

No. S189476

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

En Banc

KRISTIN M. PERRY, et al., Plaintiffs and Respondents,
CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, Intervenor and
Respondent;

v.

ARNOLD SCHWARZENEGGER., as Governor, etc. et al., Defendants;
DENNIS HOLLINGSWORTH, et al., Defendants, Intervenors and Appellants.

On Request from the U.S. Court of Appeals for the Ninth Circuit for
Answer to Certified Questions of California Law

DEFENDANTS, INTERVENORS, AND APPELLANTS' OPENING BRIEF

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APP-008

COURT OF APPEAL, Ninth Circuit APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: <p style="text-align: center;">10-16696</p>
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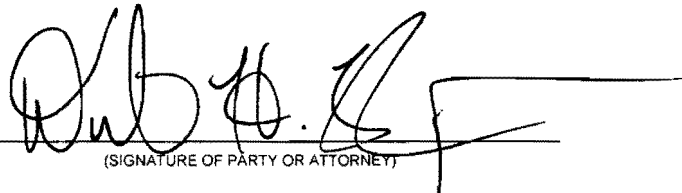
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Date: March 14, 2011

David H. Thompson

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QUESTION PRESENTED

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.

(*Perry v. Brown*, 10-16696, Order Certifying a Question to the Supreme Court of California 2 [9th Cir. Jan. 4, 2011] ["Certification Order"]; *see also Perry v. Schwarzenegger*, S189476 Order of Feb. 16, 2011 [granting certification request].)

SUMMARY OF THE ARGUMENT

It is a foundational principle of California law that “[a]ll political power is inherent in the people.” (Cal. Const., art. II, § 1.) In order to ensure “the people’s rightful control over their government,” *Strauss v. Horton* (2009) 46 Cal.4th 364, 421 (hereafter *Strauss*), the California Constitution expressly recognizes the People’s power both “to propose statutes and amendments to the Constitution and to adopt or reject them,” Cal. Const., art. II, § 8(a). And in order “to guard the people’s right to exercise initiative power, a right that must be jealously defended by the courts,” the California courts have

repeatedly allowed official proponents of initiatives to defend those measures when they are challenged in litigation, especially when government officials having the “duty to defend” them “might not do so with vigor” – or, as in this case, at all. (*Building Industry Association v. Camarillo* (1986) 41 Cal.3d 810, 822 (hereafter *Building Industry Association*); see also, e.g., *Strauss*, *supra*, 46 Cal.4th at pp. 398-99.) This consistent practice of the California courts demonstrates that initiative proponents have authority under state law to represent the State’s interest in defending the validity of initiatives; in doing so, official proponents act as agents of the People, to whom this interest ultimately belongs. (See *Karcher v. May* (1987) 484 U.S. 72, 82.)

In addition, this Court has made clear that a citizen’s exercise of the initiative powers enshrined in the California Constitution is a “fundamental right.” (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1007 (hereafter *Costa*)). And California permits official proponents to vindicate not only the sovereign People’s constitutional prerogative to “adopt or reject” initiatives, but their own fundamental right “to propose statutes and amendments to the Constitution” as well. (Cal. Const., art. II, § 8.) This right, along with numerous related statutory

rights and duties, affords the official proponents of an initiative a “particular right to be protected over and above the interest held in common with the public at large.” (*Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1178-79.) Official proponents thus have a “special interest” in initiatives they have sponsored, an interest that is “directly affected” – and thus entitles them to participate as “real parties in interest” – when their initiatives are challenged in litigation. (*Ibid.*; see also, e.g., *Hotel Employees & Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585, 590 (hereafter *Hotel Employees*).

At bottom, the ability of official proponents to defend initiatives they have sponsored when public officials refuse to do so – whether as intervenors or as real parties in interest – provides a vitally important means of vindicating “the sovereign people’s initiative power” and thus preserving “the people’s rightful control over their government.” (*Strauss, supra*, 46 Cal.4th at pp. 421, 453.) For as the Ninth Circuit aptly recognized, “the Constitution’s purpose in reserving the initiative power to the People would appear to be ill-served by allowing elected officials to nullify either proponents’ efforts to ‘propose statutes and amendments to the Constitution’ or the

People’s right ‘to adopt or reject’ such propositions.” (Certification Order at pp. 11-12 [quoting Cal. Const., art. II, § 8(a)].)

STATEMENT

I. ENACTMENT OF PROPOSITION 8

Petitioners, Defendant-Intervenors and Appellants in the federal litigation, (hereinafter “Proponents”) exercised their fundamental right “to propose statutes and amendments to the Constitution” by taking the necessary legal steps to become official proponents of Proposition 8, an initiative measure providing that “[o]nly marriage between a man and a woman is valid or recognized in California.” (Cal. Const., art. I, § 7.5.) The People of California exercised their corollary right “to adopt or reject” such proposals by approving Proposition 8 by a majority vote in the November 2008 election.

In the fall of 2007, Proponents started the process for placing Proposition 8 on the November 2008 ballot by supervising the drafting and ultimately approving the language of Proposition 8. (*See, e.g.*, App. 18.) Proponents then executed and submitted the forms and documents prescribed by the California Elections Code so that the California Attorney General could prepare a title and summary for their proposal. (*See, e.g., ibid.*) By approving the language and

submitting the forms, Proponents became “Official Proponents” of Proposition 8 within the meaning of California law. (*See* Cal. Elec. Code § 342.)

