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April 4, 2011

Ms. Molly C. Dwyer
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
James R. Browning U.S. Courthouse
San Francisco, CA 94119-3939

Re: *Perry v. Schwarzenegger,* No. 10-16696

Dear Ms. Dwyer:

Enclosed please find a courtesy copy of Plaintiffs-Respondents' Answering Brief, filed today in the Supreme Court of California, Case No. S189476.

Very truly yours,

/s/ Enrique A. Monagas
Enrique A. Monagas

Enclosure

cc: All counsel via ECF

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No. S189476

IN THE SUPREME COURT OF CALIFORNIA

KRISTIN M. PERRY et al., Plaintiffs and Respondents,

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, Intervenor and Respondent,

v.

EDMUND G. BROWN, JR., as Governor, etc. et al., Defendants,

DENNIS HOLLINGSWORTH et al., Defendants, Intervenors and Appellants.

Question Certified from the U.S. Court of Appeals for the Ninth Circuit
The Honorable Stephen R. Reinhardt, Michael Daly Hawkins,
and N. Randy Smith, Circuit Judges, Presiding
Ninth Circuit Case No. 10-16696

PLAINTIFFS-RESPONDENTS' ANSWERING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Supreme Ct. APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: S189476
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APPELLANT/PETITIONER: Dennis Hollingsworth, et al. RESPONDENT/REAL PARTY IN INTEREST: Kristin M. Perry, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Plaintiffs-Respondents Kristin M. Perry, et al.

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 4, 2011

Theodore B. Olson

(TYPE OR PRINT NAME)

▶ Theodore B. Olson /ee

(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

In response to this Court's decision recognizing that California's Constitution protected the right of gay men and lesbians to marry (*In re Marriage Cases* (2008) 43 Cal.4th 757), California enacted Proposition 8, which amended the state constitution to strip gay men and lesbians of the fundamental right to marry. In defense of that discriminatory measure, proponents now seek yet again to rewrite the California Constitution—this time not through the amendment process, but by persuading this Court to permit initiative proponents to subvert the express constitutional authority of the Governor and Attorney General to direct the defense of state laws. Proponents' argument is unprecedented. Because proponents' interest in the validity of Proposition 8 is fundamentally no different from that of any other citizen who helped to finance, advocated for, voted for or otherwise supported or opposed Proposition 8, they lack the authority to defend Proposition 8's constitutionality.

The California Constitution is clear that, "[s]ubject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State." Cal. Const. art. V, § 13. Pursuant to that constitutional mandate, the "Attorney General has charge, as attorney, of all legal matters in which the State is interested." Gov. Code, § 12511. Proponents, however, attempt to secure that constitutional prerogative for themselves—and every other private party that serves as the official proponent of a ballot

initiative. They argue that they should be permitted to appeal a federal district court decision invalidating Proposition 8—even though the Governor and Attorney General have exercised their constitutional discretion not to appeal that decision—because California law purportedly grants them the authority to represent the *State's* interest in the validity of Proposition 8. There is no support in the California Constitution—or this Court's decisions—for this proposition, which would upend the settled separation of powers and eviscerate the constitutional authority of the Governor and Attorney General to execute, implement, and defend the laws and Constitution of California and otherwise determine the position and policies of the State of California with respect to those laws in court.

There is equally little support for proponents' fall-back argument that they possess a privileged status under state law that grants them a "particularized interest" in the constitutionality of Proposition 8. The question whether a litigant possesses a "particularized interest" sufficient to confer Article III standing is a question of federal law that this Court need not address. In any event, state law would afford no assistance to proponents because California law circumscribes the rights of initiative proponents—especially after an initiative has been enacted. In fact, proponents' interest in the validity of Proposition 8 is not materially different from a jurisprudential standpoint than that of the millions of other

California voters who financed, campaigned for, voted for or otherwise supported the measure.

This Court should answer the certified question in the negative.

STATEMENT

1. Plaintiffs are gay and lesbian Californians who are in committed, long-term relationships and who wish to marry. In 2008, this Court held that the California Constitution protected the right of gay men and lesbians to marry. *Marriage Cases*, 43 Cal.4th 757. That decision held that California Family Code sections 300 and 308.5—which limited marriage to individuals of the opposite sex—violated the due process and equal protection guarantees of the state constitution. *Marriage Cases*, 43 Cal.4th at p. 857.

