Proponents who are taking action, trying to continue the sealing for longer than the 10-year duration provided by the Local Rule. The problem for Proponents, however, is that doing so violates the public's right of access to the recording—a right that is not displaced by a rule against court broadcasts or by any other rule.

Next, Proponents try to escape application of the common-law right of public access by asserting that the recordings are "derivative" in nature, Op. Br. at 30, invoking the Eighth Circuit's decision in *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996). This argument also fails. In *McDougal*, the Eighth Circuit held that

the video recording of President Clinton's deposition testimony, which was played at trial, was not a "judicial record" to which the common-law presumption of public access attaches. But *McDougal* "specifically rejected the *strong* presumption standard adopted by some circuits," including this Circuit as well as the Second, Third, Seventh, and District of Columbia Circuits. *McDougal*, 103 F.3d at 657. *McDougal*, therefore, is an outlier from the start and contrary to Ninth Circuit precedent. *See Kamakana*, 447 F.3d at 1184; *Perry*, 302 F. Supp. 3d at 1056. In this Circuit, "[u]nless a particular court record is one 'traditionally kept secret,' a 'strong presumption in favor of access' is *the starting point*." *Kamakana*, 447 F.3d at 1178 (quoting *Foltz*, 331 F.3d at 1135) (emphasis added).[17] The question in this Circuit is whether the document is one of a "very specific type[] of documents that warrant the highest protection." *Id.* at 1185. This Circuit recognizes only two "very specific types of documents that warrant the highest protection"—grand jury

[17] Unsurprisingly, therefore, this Court has never cited *McDougal*, despite issuing many opinions on the right of access that postdate *McDougal*. And (other than this case) every district court order in this Circuit to cite *McDougal* concerned video recordings of depositions—not a video recording of a trial. *See, e.g.*, *Flake v. Arpaio*, 2016 WL 4095831 (D. Ariz. Aug. 2, 2016) (rejecting *McDougal* and denying motion for protective order preventing public release of deposition); *Apple iPod iTunes Antitrust Litig.*, 75 F. Supp. 3d 1271 (N.D. Cal. 2014); *Low v. Trump Univ., LLC*, 2016 WL 4098195 (S.D. Cal. Aug. 2, 2016). Moreover, *McDougal* split with the Second Circuit's correct refusal to "create an exception to the common law right to inspect and copy judicial records for videotaped depositions." *Application of CBS, Inc.*, 828 F.2d 958, 959–60 (2d Cir. 1987).

transcripts and pre-indictment warrant materials. *Id.* Classes of documents are "not readily add[ed] . . . to this category simply because such documents are usually or often deemed confidential." *Id.* "Simply invoking a blanket claim, such as privacy or law enforcement, will not, without more, suffice to exempt a document from the public's right of access." *Id.* Proponents offer no justification to expand these categories to include the video recordings at issue here.

Attempting to evade this clearly established Ninth Circuit precedent, Proponents assert that "the common-law right of access has no application 'when there is neither a history of access nor an important public need justifying access,'" and that "the common-law right of access does not apply to documents that 'have traditionally been kept secret.'" Op. Br. at 33–34 (quoting *Times Mirror Co.*, 873 F.2d at 1219). But *Times Mirror Co.* does not set out two *different* paths to find that a document is not subject to the common-law right of access. Rather, as this Court subsequently explained in *Kamakana*, the "'traditionally kept secret' exception" to the common-law right of access "is a term of art specific to the right of access; a class of documents is covered by that term if there is '*neither* a history of access *nor* an important public need justifying access.'" 447 F.3d at 1184–85. These standards, therefore, are one and the same. "Few documents" fall within this exception "because the consequences are drastic—'there is no right of access to documents which have traditionally been kept secret for important policy reasons,' . . . meaning

that a party need not show 'compelling reasons' to keep such records sealed." *Id.* (quoting *Times Mirror Co.*, 873 F.2d at 1219).

Despite this extraordinarily high threshold, Proponents claim that the recording of a *public* trial of *historic significance* somehow falls into the narrow category of documents that have "'traditionally been kept secret.'" Op. Br. at 34 (quoting *Times Mirror Co.*, 873 F.2d at 1219). But this is far from the type of "private" document that warrants inclusion in the "traditionally kept secret" category, which thus far has been limited to two categories of law enforcement documents where secrecy is of the utmost importance to the ability of the criminal justice system to function properly. *Cf. United States v. Schlette*, 842 F.2d 1574, 1583 (9th Cir. 1988) (rejecting the inclusion of presentence reports in the "traditionally kept secret" category even though such documents are confidential).