On November 29, 2007, the California Attorney General issued to Proponents a circulating Title and Summary for Proposition 8. (*See, e.g.*, App. 19.) To place Proposition 8 on the ballot, Proponents were required to prepare official petition forms that complied with the California Election Code and to obtain at least 694,354 valid signatures between November 29, 2007 and April 28, 2008. (*See, e.g.*, App. 20.) Once the required number of signatures were gathered, Proponents had the exclusive statutory right to decide whether to submit them to the State for verification. (*See* Elec. Code § 9032.)

On April 24, 2008, Proponents authorized submission of the official petitions, containing the signatures of over 1.2 million Californians, for verification by county elections officials. (*See, e.g.*, App. 20.) On June 2, 2008, the California Secretary of State notified Proponents that the county elections officials had verified the requisite number of voter signatures and that, consequently, Proposition 8 qualified for inclusion on the November 2008 ballot. (*See, e.g.*, App. 20.)

After Proposition 8 was approved for the ballot, Proponents designated the arguments in favor of Proposition 8 that were published in the statewide voter guide. (*See, e.g.*, App. 20.) The voter guide contains only one argument in favor of each ballot initiative and, if multiple arguments are submitted, the Secretary of State publishes only the argument designated by Proponents. (*See Elec. Code § 9067.*)

In late June 2008, Proponents were sued as real parties in interest in a pre-election legal challenge to Proposition 8 filed in this Court. (*See App. 24.*) Proponents defended against, and this Court summarily rejected, that legal challenge. (*See App. 36.*)

Proponents, in conjunction with Petitioner ProtectMarriage.com – Yes on 8, a Project of California Renewal (“Committee”), the “primarily formed ballot measure committee” that Proponents designated as the official Proposition 8 campaign committee, raised and spent nearly \$40 million to qualify Proposition 8 for the ballot and operate a statewide campaign to persuade a majority of California voters to approve it. (*See, e.g.*, App. 19, 22-23.)

On November 4, 2008, a majority of California voters approved Proposition 8. On November 5, Proposition 8 took effect as Article I, Section 7.5 of the California Constitution.

II. THE *STRAUSS* LITIGATION

The same day Proposition 8 took effect, three post-election lawsuits were filed in the California Supreme Court, arguing that Proposition 8 was enacted in violation of the State Constitution. (*See* App. 37.) The executive branch officials named as respondents in *Strauss* refused to defend Proposition 8. (*See* App. 116 [taking “no position” on validity of Proposition 8 under California Constitution].) And the California Attorney General affirmatively opposed Proposition 8, arguing that it “should be invalidated as violating [California’s] Constitution.” (App. 53.)

Proponents moved to intervene and, on November 19, this Court granted that motion. (*See* App 50.) By the same order, this Court denied intervention to the Campaign for California Families, an organization that sought to defend Proposition 8 but did not play an official role in its enactment.

On May 26, 2009, this Court ruled in favor of Proponents and upheld Proposition 8. (*See Strauss v. Horton* (2009) 46 Cal.4th 364.)

III. THE *PERRY* LITIGATION

On May 22, 2009, Plaintiffs-Respondents Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffery J. Zarrillo (collectively, “Plaintiffs”), a lesbian couple and a gay couple, filed suit in the United States District Court for the Northern District of California, claiming that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Plaintiffs named as defendants the Governor of California, the Attorney General of California, the Director of the California Department of Public Health and State Registrar of Vital Statistics, the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, the Clerk-Recorder for the County of Alameda, and the Registrar-Recorder/Country Clerk for the County of Los Angeles. (*See* App. 1.) None of these officials defended Proposition 8, and the Attorney General once again took the position that it was unconstitutional. (*See, e.g.*, App. 70 [“the Attorney General ... agrees with the Plaintiffs that Proposition 8 violates the 14th Amendment”]; App. 62 [“As for the merits of Plaintiffs’ claims, the Administration takes no position.”]; App. 65 [Alameda County Clerk-Recorder] [taking “no

position on the validity under the United States Constitution of Proposition 8”]; App. 78 [Los Angeles County Registrar-Recorder/County Clerk] [“the Registrar takes no position on the merits of the case as to the validity of Proposition 8”].¹

On May 28, Proponents moved to intervene, arguing that “the rift between Californians and their elected representatives” with respect to Proposition 8 meant that “Californians [must] depend on [Proponents], and not their elected officials, to defend Proposition 8 vigorously.” (App. 16.) Plaintiffs did not oppose the motion, and the district court granted it, stating that “under California law, as I understand it, proponents of initiative measures have the standing to ... defend an enactment that is brought into law by the initiative process.” (App. 100.)

