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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

KRISTIN M. PERRY, *et al.*,  
Plaintiffs,  
and  
CITY AND COUNTY OF SAN FRANCISCO,  
Plaintiff-Intervenor,  
v.  
EDMUND G. "JERRY" BROWN, JR., *et al.*,  
Defendants,  
and  
PROPOSITION 8 OFFICIAL PROPONENTS  
DENNIS HOLLINGSWORTH, *et al.*,  
Defendant-Intervenors.

CASE NO. 09-CV-2292 JW (WHO)

**PLAINTIFFS' RESPONSE IN SUPPORT OF  
INTERVENOR KQED, INC.'S MOTION TO  
UNSEAL VIDEOTAPED TRIAL RECORDS**

Date: June 28, 2017  
Time: 2:00 p.m.  
Judge: Judge William H. Orrick  
Location: Courtroom 2, 17th Floor

I. INTRODUCTION

Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo unequivocally support KQED’s Motion to Unseal Videotaped Trial Records (ECF No. 852, the “Motion”). In May 2009, Plaintiffs filed this suit challenging the constitutionality of Proposition 8. Over the ensuing months, the most intimate details of Plaintiffs’ private lives were scrutinized and challenged under oath in a federal trial—and it was all captured on videotape. Now, more than seven years later, the public is still denied full access to the twelve-day federal trial that restored marriage equality to California. Hearing and seeing that testimony is the only way for the public to appreciate fully what transpired during those twelve days in January 2010. Plaintiffs “had to literally testify and prove” that their love was true, and no trial transcript can “convey what that was like[;] only seeing the testimony, via the tapes, can communicate” what Plaintiffs experienced. Zarrillo Decl., ECF No. 860, ¶ 6.

A. The Videotaped Records Should Be Unsealed

Plaintiffs support the immediate unsealing of the trial videotapes so that they can be viewed by the public. Each Plaintiff has filed a declaration in support of the Motion, and, as Plaintiff Katami put it, they believe it is “about time” that the public has access to these indispensable video records. Katami Decl., ECF No. 858, ¶ 5; see also Perry Decl., ECF No. 857, ¶ 5 (“I had literally been hoping the tapes would be released.”); Stier Decl., ECF No. 859, ¶ 6 (“When I learned that KQED was filing a lawsuit to unseal the trial video I was elated.”); Zarrillo Decl., ECF No. 860, ¶ 5 (“I was excited [to learn about the Motion].”).

In fact, in April 2011, Plaintiffs independently sought to unseal the videotaped trial records while the merits of this case were still pending on appeal. Although the Ninth Circuit ordered the tapes to remain sealed, see *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012), as explained in more detail in the Motion, the passage of time and the conclusion of this litigation (as well as the subsequent Supreme Court ruling establishing nationwide marriage equality) militate decisively in favor of now unsealing the trial videotapes. The world has changed, but Plaintiffs’ testimony about their love remains a uniquely valuable historical record of a proceeding of profound public importance.

1 It was with the benefit of “[h]aving observed and considered the testimony presented” that  
2 Judge Walker concluded that Plaintiffs’ lay witnesses, including Plaintiffs themselves, “provided  
3 credible testimony.” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 938 (N.D. Cal. 2010). The  
4 ability to observe, rather than just read, Plaintiffs’ testimony provides the viewer, as it did Judge  
5 Walker, a wealth of additional information about the speaker. In addition, testimony given during a  
6 federal trial carries with it significant assurances of truthfulness and transparency that are not found  
7 elsewhere. As Plaintiff Perry explained, “seeing a video of the trial is very different than hearing me  
8 speak publicly after the fact about my experience, or reading the trial transcript. There is something  
9 different about being in a trial, being put under oath. Being subject to cross examination means that  
10 witnesses are subject to the highest form of transparency.” Perry Decl., ECF No. 857, ¶ 7.

11 The same is true for the fifteen other witnesses who testified during the twelve-day trial.  
12 Reading the transcripts of their testimony does not allow the public to reach its own conclusions  
13 about the credibility of those witnesses or appreciate the full import of their testimony. Judge Walker  
14 found that the “demeanor and responsiveness” of Plaintiffs’ experts “showed their comfort with the  
15 subjects of their expertise” and relied on those observations in deeming Plaintiffs’ experts to be  
16 credible. *Perry*, 704 F. Supp. 2d at 940. In contrast, Judge Walker concluded that Proponents’  
17 principal expert witness David Blankenhorn “was unwilling to answer many questions directly on  
18 cross-examination and was defensive in his answers”; that behavior informed Judge Walker’s finding  
19 that “the opinions of Blankenhorn [are] unreliable and entitled to essentially no weight.” *Id.* at 950.

20 The public should be permitted to view the testimony of both sides’ experts. In fact,  
21 Plaintiffs’ experts are renowned academics and thought leaders in their fields. They testified on  
22 many topics that are still the subject of intense public debate today, including the history of marriage,  
23 the widespread history of discrimination against gay men and lesbians, the impact of having gay or  
24 lesbian parents, and the relative political powerlessness of gays and lesbians. *Perry*, 704 F. Supp. 2d  
25 at 949-43. And like Plaintiffs, that testimony can be best understood by watching the trial videotapes.  
26 As Plaintiff Stier summarized, “reading about it is not the same. Here [the expert], like me, was  
27 under oath. He was also cross-examined, and the videos are important so people can see how he  
28 reacted to the questions from the other side.” Stier Decl., ECF No. 859, ¶ 10. The videotaped

1 testimony of all of the expert witnesses should be unsealed so that it can serve as “an instructive piece  
2 of history for school children who are starting to not remember a time before their moms and dads  
3 could get married . . . . Seeing the trial testimony, and seeing the faces and mannerisms of the  
4 witnesses, . . . people will be able to see just how injurious discrimination can be.” Perry Decl., ECF  
5 No. 857, ¶ 6.

