No. 25-337

In the Supreme Court of the United States

CITY OF HUNTINGTON BEACH, *et al.*,

Petitioners,

v.

GAVIN NEWSOM, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether political subdivisions have standing to sue their parent State in federal court on federal constitutional grounds other than the Supremacy Clause.

2. Whether public officials have standing to raise compelled speech claims under the First Amendment against the State based on requirements imposed on localities by California's Housing Element Law and the California Environmental Quality Act.

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STATEMENT

1. California faces a crisis of housing affordability. In recent decades, the State's population growth far outpaced the growth in housing stock. *See* McGhee, et al., Pub. Policy Inst. of Cal., *New Housing Fails to Make Up for Decades of Undersupply* (Dec. 3, 2021), https://tinyurl.com/2p6k3247. The State "should have been building 70,000 to 110,000 more housing units beyond what it actually built in each year from 1980 to 2010," bringing the State's shortfall over that period to approximately 3.5 million homes. *Id.* As a consequence, housing costs skyrocketed, leading to greater homelessness and a significant drop in home ownership. *See* Johnson & McGhee, Pub. Policy Inst. of Cal., *Three Decades of Housing Challenges in the Golden State* (Dec. 3, 2024), https://tinyurl.com/2p8scmax.

To address these harms, the State Legislature enacted a series of reforms to state housing law. As relevant here, the Legislature amended the State's Housing Element Law to ensure that political subdivisions across California regularly adopt and update plans—called "housing elements"—that are designed to facilitate increased housing development. *See generally, e.g.*, Cal. Gov. Code § 65580 *et seq.*; State Resp. C.A. Answering Br. 17-20. Local governments are required to update their housing elements every eight years to reflect current housing needs. *See* Cal. Gov. Code § 65588(e)(3)(A)(i). A housing element must, among other things, "make adequate provision for existing and projected [housing] needs for all economic segments of the community." *Id.* § 65583.

Many political subdivisions in California have embraced their obligations under the Housing Element Law, helping to put the State on a path toward improved housing affordability. *See, e.g.*, Cal. Dep't of

Hous. & Cmty. Dev., *Housing Element Review & Compliance Report*, https://tinyurl.com/4fpyces2.[1] But a small minority has resisted necessary reforms.

One of those political subdivisions is the City of Huntington Beach. Although the City initially worked with the California Department of Housing and Community Development to produce a draft housing element in September 2022, *see* State Resp. C.A. S.E.R. 158-159, the City ultimately refused to adopt a final housing element. The City Council considered the draft housing element at a meeting in March 2023, but the Council deadlocked on adopting the housing element. *See* C.A. E.R. 541. And at the Council's next meeting a month later, it rejected the housing element outright. *See id.*

2. a. The State sued the City in state court to obtain an order directing the City to come into compliance with the Housing Element Law. *See People v. Huntington Beach*, No. 30-2023-01312235-CU-WM-CJC (Orange Cnty. Superior Ct. Mar. 8, 2023); *see also* State Resp. C.A. S.E.R. 72-90. That state court litigation remains ongoing. *See Kennedy Comm'n v. Superior Ct.*, 114 Cal. App. 5th 385, 404-410, 425 (2025) (describing procedural history of the State's litigation with the City).[2]

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[1] *See also* Cal. Dep't of Hous. & Cmty. Dev., *Prohousing Designation Program: Prohousing Designated Jurisdictions* (Dec. 11, 2025), https://tinyurl.com/3cp5u537.

[2] The State obtained a writ of mandate that required the City to adopt a housing element, but the trial court has not yet entered final judgment in that state court litigation. *See Kennedy Comm'n*, 114 Cal. App. 5th at 408-410, 425.

b. The day after the State filed its enforcement action in state court, petitioners—the City of Huntington Beach and several local officials—initiated this case in federal court. *See* C.A. E.R. 685, 742. Petitioners sought an injunction blocking enforcement of the Housing Element Law under the First Amendment, the Fourteenth Amendment's Due Process Clause, the dormant Commerce Clause, and several state laws. *See id.* at 685-743. The complaint did not include any claims for relief under the Supremacy Clause, and petitioners nowhere claimed that the Housing Element Law was preempted by any federal law. *See id.*

