APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16375
D.C. No. 3:09-cv-02292-WHO

[Filed: November 18, 2021]

KRISTIN M. PERRY; SANDRA B. STIER; PAUL T. KATAMI; JEFFREY J. ZARRILLO,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff-Appellee,

KQED, INC.,

Intervenor-Appellee,

v.

GAVIN NEWSOM, Governor; ROB BONTA, Attorney General; TOMÁS J. ARAGÓN,* in

* Under Fed. R. App. P 43(c)(2), Rob Bonta and Tomas Aragón have been substituted for their predecessors, Xavier Becerra and Mark B. Horton.

his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health,

Defendants-Appellees,

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON,

Intervenor-Defendants-Appellants,

and

PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants.

OPINION

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted December 7, 2020
San Francisco, California

Filed November 18, 2021

Before: Carlos F. Lucero,[**] William A. Fletcher, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge W. Fletcher;
Dissent by Judge Ikuta

SUMMARY[***]

Civil Rights

The panel dismissed, for lack of jurisdiction, an appeal from the district court's order releasing to the public the video recordings of the district court bench trial in the landmark case striking down California's Proposition 8 forbidding same-sex marriage.

Judge Walker recorded the trial for use in chambers, pursuant to a local rule in effect at the time. When proponents of Proposition 8 ("Proponents") objected, he assured them that the recording was not going to be used for purposes of public broadcasting or televising. The video recordings were offered to the parties for use in their closing arguments and were later entered into the record under seal. In 2011, after Judge Walker's retirement and while the appeal of Judge Walker's order permanently enjoining Proposition 8 was pending, then-Chief Judge Ware

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[**] The Honorable Carlos F. Lucero, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

ordered the video recordings to be unsealed. Proponents appealed, explaining that they had understood Judge Walker's assurance to mean that the recordings would not be made public, although during oral argument, the attorneys acknowledged that neither they nor their clients believed the recordings would remain permanently sealed. On appeal, this court reversed the district court, holding that it had abused its discretion in ordering the recordings unsealed in light of Judge Walker's specific assurances that the recordings would not be broadcast to the public, at least in the foreseeable future. In an amended footnote, the court cited local Rule 79-5(f), which provides that any document filed under seal in a civil case shall be open to the public 10 years from the date the case was closed, unless good cause could be shown to extend the seal. In 2020, Proponents asked the district court to extend the seal. The district court declined the request, in part because Proponents failed to submit any evidence that any Proponent or witness who testified on behalf of Proponents wanted the recordings to remain under seal or feared retaliation or harassment if the recordings were released.

The panel held that Appellants, a subset of the original Proponents, failed to establish a particularized and concrete injury sufficient to constitute "injury in fact" as the Supreme Court has defined that term. Appellants did not claim, and cited no authority for the proposition, that a statement—even a "promise"—made by a judge to litigants in the course of litigation is an enforceable contract. The panel held that even assuming, contrary to their statement in the 2011 appeal, that Judge Walker told Appellants that the

video recordings would remain sealed in perpetuity, they failed to plausibly allege a concrete and particularized injury. The panel rejected Appellants' contentions that the unsealing would result in a "palpable injustice" to Appellants themselves or would harm future litigants' ability to rely on judicial "promises," and would thereby injure both the judicial system and future litigants. Neither alleged injury was sufficiently concrete and particularized for purposes of Article III standing. The panel therefore lacked jurisdiction over the appeal.

Dissenting, Judge Ikuta stated that for the past ten years, the Proponents have gone to extraordinary lengths to prevent the public broadcast of these trial proceedings, including a successful trip to the Supreme Court and multiple appeals to this court. Whether Chief Judge Walker's promise not to publicly broadcast the trial recording is an enforceable contract or merely closely analogous to one, the breach of that promise is a concrete and particularized injury sufficient to confer Article III standing upon the Proponents. Accordingly, the issue of Article III standing does not provide a basis to depart from this court's prior ruling "that the integrity of the judicial process is a compelling interest that in these circumstances would be harmed by the nullification of the trial judge's express assurances, and that there are no alternatives to maintaining the recording under seal that would protect the compelling interest at issue." *Perry v. Brown*, 667 F.3d 1078, 1081 (9th Cir. 2012).

COUNSEL

John D. Ohlendorf (argued), Charles J. Cooper, David H. Thompson, Peter A. Patterson, Cooper & Kirk PLLC, Washington, D.C., for Intervenor-Defendants-Appellants.

Christopher D. Dusseault (argued), Theodore J. Boutrous Jr., Theane Evangelis, Abbey J. Hudson, and Jillian N. London, Gibson Dunn & Crutcher LLP, Los Angeles, California; Theodore B. Olson, Matthew D. McGill, Amir C. Tayrani, and Andrew Wilhelm, Gibson Dunn & Crutcher LLP, Washington, D.C.; Ethan Dettmer and Elizabeth A. Dooley, Gibson Dunn & Crutcher LLP, San Francisco, California; David Boies, Boies Schiller & Flexner LLP, Armonk, New York; for Intervenor-Plaintiffs-Appellees.

Seth E. Goldstein, Deputy Attorney General; Benjamin M. Glickman, Supervising Deputy Attorney General; Thomas S. Patterson, Senior Assistant Attorney General; Rob Bonta, Attorney General; Attorney General's Office, Sacramento, California; for Defendants-Appellees.

Dennis J. Herrera, City Attorney; Ronald P. Flynn, Chief Deputy City Attorney; Jeremy M. Goldman, Co-Chief of Appellate Litigation; Office of the City Attorney, San Francisco, California; for Intervenor-Plaintiff-Appellee.

Thomas R. Burke (argued) and Kelly M. Gorton, Davis Wright Tremaine LLP, San Francisco, California; Rochelle L. Wilcox, Davis Wright Tremaine LLP, Los Angeles, California; for Intervenor-Appellee.

Katie Townsend, Caitlin V. Vogus, and Shannon A. Jankowski, Reporters Committee for Freedom of the Press, Washington, D.C., for Amici Curiae Reporters Committee for Freedom of the Press and 32 Media Organizations.

OPINION

W. FLETCHER, Circuit Judge:

We are once again asked to decide whether either the First Amendment or common-law right of access requires public release of video recordings of the district court bench trial in the landmark case striking down California's Proposition 8 forbidding same-sex marriage. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Long after the trial, the district court ordered release of the recordings. Appellants are a subset of the original proponents of ballot Proposition 8. We conclude that Appellants have failed to demonstrate sufficient injury for Article III standing. We therefore dismiss their appeal for lack of jurisdiction.

I. Background

In 2008, California voters passed Proposition 8 amending California's Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const. art. 1, § 7.5. Two same-sex couples who wished to marry ("Plaintiffs") filed suit in the Northern District of California against the Governor, Attorney General, and other California officials. *Hollingsworth v. Perry*, 570 U.S. 693, 702 (2013). Plaintiffs argued that Proposition 8 violated their due process and equal protection rights

under the federal Constitution. *Id.* The California State defendants refused to defend Proposition 8, though they continued to enforce it. *Id.* Proposition 8's official proponents who were responsible for putting it on the ballot—Dennis Hollingsworth, Gail Knight, Martin Gutierrez, Hak-Shing William Tam, Mark Jansson, and Protectmarriage.com ("original Proponents")—were permitted to intervene as defendants. *Schwarzenegger*, 704 F. Supp. 2d. at 954. Tam split off before trial, leaving a group we will refer to as "Proponents" or "remaining Proponents."

A bench trial was scheduled for January 2010 before then-Chief Judge Vaughn Walker. As that time grew closer, Judge Walker discussed with the parties the possibility of livestreaming the trial to other courthouses. *Hollingsworth v. Perry*, 558 U.S. 183, 200 (2010) (per curiam) (Breyer, J., dissenting). The primary obstacle to such broadcasting was the local rules of the Northern District. In particular, Local Rule 77-3 read in relevant part:

> Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge.

Perry v. Brown, 667 F.3d 1078, 1082 n.1 (9th Cir. 2012).

In December 2009, the Ninth Circuit Judicial Council authorized a pilot program "permitting the use of video in nonjury civil cases." *Hollingsworth*, 558 U.S. at 201 (Breyer, J., dissenting). A few days later, the Northern District amended its local rules in order to participate in the pilot program. *Id.* The rule change would have allowed the Proposition 8 trial to be broadcast to other courthouses.

Proponents challenged this change of rules. In January 2010, they petitioned our court for a writ of mandamus that would have prevented the district court from participating in the pilot program. *Id.* at 188. We denied the petition. On the morning of the first day of trial, the Supreme Court issued a temporary stay of the proposed broadcast to other courthouses. *Id.* at 185. Two days later, the Court extended the stay. *Id.* at 184. The Court concluded that the Northern District's amendment of its local rules likely violated 28 U.S.C. § 2071, which requires that courts generally provide "appropriate public notice and opportunity for comment" when changing their rules. *See Brown*, 667 F.3d at 1082 (citing *Hollingsworth*, 558 U.S. at 191).

Judge Walker had video recorded (but not broadcast beyond the courthouse) the first two days of trial in the event that the Supreme Court lifted the temporary stay. *Id.* After the stay was extended, Proponents asked that the trial no longer be recorded. Judge Walker responded:

> The local rule permits the recording for purposes . . . of use in chambers and that is customarily done when we have these remote courtrooms or the overflow courtrooms. And I think it would be quite helpful to me in preparing the findings of fact to have that recording. So that's the purpose for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.

After this assurance from Judge Walker, Proponents dropped their objection to recording the trial. *Perry*, 667 F.3d at 1082. Proponents called only two witnesses at the trial. Proponents explained, without providing supporting evidence, that their other witnesses declined to testify because they "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort." *Schwarzenegger*, 704 F. Supp. 2d at 944.

Without objection, the video recordings of the trial were offered to the parties for use in their closing arguments, and were later entered into the record under seal. *Brown*, 667 F.3d at 1082. Judge Walker relied on the recordings to prepare his findings of fact and conclusions of law in his written order at the conclusion of the case. *Schwarzenegger*, 704 F. Supp. 2d at 929. He also allowed the parties to keep partial copies of the recordings, subject to a protective order. *Id.* On August 4, 2010, Judge Walker entered an order permanently enjoining the enforcement of Proposition 8, holding that it violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *See id.* at 1004.

Proponents appealed. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). They did not challenge, as part of their appeal, Judge Walker's decision to enter the video recordings into the record under seal, or his decision to provide partial copies of the recordings to the parties. *Brown*, 667 F.3d at 1083.

Less than a year after deciding the case, Judge Walker retired. *Id.* Both before and after retiring, Judge Walker used clips of the recordings in public appearances. *Id.* In response, the Proponents—whose merits appeal was then pending before us—moved this court to order the return of all copies of the recordings to the district court. *Id.* Plaintiffs, joined by a coalition of media companies, cross-moved to unseal the recordings. *Id.* We transferred the motions to the district court for that court to address them in the first instance.

Then-Chief Judge James Ware had taken over the case following Judge Walker's retirement. After determining that the common-law right of access applied and that Proponents had failed to demonstrate a compelling reason to continue the seal, the court ordered that the video recordings be unsealed. *Perry v. Schwarzenegger*, No. C 09-02292, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011). Proponents appealed, explaining that they had understood Judge Walker's assurance to mean that the recordings would not be made public. They contended, further, that their witnesses would likely be harassed if the recordings were released, and that fear of harassment would make it more difficult to retry the case if Proponents succeeded in their merits appeal.

In 2011, during oral argument in the appeal from the court's order unsealing the records, Proponents' counsel acknowledged that neither they nor their clients believed the recordings would remain permanently sealed:

> JUDGE HAWKINS: Were your clients under the impression that these tapes would be forever sealed?
>
> COUNSEL: No Your Honor, I believe that a seal lasts for—not necessarily, I guess, is the better answer, is the seal lasts for ten years under the local rules of the Northern District of California and at the end of the trial—at the end of the proceedings—at the end of the case, then we would be entitled to go in and ask for an extension of that time to a specific date. But it would be a minimum of ten years, Your Honor.
>
> JUDGE HAWKINS: And it's clear from the record that your client understood that and acted on that basis?
>
> COUNSEL: The record, I don't believe has anything one way or the other on that, but yes we were aware of the local rules, Your Honor, that it was a minimum of ten years and that we would have the opportunity to ask for an extended seal if we could make a good cause showing of that.

