No. 20-16375

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, *et al.*,
Plaintiffs-Appellees,

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

KQED, INC.,
Intervenor-Appellee,

v.

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

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

and

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

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

BRIEF OF INTERVENORS-DEFENDANTS-APPELLANTS

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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 Appellants' firm objection to the recording of the 2010 trial, that he was making a recording of the trial proceedings *solely* for his use in chambers to assist him in crafting a decision. As this Court held in rebuffing an earlier effort by Appellees 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 the district 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 personal use *in camera*, the creation of those recordings would have plainly violated the local rules, which "have the force of law," *id.* at 191 (quotation marks omitted), and Appellants "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* dissemination and broadcast, had Judge Walker at the end of the trial not placed the recordings under seal and assured Appellants that any risk of their public dissemination "had been eliminated," *Perry*, 704 F. Supp. 2d at 944, his actions would again have violated the Rule, and Appellants would again have been forced to seek the extraordinary intervention of a higher court.

This Court recognized all of this eight years ago. Based on Judge Walker's repeated assurances "that there was no possibility that the recording would be broadcast to the public in the future," the Court concluded in a unanimous opinion by Judge Reinhardt that "to preserve the integrity of the judicial system, the recording must remain under seal." *Perry*, 667 F.3d at 1086, 1087. The district court has now once again ordered the release and public dissemination of the trial recordings, concluding again that the recordings must be unsealed under the

common-law right of access. But that determination is no more sound this time around, and under the law of the case that this Court established in *Perry*, it must be reversed a second time.

The district court's order unsealing the recordings is in error for multiple reasons. Local Rule 77-3 unambiguously bars the broadcast of the recordings—today no less than six years ago—displacing any common-law right of access that otherwise might apply. The court below relied on another local rule—Rule 79-5—which makes certain documents filed under seal presumptively publicly available ten years after the case is closed. But Rule 79-5's general rules governing sealed filings do not apply to the recordings here; and even if Rule 79-5 could be read as applying, its terms, too, would be overridden by Rule 77-3's *specific* rule forbidding public dissemination and broadcast of this *particular* type of sealed document.

Finally, even if the court below were correct that there is a common-law right to access the recordings (there is not) and that Rule 79-5 presumptively requires unsealing them after 10 years (it does not), the recordings here must still remain sealed. For the foundational interest this Court identified in 2012—"[t]he interest in preserving respect for our system of justice," *Perry*, 667 F.3d at 1088—is still compelling and still requires that the records be kept under seal. "[T]he integrity of the judicial system," *id.* at 1087, is a value that knows no expiration date; and

ensuring that "our justice system [continues] to function properly," *id.* at 1088, will be an interest of the highest order for as long as that system endures.

JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. There are no further matters in this case pending before the district court. The district court's order requiring the unsealing and release of the trial recording is appealable either as a collateral order or a final order. *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1129–30 (9th Cir. 2003). This Court accordingly has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered the order on July 9, 2020. ER1. Proponents timely noticed this appeal on July 14, 2020. ER302; s*ee* FED. R. APP. P. 4(a)(1)(A).

ISSUES PRESENTED

I. Whether the common-law right of access requires that the video recordings of the trial in this case be made publicly available, even though the trial judge promised they would never be disclosed and a local rule at the time they were made directly prohibited their public dissemination.

II. Whether Local Rule 79-5 requires that the video recordings be made publicly available after 10 years, even though this would cause the public dissemination of the recordings, in contravention of the specific provisions of Local Rule 77-3 and the trial judge's promise.

III. Whether Local Rule 79-5's presumptive 10-year period, to the extent it applies, began to run in August 2010, when the district court entered its permanent injunction, or August 2012, when the court entered judgment and closed the case.

IV. Whether the First Amendment requires that the video recordings be made publicly available.

PERTINENT RULES

All pertinent rules are set forth in the addendum.

STATEMENT OF THE CASE

I. The *Hollingsworth* trial

This appeal arises out of a lawsuit challenging 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, then the Chief Judge of the Northern District of California. The state officials named as defendants declined to defend Proposition 8, but the Appellants here, official proponents of the voter-initiated measure (collectively "Proponents"), intervened and defended against Plaintiffs' claims.

A. Judge Walker's efforts to broadcast the trial

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." ER464. 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 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.

B. The Supreme Court's emergency stays

On the morning of January 11, 2010, 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. ER462. 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. ER463.

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, the Supreme Court concluded that 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 Court further concluded that even had Rule 77-3 been validly amended, 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.

C. Judge Walker's continued video recording

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." ER442. 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." ER439. Proponents then asked "for clarification . . . that the recording of these proceedings has been halted, the tape recording itself." ER440. 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." ER440, ER441 (emphasis added).

Judge Walker nevertheless insisted on recording the trial over Proponents' objections. *See* ER441. Judge Walker stated that Rule 77-3 "permits . . . recording for purposes of use in chambers," and 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*." ER441. (emphasis added). Proponents relied on these assurances in acceding to Judge Walker's insistence on continuing the video recording. As this Court later 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*, 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 his assurances, on January 15, Judge Walker withdrew this case from the pilot program that had purportedly authorized public broadcast of the trial. *See* ER434. 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 31, Judge Walker *sua sponte* invited the parties "to use portions of the trial recording during closing arguments" and made "a copy of the video . . . available to the part[ies]." ER430. The parties were instructed to "maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order," *id.*, which restricts "highly confidential" material to the parties' counsel and experts and to the district court and its personnel. *See* ER452–53. Plaintiffs requested and were given a copy of the recording of the entire trial, *see* ER426, brief excerpts of which they played during closing argument, *see* ER418, ER420–22. Intervenor San Francisco requested and was given portions of the trial recording, ER428, but did not play any of the recording during closing argument. Proponents neither requested nor received a copy of the trial recording.

After closing argument, Proponents moved Judge Walker for an order requiring that all copies of the trial recording be returned to the court immediately. *See* ER412. On August 4, 2010, Judge Walker issued his substantive ruling declaring Proposition 8 unconstitutional, and in it, he denied this motion. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010). Instead, he "DIRECTED" the clerk to "file the trial recording under seal as part of the record" and allowed Plaintiffs to "retain their copies of the trial recording pursuant to the terms of the protective order." *Id.* Elsewhere in the same order, Judge Walker stated

that "the potential for public broadcast" of the trial proceedings "had been *eliminated*." *Id.* at 944 (emphasis added).

