Nos. 10-16696

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, *et al.*,
Plaintiffs-Appellees,
v.
ARNOLD SCHWARZENEGGER, *et al.*,
Defendants,
and
DENNIS HOLLINGSWORTH, *et al.*,
Defendants-Intervenors-Appellants

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CIVIL CASE NO. 09-cv-2292 VRW (Honorable Vaughn R. Walker)

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANTS AND REVERSAL

JOHN C. EASTMAN, Cal. Bar No. 193726
ANTHONY T. CASO, Cal. Bar No. 88561
KAREN J. LUGO, Cal. Bar No. 241268
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University School of Law
One University Drive
Orange, CA 92866
Telephone: (714) 628-2500

Attorneys for Amicus Curiae Center for Constitutional Jurisprudence

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *amicus curiae*, the Center for Constitutional Jurisprudence, is not a corporation that issues stock or has a parent corporation that issues stock.

CENTER FOR CONSTITUTIONAL JURISPRUDENCE
John C. Eastman

By: /s/ John C. Eastman

Attorneys for *Amicus Curiae*
Center for Constitutional Jurisprudence

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

INTEREST OF AMICUS CURIAE

This brief of *Amicus Curiae* is filed pursuant to F.R.A.P. Rule 29(a) with the consent of all parties to the case.

The Center for Constitutional Jurisprudence ("CCJ") was founded in 1999 as the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The CCJ advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the very right of the sovereign people to retain the centuries-old definition of marriage as a cornerstone of civil society, in the face of government officials holding a different personal view, is at stake. The CCJ has previously appeared as counsel or as *amicus curiae* before the Supreme Court of the United States and this and other courts in cases involving the authority of the people, as the ultimate sovereign, to direct and control the actions of their agents, the elected officials of government, through written constitutions, including *United States v. Morrison*, 529 U.S. 598 (2000); *Amodei v. Nevada State Senate*, 99 Fed.Appx. 90 (9th Cir. 2004); *Howard Jarvis Taxpayers Ass'n v. Legislature of the State of California*, No. S170071 (Cal. 2009).

BACKGROUND AND PROCEDURAL HISTORY

More than a century ago, faced with an unresponsive government beholden to special interests, the People of California amended their state constitution to grant themselves a power to adopt statutory or constitutional provisions directly by initiative rather than through the agency of their elected officials, as a mechanism to guarantee that the policy decisions of the People could not be thwarted by recalcitrant governmental officials.

Over the past decade, the People of California have engaged in an epic battle over the very definition of marriage, a bedrock institution that has long been recognized as "one of the cornerstones of our civilized society." *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 936, 957 (1971) (Black, J., dissenting from denial of cert.); *see also Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (describing marriage, "the union for life of one man and one woman," as "the sure foundation of all that is stable and noble in our civilization").

The battle has pitted the majority of the People of California against every branch of their state government. In 1994, the Legislature added Section 308 to its Family Code, mandating that marriages contracted in other states would be recognized as valid in California if they were valid in the state where performed. As other states (or their state courts) started moving toward recognizing same-sex marriages, it became clear that Section 308 would require California to recognize

those marriages, even though another provision of California law, Family Code Section 300, specifically limited marriage to "a man and a woman." This concern was foreclosed by the People at the March 2000 Election with the passage of Proposition 22, a statutory initiative adopted by a 61% to 39% majority that provided: "Only marriage between a man and a woman is valid or recognized in California." Cal. Fam. Code § 308.5.

In 2005, however, the Legislature passed a bill in direct violation of Proposition 22, A.B. 849, which would have eliminated the gender requirement found in Family Code Section 300. That bill was vetoed by the Governor as a violation of the state constitutional requirement that the Legislature cannot repeal statutory initiatives adopted by the people. Cal. Const. art. 2, § 10(c).

Meanwhile, a local elected official, the Mayor of San Francisco, took it upon himself to issue marriage licenses in direct violation of Proposition 22. Although the California Supreme Court rebuffed that blatant disregard of the law, *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (2004), it ultimately ruled that Proposition 22 was unconstitutional under the state constitution. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008).

The People responded immediately, placing another initiative on the ballot at the first opportunity, and in November 2008, Proposition 8 was adopted as a constitutional amendment, effectively overturning the decision of the California Su-

preme Court. That initiative was immediately challenged as a supposed unconstitutional revision of the state constitution rather than a valid constitutional amendment. The Attorney General of the State, an opponent of Proposition 8 during the election, not only refused to defend the initiative in court, but affirmatively argued that it was unconstitutional, despite his statutory duty to "defend all causes to which the State . . . is a party." Cal. Gov't Code § 12512. As a result, the high court of the state allowed Proponents of the Initiative to intervene in order to provide the defense of the Initiative that the governmental defendants would not, recognizing Proponents' preferred status under California law (the Court simultaneously denied a motion to intervene by other supporters of Proposition 8 who were not official Proponents of the measure) and specifically authorizing them to respond to the Court's Order to Show Cause that it issued to the governmental defendants. ER1617. Persuaded by the Proponents' arguments, the California Supreme Court upheld Proposition 8 as a valid amendment to the state constitution. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

Another group of plaintiffs, supported by many of the same organizations that had just lost in *Strauss*, then filed this action in federal court, naming as defendants several government officials: the same Attorney General who had previously refused to defend the initiative in state court, the Governor, two health officials and two county clerks, none of whom offered any defense to the lawsuit.

