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Reconsidering Arizonans: Proposition 8, Direct Democracy, and the Supreme Court

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Reconsidering Arizonans: Proposition 8, Direct Democracy, and the Supreme Court

By Reid M. Bolton† and Frank M. Dickerson III††

The most interesting issue raised by the Proposition 8 litigation in California is the question of standing for ballot-initiative sponsors in defensive litigation and how courts should deal with these unique public “representatives”. This Article argues that ballot-initiative sponsors such as ProtectMarriage.com meet the relevant Article III standing criteria and should be allowed to appeal a district court’s judgments against the proposition. Standing for ballot-initiative sponsors is consistent with both the Constitutional and the prudential concerns underlying the doctrine of standing and allows the proper party to defend an initiative when the government chooses not to. Ballot initiative sponsors play a unique role within state politics and the Supreme Court should recognize as much.

The long and convoluted history of California’s Proposition 8 is emblematic of the current state of our political system. This ballot initiative—amending the California constitution to include the provision that “only marriage between a man and a woman is valid or recognized in California”—passed by a narrow margin when California voters went to the polls in 2008. Yet that vote was only the beginning of the legal wrangling over the issue of same-sex marriage in California. Litigation commenced less than twenty-four hours

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1 The final vote was 52.3% in favor and 47.7% against. See California Secretary of State Certification of 2008 Election Results, online at http://www.sos.ca.gov/elections/sov/2008_general/
after the measure was approved, when multiple parties (various cities and a same-sex couple) requested an “immediate stay or injunctive relief” in state court to prevent the enforcement of Proposition 8. Eventually, the California Supreme Court found that the amendment was valid under California law.

However, even before the state supreme court could release its opinion, new parties challenged Proposition 8 in federal court as a violation of their rights under the 14th Amendment. In this separate federal litigation, the district court found that the state amendment did violate the plaintiffs’ rights and that there was no rational basis for the law. Thus, the stage was set for the controversy discussed in this Article.

Ordinarily, the losing party at the trial level appeals if they think the district court was wrong. However, the original defendant in this case—the State of California—decided not to appeal the district court’s order and indicated they would let the judgment become final. But the state of California was not the only party defending Proposition 8 in the district court, and the question is whether these other parties, who were not part of the original action, have the right to

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5 Perry v. Schwarzenegger, No. 3:09-cv-02292 (N.D. Cal. 2010)
appeal from the district court’s decision. In particular, the question is whether ProtectMarriage.com, the group that (1) sponsored the ballot initiative in the first place; (2) acted as its chief supporter and advocate throughout the campaign; and (3) intervened on behalf of the amendment at trial,\(^7\) can appeal the lower court’s decision even after the state of California has abandoned the case.\(^8\)

The district court was skeptical that these intervenors could establish sufficient interest in the outcome of the litigation to merit the privilege of acting as the main litigant on appeal—in other words, the court doubted that the intervenors could show standing. Six months later, the Ninth Circuit also expressed doubts about whether it could reach the merits of ProtectMarriage.com’s appeal. Both the district and appellate court were skeptical because of dicta in a Supreme Court case 13 years prior: *Arizonans for Official English v. Arizona.*\(^9\) In *Arizonans*, a case strikingly similar to the Proposition 8 litigation, the Supreme Court found that it did not need to resolve the issue of Article III standing because of mootness.\(^10\)

Believing that *Arizonans* foreclosed Article III standing,

ProtectMarriage.com’s counsel argued in front of the Ninth Circuit that state law

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\(^7\) They had been allowed to intervene under Rule 24(a) of the Fed. R. Civ. P. See *Perry v. Schwarzenegger*, Motion to Intervene, No. 09-cv-2292 (June 30, 2009).


\(^9\) 520 U.S. 43, 64 (1997)

\(^10\) *Id.* at 67.
provided standing. The Ninth Circuit subsequently certified a question to the California Supreme Court about whether state law provided them standing.\textsuperscript{11} These actions imply that no party or court believes that there is standing under Article III—everyone believes that the dicta in \textit{Arizonans} controls. This paper argues that state law notwithstanding, Article III standing is present and the \textit{Arizonans} dicta should be reconsidered.

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The issues highlighted in this paper reflect two trends in the political institutions of the United States. The first trend is the increasing use of ballot initiatives and referenda such as Proposition 8 in state elections. These electoral devices short-circuit the traditional legislative process for passing laws by placing specific proposals in front of all registered voters within the relevant jurisdiction. The first decade of the 21\textsuperscript{st} century witnessed the largest number of ballot initiatives in this country’s history, with over 350 initiatives on state

\textsuperscript{11} \textit{Perry v. Schwarzenegger}, No. 10-16696, Order Certifying a Question to the Supreme Court of California 2, 9–10 (Jan. 4, 2011) (the question certified was “whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative’s validity or the authority to assert the State’s interest in the initiative’s validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.”).
ballots. This bonanza of ballot initiatives is the culmination of continuous growth in referenda over the last half century.\textsuperscript{12}

The second trend is the increasing use of courts to challenge the public policy successes of political opponents. Where one of the political parties has controlled the executive or legislative branches of state and federal government, interest-groups from the opposing party have not only worked to prevent new regulations or laws from being enacted in those branches, but have also conducted rear-guard actions in court in order to challenge these regulations on various, often Constitutional, grounds. This trend has been accelerating for some time.\textsuperscript{13} As the administrative state has grown, more and more unhappy plaintiffs have petitioned the federal courts for redress.\textsuperscript{14}

The explanation for both of these trends is not complicated. The increased preference for ballot-initiatives and court challenges is due to both the perception and reality that political deadlock and ideological intransigence prevent many legislative goals from being achieved by interested parties. As a result, political

\begin{itemize}
\item See The Initiative & Referendum Institute, IRI Report on Initiative Use, 1904-2009 (2010), online at http://www.iandrinstitute.org/
\item See, e.g. Christopher J. Hering, Playing a Leading Role: How Recent Cases are Thrusting the Arizona Courts into the State’s Budget Drama, 52 Ariz. L. Rev. 173 (2010) (discussing increase in interest-group challenges to the Arizona budget).
\item One recent example of this trend involves the Nantucket Island wind-turbine project, where federal lawsuits are being filed despite 10 years of agency review and state court judicial decisions in the project’s favor. See, e.g., Nelson Sigelman, “Martha’s Vineyard fishermen file federal lawsuit to stop Cape Wind”, The Martha’s Vineyard Times (July 8, 2010), available at http://www.mvtimes.com/marthas-vineyard/article.php?id=1487.
\end{itemize}
advocates have turned to alternative venues for pursuing their objectives—with ballot initiatives being one popular mechanism.

Yet the judicial branch has not accepted its expanded role in politics without a fight. Federal courts were not created to grant every litigant with a perceived injury the right to present her case before a federal judge. Indeed, Article III of the U.S. Constitution is rife with restrictions, both implicit and explicit, that constrain the types of cases that are within Federal court jurisdiction. Standing, the constraint that potentially forecloses ProtectMarriage.com’s appeal, is derived from the requirement that all litigants present an actual “Case” or “Controversy.”

This theory of standing was developed by the Supreme Court in order to redirect political struggles out of the courthouse and back to the legislative and executive fora. But what happens when the political debate was never within the legislative or executive branch in the first place? The Proposition 8 sponsors have acted entirely outside the normal process for passing legislation. Because the state decided not to appeal, the proposition supporters cannot “piggyback”

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on the government’s appeal and must instead stand on the basis of their own grievance.\textsuperscript{17}

This article argues that ProtectMarriage.com has standing not because of any state statute but because of the special status that citizens assume after an initiative they have championed becomes law. By looking at the previous decisions of the Supreme Court with respect to standing, and more importantly, the themes that the Court has identified as supporting its decisions, we argue that ballot-initiative supporters—or at least a ballot initiative’s main sponsor—have sufficient standing to continue to defend their laws, whether or not the state itself wishes to support them. Indeed, although the Supreme Court expressed “grave doubt” about whether intervenors such as these would have standing in \textit{Arizonans for Official English v. Arizona},\textsuperscript{18} this Article argues that if the Court were ever to actually decide the issue on the merits, it would find standing based on its previous jurisprudence of when standing is appropriate.