In response, proponents financed and orchestrated a $40 million campaign to amend the California Constitution to strip gay men and lesbians of their fundamental right to marry recognized by this Court. That measure—Proposition 8—was placed on the ballot for the November 2008 election, and proposed to add a new Article I, Section 7.5 to the California Constitution stating that "[o]nly marriage between a man and a woman is valid or recognized in California." The Official Voter Information Guide informed voters that Proposition 8 would "[c]hange[ ] the California Constitution to eliminate the right of same-sex couples to marry in California."

Proposition 8 passed by a narrow margin, and went into effect on November 5, 2008, the day after the election. During the period between this Court's decision in the *Marriage Cases* on May 15, 2008, and the effective date of Proposition 8, more than 18,000 same-sex couples were married in California. On May 26, 2009, this Court upheld Proposition 8 against a state constitutional challenge, but held that the new amendment to the California Constitution did not invalidate the marriages of same-sex couples that had been performed before its enactment. *See Strauss v. Horton* (2009) 46 Cal.4th 364.

2. On May 22, 2009, plaintiffs filed suit in the United States District Court for the Northern District of California to protect and restore their right to marry. They challenged the constitutionality of Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and named as defendants California's Governor, Attorney General, Director of Public Health, and Deputy Director of Health Information and Strategic Planning. They also named as defendants the Alameda County Clerk-Recorder and the Los Angeles County Registrar-Recorder/County Clerk, who had denied marriage licenses to plaintiffs. In response, the Attorney General admitted that Proposition 8 is unconstitutional, and the remaining government defendants declined to defend Proposition 8.

Five California voters—the official proponents of Proposition 8—and the ballot measure committee that they had formed moved to intervene in the case to defend Proposition 8. The district court granted their motion on June 30, 2009. In August 2009, the City and County of San Francisco was also granted leave to intervene in the case.

After denying plaintiffs' motion for a preliminary injunction, the district court conducted a twelve-day bench trial in January 2010. At trial, the parties called nineteen live witnesses; the court admitted into evidence more than 700 exhibits and took judicial notice of more than 200 other exhibits.

On August 4, 2010—after hearing more than six hours of closing arguments and considering hundreds of pages of proposed findings of fact and conclusions of law submitted by the parties—the district court found in favor of plaintiffs. The court declared Proposition 8 unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and permanently enjoined defendants—"and all persons under the control or supervision of defendants"—"from applying or enforcing" Proposition 8.

Proponents noticed an appeal to the United States Court of Appeals for the Ninth Circuit; the County of Imperial, which had been denied leave to intervene in the case to defend Proposition 8, also noticed an appeal.

None of the government officials who were defendants in the case elected to appeal the district court's decision.

In an effort to compel the Governor and Attorney General to notice an appeal, a California voter filed a petition for a writ of mandamus in the California Court of Appeal. *See Beckley v. Schwarzenegger*, No. C065920 (Cal. Ct. App. Sept. 1, 2010). After the Court of Appeal denied the petition, the voter appealed to this Court. The Court called for a written response from the Governor and Attorney General, and then denied the petition. *See Beckley v. Schwarzenegger*, No. S186072 (Sept. 8, 2010).

3. The Ninth Circuit stayed the district court's injunction pending appeal, and set the case for expedited briefing and argument. In granting the stay, the Ninth Circuit directed proponents "to include in their opening brief a discussion of why this appeal should not be dismissed for lack of Article III standing. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997)." In the opinion cited in the Ninth Circuit's order, the U.S. Supreme Court expressed "grave doubts" as to whether ballot initiative proponents have Article III standing to pursue an appeal from a decision invalidating an initiative where the State itself has declined to appeal. *Ibid.*

The appeal was argued on December 6, 2010. On January 4, 2011, the Ninth Circuit issued an opinion that affirmed the denial of Imperial County's motion to intervene. *Perry v. Schwarzenegger* (9th Cir. 2011)

630 F.3d 898. It also 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.

Perry v. Schwarzenegger (9th Cir. 2011) 628 F.3d 1191, 1193.

On February 16, 2011, this Court granted the Ninth Circuit's request for certification.

SUMMARY OF ARGUMENT

The Certified Question presents two distinct issues: (1) whether proponents possess the authority to assert the State's interest in the validity of Proposition 8, and (2) whether proponents have a particularized interest in the validity of Proposition 8 that would afford them standing to appeal the district court's decision invalidating that measure. Under settled principles of California constitutional law and this Court's precedent, the answer to both of those questions is "No."

