No. 21-16299

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Philip Pinkert, individually and on behalf of a class of similarly situated individuals, and on behalf of the general public,

Plaintiff-Appellant,

v.

Schwab Charitable Fund, Charles Schwab & Co., Schwab Charitable Board of Directors, and Schwab Charitable Investment Oversight Committee,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:20-CV-07657-LB
Hon. Laurel Beeler

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In their response, Defendants focus almost exclusively on the fact that they hold legal title and control over Plaintiff's account assets. However, they elsewhere concede that (1) "California law recognizes some property interests short of holding title," *Appellees' Br. at 15*; and (2) "the invasion of some property interests short of legal title may constitute concrete and particularized injuries," *id. at 30*. Accordingly, Defendants' standing arguments suffer from the same fundamental flaw as the District Court's opinion, which also erroneously focused on who held "title to and control of" Plaintiff's account assets. *See id. at 17* (citing ER-029).

The relevant question for standing purposes is not whether Plaintiff holds legal title or formal control over his account assets (much less whether Plaintiff's interests are greater than Schwab Charitable's), but rather whether he has *any* interest in his account that distinguishes him from the general public and gives him a basis to bring suit. On this question, the answer is clear: The relevant IRS provisions, Program Policies, and Defendants' own brief recognize that Plaintiff retains certain concrete and particularized interests in his account. Among

other things, these include the fact that (1) the account is "separately identified" under Plaintiff's family name and maintained in that manner by Schwab Charitable, *Appellees' Br. at 3; Opening Br. at 10, 21*; (2) Plaintiff has unique advisory privileges regarding the investment of assets in the account, *Appellees' Br. at 4; Opening Br. at 13, 17*; (3) Plaintiff also has unique advisory privileges with respect to the disposition of assets in the account and "which charities should ultimately receive" those assets, *Appellees' Br. at 4; Opening Br. at 11–12, 16–17*; (4) Plaintiff "can exclude others" from exercising these privileges, *Appellees' Br. at 32; Opening Br. at 30*; and (5) Plaintiff can transfer his privileges to others, *Appellees' Br. at 32; Opening Br. at 13, 31*. Indeed, Schwab Charitable actively markets many of these features in order to induce persons like Plaintiff to open an account with it. *See, e.g., Opening Br. at 11, 14.*

For all of these reasons, the relationship between Schwab Charitable and Plaintiff is inherently different from the typical charity-donor relationship. Schwab Charitable is not a typical charity because all of the monies it handles are "ultimately … donate[d] to other charities." *Appellees' Br. at 3–4*. Likewise, Plaintiff is not an "ordinary

donor[],” *id. at 2*, because he has a recognized say in those ultimate donations and how monies will be invested in the meantime. As Defendants concede, there is a “decoupling” of the giving of assets (to which Schwab Charitable holds legal title) from the disposition of assets (in which the account holder maintains an interest). *See id. at 4.* Accordingly, common law cases holding that mere donors lack standing are inapposite, and a ruling that Plaintiff has standing to sue will not disturb those precedents. Indeed, “[n]o California court has held that a plaintiff with similar rights does not have standing to sue.” *Fairbairn v. Fid. Invs. Charitable Gift Fund*, 2018 WL 6199684, at *6 (N.D. Cal. Nov. 28, 2018) (“*Fairbairn I”).*

The fact that Defendants ask this Court to affirm the District Court’s decision on the merits only serves to highlight the weakness of their position on standing. The District Court never reached the merits of Plaintiff’s claims, and this Court should not rule on those claims in the first instance. Regardless, Plaintiff’s claims are well-grounded in applicable law, and this Court should not water down governing fiduciary standards by applying a business judgment rule meant for other types of claims—especially in light of the conflicts of interest here.

ARGUMENT

I. PLAINTIFF'S INTERESTS AS AN ACCOUNT HOLDER EXCEED THE INTERESTS OF ORDINARY DONORS AND CONFER STANDING TO SUE UNDER ARTICLE III.

It should not be a remarkable proposition that an account holder in a donor advised fund ("DAF") has standing to sue for matters relating to the mismanagement of assets in his account. *See Fairbairn I*, 2018 WL 6199684, at *6. Defendants' repeated arguments regarding "donor" standing in the traditional charitable context (*e.g.*, *Appellees' Br. at 1, 2, 21, 29*) ignore the important privileges granted to Schwab DAF account holders under applicable law and Schwab Charitable's own policies, which are separate and distinct from the interests of mere donors. *See* ER-086 (distinguishing rights of account holders from those of donors or contributors, as "third-party contributors have no account privileges with respect to [their] contributions"). As discussed below and in Plaintiff's opening brief, the unique interests of Schwab DAF account holders are sufficient to support Article III standing.

A. DEFENDANTS IGNORE THE SIGNIFICANT ACCOUNT HOLDER PRIVILEGES THAT ARE RECOGNIZED BY LAW AND PROMOTED BY SCHWAB CHARITABLE.

