No. 20-16375

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

KQED INC.'S OPPOSITION TO INTERVENORS-DEFENDANTS' MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

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

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Intervenor-Appellee KQED Inc. ("KQED"), respectfully submits this Opposition to the Motion of Intervenors-Defendants-Appellants Dennis Hollingsworth, et al. (collectively, "Defendants") that seeks a stay of the District Court's Order ("Stay Motion").

1. SUMMARY OF ARGUMENT

Over a decade ago, the Northern District of California heard one of the most socially and culturally significant trials in our nation's history, deciding the constitutionality of California's Proposition 8, which added a provision to the State Constitution providing that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5. That Court's ruling that Prop 8 was unconstitutional because the U.S. Constitution "protects an individual's choice of marital partner regardless of gender" (*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010)) was upheld by the U.S. Supreme Court (*Hollingsworth v. Perry*, 570 U.S. 693, 697 (2013)), and five years later, the Supreme Court recognized the constitutional right of same-sex couples to marry nationwide. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

Though many people were able to attend and witness this landmark trial for themselves, there are many more across the country who had no such opportunity, including those who were only children at the time. Fortunately for those students, scholars, activists, historians, pundits, and concerned and affected citizens all over

the country who were unable to witness this historic event in person, a videotaped recording of the trial was made and preserved. Yet, this historical trial record has been sealed from the general public for the past decade. *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012). This Court's decision, however, expressly found that the reasons that justified sealing in 2012 would not endure in perpetuity. *Id.* at 1084-85. As the district court pointed out, Defendants knew that the Local Rule applied and the sealing of the videotapes was *not* in perpetuity. App. 4 n.9; *see* Oral Argument, *Perry v. Brown*, No. 11-17255, available at https://bit.ly/35toPvJ. Appellant's counsel was clear about their burden:

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

Id. at 7:04-7:58 (emphasis added). Defendants' protestations and claims fall flat in

the face of this concession. Thus, with this full support of Defendants, this Court affirmed that the recordings should be unsealed unless Defendants could establish good cause to extend the sealing. 667 F.3d at 1085 & n.5.

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

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

App. 3 (emphasis added).

In 2012, this Court protected the interests in judicial integrity, while also recognizing that the public's rights of access would attach in the future, and that those rights would prevail over the permanent secrecy Defendants seek unless Defendants "could make a good cause showing" of the claimed need for an extended seal. 667 F.3d at 1085 & n.5. Defendants cannot make that showing as they have now, twice, failed to provide any new evidence supporting the continued sealing. Instead, Defendants regurgitate the same theories they have relied on in support of sealing since this issue arose a decade ago. Sections 3.A, 3.B *infra*.

Conversely, KQED, which operates the nation's most-listened-to public radio station and the Bay Area's most popular public television station, submitted multiple new declarations and easily demonstrated the changing circumstances and legal landscape that justify unsealing the records, especially after the passage of a full decade. While the legal and political landscape surrounding the issue of same-sex marriage continues to change and embrace the decision in this case, the clamor from the media and the public, including rights groups and legal scholars, to have access to the recording of this historic trial does not ebb. *See*, *e.g.*, Decls. of Dean Erwin Chemerinsky, Professor Suzanne Goldberg, Seth Levy, McKenna Palmer, Michael Sabatino, and Scott Shafer (KQED Appendix of Exhibits ("KQED App.") KQED App. 00038-56. The public's interest in and constitutional right to access the videotaped trial recordings is greater than ever. KQED therefore respectfully

requests that the Court deny Defendants' motion and finally allow the recordings to be unsealed so that the public may view the nuances and details of the historic Prop 8 trial that only its video recording could capture. KQED's uncontested evidence demonstrates that unsealing these trial records will allow the public to observe the legal process that the federal court followed as it heard evidence and arguments (on both sides) – a tangible public benefit that furthers judicial integrity and confidence in the nation's judicial system. Section 3.C, *infra*.

2. SUMMARY OF RELEVANT FACTS

A. The District Court Ordered the Recordings Unsealed on August 12th

In 2012, this Court issued an Opinion denying access to videotapes of the trial in this matter, which had been recorded by the trial court for the court's use. 667 F.3d at 1088-89. In doing so, the Court held that interests in judicial integrity supported the continued sealing (*id.* at 1088), while also affirming that the sealing order it contemplated would not last forever (*id.* at 1084-85 & n.5). As to the latter point, the Court explained that Defendants "reasonably relied on Chief Judge Walker's specific assurances – compelled by the Supreme Court's just-issued opinion – that the recording would not be broadcast to the public, *at least in the foreseeable future*." *Id.* In a footnote, the Court cited to Local Rule 79-5(f) [now (g)], which provides as relevant that "[a]ny 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," except that "a party that submitted documents that the Court placed under seal in a case may, *upon showing good cause at the conclusion of the case*, seek an order that would continue the seal until a specific date beyond the 10 years provided by this rule." *Id.* n.5 (emphasis added).

On April 28, 2017, KQED moved the district court to unseal the videotaped trial records based on the considerable changes in circumstances after the passage of time, including final resolution of the underlying case. The district court, like this Court before it, recognized that "the common-law right of access applies to the video recordings" (App. 15), but denied the motion finding that the same compelling reasons justifying sealing of the records cited by this Court continued to apply, "*at this juncture*." App. 19 (emphasis added). The district court, however, ordered that "the recordings shall be released to movants on August 12, 2020, absent further order from this Court that compelling reasons exist to continue to seal them." App. 20; *see also* App. 15 (citing *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1181 (9th Cir. 2006) (determining whether justifications existed to continue sealing court records)).

In so ruling, the court, carefully interpreting this Court's 2012 Opinion, relied on Civil Local Rule 79-5(g), which dictates the "presumptive unsealing" of the recordings "10 years from the date the case is closed." App. 18; *see* N.D. Cal. Civ. L.R. 79-5(g). It found that no prior orders sealing the recordings were issued

in perpetuity. Specifically, it found: (1) Defendants cannot indefinitely rely on then-Chief Judge Vaughn Walker's "implied" assurance that the video recordings would never be accessible to the public (App. 15 at n.17); (2) this Court's opinion on the sealing was "conditional as to time," and "careful to avoid concluding that the then-existing compelling reason and the Proponents' reasonable expectations regarding non-broadcast would permanently preclude disclosure" (App. 15, 10); and (3) the Supreme Court's decision on the sealing was expressly limited to the narrow issue of whether '"broadcast in this case should be stayed because it appears the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting" (App. 15 n.18 (citing *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010) ("*Hollingsworth I*"))). The court ordered release of the records on August 12, 2020 – ten years from the functional closure of the case in the district court "for substantive proceedings on the merits" (App. 18 n.20) – unless any party established good cause for the continued sealing.

Pursuant to the district court's order and Civil Local Rule 79-5(g), Defendants moved to continue the sealing of these records, making clear their position that they should be sealed in perpetuity. In opposing KQED's Motion in 2017, Defendants offered no new evidence as to why the records should be sealed beyond the presumptive 10 year expiration of any sealing order. As the district

court previously noted, Defendants "make no effort to show, factually, how further disclosure of their trial testimony would adversely affect them." App. 14. Yet – three years later, and having been warned that they were required to present facts to support any continued sealing – Defendants *again* did absolutely nothing to remedy this omission. As the district court pointed out in the Order at issue in this appeal (App. 3), Defendants offered not a shred of evidence to establish good cause for the sealing, continuing to rely on arguments they made a decade ago (App. 3-4). The district court found that although those arguments supported sealing of the videotapes for the ten years contemplated by the Local Rule, they do not justify "indefinite sealing of the trial recordings." App. 4. Instead, Defendants were required to present evidence demonstrating a "compelling" justification for the continued sealing. *Id.* They did not.

B. The Public's Enduring Interest in the Prop 8 Trial

The Prop 8 trial offered an unprecedented opportunity for the federal judiciary to conduct a trial in which opposing views on same-sex marriage were presented in a neutral public forum and subject to the rules of evidence. From the start, the public has demonstrated an intense interest in the Prop 8 trial. For example, when the Northern District of California changed its local rule to allow cameras, literally tens of thousands of people notified the Court that they favored camera coverage of the trial proceedings, even though the feedback that the Court

invited was as to only the general local rule and not case-specific. *Hollingsworth I*, 558 U.S. at 202 (Breyer, J., dissenting). After the U.S. Supreme Court banned live broadcast of the trial, interested parties had actors recreate each day of trial testimony and argument based on the transcripts, with actors playing the judge, lawyers, and witnesses.[1] These "re-enactments" of the trial were performed in cities – and sometimes on city streets – in various places across the country.[2] A database search of news stories returns over 7,500 separate articles about "Proposition 8" from 2010 alone – and there were doubtless many thousands more stories that were broadcast on radio, television, posted on social media, or published in sources not captured.

In the years since, the public has continued to be keenly interested in the historic Prop 8 trial, though the intense, day-to-day scrutiny faded. For instance, in the last year, nearly a decade after the 2010 bench trial, "Proposition 8" still returned over 286 hits in a search of news sources. And the issue of gay rights and gay marriage broadly continues to be one of substantial public interest. The writers for the NBC series, Will & Grace, the first prime-time television series to

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

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

feature openly gay lead characters, commented in an April 2020 interview, "You think about how different it feels than when Prop 8 was a really controversial thing, the idea of two [men] getting married in California."[3]

More importantly, over the past decade, the public has shown a continued interest in audio-visual depictions of the trial itself, not merely news accounts of the proceedings. The trial transcripts were used as the basis for a noted play, *8*, that was performed on Broadway in 2011, broadcast in 2012, and then adapted for a radio play in Australia in 2014.[4] Multiple documentaries have been made about the case and the issue, including the acclaimed *The Case Against 8*, which was released in theaters and aired on HBO in 2014. On March 3, 2017, an episode of *When We Rise*, a docuseries that aired on ABC, featured an extended recreation of the Prop 8 trial, with acclaimed actors playing Chief Judge Walker, the noted attorneys on each side, and even the witnesses.[5]

Others recognize other substantial value in unsealing the Prop 8 trial recordings. Erwin Chemerinsky, Dean of the Berkeley School of Law, the Jesse H. Choper Distinguished Professor of Law at the University of California, and prolific

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

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

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

legal author and scholar, observes that "legal scholars await the opportunity to review and to use the recordings to provide greater understanding and a far richer appreciation of the legal issues and evidence presented during this landmark trial." KQED App. 00047 ¶ 6. Professor Suzanne B. Goldberg, Herbert and Doris Wechsler Clinical Professor of Law at the Columbia Law School and one of the nation's experts on gender and sexuality law, who was unable to attend the Perry trial, agrees that release of the video "would be invaluable to me as a scholar and to other legal scholars and others interested in better understanding the myriad of issues that were tried in this case" and she "envision[s] using the recordings to help students and scholars hear and watch the witness trial testimony to provide a deep and realistic understanding and appreciation for the many complex factual and constitutional issues that arose during this historic trial." KQED App. 00050 ¶ 5. The It Gets Better Project, which, among other things, publishes videos meant to inspire hope for young LGBTQ+ people ("lesbian, gay, bisexual, transgender, Queer") facing harassment, has determined that unsealing of the videos "will exponentially expand the audience that can view the evidence and argument," which serves the It Gets Better Project's educational mission. KQED App. 00043 ¶ 6; *see also id.* KQED App. 00055 ¶ 4 (Decl. of McKenna Palmer); KQED App. 00052-53 ¶ 4 (Decl. of Michael Sabatino).

C. Intervenor KQED's Interest

Intervenor KQED operates the nation's most listened to public radio station and the most popular public television stations in the San Francisco Bay Area. KQED also has its own news division, KQED News, which publishes and broadcasts "The California Report," providing daily coverage of news and culture throughout the State of California. KQED serves more than a million listeners and viewers in the Bay Area, California, and around the world each week. KQED App. 00039 ¶ 2 (Decl. of Scott Shafer).

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

special and a separate radio and podcast special, and also making available online key moments of the trial. KQED App. 00040 ¶ 6.

3. DEFENDANTS HAVE NOT MET THEIR HEAVY BURDEN TO ESTABLISH THE JUSTIFICATION FOR A STAY PENDING APPEAL

The district court correctly rejected Defendants' request for a stay pending appeal. App. 4-5. Defendants' burden is demanding, requiring them to establish that (1) they are likely to succeed on the merits; (2) they will suffer irreparable injury absent a stay; (3) the stay will not substantially injure other interested parties; and (4) the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Defendants do not come close to meeting that burden.

A. Defendants Cannot Succeed on the Merits

Defendants make little effort to satisfy their burden of making "a *strong showing* that [they are] likely to succeed on the merits." *Nken*, 556 U.S. at 434 (emphasis added). Although they devote much of their Motion to this critical element (*see* Mot. at 10-19), their arguments boil down to their misguided claim that they believed the videotapes would be sealed in perpetuity (*see id.* at 11).[6] But as shown above, that is simply not correct. They knew that the sealing of the videotapes would expire in ten years unless they met their burden of establishing good cause to extend it. Defendants twice had the opportunity to submit evidence

[6] Defendants make a handful of other arguments, relying largely on unpersuasive technicalities. Mot. at 13-19. KQED incorporates Plaintiffs' responses to these arguments, rather than repeat the responses here.

and failed to do so in 2017 and 2020. Because Defendants failed to present any facts, evidence, or substantive legal argument to meet their burden of showing a likelihood of success in this Court, their Motion should be denied.

Under federal common law, "[t]hose who seek to maintain the secrecy of documents attached to dispositive motions must meet the high threshold of showing that 'compelling reasons' support secrecy." *Kamakana*, 447 F.3d at 1180 (citation omitted).[7] As this Court made clear, "a 'strong presumption in favor of access' is the starting point." *Id.* at 1178 (citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)). Next, the party seeking continued sealing of a judicial record must establish "compelling reasons" for the sealing. *Foltz*, 331 F.3d at 1135. To do that, "the party must articulate[] 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 (*citing San Jose Mercury News, Inc. v. District Court*, 187 F.3d 1096, 1102-03 (9th Cir. 1999); *Hagestad*, 49 F.3d

[7] The First Amendment also attaches to these records, requiring Defendants to demonstrate "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Leigh v. Salazar*, 677 F.3d 892, 899-900 (9th Cir. 2012) (citation omitted); *see Courthouse News Serv. v. Planet*, 947 F.3d 581, 591 (9th Cir. 2020) ("*Courthouse News II*") (recognizing First Amendment right of access to judicial records); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("*Courthouse News I*").

at 1434; *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990) (internal quotation marks omitted)). The burden on the court, then, is to "'conscientiously balance[] the competing interests' of the public and the party who seeks to keep certain judicial records secret." *Kamakana*, 447 F.3d at 1179 (citing *Foltz*, 331 F.3d at 1135). "[I]f the court decides to seal certain judicial records, it must 'base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture.'" *Id.* (citing *Hagestad*, 49 F.3d at 1434; *Valley Broad. Co. v. District Court*, 798 F.2d 1289, 1295 (9th Cir. 1986)).

