NO. 16-1015

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF MISSOURI, EX REL. JOSHUA D. HAWLEY; ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA; ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOSHUA D. HAWLEY
ATTORNEY GENERAL
D. JOHN SAUER
Counsel of Record
MICHAEL MARTINICH-SAUTER
OFFICE OF THE ATTORNEY GENERAL
207 W. High Street
P.O. Box 899
Jefferson City, Missouri 65102
john.sauer@ago.mo.gov
(573) 751-8870
Counsel for Petitioners

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I. The Court Should Grant the Petition, Because the Ninth Circuit's Decision Directly Conflicts with This Court's Cases on Matters of Significant Importance.

Respondents contend that the Court should decline review in this case because the Ninth Circuit did not actually address whether the Plaintiff States have a quasi-sovereign interest in preserving their proper role within the federal system. *See* Brief in Opposition of Respondent Xavier Becerra ("Becerra Opp. Br."), at 14; Brief in Opposition of Respondent Humane Society of the United States ("HSUS Opp. Br."), at 3-6. Instead, Respondents claim, the Ninth Circuit grounded its holding on the Plaintiff States' failure to demonstrate that California's unconstitutional activity had injured a substantial segment of their populations. *Id.* But this argument only serves to highlight that the test for *parens patriae* standing utilized by the Ninth Circuit is different from the one prescribed by this Court, and from other Circuits. For this reason, the Court should grant review.

The Ninth Circuit characterized the dispositive inquiry in this case as whether the Plaintiff States had demonstrated "an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party." *Missouri* v. *Harris*, 847 F.3d 646, 651 (9th Cir. 2016) (quoting *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 607 (1982)); *see also id.* (characterizing

this issue as the "first requirement" in a two-part test, and explaining that the court had considered only "the first requirement"). The Ninth Circuit concluded that the Plaintiff States had failed to show that they had any interest apart from those of private parties. *See id.* at 651-55. That conclusion is precisely what the Plaintiff States challenge here. And for the reasons stated in the Petition, that conclusion directly conflicts with *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*. *See* Petition, at 10-18.

In *Snapp*, the Court articulated a straightforward standard for determining when a State may invoke *parens patriae* standing. The State "must articulate an interest apart from the interests of particular private parties," which it does by "express[ing] a quasi-sovereign interest." *Snapp*, 458 U.S. at 607. In short, if a State seeks to vindicate an injury to a quasi-sovereign interest, then it has *parens patriae* standing. *Id.* at 601, 607. The Court recognized two broad, distinct categories of quasi-sovereign interests. "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Id.* at 607. "Distinct from" this interest in its residents' health and well-being, a State also has an independent "interest in securing the terms under which it participates in the federal system." *Id.* at 607-08. Again, each of these constitutes "an interest apart from the interests of particular private parties." *Id.* at 607.

The Ninth Circuit's error—and Respondents'—comes in failing to understand that these interests are disjunctive: satisfying *either* confers *parens patriae* standing. *Snapp* says just

this, carefully analyzing the two quasi-sovereign interests in turn.

As to the first interest, the Court explained that where challenged conduct harms "a sufficiently substantial segment of [a State's] citizens," the State sustains an independent injury of its own. *Id.* at 607. The Court was clear that a State cannot rely on a mere "injury to an identifiable group of individual residents." *Id.* A State may not merely "step in to represent the interests of particular citizens." *Id.* at 600. Rather, it is when the "impairment of the health and prosperity" of a particular segment of the population "would injuriously affect the entire state," *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901), or a "sufficiently substantial segment of its citizens," *Snapp*, 458 U.S. at 607, that the State has an independent, quasi-sovereign interest that it can vindicate through a *parens patriae* action. The "substantial-segment" analysis discussed in *Snapp* thus belongs to the first sort of quasi-sovereign interest; this inquiry enables a court to determine when individual injuries sustained by particular citizens impose a distinct injury on the State. *Id.* at 607-08.

