No. 20-16375

IN THE 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, in his official capacity as Governor of California, et al.,
Defendants-Appellants,
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.

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

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 35 MEDIA ORGANIZATIONS IN SUPPORT OF INTERVENOR-APPELLEE KQED, INC. URGING AFFIRMANCE

[Caption continued on next page]

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The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

The News Leaders Association has no parent corporation and does not issue any stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

The Seattle Times Company: The McClatchy Company, LLC owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

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The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

Time USA, LLC is a privately held limited liability company. No publicly held corporation owns 10% or more of its stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

WNET is a not-for-profit organization, supported by private and public funds, that has no parent company and issues no stock.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press (the "Reporters Committee"), The Associated Press, The Atlantic Monthly Group LLC, BuzzFeed, California Broadcasters Association, California News Publishers Association, CalMatters, The E.W. Scripps Company, Embarcadero Media, First Amendment Coalition, First Look Media Works, Inc., Fox Television Stations, LLC, Gannett Co., Inc., Hearst Corporation, Inter American Press Association, Investigative Reporting Workshop at American University, KPBS, Los Angeles Times Communications LLC, The McClatchy Company, LLC, Mother Jones, MPA - The Association of Magazine Media, National Association of Broadcasters, National Journal Group LLC, National Newspaper Association, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, The News Leaders Association, Radio Television Digital News Association, The Seattle Times Company, Sinclair Broadcast Group, Inc., Society of Environmental Journalists, Society of Professional Journalists, TIME USA, LLC, Tully Center for Free Speech, and WNET.

Amici file this brief in support of Intervenor-Appellee KQED, Inc. ("KQED"). Amici have a strong interest in vindicating the public's presumptive right of access to judicial records, which is critical to journalists' ability to inform

the public about court proceedings of significant interest. On July 9, 2020, the U.S. District Court for the Northern District of California ("District Court") ordered the unsealing of the audio-visual recordings of the twelve-day trial that took place in 2010 to determine the constitutionality of Proposition 8, a ballot measure that denied same-sex couples the right to marry in California. Amici urge this Court to affirm the District Court's order.

The Proposition 8 trial was—and remains—an historic event of immense public interest and importance. News media amici led by the Reporters Committee have long supported KQED's efforts to obtain access to those recordings for the benefit of the press and the public.[1] Amici write to emphasize the importance of the audio-visual recordings at issue to the ability of journalists and documentarians to completely and accurately inform members of the public who were not able to attend the trial in person about the events that occurred in the courtroom.

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[1] *See* Br. of Amici Curiae the Reporters Comm. for Freedom of the Press and 36 Media Orgs. in Support of Media Intervenor KQED, Inc., *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. May 13, 2020), ECF No. 899-2; Br. of Amici Curiae the Reporters Comm. for Freedom of the Press and 35 Media Orgs. in Support of Intervenor-Appellee KQED, Inc. Urging Affirmance, *Perry v. Hollingsworth*, No. 18-15292 (9th Cir. Aug. 8, 2018), ECF No. 37.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiffs-Appellees, Intervenor-Plaintiff-Appellee, Intervenor-Appellee, Defendants-Appellants, and Intervenors-Defendants-Appellants have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(A)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

In 2010, five years before the U.S. Supreme Court held that same-sex couples had a constitutional right to marry in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the District Court enjoined enactment of Proposition 8, a state constitutional amendment denying same-sex couples the right to marry in California. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010) ("*Perry I*"), *aff'd sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). Audio-visual recordings of the twelve-day bench trial (the "Recordings") were entered into the record and filed under seal. *See Perry I*, 704 F. Supp. 2d at 929. The Recordings have remained under seal for a decade.

