No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During the trial over the constitutionality of California's Proposition 8, the presiding judge, the Hon. Vaughn Walker, looked Petitioners' counsel straight in the eye and promised in open court that the video recording he was making of the trial proceedings over Petitioners' objections would be used only in chambers and never be made public. Judge Walker made this promise because this Court's emergency order halting his plan to unlawfully videotape and broadcast the trial compelled him to do so, and Petitioners reasonably and detrimentally relied upon the promise by not seeking, once again, this Court's intervention to halt the video recording. Following the trial, a Ninth Circuit panel unanimously held that Judge Walker's promise was legally binding and could not be nullified without grave damage to the basic integrity of the federal judiciary. But in the decisions below, the district court ordered the public release of the trial recordings, and a divided panel of the Ninth Circuit dismissed Petitioners' appeal of that order for lack of Article III standing.

The questions presented are:

1. Whether the breach of Judge Walker's binding promise to Petitioners, upon which they reasonably and detrimentally relied, cognizably injures them.

2. Whether the video recordings that Judge Walker solemnly promised Petitioners would not be made public may now be ordered publicly released over their objection.

PARTIES TO THE PROCEEDING

Petitioners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, and Mark A. Jansson were intervenor-defendants before the District Court and appellants in the Court of Appeals.

Respondents Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo were plaintiffs before the District Court and appellees in the Court of Appeals. Respondent KQED, Inc. was an intervenor before the District Court and an appellee in the Court of Appeals. Respondent City and County of San Francisco was an intervenor-plaintiff before the District Court and an appellee in the Court of Appeals. Respondents Gavin Newsom, in his official capacity of Governor of California, Rob Bonta, in his official capacity as Attorney General of California, Tomas Aragon, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics, and Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, were defendants before the District Court and appellees in the Court of Appeals. Xavier Becerra, the former Attorney General of California, was also an appellee in the Court of Appeals, but Respondent Bonta was substituted in his place on November 18, 2021, pursuant to FED. R. APP. P. 43(c)(2). Mark B. Horton, the former Director of the California Department of Public Health & State Registrar of Vital Statistics, was also an appellee in the Court of Appeals, but Respondent Aragon was substituted in his place on November 18, 2021, pursuant to FED. R. APP. P. 43(c)(2).

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Perry v. Newsom*, No. 20-16375 (9th Cir. Nov. 18, 2021)
- *Perry v. Schwarzenegger*, No. 18-15292 (9th Cir. Apr. 19, 2019)
- *Perry v. Schwarzenegger*, No. 09-cv-2292 (N.D. Cal. Aug. 27, 2012)
- *Perry v. Brown*, No. 11-17255 (9th Cir. Feb. 2, 2012)
- *Hollingsworth v. Perry*, No. 09A648 (U.S. Jan. 13, 2010)

The following proceedings are also directly related to this case under this Court's Rule 14.1(b)(iii):

- *Hollingsworth v. Perry*, No. 12-144 (U.S. June 26, 2013)
- *Perry v. Brown*, No. 10-16696 & 11-16577 (9th Cir. Feb. 7, 2012)
- *Perry v. Brown*, No. S189476 (Cal. Nov. 17, 2011)
- *Perry v. Brown*, No. 10-16751 (9th Cir. Jan. 4, 2011)
- *Perry v. Schwarzenegger*, No. 10-15649 (9th Cir. Apr. 12, 2010)
- *Hollingsworth v. United States Dist. Court, S.F.*, No. 10-70063 (9th Cir. Jan. 8, 2010)
- *Perry v. Hollingsworth*, Nos. 09-17241 & 09-17551 (9th Cir. Dec. 11, 2009)
- *Perry v. Campaign for Cal. Families*, No. 09-16959 (9th Cir. Nov. 19, 2009)

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The root question in this case is whether a federal judge's binding promise, made to litigants in open court and on the record, is worthy of trust. The courts below, in different ways, both ultimately said the answer to that question is no, threatening grave and irreversible harm to the basic integrity of the federal judiciary. If that harm is to be prevented, this Court must intervene.

Twelve years ago, as the trial over the constitutionality of California's Ballot Proposition 8 was beginning, the presiding judge, then-Chief Judge Vaughn Walker, made a promise to Petitioners—proponents of the ballot proposition, who had intervened to defend its constitutionality when the State would not. Judge Walker promised Petitioners that the video recording he was making of the trial proceedings, over their repeated objections, was for his exclusive use in chambers and was "not going to be for purposes of public broadcasting or televising." App.96a. The promise marked the apparent end of a months-long effort by the district court, with the aid and cooperation of the Ninth Circuit, to broadcast the trial in violation of the court's own rules and over Petitioners' firm objection. The promise was compelled by this Court's emergency stay, entered the previous day, blocking the effort to videotape and broadcast the trial. *Hollingsworth v. Perry*, 558 U.S. 183, 196–99 (2010). And the promise was made to induce Petitioners to refrain from seeking this Court's further intervention blocking the recording of the trial at all. Because the

emergency stay blocked Judge Walker's plan to have the trial "recorded and then broadcast on the Internet," *id.* at 188, he knew that he could lawfully *record* the trial only if he promised Petitioners that the recording would never be publicly *broadcast*.

Petitioners took Judge Walker at his word.

Unfortunately, before the appeal in the case had even concluded, Judge Walker broke his promise and began broadcasting portions of the trial recording at public events. The Ninth Circuit rebuffed that breach of trust, holding in a unanimous opinion by Judge Reinhardt that Judge Walker's promises to Petitioners constituted "binding obligations" and that "to preserve the integrity of the judicial system, the recording must remain under seal." *Perry v. Brown*, 667 F.3d 1078, 1087 (9th Cir. 2012). Yet just five years later, Respondents sought to evade Judge Walker's commitments yet again, moving the district court to lift the seal on the trial recording. The district court granted this request in 2020, ordering that the recording be unsealed and broadcast over the Internet—in the teeth of Judge Walker's binding promise and this Court's stay order. And the divided Ninth Circuit panel below blessed this glaring affront to the judiciary's basic integrity, in an opinion that constitutes, in the words of Judge Ikuta's dissent, "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." App.26a (Ikuta, J., dissenting).

