U.S. Court of Appeals Case No. 10-16696

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, ET AL.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, ET AL.,
Defendants,
and
DENNIS HOLLINGSWORTH, ET AL.,
Defendants-Intervenors-Appellants

On Appeal From The United States District Court, Northern District of California
Case No. 09-CV-2292 VRW
The Honorable Vaughn R. Walker

BRIEF OF PROPOSED AMICUS CURIAE EQUALITY CALIFORNIA IN SUPPORT OF PLAINTIFFS-APPELLEES AND PLAINTIFF-INTERVENOR-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that Amicus Curiae Equality California is not a corporation that issues stock or has a parent corporation that issues stock.

DATED: October 25, 2010

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

This brief of Amicus Curiae Equality California is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties to the case.

Equality California is a state-wide advocacy group protecting the needs and interests of lesbian, gay, bisexual, and transgender Californians and their families, including members of same-sex couples and their children. It is also California's largest lesbian, gay, bisexual, and transgender civil rights organization, with tens of thousands of members. Equality California's members include registered voters in every county in the State of California. Equality California's members also include same-sex couples who wish to marry in the state of California but cannot do so while Proposition 8 is being enforced; same-sex couples who married in California before Proposition 8's enactment; same-sex couples who are married under the laws of other jurisdictions; and same-sex couples who have registered with the state of California as domestic partners. The issues raised in this appeal will directly affect Equality California's members and supporters.

Equality California also has developed extensive expertise regarding legal and factual issues raised in this appeal. Equality California regularly sponsors legislation in the California Legislature. Over the past decade, Equality California has successfully sponsored more than 60 pieces of civil rights legislation for the

lesbian, gay, bisexual, and transgender community in California, including many of the state's anti-discrimination laws and laws concerning marriage and domestic partnership.

Equality California also frequently participates in litigation in support of the rights of lesbian, gay, bisexual, and transgender persons, and has done so by bringing lawsuits as a plaintiff, by intervening as a plaintiff, by intervening as a defendant in support of California enactments, and by participating as an amicus curiae. As both a frequent sponsor of legislation and a membership organization, Equality California is familiar with standards governing participation by sponsors of legislation in litigation in federal and California courts, including the limits on such participation.

Equality California has been a party in other judicial proceedings concerning marriage equality. For example, Equality California was a plaintiff in *In re Marriage Cases,* 183 P.3d 384 (2008), and was a petitioner in *Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009). Equality California also spearheaded the "No" on Proposition 8 campaign, and was one of the leading fund-raising organizations for the campaign. Geoffrey Kors, the Executive Director of Equality California, was a co-chair of "No-On-8." As a result of its involvement in marriage equality advocacy, Equality California has developed significant expertise in the movement for the rights of lesbian, gay, bisexual, and transgender persons; the marriage

equality movement; the legal issues surrounding marriage rights in the states and at the federal level; and state and federal constitutional issues specific to Proposition 8.

ARGUMENT

Proposition 8 is a measure that is unprecedented in our nation's history—an amendment to a state constitution purporting to enshrine in that fundamental charter the discriminatory elimination of the fundamental right to marry for one group, same-sex couples, after it had been established that, under the state constitutional guarantee of equal protection, sexual orientation is not a valid basis for the denial of legal rights and the state of California was therefore required to permit same-sex couples to marry. After a careful trial and thorough analysis, the District Court ruled that Proposition 8 violates the equal protection and due process guarantees of the federal Constitution.

The state officials named as defendants in this lawsuit, including Governor Arnold Schwarzenegger and Attorney General Jerry Brown, have chosen not to appeal. As California's elected leaders entrusted by law with the power to make such litigation decisions, they acted on behalf of the people in making the decision not to appeal.[1] In doing so, the state officials presumably considered the District

[1] The California Supreme Court recently declined a request by certain litigants to require state officials to file an appeal of the District Court's judgment in this case. *See Beckley v. Schwarzenegger* (Cal. Supreme Ct. Case No. S186072)

Court's ruling, possible outcomes of an appeal, and the potential length and costs of an appeal (including possible payment of attorney fees to other parties). The state officials also may have considered the harm that would be inflicted during the pendency of appellate proceedings. Such proceedings would result in the continued stigmatizing denial of a fundamental right to thousands of same-sex couples in California, who have been unable to marry for the two years that Proposition 8 has been in effect and who were previously unable to marry during the more than four years of state-court litigation that finally resulted in a ruling recognizing that the California Constitution all along required equal treatment of same-sex couples with respect to marriage. *See In re Marriage Cases,* 183 P.3d 384 (2008).

