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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

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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19
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21
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23
24
25
26
27
28

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 11

I. The Common-Law Right of Access Does Not Require the Unsealing and Public Dissemination of the Video Recordings After 10 Years. 11

a. Any Common-Law Rules Governing Access to the Video Recordings Are Displaced by Local Rule 77-3. 11

b. The Common-Law Right of Access Does Not Apply to Wholly Derivative Documents Such as the Video Recordings. 15

c. Any Common-Law Right of Access Continues To Be Overridden by the Compelling Reasons To Maintain the Seal. 17

II. Local Rule 79-5 Does Not Require the Unsealing and Public Dissemination of the Video Recordings After 10 Years. 20

a. Local Rule 79-5(g) Does Not Apply to “Records” of this Nature. 21

b. Local Rule 77-3’s Specific Bar on Broadcasting the Video of Trial Proceedings Governs. 22

c. Even if Local Rule 79-5(g) Applies, the Compelling Reasons To Maintain the Seal Establish “Good Cause” for its Indefinite Extension. 22

III. Even if Local Rule 79-5(g) Applies, its Presumptive 10-Year Period Did Not Start To Run Until the Case Was Closed in 2012. 23

IV. The First Amendment Does Not Require the Unsealing and Public Dissemination of the Video Recordings. 24

CONCLUSION 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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23
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25
26
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TABLE OF AUTHORITIES

Cases **Page**

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Bonneau v. Centennial Sch. Dist. No. 28J, 666 F.3d 577 (9th Cir. 2012)....23

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Conway v. United States, 852 F.2d 187 (6th Cir. 1988)....25

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661 F.3d 417 (9th Cir. 2011)....13

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2016 WL 454082 (N.D. Cal. Feb. 5, 2016)....19

Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978)....12, 13, 17, 24

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United States v. Beckham, 789 F.2d 401 (6th Cir. 1986) 24
United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986) 25
United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983) 25
United States v. Kerley, 753 F.2d 617 (7th Cir. 1985) 25
United States v. McDougal, 103 F.3d 651 (8th Cir. 1996) 15, 16, 24
United States v. Mouzin, 559 F. Supp. 463 (C.D. Cal. 1983) 13
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Constitutional Provisions, Statutes, and Rules

11 U.S.C. § 107(b) 13
28 U.S.C. § 2071 13
FED. R. CIV. P. 5.2 13
FED. R. CRIM. P. 6(e) 13
FED. R. CRIM. P. 15(a) 15, 16
CAL. CONST. art. I, § 7.5 3
N.D. CAL. L.R.
77-3 .... 13, 14, 22
77-3 (2009) 1
79-5(a) 21
79-5(d) 21
79-5(g) 20, 22
79-5(f) (2010) 20

Other

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TO THE PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on June 17, 2020, at 2:00 p.m., or as soon as the matter may be heard, Defendants-Intervenors will move the Court, the Honorable William H. Orrick presiding, to continue the seal on the videotape recordings of the trial proceedings in this matter.

INTRODUCTION

A video recording of the trial in this case exists for one reason and one reason only: former Chief Judge Vaughn Walker's solemn assurances, in specific response to Proponents' firm objection to the recording of the trial, that he was making the video recording *solely* for his use in chambers to assist him in crafting a decision. As the Ninth Circuit held in rebuffing an earlier effort to access and broadcast the recording, Judge Walker both before and after trial made "unequivocal assurances that the video recording at issue would not be accessible to the public," *Perry v. Brown*, 667 F.3d 1078, 1085 (9th Cir. 2012)—representing, indeed, that any such risk "had been *eliminated*," *id.* (quoting *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010)).

This commitment was compelled by binding law and "by the Supreme Court's ruling in this very case." *Id.* at 1087–88. In the weeks before trial, Judge Walker had tried to arrange the broadcast of the proceedings. But that effort was flatly contrary to this Court's own Local Rules, which at the time prohibited recording trial proceedings for broadcast or public dissemination. N.D. CAL. L.R. 77-3 (2009). So extraordinary was Judge Walker's attempt to circumvent this rule that the Supreme Court found it necessary to exercise its supervisory power over the federal judicial system by entering an emergency stay halting Judge Walker's efforts. *See Hollingsworth v. Perry*, 558 U.S. 183 (2010).

Accordingly, had Judge Walker not solemnly committed that the recordings were being made *solely* for his use *in camera*, the creation of those recordings would have plainly violated this Court's local rules, which "have the force of law," *id.* at 191 (quotation marks omitted), and Proponents "would very likely have sought an order directing him to stop recording forthwith, which, given the prior temporary and further stay they had just obtained from the Supreme Court, they might well have secured," *Perry*, 667 F.3d at 1085. And because Local Rule 77-3 forbade not only the public broadcast of trial proceedings but also the *recording* of those proceedings for *later*

1 dissemination and broadcast, had Judge Walker at the end of the trial not placed the recordings
2 under seal and publicly assured Proponents that any risk of their public dissemination "had been
3 eliminated," *Perry*, 704 F. Supp. 2d at 944, his actions would again have violated the Rule, and
4 Proponents would again have been forced to seek the extraordinary intervention of a higher court.
5 The Ninth Circuit recognized all of this eight years ago, holding in a unanimous opinion by Judge
6 Reinhardt that because of Judge Walker's repeated and solemn assurances, "the integrity of the
7 judicial system" demanded that "the recording must remain under seal." *Perry*, 667 F.3d 1087. The
8 arguments for lifting the seal now are no more persuasive today.

9 The seal on the video recordings must be maintained for multiple independent reasons.
10 Local Rule 77-3 unambiguously bars the broadcast of the recordings—today no less than eight
11 years ago—displacing any common-law right that might otherwise require public disclosure. And
12 Local Rule 79-5—which makes certain documents filed under seal presumptively publicly available
13 ten years after the case is closed—does not require disclosure either. Rule 79-5's general rules
14 governing sealed filings do not apply to the recordings here; and even if Rule 79-5 could be read as
15 applying, its terms, too, would be overridden by Rule 77-3's *specific* rule forbidding public
16 dissemination and broadcast of this *particular* type of sealed document. Finally, even if there *were*
17 a common-law right eventually to access the recordings (there is not), and even if Rule 79-5 *did*
18 presumptively require unsealing after 10 years (it does not), the recordings here must still remain
19 sealed. For the foundational interest the Ninth Circuit identified in 2012—"[t]he interest in
20 preserving respect for our system of justice," *Perry*, 667 F.3d at 1088—is still compelling and still
21 requires that the records be kept under seal. "[T]he integrity of the judicial system," *id.* at 1087, is a
22 value that knows no expiration date; and ensuring that "our justice system [continues] to function
23 properly," *id.* at 1088, will be an interest of the highest order for as long as that system endures.