The rest of this paper proceeds as follows. In Part I, we discuss the key Court decisions with respect to standing, and particularly focus on those cases that developed the theories of “legislative standing” and “taxpayer standing.” In Part II, we discuss the broad themes that the Court has traditionally used to justify its holdings with respect to both of these categories of standing. In Part III,

\footnotesize{\textsuperscript{17} Diamond v. Charles, 476 U.S. 54, 64 (1986).  
\textsuperscript{18} 520 U.S. 43, 64 (1997).}
we take a closer look at state ballot initiatives, the Court’s *Arizona*’s holding, and how the justifications for finding a lack of standing fall flat in cases where ballot-initiative sponsors wish to defend their initiative. In short, ballot-initiative sponsors should have standing under current case law. Furthermore, to the extent that the Supreme Court is unwilling to recognize standing for these unique litigants, it is a product of their discretionary prudential standing doctrine, as opposed to any constitutional justification.

I. Background: The Theory of Standing

Before arguing that a referendum sponsor should have standing to protect its interests in Part III or looking at how courts should react to these new litigants, this section provides the broad outlines of the standing doctrine’s origins and elements. It also explores the Court’s discussion of two specialized doctrines of standing: legislative standing and taxpayer standing. This background provides the foundation for a deeper understanding of the justifications for depriving some litigants of their day in court.

A. The Origins of Standing
Standing is of relatively recent provenance and the doctrine can be traced to the rise of the administrative state.\textsuperscript{19} Prior to the growth in federal (and state) administrative power, a litigant with a constitutional claim would allege that an official committed some kind of tort, the official would claim immunity by authorization, and the litigant would respond that the purported immunity was invalid on constitutional grounds.\textsuperscript{20} Yet as the scope of legal interests expanded beyond tortious conduct with the rise of the administrative state, the question of standing became increasingly important. The Court’s imposition of the three standing requirements— injury in fact, causation, and redressability— were simply a shorthand method of ferreting out whether the litigant had a claim or was merely an indignant bystander.\textsuperscript{21}

While the standing requirement is now a fixed star in the constitutional constellation, the interpretation of the three factors has varied greatly. The broad understanding of standing reached its zenith in the middle of the 20\textsuperscript{th} Century, with the Court’s decision in United States v. SCRAP.\textsuperscript{22} The plaintiffs in SCRAP challenged a decision by the Interstate Commerce Commission to decline to suspend a 2.5% surcharge on railroad freight rates, arguing that “the rate

\textsuperscript{19} See Vining, Legal Identity: The Coming of Age of Public Law 55 (1978) (“The word ‘standing’ . . . does not appear to have been commonly used until the middle of [the twentieth] century.”)

\textsuperscript{20} See Hart & Weschler The Federal Court and the Federal System 136 (4\textsuperscript{th} Ed. 1996).


\textsuperscript{22} 412 U.S. 669 (1973).
structure would discourage the use of ‘recyclable’ materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwanted mining, lumbering, and other extractive activities.”

SCRAP argued for standing by claiming that “each of its members suffered economic, recreational, and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure,” specifically causing its members “to pay more for finished products” and adversely affecting the use of the natural areas surrounding “the Washington Metropolitan area . . . for camping hiking, fishing, sightseeing, and other recreational (and) aesthetic purposes.” In other words, the “injury in fact” alleged was the increased possibility of pollution due to the rate hike. Although this seems to be a tenuous injury, the Court preferred a broad conception of standing so long as “the alleged injury was to an interest arguably within the zone of interests to be protected.”

23 Id. at 676.
24 Id.
25 Id. at 688 (“a general rate increase would allegedly cause increased use of non-recyclable commodities as opposed to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.”)
26 Id. at 687.
Twenty years later, the Supreme Court narrowed this broad interpretation of standing requirements in *Lujan v. Defenders of Wildlife.* Twenty years later, the Supreme Court narrowed this broad interpretation of standing requirements in *Lujan v. Defenders of Wildlife.* 27 *Lujan* concerned a regulation restricting the territorial coverage of the Endangered Species Act. 28 As a consequence of the regulation, the Act henceforth only applied to actions within the United States or in international waters. 29 The plaintiffs filed suit to block the new regulations, alleging that they would increase the rate of extinction of endangered species abroad. 30

In discussing the plaintiff’s standing to sue, the Court interpreted the injury-in-fact element to require “concrete and particularized” injury that is “actual or imminent, not conjectural or hypothetical.” 31 Causation required a connection that is “fairly traceable to the challenged action of the defendant.” 32 Redressability required that the plaintiff show that it is “likely, as opposed to merely speculative, that the injury will be redressed with a favorable decision.” 33 The Court’s new interpretation of each of these elements was far more restrictive than its previous interpretation in *SCRAP.*

While the plaintiffs in *Lujan* tried to show an injury in fact by asserting that they intended to travel to the endangered habitats (and had done so in the

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28 *Id.* at 558.
29 *Id.* at 559.
30 *Id.* at 562.
31 *Id.* (internal quotations and citations omitted).
32 *Id.*
33 *Id.* at 561 (internal quotations and citations omitted).
past), the affidavits did not allege any definite plans to return to the identified foreign countries in the future. The Court concluded that there was no perceptible harm to the plaintiffs, noting that “it goes . . . into pure speculation and fantasy[ ] to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species, with which he has no more specific connection.”

Following Lujan, the Court has had several opportunities to fine-tune its understanding of the standing doctrine and has identified several exceptions to typical standing requirements. First, in Massachusetts v. EPA, the Court found that states had standing to sue the EPA even if the controversy did not meet the “normal standards for redressability and immediacy” because of the significant risks and unique relationship between a state and its citizens. Similarly, in Sprint Communications Co., L.P. v. APCC Services, Inc., the Court allowed an assignee to bring a claim on behalf of other parties despite the fact that he had not been injured and was not expected to recover anything if successful. Finally, in

34 Id. at 563–64.
35 Id. at 564.
36 Id. at 567.
37 127 S. Ct. 1438 (2007)
38 Id. at 1453.
39 128 S. Ct. 2531 (2008);
40 Id. at 2542.
Vermont Agency of Natural Resources v. United States ex rel. Stevens, the Court unanimously recognized that qui tam litigants have standing to sue on behalf of the government even though the government is the only party that can show injury. In each of these cases, the Court recognized that the strict requirements of standing are sufficient but not necessary. In particular, the Court noted that exceptions to standing do exist, either where tradition has always allowed such suits (e.g. qui tam actions), or where the entity bringing the complaint legitimately represented the interests of third parties.