Despite governing precedent from the U.S. Supreme Court as well as this Court, the Attorney General again refused to defend the Initiative, as this Court has already recognized, instead agreeing with Plaintiffs' contention that the Proposition was unconstitutional. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 949 (2009). Indeed, circumstantial evidence from the district court proceedings below strongly suggests that the Attorney General was actively colluding with Plaintiffs to undermine the defense of the Initiative, *see* Motion to Realign at 4-5 (Dkt. #216), and the District Court even directed him to "work together in presenting facts pertaining to the affected governmental interests" with San Francisco, whose motion to intervene as a *Plaintiff* was granted by the District Court. 8/9/09 Hearing Tr. at 56 (Dkt.#162); 8/9/09 Minute Order at 2 (Dkt.#160).

Not surprisingly, given the Attorney General's antipathy toward the Proposition it was his duty to defend, the Proponents of the Initiative moved for, and were granted, Intervenor-Defendant status. ER 204-213. In granting the motion, the District Court expressly noted, without objection from any of the parties, his understanding that "under California law … proponents of initiative measures have the *standing* to … defend an enactment that is brought into law by the initiative process" and that intervention was "substantially justified in this case, particularly where the authorities, the [governmental] defendants who ordinarily would defend the proposition or the enactment that is being challenged here, are taking the posi-

tion that, in fact, it is constitutionally infirmed (sic)." 7/2/09 Hearing Tr. at 8:13-17 (ER202) (emphasis added); *see also Perry*, 587 F.3d, at 949-950 (Proponents allowed to Intervene "so that they could defend the constitutionality of Prop. 8" when the government defendants would not).

But the District Court *denied* a motion by the County of Imperial, the Imperial County Board of Supervisors, and the Imperial County Deputy Clerk to Intervene as governmental party defendants willing to defend the Initiative, holding its ruling on the motion for more than eight months until it issued its opinion on the merits and without once in its order of denial taking note of the fact that it had previously *granted* the motion by the City and County San Francisco County to intervene as a party plaintiff or that two other County clerks were already named defendants in the case, albeit ones who were offering no defense. Order Denying Intervention (Dkt.#709).

After what can only be described as a show trial—the Chief Judge of the District Court, who presided, was even chastised by the Supreme Court of the United States for attempting to broadcast the trial in violation of existing court rules, *Hollingsworth v. Perry*, 130 S. Ct. 705, 715 (2010)—the District Court on August 4, 2010, issued a 136-page opinion that purported to contain numerous findings of fact ostensibly discrediting all of the oral testimony while simply ignoring the extensive documentary and historical evidence supporting the rationality of

Proposition 8, and articulating conclusions of law that likewise simply ignored binding precedent of the Supreme Court and this Court, as well as persuasive authority from every other state and federal appellate court to have considered the issues presented by the case. On the same day, the District Court issued its Order denying the long-languishing Motion to Intervene by Imperial County, and ordered responses to a Motion for Stay Pending Appeal that had been filed by Intervenor-Defendant Proponents of the Initiative the day before. Not only the Plaintiffs, but the governmental Defendants, opposed the motion for a stay pending appeal. The district court denied the motion for a stay, holding that there was little likelihood of success on the merits of the appeal, in part because it was questionable whether this Court would even have jurisdiction to consider the appeal absent an appeal by the named governmental defendants, who were all actively siding with Plaintiffs. ER 3-13 (Dkt.#727).

Finally, despite concerted efforts by the People of California[1] to have Defendants—their elected Governor and Attorney General and even their Lieutenant Governor while serving as Acting Governor (*see* Cal. Const. art. 5, §10)—file a notice of appeal to guarantee that this Court had jurisdiction to consider whether the decision by the District Court invalidating a solemn act of the sovereign people

[1] *See, e.g.*, "Lawmakers Urge Governor to Appeal Prop 8 Ruling," Associated Press (Sept. 1, 2010), available at http://www.cbsnews.com/stories/2010/09/01/national/main6827966.shtml.

of California was erroneous, none of the governmental defendants filed a notice of appeal within the 30-day window specified by F.R.A.P. 4(a)(1)(A).

