

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 20-16375

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.,
Intervenor-Defendants-Appellants,
and
PATRICK O'CONNELL; et al.,
Defendants.

On Appeal from the United States District Court
for the Northern District of California
No. 3:09-cv-02292-WHO
The Honorable William H. Orrick, Judge

**ANSWERING BRIEF
OF DEFENDANTS-APPELLEES**

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Defendant-Appellees (hereafter “State of California”) hereby join in the brief of Intervenor-Appellee KQED INC, filed October 9, which urges the Court to affirm the district court’s order denying Intervenor-Defendant-Appellants’ motion to keep under seal the video recordings of the trial in this matter. In addition to the reasons stated therein, the State of California has significant interests in the release of the video recordings of this historic trial. Release would serve the State’s interest in ensuring public access to the courts and in educating the public about Proposition 8 and its effect on the LGBTQ community.

Public access to the courts and government transparency are essential aspects of a functioning democratic government. Courts have historically been open to the public because the judicial process is fundamentally fairer if the public is allowed to participate by observing court proceedings and accessing court records. *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982) (explaining that court access allows the public to “effectively participate in and contribute to our republican system of self-government”) “Openness in judicial proceedings enhances both the basic fairness of the proceeding and the appearance of fairness so essential to public confidence in the system . . . and forms an indispensable predicate to free expression about the workings of government.” *Courthouse News Serv. v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) (citations and internal quotations omitted). Openness and transparency in judicial proceedings

thus “‘is pivotal to public perception of the judiciary’s legitimacy and independence.’” ER 367 (citing *United States v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008)). “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

The federal judicial system has long championed such transparency. Federal courthouses have been “designed for the public to visit and learn first-hand about the tradition and purpose of the American judicial process.” United States Courts, *Visit a Court*, <https://www.uscourts.gov/about-federal-courts/federal-courts-public/visit-federal-court>. As explained on the United States Courts’ website, public access to the courts is guaranteed by “[o]ur Constitution and court tradition”, which “gives citizens right of access to court proceedings. Citizens gain confidence in the courts by seeing judicial work in action, and learn first-hand how the judicial system works.” *Id.* From 2011 to 2015, the Judicial Conference of the United States oversaw the Cameras in the Courtroom Pilot Project, which tested the use of cameras in 14 federal district courts. United States Courts, *Case Video Archive*, <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/case-video-archive>.¹ In its 2016 report on the pilot

¹ Judge Walker had designated the trial in this matter for inclusion in the pilot program to “satisfy the public’s interest in the case,” but the Supreme Court

project, the Committee on Court Administration and Case Management found, among other things, that “[a] majority of both judges in the pilot courts and attorneys who participated in a case recorded under the pilot project think video recording, to a moderate or great extent, educates the public about courtroom proceedings, educates the public about the legal issues in court cases, and increases public access to the federal courts.” *Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project Federal Judicial Center 2016*, page ix,

[https://www.fjc.gov/sites/default/files/2017/Cameras%20in%20Courts%20Project%20Report%20\(2016\).pdf](https://www.fjc.gov/sites/default/files/2017/Cameras%20in%20Courts%20Project%20Report%20(2016).pdf).

The trial in this action presented an “undeniably important historical record” of national importance, ER 6, that deserves the greatest public access available. This trial represented the first time a federal court heard live testimony from gay and lesbian couples about their relationships and the importance of marriage to them and their families. See District Court Dkt. 898-5, 898-6. At the time, thousands of people wrote to Judge Walker expressing interest in the live recording, *Hollingsworth v. Perry*, 558 U.S. 183, 202 (2010) (Breyer, J., dissenting), and since the trial, several popular dramatizations and documentaries

stayed the public broadcast. ER 7; *Perry v. Brown*, 667 F.3d 1078, 1081 (9th Cir. 2012); *Hollingsworth v. Perry*, 558 U.S. 1107 (2010).

have been produced. *See, e.g.*, “Marriage Trial,”

https://www.youtube.com/channel/UC0PKkQaBBHWwR9HAS_qWTnA; “8”

(Broadway reenactment of the trial starring leading actors);

<https://www.youtube.com/watch?v=qlUG8F9uVgM>, and “The Case Against 8,”

HBO (2014), <https://www.hbo.com/documentaries/the-case-against-8>; *see also*

KQED Opposition to Motion for Stay, Dkt. No. 6-1 at 9-10. There is no question that there continues to be a strong national public interest in viewing the trial proceedings.²

Additionally, the State of California has an interest in educating the public about Proposition 8 and its effect on the LGBTQ community.³ This can best be accomplished by the release of the video recordings. While the transcript of the trial has been widely disseminated, it is not an adequate substitute. *See* ER 11; District Court Dkt. 857-860. The trial testimonies of the plaintiffs and other

² Excerpts of the video recordings have already been made public. Both parties are in possession of and used excerpts of the videos during closing arguments, and Judge Walker used the videos during lectures he gave regarding video recordings in the courtroom. ER 7-8, ER 360-61. Plaintiffs have not provided any evidence that these disclosures or any future release of the videos would result in any cognizable harm. ER 3.

³ Indeed, the State’s History Social Science Framework, which sets out curricular guidelines for all of California’s public schools, specifically mentions the Proposition 8 case (*Hollingsworth v. Perry*) as an important event in the history of California and the country. *See* <https://www.cde.ca.gov/ci/hs/cf/documents/hssframeworkwhole.pdf> (pg. 90, 421-422).

witnesses convey deeply emotional stories of fear, stigma, discrimination, love, and persistence. *Id.* The video recordings would validate the wider LGBTQ community's shared experiences with testimony provided under oath, which itself holds more weight than the same stories told in other spaces. And for a trial that included days filled with often emotional testimony regarding the harms caused by Proposition 8, a transcript cannot possibly convey its full impact. Only the video recordings will suffice.

Proposition 8 and the trial in this matter helped to inspire a movement that impacted thousands across the nation, and ultimately led to victory at the United States Supreme Court, but most people could not get to or into the court to view the proceedings in-person. Marriage equality and LGBTQ rights in general continue to be a matter of great historical and public importance to the State of California. Affirming the district court's order and releasing the videos would properly allow maximum public access to one of the most important historical events for the LGBTQ community in California and this nation. This Court should affirm the district court.

Dated: October 9, 2020

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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9th Cir. Case Number(s) 20-16375

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Signature /s/ Seth E. Goldstein **Date** 10/9/20
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CERTIFICATE OF SERVICE

Case Name: **Kristin M. Perry, et al. v.** No. **20-16375**
Arnold Schwarzenegger, et al.
[Appeal]

I hereby certify that on October 9, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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Lindsey Cannan
Declarant

/s/ Lindsey Cannan
Signature