II. Appellees' initial effort to lift the seal

A. The district court's first order unsealing the recordings

Despite Rule 77-3, the policies of the Judicial Conference and this Court's Judicial Council, the Supreme Court's prior decision in this case, the sealing order, and his own solemn commitment in open court, Judge Walker delivered a speech at the University of Arizona on February 18, 2011, in which he played a portion of the video recording of the cross-examination of one of Proponents' expert witnesses, who had testified at trial in reliance on Judge Walker's promise that the recording would not be publicly broadcast outside the courthouse. *See* Judge Vaughn Walker, History of Cameras in the Courtroom at 33:13–36:52 (Feb. 18, 2011), *available at* https://goo.gl/ZG8qji. The speech was videotaped by C-SPAN, and it was subsequently broadcast on C-SPAN several times beginning on March 22. *See* C-SPAN, Judge Vaughn Walker on Cameras in the Courtroom, https://goo.gl/Rj7CYq ("Airing Details"). Less than two weeks later, Judge Walker resigned from the bench, but he continued to display excerpts from the trial recording in connection with his teaching and public speaking. ER360.

Promptly after learning of Judge Walker's activities, on April 13, Proponents moved this Court (where the appeal in this case was pending) to order the return of

all copies of the trial recording, including the copy retained by Judge Walker. *See* ECF No. 338-1, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 13, 2011). On April 15, Plaintiffs opposed that motion and filed a cross-motion to unseal the trial recording. *See* ECF No. 340, *Perry*, No. 10-16696 (9th Cir. Apr. 15, 2011). On April 18, the Media Coalition (which by this point included KQED) 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." ECF No. 343 at 1–4, *Perry*, No. 10-16696 (9th Cir. Apr. 18, 2011).

On April 27, the Court transferred all those motions to the Northern District for resolution. ER407. The next day, Judge Ware, who had replaced Judge Walker as the presiding judge below, issued an order requiring all parties who possessed a copy of the recording, including Judge Walker, to appear at a hearing to "show cause as to why the recordings should not be returned to the Court's possession." ER396. Shortly thereafter, Judge Walker lodged with the district court his chambers copy of the trial recording and was excused from the hearing. *See* ER391, ER394. He did not further participate in the proceedings below.

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. ER388. The court further "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. ER388. In response, Proponents filed a supplemental brief opposing the return of the trial recording to former Judge Walker. ER381–83.

On September 19, Judge Ware granted the motion to lift the seal, concluding that the common-law right of access applies to the recording and requires that it be made public. *See* ER367–74. Accordingly, he directed the clerk "to place the digital recording in the publicly available record of this case," ER363, and to return Judge Walker's copy.

B. This Court's decision in *Perry v. Brown*

Proponents immediately appealed and asked this Court to stay the order lifting the seal. *See* ER330. The Media Coalition (including KQED) was allowed to intervene as a party to the appeal. ER324, ER325. The Court granted Proponents' motion for a stay, ER322, and in February 2012, in a unanimous decision authored by Judge Reinhardt, the Court concluded that the district court abused its discretion in ordering that the seal be lifted, *Perry*, 667 F.3d 1078. This Court assumed without deciding that the common-law right of access invoked by the district court applied, but it found a "compelling reason"—namely, the need to uphold "judicial integrity"—"for overriding the common-law right." *Id.* 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, read together, 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). The Court 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 Court 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.*; *see also id.* at 1088 ("Proponents reasonably relied on Chief Judge Walker's commitments in refraining from challenging his actions").

This Court 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 Court held that "to preserve the integrity of the judicial system, the recording must remain under seal," *id.* at 1087. For this reason, the Court determined, the common-law right of access did not permit the Media Coalition to access the recording.

Finally, this Court made short work of the additional argument that the First Amendment requires that the seal be lifted. *Id.* at 1088. The Court assumed without deciding that the First Amendment right of access 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.* In short, the Court held, "the recording cannot be released without undermining the integrity of the judicial system." *Id.*

This Court 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 Court 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 Court issued its mandate to the district court. ER320. And on August 27, 2012, the district court entered its final judgment and ordered the Clerk to close the case. ER316.

III. Appellees' second attempt to lift the seal

A. The district court's 2018 order

Less than five years later, Appellees renewed their 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. According to KQED, this Court'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." ECF No. 852 at 1, *Perry v.*

Brown, No. 09-2292 (Apr. 28, 2017). On May 31, 2017, Plaintiffs filed a response supporting KQED's second motion to unseal. ECF No. 867, *Perry*, No. 09-2292 (May 31, 2017). The State Defendants likewise filed a short notice indicating they did not oppose the request. ECF No. 869, *Perry*, No. 09-2292 (May 31, 2017). Proponents opposed the motion. ECF No. 864, *Perry*, No. 09-2292 (May 31, 2017).

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. ER6. While Judge Orrick concluded that this Court's decision in *Perry* continued to "preclude[ ] [the videotapes'] release at this juncture," he "further rule[d] that the recordings shall be released to [KQED] on August 12, 2020, absent further order from [the district court] that compelling reasons exist to continue to seal them." ER19–20 (2018 Order at 14–15).

Judge Orrick reasoned that there was "no doubt that the common-law right of access applies to the video recordings." ER15 (2018 Order at 10). And while he 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," he did not believe that this justification "exists in perpetuity." ER17 (2018 Order at 12). Rather, Judge Orrick determined that this Court's reasoning and holding in *Perry* were circumscribed by "the rules of *this*

court"—i.e., the district court—"setting the presumptive unsealing of [a] record after ten years." ER18 (2018 Order at 13).

In particular, at the time of the trial, Civil Local Rule 79-5(f) provided 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," unless "a party that submitted documents that the Court placed under seal" shows "good cause" for an order that "continue[s] the seal." Because Judge Walker, at the conclusion of trial, had entered the video recording of the trial into the record, Judge Orrick concluded that it was governed by Rule 79-5. ER19 (2018 Order at 14). Although judgment in the case was not actually entered—and the case therefore not formally closed—until August 27, 2012, ER316, Judge Orrick 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. ER18 (2018 Order at 13 n.20). Accordingly, he 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." ER20 (2018 Order at 15).

Finally, Judge Orrick held that his "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." ER19 (2018 Order at 14).

