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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DEFENDANT-INTERVENORS AND APPELLANTS' REPLY TO AMICUS BRIEFS

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The briefs of the Attorney General and other amicus curiae supporting the Plaintiffs and the City and County of San Francisco (collectively "Respondents") add little of consequence to the arguments raised by Respondents that we have already refuted. Respondents' amici do, however, bring the extreme nature of Respondents' position into sharp focus.

First, the Attorney General's brief makes clear that she claims the authority not only to refuse to defend, either in the trial court or on appeal, the People's interest in a duly enacted initiative, but also the power to prevent anyone else from defending the People's interest by appealing a trial court decision invalidating that initiative. And she takes this position despite her statutory duty to "defend all causes to which the State, or any State officer is a party in his or her official capacity," Gov. Code § 12512, without regard to the provision of the California Constitution requiring state agencies to enforce state law unless it has been invalidated by an appellate court, Cal. Const., art. III, § 3.5(c), and in direct opposition to the position taken by her predecessor both in and out of court.[1] It is thus evident that the

[1] *See* App. 76 [Attorney General Brown's argument that this case presented "an actual controversy between the Plaintiffs and San Francisco, on one hand, and the Proponents on the other," and thus

Attorney General now seeks not only discretion to refuse to defend an initiative she believes (wrongly, in Proponents' view) to violate the Federal Constitution, but also the authority to "effectively veto" that initiative by preventing any appeal of a trial court decision invalidating it. (Certification Order 11.) In a State where "[a]ll political power is inherent in the people," Cal. Const., art II, § 1, this Court should not countenance such a sweeping claim of power to thwart the sovereign People's will.

Second, these new submissions explicitly confirm what was only implicit in Respondent's arguments—that the opposition to allowing official proponents to defend their initiatives when public officials refuse to do so is rooted largely in hostility to the initiative power itself. The League of Women Voters, for example, discusses at

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"satisfie[d] the constitutional 'case or controversy' limitation on federal jurisdiction found in Article III, section 2 of the Constitution."]; Bob Egelko, *Brown Debate Comment Could Help Prop. 8 Sponsors*, S.F. Chronicle (Oct. 14, 2010), *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/10/14/BADL1FS9TE.DTL ["In defending his refusal to appeal a judge's order overturning California's ban on same-sex marriage, Attorney General Jerry Brown said the sponsors of the ballot measure can appeal it themselves"]; Brown-Whitman Debate: Proposition 8 at 2:05, *available at* http://www.youtube.com/watch?v=Q_-FoWZQh_w [Attorney General Brown's statement that he was not appealing the trial court's judgment invalidating Proposition 8 "because it can be appealed by the parties"].

length the "problems inherent in the initiative process," League Br. 7, and argues that permitting initiative proponents to defend the People's interest in those measures "would compound the problems wrought by a runaway initiative process," *id*. at p. 12. And amici John Eisenberg and Professor Laurie Levenson argue that because "the validity of the initiative process itself is subject to serious constitutional doubt," Proponents' "argument for authority to appeal, based on the purported importance of the initiative process, cannot be sustained." (Eisenberg Br. 3-5.) This Court, however, has repeatedly recognized "the sovereign people's initiative power" as "one of the most precious rights of [California's] democratic process." (*Strauss v. Horton* (2009) 46 Cal.4th 364, 453 [quotation marks omitted].) And under this Court's well-settled precedents, hostility to the right of initiative provides no basis for a legal rule that would "improperly annul that right." (*Martin v. Smith* (1959) 176 Cal.App.2d 115, 117.)

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.

Respondents' amici cannot deny that the California courts have repeatedly allowed official proponents of initiatives to defend those

measures when they are challenged in litigation—especially when, as here, the public officials having the "duty to defend" them "might not do so with vigor" (or at all). (*Building Industry Association v. Camarillo* (1986) 41 Cal.3d 810, 822.) Nor can they deny that this Court has provided a clear and persuasive explanation for this practice: "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." (*Ibid*.) As Proponents have demonstrated, it plainly follows from these and other authorities that official proponents have authority under state law to represent the People's interest in defending the validity of initiatives.

