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## ESSAY

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### ARTICLE III DOUBLE-DIPPING: PROPOSITION 8'S SPONSORS, BLAG, AND THE GOVERNMENT'S INTEREST

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#### INTRODUCTION

A major procedural question looms over the two marriage cases currently before the U.S. Supreme Court: Do the parties who seek to defend the marriage-recognition bans have standing to advance their views?<sup>1</sup> The question arises because the governments that would have Article III standing, by virtue of their enforcement authority, are not defending their own laws.<sup>2</sup>

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<sup>1</sup> The Court posed standing questions as part of its grant of certiorari in the two cases. In *Hollingsworth v. Perry* (*Perry V*), the Court asked the parties to brief and argue the question “[w]hether petitioners have standing under Article III, §2 of the Constitution in this case.” 133 S. Ct. 786, 786 (2012). In *United States v. Windsor* (*Windsor IV*), the Court granted the petition of the United States and directed the parties to answer two procedural questions: “[1] Whether the Executive Branch’s Agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and [(2)] whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.” 133 S. Ct. 786, 786 (2012). This Essay focuses on the Article III standing question in both cases.

<sup>2</sup> The Court has long held that governments have standing to defend their laws. *See, e.g.,* *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (“[A] State clearly has a legitimate interest in the continued enforceability of its own statutes.” (citing *Diamond v. Charles*, 476 U.S. 54, 65 (1986))).

By “government” in reference to the *Windsor* litigation, I mean the United States, which was the named defendant in the complaint, *see* Complaint at para. 12, *Windsor v. United States* (*Windsor II*), 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-8435), 2010 WL 5647015, and which filed the petition for certiorari, *see* Petition for a Writ of Certiorari Before Judgment at 1, *United States v. Windsor*, No. 12-307, 2012 WL 3991414 (U.S. Sept. 11, 2012).

Instead, in *Hollingsworth v. Perry*, private parties are attempting to take up the state government's mantle to defend Proposition 8, which withdrew marriage rights from same-sex couples in California.<sup>3</sup> And in *United States v. Windsor*, five members of the House of Representatives leadership seek to defend the federal Defense of Marriage Act (DOMA)<sup>4</sup> in the name of the Bipartisan Legal Advisory Group (BLAG).<sup>5</sup>

As a preliminary matter, these parties' formal authority to assert the government's standing is questionable. In *Perry*, the California Supreme Court ruled that the ballot measure's sponsors could act in the government's stead to defend "their" initiative,<sup>6</sup> but that ruling lacks support in California law.<sup>7</sup> BLAG's authority in *Windsor* is also fragile.<sup>8</sup> BLAG did not obtain approval from the House of Representatives until nearly two years after first intervening to defend DOMA in federal court (and well after filing its petition for a writ of certiorari in *Windsor*).<sup>9</sup> And even with that approval,

For extended discussion of the authority of legislators and nongovernmental actors to defend statutes and initiated measures, see Suzanne B. Goldberg, Private Parties, Legislators, and the Government's Mantle: On Intervention and Article III Standing (Dec. 24, 2012) (unpublished manuscript), available at <http://papers.ssrn.com/abstract=2193601>.

<sup>3</sup> Proposition 8 was proposed by ProtectMarriage.com and several individuals to override a California Supreme Court determination in earlier litigation that the "designation of marriage" cannot be withheld from same-sex couples in California. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); see also *Perry v. Brown (Perry IV)*, 671 F.3d 1052, 1067 (9th Cir.) (describing the introduction and promotion of Proposition 8 in response to the California Supreme Court's ruling), cert. granted sub nom. *Perry V*, 133 S. Ct. 786 (2012). Proposition 8 amended the California Constitution, providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. 1, § 7.5.

<sup>4</sup> 1 U.S.C. § 7 (2006). The plaintiff-respondent in *Windsor* challenges only Section 3 of DOMA, which states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife . . ." *Id.*

<sup>5</sup> See Petition for Writ of Certiorari Before Judgment, *supra* note 2, at 6.

<sup>6</sup> See *Perry v. Brown (Perry III)*, 265 P.3d 1002, 1010, 1033 (Cal. 2011).

<sup>7</sup> The state's initiative law focuses almost exclusively on the pre-passage procedure for qualifying ballot measures. See *infra* notes 51-52 and accompanying text; see also Goldberg, *supra* note 2, at 32-33, 33 n.15 (discussing the limited scope of California initiative law). Given the absence of fair or substantial state law support for the California Supreme Court's ruling, that ruling is not binding on the federal courts for jurisdictional purposes. Cf. *Howlett v. Rose*, 496 U.S. 356, 366 n.14 (1990) ("[W]e have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds fair or substantial support in state law." (citations and internal quotation marks omitted)).

