No. 18-281

IN THE

Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES,
M. KIRKLAND COX,

Appellants,

vs.

GOLDEN BETHUNE-HILL, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

The brief *amicus curiae* will address only the question added by the Court in its order of November 13, 2018, postponing the question of jurisdiction:

Whether appellants [Virginia House of Delegates, et al.] have standing to bring this appeal.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In the past two decades, victims' rights legislation has increasingly recognized that victims of crime have interests in criminal cases beyond those of the general public. Congress has authorized crime victims to seek relief on their own, in some cases, where the attorney for the government fails to protect those interests. See 18 U. S. C. §3771(b)(2)(B) & (d). Many states have written similar enforcement rights into their state constitutions. See, *e.g.*, Cal. Const. art. I, §28(c). Marsy's Law for All, Press Release: Marsy's Law Passes in Six More States (Nov. 7, 2018), https://marsyslaw.us/marsy-law-news/marsys-law-passes-in-six-more-states (bringing total to 11 states with provisions based on California model) (all Internet materials as visited December 26, 2018).

However, neither Congress nor state legislation or constitutions can grant standing under Article III of the United States Constitution. See *Summers* v. *Earth Island Institute*, 555 U. S. 488, 497 (2009). Therefore, an excessively narrow view of Article III standing would endanger these important reforms to the extent that relief needs to be sought in federal court. Procedural rights enforceable in state court may be blocked by a contrary federal injunction if the victim lacks standing to challenge it. See *infra*, at 10. Such a result would threaten the rights of victims that CJLF was formed to advance.

SUMMARY OF THE CASE

Only a few elements of the history of this case are needed to frame the issues addressed in this brief.

In 2011, as required following a decennial census, the Virginia Legislature passed, the Governor signed, and the U. S. Department of Justice "precleared" a reapportionment bill. See District Court Opinion,

Appendix to Jurisdictional Statement 6 ("App."). The plaintiffs filed suit claiming 12 districts were "racial gerrymanders." *Ibid.*

The named defendants are executive agencies and officers. See Jurisdictional Statement iii. The District Court granted the motion of the Virginia House of Delegates and its speaker to intervene, and they "have borne the primary responsibility of defending the 2011 plan . . . ." App. 7. Following an initial decision in favor of the plan and a reversal and remand by this Court, App. 7-9, the panel majority found that the plan violates the Equal Protection Clause of the Fourteenth Amendment. App. 97.

The legislative intervenors appealed to this Court, but the executive original defendants did not. They moved to dismiss the appeal, challenging the standing of the legislative intervenors to bring the appeal. See State Appellees' Motion to Dismiss 1.

On November 13, 2018, this Court postponed the decision of the question of jurisdiction and directed briefing of a question in addition to those posed by the appellants: "Whether appellants have standing to bring this appeal."

SUMMARY OF ARGUMENT

An excessively narrow rule on standing to appeal an injunction against enforcement of a state statute endangers the state's constitutional separation of powers. The standing doctrine is intended to be a rule of judicial modesty to keep the judiciary from usurping the powers of other branches, but in this context it can have the opposite effect. If a federal district court wrongly enjoins enforcement of a valid statute and only the governor can appeal, the governor can effectively

repeal the statute, usurping a power that belongs to the legislature or to the people themselves.

A house of the legislature has sufficient interest in the validity of the statutes it enacts to appeal an injunction against one. Only a minimal interest different from the general public is needed for standing. Interests as thin as a plan to visit an area in hope of seeing a very rare animal have been accepted. Legislative bodies, as distinguished from individual legislators comprising less than half of a body, have regularly been granted standing.

ARGUMENT

I. An excessively narrow rule on standing to appeal an injunction of a state statute endangers the state's constitutional separation of powers.

A. Purpose of the Standing Rule.

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 408 (2013). However, when a federal court has enjoined the enforcement of a statute and the question is whether an appellant has standing to appeal, a narrow view of standing can actually undermine the very separation of powers principles it was meant to enhance.

The typical standing case focuses on the plaintiff in the trial court. The requirements here have been repeated many times.

> "To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is

> concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers* v. *Earth Island Institute*, 555 U. S. 488, 493 (2009).

A "generally available grievance" "seeking relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large" is not sufficient. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 573-574 (1992). Interests that only slightly differ from those of the general public have been found sufficient in some cases, however. See Part II-A, *infra*, at 11-12.