Defendants emphasize that account holders have no legal title or control over their account assets. However, this tells only half the story. In the normal course of business (outside the present litigation context), Schwab Charitable assures account holders that they retain important advisory privileges over the investment and distribution of contributed assets:

> Once the donor makes the contribution, Schwab Charitable has legal control over it. *However, the donor, or the donor's representative, retains advisory privileges with respect to the distribution of the funds and the investments of the assets in the account.*

Schwab Charitable Investment Policy Statement (August 2021) ("IPS") at 1, https://www.schwabcharitable.org/public/file/P-8085399/, referenced in ER-089 (emphasis added). Indeed, Schwab Charitable describes these investment privileges as "*a key consideration* in each Donor-Advised Fund Account's investment allocation," *id.* (emphasis added), and describes the distribution privileges as one of the "most important and fulfilling" aspects of the Schwab DAF, ER-096.

This balanced (*i.e.*, dual-interest) approach is a matter of both practical and legal necessity. If account holders truly had no say in how their account assets would be invested or distributed, they would likely contribute to a different DAF. *Cf. Fairbairn I*, 2018 WL 6199684, at *1 (noting that Fidelity Charitable "'aggressively pitched [itself] as a superior option to JP Morgan and Vanguard' which also have DAF accounts"). Moreover, the IRS *requires* DAFs to strike this balance of interests in order to receive favorable tax treatment. *See* 26 U.S.C. § 4966(d)(2)(A) ("[T]he term 'donor advised fund' means a fund or account ... (ii) which is owned and controlled by a sponsoring organization, *and* (iii) with respect to which a donor (or any person appointed or designated by such donor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account by reason of the donor's status as a donor." (emphasis added)). That is, DAFs must necessarily give DAF account holders advisory privileges specific to their individual accounts. These advisory privileges and other enumerated privileges (*see supra* at 2) are both concrete and particularized, and therefore

support standing for purposes of Article III. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992).

B. SCHWAB CHARITABLE IS NOT FREE TO DISREGARD THE ADVISORY PRIVILEGES OF ACCOUNT HOLDERS.

Defendants ignore this legally mandated balance, arguing that Schwab Charitable has "full discretion" to dispose of Plaintiff's account assets and that Plaintiff would "lack any contractual recourse" if Schwab Charitable rejected his advisory privileges with respect to a legitimate donation request. *Appellees' Br. at 27*. Indeed, Defendants take the extreme position that account holders have "no right whatsoever" to protect their account assets, *id. at 27 n.8*, and that account holders would have to rely on the Attorney General to bring suit even if Defendants absconded with the monies in their accounts, *id. at 39*.[1] Contrary to Defendants' assertions, Schwab Charitable does not

[1] These bold assertions are inconsistent with Schwab Charitable's statement in its marketing materials that a Schwab DAF account serves as "**your charitable wallet**." *See* Schwab Charitable, *Giving Via a Charitable Wallet*, https://www.schwabcharitable.org/donor-advised-funds/giving-via-charitable-wallet (emphasis added); *see also* ER-037 (noting DAFs are described as a kind of "charitable savings account").

have *carte blanche* to do whatever it pleases with respect to Plaintiff's account and ignore his advisory privileges.

The IRS does not condone the operation of a DAF in such an arbitrary manner. If the Schwab DAF did operate in such a manner, it could lose its status as a DAF. *See* 26 U.S.C. § 4966(d)(2)(C) ("The Secretary may exempt a fund or account … from treatment as a donor advised fund—(i) if such fund or account is advised by a committee not directly or indirectly controlled by the donor or any person appointed or designated by the donor for the purpose of advising with respect to distributions from such fund (and any related parties) …"). Even though Schwab Charitable has legal title and control over Plaintiff's account assets, its status as a DAF requires that it give Plaintiff the right to "advis[e] with respect to distributions from such fund." *See id.*

Consistent with the foregoing legal requirements, Schwab Charitable tells donors that grant recommendations will be "generally approved as long as the organizations are IRS-approved 501(c)(3) public charities and the grants comply with guidelines and restrictions

specified in the Program Policies."[2] Such "restrictions" are limited to "circumstances that Schwab Charitable deems appropriate to protect Schwab Charitable, its account holders, and/or the public interest, or that otherwise do not further Schwab Charitable's mission." ER-097. Contrary to Defendants' suggestion, these exceptions do not amount to full unilateral authority to arbitrarily ignore Plaintiff's advisory privileges. *Appellees' Br. at 26–27*. For example, Schwab Charitable could not, consistent with its policies and the Code, ignore Plaintiff's legitimate recommendations and instead distribute his account assets to Ms. Schwab-Pomerantz's alma mater.

Indeed, Plaintiff has directed every donation from his account since opening his account. *See* ER-044–45. This further illustrates the cognizable interest that Plaintiff has in his account:

> The presence of an advisory privilege …. may be evident through the conduct of a donor … and the sponsoring organization. For example, even in the absence of a writing, if a donor regularly provides advice to a sponsoring organization and the sponsoring organization regularly considers such advice, the donor has advisory privileges under the provision.

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[2] Schwab Charitable, *Frequently Asked Questions*, https://www.schwabcharitable.org/features/faqs.