In *Kamakana*, the Court rejected the evidence submitted by the sealing proponents, finding that "[t]hese conclusory offerings do not rise to the level of 'compelling reasons' sufficiently specific to bar the public access to the documents." 447 F.3d at 1182. Defendants know this law; they simply chose to ignore it, *twice* failing to submit *any* evidence (or even specific facts) to justify sealing, and rendering it impossible for the district court to "articulate[] compelling reasons supported by specific factual findings" to justify sealing, as the Constitution requires. *Kamakana*, 447 F.3d at 1178. The absence of any evidentiary record also precludes Defendants from demonstrating a likelihood of success on appeal.[8]

[8] Even where the party seeking sealing submits evidence to support its request, this Court consistently has applied a demanding standard, holding that vague assertions of harm are insufficient to justify sealing. *E.g.*, *Kamakana*, 447

Defendants insist that the videotapes must be sealed in perpetuity, and the district court had no discretion to hold otherwise. That is the inescapable conclusion from Defendants' continued reliance on the claim that judicial integrity requires sealing, without making any effort to provide facts and evidence demonstrating that the concerns that existed ten years ago still exist. They do not. Defendants rely on what they claim is a promise of perpetual secrecy (Mot. at 2-3, 14-15, 20-21), without offering any evidence – because they cannot – that the compelling reasons exist ***today*** to enforce that purported promise, even as they ask the Court to ignore their own admission in 2012 that the sealing was temporary.

Implicit in the Northern District's Local Rules – and its presumptive ten-year limit for sealing court records – is the recognition that the passage of time is a material change in circumstance. Concerns or risks that may exist at one time will disappear or dissipate over a ten-year period. This Court also recognized the

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F.3d at 1182 (police agency could not justify sealing despite declarations that disclosure "would, … hinder [the Criminal Intelligence Unit's] future operations with other agencies, endanger informants' lives, and cast [police] officers in a false light"; these "conclusory offerings do not rise to the level of 'compelling reasons' sufficiently specific to bar the public access to the documents"); *Oregonian Publ'g Co. v. District Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (ordering release of sealed documents because claim of danger to defendant and his family "was not supported by any factual finding" and had "no evidentiary support"); *Phoenix Newspapers, Inc. v. District Court*, 156 F.3d 940, 950 (9th Cir. 1998) (arguments that unsealing would threaten security and compromise investigation failed to overcome right of access). *See also CFAC v. Woodford*, 299 F.3d 868, 880 (9th Cir. 2002) (rejecting claim that public access to executions would jeopardize safety where officials "presented no evidence" of actual threats).

temporal basis for sealing in its 2012 decision, in affirming that Local Rule 79-5 placed a time limit on the sealing the Court ordered at the time. 667 F.3d at 1085 n.5. Thus, those hoping to keep court records secret must prove the need for secrecy. Defendants did not. They have not demonstrated any likelihood of success on appeal, let alone made the "strong showing" required to justify a stay. *Nken*, 556 U.S. at 434.

B. The Possibility of a Moot Appeal Does Not Justify a Stay

Defendants have failed to show any likelihood of success (as established in Section A, *supra*), and the public interest and balance of equities strongly weigh against a stay (as established in Section C, *infra*). Their request should be denied on those grounds alone. *Nken*, 556 U.S. at 434 ("[a] stay is not a matter of right, even if irreparable injury might otherwise result") (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). Thus, in the key case on which Defendants rely, *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986), the Court found the possibility of irreparable harm from denial of a stay, which would moot the appeal, but denied the stay nonetheless because "[n]one of the legal arguments raised by [the] appeal presents a 'serious legal question.'" *Id.* (citing *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds*, 463 U.S. 1328 (1983)). So too here; Defendants' perfunctory claim of irreparable harm does not justify the stay given the weight of these other factors.

Defendants' only other argument is their claim that the "interest in judicial integrity" requires permanent sealing of the videotapes. Mot. at 20. But because this argument fails on the merits (Section A, *supra*), it necessarily fails here as well. Defendants' vague and conclusory forebodings of "devastating and lasting harm" – without a shred of evidence to support their fearmongering – cannot meet their heavy burden. As this Court has made clear, "[s]peculative injury does not constitute irreparable injury," and thus a party "must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (original emphasis).[9] Defendants did not even try. Their motion should be denied for this additional reason.

C. The Public Interest and Balance of Equities Strongly Oppose a Stay

The interrelated factors of the public interest and prejudice to other parties to the proceedings both strongly favor public access to the videotapes, and weigh heavily against Defendants' requested relief during the additional years that their appeal may require. As described above, Defendants did not show any irreparable injury from unsealing. After over ten years of sealing, the public will suffer irreparable harm from the continued denial of access to presumptively public court

[9] Although this case concerned a preliminary injunction, the Supreme Court has explained that the same standard applies to a request for a stay pending appeal. *Nken*, 556 U.S. at 433-34.

records of this historic federal trial.

As the Supreme Court has made clear, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This Court recently affirmed that a "right of access claim implicates the same fundamental First Amendment interests as a free expression claim." *Courthouse News I*, 750 F.3d at 787; *accord Courthouse News II*, 947 F.3d at 589-90. Consequently, in a case dealing with a news organization's right of access to civil court records, this Court expressed the "concern that a delay in litigation will itself chill speech" because it would "stifle[] the free discussion of governmental affairs that the First Amendment exists to protect." *Id.* (citation and internal quotation marks omitted). Here the public nondisclosure of the videos is especially pronounced because of the significance of the proceedings, and the decade-long delay the public has endured waiting for the release of these videotapes. *See* Sections 2.B, 2.C, *supra*.

Defendants do not address any of this controlling authority or these lofty and constitutionally-recognized demands. Their countervailing argument – that there is a public interest in maintaining the status quo pending appeal (Mot. at 19-20) – should be rejected. As this Court has noted, "[m]aintaining the status quo is not a talisman." *Golden Gate Rest. Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1116 (9th Cir.), *rev'd on other grounds*, 546 F.3d 639 (9th Cir. 2008). In

addressing a preliminary injunction, this Court explained that "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury …. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Id.* (citation omitted). *See also Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963) (preservation of status quo is not a "hard and fast rule[], to be rigidly applied to every case regardless of its peculiar facts").

In the end, Defendants invoke the preservation of the status quo without presenting any rationale for why that is desirable under the circumstances here, beyond the rote invocation of interests that existed ten years ago but do not now. Sealing presumptively open court records involving a matter of tremendous public interest causes irreparable injury to the public's fundamental right of access. Because Defendants have not shown and cannot show any irreparable harm that would result from unsealing – let alone a likelihood of succeeding on appeal – their request to continue the decade-long sealing of these records for the duration of this appeal should be rejected.

4. CONCLUSION

KQED respectfully requests that this Court deny Defendants' Motion and allow the District Court's Order unsealing the videos at issue to take effect.

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KQED INC.'S OPPOSITION TO INTERVENORS-DEFENDANTS' MOTION FOR STAY PENDING APPEAL

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No. 20-16375

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

KQED INC.'S APPENDIX IS SUPPORT OF OPPOSITION TO INTERVENORS-DEFENDANTS' MOTION FOR STAY PENDING APPEAL

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Intervenor-Appellee KQED Inc.'s Appendix
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IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

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

Defendants.

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors.

Case No. 09-cv-2292-WHO

KQED INC.'S OPPOSITION TO DEFENDANTS-INTERVENORS' MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

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I. PRELIMINARY STATEMENT

Over a decade ago, the Northern District of California heard one of the most socially and culturally significant trials in our nation's history, deciding the constitutionality of California's Proposition 8, which added a provision to the State Constitution providing that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5. This Court's ruling that Prop 8 was unconstitutional because the U.S. Constitution "protects an individual's choice of marital partner regardless of gender" (*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010)) was upheld by the U.S. Supreme Court (*Hollingsworth v. Perry*, 570 U.S. 693, 697 (2013), and five years later, the Supreme Court recognized the constitutional right of same-sex couples to marry nationwide. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

Though many people were able to attend and witness this landmark trial for themselves, there are many more across the country who had no such opportunity, including those who were only children at the time. Fortunately for those students, scholars, activists, historians, pundits, and concerned and affected citizens all over the country who were unable to witness this historic event in person, a videotaped recording of the trial was made and preserved. Yet, this historical trial record has been sealed from the general public for the past decade. *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012). The Ninth Circuit's decision, however, *expressly* found that the reasons that justified sealing in 2012 would not endure in perpetuity. *Id*. at 1084-85. Both the Ninth Circuit and this Court found that Civil Local Rule 79-5 serves to *presumptively* unseal the recordings unless good cause is shown why they should continue to be sealed.

As this Court earlier found, the Ninth Circuit's sealing decision – which is the binding authority in this case – was "conditional as to time," and "careful to avoid concluding that the then-existing compelling reason and the Proponents' reasonable expectations regarding non-broadcast would permanently preclude disclosure." 2018 Order, Dkt. 878 at 10, 5 (citing *Perry*, 667 F.3d at 1084-85). Although the proponents of Proposition 8 ("Proponents") insist that the Supreme Court's decision is binding authority, this Court earlier ruled that decision was limited to the narrow issue of whether the trial court had followed proper procedures to amend its local rules

to allow for the live, contemporaneous broadcast of the 2010 trial. *Id.* at 10, n. 18. Rather, the Ninth Circuit's decision, as interpreted by this Court, directs that Civil Local Rule 79-5 *must* be applied to unseal the recordings unless Proponents can show good cause necessitating continued sealing.

Not only have Proponents utterly failed to show any good cause why the recordings should *continue* to be sealed in light of their presumptive unsealing after the passage of ten years under Rule 79-5, Proponents proffer not a single new piece of evidence or a single new legal theory in support of perpetual sealing. Proponent's Motion to Continue Sealing ("Mot."), Dkt. 892. Instead, Proponents regurgitate the same theories they have relied on in support of sealing since 2011, and stridently urge this Court to reverse the rulings it made in its 2018 Order [Dkt. 878], contending that almost all of them were made in error. *Id.*

Conversely, intervenor KQED Inc. ("KQED"), which operates the nation's most-listened-to public radio station and the Bay Area's most popular public television station, through this Opposition submits multiple new declarations and continues to demonstrate the changing circumstances and legal landscape that justify unsealing the records, especially after the passage of a full decade. While the legal and political landscape surrounding the issue of same-sex marriage continues to change and embrace the decision in this case, the clamor from the public, including rights groups and legal scholars, to have access to the recording of this historic trial does not ebb. *See, e.g.*, Decls. of Dean Erwin Chemerinsky, Professor Suzanne Goldberg, Seth Levy, McKenna Palmer, Michael Sabatino, and Scott Shafter. The public's interest in and constitutional right to access the videotaped trial recordings is greater than ever. KQED therefore respectfully requests that the Court deny Proponents' motion and finally unseal the recordings so that the public may view the nuances and details of the historic Prop 8 trial that only its video recording could capture. KQED's uncontested evidence demonstrates that unsealing these trial records will allow the public to observe the legal process that the federal court followed as it heard evidence and arguments (on both sides) – a tangible public benefit that *furthers* judicial integrity and confidence in the nation's judicial system.

II. BACKGROUND[1]

A. This Court Ordered The Recordings Be Unsealed on August 12, 2020

On April 28, 2017, KQED moved this Court to unseal the videotaped trial records based on the considerable changes in circumstances after the passage of time, including final resolution of the underlying case. Dkt. 852. The Court, like the Ninth Circuit before it, recognized that "the common-law right of access applies to the video recordings" (2018 Order, Dkt. 878 at 14), but denied the motion finding that the same compelling reasons justifying sealing of the records cited by the Ninth Circuit continued to apply, "*at this juncture*." *Id.* (emphasis added). The Court, however, ordered that "the recordings *shall be released* to movants on August 12, 2020, absent further order from this Court that compelling reasons exist to continue to seal them." 2018 Order, Dkt. 878 at 15 (emphasis added), *citing to Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1181 (9th Cir. 2006) (determining whether justifications existed to continue sealing court records).

In so ruling the Court, interpreting the Ninth Circuit's opinion, relied on Civil Local Rule 79-5(g), which dictates "the presumptive unsealing of the recordings" (*id*. at 11) "10 years from the date the case is closed." Civ. L.R. 79-5(g). It found that no prior decisions on the sealing of the recordings were issued in perpetuity. Specifically, it found: (1) Proponents cannot indefinitely rely on then-Chief Judge Vaughn Walker's "implied" assurance that the video recordings would never be accessible to the public (2018 Order, Dkt. 878 at 10, n. 17); (2) the Ninth Circuit's opinion on the sealing was "conditional as to time," and "careful to avoid concluding that the then-existing compelling reason and the Proponents' reasonable expectations regarding non-broadcast would permanently preclude disclosure" (*id*. at 10, 5); and (3) the Supreme Court's decision on the sealing was expressly limited to the narrow issue of whether '"broadcast in this case should be stayed because it appears the court below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting." (*id.* at 10, n. 18 (citing *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010))).

[1] KQED incorporates the detailed background that it provided in its initial Motion to Unseal [ECF no. 852] filed April 28, 2017 at 3-7.

Pursuant to the District Court's order (2018 Order, Dkt. 878) and Civil Local Rule 79-5(g), Proponents now move to continue the sealing of these records – *in perpetuity*. In opposing KQED's Motion in 2017, Proponents offered no new evidence as to why the records should be sealed beyond the presumptive 10 year expiration of any sealing order. As this Court previously noted, "Proponents make no effort to show, factually, how further disclosure of their trial testimony would adversely affect them." 2018 Order, Dkt. 878 at 9. The same is true of Proponents' current motion.

B. The Public's Continuing Interest In The Prop 8 Trial

From the start, the public has demonstrated an intense interest in the Prop 8 trial that uniquely presented opposing views on same-sex marriage in a neutral public forum and subject to the federal rules of evidence. For example, when the Northern District of California changed its local rule to allow cameras, literally tens of thousands of people notified the Court that they favored camera coverage of the trial proceedings, even though the feedback that the Court invited was as to only the general local rule and not case-specific. *Hollingsworth I*, 558 U.S. at 202 (Breyer, J., dissenting). After the U.S. Supreme Court banned live broadcast of the trial proceedings, interested parties had actors recreate each day of trial testimony and argument based on the transcripts, with actors playing the judge, the lawyers, and the witnesses.[2] These "re-enactments" of the trial were performed in cities—and sometimes on city streets—in various places across the country.[3] A database search of news stories returns over 7,500 separate articles about "Proposition 8" from 2010 alone—and there were doubtless many thousands more stories that were broadcast on radio, television, posted on social media, or published in sources not captured.

In the years since, the public has continued to be keenly interested in the historic Prop 8 trial, though the intense, day-to-day scrutiny faded. For instance, in the last year, nearly a decade

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

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

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

More importantly, over the past decade, the public has shown a continual interest in audio-visual depictions of the trial itself, not merely news accounts of the proceedings. The trial transcripts were used as the basis for a noted play, *8*, that was performed on Broadway in 2011, broadcast in 2012, and then adapted for a radio play in Australia in 2014.[5] Multiple documentaries have been made about the case and the issue, including the acclaimed *The Case Against 8*, which was released in theaters and aired on HBO in 2014. On March 3, 2017, an episode of *When We Rise*, a docuseries that aired on ABC, featured an extended recreation of the Prop 8 trial, with acclaimed actors playing Chief Judge Walker, the noted attorneys on each side, and even the witnesses.[6]

Others recognize other substantial value in unsealing the Prop 8 trial recordings. Erwin Chemerinsky, Dean of the Berkeley School of Law, the Jesse H. Choper Distinguished Professor of Law at the University of California, and prolific legal author and scholar, observes that "legal scholars await the opportunity to review and to use the recordings to provide greater understanding and a far richer appreciation of the legal issues and evidence presented during this landmark trial." Decl. of Erwin Chemerinsky ¶ 7. Professor Suzanne B. Goldberg, Herbert and Doris Wechsler Clinical Professor of Law at the Columbia Law School and one of the nation's experts on gender and sexuality law, who was unable to attend the *Perry* trial, agrees that release of the video "would

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

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

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

be invaluable to me as a scholar and to other legal scholars and others interested in better understanding the myriad of issues that were tried in this case" and she "envision[s] using the recordings to help students and scholars hear and watch the witness trial testimony to provide a far deeper and more realistic understanding and appreciation for the many complex constitutional issues that arose during this historic trial." Decl. of Prof. Suzanne Goldberg ¶ 5. The *It Gets Better* Project, which releases videos meant to inspire hope for young LGBTQ+ people ("lesbian, gay, bisexual, transgender, Queer") facing harassment, has determined that unsealing of the videos "will exponentially expand the audience that can view the evidence and argument," which serves the *It Gets Better Project*'s educational mission. Decl. of Seth D. Levy ¶ 6; *see also* Decl. of McKenna Palmer ¶ 4; Decl. of Michael Sabatino ¶ 4.