It is already well-established that California law does *not* afford initiative proponents the authority to represent the *State's* interest—as opposed to their own interest—regarding an initiative's validity. The California Constitution grants the Attorney General the exclusive authority

to represent the interests of the State in judicial proceedings and to make decisions regarding the defense of state laws. This Court recognized as much when it denied a petition for mandamus seeking to compel the Governor and Attorney General to appeal the district court's decision invalidating Proposition 8. The contrary rule urged by proponents would profoundly alter the separation of powers established by the California Constitution and permit private citizens to arrogate to themselves the constitutional prerogatives of the State's elected officials.

Nor do proponents have an interest in the constitutionality of Proposition 8 that is sufficiently "particularized" to distinguish them from the millions of other California voters who supported the initiative. As an initial matter, this issue is governed exclusively by Article III of the United States Constitution, and the Court should therefore decline to address this question of federal law. In any event, nothing in California law affords proponents of an already-enacted initiative a particularized interest in the initiative's validity. The rights granted to initiative proponents are narrow and carefully circumscribed, and are not materially different from those of other California citizens who voted in favor of the initiative.

ARGUMENT

I. CALIFORNIA LAW DOES NOT AUTHORIZE PROPONENTS TO ASSERT THE STATE'S INTEREST IN THE VALIDITY OF PROPOSITION 8.

Proponents invoke both the California Constitution and this Court's precedent in an effort to secure for themselves the authority to represent the State's interest in the validity of Proposition 8. But nothing in the state constitution or this Court's decisions supports their attempt to second-guess the constitutional discretion that the Governor and Attorney General possess when deciding whether and how to defend a state law.

California law vests the *Attorney General*—not private litigants—with the authority to represent the State's interest in litigation. The state constitution provides that, "[s]ubject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State." Cal. Const. art. V, § 13. It is the constitutional "duty of the Attorney General to see that the laws of the state are uniformly and adequately enforced." *Ibid.* As part of that duty, the "Attorney General has charge, as attorney, of all legal matters in which the State is interested" (Gov. Code, § 12511), and "shall . . . prosecute or defend all causes to which the State, or any State officer, is a party in his or her official capacity." *Id.* § 12512. In discharging these responsibilities, the Attorney General has the discretion to decide whether to defend an unconstitutional measure or to appeal an adverse judgment. *See State v. Super. Ct.* (1986) 184 Cal.App.3d

394, 397-98 ("The decision of the Attorney General whether to participate in a lawsuit, where the State has no financial interest at stake nor possible liability, is a decision purely discretionary and, like decisions regarding the prosecution and conduct of criminal trials, exclusively within the province of the Attorney General's office and not subject to judicial coercion."); *see also D'Amico v. Bd. of Med. Exam'rs* (1974) 11 Cal.3d 1, 15 (it is "clearly within the scope of the Attorney General's dual role as representative of a state agency and guardian of the public interest" to make binding admissions relevant to the constitutionality of a state law during discovery, even though those admissions may impair the State's defense).

This Court's decision denying the petition for mandamus attempting to compel the Governor and Attorney General to notice an appeal from the judgment invalidating Proposition 8 reaffirms their discretion to determine whether to defend a state law or appeal an adverse decision invalidating an unconstitutional measure. *See Beckley v. Schwarzenegger*, No. S186072 (Sept. 8, 2010). "By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute." *Diamond v. Charles* (1986) 476 U.S. 54, 63; *see also id.* at p. 71 (holding that a private citizen lacked standing to appeal a decision invalidating a statute that the State itself chose not to appeal).

There is nothing in California law that authorizes a proponent to second-guess the judgment of the Governor and Attorney General by

representing the interest of the State in litigation challenging the constitutionality of a ballot initiative. In fact, California law confers only a narrow set of rights on ballot initiative proponents—such as the right to have their arguments in favor of the measure reproduced in the ballot pamphlet (Elec. Code, § 9067); the right to receive election-related information from the State, including information about the status of their petition efforts (*id.* §§ 9030-9031); and the right to inspect petition signatures, Gov. Code, § 6253.5.

