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.
EDMUND G. BROWN, 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

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REPLY BRIEF OF DEFENDANT-INTERVENORS AND APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Other

ARGUMENT

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.

In order "to guard the people's right to exercise initiative power," the California courts have repeatedly allowed official proponents of initiatives to defend those measures when they are challenged in litigation, especially when those 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.) As Proponents have explained, 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.

Plaintiffs' circular assertion that "the State alone is authorized to represent its interest in the validity of state laws," Pls. Br. 16, founders on the fact that in California, unlike Louis XIV's France, neither the Attorney General nor any other public official is the State. In a system of Government where "[a]ll political power is inherent in the people," Cal. Const., art. II, § 1, the Attorney General, just like an

official proponent, is simply an individual whom the People have authorized to perform certain functions on their behalf. And Plaintiffs' claim that "nothing in California law" authorizes an official proponent to "represent[] the interest of the State in litigation challenging the constitutionality of a ballot initiative," Pls. Br. 10-11, simply begs the question of the scope and meaning of the sovereign People's initiative power and is directly contradicted by the numerous decisions allowing proponents to defend their initiatives and the clear explanation for that practice offered by this Court in *Building Industry Association*. Contrary to Plaintiffs' and San Francisco's (collectively, Respondents) arguments, reaffirming these precedents would not infringe the Attorney General's rightful authority, violate separation of powers principles, or have untoward practical consequences.

A. Allowing Official Proponents To Vindicate the People's Interest in the Validity of Initiatives Preserves the Sovereign People's Rightful Control of Their Government.

As demonstrated in our opening brief, *see* Prop. Br. 17-24, the initiative and referendum provisions of the California Constitution were "[d]rafted in light of the theory that *all* power of government ultimately resides in the people," *Building Industry Association*, *supra*, 41 Cal.3d at p. 821 (emphasis added), and were intended to

ensure "the people's rightful control over their government," *Strauss v. Horton* (2009) 46 Cal.4th 364, 421. It is well settled that courts have a "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*, 46 Cal.4th at p. 453, "and to prevent any action which would improperly annul that right," *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117. As the Ninth Circuit noted in its certification order, "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)].) Accordingly, the California courts have repeatedly allowed official proponents to vindicate the People's interest in defending initiatives when elected officials will not. (*See* Prop. Br. 26-28, 34-36 [collecting cases].) As this Court has explained, "Permitting intervention by the initiative proponents under these circumstances … serve[s] to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." (*Building Industry Association*,

supra, 41 Cal.3d at p. 822.) Plaintiffs' attempts to avoid the force of these clear constitutional principles lack merit.

Plaintiffs first argue that when public officials decline to defend initiatives, the People's only recourse is "at the ballot box—by voting out of office state officials who decline to defend an initiative." (Pls. Br. 13.) But even if new officials could be elected in time to defend against pending litigation (and in most cases they cannot), the voters should not be required to resort to a second election merely to obtain a defense of a law they have already enacted. More fundamentally, the same argument could be leveled against the existence of the initiative power itself. Indeed, opponents of California's 1911 initiative amendment argued that "[t]he voter can much more readily and discriminately select honest representatives to make the laws than he can determine what laws are honest and beneficial to the whole commonwealth." (*See* *http://traynor.uchastings.edu/ballot_pdf/1911g.pdf* , at p. 10 [last visited 4/15/11].)

Plaintiffs also argue that denying Proponents the ability to defend Proposition 8 on appeal will not nullify the People's exercise of their initiative power because "proponents were permitted to

intervene in the district court." (Pls. Br. 13-14.) But the People certainly are entitled to appellate review of a single district court's decision striking down the initiative they have enacted, especially since that decision conflicts with the judgment of every State and federal appellate court to consider the validity of the traditional opposite-sex definition of marriage under the Federal Constitution—including both the United States Supreme Court and the Ninth Circuit—all of which have upheld that definition.[1] Indeed, the California Constitution *requires* State agencies to enforce state law unless it has been invalidated by an *appellate* court. (*See* Cal. Const., art. III, § 3.5(c).)

More generally, San Francisco argues that in California, "[i]nitiatives rarely go undefended, either in federal or state court." (SF Br. 7.) This observation, of course, merely reflects the facts (1) that public officials generally do fulfill their duty to defend the

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[1] *See Baker v. Nelson* (1972) 409 U.S. 810; *Citizens for Equal Protection v. Bruning* (8th Cir. 2006) 455 F.3d 859, 871; *Adams v. Howerton* (9th Cir. 1982) 673 F.2d 1036, 1042; *Dean v. District of Columbia* (D.C. Ct. App. 1995) 653 A.2d 307, 308; *Jones v. Hallahan* (Ky. 1973) 501 S.W.2d 588, 590; *Baker v. Nelson* (Minn. 1971)191 N.W.2d 185, 187; *In re Marriage of J.B. and H.B.* (Tex. Ct. App. 2010) 326 S.W.3d 654; *Standhardt v. Superior Court of Ariz.* (Ariz. Ct. App. 2003) 77 P.3d 451, 453; *Singer v. Hara* (Wash. Ct. App. 1974) 522 P.2d 1187, 1197.

