No. 21-1304

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,

Petitioners,

v.

KRISTIN M. PERRY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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This Court's review is necessary to prevent a grievous injury to Petitioners and, more importantly, to the integrity of the federal judiciary: the open repudiation of a federal judge's solemn and unequivocal promise, made with the purpose and effect of inducing litigants appearing before him from further challenging one of his decisions. The day after this Court's January 13, 2010, Order halting Judge Walker's plans to broadcast the trial proceedings over Proposition 8, Judge Walker ordered that the video recording of the proceedings go forward nonetheless; but to dissuade Petitioners from seeking this Court's further urgent intervention, he promised them that the recording was solely for his use in chambers and would not be made public. Although the Ninth Circuit *itself previously held* that this judicial promise is legally binding, the panel majority below rendered the promise null and utterly unenforceable.

The bulk of Respondents' arguments against this Court's review are based on a single premise: that a federal judge's binding promise, detrimentally relied upon by a party in good faith, is not worth the transcript paper it is written on. If this Court shares that view of a federal judge's commitments, then Respondents are right, and the Court should deny the Petition. But if the Court believes, as Judge Reinhardt held for the previous panel, that "[l]itigants and the public must be able to trust the word of a judge if our justice system is to function properly," *Perry v. Brown*, 667 F.3d 1078, 1087–88 (9th Cir. 2012), then reversal of the decision below, either summarily or after plenary review, is imperative.

I.A. The panel majority's conclusion that Petitioners have not suffered an injury sufficient to give them standing to enforce Judge Walker's promise is plainly contrary to this Court's precedent, and Respondents fail to show otherwise.

Respondents' principal argument boils down to the proposition that a judge's unambiguous commitments in open court are distinguishable from—and somehow *less worthy of reliance than*—ordinary commercial promises. For this Court's cases establish that "intangible harms" that bear "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts" constitute cognizable injuries under Article III. *TransUnion LLC v. Ramirez*, 594 U.S. ---, 141 S. Ct. 2190, 2204 (2021). And Respondents do not dispute that (1) one such traditionally recognized harm is "the fact of breach of contract by itself," *Uzuegbunam v. Preczewski*, 592 U.S. ---, 141 S. Ct. 792, 798 (2021); and (2) early English and American courts routinely enforced not only formal contracts but "promises that induced justifiable reliance," Pet.App.37a (Ikuta, J., dissenting). It directly follows from these propositions that Petitioners have standing to enforce Judge Walker's promise if it is of equal validity to any other binding commitment.

Yet Respondents maintain otherwise, insisting that this Court's cases are "inapposite" because they did not concern the breach of binding commitments *by a judge*, and that "Petitioners do not identify a single decision … holding that a party has standing to appeal the 'breach' of a so-called judicial 'promise.' " BIO.2, 15. That response only makes sense on the assumption that, while the breach of a binding commitment *by a private party* confers standing on the promisee to

enforce it, the breach of a binding commitment *by a judge* does not. And Respondents do not identify a single case holding that breach of a judicial promise *does not* confer standing on the promisee party. Nor do Respondents offer any explanation for why a judge's binding commitments should be somehow less valid, or less worthy of reliance, than private or commercial ones.

Respondents also argue that the early English and American cases establishing that "the fact of breach of contract by itself" is a cognizable injury, *Uzuegbunam*, 141 S. Ct. at 798, are distinguishable because those cases generally awarded "nominal damages," and Petitioners do not seek money damages here, BIO.17. That is beside the point. We do not cite these early cases for whatever precedent they set on the *remedy* available for breach of contract; rather, we rely upon their holding that "the fact of breach of contract" "necessarily causes damage" even where the plaintiff could not "prove actual monetary damages." *Uzuegbunam*, 141 S. Ct. at 798. Whether the breach of a contract causes a cognizable intangible harm is a distinct question from what type of remedy is available to redress that harm. These early cases establish that the answer to the first (standing) question is yes; as to the second (remedial) question, there is no dispute that the impending harm that would be inflicted upon Petitioners by the release of the trial recordings would be fully redressed by an order requiring those recordings to remain under seal.

