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

13 KRISTIN M. PERRY, et al.,

14 Plaintiffs,

15 v.

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

18 Defendants,

19 and

20 DENNIS HOLLINGSWORTH, et al.,

21 Defendants-Intervenors.
22

CASE NO. 09-CV-2292-WHO

DEFENDANTS-INTERVENORS'
MOTION TO CONTINUE THE SEAL

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

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

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

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

BACKGROUND

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

9 As the case proceeded, Judge Walker expressed a strong desire to videotape and broadcast
10 the trial, and he importuned counsel for the parties to consent to the idea. Proponents objected to
11 both videotaping and broadcasting the trial, repeatedly warning that several of their witnesses
12 would decline to testify if the proceedings were broadcast. *See Hollingsworth v. Perry*, 558 U.S.
13 183, 186, 195 (2010). On December 21, 2009 (three weeks before the start of trial), a group of
14 media outlets (collectively the “Media Coalition”) informed the district court of the group’s interest
15 in providing “camera coverage to broadcast and webcast the . . . trial proceedings.” Dkt. #313. On
16 January 6, 2010 (five days before the start of trial), Judge Walker announced that the trial
17 proceedings would be streamed live to several courthouses in other cities and that the trial would be
18 video recorded for daily broadcast via the internet.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 Promptly after learning of Judge Walker’s activities, on April 13, Proponents moved the
3 Ninth Circuit (where the appeal in this case was pending) to order the return of all copies of the trial
4 recording. *See* Appellants’ Mot. for Order Compelling Return of Trial Recordings, *Perry v. Brown*,
5 No. 10-16696 (9th Cir. Apr. 13, 2011), Dkt. #338-1. On April 15, Plaintiffs opposed that motion
6 and filed a cross-motion to unseal the trial recording. *See* Pls.-Appellees’ Opp’n to Mot. Regarding
7 Mot. to Unseal, *Perry*, No. 10-16696 (9th Cir. Apr. 15, 2011), Dkt. #340. On April 18, the Media
8 Coalition moved to intervene for the “purpose of joining in the Motion to Unseal filed by Plaintiffs-
9 Appellees,” asserting that the “profound” “interest of the Media Coalition in [that issue] cannot be
10 denied.” Media Coal.’s Mot. to Intervene at 1–4, *Perry*, No. 10-16696 (9th Cir. Apr. 18, 2011), Dkt.
11 #343.

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

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

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

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

5 5. Proponents immediately appealed and asked the Ninth Circuit to stay the order lifting
6 the seal. *See* Mot. for Stay Pending Appeal, *Perry v. Brown*, No. 11-17255 (9th Cir. Sept. 23,
7 2011), Dkt. #3-1. The Ninth Circuit granted Proponents’ motion for a stay, *Perry v. Brown*, No. 11-
8 17255 (9th Cir. Oct. 24, 2011), Dkt. #16, and in February 2012, in a decision authored by Judge
9 Reinhardt, it concluded that this Court had abused its discretion in ordering that the seal be lifted.

10 Beginning with the common-law right of access that Judge Ware had relied upon, the Ninth
11 Circuit assumed without deciding that the right applied, but found a “compelling reason”—namely,
12 the need to uphold “judicial integrity”—“for overriding the common-law right.” *Perry*, 667 F.3d at
13 1084–85. The court focused on Judge Walker’s “unequivocal assurances that the video recording at
14 issue would not be *accessible to the public.*” *Id.* at 1085 (emphasis added). Those assurances came
15 in two forms: (1) his oral statement, “following the Supreme Court’s issuance of a stay against the
16 public broadcast of the trial,” that “he was going to continue ‘taking the recording for purposes of
17 use in chambers,’ but that the recording was ‘not going to be for purposes of public broadcasting or
18 televising,’ ” *id.*; and (2) the statement in his written opinion that “the potential for public broadcast
19 in the case had been *eliminated,*” *id.* (quoting *Perry*, 704 F. Supp. 2d at 944). These statements, the
20 court concluded, foreclosed any chance that the sealing of the trial recording might “be subject to
21 later modification” because Judge Walker “promised the litigants that the conditions under which
22 the recording was maintained *would not change*—that there was *no possibility* that the recording
23 would be broadcast to the public *in the future.*” *Id.* at 1086 (first emphasis in original; additional
24 emphases added). The Ninth Circuit thus concluded that Judge Walker made “solemn
25 commitment[s]” that were “worthy of reliance” and “compelled by the Supreme Court’s ruling in
26 this . . . case”—and that Proponents “reasonably relied” on them. *Id.* at 1086–87.