Oral Argument at 07:04–07:58, *Brown*, 667 F.3d 1078 (No. 11-17255), https://www.ca9.uscourts.gov/media/video/?20111208/11-17255.

We reversed the district court, holding that it had abused its discretion in ordering the recordings unsealed. *Brown*, 667 F.3d at 1081. We concluded, even assuming that the First Amendment and common-law right of access applied, that there was a compelling reason not to release the recordings at that time. *Id.* at 1084. We wrote, "The reason is that Proponents reasonably relied on Chief Judge Walker's specific assurances—compelled by the Supreme Court's just-issued opinion—that the recording would not be broadcast to the public, at least in the foreseeable future." *Id.* at 1084–85.

In an appended footnote, we cited and quoted Local Rule 79-5(f), to which Proponents' counsel had referred in his answer during oral argument. *Id.* at 1085 n.5. Our footnote explained that Rule 79-5(f)

> provides that "[a]ny document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed," with the proviso that "a party that submitted documents that the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond the 10 years provided by this rule."

Id. (alteration in original) (quoting Local Rule 79-5(f)).

In the separate merits appeal, we affirmed Judge Walker's ruling that Proposition 8 violated the Fourteenth Amendment of the Constitution. *Brown*, 671 F.3d 1052. The Supreme Court granted certiorari

and ultimately concluded that while Proponents had standing to defend Proposition 8 in the trial before the district court, they lacked Article III standing to appeal the district court's decision striking down Proposition 8. *Hollingsworth*, 570 U.S. at 715. Two years later, in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Court held that same-sex marriage is protected under the Fourteenth Amendment.

In 2017, media intervenor KQED asked the district court to unseal the video recordings of the trial. Proponents opposed the unsealing. By this time, Judge Ware had retired and the case had again been reassigned, this time to Judge William Orrick.

In 2018, the district court held that the common-law right of access applied to the trial recordings. The court held, further, that the reliance interest we had identified in 2012 remained a compelling reason to maintain the recording's seal until its presumptive expiration after ten years, pursuant to the court's local rules. The court ordered that the trial recordings be released after the seal's presumptive expiration in 2020, unless Proponents demonstrated a "compelling reason" to extend the seal. Proponents appealed. We dismissed the appeal for lack of jurisdiction, holding that the decision was neither a final order nor an appealable collateral order. *Perry v. Schwarzenegger*, 765 F. App'x 335 (9th Cir. 2019).

In 2020, Proponents asked the district court to extend the seal. For the first time, the California State defendants actively supported release of the video recordings to the public. The court declined to extend the seal, in part because "the Proponents again failed

to submit any evidence by declaration that any Proponent or witness who testified on behalf of the Proponents want[ed] the trial recordings to remain under seal . . . [or] fear[ed] retaliation or harassment if the recordings are released." The court also found that Proponents' acknowledgment during oral argument in 2011 was "a significant indication that even Proponents' counsel contemporaneously understood that sealing is typically limited in time and that it was not reasonable to rely solely on Judge Walker's statements to insist that sealing be permanent." On August 12, 2020, the court ordered that the recordings be made public.

Proponents timely appealed. A divided motions panel of this court stayed the district court's ordered release of the recordings pending a hearing before the merits panel. Following oral argument, our merits panel requested supplemental briefing addressing the question whether Proponents have Article III standing to bring this appeal.

II. Standard of Review

Even when not raised by the parties, we are obliged to determine whether we have subject matter jurisdiction. Article III standing is an essential ingredient of subject matter jurisdiction. *Whitaker v. Tesla Motors Inc.*, 985 F.3d 1173, 1178 (9th Cir. 2021).

III. Article III Standing

Appellants are all of the original Proponents except for Hak-Shing WilliamTam and Protectmarriage.com. With the appeal in its current posture, the threshold (and determinative) question is whether Appellants

have Article III standing. As the parties seeking federal review, Appellants bear the burden of showing that they have standing.

Under Article III of the Constitution, our jurisdiction is limited to "Cases" and "Controversies." U.S. Const. Art. III, § 2. "For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have 'standing . . . .'" *Hollingsworth*, 570 U.S. at 700. The Supreme Court has explained that the "'irreducible constitutional minimum' of [Article III] standing consists of three elements." *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Those elements require that the party invoking federal jurisdiction "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct . . . , and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan*, 504 U.S. at 560–61). The Court has explained that "under Article III, a federal court may resolve only a real controversy with real impact on real persons." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quotation marks and citation omitted).

Although questions of standing often arise early in a case, "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth*, 570 U.S. at 705. "That means that standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Id.* (quoting *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 64 (1997)).

The current appeal comes to us in a different posture from Appellants' prior appeals. When Appellants appealed Judge Ware's order unsealing the recordings in 2011, they plausibly alleged potential harm from their release. At that time, their merits appeal was still pending. If they had succeeded in that appeal, the case might well have been retried. Appellants introduced evidence that they and others had been harassed for supporting Proposition 8 around the time of its passage. Based on this evidence, Appellants plausibly alleged that their prospective witnesses might refuse to testify for fear of harassment if the video recordings of the first trial were released.

When Appellants appealed Judge Orrick's order in 2019, we lacked appellate jurisdiction to review the order. The district court had denied immediate relief but had provided Appellants the option of establishing a compelling reason to maintain the seal prior to the recordings' release in 2020. We accordingly dismissed the appeal for lack of an appealable final order.

Unlike in 2011, there is now no prospect of a retrial. Further, Appellants do not allege or rely on any fear of harassment, as indicated by comments by Appellants' counsel to the district court in 2020:

> I very much appreciate that Your Honor had invited and perhaps expected some additional kind of argumentation about threats to the witnesses' safety or harassment, or that sort of thing, but the truth is, Your Honor, that's never been the motivating factor or the basis for which we've opposed disclosure of these videotapes.

Unlike in 2019, the district court's ruling in 2020 is an appealable final order.

In denying Proponents's request to keep the video recordings sealed, the district court concluded in 2020:

> Proponents again failed to submit any evidence by declaration that any Proponent or witness who testified on behalf of Proponents wants the trial recordings to remain under seal. There is no evidence that any Proponent or trial witness fears retaliation or harassment if the recordings are released. Nor is there any evidence that any Proponent or trial witness on behalf of the Proponents believed at the time or believes now that Judge Walker's commitment to personal use of the recordings meant that the trial recordings would remain under seal forever.

IV. Injury in Fact

Our Article III standing inquiry in this appeal begins and ends with "injury in fact, the first and foremost of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (cleaned up). To satisfy this element, Appellants must demonstrate "an injury that is both 'concrete and particularized.'" *Id.* at 1545 (emphasis omitted) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). To be "particularized," the injury must affect Appellants "in a personal and individual way." *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). To be "concrete . . . [the injury] must actually exist." *Id.*

Appellants' theory of standing is rooted in an analogy to breach of contract. *See TransUnion*, 141 S.

Ct. at 2204 (explaining that the injury in fact requirement may be satisfied where the burdened party has "identified a close historical or common-law analogue for their asserted injury"). In their view, releasing the trial tapes amounts to a breach of Judge Walker's "promise" that the recordings were not made "for purposes of public broadcasting or televising," interpreting his assurance as extending into perpetuity. They claim to have relied on this assurance in deciding not to seek additional injunctive relief from the Supreme Court. Appellants contend that this alleged breach of Judge Walker's "promise" by Judge Orrick's order is alone sufficient to establish injury in fact. They write in their supplemental brief:

> Appellees begin by faulting us for failing to establish by "declarations or other evidence" that Proponents stand to suffer some tangible harm "resulting from the unsealing,"—such as threats of violence or retaliation—but as we have explained, our standing is not based on any such resulting injury, but rather on the intangible (but critically significant and concrete) harm that breach of Judge Walker's promises would cause to "the sanctity of the judicial process."

Appellants do not claim, and cite no authority for the proposition, that a statement—even a "promise"—made by a judge to litigants in the course of litigation is an enforceable contract. An analogy to a traditionally recognized cause of action does not relieve a complainant of its burden to demonstrate an injury. *See*, *e.g.*, *Carlsen v. Gamestop, Inc.*, 833 F.3d 903, 909

(8th Cir. 2016) ("[I]t is crucial . . . not to conflate Article III's requirement of injury in fact with a plaintiff's potential cause of action, for the concepts are not coextensive." (quotation marks and citation omitted)). To carry their burden, Appellants must plausibly allege a concrete and particularized *injury*. Even assuming, contrary to their statement to our court in 2011, that Judge Walker told Appellants that the video recordings would remain sealed in perpetuity, they do not have Article III standing to appeal the district court's order.

Appellants allege two kinds of injuries that would result from unsealing the recordings. First, the unsealing would result in a "palpable injustice" to Appellants themselves. Second, the unsealing would harm future litigants' ability to rely on judicial "promises," and would thereby injure both the judicial system and future litigants. Neither alleged injury is sufficiently concrete and particularized for purposes of Article III standing. We address each alleged injury in turn.

A. "Palpable Injustice" to Appellants

Although not raised in their supplemental briefing addressing Article III standing, Appellants' prior briefing alleged that concrete injury to Appellants, in the form of "palpable injustice," will result if the tapes are unsealed. We are willing to construe this allegation of injury broadly, as an allegation of injury not only to Appellants personally, but also to those who have been closely associated with them and who may have depended on them to protect their interests.

Only one of the original Proponents, Hak-Shing William Tam, testified at the bench trial. *See Schwarzenegger*, 704 F. Supp. 2d at 940. Although Tam was a named intervenor-defendant in the bench trial, he was called by Proponents to testify as an adverse witness during their case in chief. *Id.* In 2009, Tam submitted a declaration to the district court stating that he had experienced harassment because of his support of Proposition 8 and did not want the trial recorded. However, Tam has given no indication since then that he has reason to fear the release of the recordings.

Further, there is no reason to believe that Appellants now represent Tam's interests. Even before the beginning of the bench trial in January 2010, Tam had separated himself from Proponents' joint representation and had obtained his own counsel. As far as the record before us reveals, Tam never joined a motion or petition filed by the Proponents after hiring separate counsel. And while Tam's name appears on the caption in the 2011 appeals concerning both these recordings and the merits of Proposition 8, he was not listed on the notices of appeal filed by the other Proponents or on a single filing in those actions. Tam was not a party to the 2018 and 2020 proceedings before Judge Orrick, and he is not a party to this appeal. There is thus no evidence in the record that Tam now fears an injury if the recordings are released, and no evidence that Proponents are acting on his behalf in this appeal.

There is also no evidence of any threatened injury to the remaining Proponents if the video recordings are

unsealed. None of them testified at the trial. Further and critically, none of them has submitted a declaration that they fear harassment or reprisals if the recordings are unsealed.

Appellants called only two witnesses at trial, David Blankenhorn and Professor Kenneth Miller. *See Schwarzenegger*, 704 F. Supp. 2d at 945. Neither witness has ever submitted a declaration or given any indication in the record that he fears injury if the recordings are released. Indeed, Blankenhorn has been explicit that he does *not* fear harassment if the recordings are made public. *See* Oral Argument at 9:50–10:24, *Brown*, 667 F.3d 1078 (No. 11-17255), https://www.ca9.uscourts.gov/media/video/?20111208/11-17255 (Appellants' counsel explaining that Blankenhorn "has said candidly that he was not concerned about harassment of himself"). Miller has never indicated that he fears any injury if the recordings are released, even though a portion of his testimony was used by Judge Walker in a 2011 televised presentation and has been available online since that time. *See* Judge Vaughn Walker, *History of Cameras in the Courtroom* at 33:15–36:55, C-SPAN (Mar. 22, 2011), www.c-span.org/video/?298109-3/judge-vaughn-walker-cameras-courtroom.