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 this Court recognized in *Building Industry Association* and Proponents have explained at length, *see* Prop. Br. 18-24, permitting official proponents to defend initiatives when public officials refuse to do so vindicates the People's initiative power, a power adopted "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,

and intended to ensure "the people's rightful control over their government," *Strauss*, *supra*, 46 Cal.4th at p. 421. A contrary rule, by contrast, would permit "elected officials to nullify" both "proponents' efforts to 'propose statutes and amendments to the Constitution' " and "the People's right 'to adopt or reject' such propositions," Certification Order 11-12 [quoting Cal. Const., art. II, § 8(a)], and would conflict with the courts' "solemn duty jealously to guard the sovereign people's initiative power," *Strauss*, *supra*, 46 Cal.4th at p. 453, "and to prevent any action which would improperly annul that right," *Martin*, *supra*, 176 Cal.App.2d at p. 117.

Although the Attorney General concedes that "the courts have a duty to guard the initiative as one of the most precious rights of our democratic process," AG Br. 13, she argues that permitting official proponents to defend their initiatives in lieu of public officials who refuse to do so does not serve to vindicate this precious right. Her arguments, however, all lack merit.

First, in arguing that official Proponents cannot represent the People's interest in defending an initiative, the Attorney General explains that "the initiative power itself belongs to the electors as a whole, not to the individual proponents of a particular initiative

measure." (AG Br. 10.) True enough. But it is equally true, despite the Attorney General's suggestion that the certified question be reformulated to address whether the official proponents of an initiative may "assert the interest of *state officials* in the initiative's validity," *id*. at p. 9, fn. 4 (emphasis added), that neither the initiative power nor the People's interest in an initiative's validity belongs to state officials—not even an Attorney General who is politically opposed to the initiative. The real question in this case is not to whom the initiative power or the People's interest in an initiative belongs—the California Constitution and this Court's cases leave no room whatsoever for doubt or debate on that score, *see* Cal. Const., art. II, § 1; *Building Industry Association*, *supra*, 41 Cal.3d at p. 821—but who (if anyone) may assert that interest when public officials refuse to do so. And as Proponents have demonstrated, this Court's precedents and the well settled practice of permitting official proponents to intervene to defend their initiatives provides a clear answer to this question as well.

The Attorney General also argues that permitting official proponents to defend initiatives is not necessary to vindicate the initiative power because "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.” (AG Br. 15; *see also* Equality Cal. Br. 10-11 [similar].) But as this court has explained, “[p]ermitting intervention by the initiative proponents” when public officials charged with defending an initiative “may not do so with vigor” serves 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.) Not only is the Attorney General’s crabbed interpretation of the “precious” initiative power directly contrary to this specific analysis, it also contravenes the more general rules that the initiative power must be preserved “to the fullest tenable measure of spirit as well as letter,” *Strauss,* supra, 46 Cal.4th at p. 453, and that “the Constitution’s initiative and referendum provisions should be liberally construed to maintain maximum power in the people,” *Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020, 1032. And as the Ninth Circuit explained, because neither the Governor, the Attorney General, nor any other public official has “veto power over initiatives,” it is doubtful, to say the least, that such officials “may, consistent with the California Constitution, achieve through a refusal to litigate what

[they] may not do directly: effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it if no one else—including the initiative's proponents—is qualified to do so." (Certification Order 11.)[2]

Arguing that "[d]rafters of certain initiatives have specifically included provisions regarding post-enactment enforcement when submitting their initiatives to the voters," Equality California suggests that if the People wish official proponents to defend an initiative when public officials refuse to do so they should say so expressly. (Equality Cal. Br. 15.) Allowing official proponents to defend their initiative absent express language addressing this question, Equality California maintains, would impermissibly require the courts to "add to [an initiative] or rewrite it to conform to some assumed intent not

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[2] The League argues that if public officials refuse to defend an initiative, the People's proper recourse is to recall those officials or to seek a writ of mandamus compelling them to defend. (*See* League Br. 12-13.) As we have demonstrated, however, even assuming new officials could be elected in time to defend against pending litigation, the People should not be required to resort to a second election merely to obtain a defense of a law they have already voted to enact. (*See* Prop. Reply Br. 4.) And as Respondents and the Attorney General have argued at length, *see* Pl. Br. 9-11; SF Br. 10-16; AG Br. 17-20, the courts will not coerce a public official to defend a law. Indeed, this Court has already denied a petition for writ of mandamus seeking to compel the Attorney General to defend Proposition 8. (*Beckley v. Schwarzenegger* (Sept. 8, 2010) No. S186072.)

apparent from th[e] language." (*Id*. at p. 14 [alterations in Equality Cal. Br.].)