Joint Committee on Taxation, *Technical Explanation of H.R. 4, the "Pension Protection Act of 2006" (JCX-38-06)*, at 343 (Aug. 3, 2006), https://www.jct.gov/publications/2006/jcx-38-06.

Having promoted, granted, and affirmed Plaintiff's advisory privileges, Schwab Charitable cannot now turn around and claim that these advisory privileges are illusory and Plaintiff has no interest whatsoever in his account assets.

C. SCHWAB CHARITABLE'S APPROVAL OF PLAINTIFF'S DIRECTIVES REGARDING INVESTMENT AND DISPOSITION OF FUND ASSETS IS A CONDITION SUBSEQUENT THAT DOES NOT DIMINISH HIS PROPERTY INTERESTS.

Even if Schwab Charitable did not routinely honor the advisory privileges of account holders in accordance with the Tax Code, the need to obtain third-party approval to exercise a property interest does not negate the existence of that interest under California law—it simply means the interest is subject to a condition precedent. *See In re Lau Capital Funding, Inc.*, 321 B.R. 287, 295 (C.D. Cal. 2005); *Sprague v. Edwards*, 48 Cal. 239, 249, 250 (1874).

Moreover, California law is also clear that a party with a contingent interest has a legally cognizable interest in the property, even if the contingency has not yet occurred. *See Roth v. Jelley*, 45 Cal.

App. 5th 655, 669 (2020) ("[T]he law has long recognized that a contingent future interest is property no matter how improbable the contingency[.]" (citations and quotations omitted)); *Est. of Sigourney*, 93 Cal. App. 4th 593, 604 (2001) (right to appoint trustee to charitable trust if appointed trustee could not serve was a property interest in the charitable trust because "a property interest need not 'be free from conditions precedent or subsequent which may preclude it from ever becoming a present interest'") (citation and quotations omitted); *Habenicht v. Lissak*, 20 P. 874, 877 (Cal. 1889) (defendant-debtor's seat on San Francisco Stock and Exchange Board was a property interest even though exercise of right to transfer seat was subject to third-party approval).

Because the right of a third party to veto a party's exercise of its property interest is irrelevant in determining whether a property interest exists, Schwab Charitable's theoretical right to reject Plaintiff's proposed investments and donations does not negate his legally cognizable interests in his account assets. *See In re Ryerson*, 739 F.2d 1423, 1425 (9th Cir. 1984) ("all legally recognizable interests" includes those that "may be contingent and not subject to possession until some

future time"); *In re Anderson*, 572 B.R. 743, 747 (B.A.P. 9th Cir. 2017) (contingent interests are still property). "The concept of property in California is extremely broad," *Est. of Sigourney*, 93 Cal. App. 4th at 603, and "[i]t extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value," *id.* (quoting *Yuba River Power Co. v. Nevada Irr. Dist.*, 279 P. 128 (Cal. 1929)). California courts recognize that "[o]wnership is not a single concrete entity but a bundle of rights and privileges as well as of obligations." *Id.*[3] Thus, even when a "limitation or prohibition diminishes the bundle of rights that would otherwise attach to the property, … *what remains is still deemed in law to be a protectible property interest*." *Id.* at 604 (emphasis added).

[3] As explained in Plaintiff's opening brief, "the bundle of sticks that constitutes 'property' … may be divided and held (*i.e.*, owned) among multiple persons." *Pac. Gas & Elec. Co. v. Hart High-Voltage Apparatus Repair & Testing Co.*, 18 Cal. App. 5th 415, 428 (2017); *see also Opening Br. at 26–27.*

D. PLAINTIFF'S UNIQUE PRIVILEGES AS AN ACCOUNT HOLDER SUPPORT STANDING AND RENDER THIS CASE DISTINGUISHABLE FROM ORDINARY DONOR CASES.

For all of these reasons, Defendants' heavy reliance on common law cases holding that general donors lack standing to sue typical charities are inapposite. *See Appellees' Br. at 21*. "Plaintiff[] [is]… not in the same position as any donor to a charitable trust; they bring suit regarding their particular donation which is maintained in their name and in which—according to the Complaint's allegations—they have retained future rights." *Fairbairn I*, 2018 WL 6199684, at *6.

In *Fairbairn I*, the court explicitly held that virtually identical advisory privileges gave DAF account holders a legally cognizable interest in their account assets "sufficient to confer standing to sue regarding the disposition of their donation." *Id.* The *Fairbairn I* court distinguished account holders who "bring suit regarding their particular donation which is maintained in their name and in which … they have retained future rights" by virtue of their advisory privileges, from "any donor to a charitable trust." *Id.*

Defendants attempt to distinguish *Fairbairn* because the Fidelity Investments Charitable Gift Fund made "specific promises to [the

account holders] about the way stock that they donated would be sold." *Appellees' Br. at 53–54*. However, as argued in Plaintiff's opening brief, Schwab Charitable also made a promise to "keep[] donor-advised fund account costs prudent and competitive." ER-084; *see also Opening Br. at 29*. At any rate, the nature of the promise does not alter the reality that just as here, the account holders in *Fairbairn* had surrendered legal title and control of their account assets to Fidelity Investments Charitable Gift Fund. Nonetheless, the court concluded that through their advisory privileges, the plaintiff account holders "retained certain future rights" in their account assets even though Fidelity Charitable had "legal title" over those assets. *Fairbairn I*, 2018 WL6199684, at *6.