Appellants argue that not only they, but also their attorneys, "reasonably relied on Judge Walker's assurances" that the recordings would not be released. To the extent Appellants are relying on possible injury to their attorneys, we seriously question their ability to make such an argument on the attorneys' behalf. But we need not address this argument because none of

Appellants' attorneys submitted any declarations or other evidence to the district court that they fear injury if the recordings are disclosed.

Finally, even if we were to allow Proponents to assert the interests of Proposition 8 general supporters, there is no evidence in the record that they have reason to fear harassment if the recordings are released now. The record shows that during and prior to 2009, Proposition 8 supporters, including the original individual Proponents, experienced harassment. But Appellants never supplemented this evidence with anything after 2009, despite opportunities to do so in both the 2018 and 2020 proceedings before the district court.

In short, Appellants have provided no evidence showing harm or threat of harm to themselves from the release of the video recordings. Only three people aligned or potentially aligned with Appellants—Tam, Blakenhorn, and Miller—were witnesses at trial. Tam is not a party to this appeal, is not represented by Appellants, and has expressed no concern about the release of the recordings. Blakenhorn has explicitly stated that he has no concern about their release. Miller has never indicated that he fears harassment if video recordings of his testimony are released, and parts of the recordings have been available to the general public for a decade. The entire trial has been publicly available in transcript form since 2010, and there is no evidence in the record that Appellants, their witnesses, or indeed any Proposition 8 supporter, have been harassed during the period since the release of the transcript. Simply put, the record is devoid of the

"factual showing of perceptible harm" required to establish an injury in fact. *Lujan*, 504 U.S. at 566. That is, Appellants have failed to show that an injury or threat of injury "actually exist[s]." *Spokeo*, 136 S. Ct. at 1548; *see also TransUnion*, 141 S. Ct. at 2200 ("No concrete harm, no standing.").

B. Injury to the Judicial System and Future Litigants

We next consider Appellants' general allegation that harm to "the sanctity of the judicial process" and to "future litigants" will result from the release of the video recordings. In Appellants' view, releasing the recordings would result in diminished trust in the judicial system and would require future litigants "to refuse to accept trial judges' assurances, inducing the filing of seemingly pointless appeals to guard against the possibility that the court might one day go back on its word." We consider these two alleged injuries in turn.

First, in asserting injury to the judicial system, Appellants acknowledge that they allege an injury shared by everyone. They concede in their supplemental briefing, "To be sure, the interest in preserving respect for our system of justice . . . is one shared by the public as a whole." The Supreme Court has long admonished that a party "raising only a generally available grievance . . . does not state an Article III case or controversy." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (quoting *Lujan*, 504 U.S. at 573–74). A purported injury is an impermissible "generalized grievance" when the interest of the party asserting it "is plainly undifferentiated and common to

all members of the public." *Id.* at 440–41 (quotation marks omitted) (quoting *United States v. Richardson*, 418 U.S. 166, 176–77 (1974)).

Appellants argue, however, that as parties to whom Judge Walker's "promise" was made, they "would suffer in a particular and individual way if those promises are breached." But as we explained above, Appellants have provided no evidence that they, or anyone whose interests are potentially aligned with them, would suffer any injury if the tapes are released. Accordingly, they have alleged no interest beyond that common to all of society, and they are "seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Id.* at 439 (quotation marks and citation omitted). This generalized grievance therefore lacks the particularity to constitute an injury in fact under Article III.

Second, nothing in the record indicates that Appellants will themselves be among the future litigants allegedly harmed by the release of the recordings. Article III requires that the party invoking federal jurisdiction have a "personal stake in the outcome of the controversy." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). For an injury to be sufficient for standing, "the party seeking review [must] be [it]self among the injured." *Lujan*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972)). Appellants have not alleged that they are currently engaged in other litigation or have plans to litigate in the future. The purported injury to future litigants, if it even exists, is

unrelated to Appellants and insufficient for Article III standing.

V. Conclusion

While Appellants may feel strongly about the release of the recordings, "[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Hollingsworth*, 570 U.S. at 704 (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)). Appellants have failed to establish a particularized and concrete injury sufficient to constitute "injury in fact" as the Supreme Court has defined that term. We therefore lack jurisdiction over their appeal from the district court's order.

APPEAL DISMISSED.

IKUTA, Circuit Judge, dissenting:

This is yet another sad chapter in the story of how the judiciary has been willing to bend or break its own rules and standards in order to publicize the proceedings of a single high-profile trial. The urge to broadcast has continued despite the Supreme Court's unprecedented intervention to prevent the district court and our court from violating rules precluding such a broadcast, *Hollingsworth v. Perry* (*Hollingsworth*), 558 U.S. 183, 196 (2010) (per curiam), and our subsequent intercession to prevent the district court from reneging on a judge's "solemn commitments" not to do so, *Perry v. Brown* (*Perry*), 667 F.3d 1078, 1081 (9th Cir. 2012). And here we are again: the majority bends the principles of Article III standing in

order to deprive proponents of the opportunity to argue that the court should not breach its binding obligations.

I

The story began in 2009 when a group of plaintiffs challenged a ballot initiative, Proposition 8, which overruled a California Supreme Court ruling that legalized same-sex marriage. The official proponents of Proposition 8 intervened to defend the lawsuit after state officials declined to do so.[1]

The trial was scheduled for January 2010. The proponents were understandably concerned about the impact of unwanted publicity. At the time, "numerous instances of vandalism and physical violence [were] reported against those who [were] identified as Proposition 8 supporters," *Hollingsworth*, 558 U.S. at 185–86, and supporters were subjected to death threats, boycotts, or loss of employment, *id.* at 185. The proponents therefore objected to publicly broadcasting the trial, *id.* at 184–85, relying in part on the district court's Local Rule 77-3, which for years had barred the broadcast of court proceedings,[2] *id.* at 191–92.

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[1] The proponents here are all the official proponents in the original trial regarding Proposition 8 (Dennis Hollingsworth, Gail Knight, Martin Gutierrez, and Mark Jansson) with the exceptions of Hak-Shing William Tam and Protectmarriage.com.

[2] Local Rule 77-3 provided:

> Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any

Despite this local rule, the district judge presiding over the case, former Chief Judge Vaughn R. Walker, began a persistent effort to ensure that the trial would be broadcast to the public. *Id.* at 186. The judge first floated his interest in broadcasting the trial at a pre-trial hearing in September 2009, but the proponents strongly opposed it. *Id.* A month later, Chief Judge Walker joined a three-judge committee (appointed by the Ninth Circuit Judicial Council) to consider whether to initiate a "pilot program" to broadcast trial proceedings. *Id.* Not surprisingly, the committee recommended such a pilot program. *Id.* As Judge Walker acknowledged, in making this recommendation, the Proposition 8 case "was very much in mind at that time because it had come to prominence then and was thought to be an ideal candidate for consideration." *Id.* (citation omitted).

In December 2009, the Ninth Circuit Judicial Council rushed through a new pilot program allowing "the limited use of cameras in federal district courts within the circuit." *Id.* at 187 (citation omitted). Concurrently, the district court began an effort to amend Local Rule 77-3 so as to allow recording trials

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judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term 'environs,' as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

"for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit." *Id.* (citation omitted). The proponents again strongly objected. Among other arguments, they claimed that any such changes to Ninth Circuit and local rules required a sufficient notice-and-comment period. *Id*.

In response, the district court posted a new announcement, giving the public five business days to comment on the amended rule. *Id.* But even before the five business days had passed, the district court abruptly revised its website again, and announced that the revised rule was adopted pursuant to 28 U.S.C. §2071(e), which allows courts to implement rules without prior public notice and opportunity for comment if there is an "immediate need" for the rule. *Id.* at 187–88.

After the district court "revise[d] its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States . . . to allow broadcasting of this high-profile trial," *Hollingsworth*, 558 U.S. at 196, Chief Judge Walker informed the parties that he intended to record and broadcast the upcoming trial, and obtained the Ninth Circuit's approval to allow "real-time streaming of the trial to . . . federal courthouses in San Francisco, Pasadena, Seattle, Portland, and Brooklyn," *id.* at 188. The Ninth Circuit indicated it could also approve streaming the trial over the internet, if the technical difficulties could be worked out. *Id.* at 189.

Having failed to prevent the hasty amendment to the protective local rule, the proponents rushed to file an emergency motion with the Supreme Court to

prevent the broadcast. The Supreme Court immediately issued a temporary stay to prevent the trial from being broadcast to other courthouses. *See Hollingsworth v. Perry*, 558 U.S. 1107 (2010).

But still, Chief Judge Walker continued recording the trial over the proponents' objection, "on the basis that the Supreme Court might decide to lift the temporary stay." *Perry*, 667 F.3d at 1082.

Two days later, the Supreme Court extended the stay "pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus." *Hollingsworth*, 558 U.S. at 199. The Court made clear that it was wrong for the district court to "change its rules at the eleventh hour to treat this case differently from other trials in the district," in order "to broadcast a high-profile trial that would include witness testimony about a contentious issue." *Id.* The Court emphasized that courts must comply with their own rules and standards. "By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle." *Id.* at 196.

But even with the Supreme Court behind them, the proponents could not make Chief Judge Walker stop filming. The proponents requested the district court halt further recording of the trial in light of the Court's order. But Chief Judge Walker declined to do so. Implicitly acknowledging the Supreme Court's order (and the possibility that the proponents could obtain further relief from the Court), Chief Judge Walker assured the proponents that any recordings would *not*

be publicly broadcasted. Rather, Chief Judge Walker stated that a recording would be helpful to him in preparing the findings of fact, and pledged unequivocally: "So that's the purpose for which the recording is going to be made going forward. But it's *not going to be for purposes of public broadcasting* or televising." The next day, Chief Judge Walker memorialized this assurance in a publicly filed notice that stated as follows: "Transmission of the proceedings to other locations solely within the San Francisco courthouse will continue along with recording *for use in chambers*, as permitted in Civ LR 77-3." Later, in his post-trial opinion, Chief Judge Walker stated that "the potential for public broadcast in the case *had been eliminated*." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010) (emphasis added). In that same opinion, Chief Judge Walker directed the clerk of the court to file the trial recording under seal as part of the record. *Id.* at 929.

We subsequently held that these statements by Chief Judge Walker constituted "binding obligations" and "solemn commitments" that "there was no possibility that the recording would be broadcast to the public in the future." *Perry*, 667 F.3d at 1086–87. The proponents "reasonably relied on Chief Judge Walker's commitments in refraining from challenging his actions" by seeking further relief from the Court. *Id.* at 1088.

Less than a year later, Chief Judge Walker reneged on these "solemn commitments," *id.* at 1081, by playing portions of the trial recording during his public appearances, *id.* at 1083. Again, the proponents rushed

to object, and moved the Ninth Circuit to order the return of all copies of the trial recording. *Id.* We referred the motion to the district court. *Id.* A group of media outlets that included Appellee KQED intervened to move the court to unseal the trial recording.

Over the proponents' objection, the district court declined to enforce Chief Judge Walker's commitment, and issued an order to unseal the recording. *Id.* The district court concluded that the common-law right of public access applied to the recording and that the proponents had made no showing sufficient to justify its sealing in the face of the common-law right. *Id.*

We strongly disagreed, and reversed. We held that "the district court abused its discretion by ordering the unsealing of the recording of the trial notwithstanding the trial judge's commitment to the parties that the recording would not be publicly broadcast." *Id.* at 1081. "The trial judge on several occasions unequivocally promised that the recording of the trial would be used only in chambers and not publicly broadcast. He made these commitments because the Supreme Court had intervened in this very case in a manner that required him to do so." *Id.* Even assuming the common-law right of access applied to the trial recording, "the interest in preserving the sanctity of the judicial process is a compelling reason to override the presumption in favor of the recording's release." *Id.*

One might think this would be the end of the proponents' years of effort to prevent the public broadcast of the trial. But that would underestimate the apparently insatiable appetite to publicize the trial. In response to yet another motion from KQED to

unseal the trial recording, the district court concluded that Chief Judge Walker's solemn commitment had an expiration date. The court reasoned that our holding in *Perry* applied only until the local rules of the district court—under which sealed records are presumptively unsealed after ten years, see Northern District of California Local Rule 79-5—kicked in. Therefore, the district court held that the recording could be unsealed in August 2020. The proponents protested this ruling, but we dismissed their appeal for lack of jurisdiction because the decision was neither a final order nor an appealable collateral order. *See Perry v. Schwarzenegger*, 765 Fed. Appx. 335 (9th Cir. 2019) (mem.).