24 Accordingly, the seal protecting the video recordings from disclosure must be permanently
25 maintained. While this Court previously rejected that contention in its January 17, 2018 Order
26 provisionally unsealing the recordings on August 12, 2020, it was wrong to do so. The Court should
27 reconsider the matter and hold that the seal must remain in place.
28

BACKGROUND

1. This case began as a challenge to the constitutionality of California's Proposition 8, which provided that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. The suit was assigned to the Honorable Vaughn R. Walker, who at the time was the Chief Judge of the Northern District of California. The state officials named as defendants declined to defend Proposition 8, but official proponents of the voter-initiated measure and their ballot measure committee (collectively "Proponents") intervened and defended against Plaintiffs' claims.

As the case proceeded, Judge Walker expressed a strong desire to videotape and broadcast the trial, and he importuned counsel for the parties to consent to the idea. Proponents objected to both videotaping and broadcasting the trial, repeatedly warning that several of their witnesses would decline to testify if the proceedings were broadcast. *See Hollingsworth v. Perry*, 558 U.S. 183, 186, 195 (2010). On December 21, 2009 (three weeks before the start of trial), a group of media outlets (collectively the "Media Coalition") informed the district court of the group's interest in providing "camera coverage to broadcast and webcast the . . . trial proceedings." Dkt. #313. On January 6, 2010 (five days before the start of trial), Judge Walker announced that the trial proceedings would be streamed live to several courthouses in other cities and that the trial would be video recorded for daily broadcast via the internet.

Proponents objected, citing the district court's local rules prohibiting, consistent with longstanding judicial policy, the recording and broadcast of judicial proceedings. Judge Walker, as the Supreme Court later described, then "attempted to revise [the local] rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States," in order "to allow broadcasting of this high-profile trial without any considered standards or guidelines in place." *Hollingsworth*, 558 U.S. at 196.

2. On the morning of January 11, 2010, just before commencement of the trial, the Supreme Court entered a temporary emergency stay, directing that Judge Walker's order "permitting real-time streaming is stayed except as it permits streaming to other rooms within the confines of the courthouse in which trial is to be held" and that "[a]ny additional order permitting

broadcast of the proceedings is also stayed." *Hollingsworth v. Perry*, 558 U.S. 1107 (2010). This temporary stay was set to expire on Wednesday, January 13, when the Court would enter a decision on Proponents' stay application. *Id*.

At the opening of trial later that morning, Plaintiffs asked Judge Walker to continue recording the proceedings for subsequent public broadcast "in the event the stay is lifted" on January 13. Trial Tr. at 15 (Vol. 1). Judge Walker accepted this proposal over Proponents' objection that recording the proceedings was not "consistent with the spirit of" of the Supreme Court's temporary stay. *Id.* at 16.

Far from lifting the stay, on January 13, the Supreme Court reaffirmed and extended the stay "pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus." *Hollingsworth*, 558 U.S. at 199. As the Supreme Court explained, Judge Walker's "eleventh hour" attempt to amend the district court's rules to permit public broadcasting of the trial outside the courthouse was procedurally invalid. *Id*. His efforts were also contrary to the longstanding, considered policy of the Judicial Conference of the United States against such broadcasts, *see id*. at 193–94, as well as the then-existing version of Local Rule 77-3, which had "the force of law" and prohibited "public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding," *id.* at 191 (quoting Rule 77-3). Thus, as the Supreme Court concluded, the district court's attempt to broadcast the trial "complied neither with existing rules or policies nor the required procedures for amending them." *Id*. at 196. The Supreme Court further concluded that even had Rule 77-3 been validly amended to allow the public broadcast of selected trials pursuant to a pilot program, this "high-profile trial that would include witness testimony about a contentious issue" was "not a good one for a pilot program." *Id*. at 198–99.

3. Early the next day, Proponents filed a letter with Judge Walker "request[ing] that [he] halt any further recording of the proceedings in this case, and delete any recordings of the proceedings to date that have previously been made." Dkt. #452. Proponents explained that the Supreme Court's ruling made clear that Local Rule 77-3 "banned the *recording* or broadcast of court proceedings." *Id.* (quoting *Hollingsworth*, 558 U.S. at 187).

A few hours later, Judge Walker opened that day's proceedings by reporting that, "in light of the Supreme Court's decision yesterday, . . . [he was] requesting that this case be withdrawn from the Ninth Circuit pilot project." Trial Tr. at 674 (Vol. 4). Proponents then asked "for clarification . . . that the recording of these proceedings has been halted, the tape recording itself." *Id.* at 753. When Judge Walker responded that the recording "ha[d] *not* been altered," Proponents reiterated their contention (made in their letter submitted earlier that morning) that, "in the light of the stay, . . . the court's local rule . . . prohibit[s] continued tape recording of the proceedings." *Id.* at 754 (emphasis added).

Judge Walker nevertheless insisted on recording the trial over these objections. *See* Trial Tr. at 754. Judge Walker stated that Rule 77-3 "permits . . . recording for purposes of use in chambers," and indicated that the recording "would be quite helpful to [him] in preparing the findings of fact." *Id.* He assured Proponents that "that's the purpose for which the recording is going to be made going forward. *But it's not going to be for purposes of public broadcasting or televising*." *Id.* (emphasis added). Proponents relied on these assurances in acceding to Judge Walker's insistence on continuing the video recording. As the Ninth Circuit concluded, "Judge Walker could not lawfully have continued to record the trial without assuring the parties that the recording would be used only for a permissible purpose." *Perry v. Brown*, 667 F.3d at 1087. For "[h]ad Chief Judge Walker not made the statement he did, Proponents would very likely have sought an order directing him to stop recording forthwith, which, given the prior temporary and further stay they had just obtained from the Supreme Court, they might well have secured." *Id.* at 1085. Lest there be any doubt, Proponents would *definitely* have sought such an order.

Consistent with this assurance, on January 15, Judge Walker withdrew this case from the pilot program that had purportedly authorized public broadcast of the trial. *See* Dkt. #463. Based on Judge Walker's unequivocal commitment and the withdrawal of the order purporting to authorize public broadcast, Proponents took no further action to prevent the recording.

On May 18, 2010, the Media Coalition informed this Court of its "interest in recording, broadcasting and webcasting the closing arguments." Dkt. #670. A few weeks later, Judge Walker denied that request. *See* Dkt. #682.

1 On May 31, Judge Walker *sua sponte* invited the parties "to use portions of the trial
2 recording during closing arguments." Dkt. #672. The parties were instructed to "maintain as strictly
3 confidential any copy of the video pursuant to paragraph 7.3 of the protective order," *id.*, which
4 restricts "highly confidential" material to the parties' counsel and experts and to the district court
5 and its personnel. *See* Dkt. #425 at 8–9. Plaintiffs requested and were given a copy of the recording
6 of the entire trial, *see* Dkt. #675, brief excerpts of which they played during closing argument, *see*
7 Dkt. #693 at 2961, 2974–77. Intervenor San Francisco requested and was given portions of the trial
8 recording, Dkt. #674, but did not play any of the recording during closing argument. Proponents
9 neither requested nor received a copy of the trial recording.

