No. 21-16299

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 (Beeler, J.)

BRIEF FOR DEFENDANTS-APPELLEES

DAVID C. MARCUS
CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Ave., 24th Floor
Los Angeles, CA 90071
(213) 443-5300

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 937-7294

Counsel for Schwab Charitable Fund, Schwab Charitable Board of Directors, and Schwab Charitable Investment Oversight Committee

JOSHUA D. N. HESS
BRIAN RAPHEL
DECHERT LLP
One Bush Street, Suite 1600
San Francisco, CA 94111-3513
(415) 262-4500

DAVID A. KOTLER
SAMANTHA ROSA
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500

Counsel for Charles Schwab & Co.

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

December 13, 2021

ANDREW SCOTT DULBERG
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6352

SUSAN M. PELLETIER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

Counsel for Schwab Charitable Fund, Schwab Charitable Board of Directors, and Schwab Charitable Investment Oversight Committee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Appellate Rule of Procedure 26.1, the undersigned certifies that Schwab Charitable Fund is not owned by any parent corporation, and no publicly held corporation owns 10% or more of its stock; it is an independent public charity and does not have any stock. Schwab Charitable Fund's Board of Directors, and the Board's Investment Oversight Committee, are composed of individual persons.

The Charles Schwab Corporation is a publicly traded corporation and has no parent corporation. The Toronto-Dominion Bank is a publicly held corporation that owns less than 10% of The Charles Schwab Corporation's voting common stock (and combined with its ownership of a separate class of non-voting common stock, owns more than 10% of common stock of The Charles Schwab Corporation).

Date: December 13, 2021

<u>/s/ Alan E. Schoenfeld</u>
ALAN E. SCHOENFELD

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INTRODUCTION

The law has long prohibited donors from suing when they disagree with the way that charities manage charitable assets. That rule—which is applied consistently under Article III, common law, and state statutory standing principles—reflects that a donor gives up his ownership and control over assets once he has given them away, and so lacks any cognizable interest in the charity's management of assets that now belong to it. The rule also protects charities from donor suits that would both distract from charities' operations and missions and deplete charitable resources.

Pinkert's suit ignores that bar. Pinkert contributed to Schwab Charitable Fund, a charity that sponsors a donor advised fund qualified under the Internal Revenue Code and is organized as a nonprofit public benefit corporation under California law. Under federal tax law and the governing Program Policies, Pinkert irrevocably and completely ceded ownership and control over the assets he donated to the Fund. Discontent with the way the Fund manages contributed assets, Pinkert filed suit, alleging principally that Fund directors breached their fiduciary duties to the charity. The district court correctly dismissed the suit, concluding that Pinkert, having relinquished any interest in the donated assets, lacked standing to sue about their alleged mismanagement under both Article III and California statute.

The district court's judgment should be affirmed on either of these bases. The court's conclusion that Pinkert lacks standing is in accord with Article III precedent requiring concrete, particularized injuries, which Pinkert cannot assert given that it is the Fund—and not Pinkert—that would be injured by any alleged mismanagement of assets that belong to the Fund itself. And it is in accord with over a century of state law holding that the state attorney general has primary authority to ensure charities' compliance with their fiduciary duties. While that authority is supplemented by a small number of statutorily enumerated parties with authority to sue, ordinary donors like Pinkert are not among them. Finally, even if Pinkert could overcome the court's conclusion that he lacks authority to sue, affirmance would still be warranted because he fails to plausibly plead any cause of action.

JURISDICTION

Defendants agree with Pinkert's jurisdictional statement but dispute that he has standing to sue.

COUNTER-STATEMENT OF ISSUES

1. Whether a donor who has irrevocably ceded ownership and control over a charitable donation has Article III standing to sue for alleged mismanagement of donated assets.

2. Whether a donor who has irrevocably ceded ownership and control over a charitable donation has standing under California law to sue for alleged mismanagement of donated assets.

3. Whether Pinkert's complaint fails to plausibly allege any cause of action.

STATEMENT OF FACTS

A. Federal And State Regulatory Background

Donor advised funds (DAFs) fulfill an important role in the U.S. charitable sector. ER36-37 (FAC ¶4). Since they first appeared in the 1930s, they have democratized philanthropy by making it easier to donate a wide variety of assets to charitable causes and engage in longer-term, strategic giving. *See* U.S. Department of the Treasury, *Report to Congress on Supporting Organizations and Donor Advised Funds* 50 (Dec. 2011) ("Treasury Report"). In particular, DAFs offer donors the potential to donate when they have assets and could benefit from a charitable tax deduction while giving them time to consider the charitable causes they wish to support. *See* ER36-37.

The basic structure of a DAF charity is straightforward. A DAF is a charity. When a donor contributes to a DAF, the charity maintains a separately identified account reflecting the donor's contributions. The DAF charity owns and controls contributed assets, and invests them with the aim of maximizing the amount

ultimately available to donate to other charities. Donors maintain nonbinding advisory privileges with respect to amounts reflected in their individual accounts, and may make recommendations—which the DAF charity is under no obligation to accept—as to which among several pre-selected investment options their contributions should follow, and which charities should ultimately receive distributions from their accounts. This structure recognizes that individuals who have capacity to give may not be at a stage in their lives when they have the time to investigate the causes they may wish to support, and to select among the many organizations that serve those causes.

The decoupling of the giving and investigation/selection processes has advanced the contribution of billions of dollars to charity in the United States each year. ER36-37. Recognizing the benefit DAFs provide, the Internal Revenue Service granted a tax exemption to DAFs, and Congress codified their treatment as public charities. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006). Many States, including California, likewise include DAFs among public charities.

Schwab Charitable Fund sponsors a DAF qualified under the Internal Revenue Code, 26 U.S.C. §4966(d)(2)(A), and organized as a public benefit corporation (i.e., a public charity) under California law, *see* ER45. The Fund is

thus subject to the dual regulatory frameworks established under federal tax law and California laws governing public charities.

1. Federal tax law

The Internal Revenue Code defines a donor advised fund as a "fund or account (i) which is separately identified by reference to contributions of a donor or donors, (ii) which is owned or controlled by a sponsoring organization, and (iii) with respect to which a donor … has … advisory privileges with respect to the distribution or investment of amounts held in such fund or account …." 26 U.S.C. §4966(d)(2)(A); *see* ER37-38.

As with other charitable contributions, when a donor contributes to a DAF, she can claim a federal tax deduction for the amounts she contributed so long as the donation complies with certain legal requirements. *See* 26 U.S.C. §170(a), (c), (f)(18); ER36-37. Foremost among those requirements is that the donor relinquish all legal title to and control over the contributed assets. *See* 26 U.S.C. §4966(d)(2)(A). Thus, for a donor to lawfully claim a tax deduction for a gift to a DAF, the contributed assets must be "owned *and controlled*" by the sponsoring organization, *id.* §4966(d)(2)(A) (emphasis added), and the donor must "obtain[] a contemporaneous written acknowledgment … from the sponsoring organization … that such organization has *exclusive legal control* over the assets contributed," *id.* §170(f)(18)(B) (emphasis added).

By statute, donors to DAFs can retain "advisory privileges with respect to the distribution or investment of amounts held in such fund or account." 26 U.S.C. §4966(d)(2)(A). Such advisory privileges permit the donor to make "nonbinding recommendations concerning the distribution or investment of assets." H.R. Rep. No. 109-455, at 179-180 (2006) (Conf. Rep.). "Advisory privileges are distinct from a legal right or obligation," and a donor who retains "enforceable rights … with respect to a gift … will not be treated as having 'advisory privileges'"—i.e., will not be treated as having contributed to a DAF. Joint Comm. on Taxation, *Technical Explanation of H.R. 4, the "Pension Protection Act of 2006"* (JCX-38-06) (Aug. 3, 2006), at 343.

Congress's treatment of DAFs is consistent with federal tax rules generally, which permit charitable deductions only where the donor has divested himself of "control" of the gift. *See Goldstein v. C.I.R.*, 89 T.C. 535, 541-542 (1987). The Tax Court has thus confirmed that deductions for donations to DAFs must be "completed gift[s]" that "relinquish[] dominion and control over the donated property." *Viralam v. C.I.R*, 136 T.C. 151, 162 (2011); *accord National Found., Inc. v. United States*, 13 Cl. Ct. 486, 492-493 (1987) (DAF entitled to tax-exempt status in part because DAF assumed control of contributions and donors had "no legal recourse" for return of their contributions if the DAF refused to honor their requests); *see also* Treasury Report 2 ("As a legal matter, however, the donor has

no right to control the manner in which the [sponsoring organization] uses the particular funds contributed … by the donor.”).

In the case of a DAF account, the donor is permitted to advise the sponsoring organization as to how the donated funds should be invested and disbursed to other charities, but this advice is subject to the DAF sponsoring organization’s ultimate discretion and control. Treasury Report 4 (“[A] charitable gift is not considered to be ‘complete’—and no charitable deduction is allowed—if the donor maintains control over the gift, its sale, or further use.”).[1] These rules ensure that taxpayers do not simultaneously obtain a deduction and retain the ability to benefit personally from the purportedly donated property. *See New Dynamics Found. v. United States*, 70 Fed. Cl. 782, 802-803 (2006) (denying tax exemption to sponsoring organization that allowed donors to retain private benefit through control of donations).

2. California public benefit corporation law

Under California law, DAFs, like other charities, are organized as “public benefit corporations” that exist and hold their assets for the benefit of the public.