In April 2020, again over the proponents' objections, the district court concluded that the interest in judicial integrity that we emphasized in *Perry* was no longer a "compelling justification requiring indefinite sealing of the trial recordings," and held that the trial recordings prepared solely for Chief Judge Walker's private use, and subject to a commitment that eliminated their public broadcast, should be released to the public. We stayed the district courts' order pending the proponents' appeal.

II

No one reading this saga of the proponents' efforts to prevent the public broadcasting of the trial proceedings could doubt that the proponents have a personal stake in enforcing Chief Judge Walker's promise. Yet the majority remarkably concludes that the proponents—who for ten years have been trying to stop the unlawful broadcast of the trial

proceedings—cannot sufficiently show they will be injured by a breach of the trial judge's "binding obligations." *Perry*, 667 F.3d at 1087. According to the majority, the proponents do not have enough of a stake in stopping the district court's breach of its "solemn commitments," *id.* at 1081, to even have Article III standing to bring this case. As explained below, this is nothing more than another distortion of our rules and standards to ensure that this single high profile trial is broadcast, notwithstanding the compelling "interest in preserving the sanctity of the judicial process." *Id.*

A

Article III of the Constitution confines the federal judicial power to the resolution of cases and controversies. "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (cleaned up). "To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: 'What's it to you?'" *Id.* (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983)) (cleaned up). The only element of standing at issue here is whether the proponents can show they suffered an injury in fact that is concrete and particularized. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).[3]

[3] There is no dispute that the injury here—*i.e.*, unsealing the trial video—is actual and imminent.

A "concrete" injury must be "real, and not abstract." *TransUnion*, 141 S. Ct. at 2204 (citation omitted). "'Concrete' is not, however, necessarily synonymous with 'tangible,'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016), and "[v]arious intangible harms can also be concrete." *TransUnion*, 141 S. Ct. at 2204. "Chief among [such intangible harms] are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id*.

One of these "traditionally recognized" harms is a violation of private rights, including contract rights, whether or not the violation of such rights resulted in economic damage or other injury. Common law courts in the Founding era "reasoned that *every* legal injury necessarily causes damage," *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798 (2021), including "the fact of breach of contract by itself," *id.* (citing *Marzetti v. Williams* (1830), 109 Eng. Rep. 842, 845 (K.B.)); *see also Springer v. Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284, 292 (6th Cir. 2018) (Thapar, J., concurring) (collecting common law cases establishing that courts historically "entertained breach-of-contract claims even when 'no real loss be proved'" (citation omitted)). Common law courts heard breach of contract claims and awarded nominal damages even when "there was no apparent continuing or threatened injury."[4] *Uzuegbunam*, 141 S.

[4] To this day, California allows for an award of nominal damages in breach of contract cases where the plaintiff suffered no actual damages. *See* Cal. Civ. Code § 3360 ("When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.").

Ct. at 798; *see also Marzetti*, 109 Eng. Rep. at 845 (noting that in case "substantially founded on a contract . . . the plaintiff, though he may not have sustained a damage in fact, is entitled to recover nominal damages"); Restatement (First) of Contracts § 328 (Am. L. Inst. 1932) ("Where a right of action for breach exists, but no harm was caused by the breach, . . . judgment will be given for nominal damages, a small sum fixed without regard to the amount of harm."). As Justice Thomas summed it up, "[h]istorically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more." *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring).

Federal courts continue to follow this common law principle that a breach of contract is itself a concrete injury for purposes of Article III standing, regardless of whether a plaintiff suffers actual damages. *See Springer*, 900 F.3d at 287 (finding insured who was denied benefits but suffered no financial loss nevertheless sustained concrete injury because, "[l]ike any private contract claim, his [Article III] injury does not depend on allegation of financial loss. His injury is that he was denied the benefit of his bargain."); *Mitchell v. Blue Cross Blue Shield of N.D.*, 953 F.3d 529, 536 (8th Cir. 2020) ("Traditionally, a party to a breached contract has a judicially cognizable injury for standing purposes because the other party's breach devalues the services for which the plaintiff contracted and deprives them of the benefit of their bargain.") (cleaned up); *J.P. Morgan Chase Bank, N.A. v. McDonald*, 760 F.3d 646, 650–51 (7th Cir. 2014)

("When one party fails to honor its commitments, the other party to the contract suffers a legal injury sufficient to create standing even where that party seems not to have incurred monetary loss or other concrete harm."); *Katz v. Pershing, LLC*, 672 F.3d 64, 72 (1st Cir. 2012) ("[W]hen a plaintiff generally alleges the existence of a contract, express or implied, and a concomitant breach of that contract, her pleading adequately shows an injury to her rights."); *cf. Fleming v. Charles Schwab Corp.*, 878 F.3d 1146, 1151 (9th Cir. 2017) (explaining plaintiffs' potential inability to prove damages in breach of contract case does not negate standing).

Common law courts held that promises were enforceable as contracts where the promisee relied on the promise, and as a result was "deluded and diverted from using any legal diligence to pursue" other remedies. *Pillans v. Van Mierop* (1765), 97 Eng. Rep. 1035, 1037 (K.B.); *see also* Kevin M. Teeven, *A History of Promissory Estoppel: Growth in the Face of Doctrinal Resistance*, 72 Tenn. L. Rev. 1111, 1112–13 (2005) (explaining *Pillans* summarized "the justifications for common law promissory liability as they had existed since the sixteenth century"). Early American courts likewise enforced promises that induced justifiable reliance. *See, e.g.*, *King's Heirs v. Thompson*, 34 U.S. 204, 218–20 (1835); *Barzilla Homes v. Dana*, 12 Mass. 190, 192 (Mass. 1815); *Trs. of Farmington Acad. v. Allen*, 14 Mass. 172, 176 (Mass. 1817); *Trs. of Parsonage Fund in Fryeburg v. Ripley*, 6 Me. 442, 445–46 (Me. 1830). As summed up in the 1932 edition of the Restatement of Contracts, "[a] promise which the promisor should reasonably expect to induce action or

forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement (First) of Contracts § 90 (Am. L. Inst. 1932). Today, federal courts continue to entertain claims based on promissory estoppel. *See, e.g.*, *Hass v. Darigold Dairy Prods. Co.*, 751 F.2d 1096, 1100 (9th Cir. 1985) (applying rule of promissory estoppel stated in Restatement (Second) of Contracts § 90 (Am. L. Inst. 1979)).

In sum, the breach of a contract or binding promise is an injury traditionally recognized as a violation of a private right, whether or not the injured party suffers economic or other damage.

B

Given this background, the proponents have a vigorous response to the question: "what's it to you." *TransUnion*, 141 S. Ct. at 2203 (cleaned up).

First, we are bound by our precedent to hold that Chief Judge Walker made a binding, enforceable promise. *Perry*, 667 F.3d at 1087. Chief Judge Walker's promises not to broadcast the trial recording publicly were "solemn commitments," "binding obligations," and constraints on other judges' discretion to unseal the recording. *Id.* We held that Chief Judge Walker "promised the litigants that the conditions under which the recording was maintained *would not change*," and identified the "legal consequence" of that promise: "there was no possibility that the recording would be broadcast to the public in the future." *Id.* at 1086. And

this conclusion that Chief Judge Walker made a binding promise wasn't a close call: "No other inference could plausibly be drawn from the record." *Id.*

Further, "[t]here can be no question that [the proponents] reasonably relied on Chief Judge Walker's explicit assurances" that the recording would not be publicly broadcast. *Id.* As we explained, because the local rules did not allow for public broadcasting of trials, "Chief Judge Walker could not lawfully have continued to record the trial without assuring the parties that the recording would be used only for a permissible purpose." *Id.* at 1087. Accordingly, "[h]ad Chief Judge Walker not made the statement he did, [the proponents] would very likely have sought an order directing him to stop recording forthwith, which, given the prior temporary and further stay they had just obtained from the Supreme Court, they might well have secured." *Id.* at 1085. And because Chief Judge Walker's assurances were "compelled by the Supreme Court's ruling in this very case," they were "even worthier of the parties' reliance." *Id.* at 1087. Even the majority notes that the proponents relied on Chief Judge Walker's promises to keep recordings private not only for themselves, but also for the attorneys, witnesses, and supporters who "depended on them to protect their interests." Majority Op. at 20.

Because Chief Judge Walker made a clear and unambiguous promise that resulted in reasonable, foreseeable, and detrimental reliance by the proponents and those who depended on them, a violation of that promise would be a violation of the proponents' legal

rights.[5] *See supra*, at 33–36. Such a violation is a traditionally recognized harm providing a basis for lawsuit, whether or not it resulted in economic injury. Therefore, publicly broadcasting the trial today constitutes a concrete injury for purposes of Article III standing, *see, e.g.*, *TransUnion*, 141 S.Ct. at 2204, regardless of whether the proponents or other individuals associated with them alleged a fear of harassment or reprisals if the broadcast is released.

The proponents' injury is also "particularized." An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. Here, there can be no question that unsealing the trial recording would do so. Chief Judge Walker's promise was made directly to the proponents; it was a promise about a recording of the proponents' trial specifically; and it was a promise that the proponents

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[5] The appellees here assert that the proponents were aware that Chief Judge Walker's promise would not last indefinitely. But that argument relates to the merits of proponents' claim. The proponents need not definitively prove the existence or scope of a contract or binding promise to establish Article III standing. "Whether the elements of breach of contract, including the existence of a contract, are satisfied . . . goes to the merits, not to a court's power to resolve the controversy. *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 212 (2d Cir. 2020) (citing *Perry v. Thomas*, 482 U.S. 483, 492 (1987)). Accordingly, "a party that alleges harm due to another's breach of a contract has a justiciable controversy with the other party," and "courts have jurisdiction to resolve the controversy." *Id.*; *see also Novartis Seeds, Inc. v. Monsanto Co.*, 190 F.3d 868, 871 (8th Cir. 1999) (finding plaintiff alleging breach of contract had Article III standing and rejecting argument that merits defense defeats standing because "the distinction between such a defense and subject-matter jurisdiction is a vital one").

relied on. Indeed, in *Perry*, we emphasized that Chief Judge Walker's "solemn commitments" were "representations *to the parties*," and they "could not have been more explicitly directed toward the particular recording at issue." 667 F.3d at 1081 (emphasis added).

C

The majority's arguments to the contrary fail. First, the majority argues that the proponents have failed to establish that any harm will result from the release of the recordings. Majority Op. at 22–23. But, as explained above, the breach of a binding promise (here, a promise not to release the recording) is itself a concrete harm sufficient to establish an injury in fact for purposes of Article III standing. *See supra* at 33–36.

Second, the majority argues that we are not bound by *Perry*'s holding that Chief Judge Walker made a binding commitment, because when the proponents previously appealed Chief Judge Ware's order unsealing the recordings, "they plausibly alleged potential harm from their release." Majority Op. at 16. In the majority's view, the plausible harm was that, if the recording were unsealed, prospective witnesses might refuse to testify at a re-trial for fear of harassment. Majority Op. at 16. But our reasoning in *Perry* was not based on the conclusion that the proponents had plausibly alleged a fear of harassment. Indeed, *Perry* never addressed the question whether the proponents had standing, and so did not consider any question of the proponents' injury. Instead, focusing on the binding nature of Judge Walker's statements and the proponents' reliance on those

statements, we held that the "compelling reason" that required maintaining the trial recording under seal was that the "breach of reliance interests" constituted a "grave threat to the integrity of the judicial system." *Perry*, 667 F.3d at 1087. We explained that "the explicit assurances that a judge makes—no less than the decisions the judge issues—must be consistent and worthy of reliance." *Id.*

Finally, the majority argues that the proponents' injury is not particularized because any injury to the integrity of the judicial system is "an injury shared by everyone." Majority Op. at 23. But Chief Judge Walker did not promise the public as a whole that the trial recording would not be publicly broadcasted. Rather, he made that promise to the proponents specifically. And a breach of that promise will impact the proponents in particular because the recording is of *the proponents'* trial. Moreover, a breach of judicial integrity can concretely injure specific litigants even if it also undermines the public's trust in the justice system. *Cf. Spokeo*, 578 U.S. at 339 n.7 ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance."). Thus, the fact that a breach of Chief Judge Walker's promise would undermine trust in the judicial system does not mean that the proponents—*i.e.*, the specific recipients of that promise—would not suffer a particularized injury.