Respondents' answer to the early cases extending breach-of-contract principles to "promises that induced justifiable reliance," Pet.App.37a (Ikuta, J., dissenting), is based on a similar *non sequitur*. They note

that these early promissory-estoppel cases involved "traditional, tangible harms" rather than the intangible harm of the breach itself. BIO.17. This argument, like the previous one, completely misunderstands the role these cases play in establishing Petitioners' standing. We do not cite these cases as establishing that the intangible harm of the breach itself is a cognizable injury; that proposition is established by *Uzuegbunam* and the line of cases cited therein. Rather, we cite these promissory-estoppel cases to show that promises that induced detrimental reliance have always been understood to be just as enforceable as a formal contract made binding by consideration. Again, if (1) the breach of a binding contractual commitment causes a cognizable, intangible harm, and (2) a promise supported by detrimental reliance is just as binding and enforceable as a formal contractual commitment, then it necessarily follows that the breach of a promise detrimentally relied upon (like Judge Walker's promise) inflicts an intangible harm sufficient to establish injury in fact. Given that Respondents *do not dispute* either premise of this syllogism, they cannot defeat the conclusion by pointing out that the authority we cite for the *second* premise does not also establish the *first*.

Respondents next resort to the principle that a "generalized grievance" cannot constitute an injury in fact, which they say is "fatal to Petitioners' standing." BIO.18. Not so. Petitioners' injury is particularized: the intangible harm caused by the flagrant breach of a binding promise made *specifically to Petitioners*, for the purpose of *specifically inducing them* to refrain from seeking this Court's further intervention to stop the recording, and on which *Petitioners (and their*

counsel and witnesses) relied. To be sure, the breach of that promise would injure not only Petitioners but all who are asked to rely upon the integrity of the federal courts. But if that transforms the breach of *this* specific promise to Petitioners into an un-cognizable "generalized" injury, then the breach of *every* promise is similarly un-cognizable—for *whenever* a binding commitment is breached, the resulting loss-of-faith in the promisor injures all who have occasion to deal with him. Respondents have no answer to this point.

Nor do Respondents explain how, if their generalized-grievance argument is right, *any* intangible injury could ever be cognizable, for it is in the nature of such injuries to cause generalized harm to society as a whole. *See* Pet.21–22. Respondents say that "[t]he Ninth Circuit did not *hold* that any intangible injury that also has broader impacts is insufficiently particularized to satisfy Article III." BIO.19 (emphasis added). But as just explained, that is the clear implication of what the panel majority *did* hold, unless there is some principled reason why "Petitioners' claimed injury to the integrity of the judicial system," *id.*, is somehow distinguishable in this respect from other intangible injuries. Neither the majority below nor Respondents have been able to produce such a distinguishing reason. Accordingly, Respondents' contention that the panel majority "properly employed" the "principles embodied in *TransUnion* and *Uzuegbunam*," BIO.16, is simply wrong.

B. Respondents' attempt to waive away the clear conflict between the decision below and the precedent in at least eight other circuits also fails, and for the same reasons. Our Petition explained, and Respondents do not dispute, that the case law in the First,

Second, Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits all makes clear that the breach of a binding contractual obligation itself constitutes an intangible Article III injury, apart from any tangible monetary harm. Pet.23–24. The decision below cannot be reconciled with that proposition, a division of authority that itself amply justifies this Court's review.

Respondents' only answer to this point is the same as its answer to the conflict between the decision below and this Court's precedent: all of these other circuit decisions "involve traditional, private contractual agreements" and thus are purportedly "distinguishable … from the breach of a supposed judicial 'promise.' " BIO.19–20. But again, Respondents have offered no explanation why the open breach of a *federal judge*'s binding promise should be treated differently, and as somehow *less damaging*, than the breach of a private party's binding commitment.