The State moved to dismiss petitioners' complaint on several grounds. *See* C.A. E.R. 548-580. It argued that "cities, as political subdivisions, have no standing to sue the State in federal court for alleged constitutional violations," and that—even if petitioners could establish standing—the court should abstain from deciding petitioners' claims under *Younger v. Harris*, 401 U.S. 37 (1971). *Id.* at 560. As the State explained, petitioners' complaint was "a transparent attempt to interfere with an ongoing state-court lawsuit brought by the State against Huntington Beach over the city's refusal to comply with state housing laws." *Id.* And on the merits, the State argued that each of petitioners' claims plainly failed as a matter of law. *See id.* at 560-561.

The district court dismissed petitioners' federal claims for lack of standing. *See* Pet. App. 14a-22a. The court also declined to exercise supplemental jurisdiction over petitioners' state law claims and denied petitioners leave to amend their complaint, concluding that any amendment would be "futile." *Id.* at 22a-26a.

The Ninth Circuit affirmed in a short, unpublished opinion. *See* Pet. App. 1a-4a. It held that the City's

constitutional claims were foreclosed by longstanding circuit precedent, "which forbids political subdivisions . . . from challenging the constitutionality of state statutes in federal court." *Id.* at 2a. It likewise held that the various city officials who had joined the City's lawsuit lacked standing: while those officials "retain personal free speech rights," "they cannot invoke those rights to avoid executing 'laws within their charge.'" *Id.* at 4a (quoting *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Plan. Agency*, 625 F.2d 231, 238 (9th Cir. 1980)). And "[b]ecause each Plaintiff lack[ed] standing," the court explained that it "need not consider whether abstention is proper under *Younger*." *Id.* The Ninth Circuit later denied petitioners' request for rehearing en banc with no noted dissent. *See* Pet. App. 27a-28a.

ARGUMENT

Petitioners seek review of the court of appeals' unpublished disposition holding that they lack standing to challenge certain state laws designed to increase housing supply and affordability. The court of appeals applied longstanding circuit precedent restricting the ability of political subdivisions to sue their parent States in federal court on federal constitutional grounds. Petitioners view that precedent as flawed because they think that political subdivisions suffer an injury when required to effectuate state laws that they would prefer not to implement. But because political subdivisions are "'subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions,'" *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362 (2009), they suffer no legally cognizable injury merely because they are required to do the very job they were created to do.

In alleging "an entrenched circuit split" on this issue, Pet. 6, petitioners point to several lower-court decisions that have allowed political subdivisions to challenge state laws in federal court on *preemption* grounds. But petitioners have not brought preemption claims in this case. *Cf. Tong v. Tweed-New Haven Airport Auth.*, 140 S. Ct. 2508 (2020) (No. 19-735) (denying certiorari in preemption case brought by political subdivision against its parent State). No other court of appeals would have allowed petitioners' particular claims here—under the First Amendment, Due Process Clause, and dormant Commerce Clause—to proceed in federal court. For that reason, as well as several others detailed below, this case would provide an exceptionally poor vehicle to address questions about the scope of political subdivisions' standing. And petitioners provide no good reason for the Court to review their "narrow," "subsidiary question" concerning First Amendment claims brought by local officials. Pet. 22. Certiorari should be denied.

1. a. A core requirement of Article III is that plaintiffs demonstrate not just an "injury in fact," but an injury in fact that is "legally cognizable." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992); *see, e.g.*, *United States v. Texas*, 599 U.S. 670, 676 (2023). Petitioners' principal theory of standing fails to satisfy that requirement. The City argues that it suffers injury when it is forced as a matter of state law "to adopt a housing element incorporating a large quota of higher-density units." Pet. 3; *see supra* pp. 1-2 (discussing the role of California's Housing Element Law in addressing the housing crisis). It has long been settled, however, that local governments "are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." *Hunter v. City*

of Pittsburgh, 207 U.S. 161, 178 (1907). In light of that principle, petitioners cannot show that the City suffers legally cognizable injury merely because it must do what it was created to do: assist the State in implementing state law—including state housing policy.[3]

