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 OF KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO, AND KQED INC.

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QUESTION PRESENTED

Whether then-Chief Judge Walker committed to keep the video recording of the Proposition 8 trial under seal in perpetuity, and, if so, whether Petitioners have standing to appeal the unsealing of the recording where they have established no concrete, particularized injury from the unsealing.

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INTRODUCTION

Petitioners seek a writ of certiorari with respect to the Ninth Circuit's narrow decision that they failed to demonstrate concrete, particularized injury sufficient for Article III standing arising from the unsealing of a decade-old video recording of an entirely public trial. The petition is founded on hyperbole, mischaracterizes the proceedings below, and ignores Petitioners' own admissions and failure to present any evidence of their supposed injury. Because this fact-bound dispute does not meet any of the criteria for certiorari, the petition should be denied.

The relevant facts of the case are these: (1) then-Chief Judge Walker of the Northern District of California stated that he would record the public trial on the constitutionality of California's ban on same-sex marriage ("Proposition 8") for use in his chambers when deciding the case; (2) following trial, and after Judge Walker used the recording in the manner he said he would, the recording was placed in the record under seal without objection by any party; (3) Petitioners understood at the time the recording was placed in the record that the seal, pursuant to local rules, would presumptively last only ten years; (4) the recording has remained under seal for nearly twelve years; (5) the district court provided Petitioners more than two years to file a motion to continue the seal beyond the ten-year mark, including offering any evidence of harm from unsealing the recording; and (6) Petitioners ultimately filed a motion but offered *no evidence* of any harm they would face as a result of the unsealing.

The district court ordered the recording unsealed, and on appeal, the Ninth Circuit, following this

Court's settled standing jurisprudence, carefully analyzed this unique factual scenario and held that Petitioners had not demonstrated a concrete, particularized injury sufficient for Article III standing. This conclusion flows easily from the facts because Petitioners failed to present any evidence of tangible harm, Pet. App. 48a, and failed to demonstrate that the unsealing of the recording is a particularized intangible injury sufficient for standing—even assuming, in contravention of Petitioners' own statements to the Ninth Circuit, that Judge Walker had committed that the recording would remain sealed in perpetuity.

There is no basis for this Court to review the Ninth Circuit's decision, which correctly applied this Court's Article III standing precedent to a peculiar and fact-bound situation. Petitioners do not identify a single decision from this Court, or any other court, holding that a party has standing to appeal the "breach" of a so-called judicial "promise," even assuming *arguendo* that such a "promise" was made and breached here. Nor do they establish that this is a frequently recurring issue; indeed, they do not cite any case in which it has arisen in the past and provide no reason to believe that the issue will arise with any frequency in the future. And, in any event, this case is an exceedingly poor vehicle for addressing the question because, as Petitioners themselves acknowledged to the Ninth Circuit, Judge Walker never actually promised that the recording would remain under seal in perpetuity—an acknowledgement that Petitioners seek to disavow in this Court.

This is not the first time that Petitioners have attempted to expand the bounds of Article III standing to serve their objectives in this litigation. Like Petitioners' prior effort to cast aside the requirements of

Article III, this effort should fail. *See Hollingsworth v. Perry* (*Hollingsworth III*), 570 U.S. 693, 706 (2013) (holding that Petitioners lacked standing to appeal the district court's decision invalidating Proposition 8). The Court should deny the petition.

STATEMENT

1. This case began thirteen years ago when two same-sex couples—Kristin M. Perry and Sandra B. Stier, and Paul T. Katami and Jeffrey J. Zarrillo—filed a lawsuit in federal court challenging the constitutionality of California's Proposition 8, a 2008 ballot initiative that amended the California constitution to recognize only marriages between a man and a woman and stripped Plaintiffs of their right to marry. At the time Plaintiffs filed suit—six years before the Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), would confirm that same-sex couples have an equal right to marry—the many open questions about the legal rights of same-sex couples were of keen public interest.