<sup>8</sup> See *infra* text accompanying notes 54-57 (discussing whether Congress has standing to seek enforcement of a federal statute).

<sup>9</sup> See H.R. Res. 5, 113th Cong. § 4(a)(1) (2013) (enacted); see also Plaintiffs' Opposition to the Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives for Leave to Intervene, *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. May 10, 2012) [hereinafter Plaintiffs'

BLAG represents only the House, rather than the full Congress that passed DOMA.<sup>10</sup> In addition, in both *Windsor* and *Perry*, there are significant problems with the lower courts having permitted intervention at all.<sup>11</sup>

There are two more fundamental difficulties with the *Perry* petitioners' and BLAG's claims to standing. First, each presents the Article III double-dipping problem to which this Essay's title refers. The problem arises because there are parties asserting the government's interest and, therefore, the government's standing, on both sides of each case.<sup>12</sup> That is, the California and United States governments have taken the position that their exclusion of same-sex couples from marriage is unconstitutional while the *Perry* petitioners and BLAG seek to argue, also on the government's behalf, that the exclusions are constitutional.<sup>13</sup>

The second problem arises from the premise, essential to the standing claims of both the *Perry* petitioners and BLAG, that governments can confer their Article III standing on private actors and subsets of legislators. The difficulty is that the government's standing derives from its interest in enforcing its laws, which is not an interest shared by either group.

The remainder of this Essay elaborates these two points in the context of the *Perry* and *Windsor* cases. I argue that both the double-dipping problem and the limits on a government's ability to transfer its standing to private actors in this context leave Proposition 8's sponsors and BLAG without Article III standing to press their positions. Nor can either group of would-be defenders demonstrate the "concrete and particularized" stake it would need to have standing in its own right<sup>14</sup> rather than on the government's behalf.

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Opposition] (arguing at length against BLAG's capacity to represent the House); *infra* notes 36-37 and accompanying text (discussing BLAG's intervention in this dispute).

<sup>10</sup> See Plaintiffs' Opposition, *supra* note 9, at 32-33.

<sup>11</sup> See Goldberg, *supra* note 2, at 14-18. The essence of the problem is that intervention requires a cognizable interest closely related to the litigation. Initiative proponents and subgroups of legislators do not have this requisite interest for many of the same reasons that they lack standing.

<sup>12</sup> Parties seeking to invoke federal jurisdiction "must establish . . . a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). For a discussion of the parties' respective positions, see *supra* notes 3-5 and *infra* notes 15 & 18.

<sup>13</sup> See *infra* text accompanying notes 15-19 & 33-38.

<sup>14</sup> *Lujan*, 504 U.S. at 560; see also *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-44 (1986) (holding that a school board member who "has no personal stake in the outcome of the litigation" lacked Article III standing to represent the Board as a whole).

## I. ARTICLE III DOUBLE-DIPPING

In both *Perry* and *Windsor*, as just noted, the government entities that would ordinarily defend the challenged marriage laws have conceded that the laws are unconstitutional and should be invalidated.<sup>15</sup> Yet the intervenors claim to represent the government's interest in arguing that the measures should be upheld. This Janus-faced commitment to both sides of the cases, if permitted, renders the concept of the government's interest incoherent for Article III purposes.<sup>16</sup>

A. *Double-Dipping in Perry*

In *Perry*, California's Attorney General, as the state's chief legal officer, asserted at the litigation's outset that the government's interest lay in opposing Proposition 8's exclusion of same-sex couples from marriage.<sup>17</sup> In answer to the plaintiffs' complaint, he wrote that "[t]aking from same-sex couples the right to civil marriage that they had previously possessed under California's Constitution cannot be squared with guarantees of the Fourteenth Amendment [of the federal Constitution]."<sup>18</sup> Yet Proposition 8's sponsors also claimed to assert the government's interests, but from the opposite vantage point—arguing that numerous rationales justified California's exclusion of same-sex couples from marriage.<sup>19</sup>

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<sup>15</sup> See Answer of Attorney General Edmund G. Brown Jr. at 9-10, *Perry v. Schwarzenegger* (*Perry I*), 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292), 2009 WL 1748382 [hereinafter Brown Answer]; Press Release, U.S. Dep't of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Holder Letter], <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>16</sup> State courts are free, within the limits of state law, to sanction this sort of split standing, but their determinations do not control *federal* standing analysis. See, e.g., *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy . . ."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) ("Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's . . . standing in state court.").

<sup>17</sup> See Brown Answer, *supra* note 15, at 4 (admitting that "in his official capacity he is the chief law officer of the state; that it is his duty to see that the laws of the state are uniformly and adequately enforced").

<sup>18</sup> *Id.* at 2; see also, e.g., *id.* at 3, 8, 10 (restating the Attorney General's conclusion that Proposition 8 violated the Constitution's equal protection guarantee).

