In the Supreme Court of the State 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., et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors and Petitioners.

Case No. S189476

Question Certified by Request of the United States Court of Appeals for the Ninth Circuit, Case No. 10-16696

BRIEF OF ATTORNEY GENERAL KAMALA D. HARRIS AS AMICUS CURIAE

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QUESTION CERTIFIED

> 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.

INTRODUCTION

Attorney General Kamala D. Harris submits this brief as amicus curiae pursuant to California Rules of Court, rule 8.520(f)(8). Although the Attorney General, in her official capacity, was a defendant in the underlying case in the United States District Court, she did not appeal the judgment, so she is not a party to the underlying appeal or to these proceedings. But the question certified to this Court by the Ninth Circuit, if answered affirmatively, threatens to intrude on the exercise of discretionary powers that the California Constitution and the Government Code entrust to state officials exercising executive power. Therefore, the Attorney General, whom the Constitution appoints the chief law officer of the state (Cal. Const. art. V, § 13), submits that the correct answer to the certified question is "no." Standing alone, the role of official proponents in the exercise of the initiative power does not confer on the proponents of a successful initiative a substantive right either to defend that measure or to appeal a judgment invalidating it.

The question certified reveals two basic misunderstandings about the initiative power. First, it confuses the authority and role of "proponents" under California law with the authority and role of "the electors." The initiative is the power of the *electors, as a whole*, to propose and adopt or reject laws. (Cal. Const., art. II, § 8.) The initiative power does not belong

to the individual, or individuals, who propose a particular initiative. Second, the initiative power is a legislative power of government. As a legislative power, the power of initiative is fully executed on adoption of the measure. And, as a legislative power, the adoption of an initiative measure does not authorize its proponents to exercise any part of the executive power of government, either to enforce the measure, to defend the measure's validity, or to appeal a decision enjoining its enforcement. The constitutional and statutory authority to act on behalf of the state remains vested in public officials acting in an executive capacity.

Proponents of an initiative measure surely remain interested in its validity once it becomes law. And state courts recognize that interest by liberally granting proponents permissive leave to intervene (and to participate as amicus curiae) in cases challenging the validity of a successful initiative measure. In other cases, the validity of a measure may affect the lives of initiative proponents (or other members of the public) in a personal way that would permit them to sue or to defend their own legal interests in court. But once an initiative measure has become the law of the state – just as with laws passed by the Legislature – only public officials exercising the executive power of government have the legal authority to represent the state's interest and to decide whether to defend or to appeal an adverse judgment *in the name of the state.* California law affords an initiative's proponents no right to defend the validity of a successful initiative measure based only on their role in launching an initiative process.

Initiative proponents are private citizens. They are free to pursue their own interests because they represent no one and – perhaps more importantly – unlike legislators or other public officials, they are accountable to no one. Consequently, blurring the line between "proponents" and "the electors" and between the legislative power of

initiative and the executive powers of state officials would not preserve either the electors' power or the democratic process. Instead, it would rob the electors of power by taking the executive power from elected officials and placing it instead in the hands of a few highly motivated but politically unaccountable individuals. It is thus important to affirm that the state officials charged with enforcement of an initiative measure (and ultimately, the Governor and Attorney General) have discretion to decide whether or not *the state* will appeal from an adverse judgment striking down a measure that has become state law. It is also important for this Court to recognize that proponents' role in the initiative process gives them no greater stake in the validity of a law adopted by initiative than any of the other electors.

STATEMENT OF THE CASE

In 2008, this Court decided *In re Marriage Cases* (2008) 43 Cal.4th 757, holding that the California Constitution secures to gay men and lesbians an equal protection right to marry. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 384-385.) But later that year, California voters adopted Proposition 8, which created a constitutional ban on same-sex marriage. (See *id.* at pp. 385, 388; see Cal. Const, art. I, § 7.5 ["Only marriage between a man and a woman is valid or recognized in California"], added by initiative, Gen. Elec. [Nov. 4, 2008].)

The four plaintiffs (Plaintiffs) in the underlying case are a lesbian couple (Kristen Perry and Sandra Stier, who live in Alameda County) and a gay couple (Paul Katami and Jeffrey Zarrillo, who live in Los Angeles County) both of whom wish to marry in California but cannot do so as long as Proposition 8 is the law. (*Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 921, 927 [hereafter, *Perry 1*].) Shortly before this Court upheld Proposition 8 on state law grounds in *Strauss v. Horton*, *supra*, 46 Cal.4th 364, the Plaintiffs filed the underlying civil rights action pursuant to 42

U.S.C. § 1983, to enjoin state and local officials from enforcing Proposition 8 on federal constitutional grounds. (*Perry 1*, *supra*, 704 F.Supp.2d at p. 927.) The district court permitted the City and County of San Francisco (the City) to intervene as a plaintiff. (*Id.* at pp. 928-929.) The Attorney General, the Governor, the State Registrar of Vital Statistics (State Registrar, who is also the Director of the State Department of Public Health) and the clerk/recorders of Alameda and Los Angeles Counties were named as defendants in their official capacities.[1] (*Id.* at p. 928.)