10 After closing argument, Proponents moved Judge Walker for an order requiring that all
11 copies of the trial recording be returned to the Court immediately. *See* Dkt. #696. On August 4,
12 2010, Judge Walker issued his substantive ruling declaring Proposition 8 unconstitutional, and in it,
13 he denied this motion. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010).
14 Instead, he "DIRECTED" the clerk to "file the trial recording under seal as part of the record" and
15 allowed Plaintiffs to "retain their copies of the trial recording pursuant to the terms of the protective
16 order." *Id.* Elsewhere in the same order, Judge Walker stated that "the potential for public
17 broadcast" of the trial proceedings "had been *eliminated*." *Id.* at 944 (emphasis added).

18 4. Despite Rule 77-3, the policies of the Judicial Conference and this Court's Judicial
19 Council, the Supreme Court's prior decision in this case, the sealing order, and his own solemn
20 commitment in open court, Judge Walker, while delivering a speech at the University of Arizona on
21 February 18, 2011, played a portion of the video recording of the cross-examination of one of
22 Proponents' expert witnesses, who had testified at trial in reliance on Judge Walker's promise that
23 the recording would not be publicly broadcast outside the courthouse. *See* Judge Vaughn Walker,
24 History of Cameras in the Courtroom at 33:13–37:04 (Feb. 18, 2011), *available at* https://goo.gl/
25 ZG8qji. The speech was videotaped by C-SPAN, and it was subsequently broadcast on C-SPAN
26 several times beginning on March 22. *See* C-SPAN, Judge Vaughn Walker on Cameras in the
27 Courtroom, https://goo.gl/Rj7CYq ("Airing Details"). Less than two weeks later, Judge Walker
28 resigned from the bench, but he continued to display excerpts from the trial recording in connection

with his teaching and public speaking. *See* Dkt. #816-1 ex. 20.

Promptly after learning of Judge Walker's activities, on April 13, Proponents moved the Ninth Circuit (where the appeal in this case was pending) to order the return of all copies of the trial recording. *See* Appellants' Mot. for Order Compelling Return of Trial Recordings, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 13, 2011), Dkt. #338-1. On April 15, Plaintiffs opposed that motion and filed a cross-motion to unseal the trial recording. *See* Pls.-Appellees' Opp'n to Mot. Regarding Mot. to Unseal, *Perry*, No. 10-16696 (9th Cir. Apr. 15, 2011), Dkt. #340. On April 18, the Media Coalition moved to intervene for the "purpose of joining in the Motion to Unseal filed by Plaintiffs-Appellees," asserting that the "profound" "interest of the Media Coalition in [that issue] cannot be denied." Media Coal.'s Mot. to Intervene at 1–4, *Perry*, No. 10-16696 (9th Cir. Apr. 18, 2011), Dkt. #343.

On April 27, the Ninth Circuit transferred all those motions to this Court for resolution. *See* Order, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 27, 2011), Dkt. #348-1. The next day, Judge Ware, who had replaced Judge Walker as the presiding judge, issued an order requiring "[a]ll participants in the trial, including [Judge Walker], who are in possession of a recording of the trial proceedings" to appear at a hearing on Proponents' motion and to "show cause as to why the recordings should not be returned to the Court's possession." Dkt. #772 at 2. Shortly thereafter, Judge Walker lodged with this Court the chambers copy of the trial recording that he had taken with him when he left the bench and was excused from the hearing. *See* Dkt. ##777, 791.

On June 14, 2011, Judge Ware denied Proponents' motion for the return of all copies of the trial recordings and set a subsequent hearing to consider the cross-motion to lift the seal on the trial recording. Dkt. #798. He found "no indication" that any party had "violated the terms of the Protective Order" and thus concluded that the parties "may retain their copies of the trial recordings." *Id*. at 4. The district court "g[ave] notice that it intend[ed] to return the trial recordings to Judge Walker as part of his judicial papers," and invited "[a]ny party who objects" to "articulate its opposition" in supplemental briefing. *Id.* at 5. In response, Proponents filed a supplemental brief opposing the return of the trial recording to former Judge Walker. Dkt. #806.

On August 29, this Court held the hearing on the motion to lift the seal. *See* Dkt. #810. On

September 19, Judge Ware granted that motion, concluding that the common-law right of access applies to the recording and requires that it be made public. Dkt. #812 at 6–8. Accordingly, he directed the clerk "to place the digital recording in the publicly available record of this case." *Id.* at 2. In the same order, Judge Ware directed that a copy of the recording be returned to Judge Walker.

5. Proponents immediately appealed and asked the Ninth Circuit to stay the order lifting the seal. *See* Mot. for Stay Pending Appeal, *Perry v. Brown*, No. 11-17255 (9th Cir. Sept. 23, 2011), Dkt. #3-1. The Ninth Circuit granted Proponents' motion for a stay, *Perry v. Brown*, No. 11-17255 (9th Cir. Oct. 24, 2011), Dkt. #16, and in February 2012, in a decision authored by Judge Reinhardt, it concluded that this Court had abused its discretion in ordering that the seal be lifted.

Beginning with the common-law right of access that Judge Ware had relied upon, the Ninth Circuit assumed without deciding that the right applied, but found a "compelling reason"—namely, the need to uphold "judicial integrity"—"for overriding the common-law right." *Perry*, 667 F.3d at 1084–85. The court focused on Judge Walker's "unequivocal assurances that the video recording at issue would not be *accessible to the public*." *Id.* at 1085 (emphasis added). Those assurances came in two forms: (1) his oral statement, "following the Supreme Court's issuance of a stay against the public broadcast of the trial," that "he was going to continue 'taking the recording for purposes of use in chambers,' but that the recording was 'not going to be for purposes of public broadcasting or televising,' " *id.*; and (2) the statement in his written opinion that "the potential for public broadcast in the case had been *eliminated*," *id.* (quoting *Perry*, 704 F. Supp. 2d at 944). These statements, the court concluded, foreclosed any chance that the sealing of the trial recording might "be subject to later modification" because Judge Walker "promised the litigants that the conditions under which the recording was maintained *would not change*—that there was *no possibility* that the recording would be broadcast to the public *in the future*." *Id.* at 1086 (first emphasis in original; additional emphases added). The Ninth Circuit thus concluded that Judge Walker made "solemn commitment[s]" that were "worthy of reliance" and "compelled by the Supreme Court's ruling in this . . . case"—and that Proponents "reasonably relied" on them. *Id*. at 1086–87.

In light of Judge Walker's unequivocal assurances, the Ninth Circuit observed, "[i]t would be unreasonable to expect Proponents . . . to foresee that a recording made for such limited purposes

might nonetheless be *released for viewing by the public*, either during or *after the trial*." *Id.* at 1085 (emphases added). Absent those assurances, the court stated, "Proponents would very likely have sought an order" forcing Judge Walker "to stop recording" or "ensur[ing] that the recording would not be made available for public viewing." *Id.*

The Ninth Circuit then affirmed "the importance of preserving the integrity of the judicial system," *id.* at 1087, and explained that "[l]itigants and the public must be able to trust the word of a judge if our justice system is to function properly," *id.* at 1087–88; *see also id.* at 1081. "To revoke Chief Judge Walker's assurances after Proponents had reasonably relied on them," the court held, "would cause serious damage to the integrity of the judicial process"—damage that provides a " 'compelling reason' . . . to keep the recording sealed." *Id.* at 1087; *see also id.* at 1088. Because any order unsealing the recording "would permit the broadcast of the recording for all to view," *id.* at 1080, the Ninth Circuit held that "to preserve the integrity of the judicial system, the recording must remain under seal," *id.* at 1087.