Defendants do not cite any standing decisions involving a donor-advised fund. The lone DAF case that they cite, *Styles v. Friends of Fiji*, 2011 WL 488951 (Nev. Feb. 8, 2011), involved a ruling on the merits after a bench trial. The case was not dismissed in its infancy on standing grounds, and the fact that it proceeded to trial only serves to

demonstrate that the present case should not have been dismissed at the pleading stage.[4]

The other cases on which Defendants rely highlight the distinction between general donors and those with advisory interests. For example, *In re Milton Hershey School* involved a trust established at a school, and an affiliated association of alumni and a former school superintendent. 911 A.2d 1258, 1263 (Pa. 2006) (cited in *Appellees' Br. at 21*). When the

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[4] Aside from the fact that *Styles* never addressed the issue of standing, the case is distinguishable for several reasons. *First*, it did not involve a commercially sponsored DAF affiliated with an investment management firm like *Fairbairn* and the present case. *Second*, the defendant charity in *Styles* "did not keep the funds of the contribution by Plaintiff in a separate account from the time the funds were received." *Styles v. Friends of Fiji*, 2007 WL 8058851, at *4 (Nev. Dist. Ct., Clark Cty. Dec. 11, 2007). Here, Defendants concede that monies were kept in a "separately identified account reflecting the donor's contributions." *Appellees' Br. at 3*. *Third*, the plaintiff in *Styles* claimed that "he was entitled to the return of his donation". *Styles*, 2011 WL 488951, at *1. Here, by contrast, Plaintiff seeks declaratory and injunctive relief, and restoration of any losses to Plaintiff's Schwab DAF account and the accounts of other putative class members. ER-075. He does not seek to take back the donation for which he has already received a tax deduction. *Finally*, *Styles* did not involve "a promise made to induce a donation". *See Fairbairn v. Fid. Invs. Charitable Gift Fund*, 2020 WL 999752, at *2 (N.D. Cal. Mar. 2, 2020) ("*Fairbairn II*") (distinguishing *Styles*). As noted above, the present situation is different because Schwab Charitable promised that account costs would be "prudent and competitive." *See supra* at 14.

association tried to sue on behalf of the trust for mismanagement, the Pennsylvania Supreme Court held that the association lacked standing, since its interest was "held in common with other members of the public" and it lacked any special interest in the enforcement of the trust. *See* 911 A.2d at 1262. The *Hershey* court contrasted that case with *In re Francis Edward McGillick Foundation*, which involved a trust for scholarships, where the bishop and an association were vested with the power to "select scholarship recipients that were funded through the trust." *Id.* (discussing *In re Francis Edward McGillick Found.*, 642 A.2d 467 (Pa. 1994)). The *Hershey* court found this distinction relevant, noting that unlike the McGillick Foundation, "the Hershey Trust does not provide the Association with any decision-making power." *Id.*

Just like the diocese in *McGillick*, Plaintiff has been granted advisory privileges that empower him to recommend recipients of grant distributions. Plaintiff's "integral involvement … in the awarding of [grants] … create[s] an interest on the part of [Plaintiff] which is immediate, direct, and substantial—certainly far greater than the

abstract interest of all citizens in having others comply with the law." *See In re Francis Edward McGillick Found.*, 642 A.2d at 469–70.[5]

E. DEFENDANTS' CONDUCT INJURES PLAINTIFF'S ABILITY TO EXERCISE HIS ACCOUNT PRIVILEGES.

Defendants assert that Plaintiff "does not allege that the Charitable Defendants ever *barred* him from exercising" his account privileges. *Appellees' Br. at 28* (emphasis added). However, that does not mean that his interests as an account holder have not been injured.

Plaintiff's advisory privilege with respect to the investment of assets in his account (*i.e.*, his ability to direct how account assets will be invested) is necessarily limited by the investment options that Schwab

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[5] Defendants argue that even if Plaintiff did have standing to enforce the trust, he can sue only to remedy injuries to himself, not to the trust. *Appellees' Br. at 20*. However, someone must always stand in the shoes of the trust, and no matter who is deemed to have standing—trustees, directors, or those with advisory privileges—that person is always suing *on behalf of the trust. See, e.g.*, *Holt v. Coll. of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 756 (1964) (acknowledging that directors of a charitable corporation "do not hold legal title to corporate property" but nonetheless should have standing to enforce a charitable trust). Plaintiff's injuries to his account holder interests are directly attributable to Schwab Charitable's mismanagement of the trust. *See infra* at § I.E.