C. Intervenor KQED's Interest

Intervenor KQED operates the nation's most listened to public radio station and the most popular public television stations in the San Francisco Bay Area. KQED also has its own news division, KQED News, which publishes and broadcasts "The California Report," providing daily coverage of news and culture throughout the State of California. KQED serves more than a million listeners and viewers in the Bay Area, California, and around the world each week. Decl. of Scott Shafer ¶ 2.

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

online key moments of the trial. Shafer Decl. ¶ 6.

III. ARGUMENT

As the Supreme Court observed in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980), "[I]t is difficult for [people] to accept what they are prohibited from observing". The "news media's right of access to judicial proceedings is essential not only to its own free expression, but also to the public's." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 589–90 (9th Cir. 2020) (internal citations omitted). For judicial proceedings, "the function of the press serves ... to bring to bear the beneficial effects of public scrutiny upon the administration of justice.' [] 'The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press."' *Id.* at 589-90. There is no doubt that the public, through the press, has a critical right to access the videotaped trial records of the historic Prop 8 trial. Both the common-law and First Amendment's right of access to judicial proceedings and records cover the videotaped trial records at issue here. That issue is not in question. Rather, the question is whether the compelling interest that once justified the sealing of the records in 2011, 2012 and 2018 continues today and should, as Proponents contend, be permanent. The answer is no.

As this Court and the Ninth Circuit previously determined, the compelling interest that initially justified sealing the recordings – judicial integrity – does not control public access to the recordings in perpetuity. Civil Local Rule 79-5 to which the sealing order is subject, *presumptively* serves to unseal any sealed records, including the recordings, after ten years unless good cause can be shown why sealing should continue. Proponents have failed to identify *any new cause* why the recordings should not now be unsealed, let alone a good cause. The recordings of the Prop 8 trial should therefore be unsealed as the passage of 10 years has diminished any compelling interest in sealing the records, both presumptively and under the actual circumstances of this case.

A. Local Rule 79-5 Requires Unsealing Of The Videotaped Trial Records

The Ninth Circuit and this Court agree that Civil Local Rule 79-5(g) requires that the videotaped trial records be unsealed and "open to public inspection without further action by the Court 10 years from the date the case is closed" unless Proponents are able to show good cause

why the records should continue to be concealed from the public, which Proponents make no effort to do. Civ. L.R. 79-5(g). The Ninth Circuit "was careful to avoid concluding that the then-existing compelling reason and the Proponents' reasonable expectations regarding non-broadcast would permanently preclude disclosure." 2018 Order, Dkt. 878 at 5. It expressly conditioned its finding that Proponents "reasonably relied on Chief Judge Walker's specific assurances … that the recording would not be broadcast to the public," on the modifier, "*at least in the foreseeable future*," citing this Court's rules on the presumptive unsealing of records after 10 years: "Northern District of California Local Rule 79-5(f) [now 79-5(g)] provides that '[a]ny 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…'" *Perry v. Brown*, 667 F.3d 1078, 1084-85, n. 5 (emphasis added). This Court agreed with the Ninth Circuit's interpretation of its local rules, finding that the compelling reason to keep the videotaped trial records under seal identified in the Ninth Circuit's 2012 Order continues to apply, but only "through the *presumptive* unsealing ten year mark applicable under Civil Local Rule 79-5(g)." 2018 Order, Dkt. 878 at 10-11.

Proponents merely repeat a number of arguments that both the Ninth Circuit and this Court are wrong in their application of Local Rule 79-5, and alternatively argue that the compelling reason to seal the recordings found by the Ninth Circuit nearly a decade ago still inures as good cause why the recordings should remain under seal, even after the "presumptive unsealing ten year mark." *Id.* Proponents fail to advance any *new* arguments or introduce any *new* evidence of good cause why the records should continue to be sealed a decade after the closure of this case. Mot. at 23 ("the Ninth Circuit has already determined in *Perry* that avoiding the harm to judicial integrity … is a compelling reason to prevent exposing those recordings to public access and dissemination—a determination that the Court need not (and cannot) revisit.")[7] But to claim the

[7] Proponents do not allege any material differences in fact or law or the emergence of any new facts or changes of law since 2018. Proponents cannot show any "manifest failure" by this Court to consider dispositive legal arguments, as they have provided none. As such, their motion fails to satisfy the requirements of Local Rule 7-9, governing motions for reconsideration, and should be denied on this independent basis.

same rationale for the sealing in 2012 continues today (and instructing the Court not to revisit the issue) flatly ignores both the Ninth Circuit's and this Court's opinion that "just because a compelling justification existed at one point in time does not mean that a compelling justification exists in perpetuity." 2018 Order, Dkt. 878 at 12 [citing *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1181 (9th Cir. 2006) ("there must be compelling 'interests favoring *continued* secrecy."')]. If either court believed the compelling reason justifying sealing at the time of its decision would inure in perpetuity, it would have so ordered. Neither court did. Instead, both courts used language expressly conditional as to time. 2018 Order, Dkt. 878 at 10, 12, 15; *Perry*, 667 F.3d at 1084-85, n. 5. They did not do so arbitrarily. Both courts acknowledged the principle underlying Local Rule 79-5(g), that the passage of time presumptively will diminish any compelling reason to conceal judicial records from the public. *Id.* The Rule itself recognizes the overriding public interest in access to judicial records and the need to take the *minimum* actions necessary to protect the narrow category of sealable information. Civ. L.R. 79-5, Commentary ("*As a public forum, the Court has a policy of providing to the public full access to documents filed with the Court… and that a redacted copy is filed and available for public review that has the minimum redactions necessary to protect sealable information.*"). The "strong presumption in favor of access" recognized by this Local Rule dictates that the videotaped trial records should be finally unsealed, especially since Proponents proffer no new cause whatsoever why the records should continue to be sealed. *Kamakana*, 447 F.3d at 1178.

1. Plain Language of Local Rule 79-5 Covers the Videotaped Trial Records

In addition to cautioning this Court that it should not and "cannot" revisit Proponents' compelling interest argument (Dkt. 892 at 23) (despite this Court's *order* instructing the parties to do just so), Proponents incorrectly argue that this Court was wrong in finding that Rule 79-5 applies to "video-recordings lodged in the record *by the Court itself*." Mot., Dkt. 892 at 21. Proponents contend that Local Rule 79-5 only applies to documents "*filed by a party*", and not materials created and placed in the record by the Court because certain provisions in Local Rule 79-5 use the term "party": "a registered e-filer" or "a party that is not permitted to e-file" or "a *Submitting Party or a Designating Party*." *Id.* This argument cannot avail.

First, the argument was already rejected by this Court, which held: "Rule 79 applied generally to 'BOOKS AND RECORDS KEPT BY THE CLERK,' Rule 79-5 applied to 'Filing Documents Under Seal,' … *There was and is nothing in Rule 79-5 limiting the presumptive unsealing to materials filed by the parties as opposed to materials created and filed by the Court, like transcripts of judicial proceedings or the video recordings at issue.*" 2018 Order, Dkt. 878 at 13-14 (emphasis added).

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

Third, the argument misconstrues the Rule's use of the term "party" and its general application. The term "party" as used in the Local Rule is not limited to the plaintiffs and defendants in an action as Proponents assume. For example, Local Rule 79-5 refers to the use of protective orders and includes terminology from the Northern District's Stipulated Protective Order for Standard Litigation[8], such as "designating party," a term on which Proponents also rely

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

in their argument. The Stipulated Protective Order clarifies, however, that the term "designating party" is not limited to the actual parties in the action, but rather defines that term as "a Party *or Non-Party* that designates information or items that it produces in disclosures or in responses to discovery as 'CONFIDENTIAL.'" And a Non-Party includes "any natural person, partnership, corporation, association, or other legal entity *not named as a Party to this action*" and thus includes the Court. *Id*. (emphasis added). Rule 79-5 itself recognizes that non-parties may designate records confidential and submit declarations to support the sealing of such records. Civ. L.R. 79-5(e); *and see, e.g.*, *Zheng-Lawson v. Toyota Motor Corp.*, No. 17-cv-06591-BLF, 2019 U.S. Dist. LEXIS 126175, at *3 (N.D. Cal. July 29, 2019) ("Where the moving party requests sealing of documents because they have been designated confidential by another party or a non-party under a protective order, the burden of establishing adequate reasons for sealing is placed on the designating party or non-party. Civ. L.R. 79-5(e)."). Rule 79-5 is thus not limited in application to "documents filed by a party." Proponents' nonsensical argument again should be rejected.

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

Proponents are also mistaken when they insist that Local Rule 77-3[9] conflicts with and therefore bars application of Local Rule 79-5(g). Proponents base this argument on their *unsupported* assumption that Local Rule 77-3 not only prohibited the *contemporaneous* broadcast of trial proceedings, but "also encompasses the video-recording and *subsequent* broadcast of the proceedings." Mot., Dkt. 892 at 22. They assert that Local Rule 79-5(g) cannot act to unseal a record that *could* result in a subsequent broadcast of the 10-year-old recording of the trial. But this

[9] **77-3. Photography and Public Broadcasting**. Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

argument falsely presupposes that Local Rule 77-3 applies indefinitely to any *subsequent* broadcast of a judicial proceeding, even those originally recorded for purposes other than "broadcasting or televising."

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

By its plain language, Local Rule 77-3 imposes limitations only on the *contemporaneous* broadcasting or televising of court proceeding – circumstances that are now years removed from the issues in this case. The Supreme Court confirmed this interpretation. *Hollingsworth I*, 558 U.S. at 189 (staying the district court's January 7, 2010 order "to the extent that it permits the *live streaming* of court proceedings.") (emphasis added). Indeed, the language of the Rule only limits the taking of recordings "*for those purposes*," i.e. for public broadcasting and televising. The Supreme Court recognized, for example, that contemporaneous broadcasting for some mediums, like a webcast, requires recording: "A court technician explained that the proceedings would be recorded by three cameras, and then the resulting broadcast would be uploaded for posting on the Internet, with a delay due to processing requirements." *Id*. at 188. Thus inclusion of the term "recording" in the Rule does not imply its application to subsequent broadcasting. It also did not preclude Chief Judge Walker from recording the trial and later using it in preparing findings of fact. *Perry*, 667 F.3d at 1082 ("the local rule permits the recording for purposes . . . of use in chambers").

This reading of the plain language of Local Rule 77-3 is logical. The Rule was meant to prevent interference with the conduct of the trial, which could theoretically be influenced by the presence of news cameras and the specter of a live, national broadcast. *See, e.g., United States v. Criden*, 648 F.2d 814, 829 (3d Cir. 1981) (noting that the Judicial Conference resolution prohibiting televising courtroom proceedings is based on apprehension about the effect that *contemporaneous* broadcast of trial proceedings might have on the conduct of the trial itself); *In re Nat'l Broad. Co.*, 635 F.2d 945, 952, n. 5 (2d Cir. 1980) (distinguishing between copying of physical evidence and broadcasting of testimony of live witnesses). The same is not true of subsequent publications a decade later, long after witnesses have delivered their testimony and the case has been decided through every level of the court system. In this respect, Rule 77-3 dovetails

nicely with Rule 79-5(g), both recognizing the strong presumption in favor of access to court records and the diminution of any countervailing interests with the passage of time. *Canatella v. Stovitz*, 365 F. Supp. 2d 1064, 1081 n.19 (N.D. Cal. 2005) ("In construing statutes, the Court is guided by the well-settled principle that, where possible, laws should be read to avoid conflict.") (citation omitted).

b. Proponents Misconstrue Application of Local Rule 79-5

Further, Rule 79-5(g) does not specifically act to release records "for public dissemination *and broadcast*" as Proponents contend. Mot., Dkt. 892 at 22. Local Rule 79-5(g) is silent as to how records may be used after they are unsealed and "open to public inspection." Civ. L.R. 79-5(g). There are myriad ways the recordings of the trial may be used, in addition to potential public broadcast a decade later. As just one example, Berkeley School of Law Dean Chemerinsky and Colombia Law Professor Suzanne Goldberg agree that release of the recordings would be invaluable to legal scholars in better understanding the "dynamics of what led to a historic change in American law" and to "help students and scholars hear and watch the witness trial testimony to provide a far deeper and more realistic understanding and appreciation for the many complex constitutional issues that arose during this historic trial." Chemerinsky and Goldberg Decls. ¶¶ 6-7, ¶ 5. Others who could not personally attend the trial proceedings should not be denied access to the recordings. *See* Decls. of Palmer, Sabatino.

KQED does not seek to broadcast or to record a court proceeding; KQED seeks to *unseal* a recording made more than a decade ago that was used by the court to prepare the merits ruling and expressly incorporated into the court record. The recording was properly made pursuant to Local Rule 77-3 (*Perry*, 667 F.3d at 1082), entered into the record and used by the trial judge to prepare his ruling, and now may properly be unsealed and released to the public under Local Rule 79-5(g) for various worthy uses, such as KQED's intended uses, and by scholars and others to enrich their teaching and understanding of this "historic change in American law."

3. This Court Did Not Miscalculate Timing of Presumptive Release Under Local Rule 79-5(g)

Proponents again challenge this Court's 2018 Order by questioning its calculation of the 10-year period under Local Rule 79-5(g). Mot., Dkt. 892 at 23. This is pure gamesmanship. Proponents include the central part of their argument in a footnote, attempting to brush aside the undisputed fact that the Court issued an order "to make its order of final judgment effective '*nunc pro tunc*' on August 12, 2010." *Id.* at 24 n. 5 (citing Dkt. No. 843). Proponents claim without any legal support that "a court cannot manipulate Rule 79-5(g) by ordering that a case be deemed to have not been closed '*nunc pro tunc*' on a different date." *Id.* This assertion is wrong, and falsely implies that the Hon. Judge James Ware entered the order to "manipulate Rule 79-5(g)," again without any support.

But a district court may amend a filing date *nunc pro tunc* to correct its own error. *See e.g.*, *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000). Judge Ware did nothing improper when he ordered the judgement be entered *nunc pro tunc* to August 12, 2010, "the date on which the Court directed that judgement be entered 'forthwith,'" to correct the court's own error in failing to have issued a separate judgement and close the case in 2010. Dkt. 843 at 2. Moreover, Proponents never challenged Judge Ware's judgement and amended order closing the case. The issue is therefore moot. The case was properly closed effective August 12, 2010 by order of the court, and this Court has properly calculated the 10-year presumptive unsealing period from that date.