Although the District Court's ruling invalidating Proposition 8 is correct on the merits, this Court does not have jurisdiction to reach the merits because no party with standing to appeal has chosen to appeal. The official proponents of Proposition 8 who intervened in the District Court proceedings ("Proponents") lack standing on appeal because they have no particularized injury related to the District

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(order dated Sept. 8, 2010 denying petition for review). The California Supreme Court previously stated in another case that its "[o]bservation that [state officials in the case] largely declined to defend the challenged statutes does not imply that these agencies committed misconduct" and that "whether they have an obligation to defend such statutes in court is a complex issue, which [the court] need not decide here." *Connerly v. State Personnel Bd.,* 129 P.3d 1, 6-7 (2006).

Court's judgment. Having successfully secured placement of Proposition 8 on the ballot and enactment of the measure two years ago, Proponents' interests in connection with Proposition 8 are no different than the political or ideological interests of other residents of California who may hold strong views about the measure. The Supreme Court of the United States has expressed "grave doubts" as to whether a proponent of an initiative has standing to appeal in federal court to defend the initiative where state officials decline to appeal. *Arizonans for Official English v. Arizona* ("*Arizonans"*), 520 U.S. 43, 66 (1997). Consistent with the Supreme Court's unanimous opinion in *Arizonans*, this Court should consider as a threshold matter whether California law authorizes initiative proponents to defend a measure in federal court in lieu of state officials. *Id.* at 65-66. As explained below, Proponents and their amici have not identified any such authorization in California law.

Nor do the County of Imperial, its Board of Supervisors, or its Deputy County Clerk Isabel Vargas (collectively, "Imperial County" or "Imperial Movants") have standing to appeal, for the reasons set forth in Equality California's amicus-curiae brief in the separate appeal by the Imperial Movants, Appeal No. 10-16751. Were this Court nevertheless to determine that one of the appellants has standing to appeal the judgment, however, this Court should affirm the judgment in full, including the scope of the injunction, for all of the reasons set

forth in the briefs of the Perry Appellees and Appellee City and County of San Francisco. As further explained below, Proposition 8 is "a classification of persons undertaken for its own sake," not in furtherance of any legitimate interest. *Romer v. Evans*, 517 U.S. 620, 635 (1996). "[T]he Constitution 'neither knows nor tolerates classes among citizens,'" *id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)), and Proposition 8 stands in stark violation of the federal Equal Protection Clause. If the Court reaches the merits of this appeal (which it should not do), then the Court should affirm the District Court's judgment.

I. PROPONENTS DO NOT HAVE STANDING TO APPEAL

To invoke the jurisdiction of the federal courts, an appellant must meet the requirements of Article III standing at all stages of a case, including on appeal. *See Arizonans for Official English v. Arizona* ("*Arizonans"*), 520 U.S. 43, 64-65 (1997). Thus, intervenors at trial cannot pursue an appeal unless they independently establish their Article III standing. *See Diamond v. Charles*, 476 U.S. 54, 68-71 (1986); *see also Arizonans*, 520 U.S. at 65 ("An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III.") (internal quotation marks and citation omitted). The intervention of Proposition 8's official proponents in the District Court proceedings therefore does not confer on them standing to pursue an appeal.

For that, a would-be appellant must show, first and foremost, an "actual," "concrete and particularized" stake in the litigation related to the judgment from which they wish to appeal. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do." *Arizonans*, 520 U.S. at 64; *see also Lujan*, 504 U.S. at 575 (no standing where "the impact on plaintiff is plainly undifferentiated and common to all members of the public"). Rather, a party "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not

conjectural or hypothetical." *Lujan* at 560 (internal quotation marks and citations omitted). "[T]he decision to seek review must be placed in the hands of those who have a direct stake in the outcome. It is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." *Diamond*, 476 U.S. at 62 (internal quotation marks and citations omitted).