The panel majority's stated reason for allowing the recordings to be unsealed is that Petitioners lack standing to enforce Judge Walker's promise. That ruling is contrary to this Court's precedent, departs from the case law in eight Circuits, and defies all sense. The majority's reasoning is based on Petitioners' purported failure to demonstrate some *tangible* injury from the recordings' release, such as a "fear [of] harassment or reprisals." App.22a. But as Judge Ikuta's dissent explains, an "intangible" injury can also support standing, App.35a (Ikuta, J., dissenting), and this Court has recognized that one intangible harm that has *always* qualified is "the fact of breach of contract by itself," *id.* (quoting *Uzuegbunam v. Preczewski*, 592 U.S. ---, 141 S. Ct. 792, 798 (2021)). At least eight Circuits have likewise recognized that the breach of a legally binding promise is *per se* a cognizable injury. Because Judge Walker's promise to Petitioners—upon which they reasonably and detrimentally relied—constituted a "binding obligation[ ]," *Perry*, 667 F.3d at 1087, the injury inflicted upon them by the breach of that promise bears at least "a close relationship" to a traditionally recognized injury, *TransUnion LLC v. Ramirez*, 594 U.S. ---, 141 S. Ct. 2190, 2204 (2021), and Petitioners' standing cannot seriously be questioned.

The patent conflict between the panel majority's decision and the precedent from this Court and multiple other Circuits would warrant the Court's review even in an ordinary case. But this case has never been ordinary. What is at stake, here, is not the standing of

a litigant to enforce some commercial contract. At stake is the federal judicial system's very honor and thus its basic ability to function. As Judge Reinhardt explained a decade ago, "[l]itigants and the public must be able to trust the word of a judge if our justice system is to function properly." *Perry*, 667 F.3d at 1087–88. Yet the panel majority's standing decision renders "the word of a judge" unenforceable and, thus, worthless. Under that decision, litigants—or at least those litigating in the Ninth Circuit—will *never again* be able to fully "trust the word of a judge," because they will know that if the court one day goes back on even the most binding and solemn of promises, they may have no standing to enforce it.

The latest "sad chapter" in this case, App.26a (Ikuta, J., dissenting)—the final one, unless this Court again intervenes—thus threatens profound institutional damage. For over 230 years, litigants practicing before federal trial courts have accepted and relied upon countless representations, commitments, and promises from federal judges in shaping the course of the trial. If the decision below stands, and judicial promises are rendered unworthy of reliance, the course of the next 230 years of legal practice before the federal courts will look very different. For the integrity of the courts that has been so carefully husbanded since the days of Chief Justice Jay, once squandered through a breach of faith of this magnitude—and based on reasoning so far-reaching—will not easily be recovered.

When this Court blocked the broadcast of the Proposition 8 trial 12 years ago, it invoked a truth so fundamental that it should not have needed to be said: "insisting that courts comply with the law . . . vindicate[s] . . . the law's own insistence on neutrality and fidelity to principle." *Hollingsworth*, 558 U.S. at 196. No less essential to the law's own fidelity to principle is insisting that courts honor their promises. The Court should grant the writ. Alternatively, the decision below amply qualifies for summary reversal. *See* this Court's Rule 16.1.

OPINIONS BELOW

The Ninth Circuit's opinion holding that Applicants lack standing to continue to challenge the disclosure of the video recordings at issue is published at 18 F.4th 622, and it is reproduced at App.1a. The district court's opinion ordering the public release of the video recordings has not been published in the federal supplement, but it is available at 2020 WL 12632014, and it is reproduced at App.44a. An earlier order of the district court concluding that the video recordings would be subject to release ten years after the conclusion of the case is published at 302 F. Supp. 3d 1047, and it is reproduced at App.52a.

JURISDICTION

The Court of Appeals issued its judgment on November 18, 2021. App.1a. The Court of Appeals denied Petitioners' petition for rehearing *en banc* on December 28, 2021. App.75a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The relevant portions of Article III and Amendment I to the United States Constitution and Rules 77-3 and 79-5 of the Northern District of California's Local Rules are reproduced in the Appendix beginning at App.77a.

STATEMENT

I. The *Hollingsworth* Trial.

A. This case began as a challenge to the constitutionality of California's Proposition 8, a constitutional amendment providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. The district court had jurisdiction over the challenge under 28 U.S.C. § 1331. California declined to defend Proposition 8, but Petitioners—official proponents of the voter-initiated measure—intervened and defended the initiative against the plaintiffs' claims.

The suit was assigned to then-Chief Judge Vaughn R. Walker, and as the trial approached, Judge Walker expressed a strong desire to videotape and broadcast the trial. Petitioners strenuously objected, repeatedly warning that several of their witnesses would decline to testify if the proceedings were broadcast. *See Hollingsworth v. Perry*, 558 U.S. 183, 186, 195 (2010). Despite these objections, Judge Walker announced on January 6, 2010 (five days before the start of trial) that the trial proceedings would be streamed live to several courthouses in other cities

and that the trial would be video recorded for daily broadcast via the internet.

Petitioners objected, explaining that the court's Local Rule 77-3 specifically prohibited the recording and broadcast of the proceedings. Judge Walker, as this Court later described, nonetheless proceeded with a determined campaign "to revise [the local] rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States," in order "to allow broadcasting of this high-profile trial without any considered standards or guidelines in place." *Hollingsworth*, 558 U.S. at 196.

B. Petitioners sought emergency relief from the Ninth Circuit, which denied the request on January 8, 2010. Petitioners then turned to this Court, and on the morning of January 11, 2010, the Court entered a temporary emergency stay of the planned broadcast. *Hollingsworth v. Perry*, 558 U.S. 1107 (2010). This temporary stay was set to expire on January 13, when the Court would enter a decision on Petitioners' stay application. *Id*. At the opening of trial later that morning, Judge Walker decided, at the Plaintiffs' request and over Petitioners' objection, to video record the proceedings for subsequent public broadcast in case the temporary stay was lifted.