The rights granted proponents under California law—which are overwhelmingly focused on the period *before* the initiative is enacted—are far more circumscribed than those granted under New Jersey law to the sitting state legislators who were permitted to defend a New Jersey statute "on behalf of the legislature" in *Karcher v. May* (1987) 484 U.S. 72, 75. The United States Supreme Court held that the legislators possessed standing to appeal that case to the Third Circuit because, as Speaker of the New Jersey General Assembly and President of the New Jersey Senate, they were "authorize[d]" under "state law . . . to represent the State's interests." *Arizonans*, 520 U.S. at p. 65 (citing *Karcher*, 484 U.S. at p. 82). The Court further held, however, that once the legislators lost their leadership posts in the New Jersey Legislature, they "lack[ed] authority to pursue [an] . . . appeal on behalf of the legislature" to the U.S. Supreme Court 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. The Court did not permit the former legislative leaders to pursue the appeal in their capacities as individual legislators or as representatives of the prior legislature that had passed the measure they sought to defend. *Id.* at p. 81.

In *Arizonans*—where the Supreme Court expressed "grave doubts" about the standing of initiative proponents to appeal an adverse decision in the absence of the State—the Court distinguished *Karcher* on the ground that ballot initiative proponents "are not elected representatives." *Arizonans*, 520 U.S. at p. 65. But, even if proponents were elected representatives, they are unable to point to any provision of California law that even remotely resembles the provisions referenced in *Karcher*. Proponents thus have no authority to disturb the considered determination of the Governor and Attorney General that, in light of the lengthy and thorough trial that culminated in the invalidation of Proposition 8 and the irreparable harm daily inflicted by that discriminatory measure, this litigation should be brought to a swift conclusion. Proponents may not usurp the constitutional discretion of the State's elected officials to decide whether to enforce or defend a state law.

Proponents contend that a decision denying them the right to represent the interest of the State would "effectively authoriz[e] the Governor and the Attorney General to 'improperly annul' the 'sovereign

people's initiative power.'" Prop. Br. at p. 23 (quoting Certification Order at p. 11). In reality, it is a decision in favor of proponents that would upend the carefully calibrated separation of powers embodied in the California Constitution. Permitting official proponents of a ballot initiative to act on behalf of the State in litigation challenging the validity of ballot initiatives would fatally undermine the constitutional authority of the Governor and Attorney General to make litigation decisions on behalf of the State. The authority of the Attorney General as the "chief law officer of the State" (Cal. Const. art. V, § 13) would be subject to a veto by ballot initiative proponents whenever the constitutionality of an initiative were at issue. But the People's veto of the Executive Branch's litigation decisions is properly exercised at the ballot box—by voting out of office state officials who decline to defend an initiative—not by asking this Court to rewrite the California Constitution to cede a portion of the constitutional authority of the Governor and Attorney General to ballot initiative proponents.

In any event, proponents are wrong to suggest that failing to grant them the authority to represent the State's interest in the validity of a ballot initiative would "'nullify'" the People's right to propose and enact initiatives. Prop. Br. at p. 23. The Governor and Attorney General have followed and enforced Proposition 8 from the day it took effect, and they continue to do so today. Even though the Governor and Attorney General elected not to defend that discriminatory, unconstitutional measure when

plaintiffs challenged it in federal court, proponents were permitted to intervene in the district court proceedings to represent their own interest in the measure's validity, mounted a vigorous defense of Proposition 8 during a twelve-day trial, and clearly have had their day in court. *Cf. M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 110 ("the Federal Constitution guarantees no right to appellate review"). It was the district court—not the Governor or Attorney General—that determined after a full and fair trial on the merits that Proposition 8 violates the United States Constitution and cannot stand. The Governor and Attorney General did not "nullify" Proposition 8; they simply exercised their prerogative not to expend California's finite resources challenging the district court's well-reasoned application of federal law to this case.

Proponents are equally unsuccessful in their effort to locate in this Court's decisions a right of initiative proponents to represent the interest of the State. Proponents rely principally on cases permitting "official proponents . . . [to] intervene to defend the initiatives they have sponsored if they are challenged in court." Prop. Br. at p. 16; *see also id.* at p. 17 (citing, *e.g.*, *Strauss*, 46 Cal.4th at pp. 398-99). But those decisions allowed proponents to pursue their *own* interests in the validity of the ballot initiative, not to represent the interests of the *State*. In this respect, California initiative proponents are no different from their counterparts in Arizona, who have also been permitted to intervene to represent their own

interests in state court cases but whose standing in federal court is subject to "grave doubt[ ]." *Arizonans*, 520 U.S. at p. 66; *see also Diamond*, 476 U.S. at p. 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.").[1]

Proponents are unable to identify a single decision in which this Court—or any other California court—has permitted ballot initiative proponents to act on behalf on the State when intervening in litigation. This Court said no such thing in *Strauss* when it permitted proponents to intervene in defense of the constitutionality of Proposition 8.