In granting the motion for a stay pending appeal by the Initiative Proponents, Intervenor-Defendants below, this Court ordered briefing on whether the Intervenor-Defendants had standing to pursue the appeal. The issue can be re-characterized as follows: Does California law provide authority, cognizeable in the federal courts for purpose of establishing Article III standing, for Proponents of an Initiative to defend their exercise of the initiative power so that an elected official personally opposed to the initiative cannot effectively veto a duly-approved initiative by refusing to defend it? Similarly, in the parallel appeal brought by Imperial County, the issue can be presented as follows: Can a district court shield its judgment from appellate court review by *denying* intervenor status to governmental entities willing to offer a defense of an initiative duly enacted by the People of the State, even while *granting* intervenor status to a similarly-situated governmental entity who intervened in order to join in the attack on the constitutionality of the initiative?

SUMMARY OF ARGUMENT

Initiative Proponents have standing to defend on appeal the Initiative they authored, both as agents of the state of California and on their own behalf to protect the fundamental right to Initiative afforded to them under California Law.

Similarly, the County of Imperial, its Board of Supervisors and its County Deputy Clerk, all had a right under Federal Rules of Civil Procedure 24(a) to intervene in the litigation below. The denial by the district court of their motion to intervene as of right was erroneous and must be reversed; then, as governmental Intervenor-Defendants, they, too, clearly have standing to appeal the decision below, providing an alternative basis for this Court's jurisdiction to consider the appeal by Proponents.

On the merits, the district court below vastly exceeded its authority in numerous ways. Most substantially, it held that Proposition 8, which defines marriage as between one man and one woman, violated the federal Due Process and Equal Protection rights of same-sex couples despite binding authority of the Supreme Court to the contrary.

The decision of the district court must therefore be reversed.

ARGUMENT

It is hard to read the procedural history set out above without the phrase, "manipulation of the judicial process," coming forcefully to mind. As Chief Judge Kozinski recently noted, the courts must be particularly sensitive to efforts by parties to withdraw a case from consideration "in order to manipulate the judicial process to its advantage." *Suntharalinkam v. Keisler*, 506 F.3d 822, 830 (9th Cir. 2007) (Kozinski, C.J., dissenting). All the more must the appellate courts be concerned lest a district court's apparently contradictory actions—*granting* San Francisco's motion to intervene as a Plaintiff while *denying* Imperial's motion to intervene as a Defendant—be viewed by the citizenry as a manipulative attempt to shield a district court decision from appellate scrutiny. Happily, for the reasons set out below, this Court need not, for lack of jurisdiction, abide that apparent manipulation of the judicial process.

I. The Initiative Proponents Have Standing to Defend Proposition 8, Both as Agents of the State and in Their Own Right.

A. The Principal Purpose of the Initiative Power Is To Allow The People To Act Directly, When Their Government Officials Will Not.

The initiative power in California is central to ensuring that the government is responsive to its citizens, and is "one of the most precious rights of [California's] democratic process." *Brosnahan v. Brown*, 651 P.2d 274, 289 (Cal. 1982). Initiatives are designed to circumvent unresponsive government officials who wield the

power to create law. Initiative proponents, therefore, retain a power that is superior to that of the State legislature. Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 Loy. L.A. L. Rev. 1165, 1195 (1998). For example, the legislature may not repeal or amend an initiative statute unless the enactment permits it, Cal. Const. art. 2, § 10(c), a prohibition that no other state carries to such lengths as California, *People v. Kelly*, 222 P.3d 186, 200 (Cal. 2010).

To fully understand the importance of the initiative power in California, it is helpful to review why it was adopted. Starting in the late 19th century, Californians grew frustrated at the unresponsive, corrupt nature of their legislature. Special interests essentially governed the state. *See* Center for Governmental Studies, *Democracy by Initiative: Shaping California's Fourth Branch of Government* 3 (2nd. ed. 2008) ("Democracy by Initiative"). There was an "ever increasing public dissatisfaction with machine-controlled politics at the state and local levels. Representative government seemed unresponsive to the popular will, and legislative decisions seemed biased in favor of special interests." Steven Piott, *Giving Voters a Voice: The Origins of the Initiative and Referendum in America* 148 (2003). Voters were searching for a way to regain control. *Id*.

The initiative movement actually began in the cities of San Francisco and Los Angeles. Organized citizen groups succeeded in passing city charters that

gave voters the right to propose city ordinances and future charter amendments. Piott, *supra* at 151; George Mowry, The California Progressives 39 (1951). Success at the local level spurred action at the state level, but the state legislature remained unresponsive. Piott, *supra* at 163; Mowry, *supra* at 56-57. That changed when the initiative movement swept Governor Hiram Johnson into office in 1910, and he immediately proposed legislation intending to "'return the government to the people' and to give them honest public service untarnished by corruption and corporate influence." Spencer C. Olin, Jr., California's Prodigal Sons 35 (1968). Pressed by the Governor, the Legislature put before voters a reform package that consisted of Proposition 7 (the initiative power), Proposition 4 (granting women the right to vote), and Proposition 8 (providing for the recall of government officials). "It gave citizens the techniques to check the influence of special interest groups, alter the state's political agenda and public policies and remove unresponsive or corrupt officeholders." Democracy by Initiative at 42. This reform package satisfied the demand of the people of California to directly control government when elected representatives become unresponsive to their needs.

"Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of initiative and referendum, not as a right granted the people, but as a power reserved by them." *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976) (Tobriner, J.). It is

"the duty of the courts to jealously guard this right of the people," *id.* (quoting *Martin v. Smith*, 176 Cal.App.2d 115, 117 (Cal.App. 1959), "and to prevent any action which would improperly annul that right," *Martin*, 176 Cal.App.2d at 117. In short, as Justice Stanley Mosk has noted, the initiative process "is in essence a legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end." *Raven v. Deukmejian*, 52 Cal.3d 336, 357, 801 P.2d 1077 (Cal. 1990) (Mosk, J., dissenting).

Given the importance of the initiative in the California constitutional scheme, it is not surprising that California law confers special authority on the official proponents of initiatives to defend their initiatives against legal challenge. For the reasons set out in subsections B and C below, that special authority is more than sufficient to confer Article III standing on the official Proponents of Proposition 8, so that they can continue to provide here on appeal the defense of the Initiative they sponsored, as they did as Intervenor-Defendants in the court below.

B. California Law Authorizes Proponents of Initiatives to Stand in as "Agents of the State" to Defend Their Initiative, At Least When Government Officials Will Not, Thereby Providing Them Standing in Federal Court for Article III Purposes.

Relying in part on *dicta* in Justice Ginsburg's opinion for the Court in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997), the district court

below questioned whether the Official Proponents of Proposition 8 would have standing to pursue an appeal on their own, absent participation in the appeal by one of the governmental defendants. 8/12/10 Order at 5-6 (Dkt.#727) (ER7-8). Yet in the identical circumstance where a governmental defendant who had opposed an Initiative refused to file an appeal from a district court judgment holding the initiative unconstitutional, governing precedent in this Circuit holds that initiative proponents do have standing to defend their own initiatives. *Yniguez v. State of Arizona*, 939 F.2d 727, 730 (9th Cir. 1991), *ultimately dismissed as moot on other grounds sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Even reading the tea leaves of Justice Ginsburg's *dicta* in the decision much later in the procedural posture of the same case, dismissing the action on other grounds as moot, this Court's holding that initiative proponents do have standing to defend their own initiative is particularly applicable to California initiative proponents, given the preferred place that California law gives to them.

The California Supreme Court has expressly noted that because a governmental entity might not defend a citizen-enacted initiative "with vigor if it has underlying opposition" to the initiative, courts "should allow intervention by proponents of the initiative." *Building Industry Assn. v. City of Camarillo*, 41 Cal.3d 810, 822, 718 P.2d 68 (Cal.1986). Indeed, failure to do so "may well be an abuse of discretion." *Id.* Following this governing authority, California courts have rou-

tinely permitted initiative proponents to intervene in defense of the initiatives they sponsored. *See, e.g.*, *20th Century Ins. Co. v. Garamendi*, 8 Cal.4th 216, 241, 878 P.2d 566 (Cal. 1994); *Amwest Surety Ins. Co. v. Wilson*, 11 Cal.4th 1243, 1250, 906 P.2d 1112 (Cal. 1995); *City of Westminster v. County of Orange*, 204 Cal.App.3d 623, 626 (Cal.App.4.Dist. 1988); *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 480, 683 P.2d 1150 (Cal.1984); *Community Health Assn. v. Board of Supervisors*, 146 Cal.App.3d 990, 992 (Cal.App. 1.Dist. 1983); *cf. Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 683 P.2d 1150 (Cal.1989) (initiative supporters appeared as real parties in interest to defend against constitutional challenge).

Although the test for intervention is not identical to that for standing, there are "substantial similarities between the two," and "the added interest necessary to confer Article III standing—a particularized injury that distinguishes [initiative proponents] from 'concerned bystanders,'" *Yniguez*, 939 F.2d at 731 (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986), has been recognized by California courts, which have allowed intervener initiative proponents to unilaterally pursue appeals when the government defendants would not.