<sup>19</sup> See *Perry IV*, 671 F.3d 1052, 1086 (9th Cir.) (summarizing "four possible reasons offered" by Proposition 8's sponsors in defense of the measure), *cert. granted sub nom. Perry V*, 133 S. Ct. 786 (2012); *id.* at 1074 (characterizing the *Perry* petitioners as "assert[ing] the interests of the State of California"). Proposition 8's sponsors were able to advance these arguments after the district court permitted them to intervene. See *Perry I*, 704 F. Supp. 2d at 930 (recounting how Proposition 8's sponsors intervened in the case).

Sensitive to the potential for a standing problem, the Ninth Circuit certified to the California Supreme Court the question whether Proposition 8's sponsors could assert the state's interest to defend the measure they had promoted.<sup>20</sup> The state high court held that they could, reasoning that "when the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, . . . the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity."<sup>21</sup> Affirming this substitutional standing for initiative sponsors, the court added that "the role played by the proponents in such litigation is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law and raising all arguable legal theories upon which a challenged provision may be sustained."<sup>22</sup>

The Ninth Circuit then held that it was "bound to accept the California court's determination" regarding the proponents' standing,<sup>23</sup> while also acknowledging its obligation to conduct an independent Article III review.<sup>24</sup> "The People of California are largely free to structure their system of governance as they choose," the court wrote, "and we respect their choice."<sup>25</sup>

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<sup>20</sup> See *Perry v. Schwarzenegger (Perry II)*, 628 F.3d 1191, 1193 (9th Cir.), *certified question answered sub nom. Perry III*, 265 P.3d 1002 (Cal. 2011).

<sup>21</sup> *Perry III*, 265 P.3d at 1033. Presumably, even a weak defense by state officials would preempt Article III claims by the initiative sponsors, although this cuts against the California high court's suggestion that the sponsors are best positioned, in nearly any case, to defend the People's interests. As the California Supreme Court wrote:

"Allowing official proponents to assert the state's interest in the validity of the initiative measure . . . assures voters . . . that any residual hostility or indifference of current public officials to the substance of the initiative measure will not prevent a full and robust defense of the measure to be mounted in court on the people's behalf . . ."

*Id.* at 1006.

<sup>22</sup> *Id.* at 1023. Interestingly, Proposition 8's sponsors did not make this argument in their intervention motion. Instead, they argued that they had "unique legal statuses regarding [the] initiative" because they "ha[d] indefatigably labored in support of Proposition 8." Proposed Intervenors' Notice of Motion and Motion to Intervene, and Memorandum of Points and Authorities in Support of Motion to Intervene at 8-9, *Perry I*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292), 2009 WL 1499309.

<sup>23</sup> *Perry II*, 671 F.3d at 1072; *see also id.* at 1075 ("Because the State of California has Article III standing to defend the constitutionality of Proposition 8, and because both the California Constitution and California law authorize [standing for] the official proponents of an initiative," when government officials do not defend, Proposition 8's sponsors "are proper appellants." (internal quotation marks and citations omitted)).

<sup>24</sup> *See id.* at 1074 ("To be clear, we do not suggest that state law has any 'power directly to enlarge or contract federal jurisdiction.'" (quoting *Duchek v. Jacobi*, 646 F.2d 415, 419 (9th Cir. 1981))).

<sup>25</sup> *Id.* at 1073.

But, given that California was a full participant in the litigation and took a position in the case, the *Perry* petitioners can stand in for the state only if the state can bifurcate its Article III standing, retaining some for itself and apportioning the rest to a party on the other side of the case.<sup>26</sup> In other words, the state would have a permanent interest in defending its laws that it could confer on others whenever state officials determined that a challenged law was invalid.<sup>27</sup> Indeed, per the Ninth Circuit's analysis, the state would have categorical control over how and when to bifurcate its standing.<sup>28</sup>

Treating ballot measure sponsors as though they were the state's agents or outside counsel does not alleviate the tensions associated with this concern about double-dipping. Given the Attorney General's position that Proposition 8 is invalid, the sponsors cannot serve as the state's agents unless the government is able to split its interest in two. The sponsors also cannot plausibly obtain outside-counsel status when they are arguing against

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<sup>26</sup> One might argue that the government does not deploy its Article III interest if it opposes, rather than defends, a law. Under this view, a government only has an Article III interest if and when it seeks to *enforce* its laws. But the argument is flawed for two reasons. First, the state's interest in enforcing its laws is not a free-floating one that can be transferred, if not used by the state, to another party with no cognizable interest in enforcement. *See infra* text accompanying notes 48-53. Second, the government can also be said to have "used" its interest by exercising its prerogative *not* to enforce a challenged law. In other words, the government's interest is not in enforcement absolutely, but instead in taking a position on whether or not it should be enforcing a given measure.