Nor did the Court in *Building Industry Association of Southern California, Inc. v. City of Camarillo*, (1986) 41 Cal.3d 810, which presented a constitutional challenge to a provision of the Evidence Code that shifted the burden of proof to local governments to defend growth control ordinances. There, the Court stated only that, "when a city or county is required to defend an initiative ordinance and, because of Evidence Code section 669.5, must shoulder the burden of [proof] . . . ,

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[1] *See, also, e.g.*, *Slayton v. Shumway* (Ariz. 1990) 800 P.2d 590, 591; *Energy Fuels Nuclear, Inc. v. Coconino Cnty.* (Ariz. 1988) 766 P.2d 83, 84 (superseded by statute on other grounds); *Transamerica Title Ins. Co. Trust Nos. 8295, 8297, 8298, 8299, 8300 & 8301 v. City of Tucson* (Ariz. 1988) 757 P.2d 1055, 1056.

we believe the trial court *in most instances* should allow intervention by proponents of the initiative." *Id.* at p. 822 (emphasis added). The Court did not state that the initiative proponents would be permitted to intervene to represent the interest of the State. In fact, the Court emphasized that "the proponents of the initiative have *no guarantee* of being permitted to intervene in the action, a matter which is discretionary with the trial court." *Ibid.* In contrast, the Attorney General has a statutory "right to intervene and participate in *any* appeal taken" from a decision invalidating a state law. Code Civ. Proc., § 902.1 (emphasis added). This right "appl[ies] regardless of whether the Attorney General participated in the case in the trial court." *Id.* The absence of any analogous statutory right for initiative proponents makes clear that the State alone is authorized to represent its interest in the validity of state laws.

Citizens for Jobs & the Economy v. County of Orange (2002) 94 Cal.App.4th 1311, and *Community Health Association v. Board of Supervisors* (1983) 146 Cal.App.3d 990, are equally unhelpful to proponents. While the appeals in those cases were taken by initiative proponents who had intervened in defense of local initiative measures, the courts did not even hint that the proponents were representing any interests other than their own. Moreover, because California courts are not subject to the requirements of Article III—which prohibits appeals by initiative proponents who do not represent the interest of the State—the fact that the

proponents in those cases were permitted to appeal to defend local ballot initiatives does not suggest that the proponents were acting on behalf of the State. In any event, the Court of Appeal did not address the proponents' standing to pursue an appeal in either of those cases. *See* Certification Order at pp. 12-13 ("Proponents . . . have referred us to numerous cases in which proponents of an initiative . . . defended against post-election challenges concerning the validity of their exercise of the initiative power . . . . None of those cases explained, however, whether or why proponents have the right to defend the validity of their initiative . . . .").

In fact, where ballot initiative proponents have sought not merely a right to intervene, but *standing* to maintain a suit in their own right, this Court has determined that they lack standing. In the *Marriage Cases*, for example, this Court held that the Proposition 22 Legal Defense and Education Fund, representing the proponent of that initiative, lacked standing to defend the provision, which had amended the Family Code to limit marriage to individuals of the opposite sex. The Fund asked this Court to grant review to determine "whether *initiative proponents*, or an organization they establish to represent their interests, have standing to defend attacks on the validity or scope of the initiative." Petition for Review of Proposition 22 Legal Defense and Education Fund at p. 13, *Marriage Cases*, 43 Cal.4th 757 (No. S147999), 2006 WL 3618498 (emphasis added); *see id.* at p. 13, fn. 6 ("The Fund represents the

proponents and organizers of the campaign to enact Proposition 22."). In support of its petition, the Fund argued that initiative proponents should be allowed to defend the constitutionality of their enactments because elected officials were not uniformly vigorous in defending initiatives—which was particularly true in the *Marriage Cases*. *Id*. at pp. 15-16.

This Court granted review and held that the Fund's strong interest in Proposition 22 was "not sufficient to afford *standing to the Fund* to maintain a lawsuit" concerning the constitutionality of Proposition 22. *Marriage Cases*, 43 Cal.4th at pp. 790-91 (emphasis added). The Court explained that "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 legal position advanced by a public entity that, through judicial compulsion or otherwise, continues to comply with a contested measure." *Ibid*.