¹ Proponents later moved to realign the Attorney General as a party plaintiff in light of his repeated embrace of Plaintiffs’ constitutional claims. (*See* App. 72.) In opposing Proponents’ motion, the Attorney General argued that realignment should be denied because “[n]either the Attorney General’s admissions nor his cooperation with the Plaintiffs and San Francisco can destroy the existence of [a] live controversy or the jurisdiction of the court to resolve it.” (App. 76.) In particular, the Attorney General argued that the case presented “an actual controversy between the Plaintiffs and San Francisco, on the one hand, and the Proponents on the other,” and thus “satisfie[d] the constitutional ‘case or controversy’ limitation on federal jurisdiction found in Article III, section 2 of the Constitution.” (*Ibid.*) On December 23, the district court denied the motion. (*See* App. 82.)

On June 26, the Campaign for California Families also moved to intervene to defend Proposition 8. Plaintiffs opposed the motion, arguing that the organization lacked standing because the “Campaign was merely one of many supporters of Prop. 8—*not* one of the official sponsors, who are already parties to this case.” (App. 59-60.) On August 19, the district court denied the motion, reasoning that “because the Campaign is not the official sponsor of Proposition 8, its interest in Proposition 8 is essentially no different from the interest of a voter who supported Proposition 8, and is insufficient to allow the Campaign to intervene.” (App. 102.)²

The case was tried from January 11 through January 27, 2010, and closing arguments were held on June 16. On August 4, the district court issued its Findings of Fact and Conclusions of Law. The district court held that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United

² On the same day, the district court permitted the City and County of San Francisco to intervene as a plaintiff for the limited purpose of litigating Proposition 8’s alleged adverse effects on its own governmental interests. (*See* App. 103-107, 69.) The district court further directed that it would be “appropriate” for “the Attorney General and San Francisco [to] work together in presenting facts pertaining to the affected governmental interests.” (*Id.*)

States Constitution. As a remedy, the district court “order[ed] entry of judgment permanently enjoining [Proposition 8’s] enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8.” (*Perry v. Schwarzenegger*, No. C09-2292, Findings of Fact/Conclusions of Law/Order at 136 [N.D. Cal. Aug. 4, 2011].)

Although none of the official defendants appealed the district court’s ruling, Proponents immediately noticed an appeal and sought a stay of the district court’s ruling pending that appeal. The district court denied Proponents’ motion, but entered a limited stay to permit Proponents to seek a stay from the Ninth Circuit. (*See App. 88.*) In denying a stay, the district court for the first time questioned Proponents’ standing. (*App. 93.*)

Proponents then moved the Ninth Circuit for a stay pending appeal, which was granted. (*See App. 108.*)³ The Ninth Circuit established an expedited briefing schedule and directed Proponents to

³ After this Court granted the Ninth Circuit’s certification request, Plaintiffs moved the Ninth Circuit to vacate the stay and thus to permit the district court’s ruling to go into effect while this Court considers the certified question. (*See App. 110.*) Proponents have opposed that request, and the matter remains pending before the Ninth Circuit. At present the stay thus remains in place.

address the issue of standing in their opening brief. (*See App. 109.*)⁴

In their briefs to the Ninth Circuit, Proponents argued that California law not only authorizes them to defend the State’s interest in the constitutionality of Proposition 8 when state officials refuse to do so, but also creates and secures for them a particularized interest in defending the initiative they have successfully sponsored. (*See Perry v. Brown*, 10-16696, Defendant-Intervenors-Appellants’ Opening Brief 19-24 [9th Cir. Sept. 17, 2010]; *Perry v. Brown*, 10-16696, Defendant-Intervenor-Appellants’ Reply Brief 5-8 [9th Cir. Nov. 1, 2010].) While Plaintiffs disagreed with Proponents’ assessment of California law, they agreed that “Proponents’ claim of standing ... rises or falls on the strength of their assertions that (1) California law authorizes ballot measure proponents to directly assert the State’s interest in defending the constitutionality of the ballot measure once enacted, or (2) California law creates a particularized interest in initiative proponents.” (*Perry v. Brown*, 10-16696, Brief for

⁴ After this Court granted the Ninth Circuit’s certification request, Plaintiffs moved the Ninth Circuit to vacate the stay and thus to permit the district court’s ruling to go into effect while this Court considers the certified question. (*See App. 110.*) Proponents have opposed that request, and the matter remains pending before the Ninth Circuit. At present the stay thus remains in place.

Appellees 43-44 [9th Cir. Oct. 18, 2010] [quotation marks and citations omitted].)

IV. CERTIFICATION

On December 6, the Ninth Circuit heard oral argument on Proponents' appeal. During argument, the Ninth Circuit raised the possibility of certifying to this Court the question of Proponents' State-law interests and authority with respect to Proposition 8. (*See Perry v. Brown*, 10-16696, Oral Argument Video 50:10 [9th Cir. Dec. 6, 2010] ["rather than kill an initiative that the voters have passed, wouldn't it be advisable to attempt to get a legal answer to this question before saying we're going to let a district judge whose ruling is binding on a couple of county clerks make a final decision without finding out from the California Supreme Court and the United States Supreme Court whether there's standing ...?"].)

On January 4, 2011, the Ninth Circuit issued an order certifying the following question to this Court:

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.

(Certification Order at 3.)

