No. 20-16375

IN THE 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, in his official capacity as Governor of California, 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
Case No. 3:09-cv-02292-JW (WHO) (Honorable William H. Orrick)

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INTRODUCTION

For over a decade, Proponents have fought to keep the video recordings of a public trial under seal based on a purported interest in protecting "judicial integrity." But they fail to identify *any* case in *any* jurisdiction holding that such a generalized interest is sufficient to give them Article III standing, nor have they shown that they will individually suffer any concrete, particularized harm when the tapes are unsealed. "No concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

Proponents fail to establish concrete, particularized harm resulting from the unsealing, despite ample opportunity to do so, for one simple reason: They will not be harmed by unsealing the recordings 11 years after trial. Proponents did not even try to prove such harm, choosing to present no declarations or other evidence from any Proponent or witness. Proponents' lack of personal stake in this procedural issue is also underscored by the Supreme Court's 2013 holding that they lacked a personal stake in the substantive outcome of this litigation. *See Hollingsworth v. Perry*, 570 U.S. 693, 705–06 (2013).

Because Proponents do not and cannot establish that the unsealing order would cause any concrete, particularized harm to them individually, they lack standing, and this Court therefore lacks jurisdiction. It should dismiss this appeal and lift its stay of the district court's order.

LEGAL STANDARD

Under Article III, the federal "judicial Power shall extend" only to certain "Cases" and "Controversies." "For there to be a case or controversy under Article III, the plaintiff must have a personal stake in the case—in other words, standing." *TransUnion*, 141 S. Ct. at 2203 (quotation marks and citation omitted). A party lacks standing when it cannot "sufficiently answer the question: 'What's it to you?'" *Id.*

"To answer that question in a way sufficient to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S. Ct. at 2203 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "Requiring a plaintiff to demonstrate [all three requirements] ensures that federal courts decide only the rights of individuals, and that federal courts exercise their proper function in a limited and separated government." *Id.* (quotation marks and citations omitted); *accord Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Article III "requir[es] a real controversy with real impact on real persons to make a federal case out of it").

The burden to establish standing continues through "all stages of litigation." *TransUnion*, 141 S. Ct. at 2208. Once litigation proceeds to the introduction of

evidence, standing must be grounded in "specific facts" that are "supported adequately by the evidence." *Id.* (quotation marks and citation omitted).

ARGUMENT

Proponents wholly fail to meet their burden of establishing that any purported harm from unsealing is both concrete and particularized to them. Thus, they lack Article III standing to challenge the unsealing order, just as they lacked standing to appeal Judge Walker's merits decision a decade ago. The Court should dismiss this appeal and lift its stay of the district court's order.

I. Proponents Do Not And Cannot Establish A Concrete Injury

Proponents do not establish a personal stake in keeping the video recordings under seal because they identify no concrete injury. Although there is no singular definition of what constitutes a "concrete" injury, the Supreme Court recently explained that "physical or monetary injury" are "obvious" examples. *TransUnion*, 141 S. Ct. at 2204. "Various intangible harms can also be concrete," such as "reputational harms, disclosure of private information, and intrusion upon seclusion," as well as "harms specified by the Constitution." *Id.* Whatever form it takes, a "'concrete' injury must be '*de facto*'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

Proponents do not point to *any* facts showing the existence of *any* concrete injury that is supported by the evidence in this case. *TransUnion*, 141 S. Ct. at 2208. The district court said it best:

> Proponents again failed to submit any evidence by declaration that any Proponent or witness who testified on behalf of the Proponents wants the trial recordings to remain under seal. There is no evidence that any Proponent or trial witness fears retaliation or harassment if the recordings are released. Nor is there any evidence that any Proponent or trial witness on behalf of the Proponents believed at the time or believes now that Judge Walker's commitment to personal use of the recordings meant that the trial recordings would remain under seal forever.