In one recent case, the California Court of Appeal treated the initiative proponent as potentially an "indispensible person," and allowed him to appeal from a trial court decision invalidating the initiative he sponsored when the governmental

defendant, who had joined with plaintiffs in challenging portions of the initiative, did not. *Citizens for Jobs and the Economy v. County of Orange*, 94 Cal.App.4th 1311, 1321-22 (Cal. App. 4.Dist. 2002) (citing Cal. Code Civ. Proc. § 389, "Joinder as party, conditions; indispensable person, factors . . . ."). In another, the proponent of a local initiative was held to be an "aggrieved party" that could file a motion to vacate a writ of mandate issued in conflict with the initiative it supported and appeal from the denial of its motion as well as the judgment, even though the City defendant did not appeal and even though the proponent of the initiative was not a party to the trial court proceeding. *Simac Design, Inc. v. Alciati*, 92 Cal.App.3d 146, 151-53 (Cal.App.1.Dist.1979); *cf. Greif v. Dullea*, 66 Cal.App.2d 986, 993 (1944) ("A party in interest, but not of record, who accepts complete control in the conduct of a case, but suddenly is confronted with his lack of legal capacity to take an appeal, is an aggrieved party").

To be sure, state courts can recognize a broader standing than is permitted in federal court under Article III, *Lee v. American Nat. Ins. Co.*, 260 F.3d 997, 999-1000 (9th Cir. 2001); *Reycraft v. Lee*, 177 Cal.App.4th 1211, 1217 (Cal.App. 4 Dist. 2009), but California has not done so here. Instead, its relevant standing rules parallel those applied by the federal courts under Article III. "To have standing to seek a writ of mandate,"—one of the procedures used to obtain appellate court review—"a party must be 'beneficially interested' (Code Civ. Proc. § 1086), i.e.,

have 'some 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.'" *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal.4th 352, 361-62, 981 P.2d 499 (Cal. 1999) (quoting *Carsten v. Psychology Examing Com.*, 614 P.2d 276 (1980)). The California Supreme Court noted that this standard "is equivalent to the federal 'injury in fact' test, which requires a party to prove by a preponderance of the evidence that it has suffered 'an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* at 362; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, the relevant California standing requirements are interpreted as equivalent to Article III standing in federal courts. That the California courts recognize standing for Initiative Proponents to unilaterally pursue appeals, *Citizens for Jobs*, 94 Cal.App.4th at 1322; *Simac Design*, 92 Cal.App.3d at 153, using a test "equivalent" to that used by federal courts to determine Article III standing, *Associated Builders and Contractors*, 21 Cal.4th 362, should be dispositive.

It is not surprising that California law gives such a preferred position to initiative proponents, given the "precious right" status of the initiative power and the concern about unresponsive government that motivated its adoption. In the present case, the Governor and Attorney General have both refused to defend Proposition

8, as was their duty. Absent defense by the Initiative Proponents, the potential for mischief by elected officials bent on nullifying an initiative that they did not like is not hypothetical or speculative, but very real. The California courts have recognized this potential harm, and ruled that in such instances initiative proponents are to be allowed to intervene and given standing to pursue an appeal even absent appeal by the governmental defendants. *Camarillo*, 41 Cal.3d, at 822; *Citizens for Jobs*, 94 Cal.App.4th, at 1321-22; *Simac Design*, 92 Cal.App.3d, at 151-53.

This Court reached a similar conclusion in *Yniguez.* After carefully reviewing the Supreme Court's decisions that had denied intervenor standing on appeal, this Court concluded quite persuasively that the case of initiative proponents was different. The initiative proponents were not merely "private citizen[s]" like the private physician intervenor in *Diamond* who was simply interested in seeing the state's abortion law enforced. Rather, "[a]s the principal sponsors, . . . their relationship to [the Initiative was] closely analogous to the relationship of a state legislature to a state statute." *Yniguez*, 939 F.2d, at 732.

This Court then reviewed *Karcher v. May*, 484 U.S. 72 (1987), a case involving legislator standing. The Supreme Court held in *Karcher* that the legislators who had intervened in their official capacities as presiding officers of the Legislature, to defend the constitutionality of a statute when the Attorney General of the state would not do so, no longer had standing to pursue an appeal "on behalf of

the legislature" once they had lost their leadership positions. *Karcher*, 484 U.S., at 81. "But in arriving at that decision," this Court noted in *Yniguez*, "the [Supreme] Court clearly indicated that jurisdiction had been proper in the district court and the court of appeals so long as the legislators held office, notwithstanding the fact that the Attorney General had declined to defend the suit." *Yniguez*, 939 F.2d, at 732. This Court went on to hold that because the principal sponsors of an initiative "stan[d] in an analogous position to a state legislature," and "have a strong interest in the vitality of a provision of a state constitution which they proposed and for which they vigorously campaigned," they had standing to pursue the appeal even after the governmental defendants declined to do so. *Id*., at 733.