III

For the past ten years, the proponents have gone to extraordinary lengths to prevent the public broadcast of these trial proceedings, including a successful trip to

the Supreme Court and multiple appeals to our court. Whether Chief Judge Walker's promise not to publicly broadcast the trial recording is an enforceable contract or merely closely analogous to one, the breach of that promise is a concrete and particularized injury sufficient to confer Article III standing upon the proponents. Accordingly, the issue of Article III standing does not provide a basis to depart from our prior ruling "that the integrity of the judicial process is a compelling interest that in these circumstances would be harmed by the nullification of the trial judge's express assurances, and that there are no alternatives to maintaining the recording under seal that would protect the compelling interest at issue." *Perry*, 667 F.3d at 1088. I therefore respectfully dissent from the majority's holding.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 09-cv-02292-WHO

[Filed: July 9, 2020]

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

ORDER DENYING MOTION TO MAINTAIN SEAL; UNSEALING TRIAL RECORDINGS

Re: Dkt. Nos. 892, 899

On January 17, 2018, I issued an Order on Media Intervenor KQED, Inc.'s motion to unseal the recordings of the bench trial conducted by former Chief Judge Vaughn Walker in 2010 determining that California's Proposition 8 – colloquially known as the ban on gay marriage – was unconstitutional. January

2018 Order [Dkt. No. 878].[1] I concluded that the "common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches. . . ." January 2018 Order at 10. In opposition to the motion, Proponents[2] did not submit evidence that they or their counsel personally feared harm from the recordings' release. But I concluded that the "compelling justification of judicial integrity" outweighed the public's right of access at that juncture.

My concern regarding judicial integrity was based on Judge Walker's unequivocal commitments to the trial participants that he intended the recordings solely for his own use in drafting his opinion and the judgment in that case. But I did not find that his statements meant that the recordings should be permanently sealed. Instead, given the guidance in *Perry v. Brown*, 667 F.3d 1078, 1082 (9th Cir. 2012), the prior Ninth Circuit opinion on this subject, I

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[1] The judicial decisions and reasons that led to the bench trial proceedings being recorded but not broadcast, and the numerous appeals of those decisions to the Ninth Circuit and the Supreme Court, are detailed in my January 2018 Order and will not be repeated here.

[2] The Proponents who opposed KQED's motion to unseal and who are the movants on the current motion are defendant-intervenors in the underlying action: Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, and Mark A. Jansson. KQED's motion to unseal was joined by plaintiffs in the action, plaintiff-intervenor City and County of San Francisco (CCSF), and amicus American Civil Liberties Union of Northern California (ACLU). Defendant State of California did not join but did not oppose KQED's motion to unseal.

concluded that Northern District Civil Local Rule 79-5(g) and its ten year default for sealing court records set the reasonable limit for sealing the trial recordings, and that on August 12, 2020 the trial recordings would be released unless Proponents offered evidence justifying a continued seal. January 2018 Order at 10-11, 13-15.[3]

I directed that if the Proponents wanted to maintain the seal on the trial recordings past August 12, 2020, they had to file a motion to continue the seal by April 1, 2020 and set a briefing schedule and hearing date. January 2018 Order at 15.[4] They did. Plaintiffs,[5] CCSF, media intervenor KQED,[6] and amicus the ACLU

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[3] At the time of the trial, the ten year default was contained in Civil Local Rule 79-5(f).

[4] The Proponents appealed my January 2018 Order. Dkt. No. 880. On April 19, 2019, in a Memorandum Disposition, the Ninth Circuit dismissed the appeal concluding it lacked jurisdiction because my January 2018 Order was not a final decision or a reviewable collateral order. Dkt. No. 888.

[5] Fifteen of plaintiffs' trial witnesses, including the plaintiffs and expert witnesses, submit declarations supporting the release of the trial recordings. The witnesses generally describe their beliefs that release of the trial recordings would serve significant historical purposes (as a watershed moment in the fight for LGBTQ rights), educative functions (allowing the public to observe leading experts discussing relevant theory and research), and show the emotional impact of the trial testimony that they contend is not captured by the written transcript of the proceedings. *See* Dkt. No. 895, Exhibits B-P.

[6] KQED submits declarations from Dean Erwin Chemerinsky (Berkeley Law), Professor Suzanne Goldberg (Columbia Law

opposed. Dkt. Nos. 895 896, 897, 898. The State of California also opposes the motion to maintain the seal, and now actively contends that the recordings should be unsealed. Dkt. No. 894. In addition, the Reporters Committee for Freedom of the Press (RCFP) filed a request for leave to file an amicus brief on behalf of itself and 36 media entities and journalism organizations in support of KQED and unsealing the recordings. Dkt. No. 899.[7]

School), Seth Levy (President and Chairman of the Board of Directors for the It Gets Better Project), McKenna Palmer (LGBTQ supporter and activist), Michael Sabatino (marriage equality advocate), and Scott Shafter (Senior Editor, California Politics & Government at KQED) supporting the release of the trial recordings from their journalistic, legal, historical, and activist perspectives. *See* Dkt. Nos. 898-3 – 898-8. 2

[7] The amici represented by the Reporters Committee of Freedom of the Press (RCFP) are The Associated Press, Berkeleyside Inc., Boston Globe Media Partners, LLC, BuzzFeed, Cable News Network, Inc., California News Publishers Association, Californians Aware, CalMatters, Dow Jones & Company, Inc., 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, International Documentary Association, Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, Mother Jones, MPA – The Association of Magazine Media, National Press Photographers Association, The New York Times Company, The News Leaders Association, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Sinclair Broadcast Group, Inc., Society of Environmental Journalists, Society of Professional Journalists, TEGNA Inc., Tully Center for Free Speech, and Univision Communications Inc. The amici's motion for leave to file their brief is GRANTED. Dkt. No. 899. The RCFP, on behalf of the other

In support of their motion to continue the seal past the ten year default sealing date, Proponents rely solely on the "judicial integrity" argument they raised before. They assert that Judge Walker promised them that he would use the recordings solely for his personal use in drafting the opinion and judgment following the bench trial. Given those assurances, they did not continue to object to the recordings and did not try to convince Judge Walker to stop recording or to seek the assistance of a higher court to force Judge Walker to stop recording. The Proponents contend that the recordings should never be unsealed because of the need to maintain Judge Walker's "promise" as a compelling matter of judicial integrity.

Significantly, the Proponents again failed to submit any evidence by declaration that any Proponent or witness who testified on behalf of the Proponents wants the trial recordings to remain under seal. There is no evidence that any Proponent or trial witness fears retaliation or harassment if the recordings are released. Nor is there any evidence that any Proponent or trial witness on behalf of the Proponents believed at the time or believes now that Judge Walker's commitment to personal use of the recordings meant that the trial recordings would remain under seal forever.

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amici, argues generally that release of the recordings would serve "the interests advanced by the common law and First Amendment rights of access to judicial documents" by providing a contemporaneous view of how the trial progressed and would "enhance the completeness of news reports about the trial." Dkt. No. 899-2 at 7-15.

There is attorney argument that the Proponents relied on Judge Walker's commitments regarding recording the trial proceedings to conclude that the records would never be released.[8] But that is a different position than they took during oral argument at the Ninth Circuit in 2011. Then, Proponents' counsel acknowledged *both* Proponents' knowledge of Civil Local Rule 79-5(g) and that they would bear the burden of having to demonstrate reasons to continue the seal beyond ten years.[9] Proponents now argue that their counsel's concessions in the Ninth Circuit cannot bind them as a judicial admission. Reply (Dkt. No. 900) at 4. Perhaps. But those concessions are a significant indication that even Proponents' counsel contemporaneously understood that sealing is typically limited in time and that it was not reasonable to rely solely on Judge Walker's statements to insist that sealing be permanent.

In my prior Order, I rejected the idea that Proponents' "judicial integrity" argument, defined as it is by the unique procedural and historical facts that led to the recordings' existence, could be a compelling justification requiring indefinite sealing of the trial

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[8] Indeed, plaintiffs asked Proponents' counsel for permission to contact three of the Proponents' trial witnesses to ask them if they had any concerns about unsealing the trial recordings. Declaration of Christopher D. Dusseault, ¶ 2. Dkt. No. 895-1. Proponents' counsel declined that permission, informing plaintiffs' counsel that he "polled a critical mass of our clients and witnesses" and none of them supported unsealing. *Id.* ¶ 3.

[9] *See* Oral Argument at 7:04–7:48, *Perry v. Brown*, 667 F.3d 1078, 1082 (9th Cir. 2012) (No. 11-17255), https://bit.ly/35toPvJ.

recordings. Having found that the common law right of access requires release of the trial recordings absent some other evidence that could theoretically provide a compelling justification, and finding absolutely none presented on this record, Proponents' motion to continue the seal on the trial recordings is DENIED. On the undisputed record before me, there is no justification, much less a compelling one, to keep the trial recordings under seal any longer. The recordings shall become public on **August 12, 2020**.[10]

The Proponents ask me to stay the release of the recordings until either their appeal of the unsealing order is resolved by the Ninth Circuit (and perhaps the Supreme Court) or at least until movants can seek a stay from the Ninth Circuit. However, I wrote in my January 2018 Order and reiterated at the June 17, 2020 hearing on the current motion that the release of the recordings would occur on August 12, 2020 in light of Proponents' failure to identify any compelling justification other than the time-limited one of judicial integrity. The Proponents, who appealed the January 2018 Order, are in a position to swiftly to seek a stay of the release from the Ninth Circuit. Absent a stay from the Ninth Circuit, on August 12, 2020, the Clerk's

[10] On the prior motion and again here, the sides disagree when the Judgment in this case was entered and, hence, when the default ten years will run. I addressed these arguments in my January 2018 Order and see no reason to deviate from the conclusion that the ten years runs on August 12, 2020.

Office will prepare to release the recordings to the public.[11]

IT IS SO ORDERED.

Dated: July 9, 2020

/s/ William H. Orrick
William H. Orrick
United States District Judge

[11] The actual mechanics of the public release of the recordings is still under consideration. A further Order describing the mechanics of that release will be issued prior to August 12, 2020.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 09-cv-02292-JW (WHO)

[Filed: January 17, 2018]

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

ORDER ON MOTION TO UNSEAL VIDEOTAPED TRIAL RECORDS

Re: Dkt. Nos. 852, 863

This motion presents a conundrum: our District has possession of an undeniably important historical record — video recordings of the high profile bench trial to determine the constitutionality of California's Proposition 8, colloquially known as the ban on same-sex marriage. But the recordings were explicitly made for personal use by the presiding judge at the trial, the Hon. Vaughn Walker, in preparing findings of fact. When he began using them in public appearances,

the Ninth Circuit stopped him, citing the "importance of preserving the integrity of the judicial system." It left open the question of whether they could be released in the future, or when.

Media intervenor KQED, Inc. now asks me to unseal those video recordings.[1] KQED's unsealing request is supported by the plaintiffs in the action[2] and the plaintiff-intervenor City and County of San Francisco (CCSF). Dkt. Nos. 866, 867.[3] Defendant State of California does not oppose the motion to unseal. Dkt. No. 869. The unsealing request is opposed by the defendant-intervenors (Proponents).[4] With scant guidance, I refer to our Civil Local Rule 79-5, also cited by the Ninth Circuit, to order that the recordings be kept under seal for a total of ten years from the trial court's order entering judgment, or until August 12, 2020, unless the Proponents, by that time, show compelling reasons for the seal to remain in place for an additional period of time. I DENY the motion to unseal at this juncture.

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[1] This matter came to me as Duty Judge, given Judge Walker's retirement from the bench.

[2] Plaintiffs are Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo.