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

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

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

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

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

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

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

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

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

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

8 Proponents appealed the Court’s January 17, 2018 Order to the Ninth Circuit, but on April
 9 19, 2019, that court dismissed the appeal “without prejudice for lack of jurisdiction.” Mem. Order,
 10 *Perry v. Schwarzenegger*, No. 18-15292 (Apr. 19, 2019), ECF No. 57-1. The Ninth Circuit
 11 concluded that this Court’s order provisionally unsealing the video recordings on August 12, 2020,
 12 was not an appealable final decision in light of the Order’s invitation of a further motion to continue
 13 the seal. Proponents now move to continue the seal.

14 ARGUMENT

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

25 I. THE COMMON-LAW RIGHT OF ACCESS DOES NOT REQUIRE THE UNSEALING AND PUBLIC 26 DISSEMINATION OF THE VIDEO RECORDINGS AFTER 10 YEARS.

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

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

Displaced by Local Rule 77-3.

1
2 “[T]he courts of this country recognize a general right to inspect and copy public records
3 and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435
4 U.S. 589, 597 (1978). While this traditional right “historically developed to accomplish many of the
5 same purposes as are advanced by the first amendment,” it “is not of constitutional dimension.”
6 *Valley Broad. Co. v. United States Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1293 (9th Cir.
7 1986). Rather, this right of access is a “common-law right,” *id.*—a judge-made right, a creature of
8 the courts themselves, in exercise of each court’s “supervisory power over its own records and
9 files,” *Nixon*, 435 U.S. at 598.

10 Because the common-law right lacks any “constitutional dimension,” *Valley Broadcasting*,
11 798 F.2d at 1293, it may be displaced by positive law in the same fashion as any other judge-made
12 rule. Federal courts “do not possess a general power to develop and apply their own rules of
13 decision,” and so the few, isolated enclaves of federal common law exist only by “necessary
14 expedient.” *City of Milwaukee v. Illinois and Michigan (Milwaukee II)*, 451 U.S. 312, 314 (1981).
15 And where positive, enacted law “addresses a question previously governed by a decision rested on
16 federal common law the need for such an unusual exercise of lawmaking by federal courts
17 disappears.” *Id.* at 304. Thus, “federal regulations may . . . pre-empt the field of federal common
18 law.” *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 107 (1972).

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

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

6 Following *Nixon*, courts have repeatedly found the common-law right of access displaced
7 by positive law. The Ninth Circuit, for instance, has held that 11 U.S.C. § 107(b)’s limitations on
8 when bankruptcy-court filings may be disclosed “displaces the common law right of access”
9 because it “speaks directly to, and diverges from, the common law right.” *In re Roman Catholic*
10 *Archbishop of Portland in Oregon*, 661 F.3d 417, 430 (9th Cir. 2011). Similarly, the common-law
11 right of access is supplanted by FED. R. CRIM. P. 6(e)’s rules governing recording and disclosure of
12 grand jury proceedings. *See, e.g., In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir.
13 1998). And it is likewise displaced by FED. R. CIV. P. 5.2, which does not permit documents
14 containing minors’ names to be unsealed unless they are redacted. *See Offor v. Mercy Med. Ctr.*,
15 167 F. Supp. 3d 414, 447 (E.D.N.Y. 2016), *aff’d in part, vacated in part*, 676 F. App’x 51 (2d Cir.
16 2017) (Rule 5.2 “overcomes the presumptive common-law right of access to judicial documents”).

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

24 Rule 77-3 provides:

25 Unless allowed by a Judge or a Magistrate Judge with respect to his or her own
26 chambers or assigned courtroom for ceremonial purposes or for participation in a pilot
27 or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial
28 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

1 courtroom proceedings and presentation of evidence within the confines of the
2 courthouse is permitted, if authorized by the Judge or Magistrate Judge.