To be sure, Congress occasionally "elevates *de facto* injuries to the status of legally cognizable injuries redressable by a federal court." *Texas*, 599 U.S. at 681-682. For example, in *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 257 (2011), this Court exercised jurisdiction in a case where Congress had authorized "adjudicat[ion] [of] a dispute between [two] components" of a single State's government. *See id.* at 250-251. The Court noted that "the relative novelty of [the] lawsuit" "give[s] us pause." *Id.* at 260. But it allowed the suit to proceed on the assumption that similar suits would "rarely" arise. *Id.* at 261. "Such litigation cannot occur," the Court emphasized, "unless [a] state agency has been given a federal right" by Congress, as was the case "under the highly unusual statute at issue"—a statute that explicitly authorized suit by a particular type of state agency. *Id.* at 261

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[3] Amici suggest that the Court should overrule the principle discussed in *Hunter*, 207 U.S. at 178. *See* Br. of Indep. Cities Ass'n i, 6, 9. But that principle has been settled law for at least 180 years: it was recognized as early as 1845, *see State v. Baltimore & O.R. Co.*, 44 U.S. 534, 550 (1845), and has continued to play an important role in modern decisions, *see, e.g.*, *Ysursa*, 555 U.S. at 362. Amici provide no sensible basis for overruling that longstanding precedent—especially in a case where petitioners themselves fail to make that request. *See generally Clark v. Sweeney*, 607 U.S. ___, ___, 2025 WL 3260170 (Nov. 24, 2025) ("[W]e follow the principle of party presentation," whereby "[t]he parties frame the issues for decision, while the court serves as neutral arbiter." (internal quotation marks omitted)).

n.8; *cf. id.* at 266 (Roberts, C.J., dissenting) (calling it "unsettling" to allow "a state agency [to] sue officials acting on behalf of the State in federal court").[4]

As relevant here, petitioners have not raised claims under any federal statutes, let alone the type of "highly unusual" statute that might authorize them to sue their parent State. *Va. Off. for Prot. & Advoc.*, 563 U.S. at 260 n.8. Petitioners instead seek relief under state law, as well as the First Amendment, Due Process Clause, and dormant Commerce Clause. Pet. App. 13a. Petitioners identify no precedents of this Court—or any historical precedent—that would support allowing such constitutional claims to move forward in federal court. *Cf. Va. Off. for Prot. & Advoc.*, 563 U.S. at 266 (Roberts, C.J., dissenting) (raising concerns about federal suits between agencies or instrumentalities within a single State because "[t]his has never happened before").

Petitioners principally rely on decisions that do not address the standing of political subdivisions. For example, in *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960), and *Romer v. Evans*, 517 U.S. 620, 625-626 (1996), *see* Pet. 14-15, this Court addressed the merits of equal protection claims raised by private litigants. And in *Washington v. Seattle School District No. 1*, 458 U.S. 457, 467 (1982), the Court discussed the merits of

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[4] *Virginia Office for Protection & Advocacy* addressed the cautious approach that courts should take in determining whether Congress has authorized relief under the *Ex Parte Young* doctrine; the Court did not address Article III. *See* 563 U.S. at 250. But there is no reason to think that courts should be any less cautious in evaluating whether Congress has "elevate[d]" a political subdivision's injury to "the status of [a] legally cognizable injur[y]" for Article III purposes. *Texas*, 599 U.S. at 681-682.

a local government's constitutional claim without addressing standing. But "[t]he mere fact that [a] case was entertained by this Court is no basis for considering it as authoritative on . . . jurisdiction[]," "it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored." *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 138 n.2 (1947); *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("drive-by jurisdictional rulings . . . have no precedential effect").[5]

Petitioners also invoke this Court's sovereign immunity precedents. Pet. 11-13; *see, e.g.*, *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997). But they provide no basis for consulting sovereign immunity cases when addressing the question of Article III standing presented here. Just because courts sometimes conduct a "state-law-grounded analysis" when evaluating sovereign immunity, Pet. 13, does not mean that there is any good reason to do so in the way that petitioners request in this case. There is certainly nothing in the Court's sovereign immunity decisions purporting to adopt the expansive "state-law-first method" described by petitioners. Pet. 11 n.3.

