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., *Defendant-Intervenor-Appellants*	**Case No. 10-16696** District. Court Case No. 09-CV-2292 VRW Hon. Vaughan A. Walker MOTION OF TAMARA L. CRAVIT FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEES

COMES NOW Tamara L. Cravit, pro se, and moves for leave of the Court to file the included Amicus Curiae brief in support of Petitioner-Appellees Kristin Perry et al.

Pursuant to FRAP 29(b), the included brief states Movant's interest in the case. Movant believes that her brief would be beneficial to the Court in that it would provide an alternative viewpoint on the central issue of Defendant-Intervenor-Appellants' standing to pursue this appeal.

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For the foregoing reasons, Movant prays for leave to file the included Amicus Curiae brief.

Dated: September 27, 2010

Respectfully Submitted,

s/Tamara L. Cravit

Tamara L. Cravit

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., *Defendant-Intervenor-Appellants*	**Case No. 10-16696** District. Court Case No. 09-CV-2292 VRW Hon. Vaughan A. Walker [PROPOSED] ORDER GRANTING LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEES

For good cause shown, Tamara L. Cravit is granted leave to appear as an *amicus curiae*, pro se, on behalf of plaintiff-appellees, and movant's amicus curiae brief is ordered filed. Within seven days of the date of this order, movant is to file seven (7) signed paper copies of the included brief, bearing green covers, with the court.

IT IS SO ORDERED.

Dated: _____

_____
Signature of Judge or Judicial Officer

No. 10-16696

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.,
Defendant-Intervenor-Appellants

Appeal from the United States District Court for the Northern District of California, Civil Case No. 09-CV-2292 VRW
(Honorable Vaughan A. Walker)

AMICUS CURIAE BRIEF OF TAMARA L. CRAVIT IN SUPPORT OF PLAINTIFFS-APPELLEES

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FRAP 26.1 DISCLOSURE STATEMENT

There is no corporation involved with Amicus.

STATEMENT OF ISSUES

1. In view of the United States Supreme Court's decision in Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) ("Arizonans"), do Defendant-Intervenor-Appellants have standing to appeal the decision of the District Court in the absence of an appeal by the Defendants below?

SUMMARY OF ARGUMENT

1. Defendant-Intervenor-Appellants do not have standing to appeal the decision of the District Court because they have failed to show "a concrete and particularized injury" and because no provision of Federal or California law authorizes the supporters of a ballot initiative to defend it on appeal when the Governor and Attorney General decline to do so.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

Amicus is an individual activist seeking to secure and preserve the equal rights of gay, lesbian, bisexual and transgender citizens as guaranteed by the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, and by Article I, Section 7 of the California Constitution.

Tamara Cravit was born and raised in Toronto, Canada, and became a legal permanent resident of the United States in 1992. She is a certificated paralegal, having graduated from the Center for Legal Studies' paralegal certification program at California State University-Monterey Bay. As an immigrant, she harbors a profound respect and appreciation for the guarantees of freedom granted to all citizens and residents of the United States. She believes that carving out an exclusion to these most fundamental Constitutional guarantees on the basis of a person's gender identity or sexual orientation is inimical to the bedrock Constitutional guarantee of equal protection under the law.

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[1] Amicus Curiae authored this brief in its entirety. No other person, entity, corporation, supporters, or counsel made any contribution, monetary or otherwise, for the preparation and submission of this brief.

Tamara Cravit is presently a resident of the State of California and one of the 18,000 gay, lesbian, bisexual and transgendered Californians who were legally married during the window of time between the California Supreme Court's decision in In re Marriage Cases, 43 Cal. 4th 757 (2008) ("Marriage Cases") and the passage of Proposition 8 on November 6, 2008.

INTRODUCTION

In May 2008, the California Supreme Court decided In re Marriage Cases, *supra*, 43 Cal. 4th 757 (2008), which held that marriage was a fundamental right that could not be denied to California citizens on the basis of their sexual orientation or gender identity. In re Marriage Cases, which overturned the voter-enacted Proposition 22 (Fmr. Cal. Fam. Code, Sec. 308.5), held that Proposition 22 denied a fundamental right – namely, marriage – to a suspect classification of citizens based upon their sexual orientation, in violation of the guarantee of equal protection enshrined in both the United States and California Constitutions. (US Const., Amendment XIV; Calif. Const., Art. 1, Sec. 7)

In response to In re Marriage Cases, a group of citizens and political action organizations, including Defendant-Intervenor-Appellants and religious organizations such as the Church of Jesus Christ of Latter-Day Saints, submitted Proposition 8 for inclusion on the November 2008 election ballot. Proposition 8 sought to amend the California Constitution to provide that "only marriage between a man and a woman is valid or recognized in the State of California", thereby carving out an exception to the

Constitutional guarantee of equal protection under the law. (Cal. Const., Art. 1, Sec. 7.5)

As was amply demonstrated in the District Court proceedings below, the voter materials and advertising in support of Proposition 8 demonstrated a clear, consistent message and intent. The proponents of Proposition 8 sought to promote fear and distrust on the part of voters, and to incite ill will toward gays, lesbians, bisexuals and transgender individuals.