Far from lifting the stay, on January 13, this Court reaffirmed and extended the stay until the conclusion of any subsequent review by the Court. *Hollingsworth*, 558 U.S. at 199. As the Court explained, Judge Walker's "eleventh hour" attempt to amend the

district court's rules to permit public broadcasting of the trial was procedurally invalid. *Id*. His efforts were also contrary to the longstanding, considered policy of the Judicial Conference of the United States against such broadcasts and the court's own Local Rule barring the broadcast of judicial proceedings, Rule 77-3, which had "the force of law." *Id.* at 191, 193–94. Thus, the Court concluded that the district court's attempt to broadcast the trial "complied neither with existing rules or policies nor the required procedures for amending them." *Id*. at 196.

C. At the opening of the proceedings on January 14, Judge Walker reported that "in light of the Supreme Court's decision yesterday" permanently staying any broadcast, he was "requesting that this case be withdrawn from the Ninth Circuit pilot project." App.94a. Petitioners' counsel then asked "for clarification . . . that the recording of these proceedings has been halted, the tape recording itself." App.95a. When Judge Walker responded that the recording "ha[d] *not* been altered," Counsel reiterated Petitioners' contention (made in a letter submitted earlier that morning) that, "in the light of the stay, . . . the court's local rule . . . prohibit[s] continued tape recording of the proceedings." *Id.* (emphasis added). Judge Walker insisted on recording the trial over these objections, stating that Rule 77-3 "permits . . . recording for purposes of use in chambers." App.96a. But he assured Petitioners that "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*." *Id.*

(emphasis added). Judge Walker repeated these assurances in a signed notice entered in the case the following day. App.98a.

Petitioners relied on these assurances in acceding to Judge Walker's insistence on continuing the videorecording. As the Ninth Circuit later explained, "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. For "[h]ad Chief Judge Walker not made the statement he did, [Petitioners] 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. Lest there be any doubt, Petitioners definitely would have sought such an order.

As the trial was drawing to a close, Plaintiffs and Intervenor San Francisco obtained copies of the recording, at Judge Walker's invitation, on a confidential basis pursuant to a protective order, for use during their closing arguments. After closing argument, Petitioners moved for an order requiring that all copies of the recording be returned to the court. *See* D. Ct. Doc. 696 (June 29, 2010). On August 4, 2010, Judge Walker issued his substantive ruling declaring Proposition 8 unconstitutional, and in it, he denied this motion. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010). Instead, he "DIRECTED" the clerk to "file the trial recording under seal as part of the record." *Id.* Elsewhere in the same order, Judge

Walker stated that "the potential for public broadcast" of the trial proceedings "had been *eliminated*." *Id.* at 944 (emphasis added).

II. Respondents' Initial Effort To Lift the Seal.

A. Despite Rule 77-3, this Court's emergency intervention, the sealing order, and his own unequivocal and repeated commitments in open court, Judge Walker publicly played a portion of the video recording of the trial while delivering a speech at the University of Arizona in 2011. *See* Judge Vaughn Walker, History of Cameras in the Courtroom at 33:13–37:04 (Feb. 18, 2011), https://bit.ly/3KT2agp. Less than two weeks later, Judge Walker resigned from the bench, but he continued to publicly display excerpts from the trial recording during speaking engagements. *See* 9th Cir. Doc. 21-3, 360 (Sept. 9, 2020).

Petitioners promptly sought an order directing the return of all copies of the recording, and Plaintiffs opposed that motion and cross-moved to unseal the recording. On September 19, 2011, Judge Ware, who had replaced Judge Walker as the presiding judge in the district court, granted Plaintiffs' motion to lift the seal. Judge Ware concluded that the common-law right of access applies to the recording, that this common-law right requires that the recording be made public, and that Judge Walker's promises to the contrary were not binding on him. *See* D. Ct. Doc. 812 (Sept. 19, 2011).

B. Petitioners immediately appealed, and in February 2012, the Ninth Circuit unanimously

concluded that the district court had abused its discretion in ordering that the seal be lifted. *Perry*, 667 F.3d 1078.

The court emphasized Judge Walker's "unequivocal assurances that the video recording at issue would not be accessible to the public." *Id.* at 1085. Those assurances, the Ninth Circuit concluded, foreclosed any chance that the sealing of the trial recording might "be subject to later modification" because Judge Walker "promised the litigants that the conditions under which the recording was maintained *would not change*—that there was *no possibility* that the recording would be broadcast to the public *in the future*." *Id.* at 1086 (first emphasis in original; additional emphases added). The court further concluded that those "solemn commitment[s]" were "compelled by the Supreme Court's ruling in this . . . case," that they were "worthy of reliance," and that Petitioners in fact "reasonably relied" on them in relinquishing their right to seek this Court's further intervention halting the recording. *Id*. at 1086–87.

"To revoke Chief Judge Walker's assurances after [Petitioners] had reasonably relied on them," the court held, "would cause serious damage to the integrity of the judicial process"—damage that provides a " 'compelling reason' . . . to keep the recording sealed." *Id.* at 1087. After all, "[l]itigants and the public must be able to trust the word of a judge if our justice system is to function properly." *Id.* at 1087–88. Judge Walker's commitments therefore constituted "binding obligations and constraints" governing any later

attempt to unseal the recordings. *Id.* at 1087. In short, "the recording cannot be released without undermining the integrity of the judicial system." *Id.* at 1088.

III. Respondents' Second Attempt To Lift the Seal.

A. Little more than five years later, Respondent KQED filed a motion to unseal the recordings. The motion was referred to Judge William H. Orrick, who entered an order ruling on the motion on January 17, 2018. App.52a. While Judge Orrick acknowledged that the interest in judicial integrity "continues to exist and precludes release of the video recordings at this juncture," he concluded that the duration of the judicial-integrity interest was circumscribed by the district court's Local Rule 79-5, which generally provides that "[a]ny document filed under seal" is presumptively unsealed "10 years from the date the case is closed"—a period Judge Orrick calculated would end on August 12, 2020. App.69a–72a. Local Rule 79-5 allows a seal to be extended beyond the 10-year default limit upon a showing of good cause, however, and the district court invited Petitioners to move to continue the seal beyond that date by April 1, 2020.