KQED, Plaintiffs-Appellees, and others have repeatedly sought to unseal, and thus make public, the Recordings. *See* Br. of Intervenor-Appellee ("KQED Br.") at 7–9. Most recently, on July 9, 2020, the District Court denied the renewed motion by Intervenors-Defendants-Appellants ("Proponents") to maintain the Recordings under seal, holding that "the common law right of access requires release of the trial recordings absent some other evidence that could theoretically provide a compelling justification." Order Denying Mot. to Maintain Seal; Unsealing Trial Recordings at 4, *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. July 9, 2020), ECF No. 909 ("District Court Order"). Finding that Proponents had

presented no such evidence of a compelling justification to maintain the seal, the District Court ordered the Recordings unsealed. *Id.*

Despite failing to submit any evidence to the District Court that they or any trial witness "fears retaliation or harassment" if the Recordings are released, or any evidence at all that would demonstrate a compelling interest in maintaining the Recordings under seal, *id.* at 3, Proponents ask this Court to permanently deny the press and public access to the Recordings. *See* Br. of Intervenors-Defs.-Appellants ("Proponents' Br.") at 56. Proponents have proffered no facts that would warrant continued sealing of the Recordings of a trial of unique historical significance and ongoing public interest.

Disclosure of the Recordings, however, will advance the purposes underlying both the common law and First Amendment rights of access to judicial documents: encouraging fair judicial proceedings and fostering informed civic engagement on matters of public importance. Though transcripts of the trial are available, the Recordings provide the best and most complete depiction of it. There is a stark difference between cold transcripts and the Recordings, which convey body language, inflection, tone of voice, and the emotional tenor of the trial. Indeed, this additional context is critical to the work of broadcast journalists

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

Because access to the Recordings will provide the public with a richer, more fulsome account of the witness testimony and legal arguments in this historic trial—an account which, in all other respects, has been unavailable to the public for the past decade—amici urge this Court to affirm the District Court Order unsealing the Recordings.

ARGUMENT

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

Both the common law and the First Amendment provide the press and the public with a presumptive right of access to judicial documents. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 591 (9th Cir. 2020) ("The press's right of access to civil proceedings and documents fits squarely within the First Amendment's protections.") (quoting *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1069 (7th Cir. 2018)); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (recognizing the strong common law "presumption in favor of access to court records" in civil proceedings).

Public access to judicial proceedings and documents has long been recognized as "one of the essential qualities of a court of justice." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980) (internal quotation marks omitted). Openness provides citizens with "assurance that the proceedings were conducted fairly to all concerned" and enhances fairness by exposing participants to public scrutiny. *Id.* at 569.

Amici agree with KQED that the District Court correctly determined that the common law right of access to judicial documents applies to the Recordings at issue in this case. *See* KQED Br. at 15–16; *Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047, 1055 (N.D. Cal. 2018), *appeal dismissed*, 765 F. App'x 335 (9th Cir. 2019). Moreover, the District Court further noted that its analysis in this case "would be no different if [it] applied a First Amendment right of access instead of the common-law right of access." *Perry*, 302 F. Supp. 3d at 1058. Indeed, disclosure of the Recordings supports the purposes of both the First Amendment and the common law presumptions of access.

Public access to the Recordings will bolster confidence in the judicial process by allowing citizens, including the large numbers who could not attend this historic trial in person, to observe the workings of the judicial system. *See Richmond Newspapers, Inc.*, 448 U.S. at 572 (finding that "the appearance of

justice can best be provided by allowing people to observe it"); *see also United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981) (holding that the news media may copy tapes introduced into evidence at trial in part because "the public forum values emphasized in [*Richmond Newspapers, Inc.*] can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person").

Though a transcript of the trial is publicly available, access to the Recordings is the closest substitute to in-person attendance. Public access to the Recordings will ensure that this historic trial will at last be "open to all who care to observe." *Richmond Newspapers, Inc.*, 448 U.S. at 564.

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

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

Numerous courts have recognized that a transcript conveys far less information than an audio-visual or audio recording. *See, e.g.*, *In re Nat'l Broad. Co., Inc. (Myers)*, 635 F.2d 945, 953 (2d Cir. 1980) ("[S]eeing the [audio-visual] tapes . . . will create a stronger impression of the events among those who already have been exposed to news accounts of their contents."); *State v. WBAL-TV*, 975 A.2d 909, 926 (Md. Ct. Spec. App. 2009) ("[A] transcript ordinarily reflects only

the words spoken, and not how they were said or the physical actions and reactions of the participants present."). Video provides the news media and the public with a more robust and informative depiction of a courtroom proceeding than even a perfect transcript of that proceeding. Unlike a transcript, a recording conveys body language, inflection, tone of voice, and other contextual information. *See Criden*, 648 F.2d at 824 (noting that in a written record, "[i]mportant, sometimes vital, parts of the trial, including the appearance, demeanor, expression, gestures[,] intonations, hesitances [sic], inflections, and tone of voice of witnesses, of counsel, and of the judge are not there") (quoting *Oxnard Publ'g Co. v. Superior Court*, 68 Cal. Rptr. 83, 95 (Ct. App. 1968). If access to existing audio-visual recordings is denied, "a substantial part of the real record of the proceeding will [be] permanently lost to public scrutiny." *Id.*

