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 A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners failed to establish standing to appeal the district court's order unsealing a video recording of the 2010 civil trial in this case.

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STATEMENT

This petition arises out of a 2009 lawsuit challenging California's Proposition 8, which amended the state Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." *Hollingsworth v. Perry*, 570 U.S. 693, 701 (2013) (*Hollingsworth II*). The plaintiffs (respondents here) challenged the measure in federal district court as a violation of their due process and equal protection rights. *Id.* at 702. The state defendants (also respondents here) declined to defend Proposition 8, *id.*, and have not had a substantial role in the litigation since that time. Petitioners thereafter intervened to defend Proposition 8. *Id.* The extensive factual and procedural history relevant to this petition is described in detail in the principal brief in opposition, filed by the intervenors, KQED Inc., and the City and County of San Francisco, *see* Principal Opp. 3-12, and is therefore summarized only briefly here.

1. Following a bench trial, the district court declared that Proposition 8 was unconstitutional and permanently enjoined state respondents from enforcing it. *Hollingsworth II*, 570 U.S. at 702. The court of appeals affirmed. *Id.* This Court granted certiorari and vacated the court of appeals' judgment, reasoning that petitioners had only a general interest in "vindicat[ing] the constitutional validity of a generally applicable California law," which was insufficient to confer standing. *Id.* at 706.

2. This proceeding involves a video recording of the 2010 bench trial. Prior to the trial, "the Ninth Circuit Judicial Council authorized a pilot program 'permitting the use of video in nonjury civil cases.'" Pet. App. 9a. The Northern District of California thereafter "amended its local rules in order to participate in

the pilot program"; that amendment "would have allowed the Proposition 8 trial to be broadcast to other courthouses." *Id.*; *see also id.* at 8a (quoting the pre-existing local rule, which prohibited the "'public broadcasting or televising'" of judicial proceedings in the courtroom, or the recording of such proceedings "'for those purposes'"); *see generally Hollingsworth v. Perry*, 558 U.S. 183, 186-189 (2010) (*Hollingsworth I*). Based on that amendment, the district court announced that an audio and video feed of the Proposition 8 trial would be streamed live to certain courthouses and (subject to the court of appeals' approval) recorded for broadcast over the internet. *Hollingsworth I*, 558 U.S. at 188.

This Court subsequently stayed the district court's order authorizing the trial to be livestreamed in other courthouses. *Hollingsworth I*, 558 U.S. at 184. The Court explained that the stay application implicated a "narrow legal issue" of whether the process for amending the local rules complied with federal legal requirements. *Id.* at 189 (citing 28 U.S.C. § 2071). Because the amendment was adopted without notice and comment or any showing of an immediate need that justified dispensing with that process, the Court concluded that the district court's order was likely unlawful. *Id.* at 191-195. The Court also held that petitioners would likely suffer harm from the denial of a stay, pointing to the possibility that "witness testimony may be chilled if broadcast." *Id.* at 195.

Consequently, the district court abandoned its plans to broadcast the trial. Pet. App. 9a-10a. But the court stated that it would continue to video record the trial for use in chambers. *Id.* at 10a, 96a. At the conclusion of the trial, the district court entered the video

recordings into the record under seal without objection from any of the parties. *Id.* at 10a.

The following year, the district judge who presided over the trial (who had since retired) began to use clips of the trial during public appearances. Pet. App. 11a. Petitioners moved for an order directing the return of all copies of the recordings to the district court. *Id.* The plaintiffs, along with a coalition of media companies, cross-moved to unseal the recordings. *Id.* A newly assigned district judge ordered the recordings unsealed, reasoning that the common-law right of access applied and that petitioners had failed to demonstrate any compelling reason to continue the seal. *Id.*

Petitioners appealed that order. Pet. App. 11a. At oral argument before the court of appeals, petitioners acknowledged that "the seal lasts for ten years under the local rules of the Northern District of California," and that petitioners "would have the opportunity to ask for an extended seal" beyond that "minimum of ten years . . . if we could make a good cause showing of that." *Id.* at 12a. The court of appeals reversed. *Perry v. Brown*, 667 F.3d 1078, 1088-1089 (9th Cir. 2012). It concluded that the common law right of access should be overridden because petitioners had reasonably relied on the district court's assurances that the "recording would not be broadcast to the public, at least in the foreseeable future." *Id.* at 1084-1085; *see id.* at 1085 n.5 (describing provisions of Northern District of California Local Rule 79-5(f) directing that sealed documents "shall be open to public inspection . . . 10 years from the date the case is closed" unless there is a "showing [of] good cause" for "continu[ing] the seal until a specific date beyond the 10 years").

