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FEDERAL EXPRESS

February 4, 2011

Office of the Clerk
Supreme Court of California
350 McAllister Street
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10-16696

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

To the Honorable Justices of the Supreme Court of California:

Pursuant to California Rule of Court 8.548(e)(2), Defendant-Intervenor-Appellants Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com (collectively, "Proponents") submit this letter in response to the letters submitted by Plaintiffs and Plaintiff-Intervenor City and County of San Francisco ("San Francisco") addressing the Ninth Circuit's January 4, 2011 Order Certifying a Question to the Supreme Court of California ("Order"). As detailed in our opening letter, the question posed by the Ninth Circuit is properly certified to this Court and presents issues of fundamental importance to the integrity of the State's initiative process. *See also* PLF Ltr. 6 ("the right of initiative sponsors to defend their measures in court is of paramount importance to the vindication of the initiative power"). Contrary to Plaintiffs' and San Francisco's submissions, this Court should accept the certification request and answer the certified question as formulated by the Ninth Circuit.

1. The certified question presents two issues: whether, under California law, the official proponents of an initiative measure possess (1) a particularized interest in the initiative's validity, and/or (2) the authority to assert the State's interest in the initiative's validity. Plaintiffs argue that certification is not warranted with respect to the first issue because they claim it presents "a matter of federal law ... governed exclusively by Article III of the United States Constitution." Pl. Ltr. 3. And Plaintiffs argue that certification is not warranted with respect to the second issue because they claim that "it is already well-settled under California law that initiative proponents do not possess the authority to represent the State's interest ... regarding an initiative's validity." *Id.* (emphasis omitted). Plaintiffs are wrong on both fronts.

2. We of course do not dispute that Article III standing is ultimately an issue of federal law. But as we explained in our opening letter, while Article III requires a concrete and particularized interest, the question whether such an interest exists in any given case may turn on State law. In particular, such an interest may have its source in legal rights and responsibilities

created by State law. *See Diamond v. Charles*, 476 U.S. 54, 66 n.17 (1986) ("The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing."); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("the injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing") (quotation marks and ellipses omitted); *id.* at 580 (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) ("the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing") (quotation marks omitted); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (same).

The question whether initiative proponents have under California law a concrete and particularized interest in the validity of an initiative that is distinct from the interest of the public at large is thus directly relevant to, and likely dispositive of, Proponents' Article III standing to defend their own interests in Proposition 8 in federal court. Indeed, Plaintiffs embraced this position before the Ninth Circuit, arguing that "Proponents' claim of standing ... *rises or falls* on the strength of their assertion[] that... California law creates a particularized interest in initiative proponents." Pl. Br. 30-31 (emphasis added).

Before this Court, however, Plaintiffs have reversed course, arguing now that "California law has no bearing" on the question of Proponents' standing, Pl. Ltr. 5, citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) and *Raines v. Byrd*, 521 U.S. 811 (1997). Neither case supports Plaintiffs' new-found stance.

In *DaimlerChrysler*, the United States Supreme Court held that Ohio residents lacked standing to challenge state tax breaks given to DaimlerChrysler. But the plaintiffs in that case did not assert that Ohio law gave them an interest in the suit distinct from their fellow Ohioans. To the contrary, they "principally claim[ed] standing" simply "by virtue of their status as Ohio taxpayers." *Id.* at 342.

And in *Raines*, the Court held that members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act, despite the fact that the Act provided that "any Member of Congress ... may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution." 521 U.S. at 815-16 (quotation marks omitted). But the Act plainly did not create a concrete and particularized interest that its own enactment threatened, and the case thus stands for the unremarkable proposition that Congress cannot do an end-run around Article III by bestowing a right to sue upon a party that has suffered no judicially cognizable injury. *See id.* at 820 n.3 ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *id.* at 829 (plaintiff members of Congress "alleged *no* injury to themselves as individuals" and "the institutional injury they allege[d] [was] wholly abstract and widely dispersed") (emphasis added).

