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No. 12-144

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,

v.

KRISTEN M. PERRY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR WALTER DELLINGER AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS ON THE ISSUE OF STANDING

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BRIEF FOR WALTER DELLINGER AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS ON THE ISSUE OF STANDING

This brief is submitted on behalf of Walter Dellinger.[1]

INTEREST OF AMICUS CURIAE

Walter Dellinger is the Douglas B. Maggs Professor Emeritus of Law at Duke University, and a partner at O'Melveny & Myers LLP.[2] Professor Dellinger has throughout his career studied the scope of the Article III jurisdiction of federal courts, including issues relating to Article III standing. He is committed to the public interest and to the enforcement of proper limits on the scope of judicial power. Based on his study of the applicable precedent and principles, he believes that the proponents of Proposition 8 had no standing to appeal the judgment of the district court in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2008, petitioners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, and Mark A. Jansson (the proponents) proposed an initiative known as

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amicus or his counsel has made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of amicus curiae briefs generally have been filed with the Clerk's office.

[2] Institutional affiliations are listed for identification purposes only.

Proposition 8 that would amend the California Constitution to provide that only marriages between a man and a woman would be valid in California. The voters approved that initiative, and Proposition 8 became California law.

Two same-sex couples subsequently brought suit against the Governor, the Attorney General, and other state officials in federal district court, alleging that Proposition 8 violated their rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The state officials answered the complaint and continued to enforce Proposition 8, but they did not defend its constitutionality. The district court allowed the proponents to intervene to defend Proposition 8. After a trial, the district court issued a judgment holding Proposition 8 unconstitutional.

The state officials declined to appeal the district court's judgment. After the proponents sought to appeal to the Ninth Circuit, that court certified to the California Supreme Court two questions related to the proponents' standing. As relevant here, the California Supreme Court held that initiative proponents are authorized under state law to represent the state's interest in enforcement of a law enacted through an initiative when the state Attorney General refuses to defend the law. Based on that determination, the Ninth Circuit held that the proponents here have standing in federal court to defend Proposition 8's constitutionality.

That holding is incorrect. The proponents did not have Article III standing to appeal from the district court's judgment holding Proposition 8 uncon-

stitutional because they have only a generalized interest in the enforcement of that law, and the Court has repeatedly held that such an interest is not sufficient to establish a case or controversy under Article III. The Court should therefore vacate the court of appeals' judgment and remand with directions to dismiss the proponents' appeal.

I. To satisfy the requirements of Article III, parties appealing from a district court judgment must show that they have a personal stake in the outcome of the appeal. A generalized interest in the enforcement of a law is not sufficient to create Article III standing, and that is true regardless of the parties' level of ideological commitment to the law's enforcement.

The proponents had certain personal rights in the initiative process that arguably gave them a personal interest in ensuring that Proposition 8 became valid California law. Once the California Supreme Court held that Proposition 8 was valid California law, however, the proponents had no more interest in the enforcement of that law than any other citizen. And that generalized interest in Proposition 8's enforcement was not sufficient to give them standing to defend that law.

The state had a continuing interest in defending Proposition 8. But the state, through its officials, declined to appeal.

II. Relying on the California Supreme Court's determination that state law confers on an initiative's proponents the authority to represent the state's own interest in the enforcement of an initia-

tive when state officials decline to defend it, the Ninth Circuit held that the proponents had Article III standing to appeal. But a private party having only a generalized interest in enforcement of a law does not possess Article III standing, and neither Congress nor a state has authority to confer standing on private parties when they otherwise would not have it. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992); *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952). The rule against generalized-grievance standing is one of substance, not semantics: It ensures that federal courts stay within their constitutionally prescribed role. Accordingly, neither Congress nor a state can transform a generalized interest in a law's enforcement from an insufficient basis for Article III standing into a cognizable Article III injury simply by relabeling it as the state's interest.

If the rule were otherwise, the Article III principle that federal courts cannot serve as a forum for the airing of generalized grievances would be drained of any practical meaning. For example, the Court has held that a doctor ethically opposed to abortion does not have standing to appeal the invalidation of a law restricting abortions, and taxpayers who have standing in state court to challenge official action without showing a personal injury do not have standing to appeal to this Court. Under the Ninth Circuit's theory, each of these cases would have come out the other way if the state had designated the party's generalized interest in enforcement to be the state's interest. Indeed, under the Ninth Circuit's ruling, a state could authorize any citizen of the state to enforce or defend any state law in any court,

so long as it makes clear that the citizen is representing the state's interest rather than his own.

III. The Ninth Circuit relied on *Karcher v. May*, 484 U.S. 72 (1987), and *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), as support for its novel standing theory. But those cases merely recognize that when agents of the state have been delegated authority to represent the state's interest, the agents have Article III standing to do so. Those decisions do not suggest that states can confer standing on non-agents who have nothing more than a generalized interest in a law's enforcement.

