No. 10-16696

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

KRISTIN M. PERRY, et al.,

*Plaintiffs-Appellees*,

v.

EDMUND G. BROWN, JR., et al.,

*Defendants*,

and

DENNIS HOLLINGSWORTH, et al.,

*Defendants-Intervenors-Appellants*.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 JW (Honorable James Ware)

# SUPPLEMENTAL BRIEF FOR APPELLEES

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Plaintiffs-Appellees respectfully submit this brief in response to the Court's Order of November 18, 2011, directing the parties to file briefs discussing the effect on this case of the California Supreme Court's decision in *Perry v. Brown*, No. S189476, 2011 WL 5578873 (Cal. Nov. 17, 2011). Nothing in that decision alters the fact that Proponents lack standing to pursue this appeal. Even though Proponents possess the right under California law to assert the *State's* interest in the validity of Proposition 8, their standing under Article III depends on their ability to establish that the invalidation of Proposition 8 would cause them a "*personal*, particularized, [and] concrete" injury. *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (emphasis added). In contrast to Plaintiffs—who are harmed each day that Proposition 8 remains on the books and continues to deny them the right to marry—Proponents are unable to meet that fundamental constitutional requirement.

## ARGUMENT

In response to this Court's Certified Question, the California Supreme Court concluded that, "[i]n a postelection challenge to a voter-approved initiative, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the

measure or appeal such a judgment decline to do so." *Perry*, 2011 WL 5578873, at *3. In so ruling, the court declined to "decide whether the official proponents of an initiative measure possess a particularized interest in the initiative's validity once the measure has been approved by the voters." *Id.* at *12.

The California Supreme Court's decision does not—and cannot—alter Proponents' inability to meet the "irreducible constitutional minimum" requirements of standing established by Article III of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To satisfy Article III, a party must establish, among other things, that it has suffered an "injury" that is "personal, particularized, concrete, and otherwise judicially cognizable." *Raines*, 521 U.S. at 820; *see also Lujan*, 504 U.S. at 560. In other words, the "'Art[icle] III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*.'" *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (emphasis in *Stevens*).

The California Supreme Court's decision did not establish that Proponents stand in the shoes of the State defendants in this litigation, or otherwise are themselves arms of the State. Indeed, the California Supreme Court went out of its way to make clear that its "determination that the official proponents of an

initiative are authorized to assert the State's interest in the validity of the initiative measure when public officials have declined to defend the measure . . . does *not* mean that the proponents become de facto public officials or possess any official authority to enact laws or regulations or even to directly enforce the initiative measure in question." *Perry*, 2011 WL 5578873, at *25 (emphasis added). Thus, if Proponents have standing to pursue this appeal based on the California Supreme Court's decision, their standing can only be based on their right under California law to vicariously represent the interests of the State.

The U.S. Supreme Court has made clear, however, that the "personal" injury requirement established by Article III applies even where a litigant is authorized to assert the rights of a third party. The Court "ha[s] recognized the right of litigants to bring actions on behalf of third parties" *only* where "[t]he litigant . . . ha[s] suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991); *see also United States v. Payner*, 447 U.S. 727, 731-32 (1980) (criminal defendant "lacks standing under the Fourth Amendment to suppress . . . documents illegally seized from" a third party "unless [the court] finds that an unlawful search or seizure violated the defendant's *own* constitutional rights") (emphasis added).

Similarly, "[s]tanding to defend on appeal in the place of an original defendant . . . demands that the litigant possess a *direct* stake in the outcome" (*Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (emphasis added; internal quotation marks omitted)), which cannot be satisfied by the invocation of another party's interests. *See, e.g.*, *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) ("a litigant must assert his *own* legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties") (emphasis added; internal quotation marks omitted); *Warth*, 422 U.S. at 499 (same). Accordingly, Proponents cannot rely on the injury that the State would suffer from the invalidation of Proposition 8—and their right under state law to vicariously represent the State's interest in the constitutionality of that provision—to demonstrate that they would suffer the requisite "personal, particularized, [and] concrete" injury from the invalidation of this state enactment. *Raines*, 521 U.S. at 820. If they could, then States would be free to open the federal courthouse doors to any private individual authorized under state law to represent the interests of the State—in contravention of the settled principle that "[s]tanding to sue in any Article III court is . . . a federal question which does not depend on the party's prior standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985).

Proponents would not suffer any personalized injury as a result of the invalidation of Proposition 8, and thus are unable to satisfy the requirements of Article III, even if their right under state law to represent the interests of the State is taken into account. Indeed, the district court found that Proponents "have failed to articulate even one specific harm they may suffer as a consequence of the injunction" against the enforcement of Proposition 8, ER 7, and Proponents have conceded in this Court that it is not their position "that any individual's existing marriage will be directly affected" by the "adoption of same-sex marriage." Proponents' Reply Br., No. 11-16577, at 16 n.4.; *see also* ER 44 (Proponents' counsel responding "I don't know" when asked by the district court to identify what harms would be suffered by opposite-sex married couples if gay and lesbian couples could marry).