Before any defendant responded to the complaint, the five official proponents of Proposition 8 (Proponents), as well as the official ballot committee, ProtectMarriage.com, moved to intervene as defendants. (*Perry 1, supra*, 704 F.Supp.2d 921, 928.) Proponents had dedicated substantial time and resources to campaigning for the initiative. (*Id.* at p. 954.) ProtectMarriage.com was responsible for all aspects of the campaign to qualify the measure for the ballot and enact it into law. (*Id.* at pp. 954-955.) Without opposition, their motion to intervene was granted. (See *id.* at p. 928.) Subsequently, then-Attorney General Edmund G. Brown Jr. answered by admitting that Proposition 8 violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment and declined to defend the initiative. (See *ibid.*) The other defendants, including then-Governor Arnold Schwarzenegger (who was represented by private counsel), did not admit the allegations of the complaint but also did not defend the initiative. (See *ibid.*) Proponents and ProtectMarriage.com controlled the defense of Proposition 8 in its entirety. (*Id*. at p. 930.)

[1] The Deputy Director of Health Information and Strategic Planning for the Department of Public Health was also a named defendant. (*Perry 1, supra,* 704 F.Supp.2d 921, 928.)

Though none of the government defendants was willing to *defend* the measure, they each conceded their obligation to *enforce* Proposition 8. (See City and County of San Francisco's Appendix to Answer Brief, Exh. 2 at ¶ 36, Exh. 3 at ¶ 36; *Perry 1, supra,* 704 F.Supp.2d 921, 928; see also Cal. Const., art. III, § 3.5.) No same-sex couples have married or obtained a license to marry in California since passage of Proposition 8. The district court denied a motion to realign the Attorney General as a plaintiff (filed by Proponents and ProtectMarriage.com) because, among other reasons, the Attorney General was enforcing the law. (See City and County of San Francisco's Appendix to Answer Brief, Exh. 6 at pp. 82, 83-84.)

In August 2010, after unsuccessful cross-motions for summary judgment, a three-week trial, and a full day of closing arguments, the district court issued findings of fact and conclusions of law. (*Perry 1*, *supra*, 704 F.Supp.2d 921, 921, 928-929.) The court concluded that Proposition 8 violates both the Equal Protection and Due Process guarantees of the Fourteenth Amendment. (*Id.* at p. 991.) The court also denied the motion to intervene as a defendant filed by the deputy clerk and Board of Supervisors of Imperial County (Imperial County) that had been interposed solely to ensure federal appellate jurisdiction. (*Perry v. Schwarzenegger* (9th Cir. 2011) 630 F.3d 898, 902 [hereafter, *Perry 5*].)

Four of the five Proponents[2] and ProtectMarriage.com immediately filed a notice of appeal and a motion to stay the judgment pending appeal, as did Imperial County. (*Perry v. Schwarzenegger* (N.D. Cal. 2010) 702 F.Supp.2d 1132, 1134 [hereafter, *Perry 2*].) The District Court denied the stay and ordered that judgment be entered against the defendants, as well as

[2] Defendant-Intervenor and Proposition 8 Proponent Hak-Shing William Tam did not join in the Notice of Appeal filed by the remaining four Proponents and ProtectMarriage.com. (See *Perry 2, supra,* 702 F.Supp.2d 1132, 1134.)

against defendant-intervenors Proponents and ProtectMarriage.com. (See *Perry 1*, *supra*, 704 F.Supp.2d 921, 1004; *Perry 2, supra,* at pp. 1138-1139.) A permanent injunction issued separately, as follows:

> Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution.

(*Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1191, 1194 [hereafter, *Perry 4*].) No relief was entered against the Proponents or ProtectMarriage.com. (*Perry 2*, *supra*, 702 F.Supp.2d at p. 1136.)

Before the injunction became effective, a motions panel of the Ninth Circuit granted the Proponents' and ProtectMarriage.com's motion (joined by Imperial County) for a stay pending appeal and expedited both appeals, setting them for hearing in December 2010. (*Perry v. Schwarzenegger* (9th Cir. August 6, 2010, No. 10-16696) 2010 WL 3212786, *1 [hereafter, *Perry 3*].) The order also directed Proponents to address in their opening brief why the appeal should not be dismissed for lack of Article III standing. (*Ibid.*)

None of the government defendants filed a notice of appeal. (*Perry 4*, *supra*, 628 F.3d 1191, 1195.) (A related state mandamus proceeding, *Beckley v. Schwarzenegger*, was initiated on August 30, 2010 to compel the Governor and the Attorney General to file notices of appeal from the *Perry* injunction. The Third District Court of Appeal summarily denied the petition, and this Court denied a petition for review after requesting letter briefs in opposition. (*Beckley v. Schwarzenegger, et al*., Nos. C065920, S186072.)) Consequently, no government defendant is a party to either of the *Perry* appeals, and none filed a brief or participated at hearing on appeal. (See *Perry 4*, *supra*, at p. 1195.)

In January 2011, a three-judge panel of the Ninth Circuit United States Court of Appeals issued an Order Certifying a Question to the

Supreme Court of California, pursuant to California Rules of Court, rule 8.548 (*Perry 4*, *supra*, 628 F.3d 1191[certification order]), and a published opinion (see *Perry 5*, *supra*, 630 F.3d 898). The certification order, attributed to all of the three panel judges, certified to this Court a question of state law that the panel found necessary to the threshold determination of whether Proponents have standing to appeal under Article III of the United States Constitution, and whether the court itself has jurisdiction to address the merits of the appeal. (*Perry 4*, *supra*, at p. 1193; *id.* at p. 1200 [concurring opinion of Reinhardt, P.J.].) If the Proponents lack standing to appeal, then the Ninth Circuit lacks jurisdiction to resolve the merits and, barring a writ of certiorari from the United States Supreme Court, the judgment of the District Court would become final. (*Id.* at p. 1195 ["[t]he certified question therefore is dispositive of our very ability to hear this case"].) The panel said that it would not address the merits of the appeal until the jurisdictional issue is resolved. (*Id.* at p. 1200.)