Out of an abundance of caution, Petitioners promptly appealed Judge Orrick's 2018 Order, but the Ninth Circuit dismissed the appeal "without prejudice for lack of jurisdiction," concluding that the order was not an appealable final decision in light of the Order's invitation of a further motion to continue the seal.

Perry v. Schwarzenegger, 765 F. App'x 335, 336 (9th Cir. 2019).

B. On April 1, 2020, Petitioners moved the district court to permanently maintain the seal. Respondents opposed, and on July 9, 2020, the court denied the motion. Once again, Judge Orrick concluded that the " 'judicial integrity' argument" provides "no justification, much less a compelling one, to keep the trial recordings under seal any longer"—a conclusion he felt was supported by what he characterized as "concessions" by Petitioners' counsel, during the argument before the Ninth Circuit in the 2011 *Perry* appeal, purportedly acknowledging "*both* [Petitioners'] 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." App.49a, 50a. Judge Orrick refused to stay his decision, App.50a–51a, but Petitioners swiftly appealed, and the Ninth Circuit granted a stay pending the determination of the appeal, 9th Cir. Doc. 14 (Aug. 11, 2020).

C. On November 18, 2021, a divided Ninth Circuit panel entered an opinion dismissing Petitioners' appeal for lack of standing. Writing for the majority, Judge Fletcher concluded that the public release of the video recordings—in breach of Judge Walker's binding promise—would not cause Petitioners any "particularized and concrete injury sufficient to constitute 'injury in fact.' " App.26a. The majority did not dispute (1) that an injury qualifies as concrete under this Court's precedent if it "has a close relationship to a harm traditionally recognized as providing a basis

for a lawsuit in American courts," *TransUnion*, 141 S. Ct. at 2204 (quotation marks omitted), or (2) that one such traditionally recognized harm is "the fact of breach of contract by itself," *Uzuegbunam*, 141 S. Ct. at 798. But it rejected Petitioners' argument that the breach of Judge Walker's binding promise is at least closely analogous to this traditional injury, asserting that Petitioners "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." App.19a. Having brushed aside Petitioners' alleged *intangible* injury with virtually no analysis, the majority then spent the bulk of its analysis attempting to refute the existence of various *tangible* injuries, such as a risk of "harassment or reprisals" stemming from the release of the trial recordings. *Id.* at 22a.

The majority also concluded that any injury inflicted upon Petitioners was not particularized to them. It effectively acknowledged that the release of the recordings would visit grievous damage on the federal judiciary, for it expressly assumed, as part of its analysis, "that Judge Walker told Appellants that the video recordings would remain sealed in perpetuity," *id.* at 20a, and it said nothing to cast doubt on *Perry*'s emphatic holding that the nullification of Judge Walker's promises would cause irretrievable damage to "the sanctity of the judicial process," 667 F.3d at 1081. But it held that Petitioners "have alleged no interest" in preventing this grave harm to the integrity and functioning of the judicial system "beyond that

common to all of society," since they had not claimed that they "will themselves be among the future litigants" who will suffer for the lack of a functioning court system that can credibly claim the trust of those who appear before it. App.25a.

Judge Ikuta dissented. There could be no serious dispute, she explained, that one of the " 'traditionally recognized' harms" giving rise to a concrete and cognizable injury-in-fact was "a violation of private rights, including contract rights, whether or not the violation of such rights resulted in economic damage or other injury." App.35a (Ikuta, J., dissenting). And because it was also settled under this traditional rule that "promises were enforceable as contracts where the promisee relied on the promise" by forbearing the pursuit of "other remedies," Judge Ikuta reasoned that the breach of Judge Walker's binding promise to Petitioners—upon which they reasonably and detrimentally relied—is indistinguishable from this traditionally recognized harm. *Id.* at 38a–40a. The majority's contrary holding, Judge Ikuta concluded, simply distorted "the principles of Article III standing in order to deprive [Petitioners] of the opportunity to argue that the court should not breach its binding obligations." *Id.* at 26a–27a.

Petitioners requested rehearing *en banc*, but on December 28, the Ninth Circuit denied their petition. 9th Cir. Doc. 73 (Dec. 28, 2021). On December 30, however, the court granted Petitioners' motion to stay the issuance of the mandate—and thus to maintain the court's stay of the district court's unsealing order—

pending the filing and disposition of a petition to this Court for writ of certiorari. 9th Cir. Doc. 76 (Dec. 30, 2021).

REASONS FOR GRANTING THE WRIT

The panel majority's conclusion that Petitioners lack standing to challenge the disclosure of the trial recordings is contrary to this Court's precedent and the precedent of numerous other Circuits. And the result of the majority's distortion of settled Article III standing principles is to sanction the open violation of this Court's emergency stay order and the trial judge's own "solemn commitments." App.26a (Ikuta, J., dissenting). The magnitude of the damage caused by that breach of faith, and this Court's unique responsibility for supervising the federal judiciary, call for the Court to prevent this case from becoming an indelible stain on the integrity of the federal courts.

I. The Ninth Circuit's Conclusion that Petitioners Lack Standing Conflicts with Decisions of this Court and Other Circuits.

The panel majority held that Petitioners lack standing to challenge the disclosure of the trial recordings because the release of the recording would not cause them a "sufficiently concrete and particularized" injury. App.20a. But the injury-in-fact faced by Petitioners is the same one identified by the Ninth Circuit itself in *Perry*: the flagrant breach of Judge Walker's binding promise to Petitioners "that the video recording at issue would not be accessible to the public," nullifying their justified and detrimental

reliance on that promise and inflicting irretrievable harm to "the integrity of the judicial process." 667 F.3d at 1085, 1088. Precedent from this Court, and from multiple other Circuits, squarely establishes that this injury is both concrete and particularized.