[3] Proposed Amicus American Civil Liberties Union of Northern California (ACLU) also supports the motion to unseal. Dkt. No. 863. The ACLU's motion for leave to file their amicus brief is GRANTED. I will refer to KQED, plaintiffs, CCSF, and the ACLU as "movants" herein.

[4] The Proponents are Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, and Mark A. Jansson.

BACKGROUND

In the weeks leading up to the January 2010 bench trial, Judge Walker "expressed a desire to satisfy the public's interest in the case by broadcasting a video feed of the proceedings to various federal courthouses and online" and designated the trial for inclusion in the Northern District's pilot program for broadcasting court proceedings. *Perry v. Brown*, 667 F.3d 1078, 1081 (9th Cir. 2012).[5] On the morning of the first day of trial, the Supreme Court (at the request of Proponents) issued a temporary stay of the broadcast. *Hollingsworth v. Perry*, 558 U.S. 1107 (mem.). Two days later, the Court entered a further stay pending the filing of a petition for mandamus or certiorari, finding that "the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting." *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (per curiam).[6]

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[5] The procedural background is largely taken from the Ninth Circuit's recitation in *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012). None of the parties or movants on this motion dispute the procedural facts as described by the Ninth Circuit.

[6] At issue was the Ninth Circuit's adoption in late 2009 of a pilot program to allow recording and broadcasting, and the Northern District's revision of its Civil Local Rule to allow participation in that new pilot program. As a result of the Supreme Court's stay, the applicable Civil Local Rule in effect at the time of trial, Civ. L. R. 77-3, prohibited recording and broadcasting of court proceedings, "[u]nless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes, the taking of photographs, public broadcasting or televising, or recording for those purposes in the

Judge Walker recorded the first two days of trial, because the Supreme Court might have decided to lift the temporary stay issued on the first day of trial. After the further stay came into effect, the Proponents asked that the recording be stopped. As recited by the Ninth Circuit:

> It was in this context that Judge Walker responded as follows:
>
> > The local rule permits the recording for purposes ... of use in chambers.... And I think it would be quite helpful to me in preparing the findings of fact to have that recording. So that's the purpose for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.
>
> Proponents dropped their objection at that point.

Perry v. Brown, 667 F.3d at 1082.[7]

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courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge." *Perry v. Brown*, 667 F.3d at 1082 n. 1.

[7] As the Ninth Circuit recognized, Proponents did subsequently file a petition for a writ of certiorari in April 2010, seeking to vacate the Ninth Circuit's denial of Proponents' petition for a writ of mandamus to prevent Judge Walker from "broadcasting the trial." *See* Petition for a Writ of Certiorari, *Hollingsworth v. U.S. Dist. Court for Northern Dist. of California*, —— U.S. ——, 131 S.Ct. 372, 178 L.Ed.2d 1 (2010) (No. 09–1238), 2010 WL 1513093. The Supreme Court ultimately granted certiorari and remanded with

In May 2010, Judge Walker offered to make copies of the video recordings available to any party that intended to use excerpts during their closing arguments. That offer was made contingent on the recipient maintaining the recordings under "a strict protective order." Plaintiffs and CCSF obtained copies. After closing arguments, Proponents moved to require the return of the copies. *Perry v. Brown*, 667 F.3d at 1082. In an August 4, 2010 Order, Judge Walker held:

> The trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law; the clerk is now DIRECTED to file the trial recording under seal as part of the record. The parties may retain their copies of the trial recording pursuant to the terms of the protective order herein. Proponents' motion to order the copies' return [] is accordingly DENIED.

Perry v. Schwarzenegger, 704 F.Supp.2d 921, 929 (N.D.Cal. 2010).[8]

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instructions to dismiss the petition for a writ of mandamus as moot because the trial was over and had not been "broadcasted." *Hollingsworth v. U.S. Dist. Court for Northern Dist. of California*, —— U.S. ——, 131 S.Ct. 372, 178 L.Ed.2d 1 (2010) (mem.).

[8] As noted by the Ninth Circuit, Judge Walker recognized in his opinion that the Proponents' designated witnesses had expressed concerns about testifying in light of the potential for the broadcast of the proceedings. Judge Walker discounted that concern, weighing it against the Proponents because "proponents failed to make any effort to call their witnesses after the potential for public broadcast in the case had been eliminated." *Perry v. Schwarzenegger*, 704 F.Supp.2d at 929.

The Proponents appealed Judge Walker's judgment striking down Proposition 8; they did not challenge either the denial of their motion to compel the return of the copies or the district court's entry of the recording in the record. *Perry v. Brown*, 667 F.3d at 1083.

In 2011, Judge Walker retired. Both before and after that retirement, Judge Walker "displayed" excerpts from the video recordings during public appearances. *Id*. The Proponents once again returned to court, asking the Ninth Circuit to order Judge Walker to return the video recordings to the Court's possession. The plaintiffs filed a cross-motion to unseal the recordings.[9] The Ninth Circuit referred the matters back to the District Court.

The Hon. James Ware denied Proponents' motion to order Judge Walker to return the videos to the possession of the Court (although Judge Walker had returned them in the interim), and granted plaintiffs' cross-motion to unseal. *Perry v. Schwarzenegger*, No. C 09–02292 JW, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011).[10] Judge Ware concluded that the common-law right of public access applied to the recordings, that neither the Supreme Court's decision in *Hollingsworth* nor the local rule governing audiovisual recordings barred their release, and that Proponents had made no

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[9] A "Media Coalition," including KQED, moved to intervene at the Ninth Circuit in order to support plaintiffs' cross-motion to unseal. *Perry v. Brown*, Ninth Cir. Case No. 10-16696, Dkt. No. 343.

[10] The Media Coalition appeared at the August 29, 2011 hearing before Judge Ware on the cross-motion to unseal. Dkt. No. 810.

showing sufficient to justify continued sealing in the face of the common-law right. *Id.* at *3–6. Judge Ware also directed that a copy of the recordings be returned to former Judge Walker. *Id.* at *6. Proponents immediately appealed that ruling.[11]

The Ninth Circuit reversed. The court initially assumed "for purposes of this case only, that the common-law presumption of public access applies to the recording at issue here and that it is not abrogated by the local rule in question." *Perry v. Brown*, 667 F.3d at 1084. The court then concluded that there was "a compelling reason in this case for overriding the common-law right" of access, namely "Proponents reasonably relied on Chief Judge Walker's specific assurances—compelled by the Supreme Court's just-issued opinion—that the recording would not be broadcast to the public, at least in the foreseeable future." *Id.*, 667 F.3d at 1084–1085.

The Ninth Circuit determined that Judge Walker made "at least two" "unequivocal assurances that the video recording at issue would not be accessible to the public." *Id.* at 1085. Those assurances were, in essence, a commitment by Judge Walker not to allow the public broadcasting of the videos. In the absence of those assurances, and given the indications provided in the Supreme Court orders, the Ninth Circuit concluded the "Proponents again might well have taken action to

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[11] The Media Coalition successfully intervened back at the Ninth Circuit in support of Judge Ware's order unsealing the video recordings. *Perry v. Brown*, Ninth Cir. Case No. 11-17255, Dkt. Nos. 6-1, 15, 28-1.

ensure that the recording would not be made available for public viewing." *Perry v. Brown*, 667 F.3d at 1085-86.

In light of those assurances and the "importance of preserving the integrity of the judicial system" the Ninth Circuit found a compelling reason for the continued sealing of the recordings. *Id*. at 1087-88. In reaching its decision, however, the Ninth Circuit was careful to avoid concluding that the then-existing compelling reason and the Proponents' reasonable expectations regarding non-broadcast would permanently preclude disclosure. The court explained that proponents reasonably relied on assurances that the video recordings would not be broadcast in public "at least in the foreseeable future." *Id*. at 1084-85. That "foreseeable future" according to the court was informed by the Northern District's Civil Local Rule providing that documents filed under seal in a civil case "shall be open to public inspection without further action by the Court 10 years from the date the case is closed" unless "a party that submitted documents that the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond the 10 years provided by this rule." *Id*. at 1084-85 n.5.

KQED now moves to unseal again, arguing that the Supreme Court's decision affirming Judge Walker's determination that Proposition 8 was unconstitutional (*Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (*Hollingsworth II*)), the passage of time, and the wider-acceptance of same-sex marriage has lessened

both the justifications for the sealing and the reasonable expectations of the Proponents for continued sealing of the indisputably historically significant video recordings.

Each of the named plaintiffs who testified during the bench trial submits a declaration in support of unsealing. Dkt. Nos. 857, 858, 859, 860. The plaintiffs explain why they believe public release and review of the video recordings is important and why the currently-available transcripts are not an adequate substitute. The plaintiffs expect that the video recordings will carry significant and unique weight in showing what happened during the trial because they show the vulnerability of the plaintiffs as they testified and the level of emotion surrounding their testimony, "uniquely show[ing] the real reasons that marriage is important to people like" the plaintiffs. Stier Declaration [Dkt. No. 859] ¶¶ 7, 8; *see also* Zarrillo Decl. [Dkt. No. 860] ¶ 6 ("People should be able to see what I experienced, where I had to literally testify and prove that I love Paul.").

KQED also submits declarations from directors at two non-profits involved in advocacy and education on lesbian, gay, bisexual and transgender (LGBT) issues. Dkt. Nos. 855, 856. One director testifies that release of the video recordings will further "the public's ongoing desire to understand the profound social and legal issues that were publicly tried in this Court and ultimately affirmed by the U.S. Supreme Court." Levy Decl. [Dkt. No. 856], ¶ 4. The other director states that release of the video recordings "will meaningfully contribute to the public's understanding of the evidence

that was presented by the parties during this contested federal trial, evidence that continues to have relevance and resonance today." Kendell Decl. [Dkt. No. 855], ¶ 4. Finally, KQED submits the declaration of its Senior Editor, California Politics & Government, Scott Shafer. Dkt. No. 854. According to Shafer, the initial KQED and other media coverage of the trial could only summarize what happened in the court each day, and public access to the full and "actual trial recording is critical [] understanding how this critical chapter in California legal history unfolded." Shafer Decl. ¶ 5. Shafer explains that KQED would use the video recordings as teaching tools and to produce a statewide radio special. *Id*. ¶ 6.[12]

LEGAL STANDARD

"The law recognizes two qualified rights of access to judicial proceedings and records," a First Amendment right of access to criminal proceedings and a common-law right of access to inspect and copy judicial records and documents. *United States v. Bus. of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1195 (9th Cir. 2011). The Ninth Circuit has not squarely addressed which standard applies to access to civil proceedings as opposed to access to civil judicial records and documents.[13]

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[12] The Proponents did not submit a declaration or other evidence in support of their opposition to the motion to unseal.

[13] KQED argues the Ninth Circuit confirmed that the First Amendment right of access applies to civil proceedings in *Courthouse News Service v. Planet*, 750 F.3d 776, 793 (9th Cir.

Under the common-law right of access, "[f]ollowing the Supreme Court's lead, 'we start with a strong presumption in favor of access to court records.'" *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.2003)). Accordingly, "[a] party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the 'compelling reasons' standard." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.2006). Under this stringent standard, a court may seal records only when it finds "a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture." *Kamakana*, 447 F.3d at 1179. The court must then "conscientiously balance[ ] the competing interests of the public and the party who seeks to keep certain judicial records secret." *Id*.

Under the qualified First Amendment right of access, courts "must consider whether '(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this

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2014). The question before that panel, however, was whether First Amendment and free speech issues were significantly implicated to reverse the district court's decision to abstain from deciding what rights of access a media outlet should have to complaints filed in superior court. The court expressly took "no position on the ultimate merits" of the claim, but in light of the significant First Amendment issues involved remanded for the district court to consider the merits of the claim in the first instance. *Id*. *Courthouse News* did not explicitly settle the question of which standard is applied to justify sealing (or closing) civil proceedings and records of those proceedings.

compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.'" *Perry v. Brown*, 667 F.3d at 1088 (quoting *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of O*r., 920 F.2d 1462, 1466 (9th Cir.1990)). To determine whether a First Amendment right of access exists to particular proceedings or documents, courts apply the two part "experience and logic" test, asking: (1) "whether the place and process have historically been open to the press and general public"; and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *See United States v. Doe*, 870 F.3d 991, 997 (9th Cir. 2017) (quoting *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986)). "Even when the experience and logic test is satisfied, however, the public's First Amendment right of access establishes only a strong presumption of openness, and 'the public still can be denied access if closure 'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'" *Times Mirror Co. v. United States*, 873 F.2d 1210, 1211 n.1 (9th Cir. 1989) (quoting *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 509–10 (1984)).