Other decisions of this Court, including *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), confirm that agents can assert the sovereign's interest in federal court. But they also indicate that a mere delegation of authority is not enough.

The Proposition 8 proponents are not agents of the state or the people. Under common-law agency principles, an agent has a fiduciary duty to the principal and is subject to the principal's control. The proponents do not satisfy either of those requirements. They do not take an oath to support the state and federal constitution or otherwise assume a duty to serve the state's interest. They are also not subject to the state's or the people's control, such as through election or removal. Neither the state nor the people exercise any control over the arguments proponents make, or over their decisions to appeal, settle, or let matters lie. The proponents remain entirely free to pursue their own ideological agenda, and are accountable to no one other than them-

selves. And the proponents can apparently continue to pursue their own agenda in litigation challenging Proposition 8 years and even decades after its enactment.

A rule that a state may delegate representation of its own interests only to actual agents is necessary to keep the federal judiciary within its constitutionally prescribed role. When a party has a fiduciary duty to the state and is subject to its control, a federal court can be sure that the agent is pressing the state's interests rather than his own ideological agenda. When a party lacks a fiduciary duty and is not subject to state control, there can be no such guarantee. The court is then at risk of serving as a forum for the airing of an ideological grievance, a role that is outside the purview of Article III.

The agency rule also promotes the Constitution's structural concern with government accountability. When an agent decides to appeal, the people can hold him or his superiors accountable for the decision. But allowing non-agents to make that decision—and all subsequent litigation decisions in the case—would blur the lines of accountability. State officials would be shielded from the electoral consequences of their decision not to appeal. And they would also be able to blame unaccountable private parties for the decision to appeal without absorbing the political consequences for that decision.

The Ninth Circuit's rule also raises serious administrability concerns. For example, a federal court would have no way to know what to do when proponents disagree on such matters as whether to appeal or what to argue. No such concerns exist under the

agency rule, because governments routinely assign the authority to resolve any such conflicts to a single high-ranking officer.

IV. The agency rule does not prevent the state from ensuring a defense for its initiatives. Among other options, it can authorize any citizen to bring a state court action to determine an initiative's constitutionality before it takes effect, which would bind the Attorney General and other state officials. It can require the state Attorney General, in the event she has doubts about an initiative's constitutionality, to initiate an action or seek an advisory opinion in state court to test its constitutionality before it becomes effective. It can require the Attorney General to defend the initiative in federal court and to take all necessary appeals to do so. Or it could establish an independent officer, removable for cause by a high-ranking state official, to defend initiatives when the Attorney General declines to do so. The one thing a state cannot do is conscript federal courts to serve as a forum for the resolution of a generalized grievance by a private party who has nothing more than an ideological interest in a law's enforcement.

V. Because the proponents lacked standing to appeal, this Court should vacate the court of appeals' judgment. But it should not disturb the district court's judgment. An Article III case or controversy existed in the district court because the plaintiffs sought marriage licenses and the defendant state officials declined to provide them absent a court order. *See INS v. Chadha*, 462 U.S. 919, 939-40 (1983). In similar circumstances, the Court has left intact

judgments that were the product of a case or controversy.

The proponents challenge the breadth of the district court's injunction to the extent it gives relief to non-parties. Such arguments may be open to future litigants with Article III standing. But because no party with standing appealed, issues relating to the actual scope of the injunction and the district court's remedial authority to issue it are not properly before the Court.

ARGUMENT

I. THE PROPONENTS' GENERALIZED INTEREST IN ENFORCEMENT OF PROPOSITION 8 IS NOT SUFFICIENT TO GIVE THEM ARTICLE III STANDING

A. The Proposition 8 proponents lacked Article III standing to appeal the district court's judgment to the Ninth Circuit and to petition for this Court's review. The proponents have nothing more than a generalized interest in the enforcement of Proposition 8. That interest is insufficient to establish Article III standing. And state law cannot confer Article III standing on a private party who otherwise lacks it. The proponents' lack of standing follows from three bedrock Article III principles.

First, the Constitution does not give federal courts an unrestrained power to decide every constitutional question that a party wishes to have them resolve. Instead, it confines federal courts to resolving constitutional questions only when they are presented in "Cases" or "Controversies." U.S. Const. art. III, § 2. The case-or-controversy limitation is

indispensable to ensuring "the proper—and properly limited—role of the [federal] courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Allowing federal courts to decide constitutional questions outside of cases or controversies "would be inimical to the Constitution's democratic character." *Ariz. Christian Sch. v. Winn*, 131 S. Ct. 1436, 1442 (2011).

One component of a case or controversy is that a party who invokes federal court jurisdiction must have standing to sue. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). To establish standing, a party must show the invasion of a legally cognizable interest that is "concrete and particularized," *id.* at 64, meaning that the injury must affect the plaintiff "in a personal and individual way." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 n.1 (1992).

