No. 20-16375

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, *et al.*,
Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,
Intervenor-Plaintiff-Appellee,

KQED, INC.,
Intervenor-Appellee,

v.

GAVIN NEWSOM, Governor, *et al.*,
Defendants-Appellees,

DENNIS HOLLINGSWORTH, *et al.*,
Intervenors-Defendants-Appellants,

and

PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, *et al.*,
Defendants.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 WHO (Honorable William Orrick)

INTERVENORS-DEFENDANTS-APPELLANTS' OPENING SUPPLEMENTAL BRIEF

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ARGUMENT

This Court's July 12 Order requests supplemental briefing "addressing whether the Proponents have Article III standing to appeal the district court's order." Doc. 57 at 1 (July 12, 2021). The answer to the Court's question is not a difficult one: Proponents plainly have standing to challenge, on appeal, the order unsealing the video-recordings Judge Walker unequivocally promised them would never be made public.

The basic principles are familiar: to establish standing a party must satisfy "three elements": (1) injury-in-fact; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). These requirements are all met here.

The injury inflicted upon Proponents by the district court's July 9, 2020 order is the one identified by this Court itself in *Perry*: unsealing the trial recordings at issue would openly breach Judge Walker's binding promises to Proponents "that the video recording at issue would not be accessible to the public," thereby upsetting their justified reliance on those promises, which induced them to refrain from seeking a further Supreme Court order halting the recording, and inflicting irretrievable harm to "the integrity of the judicial process." *Perry v. Brown*, 667 F.3d 1078, 1085, 1088 (9th Cir. 2012). That injury is concrete, particularized to

Proponents, and imminent—and there can be no doubt that it is directly traceable to the district court's order and would be redressed if that order is vacated.

I. The unsealing and dissemination of the trial videotapes, in breach of Judge Walker's repeated promises, would cognizably injure Proponents.

To be legally cognizable, a party's injury must be (A) "concrete," (B) "particularized," and (C) "actual or imminent." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). The injury here easily clears all three of these hurdles.

A. Proponents' injury is concrete.

"A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* The injury must be " 'real,' and not 'abstract.' " *Id.* While "traditional tangible harms, such as physical harms and monetary harms," are the types of injuries that "most obvious[ly]" satisfy the "concreteness" requirement, "intangible harms can also be concrete." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

As this Court's decision in *Perry* makes clear, the harm that would be inflicted by unsealing the trial recordings in direct breach of Judge Walker's solemn promises to Proponents easily qualifies as a real and concrete one. As *Perry* explained, Judge Walker "on several occasions unequivocally promised that the recording of the trial would be used only in chambers and not publicly broadcast." 667 F.3d at 1081. Those promises were made directly to Proponents and their counsel, and "[t]here can be no question that Proponents reasonably relied on Chief Judge Walker's explicit assurances as to this particular record," by refraining from seeking further

intervention from the Supreme Court putting a stop to the recording—which, given that Court's earlier emergency stay, "they might well have secured." *Id.* at 1085, 1086. And because a decision now nullifying "Chief Judge Walker's assurances after Proponents had reasonably relied on them would cause serious damage to the integrity of the judicial process," Judge Walker's "solemn commitments" constitute "binding obligations." *Id.* at 1087. After all, "[t]he integrity of our judicial system depends in no small part on the ability of litigants and members of the public to rely on a judge's word." *Id.* at 1081.

When an obligor subject to a binding promise breaches that obligation, the obligee is plainly injured in a concrete way. What Proponents seek in this appeal is no more or less than this: to prevent the breach of the solemn and unequivocal promises that Judge Walker made directly to them and upon which they reasonably relied by allowing the recordings to be made in the first place. The parties have differed in this case over the extent to which the district court's July 2020 order breaches Judge Walker's promises, but in assessing standing, the Court is bound to assume that Proponents are right about that merits question. *Warth v. Seldin*, 422 U.S. 490, 501-03 (1975); *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1109 (9th Cir. 2014). And given that assumption, *Perry's* square holdings that Judge Walker's promises created "binding obligations" and that nullifying those obligations "after Proponents had reasonably relied on them would cause serious damage to the

integrity of the judicial process" simply do not allow any suggestion that breaching Judge Walker's promises would not inflict a real, concrete, cognizable harm. *Id.* at 1087.