As Proponents have already demonstrated, however, initiative proponents and the People are entitled to rely on the assumption that public officials will fulfill their duty to defend the laws that the People have enacted. (*See* Prop. Reply Br. 6-7.) They are also entitled to rely on the numerous California cases consistently allowing official proponents to defend their initiatives, including on those rare occasions when public officials refuse to do so. It does not "add to" or "rewrite" an initiative to interpret it in light of these basic and well-settled background principles. To the contrary, it would be unreasonable to require official proponents and the People to anticipate that public officials not only will refuse to discharge their duty to defend an initiative the People have duly enacted, but also will disavow the host of cases allowing official proponents to defend their initiatives. Indeed, like San Francisco, Equality California fails to identify a single instance where official proponents and the People

have seen the need to include language expressly addressing the failure of public officials to defend an initiative.[3]

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

As Proponents have demonstrated, the numerous precedents permitting official proponents to intervene to defend their initiatives demonstrate that official proponents have authority under state law to represent the People's interest in the validity of initiatives when public officials refuse to defend those measures. (*See* Prop. Br. 24-30; Prop. Reply Br. 8-16.) Indeed, the United States Supreme Court looked to just such authority in concluding that leaders of the New Jersey legislature "had authority under state law to represent the State's interests" by defending, both in federal trial court and on appeal, a state statute that "neither the Attorney General nor the named defendants would defend." (*Karcher v. May* (1987) 484 U.S. 72, 75, 82.)

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[3] Equality California cites an initiative allowing citizens to sue the *State* to *enforce* an initiative and another initiative creating a redistricting commission and granting that commission exclusive authority to defend *its redistricting plans*. (*See* Equality Cal. Br. 15-16.) Neither initiative addressed the question of who would defend the initiative itself if it were challenged in litigation and public officials refused to defend it.

Respondents' amici dismiss the numerous authorities permitting intervention by official proponents on the ground that these decisions did not specifically address the propriety or basis of intervention. (*See* AG Br. 21-22, fn. 9; Equality Cal. Br. 6-7; California Faith Br. 28-29.) But as proponents have demonstrated, *see* Prop. Reply Br. 10, the same was true of *In re Forsythe* (1982) 91 N.J. 141, 450 A.2d 499, the state law decision the *Karcher* Court found controlling on the question of New Jersey's legislative leaders' authority to defend the State's interest in the validity of a statute in lieu of the Attorney General and government defendants who refused to do so. (*See Karcher, supra*, 484 U.S. at p. 82.)

Furthermore, this Court plainly should not "disregard the implication of an exercise of judicial authority assumed to be proper" so frequently over so many years. (*Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 307.) To the contrary, these decisions are entitled to "much weight, as they show that [doubts regarding the propriety of intervention by official proponents] neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favour" of the position urged by Proponents here. (*Bank of*

United States v. Deveaux (1809) 5 Cranch 61, 88 [Marshall, C. J.].)[4] And in all events, this Court has provided a clear explanation of the basis and propriety of intervention by official proponents in *Building Industry Association*, and the numerous cases allowing such intervention surely must be understood in light of that decision.[5]

Equality California complains, however, that the numerous decisions permitting official proponents to intervene to defend initiatives do not specifically and expressly address the authority of official proponents (1) "*to appeal a judgment* invalidating an initiative" (2) "*as representatives of the State*" (3) "*in federal court*." (Equality Cal. Br. 2.) But precisely the same could be said of the New Jersey Supreme Court's decision in *In re Forsythe*—a decision that

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[4] In at least some of the cases where official proponents were permitted to intervene to defend their initiatives, intervention was essential to the courts' jurisdiction to decide the cases before them. (*Compare, e.g., Citizens for Jobs & the Economy v. County of Orange* (1988) 94 Cal.App.4th 1311, 1323 [deciding appeal brought by proponents, not government defendant], *and Community Health Association v. Board of Supervisors* (1983) 146 Cal.App.3d 990, 993 [same], *with, e.g., Marsh v. Mountain Zephyr, Inc*. (1996) 43 Cal.App.4th 289, 295 ["standing to appeal is 'jurisdictional and therefore cannot be waived' "].)

