GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Theodore B. Olson
Direct: 202.955.8668
Fax: 202.530.9575
TOlson@gibsondunn.com

Client: T 36330-00001

February 2, 2011

Honorable Frederick K. Ohlrich
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

10-16696

Re: *Perry v. Schwarzenegger*, No. S189476

Dear Mr. Ohlrich:

Pursuant to Rule 8.548(e)(2) of the California Rules of Court, Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo ("plaintiffs") respectfully submit this letter in reply to the letter filed by Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com (collectively, "proponents"). Proponents concede that "Article III standing is a question of federal law" and that this Court has never afforded initiative proponents the authority under state law to represent the interest of the State. *See* Prop. Letter pp. 2, 3-4. Because answering the certified question thus would not resolve the issue of proponents' Article III standing and would not clarify any unsettled issues of California law, the Court should deny the request for certification.

If the Court grants the Ninth Circuit's certification request, it should set the case for accelerated briefing and argument. In light of the irreparable harm that plaintiffs suffer each day that Proposition 8 continues to deny them the right to marry, each court that has considered this case has recognized the need for the expeditious resolution of plaintiffs' claims. This Court should do the same.

I. The Certified Question Raises Issues Of Federal Law And Settled State Law That Do Not Require Elucidation By This Court.

As proponents themselves recognize, whether proponents' interests in the constitutionality of Proposition 8 are sufficiently "particularized" to distinguish them from the millions of other California voters who supported the initiative is a matter of federal law. *See* Prop. Letter p. 2 ("Article III standing is a question of federal law"). Indeed, if a state court's finding that a particular litigant or class of litigants had a sufficiently "particularized" interest to create standing under state law were sufficient to confer Article III standing under federal law, then federal standing would necessarily be at least coextensive with the standing law of the State in which the case originated. That is not the law. *See Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 804 ("Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court.").

Proponents rely on *Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1178-79 and *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1007-08 for the unremarkable proposition that proponents of ballot initiatives have a state-recognized interest in the campaign process itself. Prop. Letter p. 3; *see also Connerly*, 37 Cal.4th at pp. 1178-79 (discussing *Sonoma Co. Nuclear Free Zone '86 v. Super. Ct.* (1987) 189 Cal.App.3d 167). These decisions applying state law in state court are irrelevant to the question whether proponents possess Article III standing to appeal an adverse judgment in federal court. *See Baker v. Carr* (1962) 369 U.S. 186, 204 (standing in federal court "is, of course, a question of federal law"). In any event, those cases arose in a different posture from proponents' pending appeal in the Ninth Circuit, which is a challenge to the constitutionality of Proposition 8, rather than to the process that placed the initiative on the ballot.

Proponents also concede that this Court has never afforded initiative proponents the authority under state law to represent the interest of the State. *See* Prop. Letter pp. 3-4. In fact, it is already well-settled under California law that initiative proponents do *not* possess the authority to represent the *State's* interest—as opposed to their own interest—regarding an initiative's validity. *See In re Marriage Cases* (2008) 43 Cal.4th 757, 790-91. And, as the Ninth Circuit observed in its certification request, nothing in *Strauss v. Horton* (2009) 46 Cal.4th 364 suggests that proponents have either a particularized interest in the validity of Proposition 8 or the authority to assert the State's interest in its validity. *See Perry v. Schwarzenegger* (9th Cir. Jan. 4, 2011, No. 10-16696) __ F.3d __ [at pp. 13-14]. In *Strauss*, this Court (like the district court here) merely permitted proponents to intervene to advance their *own* interest in Proposition 8 in a proceeding in which the State was also a party; that decision to permit intervention has no bearing on whether proponents possess Article III standing to pursue an appeal in the absence of the State. *See Diamond v. Charles* (1986) 476 U.S. 54, 68 ("Diamond's status as an intervenor below . . . does not confer standing sufficient to keep the case alive in the absence of the State on this appeal.").