Justice Ginsburg's *obiter dicta* in *Arizonans for Official English*, expressing "grave doubts" about whether the initiative proponents had standing to pursue the appeal, is, well, *dicta*. Justice Ginsburg cited the summary dismissal in *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, 460 U.S. 1077 (1983) ("DBWC"), but the summary dismissal in that case was "triggered by the Solicitor General's argument [in an *amicus curiae* brief filed by the United States] that 'where the State has litigated the validity of its law and decided to acquiesce in a holding that it is unconstitutional, it is not the prerogative of *private citizens* to revive the law through further litigation, even if they might benefit in an abstract way by doing so.'" Brief of Appellee the

United States of America to Dismiss or Affirm, *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, No. 82-1445 (Oct. Term, 1982) (*cited in* Brief for Respondents In Opposition to the Judgment, *Arizonans for Official English v. State of Arizona*, No. 95-974, at 25 (Oct. Term 1995) (emphasis added)).

It does not appear that the *DBWC* Court was ever presented with, much less considered, the argument that led Judge Reinhardt to hold in *Yniquez* that Initiative Proponents do have standing, namely, that initiative proponents are not merely "private citizens," but "[a]s the principal sponsors, . . . their relationship to [the Initiative was] closely analogous to the relationship of a state legislature to a state statute." *Yniguez*, 939 F.2d, at 732. Neither does it appear that the *DBWC* Court was presented with, or considered, a state statutory scheme giving special rights to initiative proponents, or specific holdings by state courts, much like those found sufficient to confer standing in *Karcher*, that allow official proponents to defend their initiatives when government officials will not, such as exist in California. *See Simac Design*, 92 Cal.App.3d, at 151-53. As *Karcher* and even Justice Ginsburg's *dicta* in *Arizonans* makes clear, those things matter greatly to the Article III analysis. *Karcher*, 484 U.S., at 82 (holding that because the New Jersey Supreme Court had previously granted intervenor status to legislative leaders to intervene on behalf of the legislature, the appearance by the legislative leaders as intervenors in

the trial and appellate courts below obviated the need to "vacate the judgments below for lack of a proper defendant-appellant"); *Arizonans*, 520 U.S., at 65 (citing *Karcher* and apparently recognizing that state law appointing initiative sponsors to intervene as agents of the people—as California law clearly does—would provide the necessary Article III standing that Arizona initiative proponents may have lacked).

In any event, Justice Ginsburg's "grave doubt" was clearly *dicta*. *See Arizonans for Official English*, 520 U.S., at 66 ("we need not definitively resolve the issue"). Judge Reinhardt's 1991 opinion in *Yniguez* was not vacated. *See Yniguez v. Arizonans for Official English*, 118 F.3d 667 (9th Cir. 1997) (en banc) (order by the en banc court vacating only the 1995 judgment of the en banc court following remand from the Supreme Court); *Yniguez v. Arizonans for Official English*, 119 F.3d 795 (9th Cir. 1997) (order by the original panel remanding to the district court with instructions to dismiss, but without ordering that the 1991 opinion be vacated); *but see League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305 n.5 (9th Cir. 1997) (mistakenly stating that the 1991 decision, rather than the 1995 decision, was vacated); *Prete v. Bradbury*, 438 F.3d 949, 955 n.8 (9th Cir. 2006) (same). The 1991 panel decision, and its reasoning, therefore remains the law of this Circuit, binding on other panels. *See Sanchez v. Mukasey*, 521 F.3d 1106, 1110 (9th Cir. 2008). Initiative proponents "stan[d] in an analog-

ous position to a state legislature" and therefore have standing to appeal as "agents of the people."

C. California Law Recognizes a Fundamental Right of Citizens to Propose Initiatives, and this Right Becomes A Particularized Interest for Citizens Who Serve as an Initiative's Official Proponents.

The holding of the 1991 *Yniguez* decision that initiative proponents do have standing to pursue an appeal is further bolstered here by the fact that California law recognizes a "fundamental right of the people to propose statutory or constitutional changes through the initiative process." *Costa v. Superior Court*, 128 P.3d 675, 686 (Cal., 2006). The California Constitution describes two facets of the initiative power: 1) "the power of the electors to propose statutes and amendments to the Constitution"; "and" 2) the power of electors "to adopt or reject" those proposed statutes and constitutional amendments. Cal. Const. art. 2, § 8. Initiative proponents, parties that actually exercise the first part of that authority, thus have an interest distinct from the entire body of electors who adopt or reject their handiwork. In other words, initiative proponents in California have a "sufficient beneficial interest" and a "special interest to be … preserved or protected over and above the interest held in common with the public at large." *Sonoma County Nuclear Free Zone v. Superior Court*, 189 Cal.App.3d 167, 175 (Cal.App.1.Dist.1987).

The Supreme Court's decision in *Diamond* is not to the contrary. There, the Court stated that since "the State alone is entitled to create a legal code, only the

State has the kind of 'direct stake' identified in *Sierra Club v. Morton*, [405 U.S. 727, 740 (1972)], in defending the standards embodied in that code." *Diamond*, 476 U.S., at 65. But as the initiative provisions of the California Constitution make clear, the power to "create a legal code" in California does not rest exclusively with the State or its legislature. The people, as the ultimate sovereign, have retained the right to "create a legal code" for themselves. They have retained the power to "propose" statutes and constitutional amendments, and the power "to adopt or reject" them. Cal. Const. art. 2, § 8.