In the context of plaintiff standing, a finding of no standing means that the judiciary does not get involved in the dispute at all. The case is dismissed, and no judgment on the merits is rendered. It was in this context that *Raines* v. *Byrd*, 521 U. S. 811, 819-820 (1997), noted that the standing inquiry is "especially rigorous" in constitutional cases. This application of standing complements the time-honored rule against deciding constitutional questions unless and until it is necessary to decide them. See *Pearson* v. *Callahan*, 555 U. S. 223, 241 (2009). It is a rule of judicial modesty with an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere . . . ." *Raines*, *supra*, at 820.

The context of the present case is starkly different with regard to these considerations. A decision against standing to appeal would allow a district court judgment striking down a statute to stand unreviewed in a type of case where Congress has indicated this Court's review is particularly important, warranting placement on the appeal rather than certiorari docket. See 28 U. S. C. §§ 1253, 2284(a). Far from abstinence and

modesty, this is heightened intrusiveness. If the judgment is incorrect but stands unreviewed, then federal judicial intrusion into a state legislative matter has occurred where it was not necessary.

Another purpose of the standing rule is to "assure that the legal questions presented to the court will be resolved . . . in a concrete factual context . . . ." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982). Decision on concrete facts helps to limit the scope of precedents and make it less likely that the precedent will be applied to different factual contexts not foreseen by the court. See *ibid.* This purpose, also, is served primarily by applying the concreteness requirement at trial. Once a case is tried and facts are found (or pleaded facts assumed on summary judgment), an appeal must be based on those facts regardless of who takes it.

Depending on how it is applied, then, a strict view of standing may either protect or degrade the separation of powers. The separation of powers that is degraded may be a separation in the Federal Constitution or the state's constitution. Because few issues of state separation of powers come before this Court, a few words on the importance of such issues is in order before we return to the application in this case.

B. State Separation of Powers.

The separation of powers under a state constitution is a matter of state law, not federal law, and this Court has long recognized it has no jurisdiction to review such questions. See, *e.g.*, *Dreyer* v. *Illinois*, 187 U. S. 71, 83-84 (1902). That does not mean these issues are not important or that they should not be considered as this Court navigates its jurisdiction to review injunctions against enforcement of state statutes. Before the

Federal Constitution was written, a robust separation of powers was regarded as an essential element of sound state government.

> "An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectively checked and restrained by the others." T. Jefferson, Notes on the State of Virginia, Query XIII, § 4 (1787), reprinted in Jefferson, Writings (M. Peterson ed. 1984).

Organs of government are assigned powers to check other organs, but the intended beneficiaries of the system of checks and balances are the people. The Federal Constitution draws the line between federal and state power to "secure[] the freedom of the individual." *Bond* v. *United States*, 564 U. S. 211, 221 (2011). Within the federal and state governments, powers are divided among the branches by the governments' respective constitutions, all to the same end. See The Federalist No. 47 (J. Madison).

Some states have gone beyond the classical tripartite division of powers. Legislative authority is delegated by the people to the legislature, see The Federalist No. 78 (A. Hamilton), but they need not part with all of it. In nearly half the states the people have reserved some portion of the legislative power through initiative and referendum to provide an additional check on the elected legislature. See *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U. S. __,135 S. Ct. 2652, 2659-2660 (2015) (slip op. at 4-5).

While the federal judiciary does not enforce the separation of powers laid out in state constitutions,

neither should it trample upon that separation. The state's checks and balances are too important to allow a federal judicial thumb on the scale.

C. Executive Repeal of Statutes.

In the Federal Constitution, enactment of statutes is made difficult on purpose. Bills must follow the complex path of passage through both houses of the legislature, followed by the approval of the President or re-passage by two-thirds majorities to override a veto. See U. S. Const. art. I, § 7. Repeal must follow the same path. See *INS* v. *Chadha*, 462 U. S. 919, 954 (1983); *Clinton* v. *City of New York*, 524 U. S. 417, 438 (1998). Generally speaking, state constitutions follow the same model. See National Conference of State Legislatures, Learning the Game (June 26, 2018), http://www.ncsl.org/research/about-state-legislatures/learning-the-game.aspx. There are some variations, to be sure. Nebraska, alone, has a unicameral legislature. See *ibid.*; Neb. Const. art. III, § 1. As noted *supra*, many states have initiative and referendum procedures.