B. Legislative Standing

The first specialized theory of standing is the right of legislators to sue for relief in court either where they have been deprived of their vote or their vote’s effect has been somehow diminished. The foremost cases that describe the limits for legislative standing are Coleman v. Miller and Raines v. Byrd. In Coleman, a group of Kansas senators and representatives challenged the outcome of a state senate vote on the proposed Federal Child Labor Amendment. More specifically, the Kansas senate was deadlocked on the amendment with a 20-20

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42 Legislative standing goes to the “institutional injury” that has taken place. It is distinguishable from instances where an individual legislator is deprived of their individual vote by being excluded from the chambers. See, e.g., Powell v. McCormack, 395 U.S. 486 (1969).
43 307 U.S. 433 (1939).
vote, and the Lieutenant Governor cast an affirmative vote to break the tie. The losing senators challenged this result in court, alleging that the Lieutenant Governor did not have the power to cast the deciding vote, and thus the amendment was unfairly approved.\textsuperscript{45}

The Court, in assessing standing, noted that “the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification.”\textsuperscript{46} As a consequence, the court concluded that the “senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.”\textsuperscript{47} The Court distinguished this basis for standing from “the right possessed by every citizen ‘to require that the government be administered according to law and that the public moneys not be wasted,’” which “did not entitle a private citizen to bring such a suit as the one in question in the federal courts.”\textsuperscript{48} In essence, the reason for standing was that the legislator’s vote had been “negated by outside action” beyond its control.\textsuperscript{49}

Almost sixty years after Coleman, a similar situation came before the Court in Raines v. Byrd, when several U.S. senators and representatives challenged the

\textsuperscript{45} Coleman, 307 U.S. at 437–38.
\textsuperscript{46} Id. at 438.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 440 (citing Fairchild v. Hughes, 258 U.S. 126 (1922)).
\textsuperscript{49} James A. Turner, Comment The Post-Medellin Case for Legislative Standing, 59 Am. U. L. Rev. 731 (2010).
Line Item Veto Act, alleging that it was unconstitutional. Specifically, the senators claimed that the present harm was to the power of the Senate itself, rather than to any senator individually. The Court then addressed Coleman, stressing that in Coleman, “if [the] legislators . . . were correct on the merits, then their votes not to ratify the amendment were deprived of all validity.” In the case of the Line Item Veto Act, to the contrary, the legislators “simply lost their vote.” While the court noted that “there would be nothing irrational about a system that granted standing in these cases,” the Court was unwilling to extend Coleman to allow a challenge to the “abstract dilution of institutional legislative power” alleged by the Raines plaintiffs.

In ruling against the plaintiffs in Raines, the Court did not foreclose all potential standing for aggrieved legislators. Instead, it left a narrow opportunity for future legislators by distinguishing the current case from Coleman:

It is obvious, then, that our holding in Coleman stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative act goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

While the Court did not explain when this situation would take place, it left the door open to future challenges.

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50 Id. at 822.
51 Id. at 824.
C. Taxpayer Standing

A final specialized form of standing relevant in this instance is the theory of taxpayer standing, which allows a federal taxpayer to challenge unlawful or unconstitutional action by the government based on her status as a federal taxpayer. In *Frothingham v. Mellon*, the first case to consider this theory, the Court concluded that simply paying taxes was not a sufficient ground for standing to challenge a law of general applicability. The Court feared that allowing taxpayer standing would put the court in a position where it would not “decide a judicial controversy, but [ ] assume a position of authority over the governmental acts of another and co-equal department.”

Thirty years later, the Court reversed itself on taxpayer standing in *Flast v. Cohen*, an Establishment Clause case. In *Flast*, the Court distinguished *Frothingham* as turning on “pure policy considerations.” The Court further noted that questions as to “whether a particular person is a proper party to maintain an action” are not related to separation of powers concerns, and that “the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically

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53 262 U.S. 447 (1923).
54 Id. at 489.
56 Id. at 93.
viewed as capable of judicial resolution. More importantly, the Court noted that the question of standing is about whether the party is proper “and not whether the issue itself is justiciable.” The Court went on to create an elaborate “nexus” test for determining which taxpayers had a sufficient interest in the litigation such that “the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor.”

However, since Flast, no case has found taxpayer standing. The most recent Supreme Court case to address taxpayer standing, Hein v. Freedom From Religion Foundation, concerned a taxpayer challenge to expenditures through the White House Office of Faith-Based and Community Initiatives. In that case, the Court summarily rejected taxpayer standing and noted that taxpayer standing was limited to the specific context observed in Flast.

Justice Scalia wrote a strongly worded concurrence that the plurality opinion should have rejected taxpayer-standing altogether and overruled Flast.

57 Id at 100–01.
58 Id.
59 Id. at 106.
60 See Hein, 551 U.S. 587, 610 (collecting cases where Court rejected taxpayer standing). Note however, that the Supreme Court does currently have a case under consideration that raises taxpayer standing issues. See Arizona Christian School Tuition Organization v. Winn, No. 09-991 (argued Nov. 3, 2010).
62 Id. at 594.
63 Id. at 613.
The concurrence argued that “a taxpayer’s purely psychological displeasure that his funds are being spent in an allegedly unlawful manner” is never “sufficiently concrete and particularized to support Article III standing.” Notwithstanding Justice Scalia’s position, Flast survives and stands for the proposition that litigants can access federal court under some unique circumstances.

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The above discussion reveals several patterns about the Court’s standing doctrine. First, the Court has implemented increasingly stringent requirements for standing over time, whether in traditional cases or in those requesting legislative or taxpayer standing. The SCRAP plaintiffs would never make it into federal court in 2011. Second, although the Court is skeptical of specialized versions of standing, it has continued to recognize unique litigants in numerous cases. It refuses to eliminate legislative and taxpayer standing and has repeatedly identified exceptions to the broad rules where it appeared that the result would be inequitable.65

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64 Hein, 551 U.S. 618 (Scalia, J., concurring) (describing Flast as “beat[en] to a pulp,” “weakened, denigrated, more incomprehensible than ever, and somehow technically alive”)
65 See, e.g., Massachusetts v. EPA, 549 U.S. at 526 (noting that the state had a “quasi-sovereign” interest that allowed for standing even though the state itself did not demonstrate an injury in fact).
II. The Justifications Behind the Court’s Standing Doctrine

The Court consistently requires that litigants show their own injury and casts aside parties that want to bring a claim on behalf of their institution (or the electorate). Yet even though the Court’s holdings are generally dismissive of standing in taxpayer and legislative standing cases, the more important issue for our purposes is how the Court reaches its holdings and the justifications it uses to reach its decisions. Because ballot-initiative sponsors are a unique class of litigants unlike the types of litigants the Court typically deals with, this paper looks behind the Court’s decisions to understand how the Court would treat these litigants if the issue in Arizonans were squarely in front of the Court. Therefore, we look to the reasoning that the Court has used to reach its holdings—the first principles, so to speak—and argue that fidelity to these themes supports granting standing to ballot-initiative sponsors for defensive litigation.

In this Part, we discuss the key theories and arguments that the Court has used to justify its past decisions. There are two themes that the Court has identified for why standing should not be applicable in legislative and taxpayer standing cases: (1) ensuring the separation of powers between the branches of government; and (2) avoiding the administrability problems created by allowing numerous parties to have standing.
A. Separation of Powers Concerns

The most important justification that the Court has used for its decisions about standing is the idea that granting standing to legislators or taxpayers would violate the separation of powers principles inherent\textsuperscript{66} in our constitutional democracy. This principle has been voiced in virtually all of the standing decisions that the Court has announced. As Justice O'Connor stated in \textit{Allen v. Wright}, “The law of Art. III standing is built on a single basic idea—the idea of separation of powers.”\textsuperscript{67} This idea has served as the guiding principle for the Court and shows up in almost every decision that discusses standing.