The panel's separate published opinion affirmed the district court's order denying intervention to Imperial County's deputy clerk and dismissed that appeal. (*Perry 5*, *supra*, 630 F.3d 898, 901.) Subsequently, the newly-elected clerk of Imperial County filed a motion to intervene in the Ninth Circuit as a defendant-appellant. That motion has been fully briefed since March 14, 2011, but remains unresolved. (See Perry v. Schwarzenegger, Case No. 16751, docket entries 67-1 [filed February 25, 2011], 70, 71, and 72-1 [filed March 7, 2011], and 73, 74 [filed March 14, 2011], available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000513.)

The parties and amici submitted letters to this Court discussing whether and how the Court should grant review of the certified question, but the Attorney General did not. On February 16, 2011, this Court granted review and set a briefing schedule.

ARGUMENT

It is important at the outset to emphasize the context in which this proceeding arises. First, the Proponents and Protect Marriage.com intervened without objection and controlled the defense of Proposition 8 in federal district court. Accordingly, a proponent's ability to participate in defending the validity of a successful initiative is not at issue here. What is at issue is a proponent's authority to take a federal appeal from an adverse judgment when the public officials enjoined from enforcing the law choose not to appeal.

Second, it is federal law that creates what Judge Reinhardt called "the standing problem." (*Perry 4*, *supra*, 628 F.3d 1191, 1200 [concurring opinion].) Federal law creates the circumstance in which, in the absence of a government appellant, an intervenor that defended a state law at trial has no right to appeal an adverse judgment unless he or she can independently demonstrate appellate standing. (See *Diamond v. Charles* (1986) 476 U.S. 54, 68 [holding that intervenor status in the trial court is alone insufficient to confer standing to appeal].) This result is not a consequence of state law[3] or of the discretionary decision of a state official to forgo an appeal, and it cannot be remedied by resort to state law. Yet, the implication of the certified question is that resolution of the federal "standing problem" will turn on whether or not this Court finds a substantive right not previously

[3] There is no state law counterpart to the federal limitation on standing to appeal. Under California law, an intervener is considered a full party to an action for all procedural purposes, including for purposes of appeal. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1183, fn. 6.) If the *Perry* case had been filed in state court, all parties given leave to intervene would also have had a right to appeal. But as explained, *post*, in footnote 9, this is not a substantive right that California law confers on initiative proponents, it is a procedural right conferred on all successful interveners.

recognized by state law. Fairly stated, the question asks whether, notwithstanding the absence of clear constitutional, statutory, or case authority, this Court will find that California law gives official proponents of a successful initiative measure an enforceable interest in its validity.[4] (See *Perry 4, supra,* 628 F.3d 1191, 1195.)

An initiative's official proponents have a great interest in the validity of a successful measure, but a limited role in California's initiative process. Our law does not protect their post-adoption interest by giving proponents the authority to represent the *state's* interest against a challenge to the validity of a measure that has become state law. And our law does not afford official proponents any legal right, arising solely from their role as

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[4] The certified question refers to the "State's" interest (*Perry 4, supra,* 628 F.3d 1191, 1193), but the state, as such, was never a party to the underlying case, nor would it have been a defendant in a case brought in federal court. Absent consent, Eleventh Amendment immunity bars suits which seek either damages, injunctive, or declaratory relief against a state, an arm of the state, or the state's instrumentalities or its agencies by a citizen of that state. (*Federal Martime Com'n v. South Carolina State Ports Authority* (2002) 535 U.S. 743, 765-66; *Durning v. Citibank, N.A.* (9th Cir. 1991) 950 F.2d 1419, 1422-23.) The Plaintiffs instead sued public officials to prospectively enjoin their enforcement of Proposition 8 pursuant to *Ex parte Young* (1908) 209 U.S. 123, 159-160. For this reason, as well as the reasons stated in the text and footnote 3, *ante*, the Attorney General suggests that the Court restate the question as follows:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either: (1) a particularized interest in the initiative's validity; or (2) the authority to assert the interest of state officials in the initiative's validity, which authority would enable proponents to appeal a federal judgment invalidating the initiative when the officials enjoined from enforcing it do not appeal that judgment.

(California Rules of Court, rule 8.548(f)(5).)

official proponents, that is injured by a judgment invalidating a law adopted by initiative. Instead, once an initiative measure is approved by the voters, a court considering a challenge to the measure's validity may grant the measure's proponents leave to intervene and participate in its defense, or as amicus curiae, but only to represent their own interests as individuals, not those of the state.

I. PROPONENTS HAVE NO AUTHORITY TO REPRESENT THE STATE'S INTEREST

Although this Court has not previously ruled on the precise question certified, it will not be writing on a blank slate. The Constitution, statutes, and decisions of this Court lead to the conclusion that proponents have no right to assert the state's interest in defending the validity of an adopted initiative measure or in appealing from a judgment invalidating the law.

As set forth below, the initiative power itself belongs to the electors as a whole, not to the individual proponents of a particular initiative measure. The limited role of initiative proponents in stimulating an initiative process is defined by statute. The voters, by adopting an initiative, do not elect initiative proponents to represent the state. In addition, the initiative power is a reservation of the legislative power of government. It does not encompass the executive authority to enforce the law once passed, or to defend the state's interest in the validity of state law. Finally, to the extent that California courts have granted official proponents permissive leave to intervene in cases challenging the validity of a law adopted by initiative, they have done so to allow proponents to represent their own interests, not those of the state. The interests of the state are necessarily represented by the public officials exercising executive powers and against whom relief is sought.