Proponents' only purported "personal" injury caused by the district court's invalidation of Proposition 8 is premised on their role as the official sponsors of the ballot initiative during the election campaign that culminated in the initiative's enactment. But, in this regard, Proponents are no different for Article III purposes from any of the millions of other Californians who voted in favor of Proposition 8 and who expended time and money campaigning for the initiative. The U.S. Supreme Court has already determined that status as an initiative proponent—no

matter the amount of time and money devoted to securing a measure's enactment—is insufficient to confer Article III standing on the proponents to defend the measure on appeal where the State itself refuses to do so. *See Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 460 U.S. 1077 (1983) (summarily dismissing, for lack of standing, an appeal by an initiative proponent from a decision invalidating the initiative). Thus, while it is clear that Proponents feel strongly about the continued enforcement of Proposition 8, that "interest shared generally with the public at large . . . will not do" to afford Proponents standing to pursue this appeal; "[t]he decision to seek review is not to be placed in the hands of concerned bystanders . . . who would seize it as a vehicle for the vindication of value interests." *Arizonans*, 520 U.S. at 64-65 (internal quotation marks omitted); *see also id.* at 66 (expressing "grave doubts" whether initiative proponents have standing to defend an initiative on appeal).

Moreover, even if Proponents could satisfy the Article III injury-in-fact requirement based on their authority to represent the interests of the State, they would still be required to make "two additional showings" to demonstrate their entitlement to "third-party standing": "a 'close' relationship with the person who possesses the right" and a "'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Powers*, 499

U.S. at 411); *see also Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (federal courts "must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons"). Proponents cannot meet either of those requirements (nor have they attempted to do so at any point during this appeal).

First, Proponents are unable to demonstrate the requisite "'close' relationship" with the State because, unlike the state legislators in *Karcher v. May*, 484 U.S. 72 (1987), who were permitted to represent New Jersey's interest in the validity of a challenged law (*id.* at 82), the proponents of a ballot initiative "are not elected representatives" of the State but, instead, are private citizens without any official position in state government. *Arizonans*, 520 U.S. at 65; *see also Perry*, 2011 WL 5578873, at *26 ("official proponents of an initiative measure are not public officials"). And, while Proponents purport to be representing the State's own interest in the validity of Proposition 8, the State itself has no right to control Proponents' litigation strategy or to compel them to terminate their defense of that controversial measure. Similarly, the California Supreme Court suggested that Proponents' authority under state law to represent the State's interests in this litigation "does not mean that any monetary liability incurred as a result of the proponents' actions"—such as attorneys' fees obligations—"should or must be

borne by the state." *Id.* Proponents' asserted right to litigate this appeal free from any oversight by the State—and evidently absent any ability to bind the State based on their litigating positions—is fundamentally at odds with the type of "'close' relationship" necessary to support third-party standing. *Cf. Stevens*, 529 U.S. at 772 (holding that a relator pursuing a False Claims Act suit is not an agent of the government because, among other things, the Act "prohibits the Government from settling the suit over the relator's objection without a judicial determination of 'fair[ness]'") (alteration in original).

Second, there is no "hindrance" to the State of California's "ability to protect [its] own interests" in the validity of Proposition 8. *Kowalski*, 543 U.S. at 130. The Governor and Attorney General of the State were both named as defendants in this suit and were free to defend the validity of Proposition 8 at trial and on appeal. Both officials ultimately decided that it was not in the best interests of the State to defend that discriminatory, unconstitutional measure—a decision that was well within the discretion afforded them under California law. *See Beckley v. Schwarzenegger*, No. S186072 (Cal. Sept. 8, 2010) (denying a petition for a writ of mandamus seeking to compel the Governor and Attorney General to appeal the district court's decision invalidating Proposition 8). In light of the Governor's and Attorney General's status as defendants in this litigation—which afforded them a

full opportunity to defend Proposition 8—there is no reason to authorize Proponents to assert for themselves the State's interest in the validity of that enactment. *See Kowalski*, 543 U.S. at 131 (holding that an indigent criminal defendant was not hindered in his ability to challenge a state law denying him appointed counsel on appeal because he "ha[d] open avenues to argue that denial deprives him of his constitutional rights").

* * *

Permitting Proponents to appeal the district court's decision invalidating Proposition 8 would disregard Supreme Court precedent, dilute Article III's injury-in-fact requirement, and empower private litigants to second-guess States' litigating decisions. Because the California Supreme Court's decision cannot override controlling U.S. Supreme Court precedent or displace settled constitutional principles, the Court should dismiss this appeal for lack of jurisdiction.

## CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiffs' Answering Brief, the Court should dismiss this appeal.

Dated: December 2, 2011

/s/ Theodore B. Olson

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9th Circuit Case Number(s) 10-16696

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