Proponents appealed the 2018 Order to this Court, ER308, but on April 19, 2019, the Court dismissed the appeal "without prejudice for lack of jurisdiction," ER307. This Court concluded that the district 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.

B. The district court's 2020 order

On April 1, 2020, Proponents accepted that invitation and moved the district court to permanently maintain the seal. ECF No. 892, *Perry*, No. 09-2292 (Apr. 1, 2020). Plaintiffs and KQED opposed the motion, ECF No. 895, *Perry*, No. 09-2292 (May 13, 2020); ECF No. 898, *Perry*, No. 09-2292 (May 13, 2020), as did the State Defendants and Intervenor San Francisco, ECF No. 894, *Perry*, No. 09-2292 (May 13, 2020); ECF No. 897, *Perry*, No. 09-2292 (May 13, 2020).

On July 9, 2020, Judge Orrick entered an order denying the motion. ER1 (2020 Order at 1). Once again, the court concluded that the " 'judicial integrity' argument" provides "no justification, much less a compelling one, to keep the trial recordings under seal any longer"—a conclusion the court felt was supported by what it characterized as "concessions" by Proponents' counsel, during the argument before this Court in 2011, purportedly acknowledging "*both* Proponents' knowledge of Civil Local Rule 79-5(g) and that they would bear the burden of having to demonstrate reasons to continue the seal beyond ten years." ER4 (2020 Order at 4).

Judge Orrick accordingly reaffirmed his direction that the recordings be unsealed on August 12, 2020. Finally, he denied Proponents' request that he stay any decision unsealing the tapes pending appeal. ER5 (2020 Order at 5).

Proponents swiftly appealed Judge Orrick's order, ER302, and this Court granted a stay of the order pending appeal, *see* Dkt. Entry 14.

SUMMARY OF THE ARGUMENT

I. The district court erred in concluding that the common-law right of access to judicial records applies to the trial recordings. It is well settled that where positive law "speaks directly to, and diverges from, the common law right of judicial access," the common-law right is displaced by the positive law and no longer applies. *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 430 (9th Cir. 2011). Here, Local Rule 77-3 "speaks directly to" the ability of the public and press to access, distribute, or broadcast the video recordings at issue, thereby displacing any common law on the matter.

What is more, even in the absence of Rule 77-3, the common-law right of access would not apply to the recordings, since they are merely derivative documents recording testimony that was given at trial in open court and memorialized in publicly-available transcripts. *See United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996). And in any event, the fundamental interest in preserving judicial integrity that this Court identified the last time this case was before it as demanding that the

recordings be kept under seal did not expire on August 12, 2020. This Court's holding in *Perry* thus continues to apply and continues to require the maintenance of the seal.

II. The court below also erred in determining that Local Rule 79-5 applies to the trial recordings, presumptively requiring that they be unsealed and released to the public after ten years. The text and structure of Rule 79-5 demonstrate that it applies only to the parties' filings, not a video-recording created and lodged in the record by the district court itself. Moreover, even if Rule 79-5 could be read as requiring the public release of the recordings, alongside other types of filings, the more specific provisions of Rule 77-3—which expressly prohibit the public release and broadcast of this specific type of document—would govern. And once again, the public interest in preserving the honor and integrity of the judicial system provides "good cause" to rebut Rule 79-5's ordinary presumption of unsealing.

III. Even assuming Rule 79-5 applies here, the district court erred in calculating the date that the Rule would require the recordings to be released to the public. Rule 79-5's 10-year clock starts ticking only when the case is "closed," and here the underlying case was not formally closed until August 27, 2012—not, as the court below thought, on August 12, 2010, when Judge Walker entered his injunction.

IV. Finally, the First Amendment no more requires the eventual public release and dissemination of the video recordings than the common law or the district

court's local rules. Binding precedent from the Supreme Court and uniform decisions of multiple federal circuits squarely foreclose Appellees' suggestion that the First Amendment applies here. And even apart from this binding precedent, the same compelling reasons of judicial integrity that outweigh any common-law access right also satisfy any First Amendment analysis, as this Court already has held.

ARGUMENT

A district court's decision whether to unseal records or documents is subject to review for abuse of discretion. *Perry*, 667 F.3d at 1084. "[A] district court by definition abuses its discretion when it makes an error of law." *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1167 (9th Cir. 2017).

I. The common-law right of access does not require the unsealing and public dissemination of the video recordings.

The foundation-stone of the decision below was the court's conclusion, in its 2018 Order, 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." ER15 (2018 Order at 10); *see* ER4 (2020 Order at 4). But the district court erred out of the starting gates—both because any common-law right to access the video recordings has been displaced by Local Rule 77-3, and because derivative documents like the recordings are not within the scope of the right of access. Finally, even if the common-law access right did apply here (and it does not), it is outweighed by the fundamental interest in judicial integrity, as this Court has already held.

A. Any common-law rules governing access to the video recordings are 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 (Milwaukee II)*, 451 U.S. 304, 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 314.

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, which "created an administrative procedure for processing and releasing to the public." *Id.* at 603, 604. And that statute had displaced the common-law analysis that the Court would otherwise have undertaken: "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. This Court, 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 of judicial access." *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d at 430; *see also Center for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (FOIA "preempts any preexisting common law right [of access]"). 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 those names 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 of courts 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. Like any other valid, positive enactment, then,

where Rule 77-3 "speaks directly to" an issue, it displaces any preexisting common law on the subject. *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011). Because Rule 77-3 bars the public dissemination of the video recordings at issue in this case, it directly forecloses Appellees' claim that they 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.[1]

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 (Rule 77-3 bars "the broadcasting of trials outside the courthouse in

[1] The version of Rule 77-3 in force at the time of the Supreme Court's decision in *Hollingsworth* did not contain an exception for public broadcast in connection with a pilot program (though the district court had attempted unlawfully to amend the rule to create such an exception). *See Hollingsworth*, 558 U.S. at 194. As discussed below, the public broadcast of the trial proceedings in this case is plainly not authorized in connection with any pilot program.

which a trial takes place"). 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 these purposes" is to extend the prohibition against "public broadcasting or televising" to subsequent broadcasts of recorded proceedings. Any subsequent public dissemination of trial recordings thus clearly runs afoul of the "prohibit[ion against] the streaming of transmissions, or other broadcasting or televising, beyond 'the confines of the courthouse.' " *Hollingsworth*, 558 U.S. at 192 (quoting Rule 77-3).