People's interest in their initiatives and, more relevant here, (2) that the courts have uniformly allowed official proponents to defend in lieu of public officials who refuse to do so. But the arguments advanced by Respondents here plainly would eliminate, or at least sharply curtail, the latter practice.[2]

In addition, San Francisco argues that initiative proponents can ensure the defense of their initiatives by including provisions in those measures that expressly delegate "defense or enforcement powers to people whom they believe will use them properly." (SF Br. 25.) But even assuming San Francisco is serious about this argument—and it elsewhere appears to argue that an initiative allowing proponents to defend their initiatives "would risk being invalidated as a revision to the Constitution," SF Br. 20—there is no reason to inject such needless complexity into the initiative process. To the contrary, initiative proponents and the People are surely entitled to rely on the assumption that public officials will defend the laws the People have

[2] Plaintiffs argue that official proponents may be permitted to intervene in actions challenging their initiatives "to represent their own interest in the measure's validity," Pls. Br. 13-14, but elsewhere argue that this interest is no different from that of any other initiative supporter, *id.* at pp. 1-3, 8, 14-15, 19, 21-23, 25, an interest that has been held insufficient to support intervention. (*See City & County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1038; *In re Marriage Cases* (2008) 43 Cal.4th 757, 790.)

enacted—as both Plaintiffs and San Francisco point out, the Government Code expressly provides that "[t]he Attorney General *shall* . . . defend all causes to which the State, or any State officer is a party in his or her official capacity," *id*. § 12512 (emphasis added), and in fact the Attorney General generally complies with this directive. Initiative proponents and the voters are likewise entitled to rely on the cases in which this Court and the courts of appeal have allowed official proponents to intervene to defend their measures, including when public officials refuse to do so. (*See* Prop. Br. 17-18 [collecting cases].) In all events, the requirement proposed by San Francisco would be patently unjust if applied retroactively to Proposition 8 and other initiatives the voters have already adopted—because, for the reasons set forth above, the proponents and voters had no reason to think such specificity was necessary at the time they drafted and approved those initiatives.[3]

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[3] Despite its strained attempts, *see* SF Br. 22, San Francisco is unable to muster even a single initiative specifying that it may be defended by its proponents if public officials refuse to do so. San Francisco does cite a pending Senate bill that would, among other things, expressly authorize official proponents to defend their initiative "in the place of the Attorney General, if he or she is disqualified." (*Id.* at p. 23, fn. 10.) But this bill was introduced just last December, after Respondents raised the argument that Proponents lacked standing to defend Proposition 8 in this case. In all events, it is

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

Even San Francisco is forced to concede that "a host" of decisions by this Court and the courts of appeal have permitted official proponents to intervene to defend their initiatives, SF Br. 39, and Plaintiffs do not dispute this fact. Plaintiffs contend, however, that "those decisions allowed proponents to pursue their *own* interests in the validity of the ballot initiative, not to represent the interests of the *State*." (Pls. Br. 14.) Leaving aside that Plaintiffs' reading of these cases would support Proponents' alternative argument that they have a personal, particularized interest in the validity of their initiative under California law, the decisions do not say this. To the contrary, as discussed above, this Court has expressly addressed the issue and, as San Francisco aptly concedes:

> *Building Industry Association* focuses not on the interest of individual proponents but instead on whether an intervener is available to champion voters' interests. (*Id.* at 822.) Allowing intervention satisfies this concern, but *Building Industry Association* says nothing about the *personal* interest proponents possess, or the injury they suffer if the government does not appeal from a decision striking a measure.

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difficult to see how such a statute could be reconciled with the extreme view of the Attorney General's exclusive constitutional litigation authority advanced by Respondents in this case.

(SF Br. 42.) While San Francisco asserts that *Building Industry Association*'s analysis is dictum, *see* SF Br. 41, we have already demonstrated why that is incorrect, *see* Prop. Br. 18-19.

The numerous decisions routinely permitting official proponents to intervene surely must be understood in light of this Court's clear explanation of this practice in *Building Industry Association*, as well as this Court's established practice of construing and preserving the initiative power "to the fullest tenable measure of spirit as well as letter," *Strauss, supra*, 46 Cal.4th at p. 453, in order "to maintain maximum power in the people," *Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, 1032. Nor can these numerous decisions be dismissed, as San Francisco would have it, as meaningless. (*See* SF Br. 31.) To the contrary, the consistent, longstanding, and heretofore unquestioned practice of the California courts in allowing official proponents to intervene to defend their initiatives is highly probative of the propriety of this practice and the authority of official proponents under California's Constitution.

In all events, as we have demonstrated, *see* Prop. Br. 24-28, the California case law permitting official proponents to intervene goes

far beyond the authority found sufficient by the Supreme Court in *Karcher* to demonstrate that the leaders of New Jersey's Senate and General Assembly "had authority under state law to represent the State's interests" in lieu of the Attorney General and other named defendants who had refused to defend a state statute in federal litigation. (*Karcher v. May* (1987) 484 U.S. 74, 82.) While Plaintiffs assert that Proponents are "unable to point to any provision of California law that even remotely resembles the provisions" of New Jersey law involved in *Karcher*, they do not identify any such provisions of New Jersey law. In all events, the Supreme Court based its decision in *Karcher* on a single decision of the New Jersey Supreme Court that simply noted—without explanation or analysis—that the trial court had permitted these legislative leaders to intervene to defend a challenged statute *alongside* the Attorney General. (*See ibid.*; *In re Forsythe* (N.J. 1982) 450 A.2d 499, 500.) Neither the Supreme Court in *Karcher* nor the New Jersey Supreme Court in *In re Forsythe* relied on any provision of New Jersey law that matches Plaintiffs' unsupported assertions.