3. In 2017, respondent KQED moved the district court for an order unsealing the recordings. Pet. App.

14a. Petitioners opposed that motion, D. Ct. Dkt. 864, while the other parties (including the state respondents, who remained defendants in the district court) noted their non-opposition, D. Ct. Dkt. 866, 867, 868. The district court did not unseal the recordings at that time, but it held that the seal would expire under Local Rule 79-5(f) in 2020, 10 years from the date on which the case was closed. Pet. App. 14a; *see also id.* at 52a-74a. The court invited petitioners to file a motion to establish good cause to extend the seal beyond 2020. *Id.* at 74a.

Two years later, petitioners filed a motion to make the seal permanent. Pet. App. 14a; D. Ct. Dkt. 892 at 25. In response, KQED and the plaintiffs argued that the local rules and other legal principles required the video recordings to be unsealed. D. Ct. Dkt. 895 at 9-24; D. Ct. Dkt. 898 at 7-25. The state respondents filed a brief statement of opposition, noting that petitioners failed to present any compelling reasons for maintaining the seal, as required by the local rules, and acknowledging the public interest in transparency of legal proceedings. D. Ct. Dkt. 894 at 1-2. The district court denied petitioners' motion in light of the absence of any "evidence that any [petitioner] or trial witness fears retaliation or harassment if the recordings are released" or that any petitioner "or trial witness on behalf of the [petitioners] 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." Pet. App. 48a.

Petitioners appealed, and the court of appeals granted a stay to preserve the status quo pending its consideration of the merits. Pet. App. 15a. Before the

court of appeals, KQED and the plaintiffs filed comprehensive answering briefs defending the district court's order. C.A. Dkt. 30, 34. The state respondents submitted a short filing, which joined the legal arguments in the KQED brief and emphasized the importance of "[p]ublic access to the courts and government transparency." C.A. Dkt. 38 at 3. Following oral argument, several parties submitted supplemental briefs addressing whether petitioners have Article III standing to pursue the appeal, *see* C.A. Dkt. 60, 63, 66, but the state respondents did not brief that issue.

The court of appeals dismissed the appeal, concluding that petitioners lacked a sufficiently concrete and particularized injury to support standing. Pet. App. 18a-26a. Judge Ikuta dissented. *Id.* at 26a-43a. The court of appeals denied rehearing en banc, but stayed the issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari. C.A. Dkt. 76.

ARGUMENT

The state respondents initially waived their response to the petition, in view of the comprehensive brief in opposition to be filed by the other respondents, who had actively litigated the unsealing issues throughout the proceedings below. This Court thereafter requested a response from the state respondents. The state respondents agree with the other respondents that the issues raised by petitioners do not warrant plenary review or summary reversal by this Court, and that the court of appeals correctly dismissed petitioners' appeal.

1. This petition does not warrant an exercise of the Court's certiorari jurisdiction. The issues raised by

petitioners turn on the unique facts of a particularly unusual case, and are unlikely to recur. And they are not the type of practically or legally significant question that typically prompts this Court to grant plenary review.

Despite many opportunities to do so, petitioners have not established that unsealing the video recording of the 2010 trial would work any practical harm on them or others. Applying the local rules, the district court invited petitioners to identify any "'compelling reason'" to extend the seal beyond the 2020 presumptive expiration date. Pet. App. 14a. But petitioners failed to submit any declarations substantiating any concern that unsealing the recording would harm them or others. *Id.* at 48a. Nor is there any indication that they could have submitted such evidence. The transcript of the trial has been publicly available for more than a decade, "and there is no evidence in the record that [petitioners], their witnesses, or indeed any Proposition 8 supporter, have been harassed during the period since the release of the transcript." *Id.* at 23a. Indeed, of the "three people aligned or potentially aligned with" petitioners who "were witnesses at trial," two have "expressed no concern about the release of the recordings," and the third "has explicitly stated that he has no concern about their release." *Id.*; *see id.* at 23a-24a ("the record is devoid of [any] 'factual showing of perceptible harm'").