[1] *See* Treasury Report 82 (advising Congress that it is appropriate to continue treating donations to DAFs as deductible charitable contributions because donors have only a “non-binding advisory relationship” with the DAF sponsoring organization and “the sponsoring organization … —not the donor—is the legal owner of the contributed assets and controls how those assets are invested and disbursed”).

To ensure that charitable assets are overseen for the benefit of the public and charitable beneficiaries, while also ensuring that charitable resources are insulated against waste from lawsuits, California vests its Attorney General with primary responsibility for supervising charities and enforcing charitable trusts. *See* Cal. Gov't Code §12598(a) ("The primary responsibility for supervising charitable trusts in California, for ensuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations, resides in the Attorney General.").[2]

The law gives the Attorney General "broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities." Cal. Gov't Code §12598(a). The Attorney General's Office

[2] The legislative choice to give the attorney general primary authority to safeguard charitable assets and enforce charitable trusts reflects over a century of practice across jurisdictions. *See, e.g.*, *Burbank v. Burbank*, 25 N.E. 427, 428 (Mass. 1890) ("[T]he law has provided a suitable officer to represent those entitled to the beneficial interest in a public charity. It has not left it to individuals to assume this duty[.] The attorney general, … as representing the crown, is the protector of all the persons interested in the charity funds. He represents the beneficial interest."). As courts have routinely recognized, 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 Carl J. Herzog Found., Inc. v. University of Bridgeport*, 699 A.2d 995, 1002 (Conn. 1997) (declining to expand standing to donors who did not reserve a property interest in charitable gift because such an expansion was likely to "establish[] standing for a new class of litigants, donors," who would, thus, pose a risk of "lengthy and complicated litigation").

operates a Charitable Trusts Section charged with registering public charities, trustees, and professionals, and with "investigat[ing] and bring[ing] legal actions against charities and fundraising professionals that misuse charitable assets or engage in fraudulent fundraising practices."[3] The Section oversees public charities, including DAFs, and brings enforcement actions against charities it concludes have violated the law, issuing cease and desist orders, imposing monetary penalties, and even taking action to revoke or suspend charitable corporations' registration.[4] The Section also accepts complaints from the public, ensuring that it can effectively enforce the law on the public's behalf.

Aside from the Attorney General and persons granted "relator" status by the Attorney General, California law strictly limits who can bring claims alleging mismanagement of charitable funds. The law confers standing to pursue actions to "enjoin, correct, obtain damages for … or to otherwise remedy a breach of a charitable trust" involving a public benefit corporation only to: (1) the corporation; (2) a member of the corporation acting in the name of the corporation; (3) a director or officer of the corporation; and (4) "[a] person with a reversionary,

[3] Office of the California Attorney General, *Charities*, https://oag.ca.gov/charities.

[4] *See* Office of the California Attorney General, *Charities—Public Notice*, https://oag.ca.gov/charities/public-notice (listing recent enforcement actions).

contractual, or property interest in the assets subject to [the] charitable trust." Cal. Corp. Code §5142(a); *see also id.* §5233(c).

B. Schwab Charitable Policies

Schwab Charitable Fund has adopted customer-facing policies that are consistent with the governing statutory and regulatory structure. ER78-109 (Schwab Charitable Program Policies); *see* Pinkert Br. 1 (acknowledging that the Program Policies govern his relationship with Schwab Charitable and define his privileges and authority in relation to the Fund). In particular, the Fund advises donors in writing that they cede all ownership and control over the assets that they contribute to the Fund. The Program Policies inform donors that, in accordance with federal law, "contributions [to the Fund] are both irrevocable and unconditional," and all contributions received by the Fund are "subject to the exclusive legal authority and control of [the Fund] as to their use and distribution." ER86; *accord* ER91.

The Program Policies further advise donors that they cannot make contributions subject to any material restrictions or conditions. ER89. Therefore, the Program Policies note, a donor cannot reserve "a right to control or direct distributions" and cannot impose "[a]ny other condition that prevents Schwab Charitable from exercising exclusive legal control over the use of contributed assets to further its exempt purposes." *Id.* The Program Policies explain that

donors may recommend how assets they contributed should be invested and ultimately disbursed, but underscore that "Schwab Charitable retains final authority over the distribution of all grants and may decline or modify a grant recommendation that is inconsistent with these Program Policies, or for any other reason." ER99.

The Fund is governed by a seven-member Board of Directors, ER45, composed of individuals with extensive corporate experience, ER49. The Board has established an Investment Oversight Committee, which includes at least three members of the Board, to review and select investment options for the Fund's assets. ER46. The Fund's Board and Committee have selected fourteen diverse investment options for the Fund's assets, ER52, including five index funds, a money market fund, several actively managed pools, and several asset-allocation pools (e.g., a Socially Responsible Balanced Pool). ER41, 52-23.

C. Procedural History

Pinkert is a Schwab Charitable donor. He sued the Fund, its Board of Directors, and the Board's Investment Oversight Committee (the "Charitable Defendants"), as well as Charles Schwab & Co. ("CS&Co."), supposedly on behalf of tens of thousands of the Fund's donors and "on behalf of the general public." ER36. Pinkert's complaint alleges that the Charitable Defendants breached their fiduciary duties to manage the Fund's assets carefully and loyally in selecting

investment options and in negotiating the fees that the Fund pays to CS&Co. for custodial and brokerage services.

Specifically, Pinkert alleges that the Charitable Defendants selected index funds and a money market fund for which there are at least some cheaper alternatives available, ER41, 58-60, and selected "retail" share classes of some funds when the Fund could have qualified for cheaper "institutional" share classes of the same funds, ER61-63. He further alleges that the Charitable Defendants failed to negotiate "marketplace rates" for custodial and brokerage services that CS&Co. provides to the Fund, ER41-42, 66, and allowed CS&Co. to receive "grossly excessive" compensation for the services it provides, ER40-41, 71. He alleges that through this conduct, the Charitable Defendants sought to benefit CS&Co. to the detriment of the Fund, *see* ER40-41 (FAC ¶16), and that CS&Co. is a "knowing contributor to and beneficiary of" the Charitable Defendants' breaches of their fiduciary duties, ER72.

Pinkert's complaint asserts claims against the Charitable Defendants for: (1) breach of the fiduciary duties of care and loyalty, allegedly imposed under the common law of trusts (Count I); and (2) violation of California's Unfair Competition Law (UCL), Bus. & Prof. Code §17200, based on unlawful breaches of common-law and statutory fiduciary duties (Count III(A), (C)). ER71-75. The complaint asserts claims against CS&Co. for aiding and abetting breach of

fiduciary duties (Counts II and III(B), (D)). ER72, ER73. Pinkert seeks declaratory, injunctive, and other equitable relief. ER75.

The district court granted Defendants' motion to dismiss, finding that Pinkert lacked standing to sue because he "ceded control of his assets" when he transferred their ownership to the Fund. ER28. Citing the statutory framework governing DAFs, the court explained that Pinkert necessarily "gave up title to and control of his donation in exchange for an immediate tax deduction," and therefore "has no property interest that establishes standing." ER 29-31. The court found that "[n]o case supports the conclusion that the right to designate investments … and donations in a donor-advised fund is a contractual or contingent property interest that gives a donor Article III standing to challenge the fund's choice of investment funds or administrative fees." ER29-30. It likewise found no support for treating Pinkert's asserted reputational and expressive interests as cognizable for purposes of Article III. ER31.

In the alternative, the court found that Pinkert had no standing to sue under California law. The court recognized that "[b]y statute, California limits the persons who can sue for mismanagement of a charitable corporation's assets, and a donor like the plaintiff is not among them" because he "does not have an interest in the property." ER31-32. The court also rejected Pinkert's assertion that he had "a special interest that conveys common-law standing," reasoning that, under

longstanding California common law, "[d]onors who 'parted with their interest in' and 'control over' their donated assets have no standing to complain." ER31-33.

Pinkert appealed.

SUMMARY OF THE ARGUMENT

The district court correctly dismissed Pinkert's suit for lack of Article III standing and for lack of statutory standing under California law. Both conclusions are correct and should be affirmed. Pinkert needs both Article III standing and authorization under state law to sue; he lacks both. And in addition to lacking authority to sue, Pinkert fails to plead any plausible cause of action, providing yet another basis for affirmance.

I. Pinkert lacks Article III standing to sue the Charitable Defendants or CS&Co. for alleged mismanagement of the Fund's assets. Under settled federal law and the Program Policies, Pinkert irrevocably ceded ownership and control over the assets he contributed to the Fund. Any mismanagement of those assets—which belong as a matter of law to the Fund—would not injure him in a concrete or particularized way, as Article III requires. The nonbinding advisory privileges that Pinkert can retain as a DAF donor do not give him standing either. Pinkert theorizes that the alleged diminution in value of the assets over which he retains such privileges injured him, but such injuries are not among those "traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*

LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021). Finally, Pinkert fails to identify any authority supporting his assertion of standing based on alleged "expressive" and "reputational" injuries from, again, the purported diminution in value of the assets over which he retains advisory privileges. And even if such injuries were theoretically sufficient to support Article III standing—they are not—here they are impermissibly speculative and unspecific.