Contrary to Plaintiffs' claims, *see* Pls. Br. 17-18, nothing in this Court's decision in the *Marriage Cases* supports their position. As

Plaintiffs were forced to concede before the Ninth Circuit, the Proposition 22 Legal Defense and Education Fund ("Fund") was *not* the official proponent of Proposition 22:

Plaintiffs' Counsel:	[T]he California Supreme Court said in the Proposition 22 litigation that … [proponents] do not have standing.
Judge Reinhardt:	They said that proponents don't have standing?
Plaintiffs' Counsel:	Proponents do not … have standing. For example, in the Proposition 22 case, the fund that was involved -
Judge Reinhardt:	But they weren't the proponents, were they?
Plaintiffs' Counsel:	Well, they were put forward as the proponents.
Judge Reinhardt:	But that doesn't fool the Court. They were not the proponents.
Plaintiffs' Counsel:	They were not the proponents. They were not strictly the proponents, your Honor.
Judge Reinhardt:	I don't know what "strictly" means. They were not the proponents.
Plaintiffs' Counsel:	They claimed to be the proponents.
Judge Reinhardt:	But they were not.

Plaintiffs' Counsel: I don't think they were.

(Oral Argument at 46:45, *Perry v. Schwarzenegger* (9th Cir. Dec. 6, 2010) No. 10-16696.) And while the California courts have sometimes treated organizations that were directly involved in drafting and sponsoring initiatives the same as official proponents, *see* SF Br. 42, 44-45,[4] the Fund "played no role in sponsoring Proposition 22" and "was not even created until one year *after* voters passed the initiative." (*City & County of San Francisco, supra*, 128 Cal.App.4th at p. 1038.) Nor could the Fund "be said to represent [the official proponents'] interests" because the official proponent who was once a

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[4] *See, e.g., Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250 ["Voter Revolt, the organization that drafted Proposition 103 and campaigned for its passage, successfully sought to intervene"]; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 243 [Voter Revolt intervened to defend Proposition 103]; *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 626 [California Tax Reduction Movement "intervened in the action to defend the measure [Proposition 62] it had sponsored"]; *Legislature v. Eu*, (1991) 54 Cal.3d 492, 500 ["Intervener, Californians for a Citizen Government, is the organization that sponsored Proposition 140"]; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153, 157 [intervention by CORD, "an unincorporated association of residents and registered voters … whose purpose was to draft and organize voter support for" the challenged initiative]; *cf. Sonoma County Nuclear Free Zone '86 v. Superior Court* (1987) 189 Cal.App.3d 167, 171 [treating "[t]he group supporting the initiative, Sonoma County Nuclear Free Zone '86, *along with individual sponsors and proponents of the initiative (referred to collectively as Pro-NFZ)*" as proponents] [emphasis added].

member of the Fund was "now deceased," and because nothing in the record "suggest[ed] [that] any other member of the Fund was an official proponent of Proposition 22." (*Ibid*.; *see also ibid*. ["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"].) Nowhere in its decision in the *Marriage Cases* did this Court state or imply that the Fund "represent[ed] the proponent" of Proposition 22, let alone that it was an official proponent. Indeed, this Court expressly referenced the court of appeal's analysis of the Fund's interest in *City & County of San Francisco*. (*See In re Marriage Cases*, *supra,* 43 Cal.4th at p. 791, fn. 8.) Plaintiffs' continued invocation of this case as somehow speaking to the authority of official proponents under California law is thus perplexing at best.

Ultimately, the treatment of the Fund in the *Marriage Cases* and *City & County of San Francisco* belies Plaintiffs' claim that official proponents are treated identically to "all other private citizens in California" for purposes of intervention to defend their initiatives. (Pls. Br. 22.) Indeed, Respondents do not identify a single case in which any party other than an official proponent or an organization

directly involved in drafting and sponsoring an initiative was allowed to intervene to offer the sole defense of an initiative. Nor do they identify a single case where an official proponent was denied intervention to defend his or her initiative. The special treatment afforded official proponents confirms their authority under California law to vindicate the People's interest in defending initiatives when public officials refuse to do so.

Finally, Plaintiffs err in suggesting that *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43 and *Diamond v. Charles* (1986) 476 U.S. 54 establish that official proponents lack authority under California law to represent the People's interest in defending challenged initiatives. (*See* Pls. Br. 12, 14-15.) In dicta in *Arizonans*, the Supreme Court discussed, but did "not definitively resolve" the question whether the principal sponsor of an Arizona ballot initiative had standing to appeal a decision invalidating that measure. (520 U.S. at p. 66.) Citing *Karcher*, the Court explained that it had previously "recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests." (*Id*. at p. 65.) The Court, however, distinguished *Karcher*: "AOE [the initiative sponsor]

and its members, however, are not elected representatives, and we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Ibid*.[5] Indeed, although the Supreme Court specifically directed the Arizona initiative sponsors to brief the issue of their standing, their brief did not cite a single Arizona case on the question of state-law authorization. (*Arizonans*, 520 U.S. at p. 64; Brief for Petitioners, *Arizonans*, No. 95-974, 1996 U.S. S. Ct. Briefs LEXIS 333, at *67-77 [May 23, 1996].) Certainly none of the Arizona cases cited by Plaintiffs here, *see* Pls. Br. 15, fn. 1, were brought to the Court's attention. In all events, unlike *Strauss* and other California cases identified by Proponents, none of Plaintiffs' Arizona cases allowed an initiative sponsor to intervene to defend a law when State officials would not. *Diamond* is even further afield—the private intervener in