The "historical practice" of American courts eliminates any conceivable doubt that the injury to Proponents here is sufficiently concrete. *Spokeo*, 136 S. Ct. at 1549. As the Supreme Court's recent cases have clarified, determining whether an intangible harm qualifies as sufficiently concrete generally depends on "whether the alleged injury to the plaintiff 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). "That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *Id.* Here, Proponents' injury bears a close relationship to a traditional harm understood to provide a basis for suit since the dawn of the common-law system: breach of contract.

"Traditionally, a party to a breached contract has a judicially cognizable injury for standing purposes…." *Mitchell v. Blue Cross Blue Shield of N. Dakota*, 953 F.3d 529, 536 (8th Cir. 2020) (quotation marks omitted). Anglo-American courts heard contract suits for centuries before the dawn of the American Republic, A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 3 (1975), and the first two cases argued before the Supreme Court both involved claims for breach of contract,

see 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 7-17 (1994) (discussing *Van Staphorst v. Maryland*); 6 *id.* at 7-9 (1998) (discussing *West v. Barnes*). It is thus no surprise that court after court has recognized 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." *Springer v. Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284, 287 (6th Cir. 2018); *accord, e.g.*, *Southwest Power Pool, Inc. v. FERC*, 736 F.3d 994, 996 (D.C. Cir. 2013); *Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 800 (5th Cir. 2012); *Katz v. Pershing, LLC*, 672 F.3d 64, 72 (1st Cir. 2012). The harm the district court's unsealing order would inflict on Proponents—nullifying the "solemn commitments" Judge Walker made to them, which *Perry* squarely holds constitute "binding obligations," 667 F.3d at 1087—is directly analogous to this traditionally recognized injury.

A contrary conclusion that the injury faced by Proponents is not sufficiently concrete to be cognizable would render the "interest in preserving the sanctity of the judicial process"—a value *Perry* found so compelling that it overrides any countervailing First Amendment rights, 667 F.3d at 1081, 1088—effectively toothless. For if *even the recipients* of a judge's "solemn commitments"—the very parties who obtained and then "reasonably relied" upon those promises—do not have standing to enforce them, then this Court's holding in *Perry* that those

commitments constitute "binding obligations and constraints" was an utterly empty one. *Id.* 1081, 1084, 1087. The Court should not adopt a theory of standing that would so completely vitiate the "interest in preserving respect for our system of justice." *Id.* at 1088.

B. Proponents' injury is particularized to them.

To support standing, an injury must also be "particularized" as to the party invoking it. *Spokeo*, 136 S. Ct. at 1548. The injury "must affect the plaintiff in a personal and individual way." *Id.* The requirement is not satisfied if the party asserts a "generalized grievance," such as an undifferentiated "injury to the interest in seeing that the law is obeyed." *FEC v. Akins*, 524 U.S. 11, 23-24 (1998). But where the party "personally has suffered some actual or threatened injury," particularization is met. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

Proponents' injury here is particularized because *they were the specific recipients* of the unequivocal promises that the district court's unsealing order would now nullify. 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 were those promises made generally to the public as a whole. Rather, Judge Walker's "solemn commitments" were specific "representations *to the parties*," *id.* (emphasis

added)—and in particular *to Proponents*, the very parties who (1) objected to the proposal to broadcast the trial in the first place and procured a temporary stay from the Supreme Court; (2) objected to videorecording the proceedings at the outset of the trial, thereby provoking 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—compelled by the Supreme Court's just-issued opinion"—by declining to seek "an order directing him to stop recording forthwith," *id.* at 1084-85.

To be sure, the "interest in preserving respect for our system of justice"—like the interest in seeing contractual obligations fulfilled, or in seeing constitutional rights honored—is one shared by "the public" as a whole. *Id.* at 1088; *see Abdou v. Davita, Inc.*, 734 F. App'x 506, 507 (9th Cir. 2018) (unpublished) (noting public's general interest in "enforcing contractual rights and obligations"); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (noting "public interest" in "prevent[ing] the violation of a party's constitutional rights"). But just as the party *whose contractual obligations have actually been breached*, or the individual *whose constitutional rights have actually been infringed*, has suffered a particularized, individual harm that is different in kind from the generalized societal interest that these unlawful actions not take place, Proponents—as the *specific recipients and*

beneficiaries of the binding judicial promises at issue—would suffer in a particular and individual way if those promises are breached.