A. The Initiative Power Belongs to the Electors as a Whole; the Role of Initiative Proponents in the Process Leading Up to the Ballot, Ends at the Ballot

Proponents of successful initiative measures cannot credibly rest a claim to represent the state's interest on their statutory role in the initiative process. "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8, subd. (a).) The Constitution and statutes governing the initiative process strongly suggest that both the power to propose and the power to adopt belong to *the electors* (plural), as a whole, rather than to an individual elector or group of electors who advance a particular measure. (See *id*., art. II, § 8.) For example, an initiative measure is "proposed" (in the sense that word is used in the Constitution), not by its proponents, but by the electors themselves, when a sufficient number of them sign their names to circulating petitions. (*Id.*, art. II, § 8, subd. (b); Elec. Code, §§ 9009, 9020, 9035.) Until the necessary number of valid signatures is obtained and certified, the measure is not even an "initiative;" it is merely a "proposed measure" or "proposed initiative measure." (See Elec. Code, §§ 9001, subd. (a); 9002, subd. (a); 9004, subd. (a); 9005, subd. (a); 9008, 9012, 9014.)

The role of initiative "proponents" is not found in the Constitution, but in statute. (See Elec. Code, §§ 9000, et seq., 18600, et seq.; Gov. Code, §§ 10243, 12172, 81000, et seq., 88001, et seq.) The statutory prerogatives of proponents can fairly be summarized as the right, subject to certain limitations and requirements, to suggest to the voters that they propose a particular measure for adoption; to begin the initiative process by obtaining a circulating title and summary; to file signature petitions with appropriate authorities; and to argue in favor of the measure's adoption in the ballot pamphlet. (See *ibid.*) For example, "proponents" are identified as the

electors who present the text of a particular proposed measure to the Attorney General and ask her to prepare a title and summary, which is a prerequisite to circulating petitions for signature. (See Elec. Code, §§ 342, 9001, subd. (a) ["The electors presenting the request shall be known as the 'proponents'"]; see also *Hardie v. Eu* (1976) 18 Cal.3d 371, 374.) These petitions are used to collect a sufficient number of voters' signatures to qualify a measure for the ballot. (Elec. Code, §§ 9020-9035.) The official proponents are not necessarily responsible for qualifying the measure for the ballot. (*Id.,* § 9021.) For example, in this case, it was ProtectMarriage.com, not the Proponents, that was responsible for all aspects of qualifying the measure for the ballot and running the campaign for its adoption. (*Perry 1, supra,* 704 F.Supp.2d 921, 954-955.)

No statute confers on the proponents of a successful initiative measure any authority to represent the state or its interests. Moreover, the statutory scheme itself strongly suggests that any powers that proponents exercise are their own as proponents, not those of the electors or of the state. For example, the statutory role of proponents diminishes when they file signed petitions with local election officials. (See Elec. Code, §§ 9001, subd. (a), 9604, subds. (a) & (b) [proponents may withdraw the measure at any time *before* filing the petition].) At any time before the petitions are filed, the proponents can withdraw the measure and elect not to file the petitions, no matter how many voters have signed. (Elec. Code, §§ 9032; 9604, subds. (a) & (b).) But after the proponents have filed signed petitions, they cannot withdraw the petitions – or amend or withdraw the measure itself. (*Id.*, §§ 9030, 9604, subd. (a).) At that juncture, the success or failure of the measure rests with the electorate as a whole. Moreover, the role of official proponents ends entirely with submission of a ballot argument. (See *id*., § 9601.) Thus, *any* elector, not just an official proponent, may seek a writ

of mandate to challenge the ballot pamphlet title and summary prepared by the Attorney General. (*Id*., § 9092; Gov. Code, § 8806.)

B. The Initiative Is a Reservation of the Legislative Power of Government to Enact Laws; It Does Not Encompass a Reservation of the Executive Power of Government to Represent the State's Interest by Defending the Validity of State Law

Even if proponents of an initiative measure could claim a role in exercising some part of the initiative power, they cannot claim that their role in the initiative process vests them with any *executive* power of government to represent the state's interest in the validity of state law.

The Attorney General does not dispute that the courts have a duty to guard the initiative as one of the most precious rights of our democratic process. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 248.) But the integrity of the initiative process is protected by enforcing its limits as well as by liberally construing its exercise. The courts must guard the initiative power:

> with both sword and shield. We must not only protect against interference with its proper exercise, but must also strike down efforts to exploit the power for an improper purpose.

(*Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 785 [holding that use of an initiative measure to declare policy, rather than to enact specific legislation, was beyond the proper scope of the initiative power].)

For example, this Court has ruled that the single-subject rule is "an integral safeguard against improper manipulation or abuse" of the initiative process. (*Senate of State of California v. Jones* (1999) 21 Cal.4th 1142, 1158; see Cal. Const., art. 2, § 8, subd. (d).) Other courts have also enforced reasonable statutory limits on the exercise of the initiative power. (See, e.g., *Howard Jarvis Taxpayers Ass'n v. Bowen* (2011) 192 Cal.App.4th 110, 114 & fn. 1 [noting that one purpose of the Political

Reform Act of 1974 (Gov. Code, § 81000, et seq.), which was adopted as Proposition 9, was to limit potential abuse of the initiative process, and listing sources of potential abuse]; *Gray v. Kenny* (1944) 67 Cal.App.2d 281, 287-288 [holding that statute imposing a refundable fee for obtaining a circulating title and summary does not burden the right of initiative, instead it is a safeguard "to the end that it may not be misused for purely personal purposes by proponents of measures that have no reasonable chance of approval by the requisite number of voters"].) This Court has also said that the Attorney General may seek a judicial declaration relieving her of the duty to prepare a title and summary by challenging the validity of a proposed measure. (See *Schmitz v. Younger* (1978) 21 Cal.3d 90, 93.) And the initiative cannot be used to compel the Legislature to act. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 708. 714.)

