No. 20-16375

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, 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.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 WHO (Honorable William Orrick)

INTERVENORS-DEFENDANTS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

This appeal requires this Court to decide, for the second time, whether a federal judge's repeated, unequivocal promises to parties appearing before him may be trusted.

In 2010, the U.S. Supreme Court intervened on an emergency basis to prevent former Chief Judge Vaughn Walker from publicly broadcasting the trial over the constitutionality of Proposition 8 as "contrary to federal statutes and the policy of the Judicial Conference of the United States." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). Invoking principles that continue to be paramount in this matter, the Supreme Court reasoned that protecting "the integrity of judicial processes" counseled in favor of granting the "extraordinary relief" of staying broadcast of the trial. *Id.* at 196-97.

Over Proponents' objection, Judge Walker continued to videotape the trial proceedings; but to maintain compliance with the Supreme Court's emergency order, he unambiguously assured Proponents that the recordings were solely "for purposes … of use in chambers" and that they were "*not* going to be for purposes of public broadcasting or televising." ER441 (emphasis added). Proponents accepted and relied on this assurance, taking no further action. Again at the conclusion of the trial, when he placed the recordings in the court's record under seal, Judge Walker unequivocally promised that "the potential for public broadcast" of the trial

proceedings "had been *eliminated*." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010) (emphasis added). And again, Proponents relied on this judicial assurance. As this Court has already held, Judge Walker thus twice "unequivocally promised that the recording of the trial would be used only in chambers and not publicly broadcast. He made these commitments because the Supreme Court had intervened in this very case in a manner that required him to do so." *Perry v. Brown*, 667 F.3d 1078, 1081 (9th Cir. 2012).

In the teeth of these solemn guarantees, Appellees ask this Court to unseal and publicly disseminate the trial videotapes that Judge Walker promised would never be released. The last time they made this request, in 2012, Judge Reinhardt's opinion for this Court recognized that breaching Judge Walker's word in the way Appellees ask "would cause serious damage to the integrity of the judicial process." *Id.* at 1087. "Litigants and the public must be able to trust the word of a judge if our justice system is to function properly." *Id.* at 1087-88. This very same reasoning requires that Appellees' request be rejected again. Under principles of finality and *stare decisis*, this Court has no power to give the value of judicial integrity less than controlling weight now, merely because eight years have passed since its previous decision.

Appellees attempt to sweep this Court's conclusions in the 2012 *Perry* appeal aside, seizing on the Court's statement that broadcast could not take place "at least

in the foreseeable future." *Id.* at 1084-85. KQED insists that by this aside—and by citing, in a footnote, Local Rule 79-5's instructions that records filed under seal by the parties are presumptively unsealed ten years after the case is closed—this Court in *Perry* somehow "expressly found" that the seal would not remain in place permanently. KQED Inc.'s Appellee's Br. at 1-2 (Oct. 9, 2020), Doc. 30 ("KQED's Br."). But the most that can be said is that the specific *holding* of this Court in *Perry* did not address the issue whether the seal could be lifted after ten years have passed. The Court's *reasoning*—which is binding on this panel no less than the Court's holding—is plainly not so limited: maintaining the seal was necessary, this Court explained, to keep faith with Judge Walker's "promise[ ] … that the conditions under which the recording was maintained *would not change*—that there was no possibility that the recording would be broadcast to the public in the future." *Perry*, 667 F.3d at 1086. That promise plainly had no time horizon; the public release and dissemination of the videotapes, whenever it were to occur, would in equal measure be a breach of that deliberate, public guarantee, as well as thwart the Supreme Court's order halting broadcast of the trial.

Appellees also suggest that Proponents are somehow estopped from arguing that Judge Walker's promise that the recordings would never be publicly released in fact meant that they would never be publicly released. That is so, according to Plaintiffs, because in response to a question at the 2011 oral argument in the previous

appeal, Counsel for Proponents suggested that the seal on the recordings may be governed by Rule 79-5's ten-year period. Pls.' Answering Br. at 16-18 (Oct. 9, 2020), Doc. 34 ("Plaintiffs' Br."). But this brief exchange at argument—on an issue not briefed by either party and not relied upon by the Court in its 2012 opinion—plainly does not meet the test this Court has established for binding judicial estoppel. *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 558 (9th Cir. 2016). Nor does the exchange show that Proponents "knew that … the sealing of the videotapes was *not* in perpetuity." KQED's Br. 2. As Counsel was careful to note in 2011, there is no indication in the record "one way or the other" showing any specific understanding by Proponents that the seal would expire after 10 years, and even if Rule 79-5 *does* apply, it expressly provides that the seal may be extended beyond 10 years for "good cause," Oral Argument at 6:24, 6:43, https://goo.gl/coepDh—a standard plainly met by the compelling interest in judicial integrity.

In 2012, faced with much the same arguments as those advanced by Appellees today, this Court had no difficulty concluding that "Proponents were … entitled to take Chief Judge Walker at his word when he assured them that the trial recording would not be publicly broadcast or televised" and accordingly that "[t]he interest in preserving respect for our system of justice is clearly a compelling reason for maintaining the seal on the recording." *Perry*, 667 F.3d at 1088. The interest in judicial integrity has become no less compelling in the eight years that have passed

since the Court proclaimed those words—nor in the ten years since the Supreme Court initially relied on the need to protect judicial integrity to halt broadcast of the trial in the first place. Appellees' request to obtain the recordings for public broadcast must be denied.