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

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

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

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

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

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

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

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

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

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

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

4 the videotape at issue in the present case is merely an electronic recording of witness
5 testimony. Although the public had a right to hear and observe the testimony at the time
6 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.

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

10 This Court’s earlier decision attempted to distinguish *McDougal*, reasoning that the case
11 “dealt with a markedly different situation” because here “the video recordings at issue are
12 recordings of the court proceedings themselves, not a prior recording of testimony simply played at
13 trial.” Dkt. #878 at 11. Not so. The recording in *McDougal* was also a recording of a “court
14 proceeding []” itself—witness testimony offered in the underlying trial, which only happened to be
15 presented by videotape because the court had concluded that “exceptional circumstances” warranted
16 President Clinton’s testimony by video deposition rather than in open court. *See* FED. R. CRIM. P.
17 15(a); *see also* *McDougal*, 103 F.3d at 653.

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

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

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

6 Indeed, far from applying “to all judicial and quasi-judicial documents,” the common-law
7 right of access has no application “when there is neither a history of access nor an important public
8 need justifying access.” *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989).
9 Nor does it apply to documents that “have traditionally been kept secret.” *Id.* There is, of course, no
10 history of access to video recordings of federal trial proceedings; and the video recordings in this
11 case in particular are akin to private documents not traditionally exposed to the public. *See Perry*,
12 667 F.3d at 1090, 1087. Nor is there an important public need to access them, given that the trial
13 itself was open to the press and public and the official transcript is readily available.

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

16 Even if the common law right of access did apply, it would not justify unsealing the video
17 recordings because of the compelling interest in judicial integrity that the Ninth Circuit identified in
18 *Perry*. “The common law right of access . . . can be overridden given sufficiently compelling
19 reasons for doing so.” *Perry*, 667 F.3d at 1084 (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331
20 F.3d 1122, 1135 (9th Cir. 2003)); *see also Nixon*, 435 U.S. at 603. “[P]ublic perception of judicial
21 integrity” is an “interest of the highest order.” *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666
22 (2015) (quotation marks omitted). And as the Ninth Circuit squarely held in *Perry*, “[t]he interest in
23 preserving respect for our system of justice is clearly a compelling reason for maintaining the seal
24 on the recording” in this case. *Perry*, 667 F.3d at 1088. This Court has no power to depart from that
25 holding now—both because it has become the law of this case, *see Bernhardt v. Los Angeles Cty.*,
26 339 F.3d 920, 924 (9th Cir. 2003), and because it controls under ordinary principles of stare decisis,
27 *see Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987).

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

1 assurances that the video recording at issue would not be accessible to the public.” 667 F.3d at
 2 1085. He “promised the litigants that the conditions under which the recording was maintained
 3 *would not change*—that there was no possibility that the recording would be broadcast to the public
 4 in the future.” *Id.* at 1086. These “solemn commitment[s]” were “worthy of reliance,” *id.*, and
 5 Proponents in fact “reasonably relied” on them, *id.* Unsealing the recording now would renege on
 6 those solemn commitments, and thus “would cause serious damage to the integrity of the judicial
 7 process,” for not only would it result in a palpable injustice to the litigants and witnesses who took
 8 Judge Walker at his word, it would put future litigants and witnesses on notice that judicial
 9 promises cannot be trusted. *See id.* at 1087.

10 In addition, based on “decades of experience and study,” the Judicial Conference has found
 11 that the public broadcast of trial proceedings can “create privacy concerns,” “increase[] security
 12 and safety issues,” and escalate “[t]hreats against judges, lawyers, and other participants.” Dkt.
 13 #771-2 at Ex. 3; *see also Hollingsworth*, 558 U.S. at 193. These findings are based on the Judicial
 14 Conference’s study of ordinary cases. “[I]n ‘truly high-profile cases’ one can ‘[j]ust imagine what
 15 the findings would be.’ ” *Hollingsworth*, 558 U.S. at 198 (second alteration in original). Indeed,
 16 Proponents consistently opposed broadcast in this trial precisely because they fear that public
 17 dissemination of the trial video would subject them and their witnesses to well-substantiated risks
 18 of harassment. As the Supreme Court noted, those concerns have been “substantiated” by “incidents
 19 of past harassment.” *Id.* at 195. The record in this case is replete with evidence of repeated—and
 20 frequently serious—harassment of Proposition 8 supporters.³ For example, “donors to groups
 21 supporting Proposition 8 ‘have received death threats and envelopes containing a powdery white
 22 substance,’ ” and “numerous instances of vandalism and physical violence have been reported
 23 against those who have been identified as Proposition 8 supporters.” *Id.* at 185–86. If Judge
 24