Separately, if the Governor and Attorney General had taken opposing positions regarding Proposition 8's constitutionality, there would be a question whether federal courts would have to grant standing to whichever government official sought to defend the law. While that is not the case in *Perry*, the Article III double-dipping analysis suggests that, in the context of such a policy dispute, the state would have to determine which official's interest trumped for federal standing purposes.

<sup>27</sup> An argument that the sponsors were merely stepping into the shoes of the governmental defendants other than the Attorney General is not tenable here because those government actors participated in the *Perry* litigation; they responded to the plaintiffs' complaint and then accepted the district court judgment that Proposition 8 was invalid. They did not exercise their right to file an appeal or make their acceptance of the judgment contingent on the sponsors' appeal. In other words, all of the official defendants participated for themselves; the initiative sponsors thus could not have stood in their stead. *See Perry IV*, 671 F.3d 1052, 1068 (9th Cir.) (summarizing the case's procedural history), *cert. granted sub nom. Perry V*, 133 S. Ct. 786 (2012).

<sup>28</sup> *See id.* at 1064 (explaining that "[i]t is for the State of California to decide who may assert its interests in litigation"). Although the California Supreme Court held that the official sponsors were "the most obvious and logical persons to assert the state's interest in the initiative's validity on behalf of the voters who enacted the measure," based on "their unique relationship to the initiative measure under [the California Constitution] and the relevant provisions of the [Elections] Code," *Perry III*, 265 P.2d 1002, 1006 (Cal. 2011), there seems to be nothing in the Ninth Circuit's analysis to prevent California from selling its standing to the highest bidder or, less provocatively, from having a lottery among all who had demonstrated their commitment by promoting the initiative. The lottery suggestion assumes that there is a limit to the number of parties on which a state can confer its Article III interest, but in the Ninth Circuit's analysis, there is no indication that such a limit exists. *See Perry IV*, 671 F.3d at 1064.

the government's position. Further, standing derives from the parties in a case; counsel does not gain the requisite Article III stake through its work on a party's behalf.

Nor can the Ninth Circuit's characterization of the sponsors as representatives of the People rather than the government eliminate the tension arising from these competing assertions—and conceptions—of the government's interest. In its opinion, the court stressed, for example, that “the People have an interest in the validity of Proposition 8” and that “under California law, Proponents are authorized to represent the People's interest.”<sup>29</sup> But the California Supreme Court itself made clear that to advance the People's interests is to advance the state's interests.<sup>30</sup> Indeed, it would make little sense for the sponsors' standing to be contingent on public officials' actions if the People's interests were distinct from the state's. In addition, if the state's interests that give rise to standing are separable from the People's, the potential for double-dipping escalates, with the People and the state both entitled to claim the government's stake for Article III purposes. Further, this sort of generalized “People's interest” is precisely what standing doctrine has long rejected; only a radical jurisprudential change would permit such a shift in Article III jurisprudence.<sup>31</sup>

Finally, permitting Article III double-dipping puts federal courts in the position of giving second opinions to a government absent a genuine conflict between that government and the party that sued it. In *Perry*, for example, there is no dispute between the state and the plaintiffs about whether Proposition 8 should be enforced; the state's “stake” in defending the law is thus an empty one. If Proposition 8's proponents are allowed to claim this empty interest to obtain federal review, their engineered, artificial conflict becomes the basis for obtaining federal court guidance about the state's nonenforcement decision.<sup>32</sup>

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<sup>29</sup> *Perry IV*, 671 F.3d at 1073; see also *Perry III*, 265 P.2d at 1006 (“[I]n most instances it may well be an abuse of discretion for a court to fail to permit the official proponents of an initiative to intervene . . . to protect the people's right to exercise their initiative power . . .”).

<sup>30</sup> See *Perry III*, 265 P.2d at 1006 (deciding that “California law authorizes the official proponents . . . to appear in the proceeding to assert the state's interest in the initiative's validity”).

<sup>31</sup> See *infra* note 58 and accompanying text.

<sup>32</sup> Arguably, this amounts to an impermissible request for an advisory opinion per *Muskrat v. United States*, where the Court found that a request was not justiciable where the defendant government had “no interest adverse to the claimants.” 219 U.S. 346, 361 (1911). Either way, Article III remains a problem for these defendant-intervenors, who, like other parties seeking federal court review, must have a “direct stake in the outcome.” See *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)).

### B. *Double-Dipping in Windsor*

In *Windsor*, the double-dipping problem first arose when the United States, as defendant, agreed that DOMA was invalid, but a subset of its lawmakers sought to invoke the government's interest to assert the statute's constitutionality.<sup>33</sup> While there are situations in which distinct parts of the federal government have been permitted to appear on both sides of a case,<sup>34</sup> the circumstance of dueling lawmakers and law enforcers regarding the continued viability of a federal marriage law poses troubling questions about the degree to which the government's Article III standing can be stretched to enable federal adjudication of policy disagreements.