The *Diamond* Court specifically noted that the "legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Article III may be met." *Diamond*, 476 U.S., at 65 n.17. Necessarily, then, because "[a]ll political power is inherent in the people," Cal. Const. art. 2, § 1, the people have the power to create new interests sufficient to confer standing, and the people of California have done so here. Proponents of initiatives have a "sufficient beneficial interest" in their own right for Article III standing. *Sonoma County Nuclear Free Zone*, 189 Cal.App.3d, at 175. That's why California courts "should allow intervention by proponents of the initiative," *Camarillo.*, 41 Cal.3d, at 822, why initiative proponents are frequently treated as "real parties in interest," *e.g.*, *Independent Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 180 (Cal. 2006); *Senate of the State of California v. Jones*, 988 P.2d

1089, 1091 (Cal. 1999), and why such intervenors have specifically been allowed to unilaterally appeal from adverse judgments, *Citizens for Jobs*, 94 Cal.App.4th, at 1321-22; *Simac Design*, 92 Cal.App.3d, at 151-53.

II. Imperial County and Its Officials Were Entitled to Intervene as of Right under Rule 24(a). Their Parallel Appeal Therefore Provides an Alternative Ground for Jurisdiction By This Court To Hear Proponents' Appeal.

Rule 24(a)(2) of the Federal Rules of Civil Procedure requires a district court to grant intervention on a timely motion of any party that claims an interest in the action "and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." The district court denied the motion to intervene by Imperial County, its Board of Supervisors, and its Deputy County Clerk ("Imperial County"), on the ground that their duties were merely "ministerial."

Under California law, local administrative agencies and their executive officials are required to follow duly enacted statutes and state constitutional provisions. *Lockyer*, 95 P.3d, at 485 (2004). Administrative officials have no power to refuse to enforce a state law unless and until an *appellate court* has ruled the statute or constitutional provision unconstitutional. Cal. Const. art. 3, § 3.5 (emphasis added). The ministerial duty to issue marriage licenses in this case is a duty pursuant to statute and state constitution—not executive fiat of the Governor and Attorney General. *See Lockyer*, 95 P.3d, at 488-89. Neither the Governor nor the At-

torney General are given the authority under California law to alter the terms of either state statute or the state constitution. The lower court may be able to compel the Governor and the Attorney General to issue such an edict and could enforce that order *against the Governor and Attorney General*, but nothing in state law imposes a ministerial duty on Imperial County to follow such an edict. *See* Cal. Const. art. 3, §3.5; *Valdes v. Cory*, 139 Cal. App. 3d 773, 780 (1983) (Constitutional officers are under a constitutional duty to comply with state law "unless and until an appellate court declares them unconstitutional").

We are left then with a lower court judgment that seeks to alter the legal duties of county officials who were not parties to the action. This Court encountered a similar situation in *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993). In that case, Sierra Club sued the Environmental Protection Agency seeking to change the terms of a permit issued to the City of Phoenix. 995 F.2d, at 1480. Phoenix sought to intervene and this Court was called on to decide whether the city had a protectable interest. *Id*., at 1481. This Court had little trouble in finding a protectable interest since the action sought to alter the permits held by the city.

In addition to the city's "property interest" in its permit and wastewater treatment facility, the Court noted that the litigation also sought to impose new regulatory responsibilities on the city. *Id*., at 1486. A judgment for the Sierra Club in the case would have led to the creation of a list of impaired waters that would

have in turn obligated the city to implement "control strategies." Those requirements would have been mandatory under the federal law at issue in the case. The fact that the city would have had no discretion to ignore those legal obligations did not suffice to exclude it from the litigation because "an adjudication on these issues could 'result in practical impairment of the [City's] interests.'" *Id.*

It was also of no moment that the city's interest in its permit was not "protected" by the environmental laws at issue. "[T]he issue is participation in a lawsuit, not the outcome." *Id*., at 1483. As this Court noted, "[o]ur adversary process requires that we hear from both sides before the interests of one side are impaired by a judgment." *Id*.

The adversarial process has taken a beating in this action. The nominal state defendants refused to defend this action and in any event had no authority to alter the legal requirements for county clerks who were not made parties. A county that favored the plaintiffs' position was granted intervention to challenge the California Constitution, but Imperial County was denied intervention because it sought to defend its obligations under the state constitution. Imperial County has the right to intervene in this action not only to protect the interests of its voters, *see United States v. Oregon*, 745 F.2d 550, 553 (9th Cir.1984), but also because the judgment in the case seeks to impose legal obligations directly on the county and its deputy clerk, *Sierra Club*, 995 F.3d, at 1486.