1-ER-3. Thus, the district court found "absolutely no[]" justification "presented on this record" to overcome the common-law presumption of unsealing. 1-ER-4.[1]

In contrast with Plaintiffs, who submitted 15 declarations supporting unsealing (*see* ECF 8-2 at 97–168), no Proponent submitted a declaration attesting that he would not have intervened had he known the video recordings would be unsealed a decade after trial. Nor did Proponents submit any evidence that any Proponent or witness *even cares* whether the recordings are unsealed, let alone whether any of them would be injured. Proponents rely solely on attorney argument about what Proponents purportedly "understood" Judge Walker's 2010 statement to

[1] The district court also noted Proponents' counsel's refusal to permit Plaintiffs to contact "three of the Proponents' trial witnesses to ask them if they had any concerns about unsealing the trial recordings." 1-ER-4 n.8.

mean (ECF 48 at 10), but attorney argument does "not constitute evidence," *Carrillo-Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003). As *TransUnion* makes clear, Article III demands far more.

Proponents' only attempt at establishing concreteness is to analogize to out-of-circuit breach of contract actions. ECF 60 at 4–6. Proponents do not (and cannot) assert that Judge Walker actually created a binding contract, so they argue without support that "[w]hen an obligor subject to a binding promise breaches that obligation, the obligee is plainly injured in a concrete way." *Id.* at 3.

But there was no "breach" of any promise. Judge Walker stated that video recordings "would be quite helpful to me in preparing the findings of fact . . . . But it's not going to be for purposes of public broadcasting or televising." *Perry v. Brown*, 667 F.3d 1078, 1082 (9th Cir. 2012). That is exactly what happened—Judge Walker did not broadcast or televise the trial. Rather, Judge Walker explained that he used the recordings "in preparing the findings of fact and conclusions of law," and that "the experts' demeanor and responsiveness showed their comfort with the subjects of their expertise," which helped to inform his decision. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929, 940 (N.D. Cal. 2010).

Moreover, Proponents' counsel conceded at oral argument before this Court that Proponents were not under the impression that the recordings "would be forever sealed" because "[a] seal lasts for ten years under the local rules" and "then we would

be entitled to go in and ask for an extension of that time, to a specific date." Proponents' counsel further noted that they were "aware of the local rules."[2] The unsealing Proponents now oppose occurs by operation of law under Local Rule 79-5, and it is a rule Proponents understood at the time.

In any event, even if there were some basis for finding a contract here—and there is not—"being a party to [a] contract does not alone establish Article III standing." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013). This Court regularly finds a lack of standing where a party to a contract fails to allege concrete harm resulting from a purported breach. *See, e.g.*, *Cahen v. Toyota Motor Corp.*, 717 F. App'x 720, 723 (9th Cir. 2017) (no standing where risk of hacking was speculative); *Prescott v. Cty. of El Dorado*, 298 F.3d 844, 845 (9th Cir. 2002) (no standing where "there is no causal relationship between the [contract] and the injury plaintiffs have suffered"); *Garcia v. Serv. Emps. Int'l Union*, 2019 WL 4281625, at *5 (D. Nev. Sept. 10, 2019) (no standing where party to contract failed to "present[] sufficient evidence [that] he suffered an injury in fact" or "that he has a personal stake in the

[2] Oral Argument at 7:04–7:48, *Perry*, 667 F.3d 1078 (No. 11-17255), https://bit.ly/35toPvJ. Proponents' counsel vigorously argue that their clients have "authoriz[ed]" their words and actions. ECF 60 at 9 n.1. This Court may therefore conclude that Proponents were well aware of the local rules.

outcome of this claim"), *aff'd in relevant part*, __ F. App'x __, 2021 WL 1255615 (9th Cir. Apr. 5, 2021).

Thus, even assuming the counterfactual situation that a valid contract was made, Proponents *still* do not satisfy Article III's standing requirements because they fail to identify any evidence of concreate harm. *See* 1-ER-3–4. Dismissal for lack of jurisdiction is warranted on this basis alone.

II. Proponents Do Not And Cannot Establish A Particularized Injury

Proponents lack standing for a second independent reason: They do not point to any evidence establishing that any hypothetical harm is "particularized." The Supreme Court has "made it clear time and time again that an injury in fact must be . . . particularized" in addition to being concrete. *Spokeo*, 136 S. Ct. at 1548. "For an injury to be 'particularized,' it 'must affect [Proponents] in a personal and individual way.'" *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1). In other words, Proponents must "personally . . . suffer[] some actual or threatened injury." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quotation marks and citation omitted).