More specifically, the United States, through the Department of Justice (DOJ), began to "advocate that the statute be ruled unconstitutional" following the Attorney General's announcement that the Obama administration would not defend DOMA.<sup>35</sup> Shortly after, BLAG, a five-person body consisting of House majority and minority leaders,<sup>36</sup> intervened to take "the laboring oar in defense of the statute,"<sup>37</sup> and federal courts throughout the country accepted its intervention on behalf of the House of Representatives.<sup>38</sup>

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<sup>33</sup> *Windsor II*, 833 F. Supp. 2d 394, 397 (S.D.N.Y.), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).

<sup>34</sup> See Michael Herz, United States v. United States: *When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 910-11 (1991) (discussing examples of interbranch litigation).

<sup>35</sup> See *Windsor v. United States (Windsor III)*, 699 F.3d 169, 176 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012); see also Holder Letter, *supra* note 15 (announcing and explaining DOJ's decision not to defend DOMA).

<sup>36</sup> See R. OF THE HOUSE OF REPS., R. II, § 8 (2013), available at <http://clerk.house.gov/legislative/house-rules.pdf> (describing the composition of BLAG). Only three of BLAG's five members, all Republicans, voted in favor of defending DOMA. See Press Release, John A. Boehner, Speaker, U.S. House of Representatives, House Will Ensure DOMA Constitutionality Is Determined by the Court (Mar. 9, 2011), available at <http://boehner.house.gov/news/documentsingle.aspx?DocumentID=228585> (explaining that BLAG directed the House General Counsel to initiate a legal defense of DOMA and that "[t]his action by the House will ensure that this law's constitutionality is decided by the courts, rather than by the President unilaterally"); Press Release, Nancy Pelosi, Minority Leader, U.S. House of Representatives, Pelosi Letter to Speaker Boehner on House Counsel Defense of DOMA (Mar. 11, 2011), available at <http://pelosi.house.gov/news/press-releases/2011/03/pelosi-letter-to-speaker-boehner-on-house-counsel-defense-of-doma.shtml> (noting that BLAG "voted this week by a 3-2 margin to direct the House General Counsel to initiate a legal defense of [DOMA]").

<sup>37</sup> See *Windsor III*, 699 F.3d at 176.

<sup>38</sup> See *Windsor v. United States (Windsor I)*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011) (stating that "BLAG has a cognizable interest in defending the enforceability of statutes the House has passed"); see also, e.g., *Revelis v. Napolitano*, 844 F. Supp. 2d 915, 925 (N.D. Ill. 2012) (finding that BLAG had Article III standing because "[t]he House has an interest in defending the constitutionality of legislation which it passed when the executive branch declines to do so").



Unlike in *Perry*, where the government defendants did not appeal the district court's decision,<sup>39</sup> the United States appealed DOMA's invalidation, explaining that although it agreed with the district court's determination, it would continue to enforce the law.<sup>40</sup>

But the difficulties for BLAG, are several, even with the United States' certiorari petition having been granted. First, BLAG's authority is limited to asserting the interests of the House of Representatives, at most.<sup>41</sup> More generally, even if BLAG were accepted as a representative of the legislative branch, it is not clear that Article III does or should permit the federal government to bifurcate its standing for purposes of having federal courts resolve policy disputes between the executive and legislative branches.<sup>42</sup>

One might argue that lawmakers have a direct stake in defending the laws they have passed so that they are not double-dipping into the government's enforcement interest but instead are asserting the legislature's independent Article III interest in the case. This theory arguably grows out of *INS v. Chadha*, in which the Court allowed Congress to defend an immigration law when the enforcing agency, the Immigration and Naturalization Service, agreed with the plaintiff that the law was unconstitutional.<sup>43</sup> The Court wrote that it had "long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."<sup>44</sup>

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<sup>39</sup> See *Perry II*, 628 F.3d 1191, 1195 (9th Cir.) (stating that the named government defendants did not appeal the district court order enjoining them from enforcing Proposition 8), *certified question answered sub nom. Perry III*, 265 P.3d 1002 (Cal. 2011).

<sup>40</sup> See *Windsor III*, 699 F.3d at 176 (stating that "[n]otwithstanding the withdrawal of its advocacy, the United States continues to enforce Section 3 of DOMA, which is indeed why Windsor does not have her money"); Petition for Writ of Certiorari Before Judgment, *supra* note 2, at 6 (explaining that the United States filed its appeal to "ensur[e] that the court had Article III jurisdiction to enter judgment for or against the federal officials tasked with enforcing Section 3").