Of critical importance here, the Court has repeatedly held that the generalized interest a party shares with all members of the public in proper enforcement of the laws is not sufficient to establish Article III standing. *E.g.*, *Arizonans,* 520 U.S. at 64. As explained in *Lujan,* "a plaintiff raising only 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." 504 U.S. at 573-74.

That rule applies regardless of the level of ideological commitment individuals have to the law

whose enforcement they seek. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). As the Court has explained, the role of federal courts is not to referee debates between ideological opponents, or to serve as a neutral forum "for the vindication of … value interests." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Instead, a federal court's sole constitutional role is to resolve real disputes between parties who have a personal stake in the outcome. *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State,* 454 U.S. 464, 472 (1982). The Court has applied the rule that a generalized grievance does not establish Article III standing across the ideological spectrum, denying standing to taxpayers opposed to federal laws for the protection of mothers and infants, *Massachusetts v. Melon*, 262 U.S. 447, 488-89 (1923); environmentalists committed to enforcement of laws protecting endangered species, *Lujan*, 504 U.S. at 573-76; antiwar activists opposed to members of Congress serving as reservists, *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 217, 220 (1974); and doctors ethically opposed to abortion, *Diamond v. Charles,* 476 U.S. 54, 63-68 (1986).

Second, because the rule against generalized-grievance standing is required by Article III, it cannot be altered by Congress or the states. *See Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (Congress cannot "erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing"); *Orr v. Orr*, 440 U.S. 268, 277 n.7 (1979) (states "cannot confer standing before this Court on a party who would

otherwise lack it"). That means that neither Congress nor the states can confer standing on parties who have nothing more than a generalized interest in a law's enforcement.

The Court reached that conclusion in *Lujan,* holding that Congress could not, by enacting a "citizen suit" provision to make citizens "private attorneys general," give every citizen a right to seek enforcement of the Endangered Species Act. The Court rejected the view that "the public interest in proper administration of the laws … can be converted into an individual right by a statute that denominates it as such." *Lujan*, 504 U.S. at 576-77. Similarly, in *Doremus v. Board of Education*, 342 U.S. 429 (1952), the Court held that a taxpayer's generalized interest was insufficient to invoke the Article III jurisdiction of this Court, even though states could give state taxpayers a right to sue in their own courts, where Article III does not apply, without a showing of personal injury. *Id.* at 434.

Third, Article III's standing requirements apply not only to plaintiffs, but to all parties who seek to invoke the jurisdiction of a federal court. Thus, a party who intervenes as a defendant in a district court and then seeks to appeal must establish Article III standing to appeal. *Arizonans*, 520 U.S. at 64; *Diamond*, 476 U.S. at 62.

In *Diamond*, the Seventh Circuit invalidated an Illinois statute that placed restrictions on abortions. When the State of Illinois acquiesced in that judgment by failing to appeal to this Court, a doctor who had intervened below appealed instead. The Court held that the doctor lacked standing to appeal be-

cause his ethical opposition to abortion did not give him a personal stake in the defense of the abortion statute. The Court explained that "the standing that Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance," and that it "is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." 476 U.S. at 62 (internal quotation marks and citations omitted). The Court also rejected the doctor's claim that he had a personal interest in the enforcement of the state's abortion restrictions, reasoning that "only the State" has a "direct stake" "in defending the standards embodied in [a legal] code." *Id.* at 65.

B. Those established principles control the outcome here. Although the proponents intervened as defendants in the district court, they sought to invoke federal court jurisdiction when they appealed to the Ninth Circuit and when they petitioned for this Court's review. They were therefore required to establish a personal stake in the outcome of those proceedings. *Diamond,* 476 U.S. at 62.

The proponents failed to make that showing. In particular, they failed to show that the district court decision invalidating Proposition 8 caused them any injury other than the generalized injury shared by every California citizen.

California law afforded the proponents certain rights during the initiative process that were personal to them. For example, they had the right to submit the text of the proposed initiative and draft an argument for it that would appear on the ballot.

E.g., Cal. Elec. Code § 342. Had state officials interfered with those rights in a way that implicated the federal Constitution, the proponents would have suffered a personal injury sufficient to give them Article III standing. Moreover, because state courts are not bound by the Article III case or controversy requirement, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989), the California Supreme Court acted within its authority in giving the proponents a special role in defending the initiative against procedural challenges to it becoming California law. *See Strauss v. Horton*, 46 Cal. 4th 364 (2009)

Once the California Supreme Court rejected the challenges to the adoption of the initiative in *Strauss,* and the initiative became California law, however, the proponents' distinctive personal interest in Proposition 8 came to an end. At that point, the proponents had succeeded in urging the voters to adopt an amendment to the California Constitution—which is all the initiative process allowed them to do—and they were then left with the same generalized interest in the law's defense as any other California citizen. And that generalized interest is insufficient to establish standing to defend Proposition 8. *Arizonans,* 520 U.S. at 64; *Lujan*, 504 U.S. at 573-76.