For example, with respect to standing in general, the Court has linked the injury-in-fact requirement to the idea that the court should only exercise those powers “strictly judicial in their nature.”\textsuperscript{68} As Justice Scalia wrote in \textit{Lujan},

\begin{quote}
If the concrete injury requirement has the separation-of-powers significance we have always said . . . permit[ting] Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to “take Care that the Laws be faithfully executed,” Art. II, § 3. It would enable the courts, with the permission of Congress, “to assume a position of authority over the
\end{quote}

\textsuperscript{66} As Justice Scalia noted, the separation of powers principle is not explicitly described in the Constitution. See Scalia, \textit{The Doctrine of Standing as an Essential Element of the Separation of Powers}, 17 Suffolk L. Rev. at 881.
\textsuperscript{67} 468 U.S. 737, 752 (1984).
\textsuperscript{68} \textit{Muskrat v. United States}, 219 U.S. 346, 356 (1911).
Similarly, the Court held in *Massachusetts v. EPA*\(^{70}\) that the Court’s standing doctrine is designed to preclude “citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.”\(^{71}\) In other words, the Court does not want to entertain arguments that should be directed to the other branches. Thus, the standing requirement prevents courts from aggrandizing their own power or influencing the political discussions taking place between the other two branches of government.

The restrictions on taxpayer standing in particular have been grounded in separation of powers principles. For example, in *Frothingham*, the original standing case, the Court noted that the taxpayer’s claim ultimately boiled down to a request to “assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.”\(^{72}\) The Court did not want to interfere with the executive branch and the legislative branch’s decisions of what laws to pass and which ones to enforce. The subsequent discussions in *Flast* and *Hein* also reinforce the point that the Court’s standing jurisprudence focuses on maintaining a separation of powers.

In *Flast*, the Court recognized that standing was only appropriate if it was

\(^{69}\) *Lujan*, 504 U.S. at 577.

\(^{70}\) 549 U.S. 497 (2007).

\(^{71}\) Id. at 517, quoting *Lujan*, 504 U.S. 581 (Kennedy concurring)

\(^{72}\) *Frothingham*, 262 U.S. at 489.
“consistent with a system of separated powers.” The dissent in *Flast* and the majority in *Hein* went further. In fact, Justice Alito stated that “*Flast* itself gave too little weight to [separation of power] concerns” and “failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis other branches, concrete adverseness or not.”

With respect to legislative standing, the opinion in *Raines* expresses the same theme. Chief Justice Rehnquist first cited the bedrock theory in *Allen* and then looked to historical precedent to support his argument that standing does not exist for these legislators. Just as President Johnson in 1867 did not bring (and could not have successfully brought) suit in court against Congress for passing a law that “altered the calculus by which he would nominate someone to his cabinet,” a single Congresswoman in 2010 could not bring a claim in federal court simply because she believed a new law put more power in the hands of the President. According to Rehnquist, to do otherwise would be to “improperly and

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73 *Flast*, 392 U.S. at 97.
74 See *Flast*, 392 U.S. at 130-131 (Harlan dissenting) (“There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government.”).
75 *Hein*, 551 U.S. at 611.
76 *Id.*, quoting *Lewis v Casey*, 518 U.S. 343, 353 n.3 (1996). *U.S. v. Richardson*, 418 U.S. 164, 188 (1974) (Powell concurring) (“Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.”).
77 “The law of Art. III standing is built on a single basic idea—the idea of separation of powers.”
78 *Raines*, 521 U.S. at 827 (referring to the Tenure of Office Act).
unnecessarily plunge [courts] into the bitter political battle being waged between the President and Congress.”\textsuperscript{79}

\textit{Raines} also suggests a second separation of powers argument for the Court’s standing decisions: a desire to avoid political questions wherever possible.\textsuperscript{80} In most taxpayer and legislative standing cases, recognizing the litigant’s standing would allow the “anti-majoritarian judiciary” to “usurp[] the policy-making function of the coordinate branches of the federal government.”\textsuperscript{81} This concern was expressed in \textit{Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.},\textsuperscript{82} where the Court denied standing in part because courts are not “merely publicly funded forums for the ventilation of public grievances” or “judicial versions of college debating forums.”\textsuperscript{83}

Finally, the scholarship of several Justices describes standing limitations as primarily based on separation of power principles. For example, Justice Scalia

\begin{itemize}
    \item \textsuperscript{79} Id. See also Weiner, \textit{The Law of Legislative Standing}, 54 at Stan. L. Rev. at 218 (noting that \textit{Raines} combined the equitable discretion and separation of powers issues into the same standing inquiry)
    \item \textsuperscript{80} See Una Lee, \textit{Reinterpreting Raines: Legislative Standing to Enforce Congressional Subpoenas}, 98 Georgetown L. J. 1165, 1175 (2010)
    \item \textsuperscript{82} 454 U.S. 464 (1982).
    \item \textsuperscript{83} \textit{Valley Forge Christian Coll.}, 454 U.S. at 473-74. See also \textit{Warth v. Seldin}, 422 U.S. 490, 500 (1975 (“Without such limitations-closely related to Art. III concerns but essentially matters of judicial self-governance-the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions . . . .”).
has written that a separation of powers is the key interest behind the standing doctrine.\textsuperscript{84} Similarly, Chief Justice Roberts explicitly defended the decision in \textit{Lujan} by referring to the separation-of-power benefits attributable to the denial of standing:

Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches. . . . The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury-in-fact [] ensures that the court is carrying out \textit{its} function of deciding a case or controversy, rather than fulfilling the executive’s responsibility of taking care that the laws be faithfully executed.\textsuperscript{85}

Taking all of these statements by the Court and its membership together, standing becomes inextricably connected to the principle of separation of powers. Whether scrutinizing standing generally or taxpayer and legislative standing in particular, the Court has consistently tied its justifications for denying standing to fears about judicial aggrandizement or interference with the political struggles that take place within (and between) the other two branches.

Therefore, this Article’s argument that standing should be extended to ballot initiatives must prove that separation-of-powers principles are not implicated. In Part III, we argue that these principles are not violated, both

\textsuperscript{84} See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 892 (1983) (“My thesis is that the judicial doctrine of standing is a crucial and inseparable element of that principle [separation-of-powers].”).

because ballot initiatives are completely independent from the other branches of government, and because there is no risk that the court would be deciding a political question better left to the other branches of government.

B. Generalized Injury and Docket Control Concerns

The second major concern that the court has consistently focused on is the danger of recognizing standing for generalized injuries. Admittedly, this concern is the flip-side of the separation of powers concern. However, the Court has expressly considered this concern in addition to the separation of powers concerns ever since the theory of standing was first developed in *Frothingham*. In that case, Justice Sutherland justified the decision to dismiss the case in part because it was a generalized grievance:

> [Plaintiff’s interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventative powers of a court of equity.]

This interest, also grounded in the “cases” and “controversies” clause in Art. III, is just as important to the court because recognizing generalized grievances would mean that “federal courts would cease to function as courts of law and

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86 If the Court were willing to grant standing to hear a generalized grievance and create widely applicable rules, the Court would exercise legislative powers.

87 *Frothingham*, 262 U.S. at 487.
Numerous cases since *Frothingham* have expressed the fear about generalized grievances. For example, in *Lujan*, the Court reviewed the history of standing cases before stating that “we have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy.” This sentiment was also expressed by the Court in several earlier cases regarding alleged unconstitutional acts by members of Congress or the Justices themselves. The Court voiced a similar concern in *Richardson*, noting that the Founding Fathers did not “intend[] to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.”