Finally, the Ninth Circuit made short work of the Media Coalition's additional argument that "the First Amendment right of public access" requires that the seal be lifted. *Id.* at 1088. The court assumed without deciding that "the First Amendment applies" to "civil proceedings," but nevertheless concluded that "the integrity of the judicial process is a compelling interest that in these circumstances would be harmed by the nullification of the trial judge's express assurances, and that there are no alternatives to maintaining the recording under seal that would protect the compelling interest at issue." *Id.*

The Ninth Circuit thus "reverse[d] the order of the district court as an abuse of its discretion and remand[ed] with instructions to maintain the trial recording under seal." *Id.* at 1088–89. The Ninth Circuit additionally ordered that "the district court shall not return to former Chief Judge Walker the copy of the recording that he has lodged with the court." *Id*. at 1089 n.7. Approximately three weeks later, the Ninth Circuit issued its mandate to this Court. *See* Mandate, *Perry v. Brown*, No. 11-17255 (9th Cir. Feb. 24, 2012), Dkt. #74. And on August 27, 2012, this Court entered its final judgment and ordered the Clerk to close the case. *See* Dkt. #842.

6. Less than five years later, KQED, one of the members of the Media Coalition,

renewed its efforts to obtain and broadcast the video recording of the trial. On April 28, 2017, KQED filed a second motion to unseal the video recordings, reiterating essentially the same arguments it had advanced before this Court in 2012. Lifting the seal and making the recordings available for broadcast is "required under the common-law right of access," KQED maintained, and "the First Amendment provides independent grounds to unseal [the videotapes]." Dkt. #852 (initial capitalization omitted). According to KQED, the Ninth Circuit's 2012 decision in *Perry* did not foreclose its request "because so much has changed since the Ninth Circuit ordered that the tapes remain sealed." *Id.* at 1. On May 31, 2017, Plaintiffs filed a response supporting KQED's second motion to unseal. Dkt. #867. The State Defendants likewise filed a short notice indicating they did not oppose the request. Dkt. #869. Proponents opposed the motion. Dkt. #864.

Because Judge Ware had retired in 2012, KQED's motion was referred to Judge William H. Orrick. Judge Orrick held a hearing on the motion on June 28, 2017, and on January 17, 2018, he entered an order ruling on the motion. Dkt. #878. While the Court concluded that the Ninth Circuit's decision in *Perry* continued to "preclude[ ] [the videotapes'] release at this juncture," it "further rule[d] that the recordings shall be released to [KQED] on August 12, 2020, absent further order from this Court that compelling reasons exist to continue to seal them." *Id.* at 14–15. The Court accepted KQED's argument that "the common-law right of access applies to the video recordings." *Id.* at 10. And while it concluded that "the compelling justification identified by the Ninth Circuit in 2012—namely, judicial integrity—continues to exist and precludes release of the video recordings at this juncture," the Court did not believe that this justification "exists in perpetuity." *Id.* at 12. Rather, the Court determined that the consideration found determinative by the Ninth Circuit in *Perry* was circumscribed by "the rules of *this court*," *id.* at 13—in particular, Civil Local Rule 79-5's provision that "[a]ny document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed." Finally, the Court also held that the "analysis would be no different [under the] First Amendment right of access instead of the common-law right of access," since "compelling justifications must exist to satisfy both standards." *Id.* at 14.

Accordingly, the Court ordered that the recordings "shall be released to [KQED] on August

12, 2020, absent further order from this Court that compelling reasons exist to continue to seal them." *Id.* at 15. Although judgment in the case was not actually entered—and the case therefore not formally closed—until August 27, 2012, Dkt. #842, the Court reasoned that it was "functionally . . . 'closed' " two years earlier, on August 12, 2010, when Judge Walker had first entered a permanent injunction against Proposition 8—and it therefore calculated the 10-year period from that date in 2010. *Id.* at 13. The Court provided that any motion by Proponents to continue the seal should be filed no later than April 1, 2020. *Id.* at 15.

Proponents appealed the Court's January 17, 2018 Order to the Ninth Circuit, but on April 19, 2019, that court dismissed the appeal "without prejudice for lack of jurisdiction." Mem. Order, *Perry v. Schwarzenegger*, No. 18-15292 (Apr. 19, 2019), ECF No. 57-1. The Ninth Circuit concluded that this Court's order provisionally unsealing the video recordings on August 12, 2020, was not an appealable final decision in light of the Order's invitation of a further motion to continue the seal. Proponents now move to continue the seal.

ARGUMENT

The Court should continue to keep the video recordings under seal for the same reasons that it should have denied KQED's motion to lift the seal in the first place. The common-law right of access does not apply to the recordings to begin with, for multiple independent reasons; this Court's Local Rule 79-5 likewise does not require the recordings' public release after 10 years—and it certainly does not do so as early as August 12 of this year, given that the case was not formally closed until August of 2012; and binding precedent forecloses any suggestion that the disclosure and public dissemination of the video recordings is required by the First Amendment.[1] This Court previously rejected these arguments in its January 17, 2018 Order, but it was wrong to do so, and it should reconsider them now, resolve them in Proponents' favor, and hold that the video recordings must remain permanently under seal.

I. THE COMMON-LAW RIGHT OF ACCESS DOES NOT REQUIRE THE UNSEALING AND PUBLIC DISSEMINATION OF THE VIDEO RECORDINGS AFTER 10 YEARS.

A. Any Common-Law Rules Governing Access to the Video Recordings Are

[1] Proponents also preserve all of the additional arguments against lifting the seal articulated in their brief opposing KQED's motion to lift the seal, Dkt. #864.

Displaced by Local Rule 77-3.

"[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). While this traditional right "historically developed to accomplish many of the same purposes as are advanced by the first amendment," it "is not of constitutional dimension." *Valley Broad. Co. v. United States Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1293 (9th Cir. 1986). Rather, this right of access is a "common-law right," *id.*—a judge-made right, a creature of the courts themselves, in exercise of each court's "supervisory power over its own records and files," *Nixon*, 435 U.S. at 598.

Because the common-law right lacks any "constitutional dimension," *Valley Broadcasting*, 798 F.2d at 1293, it may be displaced by positive law in the same fashion as any other judge-made rule. Federal courts "do not possess a general power to develop and apply their own rules of decision," and so the few, isolated enclaves of federal common law exist only by "necessary expedient." *City of Milwaukee v. Illinois and Michigan* (*Milwaukee II*), 451 U.S. 312, 314 (1981). And where positive, enacted law "addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 304. Thus, "federal regulations may . . . pre-empt the field of federal common law." *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 107 (1972).