A. This Court's Precedent Establishes that Petitioners Have Standing.

1. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). This Court's cases set forth several basic principles delineating what types of harms are concrete. It directly follows from those principles that the breach of Judge Walker's promise to Petitioners will injure them in a concrete and cognizable way.

First, while the "most obvious" concrete harms are "traditional tangible harms, such as physical harms and monetary harms," "intangible harms can also be concrete." *TransUnion*, 141 S. Ct. at 2204. Second, determining whether an intangible harm qualifies as concrete depends on whether it "has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* (quotation marks omitted). And third, this Court has recognized that one such traditionally accepted, intangible harm is "the fact of breach of contract by itself." *Uzuegbunam*, 141 S. Ct. at 798. In cases "both before and after ratification of the Constitution," courts repeatedly held "that the fact of breach of contract itself" constitutes a concrete injury—and justifies an award of nominal damages—even "absent

evidence of other damages" or any "apparent continuing or threatened injury." *Id.*

The panel majority's decision conflicts with these principles at every turn. As the Ninth Circuit explained in *Perry*, Judge Walker "unequivocally promised that the recording of the trial would be used only in chambers and not publicly broadcast." 667 F.3d at 1081. "There can be no question that [Petitioners] reasonably relied on Chief Judge Walker's explicit assurances," by refraining from seeking further intervention from this Court to stop the recording. *Id.* at 1086. And absent Judge Walker's promise, "they might well have secured" this Court's intervention a second time. *Id.* at 1085. Because nullifying "Chief Judge Walker's assurances after [Petitioners] had reasonably relied on them would cause serious damage to the integrity of the judicial process," those promises constitute "binding obligations." *Id.* at 1087.

The panel majority did not, and could not, dispute these conclusions. Nor did it dispute that unsealing the trial recording today would squarely breach Judge Walker's promise; to the contrary, the majority expressly (and correctly) assumed that "that Judge Walker told [Petitioners] that the video recordings would remain sealed in perpetuity." App.20a. But it directly follows from these propositions that the district court's unsealing order will inflict upon Petitioners a concrete, cognizable harm—quite apart from any further, tangible injury it may cause. As Judge Ikuta explained, "[b]ecause Chief Judge Walker made a clear and unambiguous promise that resulted in

reasonable, foreseeable, and detrimental reliance by [Petitioners] and those who depended on them, a violation of that promise would be a violation of [Petitioners'] legal rights"—a violation that is directly analogous to breach of contract, "a traditionally recognized harm providing a basis for lawsuit, whether or not it resulted in economic injury." *Id.* at 39a–40a (Ikuta, J., dissenting).

The majority's only meaningful response to this reasoning was the conclusory assertion that Petitioners "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." *Id.* at 19a (majority). That response fails twice over. First, as Judge Ikuta detailed, early English and American courts routinely enforced not only formal contracts but "promises that induced justifiable reliance." *Id.* at 37a (Ikuta, J., dissenting). Given *Perry*'s holdings (and the majority's assumption) that Judge Walker's promises to Petitioners were "binding obligations" and that "[Petitioners] reasonably relied on [them] in refraining from challenging his actions," 667 F.3d at 1087, 1088, the injury to Petitioners falls within this historical tradition *whether or not* those promises amounted to a formal "enforceable contract." And while a federal judge's promise to a litigant may not be enforceable by a damages action, surely it is not utterly worthless.

Second, and in all events, an injury "does not require an exact duplicate in American history and tradition" to qualify as concrete, merely a "close

relationship." *TransUnion*, 141 S. Ct. at 2204. Even if the breach of a binding promise that reasonably induces detrimental reliance did not qualify as an "exact duplicate" of a historically recognized harm—and it does—it would plainly meet this "close relationship" standard. The panel majority did not even offer an answer to these points.

2. The injury faced by Petitioners is also particularized, because *they alone were the specific recipients* of Judge Walker's unequivocal promises and *they alone reasonably and detrimentally relied* upon them.

Judge Walker's "commitments were not merely broad assurances about the privacy of judicial records in the case; they could not have been more explicitly directed toward the particular recording at issue." *Perry*, 667 F.3d at 1081. Nor did Judge Walker "promise the public as a whole that the trial recording would not be publicly broadcast." App.42a (Ikuta, J., dissenting). Rather, Judge Walker made specific "representations *to the parties*," *Perry*, 667 F.3d at 1081 (emphasis added)—and in particular *to Petitioners*, the very parties who (1) objected to the proposal to broadcast the trial and successfully sought a stay from this Court; (2) objected again to videorecording the proceedings at the outset of the trial, thereby prompting the promise that the recordings were "not going to be for purposes of public broadcasting or televising," *id.* at 1082; and (3) "reasonably relied on Chief Judge Walker's specific assurances" by declining to seek "an order directing him to stop recording forthwith," *id.* at 1084–85.

The panel majority reasoned that the injury caused by breaching Judge Walker's promise was not particularized because the resulting loss of faith in the integrity of the courts would be "shared by everyone." App.24a. There is nothing to this. Yes, the nullification of a court' promise will *also* harm all who rely upon "the wisdom, the stability, and the integrity of the courts of justice" to secure their "personal security and private property." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 426 (1833). But the injury caused by a broken promise to the one who received and relied upon it is rendered no less particularized by the harm that the breach of faith *also* causes to all who have dealings with the promisor.

The panel majority's reasoning would upend standing doctrine. For virtually *every* intangible harm also causes reverberating harm to "the public as a whole." App.24a. The interest in seeing constitutional rights vindicated is, for instance, also "shared by everyone." *Id.*; *see United States v. Raines*, 362 U.S. 17, 27 (1960). And "the public as a whole," App.24a, also has a strong and obvious interest "that it be understood that there is a binding force in all contract obligations," *Union Pac. Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 163 U.S. 564, 604 (1896). But the individual *whose constitutional rights have actually been infringed*, or the party *whose contractual obligations have actually been breached*, has obviously suffered a particularized harm that is different in kind from the generalized societal interest in ensuring that these unlawful actions not take place. The panel's contrary

conclusion simply cannot be squared with this Court's recognition that intangible injuries, including "harms specified by the Constitution itself," *TransUnion*, 141 S.Ct. at 2204, and "the fact of breach of contract by itself," *Uzuegbunam*, 141 S. Ct. 792 at 798, are and always have been cognizable in federal courts.