Based on this continued enforcement, the Second Circuit affirmed that BLAG did not need to establish independent Article III standing. See *Windsor III*, 699 F.3d at 176. At the Supreme Court's request, an amica curiae filed a brief that argues against the United States' standing to seek review when it agrees with the lower court's decision on the merits. See Brief for Court-Appointed *Amica Curiae* Addressing Jurisdiction at 23-24, *United States v. Windsor*, No. 12-0307 (U.S. Jan. 24, 2013), 2013 WL 315234.

<sup>41</sup> See R. OF THE HOUSE OF REPS., *supra* note 36, at R. II, § 8; see also *supra* note 9 and accompanying text (discussing the House's post-hoc endorsement of BLAG's position).

<sup>42</sup> Full exploration of this question is beyond this Essay's limited scope; my aim here is simply to flag this issue as a serious hurdle to BLAG's standing claim and to explore related concerns.

<sup>43</sup> 462 U.S. 919, 939 (1983).

<sup>44</sup> See *id.* at 940.

But there are difficulties with this theory. First, and most basically, the Court in *Chadha* did not grant standing to the House alone. Instead, both the House and Senate had passed a joint resolution authorizing intervention by Congress as a whole.<sup>45</sup> Second, as I will discuss in the next Part, Congress may not have a cognizable Article III interest in defending a challenged law, given that it lacks the power to *enforce* that law.

Further, by permitting lawmakers to assert the government's interests contrary to the stated positions of government officials authorized to enforce the challenged law,<sup>46</sup> federal courts would, in effect, be transferring enforcement power from one branch to another. Yet, again, it is not clear why federal courts can use their jurisdictional authority to reshape the enactment–enforcement relationship between legislative and executive branches in this way.<sup>47</sup>

## II. GOVERNMENTAL STANDING FOR ACTORS WITHOUT GOVERNMENTAL ENFORCEMENT AUTHORITY

The petitioners in *Perry* face an additional procedural problem. California's stake in the case derives from the state's authority to enforce its marriage laws, but the sponsors who seek to assert the government's interest are not government agents of any kind and thus, have no connection to the government's enforcement powers. If federal courts give states the discretion to unmoor standing from enforcement authority, Article III's requirement that a party have a direct and particularized interest in a case becomes nothing more than a nominal obstacle, easily sidestepped whenever states are so inclined. This Section explores several possible responses to this concern but

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<sup>45</sup> See *id.* at 930 n.5, 939–40; see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 n.20 (1997) (summarizing *Chadha* as standing for the proposition that Congress was a proper party to defend a statute “where both Houses, by resolution, had authorized intervention in the lawsuit”).

<sup>46</sup> The New Jersey legislature succeeded in doing something similar in *Karcher v. May*, where the defendant state officials declined to defend a moment-of-silence law. 484 U.S. 72, 75 (1987). The legislature authorized its leadership to seek the enforcement of the law. See *id.* (“When it became apparent that neither the Attorney General nor the named defendants would defend the statute, Karcher and Orechio, as Speaker of the New Jersey General Assembly and President of the New Jersey Senate, respectively, sought and obtained permission to intervene as defendants on behalf of the legislature.”).

<sup>47</sup> This point raises broader questions about the sustainability of the Court's theory in *Chadha* as well as *Chadha*'s specific applicability here. Although full exploration is, again, beyond this brief Essay's scope, it bears noting that, even in *Chadha*, the Court grounded its endorsement of Congressional standing in only two cases, and neither case is actually on point. Instead, *Cheng Fan Kwok v. INS* discussed the Court's appointment of a member of the bar to present argument as amicus curiae. 392 U.S. 206, 210 n.9 (1968). The other case, *United States v. Lovett*, does not discuss standing at all. 328 U.S. 303, 306 (1946) (observing that Congress passed a joint resolution authorizing an attorney to represent its interests).

concludes that stand-ins for a state must have a link to the state's enforcement power lest Article III standing requirements be contorted beyond recognition.

One response to the enforcement concern might be that California is simply assigning its interest in enforcing approved initiatives to the measures' sponsors, just as a government can assign its interest in a *qui tam* case.<sup>48</sup> There is an important difference, however, between the interest asserted in a case such as *Perry* and the financial interest associated with a *qui tam* fraud prosecution. *Perry* involves the government's power to recognize marriages and to confer benefits based on that status.<sup>49</sup> This is a power that *only* the government can exercise. If the state were to delegate the practice of validating or recognizing marriages to private actors, those actors might have an enforcement interest alongside, or perhaps in place of the state. But under California law, and indeed, the law of all fifty states, the validation of civil marriages is a matter exclusively within the state's authority.<sup>50</sup>

Even if California could assign its interest in the case, California law does not confer this interest on ballot initiative sponsors. Instead, the state's initiative-law framework specifies the procedural steps, such as petition approval and signature gathering, that sponsors must take to qualify a measure for a statewide ballot.<sup>51</sup> It provides, too, that sponsors can exercise control over arguments for the measure that appear in the official voter information guide published by the Secretary of State.<sup>52</sup> But these rules give proponents a procedurally focused interest; if the state deviated from

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<sup>48</sup> See, e.g., *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (affirming "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor"). Of course, California has not purported to make a similar assignment here, but to further the analysis, I will set the double-dipping issue aside for the moment.