C. Finally, Respondents are also wrong to claim that Petitioners have not "shown any tangible injury that would result from unsealing the trial recording." *Id.* at 13. As explained in our Petition, the record is rife with evidence of the past harassment of Proposition 8's public supporters. *See* 9th Cir. Doc. 21-2, 30–36, 299–301 (Sept. 9, 2020). And the Court also need not blind itself, in determining standing, to the well-known and ongoing efforts by many to harass, ostracize, and ruin the reputations and livelihoods of those who do not subscribe to the constitutionally required definition of marriage. *See* Pet.22–23. As anyone with eyes can see, Respondents' assertion that "in 2022" no one need fear any tangible harm for being publicly associated with the traditional definition of marriage, BIO.14, is completely untenable.

II. The source of the binding commitment at issue here—a federal judge rather than a private party—far from rendering this case "jurisprudentially insignificant," BIO.21, has the directly opposite effect: it makes this Court's review critically imperative. For when a private company flouts its binding commitment, a single commercial deal may go bad, and the handful of other actors who deal with the promisor may be forced to reevaluate their own expectations. But when *a judge*'s binding promise is openly nullified—on grounds that would render *all* similar judicial commitments inherently unreliable—the public's trust in the judiciary, and its faith in the rule of law itself, is unavoidably shaken. And the Nation as a whole suffers serious and irretrievable harm.

A. The Petition sets forth at length why "[l]itigants and the public must be able to trust the word of a judge," *Perry*, 667 F.3d at 1087–88, if the judiciary is to be capable of fulfilling its solemn obligation "to protect basic human liberties and to promote the prosperity of the citizens of … our nation[ ]," Pet.28–29 (quoting Stephen Breyer, *Remarks*, Feb. 25, 1999, at 4, https://bit.ly/3ljyo9G). These considerations are too obvious to require further elaboration here, and Respondents do not dispute them. And these considerations completely refute Respondents' suggestion that this case is "jurisprudentially insignificant" and has no "extraordinary importance to other litigants." BIO.21, 23.

Nor does the fact that the panel majority disposed of the case on standing, rather than the merits, diminish the urgency of this Court's intervention. To the contrary, by resting its decision on standing, the panel significantly upped the ante. For as the Petition

also explained, if the panel had been able to set aside Judge Walker's promise on some narrow substantive ground specific to this case, its ruling would perhaps have been "jurisprudentially insignificant," *id.* at 21—though given the history of this high-profile case, and of Judge Walker's conduct, even that is doubtful. But by holding that the breach of a judge's binding commitment *does not even inflict a cognizable injury* on the party who received and relied upon it, the majority below ensured that its ruling would gut the reliability of *every* judicial promise.

B. Unable to meaningfully support the panel majority's conclusion that the breach of a judge's binding promise inflicts no cognizable injury, Respondents try to cast doubt on the existence of Judge Walker's promise in the first place. They repeatedly refer to Judge Walker's commitment as a "so-called" and "supposed" promise, with the word "promise" in scare-quotes. And they attempt to draw an analogy between Judge Walker's promise that the recording would not be made public and other types of district-court decisions that are subject to being "vacated or reversed on appeal." *Id.* at 22.

Respondents' attempt to deny the very existence of Judge Walker's binding promise is beyond the pale. They claim that "the Ninth Circuit did not decide the threshold question whether Judge Walker actually committed that the trial recording would remain under seal in perpetuity," *id.* at 13, but that is not so. The Ninth Circuit's earlier decision in *Perry* squarely held that Judge Walker repeatedly "promised the litigants that … there was no possibility that the recording would be broadcast to the public in the future," and that these promises constituted "binding

obligations and constraints." 667 F.3d at 1086, 1087. And *Perry squarely rejected* the very arguments Respondents now press anew, explaining that the "question whether a discretionary decision made by one judge binds a subsequent judge in the same case … is not the one we face here," since this case involves "a *commitment* that [a judge] has made and upon which a party has reasonably relied." *Id.* at 1086.[1]

Those holdings are now binding upon Respondents under principles of issue preclusion (not to mention the law of the case). The issue of the binding nature of Judge Walker's promise was fully litigated in *Perry*; the Ninth Circuit's judgment squarely and finally resolved it; all of parties here were parties in that case; and Respondents come forward with no intervening changes in the law that would cast doubt on the Ninth Circuit's holding. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980). In all events, even if *Perry*'s determination of the existence or nature of Judge Walker's promise were up for grabs, *Perry*'s resolution of these issues is plainly correct.