If an initiative were first challenged decades after its enactment, no one would suggest tracking down the proponents of the initiative to defend that measure any more than they would suggest tracking down any other citizen who voted for the measure. There is no reason to reach a different conclusion only because an initiative has been challenged closer in time to its enactment. With any procedural chal-

lenges behind them, and only the federal constitutional challenge alive, initiative proponents are no more than "a subclass of citizens who suffer no distinctive concrete harm." *Lujan*, 504 U.S. at 577. That is why the Court in *Arizonans* expressed "grave doubts" about whether initiative proponents have Article III standing to appeal. 520 U.S. at 65-66. And that is why the Court in *Don't Bankrupt Washington Committee v. Continental Illinois National Bank & Trust Co. of Chicago*, 460 U.S. 1077 (1983), summarily dismissed an appeal by an initiative proponent for lack of standing.

That conclusion could not be affected by a state law that purported to confer on proponents a personal interest in an initiative's enforcement. As explained above, the state may not transform a generalized interest in enforcement of the law into a personal injury merely by calling it one. *Lujan,* 504 U.S. at 576-77.

II. A STATE CANNOT CONFER STANDING BY DENOMINATING A PRIVATE PARTY'S GENERALIZED INTEREST AS THE STATE'S INTEREST

A. The Ninth Circuit did not hold that the proponents' generalized interest in application and enforcement of Proposition 8 gave them a personalized interest sufficient to establish Article III standing. Instead, it held that the state itself had an Article III interest in defending Proposition 8, which the state then validly conferred on the proponents. In reaching that conclusion, the court relied on the California Supreme Court's holding that California law "confers on the official proponents of an initiative the author-

ity to assert the state's interests in defending the constitutionality of that initiative, where the state officials who would ordinarily assume that responsibility choose not to do so." Pet. App. 38a; *see* Pet. App. 352a-402a (California Supreme Court opinion) (holding that California law authorizes initiative proponents to represent the state's interest in enforcement of voter-enacted initiatives).

The Ninth Circuit's reasoning cannot be squared with the basic Article III principles described above. The principle that a private party cannot assert a generalized interest in enforcement of the law as Article III injury is one of substance, not semantics—it ensures that courts "stay within their constitutionally prescribed sphere of action." *Steel Co.*, 523 U.S. at 102 n.4. Accordingly, just as the state cannot transform a generalized grievance into a personal interest by a law "that denominates it as such," *Lujan*, 504 U.S. at 576-77, neither can it transform a generalized interest insufficient to establish Article III standing into a cognizable Article III injury simply by relabeling it something else. States cannot, through labels alone, confer Article III standing on a private party where standing would not otherwise exist. *Cf. Orr*, 440 U.S. 268 at n.7; *Doremus*, 342 U.S. at 434.

B. If the rule were otherwise, the principle that a generalized interest in enforcement of the law is insufficient to create an Article III case or controversy would be drained of any practical meaning, because the states would be able to transform any generalized grievance into an Article III injury. Some examples illustrate why that is so.

In *Diamond*, discussed above, the Court held that a doctor ethically opposed to abortion did not have Article III standing to defend a state's restrictions on abortions. Under the Ninth Circuit's analysis, however, if the Illinois legislature had declared that physicians ethically opposed to abortion may represent the state's interest in its abortion restrictions when state officers refuse to appeal, *Diamond* would have come out the other way. And that would be true even though the physician would still be pressing the same generalized interest in enforcement of the law this Court held insufficient to establish Article III injury. 476 U.S. at 63-68.

In *Doremus*, the Court held that a taxpayer asserting no distinctive personal injury did not have Article III standing to appeal from a state court judgment, 342 U.S. at 434, and the Court recently reaffirmed that principle in *Winn,* 131 S. Ct. at 1443-45. Under the Ninth Circuit's analysis, however, *Doremus* would have come out differently if the state court had simply denominated the taxpayer's interest to be that of the state, even though the nature of the taxpayer's own interest would not have changed at all. Indeed, the California Supreme Court in this case explained that a citizen in a state mandamus action who suffers no personal injury can assert "the State's interest" in the enforcement of a "public duty," including the duty to comply with federal law. Pet. App. 392-93. Accordingly, under the Ninth Circuit's reasoning, if cases like *Doremus* and *Winn* had come up through the state system in California, this Court would have been required to entertain them even though the plaintiffs in those cases

possessed nothing more than a generalized interest in having state officers comply with the federal constitution.

Similarly, in *Arizonans*, the people of Arizona had approved an initiative that included a citizen-suit provision granting standing to enforce the initiative to any "person who resides in or does business in this State." 520 U.S. at 82. Under the Ninth Circuit's analysis, there would be nothing to prevent a state from granting to every "person who resides in or does business in [the] State" the authority to enforce or defend any provision of state law in any court, state or federal, so long as the state makes clear that the interest being enforced is the state's, not the individual's.