In January 2010, then-Chief Judge Walker of the Northern District of California presided over a bench trial to resolve the question of Proposition 8's constitutionality. Just before trial, relying on a recent amendment to the district's Local Civil Rule 77-3 and against the backdrop of intense public interest in the case, Judge Walker ordered the trial to be live-streamed to several courthouses, with the potential for delayed nationwide airing. Pet. App. 54a. Petitioners, the official proponents of Proposition 8—who intervened in the case to defend the constitutionality of Proposition 8 after the State declined to do so—sought a stay of the order, a request that eventually reached this Court. Petitioners argued that the amendment to Local Civil Rule 77-3, which allowed

for the case's inclusion in a pilot program permitting certain cases to be recorded for broadcast, violated their due process rights and 28 U.S.C. § 2071(b) because the amendment was promulgated "without sufficient opportunity for notice and comment." *Hollingsworth v. Perry* (*Hollingsworth II*), 558 U.S. 183, 184–85 (2010).[1]

This Court temporarily stayed the broadcast pending further consideration. *Hollingsworth v. Perry* (*Hollingsworth I*), 558 U.S. 1107 (2010). Two days later, it extended the stay. In doing so, the Court "confined" its review "to a narrow legal issue: whether the District Court's amendment of its local rules to broadcast this trial complied with federal law." *Hollingsworth II*, 558 U.S. at 189. Concluding "that it likely did not and that applicants have demonstrated that irreparable harm would likely result from the District Court's actions[,]" this Court "stay[ed] the court's January 7, 2010, order to the extent that it permits the live streaming of court proceedings to other federal courthouses." *Id.* The Court did "not address other aspects of that order, such as those related to the broadcast of court proceedings on the Internet," which the Court deemed "premature." *Id*.

In examining the "irreparable harm" that Petitioners could face in the absence of a stay, the Court focused on the potential impact on the upcoming trial, noting its prior "recogni[tion] that witness testimony may be chilled if broadcast," and emphasizing that "[s]ome of [Petitioners'] witnesses have already said that they will not testify if the trial is broadcast." *Hollingsworth II*, 558 U.S. at 195. Those witnesses also

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[1] 28 U.S.C. § 2071(b) grants rulemaking power to lower federal courts "only after giving appropriate public notice and an opportunity for comment."

"substantiated their concerns by citing incidents of past harassment." *Id.*

On January 15, 2010, in compliance with this Court's order, Judge Walker entered a notice that he had formally requested that the Ninth Circuit withdraw the case from the pilot program. The order further noted that "[t]ransmission of the proceedings to other locations solely within the San Francisco courthouse will continue along with recording for use in chambers, as permitted in Civ LR 77-3." Pet. App. 98a. When asked by Petitioners' counsel if the recording had stopped, Judge Walker explained:

> The local rule permits the recording for purposes . . . of use in chambers and that is customarily done when we have these remote courtrooms or the overflow courtrooms. And I think it would be quite helpful to me in preparing the findings of fact to have that recording.
>
> So that's the purpose for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.
>
> And you will notice the local rules states that: "The taking of photographs, public broadcasting or televising, or recording for those purposes."
>
> So the recording is not being made for those purposes, but simply for use in chambers.

Tr. of Proceedings at 754–55, *Perry v. Schwarzenegger*, No. C 09-2292 (N.D. Cal. Jan. 15, 2010), ECF No. 464. Petitioners dropped their objection to recording the proceedings at that point.

Following the three-week bench trial with testimony from nineteen fact and expert witnesses, Judge Walker used the recording of that testimony in making his findings and concluding that Proposition 8 was unconstitutional. Pet. App. 10a. He further ordered that the recording be filed under seal as part of the trial record; Petitioners did not object. *Id.* at 68a.

At the time the recording was placed in the record, Local Civil Rule 79-5(f) provided that any document placed in the record under seal would be presumptively unsealed in ten years absent a subsequent showing of good cause. *See* Pet. App. 88a ("Any document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed."). And as Petitioners would later explain, they understood at the time that the recording would not necessarily remain under seal indefinitely. *Id*. at 12a.

2. In 2011, while the underlying merits case was still on appeal, Judge Walker showed a portion of the then-sealed trial recording while delivering speeches, and Petitioners sought an order directing a return of all copies of the recording to the court, including those provided to the parties under a protective order. Plaintiffs and an intervenor media coalition including KQED Inc. ("KQED") cross-moved to unseal the recording pursuant to the public right of access to court proceedings. Pet. App. 57a. By that point, the case had been reassigned to Judge Ware, who "concluded that the common-law right of public access applied to the recordings, that neither the Supreme Court's decision in *Hollingsworth* nor the local rule governing audiovisual recordings barred their release, and that [Petitioners] had made no showing sufficient to justify

continued sealing in the face of the common-law right." *Id.* at 57a–58a.

Petitioners appealed that decision. During argument before the Ninth Circuit, Petitioners' counsel noted that Petitioners were aware of the local rules and understood that the seal would presumptively last only for ten years:

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

Pet. App. 12a (emphases added).