3. Turning to the second issue—Proponents' authority to assert the State's interest in an initiative's validity—Plaintiffs' claim that *In re Marriage Cases* answered the question in the negative is patently wrong, for the relevant party in that case *was not the official proponent* of the challenged initiative. Plaintiffs claim that the Proposition 22 Legal Defense & Education Fund (the "Fund") was "representing the proponent of that initiative," Pl. Ltr. 6, but the California courts *expressly rejected* the Fund's argument that it should be treated as the proponent, holding that "the Fund itself played no role in sponsoring Proposition 22 because the organization was not even created until one year *after* voters passed the initiative." *City and County of San Francisco v. Proposition 22 Legal Def. & Educ. Fund*, 128 Cal.App.4th 1030, 1038 (2005). Accordingly, the Court of Appeal squarely held that "this case *does not present* the question of whether an official proponent of an initiative (*Elec. Code, § 342*) has a sufficiently direct and immediate interest to permit intervention in litigation challenging the validity of the law enacted." *Id.* (emphasis added).

This Court's subsequent decision in *In re Marriage Cases* cited the holding in *City and County of San Francisco* with approval, *see* 183 P.3d at 406, n.8, and accordingly treated the Fund's interest as merely one of advancing "an advocacy group's strong political or ideological support of a statute or ordinance—and its disagreement with those who question or challenge the validity of the legislation ...." *Id.* at 405. Thus, "the Fund is in a position no different from that of any other member of the public having a strong ideological or philosophical disagreement with" a challenge to a measure it supports, and accordingly, this Court held that the Fund lacked standing to maintain a declaratory judgment action regarding the scope or validity of Proposition 22. *Id.* at 406.

Contrary to Plaintiffs' submission, at no point in its opinion did this Court even hint that the Fund "represent[ed] the proponent" of Proposition 22, Pl. Ltr. 6, much less *was* an "initiative proponent[]," as Plaintiffs imply, *id.* Indeed, although Plaintiffs attempt to obscure this point by quoting from the Fund's petition to this Court in which it sought to align itself with the proponents of Proposition 22, *see id*, at oral argument before the Ninth Circuit Plaintiffs' counsel was forced to concede that the Fund was not the proponent:

Plaintiffs' Counsel:	... [T]he California Supreme Court said in the Proposition 22 litigation that ... [proponents] do not have standing.
Judge Reinhardt:	They said that proponents don't have standing?
Plaintiffs' Counsel:	Proponents do not ... have standing. For example, in the Proposition 22 case, the fund that was involved -
Judge Reinhardt:	But they weren't the proponents, were they?
Plaintiffs' Counsel:	Well, they were put forward as the proponents.

Judge Reinhardt:	But that doesn't fool the Court. They were not the proponents.
Plaintiffs' Counsel:	They were not the proponents. They were not strictly the proponents, your Honor.
Judge Reinhardt:	I don't know what "strictly" means. They were not the proponents.
Plaintiffs' Counsel:	They claimed to be the proponents.
Judge Reinhardt:	But they were not.
Plaintiffs' Counsel:	I don't think they were.

Oral Argument at 45:53, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Dec. 6, 2010).

It is thus plain that this Court's treatment of the Fund did not even implicate the question of proponents' authority to represent the State's interest in the validity an initiative, much less definitively resolve it. Indeed, as we explained in our opening letter, this Court's past practice points strongly toward the conclusion that initiative proponents *do* have the authority to represent the State's interest in an initiative's validity. *See, e.g., Strauss v. Horton*, 207 P.3d 48, 69 (Cal. 2009).

4. San Francisco does not take a position on whether this Court should accept the Ninth Circuit's certification request, but instead argues that if this Court accepts the request it should reformulate the question presented. We respectfully submit that no reformulation is necessary. The Ninth Circuit's Order demonstrates that the question it has requested this Court to answer is carefully and properly formulated in light of controlling principles of federal standing law. No reformulation is necessary for this Court to engage in a complete and detailed analysis of the interests and authority of initiative proponents under California law.

CONCLUSION

For these reasons, and for the reasons explained in our opening letter, this Court should accept the Ninth Circuit's request to answer the certified question.

Respectfully submitted,

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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 February 4, 2011, I served the following document:

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

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

Executed on February 4, 2011 at Washington, D.C.

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