Nor do Proponents' assertions that there is "no history of access to video recordings of federal trial proceedings" and no important public need justifying access because "the trial itself was open to the press and public and the official transcript is readily available" (Op. Br. at 33–34) fare any better. Regarding the history of access to video recordings, the fact that it has traditionally been impermissible to *record* a trial does not mean that there is a history of depriving the public of *access* to those recordings—the recordings simply did not exist in the past. And the fact that the trial at issue here was open to the press and the public only

undermines Proponents' claim that the recordings are worthy of the utmost level of secrecy. Indeed, *public* trial testimony is on the opposite end of the secrecy spectrum as grand jury transcripts and pre-indictment warrant materials. Despite Proponents' assertions to the contrary, a very real public purpose justifies access here—the right of the public to be able to witness for itself this historic trial. As Judge Walker explained, "the experts' demeanor and responsiveness showed their comfort with the subjects of their expertise," and that this helped to inform his decision. *Perry*, 704 F. Supp. 2d at 940. He also noted that "[P]laintiffs' lay witnesses provided credible testimony," based in part on his "observ[ation]" of the testimony they presented. *Id.* at 938. Permitting the full public access to the recording of the trial would permit individuals to observe the *full* evidence on display in the Prop 8 trial, just as Judge Walker did in rendering his decision.

In short, the recordings at issue are subject to the common-law right of public access and to this Court's strong presumption of public access standard.

Because the common-law right of access applies here, Proponents can overcome the "strong presumption in favor of access" only by articulating "compelling reasons supported by specific factual findings, . . . that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana*, 447 F.3d at 1178–79 (citations and quotation marks omitted). In evaluating whether the presumption

in favor of access has been overcome, district courts must "weigh 'the interests advanced by the parties in the light of the public interest and the duty of the courts.'" *Valley Broad.*, 798 F.2d at 1294 (quoting *Nixon*, 435 U.S. at 602); *see also Kamakana*, 447 F.3d at 1179 ("the court must 'conscientiously balance[] the competing interests' of the public and the party who seeks to keep certain judicial records secret" (quoting *Foltz*, 331 F.3d at 1135) (alteration in original)).

As explained above, the district court weighed the various interests and exercised its discretion to lift the seal. *See supra* pp. 12–14. Proponents provided no compelling reason to maintain the seal under either Local Rule 79-5 or the common-law right of access.

2. The First Amendment Right Of Access Requires Unsealing

The district court also correctly determined that the First Amendment right of public access compels the same result. ER19. Indeed, right of access claims implicate "fundamental First Amendment interests" and "command the respect and attention of the federal courts." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 787 (9th Cir. 2014).

First Amendment protections are "a foundation of our freedom," *United States v. Alvarez*, 567 U.S. 709, 723 (2012), because they guarantee the "right to 'receive information and ideas,'" *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). The "First Amendment does not speak equivocally" and must be given the "broadest

scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263 (1941) (footnote omitted).

As a bedrock of our Nation's liberty, the First Amendment "prohibit[s] government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality op.). The First Amendment thus creates a "presumption of access to judicial proceedings" that "flows from an 'unbroken, uncontradicted history' rooted in the common law notion that 'justice must satisfy the appearance of justice.'" *Courthouse News Serv. v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) (quoting *Richmond Newspapers*, 448 U.S. at 573–74).

The First Amendment's guarantee of access to "court proceedings and documents," *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990), promotes public confidence in the judicial system because "it is difficult for [people] to accept what they are prohibited from observing," *Richmond Newspapers*, 448 U.S. at 572. Indeed, witnessing a trial "affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." *Id.* (citation omitted); *see also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1181 (6th Cir. 1983) ("The public has an interest in ascertaining what evidence and records the District Court . . . relied upon in reaching [its] decisions.").