ARGUMENT

I. The compelling interest in judicial integrity continues to require maintaining the seal.

In its 2012 decision rejecting Appellees' previous attempt to obtain the trial recordings, this Court held that any right to access the tapes is decisively outweighed by the judicial branch's compelling interest in keeping its own promises. For the reasons discussed below, Appellees have no right to access the videotapes that Judge Walker solemnly promised would never be released—not under the common law, not under the Local Rules, and not under the First Amendment. But even assuming one of those doctrines *did* grant such a right, the compelling interest in judicial integrity continues to provide an independent, overriding reason to reverse the trial court's order unsealing the trial recordings. We accordingly begin there.

As this Court described in *Perry*, in the course of defending his decisions both to create the video recordings and to place them in the record under seal, Judge Walker made repeated, "unequivocal assurances that the video recording at issue would not be accessible to the public." 667 F.3d at 1085. And because both "[l]itigants and the public must be able to trust the word of a judge if our justice

system is to function properly," the Court explained, "the explicit assurances that a judge makes—no less than the decisions the judge issues—must be consistent and worthy of reliance." *Id.* at 1087-88. Accordingly, the Court concluded that "the setting aside of [Judge Walker's] commitments would compromise the integrity of the judicial process." *Id.* at 1087, 1088. Because the value of judicial integrity is a timeless one, that is no less true today. Now as well as eight years ago, "the interest in preserving the sanctity of the judicial process is a compelling reason" requiring that the trial recordings remain sealed, just as Judge Walker promised. *Id.* at 1081.

Appellees' principal response is based on an Alice-in-Wonderland reading of this Court's decision in *Perry* that interprets Judge Reinhardt's opinion as meaning precisely *the opposite* of what it said. As Appellees tell it, the Court's opinion was apparently comprised entirely of six words and a footnote: the statement that the videotapes could not be disclosed "at least in the foreseeable future," and a footnote reproducing portions of the district court's Local Rule 79-5(g) without comment. *Perry*, 667 F.3d at 1084-85 & n.5. Based solely on these passages, Appellees claim that the Court "affirmed" that "Local Rule's presumptive 10-year limit for sealing orders" applied and "expressly found that the reasons that justified sealing in 2012 would not endure in perpetuity," KQED's Br. 1, 2, a "decision" that is now "binding," Plaintiffs' Br. 19.

Not so. As an initial matter, ten years can hardly be said to be beyond the "foreseeable future." And in any event, the most that one can reasonably conclude based upon the brief passage that Appellees seize upon is that *Perry*'s specific *holding* may not have addressed whether the recordings must remain sealed beyond "the foreseeable future." The doctrine of *stare decisis* requires obedience not only to a previous case's holding, but also to its reasoning. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). And this Court's reasoning—by focusing on Judge Walker's "promise[ ] … that the conditions under which the recording was maintained *would not change*—that there was *no possibility* that the recording would be broadcast to the public *in the future*"—simply cannot be read as good for ten years only. *Perry*, 667 F.3d at 1086 (first emphasis in original).

Moreover, the scope of the judicial-integrity interest articulated in *Perry* must be understood in light of the scope of the *promise* that the interest in integrity requires the courts to honor. And Judge Walker did not promise that the potential for public release of the recordings had been *delayed*, he promised that this possibility "*had been eliminated*," *Perry*, 704 F. Supp. 2d at 945 (emphasis added). Indeed, it was only because of this unlimited assurance that Proponents took no action to prevent the recordings at issue from being *created at all*.

Accordingly, the point is not that there continues to be a compelling interest in maintaining the seal "just because a compelling justification existed at one point,"

as KQED pretends. KQED's Br. 20. Rather, the point is that the compelling interest in keeping a judge's solemn, on-the-record promise that the court will *never* take a certain action *by its nature* "exists in perpetuity," *id.*, because that is how long *the promise itself* extends. KQED protests that "permanent sealing of court records is rarely justified," *id.* at 36, but as explained in the very authority it cites, "[t]here are occasions when permanent sealing is justified," *Phoenix Newspapers, Inc. v. United States Dist. Court for Dist. of Ariz.*, 156 F.3d 940, 948 n.2 (9th Cir. 1998). And just like the example of grand jury proceedings identified in *Phoenix Newspapers*, *id.*, where the court's "obligation … to preserve the secrecy of grand jury proceedings and the privacy of jurors" endures without any temporal limit, *United States v. Sierra*, 784 F.2d 1518, 1522 (11th Cir. 1986), the judiciary's compelling interest in honoring Judge Walker's promise has no time horizon.

Appellees next seize upon the brief statement by Proponents' counsel, at oral argument in 2011, that under the Local Rules the seal on the recordings lasts for a minimum of ten years. Plaintiffs argue that counsel's statement "conceded the applicability of [Rule 79-5's] presumptive unsealing rule to the trial records," and that "[t]his concession is binding." Plaintiffs' Br. 16. But as noted in our opening brief, a party's statement of its position on some issue does not preclude it from later articulating a different view, upon reflection, unless (1) "the party … succeeded in persuading a court to accept that party's earlier position," and (2) the opposing party

would suffer an "unfair detriment" from the change of course. *Tohono O'odham Nation*, 818 F.3d at 558. Here, neither condition is met, and neither Appellees nor the court below have claimed otherwise. *See* Plaintiffs' Br. 16-18; ER4 (2020 Order at 4). And in all events, counsel was careful to emphasize in the 2011 exchange at issue that even if the ten-year presumption applies, the local rules *themselves* allow that period *to be extended for good cause.* Oral Argument, *supra*, at 6:24. As discussed, the judiciary's interest in keeping faith with Judge Walker's promises easily *meets* that standard, *Perry*, 667 F.3d at 1088—now as well as in 2012.