The related idea that the enforcement-authority deficit can be avoided because the proposition's sponsors are functioning as the state's agents is also unavailing factually and analytically for the reasons discussed earlier. Notably, too, the government defendants declined to appeal, and the proponents filed their appeal on their own behalf, not on behalf of the state. See *Perry I*, 704 F. Supp. 2d 921, 928-29 (N.D. Cal. 2010), *aff'd sub nom. Perry IV*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Perry V*, 133 S. Ct. 786 (2012).

<sup>49</sup> See *Perry IV*, 671 F.3d at 1063 ("[A]ll parties agree that Proposition 8 had one effect only. It stripped same-sex couples of the ability they previously possessed to obtain from the State, or any other authorized party, an important right . . .").

<sup>50</sup> The practice of vesting the state's authority in private parties for marriage ceremonies does not diminish the state's comprehensive control over marriage. Those delegations to clergy and others are entirely for ceremonial purposes; in all cases, it is the state that controls the issuance of marriage licenses. See, e.g., CAL. FAM. CODE § 421 (West 2012) ("Before solemnizing a marriage, the person solemnizing the marriage shall require the presentation of the marriage license.").

<sup>51</sup> See *Perry III*, 265 P.3d 1002, 1015-17 (Cal. 2011) (reviewing California's constitutional and statutory provisions that govern the initiative processes).

<sup>52</sup> *Id.* at 1024.

these provisions, the proponents might suffer a distinct and palpable injury sufficient to justify Article III standing.<sup>53</sup> Once an initiative is presented and passed, however, the initiative's sponsors' formal interest in the matter comes to an end.

Against this backdrop, sponsors might try to analogize themselves to elected legislators working on their constituents' behalf, but that argument, too, is unavailing for Article III purposes because individual lawmakers do not have a government interest sufficient for standing. In *Raines v. Byrd*, for example, Congress authorized lawmakers to challenge the Line Item Veto Act on constitutional grounds.<sup>54</sup> Six members filed suit,<sup>55</sup> each arguing that the veto law unconstitutionally diminished his political power.<sup>56</sup> The Court held, however, that the lawmakers' alleged injuries were "wholly abstract and widely dispersed" and that "these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing."<sup>57</sup>

Nor can the sponsors succeed by claiming standing based on their taxpayer or citizenship status. As the Court has affirmed repeatedly: to qualify as a party with Article III standing, "[a]n interest shared generally with the public at large in the proper application of the Constitution and laws will not do."<sup>58</sup> In a taxpayer's action to enforce a constitutional provision, for example, the Court explained that a claim to have the law enforced in a particular way "is surely . . . a generalized grievance . . . since the impact on him is plainly undifferentiated and 'common to all members of the public.'"<sup>59</sup> Nearly a century ago, the Court similarly rejected a taxpayer and citizen activist's challenge to the Nineteenth Amendment, holding that his concerns about the diminished effectiveness of "free citizens'" votes and the rise in election expenses were insufficiently particularized to generate Article III standing.<sup>60</sup>

<sup>53</sup> Cf. *Coleman v. Miller*, 307 U.S. 433, 445-46 (1939) (finding standing for legislators where lawmaking rules were allegedly disregarded in ways that nullified legislators' votes).

<sup>54</sup> 521 U.S. 811, 815-16 (1997) ("The Act provided that '[a]ny Member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.'" (alterations in original) (citation omitted)).

<sup>55</sup> See *id.* at 814.

<sup>56</sup> See *id.* at 837 (Stevens, J., dissenting) ("The appellees thus articulated their claim as a combination of the diminished effect of their initial vote and the circumvention of their right to participate in the subsequent repeal.").

<sup>57</sup> *Id.* at 829-30.

<sup>58</sup> *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

<sup>59</sup> *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (quoting *Ex parte Lévit*, 302 U.S. 633, 636 (1937) (per curiam)).

<sup>60</sup> *Fairchild v. Hughes*, 258 U.S. 126, 129-30 (1922).