II. Pinkert also lacks statutory standing under California law. The California legislature has prescribed strict limitations on who can sue charities to enforce their trust duties. Cal. Corp. Code §5142(a)(2), (3). As a donor, Pinkert is not among the carefully enumerated list of persons entitled to sue. He attempts to shoehorn donor standing into a provision permitting those with "contractual" or "property" interests "in the assets" to sue, but California law forecloses that argument, as a donor who has irrevocably and completely ceded ownership or control over contributed assets has neither a contractual nor a property interest in those assets. While California law recognizes some property interests short of holding title, authority to make nonbinding recommendations about asset expenditures is not one of them. Pinkert's cursory attempt to invoke common-law "special interest" standing fares no better. California statute has displaced the common law of charitable standing and in any event the common law does not support Pinkert's standing here. To the contrary, the California Supreme Court has

made clear that where a donor has "parted with [his] interest in" and "control over" donated assets, the donor does not "belong[] to the class intended to be benefited" by the charitable trust and has no standing to complain as to the disposition of the trust's assets. *O'Hara v. Grand Lodge, Indep. Ord. of Good Templars of Cal.*, 2 P.2d 21 (Cal. 1931).

This principle of donor standing law reflects courts' recognition that broad donor standing would turn charities into targets for a deluge of litigation, distracting their directors from charitable purposes, and draining charitable funds. Pinkert submits that the Court should ignore these practical concerns on the basis that DAFs are unlike other charities. But DAFs are charities under both state and federal law, and Pinkert's standing theories would open the doors to suits by any type of charitable donor.

III. The district court's judgment may be affirmed on yet another ground—namely, that the complaint fails to state any plausible cause of action. First, to the extent Pinkert's claims (Counts I and III) are predicated on alleged breaches of fiduciary duties of care and loyalty imposed under the common law of trusts, they fail because Schwab Charitable's actions with respect to managing Fund assets are not subject to the common law of trusts, but instead are subject to statutory, deferential corporate-law standards. *See* Cal. Corp. Code §5230. Second, to the extent that Count III rests on alleged breaches of applicable

statutory duties of care and loyalty, Pinkert's allegations cannot overcome the business judgment rule—i.e., the presumption under California law that directors of a charitable corporation have acted in good faith and based on sound and informed judgment. *See id.* §5231. Finally, because Count II and Pinkert's aiding-and-abetting theory under Count III against CS&Co. are derivative of the failed principal claims asserted against the Charitable Defendants, they fail for the same reasons.

ARGUMENT

I. PINKERT LACKS ARTICLE III STANDING

The district court correctly dismissed Pinkert's suit for lack of Article III standing "because—as the statutory framework for [DAFs] provides—he gave up title to and control of his donation in exchange for an immediate tax deduction." ER29. The most basic principle of Article III standing is that a federal court "may resolve only 'a real controversy with real impact on real persons.'" *TransUnion*, 141 S. Ct. at 2203. To that end, federal courts require plaintiffs to establish injury in fact, "the 'first and foremost' of standing's three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). That requires, at a minimum, an injury that is "'concrete'" and "'particularized'"—i.e., one that "affect[s] the plaintiff in a personal and individual way." *Id.* at 339. That injury must go beyond "the psychological consequence presumably produced by observation of conduct with

which one disagrees." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

Pinkert's complete and irrevocable relinquishment of ownership and control over the assets he donated to the Fund precludes him from establishing Article III standing to sue the Charitable Defendants or CS&Co. The conduct he challenges affects only assets that are indisputably owned and controlled by the Fund, and Pinkert has no personalized or concrete interest in them. To the contrary, the applicable law precludes Pinkert from maintaining or exercising any sort of personal or individual control over the assets he contributed to the Fund. And while Pinkert makes much of his prerogative to make nonbinding recommendations regarding Fund distributions and the reputational or expressive benefits he expects to receive by exercising those privileges, none of those interests suffices to establish standing.

A. Pinkert Has No Cognizable Injury To Sustain Article III Standing

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized.'" *Spokeo*, 578 U.S. at 339. For an injury to be concrete, it "must be 'de facto'; that is, it must actually exist …. [and be] 'real,' and not 'abstract.'" *Id.* at 340 (citations omitted). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id*. at 339. Thus, under settled Supreme Court case

law, a plaintiff cannot establish that he is injured by a challenged action simply because he cares about what happens; he must instead demonstrate that the action harms him in a real, personal manner distinct from the interest that others in the general public might have in the same outcome.

Pinkert cannot make this showing. Pinkert concedes (ER46-47) that when he contributed assets to the Fund, he relinquished all legal title to and control over those assets. That admission accords with the applicable federal tax law. For a "transfer of property to a charitable organization to qualify for a charitable contribution deduction," which Pinkert accepts was true of his contribution to the Fund, "the transfer must be a completed gift; that is, the donor must have relinquished dominion and control over the donated property[.]" *Viralam*, 136 T.C. at 162.

The Internal Revenue Code reflects the same understanding specifically with respect to DAFs, requiring that the sponsoring organization have "exclusive legal control over the assets contributed." 26 U.S.C. §170(f)(18)(B). Thus, the assets Pinkert contributed now belong exclusively to the Fund, and he has no right under federal tax law, state law, or the Program Policies to possess or control those assets now or in the future. *See supra* pp.5-11; ER86 (Fund assets are "subject to [the Fund's] exclusive legal authority and control").

Having ceded any ownership or control over those assets, Pinkert has no concrete or particularized interest in how they are managed. He may care about what happens to the money he donated—irrevocably and completely to the Fund—but he no longer has any concrete or particularized interest in it. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (plaintiffs must demonstrate injury beyond having a "special interest in the subject"). Any mismanagement of those assets therefore does not inflict concrete or particularized economic injury on *him*. *See id.* ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."). He is instead "seeking relief that no more directly and tangibly benefits [him] than it does the public at large." *Id.* at 573-574.

If Pinkert were correct that the Charitable Defendants are mismanaging Fund assets—and he is not—then the result of that mismanagement would be injury to *the Fund*. If Pinkert's allegations are true, it is *the Fund*, not Pinkert, that would suffer harm from the faithlessness of its fiduciaries, and it is *the Fund's* assets, not Pinkert's, that would be depleted or diverted to CS&Co. Under settled law, a plaintiff may only "seek[] to remedy a[] harm to [him]self," *TransUnion*, 141 S. Ct. at 2206—he "cannot rest his claim to relief on the legal rights of third parties," *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017). *See also Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1043 (9th Cir. 2015)

(plaintiff who owned no shares in fund could not sue fund manager for failure to adhere to investment policies absent an assignment of a shareholder's claims); *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 108 (2d Cir. 2008) (same).

Consistent with these principles, courts have long concluded that charitable donors like Pinkert lack any cognizable interest in donated assets and so cannot claim injury in fact based on alleged mismanagement of their donations. For instance, in *Patton v. Sherwood*, 152 Cal. App. 4th 339, 342 (2007), the court explained that under common-law standing principles, "[i]t is well established that the settlor of a charitable trust who retains no reversionary interest in the trust property lacks standing to bring an action to enforce the trust independently of the Attorney General." The Pennsylvania Supreme Court explained why this is so: "Nothing in … litigation [over charitable assets] would affect the [donor] itself; it loses nothing and gains nothing. The [donor]'s intensity of concern is real and commendable, but it is not a substitute for an actual interest." *In re Milton Hershey Sch.*, 911 A.2d 1258, 1263 (Pa. 2006).[5]

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[5] *See also, e.g.*, *Carl J. Herzog Found.*, 699 A.2d at 999; *Warren v. Board of Regents of Univ. Sys. of Ga.*, 544 S.E.2d 190, 193 (Ga. Ct. App. 2001); *Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst.*, 698 N.W.2d 900, 913-914 (Mich. Ct. App. 2005); *Schalkenbach Found. v. Lincoln Found., Inc.*, 91 P.3d 1019, 1024 (Ariz. Ct. App. 2004); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 645-646 (1819).

Those principles apply here. Because the assets Pinkert says were mismanaged do not belong to him, and because the misconduct he alleges could have harmed only the Fund, Pinkert cannot establish a concrete and particularized economic injury resulting from the alleged mismanagement. *Cf. Styles v. Friends of Fiji*, 2011 WL 488951, at *1 (Nev. Feb. 8, 2011) (table) (DAF donor could not establish damages stemming from DAF sponsor's mismanagement "because once [the donor] made the unrestricted gift, he no longer had any interest in or control over the donation").

Pinkert tries in multiple ways to avoid this straightforward application of standing law, but none answers his fundamental problem: he is not the injured party. Pinkert cites cases (Br. 36) supporting the proposition that even small losses of money can give rise to Article III standing. The lack of concrete and particularized injury here has nothing to do with the "fraction of account assets" at issue, however. *Id*. at 37. Regardless of whether Pinkert alleged that the Fund's mismanagement cost $1 or $1 million, he would lack standing because he retains *zero* ownership or possessory interest in the Fund's assets. Pinkert likewise attacks a strawman (Br. 38) when he argues that standing does not turn on the number of "account holder[s]" in the Fund. That his injury is neither concrete nor particularized is the result of the fact that *none* of the Fund's account holders is personally injured by Fund management decisions—not that they all are. Whether

the Fund had one or one million account holders, Pinkert (and any other DAF donor) would lack standing because *all of them* have ceded ownership and control of their contributed assets.