The Ninth Circuit reversed, and consistent with the colloquy above, noted that the "control[ling]" issue

was whether "the unique circumstances surrounding the creation and sealing of the recording" entitled the public "to view that recording some *two years after the trial*." *Perry v. Brown*, 667 F.3d 1078, 1080, 1084 (9th Cir. 2012) (emphasis added). The Ninth Circuit found that any assurance given by the district court regarding the video was limited to "*the foreseeable future*," because "'[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'" absent a showing of good cause to remain under seal. *Id.* at 1084–85 & n.5 (alteration in original; emphasis added) (quoting then-operative Northern District of California Local Civil Rule 79-5(f)). The Ninth Circuit found that, in the particular circumstances of the motion before it and given that the recording had been sealed just two years earlier, continued sealing remained appropriate at that time. *Id.* at 1088.

3. The case was subsequently reassigned to Judge Orrick, and in 2017, Respondent KQED again moved to unseal the recording. Although the district court declined to unseal the recording at that time, it ordered that "the recordings shall be released . . . on August 12, 2020"—ten years from case closure—"absent further order from this Court that compelling reasons exist to continue to seal them." Pet. App. 74a. In so ruling, the court found that "the common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches." *Id.* at 67a. Therefore, a compelling reason must exist to justify "*continued* secrecy." *Id.* at 70a. Petitioners had "ma[d]e no effort to show, factually, how further disclosure of their trial testimony would adversely affect them." *Id.* at 66a. But the

court held that adhering to the assurances provided by Local Rule 79-5 that judicial records are to be presumptively unsealed only after ten years furthered the interest of judicial integrity, which it found to be compelling. *Id.* at 67a–68a, 71a–73a. Thus, the video would remain sealed until August 2020, unless Petitioners could establish harm or other facts compelling continued sealing. *Id.* at 69a–73a. The court offered Petitioners the opportunity to file a motion by April 1, 2020, demonstrating any compelling reasons justifying an extension of the seal. *Id.*[2]

4. On April 1, 2020, Petitioners moved to continue the seal permanently. Pet. App. 14a. Despite having two years to do so, however, Petitioners adduced no *evidence* that they or their trial witnesses would suffer any harm from the unsealing of the trial recording, or that any witness opposed unsealing. *Id.* at 48a. As the district court explained, there was no evidence "that any [Petitioner] or witness who testified on behalf of the [Petitioners] wants the trial recordings to remain under seal," 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 . . . the trial recordings would remain under seal forever*." *Id.* (emphasis added). In contrast, in opposition to Petitioners' motion to continue the seal indefinitely, Respondents offered declarations from fifteen trial witnesses supporting unsealing. *Id.* at 14a. Because Petitioners put forth only "attorney argument" that they "relied on Judge Walker's commitments . . . to conclude the recordings

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[2] The Ninth Circuit dismissed Petitioners' appeal of this order, holding that the order was neither a final order nor an appealable collateral order. Pet. App. 14a.

would never be released," which conflicted with their attorney's prior concessions that "sealing is typically limited in time," the district court found that Petitioners failed to meet their burden to maintain the seal and ordered the public release of the trial recording. *Id.* at 49a–50a.

5. Petitioners appealed. Following briefing and argument, including supplemental briefing on the question of Petitioners' standing, the Ninth Circuit dismissed the appeal. Pet. App. 18a, 25a–26a. "Even assuming, contrary to [Petitioners'] statement to [the Ninth Circuit] in 2011, that Judge Walker told [Petitioners] that the video recordings would remain sealed in perpetuity," the court concluded that Petitioners did "not have Article III standing to appeal." *Id.* at 20a.

The Ninth Circuit thoroughly examined and then rejected each of Petitioners' arguments in support of their standing. First, it dismissed Petitioners' strained analogy to principles of contract law. Pet. App. 18a–20a. The court rejected Petitioners' contention that the "alleged breach of Judge Walker's 'promise' by Judge Orrick's order is alone sufficient to establish injury in fact," holding that "[a]n analogy to a traditionally recognized cause of action does not relieve a complainant of its burden to demonstrate . . . a concrete and particularized *injury*." *Id.* at 19a–20a. And the court emphasized that Petitioners "d[id] 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.

The Ninth Circuit then analyzed Petitioners' claim that unsealing the recording would result in "palpable injustice" to Petitioners themselves. Pet.