[5] Quoting only the first part of this sentence, Plaintiffs claim that *Arizonans* "distinguished *Karcher* on the ground that ballot initiative proponents 'are not elected representatives.' " (Pls. Br. 12 [quoting *Arizonans*, 520 U.S. at p. 65].) But as is evident from the full sentence quoted in the text, the salient distinction between *Karcher* and *Arizonans* was the absence of Arizona law authorizing initiative sponsors to defend those measures on behalf of the State; the Court certainly did not advance the extraordinary suggestion that Article III of the Federal Constitution somehow forbids States from authorizing individuals other than "elected representatives" to defend their laws.

that case neither claimed, nor had any plausible basis for claiming, that he possessed authorization under state law to represent the State's interest in defending its laws. That case thus did not even address the question of who could represent the State's interest under the relevant state law applicable there, let alone hold that no one other than the State Attorney General could do so.

C. Reaffirming That Official Proponents May Defend Their Initiatives Would Not Infringe the Attorney General's Authority Or Violate Separation of Powers Principles.

Respondents argue that permitting official proponents to represent the People's interest in defending their initiatives would impermissibly infringe upon the Attorney General's constitutional and statutory authority, *see* Pls. Br. 1, 13, and would violate constitutional separation of powers, *see* SF Br. 1, 7-10, 18. These arguments lack merit.

1. Plaintiffs place great emphasis on Article V, section 13 of the California Constitution, which provides in relevant part as follows: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." (*See* Pls. Br. 9.) As a textual matter,

however, this provision does not even explicitly address the Attorney General's authority to defend the laws of the State, let alone state that no one besides the Attorney General may do so. Nor do any of the cases cited by Respondents address whether a party other than the Attorney General may defend a state law. (*See* Pls. Br. 9-10 [collecting authorities]; SF Br. 9-10 [same].)

Even with respect to "enforc[ing]" the law, moreover, it is well settled that "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty," *any citizen* of the State may seek a writ of mandamus to enforce the law simply because "he is interested as a citizen in having the laws executed and the duty in question enforced." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144) Thus, for example, as San Francisco concedes, "If elected officials decline to enforce an initiative on constitutional grounds," its proponents—or indeed any citizens of California—may file "a mandamus action asserting a public right to performance of a public duty." (SF Br. 26, fn. 12.)[6] Similarly, as San Francisco also concedes, until recently California allowed citizens who had suffered

[6] This procedure appears to be unavailable where, as here, public officials enforce an initiative but refuse to defend that measure in court.

no direct injury to enforce its unfair competition laws through "private attorney general actions." (SF Br. 33-34; *see also Amalgamated Transit Union v. Superior Court* (2009) 46 Cal.4th 993, 1000.) Such private enforcement of the State's laws would surely be unconstitutional were Plaintiffs' reading of the Attorney General's authority under Article V, section 13 in fact the law. (*See Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 440 [holding that to infer limitations on citizen standing in favor of exclusive enforcement authority for Attorney General would "contradict … our recognition of a 'public interest' exception to the requirement that a petitioner for writ of mandate have a personal beneficial interest in the proceedings"].)

Although California imposes stricter limits on who may *defend* its laws, *see, e.g., In re Marriage Cases, supra,* 43 Cal.4th at pp. 790-91; *Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1178-79, the precedents identified in our opening brief and discussed above amply demonstrate that California's Constitution does not bar parties other than the Attorney General from representing the People's interest in defending their laws. Indeed San Francisco itself cites an original action filed in the California Supreme Court by California's

first Attorney General against a public official charged with executing a law enacted by California's first legislature. (*See Ex Parte People ex rel. Attorney General* (1850) 1 Cal. 85 [cited in SF Br. 13].) Contending that the California statute violated the Federal Constitution, the Attorney General "prayed that leave might be granted him to file an information in this Court in the nature of a *quo warranto*" against the public official and that the official "be required to appear and show by what authority he exercised [his] office." (*Id.* at 85.) Although this Court refused the writ on the ground that it lacked original jurisdiction over the suit, it was plainly understood by all involved that the public official, and not the Attorney General, would have defended the validity of the challenged law had jurisdiction been proper. (*Cf., e.g., Kopp v. Fair Political Practices Commission* (1995) 11 Cal.4th 607, 614 [California legislature allowed to intervene to defend Agency's enforcement decision; Agency took a neutral position on the issue]; *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 740 [Legislature defended successful initiative it had proposed].)[7]

[7] San Francisco also cites examples from other jurisdictions in support of the undisputed proposition that executive officers sometimes—though rarely—decline to defend laws that they believe

Indeed, San Francisco concedes that "other actors," besides the Attorney General, "may sometimes represent the State," though it claims they do so only through delegations that "are express, narrow, and typically subject to the Attorney General's supervision." (SF Br. 19, fn. 8.) And it acknowledges that "drafters of statutes or amendments" may "reassign litigating authority away from the Attorney General." (SF Br. 23.) While the cases cited above make clear that an express statutory delegation of litigating authority to actors other than the Attorney General is not always necessary, such statutory delegations would be plainly unconstitutional if Respondents were correct that only the Attorney General has authority to represent the People's interest in the validity of their laws.