Even if the Court consulted state law, it would make no difference here. Petitioners suggest that Huntington Beach's charter-city status gives it sufficient independence to serve as an appropriate litigant

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[5] In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), *see* Pet. 11 n.3, the Court held that the Arizona Legislature had standing to sue an independent state agency—but only in light of the Legislature's claim that it was exercising rights uniquely conferred on state legislatures by the federal Constitution's Elections Clause. *See* 576 U.S. at 800. Here, the City does not invoke any federal rights uniquely conferred on political subdivisions.

against the State in federal court. *See, e.g.*, Pet. 16-18. But petitioners overstate the degree of independence that charter cities enjoy under state law. As relevant here, charter cities are required to assist the State in implementing housing laws. State law "prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern." *Kennedy Comm'n*, 114 Cal. App. 5th at 419 (internal quotation marks omitted). And the relevant state housing laws—which were designed to "promot[e] the supply and affordability of housing statewide," *id.* at 420—implicate matters of statewide concern, *see id.* at 398 ("The Legislature has declared housing availability to be of 'vital statewide importance'" and "'a priority of the highest order.'"). Indeed, the California Court of Appeal recently directed a trial court to enter mandamus relief against the City for its unlawful "refus[al] to adopt a revised housing element" "nearly four years after [its] deadline" for doing so. *Id.* at 398-399.

b. Petitioners also fail to show that their suit would move forward if brought in any other part of the country. Outside of the Ninth Circuit, several courts of appeals have allowed political subdivisions to raise preemption claims against their parent States—though they have not offered any "convincing[]" rationale for doing so. *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 567 & n.6 (5th Cir. 2008); *see also City of San Juan Capistrano v. Cal. Pub. Utils. Comm'n*, 937 F.3d 1278, 1283-1284 (9th Cir. 2019) (Nelson, J., concurring). Any narrow division of authority between those circuits' cases and the Ninth Circuit's precedent is not implicated here because petitioners have not raised a preemption claim. *Supra*

p. 3. And no other circuit has precedent that would allow petitioners' suit here to proceed.

For example, the Tenth Circuit would reject petitioners' claims under its categorical bar on suits by political subdivisions against their parent States under *any* "constitutional provisions that 'provide substantive restraints on state action.'" *Kerr v. Polis*, 20 F.4th 686, 701 (10th Cir. 2021) (en banc); *see, e.g.*, *City of Hugo v. Nichols*, 656 F.3d 1251, 1257-1258 (10th Cir. 2011) (barring dormant Commerce Clause claim); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998) ("It is well-settled that a political subdivision may not bring a federal suit against its parent state [under] . . . the Fourteenth Amendment."). The only exception recognized by the Tenth Circuit is for preemption claims—and even then, there is only a "narrow pathway . . . to sue." *Kerr*, 20 F.4th at 694.[6]

The rule in the Second, Third, and Fifth Circuits is similar. *See* Pet. 6-7. In *Tweed-New Haven Airport Authority v. Tong*, 930 F.3d 65, 73 & n.7 (2d Cir. 2019), the Second Circuit acknowledged its longstanding precedent denying "a political subdivision . . . standing to sue its state under the Fourteenth Amendment." But it allowed claims to proceed under the Supremacy Clause. *See id.* The Third Circuit has likewise allowed Supremacy Clause suits, but it has refused to confer standing on local governments when pressing other types of constitutional claims against their parent States. *Ocean Cnty. Bd. of Comm'rs v. Att'y Gen. of N.J.*, 8 F.4th 176, 180-181 & n.3 (3d Cir.

[6] In the Tenth Circuit's view, "political subdivision standing is an inquiry going to the merits of the case, not the court's jurisdiction." *Kerr*, 20 F.4th at 696. As the court has acknowledged, however, that distinction has little effect on "the actual substance of the inquiry." *Id.* at 696 n.4.