Once a ballot initiative becomes law, Proponents can claim no greater interest in the law than any other concerned member of the general public; like everyone else, they must defer to duly elected officials for whom California law has delegated the responsibility to defend state laws. Proponents therefore cannot demonstrate the concrete and particularized injury that forms part of the "irreducible constitutional minimum" to pursue an appeal. *Lujan*, 504 U.S. at 560. Indeed, Proponents do not dispute this. Instead, Proponents argue that California law creates interests that confer Article III standing on them. Proponents are incorrect for the reasons discussed below.

A. California Law Does Not Authorize an Initiative Proponent to Pursue an Appeal in Federal Court in Defense of An Initiative In Lieu of State Officials

In *Arizonans*, the Supreme Court discussed the issue that this Court confronts here: whether an initiative proponent has standing to appeal in federal court to defend an initiative where elected state officials have acquiesced in a trial

court's determination that a state initiative violates the federal Constitution. In a unanimous opinion authored by Justice Ginsburg, the Supreme Court expressed "grave doubts" as to whether initiative proponents had Article III standing to pursue an appeal. *Arizonans*, 520 U.S. at 66. Although the Supreme Court found it unnecessary to decide the standing issue in that case because it found that the case had become moot, the Court's discussion of the standing issue made plain the Court's unanimous view that it is extremely doubtful that the proponent of an initiative has federal-court standing to appeal a judgment invalidating the initiative where state officials have declined to do so and there is no state law clearly "appointing initiative sponsors as agents of the people of [the state] to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Id*. at 65. In the course of its analysis, the Supreme Court explained that the existence of a state law permitting initiative proponents to defend an initiative in state court was not sufficient for purposes of federal standing analysis. *See id*. at 66 ("Nor do we discern anything flowing from [the challenged Arizona constitutional measure's] citizen suit provision—which authorizes suits to enforce [the measure] in state court—that could support standing for Arizona residents in general, or [the initiative proponent] in particular, to defend the Article's constitutionality in federal court."). Accordingly, in order for there even to be a possibility that Proponents have standing to appeal, Proponents must identify

California law that authorizes initiative proponents to file an appeal *in federal court* to defend an initiative. Neither Proponents nor their amici have identified any such California law.

Instead, Proponents and their amici attempt to deflect attention away from the analysis in *Arizonans* by focusing on its status as dicta. *See* Proponents' Opening Br. at 21; Br. of Amicus Center for Constitutional Jurisprudence ("CCJ") at 13, 21. This Court has recognized, however, that Supreme Court dicta should be treated with considerable deference. *See, e.g., United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996) ("[W]e treat Supreme Court dicta with due deference . . . ."); *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring in part, dissenting in part) ("[D]icta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold. We should not blandly shrug them off because they were not a holding."). As more fully explained below, this Court should here follow the reasoning of the standing analysis in *Arizonans*.

Amicus Center for Constitutional Jurisprudence ("CCJ") argues, however, that the Ninth Circuit's opinion and reasoning in *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991)—which found standing for the initiative sponsors as to whose standing the Supreme Court in *Arizonans* later expressed "grave doubt"—remains binding circuit precedent because, according to CCJ, the "1991 opinion in *Yniguez*

was not vacated." Br. of Amicus CCJ at 21. In *Arizonans*, however, the Supreme Court recounted in detail the procedural history of the litigation in the course of explaining which decisions should be vacated and expressly held "that vacatur down the line is the equitable solution." 520 U.S. at 75. This Court has indicated at least twice that the 1991 opinion in *Yniguez* was vacated. *See Prete v. Bradbury*, 438 F.3d 949, 955 n.8 (9th Cir. 2006) (stating that "*Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991) . . . was vacated by the U.S. Supreme Court."); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 n.5 (9th Cir. 1997) (discussing the 1991 *Yniguez* decision and stating that "the Ninth Circuit's decision in *Yniguez v. Arizona* was *vacated* by the Supreme Court, and is thus wholly without precedential authority") (emphasis in original); *see also O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect . . . ."). Given the Supreme Court's instruction for "down the line" vacatur in an opinion expressing "grave doubt" about the conclusion and reasoning of the 1991 *Yniguez* opinion regarding standing, and in light of opinions of two other panels of this Circuit stating that the 1991 *Yniguez* opinion is no longer binding precedent, this Court should reject CCJ's call to follow the 1991 *Yniguez* opinion.