Respondents also seek to undermine Judge Walker's promise by pointing to the district court's Local Rule 79-5, which provides that sealed documents are presumptively unsealed after 10 years. As explained in the Petition, that Rule cannot justify unsealing the trial recordings for multiple reasons: (1) it does not apply to records, like the trial recordings, created and placed in the record by the court rather than the parties; (2) even if it did, it would be superseded

[1] *Perry* also disposes of Respondents' mistaken reliance on this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). *See Perry*, 667 F.3d at 1087 n.6.

by Local Rule 77-3, which expressly bars the public dissemination of a trial video recording; and (3) most fundamentally, Rule 79-5 on its face does not require unsealing if there is "good cause" to maintain the seal—a standard easily satisfied by the compelling judicial-integrity interest in enforcing Judge Walker's promise. Respondents do not have answers to any of these arguments. There are none.

Similar considerations also dispose of Respondents' reliance on Petitioners' supposed "concession" during the *Perry* oral argument that "based on the local rules … the seal would only necessarily last for ten years." BIO.23. Respondents bring forward that purported concession over and over again, but all Petitioners' counsel "conceded" was that after 10 years, Petitioners would have to go back before the district court and provide good cause for maintaining the seal—which is *precisely what they did*, in 2020, when they explained that the judicial integrity interest in keeping faith with Judge Walker's promise continued to provide a compelling reason (and, *a fortiori*, good cause) to maintain the seal. *See* Pet.31. Petitioners *never* conceded that Judge Walker's absolute and unequivocal promise was somehow superseded by the decision to place the recording under seal, or that the judicial-integrity interest in honoring it would somehow cease to apply with the passage of time.

C. Finally, the Court should grant review—or summarily reverse—to make clear that its emergency orders may not be "gamed" or otherwise circumvented. This Court's January 13, 2010, Order put a stop to Judge Walker's determined, unlawful campaign to have the trial "recorded and then broadcast on the Internet." *Hollingsworth v. Perry*, 558 U.S. 183,

188 (2010). Judge Walker's decision to *record* the trial anyway was consistent with this Order (and was acquiesced in by Petitioners) *only* because he simultaneously promised Petitioners that the recording *would not be broadcast*. The release of the recordings today would constitute an obvious circumvention of the Court's January 13 Order.

Respondents assert that that Emergency Order was limited to Judge Walker's plan to live-stream the trial to other courthouses, which "is no longer at issue," BIO.24, but that is only because Judge Walker's further plan "to broadcast the trial on the internet" had been stalled in the Ninth Circuit due to technical difficulties, *Hollingsworth*, 558 U.S. at 189. No one seriously thinks that Judge Walker could have lawfully live-streamed the trial in the face of the January 13 Order. Indeed, *Perry* specifically held that Judge Walker's promise that the recording would not be broadcast was "compelled by th[is] Court's ruling in this very case," since "Judge Walker could not lawfully have continued to record the trial without assuring the parties that the recording would be used only for a permissible purpose." *Perry*, 667 F.3d at 1087. Respondents' insistence that the Court's January 13 Order had nothing at all to say about "whether the trial recording could be otherwise broadcast," BIO.24, is completely unsupportable, as Judge Walker himself plainly understood.

CONCLUSION

For the reasons given above and in the Petition, the Court should grant certiorari or, alternatively, summarily reverse.

June 14, 2022 Respectfully Submitted

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