B. The Common-Law Right Of Access Requires That The Recordings Be Unsealed

Courts in the Ninth Circuit "start with a strong presumption in favor of access to court records." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). The right of access to court records includes the right to obtain copies of videotapes and audiotapes as they are introduced into evidence during a trial. *Valley Broad. Co. v. United States Dist. Ct.*, 798 F.2d 1289, 1294 (9th Cir. 1986) (rejecting trial court's stated reasons for refusing to provide public with copies of tapes introduced into evidence); *see also United States v. Mouzin*, 559 F. Supp. 463, 463–64 (C.D. Cal. 1983) (permitting media to copy video and audio tapes used at trial). This is because "what transpires in the courtroom is public property." *In re Nat'l Broad. Co.*, 653 F.2d

609 (D.C. Cir. 1981) (granting post-verdict access to video and audio tapes played to the jury at trial); *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("What transpires in the court room is public property").

The recordings here—which form an audiovisual record of what occurred in open court during this historical trial held in San Francisco—are thus the very definition of "public property" to which the common-law right of access attaches. As this Court observed, the recordings are an "undeniably important historical record". Mot., Dkt. 878 at 1. Every moment of what was recorded was open to the public, and every line uttered by a participant was captured in the transcript. Additionally, it is undisputed that the recordings themselves were relied on by the court as it made its decision on the records, so the videotapes are no different than other documentary evidence or court transcripts that are also presumptively available for inspection by the public. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (recognizing "a general right to inspect and copy public records and documents, including judicial records and documents"); *Marisol A. v. Giuliani*, 26 Media L. Rep. 1151, 1154 (S.D.N.Y. 1997) (noting that a "strong" presumption of access attaches to a report prepared pursuant to court order because it was likely to play an important role in the Court's performance of its Article III function).

The Ninth Circuit did not call into question the district court's 2011 conclusion that the common-law right of access applied to the videotapes, *see Perry*, 667 F.3d at 1084, and this Court again confirmed that conclusion. There can be no dispute that the videotapes are presumptively available for public access. "On the merits, I have no doubt that the common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches." 2018 Order, Dkt. 878 at 10. Indisputably, the common-law right of access attaches to the Prop 8 trial recordings.

1. Local Rule 77-3 Does Not Displace Common-Law Right Of Access

Proponents wrongfully contend that Local Rule 77-3 is "positive law" that displaces the common-law right of access to judicial proceedings, records and documents. Mot., Dkt. 892 at 12-14. There is no need to interpret Rule 77-3 and the common-law right of access as being in conflict. *See Pasquantino v. United States*, 544 U.S. 349, 349 (2005) ("Relying on the canon of

construction that '[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident'.") (citation omitted). Any conflict between Rule 77-3 and the common-law right of access has long expired because the application of Rule 77-3 was limited to the time of trial. As explained above, the 2010 trial was properly recorded in compliance with Rule 77-3 for use by Chief Judge Walker in chambers. Nothing in Rule 77-3 now precludes public access to that recording, as the potential for any contemporaneous broadcasting or televising was long ago "eliminated." *Perry*, 704 F. Supp. 2d at 929, 944.

Proponents nonetheless again ask this Court to set aside its finding that "Rule 77-3 . . . [does not] preclude the public's right of access from attaching to the video recordings." Dkt. 878 at 11. In doing so, Proponents again rely on the argument that Chief Judge Walker promised that the potential for public broadcast had been "eliminated." Mot., Dkt. 892, at 14. But as of 2010, the potential for live public broadcast had been eliminated; nothing in Judge Walker's statement conveyed its application to *future* broadcasts.

While Judge Walker's pledge, along with other factors, may have created a compelling reason to seal the recording consistent with the time limits of the local rule, both the Ninth Circuit and this Court have made clear that does not mean the recordings must be sealed in perpetuity. 2018 Order, Dkt. 878, at 12 ("I am not holding that the recordings must continue to be sealed simply because Judge Walker made a promise that movants argue was mistaken if not impermissible under the law. I agree that a record cannot continued to be sealed where a trial judge makes a mistake in characterizing the record at issue or the interests proffered to justify sealing. I also agree that just because a compelling justification existed at one point in time does not mean that a compelling justification exists in perpetuity.") (footnote omitted).

2. Common-Law Right Applies to Recordings of Trial

Proponents again rely on *United States v. McDougal*, 103 F. 3d 651 (8th Cir. 1996) – a non-binding decision from the Eighth Circuit involving a request for access to a videotape of President Clinton's testimony in a criminal proceeding – to insist that the video recordings of the Prop 8 trial proceedings are merely derivative and akin to a video offered in lieu of live testimony,

and therefore not within the common law right of access. Mot., Dkt. 892 at 15. But *McDougal* conflicts with Ninth Circuit case law and is factually distinguishable. As this Court already found, "*McDougal* [] dealt with a markedly different situation and applied a different standard in assessing the public's right of access." 2018 Order, Dkt. 878 at 11. Proponents nevertheless instruct the Court to reverse its "attempt to distinguish *McDougal*," which "gets the matter exactly backwards," on the basis that the videotape in *McDougal* recorded a testimony preservation deposition and thus was, in essence, a court proceeding. Mot., Dkt. 892 at 16. This argument is deficient for a number or reasons.

As a threshold matter, *McDougal* held that the videotape was "not a judicial record to which the common law right of public access attaches." *Id.* at 657. But the question in this case is not whether the common law right of access attaches (the Ninth Circuit and this Court agree that it does, 667 F.3d at 1084; Dkt. 878 at 10), but whether the presumption of access should be overcome. *McDougal* also held that, even assuming the right attached to the record at issue, it should be overcome, but only because it "rejected the strong presumption" "in favor of public access" standard adopted by other circuits, including the Ninth. *Id.* at 657; *see also Foltz*, 331 F.3d at 1135 ("strong presumption in favor of access to court records"); *Mirlis v. Greer*, 952 F.3d 51, 60 n. 8 (2d Cir. 2020) (distinguishing *McDougal* as contrary to the law in many other circuits). Thus, *McDougal* denied access to the videotape, but under a legal standard at odds with the governing legal standard in this Circuit.

Moreover, *McDougal* is also factually distinguishable because the Prop 8 recordings served an entirely different purpose. They are a verbatim audio-visual record of the *full* trial proceedings that was entered into the record. Conversely, the videotape in *McDougal* recorded the deposition of a single prominent witness (the sitting president),[10] was not entered into evidence, and which movants sought to treat differently from the other trial testimony.

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

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

Contrary to what Proponents assert (Mot., Dkt. 892 at 17), tradition also does not justify continuing the sealing beyond a decade. The common-law right of access is often not applied to traditionally private documents—such as grand jury records, *see In Re Special Grand Jury (For Anchorage, Alaska)*, 674 F.2d 778, 781 (9th Cir. 1982), and search warrants and related materials for an ongoing investigation, *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989)—but there is no tradition of secrecy for videotapes of complete judicial proceedings that were fully open to the public.

3. Proponents Do Not Assert Compelling Interest to Overcome Common-Law Right of Access at this Juncture

Both the Ninth Circuit and this Court made clear that the compelling reason identified in 2012 and 2018 to seal the videotaped trial records would not endure forever. 2018 Order, Dkt. 878 at 5; *Perry*, 667 F.3d at 1084-85. The question the Ninth Circuit's decision left open is not *if* the records will be unsealed, but *when*. To that end, this Court invited Proponents to renew their motion to continue sealing in 2020, to show that compelling reasons exist *to continue* sealing the records after their presumptive release under Local Rule 79-5(g). 2018 Order, Dkt. 878 at 15. Proponents ignored this invitation, failing to posit a single new or current compelling interest to justify the continued sealing of the records today.[11] Proponents were aware of the presumptive ten-year expiration on sealing under this Court's Local Rules (*Perry*, 667 F.3d at 1085 n.5), and by not appealing that aspect of the court's order placing the videotapes under seal in the same manner as any other court record, Proponents implicitly accepted that the records would be subject to

[11] Proponents rely on the same "evidence" submitted a decade earlier and rote speculation about "the passions surrounding a controversial social issue." Mot., Dkt. 892 at 19.

release at some point.[12]

Instead of embracing this fact, Proponents offered no new basis or evidence for continuing the seal. They stubbornly insist instead that the same reason they relied on in 2012 and 2018 – judicial integrity— still applies and assert that "[t]his Court has no power to depart from that [2012] holding" as the "law of this case" or "under ordinary principles of stare decisis." Mot., Dkt. 892 at 17. But this argument has already been rejected by this Court (2018 Order, Dkt. 878 at 10) and cannot support a perpetual sealing.

a. Changes in Circumstance Continue to Diminish any Concerns over Public Dissemination

Proponents have not and cannot identify any changed circumstances justifying sealing now. They claim only, without *any* support or new evidence, that the hazards of public dissemination have not lessened, citing a 2016 decision on abortion (yet, for reasons we need not delve into here, the legal landscape surrounding the issue of abortion is considerably different). Mot., Dkt. 892 at 19.

Considerations related to the litigation or the litigants, such as concerns about privacy, the threat of harassment, or prejudice to ongoing proceedings, cannot justify the continued sealing of the tapes any longer. None of these interests apply in 2020, let alone a perpetual sealing. In 2010, for instance, the Supreme Court noted that "witness testimony may be chilled if broadcast," and it also noted that Proponents' witnesses were worried about potential harassment due to their involvement in the case. *Hollingsworth I*, 558 U.S. at 195. Likewise, when the Ninth Circuit discussed the propriety of sealing the tapes in 2011 and 2012, the Proponents had identified ongoing harassment of witnesses and supporters of the Proposition as a reason that the common-law presumption of access could be overcome. *See* 9th Cir. Br., Dkt. No. 31 at 40–41. Years have passed since those justifications were last articulated, and there is now a drastically changed

[12] Moreover, permanent sealing is rarely justified, and can typically only be effected by express operation of law. *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 948 n.2 (9th Cir. 1998) (noting that that "permanent sealing is justified … by law" in some instances, such as the "sealing of portions of hearing related to grand jury proceedings"). There is no rational reason that videotaped records of otherwise public trial proceedings must be sealed permanently.

calculus on these points.

The decision on the merits is no longer on appeal; there is no longer any potential for retrial; and the legal issue is no longer an open question. Further, whatever concerns the Proponents' supporters had for privacy have long since disappeared: given the extensive reporting on the case in all media, including through reenactments of the case through transcripts, the Proponents' key participants are known to anyone with an Internet connection. Both witnesses for the Proponents, for instance, have Wikipedia pages that extensively discuss their testimony,[13] and have had their testimony dissected, discussed, and reenacted in a variety of venues.[14]

Just as importantly, the views of at least one of the two witnesses for the Proponents has changed too. On June 23, 2012—several months *after* the Ninth Circuit last considered whether the videotapes here could be open to public inspection—Proponents' witness David Blankenhorn publicly reversed his position. In a remarkable op-ed in the *New York Times,* Blankenhorn announced that "the time has come [] to accept gay marriage and emphasize the good that it can do."

In the decade since the trial, there is no evidence that any of the Proponents' witnesses have faced harassment or intimidation in connection with their participation, even though the trial proceedings were open to the public and widely-reported in the news and annotated online. Proponents fail to submit any new declarations or evidence to even suggest that any of the witnesses or participants have recently experienced, or have a fear of future, reprisal for their participation in the 2010 trial.

Balancing the various interests, then, the recordings should now be unsealed. The sealing imposed earlier was not permanent, but rather temporally limited by Local Rule 79-5(g), which this Court, the Ninth Circuit, and even Proponents acknowledged applies to the 2012 sealing order.

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

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

2018 Order, Dkt. 878 at 5; *Perry*, 667 F.3d at 1084-85. Now, whatever risk of harm came from unsealing the tapes in 2012 or the years immediately following has dissipated both procedurally, under Rule 79-5, and practically. There is no current value that can justify continued government sealing.

C. The First Amendment Independently Requires The Unsealing Of The Recordings

This Court correctly found that its analysis regarding the right of access "would be no different" under the "First Amendment right of access" (2018 Order, Dkt. 878 at 14), but noted that the "Ninth Circuit has not squarely addressed which standard applies to access to civil proceedings as opposed to access to civil judicial records and documents." *Id.* at 7. Earlier this year, however, the Ninth Circuit squarely addressed this issue on the merits of the case, pronouncing:

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

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

Here as in *Courthouse News*, the videotaped trial records fit squarely within the First Amendment's right of access to "civil judicial proceedings and records." *Id.* The videotapes are items "filed with the court" that were "relevant to the judicial function and useful in the judicial

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

1. There Is No Longer A Compelling Interest In Sealing Here

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

The Ninth Circuit recognized a compelling interest that applied in 2012 to keep the records sealed: that preserving "the integrity of the judicial process" was "a compelling interest that in these circumstances would be harmed by the nullification of the trial judge's express assurances" that the videotapes would not be publicly broadcast. *Perry*, 667 F.3d at 1088. This Court upheld that determination, but indisputably, both courts noted the temporal limits of that interest.

Local Rule 79-5 puts a presumptive end to that compelling interest. *Perry*, 667 F.3d at 1084-85, n. 5; 2018 Order, Dkt. 878 at 5. As explained above, Proponents offer no new evidence or theory to support a compelling interest thus abandoning their burden here. That is because the passage of ten years has diminished any risk of harm, as presumed by Local Rule 79-5. Any risk of simultaneous broadcast or televising that could have interfered with trial has long since lapsed; the case has been fully resolved with no potential for retrial; the legal issue is no longer an open question; there has been no evidence of harassment or harm to the Proponents' witnesses or participants; and Proponents have offered no new evidence to alter these facts or introduce any new ones. The First Amendment clearly attaches, now more than ever, to the videotaped trial records and there is no longer a compelling reason to keep them under seal. They should be released to the long-awaiting public.

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

D. The Public Will Benefit From Making The Videotapes Public

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

The circumstances of the Prop 8 Trial mean that these particular videotapes contain unique emotional and educational information that no transcript can provide. Those who actually testified believe that video will uniquely show why marriage is important to same-sex couples because only video will "relay the emotional tenor that was so present in every day of the trial." Decl. of Sandra B. Stier ¶ 5. The actual video testimony differs substantially from the reenactments, because most reenactments have portrayed the witnesses as "brave and confident" when in fact the record will show them to be "vulnerable." *Id.* ¶ 12. And those who were in the courtroom think it will be particularly revealing to watch the videotape of "other witnesses that spoke about their experiences dealing with Proposition 8 or living as a lesbian or gay person" so that the public can see the

"tears" and "emotion" that no transcript can sufficiently convey. *See United States v. Bergera*, 512 F.2d 391, 393 (9th Cir. 1975) (noting that "dry records" cannot convey the same "immediate impressions" as live testimony, and so are often inferior tools for decisionmaking).

Moreover, a variety of organizations plan to make productive, educational uses out of the videotapes and put them in context. KQED, legal scholars and educators, the *It Gets Better* Project, and others all intend to review and analyze the tapes and use them in a way that enlightens and illuminates and does not merely sensationalize what happened in the courtroom. *See* Shafer, Chemerinsky, Goldberg, Levy, Palmer and Sabatino Decls. There will thus be substantial public benefit, and no harm from unsealing the tapes.