App. 20a. The court found "no evidence of any threatened injury to" Petitioners, none of whom testified at trial, and, "critically, none of [whom] . . . submitted a declaration that they fear harassment or reprisals if the recordings are unsealed." *Id.* at 21a–22a. As for the only two witnesses Petitioners called at trial—both of whom were retained experts—the court noted that "[n]either witness has ever submitted a declaration or given any indication in the record that he fears injury if the recordings are released." *Id.* at 22a. Indeed, one "has been explicit that he does *not* fear harassment if the recordings are made public," and the other "has never indicated that he fears any injury if the recordings are released, even though a portion of his testimony was used by Judge Walker in a 2011 televised presentation and has been available online since that time." *Id.* Finally, the Ninth Circuit noted that even if Petitioners could "assert the interests of Proposition 8 general supporters," while "[t]he record shows that during and prior to 2009, Proposition 8 supporters . . . experienced harassment," this evidence was "never supplemented . . . after 2009, despite opportunities to do so in both the 2018 and 2020 proceedings before the district court." *Id.* at 23a. Accordingly, the Ninth Circuit found that "the record is devoid of the 'factual showing of perceptible harm' required to establish an injury in fact." *Id.* at 23a–24a (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566 (1992)).

The Ninth Circuit further held that Petitioners failed to demonstrate a particularized injury based on alleged "injury to the judicial system," which the court dismissed as an "impermissible 'generalized grievance.'" Pet. App. 24a (quoting *Lance v. Coffman*, 549 U.S. 437, 440 (2007)). The court rejected

Petitioners' argument that they would "suffer in a particular and individual way" as the "parties to whom Judge Walker's 'promise' was made" because they provided no evidence of potential injury to themselves and thus demonstrated "no interest beyond that common to all of society." *Id.* at 25a.

Because Petitioners "failed to establish a particularized and concrete injury sufficient to constitute 'injury in fact' as the Supreme Court has defined that term," the Ninth Circuit dismissed the appeal for lack of jurisdiction. Pet. App. 26a.

REASONS FOR DENYING THE PETITION

The decision at issue here is narrow, fact-specific, and straightforward: Petitioners failed to demonstrate that they would suffer a concrete, particularized injury sufficient for Article III standing from the unsealing of a decade-old recording of a public trial—the transcript of which has been public since the trial's conclusion—pursuant to local rules that they fully understood at the time of sealing. But Petitioners now try to recast this case in the broadest possible terms—as a supposedly watershed decision by an outlier circuit in contravention of this Court's standing jurisprudence and in conflict with the decisions of other circuits.

Petitioners' framing crumbles under scrutiny. The Ninth Circuit correctly articulated this Court's legal test for injury-in-fact and applied it to the unique facts of this case, which are unlikely to recur in the future. Petitioners fail to show that the decision below conflicts with any of this Court's cases or those of any other court. In addition, this case is a poor vehicle for resolving the application of Article III standing to

claims premised on an alleged judicial "promise" because the Ninth Circuit did not decide the threshold question whether Judge Walker actually committed that the trial recording would remain under seal in perpetuity.

I. THE DECISION BELOW COMPORTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Petitioners fail to identify a single case from this Court or any other court that has addressed standing to challenge the alleged breach of a judicial "promise"—let alone one that has decided the issue in a manner that conflicts with the Ninth Circuit's decision. Certiorari is therefore unwarranted.

A. The Decision Below Follows This Court's Standing Jurisprudence.

Petitioners contend that the decision below "conflicts" with this Court's standing jurisprudence "at every turn." Pet. 18. Not so. The Ninth Circuit narrowly ruled that Petitioners failed to establish any concrete, particularized injury to themselves that would result from unsealing the recording of the trial. That ruling faithfully follows this Court's precedent.

1. Petitioners do not seriously contend that they have shown any tangible injury that would result from unsealing the trial recording. Petitioners do not dispute that they failed to submit any evidence substantiating that they, their trial witnesses, or anyone else would suffer tangible harm from release of the recording. *See* Pet. App. 23a (Petitioners "have provided no evidence showing harm or threat of harm to themselves from the release of the video"). The Ninth Circuit's conclusion that Petitioners failed to demonstrate a tangible harm is consistent with the well-es-

tablished principle that the "party invoking federal jurisdiction bears the burden of establishing" standing through "a factual showing of perceptible harm." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 566 (1992).