Nor does permitting parties other than the Attorney General in some circumstances to defend the validity of laws infringe the Attorney General's authority as the "chief law officer of the State" or

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are unconstitutional. These cases obviously do not speak to the question of whether official proponents are authorized by California law to defend initiatives when public officials refuse to do so. The cases do demonstrate, however, that those responsible for enacting the challenged laws are commonly allowed to defend those measures in lieu of executive officials who refuse to do so. (*See, e.g., Metro Broadcasting, Inc. v. FCC* (1990) 497 U.S. 547, 551 [FCC, among others, defended a policy it had adopted]; *INS v. Chadha* (1983) 462 U.S. 919, 930 & fn. 5 [both Houses of Congress intervened to defend federal statute].)

interfere with the Attorney General's "duty … to see that the laws of the State are uniformly and adequately enforced." Cal. Const., art. V, § 13. For example, there is little doubt that had one of the County Clerks named by Plaintiffs as a defendant chosen to defend Proposition 8, he would have been free to do so and to appeal the district court's decision, regardless of the Attorney General's litigating decisions. And surely such litigation choices by a defendant County Clerk would not infringe the Attorney General's litigation authority.

Similarly, recognizing Proponents' authority to defend their initiative in no way prevents the Attorney General from litigating in whatever manner he or she chooses. Contrary to Respondents' straw man contentions, *see* SF Br. 11-12, Proponents do not seek to compel the Attorney General to defend Proposition 8 or to appeal the district court's judgment. Rather, Proponents simply maintain that they are authorized under California law to defend their initiative on behalf of the People if public officials refuse to do so and that this authority includes power to notice an appeal if necessary. In opposing Proponents' right to do so, Respondents do not seek to preserve the Attorney General's discretion to decide whether to defend an

initiative. Rather, they seek to secure to the Attorney General the authority to effectively nullify an initiative by refusing to defend it *and* by barring anyone else from doing so.

2. Respondents also argue that reaffirming official proponents' authority to represent the People's interest in the validity of initiatives violates sections 12511 and 12512 of the California Government Code, which provide, respectively, that "[t]he Attorney General has charge, as attorney, of all legal matters in which the State is interested," and that "[t]he Attorney General shall … prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity." These statutes, however, simply impose upon the Attorney General the duty to take charge of and defend litigation to which the State or its officers are parties, and nothing in Proponents' argument would prevent the Attorney General from doing so. These statutes do not speak to the consequences of the Attorney General's refusal to take charge of and defend litigation, let alone preclude anyone else from defending the People's interest in the validity of their laws when the Attorney General declines to do so. In all events, these statutes have long coexisted with the numerous decisions, discussed above, that have permitted parties besides the

Attorney General to vindicate the People's interest in the defense of their laws.

3. San Francisco also contends that the People's constitutional initiative power is exclusively legislative, and that allowing official proponents to defend initiatives violates Article III, section 3 of the California Constitution. (*See* SF Br. 16-18.) That provision provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) This argument plainly lacks merit.

First, the initiative provisions of the Constitution do not limit the People or official proponents to the exercise of legislative power. To the contrary, these provisions were "drafted in light of the theory that *all* government power ultimately resides in the people." (*Building Industry Association, supra*, 41 Cal.3d at p. 821 [emphasis added]; *accord* Cal. Const., art. II, § 1.) "[L]iberally construed," as they must be, "to maintain maximum power in the people," *Independent Energy Producers Association, supra,* 38 Cal.4th at p. 1032, the initiative provisions authorize official proponents to defend initiatives when public officials "might not do so with vigor," in order

"to guard the people's right to exercise initiative power." (*Building Industries Association, supra*, 41 Cal.3d at p. 822.) Because the initiative provisions permit official proponents to defend their initiatives, Article III, section 3—which exempts the exercise of powers "permitted by this Constitution"—simply does not apply.

More fundamentally, California's separation of powers doctrine "does not command a hermetic sealing off of the three branches of Government from one another." (*Obrien v. Jones* (2000) 23 Cal.4th 40, 48 [internal quotations omitted].) Rather, the doctrine "is expressed in a system of checks and balances designed to prevent any governmental branch from obtaining arbitrary or inordinate power." *California Association of Retail Tobacconists v. State* (2003) 109 Cal.App.4th 792, 830. While allowing the Attorney General effectively to nullify the People's exercise of the initiative power thus might well violate the separation of powers doctrine, allowing those who exercise legislative authority to defend the People's interest when the Attorney General refuses to do so does not.

As San Francisco's own authority makes clear, the separation of powers doctrine "has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the

result that once a technique or method or procedure is associated with a particular branch of the government, it can never be used thereafter by another." (*Marine Forests Society v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 42; *see also* SF Br. 19 [citing *Marine Forests Society*].) Accordingly, the fact that Executive officers ordinarily defend the validity of laws does not mean that those who exercise legislative authority can never perform this function. It may be true, as San Francisco implies, that it is an open question whether the California Legislature can intervene to defend its enactments when Executive officials refuse to do so. (*See* SF Br. 18.) But the Legislature has been permitted to defend its own successful ballot propositions, *Californians for an Open Primary*, *supra*, 38 Cal.4th at p. 740, and even to defend enforcement decisions by an executive agency when the agency declined to take a position, *Kopp*, *supra*, 11 Cal.4th at p. 614. Accordingly, there is no reason to think that permitting the Legislature to defend its own enactments when Executive officials refuse to do so would violate California's separation of powers principles.[8] At a minimum, these cases make

[8] An analogous argument could have been made against the Legislature defending its enactments in New Jersey, where the State Constitution likewise provides that "[t]he powers of the government

clear that defending the interests of the State is not in all circumstances the exclusive province of the Executive. And if San Francisco is correct that official proponents may exercise only legislative power, the numerous cases permitting them to defend their initiatives further belies San Francisco's rigid separation of powers argument.