Finally, the panel's observation that Petitioners "have not alleged that they are currently engaged in other litigation or have plans to litigate in the future," App.25a, is insubstantial. Petitioners *already* engaged in litigation in federal court, placing their trust in that body's basic integrity; and in the course of that litigation, the presiding federal judge made repeated, binding promises to them that were "worthy of reliance." *Perry*, 667 F.3d at 1086. The recipient of a binding obligation does not need to show that he intends to *deal with the promisor again in the future* in order to have standing to enforce a binding promise already made.

3. These principles are alone sufficient to show that Petitioners have standing—quite apart from any more tangible injury. But the risk of more tangible injury is also obvious from the record.

The record is replete with evidence of the repeated—and frequently serious—harassment supporters of Proposition 8 previously suffered. *See* 9th Cir. Doc. 21-2, 30–36, 299–301 (Sept. 9, 2020). And Petitioners' briefing before the Ninth Circuit explained why this risk remains today. *See* 9th Cir. Doc. 20, 39–41 (Sept. 9, 2020). Yes, Petitioners did not submit "any

declarations," App.23a, averring that they, their witnesses, and their attorneys—who "[f]or the past ten years, . . . have gone to extraordinary lengths to prevent the public broadcast of these trial proceedings," App.42a (Ikuta, J., dissenting)—do, in fact, fear they will suffer personal and professional harm if those proceedings are broadcast. But no one familiar with current American culture can doubt the plausibility of this fear. *See Americans for Prosperity Found. v. Bonta*, 594 U.S. ---, 141 S. Ct. 2373, 2388 (2021) (risks of harassment for unpopular views "are heightened in the 21st century and seem to grow with each passing year"); *see also, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. ---, 138 S. Ct. 1719, 1723 (2018); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1210-11 (Wash. 2019). The historical record and common sense thus support a reasonable inference that Petitioners continue to face an ongoing risk of tangible harm. *See Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 270 (2015); *Association of Irritated Residents v. EPA*, 10 F.4th 937, 944 (9th Cir. 2021).

B. The Ninth Circuit's Standing Decision Also Conflicts with Decisions from Numerous Other Circuits.

In addition to contradicting this Court's precedent, the majority's decision also conflicts with the case law in at least eight Circuits making clear that the breach of a binding obligation itself constitutes a cognizable injury.

The Sixth Circuit has explained, for instance, that a party who "was denied the benefit of his bargain" under a valid contract has "suffered an injury within the meaning of Article III"—*whether or not* he has also suffered a tangible injury such as a "financial loss." *Springer v. Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284, 287 (6th Cir. 2018); *accord id.* at 292 (Thapar, J., concurring) (collecting cases). Cases from the First, Second, Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits are all in accord. *See, e.g.*, *Amrhein v. eClinical Works, LLC*, 954 F.3d 328, 331 (1st Cir. 2020); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Cookson Am., Inc.*, 710 F.3d 470, 475 (2d Cir. 2013) (per curiam); *Castro Convertible Corp. v. Castro*, 596 F.2d 123, 124 (5th Cir. 1979); *J.P. Morgan Chase Bank, N.A. v. McDonald*, 760 F.3d 646, 650–51 (7th Cir. 2014); *Mitchell v. Blue Cross Blue Shield of N.D.*, 953 F.3d 529, 536 (8th Cir. 2020); *E.A. Renfroe & Co., Inc. v. Moran*, 249 F. App'x 88, 91 (11th Cir. 2007) (unpublished per curiam); *Alston v. Flagstar Bank, FSB*, 609 F. App'x 2, 3 (D.C. Cir. 2015) (unpublished per curiam).

Given that the historical tradition of entertaining actions vindicating contract rights extends to "promises that induced justifiable reliance," App.37a (Ikuta, J., dissenting), the panel majority's rejection of Petitioners' standing simply cannot be squared with the conclusion, in all eight of these Circuits, that the breach of a legally binding obligation itself inflicts a cognizable injury.

C. Whether Petitioners Have Standing Is Exceptionally Important.

That the decision below conflicts with the precedent in this Court and at least eight other Circuits would justify this Court's intervention even in an ordinary case. But again, this is no ordinary case. This case concerns the enforceability and trustworthiness of a binding promise by a federal judge, made from the bench in open court, to induce the reliance of one of the litigants. Nothing less than the basic integrity of the federal judiciary itself is at stake.

The majority perhaps thought it had evaded these fundamental implications of the case by disposing of Petitioners' appeal on the basis of standing. In fact, it compounded them. For instead of refusing to enforce Judge Walker's promise based on substantive grounds specific to that commitment, the panel majority's standing decision guts the reliability of *every* commitment made by a federal judge. If the decision below stands, litigants will now be on notice that *every* promise by a federal judge is inherently unreliable because the breach of the promise itself will not even give the promisee standing to enforce it. The full cost of that loss of faith to the federal judiciary, to those who rely upon it to fairly resolve their disputes, and to society as a whole cannot be overstated.

II. This Court's Intervention Is Necessary To Prevent the Release of the Trial Recordings in Defiance of Judge Walker's Unequivocal Promise and the Court's Emergency Stay.

The video recording of the trial in this case exists for one reason and one reason only: Judge Walker's "unequivocal assurances," in direct response to Petitioners' firm objection to the recording of the trial, that he was making the recording *solely* for his use in chambers to assist him in crafting a decision and "that the video recording at issue would not be accessible to the public," *Perry*, 667 F.3d at 1085. This commitment was compelled by binding law and by this Court's "ruling in this very case." *Id.* at 1087–88. Had Judge Walker not represented that the recordings were being made *solely* for his personal use *in camera*, the creation of those recordings would have plainly violated Local Rule 77-3, which has "the force of law," *Hollingsworth*, 558 U.S. at 191 (quotation marks omitted), and Petitioners would immediately "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," *Perry*, 667 F.3d at 1085.