Even were this Court to credit CCJ's argument that *Yniguez* was not vacated, the reasoning in that panel opinion must be considered in light of the Supreme

Court's subsequent opinion in *Arizonans*. In finding standing for an Arizona initiative sponsor and spokesperson in *Yniguez*, the Ninth Circuit panel looked to Arizona law and relied in part on the fact that "Arizona law recognizes the ballot initiative sponsor's heightened interest in the measure by giving the sponsor official rights and duties distinct from those of the voters at large." *Yniguez*, 939 F.2d at 733. That basic approach of looking to state law is consistent with the Supreme Court's opinion in *Arizonans*, but the Supreme Court's opinion made clear that the state-law inquiry required for the Article III standing analysis should focus on the particular question of whether state law authorizes initiative proponents to defend an initiative on appeal *in federal court* in lieu of state officials.

In addressing that question, Proponents and their amici come up empty-handed. They do not point to any California enactment—constitutional or statutory—that provides authorization for initiative proponents to represent the people's interests by pursuing an appeal in federal court in lieu of elected officials. Instead, Proponents and their amici place their reliance solely on decisional law, none of which supports their standing argument.

Proponents can find no support in the California Constitution. Article II, Section 8(a) of the Constitution provides that "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or

reject them," but does not state that the initiative power includes anything beyond proposing and voting on measures.

Moreover, the California Constitution exclusively charges the executive branch with the duty to "see that the law is faithfully executed." Cal. Const., art. V, § 1. The Constitution specifically provides that the Attorney General—not the Legislature, individual members of the Legislature, or proponents of ballot initiatives—is responsible for making legal decisions on behalf of the state and determining which steps are necessary for adequate enforcement of the law, with the stated exception that the Attorney General's powers are "[s]ubject to the powers and duties of the Governor." *See* Cal. Const., art. V, § 13 ("Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced."). Given that initiative proponents act in a legislative capacity, the absence of any constitutional provision authorizing them to play an executive role in deciding whether to pursue an appeal as a representative of the people is devastating to Proponents' standing argument in light of the California Constitution's provisions that "[t]he powers of state government are legislative, executive, and judicial" and that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Cal. Const., art. III, § 3.

California *statutory* law also vests responsibility for challenges to enacted state law in the Attorney General. *See* Cal. Gov't Code § 12511 ("The Attorney General has charge, as attorney, of all legal matters in which the State is interested, except the business of The Regents of the University of California and of such other boards or officers as are by law authorized to employ attorneys"); *id.* §§ 948, 12512 (vesting authority in Attorney General to defend suits against the state, its officers and agencies and giving Attorney General power to recommend settlement). These provisions apply to all actions equally and grant no responsibility to initiative proponents for laws that originate by ballot initiative. Thus, in contrast to the New Jersey enactment at issue in *Karcher v. May*, 484 U.S. 72 (1987), upon which Proponents rely, no provision of California law confers on initiative proponents standing to maintain an action (or an appeal) to defend their initiatives on behalf of the people once passed into law.[1] That duty falls exclusively on the persons specified by California law, namely, the Attorney

[1] In *Karcher*, the Supreme Court held that two legislators who had previously pursued an appeal as representatives of the New Jersey Legislature had standing in the Court of Appeals because "the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals." *Karcher*, 484 U.S. at 82. Together, *Arizonans* and *Karcher* stand for the proposition that a third party *may* possess standing to pursue an appeal if state law authorizes that third party to represent the interests of the State on appeal in federal court. But Proponents point to no California law that grants them such authority. In fact, California law is to the contrary.

General and, ultimately, the Governor as the "supreme executive of this State." Cal. Const., art. V, §§ 1 and 13.