25 ³ *See, e.g.*, Dkt. #187-2 ¶¶ 11–12 (discussing harassment); Dkt. #187-9 ¶¶ 6–8 (declaring that
 26 supporters “were physically assaulted” and had “homes and automobiles defaced”); Dkt. #187-
 27 11 (collecting 71 articles that discuss harassment of supporters); Dkt. #187-12 ¶¶ 5–6 (discussing
 28 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>.

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

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

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

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

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

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

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

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

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

19 **Effect of Seal.** Unless otherwise ordered by the Court, any document filed under seal
 20 shall be kept from public inspection, including inspection by attorneys and parties to
 21 the action, during the pendency of the case. Any document filed under seal in a civil
 22 case shall, upon request, be open to public inspection without further action by the
 23 Court 10 years from the date the case is closed. However, a Submitting Party or a
 24 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.

25 N.D. Cal. L.R. 79-5(g).⁴

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

27
 28 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>.

1 667 F.3d at 1085 n.5, the Court’s previous Order concluded that the Rule’s 10-year period negates
2 any compelling interest in keeping the recordings “under seal in perpetuity,” and instead
3 presumptively requires that they be unsealed after 10 years. Dkt. #878 at 10. But for multiple
4 reasons, this Rule does not justify lifting the seal.

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

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

19 The January 17 order reasoned that “[t]here was and is nothing in Rule 79-5 limiting the
20 presumptive unsealing to materials filed by the parties as opposed to materials created and filed by
21 the Court.” Dkt. #878 at 13–14. But the subsection setting out Rule 79-5’s scope does so explicitly,
22 referring to “sealed documents submitted by registered e-filers in e-filing cases” and those
23 “submitted by a party that is not permitted to e-file and/or in a case that is not subject to e-filing.”
24 Rule 79-5(a). And the very subsection at issue here, subsection (g), refers to “Submitting Part[ies]”
25 and “Designating Part[ies]” in a way that is simply nonsensical if the Rule is applied to documents
26 created by the court. To be sure, “Judge Walker . . . directed that the Clerk file the trial recording
27 under seal as part of the record.” Dkt. #878 at 14 (quotation marks omitted). But the recordings’
28 presence in the record does not somehow transform them into documents *filed by a party*.

1 **B. Local Rule 77-3’s Specific Bar on Broadcasting the Video of Trial Proceedings**
 2 **Governs.**

3 Interpreting Rule 79-5(g) as applying to the video recordings also conflicts with the canon
 4 that courts must not “construe two statutes [or rules] so that they conflict,” but instead are “obliged
 5 to reconcile them.” *Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008). The reading of Rule
 6 79-5(g) adopted by the January 17, 2018 Order—as presumptively making the recordings available
 7 for public dissemination and broadcast after ten years—heedlessly flouts that canon by creating a
 8 conflict with Rule 77-3’s specific *prohibition* on the public broadcast of the recordings.

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

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

22 Even if Local Rule 79-5(g) could be read as presumptively requiring the release of the video
 23 recordings (and as shown above, it cannot), the seal should still be maintained. For that Rule itself
 24 provides that the duration of the Court’s seal may be “extend[ed] . . . to a specific date beyond the
 25 10 years provided by this rule” by order of the Court “upon showing [of] good cause.” N.D. CAL.
 26 L.R. 79-5(g). And the Ninth Circuit’s decision in *Kamakana v. City and Cty. of Honolulu* makes
 27 clear that the “good cause” standard is *less* demanding than the “compelling reasons” showing
 28 required under the common-law right of access. 447 F.3d 1172, 1180 (9th Cir. 2006); *see also*