In no state, though, does the governor have the power to unilaterally repeal a statute. Most governors have some form of line-item veto authority, see National Conference of State Legislatures, Inside the Legislative Process, The Veto Process (1998), http://www.ncsl.org/documents/legismgt/ILP/98Tab6Pt3.pdf, but that is not the same as nullifying a law after it has taken effect. Cf. *Clinton*, 524 U. S., at 439. Instead, most states have constitutional provisions modeled on Article II, § 3, of the United States Constitution affirmatively imposing on the executive a duty to "take care that the laws be faithfully executed." See Education Commission of the States, What constitutional or statutory duties does the governor have as it

relates to education? (Nov. 2017), http://ecs.force.com/mbdata/mbquestNB2?rep=KG1701.

States may have broader standing rules for their state courts than the federal courts observe. See *Hollingsworth* v. *Perry*, 570 U. S. 693, 714-715 (2013). State citizens may have procedural rights to bring suits in state court to enforce a law if the state executive will not. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 66 (1997).

A governor who opposes a state law as a matter of policy, who cannot repeal it unilaterally, and who is subject to suit in state court for refusal to enforce it may actually *want* to be enjoined by a federal court from enforcing the law. The possibility of litigation that is fully or partially collusive looms large. Federal courts lack authority to act in friendly suits. See *id.*, at 71. "[T]he standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits, [citation], or those which are feigned or collusive in nature [citation]." *Flast* v. *Cohen*, 392 U. S. 83, 100 (1968). In the present context, though, an overly strict rule on standing to appeal may well have the opposite effect, facilitating collusion.

Most cases in federal district court are tried by a single judge. If no one else has standing to appeal, all that a governor needs to do to unilaterally repeal a statute is be sued in one case before one judge who will issue an injunction with statewide effect (even if other judges have decided to the contrary) and then refuse to appeal.

In *Arizonans for Official English*, this Court observed that an unreviewed district court "judgment had slim precedential effect," did not bind nonparties or state courts, and did not preclude enforcement actions

in state courts. 520 U. S., at 66; see also *id.*, at 58-59, n. 11. However, the judgment in that case was declaratory only; injunctive relief was denied. See *id.*, at 55. A state citizen who wishes to bring suit in state court against a state official for failure to enforce a statute is in a very different posture if that official is already subject to a federal court's injunction forbidding enforcement of the same statute.

Conflicting injunctions are a major problem in the controversy over nationwide injunctions, see Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 420, 462-463 (2017), but the same problem can occur on a smaller scale with statewide injunctions against enforcement of a state statute. A party may be denied injunctive relief that would otherwise be granted if the defendant is already subject to a conflicting injunction. See *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.*, 445 U. S. 375, 386-387 (1980). It is "established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *Id.*, at 386. But if the enjoined party chooses not to appeal on those proper grounds and no one else has standing to do so, the enforcement of rights under a valid law may be blocked.

Traditionally, it was considered the duty of the executive to defend the acts of the legislature whenever a reasonable argument in defense could be made. Attorney General William French Smith explained this duty in a letter to the Senate Judiciary Committee leaders in 1981. See The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 U. S. Op. Off. Legal Counsel 25 (1981), https://www.justice.gov/olc/file/626816/download. Sadly, this sense of duty is in decline, and we more commonly see refusals to defend

defensible statutes, which may be based on acceptance of a dubious legal theory, disagreement with the policy of the statute, or even partisan politics.

The federal judiciary must not unbalance the checks and balances of state constitutions. Where a federal court has enjoined enforcement of a state statute, a rule of standing to appeal so strict that it allows the governor to effectively repeal a statute would do exactly that.

II. The House of Delegates has standing to seek review of the judgment.

A. Minimal Interest Required.

Despite the emphasis on "particularized" injury, see *Summers* v. *Earth Island Institute*, 555 U. S. 488, 493 (2009), and differentiation from "the public at large," *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 574 (1992), small interests have been found sufficient to establish standing. *Lujan* indicated that a concrete plan to visit an area to view an endangered animal would be sufficient, *id.*, at 564, and Endangered Species Act plaintiffs now routinely allege such plans. See, *e.g.*, *Oregon Wild* v. *Cummins*, 239 F. Supp. 3d 1247, 1260 (D. Or. 2017). If an animal is truly endangered, the chances of actually observing it on a given visit are typically very remote. The aesthetic interest claim is clearly a fiction to obtain standing for an interest in species preservation that is undifferentiated from the general public interest in enforcing the law, yet the minimal "particularized" injury is routinely accepted.