C. The consequences of the Ninth Circuit's theory do not stop there. If states could confer Article III standing on a private party by redesignating a generalized interest in enforcement of the law as the sovereign's interest, then Congress could do the same thing.

In *Steel Company*, for example, the Court held that Congress did not have authority to give any person the right to sue "on his own behalf" a defendant who failed to comply with the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1). The Court reasoned that a person's generalized interest in recovering penalties payable to the treasury was "insufficient for purposes of Article III." 523 U.S. at 108-09. Yet on the Ninth Circuit's analysis, the result in *Steel Company* would have been different if the statute allowed a private party to bring a generalized-grievance suit "on be-

half of the United States" rather than "on his own behalf."

To take a final example, under current law, when the United States fails to appeal a judgment enjoining enforcement of a statute, private parties who are not themselves injured by the judgment cannot intervene and appeal the judgment. *Cf. Diamond,* 476 U.S. at 63-68. Under the Ninth Circuit's theory, however, Congress could amend Federal Rule of Civil Procedure 24 and permit any private party to intervene and appeal, as long as Congress made clear that the private party was representing the United States' interest rather than his own.

No plausible conception of Article III would allow its strictures to be evaded so easily. In *Whitmore v. Arkansas*, 495 US. 149 (1990), the Court adopted stringent requirements for "next friend" standing in the habeas context, explaining that absent such constraints, "the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Id.* at 164. The need to prevent circumvention is even more pressing here. If the states and Congress could assume the role of Article III alchemists and freely transform a private party's generalized interest into the government's concrete injury-in-fact, the rule against federal courts entertaining suits involving only generalized grievances would have little remaining force.

III. AGENTS OF THE STATE CAN REPRESENT THE STATE'S INTERESTS, BUT PROPONENTS ARE NOT AGENTS OF THE STATE

A state may, of course, appoint an agent to represent its interests, as this Court has recognized. But that is far from what happened here. Under established common-law agency principles, an agent of the state has a fiduciary duty to serve the state's interest and is subject to the state's (or people's) control. *See* Restatement (Third) of Agency § 8.01 ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."); *id.* § 1.01 cmt. f(1) ("A relationship of agency is not present unless the person on whose behalf action is taken has the right to control the actor."). The proponents are not agents of the state because they do not owe a fiduciary duty to the state and they are not subject to its control in any respect. Requiring such an agency relationship will ensure that the courts decide concrete controversies, and not merely ideological, generalized grievances. To allow citizens with only a generalized grievance and no agency responsibilities to sue would be contrary to Article III principles and this Court's precedents. *Cf. Whitmore*, 495 U.S. at 163-64 (adopting common-law limits on "next friend" status to prevent circumvention of Article III's generalized-grievance rule).

A. *Karcher* And *Arizonans* Recognize That Agents Of The State May Represent The State's Interests

The Ninth Circuit relied on *Karcher v. May*, 484 U.S. 72 (1987), and *Arizonans* to support its conclusion that a delegation of authority to represent the state's interest was sufficient to give the proponents standing. Pet. App. 35a-38a. Neither case supports that conclusion. Both cases indicate only that a delegation of authority to an *agent* of the state may allow the agent to assert in federal court the state's interest in enforcement of its laws.

1. In *Karcher*, the Court held that the Speaker of the New Jersey House (Karcher) and the President of the New Jersey Senate (Orechio) could, in their official capacities, defend the constitutionality of a state statute on behalf of the state legislature. 484 U.S. at 82. But that was only because the Speaker and President were agents of the state legislature, and the state had delegated defense of the statute to the legislative branch when the executive branch declined to defend. *Id.*; *see Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902) (federal separation-of-powers principles are not binding on the states). Once Karcher and Orechio lost their posts as agents of their respective legislative bodies, this Court held, they no longer had authority to defend the statute. 484 U.S. at 81.

Thus, the ability of Karcher and Orechio to defend a state statute turned on their status as agents of the state legislature, a position from which they could be (and, indeed, were) removed. Nothing in *Karcher* suggests that a state delegation of authority

to private parties—who are not agents and who have only a generalized interest in enforcement—would be sufficient to create Article III standing.

2. The court of appeals also read *Arizonans* for the proposition that a delegation to private parties to represent the state's interest is sufficient to create Article III standing even when the private party otherwise has only a generalized interest in enforcing the law. Pet. App. 37a. But in expressing "grave doubts" about the standing of the proponents of the initiative at issue in *Arizonans*, the Court stated that "we are aware of no Arizona law appointing initiative sponsors as *agents* of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." 520 U.S. at 65 (emphasis added). As that passage made clear, the Court viewed the absence of an agency relationship between the sponsors and the people as the potentially fatal defect in the sponsors' claim to represent the state's interest.