Releasing the recordings now would cause grave damage to the integrity of the judicial system and would bless what amounts to little more than the outright circumvention of this Court's 2010 emergency order blocking the broadcast of the trial. These extraordinary circumstances call for the Court to

intervene, again, to put a halt to the public release and dissemination of the trial recordings.

A. Whether Principles of Judicial Integrity Allow the Release of the Trial Recordings Despite Judge Walker's Promise Is a Question of Extraordinary Importance.

1. "[P]ublic perception of judicial integrity" is an "interest of the highest order." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015) (quotation marks omitted). And as the Ninth Circuit itself held in *Perry*, "[t]he interest in preserving respect for our system of justice is clearly a compelling reason for maintaining the seal on the recording" in this case. 667 F.3d at 1088. Not only would unsealing the recording now result in a palpable injustice to the litigants and witnesses who took Judge Walker at his word, it would put future litigants and witnesses on notice that judicial promises cannot be trusted.

Petitioners consistently opposed broadcast of the trial over Proposition 8 because they feared that public dissemination of the trial video would subject them and their witnesses to harassment—concerns that this Court noted were "substantiated" by "incidents of past harassment." *Hollingsworth*, 558 U.S. at 195. If Judge Walker's repeated and unequivocal assurances that "there was no possibility that the recording would be broadcast to the public in the future," *Perry*, 667 F.3d at 1086, are now disregarded, that would send a clear message to witnesses—reasonably concerned

about testifying because of reasons like these—that they cannot even trust a *blanket assurance* made on the record *by a federal judge* that they will not be subject to public exposure or harassment in this way.

More generally, a trial judge's solemn assurances, and the litigants' trust in those assurances, routinely shape the course of a trial; but if courts are not bound to honor the unambiguous promises of fellow judges, litigants would have no choice but to refuse to accept them, inducing the filing of numerous, costly appeals to guard against the possibility that the court might one day go back on its word. And the public's resulting loss of faith in the Nation's judicial officers can only have the most grave and lasting effects on society as a whole.

The stakes in this case, accordingly, could scarcely be higher. What Judge Reinhardt wrote in *Perry* bears repeating: "Litigants and the public must be able to trust the word of a judge if our justice system is to function properly." *Id.* at 1087–88. And a properly functioning justice system is of paramount importance to the health of the Republic. As Justice Story explained nearly two centuries ago, "personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice." 3 STORY, *supra*, at 426. Or as Justice Breyer has more recently echoed, "the integrity of a judicial system is a national treasure. Government itself must earn and deserve the public's trust. And . . . integrity is a necessary condition for judicial independence, which itself helps to protect basic human

liberties and to promote the prosperity of the citizens of . . . our nation[ ]." Stephen Breyer, *Remarks*, Feb. 25, 1999, at 4, https://bit.ly/3ljyo9G. The Ninth Circuit's decision nullifies this critical value—a fact that the panel majority *did not even dispute*.

2. While the district court below acknowledged "the compelling reason of judicial integrity identified by [the Ninth Circuit]," it thought that interest was not dispositive "because circumstances change and justifications become more or less compelling." App.71a. But the fundamental importance of judicial integrity has no expiration date. No, the imperative that "[l]itigants and the public must be able to trust the word of a judge" is structural and permanent. *Perry*, 667 F.3d at 1087–88. Because Judge Walker's assurances had no time horizon, neither Petitioners' reasonable reliance on those assurances nor the judicial branch's compelling interest in honoring them can fade or "become . . . less compelling" with the passage of time, App.71a.

Nor is the judicial integrity imperative undermined, as the district court suggested, by the court's Local Rule 79-5. That provision establishes a default rule that documents "filed under seal" become public "10 years from the date the case is closed." App.84a; *see also* App.88a. The district court concluded that this 10-year default rule trumped the judicial integrity interest in honoring Judge Walker's promise, App.70a–72a, but that conclusion is wrong for multiple independent reasons.

For starters, Rule 79-5 is plainly addressed to materials filed under seal *by parties*, so it has no application to the video recordings at issue. For instance, the Rule is entitled "Filing Documents Under Seal in Civil Cases," and it applies to documents "Electronic[ally] and Manually-Filed" by either "a registered e-filer" or "a party that is not permitted to e-file." App.79a; *see also* App.84a–86a. None of this language bespeaks any intent to govern documents, like the videotapes here, that are created and placed in the record by the court itself, reflecting their *in camera* use in chambers. Moreover, reading Local Rule 79-5 as covering a trial recording like the one here would bring it into conflict with Local Rule 77-3, the rule that prevented the broadcast of the trial videotapes in the first place by explicitly prohibiting the "public broadcasting or televising" of any recording of trial proceedings. App.78a. Interpreting Rule 79-5 to require the public dissemination and broadcast of the recordings after ten years directly conflicts with Rule 77-3's specific prohibition on such broadcasts. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls over one of more general application.").

Finally, and most fundamentally, even if Local Rule 79-5 *does* apply to the video recording and *does* presumptively require its release after ten years, the rule *itself* provides that a seal may be extended beyond the initial ten-year period "upon showing [of] good cause." App.84a; *see also* App.88a. The interest in safeguarding the very integrity, trustworthiness,

and basic functioning of the court system plainly satisfies that standard.

The district court also sought to undermine the continuing vitality of the judicial integrity interest by pointing to Petitioners' counsel's purported "concession," during the 2011 Argument before the Ninth Circuit in *Perry*, that the duration of the seal protecting the recordings would be governed by Rule 79-5's ten-year default rule. Oral Argument at 6:24, *Perry v. Brown*, No. 11-17255 (9th Cir. Dec. 8, 2011), https://bit.ly/3B1R1pj. That contention fails too.