2021). Similarly, in *Rogers v. Brockette*, 588 F.2d 1057, 1067-1071 (5th Cir. 1979), the Fifth Circuit described a general rule prohibiting political subdivisions from bringing claims against their parent States under the Fourteenth Amendment, while concluding that a school district had standing to sue on Supremacy Clause grounds. More recently, however, the Fifth Circuit called *Rogers* "anomalous" and "not very convincing[]" when compared to the rule long applied by the Ninth Circuit: "that a political subdivision [does] not have standing to sue [its] parent state" under any circumstances. *Donelon*, 522 F.3d at 567 & n.6.[7]

The decisions petitioners cite from the Sixth and Eleventh Circuits do not support their assertion of a circuit conflict. *See* Pet. 7. In *South Macomb Disposal Authority v. Washington Township*, 790 F.2d 500, 505 (6th Cir. 1986), the Sixth Circuit pointed to the principal Ninth Circuit precedent invoked by the decision below—*South Lake Tahoe*, 625 F.2d at 233—as persuasive authority in support of its determination that one political subdivision could not sue another political subdivision on Fourteenth Amendment grounds. And *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), adds nothing new to the mix. There, the court merely recognized that Fifth Circuit decisions that pre-date the 1981 creation of the Eleventh Circuit—including *Rogers*, 588 F.2d at 1068—establish binding circuit precedent until abrogated by the Eleventh Circuit sitting en banc. *Alabama*, 791 F.2d at 1455; *see generally Bonner v. City of Prichard, Ala.*,

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[7] *See also Vill. of Arlington Heights v. Reg'l Transp. Auth.*, 653 F.2d 1149, 1152 (7th Cir. 1981) (calling it "well established in the federal courts" that political subdivisions "cannot invoke the protection of the Fourteenth Amendment against the State" (internal quotation marks omitted)).

661 F.2d 1206, 1210 (11th Cir. 1981) (en banc). The Eleventh Circuit has never endorsed *Rogers* as a matter of first principles.

City of South Miami v. Governor, 65 F.4th 631 (11th Cir. 2023), has nothing relevant to say about the questions presented here. *Contra* Pet. 19. There, the Eleventh Circuit determined that various *nonprofit organizations* lacked standing "to challenge a state law that require[d] local law enforcement to cooperate with federal immigration officials." *S. Miami*, 65 F.4th at 634. The court nowhere suggested that *municipalities* would have had standing. In fact, the district court in that case had previously dismissed the City of South Miami's constitutional claims because "political subdivisions have no standing to invoke the provisions of the Fourteenth Amendment" against their parent State. *City of S. Miami v. DeSantis*, 424 F. Supp. 3d 1309, 1322 (S.D. Fla. 2019). Nothing in the Eleventh Circuit's reasoning suggests that it disagreed with the district court on that score.

c. This case would also be an exceptionally poor vehicle to address the standing of local governments to sue their parent States—not only because there is no preemption claim in this case, *see supra* pp. 9-12, but for several other reasons as well. Throughout this case, for example, petitioners have focused on questions of California state law concerning the status of charter cities. *See, e.g.*, Pet. 9-13, 16-18; *see also* Pet. App. 3a; C.A. Opening Br. 48-60. They contend that this Court should adopt a "state-law-first" rule, whereby a political subdivision's standing to sue its parent State would turn on considerations like "the entity's status under the State's constitution; its corporate autonomy and powers; [and] the degree of State control" over the entity. Pet. 5. But no circuit has

adopted a rule that relies on a political subdivision's status and authority under state law. *See supra* pp. 5-12. And petitioners provide no good reason why this Court should spend its scarce time and resources focusing on questions of charter-city authority and status under state law. *Cf. McKesson v. Doe*, 592 U.S. 1, 5 (2020) (per curiam) (refusing to reach "novel issues of state law peculiarly calling for the exercise of judgment by the state courts").