*Allen* also focused on this issue in a challenge by citizens to the way that taxpayer funds had been allocated amongst segregated and desegregated schools. The Court denied standing in part based on the fear that this type of injury, even if it existed, would make all citizens capable of litigating. A

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88 *Hein*, 551 U.S. at 593. Of course, when there is a “concrete” injury against large numbers of people, then the Court has sometimes found standing. See *FEC v. Akins*, *FEC v. Akins*, 524 U.S. 11, 23 (1998); *Massachusetts v. EPA*, 549 U.S. at 522
89 *Lujan*, 504 U.S. at 573.
90 See *Ex parte Levitt*, 302 U.S. 633 (1937)(“It is not sufficient that he has merely a general interest common to all members of the public.”); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (rejecting the case on standing grounds where the alleged injury “adversely affected only the generalized interest of all citizens in constitutional governance”).
favorable holding for the citizens, in addition to making the judicial system deal
with political questions (itself a major justification for denying standing), would
also make the judicial system unworkable—which was a major concern for the
Court. 92

More recently in Raines, the Court was concerned in part by the idea that
recognizing such legislative standing would allow any legislator that lost a vote
on a particular piece of legislation to bring a grievance to the courts. Such a
development could potentially lead to hundreds of generalized suits in federal
court each time the House or Senate of any state or the Federal government
considered a piece of legislation and subsequently passed it by anything less
than a unanimous vote. 93

All of these examples suggest that the Court is mindful of the practical
implications of a permissive standing doctrine and the risks associated with
extending standing beyond the traditional private-right model. Therefore, any
extension of standing doctrine to include ballot-initiative supporters must also
ensure that it does not open a pandora’s box of generalized injuries and
demonstrate some sort injury specific to the people who wish to litigate.

92 See Allen, 468 U.S. at 756 (“Recognition of standing in such circumstances would transform the
federal courts into ‘no more than a vehicle for the vindication of the value interests of concerned
bystanders.’”) quoting SCRAP, 412 U.S. at 687.
93 Raines, 521 U.S. at 828 (noting the numerous instances where politicians could have sued in
court if legislative standing extended as far the litigants in that case desired).
III. Reconsidering Arizonans

While the Supreme Court has been tinkering with its rules for litigants, important legal developments have also taken place outside the Beltway. In particular, the ballot initiative has become a popular way of seeking change in state law. Even more importantly, the ballot initiative is capable of changing policies without ever interacting with the executive and legislative branches of government. This paper therefore argues that the traditional reasons for denying standing—Article III separation-of-power concerns and prudential docket control concerns—are irrelevant for ballot-initiative sponsors. Given that these sponsors can demonstrate standing—either traditional standing or a form of legislative standing under Coleman and Raines—courts should recognize ballot-initiative sponsor standing where the state government refuses to appeal adverse judgments against laws passed by the people themselves.

This section opens by discussing the mechanics of ballot initiatives in three representative states: California, Oregon, and Arizona.94 Next, it discusses Arizonans and how the Court dealt with the issue of ballot-initiative sponsor standing.

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94 Oregon has had the greatest number of ballot initiatives and referenda, with 351. California is second with 329. Arizona is fifth with 171, but has the unique feature of having a Supreme Court decision concerning standing for citizens to sue to enforce an initiative. See The Initiative & Referendum Institute, IRI Report on Initiative Use, 1904-2009 (2010), online at http://www.iandrinstitute.org/
standing in dicta. It then argues that despite initial skepticism by the Court, referendum supporters *should* have standing to intervene to defend an initiative where the government has failed to appeal.

A. Ballot Initiative Mechanics

The ballot initiative processes are relatively similar across numerous U.S. states. Almost all states require an individual or organization to be the official sponsor of the initiative. The sponsor must submit the proposed initiative to a state official, generally the Secretary of State or Attorney General, who provides a caption and sometimes a summary of the law. After that, the sponsor must gather a significant number of signatures, after which the proposal will be placed on the ballot.

For example, in California, the ballot-initiative sponsor\(^{95}\) must draft the law, present the law to the Legislative Counsel,\(^ {96}\) and obtain the signature of 25 or more electors (i.e. registered voters).\(^ {97}\) The sponsor may draft the law, or leave

\(^{95}\) Under California law, these sponsors are known as the “proponents” of the initiative. See CAL. ELEC. CODE § 342.

\(^{96}\) The Legislative Counsel is a “is a nonpartisan public agency that drafts legislative proposals, prepares legal opinions, and provides other confidential legal services to the Legislature and others.” See State of California Office of Legislative Counsel, online at http://www.legislativecounsel.ca.gov/portal/site/OLCInternet/.

the task up to the Legislative Counsel. The sponsor must then submit a request for a title and a summary of the initiative to the Attorney General’s office, along with a $200 deposit that is refunded if the initiative qualifies for the ballot within two years. The Sponsors then have 150 days to circulate the petition and gather the signatures of registered voters equal to 5% of the total votes cast for Governor at the last gubernatorial election (8% of such votes when the initiative amends the constitution). The petition must be submitted at least 131 days before the next statewide election at which it is submitted to voters. If these conditions are met, the initiative is placed on the ballot for the next statewide election, where it is subject to approval by majority vote. In the case of Proposition 8, the ballot sponsors included State Senator Dennis Hollingsworth and ProtectMarriage.com. Both Hollingsworth and his organization subsequently became defendant-intervenors in the state and federal litigation.

Oregon operates a system generally similar to California. In Oregon, no more than three Chief Petitioners must draft the text of the law, and file it, along

98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 See Brief of the Defendant-Intervenor-Appellants, Perry v. Schwarzenegger, No. 10-16696, *10 (Sept. 17, 2010)(declaring that Hollingsworth was one of the “official proponents of Proposition 8”).
with some supporting documents, with the Secretary of State.\textsuperscript{104} The Chief Petitioner must then secure 1000 signatures to obtain a title for the initiative from the Attorney General.\textsuperscript{105} After obtaining a title, the chief petitioner must circulate the petition, and must obtain signatures from 6\% of registered voters (as of the most recent election, 82,769) for a statutory initiative or signatures from 8\% of voters (110,358) for a constitutional initiative.\textsuperscript{106} One important difference in Oregon law concerning initiatives, vis-à-vis other states, is that Oregon requires at least one of the original Chief Petitioners to be associated with the petition throughout the filing process. If all of the original Chief Petitioners resign, the initiative must be re-filed.\textsuperscript{107}

Like Oregon and California, Arizona also requires that an individual or organization take responsibility for the initial filing process of any initiative. The initiative sponsor in Arizona must file an application with his name (or the name of the organization and its officers), intention to circulate a petition, and a description of no more than 100 words of the principal provisions of the proposed law or amendment.\textsuperscript{108} They must also file all of the relevant campaign

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item A.R.S. § 19-111
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finance paperwork.\textsuperscript{109} After they have completed the necessary paperwork, the initiative sponsor must gather the signature of 10\% of the state electorate for a statutory initiative or 15\% of the state electorate for a constitutional initiative.\textsuperscript{110}

* * *

Two consistent threads run through all of these reform processes. First, all of them act as a short-circuit to the traditional democratic process, bypassing both the legislature and the executive. Second, most of these ballot-initiative processes require an initiative sponsor of some kind, who is legally associated with the initiative, pays the fees, and organizes the signature-gathering efforts. This unique system suggests that the initiative sponsors should have a special status with respect to her initiative. Yet the Supreme Court expressed skepticism about the standing of ballot-initiative supporters in \textit{Arizonans for Official English v. Arizona},\textsuperscript{111} its only discussion of the issue.\textsuperscript{112} The next section explores the Court’s analysis in that case.