Karcher v. May (1987) 484 U.S. 72 underscores this conclusion. In *Karcher*, the United States Supreme Court held that the Speaker of the New Jersey General Assembly and President of the New Jersey Senate possessed standing to pursue an appeal because they were "authorize[d]" under "state law . . . to represent the State's interests." *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 65 (citing *Karcher*, 484 U.S. at p. 82). Once the legislators lost their leadership posts in the New Jersey Legislature, however, they "lack[ed] authority to pursue [an] . . . appeal" because "[t]he authority to pursue the lawsuit on behalf of the legislature belong[ed] to those who succeeded [them] . . . in office." *Karcher*, 484 U.S. at pp. 77, 81.

There is nothing in California law that authorizes proponents to represent the interest of the State in litigation challenging the constitutionality of a ballot initiative. Thus, proponents are in the same position as the former legislative leaders in *Karcher*—they are no

different from the millions of other California voters who supported Proposition 8 and who lack standing to represent the State's interest in the validity of the initiative.

Proponents nevertheless contend that, if they are not permitted to pursue an appeal in this case, "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." Prop. Letter p. 4. But proponents have already been afforded the opportunity to mount a vigorous defense of Proposition 8 during the twelve-day bench trial conducted by the district court. Without opposition from any party, the district court permitted proponents to intervene in that proceeding to defend Proposition 8. Thus, the defense of Proposition 8 clearly did not "rest solely in the hands of" the Governor and the Attorney General. Proponents forcefully defended their initiative in the district court—and lost.

Proponents now seek to circumvent the discretion that the California Constitution and state law grant to the Governor and Attorney General to determine whether to appeal a judgment that has invalidated a state enactment. *See, e.g.*, Gov. Code, § 12511 (the "Attorney General has charge, as attorney, of all legal matters in which the State is interested"); *State v. Super. Ct.* (1986) 184 Cal.App.3d 394, 397-98. This Court has already made clear, however, that ballot initiative proponents and other private parties lack the authority to second-guess that discretionary determination. *See Beckley v. Schwarzenegger*, No. S186072 (Sept. 8, 2010).

II. If Certification Is Granted, Expedited Treatment Of This Case Is Warranted.

Because the certification request raises only issues of federal law and settled issues of state law, certification would needlessly prolong the denial of plaintiffs' constitutional rights. In the event that the Court decides to grant the Ninth Circuit's request, plaintiffs respectfully request that the Court expedite its treatment of this case to the greatest extent possible. As every court considering this case has concluded, expedited treatment is warranted because plaintiffs suffer grievous, irreparable harm each day that Proposition 8 continues to deny them the right to marry. *See* District Court D.E. 76 at p. 9 (June 30, 2009) ("The just, speedy and inexpensive determination of these issues would appear to call for proceeding promptly to trial."); Ninth Circuit D.E. 14 at p. 2 (Aug. 16, 2010) (setting expedited briefing schedule). On a daily basis, plaintiffs are told by the State of California that they are not good enough to enter into the fundamental institution of marriage and that their relationships are somehow inferior to, and less worthy than, those of heterosexual individuals. That invidious discrimination cannot be undone and inflicts enduring and irremediable harm on plaintiffs. *See Nelson v. NASA* (9th Cir. 2008) 530 F.3d 865, 882 ("[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.").

Accordingly, if the request for certification is granted, plaintiffs respectfully request that the Court significantly expedite these proceedings so that this case can be returned to the Ninth Circuit at the earliest conceivable point. These issues have already been the subject of substantial briefing in the Ninth Circuit, and in the parties' letter briefs before this Court. In light of the parties' experience in proceeding on an expedited basis throughout this case, and in light of the settled nature of the state law issues presented, the case should be expedited to the utmost extent possible.