Indeed, this displacement is demonstrated by the very Supreme Court decision that first recognized the common-law right of access to judicial records. In *Nixon v. Warner Communications*, the Court dealt with an attempt by media broadcasters to access President Nixon's Watergate tapes, which had been introduced into evidence in the criminal trial of several of Nixon's associates. The Supreme Court assumed for the sake of analysis that the common-law right of access applied to the tapes, and it noted that accordingly "we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts." 435 U.S. at 602. The Court concluded, however, that it "need not decide how the balance would be struck" between these interests, because access to the tapes was instead governed by the Presidential Recordings Act. *Id.* at 603. "[T]his congressionally prescribed avenue of public

access," the Court held, was "a decisive element in the proper exercise of discretion with respect to release of the tapes," *Id.* at 605–06, 607. "Simply stated, the policies of the Act can best be carried out under the Act itself." *Id.* at 606. *See also United States v. Mouzin*, 559 F. Supp. 463, 464 (C.D. Cal. 1983) (noting that in *Nixon*, "the Court . . . found that Congress had displaced the common law right of access as to presidential tapes by the Presidential Recordings Act").

Following *Nixon*, courts have repeatedly found the common-law right of access displaced by positive law. The Ninth Circuit, for instance, has held that 11 U.S.C. § 107(b)'s limitations on when bankruptcy-court filings may be disclosed "displaces the common law right of access" because it "speaks directly to, and diverges from, the common law right." *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 430 (9th Cir. 2011). Similarly, the common-law right of access is supplanted by FED. R. CRIM. P. 6(e)'s rules governing recording and disclosure of grand jury proceedings. *See, e.g.*, *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998). And it is likewise displaced by FED. R. CIV. P. 5.2, which does not permit documents containing minors' names to be unsealed unless they are redacted. *See Offor v. Mercy Med. Ctr.*, 167 F. Supp. 3d 414, 447 (E.D.N.Y. 2016), *aff'd in part*, *vacated in part*, 676 F. App'x 51 (2d Cir. 2017) (Rule 5.2 "overcomes the presumptive common-law right of access to judicial documents").

As in these examples, any common-law right of access here has been displaced by a positive enactment governing access to the video recordings in question: Rule 77-3. That Rule was promulgated pursuant to Congress's authorization to "all courts established by Act of Congress" to "prescribe rules for the conduct of their business," 28 U.S.C. § 2071, and the Supreme Court has confirmed that it has "the force of law," *Hollingsworth*, 558 U.S. at 191. Because Rule 77-3 bars the public dissemination of the video recordings at issue in this case, it directly forecloses KQED's claim that it may access and broadcast the recordings under the common law.

Rule 77-3 provides:

> 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.

N.D. Cal. L.R. 77-3.

By its plain terms, this provision expressly prohibits not only the "recording . . . in the courtroom . . . [of] any judicial proceeding," but also the "public broadcasting or televising" of such a recording. *Id.*; *see also Hollingsworth*, 558 U.S. at 184. Nor does the Rule draw any distinction between live broadcasting during a trial and subsequent broadcasting of a video recording of the trial; rather, it applies by its plain terms regardless of when the public dissemination occurs. Indeed, the obvious import of the prohibition on "recording for those purposes" is to extend the prohibition against "public broadcasting or televising" to subsequent broadcasts of recorded proceedings. Accordingly, Judge Walker's decision to record the trial proceedings over Proponents' objection was lawful only on the basis of his unequivocal representation that the recording would be used only in chambers and would not be publicly broadcast beyond the confines of the courthouse. In like form, his decision to place the trial recording in the record was lawful only because he did so under seal, thereby preventing its public dissemination. And it necessarily follows that lifting the seal on August 12, 2020 to permit public dissemination and broadcasting of the trial proceedings is plainly contrary to the Rule.

This Court's January 17, 2018 Order rejected this conclusion, reasoning that "a recording of the proceedings *was made* and was, without separate objection by Proponents, made part of the trial record." Dkt. #878 at 11. Accordingly, the Court reasoned that "Rule 77-3 . . . [does not] preclude the public's right of access from attaching to the video recordings." *Id.* But neither of these actions granted the Court license to disregard Rule 77-3's dictates. As just shown, and as the Ninth Circuit has found, the recording "*was made*," *id.*, because—and *only* because—of Judge Walker's "unequivocal assurances . . . that the recording was 'not going to be for purposes of public broadcasting or televising,' " *Perry*, 667 F.3d at 1085. Likewise, Proponents did not act to prevent the inclusion of the recordings as "part of the trial record," Dkt. #878 at 11, *only because* of Judge Walker's simultaneous order maintaining them under seal and his solemn, unequivocal promise that any "potential for public broadcast" was thereby "eliminated." *Perry*, 704 F. Supp. 2d at 929, 944.

Because of these repeated assurances—and the extraordinary intervention of the Ninth Circuit and the Supreme Court, at Proponents' request—the recordings have thus far remained under seal, preventing their "public broadcasting or televising," in compliance with Rule 77-3. Those assurances cannot be cast aside now.[2]

Accordingly, the public release and dissemination of the video recordings would be flatly contrary to Rule 77-3, which "speaks directly to" whether the trial recording may be publicly broadcast and thus clearly preempts any common-law right of access that might otherwise apply. *American Elec. Power v. Connecticut*, 564 U.S. 410, 424 (2011).

B. The Common-Law Right of Access Does Not Apply to Wholly Derivative Documents Such as the Video Recordings.

The common law does not require the disclosure and broadcast of the video recordings for another reason: the common-law right simply does not apply to documents like these, which merely record testimony and proceedings that occurred in the courtroom and were open to the public.

The decision in *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996), is closely on point. In *McDougal*, a group of media interests sought access to a videotape of deposition testimony by President Clinton, which he had made pursuant to FED. R. CRIM. P. 15 as a witness in a criminal trial of two individuals under prosecution in connection with the Whitewater scandal. The videotaped deposition testimony was presented to the jury in open court, in proceedings that were open to the public and the press; and a transcript of the deposition was entered into evidence and contemporaneously released to the public and members of the press. *Id.* at 653. The press, however, also sought to obtain a copy of the video recording of the deposition. The district court denied that request, and the Eighth Circuit affirmed. *Id.* at 654, 660.

The court assumed that when the videotape of President Clinton's deposition was "played in open court," it was thereby "introduced into evidence," *id.* at 655, 656; but it nonetheless held "as a

[2] Nor does the analysis change because "the current Northern District and Ninth Circuit rules and policies *allow* for public broadcast of proceedings." *Id.* at 11. The current version of Rule 77-3 permits "public broadcasting or televising" *only* for cases "participati[ng] in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States," and that exception was not lawfully added to the Rule until after the trial in this case had occurred. *See Hollingsworth*, 558 U.S. at 196. In all events, this case was formally *withdrawn* from the invalid pilot program by Judge Walker, so it plainly cannot authorize public broadcast of the trial recording here.

matter of law that the videotape itself is not a judicial record to which the common law right of public access attaches" because of its derivative character. Rather than "recordings of the primary conduct of witnesses or parties," the Eighth Circuit reasoned,

> the videotape at issue in the present case is merely an electronic recording of witness testimony. Although the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom, we hold that there was, and is, no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony.