The First Amendment is "generally understood to provide a stronger right of access than the common law." *Custer Battlefield*, 658 F.3d at 1197 n.7. However, as noted above, both the qualified First Amendment and common-law right of access standards require a showing of compelling justifications for the sealing of court proceedings and documents.

At the time of the Proposition 8 bench trial and the February 2012 decision by the Ninth Circuit in *Perry v. Brown*, Northern District Civil Local Rule 79-5(f) "provided that '[a]ny document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed,' with the proviso that 'a party that submitted documents that the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond the 10 years provided by this rule.'" *Perry v. Brown*, 667 F.3d at 1085 n.5.[14]

DISCUSSION

KQED, the plaintiffs, CCSF, and the ACLU argue that release of the video recordings is warranted now. They point out that Judge Walker's ruling is settled law following its affirmance by the Supreme Court. They note that in its 2012 decision on the appeal from the first motion to unseal, the Ninth Circuit relied in part on the fact that merits of the case had not yet been

[14] The current version, Civ. L.R. 79-5(g), provides in full: "Effect of Seal. Unless otherwise ordered by the Court, any document filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. Any document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed. However, a Submitting Party or a Designating Party may, upon showing good cause at the conclusion of a case, seek an order to extend the sealing to a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records disposition policy of the United States Courts."

decided and the law on same-sex marriage remained unsettled, and held only that the video recordings had to remain under seal at that time and not in perpetuity. They also show that while there has been wider acceptance of same-sex marriage (certainly as a legal matter), there is continued, ongoing debate over the issue and a continued interest in the Proposition 8 trial itself.

Given the changed circumstances from the time when the Ninth Circuit ruled on sealing in 2012 and the significant continued public interest, movants argue that the compelling justifications found by the Ninth Circuit in 2012 no longer exist and the public's right of access – both under the common law and the First Amendment – requires the video recordings to be unsealed. Movants also argue that any interests the Proponents may have had regarding potential harassment due to their involvement in the trial that could have supported continued sealing in 2012 have been mitigated by the passage of time, the now-settled legality of same-sex marriage, and the extensive reporting that occurred during and following the trial (including re-enactments) that disclosed Proponents' actual arguments and testimony but which did not result in any actual harassment shown by evidence in the record.[15] Finally, movants contend that the Northern District's Local Rule presumptively sealing court records for ten years, Civ. L.R. 79-5(g), must give way to the public's right of access given the lack of

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[15] Movants also note that one of the two witnesses for the Proponents subsequently and publicly reversed his position on same-sex marriage. Mot. at 11-12 n.8.

existing compelling justifications and the arbitrary ten year outer boundary used in that Rule.[16]

Proponents make no effort to show, factually, how further disclosure of their trial testimony would adversely affect them. Indeed, the transcript of the trial has been widely disseminated and dramatized in plays and television shows. Instead, they raise a number of arguments that I am both barred from considering movants' request to unseal and, if I reach the merits, required to continue the seal.

As an initial matter, I reject the arguments that I cannot consider the motion to unseal on its merits because of the Ninth Circuit's mandate on the prior motion to unseal or because of the doctrines of issue preclusion, law-of-the-case, or stare decisis. The Ninth Circuit's mandate reversed Judge Ware's decision, concluding he had abused his discretion, and remanded "with instructions to maintain the trial recording under seal." *Perry v. Brown*, 667 F.3d at 1088-89. That mandate did not include any language indicating that the materials should remain under seal in perpetuity or otherwise binding the district court from addressing a future motion to unseal based on changed circumstances. The language utilized by the Ninth Circuit was conditional as to time. The court expressly concluded that: "Proponents reasonably relied on Chief Judge Walker's specific assurances—compelled by the

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[16] KQED points out that the Eastern District of Pennsylvania provides for the presumptive unsealing of records two years after the conclusion of a civil action and the Western District of North Carolina unseals records after final disposition of the case. Mot. at 18.

Supreme Court's just-issued opinion—that the recording would not be broadcast to the public, *at least in the foreseeable future*" and cited the District's civil local rule providing a ten year presumptive mark for unsealing court records. *Id*., 667 F.3d at 1084-85 (emphasis added).[17] The court's recognition that continued sealing is conditional squares with Ninth Circuit authority requiring proponents of sealing to show that justifications supporting continued sealing continue to exist. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1181 (9th Cir. 2006) (determining whether justifications existed to continue sealing court records).[18] Therefore, I am not bound or otherwise precluded from addressing this motion on its merits.

On the merits, I have no doubt that the common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches. But I conclude that the compelling justification of judicial integrity identified

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[17] I recognize that Judge Walker's assurances, relied on by the Ninth Circuit, could imply that the video recordings would never be accessible to the public. But the focus here is on whether Proponents could rest on those implied assurances indefinitely, and as recognized by the Ninth Circuit, they cannot.

[18] Nor is my consideration of this motion barred by the Supreme Court's decisions staying the broadcast of the trial. The Supreme Court did not address the question at hand, and expressly limited itself to whether "broadcast in this case should be stayed because it appears the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting." *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010).

in the Ninth Circuit's 2012 Order continues to apply and prevents disclosure of the video recordings through the presumptive unsealing ten year mark applicable under Civil Local Rule 79-5(g).

Proponents argue that former Local Rule 77-3, as well as long-standing judicial policies in place in 2010 preventing or tightly controlling the recording and broadcasting of court proceedings, defeat the public's right of access and preclude release of the video recordings for public dissemination. They rely on the Supreme Court's recognition that the Rule 77-3 had the "force of law" *Hollingsworth v. Perry*, 558 U.S. at 191, and argue that releasing the video recordings now would violate that law which at the time strictly prohibited the broadcast of proceedings outside of the Court. However, a recording of the proceedings *was made* and was, without separate objection by Proponents, made part of the trial record. As circumstances and justifications change (for example, the current Northern District and Ninth Circuit rules and policies *allow* for public broadcast of proceedings), so does the calculus concerning how the public's right of access weighs against asserted compelling justifications for maintaining court records under seal. Neither former Rule 77-3 nor the Judicial Conference or Ninth Circuit Judicial Council policies in effect in 2010 preclude the public's right of access from attaching to the video recordings.

Proponents also contend that the common-law right of access cannot apply to video recordings of witness testimony that are "wholly derivative of evidence offered and the arguments made in open court" relying

on *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996). Oppo. at 18-19. *McDougal*, however, dealt with a markedly different situation and applied a different standard in assessing the public's right of access. There, the Eighth Circuit concluded that a videotaped deposition played in open court was not a "judicial record" to which the right of public access attaches and, in the alternative if considering the deposition tape to be a judicial record, declined to apply the accepted-in-other-circuits (including the Ninth) "strong presumption" of public access to judicial records. Here, unlike in *McDougal*, the video recordings at issue are recordings *of the court proceedings themselves*, not a prior recording of testimony simply played at trial. Those tapes were made with the express intent and actual purpose of assisting the trial judge in reaching his decision. Moreover, the analysis of *McDougal* is contrary to "the strong presumption in favor of copying access" applicable in the Ninth Circuit to "audio and videotape exhibits as they are received in evidence during a criminal trial." *Valley Broadcasting Co. v. U.S. Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1290, 1294 (9th Cir. 1986). The public's right of access applies to the video recordings at issue.

However, the compelling justification identified by the Ninth Circuit in 2012 – namely, judicial integrity – continues to exist and precludes release of the video recordings at this juncture. To be clear, I am not holding that the recordings must continue to be sealed simply because Judge Walker made a promise that movants argue was mistaken if not impermissible under the law. I agree that a record cannot continued to be sealed where a trial judge makes a mistake in

characterizing the record at issue or the interests proffered to justify sealing.[19] I also agree that just because a compelling justification existed at one point in time does not mean that a compelling justification exists in perpetuity. As the Ninth Circuit has noted, in order for documents to remain under seal, there must be compelling "interests favoring *continued* secrecy." *Kamakana*, 447 F.3d at 1181 (emphasis added).

Here the compelling justification identified by the Ninth Circuit in 2012 continues to exist. That justification, judicial integrity, was and continues to be inextricably couched in the unique procedural facts recognized by both the Supreme Court and the Ninth Circuit in the appeals related to recordings at issue including: (i) the adoption of a pilot project to allow recording and broadcast of court proceedings in the Ninth Circuit (without prior public notice and comment), (ii) the efforts to modify this District's civil local rules (without prior public notice and comment), (iii) then-existing Civil Local Rules in effect at the time of the trial (given the Supreme Court's stay) that did not allow for recording or broadcast, (iv) the assurances of internal-only use made by Judge Walker which (as the Ninth Circuit concluded) were relied upon by Proponents in not seeking a further stay of the recording, and (v) the Ninth Circuit's reliance on this District's ten year presumption of continued sealing.

---

[19] Although there is no evidence that at the time Judge Walker made his assurances to the Proponents that he was mistaken on a matter of fact or law.

While I do not find my consideration of this motion to unseal is precluded by the Ninth Circuit's decision in *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012) – because circumstances change and justifications become more or less compelling – I do find that the compelling reason of judicial integrity identified by *that court* continues to require sealing of the video recordings, at least until the rules of *this court* setting the presumptive unsealing of record after ten years apply.[20]

Proponents argue that the ten year unsealing presumption in former Local Rule 79-5(g) cannot set their reasonable expectations as to whether and when the video recordings might be released because that Rule only applies to records created by the parties and not records of judicial proceedings created by the Court. However, Rule 79 applied generally to "BOOKS AND RECORDS KEPT BY THE CLERK," Rule 79-5 applied to "Filing Documents Under Seal," and then-Rule 79-5(f) provided in full:

> (f) Effect of Seal. Unless otherwise ordered by the Court, any document filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. Any document filed under seal in a civil case shall be open to

[20] I recognize there is some dispute over when that ten year mark will occur, given that judgment in the case was not (apparently due to an oversight) entered in August 2010 as Judge Walker instructed. However, given the intent of the trial court and the subsequent appeal on its merits, August 12, 2010 is functionally the date the case was "closed" for substantive proceedings on the merits.

> public inspection without further action by the Court 10 years from the date the case is closed. However, a party that submitted documents that the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records destruction policy of the United States Courts. The chambers copy of sealed documents will be disposed of in accordance with the assigned Judge's discretion. Ordinarily these copies will be recycled, not shredded, unless special arrangements are made.

Civil Local Rule 79 (in effect in 2010 <https://cand.uscourts.gov/superseded-local-rules>).[21]

That Rule 79-5 contained procedures in some of its subdivisions governing how parties could file materials under seal and that 79-5(f) provided that any party who did so may move to continue the seal after the ten year presumptive period expires, does not mean that the presumptive unsealing rule is somehow limited. There was and is nothing in Rule 79-5 limiting the presumptive unsealing to materials filed by the parties as opposed to materials created and filed by the Court, like transcripts of judicial proceedings or the video recordings at issue. Judge Walker, as noted above, directed that the Clerk "file the trial recording under seal as part of the record." *Perry v. Schwarzenegger*,

---

[21] A similar rule currently exists as Civil Local Rule 79-5(g).

704 F.Supp.2d at 929. Rule 79-5 applies. Moreover, there is no inherent conflict between then-existing Rule 79-5(f) presumptive unsealing and then-existing Rule 77-3 prohibition on recording and broadcasting proceedings. Nothing in the Rules themselves creates an inherent conflict.