In contrast, the second quasi-sovereign interest recognized in *Snapp* depends not on the well-being of a State's citizens but instead on the State's own "interest in securing observance of the terms under which it participates in the federal system." *Id.* at 607-08. Because a State sustains such an injury directly, the Court's discussion of this interest in *Snapp* did not even address the effect that such an injury might have on the State's citizens. *See id.* Such an effect would be beside the

point, because the relevant injury is sustained directly by the State itself. *See id.* And *Snapp* emphasized that the two quasi-sovereign interests are "distinct from" each other by holding that Puerto Rico would establish *parens patriae* standing if it could "satisfy *either* or both of these criteria." *Id.* at 608 (emphasis added).

In this case, the Ninth Circuit held that the Plaintiff States could not rely on *Snapp*'s second quasi-sovereign interest unless they first demonstrated that the deprivation of their role in the federal system also independently injured a substantial portion of those States' citizens. *Missouri* v. *Harris*, 847 F.3d at 651-55. As Respondent Becerra puts it, "[*p*]*arens patriae* standing requires a State to allege not only a special sort of injury, but one affecting a 'sufficiently substantial segment of its population.'" Becerra Opp. Br., at 10 (quoting *Snapp*, 458 U.S. at 607); *see also id.* at 12 (claiming that *parens patriae* standing requires a "widely diffused public injury").

This conclusion directly conflicts with *Snapp*. *Snapp* requires a State to show injury to a substantial segment of its population only if the State relies solely on the well-being of its citizens to justify *parens patriae* standing. *Snapp*, 458 U.S. at 607. But where the State relies on injury to its own "interest in securing observance of the terms under which it participates in the federal system," *id.*—an interest that *Snapp* explicitly recognized is "distinct from" the interest in citizen well-being—*Snapp* does not require that a State demonstrate anything more than injury to the State's own interest, *id.* at 607-08.

The specific facts presented in *Snapp* vividly illustrate this point. In *Snapp*, the alleged interstate commercial discrimination at issue impacted only 787 individuals. *Id.* at 597. According to the 1980 Census,[1] Puerto Rico had a population of approximately 3,196,520. *See* U.S. Dep't of Commerce, Bureau of the Census, 1980 Census of Population, Detailed Population Characteristics: Puerto Rico 1, Table 93 (1984), *at* https://www2.census.gov/prod2/decennial/documents/1980/1980censusofpo80153unse_bw.pdf. Thus, the challenged conduct in *Snapp* affected approximately 0.02 percent of Puerto Rico's population.

In unanimously concluding that Puerto Rico had *parens patriae* standing, the Court did not inquire whether the challenged conduct had affected a substantial segment of the Commonwealth's population. *Snapp*, 458 U.S. at 608-10. If the Court *had* undertaken such an inquiry—that is, if it had applied the substantial-segment rule on which the Ninth Circuit relied and which Respondents urge—Puerto Rico could not possibly have carried its burden. Challenged conduct that affects only 787 of 3.2 million people plainly does not impact a substantial segment of the State's population, at least in the sense that the Ninth Circuit and Respondents understand that standard. *See Missouri* v. *Harris*, 847 F.3d at 652-55; Becerra Opp. Br., at 10, 12; HSUS Opp. Br., at 4. Instead, the Court considered only whether the challenged

[1] The conduct at issue occurred in 1978. *Snapp*, 458 U.S. at 597. Thus, the 1980 Census is the closest approximation of the Commonwealth's population at the time.

conduct had harmed *the Commonwealth*'s interests. *Snapp*, 458 U.S. at 609-10.

In contrast, the Ninth Circuit erroneously focused on the number of individual citizens affected by California's unconstitutional regulations, rather than the effect that those regulations had on the Plaintiff States' own interests. But where "a State and its residents [have been] excluded from the benefits that are to flow from participation in the federal system," the State sustains an injury "[d]istinct from . . . [any harm to] the general well-being of its residents." *Snapp*, 458 U.S. at 607-08. Regardless of whether that exclusion indirectly harms a large segment of the State's population, the challenged conduct directly violates the State's own sovereignty and its right to "secur[e] observance of the terms under which it participates in the federal system." *Id.*; *see also* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 419 (1996) ("Infringements against this structural protection [of the Commerce Clause] threaten states' abilities to fulfill their sovereign functions and to promote their citizens' well-being."). The very nature of this quasi-sovereign interest makes it irrelevant whether the violations of a State's sovereignty also have indirect impact on a substantial segment of the State's citizens.