As these declarations make clear, court transcripts of the trial and the various reenactments of the Prop 8 trial proceedings are no substitute for the video recordings. Plaintiffs gave emotional trial testimony that only those who were able to attend the court proceedings witnessed. Plaintiff Paul Katami notes that those in the courtroom who watched him testify could "judge for themselves [his] commitment" to his now-husband Jeff and "hear the way [his] voice quivers when [he] talk[s] about what Jeff means to [him]." Katami Decl. ¶ 6. Plaintiff Jeffrey Zarrillo notes that "The trial has been written about and there are trial transcripts, but unless you see the video, you cannot assess for yourself the truthfulness of each witness." Zarrillo Decl. ¶ 7. Plaintiff Sandra Stier emphasized that "I think my testimony captured the voice of the other gay couples that were not actual plaintiffs in this lawsuit, but who I felt like I was representing. Seeing my trial testimony, I think people will be able to also see how lawyers, who are not gay, fought for my family and families like mine." Stier Decl. ¶ 7. Plaintiff Kristin Perry believes that those who saw her testify could "see how terrified [she] was" and "how personal this was for her." Perry Decl. ¶ 7. Those watching, including Judge Walker, could "see on [her] face that [she] was carrying the weight of not only [her] family but the lesbian and gay community as well." *Id.* As Professor Goldberg explained, "This recording is the only one available of a federal trial in which extensive witness testimony and evidence was given on whether couples in same-sex relationships should be permitted to marry. Access to the recorded testimony of trial witnesses will provide an unprecedented and wholly unique perspective into the evidence that Judge Walker heard and

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

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

IV. CONCLUSION

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

DATED: May 13, 2020

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IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

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

Defendants.

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors.

Case No. 09-cv-2292-WHO

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF KQED INC.'S OPPOSITION TO DEFENDANTS-INTERVENORS' MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

DAVIS WRIGHT TREMAINE LLP

I. INTRODUCTION

In connection with its concurrently-filed Opposition to Defendants-Intervenors' Motion to Continue the Seal, KQED Inc. ("KQED") respectfully requests that the Court take judicial notice pursuant to Federal Rule of Evidence 201 of the April 26, 2017 Declaration of Kate Kendell, On Behalf of the National Center for Lesbian Rights, in support of KQED's Motion to Unseal Videotaped Trial Records (Dkt. 855), a true and correct copy of which is attached hereto as **Exhibit A**.

II. ARGUMENT

A court may take judicial notice of a fact "not subject to reasonable dispute [and] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts may take judicial notice of "undisputed matters of public record." *See Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001), *overruled on other grounds by Galbraith v. City of Santa Clara*, 307 F.3d 1119 (9th Cir, 2002). Courts may also "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *See U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citations omitted). Courts "may presume that public records are authentic and trustworthy." *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999).

Under these rules, courts have taken judicial notice of declarations that parties have filed in support of other motions in the same proceeding. *See, e.g., Britz Fertilizers, Inc. v. Bayer Corp.*, 665 F. Supp. 2d 1142, 1176-77 (E.D. Cal. 2009) (taking judicial notice of "an earlier declaration in this action"); *Singh v. Bank of N.Y. Mellon*, No. SACV 17-01178 AG (JCGx), 2017 U.S. Dist. LEXIS 190869, at *3 (C.D. Cal. Nov. 17, 2017) (taking judicial notice of a declaration that Plaintiff filed in the action with a previously denied application for a temporary restraining order).

Exhibit A is a public record in this action, and therefore the proper subject of judicial notice.

III. CONCLUSION

For the forgoing reasons, KQED respectfully requests that the Court take judicial notice of the April 26, 2017 Declaration of Kate Kendell, On Behalf of the National Center for Lesbian Rights, in support of KQED's Motion to Unseal Videotaped Trial Records (Dkt. 855) attached as Exhibit A.

DATED: May 13, 2020

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE

By: */s/ Thomas R. Burke*
Thomas R. Burke
Kelly M. Gorton

Attorneys for Intervenor KQED Inc.

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Kristin M. Perry, et al., Plaintiffs, v. Edmund G. "Jerry" Brown, Jr., Governor of California, Defendant.	Case No. 09-cv-2292 **DECLARATION OF KATE KENDELL, ON BEHALF OF THE NATIONAL CENTER FOR LESBIAN RIGHTS, IN SUPPORT OF KQED'S MOTION TO UNSEAL VIDEOTAPED TRIAL RECORDS** Date: Time: Department:

DAVIS WRIGHT TREMAINE LLP

I, Kate Kendell, state:

1. I am the Executive Director of the National Center for Lesbian Rights ("NCLR"). The matters stated herein are true of my own personal knowledge and I could competently testify them if called as a witness. I make this declaration in support of KQED's Motion to Unseal Videotaped Trial Records.

2. I obtained my J.D. degree from the University of Utah College of Law in 1988. After working a few years as a corporate attorney, I was named the first staff attorney for the American Civil Liberties Union of Utah. In this capacity, I oversaw the legal department of ACLU of Utah and directly litigated many high-profile cases focusing on all aspects of civil liberties, including reproductive rights, prisoners' rights, church/state conflicts, free speech, and the rights of LGBT people. In 1994, I accepted the position as Legal Director with the National Center for Lesbian Rights in San Francisco and became its Executive Director in 1996.

3. Founded in San Francisco in 1977, NCCR pursues justice, fairness, and legal protections for all LGBT people. NCLR's programs focus on employment, immigration, youth, elder law, transgender law, sports, marriage, relationship protections, reproductive rights, and family law create safer homes, safer jobs, and a more just world. Each year, NCLR shapes the legal landscape for all LGBT people and families across the nation through its precedent- setting litigation, legislation, policy, and public education.

4. On behalf of NCCR, I urge this Court to unseal the videotaped recording of the Prop. 8 trial proceedings. The Prop. 8 trial conducted in this Court was a watershed moment in the history of LGBT rights. Before this Court, the parties presented arguments and evidence in favor of and against same-sex marriage. Even to the most casual observer, all of the evidence lined up against the propriety of denying the legal status of marriage to couples based solely on the fact that they were who were in a same-sex relationship and to discriminate against the families of these unions. The absolute barrenness of the allegations and evidence against same-sex marriage and LGBT people generally was fully exposed. Given the legal history of stigma against LGBT persons, it is vital that the video recording of this trial not be sealed and instead, be publicly available for viewing. Doing so will help the public more fully understand the arguments and

evidence that this Court (and ultimately the U.S. Supreme Court) heard and used to validate the constitutional rights of LGBT persons in the decorum of this historic trial. The rights of LGBT across the nation continue to be tested. Although the U.S. Supreme Court ultimately affirmed Judge Walker's decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) and decided both *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), decisions that recognized the rights of same-sex couples, a spate of legislative bills recently introduced in the states of North Carolina, Texas and North Dakota seek to discriminate against same-sex couples. In the face of these and other legal challenges across the nation, making the videotapes of the Prop. 8 trial public will meaningfully contribute to the public's understanding of the evidence that was presented by the parties during this contested federal trial, evidence that continues to have relevance and resonance today.

5. There is no substitute for witnessing live court testimony, seeing an individual testify and observing their body language and demeanor, the tone of their voice, their speaking cadence and verbal emphasis. While relatively few people were able to personally attend the two-week trial proceedings – I personally attended multiple days of the trial – fortunately, the full proceedings and witness testimonies were captured in the audiovisual recordings that Judge Walker made to assist him in his deliberations. Years later, the trial videotape is the most fulsome record of the trial. The court transcript captures only the spoken word and little else. Although there have been theatrical performances based on the transcript of the trial, such performances are but an amalgam of events, designed for dramatic effect.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 26th day of April, 2017, at San Francisco, California.

By: */s/ Kate Kendell*
Kate Kendell
Its: Executive Director

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Attorneys for Intervenor KQED, Inc.

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

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

Defendants.

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors.

Case No. 09-cv-2292-WHO

DECLARATION OF SCOTT SHAFER IN SUPPORT OF KQED'S OPPOSITION TO DEFENDANTS-INTERVENORS' MOTION TO CONTINUE THE SEAL ON VIDEOTAPED TRIAL RECORDS

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

DAVIS WRIGHT TREMAINE LLP

I, Scott Shafer, state:

1. I am the Senior Editor, California Politics & Government, at KQED Public Media. The matters stated herein are true of my own personal knowledge and I could competently testify them if called as a witness. I make this declaration in support of KQED's Opposition to Defendants-Intervenors' Motion to Continue the Seal on Videotaped Trial Records.

2. KQED is the nation's most-listened-to public radio station, with more than a million people tuning in each week and many more watching KQED TV and accessing our content online. KQED's mission is to educate, challenge and engage our audience with substantive stories and analysis of issues and topics that help them be active and responsible citizens.

3. KQED was the only local broadcast media in California to comprehensively report on the same-sex marriage issue from 2004, when San Francisco began issuing marriage licenses to gay and lesbian couples, through the Proposition 8 campaign to ban gay marriage all the way to 2013 when the U.S. Supreme Court let stand the lower court decision striking down Proposition 8. KQED was also a member of the Media Coalition that sought to broadcast the trial proceedings – a request that was struck down by the U.S. Supreme Court at the start of the trial – and later proceedings in this Court and in the Ninth Circuit to obtain access to the videotape of the trial proceedings that Judge Walker had ordered to assist him with his deliberations.

4. KQED attended every day of the 2010 Proposition 8 trial, covered oral argument at the California Supreme Court and before the Ninth Circuit Court of Appeals as well as oral argument at the U.S. Supreme Court in 2013. KQED reported on the questions raised by the federal appellate panel of judges who questioned the attorneys and we heard members of the U.S. Supreme Court parry back and forth with attorneys on both sides of the issue.

5. What we have not heard or seen is the trial that started it all. Because plans to broadcast the trial were interrupted as the trial was beginning, beyond those who were able to attend the trial court proceedings in person in San Francisco, the public has never seen or heard the plaintiffs, witnesses, attorneys and Judge Vaughn Walker as this landmark civil rights trial was conducted. This is critical missing chapter. Instead, broadcast media were limited to summarizing what happened in the courtroom, press conferences with attorneys and plaintiffs, and old

campaign commercials referred to in the trial. The actual trial recording is critical understanding how this critical chapter in California legal history unfolded.

6. If KQED is able to obtain access to these video tapes and their audio we envision using them in some or all of the following ways:

a. Producing a KQED TV special using the video tapes as a teaching tool with a discussion to include attorneys and others who participated in the trial;

b. Online video clips from key moments in the trial, such as the testimony of the plaintiffs and Ryan Kendall, whose emotional testimony about being forced to endure "conversion therapy" triggered tears in Judge Walker. These trial moments are highly educational and informative in providing context and detail of the trial.

c. A statewide radio special and/or Podcast series using audio never before heard to discuss the legal path of same-sex marriage in California.

d. Beyond KQED's use of the videotapes, the trial tapes could also be used by law schools, historians, civil liberties groups and others for educational purposes.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 11 day of May, 2020, at San Francisco, California.

By: Scott Shafer

Scott Shafer
Its: Senior Editor, California Politics & Government

DAVIS WRIGHT TREMAINE LLP

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Attorneys for Intervenor KQED, Inc.

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

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

Defendants.

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors.

Case No. 09-cv-2292-WHO

DECLARATION OF SETH D. LEVY, ON BEHALF OF IT GETS BETTER PROJECT, IN SUPPORT OF KQED'S OPPOSITION TO DEFENDANTS-INTERVENORS' MOTION TO CONTINUE THE SEAL ON VIDEOTAPED TRIAL RECORDS

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Seth D. Levy, state:

1. I am the President and Chairman of the Board of Directors for the It Gets Better Project ("IGBP"). The matters stated herein are true of my own personal knowledge and I could competently testify to them if called as a witness. I make this declaration in support of KQED's Opposition to Defendants-Intervenors' Motion to Continue the Seal on Videotaped Trial Records.

2. In September of 2010, syndicated columnist and author Dan Savage created a YouTube video with his partner Terry Miller to inspire hope for lesbian, gay, bisexual, transgender and queer/questioning ("LGBTQ+") young people. In response to a number of students taking their own lives after being bullied in school, they wanted to create a personal way for supporters everywhere – and particularly LGBTQ+ adults – to tell LGBTQ+ youth that, yes, it does indeed get better. This was important, because many LGBTQ+ youth don't have LGBTQ+ adults in their lives who can provide the sort of mentorship and guidance that helps a young person to envisage a fulfilling adulthood, particularly LGBTQ+ youth who live in communities or who are part of families that are hostile to their LGBTQ+ status. Connecting LGBTQ+ youth with LGBTQ+ adults and their allies through an online experience provided, and continues to provide, a critical means by which to offer hope, and to counteract the notion prevalent among so many LGBTQ+ youth that no future exists for them.

3. In fact, adolescence and young adulthood are difficult times for all of us, but they are acutely problematic for those of us struggling to embrace a sexuality and/or gender identity that challenges dominant social narratives. LGBTQ+ young people are more likely to experience bullying, familial and peer rejection, homelessness, and depression and other mental illnesses that contribute to, in worst case scenarios, a higher likelihood to consider suicide as a viable escape. These are unacceptable symptoms of what should be a beautiful and uniquely individual experience for all of us: the ability to embrace every aspect of our human experience.

4. From the first *it gets better* video, the It Gets Better Project, accessible at www.ItGetsBetter.org, was born. It quickly became a worldwide movement, inspiring more than 60,000 user-created videos viewed more than 50 million times. ItGetsBetter.org and the popular social media channels that IGBP operates are places where LGBTQ+ youth can see how love and

happiness can be a reality in their future. Ten years later, IGBP's current suite of media, education and international affiliate programs operate on the ground in nearly 20 countries, employing the power of media in its many forms to tell the stories of the LGBTQ+ community, offering inspiration and connectivity for LGBTQ+ youth wherever they live; uplifting and empowering them. IGBP is built upon the power of storytelling to inspire hope and to influence positive change for LGBTQ+ young people.

5. We at IGBP know from experience, as do the tens of thousands of people who have added their personal stories to the It Gets Better movement, that life can and will get better with time. There are no insurmountable obstacles on the path to self-affirmation for a young LGBTQ+ person, and IGBP is determined to share the stories that carry the proof of this knowledge. We shine a light on all that is possible for LGBTQ+ youth.

6. IGBP urges this Court to deny Defendants-Intervenors' Motion to Continue the Seal on Videotaped Trial Records. Relatively few people were able to personally attend and witness the trial proceedings and yet, the Prop. 8 trial – in which the Court heard evidence presented by both sides – was a landmark case in the history of LGBTQ+ rights. Although transcripts of the trial proceedings are public, the U.S. Supreme Court's prohibition on broadcasting the trial as it was happening meant that for the vast majority of people who could not attend the proceedings in person, the public was left either to read the trial transcripts or to watch various "re-enactments" of the trial proceedings. Thus, unsealing the audiovisual recordings of the trial proceedings will exponentially expand the audience that can view the evidence and arguments that were presented – by noted attorneys on both sides – through the efforts of organizations like IGBP and other outlets. By making this information public, the Court will further the public's ongoing desire to understand the profound social and legal issues that were publicly tried in this Court and ultimately affirmed by the U.S. Supreme Court. For LGBTQ+ young people around the world – including those living in communities in the U.S. and overseas that are unfriendly to the LGBTQ+ community – experiencing the trial proceedings with the level of engagement that only actual videotaped recordings can offer could be a remarkable glimmer of

hope for the possibility of one day having a meaningful adult relationship that's treated with the same level of respect as a heterosexual marriage.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 5th day of May, 2020, at Sagle, Idaho.

By: _____
Seth D. Levy
Its: President

DAVIS WRIGHT TREMAINE LLP

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Attorneys for Intervenor KQED Inc.

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

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

Defendants.

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors.