D. Permitting Official Proponents To Represent the People's Interest in the Validity of Initiatives Would Not Have Untoward Consequences.

San Francisco argues that public power should not be entrusted to "secretive single-interest group[s]," who may be accountable to "monied interests or special interest groups" rather than "California's citizens," and may have dark and hidden agendas. (SF Br. 27.) Such concerns are plainly ludicrous. By definition, a successful initiative has been approved directly by the People themselves, and there is no secret or hidden agenda in defending the People's will when

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shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." (N.J. Const., art. III, ¶ 1.) Yet the Supreme Courts of both New Jersey and the United States have recognized that New Jersey law permits the legislature, through its officers, to defend its enactments. (*See Karcher, supra*, 484 U.S. at p. 82; *In re Forsythe, supra*, 91 N.J. at p. 144.)

challenged in court. Indeed, by adopting a law through the initiative process, the People have made clear both that they wish to override their elected officials' judgment and that they want that law to be enforced and defended.

More generally, San Francisco's objection would appear to be to the initiative process itself, which allows citizens to participate directly in their government. And San Francisco's claim that initiative proponents, unlike elected officials, may be beholden to monied interests or special interests rather than the People has it exactly backwards. Indeed, it is precisely because the People believed that *elected officials* can, and too often do, favor special interests over the will of the People that the initiative process was adopted in the first place. As this Court has explained, the initiative provisions "grew out of a widespread belief that moneyed special interest groups controlled government, and that the people had no ability to break this control." (*Strauss, supra*, 46 Cal.4th at p. 420 [quotation marks omitted].) Similarly, though San Francisco frets that official proponents, unlike public officials, will not take account of other (presumably competing) policies in deciding to defend an initiative, the People usually resort to the initiative process precisely because

they disagree with public officials' decisions to sacrifice the People's concerns to other policy objectives.[9]

San Francisco's professed concern about the cost of litigation and liability for damages and attorneys' fees, *see* SF Br. 28, likewise lacks merit. In this case Proponents, not California, have born and are bearing the cost of defending the People's will and Plaintiffs have not sought money damages. To be sure, the State may be liable for the attorneys' fees incurred by Plaintiffs in challenging Proposition 8 through a full blown trial if Proponents are not permitted to appeal the trial court's decision. But the Attorney General's decision not to appeal hardly reflects concern that the State may be liable for appellate attorneys' fees. Indeed, the risk of additional liability for the relatively modest fees associated with an appeal is plainly outweighed

[9] San Francisco also raises the hypothetical possibility that official proponents of an initiative might disagree among themselves about litigation strategy. (See SF Br. 30.) But it seems doubtful that official proponents would disagree about whether the initiative they successfully sponsored should be defended if challenged in court. In all events, there is plainly no such conflict here. Although, as San Francisco notes, one official proponent sought to withdraw from the case and did not notice an appeal after being subjected by Plaintiffs to intrusive discovery and intense public scrutiny, there is no indication that he opposes Proponents' defense of Proposition 8. Surely San Francisco would not argue that if one of the proponents of an initiative left California, died, or otherwise became unavailable, the remaining proponents would be disabled from exercising any authority they previously had.

by the potential for avoiding liability for attorneys' fees altogether if the district court's decision is reversed, especially given that every state and federal appellate court to consider the validity of the traditional definition of marriage under the Federal Constitution has rejected the district court's conclusions. (*See supra* p. 5, fn. 1.)

San Francisco also voices concern about the difficulty of determining when the Attorney General is not defending an initiative with vigor, *see* SF Br. 20, and contends that "there is no principled way to draw a line between delegating Proponents the authority to appeal on behalf of the State and delegating Proponents other decisions," *see id*. 30. Whatever the outer limits of the principle this Court articulated in *Building Industry Association*, however, *see* 41 Cal.3d at p. 822, there can be no question that it applies in cases such as this one where the Attorney General not only declines to defend an initiative adopted by the People but affirmatively attacks the measure as unconstitutional. Under such circumstances, official proponents must be allowed to defend the People's interest lest the Attorney General's litigation decisions be converted into an impermissible veto of the sovereign People's precious right to exercise initiative power.

II. Proponents' Have a Personal, Particularized Interest In Proposition 8's Validity

California law clearly affords "the proponent of [a] ballot initiative" 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" when it comes to "litigation involving that initiative." (*Connerly, supra*, 37 Cal.4th at p. 1179.) This "special" and "particular" interest is not shared by groups with "a particular ideological or policy focus that motivates them to participate in certain litigation" involving an initiative, who *unlike* proponents have interests that are "no different in substance from like-minded members of the general public." (*Ibid*.) Respondents' attempts to paint Proponents as no different from the millions of Californians who support Proposition 8 thus lack merit.

A. Proponents' Standing to Defend Their Personal Interest in the Validity of Proposition 8 in Federal Court is Rooted in California Law Creating that Interest.

