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January 24, 2011

VIA HAND DELIVERY

The Honorable Tani Cantil-Sakauye,
Chief Justice of California,
and Associate Justices
The Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger (Hollingsworth)*, California Supreme Court No. S189476
Certification request pending from the United States Court of Appeals for the Ninth Circuit, Case No. 10-16696

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The City and County of San Francisco ("City") is plaintiff-intervenor in this case. Pursuant to California Rule of Court 8.548(e)(3), the City respectfully submits that, should this Court accept the questions certified to it by the United States Court of Appeals for the Ninth Circuit, it should reformulate those questions as follows:

1. Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess a particularized interest in the initiative's validity after the measure has been adopted by the voters? If so, what is the nature of their interest under California law and how is it harmed by a decision that the initiative is unconstitutional?

2. Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess the authority to assert the State's interest in the initiative's validity when public officials decline to appeal an adverse judgment concerning the initiative's validity?

We suggest the revision to the first question in order to ensure that, if this Court accepts review, whatever answer it provides to the Ninth Circuit provides that court with sufficient information to decide the question of federal law that will remain: whether any injury to official proponents' state-created right is sufficient to establish Article III standing in the federal courts. We suggest the revision to the second question in order to describe more accurately the circumstances of this case. Further justification for our proposed reformulation is provided below.

A. If This Court Accepts Certification Of The First Question, It Should Describe The Nature Of Any State-Created Interest Possessed By Official Proponents.

To invoke the jurisdiction of the federal appellate courts pursuant to Article III of the United States Constitution, a putative appellant must assert an injury related to the judgment appealed from. (*Western Watersheds Project v. Kraayenbrink* (9th Cir. 2010) 620 F.3d 1187.) Generally the injury must be concrete, particularized, and actual or imminent. (*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560.) In some cases, an injury to a right created by state law may satisfy Article III's requirement of concrete, particularized, and actual injury. (*Diamond v. Charles* (1986) 476 U.S. 54, 66 n.17.) But not every invasion of a right created by statute will satisfy the requirement of injury. (*Sierra Club v. Morton* (1972) 405 U.S. 72, 735.) Indeed, even the express creation of a private right of action may not suffice to create a sufficiently concrete, particularized and imminent injury to satisfy the requirements of Article III. (See *id.*; see also *Raines v. Byrd* (1997) 521 U.S. 811, 820 n.3.) In *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, for example, the United States Supreme Court noted that a state law allowing citizen suits in state court to enforce an English-only initiative amendment did not give rise to a right in federal court to defend the initiative amendment. (*Id.* at 66.) It bears noting that the California Constitution is explicit in giving intervenors a private right of action in state court in specified circumstances, such as to enforce Article III, section 6 of the California Constitution (making English the official language of California). Here, where the official proponents did not include a private right of action in the text of Proposition 8, the question is what rights these proponents may possess in the continuing enforcement or validity of the measure when the Constitution is silent.

Moreover, the nature of the alleged injury to any right created by state law may make a difference in whether the federal courts recognize it as sufficient to confer Article III standing. For example, the invasion of purely procedural rights may be insufficient to confer standing. (*Summers v. Earth Island Institute* (2009) -- U.S. --, 129 S. Ct. 1142, 1151.) The invasion of rights that accrue by virtue of an official position, rather than individually held rights, may be insufficient as well. In *Raines v. Byrd, supra*, the Supreme Court found that members of Congress who alleged that they lost political power when the line-item veto was enacted did not have standing to challenge its enactment. (521 U.S. 811.) This was in part because their claimed loss of political power was not the loss of something to which they were personally entitled but instead was something they possessed by virtue of their official positions as members of Congress, making their loss less concrete and their stake in the controversy less personal. (*Id.* at 821.)