In *Snapp*, this Court explained that a "State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce." *Snapp*, 458 U.S.

at 608. Despite this clear statement in *Snapp*, the Humane Society asserts that "States generally do not have justiciable interests of their own in dormant Commerce Clause cases." HSUS Opp. Br., at 1; *see also id.* at 7-8. In support of this implausible proposition, the Humane Society relies on *Louisiana* v. *Texas*, 176 U.S. 1 (1900). But the Humane Society misconstrues that case. In *Louisiana* v. *Texas*, the State of Louisiana filed an original action in this Court against the State of Texas. *Id.* at 2. The Court dismissed the action, but not because Louisiana lacked *parens patriae* standing. On the contrary, *Louisiana* v. *Texas* expressly recognized that a State could maintain a *parens patriae* action to challenge barriers to interstate commerce—as Respondent Becerra explicitly acknowledges. *Id.* at 19; *see also* Becerra Opp. Br., at 12 (acknowledging that *Louisiana* v. *Texas* recognized that a State can maintain a *parens patriae* Commerce Clause challenge under appropriate circumstances). But the Court found that Louisiana had not alleged sufficient involvement by the State of Texas for the case to constitute a controversy between States. *Louisiana*, 176 U.S. at 22-23. For that reason, the case did not fall within the Court's original jurisdiction, and the Court dismissed the case. *Id.*

For all these reasons, a State has *parens patriae* standing to challenge barriers to interstate commerce based on its quasi-sovereign "interest in securing observance of the terms under which it participates in the federal system." *Snapp*, 458 U.S. at 607-08. That is precisely what the Plaintiff States have sought to do here, and precisely what the Ninth

Circuit has rejected. The Court should grant the Petition.

II. The Court Should Grant the Petition, Because the Ninth Circuit's Decision Conflicts with Decisions of Other Circuits.

As described in the Petition, the Ninth Circuit's decision conflicts with the Second Circuit's decision in *Connecticut* v. *Cahill*, 217 F.3d 93 (2d Cir. 2000). In *Cahill*, the Second Circuit considered a Commerce Clause challenge brought by the State of Connecticut against New York's commercial-lobstering laws. *Id.* at 96. Both parties contended that Connecticut had *parens patriae* standing to bring its Commerce Clause claim. *Id.* at 97. The court agreed, but only after employing a different rule for *parens patriae* standing than the one invoked by the Ninth Circuit below. As the Second Circuit explained, "[a] state possesses a quasi-sovereign interest . . . in 'not being discriminatorily denied its rightful status within the federal system.'" *Id.* (quoting *Snapp*, 458 U.S. at 607). This approach precisely follows *Snapp*, and precisely conflicts with the rule outlined by the Ninth Circuit. Notably, the *Cahill* court never inquired whether Connecticut had shown—or even claimed—that New York's lobstering restrictions affected a substantial portion of Connecticut's population. *See id.* Connecticut's Commerce Clause challenge to New York's commercial regulations is thus indistinguishable from the claims brought by the Plaintiff States here.

Respondents contend that *Cahill*'s discussion of Connecticut's *parens patriae* standing was, at most, *dicta*, and thus the Ninth Circuit's decision did not create a circuit split. Becerra Opp. Br., at 16-17; HSUS Opp. Br., at 9-10. This contention is incorrect. Standing can never be assumed: A federal appellate court is "obliged to examine standing *sua sponte* where standing has erroneously been assumed below." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001). And indeed, the court in *Cahill* spent multiple paragraphs addressing the *parens patriae* question, carefully explaining the doctrine and its requirements—in terms directly at odds with the approach employed by the Ninth Circuit. *Cahill*, 217 F.3d at 97. A district court within the Second Circuit, or another panel of the same Circuit, would rightly view *Cahill* as binding precedent on *parens patriae* standing and would rightly reach a result different from that of the Ninth Circuit in this case. *See*, *e.g.*, *City of New York* v. *Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 265 (E.D.N.Y. 2004) (citing *Cahill* for a general proposition regarding *parens patriae* standing); *E.E.O.C.* v. *Fed. Express Corp.*, 268 F. Supp. 2d 192, 197-98 (E.D.N.Y. 2003) (similar).