Plaintiffs first argue that, because Article III standing is an issue of federal law, "this Court does not have any peculiar insights to provide the Ninth Circuit" regarding Proponents' "particularized interest" in Proposition 8. (Pls. Br. 21.) But as even San Francisco

acknowledges, "when states confer rights, the denial of those rights may sometimes create an injury that is concrete and particularized enough that it creates standing." (SF Br. 33.) Indeed, before the Ninth Circuit *Plaintiffs* took the position that "Proponents' claim of standing [to assert their interest in Proposition 8] … *rises or falls* on the strength of their assertion[] that … California law creates a particularized interest in initiative proponents." (*Perry v. Brown*, 10-16696, Brief for Appellees 30-31 [9th Cir. Oct. 18, 2010] [emphasis added].)

Plaintiffs had it right the first time. While Article III standing is a matter of federal law, States have "the power to create new interests, the invasion of which may confer standing," creating the potential for "circumstances in which a private party *would have standing to defend the constitutionality of a challenged statute*." (*Diamond v. Charles* (1986) 476 U.S. 54, 65 & fn. 17 [emphasis added]; *see also Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 578 ["the injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing"] [quotation marks omitted]; *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 373 [same]; *Warth v. Seldin* (1975) 422 U.S. 490, 500 [same]). The

question whether Article III standing exists, in other words, "often turns on the nature and source" of the interest asserted. (*Warth*, 422 U.S. at p. 500.) Here, the nature of Proponents' interest is in the validity of Proposition 8, and the source of that interest is California law. As the authoritative expositor of California law, far from lacking "any peculiar insight" regarding Proponents' interest in Proposition 8, this Court's opinion on the matter is authoritative.

By contrast, a State law that *does not* create a particularized interest in a party cannot support Article III standing regardless of how it is treated by State courts. This principle is illustrated by Plaintiffs' citations to *DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332 and *Raines v. Byrd* (1997) 521 U.S. 811. In *DaimlerChrysler*, the Supreme Court held that Ohio residents lacked standing to challenge a state tax program because their claim to standing was principally rooted in "their status as Ohio taxpayers," not any particularized interest created by Ohio law. (547 U.S. at p. 342.) And in *Raines*, the Supreme Court held that members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act, despite the fact that the Act provided that "[a]ny Member of Congress … may bring an action ... for declaratory

judgment and injunctive relief on the ground that any provision of this part violates the Constitution." (521 U.S. at pp. 815-16.) But the Act plainly did not create a particularized interest in its own invalidity. (*See id*. at p. 829.)

The same principle is illustrated by San Francisco's citations of California law allowing private attorney general actions authorizing taxpayers to challenge wasteful or illegal government expenditures and relaxing the standing requirements for citizens suing when a public right is at stake. (*See* SF. Br. 34.) In each of these situations, California law does not create any *particularized* interest in the individuals it permits to appear in court. (*See People v. Beltz Travel Serv., Inc.* (N.D. Cal. 1992) 379 F. Supp. 948, 950 [plaintiffs suing pursuant to private attorney general law did "not allege that they were personally injured, but claim[ed] a derivative right … to sue on behalf of persons who did suffer such injury"]; *White v. Davis* (1975) 13 Cal.3d 757, 765 ["under section 526a no showing of special damage to the particular taxpayer [is] necessary"] [quotation marks omitted]; *Green*, *supra*, 29 Cal.3d at p. 144 ["relator need not show that he has any legal or special interest in the result"].) Proponents, by contrast,

do have a particularized interest created by State law in Proposition 8's validity, as demonstrated below.

B. Proponents Have a Particularized Interest in Proposition 8's Validity.

As noted above, this Court in *Connerly* distinguished the "special" and "particular" interest held by "the proponent of the ballot initiative" from the interests held by "members of the general public." (37 Cal.4th at p. 1179.) In light of this decision, there is little substance to Respondents' argument that in the cases in which initiative proponents were named real parties in interest the propriety of that designation was often not at issue. It is surely no accident that litigants challenging initiatives name the initiative's proponents as real parties in interest as opposed to, say, random Californians who voted for the initiative. Indeed, in *Sonoma County*, *supra*, 189 Cal.App.3d 167—which this Court discussed approvingly in *Connerly*—the Court of Appeal held that "the issuance of a peremptory writ [of mandate regarding an initiative] by the trial court was *beyond the pale of its authority* because Pro-NFZ [the group supporting the initiative along with individual sponsors and proponents of the initiative] had no notice of the hearing on the petition" because petitioners had not named them as real parties in interest. (*Id.* at pp. 175-76 [emphasis

added].) Respondents, of course, have not identified a single case in which a California court has held that a party challenging an initiative *erred* by designating an initiative proponent as a real party in interest.

San Francisco also claims that "for intervenor status and status as real party in interest … California law requires only that the party possess an interest." (SF Br. at 38.) But California law on these matters is more demanding than San Francisco lets on. In *City and County of San Francisco*, *supra*, 128 Cal.App.4th at p. 1043, for example, the Court of Appeal explained that intervention under Section 387(a) requires a "direct and immediate interest" in the litigation such that "the moving party will either gain or lose by the direct legal operation and effect of the judgment." Indeed, it emphasized that this statute imposes a "stricter test" for intervention than do the Federal Rules of Civil Procedure. (*Ibid*.) Similarly, this Court in *Connerly* explained that "a real party's direct interest must be … 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." (37 Cal.4th at p. 1179 [quotation marks omitted.]) That initiative proponents are regularly deemed to have met these standards

underscores the particularized nature of the interest they have in their initiatives.