Respectfully submitted,

Theodore B. Olson

Theodore B. Olson
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of San Francisco. My business address is 555 Mission Street, Suite 3000, San Francisco, California 94105. On February 2, 2011, I caused to be served the following documents:

PLAINTIFFS-APPELLEES' REPLY LETTER REGARDING THE NINTH CIRCUIT'S CERTIFICATION REQUEST

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown, in the following manner:

SEE SERVICE LIST BELOW

☑ **BY MAIL**: I placed a true copy in a sealed envelope for deposit in the U.S. Postal Service through the regular mail collection process at Gibson, Dunn & Crutcher LLP on the date indicated above. I am familiar with the firm's practice for collection and processing of correspondence for mailing with the U.S. Postal Service. It is deposited with the U.S. Postal Service with postage prepaid on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if the postal cancellation date or the postage meter date is more than one day after the date of deposit for mailing in the declaration.

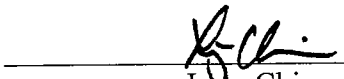
☑ **BY EMAIL**: By agreement of the parties, a copy was emailed to the email addresses listed below.

Counsel	**Attorneys For**
Charles J. Cooper David H. Thompson Howard C. Nielson, Jr. Peter A. Patterson Cooper & Kirk, PLLC 1523 New Hampshire Avenue, N.W. Washington, DC 20036 ccooper@cooperkirk.com dthompson@cooperkirk.com	Attorneys for Defendants-Intervenors-Appellants
Andrew P. Pugno Law Offices of Andrew P. Pugno 101 Parkshore Drive, Suite 100 Folsom, CA 95630 andrew@pugnolaw.com	Attorneys for Defendants-Intervenors-Appellants

Brian W. Raum James A. Campbell Alliance Defense Fund 15100 North 90th Street Scottsdale, AZ 85260 braum@telladf.org jcampbell@telladf.org	Attorneys for Defendants-Intervenors-Appellants
Dennis J. Herrera Therese Stewart Christine Van Aken San Francisco City Attorney's Office City Hall 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94102-4682 therese.stewart@sfgov.org christine.van.aken@sfgov.org	Attorneys for Plaintiff-Intervenor-Appellee City and County of San Francisco
Tamar Pachter Daniel Powell Deputy Attorney General California Department of Justice 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102 tamar.pachter@doj.ca.gov	Attorneys for Defendant Edmund G. Brown, Jr., in his official capacity as Attorney General of California
Kenneth C. Mennemeier, Jr Andrew W. Stroud Mennemeier, Glassman & Stroud LLP 980 9th Street, Suite 1700 Sacramento, CA 95814 kcm@mgslaw.com stroud@mgslaw.com	Attorneys for Defendants Arnold Schwarzenegger, in his official capacity as Governor of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; and Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health (the "Administration Defendants")
Claude Franklin Kolm Office of County Counsel 1221 Oak Street, Suite 450 Oakland, CA 94612-4296 claude.kolm@acgov.org	Attorneys for Defendant Patrick O'Connell, in his official capacity as Clerk-Recorder for the County of Alameda

Judy W. Whitehurst Principal Deputy County Counsel Los Angeles County Counsel 648 Kenneth Hahn Hall of Administration 500 West Temple Street, 6th Floor Los Angeles, CA 90012-2713 jwhitehurst@counsel.lacounty.gov	Attorneys for Defendant Dean C. Logan, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles
Office of the Governor Attn: Legal Department State Capitol Building Sacramento, CA 95814 (VIA U.S. MAIL ONLY)	Attorneys for the Governor Edmund G. Brown, Jr.
Office of the Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004 (VIA U.S. MAIL ONLY)	Attorneys for the Attorney General Kamala D. Harris
Ms. Molly C. Dwyer Clerk of the Court United States Court of Appeals for the Ninth Circuit James Browning Courthouse 95 7th Street San Francisco, CA 94103 (VIA U.S. MAIL ONLY)	United States Court of Appeals for the Ninth Circuit

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Certificate of Service was executed by me on February 2, 2011, at San Francisco, California.



Ling Chiou