Case No. 09-cv-2292-WHO

DECLARATION OF ERWIN CHEMERINSKY IN SUPPORT OF KQED'S OPPOSITION TO DEFENDANTS-INTERVENORS' MOTION TO CONTINUE THE SEAL ON VIDEOTAPED TRIAL RECORDS

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

DAVIS WRIGHT TREMAINE LLP

I, ERWIN CHEMERINSKY, declare:

1. I am Dean of the Berkeley School of Law and the Jesse H. Choper Distinguished Professor of Law at the University of California. Before assuming this position, from 2008-2017, I was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law, with a joint appointment in Political Science. I previously taught at Duke Law School, and the University of Southern California School of Law, serving for four years as director of the Center for Communications Law and Policy. I have also taught at UCLA School of Law and DePaul University College of Law.

2. My areas of expertise are constitutional law, federal practice, civil rights and civil liberties, and appellate litigation. I am the author of eleven books, including leading treatises about constitutional law, criminal procedure, and federal jurisdiction and more than 200 law review articles. In 2016, I was named a fellow of the American Academy of Arts and Sciences. I frequently argue cases before the nation's highest courts, and also serve as a commentator on legal issues for national and local media.

3. I have written extensively on the role of the legal academy and legal scholarship in the functioning of our democracy. In *In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship*, 34 Tulsa L.J. 667 (1998-1999), I recognized that legal scholarship has effects that reach far beyond the lecture halls and offices of our nation's law schools. The audience for legal scholarship, I believe, includes not only students and professors inside and outside legal academia, but the general public, governmental decision-makers, at the local, state and federal levels.

4. Legal academics conduct scholarship with the goal of improving the law – articles dissecting cases and decisions from all angles and perspectives build up over time to create a body of work that causes shifts in jurisprudence and public opinion. Scholars share a deep belief in the importance of ideas – ideas that are influenced by, and reflected in, the body of precedent that includes executive orders, statutes, case law, and, finally, the events of history. These are the building blocks of legal scholarship.

5. From its filing in 2009, the myriad of constitutional issues raised by *Perry v. Hollingsworth* have been the subject of numerous court decisions and considerable academic focus. After all, this closely watched case is the only instance in which a federal court has conducted a court trial and heard evidence to decide whether same-sex couples have the freedom to marry. As such, legal scholars have considerable interest in being able to watch the recordings of the trial that uniquely capture the emotion and tone of the witnesses as they testified before Chief Judge Vaughn R. Walker during the trial held in San Francisco January 11-27, 2010.

6. Judge Walker not only listened as witnesses testified in open court, he used the recordings for his deliberations and included them as part of the record of this historic trial. Thus, the recordings reflect a record that is far richer than what is typically available to scholars in the dry transcripts available from every other trial. The value of the recordings is also substantially enhanced because this was no ordinary federal trial – it addressed crucial constitutional issues of the day: the freedom to marry including whether California voters could, consistent with due process and equal protection, limit marriage to heterosexual couples. More than a decade after this trial was conducted – and years since the Ninth Circuit affirmed Judge Walker's ruling – legal scholars await the opportunity to review and to use the recordings to provide greater understanding and a far richer appreciation of the legal issues and evidence presented during this landmark trial.

7. Scholars 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. No one would be harmed by allowing these recordings to be made public.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 11th day of May, 2020, at Oakland, California.

By: Erwin Chemerinsky
Dean Erwin Chemerinsky

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Attorneys for Intervenor KQED Inc.

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KRISTIN M. PERRY, et al.,

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Defendants.

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors.

Case No. 09-cv-2292-WHO

DECLARATION OF PROFESSOR SUZANNE B. GOLDBERG IN SUPPORT OF KQED'S OPPOSITION TO DEFENDANTS-INTERVENORS' MOTION TO CONTINUE THE SEAL ON VIDEOTAPED TRIAL RECORDS

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Professor Suzanne B. Goldberg, state:

1. I am the Herbert and Doris Wechsler Clinical Professor of Law at the Columbia Law School, founding director of the Sexuality and Gender Law Clinic, and co-director of the school's Center for Gender & Sexuality Law. The matters stated herein are true of my own personal knowledge and I could competently testify them if called as a witness. I make this declaration in support of KQED's Opposition to Defendants-Intervenors' Motion to Continue the Seal on Videotaped Trial Records.

2. After graduating from Harvard Law School in 1990, I began my career with Lambda Legal, the nation's first and largest organization focused on achieving full equality for LGBTQ+ people. While at Lambda I worked on immigration, employment discrimination, and family law matters as well as two cases that became cornerstone gay rights victories at the U.S. Supreme Court: *Lawrence v. Texas*, the landmark decision that struck down Texas's sodomy law, and *Romer v. Evans*, which overturned an anti-gay Colorado constitutional amendment. As a law professor (at Rutgers University School of Law from 2000 to 2006 and after joining Columbia in 2006), I have filed briefs in nearly every marriage equality case in the United States.

3. I received Columbia Law School's Willis L.M. Reese Prize for Excellence in Teaching and have been named the Public Interest Professor of the Year. As a scholar, my areas of expertise are sexuality and gender law, civil procedure, civil rights, lawyering and social change and equality theory. I am the author of one book and over 20 law review articles on this subjects of sexuality and gender law, among other topics.

4. As one of the nation's experts on gender and sexuality law, I closely followed California voters' enactment of Proposition 8 and the various legal challenges to that proposition including *Perry v. City and County of San Francisco*, which later became known as *Hollingsworth v. Perry*, when it was decided by the United States Supreme Court in 2013. I was unable to attend in person any of the trial proceedings that took place during the court trial held in San Francisco, January 11-27, 2010 before the Hon. Vaughn R. Walker, Chief Judge of the U.S. District Court for the Northern District of California.

5. Release of the video of the trial proceedings that Judge Walker oversaw and used to prepare his findings of fact and conclusions of law would be invaluable to me as a scholar and to other legal scholars and others interested in better understanding the myriad of issues that were tried in this case. This recording is the only one available of a federal trial in which extensive witness testimony and evidence was given on whether couples in same-sex relationships should be permitted to marry. Access to the recorded testimony of trial witnesses will provide an unprecedented and wholly unique perspective into the evidence that Judge Walker heard and considered during his deliberations and then used to support his order striking down Proposition 8 and which later became the basis of landmark rulings by the Ninth Circuit Court of Appeals and the United States Supreme Court. Among other things, I envision using the recordings to help students and scholars hear and watch the witness trial testimony to provide a deep and realistic understanding and appreciation for the many complex factual and constitutional issues that arose during this historic trial.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 12th day of May, 2020, at New York, New York.

By: */s/ Suzanne Goldberg*
Professor Suzanne Goldberg

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Attorneys for Intervenor KQED Inc.

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

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

Defendants.

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors.

Case No. 09-cv-2292-WHO

DECLARATION OF MICHAEL SABATINO IN SUPPORT OF KQED'S OPPOSITION TO DEFENDANTS-INTERVENORS' MOTION TO CONTINUE THE SEAL ON VIDEOTAPED TRIAL RECORDS

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Michael Sabatino, state:

1. The matters stated herein are true of my own personal knowledge and I could competently testify them if called as a witness. I make this declaration in support of KQED's Opposition to Defendants-Intervenors' Motion to Continue the Seal on Videotaped Trial Records.

2. My husband, Robert Voorheis, and I have been together for nearly 42 years. We are long-time marriage equality advocates. We had a commitment ceremony in 1979. We were the second couple in Westchester County (in New York State) to register as domestic partners and were married in Toronto, Canada in 2003. As a couple, we were plaintiffs in *Godfrey v. Spano*, 871 N.Y.S.2d 296 (N.Y. App. Div. 2008), a case in which the New York Court of Appeals (New York's highest court) established that Westchester County could lawfully extend government benefits to same sex couples in marriages. With this decision, we became the first couple to have their foreign marriage officially recognized in New York State. An article about our life-long advocacy is available here: https://www.marriageequality.org/a_four_decade_march_down_the_aisle. We were also co authors (with many other) on a book, *The Peoples Victory*. https://www.amazon.com/Peoples-Victory-Stories-Marriage-Equality-ebook/dp/B073B1JWJP.

3. When the Prop. 8 trial took place in San Francisco in January of 2010, my husband and I were unable to attend in person due to work commitments. Only two months earlier we had won our case in New York. We were both board members of Marriage Equality NY and Marriage Equality USA. We very much wanted to watch the Prop. 8 trial as we were still very involved and committed to obtaining marriage equality nationwide. We were closely following all major legal challenges to DOMA. It was important that we were as educated as possible on all the court cases and arguments to prepare us for any potential future cases. The fact that there was no live broadcast or video available of the trial was very frustrating and disappointing to us and so many others.

4. Now, more than a decade later, my husband and I would both like to watch the recordings of the Prop. 8 trial. We know many others who would too. This federal trial, involving lawyers for both sides, considered evidence and arguments about rights for which we advocated

for decades. It makes no sense that the public cannot view the video that Chief Judge Vaughn Walker made of this public trial and used to prepare his opinion. Having the recording available to the public will contribute to the understanding of the vital societal and constitutional issues tried in the course of this landmark case.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 8 day of May, 2020, at Yonkers, New York.

By: /s/ Michael Sabatino
Michael Sabatino

DAVIS WRIGHT TREMAINE LLP

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Attorneys for Intervenor KQED, Inc.

IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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Defendants-Intervenors.

Case No. 09-cv-2292-WHO

DECLARATION OF MCKENNA PALMER IN SUPPORT OF KQED'S OPPOSITION TO DEFENDANTS-INTERVENORS' MOTION TO CONTINUE THE SEAL ON VIDEOTAPED TRIAL RECORDS

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, McKenna Palmer, state:

1. The matters stated herein are true of my own personal knowledge and I could competently testify to them if called as a witness. I make this declaration in support of KQED's Opposition to Defendants-Intervenors' Motion to Continue the Seal on Videotaped Trial Records.

2. After high school, I interned at the *It Gets Better Project* in Los Angeles, where I have continued as a volunteer for several years. In 2019, while home from college in the small city of Yucaipa, California, I organized and launched my town's first LGBTQ support group because I found there was a profound need for this resource. A profile on my work in support of the LGBTQ community was captured in this nationally-broadcast piece: https://www.msn.com/en-us/video/t/meet-the-teenager-who-launched-an-lgbtq-support-group/vp-AAIDzU8.

3. I grew up in California and was only 11 years old when Proposition 8 was being debated. I had absolutely no concept of how its passage would shape my life. I graduated high school in 2015 and during the same month, same-sex marriage became legal in California. Candidly, it's easy for someone of my age to take same-sex marriage for granted, but I appreciate that this legal recognition came after a very long journey, about which I am still wanting to learn.

4. I had no opportunity to attend the Prop. 8 trial proceedings in San Francisco – I was 13 when the trial took place in January of 2010. Over a decade later, I would very much like to be able to watch the recordings of this federal trial and to be able to watch the testimony that Chief Judge Vaughn Walker heard on whether same-sex couples should be allowed to marry and, if they desire, raise families. Not only do I have a very strong personal interest in this – as someone who came out in high school – I feel it is vital for me (and others) to be able to fully understand and appreciate the risks that the plaintiffs in this case took to publicly share their personal stories, their hopes to marry their long-time partners and to lead normal lives. I don't know why the video of this public trial should remain sealed after all these years.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 13th day of May, 2020, at Yucaipa, California.

By: /s/ mckenna palmer
McKenna Palmer

KATIE TOWNSEND (SBN 254321)
ktownsend@rcfp.org
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
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Counsel for Amici Curiae

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

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

Defendants,

and

DENNIS HOLLINGSWORTH, et al.**,**

Defendants-Intervenors.

Case No. 09-CV-2292-WHO

UNOPPOSED MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 36 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF MEDIA INTERVENOR KQED, INC.

UNOPPOSED MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Civil Local Rule 7-11, proposed amici curiae the Reporters Committee for Freedom of the Press ("Reporters Committee") and The Associated Press, Berkeleyside Inc., Boston Globe Media Partners, LLC, BuzzFeed, Cable News Network, Inc., California News Publishers Association, Californians Aware, CalMatters, Dow Jones & Company, Inc., The E.W. Scripps Company, Embarcadero Media, First Amendment Coalition, First Look Media Works, Inc., Fox Television Stations, LLC, Gannett Co., Inc., Hearst Corporation, Inter American Press Association, International Documentary Association, Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, Mother Jones, MPA - The Association of Magazine Media, National Press Photographers Association, The New York Times Company, The News Leaders Association, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Sinclair Broadcast Group, Inc., Society of Environmental Journalists, Society of Professional Journalists, TEGNA Inc., Tully Center for Free Speech, and Univision Communications Inc. (collectively, "amici") request leave to file the attached amici curiae brief in support of KQED, Inc.'s Opposition to Defendants-Intervenors' Motion to Continue the Seal.

Interest of Amici Curiae

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Descriptions of the other amici are included as Appendix A to the attached amici curiae brief.

As members and representatives of the news media, amici have a strong interest in ensuring that journalists, including documentary filmmakers, can access and report on information of public

interest. The news media often "function[] as surrogates for the public" by reporting on judicial proceedings to the public. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 573 (1980). Accordingly, it is vital that members of the news media be able to provide accurate and thorough accounts of judicial proceedings. The attached amici curiae brief details the importance of the recordings at issue to the efforts of journalists, including documentarians, to report on what was an historic and influential trial. Audio-visual recordings of courtroom proceedings provide a more complete source of information regarding judicial events than a transcript alone. Recordings convey body language, inflection, tone of voice, emotional tenor, and other contextual information vital to a complete understanding of the proceeding. This additional context is particularly important for broadcast journalists and documentary filmmakers who depend on audio and video in their reporting.

Efforts to Obtain a Stipulation

In advance of filing this motion, amici contacted counsel for Defendants-Intervenors and counsel for Media Intervenor KQED, Inc., each of whom stated that their clients consent to the filing of this amici curiae brief. *See* Townsend Decl. at ¶ 4–5. Amici file this motion and the accompanying proposed amici curiae brief on May 13, 2020, the same day as the opposition to the motion to continue the seal is due and fourteen days before the reply is due on May 27, 2020. The filing of this amici curiae brief would therefore not delay the schedule set forth by this Court. *See* Order on Mot. to Unseal Videotaped Trial Records at 15, *Perry v. Schwarzenegger*, No. 09-2292 (Jan. 17, 2018), ECF No. 878.

For the foregoing reasons, amici respectfully request leave to file the attached brief as amici curiae in support of KQED, Inc.'s Opposition to Defendants-Intervenors' Motion to Continue the Seal.

Dated: May 13, 2020

Respectfully submitted,

/s/ *Katie Townsend*
Katie Townsend
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

KATIE TOWNSEND (SBN 254321)
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Counsel for Amici Curiae

UNITED STATES DISTRICT COURT
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Defendants,

and

DENNIS HOLLINGSWORTH, et al.**,**

Defendants-Intervenors.

Case No. 09-CV-2292-WHO

DECLARATION OF KATIE TOWNSEND IN SUPPORT OF UNOPPOSED MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF MEDIA INTERVENOR KQED, INC.

I, Katie Townsend, declare as follows:

1. I am the Legal Director at the Reporters Committee for Freedom of the Press (the "Reporters Committee"), a position I have held since May 2018. Prior to becoming the Reporters Committee's Legal Director, I was the Reporters Committee's Litigation Director; I held that position from September 2014 to May 2018. I am counsel for proposed amici curiae Reporters Committee and 36 Media Organizations. I have personal knowledge of the matters stated in this declaration and could competently testify to them as a witness.