6 Plaintiffs recognize that there are still those who wish to deny them fundamental rights or  
7 believe that their marriages somehow denigrate or disrespect marriages between people of opposite  
8 sex. But, as the Supreme Court has emphasized, “[i]t would misunderstand [Plaintiffs] to say they  
9 disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they  
10 seek to find its fulfillment for themselves.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).  
11 And the trial videotapes show this: “When the public sees the video of my testimony they will be  
12 able to see in my face and hear in my voice that for me, being married to Kris was my dream, just to  
13 share my life in a recognized way with the person I love.” Stier Decl., ECF No. 859, ¶ 7. The trial  
14 videotapes communicate the depth of Plaintiffs’ love: “If you see the trial tape, you will be able to  
15 see the tears in my eyes, and you will hear the way my voice quivers when I talk about what Jeff  
16 means to me.” Katami Decl., ECF No. 858, ¶ 6.

17 Plaintiffs’ “stories reveal that they seek not to denigrate marriage but rather to live their lives  
18 . . . joined by its bond,” *Obergefell*, 135 S. Ct. at 2595, and they want the public to be able to see that  
19 directly. As Plaintiff Zarrillo put it, “I want people to be able to look at my face and hear the emotion  
20 in my voice, because then they will understand how much I love Paul.” Zarrillo Decl., ECF No. 860,  
21 ¶ 7.

22 As the Supreme Court recognized in *Obergefell*, it was not long ago that a “truthful  
23 declaration by same-sex couples of what [is] in their hearts” was simply not possible to share  
24 publicly. 135 S. Ct. at 2596. The testimony given by Plaintiffs under oath in this case is the most  
25 truthful and raw declaration of what is in Plaintiffs’ hearts, and it serves as a historical record of the  
26 moment in time when the love of same-sex couples was vindicated by the federal courts. As Plaintiff  
27 Perry stated, “[i]f the tapes are not released, to me it would feel like a very important part of my  
28

1 history, and the LGBT history as a whole is being erased.” Perry Decl., ECF No. 857, ¶ 9. Plaintiffs  
2 believe the public should have the opportunity to see and hear their truthful declarations of love.

3 **B. The First Amendment Guarantees Access To Public Trial Records Including The**  
4 **Videotapes**

5 Plaintiffs’ desire for the world to see the videotaped record of their trial is supported by the  
6 First Amendment, which guarantees the public the right to access judicial proceedings in order “to  
7 protect the free discussion of governmental affairs” essential to our democracy. *Globe Newspaper*  
8 *Co. v. Superior Court*, 457 U.S. 596, 604 (1982). “Under the first amendment, the press and the  
9 public have a presumed right of access to court proceedings and documents.” *Oregonian Publ’g Co.*  
10 *v. United States Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (citing *Press-Enterprise Co. v.*  
11 *Superior Court*, 464 U.S. 501, 510 (1984)).

12 The videotaped records at issue here are more than seven years old, the litigation that  
13 produced the records is over, and the constitutional principle litigated in the lawsuit has been fully  
14 and finally adjudicated by the Supreme Court. The delay in providing public access to these records  
15 can no longer be justified. Indeed, even a 48-hour delay in unsealing judicial records “is a total  
16 restraint on the public’s first amendment right of access.” *Associated Press v. United States Dist.*  
17 *Court*, 705 F.2d 1143, 1147 (9th Cir. 1983). Having waited more than seven years, the public should  
18 not be required to wait a day longer to view the videotape of this trial.

19 Public access is particularly necessary here given the sharply contested nature of the  
20 constitutional dispute regarding the marriage rights of gay men and lesbians. Because “it is difficult  
21 for [people] to accept what they are prohibited from observing,” *Richmond Newspapers, Inc. v.*  
22 *Virginia*, 448 U.S. 555, 572 (1980) (plurality), the First Amendment guarantees free and open access  
23 to judicial proceedings to foster public confidence in the judicial system. The First Amendment right  
24 of access “exists to enable free expression about important issues” such as the question of overriding  
25 public importance litigated in this trial. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir.  
26 2014). Observing the trial testimony through the videotaped records, rather than merely reading it (or  
27 hearing about it secondhand), will allow the public to participate more meaningfully in the ongoing  
28 public discussion about the issues of same-sex marriage and the rights of same-sex couples.

1 The videotaped records in this historically significant proceeding are a quintessential judicial  
2 record of the utmost public importance. *See Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d  
3 1165, 1181 (6th Cir. 1983) (“The public has an interest in ascertaining what evidence and records the  
4 District Court . . . relied upon in reaching [its] decisions.”); *NBC Subsidiary (KNBC-TV), Inc. v.*  
5 *Superior Court*, 980 P.2d 337, 358 (Cal. 1999). The records should be unsealed and made available  
6 to the public so that everyone can see, hear, and evaluate what transpired in this courthouse.

7 **II. CONCLUSION**

8 Eight years ago, Plaintiffs filed a federal lawsuit seeking to vindicate their right to marry the  
9 person they love. As part of that lawsuit, Plaintiffs gave testimony under oath about the most  
10 intimate aspects of their lives and their love. Their stories deserve to be told, and the public has the  
11 right to hear their words, from their own mouths. Plaintiffs respectfully request that this Court grant  
12 KQED’s Motion to Unseal Videotaped Trial Records.

13 Respectfully submitted,

14 DATED: May 31, 2017

GIBSON, DUNN & CRUTCHER LLP

15  
16 By: \_\_\_\_\_ /s/  
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18 and

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