The cases that Proponents cite to the contrary are inapposite. Many of those cases pertain to pre-election challenges to proposed initiatives, involving such matters as ballot materials or efforts to exclude an initiative from a ballot. *See*, *e.g., Independent Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 180 (Cal. 2006) (appearance of initiative on ballot); *Senate of Cal. v. Jones*, 988 P.2d 1089, 1091 (Cal. 1999) (single-subject rule); *Legislature of Cal. v. Deukmejian*, 669 P.2d 17, 19-20 (Cal. 1983) (time restrictions); *Brosnahan v. Eu*, 641 P.2d 200, 201 (Cal. 1982) (signature collection); *Vandeleur v. Jordan*, 82 P.2d 455, 456 (Cal. 1938) (form of initiative); *Sonoma County Nuclear Free Zone '86 v. Superior Court*, 189 Cal.App.3d 167, 173 (1987) (content of ballot argument); Proponents' Opening Br. at 21 n.6. In such proceedings—before a proposed measure has become a law or even appeared on a ballot—the initiative proponents have standing because they represent their individual interests, arising under California law, in ensuring the proposed measure reaches the ballot in the manner they wish. *See* Cal. Const., art. II, § 8. But those cases do not hold that an initiative proponent can stand in the shoes of the state after the enacting election to defend a state law.

Proponents also cite several post-election cases in which initiative proponents were permitted to *intervene* alongside other defendants. In particular,

Proponents place great reliance on *Strauss v. Horton*, 207 P.3d 48 (2009), in which Proponents were permitted to intervene. But that case (an original action in the California Supreme Court, not an appeal) says nothing about Proponents' standing to maintain the suit in their own right. *See id*. at 69. The right to intervene is not coterminous with standing, *see, e.g.*, *Arizonans*, 520 U.S. at 64-65, and a state's authorization of the participation of persons or entities in an existing lawsuit or appeal does not suggest an intention by the state to authorize such persons or entities to maintain their own lawsuits or appeals—and certainly not to represent the state's interests.

The other post-election cases that Proponents rely upon likewise involve intervention, not individual standing. Proponents' Opening Br. at 21 n.6 (citing *Amwest Sur. Ins. Co. v. Wilson*, 906 P.2d 1112, 1116 (Cal. 1995); *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 581 (Cal. 1994); *Legislature of Cal. v. Eu*, 816 P.2d 1309, 1312 (Cal. 1991)). Indeed, the California Court of Appeal recently discounted the import of those very cases *even as to the issue of intervention* for initiative proponents. In an ultimately successful action filed by the City and County of San Francisco seeking the invalidation of Proposition 22 and other statutory law denying same-sex couples the right to marry, the Proposition 22 Legal Defense and Education Fund sought to intervene (represented by some of the same lawyers who are now representing Proponents and the Imperial County

Movants on appeal here). *See City & County of San Francisco v. State of California*, 128 Cal.App.4th 1030, 1033 (2005). In rejecting that intervention request, a unanimous panel of the California Court of Appeal (including Justice Corrigan, who now is a member of the California Supreme Court) made clear that there is no general rule under California law that initiative proponents must be permitted to intervene. The Court of Appeal explained as follows, citing some of the very cases that Proponents have cited to this Court on appeal:

> The Fund also discusses several cases in an effort to establish there is a "routine practice" in California and federal courts of allowing initiative proponents to intervene when the measures they helped enact are challenged. However, *none* of the California cases cited addresses whether intervention was proper. Some simply note that an initiative sponsor was permitted to intervene in earlier proceedings [citing *Amwest Surety Ins. Co. v. Wilson and 20th Century Ins. Co. v. Garamendi*], while others refer to initiative sponsors as "interveners" without mentioning whether an objection was ever made to their intervention [citing *Legislature v. Eu and City of Westminster v. County of Orange,* 204 Cal.App.3d 623, 626 (1988)]. Because these cases do not address the propriety of intervention, they do not constitute authority supporting the Fund's position. (*See Mattco Forge, Inc. v. Arthur Young & Co*. (1997) 52 Cal.App.4th 820, 850, 60 Cal.Rptr.2d 780 ["Dicta is not authority upon which we can rely"].)

Id. at 1041-42 (2005) (emphasis in original). The Court of Appeal went on to discredit the precedential value of yet another case on which Proponents here attempt to rely, *Building Industry Association v. City of Camarillo*, 718 P.2d 68 (Cal. 1986). That case did not even involve intervention by an initiative sponsor, and the Court of Appeal in *City & County of San Fra*ncisco stated that "[b]ecause

the permissibility of intervention under specific facts was not before the court [in *Building Industry Association v. City of Camarillo*], the court's observation about intervention . . . was dictum and not dispositive here." *City & County of San Francisco*, 128 Cal.App.4th at 1042 n.9.