Appellate courts "widely agree" that the First Amendment right of access applies to "civil judicial proceedings and records," just as it does criminal proceedings. *Courthouse News*, 947 F.3d at 590; *see also Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1260 (9th Cir. 2017) (treating the First Amendment and common-law rights of public access to court documents in a civil case as coextensive with those of a criminal case). Thus, in determining whether to maintain the seal in the face of the First Amendment, the Court must "consider whether (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." *Perry*, 667 F.3d at 1088 (citation and quotation marks omitted).

Because the right of public access applies, Proponents bear the burden of showing a "compelling reason" for maintaining the seal. As discussed above, they cannot. The district court correctly found that Proponents failed to submit *any* evidence that they believe Judge Walker's statement to require indefinite sealing (indeed, in 2011, their counsel stated the opposite) or that they would be harmed by unsealing. ER3. Without a compelling interest, Proponents cannot satisfy any of the three considerations this Court laid out in *Perry*.

A finding that the First Amendment applies to these unique circumstances would not "imply that the longstanding prohibition on the public broadcast of trial proceedings is unconstitutional." Op. Br. at 54. This case is not about whether courts may choose to prohibit broadcasting of trials. It is about what should happen to existing video recordings of a decade-old trial. Unsealing those recordings is not a public broadcast, let alone a contemporaneous one, by the Court. It is providing the public access to material—entered into the record without objection—that aided Judge Walker in rendering his historic decision.

Proponents' cited cases—nearly all out-of-Circuit—are inapposite. Many concern the right to televise or broadcast live from the courtroom or release video recordings during the course of trial—a circumstance not implicated by this appeal. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 539 (1965) (discussing right "to televise from the courtroom"); *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986) (similar); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16 (2d Cir. 1984) (similar); *United States v. Hastings*, 695 F.2d 1278 (11th Cir. 1983) (similar); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 425, 428 (5th Cir. 1981) ("broadcast of the tapes outside his courtroom would have a deleterious effect on the pending trial"); *United States v. Beckham*, 789 F.2d 401, 415 (6th Cir. 1986) (release of tape-recorded evidence could create a "local furor that could endanger the validity of the proceedings"). Others concern local rules or rules of criminal procedure not

implicated here. *See In re Sony BMG Music Entm't*, 564 F.3d 1, 9 (1st Cir. 2009); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988); *United States v. Kerley*, 753 F.2d 617, 621 (7th Cir. 1985).[18]

None involved this unique situation, where video recordings of a historic trial have already been made. And none concerned a district court unsealing video recordings in light of First Amendment principles that converge with local rules to presumptively require public access after 10 years.

Again, this case is not about whether the Constitution permits courts to prohibit recording or broadcast of trial proceedings. It is about the public's right to decade-old recordings that the district court used in rendering a historic decision and that the district court concluded should be made public now that 10 years have passed. Far from an abuse of discretion, that determination "affords citizens . . . legal education" and "promotes confidence in the fair administration of justice." *Richmond Newspapers*, 448 U.S. at 572.

---

[18] And still others arose from unique factual circumstances not relevant here. *See In re Providence Journal Co.*, 293 F.3d 1, 17 (1st Cir. 2002) (district court did not abuse its discretion in not releasing tape recordings where "no electronic medium . . . currently in existence" contained the precise taped excerpts that were played in open court); *Fisher v. King*, 232 F.3d 391, 396–97 (4th Cir. 2000) (holding that a prisoner (as opposed to the general public) had no First Amendment right to an original recording of a 911 call played during trial); *United States v. Antar*, 38 F.3d 1348, 1359–60 (3d Cir. 1994) (reaffirming the public's constitutional right of access to voir dire proceedings and reversing the district court's order sealing certain voir dire transcripts).

II. At Minimum, This Court Should Affirm The District Court's Order As To The Testimony Of Plaintiffs' Witnesses And Attorney Argument

If this Court determines that any portion of the recordings should remain under seal—and it should not—Plaintiffs request in the alternative that, at a minimum, this Court affirm the district court's order insofar as it orders the unsealing of trial testimony from Plaintiffs' witnesses and attorney statements and arguments, including openings and closings. Doing so would comport with this Court's requirement that courts consider "alternatives to closure that would adequately protect [any] compelling interest" that requires at least some sealing, *Perry*, 667 F.3d at 1088, as well as the district court's requirement that requests to seal material in civil cases be "narrowly tailored to seek sealing only of sealable material," Local Rule 79-5(b).