In *United States* v. *SCRAP*, 412 U. S. 669, 688 (1973), the plaintiffs alleged harm through an "attenuated line of causation" from nationwide railroad rate increases to reduced recycling to environmental damage to reduced enjoyment of national parks in the vicinity

of the District of Columbia. For the purpose of pleading, at least, this was deemed sufficient. The Court rejected the Government's request "to limit standing to those who have been 'significantly' affected by agency action." *Id.*, at 689, n. 14. It cited with approval a law review article stating that numerous cases had held " 'that an identifiable trifle is enough for standing to fight out a question of principle . . . .' " *Ibid.*, citing Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613 (1968).

SCRAP certainly has its critics, see *Massachusetts* v. *EPA*, 549 U. S. 497, 547 (2007) (Roberts, C.J., dissenting) ("high-water mark of diluted standing"), but it has not yet been scrapped. See *id.*, at 526, n. 24 (opinion of the Court). It marks "the very outer limit of the law." *Whitmore* v. *Arkansas*, 495 U. S. 149, 159 (1990).

B. Standing to Appeal in Defense.

If SCRAP marks the very outer limit of standing, then *Hollingsworth* v. *Perry*, 570 U. S. 693 (2013), surely marks the very outer limit of non-standing. By a bare majority, the *Hollingsworth* Court held that proponents of an initiative who were authorized by state law to defend it if state officials failed to did not have standing in federal court, even though government officials designated as backups by state law do have standing in similar circumstances. See *id.*, at 709-710; cf. *id.*, at 717-719 (Kennedy, J., dissenting).

The private/public distinction is not present in this case, however. A house of the state legislature seeks to defend the legislature's statute against attack. There is no need in this case to reconsider *Hollingsworth*, but it should remain the outer limit of non-standing and not be extended any further.

Part II of *Hollingsworth* addresses whether the initiative proponents had standing on their own, and Part III addresses whether they could assert the interest of the State, which indisputably does have an interest in the constitutionality of its statutes. See 570 U. S., at 704-708. It is important not to confuse the two different bases of standing. This case involves the first type, direct interest, and the State appellees' assertion that the House of Delegates is not authorized to represent the State's interest, see State Appellees' Motion to Dismiss 3, is beside the point.

Government officials and bodies have an interest in challenging injunctions that interfere with their duties and limit the exercise of the discretion invested in them by the law or constitution of the jurisdiction. Obviously, a party named as a defendant and directly enjoined by the trial court has standing to appeal. Other persons may also be bound by an injunction without being parties. Under Federal Rule of Civil Procedure 65(d)(2), an injunction binds not only the parties but also "(B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with" the parties or any of the numerous people listed in paragraph (B).

"Thus, although the contours of the federal courts' injunctive powers are hazy, federal courts sometimes may direct injunctions against nonparties, mandating or prohibiting conduct in the world outside the litigation in which the injunction is entered." Steinman, Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties, 39 Ga. L.Rev. 411, 497 (2005). "Hazy" is an understatement. If a substantial risk of harm is sufficiently concrete for a plaintiff to have standing to bring an action, see *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. 139, 153-155 (2010), then a substantial risk that a nonparty could be held in

contempt for disregarding an injunction should be sufficient for standing to challenge it.

Even officials not bound by an injunction may have their interests impaired by a judgment. In *Camreta* v. *Greene*, 563 U. S. 692, 697-698 (2011), the parties seeking this Court's review were officials who had lost the argument on the legality of their actions but won the case on the ground that qualified immunity precluded an award of damages, the only relief the plaintiff sought. The Court held that the prospective effect of the judgment on the defendants was sufficient to supply the personal stake required by Article III. See *id.*, at 702.

> "The court in such a case says: 'Although this official is immune from damages today, what he did violates the Constitution and he *or anyone else* who does that thing again will be personally liable.' If the official regularly engages in that conduct as part of his job (as Camreta does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action." *Id.*, at 702-703 (emphasis added).