As a reservation of the legislative power of government that is otherwise vested in the Legislature (Cal. Const., art. IV, § 1), the initiative power is "generally coextensive with the power of the Legislature to enact statutes." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1042 [quoting *Santa Clara County Local Transp. Authority v. Guardino* (1995) 11 Cal.4th 220, 253].) This Court has recognized limitations on the scope of the initiative power by distinguishing legislative acts, which are within the scope of the initiative power, from executive and administrative acts, which are not. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776 [considering scope of local initiative power]; see also *Widders v. Furchtenicht*, *supra*, 167 Cal.App.4th 769, 782 ["an initiative which seeks to do something other than enact a statute – which seeks to render an administrative decision, adjudicate a dispute, or declare by resolution the views of the resolving body – is not within the initiative power reserved by the people," quoting *American Federation of Labor v. Eu*, *supra*, 36 Cal.3d 687, 714].) An act that prescribes a new

policy or plan is legislative; one that pursues a plan already adopted by a legislative body is administrative. (*Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1332.) Administrative acts are "properly assigned" to the executive branch. (*Id*. at pp. 1332-1333.)

The recognized constitutional and statutory limits on the scope of the initiative power foreclose the possibility that initiative proponents have authority to undertake litigation in the name of the state, especially when the officials responsible for enforcing the law, including the Governor and Attorney General, have decided that an appeal is not in the public interest. As set forth below, the first limit is temporal: the initiative power is fully exercised when the measure is adopted or rejected. The second limit is substantive: the initiative power does not include the right to exercise executive power. The authority to assert the state's interest in the validity of state law is an executive function, not a legislative function. Initiative proponents, therefore, can claim no authority to exercise any part of the executive power of the state by virtue of their role in the initiative process.

1. The exercise of the initiative power for a particular measure is complete when that measure is adopted or rejected

"The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8, subd. (a).) Consistent with an exercise of legislative power, this language suggests that the initiative power is fully executed (and thus "vindicated") when an initiative that has qualified for the ballot is adopted or rejected by the voters. Accordingly, the role that the proponents of initiative measures play in the initiative process ceases, at the latest, when that process is concluded by the ballot.

2. The initiative cannot be used to exercise executive powers, including the authority to assert the state's interest in defense of a particular law

In any event, proponents' participation in the initiative process cannot vest them with *executive* powers, including the authority to assert the state's interest in defending state law. The power of government in California is divided in three parts: legislative, executive, and judicial. (Cal. Const., art. III, § 3.) Because it is a reserved part of the legislative power of government, the initiative power is subject to the same limitations as legislative action.[5] (See *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 821 [quoting *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674-675].) The legislative powers that the electors may exercise by initiative are limited to the proposal, adoption, and rejection of statutes and amendments to the Constitution. (*American Federation of Labor v. Eu*, *supra*, 36 Cal.3d 687, 714.)

The authority to assert *the state's* interest in defending state law is not part of the reserved legislative power of initiative. It is part and parcel of the executive power, some of which the Constitution expressly assigns to the Attorney General as "chief law officer of the State," subject to the powers and duties of the Governor, who exercises the "supreme executive power of the State." (Cal. Const., art. V, §§ 1, 13.) "Such powers as are specifically conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority." (*State Bd. of Ed. v. Levit*

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[5] By analogy, it might be argued that the sponsors of a chaptered bill in the Legislature have inherent authority to defend the law on behalf of the state when the Attorney General and Governor have decided not to do so or have decided not to appeal from a judgment invalidating the law. The Attorney General has found no case supporting such a proposition. (See Cal. Const., art. III, § 3.)

(1959) 52 Cal.2d 441, 461-462 [quoting Cooley, Constitutional Limitations at p. 215 (8th ed. 1927)].) Thus, representing the state's interest in litigation challenging the validity of state law is an executive function.

The Legislature has fleshed out these executive functions in the Government Code. "The Governor may direct the Attorney General to appear on behalf of the State and may employ such additional counsel as he [*sic*] deems expedient whenever any suit or legal proceeding is pending: ¶ (a) Against the State … [or] ¶ (c) Which may result in a claim against the State." (Gov. Code, § 12013.)

The Attorney General "has charge, as attorney, of all legal matters in which the State is interested . . . ," and "shall attend the Supreme Court and prosecute or defend all causes to which the State or any state officer is a party in his or her official capacity." (Gov. Code, §§ 12511, 12512.) Accordingly, the Attorney General must give consent to a private person to sue in the name of the people. (*People ex rel. Ferguson v. Bd. of Sup'rs, etc.* (1869) 36 Cal. 595, 605.) She is the only person to whom authority is given by law to appear for the people in this Court. (*People ex rel. Livingston v. Pacheco* (1865) 29 Cal. 210, 213 ["A private person has not the right or power to use at his election, the name of the people for the purpose of obtaining redress for private wrongs"].)

