RECEIVED
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JAN 24 2011

FILED________ ______
DOCKETED________ ______
DATE INITIAL

Cooper & Kirk
Lawyers
A Professional Limited Liability Company
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Charles J. Cooper
ccooper@cooperkirk.com

(202) 220-9600
Fax (202) 220-9601

10-16696

FEDERAL EXPRESS

January 21, 2011

Office of the Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Perry v. Schwarzenegger (Hollingsworth)*
Supreme Court Case No. S189476

To the Honorable Justices of the Supreme Court of California:

Introduction

Pursuant to California Rule of Court 8.548(e)(1), Defendant-Intervenor-Appellants Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com (collectively, "Proponents") submit this letter in support of the United States Court of Appeals for the Ninth Circuit's January 4, 2011 Order Certifying a Question to the Supreme Court of California (hereinafter, "Order"). Proponents respectfully request that this Court accept the Ninth Circuit's request.

Background

Proponents are official proponents of Proposition 8 (now codified as Cal. Const. art. I., § 7.5) and the primarily formed ballot measure committee designated by the official proponents as the official Yes on 8 campaign. This matter "concerns a subject that is familiar to the Supreme Court of California:" the constitutionality of the traditional definition of marriage as the union of a man and a woman. Order 3. This Court has had several occasions to consider this subject under State law, *see Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004), and Proposition 8's constitutionality under the United States Constitution is now pending before the Ninth Circuit, *see* Order 5-7 (explaining federal court proceedings to date). As the Ninth Circuit explains in its certification request, its jurisdiction over Proponents' appeal turns on the answer to the question of California law it has certified to this Court. *See id.* at 7-9 (explaining why "[t]he certified question … is dispositive of our very ability to hear this case").

Kristin Perry, et al v. Arnold Schwarzenegger, et al Doc. 298
Dockets.Justia.com

Question Certified

Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

The Question is Properly Certified

This Court may decide a question of California law on the request of a United States Court of Appeals if "[t]he decision could determine the outcome of a matter pending in the requesting court" and "[t]here is no controlling precedent." Cal. R. Ct. 8.548(a). Because these requirements are met in this case, and because of the overriding importance of the issues presented not only to the future of marriage in California but also to the very integrity of the State's initiative process, this Court should accept the Ninth Circuit's request to answer the certified question.

A.

The Ninth Circuit and "[t]he parties agree that Proponents' standing—and therefore [the Ninth Circuit's] ability to decide this appeal—rises or falls on whether California law affords them the interest or authority described" in the certified question. Order 9 (quotation marks omitted).

To have standing to appeal, an appellant in federal court "must establish that the district court's judgment causes [it] a concrete and particularized injury that is actual or imminent and is likely to be redressed by a favorable decision." *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1196 (9th Cir. 2010). And while Article III standing is a question of federal law, whether the necessary predicates for standing are established in a particular case may turn on State law. This is such a case.

As an initial matter, under federal law "a State clearly has a legitimate interest in the continued enforceability of its own" laws, *Maine v. Taylor*, 477 U.S. 131, 137 (1986), and a State thus "has standing to defend the constitutionality" of those laws and to appeal adverse judgments finding them unconstitutional, *Diamond v. Charles*, 476 U.S. 54, 62 (1986). And a litigant seeking to invoke a State's interest in defending its laws must have the authority under State law to do so.

This principle is demonstrated by *Karcher v. May*, 484 U.S. 72 (1987). There, the United States Supreme Court held that the Speaker of the New Jersey General Assembly and the President of the New Jersey Senate had standing to appeal a district court judgment striking

down a New Jersey law, in lieu of executive officials who declined to do so, because "under state law [they had authority] to represent the State's interests in ... the Court of Appeals." *Id.* at 82. In so holding, the Supreme Court relied on *In re Forsythe*, 91 N.J. 141, 450 A.2d 499 (1982), a decision by the New Jersey Supreme Court affirming intervention by the Speaker and President to defend the validity of a state law in state court proceedings. This principle plainly extends to the determination of whether Proponents have authority to represent California's interest in the validity of Proposition 8.

In addition to determining who has authority to represent the State's interests, State law may also "create new interests, the invasion of which may confer standing." *Diamond*, 476 U.S. at 65 n.17. In other words, the existence of a "concrete and particularized" interest that is a necessary predicate for federal court standing may turn on State law, and at issue in this case is whether California law vests such an interest in initiative proponents in defending the validity of the measures they sponsor.