2. The Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

3. On May 7, 2020, I wrote to Thomas R. Burke, counsel for KQED, Inc. ("KQED") and to Charles J. Cooper, David H. Thompson, Peter A. Patterson, and Andrew P. Pugno, counsel for Defendants-Intervenors ("Proponents") via e-mail to ask if their clients would be willing to stipulate to—or, at a minimum, not oppose—the Reporters Committee's filing of an amicus brief on behalf of itself and a coalition of media organizations in support of KQED's Opposition to Proponents' Motion to Continue the Seal on the video recordings of the trial proceedings in this matter.

4. On May 7, 2020, Mr. Cooper responded via e-mail stating that Proponents consent to the Reporters Committee's filing of an amicus brief in support of KQED's Opposition to Proponents' Motion to Continue the Seal.

5. On May 11, 2020, Mr. Burke responded via e-mail stating that KQED consents to the Reporters Committee's filing of an amicus brief in support of KQED's Opposition to Proponents' Motion to Continue the Seal.

6. Attached as Exhibit A is a true and correct copy of my e-mail correspondence with Mr. Cooper and Mr. Burke.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 13th day of May 2020, in Washington, D.C.

Dated: May 13, 2020

Respectfully submitted,

/s/ *Katie Townsend*
Katie Townsend
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

EXHIBIT A

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Shannon Jankowski <sjankowski@rcfp.org>

RE: Perry v. Hollingsworth, 09-CV-2292-WHO

1 message

Chuck Cooper <ccooper@cooperkirk.com> Thu, May 7, 2020 at 2:28 PM
To: Katie Townsend <ktownsend@rcfp.org>, David Thompson <dthompson@cooperkirk.com>, Pete Patterson <ppatterson@cooperkirk.com>, "andrew@pugnolaw.com" <andrew@pugnolaw.com>, "Burke, Thomas" <THOMASBURKE@dwt.com>
Cc: Caitlin Vogus <cvogus@rcfp.org>, Shannon Jankowski <sjankowski@rcfp.org>, John Ohlendorf <JOhlendorf@cooperkirk.com>

Katie,

We consent.

Best,

Chuck

Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
202-220-9660
ccooper@cooperkirk.com

From: Katie Townsend <ktownsend@rcfp.org>
Sent: Thursday, May 7, 2020 1:46 PM
To: Chuck Cooper <ccooper@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Pete Patterson <ppatterson@cooperkirk.com>; andrew@pugnolaw.com; Burke, Thomas <THOMASBURKE@dwt.com>
Cc: Caitlin Vogus <cvogus@rcfp.org>; Shannon Jankowski <sjankowski@rcfp.org>
Subject: Perry v. Hollingsworth, 09-CV-2292-WHO

Counsel:

The Reporters Committee for Freedom of the Press intends to file an amicus brief on behalf of a media coalition in support of KQED, Inc.'s opposition to Defendant-Intervenors' Motion to Continue the Seal in *Perry v. Hollingsworth*, 09-CV-2292-WHO. We plan to file a motion for leave to file our amicus brief, along with the brief, on May 13. Pursuant to Civil Local Rules 7-11(a) and 7-12, I am writing to ask if your clients would be willing to stipulate to the filing of our amicus brief or, at a minimum, not oppose the motion for leave to file our amicus brief. Please let me know at your earliest convenience.

Thank you,
Katie

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Katie Townsend
Legal Director
ktownsend@rcfp.org · (202) 795-9303 · @katie_rcfp

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Shannon Jankowski <sjankowski@rcfp.org>

Re: Perry v. Hollingsworth, 09-CV-2292-WHO

1 message

Burke, Thomas <THOMASBURKE@dwt.com> Mon, May 11, 2020 at 10:27 AM
To: Katie Townsend <ktownsend@rcfp.org>
Cc: Chuck Cooper <ccooper@cooperkirk.com>, David Thompson <dthompson@cooperkirk.com>, Pete Patterson <ppatterson@cooperkirk.com>, "andrew@pugnolaw.com" <andrew@pugnolaw.com>, Caitlin Vogus <cvogus@rcfp.org>, Shannon Jankowski <sjankowski@rcfp.org>, John Ohlendorf <JOhlendorf@cooperkirk.com>

We consent.

Thomas R. Burke | Davis Wright Tremaine LLP
Partner, Media Law Practice &
Chair, Pro Bono & Social Impact Committee
505 Montgomery Street, Suite 800 | San Francisco, CA 94111
Tel: (415) 276-6552 | Fax: (415) 489-9052 | Mobile: (415) 519-3406
Email: thomasburke@dwt.com | Website: www.dwt.com
Bio: www.dwt.com/people/ThomasRBurke
[M]

On May 7, 2020, at 11:35 AM, Katie Townsend <ktownsend@rcfp.org> wrote:

[EXTERNAL]

Thank you.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Katie Townsend
Legal Director
ktownsend@rcfp.org
· (202) 795-9303 · @katie_rcfp

On Thu, May 7, 2020 at 2:29 PM Chuck Cooper <ccooper@cooperkirk.com> wrote:

> Katie,
>
> We consent.
>
> Best,
>
> Chuck

Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
202-220-9660
ccooper@cooperkirk.com

From: Katie Townsend <ktownsend@rcfp.org>
Sent: Thursday, May 7, 2020 1:46 PM
To: Chuck Cooper <ccooper@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Pete Patterson <ppatterson@cooperkirk.com>; andrew@pugnolaw.com; Burke, Thomas <THOMASBURKE@dwt.com>
Cc: Caitlin Vogus <cvogus@rcfp.org>; Shannon Jankowski <sjankowski@rcfp.org>
Subject: Perry v. Hollingsworth, 09-CV-2292-WHO

Counsel:

The Reporters Committee for Freedom of the Press intends to file an amicus brief on behalf of a media coalition in support of KQED, Inc.'s opposition to Defendant-Intervenors' Motion to Continue the Seal in *Perry v. Hollingsworth*, 09-CV-2292-WHO. We plan to file a motion for leave to file our amicus brief, along with the brief, on May 13. Pursuant to Civil Local Rules 7-11(a) and 7-12, I am writing to ask if your clients would be willing to stipulate to the filing of our amicus brief or, at a minimum, not oppose the motion for leave to file our amicus brief. Please let me know at your earliest convenience.

Thank you,
Katie

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Katie Townsend
Legal Director
ktownsend@rcfp.org · (202) 795-9303 · @katie_rcfp

> order to preserve any attorney-client or work product privilege that may be available to protect confidentiality.

KATIE TOWNSEND (SBN 254321)
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Facsimile: 202.795.9310
Email: ktownsend@rcfp.org

Counsel for Amici Curiae

UNITED STATES DISTRICT COURT
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Case No. 09-CV-2292-WHO

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 36 MEDIA ORGANIZATIONS IN SUPPORT OF MEDIA INTERVENOR KQED, INC.

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

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INTRODUCTION

In 2008, California voters adopted Proposition 8, a state constitutional amendment denying same-sex couples the right to marry. In 2010, the U.S. District Court for the Northern District of California enjoined enactment of Proposition 8 as unconstitutional under the Due Process and Equal Protection Clauses of the U.S. Constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). Video recordings of the 12-day bench trial were entered into the record and ed filed under seal ("Recordings"). *See Schwarzenegger*, 704 F. Supp. 2d at 929.

In 2017, Bay-area public radio and television station KQED, Inc. ("Movant") filed a motion in this Court to unseal the Recordings, which Defendants-Intervenors ("Proponents") opposed. The Court concluded that, although the common law right of access to judicial documents applied to the Recordings, the compelling interest in preserving judicial integrity (as previously identified by the U.S. Court of Appeals for the Ninth Circuit in *Perry v. Brown*, 667 F.3d 1078, 1084–1085 (9th Cir. 2012)) warranted continued sealing of the Recordings at the time of Movant's request. *Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047, 1057 (N.D. Cal. 2018), *appeal dismissed*, 765 F. App'x 335 (9th Cir. 2019). However, pursuant to Civil Local Rule 79-5, the Court ordered the Recordings to be released on August 12, 2020, absent a showing by Proponents of compelling reasons to justify maintaining the Recordings under seal. *Id.* at 1049. On April 1, 2020, Proponents filed a Motion to Continue the Seal on the Recordings.

Amici urge this Court to deny Proponents' motion. Disclosure of the Recordings will advance the purposes underlying both the common law and First Amendment rights of access to judicial documents: encouraging fair judicial proceedings and fostering informed civic engagement on matters of public importance. The historic trial to determine the constitutionality of Proposition 8 remains a matter of significant public interest. Though transcripts are available, the Recordings provide the best and most complete depiction of the trial. There is a stark difference between cold transcripts and the Recordings at issue, which convey body language, inflection, tone of voice, and the emotional tenor of the trial. This additional information is particularly important for journalists

and documentary filmmakers who depend on audio and video to report on matters of public and historic interest.

ARGUMENT

I. Public release of the Recordings serves the interests advanced by the common law and First Amendment rights of access to judicial documents.

Both the common law and the First Amendment provide the press and the public with a presumptive right of access to judicial documents. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). Although the presumption originally arose in the context of criminal trials, the Ninth Circuit has held that the presumption extends to civil proceedings and associated records as well. *See Courthouse News Serv v. Planet*, 947 F.3d 581, 591 (9th Cir. 2020) (stating that "[t]he press's right of access to civil proceedings and documents fits squarely within the First Amendment's protections.") (quoting *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1069 (7th Cir. 2018)); *Foltz v. State Farm Mut. Auto. Ins. Co*., 331 F.3d 1122, 1135 (9th Cir. 2003) (recognizing the strong common law "presumption in favor of access to court records" in civil proceedings).

Public access to judicial proceedings and documents has long been recognized as "one of the essential qualities of a court of justice." *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 556 (1980) (plurality opinion) (describing how the presumption of access to criminal proceedings traces to Colonial times and English history) (internal quotation marks omitted). Openness provides citizens with "assurance that the proceedings were conducted fairly to all concerned" and enhances fairness by exposing participants to public scrutiny. *Id.* at 569; *see also Nixon*, 435 U.S. at 598 (finding a common law right of access to judicial records and documents based on "the citizen's desire to keep a watchful eye on the workings of public agencies, and . . . a newspaper publisher's intention to publish information concerning the operation of government." (citations omitted)).

As this Court expressly recognized, the common law right of access to judicial documents applies to the Recordings at issue in this case. *Perry*, 302 F. Supp. 3d at 1055. Moreover, the Court noted that its "analysis would be no different if [it] applied a First Amendment right of access instead of the common-law right of access." *Id.* at 1058. Indeed, disclosure of the Recordings

supports the purposes of both the First Amendment and the common law presumptions of access. Public access to the Recordings will bolster confidence in the judicial process by allowing citizens, including the large numbers who could not attend this historic trial in person, to observe the workings of the judicial system. *See Richmond Newspapers*, 448 U.S. at 572; *see also United States v. Criden*, 648 F.2d 814, 822 (3rd Cir. 1981) (holding that the news media may copy tapes introduced into evidence at trial in part because "the public forum values emphasized in [*Richmond Newspapers*] can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person"). Although a transcript of the trial is publicly available, access to the Recordings is the closest substitute to in-person attendance. And, as described in more detail in Section II, *infra*, the Recordings themselves provide a more complete source of information regarding the events of the trial than the transcript. Unsealing the Recordings will ensure that the trial is "open to all who care to observe." *Richmond Newspapers*, 448 U.S. at 564.

II. Public access to the Recordings will enhance the completeness of news reports about the trial.

A. An audio-visual recording conveys more and different information than a cold transcript.

Proponents contend that, because a written transcript of the trial is available, there is no "important public need" to access the Recordings. See Defs.-Intervenors Mot. to Continue the Seal at 22. However, a cold transcript is not an adequate substitute for an audio-visual recording, where one exists. Video provides the news media and the public with a more robust and informative depiction of a courtroom proceeding than even a perfect transcript of that proceeding. Unlike a transcript, a recording conveys body language, inflection, tone of voice, and other contextual information vital to a complete understanding of the proceeding. *See Criden*, 648 F.2d at 824 (noting that in a written record, "[i]mportant, sometimes vital, parts of the trial, including the appearance, demeanor, expression, gestures[,] intonations, hesitances [sic], inflections, and tone of voice of witnesses, of counsel, and of the judge are not there.") (quoting *Oxnard Publ'g Co. v. Superior Court*, 68 Cal. Rptr. 83, 95 (Ct. App. 1968). If access to audio visual recordings is

withheld, "a substantial part of the real record of the proceeding will [be] permanently lost to public scrutiny." *Id.*

Moreover, "actual observation of testimony or exhibits contributes a dimension which cannot be fully provided by second-hand reports." *Id.* (granting media access to copy and rebroadcast videotaped evidence in criminal trial of public officials); *see also In re Application of CBS, Inc.*, 828 F.2d 958, 960 (2d Cir. 1987) (granting the news media the ability to copy a videotaped deposition, noting that "[t]ranscripts lack a tone of voice, frequently misreport words and often contain distorting ambiguities as to where sentences begin and end"). Providing access to a video recording allows a viewer to become "virtually a participant in the events portrayed," amplifying the impact of the information presented. *United States v. Martin*, 746 F.2d 964, 971–72 (3d Cir. 1984) ("The hackneyed expression, 'one picture is worth a thousand words' fails to convey adequately the comparison between the impact of the televised portrayal of actual events upon the viewer of the videotape and that of the spoken or written word upon the listener or reader.") (quoting *United States v. Criden*, 501 F. Supp. 854, 859–60 (E.D. Pa. 1980)).

Access to the Recordings would similarly offer the public a more detailed, nuanced, and fulsome account of the testimony and legal arguments presented in what has proven to be an historic and influential case in the interpretation of constitutional law—and one which has remained a matter of significant public interest since its inception over a decade ago.

B. Video and audio recordings are crucial to the work of the news media and documentarians in conveying context and information to the public.

The U.S. Supreme Court has long recognized that the press plays a particularly important role in facilitating public monitoring of the judicial system, acknowledging that "[w]hile media representatives enjoy the same right of access as the public," they often "function[] as surrogates for the public" by reporting on judicial matters to the public at large. *Richmond Newspapers*, 448 U.S. at 573. As surrogates for the public, the news media have a responsibility to provide accurate and

thorough accounts of judicial events—a responsibility which is greatly enhanced when its members have access to audio-visual recordings of courtroom proceedings.

1. Video recordings aid the news media and documentary filmmakers in providing more robust and thorough reporting of judicial proceedings.

Recordings serve as powerful storytelling tools for journalists and documentarians working in audio or visual mediums. For example, in the recent documentary series *The Trials of Gabriel Fernandez,* filmmaker Brian Knappenberger explored the habitual abuse and eventual murder of an 8-year-old boy by his mother and her boyfriend, as well as the systemic failings within the Los Angeles Department of Children and Family Services that may have led to the department's failure to protect the boy. Knappenberger incorporated footage of the Los Angeles trial of Fernandez's mother and her boyfriend into the series, after experiencing firsthand the unique impact of seeing and hearing the events of the trial: "We were listening to the testimony of first responders, and it was just so powerful and so moving . . . I'd heard of Gabriel's story before when it broken [sic] the L.A. Times, but I didn't quite understand how intense it was . . . It stuck with [the first responders] and it stuck with me." Ashlie D. Stevens, *How the Fallout from Gabriel Fernandez's Harrowing Murder Inspired Netflix's Must-Watch Docuseries*, Salon (Feb. 26, 2020), https://perma.cc/N2Y7-9MMP.