The Ninth Circuit emphasized that this question “affects the fundamental right under the California Constitution of the State’s electors to participate directly in the governance of their State.” (Certification Order at 17 [quotation marks omitted].) As that Court explained, “the Governor has no veto power over initiatives,” and it is thus “not clear whether he may, consistent with the California Constitution, achieve through a refusal to litigate what he may not do directly: effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it.” (*Id.* at 12.) The Ninth Circuit recognized, moreover, that “the [California] Constitution’s purpose in reserving the initiative power to the People would appear to be ill-served by allowing elected officials to nullify either proponents’ efforts to propose statutes and amendments to the Constitution or the People’s right to adopt or reject such propositions,” *id.* at 12-13 (quotation marks omitted); that the California courts “have a solemn duty to jealously guard [the initiative] right, and to prevent any action which would improperly annul that right,” *id.* at 11 (quotation marks and citations omitted); and that “all the cases cited underscore the

significant interest initiative proponents have in defending their measures in the courts,” *id.* at 17; *see also Perry v. Brown*, 10-16696, Concurrence to the Certification Order and Per Curiam Opinion 9 [9th Cir. Jan. 4, 2011] [Reinhardt, J., concurring] [explaining that “Proponents advance a strong argument” on the certified question]. Yet “[r]ather than relying on [its] own understanding of th[e] balance of power under the California Constitution,” the Ninth Circuit Court has sought from this Court “an authoritative statement of California law that would establish proponents’ rights to defend the validity of their initiatives.” (Certification Order at 13, 17.)

Proponents supported the Ninth Circuit’s certification request, and Plaintiffs opposed it. On February 16, this Court granted the Ninth Circuit’s request. (*Perry v. Schwarzenegger*, S189476 Order of Feb. 16, 2011.)

ARGUMENT

As demonstrated below, the official proponents of an initiative have authority under California law to assert the People’s interest in the validity of that initiative when it is challenged in litigation, at least when public officials refuse to defend it. Additionally, official proponents also have a personal, particularized interest in the validity

of their initiative entitling them to defend the initiative as real parties in interest if it is challenged in court. These conclusions follow from a consistent line of cases repeatedly allowing official proponents to defend their initiatives both as intervenors and as real parties in interest, cases which give force and meaning to the “important and favored status” that “the initiative process occupies . . . in the California constitutional scheme,” *Senate v. Jones* (1999) 21 Cal.4th 1142, 1157, and to the specific rights and responsibilities given official proponents under California law.

I. Official Proponents Have Authority Under California Law To Defend Their Initiatives As Agents of the People in Lieu of Public Officials Who Refuse to Do So.

It is well settled under California law that official proponents, unlike mere political, ideological, or philosophical supporters of initiatives, may intervene to defend the initiatives they have sponsored if they are challenged in court. Indeed, this Court’s precedent and established principles of California constitutional law make clear that allowing official proponents to intervene to vindicate the People’s interest in successful initiatives when public officials will not do so is necessary to preserve the People’s initiative power, a power that must be jealously defended by the courts. And even were these

constitutional principles less clear, under United States Supreme Court precedent, California's well-established practice of allowing official proponents to intervene to defend their initiatives itself makes clear that official proponents have authority under state law to represent the People's interest in the validity of initiatives in lieu of public officials who refuse to defend those laws.

A. Allowing Official Proponents to Vindicate the People's Interest in the Validity of Their Initiatives Is Necessary to Preserve the Sovereign People's Initiative Power.

Both this Court and the California Courts of Appeal have repeatedly allowed official proponents to intervene in lawsuits to defend initiatives they have sponsored. Indeed, this Court has previously allowed *these* proponents – the petitioners here – to defend Proposition 8, the initiative at issue in this case, against an earlier constitutional challenge. (*See Strauss, supra*, 46 Cal.4th at pp. 398-99; App. 50.) In allowing Petitioners to intervene to defend Proposition 8, this Court followed a long and consistent line of earlier decisions likewise allowing official proponents to defend initiatives or referenda they have sponsored. (*See, e.g., Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 243; *Legislature v. Eu* (1991) 54

Cal.3d 492, 499; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 479; *Vandeleur v. Jordan* (1938) 12 Cal.2d 71, 72; *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1316, 1321-22; *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 626; *Community Health Association v. Board of Supervisors* (1983) 146 Cal.App.3d 990, 992.)

The well-settled practice of allowing official proponents to intervene to defend their initiatives makes eminent sense. For as this Court has recognized, although public officials have “a duty to defend” an initiative enacted by the People, they “might not do so with vigor” – or, as this case illustrates, at all – if they have “underlying opposition” to the measure. (*Building Industry Association, supra*, 41 Cal.3d at p. 822.) In such circumstances, “[p]ermitting intervention by the initiative proponents . . . serve[s] to guard the people’s right to exercise initiative power, a right that must be jealously defended by the courts.” (*Ibid.*)