It is also clear that the Governor and Attorney General exercise discretion in performing these executive functions, particularly those involved in conducting litigation on behalf of the state. The Attorney General "is invested with a discretion which a private citizen may not coerce or court control." (*City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 647-648.) Nor may a court annul the Attorney General's decision, except in the event of *extreme abuse* of discretion. (*Id.* at p. 651.) Part of this discretion is to decide, with respect to asserting the interest of the state

in litigation, what is and what is not in the public interest. (*Id.* at p. 648.) The courts of appeal have consistently held that:

> 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 . . . exclusively within the province of the Attorney General's office and not subject to judicial coercion.

People v. Karriker (2007) 149 Cal.App.4th 763, 786 [quoting *State of California v. Superior Court* (1986) 184 Cal.App.3d 394, 398].)

Accordingly, this Court has suggested a distinction between the duty of state officials to enforce a law until its invalidity is judicially declared, and any obligation to defend the law's validity in court. (*Connerly v. State Personnel Board*, *supra*, 37 Cal.4th 1169, 1183.)[6] And California officials have previously decided not to appeal federal court decisions invalidating state laws. (See, e.g., *Fouke Co. v. Brown* (E.D. Cal. 1979) 463 F.Supp. 1142, 1143 [Governor and Attorney General did not oppose and took no appeal from order striking down California endangered species statute]; *Kaiser v. Montgomery* (N.D. Cal. 1969) 319 F.Supp. 329 [Attorney General took no appeal from order striking down state welfare statute]; *California Democratic Party v. Lungren* (N.D. Cal. 1996) 919 F.Supp. 1397 [Attorney General took no appeal from judgment striking down Cal. Const., art. II, § 6(b)].) California Attorney General Thomas Lynch did not defend Proposition 14 in this Court and also filed an amicus brief in the United

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[6] There is no dispute that the Governor and Attorney General have enforced Proposition 8. No license to marry has been issued to same-sex couples since this Court's decision in *Strauss v. Horton, supra,* 46 Cal.4th 364. Thus, it is incorrect to suggest that the Governor and Attorney General have exercised an ultra vires 'veto' or 'nullified' the exercise of the initiative by deciding not appeal an adverse judgment. (See *Perry 4*, *supra*, 628 F.3d 1191, 1197.) The Governor and Attorney General in no way interfered with or burdened the initiative process. Plaintiffs had to sue in order to invalidate the law.

States Supreme Court arguing that it was invalid under the Equal Protection Clause. (See *Reitman v. Mulkey* (1966) 387 U.S. 369, Brief of the State of California as Amicus Curiae, 1967 WL 113956.)[7]

It is not surprising that the Constitution entrusts the exercise of these discretionary powers to public officials. Public officials are individuals vested with a portion of the sovereign power of the state that must be exercised in the public interest. (*Parker v. Riley* (1941) 18 Cal.2d 83, 87; *Spreckels v. Graham* (1924) 194 Cal. 516, 528.) All public officials take an oath of office to protect and defend the state and federal constitutions (Cal. Const., art. XX, § 3), and they are required to put the public interest before their own. A public office is a public trust for the benefit of the people and those who hold such office may not use it for their own advantage. (*Terry v. Bender* (1956) 143 Cal.App.2d 198, 206.)

In addition to the duty to exercise the power of the state in the public interest, elected officials (like the Governor and Attorney General) are subject to limitations on the exercise of that power, as well as open government regulations that require them to publicly disclose sources of

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[7] California executive branch officials are not alone in exercising discretion not to defend laws or not appeal decisions invalidating laws. (See, e.g., *Diamond v. Charles* (1986) 476 U.S. 54, 61 [Illinois did not appeal order invalidating statute regulating abortion]; *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 55 [Arizona Governor did not appeal order invalidating English-only initiative]; *Planned Parenthood of Central New Jersey v. Farmer* (3d Cir. 2000) 220 F.3d 127, 131 [New Jersey Attorney General declined to defend partial-birth abortion ban]; *Providence Baptist Church v. Hillandale Committee, Ltd.* (6th Cir. 2005) 425 F.3d 309, 312 [city entered consent judgment admitting that zoning ordinance was unconstitutional as applied]; *Kendall-Jackson Winery, Ltd. v. Branson* (7th Cir. 2000) 212 F.3d 995, 996 [Illinois did not appeal order invalidating state legislation regulating liquor distribution]; *Planned Parenthood of Mid-Missouri, etc. v. Ehlmann, supra*, 137 F.3d 573, 574 [Missouri Attorney General did not appeal order invalidating statute banning Planned Parenthood from receiving state funds].)

income and financial interests. For example, the Governor and Attorney General must be elected to state-wide office by a majority of voters, may serve no more than two four-year terms, and are subject to recall. (Cal. Const, art. V, §§ 2, 11; *id*., art. II, § 13.) Their conduct in seeking election and holding office is governed by an assortment of laws requiring periodic public disclosures of financial information and prohibiting them from taking action in matters in which they have personal or financial conflicts of interest, including Government Code section 1090, the Political Reform Act (Gov. Code, § 87100, et seq.), and the Public Records Act (*id.,* § 6250 et seq.), and in performing some of their public duties as members of state bodies they may be subject to the Bagley-Keene Open Meeting Act (*id.*, 11120, et seq.). The regulation of public officials insures that they are accountable to the voters.

In stark contrast, no election or law vests the proponents of a successful measure with authority to represent the people, the public interest, or the state. Proponents are private citizens who appoint themselves and can claim to represent only themselves and their personal interests. They remain proponents of that measure (perhaps for all time),[8] but after adoption they are legally and politically accountable to no one. Correspondingly, they lack the authority of public officials exercising executive power to assert the state's interest in post-adoption litigation challenging the validity of the measure.