\textbf{B. The Court’s Cursory Review of Ballot-Initiative Standing}

\textsuperscript{109} A.R.S. \textsection 19-111; \textsection 16-902.01
\textsuperscript{110} AZ Constitution, Article I \textsection 1(2).
\textsuperscript{111} \textit{Arizonans for Official English v. Arizona}, 520 U.S. 43, 64 (1997).
\textsuperscript{112} The Court also summarily reversed the Ninth Circuit in another case where the ballot-initiative sponsor was the only party on appeal. However, there was no discussion of the issue in the court below or in the Court’s decision itself. \textit{See Don’t Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Co of Chicago}, 460 U.S. 1077 (1983).
Although no Supreme Court opinion has ever decided this issue on the merits, the Court in *Arizonans* considered the issue in dicta. *Arizonans* concerned a ballot initiative making English the official language of the State of Arizona and the case arose in circumstances virtually identical to the facts of the Proposition 8 litigation.\(^{113}\) In that case, voters approved of the amendment by a slim margin (50.5% to 49.5%) and litigation in federal court commenced two days later.\(^{114}\)

In the first round of litigation, the district court found the amendment “fatally overbroad” and unconstitutional. At that point the defendant, the Governor of Arizona, who had previously expressed opposition to the initiative, declined to appeal.\(^{115}\) Once the government decided not to appeal, the ballot-initiative sponsor, Arizonans for Official English Committee (AOE), and Robert D. Park, chairman of the Committee, attempted to intervene to defend the initiative on appeal.\(^{116}\) The District Court rejected AOE and Park’s intervention, noting that “the interests of voters who favored the initiative were too general to meet traditional standing criteria.”\(^{117}\) On appeal, the Ninth Circuit reversed, concluding that AOE would have standing just as, by analogy, the Arizona

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\(^{113}\) *Id.* at 48.

\(^{114}\) *Id.* at 49 n. 1.

\(^{115}\) *Id.* at 52–55.

\(^{116}\) *Id.* at 56. The Attorney General also attempted to intervene under 28 U.S.C. § 2403(b), but the court rejected the Attorney General’s intervention, indicating that the Governor “determine[d] that the state’s sovereign interests would be best served by foregoing an appeal.” *Arizonans*, 520 U.S. at 57 (citing *Yniguez v. Mofford*, 130 F.R.D. 410, 413 (April 3, 1990)).

\(^{117}\) *Arizonans*, 520 U.S. at 57.
Legislature would have standing to defend the constitutionality of a state statute.\textsuperscript{118}

The Supreme Court granted the petition for certiorari and vacated the Court of Appeals decision. In its opinion, the Court ordered the district court to dismiss the case, allowing the Arizona Supreme Court to rule definitively on the initiative’s standing argument.\textsuperscript{119} However, before reaching this conclusion, the Court discussed, in dicta, whether or not AOE and Park had Article III standing to pursue their appeal.

In a two-and-a-half paragraph discussion, the Court expressed “grave doubts whether AOE and Park [had] standing under Article III to pursue appellate review,” but declined to “definitively resolve the issue.”\textsuperscript{120} The Court noted (and dismissed) AOE’s principal argument that, as initiative sponsors, they had a “quasi-legislative interest in defending the constitutionality of the measure that they successfully sponsored.”\textsuperscript{121} The Court concluded that “the requisite concrete injury to AOE members is not apparent” because “AOE’s members were not bound by the [District Court] judgment” and the plaintiff could sue in state court.\textsuperscript{122} Interestingly, the Court also noted that “AOE and its

\textsuperscript{118} Id. at 58.
\textsuperscript{119} Id. at 79–80.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 65.
\textsuperscript{122} Id. at 66.
members . . . are not elected representatives, and 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.”

C. The Court Should Recognize Standing for Ballot-Initiative
Supporters

Despite the skepticism expressed by the Supreme Court in Arizonans,
there is a compelling case for the existence of Article III standing for initiative
sponsors to defend approved initiatives validly adopted by voters in court. The
Court’s existing precedent suggests that a broader conception of standing is
appropriate for ballot-initiative sponsors. Simply put, the separation of powers
and prudential docket control concerns that form the Court’s core constitutional
justifications for the restrictions in the standing doctrine are absent and the
Court’s dicta in Arizonans is unpersuasive. The Court should recognize the
importance of allowing this hybrid litigant into court for the purposes of
defensive appellate litigation.

a. Ballot-Initiative Sponsors have suffered a concrete injury


\[123\text{ Id.}\]
Ballot-initiative sponsors are neither taxpayers nor legislators in the usual sense. They have not been elected to office and are not part of a congress vested with “legislative Powers.” Yet they are more than just citizens upset with the performance of their elected officials. These sponsors are both a legislator responsible for enacting a constitutional amendment when their peers approve a duly registered ballot-proposal by majority vote—as occurred in the approval of Proposition 8 by California’s electorate—and simultaneously the taxpaying citizen with the most significant nexus to the statute that is being abandoned by the government. As the Court noted in *Arizonans*, this role can be characterized as “quasi-legislative.” But what is important for our purposes is that the ballot-initiative sponsor’s position does not fit nicely into the category or legislator or taxpayer. The *Arizonans* majority’s reliance on the fact that the sponsor was not an elected official is misguided. The sponsor’s unelected status is precisely why *Raines* is not controlling. Instead, the Court should look to whether the sponsor

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125 See Part III.1 (describing statutory schemes that require specific individuals assume leadership roles in collecting signatures, drafting referendum language and paying associated fees).

126 Furthermore, the emphasis that the *Arizonans* opinion placed on AOE’s ability to litigate in state court is immaterial to the question of whether standing is appropriate. In that case (and in the Proposition 8 case), state statutes allegedly gave ballot-initiative sponsors the capability to litigate their claim in state court. This paper argues that the restrictive theory of standing has never been focused on the availability of redress in other courts and such permission should not be used as a basis for preventing the sponsors from bringing the claim in federal court.
has suffered an injury in fact similar to the ones suffered in *Coleman* or *Flast* and draw on its experience in recognizing exceptions to the standing doctrine.\(^\text{127}\)

In *Coleman*, the Court did not focus on the individual’s status. Rather, it focused on the expectations of the legislators that their vote be given its proper weight. In *Raines*, the Court succinctly restated *Coleman*’s principle, noting that:

> It is obvious, then, that our holding in *Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.\(^\text{128}\)

Thus, ballot-initiative sponsors, such as ProtectMarriage.com, can argue that they have standing because their vote has been effectively nullified. The evidence with respect to Proposition 8 is that various same-sex litigants (who wanted to get married) filed challenges the day after the election (before even the final votes had been tallied) and requested an immediate stay against its implementation.\(^\text{129}\)

While the court in that case denied the temporary stay during litigation,\(^\text{130}\) the

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128 *Raines*, 521 U.S. at 823.

129 See, for example, *San Francisco v. Horton*, Pet. For Writ of Mandate, 2008 WL 4843812 *5 (Cal. 2008) (requesting that the court grant an immediate stay against implementation)

possibility remains that a stay could have prevented the referendum from ever
taking effect in the first place.\textsuperscript{131}

Furthermore, constructive nullification is possible in every ballot initiative
if the government relinquishes its duty to defend the initiative and others are not
allowed to stand in its stead. As the Petitioner’s Supreme Court brief in \textit{Arizonans}
noted, “If [Arizonans for Official English] does not have standing in this case,
then no initiative is safe from collusive suits. All a State would need to do to
avoid initiatives it did not like was to refuse to appeal an adverse ruling.”\textsuperscript{132}

Indeed, this danger is the opposite of separation of powers concern—it reflects
the possibility that the current elected representatives in the executive and
legislative branches could collude to prevent ballot initiatives from having legal
effect. No political redress is possible before either of the other branches of
government, and nullification of the vote is a real possibility.\textsuperscript{133} In fact, in cases
where the government refuses to defend an initiative, this constructive
nullification is the inevitable result.

\textsuperscript{131} Of course, this argument must assume that the ballot-initiative supporters chances on appeal
are greater than zero.