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

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

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

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

20 By keying its presumptive 10-year period to the date when “the case is closed,” Rule 79-
21 5(g) provides a clear rule for calculating its deadline—one of the highest virtues of a time limit like
22 this one. *Cf. Bonneau v. Centennial Sch. Dist. No. 28J*, 666 F.3d 577, 580 (9th Cir. 2012) (“a
23 primary goal of statutes of limitations” is “clarity and certainty in litigation”). Calculating the 10-
24 year deadline based on when a case is “*functionally . . . closed*,” Dkt. #878 at 13 n.20 (emphasis
25 added), *invites* confusion and ambiguity. Determining the date on which final judgment is entered
26 and the case is marked “closed,” by contrast, is a simple and unambiguous task. Here, the task
27 yields a simple and unambiguous answer: the case was closed on August 27, 2012, when the court
28

1 ordered the “Clerk . . . [to] close this file” and the case was marked closed. Dkt. #842.⁵

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

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

8 The First Amendment does not require public access to the trial tapes in this case. Both the
9 Supreme Court and the Ninth Circuit have squarely held that the First Amendment does not even
10 entitle the public to access recordings submitted as evidence of illegal conduct during criminal trial;
11 in those circumstances, the Constitution is satisfied so long as the trial is open to the public and
12 transcripts of the recordings as played at trial are publicly available. *See Nixon*, 435 U.S. at 608–09;
13 *Valley Broadcasting*, 798 F.2d at 1292–93; *see also Providence Journal*, 293 F.3d at 16; *Fisher v.*
14 *King*, 232 F.3d 391, 396–97 (4th Cir. 2000); *United States v. Beckham*, 789 F.2d 401, 408–09 (6th
15 Cir. 1986); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 426–28 (5th Cir. 1981). Other courts have
16 held that the same is true of recorded witness testimony offered at criminal trials, *see McDougal*,
17 103 F.3d at 659, and of recordings of criminal proceedings generally, *see United States v. Antar*, 38
18 F.3d 1348, 1359–60 (3d Cir. 1994) (explaining that the First Amendment requires access to “the
19 live proceedings” and “the transcripts which document those proceedings”). In light of this
20 precedent, it follows that the First Amendment does not compel access to the recording here.

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

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

1 and the federal courts of appeals have uniformly rejected the same argument. *See, e.g., Estes v.*
 2 *Texas*, 381 U.S. 532, 539 (1965); *id.* at 584–85 (Warren, C.J., concurring); *id.* at 588 (Harlan, J.,

3 concurring); *In re Sony BMG*, 564 F.3d 1, 9 (1st Cir. 2009); *Conway v. United States*, 852 F.2d 187,

4 188 (6th Cir. 1988); *United States v. Edwards*, 785 F.2d 1293, 1295 (5th Cir. 1986); *United States*

5 *v. Kerley*, 753 F.2d 617, 621 (7th Cir. 1985); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d

6 16, 23 (2d Cir. 1984); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983).

7 The First Amendment right of access, in any event, does not require public access to a trial

8 recording when maintaining the recording under seal “serves a compelling interest” and “there are

9 no alternatives . . . that would adequately protect the compelling interest.” *Perry*, 667 F.3d at 1088.

10 That standard is satisfied for all the reasons explained in *Perry*, *see id.* at 1084–88, and for all the

11 reasons explained above, *see supra* Part I.c.

12 **CONCLUSION**

13 This Court should permanently maintain the seal protecting the trial video recordings from

14 public disclosure or dissemination.

15
16 Dated: April 1, 2020

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

13 KRISTIN M. PERRY, et al.,

14 Plaintiffs,

15 v.

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

18 Defendants,

19 and

20 DENNIS HOLLINGSWORTH, et al.,

21 Defendants-Intervenors.
22

CASE NO. 09-CV-2292-WHO

**[PROPOSED] ORDER GRANTING
DEFENDANTS-INTERVENORS'
MOTION TO CONTINUE THE SEAL**

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

1 Defendant-Intervenors have demonstrated that the videotape recordings of the trial
2 proceedings in this matter should remain under seal permanently. Therefore, the Court hereby
3 **ORDERS** that Defendant-Intervenors' Motion to Continue the Seal is **GRANTED**.

4 **IT IS THEREFORE ORDERED** that the video recordings of the trial proceedings in this
5 matter shall remain under seal permanently.

6 Dated the _____ of _____, 2020

8 Judge William H. Orrick