Petitioners instead posit more abstract harms to the integrity of the judicial system. They argue that the unsealing of the video recording would amount to "the breach of [a] promise" by the district court, which would undermine "the basic integrity of the federal judiciary" by putting "litigants . . . on notice that *every* promise by a federal judge is inherently unreliable."

Pet. 25. Of course, the integrity of our legal system is a matter of tremendous significance to our Nation and to all of the parties to this case. But the parties' disagreement about whether unsealing the recording at this juncture would break any judicial promise or unsettle petitioners' expectations boils down to a fact- and record-intensive dispute—not any cross-cutting legal issue "of paramount importance to the health of the Republic." *Id.* at 28.

For example, petitioners now contend that the district court promised them "that the recording would never be publicly broadcast," Pet. 2 (emphasis omitted), and argue that a 2012 Ninth Circuit decision treated this as "a 'binding obligation[],'" *id.* at 3 (quoting *Perry v. Brown*, 667 F.3d 1078, 1087 (9th Cir. 2012)). As early as 2011, however, petitioners' "counsel acknowledged that neither they nor their clients believed the recordings would remain permanently sealed." Pet. App. 12a. They told the Ninth Circuit that "the seal lasts for ten years under the local rules . . . [and] we would have the opportunity to ask for an extended seal if we could make a good cause showing of that." *Id.*; *see also* Principal Opp. 2. The prior appellate decision that petitioners cite recognized that "Chief Judge Walker's specific assurances" were "that the recording would not be broadcast to the public, *at least in the foreseeable future*," *Perry*, 667 F.3d at 1084-1085 (emphasis added)—and it expressly noted the local rule providing that (absent a proper showing of good cause) "'[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,'" *id.* at 1085 n.5. Granting certiorari would thus enmesh this Court in a fact-bound dispute re-

garding the meaning and significance of various statements and representations made by litigants and courts more than a decade ago.

Petitioners also allege a circuit conflict regarding whether a "breach of a binding obligation itself constitutes a cognizable injury" for purposes of Article III. Pet. 23. But there is no real conflict. *See* Principal Opp. 19-21. Each out-of-circuit decision cited by petitioners involves "specific contractual right[s]" and "traditional principles of contract law." *E.g.*, *Springer v. Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284, 287, 288 (6th Cir. 2018). This case, by contrast, involves the purported breach of "judicial promises." Pet. 4. And petitioners have never "claim[ed], and cite no authority for the proposition," that a judge's remarks in a judicial proceeding form "an enforceable contract." Pet. App. 19a.

2. As to the merits, the state respondents did not brief the standing issue in the court below, but agree with the other respondents that the court of appeals did not err by dismissing the appeal. Petitioners have not established that they have "suffered an injury in fact that is concrete, particularized, and actual or imminent." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). With respect to their theory of tangible harm, the "record is devoid" of any evidence of the "harm or threat of harm" petitioners would suffer from the release of the video recordings. Pet. App. 23a-24a. Indeed, in the court of appeals, petitioners expressly denied that they were relying on tangible harms ("such as threats of violence or retaliation") to support their standing. C.A. Dkt. 66 at 1. Petitioners attempt to walk back that position in this Court, invoking "common sense" to support a "reasonable inference" that they "face an ongoing risk of tangible harm,"

Pet. 23; *see also* Reply 6—but they fail to identify anything in the record of this case that substantiates those assertions. And petitioners' arguments for standing based on "an 'intangible' injury" (Pet. 3, 17-22) are unpersuasive for the reasons identified by the principal brief in opposition and the court of appeals. Principal Opp. 14-19; Pet. App. 18a-20a, 24a-26a.

Even if the jurisdictional issue presented a closer question, however, certiorari should be denied: As discussed above, the question does not satisfy the Court's traditional standards for plenary review. *See supra* pp. 5-8. And petitioners would be unlikely to obtain the relief they seek in any event because their underlying arguments for "permanently maintain[ing] the seal" (D. Ct. Dkt. 892 at 25) are contrary to the local rules, their own professed understanding of those rules and the scope of the district court's commitments, and the strong public interest in the transparency of judicial proceedings. *See* Pet. App. 48a-50a; *see also* Principal Opp. 24-26.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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