Plaintiffs respond that the supposed 2011 concession "at the very least undermines [Proponents'] argument that they relied on a promise of permanent sealing." Plaintiffs' Br. 16. Wrong again. Counsel did not state in the 2011 argument that Proponents expected the seal to expire after 10 years; rather, Counsel merely noted that Proponents generally "were aware of the local rules," but that the record did not contain "anything one way or the other" indicating a specific understanding that Rule 79-5's presumptive 10-year limit would apply, and that in any event, Rule 79-5 itself provided that the seal *could be extended* beyond 10 years for "good cause"—a standard that, Counsel elsewhere indicated, was *satisfied* by the compelling interest in judicial integrity. Oral Argument, *supra*, at 6:24, 6:43, 16:52.

Appellees' revisionist attempt to paint Judge Walker's unequivocal promises—and Proponents' understanding of those promises—as somehow "limited

in time," Plaintiffs' Br. 18, is not only unsupported by the 2011 oral argument exchange, it is: (1) flatly contrary to this Court's decision in *Perry*, which repeatedly stated (based on the same record and *after* Counsel's purported concession) that Judge Walker's promises meant that "there was no possibility that the recording would be broadcast to the public in the future," 667 F.3d at 1086; and (2) also flatly contrary to Proponents' own *consistent and repeated* explanations that they understood Judge Walker's assurances "to exclude the possibility that he would later broadcast, or enable the broadcast, of the trial recording," Dkt. Entry 346-1 at 1, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 21, 2011). To the extent there could be any remaining doubt, let us be clear: Plaintiffs understood Judge Walker's promises in 2010, 2011, and 2012, and understand those promises today, to mean that the trial recordings would *never* be publicly released—the same result that would have obtained had Judge Walker *not made* the promise, prompting Proponents to seek the intervention of this Court, or the Supreme Court, blocking the creation of the recordings in the first place.

In addition to stymieing the ability of "our justice system … to function properly" and undermining the public's "respect for our system of justice," *Perry*, 667 F.3d at 1088, a failure by the judicial system to honor the solemn commitments of its judges would also seriously harm those who reasonably rely on those commitments. The parties and witnesses who testified in this case and the lawyers

who questioned them, for instance, did so in reliance on Judge Walker's promise that the videotapes would not be publicly released. And there can simply be no doubt that cashiering Judge Walker's solemn promises now would cast doubt on the reliability of all future judicial commitments, thereby making it more difficult to obtain the cooperation of witnesses going forward.

Appellees fault Proponents for failing to provide new evidence "to establish that a present risk of harassment exists" if the recordings are released, KQED Br. 39, and they seek to draw an adverse inference from Counsel's refusal of their extraordinary request that they be allowed to "contact[ ] [Proponents'] witnesses" to discuss any "concerns about the release of the video recordings," despite their adverse relationship in this case, Plaintiffs' Br. 27. All of this is of no moment. Proponents did not submit any additional evidence on this score because we have never relied upon harassment as an independent reason to maintain the seal. Rather, as we have explained, the past harassment of Prop 8 supporters illustrates the potential consequences of undermining the structural value of judicial integrity. Whether or not "the passage of time" has lessened "the passions on both sides" of the debate over Prop 8, Plaintiffs' Br. 30, *but cf. Davis v. Ermold*, 2020 WL 5881537, at *1 (U.S. Oct. 5, 2020) (statement of Thomas, J., respecting denial of certiorari), it can *never* lessen the federal judiciary's solemn interest in keeping faith with the promises a judge makes in court.

Public broadcast of the trial recordings would also increase exponentially the opportunities for partisans to sensationalize the video-recordings and present snippets of the trial video unfairly and out of context in an effort to stoke controversy and cast opprobrium on the participants. KQED doubts this conclusion too, insisting that it "intend[s] to present the recordings in a way that enlightens and illuminates and does not merely sensationalize what happened in the courtroom." KQED Br. 42. But even assuming that is so, once the recordings are freely available, KQED will obviously have no control over how they are used. *See* Doc. 913, *Perry v. Schwarzenegger*, No. 9-cv-2292 (N.D. Cal. Au. 11, 2020) ("original source files … will be available for free download"). Appellees' Amici also dismiss this concern, but their arguments for access in fact prove its validity: it is precisely because videotapes can be made to "amplify[ ] the impact of the information presented" that Proponents sought (and, twice, obtained) Judge Walker's solemn and unequivocal assurances that the tapes would not be publicly broadcast. Brief of Amici Curiae Reporters Committee and 35 Media Organizations at 10, 21-22 (Oct. 16, 2020), Doc. 43 ("Media Amici Br.").

Much of Appellees' briefing proceeds as though *Perry* was never decided, struggling against the conclusions this Court has already reached with the same arguments the Court already rejected. For instance, Appellees discuss at great length the "immense public interest in the trial," the "historic nature" of the proceeding,

Plaintiffs' Br. 6, and the "strong presumption in favor of access to court records," KQED's Br. 31; *see also* Joinder and Answering Br. of Defs.-Appellees (Oct. 9, 2020), Doc. 33; Media Amici Br. 17-20. But any suggestion that these values should *outweigh* the judiciary's structural interest in keeping its own promises simply cannot be squared with this Court's express holding that "[t]he interest in preserving respect for our system of justice is clearly a compelling reason for maintaining the seal on the recording, notwithstanding any presumption that it should be released." *Perry*, 667 F.3d at 1088. Likewise, Plaintiffs' contention that Proponents' "reliance [on Judge Walker's promises] was unreasonable," citing *Greater Miami Baseball Club Ltd. Partnership v. Selig*, 955 F. Supp. 37, 39 (S.D.N.Y. 1997), was *rejected in terms* by *Perry*, which explicitly held that "[t]here can be no question that Proponents reasonably relied on Chief Judge Walker's explicit assurances." 667 F.3d at 1086.