[5] Respondents' amici persist in dismissing *Building Industry Association*'s discussion of intervention as dictum, *see, e.g.*, AG Br. 23; Equality Cal. Br. 9, but we have demonstrated otherwise, *see* Prop. Br. 18-19. Respondents' amici's silence in response to our analysis speaks volumes.

affirmed a judgment upholding a challenged statute defended by both the intervenors *and* the Attorney General, did not discuss the interests represented by the legislative interveners, and noted only that they had been allowed to intervene in *state court* proceedings. (*See supra*, 91 N.J. at pp. 143-44.) Yet the United States Supreme Court found this authority sufficient to establish that New Jersey's legislative leaders had standing to represent the People's interest in the validity of their laws both in federal trial court and on appeal. (*See Karcher, supra*, 484 U.S. at p. 82.) Indeed, as Proponents have demonstrated, California law goes much further than *In re Forsythe*, permitting official proponents to intervene to defend an initiative when public officials refuse to do so, allowing official proponents to appeal a judgment invalidating an initiative when government officials do not,[6]

[6] Arguing that California law generally permits intervenors to appeal adverse decisions, the Attorney General attempts to discount the significance of the cases where official proponents and organizations directly involved in drafting and sponsoring initiatives have been allowed to appeal adverse decisions relating to those measures even though government defendants choose not to appeal. (*See* AG Br. 8, fn. 3.) But as Proponents have explained, California law imposes strict standards for intervention, *see* Prop. Reply Br. 35-36, and, as discussed more fully below, sharply distinguishes between official proponents (and organizations directly involved in drafting and sponsoring initiatives) who are uniformly allowed to intervene to defend initiatives, on the one hand, and other individuals and organizations who are generally not allowed to intervene (except

and expressly grounding intervention by official proponents in the need to protect the sovereign People's initiative power. (*See* Prop. Br. 25-28; Prop. Reply Br. 9-10; *Building Industry Association*, *supra*, 41 Cal.3d at p. 822.)

The Attorney General also argues that "[i]n post-adoption challenges to the validity of initiatives," California treats official proponents no differently from other supporters of an initiative. (*See* AG Br. 22.) But we have already demonstrated that this is false. (*See* Prop. Br. 28-30; Prop. Reply Br. 12-13.) True, California decisions have not always distinguished between official proponents and organizations directly involved in drafting and sponsoring an initiative, *see* Prop. Reply Br. 12, and have also sometimes permitted organizations supporting an initiative to intervene *alongside* official proponents, *see* Prop. Br. 29, fn. 6. But the courts have drawn a sharp distinction between official proponents, on the one hand, and organizations or individuals who played no direct role in sponsoring

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alongside official proponents), on the other hand. Further, it is well-settled that official proponents and organizations directly involved in drafting and sponsoring initiatives independently satisfy the requirements for appealing a judgment invalidating an initiative, regardless of whether they intervened in the trial court. (*See Simac Design Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 152, 153; *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, 414, 416-18.)

or drafting the initiative, on the other hand. (*See, e.g.*, *Strauss, supra*, 46 Cal.4th at pp. 398-99; App. 50; *City & County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1038.) With respect to the former, this Court has explained that where those charged with defending an initiative "might not do so with vigor," California courts "in most instances should allow intervention by the proponents of an initiative. To fail to do so may well be an abuse of discretion." (*Building Industry Association, supra*, 41 Cal.3d at p. 822 [rejecting argument premised on the assumption that "the proponents of [an] initiative have no guarantee of being permitted to intervene in the action, a matter which is discretionary with the trial court"].) And, indeed, neither Respondents nor their amici have yet identified any case in which official proponents were denied intervention to defend an initiative they had sponsored, let alone any case denying intervention when public officials refused to defend the initiative.[7]

[7] Remarkably, the Attorney General cites this Court's treatment of the Proposition 22 Legal Defense and Education Fund in the *Marriage Cases* as somehow undermining the authority of official proponents to vindicate the People's interest in defending an initiative when public officials refuse to do so. (*See* AG Br. 24-25.) But as Proponents have demonstrated and Plaintiffs were forced to concede at oral argument before the Ninth Circuit, the Fund was *not* the official proponent of Proposition 22. (*See* Prop. Reply Br. 10-13.) Indeed, as the Attorney General elsewhere concedes, the Fund "was

Nor have they identified any case in which any party other than an official proponent or an organization directly involved in drafting and sponsoring an initiative was permitted to intervene to offer the sole defense of that measure.[8]