The Court's resolution of petitioners' standing arguments would also have no effect on the outcome of this case, which would be dismissed even assuming that cities like Huntington Beach have standing to sue their parent States in federal court. The *Younger* abstention doctrine requires dismissal of petitioners' lawsuit on jurisdictional grounds. *See Steel Co.*, 523 U.S. at 100 n.3. Abstention under *Younger* is generally appropriate where a parallel state action is pending and would provide an adequate opportunity to raise federal claims. *See, e.g.*, *Middlesex Cnty. Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982). That is the case here. The State's lawsuit against Huntington Beach in state court is ongoing, *see supra* p. 2 & n.2, and has afforded ample opportunity for the City to raise its federal claims, *see Kennedy Comm'n*, 114 Cal. App. 5th at 407-408. Indeed, "the City asserted dozens of affirmative defenses" in that ongoing state court litigation—including defenses alleging that the Housing Element Law is invalid on federal constitutional grounds. *Id.*

Moreover, each of petitioners' federal claims is meritless. Petitioners present three claims: a Fourteenth Amendment due process claim, a First Amendment claim, and a dormant Commerce Clause claim.

This Court and every court of appeals agree that political subdivisions cannot bring Fourteenth Amendment claims against their parent States. *See, e.g.*, *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933); *San Juan Capistrano*, 937 F.3d at 1283-1284 (Nelson, J., concurring). That unanimous view necessarily forecloses the City's First Amendment claim as well, because the First Amendment applies to the States only by virtue of its incorporation through the Fourteenth Amendment. *See Bigelow v. Virginia*, 421 U.S. 809, 811 (1975). And petitioners' dormant Commerce Clause theory cannot survive even cursory review. Petitioners allege that California violated the dormant Commerce Clause by "attempting to offer[] cheaper, more abundant housing than other states." C.A. E.R. 663. But petitioners fail to allege any form of economic protectionism, or any other facts that would plausibly support relief under the dormant Commerce Clause. *See generally Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 390 (2023) ("Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'").

2. Nor should the Court grant plenary review of petitioners' "subsidiary" question concerning the standing of local government officials to assert First Amendment claims. Pet. 22. Petitioners ask this Court to recognize a theory of standing that would allow them to bring compelled speech claims against the State whenever "state law compels them, *in their official roles*, to make a public statement they do not believe." Pet. i (emphasis added). But petitioners fail to cite any case—from this Court or any other—adopting that expansive rule of public official standing.

Indeed, the rule under this Court's precedent has long been the opposite. In *Smith v. Indiana*, 191 U.S. 138, 148-149 (1903), this Court recognized that public officials do not suffer legally cognizable injuries merely because they are required to perform their official duties. That longstanding rule is consistent with this Court's more recent pronouncement that mere "complicit[y] in enforcing" a law does not provide standing to challenge it. *Haaland v. Brackeen*, 599 U.S. 255, 295 (2023). And the Ninth Circuit has applied that same understanding of the limits of public official standing for over forty years. *See S. Lake Tahoe*, 625 F.2d at 238 (holding that councilmembers do not have standing merely "because they wish not to enforce a statute due to private constitutional predilections"); *Thomas v. Mundell*, 572 F.3d 756, 761 (9th Cir. 2009) ("[A] public official's 'personal dilemma' in performing official duties that [the official] perceives to be unconstitutional does not generate standing.").

The Ninth Circuit's case-specific application of these well-established principles does not conflict with the decisions of any other court. Petitioners have not shown "how they suffered a constitutional injury absent their roles as local officials." Pet. App. 4a. Their claimed injury throughout this litigation has been that state law requires them to adopt—"in their official roles," Pet. i—a housing development plan and "statement of overriding considerations" with which they personally disagree. *See, e.g.*, C.A. E.R. 653-654.[8] But

[8] The California Environmental Quality Act sometimes requires government agencies to issue a "statement of overriding considerations" when they decide to approve a policy or project—such as a housing element—that will have significant environmental effects. *See, e.g.*, *Tiburon Open Space Comm. v. Cnty. of Marin*, 78 Cal. App. 5th 700, 732-733 (2022).

petitioners fail to explain how adopting a housing element and statement of overriding considerations—which, as relevant here, impose only modest burdens on local governments, *see infra* p. 18—would be different in kind from the many plans, reports, and certifications that public officials routinely issue in their official capacities. *See generally Smith*, 191 U.S. at 149 (where "a public officer" has "certain duties . . . to perform," "[t]he performance of those duties [is] of no personal benefit to him" for standing purposes, and "[t]heir nonperformance [is] equally so").