Indeed, as the Third Circuit has recognized, "actual observation of testimony or exhibits contributes a dimension which cannot be fully provided by second-hand reports." *Criden*, 648 F.2d at 824 (granting media access to copy and rebroadcast videotaped evidence in criminal trial of public officials); *see also In re Application of CBS, Inc.*, 828 F.2d 958, 960 (2d Cir. 1987) (granting the news media the ability to copy a videotaped deposition, noting that "[t]ranscripts lack a tone of voice, frequently misreport words and often contain distorting ambiguities as to where

sentences begin and end"). And providing access to a video recording allows a viewer to become "virtually a participant in the events portrayed," amplifying the impact of the information presented. *United States v. Martin*, 746 F.2d 964, 971–72 (3d Cir. 1984) ("The hackneyed expression, 'one picture is worth a thousand words' fails to convey adequately the comparison between the impact of the televised portrayal of actual events upon the viewer of the videotape and that of the spoken or written word upon the listener or reader.") (quoting *United States v. Criden*, 501 F. Supp. 854, 859–60 (E.D. Pa. 1980)).

Access to the Recordings would similarly offer the public a more detailed, nuanced, and fulsome account of the testimony and legal arguments presented in what has proven to be an historic and influential case—and one which has remained a matter of significant public interest for more than a decade.

B. Video and audio recordings enable the news media and documentarians to provide additional context and information to the public.

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

573. As surrogates for the public, members of the news media have a responsibility to provide accurate accounts of judicial events—and their ability to do so is greatly enhanced when they have access to audio-visual recordings of courtroom proceedings.

1. Video recordings allow the news media and documentarians to provide more robust and thorough reporting of judicial proceedings.

Recordings serve as powerful storytelling tools for journalists working in audio or visual mediums. For example, in the recent documentary series *The Trials of Gabriel Fernandez*, filmmaker Brian Knappenberger explored the habitual abuse and eventual murder of an eight-year-old boy by his mother and her boyfriend, and the systemic failings within the Los Angeles Department of Children and Family Services that may have led to its failure to protect the boy. Knappenberger incorporated footage of the Los Angeles Superior Court trial of Fernandez's mother and her boyfriend into the series after experiencing firsthand the unique impact of seeing and hearing the events of the trial unfold: "We were listening to the testimony of first responders, and it was just so powerful and so moving . . . I'd heard of Gabriel's story before . . . but I didn't quite understand how intense it was." Ashlie D. Stevens, *How the Fallout from Gabriel*

Fernandez's Harrowing Murder Inspired Netflix's Must-Watch Docuseries, Salon (Feb. 26, 2020), https://perma.cc/N2Y7-9MMP.

Similarly, in the critically acclaimed 1996 documentary *Paradise Lost: The Child Murders at Robin Hood Hills*, filmmakers Joe Berlinger and Bruce Sinofsky made use of a "fair amount of footage from the original trial[s]" to paint a vivid picture of the three teenaged murder defendants that would not have been possible based on a transcript alone. Mike D'Angelo, *Paradise Lost Shows that Charisma Doesn't Need Movie-Star Looks*, AV Club (May 23, 2014), https://perma.cc/HGZ8-7RBH (featuring a defendant's testimony). Describing a visual recording of one of the defendants' testimony, one critic observed, "[W]hat comes across in this footage—and in all of *Paradise Lost*'s trial footage—is how earnest, polite, and cooperative [the defendant] is." *Id.* The documentary, and its 2000 and 2011 sequels, are credited with bringing national attention to the case and with raising questions as to the sufficiency of the evidence against the three defendants, keeping the case in the public eye until the men were ultimately freed from prison in 2011. *See* Campbell Robertson, *Deal Frees 'West Memphis Three' in Arkansas*, N.Y. Times (Aug. 19, 2011), https://perma.cc/2WKQ-WNNU.