Charitable makes available within the Schwab DAF. As the Supreme Court recently explained in the related context of retirement accounts:

> Each participant chooses how to invest her funds, *subject to an important limitation*: She may choose only from the menu of options selected by the plan administrators, *i.e.*, respondents. The performance of her chosen investments, as well as the deduction of any associated fees, determines the amount of money the participant will have.…

Hughes v. Northwestern Univ., ___ S.Ct. ___, 2022 WL 199351, at *4 (U.S. Jan. 24, 2022). Because Schwab Charitable "failed to employ a prudent process for selecting, monitoring, and reviewing the underlying investments" offered through the Schwab DAF, and imprudently utilized "proprietary funds affiliated with Schwab & Co. despite the availability of better-performing, lower cost alternatives," ER-071, Plaintiff has been left with poorer investment options and has suffered an injury.

Similarly, Plaintiff's advisory privileges with respect to the disposition of account assets (*i.e.*, his ability to direct that account assets go to specific charities to be used for charitable purposes) also have been injured. Because of Schwab Charitable's imprudent fund choices, and the siphoning of excessive fees to Schwab & Co., there are less total funds to distribute. This means either that Plaintiff must give

to fewer charities or must give less to those charities. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 204 (2014) (discussing similar conundrum with respect to donations to political organizations resulting from aggregate limitation on total combined contributions). This adversely affects his donative privileges and defeats the very purpose for which he enrolled in the Schwab DAF in the first place. The only alternative is for Plaintiff to personally contribute more money to his account, in which case he suffers an obvious economic injury.

II. PLAINTIFF'S PRIVILEGES AS AN ACCOUNT HOLDER ALSO CONFER STANDING UNDER STATE LAW.

A. CAL. CORP. CODE § 5142 EXPRESSLY GRANTS STANDING TO ANYONE WITH A CONTRACTUAL OR PROPERTY INTEREST IN ASSETS SUBJECT TO A CHARITABLE TRUST.

Defendants argue that Plaintiff also lacks standing under California law. *Appellees' Br. at 40.* However, this argument is foreclosed by the very statutory provision upon which they rely. Section 5142 of the California Corporations Code does not provide that Attorney general is the *only* party who may sue a charitable corporation. To the contrary, the statute provides that any "person with a reversionary, contractual, or property interest in the assets subject to [the] charitable trust" may bring suit. Cal. Corp. Code. § 5142(a)(4). Thus, to the extent

that Plaintiff's contractual and property rights as an account holder give him standing to bring suit for purposes of Article III, they also give him standing to bring suit under California law.

Faced with the unambiguous language of the California statute, Defendants invoke what they describe as a "traditional rule across jurisdictions." *Appellees' Br. at 41*. Relying on a few out-of-state cases and a law review article, Defendants argue that "[a]t the founding of the United States," most states limited standing to government officials acting in a *parens patriae* capacity, such as the attorney general. *Id. at 44*. However, this is irrelevant to whether standing in *California* is *currently* limited to the Attorney General. And on this point, California Corporations Code § 5142(d) makes clear that standing is not so restricted. This is dispositive—Defendants themselves argue that "§ 5142 displaced [the] common law" regarding standing. *Appellees' Br. at 46.*

B. CALIFORNIA COURTS HAVE LONG RECOGNIZED THAT STANDING IS NOT LIMITED TO THE ATTORNEY GENERAL, AND APPLIES TO THOSE WITH SPECIAL INTERESTS IN THE TRUST.

Defendants suggest that the language of § 5142(d) should be disregarded because the legislature did not reject Defendants' so-called

"traditional rule" with sufficient fanfare. *See Appellees' Br. at 45.* However, there was no need for the proverbial trumpets to sound because California had already departed from the "traditional" view. Nearly 60 years ago (over a decade before the enactment of § 5142), the California Supreme Court held that although "the Attorney General has primary responsibility for the enforcement of charitable trusts, the need for adequate enforcement is not wholly fulfilled by the authority given him." *Holt*, 61 Cal. 2d at 755. Although Defendants emphasize that the specific issue in *Holt* was whether the trustees had standing to bring suit, *Appellees' Br. at 47*, the court observed that "[i]n addition to the general public interest, … there is the interest of donors who have directed that their contributions be used for certain charitable purposes," *Holt*, 61 Cal. 2d at 754. Moreover, the court rejected policy concerns regarding expanding standing, explaining that "[t]he protection of charities from harassing litigation does not require that only the Attorney General be permitted to bring legal actions in their behalf." *Id.* at 755.

Following *Holt*, the California Court of Appeals held that a youth organization had standing to enforce a charitable trust on behalf of

youth beneficiaries when the city that held legal title to the trust property revealed its intent to use the property for a purpose other than its intended purpose. Notably, the youth organization was neither a beneficiary nor vested with any advisory authority under the terms of the trust, but was nonetheless deemed a "responsive [and] responsible party to represent" the trust beneficiaries in the litigation. *San Diego Cnty. Council, Boy Scouts of Am. v. Escondido*, 14 Cal. App. 3d 189, 196 (1971).