In light of the absence of any provision of California law conferring on ballot initiative proponents the right to assert the interest of the State—and this Court's controlling precedent confirming that initiative proponents lack standing to defend an initiative measure—it is clear that initiative proponents do *not* possess the authority to represent the interest of the State in the validity of a ballot measure. A decision affording proponents that authority would radically rework this State's constitutional framework by permitting private parties to second-guess the discretionary determinations

of the Governor and Attorney General that some laws are so misguided, discriminatory, and harmful that they do not warrant a defense in court. Proposition 8 is one of those laws.

II. CALIFORNIA LAW DOES NOT—AND CANNOT—AFFORD PROPONENTS A PARTICULARIZED INTEREST IN THE VALIDITY OF PROPOSITION 8.

The question whether proponents possess a "particularized interest" in the validity of Proposition 8 sufficient to permit them to pursue an appeal in federal court is a question of federal law that this Court should decline to address. In any event, proponents possess no peculiar rights or interests under California law that materially distinguish them from the millions of other voters who supported Proposition 8.

The types of legal interests sufficient to confer standing on a party to bring suit in federal court or appeal an adverse federal judgment are governed by Article III of the U.S. Constitution; they are not a matter of state law. *See Arizonans*, 520 U.S. at p. 64 ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."). As the U.S. Supreme Court has explained, an "irreducible constitutional minimum" requirement of Article III standing is that the party invoking the jurisdiction of a federal court demonstrate an "actual" stake in the litigation that is "concrete and particularized." *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560. A particularized stake is one that "affect[s] the plaintiff in a

personal and individual way." *Id.* at p. 560, fn. 1. "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do" to confer Article III standing. *Arizonans*, 520 U.S. at p. 64.

"The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *United States v. Hays* (1995) 515 U.S. 737, 742 (citation omitted). A federal court therefore must determine for itself—as a matter of *federal* constitutional law—whether a party's interest in the outcome of a case is sufficiently "particularized" within the meaning of Article III to permit the party to initiate litigation or appeal an adverse judgment. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332, 343 (status as state taxpayers was insufficient to confer Article III standing to challenge the constitutionality of a state tax credit because "interest in the moneys of the Treasury . . . is shared with millions of others") (internal quotation marks omitted). State law cannot unilaterally confer a particularized interest on a party who would otherwise lack Article III standing. If it could, then Article III standing would necessarily be at least coextensive with standing afforded under state law, which is not the case. The U.S. Supreme Court has emphasized that "[s]tanding 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." *Phillips Petroleum Co. v. Shutts*

(1985) 472 U.S. 797, 804; *see also Raines v. Byrd* (1997) 521 U.S. 811, 820, fn. 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.").

Accordingly, the question whether "the official proponents of an initiative measure possess . . . a particularized interest in the initiative's validity . . . which would enable them to . . . appeal a judgment invalidating the initiative" is exclusively a federal question. The Ninth Circuit itself must decide whether proponents' interest in the constitutionality of Proposition 8 is sufficiently distinct from the interest of the millions of other Californians who voted for the measure to satisfy the requirements of Article III. California law has no bearing on the answer to that question because state law cannot be used to manufacture Article III standing. *See Raines*, 521 U.S. at p. 820, fn. 3. And because this issue is controlled by principles of federal constitutional law, this Court does not have any peculiar insights to provide the Ninth Circuit and should decline to address this aspect of the Certified Question.

In any event, under California law, the interests of initiative proponents in the constitutionality of an already-enacted initiative are not materially different from those of any other California voter who supported the measure—and are therefore the antithesis of the "particularized," "personal," and "individual" interest that the U.S. Supreme Court has held

is necessary to confer Article III standing. Most tellingly, there is no provision of California law granting initiative proponents a right to defend their initiatives in litigation to which they are not a party—even though California law expressly grants a right to the Attorney General to intervene to defend state laws on appeal. Code Civ. Proc., § 902.1; *see also Bldg. Indus. Assn.*, 41 Cal.3d at p. 822. Thus, in this highly significant respect, initiative proponents' state-law interest in the validity of their initiatives is identical to that of all other private citizens in California.