Although the Ninth Circuit recognized that this analysis from this Court’s decision in *Building Industry Association* “may accurately express the intent of the California Constitution,” it believed that “it was not a holding.” (Certification Order at p. 15.) But the discussion

of proponent intervention was essential to this Court's holding in that case and thus cannot be dismissed as dictum. (*See Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 432 [“[Court’s] essential reasoning” is “not . . . dictum”].) In *Building Industry Association* this Court considered a challenge to an evidentiary code provision that “shift[ed] the burden of proof [to defendant counties or municipalities] in actions challenging the validity of growth control ordinances,” as applied to growth control measures enacted by initiative. (*Supra*, 41 Cal.3d at pp. 814-15.) One argument before the Court was that the provision “substantially impair[ed] the ability of the people to exercise initiative power because the proponents of the initiative would not have an effective way to defend it,” and because the city or county having the duty to defend “might not do so with vigor if it has underlying opposition to the ordinance.” (*Id.* at p. 822.) The Court rejected this argument, but acknowledged that it “*would have merit if intervention was unavailable.*” (*Ibid.* [emphasis added].) The Court’s decision, in other words, turned on its conclusion that California law authorizes initiative proponents to intervene to “guard the people’s right to exercise initiative power” when public officials “might not do so with vigor.” (*Ibid.*)

In all events, this conclusion – that the official proponents may represent the People’s interest in defending the validity of successful initiatives when public officials refuse to do so – follows ineluctably from the “important and favored status” that “the initiative process occupies . . . in California’s constitutional scheme.” (*Senate v. Jones, supra*, 21 Cal.4th at pp. 1157; *see also* Certification Order at p. 10 [observing that “[t]he power of the citizen initiative has, since its inception, enjoyed a highly protected status in California”].)

Under the California Constitution, “All political power is inherent in the people.” (Cal. Const., art II, § 1.) This principle is underscored by Article IV, section 1, which provides that “the people reserve to themselves the powers of initiative and referendum,” and Article II, section 8, which expressly recognizes “the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.”⁵ “[D]rafted in light of the theory that all government power ultimately resides in the people,” *Building Industry Association, supra*, 41 Cal.3d at p. 821, these initiative provisions were intended to provide a “means of restoring the people’s rightful

⁵ In addition, Article II, section 11 of the Constitution provides that “[i]nitiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide.”

control over their government,” *Strauss, supra*, 46 Cal.4th at p. 421. And while they “speak[] of the initiative . . . not as a right granted the people, but as a power reserved by them,” *ibid.*, these provisions plainly establish a “*fundamental right* of the people to propose statutory or constitutional changes through the initiative process,” *Costa, supra*, 37 Cal.4th at p. 1007 (emphasis added), and indeed “to participate directly in the governance of their State,” Certification Order at p. 16.

“In response to this broad constitutional reservation of power in the people, the courts have consistently held that the Constitution’s initiative and referendum provisions should be liberally construed to maintain maximum power in the people.” (*Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, 1032.) In particular, “[g]overning California case law uniformly emphasizes that it is [the courts’] solemn duty jealously to guard the sovereign people’s initiative power, it being one of the most precious rights of [California’s] democratic process,” *Strauss, supra*, 46 Cal.4th at p. 453 [quotation marks omitted], “and to prevent any action which would improperly annul that right,” *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117; *accord Building Industry Association, supra*, 41

Cal.3d at 821. In sum, “[t]he right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.” (*Strauss, supra*, 46 Cal.4th at p. 453.)

Consistent with the initiative process’s purpose of “restoring the people’s rightful control over their government,” *id.* at p. 421, initiatives approved by the voters take effect promptly after the election and are not subject to veto by the Governor, the Attorney General, or any other member of the Executive Branch. (*See* Cal. Const., art. II, § 10(a); *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Cal.3d 245, 252, fn. 5.) Nor can the legislature amend or repeal an initiative without the approval of the voters unless the initiative expressly provides for such action. (*See* Cal. Const., art. II, § 10(c).) Indeed, “[n]o other state in the nation carries the concept of initiatives as ‘written in stone’ to such lengths” as does California. (*People v. Kelley* (2010) 47 Cal.4th 1008, 1030 [quotation marks omitted].) As the Ninth Circuit aptly recognized, it is doubtful whether executive branch officials “may, consistent with the California Constitution, achieve through a refusal to litigate what [they] may not do directly: effectively veto the initiative by refusing

to defend it or appeal a judgment invalidating it, if no one else – including the initiative’s proponents – is qualified to do so.” (Certification Order at p. 11.) Indeed, “the Constitution’s purpose in reserving the initiative power to the People would appear to be ill-served by allowing elected officials to nullify either proponents’ efforts to ‘propose statutes and amendments to the Constitution’ or the People’s right ‘to adopt or reject’ such propositions.” (Certification Order at pp. 11-12 [quoting Cal. Const., art II, § 8(a)].)

This Court should reject the “harsh result,” Certification Order at 11, of effectively authorizing the Governor and the Attorney General to “improperly annul” the “sovereign people’s initiative power.” Instead, this Court should reaffirm that official proponents may intervene “to guard the people’s right to exercise the initiative power” by defending initiatives they have successfully sponsored, at least when, as here, the public officials having “a duty to defend” those measures refuse to do so at all, let alone “with vigor,” because of their “underlying opposition” to those measures. (*Building Industry Association*, 41 Cal.3d at p. 822.) Allowing official proponents to defend their initiatives in such circumstances “maintain[s] maximum power in the people,” and preserves their

“rightful control over their government.” For ultimately, as the California Constitution makes emphatically clear, California’s interest in the validity of its initiatives belongs not to the public officials the initiative process was intended to control, but to the People themselves.