Pinkert describes the Fund account under his name as "his" and mistakenly refers to the assets in the Fund account affiliated with his name as "his assets." Br. 2, 4, 10, 31. He strains even more in contending that the "main difference" between the assets in a DAF and assets in a personal 401(k) plan is that the DAF is "set up for charitable purposes." Br. 2. These are legal characterizations not entitled to any weight under Federal Rule of Civil Procedure 8 or Rule 12, *see Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1176 (9th Cir. 2021), and they are in any event incorrect. The relevant Internal Revenue Code provision states that while individual DAF accounts are "separately identified by reference to contributions of a donor or donors," they are nonetheless "owned or controlled by a sponsoring organization." 26 U.S.C. §4966(d)(2)(A). Consistent with those requirements, while the Program Policies refer to the donor as the "account holder" (ER81 (Program Policies 4)), they repeatedly make clear that this nomenclature does not create any actual title or control over the account (ER81-82, 99 (Program Policies 4-5, 22)).

As the district court correctly concluded, Pinkert "gave up title to and control of his donation in exchange for an immediate tax deduction," and so "[t]he

fund controls the donation, not the plaintiff." ER29. Pinkert thus lacks Article III standing to sue.

B. Pinkert's Purported Privileges Related To Fund Assets Do Not Give Him An Article III Injury

Short of legal ownership or an ability to control the assets he contributed to the Fund, Pinkert emphasizes (Br. 21) certain supposed "rights and privileges in his account," which he says constitute "equitable property interests" that give him a cognizable Article III injury. That argument fails for multiple reasons.

1. Pinkert mischaracterizes his prerogatives with respect to Fund assets.

The starting premise of Pinkert's standing argument is that he has the "right" to "use" or control the assets he contributed to the Fund—namely, (1) to determine how his account assets would be invested (from among available investment vehicles); (2) to designate who would ultimately receive those assets; (3) to specify the manner in which donations to end charities would be expressed (i.e., in his name); (4) to exclude others from his account (or to permit secondary account holders); and (5) to transfer the aforementioned account privileges to his identified heirs. Br. 21, 26-27. That is not just incorrect; it is flatly contradicted by the controlling federal tax law and Program Policies.[6]

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[6] The Program Polices are appropriately considered on a motion to dismiss, as Pinkert acknowledges, *see, e.g.*, Br. 1, 4 n.1, because he relies on them

Under the Internal Revenue Code, DAF donors receive tax deductions in exchange for their agreement to relinquish all "dominion and control" over donated assets, *Viralam*, 136 T.C. at 162, and to grant the DAF "exclusive legal control" over those assets, 26 U.S.C. §170(f)(18)(B). This forecloses Pinkert's claim that he retains a right to "use" the assets he donated. *See* Br. 26-27. Rather, donors retain only "advisory privileges with respect to the distribution or investment of amounts held in such fund or account," 26 U.S.C. §4966(d)(2)(A), which permit the donor to make "nonbinding recommendations concerning the distribution or investment of assets," H.R. Rep. No. 109-455, at 179-180 (2006) (Conf. Rep.).

Congress left no doubt that these advisory privileges are *not* rights, as Pinkert describes them: "Advisory privileges are distinct from a legal right or obligation," and a donor who secures "enforceable rights … with respect to a gift … will not be treated as having 'advisory privileges.'" Joint Comm. on Taxation, *Technical Explanation of H.R. 4, the "Pension Protection Act of 2006"* (JCX-38-06 (Aug. 3, 2006), at 343 (Title XII: Provisions Relating to Tax Exempt Organizations); *see also* Treasury Report 80, 82 (a DAF donor's "non-binding advisory relationship does not alter" the fact that the donor has no title or control over how assets are "invested and disbursed").

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extensively in his complaint. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

Pinkert responds (Br. 31) that federal law does not "determine a party's property rights." That misses the point. The Fund operates consistent with federal tax law; there is no allegation to the contrary. And federal tax law prescribes precisely how DAFs are structured, what limited privileges donors may retain, and what rights they categorically do not have. While federal law may not alone "determine" Pinkert's property rights, it provides the framework for what property interest a DAF donor may have in her contribution—i.e., none—and so confirms that Pinkert ceded even the "equitable property rights" he now claims give him standing.[7] The Fund's Program Policies further reflect this obvious point, making clear that Pinkert can make only *nonbinding recommendations*, ER82 (allowing donors only to "[r]ecommend a portfolio asset allocation"), and that the Fund is not bound to follow a donor's recommendations—to the contrary, it emphasizes that Fund assets are "subject to [the Fund's] exclusive legal authority and control," ER81.

The law and the parties' contract defeat Pinkert's mischaracterization of the "robust rights" (Br. 22) he supposedly maintains. Pinkert asserts (Br. 12) that "account holder recommendations" must be accepted unless they are "unlawful,

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[7] For this reason, Pinkert's reliance on *Hubbard v. Brown*, 785 P.2d 1183, 1186 (Cal. 1990), for the principle that "a property interest for federal taxation purposes is different from a property interest for legislative purposes" (Br. 48-49) gets him nowhere.

contrary to the purposes of the DAF, or otherwise prohibited." And he claims that if he wished to support Doctors Without Borders, the Fund "could not override his recommendation" and would instead be "contractually obligated to effectuate" it. *Id*. These are legal conclusions about the Fund's obligations not entitled to any weight on a motion to dismiss, and they are flatly contradicted by the governing federal tax law and the Program Policies.

The portions of the Program Policies that Pinkert cites describe factors that the Charitable Defendants may consider when evaluating a grant recommendation. *See* Br. 12 (citing ER96-97). Nothing in the Policies suggests that these factors are exclusive, or that a recommended grant will necessarily be accepted if the factors are satisfied. Instead, the very page Pinkert cites makes clear that Schwab Charitable may decline to make a recommended grant "due 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." ER97. Put another way, Schwab Charitable would have full discretion to reject Pinkert's hypothetical recommendation to donate to Doctors Without Borders, and Pinkert would lack any contractual recourse.[8] For

[8] If Pinkert retained "control [over] how … account assets are invested," as he asserts (Br. 13), he could have exercised that authority and would have had no need to sue to effectuate his preferred investment strategy. In reality, Pinkert cannot even bring a breach of contract action because he has no contractual right—indeed, no right whatsoever—to "control" anything about the Fund or its assets.

the same reasons, Pinkert is also wrong to suggest that he has authority to "move all his account assets" to a different Fund—i.e., "Fidelity Charitable" (Br. 12-13)—a possibility that appears nowhere in the Program Policies and that does not appear to meet any of the factors that Schwab Charitable considers in assessing recommended asset allocations.

2. The limited prerogative Pinkert actually has regarding Fund assets does not give him a cognizable interest in Fund management.

Pinkert's argument that he has standing based on his limited advisory privileges depends on mischaracterizations contrary to the relevant federal statute, decisional law, and contract. And, as the district court correctly concluded, "[n]o case supports the conclusion that the right to designate investments … and donations in a donor-advised fund is a contractual or contingent property interest that gives a donor Article III standing to challenge the fund's choice of investment funds or administrative fees." ER29-30. In short, the privileges that Pinkert retained after making his donations to Schwab Charitable do not give him Article III standing to sue.

Under federal tax law and the Program Policies, Pinkert has only a "privilege" to make nonbinding recommendations regarding certain Fund assets he contributed. Pinkert does not allege that the Charitable Defendants ever barred him from exercising that privilege. Nor does he allege that a privilege to offer

nonbinding recommendations has any economic value. Instead, his theory is that the power of his recommendations is diminished when Fund assets are diminished. He provides no authority for the premise that the size of the corpus to which a privilege to make nonbinding recommendations applies can constitute a cognizable interest to support injury in fact. And having interests adjacent to the Fund assets does not render a diminution in those assets an injury to Pinkert.

For such an "intangible" interest to be "concrete," as Article III requires, it must bear a "close relationship" to those "traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 141 S. Ct. at 2204. Courts thus "ask[ ] whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *Id.* Pinkert has not done so here; he identifies no "history and tradition" of similar suits by charitable donors or others with "equitable" advisory privileges over assets. To the contrary, donors have long been thought to lose any interest in the donated assets after title was transferred. Chief Justice Marshall explained as much two centuries ago. *See Woodward*, 17 U.S. (4 Wheat.) at 641 ("The founders of the college, at least, those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property."). And numerous courts have reached the same conclusion in the 200 years since. *See supra* pp.21-22.

Pinkert fails to identify any case supporting an historical analog to the harm he asserts here. Instead, he cites off-point cases recognizing that dissimilar interests—like a bank's "ownership" or "possessory" interests in deposited funds, *Shaw v. United States*, 137 S. Ct. 462, 466 (2016)—constitute property rights.[9] Those cases do not establish that a "privilege" to make nonbinding recommendations, or a reduction in the size of the assets to which his privilege to make recommendations applies, are the type of historically grounded interests that can form the basis of standing in federal court. *See* ER30.