Petitioners all but concede that they have failed to carry this burden, arguing only that "the risk of more tangible injury is . . . obvious from the record." Pet. 22. But evidence of "harassment supporters of Proposition 8 *previously* suffered," *id.* (emphasis added), is insufficient because Petitioners must "maintain their personal interest in the dispute at all stages of litigation," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). As the Ninth Circuit explained, although the "record shows that during and prior to 2009, Proposition 8 supporters, including the original individual Proponents, experienced harassment," Petitioners "never supplemented this evidence with anything after 2009." Pet. App. 23a. Petitioners had years and multiple opportunities to do so. Petitioners' stale evidence is insufficient to establish that, in 2022, they (or anyone else) continue to face a threat of harm from release of the trial recording. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983) (holding that the plaintiff lacked standing where he did not face a continued threat of injury from the challenged policing practice).

2. Petitioners fare no better in attempting to demonstrate that the Ninth Circuit departed from this Court's precedent in concluding that Petitioners failed to demonstrate an intangible, concrete harm from release of the trial recording. The Ninth Circuit "assum[ed], contrary to [Petitioners'] statement to [the Ninth Circuit] in 2011, that Judge Walker told [Petitioners] that the video recordings would remain

sealed in perpetuity." Pet. App. 20a. The Ninth Circuit nevertheless concluded that Petitioners had failed to sufficiently establish "a close historical or common-law analogue for their asserted injury," *id.* at 19a (quoting *TransUnion*, 141 S. Ct. at 2204), because they did "not claim . . . that a statement . . . made by a judge to litigants in the course of litigation" was enforceable as a contract, *id.*

Petitioners are unable to identify a single case from this Court holding, or even suggesting, that a party has standing to challenge the breach of a "promise" supposedly made by a judge during the course of judicial proceedings. The cases on which they rely—*TransUnion* and *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021)—are manifestly inapposite.

Neither case concerns the question whether a judge's statement to a litigant is tantamount to an enforceable contract, the breach of which would confer standing to sue even in the absence of tangible harm. In *TransUnion*, this Court held that the plaintiffs—who alleged reputational harm as a result of the dissemination of credit reports that included misleading information—"suffered a harm with a 'close relationship' to the harm associated with the tort of defamation." 141 S. Ct. at 2209. And, in *Uzuegbunam*, this Court addressed the separate question of redressability without addressing the showing necessary to establish a concrete and particularized injury. 141 S. Ct. at 802 ("It remains for the plaintiff to establish the other elements of standing (such as particularized injury) . . . ."). Nothing in the Ninth Circuit's analysis of Petitioners' standing to challenge the supposed breach of a judicial "promise" conflicts with either of those decisions.

To the extent that any *general* principles embodied in *TransUnion* and *Uzuegbunam* are applicable here, the Ninth Circuit properly employed them to analyze the unprecedented factual situation before it. Applying *TransUnion*, the Ninth Circuit correctly recited the requirement that, "under Article III, a federal court may resolve only 'a real controversy with real impact on real persons.'" Pet. App. 16a (quoting *TransUnion*, 141 S. Ct. at 2203). The Ninth Circuit also noted this Court's statement that where a claimed injury is intangible, the "injury in fact requirement may be satisfied where the burdened party has 'identified a close historical or common-law analogue.'" *Id.* at 18a–19a (quoting *TransUnion*, 141 S. Ct. at 2204); *see also TransUnion*, 141 S. Ct. at 2204 (citing as examples of cognizable intangible injuries "reputational harms, disclosure of private information, and intrusion upon seclusion").

At the same time, this Court emphasized in *TransUnion* that its recognition of certain concrete intangible injuries "is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." 141 S. Ct. at 2204. In keeping with that admonition, the Ninth Circuit reasoned that "[a]n analogy to a traditionally recognized cause of action does not relieve a complainant of its burden to demonstrate an injury," Pet. App. 19a—a burden that Petitioners failed to meet here. Thus, the Ninth Circuit followed, to the extent applicable, *TransUnion*'s framework to analyze whether the intangible harm alleged here constituted a concrete injury.

Nor does the Ninth Circuit's injury-in-fact holding conflict with the principles articulated in *Uzuegbunam*. In dicta, this Court cited to English common-law cases "recognizing . . . that the fact of breach of contract by itself justified nominal damages." 141 S. Ct. at 798. But Petitioners concede that "a federal judge's promise to a litigant may not be enforceable by a damages action." Pet. 19. This Court's statement that courts have historically found that nominal damages can redress a breach of contract has no applicability where, as here, there has been no breach of contract.