California courts have continued to recognize the standing of others with a "special and definite interest in a charitable trust." *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161–62 (1987). For example, in 2005, the California Court of Appeals applied the analysis in *Holt* to explicitly conclude that the "Attorney General's power to enforce charitable trusts does not …. deprive the donor of standing to enforce the terms of the trust it created." *L.B. Research & Educ. Found. v. UCLA Found.*, 130 Cal. App. 4th 171, 180 (2005);[6] *see also Klein v.*

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[6] Defendants cite a single case that has called this discussion dicta, *see Appellees' Br. at 53*. However, the court in *L.B. Research* explicitly held that its standing analysis under charitable trust doctrine was a basis

Anaheim Mem. Hosp. Ass'n, 2009 WL 3233914, at *8 (Cal. App. Oct. 8, 2009) (unpublished) (distinguishing a member of the general public, which lacks standing to enforce a charitable trust, from "a special donor with [a] continuing property interest in the donations," which does have such standing). In light of this long line of cases, the *Fairbairn* court put it simply: "No California court has held that a plaintiff with similar rights does not have standing to sue." 2018 WL 6199684, at *6.

California Corporations Code § 5142(d) simply codifies this expansive view by including any person with "a …. property or contractual interest" in the trust. That it "ma[kes] no mention of donors" (*Appellees' Br. at 45*) is irrelevant, as Plaintiff is not suing in his capacity as a mere donor, but instead as a holder of explicit and specific

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for its judgment and was therefore a judgment of the court. 130 Cal. App. 4th at 182 ("Under either scenario—conditional contract or charitable trust—the motion for judgment on the pleadings should have been denied."). "[I]t is well settled that where two independent reasons are given for a decision, neither one is to be considered mere *dictum*, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and is of equal validity." *S. Cal. Chapter of Assoc. Builders & Contractors, Inc., Joint Apprenticeship Comm. v. Cal. Apprenticeship Council*, 4 Cal. 4th 422, 431 n.3 (1992) (citations omitted).

advisory privileges that only he possesses. These privileges give him ongoing contractual and property interests in his account assets.

C. DEFENDANTS' PUBLIC POLICY ARGUMENTS DO NOT DEFEAT STANDING AND FAIL ON THE FACTS OF THIS CASE.

Defendants argue (based on out-of-state case law) that "expanding standing to enforce charitable trusts beyond the attorney general threatens the public interest in ensuring that charitable assets are spent for charitable purposes." *See id. at 8 n.2*. However, as discussed above, that ship has already sailed under both California's Corporations Code and case law. *See supra* at § II.A–B. Indeed, the California Supreme Court expressly rejected this argument in *Holt*, 61 Cal. 2d at 754.

In any event, Defendants' argument ignores the unique facts of this case. As noted above, Plaintiff is not an "ordinary donor[]," *Appellees' Br. at* 2, and Schwab Charitable is not a typical charity. If this Court rules that account holders (like Plaintiff) with special privileges relating to commercial DAFs (like the Schwab DAF) have interests in their account sufficient to support standing, this will not open the floodgates to a deluge of "vexatious litigation," *id. at 50,* by general donors against traditional charitable organizations such as

hospitals, schools, or religious organizations. The Court's ruling will apply only to the situation presented here—where commercial DAFs give account holders broad latitude to direct how their account assets will be invested and distributed.

Indeed, Defendants' argument stands public policy on its head. The central purpose of this case is to prevent Schwab Charitable from making excessive payments from Plaintiff's account (and the accounts of other account holders) to its affiliated for-profit enterprise, Schwab & Co., which would otherwise be used for charitable purposes. Thus, allowing the case to proceed is fully consistent with the goal of "ensuring that charitable assets are spent for charitable purposes." *Id. at 8 n.2*.[7] It is Defendants—not Plaintiff—who are "draining charitable funds." *Id. at 16*.

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[7] Similarly, finding that account holders have standing under these circumstances will "encourage[] the salutary goal of making charitable donations" by giving account holders in commercial DAFs "peace of mind that [their] gift will actually be used for a charitable purpose" and not to profit affiliated financial institutions. *See Patton v. Sherwood*, 152 Cal. App. 4th 339, 347 (2007).

III. PLAINTIFF ALSO HAS RECOGNIZED EXPRESSIVE AND REPUTATIONAL INTERESTS IN HIS ACCOUNT THAT FURTHER SUPPORT STANDING.

Aside from his specific privileges as an account holder, Plaintiff also has expressive and reputational interests associated with the assets in his Schwab DAF account. *See Opening Br. at 43–46.* Although Defendants argue that these interests are "not cognizable," *Appellees' Br. at 42*, they are in fact well-recognized under the law.

Time and again, the Supreme Court and this Court have recognized the expressive interests associated with contributions to non-profit political organizations. *See, e.g.*, *McCutcheon*, 572 U.S. at 203 ("When an individual contributes money to a candidate … [t]he contribution 'serves as a general expression of support for the candidate and his views'…." (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976))); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) ("Contributions by individuals to support … a committee advocating a position on a ballot measure is beyond question a very significant form of political expression."); *Family PAC v. McKenna*, 685 F.3d 800, 812 (9th Cir. 2012) (discussing *Citizens Against Rent Control,* 454 U.S. 290). The same principles apply to contributions to charitable organizations

and other non-profits. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021) (requiring charities to disclose the identities of donors violated donors' associational rights); *Janus v. AFSCME*, 138 S. Ct. 2448, 2464–65 (2018) (compulsory union dues for a public sector union violated nonmembers' expressive freedom by compelling private expression). Likewise, reputational interests are also well-established under the law and support standing to bring suit. *See Meese v. Keene*, 481 U.S. 465, 472–77 (1987) (finding harm to "personal, political, and professional reputation" to be a cognizable injury); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017) ("[I]ntangible injuries—for example, … harm to one's reputation … may be sufficient for Article III standing.").