Pinkert's reliance (Br. 34) on case law showing "that equitable property interests short of legal title are sufficient" for Article III injury is likewise unavailing. It is true that the invasion of some property interests short of legal title may constitute concrete and particularized injuries. But Pinkert cites no case (and none exists) suggesting that a mere "privilege" to make nonbinding recommendations is one of them. Rather, Pinkert's authorities (Br. 34-36) all involve "traditionally recognized," *TransUnion*, 141 S. Ct. at 2204, possessory,

[9] *See also Pacific Gas & Elec. Co. v. Hart High-Voltage Apparatus*, 18 Cal. App. 5th 415, 421 (2017) (rights "to all electricity generated by [a] project" and "to enter upon, operate and maintain [a] power plant" under certain circumstances gave rise to property interest); *California Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 645 (2017) (tradeable privilege "to pollute California's air" is property interest); *Habenicht v. Lissak*, 20 P. 874, 877 (Cal. 1889) (seat on stock exchange is property right).

ownership, or financial interests[10]—far removed from the novel "privilege" to make unenforceable recommendations about the investment of funds that the plaintiff does not possess, own, or control. That the law has declined to treat a loss of advisory privileges as a cognizable harm is unsurprising because a diminution in the value of funds over which a donor exercises only advisory privileges does not affect the donor "in a personal and individual way." *Spokeo*, 578 U.S. at 339. Because "[w]inning or losing this suit would not change [Pinkert's]" economic position, he has "no concrete stake in this dispute." *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615, 1622 (2020).[11]

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[10] *See Van v. LLR, Inc.*, 962 F.3d 1160, 1164 (9th Cir. 2020) (per curiam) ("temporary loss of use" of one's *own* money); *United States v. JP Morgan Chase Bank Acct. No. Ending 8215*, 835 F.3d 1159, 1167 (9th Cir. 2016) (plaintiff had a "possessory interest in the funds"); *United States v. Real Prop. Located at 475 Martin Lane, Beverly Hills*, 545 F.3d 1134, 1140 (9th Cir. 2008) (plaintiffs "specifically alleged an ownership interest" in funds and vehicles); *United States v. 5 S 351 Tuthill Rd.*, 233 F.3d 1017, 1022 (7th Cir. 2000) (plaintiff had "a right to future proceeds" if a property were sold); *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1057 (9th Cir. 1994) (plaintiff "clearly claimed at least a possessory interest in the money at issue here"); *United States v. 1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984) ("possession" of property may "create[] standing").

[11] Nor does the unpublished decision in *Fairbairn v. Fidelity Investments Charitable Gift Fund*, 2018 WL 6199684 (N.D. Cal. 2018), support Pinkert's Article III standing, since *Fairbairn* addressed standing only under state law. *Id*. at *5-*7. In any event, *Fairbairn* is both distinguishable and unpersuasive, as explained below. *See infra* pp.53-54 & n.13.

Pinkert reprises his reliance on *Pacific Gas & Electric Co. v. Hart High-Voltage Apparatus Repair & Testing Co.*, 18 Cal. App. 5th 415 (2017) ("*PG&E*"), and *California Chamber of Commerce v. State Air Resources Board*, 10 Cal. App. 5th 604 (2017), arguing that the district court erred in distinguishing those cases because he "did *not* cede exclusive control over his donations" after all. Br. 27. For the reasons just discussed, that is wrong as a factual and legal matter: Pinkert simply did not retain "right to possess, use and convey" the assets he gave away irrevocably. *PG&E*, 18 Cal. App. 5th at 427. Contrary to Pinkert's assertion, he does not retain the "traditional hallmarks of property," including the right to "exclude others" and to "sell, assign, or otherwise transfer" his interests, as the plaintiffs did in *PG&E* and *California Chamber of Commerce*. Br. 30, 33-34. While Pinkert can exclude others from and transfer his *advisory privileges*, he cannot exclude others from or transfer the Fund assets. And it is the Fund assets—not his advisory privileges—that he claims were diminished by the Charitable Defendants' investment decisions. It is his rights (if any) with respect to those assets that he must show courts have traditionally recognized as providing a basis to sue. None of the California cases he cites does so.

C. Pinkert's Asserted Non-Economic Injuries Are Not Cognizable

Pinkert also asserts (Br. 43) injuries to his "expressive and reputational interests in making and directing donations." The district court correctly found

these non-economic injuries cannot support standing either. ER31. Pinkert's attempt to bootstrap an "economic" injury onto his noncognizable "expressive and reputational interests" likewise fails. Br. 44. Contrary to Pinkert's assertion, the problem with these theories is not the "*amount* of harm" that he has alleged (Br. 45), but the fact that the type of harm he asserts is too attenuated and unspecific to constitute injury-in-fact.

1. Pinkert does not plausibly allege expressive or reputational injury.

a. *Expressive Injury*: Pinkert says that "every dollar taken away" from Fund assets due to alleged mismanagement "reduces [his] ability to express his support" for certain causes. Br. 43. He does not cite a single case recognizing this type of attenuated "expressive" injury—let alone a "history and tradition" of this type of intangible injury "providing a basis for lawsuits in American courts." *TransUnion*, 141 S. Ct. at 2204.

Pinkert's theory is that a reduction in the amount of money over which he can make nonbinding recommendations constitutes Article III injury. That is speculative and anything but "concrete." There is no basis in Pinkert's complaint to support the premise that a reduction in Fund assets will affect the expressive impact of Pinkert's recommendations. Importantly, Pinkert failed to plead any specific expressive message that was allegedly thwarted or diminished by the Charitable Defendants' alleged misconduct. He did not allege any amount that,

absent the challenged conduct, he would have recommended be donated to a specific charity. His complaint merely identifies (as "sample[s]") organizations to which he previously contributed, and asserts that "[t]he more money that is in Plaintiff's account, the better Plaintiff is able to achieve his charitable objectives." ER44-45. In other words, Pinkert's theory is that some day he might want to direct some amount to some charity, but he will not be able to direct such amount because the Charitable Defendants will have frittered some of that money away. The Supreme Court has emphatically rejected the idea that "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that [standing] requires." *Lujan*, 504 U.S. at 564. For these reasons, the injury he asserts does not resemble the concrete aesthetic and recreational injuries that courts have found sufficient where plaintiffs allege specific plans to engage in activities that would necessarily be thwarted absent judicial relief. *See* Br. 44-46.

b. *Reputational Injury*: Pinkert's reputational injury theory of standing fares no better. "[B]ecause each donation confers recognition from his community and peers," Pinkert claims, Defendants' alleged mismanagement of Fund assets "injures his reputational interests by reducing the amount he is able to donate (and thereby receive recognition for)." Br. 43-44. This reasoning fails for the same

reasons that Pinkert's expressive-donation theory fails; a claim that one's reputation is harmed in a constitutionally significant way by potentially recommending a donation of some unspecified amount less than it might have been has no basis in law, history, or tradition, and it is impermissibly speculative and non-concrete. *See supra* pp.33-35.

Moreover, this Court has rejected the proposition that indirect reputational injury can on its own satisfy Article III, explaining that "reputation is not a sufficient interest to avoid mootness," and "[a]ny interest that would not be enough to keep the case from becoming moot is necessarily insufficient to confer standing." *See Jackson v. California Dep't of Mental Health,* 399 F.3d 1069, 1075 (9th Cir.), *opinion amended on reh'g*, 417 F.3d 1029 (9th Cir. 2005); *see also McBryde v. Committee to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52, 57 (D.C. Cir. 2001) (suggesting that where, as here, "an effect on reputation is a *collateral* consequence of a challenged" action, "it is insufficient to support standing"). Pinkert does not assert that the Charitable Defendants did anything to directly harm his reputation. His theory of causation is far more indirect and speculative. It depends on the hypothesis that "his community and peers" (Br. 43) will hold him in higher regard if, for example, he can recommend that the Fund distribute $1,001 to a particular charity, as opposed to only $1,000. But there is no basis to infer that these unnamed people will react

in that manner. "[S]tanding theories" like Pinkert's "that rest on speculation about the decisions of independent actors" cannot succeed. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013); *see Physicians for Integrity in Med. Rsch., Inc. v. Ostroff*, 670 F. App'x 450, 451 (9th Cir. 2016) (applying this rule to reputational-injury claim); *see also Advanced Mgmt. Tech., Inc. v. FAA*, 211 F.3d 633, 637 (D.C. Cir. 2000) (rejecting reputational injury allegations as unduly "speculative" and "too implausible to support standing"); *Robertson v. Colvin*, 564 F. App'x 931, 934 (10th Cir. 2014) (no standing where "[p]laintiff ha[d] simply made the conclusory and conjectural assertion that her reputation will be harmed").

The more plausible inference is that Pinkert's "community and peers" would scarcely notice whether Pinkert recommended that slightly more money be distributed to a particular charity. *See Maddox v. Bank of N.Y. Mellon Tr. Co., N.A.*, __ F.4th __, 2021 WL 5347004, at *6 (2d Cir. Nov. 17, 2021) (affirming dismissal of complaint for lack of standing where plaintiffs failed to "allege that they suffered any reputational harm"; while plaintiffs "may have suffered a nebulous risk of future harm … that risk, which was not alleged to have materialized, cannot form the basis of Article III standing"). Especially given the "small fraction of account assets" (Br. 37) at issue and Pinkert's status as a mere *recommender* of asset distribution, the reputational calculus here is far removed from that of a "large donor's" name being "engraved on [a university] building[]."

Br. 44 n.9. In short, Pinkert "points to no concrete evidence of … reputational injury"—whether current or future—stemming from Defendants' actions. *Schaffer v. Clinton*, 240 F.3d 878, 885 (10th Cir. 2001).

2. Pinkert cannot establish economic injury based on his failed expressive and reputational injury theories.

Finally, Pinkert says that "economic loss" stemming from the alleged infringement of his "expressive and reputational interests" establishes Article III standing. Br. 44. In particular, Pinkert argues that "to the extent that [he] contributes more to his account to make up for the losses to his account attributable to Schwab Charitable's fiduciary breaches … and thereby preserve his expressive and reputational interests, he suffers an obvious economic loss." *Id*. This bootstrapped standing theory cannot succeed.

