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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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California's Brief in Opposition acknowledges that "the integrity of our legal system is a matter of tremendous significance to our Nation and to all of the parties to this case." BIO.7. And the Ninth Circuit majority below *effectively conceded* that its decision will inflict grievous damage to that tremendously significant interest. For as explained in our earlier papers, the panel majority expressly (and correctly) assumed that then-Chief Judge Vaughn Walker promised Petitioners "that the video recordings [of the 2010 trial over Proposition 8] would remain sealed in perpetuity," Pet.App.20a; and the majority said *nothing whatsoever* to cast doubt on the Ninth Circuit's own earlier conclusion that Petitioners "reasonably relied on Chief Judge Walker's specific assurances," and so "there are no alternatives to maintaining the recording under seal that would protect the compelling interest" in preserving "the integrity of the judicial process," *Perry v. Brown*, 667 F.3d 1078, 1084, 1088 (9th Cir. 2012). Yet the panel below nullified Judge Walker's assurances and ordered the unsealing of the recordings, on grounds that severely undermine the reliability and trustworthiness of *every* judicial promise. It inevitably follows from these propositions that this Court's intervention—either through plenary review or summary reversal—is not just warranted but imperative. Nothing in California's brief even remotely calls that conclusion into doubt.

I.a. California insists that our "arguments for standing" based on the intangible injury that would be inflicted by the breach of Judge Walker's promise "are unpersuasive for the reasons identified by the

principal brief in opposition and the court of appeals." BIO.9. But the only reason it actually discusses is the supposed concession by Petitioners' counsel during the 2011 "oral argument before the court of appeals" that "neither [Petitioners] nor their clients believed the recordings would remain permanently sealed," BIO.3, 7. Our prior briefing has already explained why counsel's argument in 2011 conceded nothing of the kind.

The portions of the 2011 argument that *California itself quotes* demonstrate that counsel *did not* "acknowledge[ ]" that the recordings would be unsealed and made publicly available after ten years, under the district court's Local Rule 79-5. To the contrary, counsel clearly explained that upon the conclusion of Rule 79-5's minimum ten-year period, Petitioners "would have the opportunity to ask for an extended seal," under the rule, by demonstrating "good cause." BIO.3. For this statement to amount to any kind of "concession" that the seal would not last beyond ten years, counsel would *also* have had to somehow represent that *Petitioners would be unable to show good cause* to extend the seal after that initial period. And far from making any such concession, as we have previously explained, counsel in fact *elsewhere in the same argument* contended that the judicial integrity interest in keeping faith with Judge Walker's promise *does* plainly require that the trial recordings remain sealed. Oral Argument at 16:52, *Perry v. Brown*, No. 11-17255 (9th Cir. Dec. 8, 2011), https://bit.ly/3B1R1pj. Petitioners have *never* suggested—in 2008, 2011, 2022, or any point in between—that this judicial-integrity interest would somehow diminish or evaporate after ten years.

Nor does *Perry*'s citation, in a footnote, to Local Rule 79-5's ten-year default rule support California, for similar reasons. *See Perry*, 667 F.3d at 1085 n.5. For even assuming that Local Rule 79-5 applies to the video recordings (and it does not, *see* Pet.30), the rule at most would provide for the unsealing of the recordings, ten years after the case was closed, had Petitioners *not moved to extend the seal* based upon good cause. But Petitioners *did* move to extend the seal before the ten-year default period had lapsed. And there is *nothing* in *Perry* to support the notion that after the passage of ten years, nullifying Judge Walker's "unequivocal assurances" "that there was no possibility that the recording would be broadcast to the public in the future" would somehow no longer "cause serious damage to the integrity of the judicial process." *Perry*, 667 F.3d at 1085, 1086, 1087.

b. California also resists this Court's review on the basis that the panel majority's conclusion that Petitioners' lack standing creates "no real conflict" between the circuits. BIO.8. Echoing the argument advanced by the other Respondents, California says that the numerous circuit court decisions holding that "the invasion of a common-law right (including a right conferred by contract)" is cognizable under Article III "without wallet injury," *Amrhein v. eClinical Works, LLC*, 954 F.3d 328, 331 (1st Cir. 2020) (cleaned up), are all distinguishable because they did not involve the "breach of '*judicial* promises,' " BIO.8 (emphasis added). The suggestion that the breach of binding "judicial promises" is less injurious than the breach of a "traditional," private contract, *id.*, is no more persuasive coming from California than it was from the other Respondents.

II. That the "solemn commitments" at issue in this case, *Perry*, 667 F.3d at 1087, issued from *a federal judge in open court*, rather than some commercial party, is *precisely why this Court's review is imperative*. The breach of a private company's contractual commitments does not "compromise the integrity of the judicial process." *Id.* at 1088. The breach of a federal judge's binding commitments does. While California admits, as it must, that "the integrity of our legal system is a matter of tremendous significance to our Nation," BIO.7, it utterly fails to grapple with this aspect of the case.

Instead, California attempts to cast this case as a "particularly unusual" "fact- and record-intensive dispute"—a one-off that lacks any "paramount importance" or "cross-cutting" significance." *Id.* at 6, 7. That description is completely unpersuasive. While there is no question that the circumstances of this case are "unique," *id.* at 6, the root question the case presents is one of profound and wide-reaching significance: whether the solemn promise of a federal judge, made on the record with the purpose and effect of inducing parties appearing before him to refrain from challenging one of his decisions, is enforceable and worthy of reliance. Far from "unlikely to recur," *id.*, that question recurs *every day*, as parties litigating before the Nation's courts face the choice between trusting a trial judge's commitments, and shaping the conduct of the proceedings accordingly, or concluding that the judge's promises are worthless and unreliable.

Since the founding of the Republic, generations of American statesmen and judges have sought to build and preserve a federal judiciary worthy of the People's

trust. As Judge Reinhardt noted in 2012, in the words of an earlier Ninth Circuit judge, " 'no man is as essential to his country's well being as is the unstained integrity of the courts.' " *Perry*, 667 F.3d at 1088 (quoting *Gubiensio–Ortiz v. Kanahele,* 857 F.2d 1245, 1264 (9th Cir. 1988), *vacated on other grounds, United States v. Chavez–Sanchez,* 488 U.S. 1036 (1989)). For the ability of the federal courts to serve their vital role of peacefully resolving the American People's disputes depends entirely on the People's faith in the basic "integrity of the judicial system." *Id.* at 1087. And that integrity, in turn, depends on whether "[l]itigants and the public" continue to believe that they can "trust the word of a judge," *id.* at 1087–88—that is, trust that the judge's promises *will be honored*, whether or not the later judges honoring them agree with the promises or would have made them in the first place. The majority's decision below threatens a serious and irreversible breach of that trust, and only this Court's intervention can prevent it.

CONCLUSION

For these reasons, and those given in Petitioners' earlier papers, the Court should grant certiorari or, alternatively, summarily reverse.

September 6, 2022 Respectfully Submitted,

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