Imperial County has appealed from the district court's orders denying it intervention and on the merits. Once the order denying Imperial County's motion to intervene is reversed, Imperial County's own parallel appeal on the merits will provide this Court with ample jurisdiction, in the alternative, to consider Proponents' own appeal.

III. The District Court Exceeded Its Jurisdiction By Ignoring (and therefore Effectively Overruling) Governing Precedent of the Supreme Court and of This Court, and by Issuing a Broad Injunction, Without a Class Action Certification, Purportedly Binding Everywhere in California, Even With Respect to Non-Parties.

On the merits, the district court below vastly exceeded its authority in numerous ways. Most substantially, it held that Proposition 8, which defines marriage as between one man and one woman, violated the federal Due Process and Equal Protection rights of same-sex couples despite binding authority of the Supreme Court to the contrary, which it completely ignored. In *Baker v. Nelson*, a case pressing the identical claims at issue here, namely, that denial of a marriage license to a same-sex couple violated federal due process and equal protection requirements, the Supreme Court dismissed the appeal from the Minnesota Supreme Court "for want of substantial federal question." 409 U.S. 810 (1972). That is a decision on the merits, and "lower courts are bound by [it] 'until such time as the

[Supreme] Court informs (them) that (they) are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quoting *Doe v. Brennan*, 414 U.S. 1096 (1973)).

The district court also ignored—did not even cite—binding authority from this Court to the same effect. *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982). And by holding that strict scrutiny applies, and even while purporting to apply rational basis review but actually applying heightened scrutiny, the district court also ignored precedent from both the Supreme Court and this Court subjecting sexual orientation classifications merely to rational basis review. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632-33 (1996); *id*., at 640 n.1 (Scalia, J., dissenting) ("The Court evidently agrees that 'rational basis' . . . is the governing standard"); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *Meinhold v. United States DOD*, 34 F.3d 1469, 1478 (9th Cir. 1994); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990).

Even if those precedents might be viewed as implicitly having been called into question by subsequent decisions of the Supreme Court, *cf. Lawrence v. Texas*, 539 U.S. 558 (2003)—a position that no federal appellate court has taken—it is most assuredly the prerogative of the Supreme Court, not a district court, to make

that determination. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also Hicks*, 422 U.S., at 344-45 (recognizing that even when "doctrinal developments" may have called into question a summary dismissal's holding of no substantial federal question, the lower courts are still bound by the summary decision until the Supreme Court tells them otherwise).

Finally, the district court vastly exceeded its jurisdictional authority by granting a state-wide injunction, purportedly requiring county clerks in all 58 counties of the state to grant a marriage license to any same-sex couple that seeks one, where the two same-sex couples who brought this litigation did not seek class-action certification, and where only two county clerks were named as defendants and one other was allowed to join—as an Intervenor-*Plaintiff* ! None of the other fifty-five county clerk offices in the state were parties to the litigation, and one—Imperial County's—was affirmatively denied Intervenor status by the district court. The non-parties cannot be bound by the District Court's injunction absent a determination that they are "in active concert" with the parties, made in a proceeding in which the non-parties were allowed to participate. *Zenith Radio Corp. v. Hazelton Research, Inc*., 395 U.S. 100, 112 (1969). And it is likewise highly questionable whether the district court's order that the named defendants direct non-parties to comply with the injunction can be binding on the non-parties, particularly in light of an express provision in the California Constitution specifically bar-

ring government officials in California from refusing to comply with California law "unless an appellate court has made a determination that such statute is unconstitutional." Cal. Const. art. 3, § 3.5.

CONCLUSION

This Court should recognize that it has jurisdiction to consider this appeal because, under California law, initiative proponents have standing to defend the initiatives they sponsored. On the merits, the District Court's decision holding that Proposition 8 is unconstitutional should be reversed.

Date: September 24, 2010

Respectfully submitted,

CENTER FOR CONSTITUTIONAL JURISPRUDENCE
John C. Eastman
Anthony T. Caso
Karen J. Lugo

By: /s/ John C. Eastman

Attorneys for *Amicus Curiae*
Center for Constitutional Jurisprudence

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and ninth Circuit Rule 32-1, that the attached amicus brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word count feature of the word processing program used to prepare this brief, contains 6,860 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

Dated: September 24, 2010

CENTER FOR CONSTITUTIONAL JURISPRUDENCE
John C. Eastman

By: /s/ John C. Eastman

Attorneys for *Amicus Curiae*
Center for Constitutional Jurisprudence

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the Appellate CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all registered CM/ECF participants and parties hereto. Service is accomplished thru the Appellate CM/ECF system.

CENTER FOR CONSTITUTIONAL JURISPRUDENCE
John C. Eastman

By: /s/ John C. Eastman

Attorneys for *Amicus Curiae*
Center for Constitutional Jurisprudence