Under these principles, this Court has reversed orders granting motions to seal entire documents when the portions eligible for sealing can be redacted. *See Foltz*, 331 F.3d at 1137. Similarly, lower courts frequently deny requests for wholesale sealing where more narrowly tailored sealing can be accomplished. *See, e.g.*, *Karasek v. Regents of Univ. of Cal.*, 2016 WL 4036104, at *17 n.8 (N.D. Cal. July 28, 2016) (denying "vastly overbroad" sealing requests and requiring "narrowing"); *Finjan, Inc. v. Blue Coat Sys., Inc.*, 2015 WL 13389611, at *1 (N.D. Cal. Apr. 17, 2015) (denying in part motion to seal "with leave to propose sealing that is more narrowly tailored to only the sealable material"); *CreAgri, Inc. v. Pinnaclife Inc.*,

2014 WL 27028, at *2 (N.D. Cal. Jan. 2, 2014) ("[T]he Court told the parties that the sealing requests were too broad and should be narrowed."); *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, 2014 WL 12647906, at *2 (N.D. Cal. Sept. 18, 2014) (refusing to seal deposition transcripts because the request to seal was "not narrowly tailored").

This Court, too, should reject Proponents' request for an overbroad, permanent seal of materials to which even their attorney arguments do not apply. Proponents' argument against unsealing stems from harm that purportedly would flow to "their witnesses" and "Proposition 8 supporters." *See, e.g.*, SER17. Proponents have never argued that witnesses who supported *Plaintiffs* would suffer similar harm from unsealing, and in fact 15 of Plaintiffs' and Plaintiff-Intervenor's witnesses submitted a declaration stating that they support unsealing—comprising approximately 43 of the 65 total hours of witness testimony. *See* SER14. Thus, none of Proponents' rationales for continuing the seal apply to Plaintiffs' witnesses' testimony.

Proponents do not explain, for example, how public access to the video recordings of the four named Plaintiffs testifying about their love for their partners would harm anyone, particularly when the four Plaintiffs themselves stated, under oath, that they want their testimony unsealed. Nor do they explain how public access to the testimony of experts who write and speak regularly on the subjects to which

they testified, and who themselves support unsealing, will cause any harm. Plaintiffs also do not explain how unsealing the arguments of high-profile, professional advocates who voluntarily embraced their roles in this case would harm anybody.

Therefore, if this Court were not inclined to permit unsealing of the entire video, it should at the very least permit unsealing of the testimony, whether given on direct or cross-examination, of any witness called by Plaintiffs, as well as any attorney statements or argument.

CONCLUSION

The Court should affirm the district court's order in its entirety. At minimum, it should affirm the district court's order regarding the unsealing of testimony of any witness called by Plaintiffs, as well as any attorney argument.

Respectfully submitted,

/s/ *Theodore B. Olson*

DAVID BOIES
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(917) 749-8200

THEODORE B. OLSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Plaintiffs-Appellees Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

ADDENDUM

N.D. Cal. Local Rule 77-3

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.

N.D. Cal. Local Rule 79-5(b)

Specific Court Order Required. Except as provided in Civil L.R. 79-5(c), no document may be filed under seal (i.e., closed to inspection by the public) except pursuant to a court order that authorizes the sealing of the particular document, or portions thereof. A sealing order may issue only upon a request that establishes that the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled to protection under the law (hereinafter referred to as "sealable"). The request must be narrowly tailored to seek sealing only of sealable material, and must conform with Civil L.R. 79-5(d).

N.D. Cal. Local Rule 79-5(g)

Effect of Seal. Unless 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. 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. Nothing in this rule is intended to affect the normal records disposition policy of the United States Courts.

STATEMENT OF RELATED CASES

Counsel for Plaintiffs-Appellees are aware of no cases pending in this court that are related to this appeal within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this opposition complies with the typeface requirements in Federal Rule of Appellate Procedure 32(a)(5) because it uses proportionally spaced Times New Roman 14-point font. I further certify that this opposition complies with the word limitation in Ninth Circuit Rule 32-1(a) because it contains 11,984 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: October 9, 2020

/s/ *Theodore B. Olson*
Theodore B. Olson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 9, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 9, 2020

/s/ *Theodore B. Olson*
Theodore B. Olson