No. 20-16375

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,
Intervenor-Plaintiff-Appellee,

KQED, INC.,
Intervenor-Appellee,

v.

GAVIN NEWSOM, Governor, et al.,
Defendants-Appellees,

DENNIS HOLLINGSWORTH, et al.,
Intervenors-Defendants-Appellants,

and

PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, et al.,
Defendants.

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

INTERVENORS-DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR STAY PENDING APPEAL *RELIEF NEEDED BY AUGUST 12, 2020*

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INTRODUCTION

There should be no mistake about what Appellees' briefs opposing a stay ask of the Court: Appellees are asking the Court to effectively *decide this appeal in their favor now—without the benefit* of meaningful briefing and argument, and even though the *only appellate decision* that has addressed Appellees' effort to disclose the trial recordings at issue *unanimously held* that their disclosure "would cause serious damage to the integrity of the judicial process." *Perry v. Brown*, 667 F.3d 1078, 1087 (9th Cir. 2012).

In *Perry*, this Court held that any right to access the trial videotapes is decisively outweighed by the judicial branch's compelling interest in keeping its own promises. For the reasons discussed below, Appellees completely fail to show that either they or anyone else has any right to access the videotapes that Judge Walker solemnly promised would never be released—not under the common law, not under the district court's local rules, and not under the First Amendment. But even if they did, the compelling interest in judicial integrity continues to provide an independent, overriding reason to keep the recordings under seal, as Judge Walker promised. Those solemn promises were not subject to a ten-year expiration date, as Appellees claim—if they had been, Judge Walker would never have had the opportunity to *make* them, because Proponents would "have sought an order directing him to stop recording forthwith, which, given the prior temporary and

further stay they had just obtained from the Supreme Court, they might well have secured." *Id.* at 1085. And because Judge Walker promised to keep the recordings under seal permanently—assuring Proponents, in this Court's words, "that there was no possibility that the recording would be broadcast to the public in the future," *id.* at 1086—the interest in judicial integrity provides a compelling reason to *honor* that promise permanently as well.

At the very least, there is a strong likelihood that all this is so—and the Court should accordingly issue a stay so it can meaningfully consider these issues, rather than effectively dismissing Proponents' appeal without argument or briefing on the merits.

ARGUMENT

I. LIKELIHOOD OF SUCCESS.

A. Proponents are likely to succeed on appeal because the interest in judicial integrity that this Court found compelling in 2012 continues to demand that the trial videotapes at issue remain under seal. As *Perry* described, 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." *Id.* at 1085. Because "the explicit assurances that a judge makes—no less than the decisions the judge issues—must be consistent and worthy of reliance," Judge Reinhardt's opinion for

this Court concluded that "the setting aside of those commitments would compromise the integrity of the judicial process." *Id.* at 1087, 1088. After all, "[l]itigants 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.

That is no less true today. Appellees note that the trial took place a decade ago and that "the legal and political landscape surrounding the issue of same-sex marriage continues to change." KQED Br. 1, 4. But contrary to KQED's suggestion, that does not mean that "the concerns that existed ten years ago" do not "still exist." *Id.* at 16. For the scope of the judicial-integrity interest in *keeping faith* with Judge Walker's promises obviously must correspond with *the scope of what he promised*—and Judge Walker *did not* promise that the trial tapes would remain private for the first ten years, or until the public came to "embrace the decision" striking down Proposition 8. *Id.* at 4. No, he promised "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 (first emphasis in original).

Unable to find anything in Judge Walker's promises that would cause them to expire after ten years, Appellees turn to this Court's decision in *Perry*. As they 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 *Perry* "explicitly recognized" that Judge Walker's "promise [was] cabined by the time requirements of the Local Rule." Plaintiffs' Br. 2. Not so. The most that one can reasonably conclude based upon the brief passage that Appellees seize upon is that *Perry*'s specific *holding* does not dictate that the recordings must remain sealed beyond "the foreseeable future." 667 F.3d at 1084-85. There can be no doubt that the Court's animating reasoning—by focusing on Judge Walker's "promise[ ] … that the conditions under which the recording was maintained *would not change*"—simply cannot be read as good for ten years only. *Id.* at 1086.

Appellees next seize upon a 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, suggesting that this aside amounts to an "admission" that now forecloses any argument that Proponents reasonably expected the recordings to remain permanently confidential. Plaintiffs' Br. 12; KQED Br. 2-3. But as we explained in our motion, 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.