Nevada Ethics Commission v. Carrigan, 564 U.S. 117 (2011), provides no support for petitioners' standing theory. *Contra* Pet. 22-26. *Carrigan* merely held that "restrictions upon legislators' voting are not restrictions upon legislators' protected speech." 564 U.S. at 125. Nothing in *Carrigan* addresses the question at issue here: the extent to which legislators or other government officials have standing to raise First Amendment claims. *See* Pet. App. 4a.

This Court's decision in *Board of Education v. Allen*, 392 U.S. 236 (1968), likewise fails to support petitioners' broad theory. *See* Pet. 15. A short footnote in *Allen* suggests that public officials have a sufficient "personal stake in the outcome" of a case to support standing when they "are in the position of having to choose between violating their oath [to the Constitution] and taking a step . . . that would be likely to bring their expulsion from office." 392 U.S. at 241 n.5 (internal quotation marks omitted). It is not at all clear, however, that *Allen*'s footnote remains good law, given that the Court has "significantly tightened standing requirements" in the years since *Allen*. *S. Lake Tahoe*, 625 F.2d at 236; *see Drake v. Obama*, 664 F.3d 774,

780 (9th Cir. 2011) (similar).[9] And even if *Allen* remained good law, it would not support standing here. In *Allen*, the officials' refusal to enforce the challenged law was "likely to bring their expulsion from office." 392 U.S. at 241 n.5; *see S. Lake Tahoe*, 625 F.2d at 240 (Sneed, J., concurring). Petitioners have not argued they face any such threat. Their only claimed injury is that they would prefer "to avoid executing laws within their charge" that they dislike. Pet. App. 4a (internal quotation marks omitted).

The Fifth Circuit's decision in *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018), is similarly unhelpful to petitioners. *See* Pet. 22-23, 25. Construing *Allen*, the court recognized "that it is not enough for public officials to assert as an 'injury' the violation of their oaths of office where no adverse consequences would occur." 890 F.3d at 186. But the court nonetheless found standing and reached the merits of the plaintiff officials' constitutional claims because the "officials face[d] criminal penalties in addition to civil fines and expulsion from office if they disobey[ed]" the challenged statute. *Id.* Again, petitioners do not point to any comparable consequences in this case.[10]

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[9] *See also* 13B Wright, Miller et al., Fed. Prac. & Proc. Juris. § 3531.11.3 n.16 (3d ed.) (collecting cases that cast doubt on the precedential significance of *Allen*'s footnote).

[10] None of the remaining cases cited by petitioners, *see* Pet. 25, address the standing of local officials. *See Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474-483 (2022) (rejecting school board member's First Amendment claim without discussing standing); *Bond v. Floyd*, 385 U.S. 116, 131-137 & n.14 (1966) (addressing state legislator's First Amendment claim without discussing standing); *Boquist v. Courtney*, 32 F.4th 764, 774-785 (9th Cir. 2022) (similar).

In any event, petitioners' First Amendment claim is meritless. They argue that they "could not truthfully adopt" a statement suggesting that "the benefits of high-density housing" "outweighed" other considerations, such as environmental impacts. Pet. 3. But where "public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). And the relevant provisions of California law merely require petitioners to issue a brief statement noting that they are approving a housing element despite their concerns about environmental impacts because state law requires them to do so. *See, e.g.*, Cal. Pub. Res. Code § 21081(a), (b). Nothing requires petitioners to express agreement with state housing laws. Petitioners remain free to criticize state housing policies in both their personal and official capacities—a freedom they have not hesitated to exercise. *See, e.g.*, C.A. E.R. 316, 354-355; Huntington Beach City Council, Study Session 2:37-2:50 (Mar. 19, 2024), https://tinyurl.com/yvb72ncu (statement of Councilmember Strickland) ("We've been . . . forced to follow nonsensical housing laws.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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