B. Well-Settled California Case Law Upholds the Authority of Official Proponents To Represent the People’s Interest in the Validity of Initiatives.

Even were its constitutional necessity less clear, the well-settled body of precedent permitting official proponents to intervene to defend their initiatives would still be highly probative here, for the United States Supreme Court has looked to just such authority in determining who has standing to represent a State’s interest in the validity of its laws in federal court when the public officials charged with defending those laws refuse to do so. Thus, in *Karcher v. May* (1987) 484 U.S. 72, the Court considered whether the Speaker of the New Jersey General Assembly and the President of the New Jersey Senate “had authority under state law to represent the State’s interests” by defending, in federal litigation, a state statute when “neither the Attorney General nor the named defendants would defend the statute.” (*Id.* at pp. 75, 82.) The Court concluded that “as a matter

of New Jersey law” these individuals had authority to defend the statute, both in the trial court and on appeal, because, in an earlier case, “[t]he New Jersey Supreme Court ha[d] granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment.” (*Id.* at p. 82 [citing *In re Forsythe* (1982) 91 N.J. 141, 144, 450 A.2d 499, 500]; *see also id.* at p. 84 [White, J., concurring] [“[W]e have now acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court.”].) By the same reasoning, the numerous decisions of this Court (and the courts of appeal) allowing official proponents to intervene to defend initiatives they have sponsored demonstrate that official proponents have “authority under [California] law to represent the State’s interests” in the validity of those initiatives when the public officials ordinarily charged with defending those initiatives refuse to do so.

Indeed, California law goes far beyond the New Jersey precedent found sufficient in *Karcher* to establish state-law authorization to represent the State’s interests. For in the New Jersey case, “[t]he initial adversary parties in the case were the [plaintiffs]

and the Attorney General. In addition, the Court granted the applications of the Speaker of the General Assembly and the General Assembly, and the President of the Senate and the Senate to intervene as parties-respondent, all of whom, *with the Attorney General*, defend[ed] the validity of the enactment.” (*In re Forsythe, supra*, 91 N.J. at p. 144, 450 A.2d at p. 500 [emphasis added].) And while several of the California decisions cited above, like the New Jersey case, permit intervention to enable official proponents to join public officials in defending initiatives, other decisions go further, allowing official proponents to intervene to defend their initiatives in lieu of public officials who refuse to do so and even to appeal decisions invalidating initiatives when public officials will not.

In *Strauss*, for example, as in this case, the Attorney General asserted that Proposition 8 was unconstitutional. (*See* App. 53 [“Proposition 8 should be invalidated as violating . . . our Constitution.”].) There, as here, the remaining state officials also declined to defend the People’s will. (*See* App. 16 [taking “no position” on whether Proposition 8 violated the California Constitution].) And there this Court permitted Proponents to

intervene to defend Proposition 8. (*See Strauss, supra*, 46 Cal. 4th at pp. 398-99; App. 50.)

Nor does *Strauss* stand alone. In *Citizens for Jobs & the Economy v. County of Orange*, for example, plaintiffs sued Orange County in an attempt to bar it from implementing an initiative measure recently approved by the County's voters. (*See supra*, 94 Cal. App. 4th at p. 1316.) Although the County "did not officially oppose all of [the initiative measure] as invalid," it "contest[ed] the validity of certain spending and procedural restrictions imposed by the measure," and "sought a stay of the effective date of [the measure]." (*Id.* at pp. 1316, 1321.) Proponents of the initiative – including the official proponent – not only were permitted to intervene to defend its validity but also were later allowed to appeal the trial court's ruling invalidating the measure, even though the County elected not to do so. (*Id.* at pp. 1316, 1323.) *Community Health Association v. Board of Supervisors* likewise involved a suit against a County and its Board of Supervisors challenging the validity of an initiative measure adopted by the County's voters. (*Supra*, 146 Cal.App.3d at pp. 991-92.) "Elaine E. Howell and the Ed Howell Committee, an unincorporated association of resident taxpayers, were

permitted to intervene as defendants as the true proponents and supporters of the Howell Initiative.” (*Id.* at p. 992.) And when the trial court invalidated the initiative, the proponents were allowed to appeal from that judgment even though the County and its Board chose not to appeal and in fact “file[d] briefs as amici curiae in support of the judgment.” (*Id.* at p. 993.)

The California courts’ favorable treatment of official proponents stands in marked contrast to their treatment of advocacy groups and other initiative supporters. In *Strauss*, for example, this Court allowed Proponents to intervene to defend Proposition 8, as noted above. The same order permitting Proponents to intervene, however, denied intervention to the Campaign for California Families, an advocacy group that did not officially sponsor, but purported to support, Proposition 8. (*See App.* 50.)