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 not be publicly broadcast. 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 now to permit public dissemination and broadcasting of the trial proceedings is plainly contrary to the Rule. Any other reading of Rule 77-3 would render it a nullity. Indeed, the district court's interpretation would give judges determined to broadcast trial proceedings a blueprint for doing so.

The court below 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." ER16 (2018 Order at 11). Accordingly, "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 district court license to disregard Rule 77-3's dictates. As just shown, and as this Court has already 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," ER16 (2018 Order 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 this Court 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.

Nor is there any basis to the suggestion that the common-law right of access is no longer displaced by Rule 77-3 because "the current Northern District and Ninth Circuit rules and policies *allow* for public broadcast of proceedings." ER16 (2018 Order at 11). The current version of Rule 77-3 permits "public broadcasting or televising" *only* for cases participating in an authorized "pilot or other project," 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* by Judge Walker from the purported pilot program invalidated by the Supreme Court, so that program plainly cannot authorize public broadcast of the trial recording here. And although the Judicial Conference subsequently adopted a revised policy that allows, in certain narrow circumstances, the broadcast of civil trial proceedings, *see History of Cameras in Courts*, UNITED STATES COURTS, https://goo.gl/ORWNaO (last visited Sept. 3, 2020), that likewise provides no support for the ruling below given that it (1) did not exist at the time of the recording of the trial in this case, (2) does not purport to invalidate Local Rule 77-3, which continues to bar broadcasting of the recording in question, *see In re Sony BMG Music Entm't*, 564 F.3d 1, 6 (1st Cir. 2009) ("[T]he Conference's policies are generally not binding *ex proprio vigore* on individual district courts . . . ."), and (3) also would only allow for broadcasting in accordance with a valid pilot program in any event.

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 Electric Power*, 564 U.S. at 424.

B. The common-law right of access does not apply to wholly derivative documents such as the video recordings.

The common law does not grant Appellees any right to access and broadcast 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 reporters, advocacy organizations, and broadcasting companies 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 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. In previous cases finding the common-law right of access applicable to video or audio tapes, the documents in question "were recordings of the primary conduct of witnesses or parties"—e.g., the "Watergate tapes" that had been introduced as substantive evidence of criminal wrongdoing in *Nixon*. *Id.* at 657. By contrast, 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.

So too here. The video recordings at issue depict witness testimony and trial proceedings that were delivered "in the courtroom," and were "open to the public." *Id.* at 653, 657. Moreover, the written transcripts of these proceedings have been "released to the public." *Id.* at 653. There simply is "no additional common law right to obtain, for purposes of copying, the electronic recording" of the proceedings. *Id.* at 657.

The court below refused to follow *McDougal*'s guidance, insisting that 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." ER16 (2018 Order 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. Judge Orrick's attempt to distinguish *McDougal* thus gets the matter exactly backwards; in fact, *McDougal*'s reasoning applies *a fortiori* to the recordings here.

The district court 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." ER16–17 (2018 Order 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*. Even if the Eighth Circuit has elsewhere adopted a somewhat less " 'strong presumption' of public access to judicial records" than this Court, ER16 (2018 Order at 11), that simply does not affect *McDougal*'s persuasive analysis of whether this type of derivative recording is *subject to the right of public access to begin with*. *See McDougal*, 103 F.3d at 657–58.

It is undisputed that the trial in this case was open to the press and public and that the official transcript is readily available to all. Neither the district court, KQED, Plaintiffs, nor their allies have identified any authority holding that the common-law right of access applies to a video recording of trial proceedings in this context.

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). There is, of course, no history of access to video recordings of federal trial proceedings. To the contrary, the recording and broadcast of such proceedings has traditionally been *barred* pursuant to the federal judiciary's concerns about "the intimidating effect of cameras" in trial-court proceedings. *Hollingsworth*, 558 U.S. at 193. Nor is there "an important public need justifying

access" where, as here, the trial itself was open to the press and public and the official transcript is readily available. This is not a case where the public seeks access to evidence or proceedings hidden from public view. *See McDougal*, 103 F.3d at 658; *see also In re Providence Journal Co.*, 293 F.3d 1, 17–18 (1st Cir. 2002) ("the fact that the public and the press have had ample opportunity to see and hear the evidentiary tapes when those tapes were played in open court during trial takes much of the sting out of the [denial of access to those tapes]").

Further still, the common-law right of access does not apply to documents that "have traditionally been kept secret." *Times Mirror Co.*, 873 F.2d at 1219. The trial recording here is necessarily a private document that could have only been used by Judge Walker in chambers or by the parties subject to the terms of a protective order. As this Court has stated, "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" that did not include making it available to the public. *Perry*, 667 F.3d at 1087. And the Court also noted in *Perry* that the trial recording is a video "that is not ordinarily available" "to the media." *Id.* at 1080. Thus, the recording is akin to a private document, and the common-law right of access does not apply to it.

C. Any common-law right of access is 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 this Court 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*, 331 F.3d at 1135); *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 this Court 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) ("The law of the case doctrine provides that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." (quotation marks omitted)), and because it controls under ordinary principles of stare decisis, *see Kohler v. Presidio Int'l, Inc.*, 782 F.3d 1064, 1070 (9th Cir. 2015) ("We will not overrule the decision of a prior panel of our court absent an *en banc* proceeding, or a demonstrable change in the underlying law.").

As this Court 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," 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.

That, in turn, would cause lasting harm to our system of justice. If courts are not bound to honor the unambiguous promises of fellow judges, litigants would have no choice but to refuse to accept trial judges' assurances, inducing the filing of seemingly pointless appeals to guard against the possibility that the court might one day go back on its word. "Litigants and the public must be able to trust the word of a judge if our justice system is to function properly." *Id*. at 1087–88. Unsealing the recordings here would thus work an injury of the highest order to the integrity of the justice system, and the interest in avoiding that harm "is clearly a compelling reason for maintaining the seal on the recording." *Id.* at 1088. This Court has already

balanced these scales in favor of maintaining the seal, and it has no power to balance them differently now. *See Bernhardt*, 339 F.3d at 924; *Kohler*, 782 F.3d at 1070.