\textsuperscript{133} Cf. \textit{Raines}; \textit{Lujan}. See also \textit{The New Law of Legislative Standing}, 54 Stan. L. Rev. 205, 218 (2001). In
particular, the idea that the subsequent election could allow referendum supporters to punish the
executive branch for failing to defend the initiative on appeal is inapposite. Once judgment
becomes final, redress for the particular initiative is impossible, particularly in a case like
Proposition 8 where a federal judge found the state constitutional amendment in violation of the
Federal Constitution. Furthermore, if a referendum’s supporters cut across both political parties,
no punishment would be forthcoming.
Even if this constructive nullification is insufficient to create an injury in fact for the purposes of Coleman or Flast, the unique position of the ballot-initiative sponsor, as compared to the legislator or taxpayer, provides a reason to consider the failure to defend the law as a concrete injury in fact. When the executive fails to defend a law, sponsors can only make their displeasure known at the next election, at which point it is virtually always too late for the incoming administration to defend the initiative.134

i. The prudential nature of injury-in-fact

Finally, we also note that, to the extent that the Court has held some injuries (but not others) sufficient for standing, the standing doctrine is suffused with prudential concerns. Many commentators noted after Lujan that the line between sufficient injuries and insufficient injuries for standing is unclear at best and more likely completely arbitrary.135 There is no constitutional guideline for

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134 As shown in the Proposition 8 case, it is possible for the people of a state to pass an initiative with which the state government disagrees. In fact, given the complexity of the initiative process, it is likely that the only laws that pass through initiatives are those that state government disagrees with. Otherwise, the expense and difficulty of the initiative process could be avoided, and the desired law passed through the legislature. In this sense, the initiative process creates an adversarial relationship between the government of a state and the people who reside there. That may create an incentive for the government to refuse to defend initiatives at trial or on appeal, as California did with Perry v. Schwarzenegger. Allowing initiative proponents to intervene solves a problem of misaligned incentives. If the state chooses to defend the law, they can prevent intervention in the first instance. If the state chooses not to defend the law, interveners can act to protect the interest of the people of the state, who passed the law in opposition to their elected officials.

determining what type of case or controversy is sufficiently present to warrant standing, absent a plaintiff claiming no injury at all (or perhaps only dignitary injury from the existence of a law).\textsuperscript{136} This gives the Court a great degree of leeway in choosing what standard to apply. The Court settled on the standard identified in \textit{Lujan}, but was not constitutionally compelled to do so. A broader or narrower conception of injury would comply equally well with the constitution, as long as it prevented advisory opinions.\textsuperscript{137}

Furthermore, the Supreme Court has often taken the very same action that they expressed grave doubts about in \textit{Arizonans}. Every time the Court has appointed amici curiae to represent a party that refused to appear in front of the Court,\textsuperscript{138} it has decided to hear a case despite the fact that the parties agree about

\textsuperscript{136}See Erwin Chemerinsky, \textit{FEDERAL JURISDICTION}, 44-45 (5th ed. 2007); Cass R. Sunstein, \textit{Standing Injuries}, 1993 Sup. Ct. Rev. 37, 38; Brian P. Goldman, \textit{Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decision?}, 63 Stan. L. Rev. 134 (forthcoming 2011) (“There has long been debate over whether the Constitution compels the justiciability doctrines or whether they are merely prudential.”).

\textsuperscript{137}This is demonstrated by the history of the standing doctrine. Prior to 1965 only eight Supreme Court cases even mentioned standing. \textsuperscript{See Cass Sunstein, \textit{What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III}, 91 Mich. L. Rev. 163, 169 (1992).}

\textsuperscript{138}The Court has appointed amici 43 times. See Goldman, 63 Stan. L. Rev. at 104.
the question presented.\textsuperscript{139} Although recent scholarship has challenged the Court’s practice of appointing these amici,\textsuperscript{140} the practice continues unabated.

The debate between SCRAP and Lujans is about how many litigants should be allowed into court, not about the threat of an unconstitutional advisory opinion—which in any event would never be an issue for ballot-initiative sponsors solely seeking appellate standing after they had participated in the district court trial. This ambiguity is the best reason for looking to the first principles of standing doctrine in a unique situation such as the ballot-initiative sponsor.

\textbf{b. The Court’s justifications for limiting standing are inapposite for referenda sponsors}

Assuming that the idea of injury is ambiguous in the context of ballot-initiative sponsors and might meet the injury injury-in-fact requirements, we think that the Court should look to its traditional justifications for limiting standing. And in fact, there is a strong argument that these sponsors satisfy

\textsuperscript{139} Not all of these appointments are problematic. When both parties believe that there is subject-matter jurisdiction but the appellate court found none, the Court must appoint someone to defend the jurisdictional decision. See, e.g., Reed Elsevier, Inc. \textit{v. Muchnick}, 130 S. Ct. 1237, 1242-43 (2010).

\textsuperscript{140} See Goldman, 63 Stan. L. Rev. at 146-51 (Noting that the Court erred in hearing \textit{Bousely v. United States}, 523 U.S. 614 (1998), and \textit{Bob Jones University v. United States}, 461 U.S. 574 (1983), because both parties agreed on the question presented and there was no jurisdictional issue.).
neither of the fundamental justifications for closing the courthouse door.

Granting standing to these individuals would not violate the Court’s first principles—its “prime directive”—of standing.

i. There are no separation of powers concerns

The primary concern identified by the Supreme Court and commentators to recognizing standing generally is one of separation of powers. The concern is generally expressed as one of requiring the courts to make judgments best left to legislators or the executive. In areas where the court has allowed a somewhat more relaxed approach to standing, the court tends to stress the inability of the plaintiffs to get redress in any other way. This can be seen from both the legislative standing cases, where the plaintiffs had their lawful votes nullified, and the (limited) taxpayer standing cases, where there was no effective redress to a citizen’s opposition to governmental support of majority religious expression.

These precedents suggest that the Supreme Court is willing to recognize standing when there is no other effective way for a party to seek review of governmental action. If recognizing standing does not interfere with any other branch of government, then the Court’s standing requirement should not raise a barrier.

Ballot-initiative sponsors arguably have no redress. When a ballot-measure is passed via popular vote, its enforcement and defense is left to the
state government. This can create a significant problem for ballot-initiative sponsors. The initiative is often an expression of the popular will that is at odds with what the legislature would have voted for (and what the executive would have signed) under the same circumstances. This can produce substantial problems with enforcement. The political branches, unhappy with the requirements forced upon them by the public, may be unwilling to initially enforce or subsequently defend the new policies.

Of course, the refusal to enforce a (non-discretionary) initiative does not provide standing. Yet when a state law (or constitutional amendment) is challenged and the government refuses to defend it, there is no possible redress. Unlike the legislators in Raines, the referendum sponsors (and the citizens who voted for it) do not have a remedy available. In Raines, the legislators simply lost the vote, and attempted to overturn the results of that loss through litigation. The Court rightly concluded that this was not sufficient to create standing, because the legislators in question did not have any of their institutional power taken away. The issues raised by the legislators were best dealt with through the political process, which is designed to encompass these pursuits, and inevitably

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141 See Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suff. U. L. Rev. at 897 (noting that non-enforcement of unpopular laws is a “prime engine of social change” and standing to sue for enforcement would interfere with this mechanism).
produces winners and losers. The courts have no role to play in policing the internal political disputes within and between the coordinate branches.

The citizen-sponsors of initiatives, on the other hand, do not have strong institutional power vis-à-vis the other branches and are not part of a carefully constructed system of checks and balances. They are far less able than legislators to ensure that their preferences, duly passed into law via initiative, are enforced. They lack the power of the purse, the ability to hold up nominations, and the ability to undermine the agenda of the executive that generally inheres in the legislature. The ballot-initiative sponsor is not an unhappy bystander or a disgruntled legislator—rather, the sponsor has suffered, in effect, the complete suspension of his power to create new statutes as entitled by state law and adopted by the requisite popular vote. Whether or not the law momentarily takes effect, the government’s ability to abandon the law in the face of any challenge means that the law will always be challenged, and will always be abandoned.