The "or anyone else" in this passage indicates that the personal stake found sufficient is not unique to the original defendant in the case. Hypothetically, if Camreta's own interest had become moot by his moving on to a different job, see, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 67 (1997), mootness could be avoided by intervention of other child protection officials. See *Rogers* v. *Paul*, 382 U. S. 198, 199 (1965). *Camreta*'s description of the future-conduct interest confirms that it is not limited to the original defendant. "Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. He thus can demonstrate, as we demand,

injury, causation, and redressability." *Camreta*, 563 U. S., at 703.

The judgment in this case impacts the Virginia Legislature's future conduct. It limits the range of discretion the Legislature can exercise when passing reapportionment acts in future decades, and the next decennial census is only a year away.

Cases that involve only the standing of individual legislators are not controlling here. This is a case of a house of the legislative branch intervening as a body. Here the precedents run much more strongly in favor of standing. *Karcher* v. *May*, 484 U. S. 72, 74-75 (1987), which involved a "minute of silence" statute, started off as a whole house case but then became an individual legislator case.

"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*." *Id.*, at 75 (emphasis added). Later in the opinion, the *Karcher* Court adds an appositive "on behalf of the State," *id.*, at 81, but this reference needs to be considered in light of the district court's actual basis for allowing intervention. The intervenors from the beginning were the two houses of the legislature and their presiding officers. The District Court explained:

> "The Legislature itself, through the Speaker of the General Assembly and the President of the Senate, moved to intervene in the case. The Legislature was permitted to intervene because it was responsible for enacting the statute and because no other party defendant was willing to defend the statute. The

> Legislature sought to perform a task which normally falls to the executive branch, but which, in this case, the executive branch refused to perform." *Id.*, at 80.

The houses of the legislature were understood to have standing, not because of any peculiarity of New Jersey law but simply "because it was responsible for enacting the statute." Allowing a governor who had vetoed a bill and had his veto overridden, see *May* v. *Cooperman*, 572 F. Supp. 1561, 1562 (D NJ 1983), to effectively veto it again by failing to defend it would upset the state separation of powers, as explained in Part I, *supra*.

Only when the legislative houses elected new leaders who withdrew the appeal did a standing issue arise with regard to the former leaders going forward on their own. See *Karcher*, 484 U. S., at 76. The present case is therefore like *Karcher* was initially, before the change in leadership. The house itself is the appellant, and it has standing.

The opinion of Congress, as a co-equal branch of government, is entitled to some respect here, and it is clear that Congress believes that a house of a legislature has standing to defend the constitutionality of its statutes. In 28 U. S. C. §530D(a)(1)(B), Congress requires the Department of Justice to notify Congress of its intent to challenge or fail to defend the constitutionality of a statute. Under paragraph (b)(2) of that section, the notice must be made "within such time as will reasonably enable [either or both houses] . . . to intervene in timely fashion in the proceeding . . . ."

Arizona State Legislature v. *Arizona Independent Redistricting Comm'n*, 576 U. S. __, 135 S. Ct. 2652 (2015), clinches the case. The Court distinguishes *Raines* v. *Byrd*, 521 U. S. 811 (1997), as one involving the standing of "six *individual Members* of Congress."

135 S. Ct., at 2664 (slip op., at 12) (emphasis in original). The Court quotes *Raines* as attaching importance to the fact that the plaintiffs had not " 'been authorized to represent their respective Houses of Congress.' " *Ibid.* That fact would have no importance at all if the Houses themselves would not have had standing, but both the *Raines* Court and the *Arizona Legislature* Court thought it was important.

Spreading standing too far and restricting it too much are both dangerous, and both risk interfering with the constitutional separation and balance of powers. *Hollingsworth* denied standing to defend a statute to private citizens with no particularized interest, and *Raines* and *Karcher* (finally) denied it to individual legislators whose votes would not have been sufficient to pass or defeat legislation. In *Karcher* (initially), *Arizona Legislature*, and *Coleman* v. *Miller*, 307 U. S. 433, 446 (1939), houses of legislatures and a group of members constituting exactly one-half (sufficient to defeat a constitutional amendment if their interpretation were correct) did have standing. The present case falls squarely on the "standing" side of the line.

CONCLUSION

This Court has jurisdiction of the present appeal and should decide the case on the merits. *Amicus* takes no position on the merits.

January, 2019

Respectfully submitted,

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