Although Defendants characterize these interests as "speculative," *Appellees' Br. at 33*, they are anything but. Schwab Charitable advertises the expressive and reputational benefits that donors receive in connection with their accounts. ER-054.[8] Having advertised these

[8] For example, Schwab Charitable has an online "Giving Guide," which encourages account holders to ask, "what personal values do [they] want to reflect in [their] giving." *See* Schwab Charitable, Giving Guide at 5, https://www.schwabcharitable.org/guide-to-giving. Schwab

benefits to account holders, Schwab Charitable cannot now disclaim them for purposes of standing. The Amended Complaint expressly alleges that "donating to organizations like Jewish Family Services of Greenwich is an expression" of Plaintiff's personal and family values. ER-045.

IV. DEFENDANTS' ALTERNATIVE ARGUMENTS ARE PREMATURE AND UNSOUND.

After spending 57 pages arguing that there is no jurisdiction to decide the case on the merits, Defendants do a remarkable about face in arguing that this Court should affirm the dismissal of Plaintiff's Amended Complaint on the merits. Because the District Court never reached the merits, it would be premature to reach Defendants' merits-based arguments on appeal. Regardless, Defendants' "alternative" arguments are themselves meritless.

A. THE DISTRICT COURT DID NOT REACH THE MERITS OF PLAINTIFF'S CLAIMS, AND THIS COURT SHOULD NOT DO SO IN THE FIRST INSTANCE.

In three pages, Defendants invite this Court to rule on complex state law issues of first impression that the District Court did not

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Charitable also permits account holders to select the level of recognition associated with each distribution. ER-100.

address. *Appellees' Br. at 57–60*. If this Court concludes Plaintiff has standing, this Court should not deviate from its role as a *reviewing* court, and should remand to the district court to rule on these questions in the first instance. *Baird v. Samsung Elecs. Am., Inc.*, 804 F. App'x 481, 484–85 (9th Cir. 2020); *see also Shirk v. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) ("This practice is rooted in 'our general assumption ... that we operate more effectively as a reviewing court than as a court of first instance.'" (quoting *Detrich v. Ryan*, 740 F.3d 1237, 1248–49 (9th Cir.2013))). Where, as here, "an argument has been 'briefed only cursorily before this Court and was not ruled on by the district court,' it is normally inappropriate for [this Court] to evaluate the argument in the first instance." *Shirk*, 773 F.3d at 1007 (quoting *Bigio v. Coca–Cola Co.*, 239 F.3d 440, 455 (2d Cir. 2000)).

This is especially so in light of the novel state law issues Defendants raise. In their cursory analysis, Defendants argue that longstanding common law fiduciary duties have been preempted by the California Corporations Code, and that Defendants' statutory fiduciary duties are subject only to a business judgment rule. No state or federal court has directly ruled on these issues. "[W]here the case involves

tangled issues of state law" and "there is no indication that the district court considered" these issues, a remand so the district court can undertake its "full analysis" is appropriate and efficient. *Baird*, 804 F. App'x at 484–85. This is true even though such legal questions are reviewed *de novo* on appeal. *Id.*; *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003). In light of the complexity of the issues and the "substantially incomplete" briefing before this Court, "the proper course of action is to remand to the district court." *Shirk*, 773 F.3d at 1007; *see also Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1156 (9th Cir. 2019) (remanding where "claims raise complex issues of state law that have not been fully briefed by the parties").

B. DEFENDANTS' ALTERNATIVE ARGUMENTS DO NOT SUPPORT DISMISSAL OF THE ACTION.

Even if this Court were to consider Defendants' merits arguments, they do not support dismissal of the action for several reasons.

First, Defendants conspicuously do *not* argue that (1) Schwab Charitable satisfied its common law fiduciary duties (Count I); (2) Schwab Charitable satisfied its statutory fiduciary duties (Count III); or (3) Schwab & Co. was free to aid and abet any underlying fiduciary

breaches (Count II). Nor could they. Instead, Defendants attempt to change the subject.

Second, with respect to Count I, Defendants also do not dispute that "stringent standards of care and loyalty" apply to trust fiduciaries at common law. *Appellees' Br. at 57.* Rather, they argue that those fiduciary standards have been "replaced … with less stringent corporate law standards" under California's Corporations Code. *Id.* (citing Cal. Corp. Code § 5230). However, the Corporations Code makes no reference to repealing the common law, and Defendants fail to identify any new statutory standards that purportedly replaced common law fiduciary standards. Accordingly, Defendants' preemption argument fails.