II. Local Rule 77-3 displaces any common-law right of access to the video recordings.

Not only would public broadcast and dissemination of the trial videotapes undermine the compelling interest in judicial integrity that this Court found dispositive in *Perry*, there is simply no right to access and broadcast the videos to begin with, because any common-law right of access has been displaced by Local Rule 77-3.

1. Much of Appellees' argument on this point is based on a fundamental misconception about how Rule 77-3 operates. That rule "does not 'speak directly' to the question of whether the recordings should be unsealed," they say, because unsealing the trial tapes would not result in "a *live* broadcast" of the trial, and Rule 77-3 "does not purport to limit what private citizens ultimately do with court records that have been made public." Plaintiffs' Br. 35, 36 (emphasis added); *see also* KQED's Br. 26-28. The plain text of Rule 77-3 itself refutes this contention.

The Rule, again, provides generally that "public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited." N.D. CAL. L.R. 77-3; *accord* N.D. CAL. L.R. 77-3 (2009). The Rule thus on its face bars not just the contemporaneous "broadcasting or televising" of judicial proceedings but also "recording" a proceeding "*for those purposes*." N.D. CAL. L.R. 77-3 (emphasis added). The entire function of this portion of the Rule is to allow a videorecording, after it is created, to be used for *some* purposes (such as use by "a Judge … [in] his or her own chambers") but *not others* (namely, subsequent "public broadcasting or televising"). *Id.*

Indeed, if KQED and Plaintiffs' reading of the Rule were correct, nothing would have stopped Judge Walker from disseminating the video recordings to the public *the week following the trial*—or even from broadcasting, each day, the prior day's proceedings. It is passing strange, on their view, *why* Judge Walker promised

to use the recordings only for "preparing the findings of fact" *to begin with*. ER441. It is also quite inexplicable, on KQED and Plaintiffs' interpretation, why this Court concluded that had Judge Walker *not* made that promise, Proponents could very likely have obtained an Order from the Supreme Court directing him to refrain from creating a recording that "might … be released for viewing by the public, *either during or after the trial*." *Perry*, 667 F.3d at 1085 (emphasis added). Of course, the reason why Judge Walker, this Court, and all the parties behaved in these ways is in fact no mystery—they all understood that Rule 77-3 prohibits not only the contemporaneous "broadcasting or televising" of judicial proceedings but also the *subsequent* use of a "recording" of the proceedings "*for those purposes*." N.D. CAL. L.R. 77-3 (emphasis added).

KQED and Plaintiffs get no further by suggesting that Judge Walker initially did not subjectively intend to broadcast the recordings, Plaintiffs' Br. 35 n.16, or that lifting the seal now would not result in the "broadcast" of the recordings. KQED's Br. 28; Plaintiffs' Br. 36. To be sure, "[t]here are myriad ways the recordings of the trial may be used, in addition to potential public broadcast." KQED's Br. 16. But the district court has expressly directed (in the order stayed pending this appeal) that the recordings be broadcast to the public at large via YouTube. *See* Doc. 913, *Perry v. Schwarzenegger*, *supra*. And given that the very party seeking access to the videotapes is "a public broadcaster" that "operates the nation's most listened to

public radio station and the most popular public television stations in the San Francisco Bay Area" and has avowed the intention of "producing an educational television special" using the recordings and "making available online key moments of the trial," *Id.* at 13, 14, the one purpose the Court can be *sure* the recordings will be used for if they are unsealed *is broadcasting and televising*. KQED's suggestion that Rule 77-3 does not apply because it "does not seek to broadcast" the video recordings, *id.* at 28, is simply beyond the pale.

2. Appellees next submit that Proponents somehow waived any argument based on Local Rule 77-3 because we did not separately appeal Judge Walker's Order placing the video recordings in the record under seal. KQED's Br. 43-44; Plaintiffs' Br. 9. But our argument is *not* that the "inclusion of the videotapes in the record[ ] violated the Local Rules," KQED's Br. 47, but rather that Rule 77-3 bars the subsequent "broadcasting or televising" of the recordings. Because Judge Walker placed the video recordings in the record *under seal*, his action at that time *did not result* in their public dissemination and broadcast and thus *did nothing that violated* Local Rule 77-3. Only if the seal on the recordings is lifted—resulting in their public broadcast—do Rule 77-3's strictures come into play. When Judge Walker placed the recordings in the record, then, there was simply nothing to which Proponents could have objected.

KQED also argues that the interpretation is somehow foreclosed by this Court's decision in *Perry*—which, KQED says, "did not call into question the district court's 2011 conclusion that the common-law right of access applied to the videotapes." KQED's Br. 32. But the Court did not "call into question" the applicability of the common-law right only because it "assume[d], without deciding" that the right applied because it concluded that any such right was overcome by the compelling interest in judicial integrity. *Perry*, 667 F.3d at 1084. That assumption cannot be transformed into *a decision in Appellee's favor* on the issue.

3. Finally, KQED argues that Rule 77-3 *cannot* displace the common-law right of access, because it was not "promulgated by Congress or the Supreme Court," but rather "by the judges of a single judicial district." KQED's Br. 45-46. And these Judges, KQED says, "do not have the power to abrogate binding precedent of this Court and the Supreme Court." *Id.* at 46. This argument deeply misunderstands both the nature of the court's Local Rules and the nature of the common-law right of access itself.