[8] See *City and County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1038, fn. 7, in which the court considered the possibility that a personal representative might have succeeded Proposition 22 initiative proponent Pete Knight in defending the initiative after his death and four years after adoption.

C. The Practice of California Courts to Liberally Grant Initiative Proponents Leave to Intervene Gives Appropriate Recognition to Their Post-Adoption Interest, But Does Not Establish that Proponents Have a Substantive Right to Assert the Interest of the State

When we examine the cases in which California courts have considered official proponents' interest in defending the validity of a successful initiative, three conclusions are evident.[9]

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[9] Many of the cases cited in the certification order, as well in the brief of Proponents and ProtectMarriage.com, did not resolve a dispute relevant to the issues under consideration here. "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered." (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.)

In *Strauss v. Horton*, *supra*, 46 Cal.4th 364, 399, the Court said that the official proponents of Proposition 8 were "granted leave" to intervene, but so was ProtectMarriage.com (not an official proponent, see http://appellatecases.courtinfo.ca.gov/search/case/partiesAndAttorneys.cfm?dist=O&doc_no=S168047 [listing ProtectMarriage.com as a co-intervener of official proponents of Proposition 8]) and intervention was not in dispute. In *Community Health Assn. v. Board of Supervisors* (1983) 146 Cal.App.3d 990, the court stated that both the official proponent and a supporting committee were "permitted" to intervene, but intervention was not in dispute. (*Id*. at p. 992.) And in *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, the court stated that both the official proponent and a supporting committee were "granted leave" to intervene, but intervention was not in issue. (*Id.* at pp. 1321-1322.) None of these cases engaged in analysis that helps to answer the certified question.

Similarly, the bare fact that in *Community Health, Citizens for Jobs, Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, and *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, the intervening proponents also appealed an adverse judgment does not help to answer the certified question. It bears repeating that, unlike federal jurisprudence, in California there is no requirement that an intervener in the trial court separately establish standing to appeal. Once intervention is granted, an intervener is a party for all purposes, including purposes of appeal and even an award of attorneys' fees. (See *Connerly v. State Personnel Bd.*, *supra*, 37 Cal.4th

(continued…)

1. In post-adoption challenges to the validity of initiatives, official proponents have been treated no differently than organizations of supporters of an initiative; they are grouped together as "proponents." This was the case in *Strauss v. Horton*, *supra*, 46 Cal.4th 364, 398-399, *Community Health Assn. v. Board of Supervisors* (1983) 146 Cal.App.3d 990, 992, and *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1321-1322. There, both the official proponents of the initiative measure and a supporting committee (not an official proponent) were permitted to intervene.[10] (See also *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 152-153 [holding that association formed to draft and support measure could intervene after judgment by moving to vacate the judgment under Code of Civil Procedure section 663];

(…continued)
1169, 1183 fn. 6; cf. *Simac Design*, *supra*, at p. 152 [noting that a person not a party to the action may intervene after judgment by moving to vacate pursuant to Code of Civil Procedure section 663 and thereby gain the right to appeal an order denying the motion to vacate], and *Paulson*, *supra*, at pp. 417-418 & fn. 7 [same].) California cases in which initiative proponents who were permitted to intervene then appealed the judgment without benefit of being joined by a government appellant are not authority for the proposition that California law gives *initiative proponents,* as such, a right of appeal. To the extent they are authority of any kind, it is for the proposition that California law gives *interveners* a right of appeal. In any event, that right is wholly procedural; it cannot be bootstrapped into a substantive right the violation of which would cause actionable injury.

[10] *City and County of San Francisco v. State*, *supra*, 128 Cal.App.4th 1030, does not demonstrate that courts treat supporting organizations less favorably than official proponents. In that case, the supporting organization (the Fund) that was denied permissive intervention to defend the validity of Proposition 22 "was not even created until one year *after* voters passed the initiative." (*Id.* at p. 1038 [italics in original].) Thus the Fund was not truly a supporter of the *initiative*; instead, it was a supporter of the *law* once it was adopted. In any event, the case did not present the question whether it would be an abuse of discretion to deny permissive intervention to an official proponent. (*Ibid*.)

and *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 417-418 & fn. 7 [same].) Although the courts did not discuss the reasons for permitting intervention, it is likely because both official proponents and supporting organizations such as ballot committees are motivated to defend, informed on the relevant issues and, in the particular circumstances presented, would be of service to the court in resolving the issues in dispute.

2. Case law demonstrates that the legitimate post-adoption interests of both official proponents and organizations of initiative supporters are acknowledged and accommodated by granting permissive leave to intervene or to file amicus briefs to represent *their own interests*. (See, e.g., *Community Health Assn. v. Bd. of Supervisors* (1983) 146 Cal.App.3d 990, 992 [noting that both the official proponent and "an unincorporated association of resident taxpayers" were "permitted to intervene as the true proponents and supporters of the Howell Initiative"]; cf. *Building Industry Assn. v. City of Camarillo*, *supra*, 41 Cal.3d 810, 822 [noting in dicta, in response to an argument from amicus curiae that Evidence Code section 669.5 substantially impairs the right of initiative, that where local government had burden of proof but questioned the validity or wisdom of adopting the initiative, a court's failure to permit intervention *might be* an abuse of discretion]; *City and County of San Francisco v. State*, *supra*, 128 Cal.App.4th 1030, 1037-1038; 1044 [affirming denial of permissive intervention to organization formed after adoption of Proposition 22 under abuse of discretion standard but noting the possibility of participation as amicus curiae to assert organization's interests including investment of personal reputation and time and efforts of its members, harm to the reputation of its members, and damage to its own reputation that might harm its ability to attract support and contributions]; *id.* at p. 1038, fn. 7 [noting that initiative proponent Pete "Knight's purported interest in

protecting the validity of the measure enacted as the fruit of his labors [Prop 22] appears to have been an entirely personal one"]; see also *In re Marriage Cases*, *supra*, 43 Cal.4th 757, 792, fn. 10 [noting importance of allowing supporters to participate to present their views as amici even when intervention is denied].)