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." ER355; *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.[2] For example, "donors

[2] *See, e.g.*, ER30–36 (declaring that supporters "were physically assaulted" and had "homes and automobiles defaced"); ER43 (collecting 71 articles that discuss harassment of supporters); ER299–301 (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.

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. The point is not that the risk of harassment to Proponents or others *itself* justifies maintaining the seal on the video recordings at issue; rather, the past harassment of Prop 8 supporters simply illustrates, in stark relief, the potential real-world consequences of undermining the structural value of judicial integrity. The district court's assertion that "[t]here is no evidence that any Proponent or trial witness fears retaliation or harassment if the recordings are released," ER3 (2020 Order at 3), is thus completely beside the point.

If Judge 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. Plainly, witness cooperation will be more difficult to obtain if the public is unable to trust promises about the broadcast of trial proceedings.

While Judge Orrick acknowledged "the compelling reason of judicial integrity identified by [this Court]," he thought that interest was not dispositive "because

circumstances change and justifications become more or less compelling." ER18 (2018 Order 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. Because Judge Walker's assurances that "there was no possibility that the recording would be broadcast to the public in the future," *id.* at 1086, had no time horizon, neither Proponents' reasonable reliance on those assurances nor the judicial branch's compelling interest in honoring them can fade or "become . . . less compelling" with the passage of time, ER18 (2018 Order at 13).

What is more, none of the supposed "changed circumstances" identified by the court below has actually lessened the hazards of publicly disseminating the video recordings. The district court suggest 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," ER13–14 (2018 Order 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 just last year the Northern District of California

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 district court's reasoning, the Supreme Court's holding that the Constitution includes a right to same-sex marriage *increases* the concerns of those who disagree. Proponents' and their supporters' views have 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) (explaining that the majority's opinion "will be used to vilify Americans who are unwilling to assent to the new orthodoxy" because it "compares traditional marriage laws to laws that denied equal treatment for African–Americans and women" and "[t]he implications of th[at] analogy will be exploited by those who are determined to stamp out every

vestige of dissent"); *cf.* Jon Brooks, *Mozilla CEO Resigns Over Donation to Prop. 8 Campaign*, KQED NEWS (Apr. 3, 2014), https://goo.gl/TluNl1.

Nor is the judicial-integrity imperative undermined, as Judge Orrick thought, by Proponents' counsel's purported "concession," during the 2011 Argument before this Court, that the duration of the seal protecting the recordings would be governed by Rule 79-5's ten-year default-rule. Oral Argument at 6:24, *Perry v. Brown*, No. 11-17255 (9th Cir. Dec. 8, 2011), *available at* https://goo.gl/coepDh. Counsel's brief suggestion at argument that Rule 79-5 might apply does not meet this Court's standards for judicial estoppel, *see Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 558 (9th Cir. 2016), and the court did not contend that it has binding force, ER4 (2020 Order at 4). And for the reasons discussed below, the suggestion was incorrect—Rule 79-5 does not apply. *See infra*, Part II. Finally, even if the Rule's ten-year default *did* apply, the only consequence—as counsel explained in 2011—is that Proponents would bear the burden of establishing, after ten years, that there continues to be "good cause" to maintain the seal. The compelling interest in judicial integrity plainly satisfies that standard. *See infra*, Part II.C.

The district court resisted this conclusion, too, insisting that counsel's statement indicated Proponents' understanding "that sealing is typically limited in time," a conclusion the court also thought was bolstered by the supposed absence of "evidence that any 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." ER3, ER4 (2020 Order at 3, 4). These assertions are flatly contrary to this Court's decision in *Perry*—which expressly held, based on the same evidence still in the record, that "[t]here can be no question that Proponents reasonably relied on Chief Judge Walker's explicit assurances" 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." 667 F.3d at 1086. Indeed, Proponents have *repeatedly maintained*, at every point during the last decade, that they understood Judge Walker's promises "to exclude the possibility that he would later broadcast, or enable the broadcast, of the trial recording," Dkt. Entry 346-1 at 1, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 21, 2011); *see also* Dkt. Entry 31 at 47, *Perry v. Brown*, No. 11-17255 (9th Cir. Nov. 1, 2011)—without any qualification that this understanding was "limited in time."

To be sure, in response to Judge Hawkins's question whether it was "clear from the record" that Proponents "understood" that Rule 79-5's presumptive ten-year limit would apply, counsel responded that "we were aware of the local rules." Oral Argument, *supra*, at 6:43. But counsel was *also* careful to note that "the record, I don't believe, has anything one way or the other" reflecting any specific understanding by Proponents that Judge Walker's promise was time-limited by Rule

79-5. *Id.* To remove any conceivable doubt about the matter: Proponents *did not* understand Judge Walker's promise to be limited to ten years. And if they had, they would *never* have acceded to it, and would instead have taken immediate action to ensure that the recordings would never have been *created in the first place* (or, after their creation, to ensure their immediate destruction or removal from the record)—relief that "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.[3]

The district court also felt 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." ER14 (2018 Order at 9). But as Appellees recognize, these things are not interchangeable. Were they the same, Appellees would have no *desire* to obtain the recordings. Indeed, the district court itself recognized that "the video recordings will carry significant and unique weight," thus refuting its own analogy to the transcript and dramatizations. ER11 (2018 Order at 6).

[3] The district court's further suggestion that no Proponent or witness "submit[ted] any evidence" that they still "want[ ] the trial recordings to remain under seal" is completely beyond the pale. ER3 (2020 Order at 3). The record shows that Proponents continue to believe that Judge Walker's promise must be kept, *see* ECF No. 895-1 at ¶ 3, *Perry*, No. 09-2292 (May 13, 2020) ("no one supports a breach of the promise of confidentiality made by the trial court")—and indeed, their behavior, through counsel, in moving the district court to maintain the seal and appealing its Order lifting it, would be utterly inexplicable if they did not.