When the Judges of a court promulgate local rules, they are not acting on their authority alone; instead, they are acting pursuant to Congress's express delegation of power to "prescribe rules for the conduct of their business." 28 U.S.C. § 2071(a). Contrary to KQED's suggestion, Rule 77-3 is thus founded on *precisely* the same authority as the rules of civil and criminal procedure that have been held to displace

the common-law right of access. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998); *Offor v. Mercy Med. Ctr.*, 167 F. Supp. 3d 414, 447 (E.D.N.Y. 2016), *aff'd in part*, *vacated in part*, 676 F. App'x 51 (2d Cir. 2017).

The Northern District's promulgation of Rule 77-3 pursuant to Congress's delegation also differs little from an agency's promulgation of an administrative rule—a proposition KQED resists, KQED's Br. 46 n.13, but that is plain from the Supreme Court's decision in *Hollingsworth* itself. *See* 558 U.S. at 191 (noting that Local rules have "the force of law" and are typically adopted after public notice and comment). Indeed, while district courts have "inherent powers, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (quotation marks omitted), administrative agencies "are creatures of Congress; an agency literally has no power to act unless and until Congress confers power upon it," *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (quotation marks and ellipses omitted). Yet it is settled that even agency rules may displace the common-law right of access. *See, e.g.*, *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773, 777 (7th Cir. 2000); *United States v. Gonzales*, 150 F.3d 1246, 1263 (10th Cir. 1998); *Kupiec v. Republic Fed. Sav. & Loan Ass'n*, 512 F.2d 147, 150-52 (7th Cir. 1975); *Lombardy v. Norfolk S. Ry. Co.*, 2014 WL 2468612, at *8 (N.D. Ind. June 3, 2014); *see also Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 107 (1972),

abrogated on other grounds by City of Milwaukee v. Illinois (Milwaukee II), 451 U.S. 304 (1981) ("new federal regulations may in time pre-empt the field of federal common law of nuisance").

KQED's suggestion that finding displacement here would "abrogate binding precedent of this Court and the Supreme Court" is also mistaken. KQED's Br. 46. Because the federal courts do not have a general common law power, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), federal common law exists only as a "necessary expedient" that governs until positive law fills the void, *Milwaukee II*, 451 U.S. at 314. Accordingly, when positive law "addresses a question previously governed by a decision rested on federal common law," the common-law rule is not "overruled"; it withdraws of its own force, because "the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.*

The cases cited by KQED are not to the contrary. Two of KQED's cases merely hold that the Local Rules—like any other form of ordinary law—must comply with *the Constitution*. *See Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 101 (3d Cir. 1988) (First Amendment); *United States v. Columbia Broad. Sys., Inc.*, 497 F.2d 102, 107 (5th Cir. 1974) (same). And all *Heckers v. Fowler* says is that local rules may not be "repugnant to any act of Congress." 69 U.S. 123, 128 (1864). None of these cases speak to displacement of federal common law

Plaintiffs, for their part, stop short of suggesting that Local Rule 77-3 is incapable of displacing the common-law right of access, but they nonetheless articulate a blinkered view of displacement that is completely unpersuasive. Plaintiffs claim that positive law must not only "speak directly" to a question previously addressed by federal common law but must also "indicate[ ] a statutory purpose not to apply the common law." Plaintiffs' Br. 35. But the very authority they cite for that proposition shows that any such "statutory purpose" requirement *is satisfied* "when there is a divergence between the statute's direction and the common law," *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 430 (9th Cir. 2011)—a test plainly met here (assuming, *arguendo*, that the common-law right would require access to the trial recordings). Plaintiffs also quibble with our reading of the Supreme Court's decision in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), but they ultimately do not dispute the black-letter rule that the common-law right may be displaced by positive law.

III. There is no common-law right to access wholly derivative video recordings of testimony presented in open court.

The common-law right does not apply to the videotapes here for the independent reason that these tapes merely record testimony and proceedings that took place in open court. As the decision in *United States v. McDougal* explains, the common-law right is wholly inapplicable to such derivative materials. 103 F.3d 651 (8th Cir. 1996). Appellees' efforts to brush *McDougal* to the side do not succeed,

and this Court would be creating a split with the Eight Circuit were it to conclude otherwise.

KQED first asserts "[a]s a threshold matter" that "whether the common law right of access attaches" "is not in question." KQED's Br. 18, 33. That is palpably incorrect; Proponents squarely argued, both before the district court and in our Opening Brief, not only that the common-law right is overcome *but also* that "the common-law right simply does not apply." Br. of Intervenors-Defs.-Appellants at 30 (Sept. 9, 2020), Doc. 20 ("Proponents' Br.").

Appellees next attempt to conjure a conflict between *McDougal* and this Court's precedent by pointing to this Court's reluctance to expand the category of documents "traditionally kept secret." Plaintiffs' Br. 37-38. But *McDougal* did not decline to apply the common-law right of access because the materials in question were of a kind "traditionally kept secret." It held that the common-law right did not apply *because they were derivative*. *McDougal*, 103 F.3d at 657. Plaintiffs also claim that *McDougal* denied a right of public access to the recording in that case "*only* because it 'rejected the strong presumption' 'in favor of public access' standard adopted by [the Ninth Circuit]." KQED's Br. 33 (quoting *McDougal*, 103 F.3d at 657). But that supposed distinction does not work either, since the *McDougal* court's rejection of a strong presumption of access was part of its *alternative* holding that disclosure was not necessary *even if the right of access attaches*. 103 F.3d at 657.