In fact, as noted in the Petition, district courts in two other Circuits have specifically held that a State has *parens patriae* standing to bring a Commerce Clause claim challenging the regulations of another State, without considering whether the challenged regulations affect a substantial segment of the plaintiff State's population. *See Minnesota ex rel. Hatch* v. *Hoeven*, 331 F. Supp.2d 1074, 1077-78 (D.N.D. 2004); *Beyer Farms, Inc.* v. *Brown*, 721 F.

Supp. 644, 646 (D.N.J. 1989). The Ninth Circuit's decision here creates a split in authority that warrants this Court's review.

Although the Humane Society disputes that the Ninth Circuit's decision conflicts with *Cahill*, it acknowledges that the Courts of Appeals are applying different standards for *parens patriae* standing. *See* HSUS Opp. Br. at 4 n.2. In particular, the Humane Society acknowledges that the Circuits are divided on the elements for *parens patriae* standing and how to apply them. *Id.* (citing *LG Display Co.* v. *Madigan*, 665 F.3d 768, 771 (7th Cir. 2011); *Table Bluff Reservation* v. *Philip Morris, Inc.*, 256 F.3d 879, 885 (9th Cir. 2001); and *New York by Abrams* v. *11 Cornwell Co.*, 695 F.2d 34, 38-40 (2d Cir. 1982)); *see also Missouri* v. *Harris*, 847 F.3d at 651 n.1 ("It is unclear whether 'substantial segment of the population' and 'interest apart from the interest of particular private parties' are separate elements of standing."). While *Snapp* establishes a ***one-part*** test for *parens patriae* standing, the Humane Society points out that some Circuits use a two-part test, and others a test in three parts. To the extent that any of the cases cited by the Humane Society depart from *Snapp*'s one-part approach, they commit the same error as did the court below by conflating the "substantial segment of the population" test with the "distinct" inquiry as to whether there is direct infringement on the State's own sovereign interest.

But more importantly, the disagreement among the Second, Seventh, and Ninth Circuits about the proper standard to apply after *Snapp* underscores the split in Circuit authority and the

need for this Court's review. These Circuits have announced three different tests for *parens patriae* standing, none of which is completely faithful to *Snapp,* and each of which would yield different results. For example, *Table Bluff Reservation* describes a three-part test under which a State must show "injury to a sufficiently substantial segment of its population," "an interest apart from the interests of particular private parties," and "a quasi-sovereign interest." 256 F.3d at 885 (quoting *Snapp*, 458 U.S. at 607). *New York by Abrams* also sets forth a three-part test, but one of its elements differs from those set forth in *Table Bluff Reservation*: in place of the requirement that a State to demonstrate "an interest apart from the interest of particular private parties," *id.*, *New York by Abrams* substitutes the requirement "that individuals could not obtain complete relief through a private suit," 695 F.2d at 38, 39, 40. And *LG Display* holds that *parens patriae* standing requires a State to "'articulate an interest apart from the interests of particular private parties' and 'express a quasi-sovereign interest.'" *LG Display*, 665 F.3d at 771 (quoting *Snapp*, 458 U.S. at 607).

Setting aside the fact that the various tests announced in these cases all conflict with *Snapp*, these cases also cannot be reconciled with one another—and they would produce different outcomes. The proliferation of inconsistent *parens patriae* tests in the lower courts after *Snapp* demonstrates the need for the Court to grant review in this case to clarify the law in this important area. The Court should grant the Petition.

CONCLUSION

For the reasons stated, the Court should grant the Plaintiff States' Petition for Writ of Certiorari.

Respectfully submitted,

JOSHUA D. HAWLEY
ATTORNEY GENERAL
D. JOHN SAUER
Counsel of Record
MICHAEL MARTINICH-SAUTER
OFFICE OF THE
ATTORNEY GENERAL
207 W. High Street
P.O. Box 899
Jefferson City, Missouri 65102
john.sauer@ago.mo.gov
(573) 751-8870

Counsel for Petitioners