In response to a question by Judge Hawkins during the *Perry* argument whether it was "clear from the record" that Petitioners "understood" that Rule 79-5 would apply, counsel responded that "we were aware of the local rules." *Id.* at 6:43. But counsel *also* made clear that Petitioners understood, as Rule 79-5 clearly says, that the seal may be extended beyond 10 years for "good cause"—a standard that *is satisfied* by the interest in judicial integrity, as discussed above and as explained by counsel a few minutes later in the very same argument. *Id.* at 6:24, 6:57, 16:52. Counsel said *nothing* during the argument, or in any place elsewhere, that even hints that the value of judicial integrity would cease to provide a compelling reason—and, perforce, "good cause"—to maintain the seal after 10 years.

Whether viewed on its own or through the lens of Counsel's purported "concession" in the 2011 argument, then, the district court's reliance on its Local

Rule 79-5 leads to the same dead end: both ten years ago and today, "the recording cannot be released without undermining the integrity of the judicial system." *Perry*, 667 F.3d at 1088.

3. Even if the judiciary's unflagging interest in preserving its unblemished integrity could be set to the side, the lower courts still erred in ordering the release of the trial recordings, for none of the other reasons for disclosure that Respondents have identified over the last decade has any application to those recordings.

First, Respondents, and the district court, have pointed to the common-law "right of access" as justifying the release of the videotapes. It does not. As an initial matter, any common-law right to access the recordings has been displaced by the district court's Rule 77-3—which, as noted above, expressly bars the broadcast and dissemination of a recording of trial proceedings. *See* App.78a; *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 312, 314 (1981); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 602 (1978); *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 430 (9th Cir. 2011). Second, the common-law right of access does not apply to the recordings in the first place because they are wholly derivative recordings of testimony and proceedings that occurred in the courtroom and were open to the public. There is "no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony." *United States v. McDougal*, 103 F.3d 651, 657 (8th Cir. 1996).

Nor, as Respondents have repeatedly suggested, does the First Amendment require disclosure of the videotapes. It is blackletter law that the First Amendment does not even entitle the public to access recordings submitted as evidence of illegal conduct during a criminal trial; in those circumstances, the Constitution is satisfied so long as the trial is open to the public and transcripts of the recordings as played at trial are publicly available. *See, e.g.*, *Nixon*, 435 U.S. at 608–09; *Valley Broad. Co. v. United States Dist. Ct. for Dist. Of Nev.*, 798 F.2d 1289, 1292–93 (9th Cir. 1986). Other courts have held that the same is true of recorded witness testimony offered at criminal trials, *see McDougal*, 103 F.3d at 659, and of recordings of criminal proceedings generally, *see United States v. Antar*, 38 F.3d 1348, 1359–60 (3d Cir. 1994). It follows from the very same reasoning that the First Amendment does not compel access to the recordings here.

Accordingly, each of the basis identified by Respondents, and the courts below, for publicly releasing the video recordings fails on its own terms. But even if one of these grounds for disclosure did apply to the recordings, the overriding interest in judicial integrity would still demand that the courts continue to keep faith with Judge Walker's word that the recordings would remain sealed. Whether disclosure is justified under the district court's local rules, the common law, or the First Amendment, "[t]he interest in preserving respect for our system of justice is clearly a compelling reason for maintaining the seal on the recording." *Perry*, 667 F.3d at 1088.

Given the critical importance of this interest and the clarity of the course of action it requires in this case, the Court would be well justified in reversing this case summarily, through a brief order spelling out what should have been obvious to the lower courts: the honor and integrity of the federal judiciary requires that the trial recordings remain under seal, just as Judge Walker promised. *See* this Court's Rule 16.1. But at a bare minimum, the lower courts' refusal to protect that compelling interest should not be allowed to stand without this Court's further review.

B. The Lower Courts' Decision To Release the Trial Recordings, Despite Judge Walker's Promise and this Court's Emergency Stay, Justifies Exercise of the Court's Supervisory Power.

This Court's intervention—either through summary reversal or plenary review—is also called for as a matter of this Court's supervisory power over the lower federal courts. *See* this Court's Rule 10(a).

1. That is so, first, for reasons already canvassed. Because the panel majority below openly failed to protect the integrity of the federal judicial system, it falls to this Court to do so as a matter of its supervisory power.

2. Additionally, this Court's review is necessary to ensure the efficacy of the Court's own prior orders in the case. For if the district court's unsealing order is allowed to go into effect, and the trial recordings are consequently released, the lower courts will in effect

have executed an end-run around this Court's 2010 emergency stay.

This Court's January 13, 2010, stay order put a stop to a determined, months'-long campaign by both the district court and the Ninth Circuit to publicly broadcast the trial over Proposition 8 in violation of their own rules and procedures. *See Hollingsworth*, 558 U.S. at 186–89. Had Judge Walker persisted in that campaign after issuance of the Court's emergency stay by recording the trial for public broadcast—either during the trial itself or thereafter—there can be no question that he would have been in open contempt of the stay order. Put differently, Judge Walker's promise that the trial recording was "not going to be for purposes of public broadcasting," App.96a, was required to bring his conduct into compliance with the Court's stay—a fact that the Ninth Circuit recognized in *Perry*, 667 F.3d at 1087, and that Judge Walker effectively recognized by making the promise in the first place.

It follows that setting aside that promise now would amount to evasion of this Court's stay order. That order blocked the district court's plan for the trial to be "recorded and then broadcast on the Internet." *Hollingsworth*, 558 U.S. at 188. Yet the district court has now ordered that once the recording of the trial is unsealed it *will* in fact be "broadcast on the Internet," *id.*, via both YouTube and "the Northern District's website," D. Ct. Doc. 913 (Aug. 11, 2020).

The lower courts could not, consistent with the reasoning of this Court's emergency stay, have publicly released the trial recordings at the conclusion of the trial in 2010. Nor could they have done so two years later, in 2012. *See Perry*, 667 F.3d at 1081. They should not be allowed to do so now, in circumvention of this Court's order, by simply waiting another eight years. The Court should intervene if for no other reason than to make clear that the lower courts cannot evade its orders by trying to outlast them.

CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari or, alternatively, summarily reverse the judgment below.

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Respectfully Submitted

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