Id. at 657. So too here. The trial proceedings in this case were "open to the public," *id.* at 653, and the written transcripts of these proceedings have long ago been "released to the public." *Id.* at 653. There simply is "no additional common law right to obtain" a video of the proceedings. *Id.* at 657.

This Court's earlier decision attempted to distinguish *McDougal*, reasoning that the case "dealt with a markedly different situation" because here "the video recordings at issue are recordings *of the court proceedings themselves*, not a prior recording of testimony simply played at trial." Dkt. #878 at 11. Not so. The recording in *McDougal* was also a recording of a "court proceeding [ ]" itself—witness testimony offered in the underlying trial, which only happened to be presented by videotape because the court had concluded that "exceptional circumstances" warranted President Clinton's testimony by video deposition rather than in open court. *See* FED. R. CRIM. P. 15(a); *see also McDougal*, 103 F.3d at 653.

Indeed, to the extent any distinction exists between the two video recordings, the recording in *this* case is even *more* obviously derivative. The broadcasters in *McDougal*, ironically, offered a similar characterization of the deposition recording there as a reason that *access was required*, arguing that the recording should be treated "like any other piece of evidence introduced or used in the courtroom." *Id.* at 655. But the court in *McDougal rejected* any such distinction, concluding that the taped deposition testimony must be treated as derivative, just like any "other electronic recording of live witness testimony in the courtroom," in order to ensure "that Rule 15 deponents are treated equally to witnesses who testify in court, in person." *Id.* at 657. The January 17, 2018 Order's attempt to distinguish *McDougal* thus gets the matter exactly backwards; in fact, *McDougal*'s reasoning applies *a fortiori* to the recordings here.

That Order also sought to brush *McDougal* aside as purportedly contrary to "the strong

presumption in favor of copying access applicable in the Ninth Circuit to audio and videotape exhibits as they are received in evidence during a criminal trial." Dkt. #878 at 11–12 (quotation marks omitted). But that rejoinder simply begs the question, since the recordings here are not "videotape exhibits . . . received in evidence during a . . . trial," they are derivative recordings *of the trial itself*. Thus—for the very reasons *McDougal* identifies—this presumption *does not apply*.

Indeed, far from applying "to all judicial and quasi-judicial documents," the common-law right of access has no application "when there is neither a history of access nor an important public need justifying access." *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989). Nor does it apply to documents that "have traditionally been kept secret." *Id.* There is, of course, no history of access to video recordings of federal trial proceedings; and the video recordings in this case in particular are akin to private documents not traditionally exposed to the public. *See Perry*, 667 F.3d at 1090, 1087. Nor is there an important public need to access them, given that the trial itself was open to the press and public and the official transcript is readily available.

C. Any Common-Law Right of Access Continues To Be Overridden by the Compelling Reasons To Maintain the Seal.

Even if the common law right of access did apply, it would not justify unsealing the video recordings because of the compelling interest in judicial integrity that the Ninth Circuit identified in *Perry*. "The common law right of access . . . can be overridden given sufficiently compelling reasons for doing so." *Perry*, 667 F.3d at 1084 (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)); *see also Nixon*, 435 U.S. at 603. "[P]ublic perception of judicial integrity" is an "interest of the highest order." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (quotation marks omitted). And as the Ninth Circuit squarely held in *Perry*, "[t]he interest in preserving respect for our system of justice is clearly a compelling reason for maintaining the seal on the recording" in this case. *Perry*, 667 F.3d at 1088. This Court has no power to depart from that holding now—both because it has become the law of this case, *see Bernhardt v. Los Angeles Cty.*, 339 F.3d 920, 924 (9th Cir. 2003), and because it controls under ordinary principles of stare decisis, *see Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987).

As the Ninth Circuit recounted at length in *Perry*, Judge Walker provided "unequivocal

assurances that the video recording at issue would not be accessible to the public." 667 F.3d at 1085. He "promised the litigants that the conditions under which the recording was maintained *would not change*—that there was no possibility that the recording would be broadcast to the public in the future." *Id.* at 1086. These "solemn commitment[s]" were "worthy of reliance," *id.*, and Proponents in fact "reasonably relied" on them, *id.* Unsealing the recording now would renege on those solemn commitments, and thus "would cause serious damage to the integrity of the judicial process," for not only would it result in a palpable injustice to the litigants and witnesses who took Judge Walker at his word, it would put future litigants and witnesses on notice that judicial promises cannot be trusted. *See id.* at 1087.

In addition, based on "decades of experience and study," the Judicial Conference has found that the public broadcast of trial proceedings can "create privacy concerns," "increase[ ] security and safety issues," and escalate "[t]hreats against judges, lawyers, and other participants." Dkt. #771-2 at Ex. 3; *see also Hollingsworth*, 558 U.S. at 193. These findings are based on the Judicial Conference's study of ordinary cases. "[I]n 'truly high-profile cases' one can '[j]ust imagine what the findings would be.' " *Hollingsworth*, 558 U.S. at 198 (second alteration in original). Indeed, Proponents consistently opposed broadcast in this trial precisely because they fear that public dissemination of the trial video would subject them and their witnesses to well-substantiated risks of harassment. As the Supreme Court noted, those concerns have been "substantiated" by "incidents of past harassment." *Id*. at 195. The record in this case is replete with evidence of repeated—and frequently serious—harassment of Proposition 8 supporters.[3] For example, "donors to groups supporting Proposition 8 'have received death threats and envelopes containing a powdery white substance,' " and "numerous instances of vandalism and physical violence have been reported against those who have been identified as Proposition 8 supporters." *Id*. at 185–86. If Judge

[3] *See, e.g.*, Dkt. #187-2 ¶¶ 11–12 (discussing harassment); Dkt. #187-9 ¶¶ 6–8 (declaring that supporters "were physically assaulted" and had "homes and automobiles defaced"); Dkt. #187-11 (collecting 71 articles that discuss harassment of supporters); Dkt. #187-12 ¶¶ 5–6 (discussing physical assault and vandalism); *see also* Thomas Messner, *The Price of Prop 8*, THE HERITAGE FOUNDATION (Oct. 22, 2009), https://goo.gl/XsJSqT (cataloging harm to supporters); Amicus Curiae Brief of Marriage Anti-Defamation Alliance, *Hollingsworth v. Perry*, No. 12-144 (U.S. Jan. 29, 2013) (same); *Gay Marriage Mob Violently Attacks Elderly Woman*, YOUTUBE (Nov. 11, 2008), https://goo.gl/xj1kwQ.

Walker's repeated and unequivocal assurances that "there was no possibility that the recording would be broadcast to the public in the future," *Perry*, 667 F.3d at 1086, are now disregarded, that would send a clear message to witnesses—reasonably concerned about testifying because of reasons like these—that they cannot even trust a *blanket assurance* made on the record *by a federal judge* that they will not be exposed to public exposure or harassment in this way.