The video recordings of the trial—unlike the transcript—would present limitless opportunities for partisans to unfairly make one side look good and the other side look bad. *See Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 34 (Oct. 5, 2011), https://bit.ly/2EYo0C2, (Justice Breyer stating that "you can make people look good or you can make them look bad, depending on what 30 seconds you take"); *Nixon*, 435 U.S. at 601–02 (noting similar concerns); *cf. National Abortion Federation*, 2016 WL 454082, at *20 (acknowledging the "disparagement, intimidation, and harassment" that could result from recordings being "taken out of the context"). Although Appellees profess only the desire to "further [the public's] ongoing desire to understand the profound social and legal issues" in the trial, ER11 (2018 Order at 6), even if one takes these assurances at face value (as Proponents took Judge Walker's), they do not purport to speak for everyone who will access the recording. Unavoidable in this age of YouTube and Facebook, partisans on both sides will sensationalize and unfairly present portions of it. Indeed, the organization that sponsored Plaintiffs' efforts in bringing this lawsuit announced that it will "flood the internet with some fascinating clips from the trial" if the recording is unsealed. Matt Baume, *Secret anti-gays unmasked, then re-masked*, LGBTQ NATION (Oct. 24, 2011), https://goo.gl/N1jsAN.

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, Judge Orrick relied upon the district court's 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 footnote in this Court's decision in *Perry* that cites this Rule without explanation or discussion, 667 F.3d at 1085 n.5, Judge Orrick concluded that the Rule's 10-year period negates any compelling interest in keeping

[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.

the recordings "under seal in perpetuity," and requires their release. ER15 (2018 Order 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).[5] The Rule is thus plainly addressed to materials filed under seal by parties, not materials created and placed in the record under seal by the court itself. Indeed, with its repeated references to "Submitting Parties" and "Designating Parties," the Rule *makes little sense* when applied to such judicially created and filed documents.

[5] The same analysis applies to the version of the Rule in force at the time of trial, which similarly (1) was entitled "Filing Documents Under Seal," (2) contained procedures for "*counsel* seeking to file" materials under seal, and (3) provided that "a *party that submitted documents* that the court placed under seal" could seek an exemption from the 10-year unsealing provision. N.D. CAL. L.R. 79-5(a)–(f) (2010) (emphases added).

The court below thought otherwise, concluding 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," and that the Rule's provisions "governing how parties could file materials under seal . . . do[ ] not mean that the presumptive unsealing rule is somehow limited." ER18–19 (2018 Order 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)—plainly tying the Rule's scope to documents *submitted by parties*. 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 and filed by the court. (For example, in this case, who is the "Submitting Party"? The district court?) The court reiterated that "Judge Walker, as noted above, directed that the Clerk file the trial recording under seal as part of the record." ER19 (2018 Order at 14) (quotation marks omitted). But the recordings' presence in the record does not somehow transform them into documents *filed by a party*.

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). "A provision that

may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.*; *see also Yates v. United States*, 135 S. Ct. 1074, 1083–88 (2015) (interpreting seemingly unlimited statutory language in light of the statute's title and surrounding provisions). Here, the court below erred in interpreting Rule 79-5(g)'s reference to a "document filed under seal" in a way that makes no sense in light of the rest of the Rule's language.

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 of the trial departed from the basic ground rules of legal interpretation in another way. It is fundamental 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). But the reading of Rule 79-5(g) adopted by the court below—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—an application specifically addressed and required by the Rule's separate prohibition of "recording . . . any judicial proceeding" "*for those purposes*." *Id.* (emphasis added). But the court below interpreted Rule 79-5 to demand *precisely that result*: after ten years have passed, by the district court's lights, 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. Judge Orrick should not have read Rule 79-5 to presumptively require the very thing Rule 77-3 forbids.

Even if the court below was right to conclude that "Rule 79-5 applies" to the video recordings, ER19 (2018 Order at 14), it was wrong to resolve any conflict *in favor of Rule 79-5(g)*. For as this Court has described, it is a "fundamental canon of statutory interpretation" that "when there is an apparent conflict between a specific provision and a more general one, the more specific one governs." *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1158 (9th Cir. 2004). Here, to the extent Rule 79-5(g) can be read as applying to the video recordings at all, at most it does so in a general way—based on the notion that those recordings, along with documents filed under seal by a party, fall within the scope of the abstract phrase "any document filed under seal." Rule 79-5(g). Rule 77-3, by contrast, *specifically applies to video recordings of trial proceedings*, and *specifically prohibits the broadcasting* of them.

Even if Rule 79-5(g) is read as applying to the video recordings, Rule 77-3's more specific terms should still control.

C. Even if Local Rule 79-5(g) applies, the compelling reasons to maintain the seal establish "good cause" for its indefinite extension.

The district court erred in presumptively requiring release of the recording after 10 years even if it was right to read Local Rule 79-5(g) as controlling (and as shown above, it was not). 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).[6] And this Court'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,

[6] The Rule provides that such an extension order may be sought by "a Submitting Party or a Designating Party." *Id.* Similarly, the version of this provision in force when the recordings were made and placed into the record provided that such an extension order could be sought by "a party that submitted documents that the Court placed under seal." N.D. CAL. L.R. 79-5(f) (2010). This language highlights the absurdity of applying this Rule to the recordings here, which were created and placed into the record *by the court itself*. But if this Court concludes that the Rule nonetheless applies, it should not adopt the further absurdity of concluding that because no party submitted the recordings, *no party can seek an extension of the 10-year period*. *See Arizona State Bd. for Charter Schs. v. United States Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) (canon against absurdities).

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, this Court has already determined 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 should not) revisit. *See Bernhardt*, 339 F.3d at 924; *Kohler*, 782 F.3d at 1070. And as shown above, the fundamental, structural interest in judicial integrity implicated here simply does not become less compelling with the passage of time. *A fortiori*, there is good cause to order that Rule 79-5(g)'s presumptive 10-year period be extended *sine die*.

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 court below not only erred in concluding that Rule 79-5(g)'s presumptive 10-year period applies to the video 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, ER316, Judge Orrick reasoned that the 10-year clock started two years earlier, on August 12, 2010, because the case was "functionally . . . 'closed' " when Judge Walker entered his permanent injunction

against Proposition 8 on that date. ER18 (2018 Order at 13 n.20); *see also* ER4 (2020 Order at 4 n.10). That was 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"). Determining the date on which final judgment is entered and the case is marked "closed" is a simple and unambiguous task. By contrast, calculating the 10-year deadline based on when a case is "*functionally* . . . closed," ER18 (2018 Order at 13 n.20) (emphasis added), *invites* confusion and ambiguity. For example, where a court enters an indefinite stay that effectively forecloses the plaintiffs' claims, has the case been "closed"? *Cf. McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). Where a court enters a series of orders that effectively terminate the case but never enters final judgment, is the case "closed"? *Cf. Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir. 1973), *overruled by United States v. Cooper*, 135 F.3d 960 (5th Cir. 1998).