Given the California Court of Appeal's recent explanation that the very California authorities on which Proponents attempt to rely do not even support a general proposition that initiative proponents have a right to intervene in challenges to an initiative, this Court should not regard California case law as somehow supporting the notion that initiative proponents have standing to file an appeal in federal court where state officials have chosen not to do so.[2]

Granting initiative proponents standing to defend the constitutionality of its laws, absent the participation of state officials, could lead to troubling

[2] It is clear from California constitutional, statutory, and case law that California law does not authorize a proponent of an initiative to maintain an appeal in federal court to defend the initiative in lieu of public officials. If, however, for any reason this Court considers there to be "no controlling precedent" on the question, and if, in the Court's view, "[t]he decision could determine the outcome of" this appeal, then this Court might choose to avail itself of the California Supreme Court's procedures for certifying questions of California law to that Court. Cal. R. Ct. 8.548. The question that could be certified is whether California law authorizes the official proponents of an initiative to defend the constitutionality of the initiative after its enactment by filing and maintaining an appeal in federal court in lieu of public officials. *Cf. Arizonans*, 520 U.S. at 79 (noting that "federal courts may avail themselves of state certification procedures" when a case presents "[n]ovel, unsettled questions of state law" and that "[t]aking advantage of certification made available by a State may 'greatly simplif[y]' an ultimate adjudication in federal court") (citation omitted).

consequences. A decision by the state's elected officials as to whether to appeal an adverse ruling may call for consideration of a broad array of factors, such as public policy considerations, the expenditure of state resources, the likelihood of success on appeal, potential collateral risks that could be posed by an appeal, how best to use limited state funds, and the possibility of incurring liability for other parties' attorney fees, among many factors. These are not matters that an unelected, unaccountable initiative proponent necessarily can be expected to be able to evaluate, and there is no indication that the people of California have authorized initiative proponents to make such decisions.

The rule that Proponents advocate would also create a remarkable incongruity in a state with term limits for the position of Attorney General and Governor. An individual's or entity's status as a proponent never ceases—they are and forever will be an initiative's proponent—and thus, they could have standing to pursue an appeal in the absence of the state for decades. In contrast, the officials specified under California law to represent the state's interests are subject to term limits and are accountable to voters at election time. This Court should reject any rule that results in conferring such significant, long-lasting power on those not elected to office, not serving in any representative capacity, and not accountable to voters.

B. California Law Creates No Particularized Interest that Would Confer Standing on Proponents

Proponents further contend that California initiative law, and the importance of the initiative power to California's constitutional scheme, elevates their otherwise ideological interests into an injury cognizable for Article III purposes. This argument is meritless for reasons grounded in California decisional law, the California Constitution, and federal decisional law.

Proponents rely on *Diamond v. Charles*, 476 U.S. 54 (1986), which says that States have "the power to create new interests, the invasion of which may confer standing." *Id*. at 66 n.17. But even that statement in *Diamond* refers to rights conferred by state statutes expressly providing for standing. The Supreme Court in *Diamond* cited to footnote 22 of *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), which states, "[t]he reference in *Linda R. S.* [*v. Richard D.*, 410 U.S. 614, 617 (1973)] to '*a statute expressly conferring standing*' was in recognition of Congress' power to create new interests the invasion of which will confer standing. *See* 410 U. S., at 617 n. 3 . . . ." (emphasis added). Thus, at minimum, in order for a state law to create standing, it must expressly confer standing. There is no such state law here. Instead, the California Constitution simply states that "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Cal. Const. art. II, § 8(a). Proponents have vindicated that power: they have

proposed an amendment to the California Constitution and caused that proposal to be adopted into law. There is no further grant of power, and certainly nothing that confers on an initiative proponent a personal right to defend the initiative or to act on behalf of the state in defending the initiatives *after the initiative becomes law*. California law allocates that role solely to the executive. Cal. Const., art. V, §§ 1, 13.