KQED also argues that *McDougal* is "factually distinguishable" because the recordings here "are a verbatim audio-visual record of the *full* trial proceedings" while "the videotape in *McDougal* recorded the deposition of a single prominent witness." KQED's Br. 34. But nothing in *McDougal*'s holding depends on some measure of *how much* witness testimony is derivatively recorded. Finally, KQED claims that *McDougal*'s holding depends on the fact that the deposition recording "was not entered into evidence," *id.*, but that is plainly false; as the court clearly explained, it concluded that the public right of access did not apply "for reasons unrelated to the fact that the videotape was never admitted into evidence," 103 F.3d at 656. Appellees have presented no persuasive reason to depart from *McDougal*'s analysis of derivative recordings like these.

IV. Local Rule 79-5 does not require the unsealing and public broadcast of the video recordings.

Appellees also argue that public dissemination and broadcast of the videos after ten years is required by Local Rule 79-5(g). Not so.

1. As an initial matter, Rule 79-5(g) does not apply to the videotapes, because they were placed in the record *by the court*, not filed by one of the parties. It is clear that Rule 79-5 is limited to party-filed documents from: (a) the title of the Rule, which indicates that it is meant to instruct parties on the procedures for "Filing Documents Under Seal"; (b) subsection a of the Rule, which establishes the scope of the rule as governing "sealed documents submitted by registered e-filers" or "by

a party that is not permitted to e-file"; and (c) the text of subsection g itself, which provides that the seal on a document shall not be lifted if the "Submitting Party"—i.e., the *party that filed the document*—shows "good cause" for maintaining the seal. *Accord* N.D. CAL. L.R. 79-5(f) (2010).

Plaintiffs suggest that this interpretation is foreclosed by Proponents' supposed "concessions" in argument before this Court in 2011 that Local Rule 79-5 applies to the recordings, Plaintiffs' Br. 19, but as explained above, the cursory exchange during the 2011 oral argument—over an issue not briefed by either party and not relied upon by the Court in reaching its decision—does not estop Proponents from now advancing the better interpretation of Rule 79-5. *See supra*, pp. 8-10.

Appellees also contend that Rule 79-5 applies no matter "who filed the document," Plaintiffs' Br. 19-20, because the Rule extends to "[a]ny document filed under seal," KQED's Br. 22. But it is a familiar principle of textual interpretation that a court must "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). The phrase "tangible object" at issue in *Yates v. United States*, 574 U.S. 528 (2015), was no less unlimited, on its face, than the "any document filed" language in Rule 79-5. Yet *Yates* still rejected an "unbounded reading" of that seemingly expansive phrase, as contrary to the statute's purpose, title, and overall structure. *Id.* at 546; *see also id.* at 543 (noting the Court had adopted a similar

narrowing interpretation in *Gustafson* even though the phrase at issue there "began with the word 'any' ").

Appellees next argue that Rule 79-5(g) does apply to documents lodged in the record by a court, notwithstanding these textual cues, citing non-precedential orders sealing a variety of documents such as transcripts, trial exhibits, and judicial opinions. *See* KQED's Br. 23; Plaintiffs' Br. 23. Of course, no one questions the authority of a court to issue opinions under seal, but none of Appellees' cases holds that this authority comes from Rule 79-5—or that it is governed by Rule 79-5(g)'s presumptive ten-year limit. After all, a "district court has the inherent power to seal documents," *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003)—a point that also disposes of Plaintiffs' contention that if Rule 79-5 does not apply to the recordings, "then they should not have been sealed to begin with and the public should have had access to them a decade ago," Plaintiffs' Br. 20. And none of Appellees' cases involved *anything like* the item at issue here—a videorecording of an entire trial, created at the direction of the court for limited use in chambers, and placed in the record by the court itself.

KQED's backup argument that Rule 79-5(g)'s use of the term "party" "includes the Court" requires little response. KQED's Br. 24. KQED submits that (1) the term "designating party" in Rule 79-5 is the same as the term "designating party" in Northern District's Stipulated Protective Order; (2) that the Stipulated

Protective Order defines "designating party" to include "a Party or Non-Party"; and (3) that the Protective Order further defines "Non-Party" to include entities "not named as a Party to this action." *Id.* at 23-24. But what KQED is *not* able to find, in its lengthy concatenation of various extraneous provisions, is *any* use of the term "Party" in the Rules to *include the Court itself*.

Plaintiffs seek to rescue the district court's flawed interpretation of Rule 79-5 by claiming that "[d]istrict courts have broad discretion to interpret their local rules." Plaintiffs' Br. 14. But all the cases cited by Plaintiffs show is that where a Local Rule leaves a discretionary determination to a district court, this Court will "rare[ly] … question the exercise of [this] discretion in connection with the application of the local rules." *Qualls ex rel. Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 842 n.2 (9th Cir. 1994) (whether to accept filings that are allegedly untimely); *see also United States v. Warren*, 601 F.2d 471, 473-74 (9th Cir. 1979) (whether to excuse the failure to file a response brief). The proper *interpretation* of Rule 79-5 is not a discretionary matter; it is a question of law. *Cf. United States v. Saenz*, 179 F.3d 686, 688 (9th Cir. 1999) (legal interpretation subject to *de novo* review).