Courts have had to grapple with these thorny questions in other areas; but here, Rule 79-5(g) by design avoids such quandaries by asking, simply, when the case was closed. In this case, that simple question has a simple answer: on August

27, 2012, when the court ordered the "Clerk . . . [to] close this file" and the case was marked closed. ER317.[7]

IV. The First Amendment does not require the unsealing and public dissemination of the video recordings.

Finally, the district court concluded that its "analysis would be no different" under the "First Amendment right of access." ER19 (2018 Order at 14). The court was wrong to suggest that the First Amendment could potentially apply to the video recordings at issue here; but it is right that the First Amendment does not alter the correct conclusion.

A. The First Amendment does not apply.

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.*

[7] Two days later, the district court entered a similar order, this time purporting to make its order of final judgment effective "*nunc pro tunc*" on August 12, 2010. ER313. 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.

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 that would imply that the longstanding prohibition 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* Response 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 and the federal courts of appeals have uniformly rejected the same argument. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 539 (1965) (rejecting the claim "that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom"); *id*. at 584–85 (Warren, C.J., concurring); *id*. at 588 (Harlan, J., concurring); *Sony BMG*, 564 F.3d at 9; *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). This precedent squarely forecloses any claim to access the recordings under the First Amendment.

B. Any First Amendment right to access the recordings is overridden by the compelling reasons to maintain the seal.

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. This Court has already held "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.* This is still true for all the reasons that this Court explained in *Perry*, *see id.* at 1084–88, and for all the reasons explained above, *see supra*, Part I.C. That holding thus remains binding. *See Bernhardt*, 339 F.3d at 924; *Kohler*, 782 F.3d at 1070.

CONCLUSION

The district court's decision to unseal and disseminate the recordings should be reversed, and this Court should remand with instructions to permanently maintain the seal.

Dated: September 9, 2020

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 20-16375

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant [s/Charles J. Cooper] Date [Sep 9, 2020]

("s/" plus typed name is acceptable for electronically-filed documents)

ADDENDUM—

PERTINENT RULES

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N.D. CAL. L.R. 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.

N.D. CAL. L.R. 77-3. Photography and Public Broadcasting (2009).

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes, 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.

N.D. CAL. L.R. 79-5. Filing Documents Under Seal in Civil Cases.

(a) This Rule Applies to Electronic and Manually-Filed Sealed Documents. The procedures and requirements set forth in Civil L.R. 79-5 apply to both the e-filing of sealed documents submitted by registered e-filers in e-filing cases; and the manual filing of sealed documents submitted by non-e-filers and/or in non-e-filing cases. For the purposes of Civil L.R. 79-5, "file" means: (1) to electronically file ("e-file") a document that is submitted by a registered e-filer in a case that is subject to e-filing; or (2) to manually file a document when it is submitted by a party that is not permitted to e-file and/or in a case that is not subject to e-filing. See Civil L.R. 5-1(b) for an explanation of cases and parties subject to e-filing.

(b) Specific Court Order Required. Except as provided in Civil L.R. 79-5(c), no document may be filed under seal (i.e., closed to inspection by the public) except pursuant to a court order that authorizes the sealing of the particular document, or portions thereof. A sealing order may issue only upon a request that establishes that the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled to protection under the law (hereinafter referred to as "sealable"). The request must be narrowly tailored to seek sealing only of sealable material, and must conform with Civil L.R. 79-5(d).

(c) Documents that May Be Filed Under Seal Before Obtaining a Specific Court Order. Only the unredacted version of a document sought to be sealed, may be filed under seal before a sealing order is obtained, as permitted by Civil L.R. 79-5(d)(1)(D).

(d) Request to File Document, or Portions Thereof, Under Seal. A party seeking to file a document, or portions thereof, under seal ("the Submitting Party") must:

(1) File an Administrative Motion to File Under Seal, in conformance with Civil L.R. 7-11. The administrative motion must be accompanied by the following attachments:

(A) A declaration establishing that the document sought to be filed under seal, or portions thereof, are sealable. Reference to a stipulation or protective order that allows a party to designate certain documents as confidential is not sufficient to establish that a document, or portions thereof, are sealable. The procedures detailed in Civil L.R. 79-5(e) apply to requests to seal in which the sole basis for sealing is that the document(s) at issue were previously designated as confidential or subject to a protective order.

(B) A proposed order that is narrowly tailored to seal only the sealable material, and which lists in table format each document or portion thereof that is sought to be sealed.

(C) A redacted version of the document that is sought to be filed under seal. The redacted version shall prominently display the notation "REDACTED VERSION OF DOCUMENT(S) SOUGHT TO BE SEALED." A redacted version need not be filed if the submitting party is seeking to file the entire document under seal.

(D) An unredacted version of the document sought to be filed under seal. The unredacted version must indicate, by highlighting or other clear method, the portions of the document that have been omitted from the redacted version, and prominently display the notation "UNREDACTED VERSION OF DOCUMENT(S) SOUGHT TO BE SEALED." The unredacted version may be filed under seal pursuant to Civil L.R. 79-5(c) before the sealing order is obtained. Instructions for e-filing documents under seal can be found on the ECF website.

(2) Provide a courtesy copy of the administrative motion, declaration, proposed order, and both the redacted and unredacted versions of all documents sought to be sealed, in accordance with Civil L.R. 5-1(e)(7).

The courtesy copy of unredacted declarations and exhibits

should be presented in the same form as if no sealing order was being sought. In other words, if a party is seeking to file under seal one or more exhibits to a declaration, or portions thereof, the courtesy copy should include the declaration with all of the exhibits attached, including the exhibits, or portions thereof, sought to be filed under seal, with the portions to be sealed highlighted or clearly noted as subject to a sealing motion.

The courtesy copy should be an exact copy of what was filed, and for e-filed documents the ECF header should appear at the top of each page. The courtesy copy must be contained in a sealed envelope or other suitable container with a cover sheet affixed to the envelope or container, setting forth the information required by Civil L.R. 3-4(a) and prominently displaying the notation "COURTESY [or CHAMBERS] COPY - DOCUMENTS SUBMITTED UNDER SEAL."