Two other features of the decision in *Arizonans* demonstrate that the Court's standing analysis focused on whether an agency relationship existed between the sponsors and the state, and not simply on whether the state had delegated authority to represent its interest. First, the Court noted that the sponsors in that case were not "elected representatives." 520 U.S. at 65. That fact is important to the question of agency, because the principal's control of the agent is a necessary feature of an agency relationship, and election is one way to ensure that the people retain such control.

Second, the Court did not view Arizona's citizen-suit provision authorizing any citizen to enforce the initiative in state court as sufficient to create Article III standing to defend the initiative in federal court. 520 U.S. at 66. At least on one view, however, the citizen-suit provision could have been regarded as delegating to any citizen the state's interest in enforcement of the initiative. *See id.* at 82 ("A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State." (quoting citizen-suit provision of challenged initiative)). That the Court did not even consider that possibility suggests that state law authority to represent the state's interest is not enough. Instead, the critical question is whether initiative proponents have become agents of the state for the purpose of defending an initiative. Only then is the state's adverse interest concretely and faithfully represented, as opposed to the ideological interests of private parties with only generalized grievances.

B. The Proponents Are Not Agents Of California

Applying the analysis in *Karcher* and *Arizonans,* the proponents here lack standing because they are not agents of the state. First, the proponents do not have a fiduciary duty to the people. A comparison between the California Attorney General's duties and those of the proponents is especially telling. The Attorney General takes an oath to support the federal and state Constitution and is required to devote her entire time to the service of the State. Cal. Const. art. XX, § 3; Cal. Gov. Code § 12504. The

proponents, by contrast, take no such oath and have no such state-law duty. Nor did the California Supreme Court impose any fiduciary duty on the proponents to serve the interests of the state or the people. Instead, the California Supreme Court held that the proponents are subject only to the ethical constraints that apply to all other civil litigants, such as refraining from making frivolous claims. Pet. App. 391a.

The proponents are also not subject to control by the people or the state. The Attorney General must stand for elections at regular intervals (Cal. Const. art. V, § 11), is subject to a recall election at any time (Cal. Const. art II, §§ 13-16), and reports to the Governor (Cal. Gov. Code § 12522; Cal. Const. art. V, § 4). The proponents, by contrast, were not elected by anyone, cannot be removed by anyone, and are not subject to control by any state official or by anyone else. Instead, on the view of the California Supreme Court, the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it. They are accountable to no one but themselves, and certainly do not represent the state's distinctive interests.

The proponents assert that they are agents of the state. Pet. Br. 15. But they cannot be agents where, as here, they have no fiduciary duty and are subject to neither the state's nor the people's control.

Notably, neither the California Supreme Court nor the Ninth Circuit ever suggested that the proponents were agents of the state or the people. Other than one quotation of *Arizonans*, the California Su-

preme Court did not even use the word "agent" in its decision. It did not find that the proponents had a fiduciary duty to the state or that they were subject to the people's control. And it expressly reserved judgment on whether the state would be liable for the potentially sizable award of attorneys' fees caused by successive unsuccessful appeals, Pet. App. 395a, even though fee liability would follow as a matter of course if the proponents were agents. *See*, *e.g.*, Restatement (Third) of Agency § 2.01 & cmt. c.

The Ninth Circuit, for its part, conspicuously deleted the reference to "agents" in *Arizonans* in concluding that petitioners have "the authority 'to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.'" Pet. App. 37a (quoting *Arizonans*, 520 U.S. at 65); *compare Arizonans*, 520 U.S. at 65 ("[W]e are aware of no Arizona law appointing initiative sponsors as *agents of the people of Arizona* to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." (emphasis added)). And it too made no finding that the proponents had a fiduciary duty to the state or that they were subject to its control.

C. Other Decisions Of This Court Support The Agency Rule

As discussed, *Karcher* and *Arizonans* support the rule that agents can assert the state's interest in enforcement of the law, but that private parties who only have a generalized interest in enforcement of a law may not. Other decisions of this Court also support that rule.

1. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000), confirms that the government can authorize an agent to represent its interest in federal court. At the same time, it indicates that a mere delegation of authority to represent the state's interest to a private party does not suffice.

In *Stevens,* the court examined a qui tam provision that authorized a person to bring a civil action "for the person *and for the United States Government*." 31 U.S.C. § 3730(b) (emphasis added). That provision clearly delegates to private plaintiffs the authority to assert the government's interest. If that were enough to confer standing, the opinion could have ended there with a statement to that effect. Instead, however, the Court examined two bases for standing that would have been unnecessary to consider had the delegation of authority to represent the government's interest been enough by itself.

The Court first examined whether standing could be upheld on the theory that a qui tam plaintiff "is simply the statutorily designated *agent* of the United States." 529 U.S. at 772 (emphasis added). The Court rejected that possibility because qui tam plaintiffs do not satisfy traditional agency standards: They lack a fiduciary duty because they can sue on their own behalf as well as on behalf of the government. *Id.* And they are not subject to government control, because they are entitled to a hearing if the United States decides to dismiss the suit, and the government cannot settle the suit without a judicial finding of fairness. *Id.* The implication of that discussion is that qui tam plaintiffs would have Article

III standing to assert the government's interest if they were properly regarded as agents, but that a mere delegation of authority to represent the government's interest does not confer standing.