Movants' argument both relies on then-Rule 79-5(f) and then seeks to avoid it. Movants first argue that the ten year presumption of unsealing, as cited by the Ninth Circuit, would set the outside boundary of Proponents' reasonable expectation of sealing. Reply at 4. They also argue, however, that ten years is an arbitrary timeframe, adopted without apparent case law or other support, and that timeframe cannot be used to defeat the public right of access to the video recordings *now* on the facts currently presented. Mot. at 18. However, as noted above, the existence of the ten year unsealing presumption was significant to the Ninth Circuit and remains significant to me.

Finally, my analysis would be no different if I applied a First Amendment right of access instead of the common-law right of access. As noted above, compelling justifications must exist to satisfy both standards. The fact that the First Amendment standard might be harder to satisfy, did not preclude the Ninth Circuit from finding it satisfied in 2012. *Perry v. Brown*, 667 F.3d at 1088. The same holds true here.

CONCLUSION

The resolution of KQED's motion to unseal is properly before me on its merits. I conclude that the

common-law right of access applies to the video recordings made by and for the use of Judge Walker but that the compelling justification of judicial integrity – given the unique facts of this case and legal decisions weighing on the legality of Judge Walker's efforts to create those recordings – still precludes their release at this juncture.

I further rule that the recordings shall be released to movants on August 12, 2020, absent further order from this Court that compelling reasons exist to continue to seal them. Proponents shall file any motion to continue the sealing no later than April 1, 2020, any opposition is due on May 13, 2020, and the reply on May 27, 2020. The hearing, if one is needed, is set for June 17, 2020.

IT IS SO ORDERED.

Dated: January 17, 2018

/s/ William H. Orrick
William H. Orrick
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16375

[Filed: December 28, 2021]

KRISTIN M. PERRY; et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff-Appellee,

KQED, INC.,

Intervenor-Appellee,

v.

GAVIN NEWSOM, Governor; et al.,

Defendants-Appellees,

DENNIS HOLLINGSWORTH; et al.,

Intervenor-Defendants-Appellants,

and)
)
PATRICK O'CONNELL, in his official)
capacity as Clerk-Recorder for the County)
of Alameda; DEAN C. LOGAN, in his)
official capacity as Registrar-Recorder/)
County Clerk for the County of Los Angeles,)
)
Defendants.)
_____)

D.C. No. 3:09-cv-02292-WHO
Northern District of California, San Francisco

ORDER

Before: LUCERO,[*] W. FLETCHER, and IKUTA, Circuit Judges.

Appellant filed a petition for rehearing en banc on December 2, 2021 (Dkt. Entry No. 72). Judge W. Fletcher has voted to deny the petition for rehearing en banc, and Judge Lucero so recommends. Judge Ikuta voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

[*] The Honorable Carlos F. Lucero, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

APPENDIX E

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U.S. CONST. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

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

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by

the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

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

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

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

referred to as "sealable"). The request must be narrowly tailored to seek sealing only of sealable material, and must conform with Civil L.R. 79-5(d).

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

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

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

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

(B) A proposed order that is narrowly tailored to seal only the sealable material, and which

lists in table format each document or portion thereof that is sought to be sealed.

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

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

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

The courtesy copy of unredacted declarations and exhibits should be presented in the same form as if no sealing order was being sought. In other words, if a party is seeking to file under seal one or more exhibits to a declaration, or portions thereof, the

courtesy copy should include the declaration with all of the exhibits attached, including the exhibits, or portions thereof, sought to be filed under seal, with the portions to be sealed highlighted or clearly noted as subject to a sealing motion.

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

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

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

declaration must be served on the Designating Party on the same day it is filed and a proof of such service must also be filed.

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

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

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

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

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

version of the document within 7 days after the motion is denied.

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

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

N.D. CAL. L.R. 79-5 (2010)
Filing Documents Under Seal.

(a) Specific Court Order Required. No document may be filed under seal, i.e., closed to inspection by the public, except pursuant to a Court order that authorizes the sealing of the particular document, or portions thereof. A sealing order may issue only upon a request that establishes that the document, or

portions thereof, is privileged or protectable as a trade secret or otherwise entitled to protection under the law, [hereinafter referred to as "sealable."] The request must be narrowly tailored to seek sealing only of sealable material, and must conform with Civil L.R. 79-5(b) or (c). A stipulation, or a blanket protective order that allows a party to designate documents as sealable, will not suffice to allow the filing of documents under seal. Ordinarily, more than one copy of a particular document should not be submitted for filing under seal in a case.

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

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

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

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

(4) Lodge with the Clerk for delivery to the Judge's chambers a second copy of the entire

document, in an identical labeled envelope or container.

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

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

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

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

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

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

(d) Filing a Document Designated Confidential by Another Party. If a party wishes to file a document that has been designated confidential by another party pursuant to a protective order, or if a party wishes to refer in a memorandum or other filing to information so designated by another party, the submitting party must file and serve an Administrative Motion for a sealing order and lodge the document, memorandum or other filing in accordance with this rule. If only a portion of the document, memorandum or other filing is sealable, the submitting party must also lodge with the Court a redacted version of the document, memorandum or other filing to be placed in the public record if the Court approves the requested sealing order. Within 7 days thereafter, the designating party must file with the Court and serve a declaration establishing that the designated information is sealable, and must lodge and serve a narrowly tailored proposed sealing order, or must withdraw the designation of confidentiality. If the designating party does not file its responsive declaration as required by this subsection, the document or proposed filing will be made part of the public record.

(e) Request Denied. If a request to file under seal is denied in part or in full, neither the lodged document nor any proposed redacted version will be filed. The Clerk will notify the submitting party, hold the lodged document for three days for the submitting party to retrieve it, and thereafter, if it is not retrieved, dispose

of it. If the request is denied in full, the submitting party may retain the document and not make it part of the record in the case, or, within 4 days, re-submit the document for filing in the public record. If the request is denied in part and granted in part, the party may resubmit the document in a manner that conforms to the Court's order and this rule.

(f) Effect of Seal. Unless otherwise ordered by the Court, any document filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. Any document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed. However, a party that submitted documents that the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records destruction policy of the United States Courts. The chambers copy of sealed documents will be disposed of in accordance with the assigned Judge's discretion. Ordinarily these copies will be recycled, not shredded, unless special arrangements are made.

APPENDIX F

Volume 4

Pages 670 - 990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE
VAUGHN R. WALKER

NO. C 09-2292-VRW

[Filed: January 15, 2010]

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO,

Plaintiffs,

VS.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information &

Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/ County Clerk for the County of Los Angeles,

Defendants.

San Francisco, California
Thursday
January 14, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By: ***Katherine Powell Sullivan, CRR, CSR 5812***
Debra L. Pas, CRR, CSR 11916
Official Reporters - U.S. District Court

APPEARANCES:

For Plaintiffs:

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
BY: THEODORE B. OLSON, ESQUIRE
MATTHEW D. MCGILL, ESQUIRE

GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
BY: THEODORE J. BOUTROUS, JR., ESQUIRE
CHRISTOPHER D. DUSSEAULT, ESQUIRE

GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, California 94105-2933
BY: ETHAN D. DETTMER, JR., ESQUIRE
ENRIQUE A. MONAGAS, ESQUIRE
SARAH E. PIEPMEIER, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
BY: DAVID BOIES, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
BY: JOSHUA I. SCHILLER, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, California 94612
BY: JEREMY MICHAEL GOLDMAN, ESQUIRE
STEVEN C. HOLTZMAN, ESQUIRE

For Plaintiff-Intervenor:

CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CITY ATTORNEY
One Drive Carlton B. Goodlett Place
San Francisco, California 94102-4682

BY: THERESE STEWART, DEPUTY CITY ATTORNEY
DANNY CHOU
CHRISTINE VAN AKEN
RONALD P. FLYNN
MOLLIE M. LEE
DEPUTY CITY ATTORNEYS

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES (CONTINUED):

For Defendant Gov. Schwarzenegger:

MENNEMEIER, GLASSMAN & STROUD
980 9th Street, Suite 1700
Sacramento, California 95814-2736
BY: ANDREW WALTER STROUD, ESQUIRE

For Defendant Edmund G. Brown Jr.:

STATE ATTORNEY GENERAL'S OFFICE
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004
BY: TAMAR PACHTER, DEPUTY ATTORNEY GENERAL

STATE OF CALIFORNIA
Department of Justice
Office of the Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814
BY: GORDON BURNS, DEPUTY SOLICITOR GENERAL

For Defendant-Intervenors:

COOPER & KIRK
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
BY: CHARLES J. COOPER, ESQUIRE
DAVID H. THOMPSON, ESQUIRE
HOWARD C. NIELSON, JR., ESQUIRE
NICOLE MOSS, ESQUIRE
PETER A. PATTERSON, ESQUIRE

ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
BY: BRIAN W. RAUM, SENIOR COUNSEL

ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, D.C. 20001
BY: JORDAN W. LORENCE, ESQUIRE

For Defendant Dean C. Logan:

OFFICE OF LOS ANGELES COUNTY COUNSEL
500 West Temple Street, Room 652
Los Angeles, California 90012
BY: JUDY WHITEHURST, DEPUTY COUNTY COUNSEL

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES (CONTINUED):

For Defendant Patrick O'Connell:

OFFICE OF ALAMEDA COUNTY COUNSEL
1221 Oak Street, Suite 450
Oakland, California 94612
BY: CLAUDE F. KOLM, DEPUTY COUNTY COUNSEL
MANUEL MARTINEZ, DEPUTY COUNTY COUNSEL

For Mr. Garlow, Mr. McPherson:

AMERICAN CENTER FOR LAW & JUSTICE
11 West Chestnut Hill Road
Litchfield, Connecticut 06759
BY: VINCENT P. MCCARTHY, ESQUIRE

– – – –

P R O C E E D I N G S

JANUARY 14, 2010 8:42 A.M.

THE COURT: Very well. Good morning, Counsel.

(Counsel greet the Court.)

THE COURT: Let's see. First order of business, I have communicated to judge -- Chief Judge Kozinski, in light of the Supreme Court's decision yesterday, that I'm requesting that this case be withdrawn from the Ninth Circuit pilot project. And he indicated that he would approve that request. And so that should take care of the broadcasting matter.

And we have motions that have been filed on behalf of Mr. Garlow and Mr. McPherson. And the clerk informs me counsel for those parties are here present.

* * *

[p. 753]

All right. Shall we take until 15 minutes of the hour, or 10:45.

MR. COOPER: Your Honor, just before we break, may I ask one minor housekeeping matter?

THE COURT: Yes.

MR. COOPER: Point of clarification, actually, and it's further to your announcement as we opened the court day, that the Court was asking for withdrawal of this case from the pilot program.

I just ask the Court for clarification, if I may then understand that the recording of these proceedings has been halted, the tape recording itself?

THE COURT: No, that has not been altered.

MR. COOPER: As the Court knows, I'm sure, we have put in a letter to the Court asking that the recording of the proceedings be halted.

I do believe that in the light of the stay, that the court's local rule would prohibit continued tape recording of the proceedings.

THE COURT: I don't believe so. I read your letter. It does not quote the local rule.

The local rule permits remote -- perhaps if we get the local rule --

MR. BOUTROUS: Your Honor, I have a copy.

THE COURT: Oh, there we go.

(Whereupon, document was tendered to the Court.)

THE COURT: The local rule permits the recording for purposes the -- of taking the recording for purposes of use in chambers and that is customarily done when we have these remote courtrooms or the overflow courtrooms. And I think it would be quite helpful to me in preparing the findings of fact to have that recording.

So that's the purpose for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No C 09-2292 VRW

[Filed: January 15, 2010]

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the

California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as registrar-recorder/ county clerk for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIOFORNIA RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors.

NOTICE TO PARTIES

In compliance with the Supreme Court's order in Hollingsworth v Perry, 558 US --, No 09A648 (January 13, 2010), as noted on the record at trial this date, the undersigned has formally requested Chief Judge Kozinski to withdraw this case from the pilot project on transmitting trial court proceedings to remote federal courthouse locations or for broadcast or webcast approved by the Ninth Circuit Judicial Council on December 17, 2009. Transmission of the proceedings to other locations solely within the San Francisco courthouse will continue along with recording for use in chambers, as permitted in Civ LR 77-3.

/s/ VAUGHN R WALKER
VAUGHN R WALKER
United States District Chief Judge