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

1. The Attorney General argues at length that her litigation duties are discretionary and that neither the citizens nor the courts can compel her to defend a law if she chooses not to do so. (*See* AG Br. 17-19; *see also* Equality Cal. Br. 11 [arguing that "State officials are under no obligation to appeal every adverse decision or even to

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not even created until one year *after* voters passed the initiative." (AG Br. 22, fn. 10 [emphasis in AG's brief].) And contrary to the Attorney General's claim that this Court did not distinguish between official proponents and the Fund in the *Marriage Cases*, *see* AG Br. 25, fn. 11, this Court expressly cited the portion of the court of appeals decision in *City & County of San Francisco* that drew precisely that distinction, *see In re Marriage Cases* (2008) 43 Cal.4th 757, 790, fn. 8 (citing *City & County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1038).

[8] In addition, the Attorney General argues that official proponents have been permitted to intervene in post-adoption challenges to the validity of initiatives only "to represent *their own interests*." (AG Br. 23.) But as we have already demonstrated, this proposition is not supported by the cases permitting official proponents to intervene to defend their initiatives and is directly contrary to this Court's explanation of this practice in *Building Industry Association*. (*See* Prop. Reply Br. 8-9.)

defend every state enactment].) This argument, whatever its merits, is a red herring. Official proponents' authority to represent the People's interest in the validity of initiatives that public officials (including the Attorney General) refuse to defend does not depend upon the proposition that the failure to defend violates these officials' duty, or that their duty is judicially enforceable. Rather, it flows from the constitutional principle that the People are entitled to a defense of the initiatives they have enacted, without regard to the legality or fault of their public official's actions. Further, as we have already explained, *see* Prop. Reply Br. 20-22, allowing official proponents to defend an initiative and to appeal a judgment invalidating it does not force the Attorney General (or any other public official) to defend that initiative, to notice an appeal, or to make any other litigation decision contrary to her wishes. The real question in this case is not whether the Attorney General may refuse to defend an initiative. Rather, it is whether she may effectively veto the People's enactment by refusing to defend it *and barring anyone else from doing so*.

2. Contrary to the Attorney General's contention, *see* AG Br. 16, article V, section 13 of the California Constitution certainly does not grant the Attorney General such arbitrary and sweeping authority.

As relevant here, that provision provides that the Attorney General "shall be the chief law officer of the State" and that "[i]t shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.)

As we have explained, this provision does not explicitly address the Attorney General's authority or duty to defend state laws, let alone state that no one else may do so. (*See* Prop. Reply Br. 16-17.) And even with respect to "enforc[ing]" the law, it is well settled that the Attorney General's authority is not exclusive. (*Id*. at pp. 17-18.) To the contrary, as the court of appeal has explained, "Although there are within the executive branch of the government offices and institutions (exemplified by the Attorney General) whose function it is to represent the general public . . . and to ensure proper enforcement [of the laws], for various reasons the burden of enforcement is not always adequately carried out by those officers and institutions, rendering some sort of private action imperative." (*Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal.App.3d 633, 640.)

Thus, for example, California generally permits *any* citizen to sue to enforce the law and, even where a statute expressly confers

enforcement authority upon the Attorney General, this Court will not interpret that authority to bar citizens from suing to enforce the law "[i]n the absence of either an express limitation on citizen standing or any indication of legislative intent to confer exclusive powers on the Attorney General." (*Common Cause of California v. Board of Supervisors* (1989) 49 Cal.3d 432, 440.)[9] Thus, the settled principle that the "conferral of enforcement power on [the] Attorney General [is] not determinative of [the] exclusivity question under California law" plainly applies to article V, section 13, no less than to statutory grants of authority. (*Id*. at pp. 440-41 [citing *People v. City of South Lake Tahoe* (E.D. Cal. 1978) 466 F.Supp. 527].) And while California imposes stricter limits on which private citizens may defend a statute, *see* Prop. Reply Br. 18, there is surely no basis for reading the Attorney General's implicit constitutional authority to

[9] Citing two cases that predate California's adoption of the initiative process, the Attorney General argues that "the Attorney General must give consent to a private person to sue in the name of the people." (AG Br. 17.) But regardless of whether this rule applies in the narrow context of relator suits such as those cited by the Attorney General, it does not apply to other contexts in which California permits private citizens to represent the People's interest in litigation.

defend state laws to be exclusive when her express enforcement authority is not.[10]

3. Nor do any of the statutes cited by the Attorney General, *see* AG Br. 17, confer upon her the authority to nullify an initiative by preventing anyone from defending it. We have already demonstrated that neither section 12511 nor section 12512 grants such authority, *see* Prop. Reply Br. 22-23, and the additional statute cited by the Attorney General likewise does not purport to grant the Attorney General such authority. And even if the legislature wished to confer such authority upon the Attorney General it could not, of course, statutorily override the People's constitutional initiative power.