Petitioners also fail to show any conflict with "early English and American courts [that] routinely enforced not only formal contracts but 'promises that induced justifiable reliance.'" Pet. 19 (quoting Pet. App. 37a (Ikuta, J., dissenting)). In each of the cases cited in the dissent (and relied upon by Petitioners here), the plaintiffs suffered traditional, *tangible* harms, primarily monetary injury. *See King's Heirs v. Thompson*, 34 U.S. (9 Pet.) 204, 220–22 (1835) (plaintiff sued for property title or value of improvements); *Barzilla Homes v. Dana*, 12 Mass. 190, 190 (1815) ("action against subscriber who refused to pay the sum he subscribed"); *Trs. of Parsonage Fund in Fryeburg v. Ripley*, 6 Me. 442, 442 (1830) (same); *Trs. of Farmington Acad. v. Allen*, 14 Mass. 172, 172–73 (1817) (same); *Pillans v. Van Mierop* (1765), 97 Eng. Rep. 1035, 1035 (K.B.) (plaintiff sued over promise to honor £800 bill of exchange). Petitioners have shown no such tangible injury, *see* Pet. App. 20a–24a, and thus derive no support from these cases.

3. Finally, Petitioners take issue with the Ninth Circuit's holding that any injury founded on an al-

leged harm to judicial integrity would be "an impermissible 'generalized grievance'" because "the interest of the party asserting it 'is plainly undifferentiated and common to all members of the public.'" Pet. App. 24a–25a (quoting *Lance v. Coffman*, 549 U.S. 437, 440–41 (2007)). That reasoning is directly supported by this Court's standing precedent.

In dismissing Petitioners' attempt to premise standing on alleged injury to judicial integrity, the Ninth Circuit relied on this Court's "lengthy pedigree" of refusing to "serve as a forum for generalized grievances." *Lance*, 549 U.S. at 439; *see also* Pet. App. 24a–25a. As this Court reasoned in concluding that Petitioners lacked standing to appeal Judge Walker's decision invalidating Proposition 8, this Court has "repeatedly held" that a party asserting merely "'a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" *Hollingsworth v. Perry* (*Hollingsworth III*), 570 U.S. 693, 706 (2013) (quoting *Lujan*, 504 U.S. at 573–74). Litigants must "seek relief for an injury that affects [them] in a 'personal and individual way,'" *id.* at 705 (quoting *Lujan*, 504 U.S. at 560 n.1), and "must possess a 'direct stake in the outcome' of the case," *id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

Those principles are fatal to Petitioners' standing argument because they failed to demonstrate how they would "personally . . . suffer[ ] some actual or threatened injury" from the unsealing of the video recordings. *Valley Forge Christian Coll. v. Ams. United*

for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (internal quotation marks omitted). A diffuse interest in vindicating the integrity of the judicial branch is no different from the interest that all members of the public share in preserving the legitimacy of the court system.

Petitioners' argument that "virtually *every* intangible harm also causes reverberating harm to 'the public as a whole'" is a red herring. Pet. 21 (quoting Pet. App. 24a and citing *United States v. Raines*, 362 U.S. 17, 27 (1960), and *Union Pac. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co.*, 163 U.S. 564, 604 (1896)). The Ninth Circuit did not hold that any intangible injury that also has broader impacts is insufficiently particularized to satisfy Article III; it held that Petitioners' claimed injury to the integrity of the judicial system—absent some other cognizable, personal injury—was too generalized to establish Article III standing. The Ninth Circuit's reasoning has no bearing on litigants who, unlike Petitioners, have suffered a particularized injury as a result of a constitutional violation or a breach of contract.

In sum, Petitioners' effort to identify a conflict with this Court's precedent fails in all respects.

B. The Decision Below Does Not Implicate A Circuit Split.

Petitioners also contend that the decision below conflicts with decisions of "eight Circuits making clear that the breach of a binding obligation itself constitutes a cognizable injury." Pet. 23. But those cases arise in plainly distinguishable circumstances from the breach of a supposed judicial "promise." Most of the cases cited by Petitioners involve traditional, pri-

vate contractual agreements. None involves purported injury arising from a judicial statement. That different courts reached different outcomes on different facts is no basis for this Court's review.