2. What is more, even if Rule 79-5(g) *did* apply to documents created and filed by the court itself, it could not require the unsealing of these specific documents—video recordings of trial proceedings—because that very act is *flatly proscribed by Rule 77-3*, as explained above. Appellees' respond by maintaining

that Rule 77-3 has nothing to say about how a videorecording may be used after it is created, KQED's Br. 25-26; Plaintiffs' Br. 25, but we have already explained why that reasoning fails.

3. Even setting all these arguments aside, Rule 79-5 still does not authorize the disclosure of the videotapes because that Rule itself provides that the seal may be extended beyond the ten-year default "upon a showing of good cause," N.D. CAL. L.R. 79-5(g), and that standard is plainly satisfied by the compelling interest in preserving the integrity of the judicial system.

Plaintiffs argue that we "concede" that the " 'good cause' standard" is synonymous with the "compelling reason" standard, Plaintiffs' Br. 21, but that contention is puzzling, given that our opening brief expressly noted that "the 'good cause' standard is *less* demanding than the 'compelling reasons' showing required under the common-law right of access," Proponents' Br. 50. Plaintiffs also claim that case law establishes that the two standards are the same, Plaintiffs' Br. 21-22, but the cases they cite all deal with the *common-law right of access*, not Rule 79-5. *See Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135-36, 1139 (9th Cir. 2003); *Plexxikon Inc. v. Novartis Pharm. Corp.*, 2020 WL 1233881, at *1 (N.D. Cal. Mar. 13, 2020). We freely acknowledge that, under this Court's precedent, the common law (if it applied here, which it does not) could be overcome

only by "compelling reasons." But that does not change the fact that *Rule 79-5(g)*—which would supplant the common law on this point—on its face allows a seal to be extended "upon showing good cause." Ultimately the point is irrelevant, however, since the value of judicial integrity surmounts either threshold.

4. Finally, even if all of the arguments above are set aside, the trial court *still* erred in calculating *the date* that disclosure should take place. Rule 79-5(g) sets forth a precise, formal rule governing how to calculate its timespan: "10 years from the date the case is closed." In this case, there is no difficulty in figuring out when the clock started: on August 27, 2012, when the Court entered judgment and directed the Clerk to "close this file" and the case was marked closed. ER317.

Both Plaintiffs and KQED point to the Court's Order two days later deeming its August 27 closure to be effective " 'nunc pro tunc' on August 12, 2010." KQED's Br. 29-30; Plaintiffs' Br. 32. But Rule 79-5 does not run from when the Court enters an order closing the case "nunc pro tunc"; it runs from when the case *was actually closed*. Proponents do not doubt the Court's power to correct clerical errors "nunc pro tunc" in some instances, but that authority "as a general rule does not enable the court to make 'substantive changes affecting parties' rights,' " *Singh v. Mukasey*, 533 F.3d 1103, 1110 (9th Cir. 2008) (quoting *Transamerica Ins. Co. v. South*, 975 F.2d 321, 325 (7th Cir. 1992)), and it does not somehow transform a case closed on August 29, 2012 into case "*actually* closed on August 12, 2010," Plaintiffs' Br. 32.

KQED objects that we "never challenged Judge Ware's order that the judgment would be entered *nunc pro tunc*," KQED's Br. 30, but that is because we do not object to the August 29, 2012 *nunc pro tunc* Order itself; what we object to is any attempt to use that Order in calculating the 10-year period established by Rule 79-7(g)—and we *have* challenged *that*, at every opportunity.

V. There is no First Amendment right to access the video recordings.

Finally, Plaintiffs and KQED ask the Court to issue a groundbreaking constitutional ruling holding that they are entitled to obtain the trial recordings under the First Amendment. The Court should decline the invitation.

1. Binding precedent makes clear that there is simply no First Amendment right to access the trial recordings at issue. It is true that the First Amendment guarantees access to "judicial proceedings," Plaintiffs' Br. 42; *see also* KQED's Br. 49, but as this Court has squarely held, that First Amendment right is "amply satisfied" where the public and press are "granted access to the proceedings themselves." *Valley Broad. Co. v. United States Dist. Court for Dist. of Nev.*, 798 F.2d 1289, 1292-93 (9th Cir. 1986). There is no dispute that such access was granted here. Plaintiffs and KQED also note that the First Amendment right extends to court "documents" and "records," Plaintiffs' Br. 42, 43; KQED's Br. 49, but again, under settled law the First Amendment right to access these items *is fully satisfied* so long as the press and public are "provided with transcripts" of those materials. *Valley*

Broadcasting, 798 F.2d at 1292; *see also Nixon*, 435 U.S. at 609 (First Amendment "simply is not applicable" where "the press … was permitted to listen to the tapes and report on what was heard" and "also were furnished transcripts of the tapes"); *United States v. Antar*, 38 F.3d 1348, 1359-60 (3d Cir. 1994); *United States v. Beckham*, 789 F.2d 401, 408-09 (6th Cir. 1986). Again, there is no dispute that such transcripts have been provided here.

Appellees utterly fail to rebut these precedents. Plaintiffs offer *no response at all* to the binding decisions in *Nixon* and *Valley Broadcasting*; and KQED's only effort is an argument that *Nixon* involved a "different question" because the audiotapes in that case were "admitted into evidence at trial, but not separately filed in the court file." KQED's Br. 50. That nonsensical distinction is plainly not a sufficient answer to *Nixon*. Whether or not it is "separately filed in the court file," when a document is admitted into evidence, it obviously becomes part of the record, *see United States v. Jamerson*, 549 F.2d 1263, 1267 (9th Cir. 1977) ("testimony … introduced into evidence without objection … becomes part of the record"), and KQED cites no authority whatsoever in support of the notion that the First Amendment analysis should somehow turn on this hyper-technical distinction. Nor does Amici's vague invocation of "the purposes underlying" the First Amendment suffice to overcome the binding precedent establishing that the First Amendment's commands have been fully satisfied here. Media Amici Br. 5. Accordingly, *Nixon*

and *Valley Broadcasting* are controlling, and they squarely hold that there is no additional right to access the videorecording of the trial in this case.