Finally, Proponents' argument is foreclosed by federal decisional law. In *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank & Trust Co.*, 460 U.S. 1077 (1983) (mem.), the Supreme Court held that an initiative proponent lacked standing to bring an appeal. The Don't Bankrupt Washington Committee ("the Committee") was the proponent of a Washington state initiative. *Continental Ill. Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692, 694 (9th Cir. 1983). On a challenge to the initiative by the federal government, in which the Committee was permitted to intervene, the Ninth Circuit invalidated the initiative. *Id*. at 694, 702. The Committee appealed to the Supreme Court, but the Court dismissed the appeal because the Committee lacked standing, notwithstanding the fact that it had intervened in the case below. 460 U.S. 1077. That dismissal is a decision on the merits that is binding on lower courts on the issues presented and necessarily decided. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Proponents brush aside *Don't Bankrupt Washington* because

it "did not address whether California law authorizes initiative proponents to defend the measures they sponsor." Proponents' Opening Brief at 22 n.7. Proponents make no attempt to explain how they suffer greater injury than proponents in Washington, but at a minimum, *Don't Bankrupt Washington* stands for the propositions that a state statutory scheme allowing citizens to propose initiatives does not necessarily create a cognizable injury for purposes of Article III, nor does intervening at an earlier stage in a case guarantee standing in subsequent stages.

II. IF THE COURT REACHES THE MERITS, THE COURT SHOULD CONCLUDE THAT PROPOSITION 8 VIOLATES THE FEDERAL QUAL PROTECTION CLAUSE

As noted above, there is no need for this Court to reach the merits of this appeal, because no party with Article III standing has appealed. Should this Court nevertheless disagree and find that a justiciable controversy exists on appeal, this Court should affirm the District Court's judgment in full, for all of the reasons presented by the Perry Appellees and Appellee City and County of San Francisco.

With respect to the merits, Equality California here emphasizes in particular that, although many states unfortunately include in their constitutions provisions barring same-sex couples from marrying, even among those numerous unlawfully discriminatory enactments, Proposition 8 stands out as a unique and unprecedented

mandate of inequality that the federal Equal Protection Clause simply cannot tolerate.

Despite a longstanding history of discrimination against lesbian, gay, bisexual, and transgender persons in California, including in California's marriage laws, the California Legislature a little more than a decade ago entered a period in which it increasingly enacted into law measures that recognized both that discrimination based on sexual orientation lacked justification and that same-sex couples, notwithstanding a long history of discrimination, formed families just like different-sex couples and were similarly situated with different-sex couples. *See Koebke v. Bernardo Heights Country Club,* 115 P.3d 1212, 1226 (Cal. 2005) Accordingly, the Legislature adopted increasing numbers of protections for same-sex couples who chose to register their "domestic partnerships" with the state, bringing the legal protections of domestic partnership closer and closer to marriage—such that by 2005 domestic partners in California were entitled to nearly all of the benefits of marriage, *id.* at 1228 n.10, though still relegated to a second-class status. The numerous protections enacted by the Legislature bore witness to the basic principle that sexual orientation is irrelevant to one's ability to contribute to society and to participate in family life and is an unjustifiable basis for discriminating with respect to legal rights.

Even as the Legislature moved closer to the ideal of equal protection of the laws with respect to legal protections, the Legislature was mindful that domestic partnership, no matter how closely modeled on marriage, could not afford true equality under the law as long as same-sex couples were excluded from the more cherished, honored, and respected status of marriage. California's courts likewise acknowledged that domestic partnership was a separate, less-respected status. *See Knight v. Superior Court,* 128 Cal.App.4th 14, 31 (2005) (noting that differences between domestic partnership and marriage "indicate marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership").

Finally, in a historic and long-awaited decision, the California Supreme Court in May 2008 articulated that under the California Constitution (1) sexual orientation is not a valid basis for denial of legal rights, and laws that discriminate based on sexual orientation are subject to the strictest level of scrutiny; (2) marriage is a fundamental right guaranteed to couples regardless of sexual orientation; and (3) the state's two-tiered system of family law—excluding same-sex couples from marriage while permitting them to participate in a family status (domestic partnership) that was not accorded equal dignity and respect—impinged on fundamental privacy interests. In the *Marriage Cases*, the California Supreme Court made clear that the California Constitution's equality guarantee required that

same –sex couples be permitted to marry on the same terms as different-sex couples.

During a period of less than five months following the finality of the Supreme Court's order, it is estimated that 18,000 same-sex couples exercised their constitutional right to marry in California. *See Straus,* 207 P.3d 48, 59 (2009). Many of those couples presumably already had registered as domestic partners and so did not obtain significant additional legal benefits from marriage. Nevertheless, they wished to participate in the more highly respected and meaningful status of marriage because of what the word "marriage" and the status of marriage conveyed, and the greater respect it brought to their relationships.