As an initial matter, Pinkert neither alleges in the complaint nor argues in his brief that he has *actually* contributed more to his account to compensate for any shortfall that the Charitable Defendants created. ER45 (alleging that "[a]s money is taken from his Schwab DAF to pay for administrative and investment fees, Plaintiff must contribute more to his Schwab DAF to achieve his charitable goals"); Br. 44 (stating that "to the extent" he were to make such an additional contribution, he would be injured). Nor, as explained, has he alleged that he had a specific charitable goal when he donated to the Fund, or (even assuming he had

such a goal) that the Charitable Defendants' alleged misconduct caused him to fall short of that goal by a certain amount. *See supra* pp.33-34.

All this aside, this argument fails because it just repackages faulty expressive- and reputational-injury claims into a faulty economic-injury claim. Pinkert's alleged need to contribute more to his account to compensate for losses arises only because he speculates that his "community and peers" (Br. 43) will think less of him based on how much money he recommends should be distributed to particular charities. As just explained, that inference is unwarranted (and even if it were, would be speculative and insufficient). *Supra* pp.35-36. And Pinkert "'cannot manufacture standing merely by inflicting harm on [himself] based on [his] fears of hypothetical future harm that is not certainly impending' because such injuries 'are not fairly traceable' to the conduct creating that fear." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). Because Pinkert has not established that he actually "face[s] a threat of" expressive or reputational injury, any "costs [he might] incur[] to avoid" that loss "are simply the product of [his] fear" of gaining less regard in his community. *Clapper*, 568 U.S. at 417. Indeed, because his prerogative with respect to the Fund is advisory only, he cannot establish that donating more money will necessarily allow him to ensure that more money goes to any specific charity. A plaintiff's voluntary expenditures

made to avert a "subjective fear" are "insufficient to create standing." *Id.* at 417-418.

3. Pinkert's policy concerns cannot establish standing.

Pinkert retreats to a parade of horribles, charging that unless his purported "equitable interests" in Fund assets establish Article III standing, his suit would be barred even if Defendants "had absconded with all of Plaintiff's account assets to buy a corporate jet." Br. 36. Article III jurisdiction turns on the presence of concrete and particularized injury—not on a plaintiff's policy arguments. And the Supreme Court has "long rejected" arguments like Pinkert's, reasoning that "the assumption that if [a particular plaintiff] ha[d] no standing to sue, no one would have standing, is not a reason to find standing." *Thole*, 140 S. Ct. at 1621.

In any event, if a charity's directors did something so wasteful and abusive, surely the Attorney General could step in, or the charity itself (or one of its directors or trustees) could sue its employees for breach of their duties. Any of these parties would have standing. Pinkert does not. A regime that empowers the State's top law-enforcement official and others to sue is hardly "an enforcement 'no man's land,'" as Pinkert asserts. Br. 40.

Pinkert's policy argument is a solution in search of a problem. And his proposed solution would introduce all sorts of adverse consequences. *See infra* pp.49-50. DAF donors generally—and likely many donors to other charities as

well—have a "privilege" to offer nonbinding recommendations about how Fund assets should be invested. On Pinkert's view, that privilege is sufficient to empower a donor to sue whenever a charity makes an investment or other management decision that the plaintiff claims depletes charitable assets. Indeed, his complaint is brought as a class action, on behalf of all Schwab Charitable donors and the "general public," on the premise that they all were injured in common fashion by the Charitable Defendants' alleged misconduct. ER36. Finding standing here would expose DAFs and other charities to mismanagement claims by broad classes of donors, forcing those entities to spend their assets on defensive litigation, class settlements, insurance, and attorneys' fees rather than on benefitting the public.

II. PINKERT ALSO LACKS STANDING UNDER CALIFORNIA LAW

Pinkert's lack of Article III standing to sue dooms his complaint. Independent of that failure, he also lacks standing under California law to bring his claims against the Charitable Defendants and CS&Co. *See Vaughn v. Bay Envt'l Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009). Each of Pinkert's causes of actions is asserted under California statutory and common law, and so is subject to California law governing who can sue a California public benefit corporation to enforce its fiduciary obligations. By statute, the California legislature has prescribed strict limitations on who can sue charities: California Corporations

Code §5142(a)(2), (3) enumerates an exclusive list of parties with standing to sue, and Pinkert is not among them. Pinkert's cursory attempt to invoke common law "special interest" standing fares no better, as the statute displaces the common law, and the common law rejects donor standing in any event. Thus, the district court correctly concluded that Pinkert's lack of "statutory standing" is an independent and alternative basis for dismissing this case. ER31-32.

A. California's Public Benefit Corporation Statute Does Not Permit Pinkert To Bring This Suit

The traditional rule across jurisdictions from time immemorial is that public charities serve the public interest and so are not amenable to suit by individual donors or beneficiaries to superintend the public interest that supports charities and their tax-exempt status. *See* Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37, 40-41 (1993). The prerogative to sue is vested either exclusively in the chief law enforcement officer of the jurisdiction or in that official and the officers and directors of the charity. *Id.* California law reflects that settled principle.

California Corporations Code §5142(a)(2), (3) vests the Attorney General with "primary responsibility" for supervising public benefit corporations like Schwab Charitable Fund, and for enforcing the fiduciary obligations that California law imposes on their directors and operators. *See Turner v. Victoria*, 67 Cal. App. 5th 1099, 1131-1132 (2021) ("Since the beneficiaries of charities and nonprofit

public benefit corporations are the public at large, the attorney general has historically been 'the protector, supervisor, and enforcer' of these organizations." "The attorney general may pursue cases for breach of duty 'as representative of the sovereign, rooted in the common law power of *parens patriae*.'"). It also authorizes four specific types of litigants to "bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust": (1) the corporation; (2) a member of the corporation acting in the corporation's name; (3) a director or officer of the corporation; and (4) "[a] person with a reversionary, contractual, or property interest in the assets subject to [the] charitable trust." These persons, and only these persons, may pursue actions to "enjoin, correct, obtain damages for … or to otherwise remedy a breach." Cal. Corp. Code §5142(a)(2), (3). Pinkert does not contest that his claims are subject to the statute. But as a charitable donor, he is not among the statute's list of plaintiffs with authority to sue.

Pinkert asserts that he is a "person with a reversionary, contractual, or property interest in" the trust assets, but he does not explain what "substantial contractual and property interests" in the Fund accounts he supposedly "maintain[s]." Br. 47. He certainly cannot claim any contractual right to the Fund *assets*, which is what the statute requires. Cal. Corp. Code §5142(a)(2), (3) (granting standing only to a person with "contractual … interest *in the assets*

subject to [the] charitable trust"). To the contrary, as discussed, federal tax law precludes the Fund from permitting Pinkert to retain any contractual interest in the assets, and the Fund's Program Policies explicitly foreclose that possibility. *See supra* pp.5-7, 10-11. Adjacent contractual interests—like the right to receive account statements—are not relevant for statutory standing because they are not interests "in the assets."

For those same reasons, Pinkert lacks a "property interest" in the Fund assets. Federal tax law and the Program Policies required Pinkert to give up legal title to the assets, any right to possess the assets, and any right to transfer or otherwise control the assets. *See supra* pp.5-7, 10-11, 25-28. Pinkert lacks any support for his claim (Br. 47) that the ability to make nonbinding recommendations regarding Fund assets counts as a "property interest" in those assets under California law. Indeed, Pinkert fails to cite a single case treating this type of advisory right as a property interest, much less a property interest *in the underlying assets*. Instead, he stresses the unexceptional point that legal title is not the only type of property interest that California recognizes. Br. 48-49. But just because some non-title interests (like permits, leases, or easements) are "sticks" within the "bundle of" recognized "property interests" does not mean that an unenforceable right to advise on how money will be spent is also within that bundle.

Rather than importing a novel nonbinding advisory privilege into the statute's contemplation of a "property interest" that might give rise to standing to sue a charity, the Court should give that phrase its traditional meaning: as requiring some entitlement to use, possess, or control charitable assets now or in the future. *See Fuentes v. Workers Comp. Appeals Bd.*, 547 P.2d 449, 453 (Cal. 1976) (legislature presumed to enact statutes consistent with common law absent "express declaration" otherwise), *superseded by statute on other grounds*; *People v. Harrison,* 48 Cal.3d 321, 329 (1989).

At the founding of the United States, "states almost unanimously adopted" the English scheme in which "the state, as *parens patriae*, superintends the management of all public charities or trusts, and in these matters acts through her attorney general," while "private citizens or organizations could not sue to enforce charities." Blasko, 28 U.S.F. L. Rev. at 40-41. State courts rejected donor standing to sue even to enforce the terms of a charitable gift—that is, even where the donor expressed that a gift must be put to a specific purposes. *See, e.g.*, *Siebach v. Brigham Young Univ*., 361 P.3d 130, 135 (Utah Ct. App. 2015) ("Under the general common-law rule, only the attorney general, and not the donor, has standing to enforce the terms of a completed charitable gift."); *Hardt v. Vitae Found., Inc*., 302 S.W.3d 133, 137 (Mo. Ct. App. 2009) ("Donors were … prevented from enforcing their gifts in court, because non-trustee donors retained

no interest in the gift, except the sentimental one that every person who contributed to the charity would be presumed to have."). The lone exception was when the donor expressly *conditioned* a gift on the donee using it for a specified purpose and retained a reversionary interest in the gift corpus in the event that purpose was not carried out. *See* Blasko, 28 U.S.F. L. Rev. at 40-41. Accordingly, the law has long differentiated between the noncognizable authority to advise on donated assets and the types of interests—generally to someday use, possess, or control assets—that qualify as cognizable "property interests" that convey standing.