The ballot-initiative sponsor’s only institutional powers are the ability to sponsor more initiatives (which does not solve the problem in the face of determined governmental resistance to their objectives) and to vote the existing government out of office. The futility of requiring a second initiative to compel enforcement of a prior initiative is obvious, but the argument that citizens have the power to elect new representatives more amenable to the referendum has
superficial appeal. It is true that the people can elect a government that is more likely to enforce any given initiative. In fact, this is likely the only remedy available to ensure the enforcement of an initiative that allows for discretionary enforcement. Yet this is not an effective remedy in the context of defending the constitutionality of an initiative that has already been challenged.

First, there is the issue of timing. If the government refuses to defend the initiative, the judgment will be stare decisis before an initiative-friendly government can be elected. In fact, the Court’s suggestion in *Arizonans* that AOE bring the issue in state court ignores the fact that by intervening in the federal litigation, any final adverse ruling is res judicata. If the Court had not remanded with orders to certify but instead simply reversed, AOE could not have gone to state court due to collateral estoppel.\(^{142}\)

Second, there is the more general problem with voting for a new government as a remedy. Specifically, there are many issues facing the electorate in any given election, and there is no guarantee that there will be a party that both wants to enforce or defend the initiative and is otherwise consonant with the wishes of the electorate. There is also the possibility that there are

\(^{142}\) See *Local 322, Allied Industrial Workers of America, AFL-CIO v. Johnson Controls, Inc.*, *Globe Battery Division*, 921 F.2d 732 (7th Cir. 1991); *Clair v. Estar*, 148 F.2d 644 (2nd Cir. 1945) (Hand, J.) (finding that where a defendant intervened in a previous case and lost, the defendant cannot litigate the same issue in a claim brought against him due to collateral estoppel). One possible rejoinder is that the ballot-initiative sponsor should not intervene whenever the law is challenged. Yet this tactical decision, while correct under current law, would lead to duplicate litigation.
crosscutting cleavages, which create support for the initiative within a population generally inclined to support a political party that opposes the initiative. These concerns render elections an untenable solution to the problem of ballot-initiative defense.

ii. There are no prudential docket control concerns

The other primary objection raised by the Supreme Court and commentators to the expansion of standing is the possibility of substantially increasing case-loads and risking advisory opinions by allowing plaintiff’s to bring cases based on generalized, rather than specific, grievances. This objection underlies much of the Court’s taxpayer standing jurisprudence.143 Yet ballot-initiative sponsors are not merely taxpayers interested in arguing the merits of an issue in the “rarefied atmosphere of a debating society.”144 They possess a specific and tangible relationship to the law that has been voided—a nexus far stronger and far more likely to produce litigation with the necessary vigor than the typical taxpayer contemplated by Hein. This relationship, developed prior to the election itself and objectively demonstrated by the financial outlay and/or the official signatures provided to the secretary of state, transforms what would otherwise be a taxpayer, into an easily identified litigant that has unique

143 See, e.g., Hein, 551 U.S. at 611-12.
144 Massachusetts, 549 U.S. at 517, quoting Lujan, 504 U.S. at 581 (Kennedy concurring).
qualifications for stepping into the role of defendant where the government elects to abandon the defense.\footnote{It is important to distinguish this situation from that of the lobbyist who writes a piece of legislation which is adopted by a legislator and passed in its entirety. The initiative sponsor takes legal responsibility of the initiative throughout the process, unlike the hypothetical lobbyist. Further, the lobbyist’s interests can be defended by the member of congress that enacted the legislation. The initiative sponsor’s interests are, by definition in this case, not represented by a legislator.}

Limiting the individuals with standing to enforce or defend a ballot initiative on appeal to initiative sponsors resolves the potential docket control problem that the Court is always concerned about. This type of litigation is already rare, and the necessity of standing would (obviously) be limited to ballot initiatives that were not supported by the state, which ensures that standing would exist only in a small number of cases. This number is vanishingly small when contrasted against the fears expressed by the Court in the taxpayer standing cases, where in theory any law could come under attack.

Therefore, any concerns that the Court might have about the limitless nature of ballot-initiative supporters (or litigation) are misguided. There can only be a limited number of ballot-initiative sponsors for any new measure or amendment. Furthermore, where multiple sponsors each have arguments for why it should become the party to the appellate litigation, courts have ample tools for identifying the “lead defendant” and allowing it to act as the
representative for the small group of ballot sponsors that all wish to defend the suit.

Finally, there are alternative doctrines that could function to resolve the concern of a flood of initiative related litigation. If the Court is unwilling to limit standing to the initiative sponsor, it could instead require that suits challenging a referendum be treated like other cases of collective civil litigation, as a class action under Rule 23 of the Federal Rules of Civil Procedure. Rule 23 provides a framework for dealing with cases where a large number of potential plaintiffs seek the same relief, and so is an ideal model for a case with several potential ballot-initiative sponsors defending an initiative on appeal.\footnote{The defendant class in an initiative context could be thought of as either a Fed. R. Civ. P. 23(b)(1) or (b)(2) class. Rule 23(b)(1) provides that a class is appropriate is prosecuting separate actions by class members would create a risk of inconsistent judgments that would establish incompatible standards of conduct for the opposing party. This addresses one of the specific concerns underlying the objection to a broad doctrine of standing, namely the potential for multiplicitous lawsuits. Rule 23(b)(2) allows for a class action in cases where the opposing party has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is an appropriate remedy for the class as a whole. This would also be applicable in the initiative context, because the only available remedy would be injunctive in nature (requiring the state to respect the initiative). The parallels between class actions and our proposed doctrine of standing are not perfect. Class actions are generally concerned with classes of plaintiffs, while our approach will generally involve a class of defendant-appellants, who are attempting to justify an appeal from an adverse judgment. That being said, class action principles enable the courts to identify which party would be best equipped to advance the interest of the class of citizens who are attempting to appeal the adverse ruling on the initiative. Our approach indicates that the actor who will be best positioned to represent the class of wronged citizens is the initiative sponsor. If that proves incorrect, the fair and adequate representation requirement of Rule 23 can protect members of the public who have an interest in the defense of the laws that they themselves enacted.}

In the alternative, the Court could treat a appellate standing by a ballot-initiative sponsor like that of a shareholder who files a derivative suit under Fed.
R. Civ. P. 23.1. Like shareholders, initiative proponents are in a position where
they will be acting to enforce a right that the state government could properly
assert but has failed to assert. Further, the requirement that a shareholder make a
demand on the board, and have that demand rejected, before filing a derivative
action serves as a limiting function on when appeals can be made. Initiative
proponents would likewise have to make a demand on the state government to
defend the initiative in question, and would only be permitted to engage in
litigation if the state refused to defend the initiative on appeal. Rule 23.1 provides
a system where an interested individual can force the hand of an organization,
or, if their demand is rejected, bring suit on their own.

CONCLUSION

By requiring standing of all litigants, courts achieve significant efficiency
savings for the judiciary—preventing abstract challenges to public laws and
funneling such challenges to the legislative and executive branches allows courts
to save their limited resources for cases that merit attention. However, there are
limits to the types of litigants courts should exclude in order to conserve
resources or channel political issues to the other branches. In denying standing to
ballot-initiative sponsors, we believe that courts cross the line and confuse the

147 The demand requirement is one of several rules that substantially limit derivative suits. See Jill
appropriate justifications for limiting taxpayers and legislators from suing for relief with the legitimate purposes that referenda champions are pursuing. In the infrequent instances where ballot initiatives are not supported by the executive or legislative branches of government, courts must step in to ensure that the peoples’ representatives at least have the opportunity to have their case heard. Only then can the constitutionality or unconstitutionality of ballot-initiatives like Proposition 8 be considered by the appellate courts.