B.

This Court's precedent goes a long way toward answering the issues presented by the certified question in the affirmative.

With respect to Proponents' authority to assert the State's interest in Proposition 8's validity, this Court's decision permitting Proponents to intervene to defend Proposition 8 in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), is at least highly probative, if not dispositive. *See id.* at 69. As explained above, a State Supreme Court decision permitting intervention is precisely the type of State law the United States Supreme Court looked to in *Karcher* to determine that the appellants in that case had "authority under state law to represent the State's interests." 484 U.S. at 82 (citing *In re Forsythe*, 91 N.J. 141, 144, 450 A.2d 499, 500 (1982)). And while this Court did not explain why it permitted Proponents to intervene in *Strauss*, it has elsewhere explained that it may be necessary to permit proponents to intervene to defend initiatives they have sponsored when government officials "might not do so with vigor" in order "to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." *Building Indus. Ass'n v. City of Camarillo*, 718 P.2d 68, 75 (Cal. 1986).

This Court has also recognized that California law vests in initiative proponents a concrete and particularized interest in the validity of the measures they sponsor. Under California law, the right to "propose ... constitutional changes through the initiative process" is a "fundamental right," *Costa v. Superior Court*, 128 P.3d 675, 686 (Cal. 2006), which affords proponents a "special interest" and "particular right to be protected over and above the interest held in common with the public at large," an interest that is "directly affected" and thus makes proponents "real parties in interest" when an initiative they have sponsored is challenged in litigation, *Connerly v. State Personnel Bd.*, 129 P.3d 1, 6-7 (Cal. 2006).

This particularized interest is not extinguished by an initiative's enactment into law, as demonstrated by *Hotel Employees & Restaurant Employees International Union v. Davis*, 981 P.2d 990 (Cal. 1999). In that case, petitioners sought a writ of mandate in this Court alleging that a recently enacted initiative statute violated the California Constitution. The petitioners designated the initiative's proponent as a real party in interest, and the proponent proceeded to defend the law in this Court in lieu of the respondent State officials, who refused to do so. *See id.* at 995.

In sum, while this Court's precedent certainly supports an affirmative answer to the certified question, this Court has not expressly addressed initiative proponents' authority and interests under State law when a trial court invalidates an initiative and the initiative's proponent is the only party appealing the judgment.

C.

The certified question is of overriding importance, and this Court should exercise its discretion to resolve it. As this Court has "emphasize[d,] ... marriage is an institution in which society as a whole has a vital interest." *In re Marriage Cases*, 183 P.3d at 424. The Ninth Circuit's jurisdiction to review the merits of the district court's decision striking down Proposition 8 depends upon Proponents' standing to appeal that decision. Surely the momentous issue of Proposition 8's validity under the Federal Constitution should not be determined by an unreviewed trial court decision.

Furthermore, the importance of the question presented to this Court extends beyond the specific context of Proposition 8 to the very integrity of the initiative process itself. "[T]he sovereign people's initiative power" is "one of the most precious rights of [California's] democratic process, *Brosnahan v. Brown*, 651 P.2d 274, 277 (Cal. 1982), and it "is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter," *Strauss*, 207 P.3d at 107. Indeed, "[n]o other state in the nation carries the concept of initiatives as 'written in stone' to such lengths" as California. *People v. Kelly*, 222 P.3d 186, 200 (Cal. 2010) (quotation marks omitted).

The ability of initiative proponents to defend in court the measures they successfully sponsor is essential to maintaining the integrity of the precious initiative right. Otherwise, as this case demonstrates, the validity of initiative measures will rest solely in the hands of the very public officials the initiative process was meant to control, and who very well may be hostile to the initiative. Surely State officials who are not permitted to veto or reverse an initiative directly should not be able to achieve the same result indirectly by refusing to defend that initiative in court. *See* Order 11-12.