Under California law, it is well established that "there is a presumption that a statute does not, by implication, repeal the common law" and that "statutes should not be interpreted to alter the common law" and the two "should be construed to avoid conflict." *Cal. Ass'n of Health Facilities v. Dep't of Health Servs.*, 940 P.2d 323, 331 (Cal. 1997) (citation and quotations omitted). Only when there is "no rational basis for harmonizing [the] two" should a court recognize "repeal by

implication." *Id.* Absent an explicit legislative reference displacing the common law, courts will find preemption only if they can discern a legislative intent to "occupy the field." *I.E. Assocs. v. Safeco Title Ins. Co.*, 702 P.2d 596, 599 (Cal. 1985). No such field preemption exists here,[9] and Defendants do not point to anything evincing a "legislative intent to eviscerate" longstanding common law protections. *See Env't L. Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844, 867 (2018).

Third, with respect to Count III, Defendants make no argument that Plaintiff's statutory claims are preempted. Nor could they.[10]

Fourth, to the extent that Defendants argue they are somehow shielded from liability by California Corporations Code § 5231, nothing

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[9] Only where "general and comprehensive legislation" "minutely describes" the "course of conduct, parties, things affected, limitations and exceptions," will a court find an implied legislative intent for a statute to "totally supersede and replace the common law." *Id.*

[10] One predicate violation for Plaintiff's "unlawful" business practices claim under California's Unfair Competition Law is an underlying violation of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"). *See* ER-073–74. UPMIFA is found in Part **7** of Division 9 of the Probate Code, *see* Cal. Prob. Code § 18501 *et seq*., which clearly is not preempted by § 5230(b).

could be further from the truth. That section of the Corporations Code recognizes that corporate directors must carry out their duties in "good faith," in a manner they believe to be in the "best interests" of the corporation, and with "such care … as an ordinarily prudent person in a like position would use under similar circumstances." Cal Corp. Code § 5231(a); *see also* Cal. Prob. Code § 18503(b) (outlining duties under UPMIFA); Restatement (Third) of Trusts §§ 77, 78 (outlining duties of prudence and loyalty at common law); Restatement (Third) of Trusts § 90 (Prudent Investor Rule). Defendants have failed to meet those standards. *See, e.g., Tibble v. Edison Int'l*, 843 F.3d 1187, 1197–98 (9th Cir. 2016) (en banc) ("The Restatement … instructs that 'cost-conscious management is fundamental to prudence in the investment function,' and should be applied 'not only in making investments but also in monitoring and reviewing investments.' … 'Wasting beneficiaries' money is imprudent'") (first quoting Restatement (Third) of Trusts § 90, cmt. b; then quoting Unif. Prudent Investor Act § 7); ER-071 (alleging that "Defendants failed to employ a prudent process for selecting monitoring, and reviewing the underlying investments held by the investment pools").

Fifth, to the extent that Defendants argue they are entitled to a watered down "business judgment rule," that so-called rule has no application under the circumstances here. The business judgment rule "does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest." *Everest Invs. 8 v. McNeil Partners*, 114 Cal. App. 4th 411, 430 (2003). Defendants argue there is no conflict of interest because Plaintiff does not allege that "a *majority* of the directors is conflicted." *Appellees' Br. at 58–59* (emphasis in original). However, this ignores the obvious conflicts of the Schwab Charitable Board chair and other Board members.[11]

The exceptions to the business judgment rule are not as narrow as Defendants suggest. Rather, "when circumstances inherently raise an inference of conflict of interest" the business judgment rule does not apply. *Kruss v. Booth*, 185 Cal. App. 4th 699, 728 (2010), as modified

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[11] The Chair of Schwab Charitable Board (Carrie Schwab-Pomerantz) has a clear conflict of interest because she is the daughter of Charles Schwab, the founder of the Charles Schwab Corporation, and is also a senior vice president of Schwab & Co. ER-045; *see also* CharlesSchwab Corp., Carrie Schwab-Pomerantz, https://www.aboutschwab.com/carrie-schwab-pomerantz. Further, several Directors are affiliated with Schwab & Co. or worked there prior to working at Schwab Charitable. ER-040.

(July 9, 2010). In particular, actions benefiting an affiliated third party to the detriment of the corporation, including purchasing assets or services from that affiliate "at an inflated price," give rise to an "inherent inference of conflict of interest." *Id.*

Here, Plaintiff has alleged that the entire relationship between Schwab Charitable and Schwab & Co. is fraught with conflicts. Since the court "must accept the truth of the alleged conflicts of interest and the concomitant inference of self-dealing for purposes of deciding whether" to dismiss the complaint, "the business judgment rule does not support" dismissing the complaint. *Kingoschu Family Partners, LLC v. Pub. Storage*, 2014 WL 787830, at *5 (Cal. Ct. App. Feb. 27, 2014) (unpublished) (citing *Kruss*, 185 Cal. App. 4th at 728).

Finally, because Plaintiff has adequately pled underlying violations of law by Schwab Charitable, Plaintiff's aiding and abetting claims as to Schwab & Co. are also adequate.

CONCLUSION

For the foregoing reasons, the District Court's order and judgment dismissing Plaintiff's Amended Complaint should be reversed, and the case should be remanded for further proceedings.

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Respectfully Submitted,

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FOR THE NINTH CIRCUIT

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