The sponsors also cannot overcome their lack of an individualized stake in the outcome by claiming to act on the government's behalf. As the Supreme Court has explained, the "expression of a desire that [a law] as written be obeyed" is an interest of the sovereign, which has a "direct stake" in defending its laws.<sup>61</sup> But an Article III interest in the rule of law is not available to citizens with no individualized injury.<sup>62</sup> Even the state's formal authorization cannot overcome individuals' "direct stake" deficit. As the Court wrote in *Raines*, Article III's standing requirement cannot be erased "by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."<sup>63</sup>

Finally, the initiative's sponsors might argue that for the purposes of standing analysis, they are most analogous to a full legislature. For support, they could conceivably invoke two Supreme Court rulings recognizing that a lawmaking body (in one case, Congress, and in the other, a state legislature) had Article III standing to defend a law.<sup>64</sup> Yet two points bear noting here. First, the analogy is factually weak. Proposition 8's sponsors did not enact Proposition 8; the voters did. Consequently, Proposition 8's sponsors are more like individual lawmakers, and while individual lawmakers sometimes have a cognizable interest in the voting process,<sup>65</sup> they do not have an Article III stake in a statute's enforcement. Second, even if sponsors are treated as the voters' representatives, voters' interest in the general enforcement of the law has been deemed, as just discussed, too generalized to support Article III standing.<sup>66</sup>

If the Court is prepared to dramatically enlarge the idea of a "direct stake" in the context of initiated legislation, then the sponsors might possibly stand in for the state (though the double-dipping problem remains). But the linchpin of the sponsors' standing claim in *Perry* is that state officials are not defending Proposition 8 as they would like. Without a significant doctrinal shift, that complaint cannot carry the *Perry* petitioners across the Article III threshold.

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<sup>61</sup> *Diamond v. Charles*, 476 U.S. 54, 66 (1986).

<sup>62</sup> *See id.*

<sup>63</sup> *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

<sup>64</sup> *See INS v. Chadha*, 462 U.S. 919, 940 (1983) (recognizing Congress's standing); *Karcher v. May*, 484 U.S. 72, 77-78 (1987) (acknowledging state legislature standing).

<sup>65</sup> *See supra* note 53 (discussing *Coleman v. Miller*, 307 U.S. 433, 445-46 (1939)).

<sup>66</sup> *See supra* notes 58-60 and accompanying text (discussing the doctrine related to generalized grievances).

## CONCLUSION

If Proposition 8's sponsors are turned away from the Supreme Court on standing grounds, some fear that public frustration and further diminution of judicial legitimacy will follow.<sup>67</sup> Similar, though lesser, concerns might arise if the Court finds that BLAG does not have standing to advance its defense of DOMA.<sup>68</sup>

While I have addressed these concerns at length elsewhere,<sup>69</sup> it bears noting here that both Proposition 8's sponsors and BLAG have, and have had, other ways to participate vigorously in defending the challenged measures. There is no question that under California law, a ballot initiative's sponsors have standing in state court to defend the measure they promoted, up through the state supreme court.<sup>70</sup> Likewise, in *Windsor*, proponents of DOMA in Congress can make their views known to the Court even if they lack standing to seek federal appellate review.<sup>71</sup>

If enthusiasm for a measure were sufficient to create a cognizable stake in a case for Article III purposes, Proposition 8's sponsors and BLAG would surely be among those first in line. But it is not. Unless the Court is prepared to blur Article III jurisprudence beyond recognition, neither Proposition 8's sponsors nor BLAG can derive standing by asserting the government's interest, particularly when the government has already done so on the other side.

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<sup>67</sup> *But see* *United States v. Richardson*, 418 U.S. 166, 179 (1974) (rejecting a taxpayer's standing to seek disclosures from the CIA and observing that "[l]ack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [one's] views in the political forum or at the polls").

<sup>68</sup> I say "lesser" because, as noted earlier, the United States sought and was granted the writ of certiorari in the case. *See* Petition for Writ of Certiorari Before Judgment, *supra* note 2; *Windsor IV*, 133 S. Ct. 786, 786 (2012) (granting certiorari).

<sup>69</sup> *See* Goldberg, *supra* note 2, at 36-43.

<sup>70</sup> *See supra* note 16.

<sup>71</sup> The circuits have split over whether proposed intervenors must establish Article III standing in addition to satisfying the intervention requirements of Federal Rules of Civil Procedure Rule 24. *See, e.g.,* *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (discussing the circuit split). But even if BLAG had been displaced from party status because of its lack of standing, it could have filed an amicus brief, as it has done in other cases. *See, e.g.,* *Raines v. Byrd*, 521 U.S. 811, 818 n.2 (1997) (describing BLAG's amicus brief). Or, if it wanted to introduce evidence, it could have sought status as a litigating amicus. *See* Goldberg, *supra* note 2, at 5, 41-42 (arguing that litigating amicus status is more appropriate than party status for subsets of lawmakers, such as BLAG).

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