4. The Attorney General asserts the policy benefits of assigning the decision whether to defend an initiative to an elected public official rather than private citizens. (See AG Br. 19-20.) But

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[10] *State Board of Education v. Levit* (1959) 52 Cal.2d 441—a decision addressing the State Board of Education's constitutional power to select textbooks that says nothing about litigation authority (exclusive or otherwise)—is plainly inapposite. Though this case states that powers which are "specially conferred by the constitution" upon an officer may not be reassigned, *id*. at pp. 461-62, the Constitution does not specifically confer upon the Attorney General exclusive authority to defend (or even to enforce) the law, as demonstrated above. Were it otherwise, the various statutes and judicial doctrines permitting persons other than the Attorney General to enforce the laws would surely be unconstitutional.

essentially the same argument could be raised against the initiative process itself, which was deliberately designed to allow private citizens—the People—to assert their rightful control over their elected officials.[11]

5. The Attorney General also contends that the initiative power is strictly legislative and thus, she argues, does not include the authority to defend an initiative when executive officers refuse to do so. (*See* AG Br. 13-16.) We have already refuted this argument. (*See* Prop. Reply Br. 23-26.) Further, the authorities cited by the Attorney General hold only that the form and content of an initiative are subject to certain constitutional requirements, such as the single subject rule, and, more generally, that "in the enactment of statutes the

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[11] The League of Women Voters likewise recites a list of untoward consequences that would allegedly flow from reaffirming official proponents' authority to represent the People's interest in the validity of initiatives. (*See* League Br. 7-8, 10-11.) The League's dire predictions essentially track those of Respondents, which we have already refuted. (*See* Prop. Reply Br. 25-29.) And the County of Santa Clara, et al., fret that reaffirming that the official proponents of statewide initiatives may represent the People's interest in defending those measures when state officials refuse to do so might lead to a holding that the official proponents of local initiatives may likewise defend those measures in lieu of local officials who fail to do so. (*See* Counties Br. 9-11.) But that is, of course, already the law. (*See, e.g., Citizens for Jobs & the Economy*, *supra*, 94 Cal.App.4th at pp. 1316, 1323; *Community Health Association*, *supra*, 146 Cal.App.3d at pp. 991-92.)

constitutional limitations that bind the Legislature apply with equal force to the people's reserved power of initiative." (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 663.) These cases do not even address the question of who may represent the People's interest in an initiative that executive officers refuse to defend, let alone hold that official proponents may not do so.

The Attorney General nevertheless argues that the efforts of anyone outside the Executive Branch to exercise and vindicate the initiative power—again, a power premised on the principle that "*all* government power ultimately resides in the people," *Building Industry Association, supra*, 41 Cal.3d at p. 821 (emphasis added)—must be limited to actions that could also be taken by the Legislature. But even if this is so, it does not follow that official proponents cannot represent the People's interest in defending an initiative.

The Attorney General has found no authority holding that California's Legislature or individual legislators whom it has authorized to act on its behalf may defend a statute when executive officers refuse to do so. (AG Br. 16, fn. 5.) But neither she, Respondents, nor any of Respondents' other amici have identified any authority holding the contrary, either. (*See also* Prop. Reply Br. 25.)

And as we have demonstrated, *see* Prop. Reply Br. 25, the Legislature has been permitted to defend its own successful ballot propositions and even executive enforcement positions, so it is highly implausible that California's Constitution would bar the Legislature from defending its own enactments if executive officers refused to do so.