Arizona v. Tohono O'odham Nation, 818 F.3d 549, 558 (9th Cir. 2016). Here, neither condition is met, and Appellees do not claim otherwise. Finally, in all events, counsel was careful to emphasize in the very 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 at 6:24, https://goo.gl/coepDh. 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. Appellees' lengthy discussion of Proponents' supposed "concession" is a red herring.

Appellees also fault Proponents for failing to provide new "evidence that they or their witnesses would suffer any harm from unsealing." Plaintiffs' Br. 8. But the evidence of harm is exactly the same as was before the Court in 2012: Judge Walker's repeated promises and Proponents' reliance upon them. Based on that evidence, the Court had no trouble concluding that "[t]here can be no question that Proponents reasonably relied on Chief Judge Walker's explicit assurances," and that "the integrity of the judicial process is a compelling interest that in these circumstances would be harmed by the nullification of th[ose] assurances." *Perry*, 667 F.3d at 1088, 1086. It is that interest in "preserving the sanctity of the judicial process" that requires continued sealing, *id.* at 1081, not any specific threat of "retaliation or harassment," KQED Br. 3. And because that interest is equally compelling today, *see supra*, pp. 3-4, Appellees' contention that there is "not a shred

of evidence to establish good cause for the sealing," KQED Br. 8, is completely unpersuasive.

Ultimately, Appellees seek nothing so much as a repudiation of this Court's decision in *Perry*. Much of their briefing—and the entirety of the amicus brief filed by 32 media organizations—is comprised of variations on the theme that the trial over Proposition 8 was "a historic civil rights trial on an issue of great public interest and importance," Plaintiffs' Br. 1, and that "the public has shown a continued interest in audio-visual depictions of the trial itself," KQED Br. 10. Those interests applied with even greater force in 2012, before "the intense, day-to-day scrutiny" of the trial "faded," *id.* at 9, yet this Court unanimously held 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.

B. The continuing, compelling interest in judicial integrity provides a fully sufficient reason for keeping the trial recordings under seal, but in addition, Proponents are *also* likely to succeed in showing that Appellees have no right to access the recordings *in the first place*. The common-law right of access that was the basis for the district court's order lifting the seal has no application here, because it has been displaced by the local rule forbidding both the "public broadcasting or televising" of "any judicial proceeding" and the creation of any "recording for those

purposes." N.D. CAL. L.R. 77-3; *see In re Roman Cath. Archbishop of Portland in Or.*, 661 F.3d 417, 430 (9th Cir. 2011) (holding common-law right of access displaced by positive law). Appellees respond that "[t]he issue here is whether to unseal the video, not whether to broadcast it," since "the public may choose" to use the recordings for purposes other than broadcast. Plaintiffs' Br. 13. But 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, KQED's Br. 12, the one use the Court can be *sure* will be made of the recordings *is broadcasting and televising*.

The right-of-access is also inapplicable here because the trial recording "is merely an electronic recording of witness testimony" that was open to the public "at the time and in the manner it was delivered … in the courtroom." *United States v. McDougal*, 103 F.3d 651, 657 (8th Cir. 1996). Plaintiffs insist that "this Circuit takes a different approach" than *McDougal*, Plaintiffs' Br. 15, but the only precedent it cites (aside from the district-court decision that is here on appeal) does not deal with derivative documents *at all*.

Nor is disclosure justified by the district court's Local Rule 79-5(g). As we explained in our motion (at 17), that rule does not even apply to documents placed

in the record by the court. No Appellee offers any answer to this argument. Even if it did apply, Rule 79-5(g)'s general provisions governing the unsealing of documents would necessarily give way to Rule 77-3's specific command that a recording of "any judicial proceedings" *may not* be broadcast. Appellees' only response is to reiterate their argument that Rule 77-3 "is inapplicable here," Plaintiffs' Br. 13—which fails for the reasons just discussed. Finally, at the very least the district court erred in starting Rule 79-5(g)'s ten-year clock at "the functional closure of the case," KQED Br. 7, rather than the *actual* closure of the case, as the rule requires.