While this Court's January 17, 2018 Order acknowledged "the compelling reason of judicial integrity identified by [the Ninth Circuit]," the Court thought that interest was not dispositive "because circumstances change and justifications become more or less compelling." Dkt. #878 at 13. But the importance of judicial integrity has no statute of limitations. No, the imperative that "[l]itigants and the public must be able to trust the word of a judge" is structural and permanent. *Perry*, 667 F.3d at 1087–88. No "changed circumstances" can diminish the necessity that our justice system continues to "function properly." *Id.* at 1088.

What is more, none of the supposed "changed circumstances" identified by the Court's previous Order has actually lessened the hazards of publicly disseminating the video recordings. The January 17 Order suggested that the issues disputed in the trial are now governed by "settled law," given the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and that there now is "wider acceptance of same-sex marriage." *Id.* at 8–9. But the Supreme Court's settling of a legal issue does not eliminate the passions surrounding a controversial social issue. For example, the Supreme Court held that the Constitution includes a right to an abortion over forty years ago, but the Northern District of California recently enjoined the release of videos of abortion providers in part because of the risk that "harassment, threats, and violent acts" would increase were the materials made public. *National Abortion Fed'n v. Center for Med. Progress*, 2016 WL 454082, at *20 (N.D. Cal. Feb. 5, 2016).

Contrary to the January 17 Order's reasoning, the Supreme Court's holding that the Constitution includes a right to same-sex marriage *increases* the concerns of those who disagree, because their views have now been rejected by the Supreme Court and removed from democratic policy making. While the Court—*in recognition of this very concern*—went out of its way to insist that those who "continue to advocate" against same-sex marriage should not be "disparaged" and

must be "given proper protection," *Obergefell*, 135 S. Ct. at 2602, 2607, the unavoidable result of the Court's ruling is that many who might have regarded support for traditional marriage as debatable five years ago now consider it deplorable. That increases (rather than eliminates) Proponents' concerns about harassment and reprisals. *See id.* at 2642 (Alito, J., dissenting).

The January 17, 2018 Order also suggested that publication of the trial recordings would not "adversely affect" Proponents because "the transcript of the trial has been widely disseminated and dramatized in plays and television shows." Dkt. #878 at 9. But the trial transcript and trial video recordings are simply not interchangeable. Were they the same, the media would have no *desire* to obtain the recordings, since they have already possessed the transcript for nearly a decade. Indeed, this Court itself recognized that "the video recordings will carry significant and unique weight," thus refuting the analogy to the transcript and dramatizations. *Id.* at 6.

This Court should continue to keep faith with Judge Walker's word, and the seal should remain in place.

II. LOCAL RULE 79-5 DOES NOT REQUIRE THE UNSEALING AND PUBLIC DISSEMINATION OF THE VIDEO RECORDINGS AFTER 10 YEARS.

In ordering the eventual release of the video recordings, this Court's January 17, 2018 Order relied upon the Local Rule 79-5, Filing Documents Under Seal in Civil Cases, subsection (g) of which provides in full as follows:

> **Effect of Seal**. Unless otherwise ordered by the Court, any document filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. Any document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed. However, a Submitting Party or a Designating Party may, upon showing good cause at the conclusion of a case, seek an order to extend the sealing to a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records disposition policy of the United States Courts.

N.D. Cal. L.R. 79-5(g).[4]

Seizing on a single reference to this Rule in dicta from the Ninth Circuit's decision in *Perry*,

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[4] At the time of the *Hollingsworth* trial, a provision substantively similar to current Rule 79-5(g) was in effect as Local Rule 79-5(f). *See* N.D. CAL. L.R. 79-5(f) (2010) (superseded July 2, 2012), *available at* https://goo.gl/DxMgrc.

667 F.3d at 1085 n.5, the Court's previous Order concluded that the Rule's 10-year period negates any compelling interest in keeping the recordings "under seal in perpetuity," and instead presumptively requires that they be unsealed after 10 years. Dkt. #878 at 10. But for multiple reasons, this Rule does not justify lifting the seal.

A. Local Rule 79-5(g) Does Not Apply to "Records" of this Nature.

To begin, the text of Rule 79-5 makes clear that the Rule addresses documents that a *party* files under seal, not derivative video-recordings lodged in the record *by the Court itself*. The Rule is entitled "Filing Documents Under Seal in Civil Cases," and it applies to documents "Electronic[ally] and Manually-Filed" by either "a registered e-filer" or "a party that is not permitted to e-file." Rule 79-5(a). Subsection (d) of the Rule sets forth procedures governing "[a] party seeking to file a document, or portions thereof, under seal," and subsection (g) provides that "a *Submitting Party or a Designating Party* may . . . seek an order to extend the sealing . . . beyond the 10 years provided by this rule." (emphasis added). The Rule is thus plainly addressed to materials filed under seal by parties, not materials created and placed in the record by the Court. It is a "fundamental canon of statutory construction that the words of a statute [or Rule] must be read in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015). Here, the Court's previous interpretation of Rule 79-5(g) as applying to materials entered in the record by the Court makes a hash out of the rest of the Rule's language.

The January 17 order reasoned that "[t]here 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." Dkt. #878 at 13–14. But the subsection setting out Rule 79-5's scope does so explicitly, referring to "sealed documents submitted by registered e-filers in e-filing cases" and those "submitted by a party that is not permitted to e-file and/or in a case that is not subject to e-filing." Rule 79-5(a). And the very subsection at issue here, subsection (g), refers to "Submitting Part[ies]" and "Designating Part[ies]" in a way that is simply nonsensical if the Rule is applied to documents created by the court. To be sure, "Judge Walker . . . directed that the Clerk file the trial recording under seal as part of the record." Dkt. #878 at 14 (quotation marks omitted). But the recordings' presence in the record does not somehow transform them into documents *filed by a party*.

B. Local Rule 77-3's Specific Bar on Broadcasting the Video of Trial Proceedings Governs.

Interpreting Rule 79-5(g) as applying to the video recordings also conflicts with the canon that courts must not "construe two statutes [or rules] so that they conflict," but instead are "obliged to reconcile them." *Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008). The reading of Rule 79-5(g) adopted by the January 17, 2018 Order—as presumptively making the recordings available for public dissemination and broadcast after ten years—heedlessly flouts that canon by creating a conflict with Rule 77-3's specific *prohibition* on the public broadcast of the recordings.

As shown above, Rule 77-3 by its plain terms prevents the public dissemination, "broadcasting or televising" of "any judicial proceeding." N.D. CAL. L.R. 77-3. And just as this rule bars the *contemporaneous* broadcast of trial proceedings, it also encompasses the video-recording and *subsequent* broadcast of the proceedings. But the Court's previous Order interpreted Rule 79-5 to demand *precisely that result*: after ten years have passed, under the reading adopted by the January 17 Order, the very "recording" that Rule 77-3 says *may not* be "broadcast[ ]," Rule 79-5(g) says *presumptively must* be released for public dissemination and broadcast. This Court should not read Rule 79-5 to presumptively require the very thing Rule 77-3 forbids. Indeed, even if Rule 79-5(g) could be read as applying in a general way to the video recordings, Rule 77-3's more specific terms *expressly prohibiting their broadcast* should still control. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1158 (9th Cir. 2004) (specific governs the general).