Ultimately, the Court held that a qui tam plaintiff has Article III standing to sue on behalf of the government and himself by virtue of an assignment of the government's monetary claim. 529 U.S. at 773. That aspect of the decision is not relevant here because the state itself has no monetary stake in the outcome of the defense of Proposition 8, and it in any event did not assign to the proponents any such monetary stake.

2. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), is the only other case that approves a private party's ability to assert the government's interest in federal court, and it too is consistent with traditional agency principles. There, the Court held that a district court could validly appoint a private party to prosecute another party for criminal contempt. *Id.* at 800-01. But that was only because a private prosecutor has a duty to vindicate the public interest and is subject to the court's control. The Court explained that the prosecutor "is appointed solely to pursue the public interest in vindication of the court's authority," and stressed the need for "assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice." *Id.* at 804, 814. Moreover, any private prosecutor is subject to the control of the court because the court has supervisory power over the contempt proceedings it initiates. *Id.* at 808-09.

In *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184 (2010), the only four Justices to address the issue also made clear that private prosecutors act as agents of the government. *Id.* at 2188 (Roberts, C.J., joined by Scalia, Kennedy, and Sotomayor, J.J., dissenting from dismissal of certiorari as improvidently granted). The opinion for the four Justices explained that in England "private parties could initiate criminal prosecutions, but the Crown—entrusted with the constitutional responsibility for law enforcement—could enter a *nolle prosequi* to halt the prosecution," and that "those private parties necessarily acted (and now act) on behalf of the sovereign." *Id.*

3. In *Lance v. Coffman*, 549 U.S. 437 (2007) (per curiam), the Court identified two early twentieth-century cases in which the Court resolved Election Clause claims on the merits, rather than dismissing for lack of standing, where the plaintiff relators brought suit in the name of the state. *Id.* at 442 (citing *Smiley v. Holm*, 285 U.S 355 (1932), and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916)). Because the issue of standing was neither raised nor addressed in either of those cases, however, they do not establish any precedent on that issue. *Winn*, 131 S. Ct. at 1448.

The Court's decision to resolve those cases on the merits rather than dismiss for lack of sanding is also understandable. Each of those decisions came before the Court authoritatively held in *Doremus* that satisfaction of state-law standing rules is insufficient to satisfy the requirements for an Article III case or controversy when an appeal is taken from a

state court judgment to this Court. *See* 342 U.S. at 434. And each of the plaintiffs made an uncontradicted assertion of personal injury. *See Baker v. Carr*, 369 U.S. 186, 206 & n.26 (1962) (explaining that the plaintiff in *Smiley* and other similar cases alleged "facts showing disadvantage to themselves as individuals"); Sup. Ct. Record in *Hildebrant* at 3 ("the Plaintiff has and will be injured"); *id.* at 52 (asserting that the action "affect[ed] [plaintiff's] private or personal rights").

D. The Agency Rule Preserves A Federal Court's Proper Role, Promotes The Constitution's Concern For Government Accountability, And Ameliorates The Administrability Concerns Raised By The Ninth Circuit's Rule

The adoption of common-law agency as a limit on who can assert the state's interest is necessary to preserve the federal courts' Article III role. In particular, it would ensure that the courts will not become a forum for the airing of generalized grievances by parties who have nothing more than an ideological commitment to enforcement of a law or the Constitution. When a party who has a fiduciary duty to the state and is subject to its control appears in federal court, the court can be sure that the party is seeking to vindicate the state's interest, and not merely his own ideological agenda. Absent a fiduciary duty to serve the state's interest and control by the people, an Article III court has no such assurance.

This case provides a stark illustration. In the district court, the proponents made no effort to har-

monize their defense of the initiative with other relevant state policies. Instead, they urged the district court to retroactively deny recognition to couples married under prior law and to set aside any other state polices, presumably including laws providing gay men and lesbians equal rights to rear children, if that were necessary to vindicate the initiative. Dist. Ct. Docket No. 687, at 46. Because the proponents had no fiduciary duty to the state, and were not subject to the state's control, the district court could have no assurance that these positions were aimed at furthering the state's interests, rather than the proponents' own ideological agenda.

A rule that private parties may assert the state's interest only when they are common-law agents would also further the Constitution's structural goal of ensuring that states are accountable for their decisions. *New York v. United States*, 505 U.S. 144, 168-89 (1992). When agents of the state are entrusted with the decision whether to appeal an adverse judgment, those agents (or their superiors) can be held accountable for that decision, as well as for the arguments ultimately made to the court.