The courtesy copies of sealed documents will be disposed of in accordance with the assigned judge's discretion. Ordinarily these copies will be recycled, not shredded, unless special arrangements are made.

(e) Documents Designated as Confidential or Subject to a Protective Order. If the Submitting Party is seeking to file under seal a document designated as confidential by the opposing party or a non-party pursuant to a protective order, or a document containing information so designated by an opposing party or a non-party, the Submitting Party's declaration in support of the Administrative Motion to File Under Seal must identify the document or portions thereof which contain the designated confidential material and identify the party that has designated the material as confidential ("the Designating Party"). The declaration must be served on the Designating Party on the same day it is filed and a proof of such service must also be filed.

(1) Within 4 days of the filing of the Administrative Motion to File Under Seal, the Designating Party must file a declaration as required by subsection 79-5(d)(1)(A) establishing that all of the designated material is sealable.

(2) If the Designating Party does not file a responsive declaration as required by subsection 79-5(e)(1) and the Administrative Motion to File Under Seal is denied, the Submitting Party may file the document in the public record no earlier than 4 days, and no later than 10 days, after the motion is denied. A Judge may delay the public docketing of the document upon a showing of good cause.

(f) Effect of Court's Ruling on Administrative Motion to File Under Seal. Upon the Court's ruling on the Administrative Motion to File Under Seal, further action by the Submitting Party may be required.

(1) If the Administrative Motion to File Under Seal is granted in its entirety, then the document filed under seal will remain under seal and the public will have access only to the redacted version, if any, accompanying the motion.

(2) If the Administrative Motion to File Under Seal is denied in its entirety, the document sought to be sealed will not be considered by the Court unless the Submitting Party files an unredacted version of the document within 7 days after the motion is denied.

(3) If the Administrative Motion to File Under Seal is denied or granted in part, the document sought to be sealed will not be considered by the Court unless the Submitting Party files a revised redacted version of the document which comports with the Court's order within 7 days after the motion is denied.

(g) 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. Filing Documents Under Seal (2010).

(a) Specific Court Order Required. No document may be filed under seal, i.e., closed to inspection by the public, except pursuant to a Court order that authorizes the sealing of the particular document, or portions thereof. A sealing order may issue only upon a request that establishes that the document, or portions thereof, is privileged or protectable as a trade secret or otherwise entitled to protection under the law, [hereinafter referred to as "sealable."] The request must be narrowly tailored to seek sealing only of sealable material, and must conform with Civil L.R. 79-5(b) or (c). A stipulation, or a blanket protective order that allows a party to designate documents as sealable, will not suffice to allow the filing of documents under seal. Ordinarily, more than one copy of a particular document should not be submitted for filing under seal in a case.

(b) Request to File Entire Document Under Seal. Counsel seeking to file an entire document under seal must:

(1) File and serve an Administrative Motion to File Under Seal, in conformance with Civil L.R. 7-11, accompanied by a declaration establishing that the entire document is sealable;

(2) Lodge with the Clerk and serve a proposed order sealing the document;

(3) Lodge with the Clerk and serve the entire document, contained in an 8 ½- inch by 11-inch sealed envelope or other suitable sealed container, with a cover sheet affixed to the envelope or container, setting out the information required by Civil L.R. 3-4(a) and (b) and prominently displaying the notation: "DOCUMENT SUBMITTED UNDER SEAL";

(4) Lodge with the Clerk for delivery to the Judge's chambers a second copy of the entire document, in an identical labeled envelope or container.

(c) Request to File a Portion of a Document Under Seal. If only a portion of a document is sealable, counsel seeking to file that portion of the document under seal must:

(1) File and serve an Administrative Motion to File Under Seal, in conformance with Civil L.R. 7-11, accompanied by a declaration establishing that a portion of the document is sealable;

(2) Lodge with the Clerk and serve a proposed order that is narrowly tailored to seal only the portion of the document which is claimed to be sealable;

(3) Lodge with the Clerk and serve the entire document, contained in an 8 ½- inch by 11-inch sealed envelope or other suitable sealed container, with a cover sheet affixed to the envelope or container, setting out the information required by Civil L.R. 3-4(a) and (b) and prominently displaying the notation: "DOCUMENT SUBMITTED UNDER SEAL." The sealable portions of the document must be identified by notations or highlighting within the text;

(4) Lodge with the Clerk for delivery to the Judge's chambers a second copy of the entire document, in an identical labeled envelope or container, with the sealable portions identified;

(5) Lodge with the Clerk and serve a redacted version of the document that can be filed in the public record if the Court grants the sealing order.

(d) Filing a Document Designated Confidential by Another Party. If a party wishes to file a document that has been designated confidential by another party pursuant to a protective order, or if a party wishes to refer in a memorandum or other filing to information so designated by another party, the submitting party must file and serve an Administrative Motion for a sealing order and lodge the document, memorandum or other filing in

accordance with this rule. If only a portion of the document, memorandum or other filing is sealable, the submitting party must also lodge with the Court a redacted version of the document, memorandum or other filing to be placed in the public record if the Court approves the requested sealing order. Within 7 days thereafter, the designating party must file with the Court and serve a declaration establishing that the designated information is sealable, and must lodge and serve a narrowly tailored proposed sealing order, or must withdraw the designation of confidentiality. If the designating party does not file its responsive declaration as required by this subsection, the document or proposed filing will be made part of the public record.

(e) Request Denied. If a request to file under seal is denied in part or in full, neither the lodged document nor any proposed redacted version will be filed. The Clerk will notify the submitting party, hold the lodged document for three days for the submitting party to retrieve it, and thereafter, if it is not retrieved, dispose of it. If the request is denied in full, the submitting party may retain the document and not make it part of the record in the case, or, within 4 days, re-submit the document for filing in the public record. If the request is denied in part and granted in part, the party may resubmit the document in a manner that conforms to the Court's order and this rule.

(f) 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 be open to public inspection without further action by the Court 10 years from the date the case is closed. However, 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. Nothing in this rule is intended to affect the normal records destruction policy of the United States Courts. The chambers copy of sealed documents will be disposed of in accordance with the assigned Judge's discretion. Ordinarily these copies will be recycled, not shredded, unless special arrangements are made.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 9, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 9, 2020

s/ Charles J. Cooper
Charles J. Cooper
Attorney for Intervenors-Defendants-Appellants