C. Even if Local Rule 79-5(g) Applies, the Compelling Reasons To Maintain the Seal Establish "Good Cause" for its Indefinite Extension.

Even if Local Rule 79-5(g) could be read as presumptively requiring the release of the video recordings (and as shown above, it cannot), the seal should still be maintained. For that Rule itself provides that the duration of the Court's seal may be "extend[ed] . . . to a specific date beyond the 10 years provided by this rule" by order of the Court "upon showing [of] good cause." N.D. CAL. L.R. 79-5(g). And the Ninth Circuit's decision in *Kamakana v. City and Cty. of Honolulu* makes clear that the "good cause" standard is *less* demanding than the "compelling reasons" showing required under the common-law right of access. 447 F.3d 1172, 1180 (9th Cir. 2006); *see also*

Wong v. Astrue, 2008 WL 2323860, at *1 (N.D. Cal. May 20, 2008) (Rule 79-5(g)'s "good cause" standard is the same as the "good cause" standard discussed in *Kamakana*).

Here, complying with Rule 77-3's directive that trial recordings not be made available for public broadcast is good cause for maintaining the seal. Furthermore, the Ninth Circuit has already determined in *Perry* that avoiding the harm to judicial integrity that would flow from disregarding Judge Walker's repeated, unequivocal assurances is a compelling reason to prevent exposing those recordings to public access and dissemination—a determination that the Court need not (and cannot) revisit. *See Bernhardt*, 339 F.3d at 924; *Zuniga*, 812 F.2d at 450. And as shown above, the fundamental, structural interest in judicial integrity implicated here simply does not become less compelling with the passage of time.

III. EVEN IF LOCAL RULE 79-5(G) APPLIES, ITS PRESUMPTIVE 10-YEAR PERIOD DID NOT START TO RUN UNTIL THE CASE WAS CLOSED IN 2012.

The January 17 Order not only erred in concluding that Rule 79-5(g)'s presumptive 10-year period applies to the recordings; it also erred *in calculating* when that period expires. While judgment was not entered in this case—and the case thus was not closed—until August 27, 2012, Dkt. #842, the January 17 Order concluded that the 10-year clock started on August 12, 2010, because the case was "functionally . . . 'closed' " when Judge Walker entered his permanent injunction against Proposition 8 on that date. Dkt. #878 at 13 n.20. That "functional" interpretation of Rule 79-5(g) is misguided, and the Court should reconsider the issue and correct that error.

By keying its presumptive 10-year period to the date when "the case is closed," Rule 79-5(g) provides a clear rule for calculating its deadline—one of the highest virtues of a time limit like this one. *Cf. Bonneau v. Centennial Sch. Dist. No. 28J*, 666 F.3d 577, 580 (9th Cir. 2012) ("a primary goal of statutes of limitations" is "clarity and certainty in litigation"). Calculating the 10-year deadline based on when a case is "*functionally* . . . closed," Dkt. #878 at 13 n.20 (emphasis added), *invites* confusion and ambiguity. Determining the date on which final judgment is entered and the case is marked "closed," by contrast, is a simple and unambiguous task. Here, the task yields a simple and unambiguous answer: the case was closed on August 27, 2012, when the court

ordered the "Clerk . . . [to] close this file" and the case was marked closed. Dkt. #842.[5]

IV. THE FIRST AMENDMENT DOES NOT REQUIRE THE UNSEALING AND PUBLIC DISSEMINATION OF THE VIDEO RECORDINGS.

Finally, the January 17, 2018 Order concluded that the "analysis would be no different" under the "First Amendment right of access." Dkt. #878 at 14. That Order was wrong to suggest that the First Amendment could potentially apply to the video recordings at issue here; but it was right that the First Amendment does not alter the correct conclusion.

The First Amendment does not require public access to the trial tapes in this case. Both the Supreme Court and the Ninth Circuit have squarely held that the First Amendment does not even entitle the public to access recordings submitted as evidence of illegal conduct during criminal trial; in those circumstances, the Constitution is satisfied so long as the trial is open to the public and transcripts of the recordings as played at trial are publicly available. *See Nixon*, 435 U.S. at 608–09; *Valley Broadcasting*, 798 F.2d at 1292–93; *see also Providence Journal*, 293 F.3d at 16; *Fisher v. King*, 232 F.3d 391, 396–97 (4th Cir. 2000); *United States v. Beckham*, 789 F.2d 401, 408–09 (6th Cir. 1986); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 426–28 (5th Cir. 1981). Other courts have held that the same is true of recorded witness testimony offered at criminal trials, *see McDougal*, 103 F.3d at 659, and of recordings of criminal proceedings generally, *see United States v. Antar*, 38 F.3d 1348, 1359–60 (3d Cir. 1994) (explaining that the First Amendment requires access to "the live proceedings" and "the transcripts which document those proceedings"). In light of this precedent, it follows that the First Amendment does not compel access to the recording here.

The consequences of a contrary conclusion would be startling indeed, since they would imply that the longstanding bar on the public broadcast of trial proceedings is unconstitutional. But the Supreme Court rejected this argument by implication in this very case when Plaintiffs raised it in opposition to Proponents' successful application for a stay of Judge Walker's initial broadcast order. *See* Resp. of Kristin M. Perry et al. to Application for Immediate Stay at 18–19, *Hollingsworth v. Perry*, No. 09A648 (U.S. Jan. 10, 2010). Other decisions by the Supreme Court

[5] Two days later, the Court entered a similar order, this time purporting to make its order of final judgment effective "*nunc pro tunc*" on August 12, 2010. Dkt. #843. But plainly a court cannot manipulate Rule 79-5(g) by ordering that a case be deemed to have been closed "*nunc pro tunc*" on a different date.

and the federal courts of appeals have uniformly rejected the same argument. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 539 (1965); *id*. at 584–85 (Warren, C.J., concurring); *id*. at 588 (Harlan, J., concurring); *In re Sony BMG*, 564 F.3d 1, 9 (1st Cir. 2009); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988); *United States v. Edwards*, 785 F.2d 1293, 1295 (5th Cir. 1986); *United States v. Kerley*, 753 F.2d 617, 621 (7th Cir. 1985); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983).

The First Amendment right of access, in any event, does not require public access to a trial recording when maintaining the recording under seal "serves a compelling interest" and "there are no alternatives . . . that would adequately protect the compelling interest." *Perry*, 667 F.3d at 1088. That standard is satisfied for all the reasons explained in *Perry*, *see id.* at 1084–88, and for all the reasons explained above, *see supra* Part I.c.

CONCLUSION

This Court should permanently maintain the seal protecting the trial video recordings from public disclosure or dissemination.

Dated: April 1, 2020

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