Similarly, in the critically acclaimed documentary *Paradise Lost: The Child Murders at Robin Hood Hills*, filmmakers Joe Berlinger and Bruce Sinofsky made use of a "fair amount of footage from the original trial[s]" to paint a vivid picture of the three teenaged murder defendants that would not have been possible based on a transcript alone. Mike D'Angelo, *Paradise Lost Shows that Charisma Doesn't Need Movie-Star Looks*, AV Club (May 23), https://perma.cc/HGZ8-7RBH (featuring a defendant's testimony). Describing a visual recording of one of the defendants' testimony, one critic observed, "[W]hat comes across in this footage—and in all of *Paradise Lost*'s trial footage—is how earnest, polite, and cooperative [the defendant] is." *Id.* The documentary is credited with bringing national attention to the case and with raising questions as to the sufficiency

of the evidence against the three defendants, keeping the case in the public eye until the men were ultimately freed from prison in 2011. *See* Campbell Robertson, *Deal Free 'West Memphis Three' in Arkansas*, N.Y. Times (Aug. 19, 2011), https://perma.cc/2WKQ-WNNU.

Courtroom footage has served as an important component of several other investigative documentaries, including the series *Making a Murderer*, which incorporated video recordings of trial testimony and depositions in its exploration of the arrests and murder trials of Wisconsin's Steven Avery and Brendan Dassey. *See Making a Murderer: Eighteen Years Lost*, at 5:05 (Netflix 2015) (featuring one of the many instances in which the documentarian used video footage of depositions of family members of the defendants). The series initiated a national conversation regarding the case and, in particular, concerns relating to Dassey's confession. *See* Ariane de Vogue & Eli Watkins, *Supreme Court Won't Take up 'Making a Murderer' Case*, CNN (June 25, 2018), https://perma.cc/CQ22-768F. And, in 2017, Emmy award-winning documentarian David Sutcliffe sought and obtained access to recordings played during a criminal trial in which a defendant—and failed Congressional candidate—described his plans to attack a predominately Muslim town in New York. Order Granting Mot. of Non-Party David F. Sutcliffe for Access to Certain Trial Exs., *U.S. v. Doggart*, No. 1:15-CR-39 (E.D. Tenn. Oct. 30, 2017). Sutcliffe utilized these recordings in a documentary film illustrating the defendant's violent plot, his arrest, and a community's efforts to draw national attention to the incident. David Felix Sutcliffe, *White Fright trailer*, Vimeo (Feb. 22, 2018), https://vimeo.com/257055941 (audio recording used at the 38-second mark of the film trailer).

The distinct power of such audio-visual recordings allows the news media and documentarians to report to the public in a more visceral and compelling manner than through mere quotation from a cold transcript. Access to recordings of trial proceedings thereby aids the public in its oversight of the judicial system and the effective functioning of government.

2. Public access to recordings of judicial proceedings guards against inaccurate portrayals of those proceedings.

Access to recordings of judicial proceedings allows journalists and the broader public to more easily disprove inaccurate and misleading information about those proceedings with ready access to primary source material. *Katzmann v. Victoria's Secret Catalogue (in re Courtroom TV)*, 923 F. Supp. 580, 587 (S.D.N.Y. 1996) (reporting on judicial proceedings "frequently is *more* accurate and comprehensive when cameras are present") (emphasis added)); *In re Application of CBS, Inc.*, 828 F.2d at 960 ("Because the videotape may in fact be more accurate evidence than a transcript . . . it's availability to the media may enhance the accurate reporting of trials."). Armed with a recording, a reporter can provide a more complete picture to his or her audience.

This principle is highlighted by the differences of interpretation that can occur when journalists lack access to tapes from judicial proceedings. For example, in 2014, *The New York Times* posted a humorous dramatization of a deposition from an Ohio public-records case based exclusively on a transcript. Brett Weiner, *Verbatim: What is a Photocopier?*, New York Times Op-Docs: Season 3 (Apr. 27, 2014), https://nyti.ms/2EOKLlT. Played for comedic effect, the dramatization shows a heated, emotional argument between the lawyer, David Marburger, and the witness; but, according to Marburger, this depiction deviated greatly from the conduct of the actual deposition: "[It] wasn't angry; there was no standing up, no shouting; nothing like the video." Michael K. McIntyre, *Cleveland Lawyer Whose Deposition Now is a New York Times Dramatization Says They Got the Dialogue Right, but the Emotions Wrong*, Cleveland Plain Dealer (Apr. 29, 2014), https://perma.cc/ZWM8-9PVN.

During the 2018 criminal trial of comedian Bill Cosby, observers reported differing recollections of Cosby's response when a prosecutor accused him of being a flight risk. Mensah M. Dean, *Why are Cameras Still out of Order in Pa. Courts*, Philadelphia Inquirer (July 15, 2018), https://perma.cc/8XUD-AG98 ("[T]he discrepancy couldn't be resolved definitively because cameras and recording devices are not permitted in Pennsylvania trial courtrooms, even though most states green-lighted the use of such technology in courts years ago."). Some publications

reported that Cosby referred to himself in the third person when responding to the prosecutor's statement that Cosby owned a plane, while others described his response as being in the first person. *See id.* ("Most journalists reported that he'd spoken of himself in the third person: 'He doesn't have a plane, you a——!'"); *Bill Cosby Found Guilty in Sexual Assault Trial*, CNN Newsroom (Apr. 26, 2018), https://perma.cc/Y8BB-MQ8G ("You were in the courtroom when . . . one of the prosecutors said [Cosby] has a plane, [and] he shouted, 'I don't have a plane.'"). In these and other instances, audio and video recordings provide the press and the public with access to more accurate information and act as a primary resource against which such discrepancies may be resolved.

C. Video and audio recordings enhance reporting on matters of historic significance.

As this Court has recognized, the Recordings constitute "an undeniably important historical record." *Perry*, 302 F. Supp. 3d at 1049. The first federal case to decide the constitutionality of a ban on same-sex marriage, the Court's decision in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) has already been the subject of a documentary,[1] a Broadway play,[2] and a network TV docuseries.[3] The historical significance of the case ensures that it will continue to be studied, documented, adapted, and reported on for years to come—further underscoring the significant public interest in the Recordings.

This public interest is reflected by the U.S. Supreme Court's decision to release same-day audio of oral arguments in the three same-sex marriage cases heard by the Court to date: *Hollingsworth v. Perry*, 570 U.S. 693 (2013), in which the Court concluded that Proponents' did not have standing to appeal the district court's decision in *Perry v. Schwarzenegger*; *United States v. Windsor*, 570 U.S. 744 (2013), in which the Court found Section 3 of the Defense of Marriage Act unconstitutional; and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), in which the Court held that the U.S. Constitution affords same-sex couples a right to marry nationwide. Under the Court's standard practice, transcripts of oral arguments are provided at the end of each day, but audio recordings are

[1] The Case Against 8 (HBO 2014).
[2] Dustin Lance Black, 8 (2011).
[3] When We Rise (ABC 2017).

not released until the end of the week in which they are heard. *Transcripts and Recordings of Oral Arguments (March 2018)*, SUPREMECOURT.GOV, https://perma.cc/988L-H2LL (last accessed April 29, 2020). However, in each of the three same-sex marriage cases, the Court announced that it would release both an audio recording *and* unofficial transcript on the same day of the arguments, thus allowing the news media to incorporate audio from the proceedings in its reporting. *See* Lyle Denniston, *Court to Release Same-Day Audio for Same-Sex Marriage Cases*, SCOTUSblog (Mar. 5, 2015), https://perma.cc/KQ9V-KE55; Adam Liptak, *Court Announces Early Release of Same-Sex Marriage Arguments,* N.Y. Times (Mar. 19, 2013), https://perma.cc/2BCH-WQ7A. Until the Court's recent decision to provide a live audio feed of oral arguments held in May 2020 due to the coronavirus pandemic, the three same-sex marriage cases ranked among only 27 cases in the Court's history for which same-day audio was made available to the press and the public. *See Supreme Court to Allow Same-Day Audio in Travel Ban Case*, Fix the Court (April 13, 2018), https://perma.cc/K2PV-UYNL. The Supreme Court's decision to provide same-day audio of the *Hollingsworth*, *Windsor*, and *Obergefell* oral arguments underscores the value of recordings when reporting on judicial proceedings of historic significance, such as those concerning the constitutionality of same-sex marriage.

The value of recordings like those at issue here is not limited to contemporaneous reporting. Access to recordings of historic trials allows the news media and documentary filmmakers to explore the lessons learned from past proceedings. For example, sixty-five years after the first international criminal trials were held in Nuremburg, Germany in 1945, critics applauded a documentary film incorporating audio and video from the trials for its "newness and freshness" in allowing audiences to hear, for the first time, "the rationalizations of the Nazi leaders in their own voices" and for offering insight into then-reemerging issues in international law and policy. *See* Terry Carter, *A Long-Forgotten Film on the Nuremburg Trials Helps Rekindle Interest in the Holocaust*, ABA Journal (Feb. 1, 2011), https://perma.cc/7T5M-8CQD; *see also* A.O. Scott, *Rare Scenes Re-Emerge from Nuremberg Trials*, N.Y. Times (Sept. 28, 2010), https://perma.cc/CH68-P4QD (noting that despite the breadth of other material available about the Nuremberg trials,

"[c]ourtroom scenes—of [defendants] and others in the dock, listening on headphones as their deeds are enumerated and explained . . . arrive with the sickening shock of discovery, and with the anguished question that must have been on many minds in 1945: how did this happen?").

Perry v. Schwarzenegger was an historic, first-of-its-kind judicial proceeding. Public interest in the trial, and its role in the history and evolution of civil liberties, will continue for generations. Providing access to the Recordings will allow the news media and documentarians to engage in robust, nuanced reporting on a matter of vital historic significance for decades to come, in a way that would be otherwise impossible.

III. Any continued sealing of the Recordings must be narrowly tailored.

This Court's Order provides that, absent "compelling reasons for the seal to remain in place for an additional period of time," the Recordings shall be unsealed on August 12, 2020. *Perry*, 302 F. Supp. 3d at 1049. Proponents have offered no such compelling reasons for the seal to remain in place, nor have they identified any new evidence or changed circumstances which would justify continued sealing of the Recordings. Rather, Proponents merely reiterate the same generalized privacy concerns this Court found unpersuasive two years ago. *See id.* at 1055. However, even assuming, *arguendo*, that the Court were to find compelling interests sufficient to overcome the strong presumption in favor of access, wholesale continued sealing of the Recordings would not be justified. Rather, any continued restriction must be "narrowly tailored" to serve that interest. *See* Civil Local Rule 79-5(b) (requiring that sealing requests "be narrowly tailored to seek sealing only of sealable material"); *see also Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014) ("'We have explained that, at least in the context of civil proceedings, the decision to seal [an] entire record . . . must be necessitated by a compelling governmental interest and [be] narrowly tailored to that interest.'") (quoting *Perez–Guerrero v. U.S. Att'y. Gen.,* 717 F.3d 1224, 1235 (11th Cir.2013)).

Here, fifteen of the original witnesses for the plaintiffs in the trial have provided declarations in support of unsealing the Recordings, *see* Plaintiffs' Opp'n to Mot. to Continue the Seal at 9, Ex. B-P, and in 2012, one of the witnesses for the Proponents published an op-ed in *The New York*

Times in support of gay marriage. *See* KQED Inc.'s Opp'n to Defs.-Intervenors' Mot. to Continue the Seal at 20. Proponents have put forth no new or compelling evidence of a potential threat to the remaining witness's privacy or security sufficient to overcome the strong presumption in favor of access to the Recordings. However, should the Court conclude that a compelling interest does exist, it should employ the least restrictive means to protect that interest, for example, by redacting the testimony of the objecting witness in part or in whole, and unsealing the remainder of the Recordings.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court deny Proponents' Motion to Continue the Seal and that the Court release the Recordings to Movant on August 12, 2020, consistent with the Court's January 18, 2017 in this case.

Dated: May 13, 2020

Respectfully submitted,

/s/ *Katie Townsend*
Katie Townsend
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

APPENDIX A

Descriptions of Amici Curiae

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Berkeleyside Inc. publishes Berkeleyside, one of the leading independent, online news sites in the country. For 10 years, Berkeleyside has provided in-depth civic and accountability journalism on Berkeley, CA.

Boston Globe Media Partners, LLC publishes The Boston Globe, the largest daily newspaper in New England.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

Cable News Network, Inc. ("CNN"), a Delaware corporation, is a wholly owned subsidiary of Turner Broadcasting System, Inc., which is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded company. CNN is a portfolio of two dozen news and information services across cable, satellite, radio, wireless devices and the Internet in more than 200 countries and territories worldwide. Domestically, CNN reaches more individuals on television, the web and mobile devices

than any other cable TV news organization in the United States; internationally, CNN is the most widely distributed news channel reaching more than 271 million households abroad; and CNN Digital is a top network for online news, mobile news and social media. Additionally, CNN Newsource is the world's most extensively utilized news service partnering with hundreds of local and international news organizations around the world.

The California News Publishers Association ("CNPA") is a nonprofit trade association representing the interests of over 400 daily, weekly and student newspapers and news websites throughout California.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

CalMatters is a nonpartisan, nonprofit journalism organization based in Sacramento, California. It covers state policy and politics, helping Californians to better understand how their government works while serving the traditional journalistic mission of bringing accountability and transparency to the state's Capitol. The work of its veteran journalists is shared, at no cost, with more than 180 media partners throughout the state.

Dow Jones & Company is the world's leading provider of news and business information. Through *The Wall Street Journal*, *Barron's*, MarketWatch, Dow Jones Newswires, and its other publications, Dow Jones has produced journalism of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

Embarcadero Media is a Palo Alto-based 40-year-old independent and locally-owned media company that publishes the Palo Alto Weekly, Pleasanton Weekly, Mountain View Voice and Menlo Park Almanac, as well as associated websites. Its reporters regularly rely on the California Public Records Act to obtain documents from local agencies.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

The Inter American Press Association (IAPA) is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

Los Angeles Times Communications LLC and The San Diego Union-Tribune, LLC are two of the largest daily newspapers in the United States. Their popular news and information

websites, www.latimes.com and www.sduniontribune.com, attract audiences throughout California and across the nation.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

Mother Jones is a nonprofit, reader-supported news organization known for ground-breaking investigative and in-depth journalism on issues of national and global significance.

MPA – The Association of Magazine Media ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and

develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Sinclair is one of the largest and most diversified television broadcasting companies in the country. The Company owns, operates and/or provides services to 191 television stations in 89 markets. The Company is a leading local news provider in the country and has multiple national networks, live local sports production, as well as stations affiliated with all the major networks.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

TEGNA Inc. owns or services (through shared service agreements or other similar agreements) 46 television stations in 38 markets.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

Univision Communications Inc. (UCI) is the leading media company serving Hispanic America. UCI is a leading content creator in the U.S. and includes the Univision Network, UniMás and Univision Cable Networks.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTES

Date: June 17, 2020	**Time:** 28 minutes 1:59 p.m. to 2:27 p.m.	**Judge:** WILLIAM H. ORRICK
Case No.: 09-cv-02292-WHO	**Case Name:** Perry v. Schwarzenegger	

Attorney for Plaintiffs: Chris Dusseault
Attorney for Defendant/Intervenors: John Ohlendorph
Counsel for KQED: Thomas Burke

Deputy Clerk: Jean Davis **Court Reporter:** Katherine Sullivan

PROCEEDINGS

Hearing on Motion to Maintain Seal conducted via videoconference. Argument of counsel heard. The motion is taken under submission; written order to follow.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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KQED INC.'S APPENDIX IS SUPPORT OF OPPOSITION TO INTERVENORS-DEFENDANTS' MOTION FOR STAY PENDING APPEAL

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