That leaves the First Amendment. As our motion explained, the binding precedents in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-09 (1978), and *Valley Broadcasting Co. v. United States District Court*, 798 F.2d 1289, 1292-93 (9th Cir. 1986), squarely dictate that there is no First Amendment right to access the trial recordings here. While Appellees' pepper their briefs with rote invocations of the First Amendment, no Appellee *even mentions these holdings*, much less explains how their claims could conceivably be squared with them.

II. IRREPARABLE HARM.

The harm Proponents will suffer on August 12th in the absence of a stay is serious—and even more critically, it is obviously irreparable. *See California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). Again, to deny Proponents a stay is in effect to decide their appeal without meaningful briefing or argument. Once the courthouse

opens on August 12th and the recordings are released, no order from this Court will be able to claw them back, and the merits of this case will have been adjudicated without *any* appellate review—except, that is, this Court's 2012 decision in *Perry* that "the recording cannot be released without undermining the integrity of the judicial system." 667 F.3d at 1088. That prospect of certain mootness itself constitutes irreparable harm. As KQED concedes, in *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986), this Court found "irreparable harm" because the "denial of a stay … would moot the appeal." KQED Br. 17. Plaintiffs disagree with KQED's interpretation, suggesting that "the irreparable harm in *Artukovic* was the applicant's extradition" instead, Plaintiffs' Br. 18, but that is not so. The Court could not have been clearer that the only role the applicant's extradition played in the irreparable-harm analysis was that once it occurred, "his appeal will become moot and will be dismissed." *Artukovic*, 784 F.2d at 1356.

Unsealing the trial recordings would also inflict the irreparable harm of forever damaging "the ability of litigants and members of the public to rely on a judge's … solemn commitments" and nullifying "Proponents' reliance on those commitments." *Perry*, 667 F.3d at 1081, 1086. Although Appellees argue that the judicial-integrity interest is not in danger here (for reasons we have already addressed), they do not question its importance, or the fact that any damage inflicted on August 12th will be irretrievable.

Plaintiffs suggest that the damage to judicial integrity counts for naught because "Proponents say nothing about how any of them—individually—would be harmed." Plaintiffs' Br. 19. There is nothing to this. Proponents, along with their attorneys and witnesses, are the very parties: (1) who *induced* Judge Walker's "solemn commitments" by obtaining the emergency Supreme Court stay that "compelled" them, *Perry*, 667 F.3d at 1087; (2) who "reasonably relied" on those commitments by withdrawing their objection to the recording and declining to take further action, *id.* at 1086; and (3) whose testimony and argumentation *would be exposed* to public view *in direct violation* of those commitments. Once again, this argument is nothing less than a frontal assault on this Court's decision in *Perry*—a decision that is utterly inexplicable if the release of the recordings would not cause any harm to Proponents "individually." Plaintiffs. Br. 19.

III. BALANCE OF THE EQUITIES.

Finally, the remaining equitable factors strongly favor a stay. Appellees insist that continuing the seal damages them because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." KQED Br. 19 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). But as discussed, Appellees do not raise even a colorable argument that the First Amendment applies here. And even if it did, while its abridgment for "minimal periods of time" may constitute irreparable harm, the temporary continuance of the

seal—for long enough to allow Proponents to obtain meaningful appellate review—quite obviously pales in comparison to the permanent damage that will be inflicted upon Proponents the moment the seal is lifted. Indeed, that follows *a fortiori* from this Court's conclusion in *Perry* that the interest in judicial integrity decisively outweighs any First Amendment rights at stake. 667 F.3d at 1088. And *Perry*'s conclusion 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," *id.*, also suffices to show where the public interest lies.

CONCLUSION

This Court should stay the district court's order pending appeal.

Dated: August 1, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Reply complies with the word-limit requirements of FED. R. APP. P. 27(d)(2)(C) because it contains 2,594 words, excluding the parts of the motion exempted by Circuit Rule 27-1(1)(d) and FED. R. APP. P. 32(f).

This Reply complies with the typeface requirements of FED. R. APP. P. 27(d)(1)(E) and 32(a)(5) and the type style requirements of FED. R. APP. P. 27(d)(1)(E) and 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: August 1, 2020

s/ Charles J. Cooper
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CERTIFICATE OF SERVICE

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 on August 1, 2020 by using the appellate CM/ECF system. I certify that service will be accomplished on August 1, 2020 by the appellate CM/ECF system on all parties or their counsel

Dated: August 1, 2020

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