The Ninth Circuit's state authority rule, by contrast, would allow the states to blur the lines of accountability. By allowing initiative proponents to appeal when state agents do not, the state shields the Attorney General and other responsible state officials from the electoral consequences of preventing an appeal. Simultaneously, state officials can cast the blame for the decision to appeal on private parties without absorbing the political consequences for that decision.

The Ninth Circuit's rule also raises serious administrability concerns. For example, a federal court would have no way to know what to do when proponents disagree among themselves on such matters as whether to appeal, whether to settle the case, whether to stipulate to facts, and what arguments should be made. By contrast, under the agency rule, there are no comparable administrability concerns because governments routinely assign the power to resolve any conflicts among agents to a single high-ranking officer. *See United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988); *Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 771-72 (1980).

IV. THE STATE CAN ENSURE DEFENSE OF ITS INITIATIVES WITHOUT PUTTING IT IN THE HANDS OF PRIVATE PARTIES WHO HAVE NOTHING MORE THAN A GENERALIZED INTEREST IN A LAW'S ENFORCEMENT

The Ninth Circuit concluded that recognizing the standing of proponents to defend an initiative when state officials do not is necessary to protect the initiative process. Pet. App. 38a-39a. That conclusion is incorrect. There are a variety of ways for a state to guarantee a defense of its initiatives without conscripting federal courts to adjudicate the grievances of private parties who have nothing more than a generalized interest in an initiative's enforcement.

First, because state courts are not bound by the Article III case-or-controversy requirement, *ASARCO*, 490 U.S. at 617, a state can authorize initiative proponents, after an initiative is approved

but before it takes effect, to file suit in state court against the Attorney General for a binding determination that the initiative is constitutional. *Cf.* Pet. App. 393a ("[P]rivate citizens have long been authorized to bring a mandate action to enforce a public duty involving the protection of a public right in order to ensure that no government body impairs or defeats the purpose of legislation establishing such a right.").

Second, the state could require the Attorney General, before an initiative about which she has constitutional doubt takes effect, to initiate a declaratory judgment action in state court to resolve the constitutionality of the initiative, or seek an advisory opinion from the state's highest court. *Cf.* Neb. Rev. Stat. 84-215 (if the Attorney General concludes that an act of the legislature is unconstitutional and any state official fails to implement the act in reliance on that opinion, then "the Attorney General shall … file an action in the appropriate court to determine the validity of the act"); Mass. Const., Art. LXXXV (amending the Massachusetts Constitution to provide: "Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions").

Third, the state could require the Attorney General or another state official to defend the constitutionality of enacted initiatives and to take all available appeals to do so. Indeed, state law could authorize any initiative to include that requirement as one of its provisions.

Fourth, without requiring the Attorney General to offer a defense of the initiative, the state could require the Attorney General to enforce it and take all possible appeals, while allowing the proponents or others to participate as amici curiae to defend the initiative on the merits. Such a procedure fully complies with Article III. *See INS v. Chadha*, 462 U.S. 919, 931 & n.6, 939-40 (1983).

Fifth, the state could create an independent office responsible for defending initiatives in cases in which the Attorney General declines to do so. The state could, for example, allow state courts to appoint such an officer and subject him to removal for cause by the Governor or Attorney General. *Cf. Morrison v. Olson*, 487 U.S. 654 (1988).

These options—and there are likely others—taken separately or together, would ameliorate the concern that the California initiative process could be undermined by state officials' refusal to defend the constitutionality of initiatives. The one option states cannot pursue is the constitutionally unacceptable one of conferring on private parties who have only a generalized interest in enforcement of an initiative the right to invoke the jurisdiction of a federal court.

V. THE COURT OF APPEALS' JUDGMENT SHOULD BE VACATED, BUT THE DISTRICT COURT'S JUDGMENT SHOULD BE ALLOWED TO STAND

Because the proponents did not have standing to appeal to the Ninth Circuit, the Court should vacate the judgment of the court of appeals. *See Diamond,*

476 U.S. at 71; *Karcher,* 484 U.S. at 83. The district court's judgment, however, should not be vacated. Because the plaintiffs sued for marriage licenses in the district court, and the state defendants refused to provide them absent a court order, a case or controversy existed in the district court. *See Chadha,* 462 U.S. at 939-40. In the past, when this Court has dismissed for lack of standing to appeal, it has left intact the judgment of the last court in which there was a case or controversy. *See Diamond,* 476 U.S. at 71; *Karcher,* 484 U.S. at 83. There is no reason not to follow the same course here.

The proponents argue that the district court issued an injunction that exceeded its remedial authority because it ordered a statewide injunction against the enforcement of Proposition 8, rather than limiting the scope of the injunction to the named plaintiffs. Pet. Br. 18. Such arguments may be open to future litigants with Article III standing. But because no party with standing appealed the district court's judgment, issues relating to the district court's injunction and the scope of the court's remedial authority are not properly before this Court.

CONCLUSION

The court of appeals' judgment should be vacated, with instructions to dismiss petitioners' appeal for lack of jurisdiction.

Respectfully submitted,

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