The Code of Civil Procedure allows for both permissive intervention and intervention as of right. (Code Civ. Proc., § 387, subds. (a) & (b).) The availability of permissive leave to intervene should not be transmuted into an unconditional right that would require courts to allow proponents to intervene as parties in every post-adoption challenge to enforcement of an initiative enactment, even when the responsible public officials are defending the law. In the vast majority of cases, the public officials charged with enforcing a law (whether enacted by initiative or by the Legislature) defend against suits to block its enforcement. If proponents of an initiative have an unconditional right to defend against enforcement challenges, then these public officials will be left unable to control the defense. The courts should be able to retain discretion to hear evidence and argument and to decide, on a case by case basis, when intervention by proponents and other informed supporters is necessary or helpful to the resolution of disputes, and when it is not.

3. The post-adoption interest of initiative supporters in the validity of an initiative enactment has not been treated as a legally protected right. Indeed, this was one of this Court's holdings in *In re Marriage Cases*, *supra*, 43 Cal.4th 757. There, the Proposition 22 Fund challenged the appellate court's determination that its action against San Francisco had been rendered moot by this Court's decision in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055. The Fund argued that there remained a live dispute between itself and San Francisco about the scope

and constitutionality of Family Code section 308.5, enacted by adoption of Proposition 22 in 2000. (*Id.* at pp. 789-790.)[11] Citing cases establishing that an advocacy group's support of a statute "does not in itself afford the group *the right* to intervene formally in an action challenging the validity of the measure" (*id*. at p. 790 [italics added]), this Court said:

> [W]e agree with the Court of Appeal that, absent a showing by the Fund that it possesses a direct legal interest that will be injured or adversely affected (which the Fund acknowledges has not been established here), . . . the Fund's strong ideological disagreement with the City's views regarding the scope or constitutionality of Proposition 22 is not sufficient to afford standing to the Fund to maintain a lawsuit . . . regarding these legal issues.

(*Id.* at pp. 790-791, footnote omitted.)[12]

II. PROPONENTS OF A SUCCESSFUL INITIATIVE HAVE AN INTEREST IN ITS VALIDITY, BUT THEIR ROLE IN THE INITIATIVE PROCESS CONFERS NO LEGALLY PROTECTED *RIGHT* TO DEFEND IT

In many ways there is no meaningful difference between the two types of interests posited by the certified question. They are two sides of the same coin.

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[11] As noted in footnote 10, *ante*, the Fund was not created until after adoption of Proposition 22, so it may be viewed as having a more remote interest than an organization formed to advance an initiative. This Court, however, did not draw that distinction. (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 790-791.)

[12] Similarly, Proponents and ProtectMarriage.com have acknowledged that if California law does not protect the interest generally of initiative proponents in defending the validity of a successful measure, then they do not suffer a direct and personal injury resulting from the judgment of the district court. (See *Perry 4*, *supra*, 628 F.3d 1191, 1196 [noting that "[t]he parties agree" that Proponent's standing rises or falls on the answer to the certified question].)

State law protects no interest of initiative proponents *as initiative proponents* in the validity of a law they proposed for the same reasons that state law does not authorize initiative proponents to assert the state's interest in the validity of state law. The exercise of the reserved legislative power by the electors ends with the adoption or rejection of the initiative measure, and any rights of initiative proponents necessarily end there, or earlier, with submission of a ballot argument. (See, *ante*, at pp. 11-12, 15.) Any continuing interest that proponents may have in defending an initiative enactment is recognized, at the discretion of the court considering an enforcement challenge, by granting permissive leave to intervene or to address the court as amicus curiae, but it is not protected as a matter of right. (See, *ante*, at pp. 21-25.) To the extent that the people, state officials, or the state itself have an interest in the validity of an adopted initiative, the authority to represent that interest lies with the public officials responsible for enforcing the law, and ultimately with the Governor and Attorney General.[13] (See, *ante*, at pp. 16-21.)

Proponents nevertheless argue that: 1) official proponents have a variety of pre-adoption statutory rights; 2) proponents are sometimes identified as "real party in interest" in post-adoption challenges, and 3) proponents have defended initiatives in cases when public officials decide that it is not in the public interest to do so. (Appellants' Opening Brief at pp. 31-36.) All of these things are true, but none of them demonstrates that California law elevates proponents' interest in the validity of an initiative enactment to a substantive right superior to that of

[13] The authority to represent the public interest may also lie with local public officials. For example, in this case, the clerk/recorders of Los Angeles or Alameda Counties might have appealed from the judgment. In so doing, however, they would have been representing the interest of the counties from which they were elected, not the state's interest as a whole.

any other informed supporter. California law does not give proponents an unconditional right to defend a successful measure just because they were its official proponents.

CONCLUSION

For all of the foregoing reasons, the Attorney General submits that the answer to the certified question should be "no."

Dated: May 2, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached amicus brief of Attorney General Kamala D. Harris uses a 13 point Times New Roman font and contains 10,145 words.

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