This can be seen clearly by imagining that the interest in honoring Judge Walker's promises was being advanced not by Proponents but by a member of the public, who merely complained that breaching Judge Walker's promises would diminish his "respect for our system of justice." *Perry*, 667 F.3d at 1088. We respectfully submit that there can be no doubt at all that such an injury is wholly different in kind from the one invoked by Proponents—the very parties who specifically prompted, received, and reasonably relied upon those promises. And the distinction between these two injuries is *precisely* the one that the particularization requirement demands: the former harm is general and undifferentiated, while the latter is personal and individual.[1]

[1] Suggestion was made at oral argument that Proponents themselves have no wish to maintain the seal on the recordings and that this litigation "is lawyer driven rather than client driven." Oral Argument at 42:58 (Dec. 7, 2020), *available at* https://bit.ly/2VCAPdb. This remarkable suggestion is completely unfounded. Proponents' conduct in the district court and this Court simply cannot be squared with any speculation that Proponents are "not interested in enforcing [Judge Walker's] promise." *Id.* at 17:25. To the contrary, for the past four years Proponents have opposed the unsealing of the recordings at every turn, both in the district court and before this Court. These actions were of course taken by Proponents *through their counsel*. But it is settled that "an appearance by an attorney for a party creates a presumption that the attorney ha[s] authority to act on behalf of such party." *Child v. Beame*, 412 F. Supp. 593, 599 n.2 (S.D.N.Y. 1976). As Chief Justice Marshall explained,

C. Proponents' injury is imminently impending.

Finally, there can be no doubt that the injury threatened by the district court's order is sufficiently imminent. For a future injury to satisfy Article III's imminence requirement, the "injury must be *certainly impending*," not dependent upon "a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409–10 (2013). There is no contingent chain of possibilities here. The district court's July 9, 2020 order directed release of the recordings on August 12, 2020—via both YouTube and the district court's website, *see* Doc. 913, *Perry v. Schwarzenegger*, No. 9-cv-2292 (N.D. Cal. Aug. 11, 2020)—and the only thing preventing their immediate release is this Court's temporary stay pending appeal, *see* Doc. 14 (Aug. 11, 2020).

> Certain gentlemen, first licensed by government, are admitted by order of Court, to stand at the bar…. The appearance of any one of these gentlemen in a cause, has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishement of our Courts, and no departure from it has been made in those of any State, or of the Union.

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 830 (1824). There is *no evidence whatsoever* that Proponents' counsel of record, contrary to this presumption—and their own ethical duties "to protect their clients' interests with competence, diligence, and loyalty," RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000)—have acted beyond their clients' authorization, interests, or wishes. None.

II. Proponents' injury-in-fact is traceable to the district court's unsealing order and would be redressed by vacatur of the order with instructions to maintain the seal.

The remaining two standing requirements are easily disposed of. The injury-in-fact that Proponents would suffer by the disclosure of the videotapes, in breach of Judge Walker's promises, is plainly traceable to the very district court order directing their disclosure. And the injury would just as plainly be fully redressed by a judgment from this Court vacating the unsealing order and instructing the district court to maintain the seal. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (concluding petitioner's standing to appeal a lower-court order directing it disclose certain documents was "beyond dispute," since the injury inflicted by compelled disclosure "is traceable to the decision below and would be fully redressed if we were to reverse the judgment of the Court of Appeals and remand with instructions to deny the Government's [disclosure demand]"). Accordingly, the threefold "irreducible constitutional minimum of standing" is satisfied, *Lujan*, 504 U.S. at 560, and the straightforward answer to the Court's supplemental briefing request is that Proponents have standing to appeal the district court's July 9, 2020 order.

CONCLUSION

For the reasons given above and in Proponents' prior briefing, this Court should hold that Proponents have standing to appeal the order unsealing the trial

recordings, vacate the order, and remand with instructions to permanently maintain the seal.

Dated: August 16, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Dated: August 16, 2021

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