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' SUPPLEMENTAL REPLY BRIEF

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ARGUMENT

This Court held in *Perry v. Brown* that Chief Judge Walker's repeated promises that the trial recordings at issue would not be released to the public were binding, that Proponents reasonably relied on them, and that breaching them would "cause serious damage to the integrity of the judicial process." 667 F.3d 1078, 1085, 1087 (9th Cir. 2012). Our opening supplemental brief explains why Proponents plainly have standing to prevent that injury by challenging the district court's 2020 unsealing order, and no party before now has suggested otherwise. Appellees now argue that the injury is not sufficiently concrete or particularized, but both contentions fail.

I. Proponents' injury is concrete.

Appellees' attempts to show that Proponents' injury is not sufficiently concrete are completely unpersuasive. Appellees begin by faulting us for failing to establish by "declarations or other evidence" that Proponents stand to suffer some *tangible* harm "resulting from the unsealing," Appellees' Supp. Br. 1—such as threats of violence or retaliation—but as we have explained, our standing is not based on any such resulting injury, but rather on the intangible (but critically significant and concrete) harm that breach of Judge Walker's promises would cause to "the sanctity of the judicial process," *Perry*, 667 F.3d at 1081.

When Appellees finally turn to *that* interest, the bulk of their response is comprised of a rote regurgitation of their *merits* arguments (1) that Proponents supposedly conceded that the recordings could be unsealed after 10 years, Appellees' Supp. Br. 5; *but see* Appellants' Reply Br. 9, Doc. 48; and (2) that publicly releasing the recordings after the trial purportedly would not " 'breach' … any promise," Appellees' Supp. Br. 5; *but see Perry*, 667 F.3d at 1085-86. Given the blackletter rule—which Appellees do not dispute—that the Court must assume that *Proponents will prevail* on these merits issues when assessing their standing, *see Warth v. Seldin*, 422 U.S. 490, 501-03 (1975), these arguments are irrelevant here.

Appellees intimate that Judge Walker's promises were not "binding," Appellees' Supp. Br. 5, but that is *flatly contrary* to the law of the case established in *Perry*, 667 F.3d at 1087 (not to mention the hornbook rule that a promise reasonably and detrimentally relied upon is binding, RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981)). And in any event, Appellees do not contest that the harm inflicted by repudiating Judge Walker's binding promises is at the very least *directly analogous* to breach of contract, "a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) (quotation marks omitted). That is all Article III requires.

Appellees make a brief effort to show that breach of contract *does not* constitute a "concrete harm," Appellees' Supp. Br. 6, but it is evident from *their own*

description of the cases they cite for this proposition that they say no such thing. In Appellees' lead case, *Southern Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, the plaintiff *did not even allege a breach of contract*—instead, it sought a declaratory judgment that certain provisions in its contract were unenforceable, a claim the Fourth Circuit held it lacked standing to assert because its only injury was caused by *other*, admittedly enforceable provisions. 713 F.3d 175, 182-83 (4th Cir. 2013). Similarly, this Court's unpublished decision in *Cahen v. Toyota Motor Corp.* says nothing to suggest that a breach of contract is not a cognizable injury; it merely holds that the threatened breach asserted there was too speculative. 717 Fed. App'x 720, 723 (9th Cir. 2017) (unpublished).

Prescott v. County of El Dorado, 298 F.3d 844 (9th Cir. 2002), while at least precedential, does not get Appellees any further. As in the Fourth Circuit's *Southern Walk* decision, the problem with standing in *Prescott* was not that the plaintiffs lacked a concrete injury, but that there was "no causal relationship" between the injury they alleged and the contract provision they challenged. *Id.* at 845-46. Finally, the district court decision in *Garcia v. Service Employees International Union*, 2019 WL 4281625, at *5 (D. Nev. Sept. 10, 2019) (affirmed by this Court in a brief unpublished memorandum, 856 Fed. App'x 105 (9th Cir. 2021) (unpublished)), is also irrelevant. The district court in *Garcia* rejected standing not for lack of a sufficiently concrete injury, but rather on the basis that the alleged breach of the

defendant union's constitution was "not particularized" because the injury was "a generalized one [the plaintiff] shares in common with every other member of the Local." *Id.* at *5. That conclusion, whatever its merits, has no bearing here for the reasons discussed below.

A conclusion that Proponents have no concrete interest in enforcing Judge Walker's promises would *hollow out* the judicial-integrity interest that was the foundation of the Court's decision in *Perry*. Appellees recognize that this result is untenable, but their only response is to claim that in "other cases" the breach of a judge's promise may *also* cause some derivative, tangible injury that would "support Article III standing." Appellees' Supp. Br. 10. Plainly, the suggestion that "in appropriate cases" the recipient of a judicial promise may have standing to assert some injury *other than* the harm to judicial integrity does nothing to square Appellees' position with this Court's holding in *Perry*.

II. Proponents' injury is particularized.

Our supplemental brief also explained why the harm to judicial integrity threatened by the unsealing order is particularized to Proponents. Appellees do not rebut any of our arguments and instead proceed as though we had not made them. They assert that Judge Walker's promise was made "to all litigants in the case," Appellees' Supp. Br. 7, but they do not grapple with the facts that it was *Proponents' actions that prompted* the promise, *only Proponents were the beneficiaries* of it, and

only Proponents relied upon it. They nakedly assert that "under Proponents' theory, every member of the public is equally entitled to challenge the unsealing order," *id.* at 9, even though we explained in detail why the interest of *the promisees* in enforcing a binding promise is obviously distinct from the interest of "the general public," *id.* at 8, since it is *their reliance* on the promise that its breach would nullify.

Appellees also briefly argue that Proponents' injury is based on "attorney argument" rather than "evidence." *Id.* at 4-5. But the only factual predicates of Proponents' injury—whether Judge Walker *made the promises at issue* and whether Proponents *relied upon them* by forbearing to seek further action by the Supreme Court—are evident from the record and from *Perry*, and have never been disputed by Appellees.[1]

[1] Appellees also state that there is no evidence that "Proponents want[ ] the trial recordings to remain under seal." *Id.* at 4. Appellees cite no authority whatsoever for the astonishing suggestion that Article III requires a plaintiff to submit not only evidence establishing injury-in-fact, but also specific evidence—apart from his *prosecution of the suit*—that he *wishes to obtain redress* for that injury. Such a rule would in effect require the appellant *in every single appeal* to submit, along with his opening brief, a declaration averring that yes, the brief was filed with his authorization. That is flatly contrary to the rule, which has "existed from the first establishment of our Courts," that an attorney-of-record is presumed authorized to act for his client. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 830 (1824). Appellees provide no evidence to rebut that presumption here, because there is none. (Certainly, Counsel's refusal of Appellees' request "to permit Plaintiffs to contact three of the Proponents' trial witnesses," Appellees' Supp. Br. 4 n.1 (quotation marks omitted), does not suffice, given the general "no-contact" rule barring a lawyer from *ex parte* communications with the opposing party, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt.a (2000), or, impliedly, his expert witnesses, ABA Formal Op. 93-378 (1993).

The foregoing also suffices to dispose of Appellees' strained attempt to invoke *Hollingsworth v. Perry*, 570 U.S. 693 (2013). Apart from its restatement of the rule that a "generalized grievance" does not satisfy Article III, *id.* at 706, *Hollingsworth* is completely irrelevant. And as just discussed, Proponents' injury is *particularized*, so that rule does not bar standing here.

CONCLUSION

The Court should hold that Proponents have standing, vacate the trial court's order, and remand with instructions to permanently maintain the seal.

Dated: September 7, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Dated: September 7, 2021

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