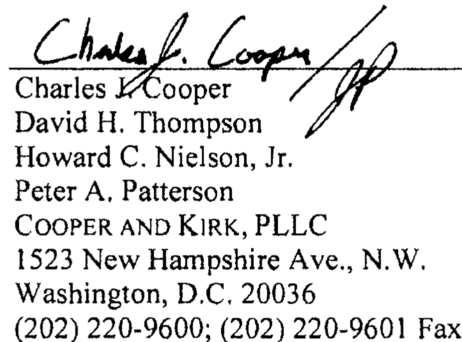
The people of California are entitled to a clear answer to the certified question. If initiative proponents do have the authority to defend in court the measures they successfully sponsor—as this Court's cases suggest—the people can rest secure in the knowledge that their

exercise of their power of initiative will be vigorously defended if the State's elected officials decline to do so. A clear answer that initiative proponents *lack* such authority, on the other hand, will put the people on notice that they may need to take additional action to secure the effective defense of initiatives from legal attack.

Conclusion

For these reasons, this Court should accept the Ninth Circuit's request to answer the certified question.

Respectfully submitted,



Charles J. Cooper
David H. Thompson
Howard C. Nielson, Jr.
Peter A. Patterson
COOPER AND KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600; (202) 220-9601 Fax

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 608-3065; (916) 608-3066 Fax

Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020; (480) 444-0028 Fax

Attorneys for Defendant-Intervenor-Appellants Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com

Cc:

United States Court of Appeals for the Ninth Circuit
(Case No. 10-16696)

Counsel of Record

Office of Governor Edmund G. Brown

Office of Attorney General Kamala D. Harris

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 1523 New Hampshire Ave. N.W., Washington, D.C. 20036. On January 21, 2011, I served the following document:

Letter in Support of the United States Court of Appeals for the Ninth Circuit's January 4, 2011 Order Certifying a Question to the Supreme Court of California.

I served the documents on the person or persons below, as follows:

Office of the Clerk
James R. Browning Courthouse
U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

United States Court of Appeals for the Ninth Circuit

Claude F. Kolm
Office of the Alameda County Counsel
1221 Oak Street, Suite 450
Oakland, CA 94612

Attorney for Defendant Patrick O'Connell

Judy Welch Whitehurst
Office of the County Counsel
500 West Temple Street, 6th Floor
Los Angeles, CA 90012

Attorney for Defendant Dean C. Logan

Andrew W. Stroud
Kenneth C. Mennemeier
Mennemeier Glassman & Stroud LLP
980 9th Street #1700
Sacramento, CA 95814

Attorneys for Defendants Arnold Schwarzenegger, Mark Horton, and Linette Scott

Tamar Pachter
Daniel Powell
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Attorneys for Defendant Edmund G. Brown

Terry L Thompson
Attorney at Law
P O Box 1346
Alamo, CA 94507

Attorney for Defendant-Intervenor William Tam Hak-Shing

Dennis J. Herrera
Therese Stewart
Vince Chhabria
Mollie Mindes Lee
Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Erin Bernstein
Danny Chou
Ronald P. Flynn
Christine Van Aken
Office of the City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102

Attorneys for Plaintiff-Respondent City and County of San Francisco

Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814

Office of Attorney General Kamala D. Harris

Theodore Olson
Matthew McGill
Amir C. Tayrani
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Ave., NW
Washington, DC 20036

David Boies
Rosanne C. Baxter
Boies, Schiller, & Flexner, LLP
333 Main Street
Armonk, NY 10504

Ethan Douglas Dettmer
Sarah Elizabeth Piepmeier
Enrique Antonio Monagas
Gibson, Dunn & Crutcher, LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105

Jeremy Michael Goldman
Boies, Schiller & Flexner, LLP
1999 Harrison St #900
Oakland, CA 94612

Office of the Governor

c/o State Capitol, Suite 1173
Sacramento, CA 95814

Office of Governor Edmund G. Brown

Theodore J. Boutrous
Christopher Dean Dusseault
Theano Evangelis Kapur
Gibson, Dunn & Crutcher, LLP
333 S. Grand Avenue
Los Angeles, CA 90071

Theodore H. Uno
Boies, Schiller & Flexner, LLP
2435 Hollywood Boulevard
Hollywood, FL 33020

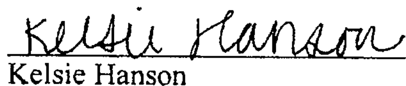
Joshua Irwin Schiller
Richard Jason Bettan
Boies, Schiller & Flexner, LLP
575 Lexington Ave., 5th Floor
New York, NY 10022

Attorneys for Plaintiffs-Respondents Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

The documents were served by enclosing them in an envelope or package provided by an overnight delivery carrier and addressed to the persons above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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

Executed on January 21, 2011 at Washington, D.C.



Kelsie Hanson