The only alleged conflicting court of appeals opinion actually quoted by Petitioners is *Springer v. Cleveland Clinic Employee Health Plan Total Care*, 900 F.3d 284 (6th Cir. 2018), where the Sixth Circuit held that the plaintiff had Article III standing to challenge a denial of insurance coverage because he was "denied the benefit of his bargain," which was a "concrete injury for Article III standing even when patients were not directly billed for their medical services." *Id.* at 287. As the Sixth Circuit noted, the plaintiff's breach-of-insurance-contract claim was "[l]ike any private contract claim." *Id.*; *see also Mitchell v. Blue Cross Blue Shield of N.D.*, 953 F.3d 529, 535–36 (8th Cir. 2020) (same, citing *Springer*); *cf. Castro Convertible Corp. v. Castro*, 596 F.2d 123, 124 n.3 (5th Cir. 1979) (stating in dicta that employer had standing to ensure that life insurance contract proceeds are paid to legally correct beneficiary).

The other circuit-court cases cited by Petitioners are equally far afield. They involve medical records, *see Amrhein v. eClinical Works, LLC*, 954 F.3d 328 (1st Cir. 2020); a union contract, *see United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, ALF-CIO/CLC v. Cookson Am., Inc.*, 710 F.3d 470 (2d Cir. 2013) (per curiam); an investment account contract, *J.P. Morgan Chase Bank, N.A. v. McDonald*, 760 F.3d 646 (7th Cir. 2014); an employment contract, *E.A. Renfroe & Co. v. Moran*, 249 F. App'x 88 (11th Cir. 2007) (per curiam); and a mortgage contract, *Alston v. Flagstar Bank, FSB*, 609 F. App'x 2 (D.C. Cir. 2015) (per curiam). None of these

cases conflicts with the Ninth Circuit's holding that Petitioners failed to demonstrate a cognizable, concrete, and particularized injury from the unsealing of the trial recording based on their purported reliance on a judge's statement that the recording would remain sealed.

Because the Ninth Circuit's holding correctly applies this Court's settled Article III jurisprudence to a *sui generis* fact pattern not encountered by any other court, there is no basis for review.

II. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED AND HAS LIMITED JURISPRUDENTIAL SIGNIFICANCE.

To the extent this Court is interested in considering the application of Article III standing to claims premised on a so-called judicial "promise," this case is a poor vehicle for doing so. In making its decision, the Ninth Circuit merely *assumed*, contrary to Petitioners' representations otherwise, that Judge Walker committed to keep the trial recording sealed in perpetuity. Pet. App. 20a. If this Court granted review, it would face the threshold question whether Judge Walker did in fact commit to sealing the trial recording in perpetuity. And, if it concluded that Judge Walker gave no such assurance—which is the only possible conclusion in light of Petitioners' acknowledgment to the Ninth Circuit that they understood that Judge Walker did not commit to keep the recording sealed forever, *see supra* p. 7—then the petition would need to be dismissed as improvidently granted.

There is no reason for the Court to run the risk of granting review in a case that is likely to be dismissed without a ruling on the merits, especially where the petition presents a jurisprudentially insignificant

question that is premised on unique facts that are unlikely to recur in the future.

Petitioners claim that "[n]othing less than the basic integrity of the federal judiciary itself is at stake," asserting that the decision below "guts the reliability of *every* commitment made by a federal judge." Pet. 25. But Petitioners are drastically overreading the Ninth Circuit's opinion.

As an initial matter, Petitioners' effort to analogize "every commitment" made by a district judge to a contract that can later be enforced is nonsensical. District judges make decisions every day that are vacated or reversed on appeal. For example, if a district judge were to rule that a nonconfidential document would be sealed in perpetuity, or a trial of great public importance closed to the public, the court of appeals would apply the relevant law and reverse or vacate the district judge's decision if appropriate. Under Petitioners' novel contract analogy, they can enforce a district judge's "promise" even if the law compels a different outcome. Here, where nearly twelve years have elapsed and Petitioners repeatedly failed to show good cause to maintain sealing, the recording should be unsealed even if the district judge indicated, contrary to law, that the seal would last forever.

Moreover, this Court has recognized that, in certain situations, a litigant does not have an unassailable right to rely upon a judge's statement or order. *See*, *e.g.*, *Bowles v. Russell*, 551 U.S. 205, 207, 214 (2007) (defendant's appeal was untimely where the district court "gave" him 17 days instead of the statutorily mandated 14-day extension and defendant relied on the district court's order). In other situations, litigants may well have standing to seek to enforce a statement by a judge—a fact-bound and case-by-case

determination—but Petitioners have not demonstrated that the Ninth Circuit's limited ruling would have any impact on how courts address these questions in other factual settings.