Indeed, although Equality California cites various decisions from other jurisdictions addressing legislative standing in a variety of contexts, *see* Equality Cal. Br. 18-20, it does not identify a single decision holding that a legislature or members it has authorized to act on its behalf may not defend its own enactment when Executive officials refuse to do so. And it is plain that there is no separation of powers problem in permitting such a defense. (*Compare, e.g.*, N.J. Const., art. III, ¶ 1 [mandating separation of powers among the legislative, executive, and judicial branches], *with Karcher, supra*, 484 U.S. at p. 82 [citing *In re Forsythe, supra*, 91 N.J. at p. 144] [recognizing that New Jersey law permits the legislature, through its officers, to defend its enactments].) Indeed, the United States Supreme Court has "long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs

that the statute is inapplicable or unconstitutional." (*INS v. Chadha* (1983) 462 U.S. 919, 940; *see also id*. at p. 939 [holding that "from the time of Congress' formal intervention," Congress was "both a proper party to defend the constitutionality" of a statute the Executive believed was unconstitutional "and a proper petitioner" in the Supreme Court].)

6. Finally, the Attorney General's own concessions fatally undermine her arguments that permitting official proponents to intervene to defend their initiatives would either undermine her authority or exceed the scope of the initiative power under the California Constitution. Indeed, she concedes that the courts of this State (including this Court) have uniformly permitted the proponents of an initiative measure to intervene to defend against actions brought in the courts of this State challenging the validity of the initiative measure that they sponsored. (*See* AG Br. 22.) And she concedes the validity and authority of "California cases in which initiative proponents who were permitted to intervene then appealed the judgment without benefit of being joined by a government appellant …." (*Id*. at p. 22, fn. 9 [referencing *Community Health Association v. Board of Supervisors*, (1983) 146 Cal.App.3d 990, *Citizens for Jobs &*

the Economy v. County of Orange, (2002) 94 Cal.App.4th 1311, *and Paulson v. Abdelnour*, (2006) 145 Cal.App.4th 400].) Nevertheless, the Attorney General argues, this authority does not confer a substantive right to appeal upon initiative proponents, but rather merely reflects a procedural right of appeal granted to intervenors in the California courts that does extend to the federal courts.

Thus, the Attorney General's true objection is *not* to permitting initiative sponsors to defend against challenges to the validity of initiative measures and to appeal adverse judgments invalidating the challenged initiatives when the Executive refuses to do so. As noted, she concedes that the courts of this State uniformly permit such appeals. Rather, the Attorney General objects to this result only in the context of *federal court* challenges to initiative measures. But none of the Attorney General's authorities or arguments concerning her purportedly exclusive authority or the supposedly strict limits on the powers of initiative proponents turns on whether a challenge to an initiative is brought in state court or in federal court. Simply stated, by conceding that initiative sponsors may defend against challenges brought in state court to the validity of initiative measures and appeal adverse judgments invalidating the challenged initiatives when the

Executive refuses to do so, the Attorney General has effectively conceded that permitting the same result when the challenge is brought in federal court will not exceed the limits of proponents' powers or improperly encroach upon the litigation authority of the Attorney General or any other executive official.

II. Official Proponents Have a Personal, Particularized Interest in the Validity of Their Initiatives.

California law clearly defines a "real party in interest" as a "person or entity whose interest will be directly affected by the proceeding." (*Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1178.) And that interest must not only be "direct," but also "a 'special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' " (*Id*. at p. 1179.) As Proponents have demonstrated, the official proponents of initiatives have been named repeatedly as real parties in interest in California cases challenging the validity of initiatives. (*See* Prop. Br. 33-36.) In addition, this Court has squarely held both that the official proponent of a ballot initiative "clearly me[ets] that definition [of a real party in interest] when it c[omes] to litigation involving that initiative," and that groups having only "a particular ideological or policy focus that motivates them to

participate in certain litigation" do not. (*Connerly, supra*, 37 Cal.4th at p. 1179.) It follows ineluctably that official proponents have a particularized interest in the validity of their initiatives under California law that entitles them to defend those initiatives when they are challenged in litigation.