Pinkert urges this Court to interpret the phrase "person with a … contractual, or property interest in the assets subject to [the] charitable trust" as encompassing donors like him. Br. 47. But that reading conflicts with basic principles of statutory interpretation. Had the legislature intended to deviate from longstanding rules governing charitable standing to include donors among those entitled to sue, one would expect it to have done so in a straightforward manner. After all, drafters typically do not alter significant components of legal regimes by implication. *See Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). The legislature instead made no mention of donors in its carefully circumscribed list. It is unlikely that the legislature intended to give donors

standing by implication by granting standing to persons with a "property interest"—particularly given that the hallmark of a charitable donation is *forfeiting* all personal interests in certain property to a charity, i.e., making a "completed gift" under long-settled federal law. *See supra* pp.5-7. This commonsense logic suffices to doom Pinkert's reading; reference to a "contractual or property interest" in charitable assets does not include donors.

The common-law backdrop against which the California legislature enacted §5142 likewise recognized that a donor of a completed gift generally has no standing to complain about a charity's disposition of its assets. In *O'Hara v. Grand Lodge, Independent Order of Good Templars of California*, 2 P.2d 21 (Cal. 1931), for example, the California Supreme Court held that "the only person who can object to the disposition of … trust property is one having some definite interest in the property," and explained that where a donor has "parted with [his] interest in" and "control over" donated assets, the donor does not "belong[] to the class intended to be benefited" by the charitable trust and has no standing to complain as to the disposition of the trust's assets. *Id.* at 24. While §5142 displaced that common law, the legislature evinced no intent to change the traditional common-law rule of donor standing. To the contrary, the legislature granted standing only to persons with reversionary, contractual, or property interests in a charity's assets presumably because those individuals—by virtue of

their status as potential *beneficiaries* of the charity's assets—would be directly affected by their mismanagement.

Notwithstanding the historic limitations placed on standing to sue charities, Pinkert argues that the Court should nonetheless interpret the phrase "property interest" in §5142 broadly to provide for maximal enforcement of fiduciary requirements. Br. 49-50. But he provides no basis for assuming that every law enacted to protect the public will benefit from expansive and indiscriminate enforcement authority. And here, that is certainly not the case. *See supra* pp.39-40; *infra* pp.49-50. As the statute's careful circumscription reflects, California's legislature specifically rejected the notion that permitting donors to sue would further its statutory aims.

Neither of the cases Pinkert cites supports his broad reading of the statute. *Holt v. College of Osteopathic Physicians & Surgeons* interpreted a prior version of the statute that did not enumerate the persons beyond the Attorney General who were entitled to sue. 394 P.2d 932, 936-937 (Cal. 1964). Against that statutory silence, the California Supreme Court held that trustees of a charitable corporation had standing to bring an action against other trustees for breach of charitable trust. *Id.* at 934-935. The court's holding was plainly limited to trustees, as it reasoned that "the protection of charities from harassing litigation … [is] inapplicable to

enforcement by the fiduciaries who are both few in number and charged with the duty of managing the charity's affairs." *Id.* at 936.

Where the statute in *Holt* was silent as to what classes of plaintiffs could sue, §5142 explicitly limits standing to, as relevant here, persons with "property interests." And while there was historical precedent for allowing trustees to sue to enforce charitable trusts under the common law, 394 P.2 at 935, no similar precedent exists for donors like Pinkert, *see supra* pp.21, 44-46. Finally, unlike trustees, donors are far from few in number; if Pinkert has "property interests" in Fund assets, so do all of the Fund's donors, and indeed charitable donors more broadly.

Summers v. Colette likewise turned on statutory, historical, and practical factors not present here. There, a California appellate court interpreted the portion of §5142 authorizing a director of a nonprofit to sue to remedy a breach of a charitable trust to permit a plaintiff who filed suit while still serving as a director to continue her suit after other directors removed her from her position while the suit was pending. 34 Cal. App. 5th 361, 368 (2019). It based that conclusion on a close reading of the statute, and the fact that language clearly imposing a continuous directorship requirement in another part of the statute did not appear in §5142. Pinkert identifies no similar textual hook on which to rest his strained

reading of "property interest." And unlike a director, as a donor he has no special access or insight into the operation of the Fund.

Pinkert's final attempt to convert his advisory privilege into a property interest reprises the flawed policy arguments that permeate his brief. *See* Br. 51-54. For reasons already explained, Pinkert has the policy implications of the issues in this case entirely backwards. *See supra* pp.39-40. California courts have long recognized the danger that donor suits pose to charities, explaining that "any rule giving ordinary donors standing to sue a charitable entity every time they disagreed with how the organization carried out its charitable purposes could bring charitable activities to a screeching halt," *Klein v. Anaheim Memorial Hospital Association*, 2009 WL 3233914, at *7-8 (Cal. Ct. App. Oct. 8, 2009) (unpublished); *cf. Hardman v. Feinstein*, 195 Cal. App. 3d 157, 162 (1987) ("Th[e] limitation on standing [in lawsuits alleging mismanagement of a charitable trust] arises from the need to protect the trustee from vexatious litigation … ."). Courts around the country have likewise taken that approach, recognizing that expanding standing to include "a new class of litigants, donors," would undermine protections for charitable institutions and risk subjecting charitable institutions to "lengthy and complicated litigation." *Carl J. Herzog Found.*, 699 A.2d at 1002.

Pinkert offers that this Court need not worry about the concerns that courts in California and around the country have raised about the threats posed by suits

like this one. Br. 52-54. He first claims (Br. 52-53) that DAFs do not implicate these issues because DAFs are not themselves charities, but that is wrong: DAFs are charities under both state and federal law. *See supra* pp.5-8. Like other charities, DAFs have substantial assets and, as a result, could serve as attractive targets for vexatious litigation. And as with other charities, litigation against DAFs will interfere with maximizing assets to be donated to charitable causes and organizations. Like other charities, DAFs' legal fees will cut into charitable assets, ultimately harming charities and the public that California's charitable organization laws are meant to protect.

Pinkert has no answer to these concerns. Instead, he simply claims that Schwab Charitable, because it "has $15 billion in assets and is one of the ten largest charities in the country" does not need "freedom to operate" without the threat of constant litigation. Br. 54. If anything, this allegation suggests the opposite—that there is little risk Schwab Charitable could actually engage in the type of abusive practices that Pinkert envisions without attracting regulatory attention. [12]

[12] For example, the California Attorney General appeared in the district court and requested to be served with pleadings and filings in the case. *See* Dist. Ct. Dkt. No. 63.

B. Pinkert Cannot Rely On Common-Law "Special Interest" Standing

With nothing in the statute to rely on for standing, Pinkert briefly resorts to the common law, which he says permits him to sue because he has a "special interest" in the management of the Fund's assets. Br. 54-55. That is incorrect. California Corporations Code §5142(a) displaces the common law by specifying who can sue for breach of a charitable trust. *See Patton*, 152 Cal. App. 4th at 347 (statute displaced common-law principles regarding settlor's standing).

Even if the common law remains relevant, Pinkert cannot establish "special interest"—or any other type of common-law standing. To protect charitable trusts and charitable corporations from costly litigation, California common law, like that of other States, restricted standing to seek redress for breaches of charitable trusts and provided that donors lacked standing to sue for breaches. *See supra* pp.44-46; *O'Hara*, 2 P.2d at 24 ("[T]he only person who can object to the disposition of the trust property is one having some definite interest in the property—he must be a trustee, or a cestui, or have some reversionary interest in the trust property."). Donors who "parted with their interest in" and "control over" donated assets did not "belong[] to the class intended to be benefited" and so had no standing to complain. *O'Hara*, 2 P.2d at 24. Pinkert cannot claim to have a reversionary or property interest in the Fund's assets; he gave up all legal interest in the assets he transferred to the Fund. *See supra* pp. 5-7, 10-11, 25-28. He therefore lacks a

sufficient interest in the Fund assets to support standing under even the common law.

Pinkert contends (Br. 55) that "even ordinary donors" have special interest standing, but none of his citations supports that premise. First, the Restatement of Trusts that Pinkert relies on (Br. 54-55) does not reflect California statutory or common law regarding charitable donors. That section provides that "[a] suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust." Restatement (Third) of Trusts, §94 (2012). A comment provides that the settlor of a charitable trust should have a special interest to sue, but only for performance of the trust's charitable purposes. Restatement (Third) of Trusts §94, at cmt. g(2). It is far from clear that the same principle would apply to donors, who are not limited in number the way that settlors are. *See id.* Reporter's Notes on §94 (cmt. g(2) ("The risk of repetitious or harassing litigation, which underlies the requirement that one who seeks to enforce a charitable trust have a special interest in doing so, seems quite low insofar as the settlor is concerned.")). And as the Restatement notes, even that limited authority with respect to settlors marks a change from the Restatement (Second), and, therefore, from longstanding common-law principles. *Id.* Reporter's Notes on §94.

Second, Pinkert's cases (Br. 55) do not help him, as the district court found. ER32-33. *L.B. Research & Education Foundation v. UCLA Foundation*, 130 Cal. App. 4th 171 (2005), merely applied the general rule (discussed above) that, in the case of a conditional gift, donors have standing to pursue claims that the condition has been violated. *Id.* at 180. Although the court went on to suggest that the result would have been the same even if the gift was not conditional, *id.*, at least one other California decision has since recognized that discussion to be "dicta," *Patton*, 152 Cal. App. 4th at 343. Moreover, *L.B. Research*'s discussion was based on *Holt*, which itself turned on interpretation of a statute that no longer governs public benefit corporation standing—not on California common law. *See supra* pp.47-48. The lower court's dicta cannot displace the California Supreme Court's clear statement that "the only person who can object to the disposition of the trust property is one having some definite interest in the property—he must be a trustee, or a cestui, or have some reversionary interest in the trust property." *O'Hara*, 2 P.2d at 24.