What occurred with the enactment of Proposition 8 in November 2008 was unprecedented in our nation's history. The California electorate enacted a constitutional amendment singling out a group based on a characteristic that, under the California Constitution, is an improper basis for denying legal rights, and denied that group the fundamental right to marry the person's chosen partner.

There can be no doubt that the classification that Proposition 8 creates is a classification drawn simply for the purposes of drawing a distinction, not to serve any legitimate government interest. In *Strauss*, the California Supreme Court made plain that, even after the enactment of Proposition 8, same-sex couples were similarly situated to different-sex couples and would be treated the same under the

law except that "Proposition 8 changes the state Constitution . . . to provide that restricting the family designation of 'marriage' to opposite-sex couples only, and withholding that designation from same-sex couples, no longer violates the state Constitution." 207 P.3d at 78. The Court's description of Proposition 8 crystallized what was clear from Proposition 8's ballot materials: the measure's purpose was to draw distinctions between two kinds of families and to afford one kind a favored, more dignified status. *No other change in family law resulted from Proposition 8.* In a real sense, Proposition 8's goal was complete with its enactment: the demarcation of families into two groups was what the measure's proponents wanted. As in *Romer*, Proposition 8 "is a status-based enactment divorced from any factual context from which [a court] could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer v. Evans,* 517 U.S. 620, 635 (1996).

The California Supreme Court acknowledged in *Strauss* that "Proposition 8 must be understood as creating a limited exception to the state equal protection clause." 207 P.3d at 73. That acknowledgment makes plain that what Proposition 8 accomplished—deliberately making one group unequal to all others by carving out an exception to the equal protection of the state's laws for that group—is fundamentally inconsistent with the command of the Fourteenth Amendment that

no state "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. xiv, § 1. As the United States Supreme Court has famously and repeatedly said: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Romer,* 517 U.S. at 633 (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))). As Justice Kennedy wrote for the Court in *Romer*, "[r]espect for this principle explains why laws singling out a certain class of citizens for disfavored legal status . . . are rare." *Romer,* 517 U.S at 633. Yet that is precisely what Proposition 8 did; it singled out same-sex couples in order to deny them the favored legal status of marriage.

The Supreme Court in *Romer* took note of "the absence of precedent for Amendment 2" as " itself instructive, " for "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer,* 517 U.S. at 633 (citing *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37-38, 48 S.Ct. 423, 425, 72 L.Ed. 770 (1928).) Unusual forms of discrimination also, as the *Romer* Court recognized, may "def[y] . . . conventional" constitutional analysis. *Id.* at 632. The initiative's very defiance of the notion that a state's laws—even a state's equal protection guarantee—must protect people equally suggests that it offends the Equal Protection Clause in a more basic way than courts normally encounter.

For purposes of determining whether Proposition 8 violates the federal equal protection guarantee it is *irrelevant* whether federal constitutional law is itself in agreement with the principles espoused in the California Constitution prior to Proposition 8's enactment—namely, that sexual orientation is not a valid basis for denial of legal rights and is subject to the strictest level of judicial review and that marriage is a fundamental right available to persons without regard to sexual orientation. Regardless of whether the federal Constitution were to regard a particular classification to be an impermissible basis for denying legal rights or were to regard a particular right, such as the right to marry the person of one's choice without regard to sexual orientation, to be fundamental, when a state's own foundational law says that a particular classification is suspect and that a particular right is fundamental, the *federal* Equal Protection Clause is offended when the state decides to target a group based on a characteristic that the state regards to be an improper basis for classification, for the selective deprivation of a fundamental right. In that instance, the state, quite literally, has "den[ied] to[a] person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

CONCLUSION

For the foregoing reasons, Equality California respectfully requests that this Court dismiss the Proponents' appeal for lack of Article III standing or, in the alternative, affirm the District Court's judgment.

DATED: October 25, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure ("FRAP") and Ninth Circuit Rule 32-1, the undersigned certifies that the attached amicus-curiae brief is proportionally spaced, has a typeface of 14 points or more, and contains 6288 words, excluding matters that may be omitted under Rule 32(a)(7)(B)(iii) of the FRAP, according to the word court feature of the word processing program used to prepare this brief.

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