To be sure, California courts have the discretion to permit initiative proponents and other private parties to intervene in defense of an initiative—and, in some cases, courts have exercised that discretion by permitting the proponent to intervene and by excluding other private parties. *See, e.g.*, *Strauss*, 46 Cal. 4th at pp. 398-99; App. 50. But, as proponents themselves concede, in a number of other cases, courts have "allowed groups allied or associated with official proponents to intervene alongside official proponents." Prop. Br. 29 (emphasis omitted) (citing *Citizens for Jobs & the Economy*, 94 Cal.App.4th at 1316 & fn.2; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153, 157).[2] Ballot

[2] *See also People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 480 n.1; *Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129, 136-37; *Shea Homes Ltd. P'ship v. County of Alameda* (2003) 110 Cal.App.4th

[Footnote continued on next page]

initiative proponents—like all other private parties with an ideological interest in the validity of a ballot initiative—therefore share the ability to intervene in litigation regarding an initiative's validity where the court decides, in the exercise of its discretion, that such intervention is appropriate.

In an effort to distinguish themselves from other private litigants—and to manufacture a particularized interest—proponents rely on cases in which ballot initiative proponents have been identified as "real parties in interest." Prop. Br. at p. 31. But the majority of cases cited by proponents involve *pre-enactment* challenges to ballot initiatives. *See id.* at p. 31 fn. 33 (citing examples of "pre-enactment challenges to initiatives" in which "[o]fficial proponents have been named as real parties in interest"). It is not at all surprising that in the pre-enactment setting—where the State itself has no interest in defending a proposed ballot initiative—the official proponent would be considered the real party in interest in a suit seeking to keep a measure off the ballot.

Moreover, *Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, the case on which proponents rely most heavily, did not involve an

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1246, 1253-54; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 533.

initiative proponent at all. In the course of deciding an attorney's fee dispute that turned on the definition of the term "real party in interest," this Court discussed the Court of Appeal's decision in *Sonoma County Nuclear Free Zone '86 v. Superior Court* (1987) 189 Cal.App.3d 167. While the Court of Appeal's decision did address the real-party-in-interest status of an initiative proponent, *Sonoma County*—like most of proponents' other cases—arose in the pre-election context and thus sheds no light on the rights of initiative proponents after an initiative has been enacted. *Id.* at p. 170.

Nor do the two post-enactment cases that proponents are able to muster provide any support for the existence of a "particularized interest" in initiative proponents. In *Hotel Employees & Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585, the party challenging an initiative measure named the proponent as a real party in interest in this Court. *Id.* at p. 590. In deciding the case, the Court did not consider whether that designation was appropriate. Indeed, the designation affixed to the proponent had no bearing on the outcome of the case. The initiative proponent in *Hotel Employees* actively defended the initiative in this Court and did not object to being named a real party in interest.

The Court of Appeal's decision in *Simac Design* is equally unhelpful to proponents. 92 Cal.App.3d 146. As in *Hotel Employees*, nothing turned on the initiative proponents' designation as a real party in interest. The

Court of Appeal did not address whether the proponents were properly considered real parties in interest—or the legal implications of that designation. It concluded only that their motion to intervene was properly granted (even though it had been made orally without supporting written documentation). *Id.* at 157. And the fact that, in the companion case decided in the same opinion, the Court of Appeal held that the proponents were properly permitted to intervene in the proceeding and appeal an adverse judgment does not distinguish the proponents' rights from those of private parties with an interest in the validity of a ballot initiative. Like initiative proponents, such ideologically oriented groups are regularly permitted to intervene in litigation regarding the validity of ballot initiatives and to appeal adverse decisions. *See supra* p. 22 fn.2.

Because proponents do not possess state-law rights that are materially different from those of other supporters of Proposition 8, they have no particularized interest in the initiative's validity and lack Article III standing to defend the measure in federal court.

* * *

The Governor and Attorney General have decided that the arbitrary, discriminatory, and irrational restriction on the right to marry imposed by Proposition 8 should not be defended on appeal. Under California law, that is the end of the matter. Neither proponents—nor any other private party—

can usurp the constitutional prerogative of the Governor and Attorney General to decide that, in some circumstances, it is in the best interests of California, and all its citizens, for the State not to participate in the defense of a patently unconstitutional initiative. Proponents' remedy for their disagreement with their elected officials lies at the ballot box—not in this, or any other, Court.

CONCLUSION

The Court should answer the Certified Question in the negative.

DATED: April 4, 2011

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Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that Plaintiffs-Respondents' Answering Brief contains 5,924 words, excluding tables and this certificate, according to the word count generated by the computer program to produce this brief.

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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 April 4, 2011, I caused to be served the following documents:

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