Similarly, in *City & County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, the court of appeal affirmed the denial of intervention by an advocacy group that “played no role in sponsoring” the challenged initiative and could not be said to represent the interests of any official proponents of that measure. (*Id.* at p. 1038; *see also ibid.* [explaining that “this case does not present the question

of whether an official proponent of an initiative has a sufficiently direct and immediate interest to permit intervention in litigation challenging the validity of the law enacted”] [internal citation omitted].) Discussing the same group in subsequent litigation, this Court explained that

Past California decisions establish . . . that notwithstanding 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 – such a disagreement does not in itself afford the group the right to intervene formally in an action challenging the validity of the measure.

(*In re Marriage Cases* (2008) 43 Cal.4th 757, 790; *see also id.* at p. 791 fn. 8 [invoking the court of appeal’s earlier holding].) Such a group “is in a position no different from that of any other member of the public” holding “strong ideological or philosophical” views about the dispute. (*Id.* at p.791.)⁶ The unique and favored treatment afforded official proponents seeking to intervene to defend their

⁶ To be sure, the courts have sometimes allowed groups allied or associated with official proponents to intervene *alongside* official proponents. (*See, e.g., Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1316 & fn. 2; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153, 157.) But as the authorities cited in the text make clear, groups other than official proponents are otherwise not allowed to intervene to defend an initiative absent a concrete interest in the litigation that is distinct from the People’s interest in the validity of their initiatives.

initiatives makes clear that, as a matter of California law, official proponents stand in a position different from that of mere political, ideological, or philosophical supporters of a law. Rather, they have authority under state law to represent the People’s interest in defending successful initiatives, especially when the public officials charged with that duty fail to do so.

In light of all this authority, it is hardly surprising that, as noted above, *see supra* at 9, the district court allowed Proponents to intervene in this case based, *inter alia*, on its understanding that “under California law . . . proponents of initiative measures have the standing to . . . defend an enactment that is brought into law by the initiative process.” (App. 100.) Nor is it surprising that it denied intervention by another group wishing to defend Proposition 8 on the grounds that “because [it was] not the official sponsor of Proposition 8, its interest in Proposition 8 is essentially no different from the interest of a voter who supported Proposition 8, and is insufficient to allow [it] to intervene as of right.” (App. 102.)⁷

⁷ As noted above, contrary to their current position, Plaintiffs themselves recognized the same distinction in the district court. On the one hand, they did not oppose Proponents’ intervention in the case. (*See* App. 54.) On the other hand, they opposed intervention by another group on the ground that it “lack[ed] a significant protectable

II. Official Proponents Have a Personal, Particularized Interest in Defending Their Initiatives As Real Parties in Interest.

Official proponents of initiatives have been repeatedly named as real parties in interest in California cases challenging the validity of initiatives. Under California law, a “real party in interest” is defined as a “person or entity whose interest will be directly affected by the proceeding.” (*Connerly v. State Personnel Board* (2006) 37 Cal. 4th 1169, 1178.) That interest must not only be “direct” but also “a ‘special interest to be served or some particular right to be protected over and above the interest held in common with the public at large.’ ” (*Id.* at p. 1179.) This Court has held that a “proponent of [a] ballot initiative clearly me[ets] that definition when it c[omes] to litigation involving that initiative.” (*Ibid.*) But groups having only “a particular ideological or policy focus that motivates them to participate in certain litigation,” in contrast, do not qualify as real parties in interest because their “policy interest” in any given case “is no different in kind from that of the typical amicus curiae and no different in substance from like-minded members of the general public.” (*Ibid.*)

interest in the litigation that may be impaired” because it was “merely one of many supporters of Prop. 8 – *not one of the official sponsors*, who are already parties to this case.” (App. 59-60 [emphasis added].)

As demonstrated above, *see supra* Part I, the “special interest” and “particular right” that entitle official proponents to defend their initiatives as “real parties in interest” likely derive from their special status as agents of the People authorized to assert the State’s indisputable interest in the validity of its initiatives. But official proponents no doubt also have a special and particularized *personal* interest in the initiatives they sponsor that arises from the unique rights and responsibilities vested in them by California law.

First and foremost, of course, official proponents exercise the “fundamental right” secured by the California Constitution “to propose statutory or constitutional changes through the initiative process.” (*Costa, supra*, 37 Cal.4th at p. 1007; *see also* Cal. Const., art. II, § 8 [identifying corollary powers “to propose statutes and amendments to the Constitution” and “to adopt or reject” those proposals].) California vests official proponents with numerous statutory rights and responsibilities as well. Among other things, initiative proponents are responsible for drafting the text of proposed initiatives, Elec. Code, § 342, and they alone may submit amendments to the proposed text, *see id.*, § 9002. They are also responsible for preparing petition forms to collect the required number of signatures,

see id., §§ 9001, 9012, 9014, for managing signature gatherers, *id.*, §§ 9607, 9609, and for submitting completed signature petitions to election officials and thus qualifying the measure for the ballot – a right California law reserves to the official proponents alone, *see id.*, § 9032. In addition, official proponents have exclusive control over the arguments in favor of the initiative that are published in the official voter guide. (*Id.*, § 9065, 9067.)