Respondents' amici find little to say in response to this analysis, and what little they do say is unpersuasive. Noting that *Connerly*'s discussion of official proponents' interest in litigation relied on *Sonoma County Nuclear Free Zone '86 v. Superior Court* (1987) 189 Cal.App.3d 167, a case that began as pre-election litigation involving an initiative, California Faith for Equality argues that official proponents do not possess any "post-enactment interest in an enacted initiative," but only certain "pre-enactment procedural rights." (California Faith Br. 21.)[12] *Connerly*, however, drew no such distinction. Rather, it spoke broadly of the interest of "the proponent of a ballot initiative" in "litigation involving that initiative." (*Supra*, 37 Cal.4th at p. 1179.) Indeed, though *Connerly* involved post-enactment litigation, this Court distinguished *Sonoma County* not on

[12] As we have explained, the court's action in deferring decision until after the election in *Sonoma County* itself demonstrates that official proponents' interest in their initiatives does not disappear post-election. (*See* Prop. Reply Br. 36-37.)

the ground that it involved pre-enactment rather than post-enactment litigation, but rather on the ground that the organization whose interest was in question was not an official proponent and therefore had only a "policy interest in the present case" that was "no different in kind from that of the typical amicus curiae and no different in substance from like-minded members of the general public." (*Ibid.*) Any doubt on this score is removed by the facts that official proponents have been allowed to defend their initiatives as real parties in interest in post-enactment litigation no less than pre-enactment litigation and that courts have drawn no distinction in official proponents' status and right to defend based on the timing of the litigation. (*See* Prop. Br. 33-34; Prop. Reply Br. 36-37.)[13]

Indeed, the Attorney General concedes, as she must, that "proponents are sometimes identified as real parties in interest in post-

[13] Echoing San Francisco, Equality California seeks to distinguish between official proponents' interest in the "processes and procedures relating to a ballot measure's appearance on the ballot" and its "substantive validity," arguing that "[i]nitiative proponents have a particularized interest in the former, but not the latter." (Equality Cal. Br. 21-22.) But as we have demonstrated, *see* Prop. Reply Br. 38-39, and Equality California is ultimately forced to concede, *see* Equality Cal. Br. 22-23, fn. 4, this distinction finds no more support in the cases than the temporal distinction urged by California Faith.

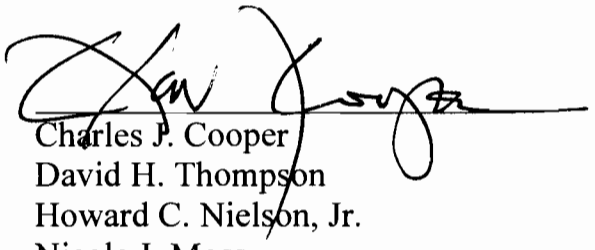
adoption challenges" to initiatives and that "proponents have defended initiatives in cases when public officials decide that it is not in the public interest to do so." (AG Br. 26.) But she nevertheless claims, without citing any supporting authority, that these facts do not "demonstrat[e] that California law elevates proponents' interest in the validity of an initiative enactment to a substantive right superior to that of any other informed supporter." (AG Br. 26-27.) This naked assertion simply cannot be squared with the strict definition of "real party in interest" under California law, the cases repeatedly permitting official proponents to defend their initiatives as "real parties in interest," or this Court's explicit holding that official proponents satisfy the definition of real parties in interest in litigation involving their initiatives but that organizations or individuals having only a "policy interest" in such litigation do not. Nor does the Attorney General (or any other amicus or party to this litigation) identify any case holding that official proponents may not defend their initiatives as real parties in interest or permitting anyone other than an official proponent or an organization directly involved in drafting and sponsoring an initiative to offer the sole defense of an initiative as a real party in interest.

* * *

At bottom, Respondents' amici, like Respondents themselves, are able to offer no persuasive response to the repeated practice of California courts allowing official proponents to defend their initiatives both as intervenors and as real parties in interest or to the clear statements from this Court and the courts of appeals explaining this practice and distinguishing official proponents from those not directly involved in drafting and sponsoring initiatives. For the reasons set forth above, as well as in Proponents' Opening and Reply Briefs, this Court should answer the certified question in the affirmative.

May 9, 2011

Respectfully submitted,



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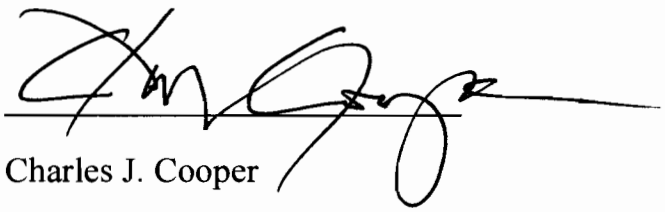
CERTIFICATE OF COMPLIANCE

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 5,203 words.



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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 9, 2011 at Washington, D.C.

Kelsie Hanson