Plaintiffs argue that *Connerly* is of little significance because the case "did not involve an initiative proponent at all." (Pls. Br. 23-24.) But that is precisely the point—this Court held that the appellants in *Connerly*, *unlike* official proponents in litigation involving the initiative they sponsored, were *not* proper real parties in interest. (*See* 37 Cal.4th at p. 1179.)

Plaintiffs also attempt to distinguish *Connerly* on the ground that the *Sonoma County* case it discusses "arose in the pre-election context." (Pls. Br. 24.) Yet *Sonoma County* demonstrates that this distinction does not make a difference with respect to proponents' interests in their initiative. In that case, "proponents of the Sonoma County Nuclear Free Zone Initiative filed [a pre-election] petition for extraordinary relief" with the Court of Appeal. (189 Cal.App.3d at p. 170.) The Court of Appeal, however, did not address the merits of the petition until *after* the election because it was "unwilling to interfere with the electoral process" and "disinclined to resolve important legal questions under severe time pressures." (*Ibid*.) The court thus issued an "alternative writ to resolve important questions of law concerning

aspects of the electoral process" *after* the election. (*Ibid.*) The court at no point expressed any concern that putting the case off until after the election could affect proponents' interest in the initiative. This Court has likewise deferred decision of challenges to initiatives defended by their official proponents until after those measures were submitted to the voters, a practice that cannot be reconciled with Respondents' claim that initiative proponents lose any special interest their initiatives once the election has taken place. (*See, e.g.*, *Independent Energy Producers Association*, *supra*, 38 Cal.4th 1020; *Costa v. Superior Court* (2006) 37 Cal.4th 986.)

Nor is there merit in Plaintiffs' further contention that "nothing turned on the initiative proponents' designation as a real party in interest" in the post-election cases we have cited. (Pls. Br. 24.) In *Simac*, *supra*, 92 Cal.App.3d 146, for example, the City of Morgan Hill denied issuance of building permits to Simac on the basis of a recently enacted growth control initiative. Simac filed a complaint for a writ of mandate ordering the City of Morgan Hill to issue the permits. (*Id.* at p. 151.) After the court granted the writ, Morgan Hill did not appeal, but Citizens for Orderly Residential Development (CORD), "an unincorporated association of residents of and registered

voters in Morgan Hill, whose purpose was to draft and organize voter support for" the initiative moved to intervene and vacate the judgment. (*Id.* at p. 153.) The court denied CORD's motion, and CORD appealed. On appeal, Simac argued that CORD was not an "aggrieved party" entitled to appeal. After explaining that "one is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment" and that "[a]ppellant's interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment," the Court of Appeal held that CORD was entitled to appeal. (*Simac*, 92 Cal.App.3d at p. 153.) Thus, CORD's right to appeal hinged on the direct and substantial nature of its interest in "seek[ing] to implement" the initiative it had drafted. (*Ibid*.)

Implicitly recognizing the futility of drawing any meaningful distinction between initiative proponents' interests pre- and post-election, San Francisco alternatively claims that "challenges to initiatives may be categorized as whether an initiative was procedurally proper as to *form* … versus whether the initiative's *substance* is valid," with initiative proponents having no special interest in cases falling in the "substance" category. (SF Br. 40, fn.

16.) This distinction, however, is refuted by the case law, as initiative proponents have frequently been permitted to defend against substantive challenges to their measures. (*See, e.g., Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 663-65; *Hotel Employees & Rest. Employees Int'l Union v. Davis* (1999) 21 Cal.4th 585, 590.) And San Francisco certainly has not cited any cases supporting the contrary proposition; *i.e.*, that initiative proponents do not have any particular interest in the substance of their initiatives.

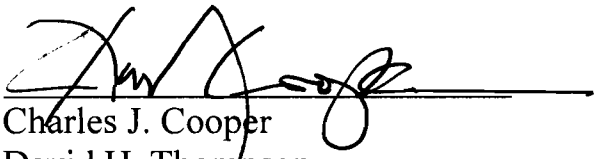
* * * * *

San Francisco closes its brief by asserting that Proponents have not identified what injury would flow to them from a judgment invalidating Proposition 8. The answer to that question is self-evident: the district court's judgment threatens to nullify Proponents' exercise of their fundamental right to propose an initiative amendment to the California Constitution and their efforts in fulfilling the corresponding duties imposed upon them by State law. As demonstrated by the principles enunciated by this Court and this Court's practice in cases involving challenges to initiatives, this is not a "wholly abstract and widely dispersed" injury, (SF Br. 47), but

rather an injury that will fall uniquely and particularly on Proponents, and it is one that they have a right to defend against in court.

April 18, 2011

Respectfully submitted,



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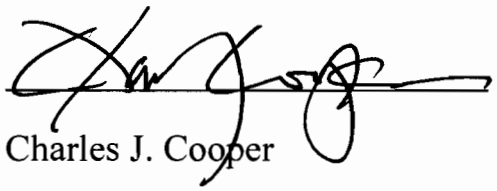
CERTIFICATE OF COMPLIANCE

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 8,396 words.



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Executed on April 18, 2011 at Washington, D.C.

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