Nor does *Fairbairn v. Fidelity Investments Charitable Gift Fund*, 2018 WL 6199684 (N.D. Cal. Nov. 28, 2018), support Pinkert's standing. In that case, the plaintiffs alleged that Fidelity Charitable had made specific promises to them about the way stock that they donated would be sold, which Fidelity Charitable then allegedly violated, causing plaintiffs to lose out on their tax deduction. *See id.* at

*2. Without addressing whether "special interest" standing even applies in California—which it does not, *see supra* p.51—the court concluded that the plaintiffs had standing to challenge the manner in which the stock was sold. The court's holding was based on the fact that the plaintiffs there did not press "a general claim that Fidelity Charitable mismanages its DAF accounts," but rather a claim "that Fidelity Charitable negligently mismanaged *their* account in which they had specific and unique future rights" beyond those advisory privileges held generally by DAF donors. *Id.* at *7.

Here, Pinkert presses the precise type of "general claim" that was *not* at issue in *Fairbairn*: namely, he is suing "on behalf of the general public" over the "mismanagement of the Schwab DAF"—a claim that he admits is "typical" of those shared by tens of thousands of other donors alleged to have held Schwab Charitable accounts at that end of 2018. ER36. And unlike the *Fairbairn* plaintiffs, Pinkert does not allege that the Charitable Defendants made any promises unique to him, or that his associated DAF account suffered any unique harm. Nor does he allege that he suffered any actual pecuniary injury akin to that at issue in *Fairbairn.* Thus, as the district court concluded, *Fairbairn* is inapposite. ER 32-33.[13]

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[13] *Fairbairn* is also incorrect. The court failed to explain why "special interest" standing suffices despite the fact that California has abrogated the common law by statute. *See supra* p.51. It likewise erroneously accepted the

Finally, the Pennsylvania Supreme Court's decision in *In re Francis Edward McGillick Foundation*, 642 A.2d 467 (Pa. 1994), neither addresses "special interest" standing for donors like Pinkert nor speaks to California law. *See* Br. 55. And on the facts it is a world apart. The court held that a diocese that was both an incidental beneficiary of a charitable trust and acted essentially as a participant in managing and dispensing the trust assets had standing to sue. 642 A.2d at 469-470. That is not akin to the type of non-binding recommendation authority that Pinkert has with respect to the Fund. Pinkert's interest far more closely reflects the ordinary ability all donors have to state intended purposes for their gifts and to advise on the charities' activities after the fact—an interest that California common law specifically rejected as insufficient to confer standing.

Put simply, both California statutory law governing public benefit corporation standing and the common law it displaced reject the premise that a charitable donor has a "special interest" giving him standing to sue. None of the cases that Pinkert relies on can overcome those binding articulations of governing law.

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plaintiffs' unsupported allegations that they retained significant future "rights" with respect to the assets they donated—a premise that is plainly untrue. *See supra* pp.5-7, 25-28. Third, *Fairbairn* relied on *L.B. Research* to find donor standing, which was error for the reasons just described. *See supra* pp.52-53.

C. These Same Principles Preclude Pinkert From Suing The Company

Pinkert makes no argument that his statutory standing to sue the Company should be distinct from his standing to sue the Charitable Defendants, and it is not. As discussed above (*see supra* pp.20, 43), if Pinkert's allegations about the Charitable Defendants' mismanagement are true—and they are not—then it is the Fund that was injured. Pinkert's claims against CS&Co. for aiding and abetting the Charitable Defendants' alleged breach of their duties likewise belong to the Fund itself. *See, e.g.*, *Avikian v. WTC Fin. Corp.*, 98 Cal. App. 4th 1108, 1115 (2002) (affirming dismissal of derivative claims where "appellants' core claim is that defendants mismanaged [the company], and entered into self-serving deals to sell [corporate] assets to third parties" and concluding that "[t]hose assertions—both the improper selling and purchasing of assets—amount of a claim of injury to [the company] itself"). So do his claims for disgorgement of amounts that the Fund paid to CS&Co. *See* ER72. It is therefore only the Fund or one of its authorized representatives that has statutory standing to sue. *See* Cal. Corp. Code §5710(b) ("No action may be instituted or maintained in the right of any corporation" unless "the plaintiff alleges in the complaint that plaintiff was a member [of the corporation] at the time of the transaction … of which plaintiff complains.").

III. THE DISTRICT COURT'S DISMISSAL CAN ALSO BE AFFIRMED ON ALTERNATIVE GROUNDS

The district court found that Pinkert lacked standing under Article III and applicable California law; that sufficed to dismiss the complaint as to all the Defendants and it suffices to affirm. The Court can also affirm the dismissal because Pinkert fails to state any viable claim against the Defendants.

Count I of Pinkert's complaint alleges that the Charitable Defendants breached fiduciary duties of care and loyalty imposed under the common law of trusts. Count III alleges that those same Defendants committed unlawful business acts or practices by breaching the common-law fiduciary duties imposed on them as well as by breaching statutorily imposed fiduciary duties. Both claims fail for the reasons discussed below. And because Count II and Pinkert's aiding-and-abetting theory under Count III against CS&Co. are derivative of the principal claims asserted against the Charitable Defendants, they fail as well.

First, the directors' actions with respect to managing the Fund's assets are not subject to the common law of trusts and so Pinkert's claims predicated on the common law of trusts fail. Although California courts historically subjected charitable corporations' directors to the common law of trust's stringent standards of care and loyalty, the California legislature abrogated the common-law trust duties and replaced them with less stringent corporate-law standards. *See* 3 Ballantine & Sterling, *California Corporation Laws* §406.01[1] (2020); Cal. Corp.

Code §5230. This preempts any common-law fiduciary duties of care and loyalty that might previously have applied. *See Pacific Scene, Inc. v. Penasquitos, Inc.*, 758 P.2d 1182 (Cal. 1988). So far as Count I and Count III turn on purported violations of common-law trust duties, they fail as a matter of law.

Second, to the extent that Count III rests at least in part on alleged breaches of applicable *statutory* duties of care and loyalty that the Fund's directors owe to the Fund and its charitable causes, Pinkert's allegations cannot overcome the presumption that the directors have acted in good faith and based on sound and informed judgment. *See* Cal. Corp. Code §5231; Ballantine & Sterling §406.01[1]. California applies the same business judgment rule to public charities' directors' management decisions as it does to for-profit corporate directors' decisions. And it generally "insulates" those corporate decisions from "court intervention." *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 714-715 (1996); *accord Berg & Berg Enterprises, LLC v. Boyle*, 178 Cal. App. 4th 1020, 1045 (2009).

Pinkert attempted to overcome that presumption in the district court by arguing that the directors acted under various conflicts of interest, but his assertions rest on speculation rather than the concrete factual allegations the law requires. For instance, he alleges vaguely that "several" unidentified directors previously worked at or are presently "affiliated with" CS&Co. ER40. Although even this allegation is demonstrably false, Pinkert does not allege that a *majority* of

the directors is conflicted. And no allegation explains why any director's prior employment (even if true) would create a material financial interest in transactions with CS&Co. or give the director any other reason to favor CS&Co.'s interests over the Fund's.

Similarly, the alleged affiliation between a single director of the Fund and CS&Co. is insufficient to overcome the business judgment rule, as are Pinkert's vague allegations about other connections between the two companies (such as sharing a logo and administrative support services), *see* ER40. None of these allegations suggests that a majority of the current directors have acted under a conflict of interest in selecting the Fund's investment pools or negotiating for services. The business-judgment rule thus provides yet another basis to dismiss this suit. *See S&A Biotech Investments, LLC v. Baruch*, 2003 WL 22222206, at *5 (Cal. Ct. App. Sept. 26, 2003) (unpublished).

Because Count I and the principal liability theory for Count III fail, so do Count II and the aspects of Count III asserted against CS&Co. Both of those claims, asserted against CS&Co., are based on an aiding-and-abetting theory for the claims asserted in Count I and III. *See* ER71-75. But "there can be no aiding and abetting liability absent the commission of an underlying tort." 1 American Law of Torts §3:5.30 (Mar. 2021); *see also Richard B. LeVine, Inc. v. Higashi*, 131

Cal. App. 4th 566, 574 (2005). Because the predicate fiduciary duty claims fail as a matter of law, so do Pinkert's aiding-and-abetting claims.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

/s/ *Alan E. Schoenfeld*

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 937-7294

SUSAN M. PELLETIER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

DAVID C. MARCUS
CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Ave., 24th Floor
Los Angeles, CA 90071
(213) 443-5300

ANDREW SCOTT DULBERG
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6352

Counsel for Schwab Charitable Fund, Schwab Charitable Board of Directors, and Schwab Charitable Investment Oversight Committee

JOSHUA D. N. HESS
BRIAN RAPHEL
DECHERT LLP
One Bush Street, Suite 1600
San Francisco, CA 94111-3513
(415) 262-4500

DAVID A. KOTLER
SAMANTHA ROSA
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500

Counsel for Charles Schwab & Co.

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STATEMENT OF RELATED CASES

Counsel knows of no related cases pending in this Court.

December 13, 2021

/s/ *Alan E. Schoenfeld*
ALAN E. SCHOENFELD

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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