Thus, if this Court accepts a certified question from the Court of Appeals for the Ninth Circuit concerning any harm initiative proponents may suffer when a court enjoins the enforcement of a law that proponents drafted, the answer to the certified question should provide sufficient information about the nature of the harm so that the Ninth Circuit may determine whether that harm satisfies Article III. We respectfully submit that this Court should therefore reformulate the question to ask what is the nature of initiative proponents' interest under California law and how that interest is injured, if at all, by a decision enjoining enforcement of the measure. In answering this question, the Court may wish to consider and address whether the rights possessed by initiative proponents are legislative (and thus similar to those of the members of Congress whose claims were considered in *Raines v. Byrd*); whether initiative proponents are conferred some measure of executive or enforcement power by virtue of the adoption of the initiative; whether initiative proponents have a private right of action concerning enforcement of

laws they drafted when the text of the law does not create a right of action or a right to defend; whether any rights possessed by initiative proponents survive after adoption of the measure by the voters, and if so, what is the period of time during which initiative proponents possess these rights; whether the rights possessed by initiative proponents are held collectively or individually (since, in this case, there are five separate official proponents); and whether any injury to initiative proponents is a personal injury or merely accrues to them by virtue of their official role as initiative proponents.

B. If This Court Accepts Certification Of The Second Question, It Should Reformulate The Question To More Accurately Describe The Circumstances Of This Case.

We have also proposed, above, a revision to the separate question posed by the Court of Appeals to this Court: whether official proponents of an initiative may assert the interest of the State of California in the validity of an enacted initiative. We respectfully submit that the Court of Appeals' formulation of this question does not accurately describe the circumstances of *Perry v. Schwarzenegger* or the duty of executive officials.

As presently formulated, the Court of Appeals' question asks whether initiative proponents may defend an initiative when public officials "refuse to do so." Here, the State officials did not refuse to defend the initiative. They enforced Proposition 8 (and continue to enforce Proposition 8), and they put plaintiffs in this case to their proof by answering their federal lawsuit. They also acceded to intervention by the official proponents of Proposition 8, and they did not in any way interfere with proponents' presentation of evidence and argument in the District Court. Rather than "refus[ing] to defend" Proposition 8, the State officials merely exercised their discretion, after a full and fair trial of the issues and a well-reasoned decision that thoroughly addressed the evidence and the law, not to appeal from the District Court's judgment.

Moreover, the Ninth Circuit's question asks whether initiative proponents may defend an initiative where public officials "charged with that duty" do not do so. We respectfully submit that there is no duty of the Governor or Attorney General to file a notice of appeal from an adverse decision of a trial court. Indeed, in *Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, this Court recently explained that state officials' refusal "to defend the challenged statutes does not imply that these agencies committed misconduct," and that "whether [officials] have an obligation to defend such statutes in court is a complex issue, which [the Court] need not decide here." (*Id.* at 1183.) In this case, the Court of Appeal for the Third Appellate District denied a petition for writ of mandamus concerning any mandatory duty by the Governor and Attorney General to file a notice of appeal of the federal district court's decision (*Beckley v. Schwarzenegger*, Case No. C065920), and this Court denied a petition for review of that decision. (Case No. S186072.)

Deciding whether or not to assert the State's interest in appealing adverse lower court decisions is routinely entrusted to the discretion of the State's law enforcement officers. The issue posed by this case is not whether the State's executive branch officials have failed to carry out a duty but rather whether the official proponents of an initiative that has been enacted into law have been delegated the power to assert the State's interest on appeal in a manner contrary to the decision of the elected officials in whom the State Constitution vests that power. (*Cf. Arizonans for Official English, supra*, 520 U.S. at 64 [issue in appeal of constitutional initiative prosecuted by initiative proponents was whether there was a state law "appointing initiative sponsors as agents of the people . . . to defend, in lieu of public officials, the constitutionality of

initiatives"].) Reformulating the certified question as we have proposed above focuses the question on this issue and more accurately describes the procedural history of this case.

For these reasons, we respectfully submit that, should it accept certification of the questions posed by the United States Court of Appeals for the Ninth Circuit, this Court should reformulate the questions as we have proposed in this letter.

Very truly yours,

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PROOF OF SERVICE

I, Catheryn M. Daly, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102. The electronic notification address from which I served the documents is: *catheryn.daly@sfgov.org.*

On January 24, 2011, I served the following document(s):

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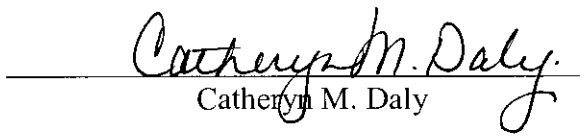
I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed January 24, 2011, at San Francisco, California.



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