Courtroom footage has served as an important component of several other investigative documentaries, including the series *Making a Murderer*, which

incorporated video recordings of trial testimony and depositions in its exploration of the arrests and murder trials of Steven Avery and Brendan Dassey. *See Making a Murderer: Eighteen Years Lost*, at 5:05 (Netflix 2015) (featuring one of the many instances in which the documentary makes use of video footage of depositions of family members of the defendants). The series sparked a national conversation about the case and, in particular, concerns relating to Dassey's confession. *See* Ariane de Vogue & Eli Watkins, *Supreme Court Won't Take up 'Making a Murderer' Case*, CNN (June 25, 2018), https://perma.cc/CQ22-768F. And, in 2017, Emmy award-winning documentarian David Sutcliffe sought and obtained access to recordings played during a criminal trial in which a defendant—and failed Congressional candidate—described his plans to attack a predominately Muslim town in New York. Order Granting Mot. of Non-Party David F. Sutcliffe for Access to Certain Trial Exs., *United States v. Doggart*, No. 1:15-CR-39 (E.D. Tenn. Oct. 30, 2017), ECF No. 300. Sutcliffe utilized these recordings in a documentary film illustrating the defendant's violent plot, his arrest, and a community's efforts to draw national attention to the incident. David Felix Sutcliffe, *White Fright trailer*, Vimeo (Feb. 22, 2018), https://vimeo.com/257055941 (audio recording used at the 38-second mark of the film trailer).

Recordings also allow journalists to explore and report on lessons learned from historic proceedings. For example, sixty-five years after the first international criminal trials were held in Nuremburg, Germany in 1945, critics applauded a documentary film incorporating audio and video from the trials for its "newness and freshness" in allowing audiences to hear, for the first time, "the rationalizations of the Nazi leaders in their own voices." *See* Terry Carter, *A Long-Forgotten Film on the Nuremburg Trials Helps Rekindle Interest in the Holocaust*, ABA Journal (Feb. 1, 2011), https://perma.cc/7T5M-8CQD; A.O. Scott, *Rare Scenes Re-Emerge from Nuremberg Trials*, N.Y. Times (Sept. 28, 2010), https://perma.cc/CH68-P4QD (noting that, despite the breadth of other material available about the Nuremberg trials, "[c]ourtroom scenes—of [defendants] and others in the dock, listening on headphones as their deeds are enumerated and explained . . . arrive with the sickening shock of discovery, and with the anguished question that must have been on many minds in 1945: how did this happen?").

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

Access to recordings of current and past judicial proceedings also leads to more accurate journalism, including retrospective journalism. Armed with a recording, journalists and the public can more easily disprove inaccurate and

misleading portrayals with ready access to primary source material. *Katzmann v. Victoria's Secret Catalogue (in re Courtroom TV)*, 923 F. Supp. 580, 587 (S.D.N.Y. 1996) (finding that reporting on judicial proceedings "frequently is *more* accurate and comprehensive when cameras are present") (emphasis added); *In re Application of CBS, Inc.*, 828 F.2d at 960 ("Because the videotape may in fact be more accurate evidence than a transcript . . . its availability to the media may enhance the accurate reporting of trials.").

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

Says They Got the Dialogue Right, but the Emotions Wrong, Cleveland Plain Dealer (Apr. 29, 2014), https://perma.cc/ZWM8-9PVN.

During the 2018 criminal trial of comedian Bill Cosby, observers reported differing recollections of Cosby's response when a prosecutor accused him of being a flight risk. Mensah M. Dean, *Why are Cameras Still out of Order in Pa. Courts*, Philadelphia Inquirer (July 15, 2018), https://perma.cc/8XUD-AG98 ("[T]he discrepancy couldn't be resolved definitively because cameras and recording devices are not permitted in Pennsylvania trial courtrooms, even though most states green-lighted the use of such technology in courts years ago."). Some publications reported that Cosby referred to himself in the third person when responding to the prosecutor's statement that Cosby owned a plane, while others described his response as being in the first person. *See id.* ("Most journalists reported that he'd spoken of himself in the third person: 'He doesn't have a plane, you a——!'"); *Bill Cosby Found Guilty in Sexual Assault Trial*, CNN Newsroom (Apr. 26, 2018), https://perma.cc/Y8BB-MQ8G ("You were in the courtroom when . . . one of the prosecutors said [Cosby] has a plane, [and] he shouted, 'I don't have a plane.'"). In these and other instances, audio and video recordings provide the press and the public with access to more accurate information and act as a primary resource against which such discrepancies may be resolved.