Appellees' First Amendment argument is also in significant tension with the rule—settled for decades—that there is no constitutional right to broadcast a criminal trial. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 539 (1965); *id*. at 584-85 (Warren, C.J., concurring); *id*. at 588 (Harlan, J., concurring); *In re Sony BMG Music Entm't*, 564 F.3d 1, 9 (1st Cir. 2009). They resist this conclusion, arguing that "[t]his case is not about whether courts may choose to prohibit broadcasting of trials," Plaintiffs' Br. 44, since they merely wish to broadcast "a recording of a historic trial that already exists," KQED Br. 50. But FED. R. CRIM. P. 53's bar on the broadcast of criminal trials—which has been repeatedly upheld on the authority of *Estes*, *e.g.*, *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988); *United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir. 1983)—has long been understood to prohibit recording trial proceedings for later dissemination in equal measure with contemporaneous broadcasting, *see United States v. Kerley*, 753 F.2d 617, 620 (7th Cir. 1985); *United States v. McVeigh*, 931 F. Supp. 753, 755 (D. Colo. 1996) (subsequent distribution of sound recordings "the functional equivalent of a broadcast of the court proceedings in violation of Rule 53"); *see also Amsler v. United States*, 381 F.2d 37, 53 (9th Cir. 1967).

Appellees trumpet this Court's recent decision in *Courthouse News Service v. Planet*, 947 F.3d 581 (9th Cir. 2020), but nothing in that opinion changes the analysis. In *Courthouse News Service*, the Court held that in addition to applying to criminal proceedings, "a qualified First Amendment right of access extends to timely access to newly filed civil complaints." *Id.* at 591. But *Courthouse News Service* nowhere suggests that the right to access civil judicial records and proceedings is *more robust* than in the criminal context; and as just discussed, it is well established even in criminal cases that (1) the First Amendment is fully satisfied where the proceedings were open to the public and transcriptions of any records are freely available; and (2) there is no right, beyond this, to broadcast the trial proceedings—either contemporaneously or after the fact. None of the cases cited by Appellees entitle them to anything more. *Compare Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 560, 580-81 (1980) (First Amendment bars closure order barring the press and public from attending a criminal trial); *Oregonian Publ'g Co. v. United States Dist. Court for Dist. of Or.*, 920 F.2d 1462, 1465 (9th Cir. 1990) (First Amendment prevented order denying any access to plea agreement), *and Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983) (vacating seal on all documents filed by agency in a case under the common-law right of public access), *with Valley Broadcasting*, 798 F.2d at 1292-93 (explaining that where the press is "granted access to the proceedings themselves and … provided with

transcripts of the exhibits admitted into evidence … [a]ny first amendment rights … [are] amply satisfied").

2. Even if the First Amendment did apply to the trial recordings, that would not change the result, for this Court already held in *Perry* that "the integrity of the judicial process is a compelling interest" sufficient to satisfy the First Amendment's demands, and as discussed above, that interest remains equally compelling today. 667 F.3d at 1088.

3. Finally, Appellees point to the First Amendment's "least restrictive means" requirement and argue that "at a minimum, this Court [should] 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." Plaintiffs' Br. 46; *see also* KQED Br. 52-53. This last-ditch effort to *only partially* breach the promise Judge Walker made also fails. To begin, the argument is flatly foreclosed by *Perry*, which squarely held that maintaining the seal on *the entirety* of the trial recordings was the least restrictive means of protecting "the integrity of the judicial process" because "there are no alternatives to maintaining the recording under seal that would protect the compelling interest at issue." 667 F.3d at 1088.

That conclusion makes sense. Appellees' suggestion that partial unsealing would be a "more narrowly tailored" solution rests entirely on the premise that the

only reason for maintaining the seal is the "harm that purportedly would flow to [Proponents'] witnesses and Proposition 8 supporters" from disclosure. Plaintiffs' Br. 46, 47 (quotation marks omitted). But as explained above, that is not so. *See supra*, p. 11. Instead, the compelling interest that requires the videotapes to remain sealed is the judiciary's obligation to keep faith with Judge Walker's promise that those recordings would never be disclosed. And the only "narrowly tailored" way to honor Judge Walker's promise that he had "eliminated" the possibility that the trial recordings would be publicly disclosed and disseminated *at all*, *Perry*, 704 F. Supp. 2d at 944, is to *prevent the trial recordings from being publicly disclosed and disseminated at all*.

Appellees' argument for partial disclosure also ignores the fact that Proponents' attorneys, as well as their witnesses, *also* reasonably relied on Judge Walker's assurances that the trial would not be broadcast. Plaintiffs themselves say that their proposed partial unsealing would reach "any attorney statements and argument." Plaintiffs' Br. 46. But Judge Walker's repeated promises that the recordings would never be disclosed extended to Proponents' lawyers as well as their witnesses—indeed, Judge Walker made that promise in open court to one of them. ER441. And the value of judicial integrity demands that faith in "the explicit assurances that a judge makes" must be preserved not only among "[l]itigants and the public," but also the officers of the court. *Perry*, 667 F.3d at 1087-88.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's order and remand with instructions to permanently maintain the seal.

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Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 30, 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 30, 2020

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