Significantly, established precedent makes clear that official proponents’ “special interest” and “particular right[s]” in the validity of the initiatives they sponsor continue after the initiatives’ enactment into law. Thus, while official proponents are routinely named as real parties in interest in pre-enactment challenges to initiatives,⁸ they are properly so designated in post-enactment litigation as well. (*See, e.g.*,

⁸ As noted above, when opponents of Proposition 8 unsuccessfully petitioned this Court to keep that measure off the ballot, they named Proponents as real parties in interest. (*See App. 24, 36.*) Official proponents have been named as real parties in interest in many other pre-enactment challenges to initiatives as well. (*See, e.g., Senate v. Jones* (1999) 21 Cal.4th 1142, 1146; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 663; *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 3; *Nestande v. Watson* (2003) 111 Cal.App.4th 232, 236 [recounting procedural history of *Songstad v. Superior Court* (2001) 93 Cal.App.4th 1202]; *see also Sonoma County Nuclear Free Zone '86 v. Superior Court* (1987) 189 Cal.App.3d 167, 171, 173 [holding that initiative proponents should have been named as real parties in interest in litigation involving initiative].)

Hotel Employees, supra, Cal.4th at p. 590; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 150, 157; *cf. Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, 1023, 1029-31 [concluding that pre-election challenge naming official proponents as real parties in interest could be appropriately deferred until after the election].)

It is also clear that official proponents are entitled, as real parties in interest, to defend an initiative when public officials refuse to do so and to appeal from an adverse judgment when those officials do not. For example, in *Hotel Employees*, the petitioner sought a writ of mandate from this Court to compel the Governor and Secretary of State not to implement Proposition 5, a recently enacted initiative statute. (*Supra*, 21 Cal.4th at p. 590.) The petitioner “named Frank Lawrence, the measure’s proponent, as real party in interest.” (*Ibid.*)⁹ “In his initial returns, [the Governor] supported the [petitioners’] claims against Proposition 5 and their prayers for relief.” (*Id.* at p. 591.) After a change in administration, the new Governor “withdrew the returns of [his predecessor] and filed substitute returns of his own,

⁹ “[A] separate, similar” petition decided together with *Hotel Employees* named both Lawrence and an allied group as real parties in interest. (*See id.*)

in which he expressed neutrality on the claims against Proposition 5 and the prayers for relief.” (*Ibid.*) The official proponent, as a real party in interest, thus stood alone in defending the initiative he had successfully sponsored.

And in *Simac Design*, the court of appeal considered two suits seeking to compel city officials to disregard a recently enacted local initiative. In both suits, proponent “Citizens for Orderly Residential Development (CORD), real party in interest” was allowed to appeal from judgments directing the city to disregard the initiative even though the city chose not to appeal. (*Supra*, 92 Cal.App.3d at pp. 150-51, 156.) In one suit, the court of appeal concluded that the trial court had properly permitted CORD to intervene as a “real party in interest,” along with an allied organization represented by the same attorney. (*Id.* at p. 157.) In the other suit, CORD was not named as a party in the trial court, but the court of appeal held that it was nevertheless entitled to “intervene even after judgment, by moving to vacate the judgment” and then to appeal the order denying that motion as “an aggrieved party” whose “rights or interests [were] injuriously affected by the judgment.” (*Id.* at pp. 152, 153.) As the court explained, because “CORD [was] an unincorporated association of

residents and registered voters . . . whose purpose was to draft and organize voter support for” the successful initiative, and because it sought “to implement” the initiative “by conforming the city’s [actions] to the express terms of the measure,” it was “an aggrieved party that may appeal.” (*Id.* at p. 153; *see also id.* at p. 150 [referring to CORD as a “real party in interest” in this suit though it had not been so designated in the trial court]; *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 414, 416-18 [holding that the official proponent of a local initiative, along with an allied organization, was an aggrieved party entitled to appeal a trial court decision invalidating a recently enacted initiative he had successfully sponsored].)

* * *

In short, it is clear that the official proponents of an initiative have both “a particularized interest in the initiative’s validity” and “the authority to assert the State’s interest in the initiative’s validity,” and that as a consequence they may both “defend the constitutionality of the initiative upon its adoption” and “appeal a judgment invalidating the initiative,” at least “when the public officials charged with that duty refuse to do so.” (Certification Order at 2.)

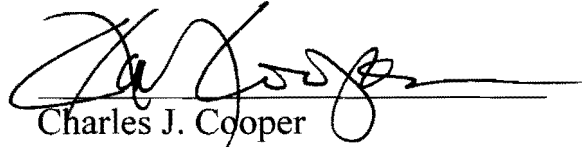
Accordingly, this Court should answer the certified question in the affirmative.

March 14, 2011

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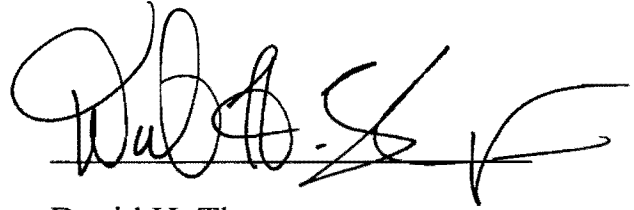


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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204, I certify that this brief on the merits was prepared on a computer using Microsoft Word, and that, according to the program, contains 7,565 words.

A handwritten signature in black ink, appearing to read 'D.H. Thompson', written over a horizontal line.

David H. Thompson

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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 March 14, 2011 at Washington, D.C.

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