C. Access to video and audio recordings enhances reporting on matters of historic significance.

The Recordings at issue in this case constitute "an undeniably important historical record." *Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047, 1049 (N.D. Cal. 2018), *appeal dismissed*, 765 F. App'x 335 (9th Cir. 2019). As the first federal case to decide the constitutionality of a ban on same-sex marriage, *Perry I* is essential to a complete understanding of the history and development of LGBTQ civil rights jurisprudence and has already become the subject of a documentary,[2] a Broadway play,[3] and a network TV docuseries.[4]

The significant public interest in such judicial matters is further reflected in the Supreme Court's decision to release same-day audio of oral arguments in the three same-sex marriage cases heard by the Court to date: *Hollingsworth v. Perry*, 570 U.S. 693 (2013), in which the Court concluded that Proponents' did not have standing to appeal the District Court's decision in *Perry I*; *United States v. Windsor*, 570 U.S. 744 (2013), in which the Court found Section 3 of the Defense of Marriage Act unconstitutional; and *Obergefell*, in which the Court held that the

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

U.S. Constitution protects the right of same-sex couples nationwide to marry. Under the Court's standard practice, audio recordings of oral arguments are not released until the end of the week in which they are heard. *Transcripts and Recordings of Oral Arguments (March 2018)*, SUPREMECOURT.GOV, https://perma.cc/988L-H2LL (last accessed Oct. 1, 2020). However, in each of these three cases, the Court announced that it would release an audio recording on the same day of the argument, thus allowing the news media to incorporate audio from the proceedings in their reporting and allowing the public to promptly listen to the arguments in their entirety. *See* Lyle Denniston, *Court to Release Same-Day Audio for Same-Sex Marriage Cases*, SCOTUSblog (Mar. 5, 2015), https://perma.cc/KQ9V-KE55; Adam Liptak, *Court Announces Early Release of Same-Sex Marriage Arguments*, N.Y. Times (Mar. 19, 2013), https://perma.cc/2BCH-WQ7A. Indeed, until the Court's decision to provide a live audio feed of oral arguments in May 2020 due to the coronavirus pandemic, the three same-sex marriage cases were among only twenty-seven cases in the Court's history for which same-day audio was made available to the press and the public. *See Supreme Court to Allow Same-Day Audio in Travel Ban Case*, Fix the Court (Apr. 13, 2018), https://perma.cc/K2PV-UYNL.

The value of audio-visual recordings like those at issue here is not limited to contemporaneous reporting. In recent years, documentarians have used audio recordings of oral arguments in the *Windsor* and *Obergefell* cases to provide powerful context to the legal issues presented in each case. For example, in the 2017 documentary film, *The Freedom to Marry*, director Eddie Rosenstein used audio recordings of the oral arguments in *Obergefell* to provide plaintiffs' attorney Mary Bonauto with a lens through which to evaluate and reflect on the events of the trial. *See* John DeFore, *"The Freedom to Marry": Film Review*, Hollywood Reporter (Mar. 10, 2017), https://perma.cc/9THC-C8SL. In the 2018 *Windsor* documentary, *To a More Perfect Union*, filmmakers used audio recordings of the oral arguments in *Windsor* to provide a more fulsome and complete view of the issues and events leading to the Court's influential decision. *See* David-Elijah Nahmod, *Queerly Digital: To a More Perfect Union*, Echo Magazine (Oct. 11, 2019), https://perma.cc/Z4LQ-GAJM ("[T]hough the outcome of the case is well known (Windsor won) the section of the film which includes [attorney Roberta] Kaplan's oral arguments before the court and arguments from the opposing side play out like a well-done suspense drama."); *see also* John DeFore, *"To a More Perfect Union: U.S. v. Windsor": Film Review*, Hollywood Reporter (June 6,

2018), https://perma.cc/XS33-E5NA ("[T]he film follows oral arguments while offering personal context for those involved.").

As a precursor to *Windsor* and *Obergefell*, *Perry I* was an historic, first-of-its-kind judicial proceeding and a key case in the development of LGBTQ civil rights jurisprudence—a body of law which continues to develop, and in which there remains significant public interest, as evidenced in the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (finding it unlawful for an employer to fire an individual for being homosexual or transgender).