Judge Walker made a statement to all litigants in this case. That does not render any hypothetical injury "particularized." ECF 60 at 6–8. Indeed, Proponents' focus on the statement itself ignores the relevant question: whether any *injury* is particularized. Proponents concede, as they must, that "the 'interest in preserving

respect for our system of justice' . . . is one shared by 'the public' as a whole." *Id.* at 7 (quoting *Perry*, 667 F.3d at 1088). And they do not explain how, as individuals, they "would suffer in a particular and individual way" different from the general public. *Id.* at 8. Of course, they cannot do so. Such "undifferentiated" injury "common to all members of the public" is not "particularized" under Article III. *United States v. Richardson*, 418 U.S. 166, 177 (1974) (quotation marks and citation omitted).

III. The Supreme Court's Decision In *Hollingsworth* That Proponents Lacked Standing On The Merits Further Underscores Their Lack Of Standing Now

After the district court found Proposition 8 to be unconstitutional, Proponents (but no other party) appealed. In 2013, the Supreme Court held that Proponents lacked standing, explaining: "for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm." *Hollingsworth*, 570 U.S. at 704. The harm must affect the plaintiff "in a personal and individual way," such that the plaintiff "possess[es] a direct stake in the outcome of the case" during all stages of litigation. *Id.* at 705 (quotation marks and citation omitted).

The Supreme Court recognized that "the District Court had not ordered [Proponents] to do or refrain from doing anything." *Hollingsworth*, 570 U.S. at 705. Thus, Proponents "had no 'direct stake' in the outcome of their appeal. Their only

interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law." *Id.* at 705–06. But "a 'generalized grievance,' no matter how sincere, is insufficient to confer standing" when the relief sought "no more directly and tangibly benefits [the party] than it does the public at large." *Id.* at 706 (citation omitted). Because Proponents had no "'particularized' interest" in defending Proposition 8, they lacked standing. *Id.* at 707. Consequently, this Court had no jurisdiction and was "instruct[ed] to dismiss the appeal." *Id.* at 715.

This Court has no more jurisdiction over this appeal of a procedural order than it did over the appeal of the district court's merits decision. Just as in *Hollingsworth*, the district court did not order Proponents to do or refrain from doing anything. Proponents do not even attempt to establish any direct, factual stake in whether the video recordings are unsealed—rather, they claim only an "'interest in preserving respect for our system of justice'" that is "shared by 'the public' as a whole." ECF 60 at 7 (quoting *Perry*, 667 F.3d at 1088).

Indeed, under Proponents' theory, every member of the public is equally entitled to challenge the unsealing order. That is not the law. For much the same reason that Proponents lacked Article III standing in 2013 regarding the merits, they lack it today regarding this procedural issue.

* * *

Concluding that Proponents lack standing here does not require the Court to hold that the pursuit of judicial integrity could *never* support Article III standing in appropriate cases, *i.e.*, where the party invoking federal jurisdiction submitted *evidence* that the purported breach of integrity harmed them in a concrete, particularized way. Despite every opportunity, Proponents do no such thing. And of course, Proponents' counsel confirmed to this Court that Proponents *were* aware of the local rules' presumption of unsealing after 10 years. *See supra* pp. 5–6. Whatever other cases might arise, Proponents lack standing in these "unique circumstances." *Perry*, 667 F.3d at 1080.

CONCLUSION

Proponents had years to submit evidence that unsealing the video recordings would cause them any harm, let alone a concrete and particularized harm sufficient to justify the permanent sealing they request. They offered nothing. Proponents thus lack Article III standing, and this Court should dismiss this appeal. Alternatively, if this Court concludes that Proponents have standing, it should affirm the district court's order for the reasons set forth in Plaintiffs' answering brief.

Respectfully submitted,

/s/ *Theodore B. Olson*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this opposition complies with the typeface requirements in Federal Rule of Appellate Procedure 32(a)(5) because it uses proportionally spaced Times New Roman 14-point font. I further certify that this opposition complies with the word limitation in this Court's July 12, 2021 order because it contains 2,347 words.

Dated: August 30, 2021

/s/ *Theodore B. Olson*
Theodore B. Olson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 30, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 30, 2021

/s/ *Theodore B. Olson*
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