The Ninth Circuit decided an exceedingly narrow issue. Its decision does not purport to announce an across-the-board rule, but rather was based on the unique facts before the court: a statement by a judge that the recording would not be made for the "purpose" of public broadcasting; no objection or challenge from Petitioners about the recording being placed in the record under seal; an understanding by Petitioners based on the local rules that the seal would only necessarily last for ten years; and an abject failure by Petitioners to demonstrate *any* harm or injury to *anyone* from release at this time.

These facts are highly unlikely to be repeated in the future, and, even in other factual settings, the standing question addressed by the court is unlikely to arise with sufficient frequency to warrant this Court's review—as evidenced by Petitioners' inability to identify a similar fact pattern that has arisen at any point over the past two centuries. This issue is not one of extraordinary importance to other litigants.

III. THIS CASE DOES NOT CALL FOR EXERCISE OF THIS COURT'S SUPERVISORY POWER.

In a last-ditch effort, Petitioners contend that review "is necessary to ensure the efficacy of the Court's own prior orders in the case." Pet. 34. In reality, the decision below is fully compatible with this Court's 2010 stay order.

Judge Walker ordered that the trial proceedings be broadcast to several courthouses around the country under an amendment to Local Civil Rule 77-3,

with the potential for delayed nationwide airing. This Court granted an emergency stay of that order "to the extent that it permits the live streaming of court proceedings to other federal courthouses." *Hollingsworth v. Perry* (*Hollingsworth II*), 558 U.S. 183, 189 (2010). This Court did "*not* address other aspects of that order, such as those related to the broadcast of court proceedings on the Internet." *Id.* (emphasis added).

That narrow ruling provides no basis for exercising this Court's supervisory powers here. Petitioners' argument fails at the outset because the stay order did not address standing, which is the only question decided by the Ninth Circuit in the decision below. Thus, whatever relevance the order might have to the propriety of the recording's release—and, as explained below, it has none—the order does not cure Petitioners' absence of standing.

Moreover, livestreaming of the court proceedings to other federal courthouses—the only question addressed in the Court's stay order—is no longer at issue. This Court did not rule on whether the trial recording could be otherwise broadcast. Its prior decision thus does not control whether the district court appropriately unsealed the recording after the ten-year sealing period had elapsed. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272–73 (1990) (explaining that decisions that do "not expressly address" a specific proposition "are not binding in future cases that directly raise" that question).

Nor is this Court's reasoning in the stay order transferrable to the current dispute. This Court's stay order was based on two factors, neither of which is implicated by a release of the trial recording at this juncture, years after the trial took place. First, this Court held that the district court likely violated 28 U.S.C.

§ 2071(b) by not providing for an appropriate notice-and-comment period when adopting the revised Local Civil Rule 77-3. *Hollingsworth II*, 558 U.S. at 192. But release of the trial recording now is fully consistent with the applicable local rules because, in accordance with Local Rule 79-5, the district court kept the recording under seal for ten years and then gave Petitioners an opportunity to establish that continued sealing was warranted.

Second, this Court concluded that irreparable harm would likely result from the denial of a stay. *Hollingsworth II*, 558 U.S. at 195. The Court noted that it had previously "recognized that witness testimony may be chilled if broadcast," and that "[s]ome of applicants' witnesses ha[d] already said that they will not testify if the trial is broadcast" and had "substantiated their concerns by citing incidents of past harassment." *Id.*

There is no evidence that the potential harms recognized by the Court in 2010 at the start of the trial are at issue any longer, more than a decade later. The case has been complete—except for the issue of the sealed recording—since 2013. *See Hollingsworth III*, 570 U.S. at 715. Thus, no further witness testimony is possible in this case or in related cases. *See Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (holding that the Constitution protects the right of same-sex couples to marry).

The current posture of the case is therefore materially distinguishable from the posture when this Court ordered the stay in 2010. It is also distinguishable from the posture of the case in 2012, when the district court initially ordered the recording unsealed and the Ninth Circuit reversed, relying in part on the fact that the merits of the case had not yet been finally

decided. *See* Pet. App. 64a–65a. Furthermore, the transcript of the entire trial, including witness names and testimony, has been in the public domain since 2010, *id*. at 23a, and there is no evidence in the record that any Petitioner or witness experienced harassment or threats from the public availability of the transcript.

Because this Court's narrow ruling staying the "live streaming of court proceedings to other federal courthouses" is not implicated by the Ninth Circuit's ruling on standing—and because the factual and procedural setting is far different today than it was in 2010—there is no basis for this Court to exercise its supervisory power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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