Public interest in *Perry I* will continue for generations. Providing access to the Recordings will allow the news media and documentarians to engage in robust, nuanced reporting on a judicial case of historic significance in a way that would be otherwise impossible.

III. Proponents failed to demonstrate a compelling interest sufficient to justify continued sealing of the Recordings.

Proponents put forth no evidence of a compelling interest sufficient to overcome the strong presumption in favor of access to the Recordings. Instead, they rely on speculative, unspecified "concerns about harassment and reprisals" due to alleged changes in public opinion following *Obergefell*. Proponents' Br. at

40. However, *Obergefell* was decided more than five years ago, and during those five years the identities of the Proponents have remained a matter of public record. Indeed, earlier this year, fifteen of the original witnesses for the plaintiffs in *Perry I* provided declarations to the District Court in support of unsealing the Recordings. *See* Pl.'s Opp'n to Defs.-Intervenors' Mot. to Continue the Seal at 9, Exs. B–P, *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. May 13, 2020), ECF No. 895.

Proponents' speculation that the Recordings could hypothetically be edited to mislead viewers is similarly unpersuasive. *See* Proponents' Br. at 44. Courts have regularly rejected such concerns as insufficient to overcome the strong presumption of public access to judicial records. For example, in *United States v. Guzzino*, the Seventh Circuit reversed a district court's decision to restrict access to audio tapes which had been admitted into evidence in a criminal trial. 766 F.2d 302, 304 (7th Cir. 1985). The restriction was based, in part, on the district court's concerns that the "tapes could be . . . inaccurately reported upon by the news media." *Id.* In reversing, the Seventh Circuit held that the lower court's "sole concern" was to weigh the defendants' right to a fair trial against the press and the public's presumptive right of access to judicial documents, and that it "had no duty to assure that the news media would do its job properly or that the public would

not be misinformed. To the contrary, assuming such a duty would greatly exceed the function of the judiciary." *Id.*; s*ee also United States v. Andreas*, 1998 WL 417768, at *4, *6 (N.D. Ill. July 16, 1998) (granting access to audio and videotapes admitted into evidence and rejecting as speculative the argument that disclosure would create a "substantial likelihood that the media will present out of context 'soundbites' or salacious excerpts from the tapes"); *Katzmann*, 923 F. Supp. at 587 (permitting television channel to videotape a trial and rejecting speculation about "editorialization and the selective use of 'soundbites' from the footage of courtroom broadcasts"). Here, contrary to Proponents' assertions (and as discussed in Section II.B.2 above), access to audio-visual recordings serves to foster more accurate reporting. Concerns about selective editing are best alleviated by allowing the public to have access to the full Recordings.

For these same reasons, Proponents' unsupported claims that unsealing the Recordings will "work an injury of the highest order to the integrity of the justice system" also fail. Proponents' Br. at 36. Public access to the Recordings will bolster confidence in the judicial process by allowing members of the public who could not attend this historic trial in person to see, hear, and more fully understand what led to the first-of-its-kind decision by the District Court in *Perry I*. *See Richmond Newspapers, Inc.*, 448 U.S. at 572 ("People in an open society do not

demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

In short, Proponents have offered no compelling reasons, whatsoever, for the seal to remain in place, nor have they identified any new evidence or changed circumstances which would justify continued sealing of the Recordings. Given the unique historical significance of the case and the public's ongoing interest in it, the Recordings should no longer be sealed.

Finally, even assuming, *arguendo*, that the Court were to find that Proponents demonstrated a compelling interest sufficient to overcome the strong presumption in favor of access, wholesale continued sealing of the Recordings would not be justified. Rather, any continued restriction must be "narrowly tailored" to serve that interest, for example, by redacting the testimony of an objecting witness in part or in whole, and unsealing the remainder of the Recordings. *See Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014) ("We have explained that, at least in the context of civil proceedings, the decision to seal [an] entire record . . . must be necessitated by a compelling . . . interest and [be] narrowly tailored to that interest.") (quoting *Perez–Guerrero v. U.S. Att'y Gen.*, 717 F.3d 1224, 1235 (11th Cir. 2013)).

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the District Court Order.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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