The record below reflects the fact that, in their campaign materials, the proponents of Proposition 8 employed false and prejudicial statements about the purported teaching of homosexuality in school, linked homosexuality with pedophilia and bigamy, and otherwise sought to transform their religious aversion to homosexuality into the legal policy of the State of California. (Perry v. Schwarzenegger, No. C 09-2292 VRW, Opn. at pp. 98-103, 105-109) ("Perry")

Proposition 8's scope and effect was unprecedented. For the first time in recent history, the proponents of Proposition 8 sought to amend a state's constitution, to strip a group of citizens of a right already guaranteed to them by the Constitution and affirmed by a decision of the California Supreme Court. The proponents of Proposition 8 sought to carve an exception out of the foundational Constitutional equal protection guarantees. They sought to

deny gay, lesbian, bisexual and transgender Californians the full measure of legal protection for their rights. And, they sought to do so not because of any colorable rational basis, much less any compelling state interest, but rather simply because of their personal moral disapproval for homosexuality.

Unfortunately, the proponents of Proposition 8 succeeded in their effort. On November 6, 2008, Proposition 8 was enacted by a 52% majority of the California electorate. A 52% majority of the electorate voted, in effect, that the California Constitution's guarantee of equal treatment under the law only applied to heterosexual citizens. This bare majority vitiated the ability of gay, lesbian, bisexual and transgender citizens to enjoy the fundamental right to marriage to the person of their choice.

As the record below clearly reflects, the proponents did so not to further any rational state purpose. Rather, their intent was as simple as it was improper: A bare majority of the voters sought to enshrine discrimination in the California Constitution, to legislate their moral and religious disapproval of gays.

It is axiomatic that, in a free society, the rights of the minority are every bit as worthy of protection as those of the majority. Indeed, the United States Supreme Court has held that the very purpose of our Constitution is to protect the rights of disfavored minorities from the "tyranny of the

majority". The Supreme Court held that the foundational purpose of the Bill of Rights is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." (West Virginia State Board of Educ. v. Barnette 319 U.S. 624, 638 (1943)).

Following the passage of Proposition 8, plaintiff-appellees brought suit in the District Court seeking a determination that the proposition, and the California Constitutional Amendment it produced, were unconstitutional as a matter of Federal law. Following a lengthy trial at which a full and complete evidentiary and factual record was established, the District Court concluded below that Proposition 8 violates the Equal Protection guarantee of the United States Constitution (US Const., Amendment XIV). The District Court found that "Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest." (Perry, at p. 123).

Dissatisfied that their attempt to legislate their personal moral preferences may be thwarted by the United States Constitution, defendant-intervenor-appellants seek now this Court's review of the District Court's decision. Defendant-intervenor-appellants face a dilemma, however: The

Governor and the Attorney General of California have both decided not to expend scarce resources seeking review of the District Court's determination. (*See*, e.g., Attorney General's Opposition to Motion for Stay Pending Appeal, dkt. entry 716 below, stating that "the public interest weighs against" further enforcement of Proposition 8.) In the absence of any appeal by the Defendants, defendant-intervenor-appellants hope to bootstrap their intervention below, and their support of the challenged ballot initiative, into standing to appeal the District Court's decision.

Such bootstrapping, however, is utterly without legal support. Defendant-intervenor-appellants have shown no concrete and particularized injury in that they will suffer as a result of the District Court's decision. In fact, they have not shown that they do or will suffer any harm at all, save perhaps for their unhappiness that a ballot measure they supported was defeated. Such harms are neither concrete nor particularized, and cannot confer standing to appeal the District Court's decision in the absence of an appeal by the defendants below.

Anticipating this problem, defendant-intervenor-appellants argue that they should be granted standing to appeal by virtue of their status as proponents of the challenged ballot initiative. This position is without legal support. In Arizonans for Official English v. Arizona, 520 U.S. 43 (1997),

the Supreme Court held that, if the responsible state actors do not seek an appeal of the constitutionality of a ballot initiative, the proponents of that initiative may not independently do so. Citing Diamond v. Charles, 476 U.S. 54, 56 (1986), the Supreme Court explained that "The decision to seek review 'is not to be placed in the hands of "concerned bystanders,"' persons who would seize it "as a "vehicle for the vindication of value interests."'" (Arizonans, 520 U.S. at p. 65)

The situation in Arizonans is directly analogous to the situation here: In that case, like here, the proponent of a ballot initiative, who had not suffered any "concrete and particularized harm", nonetheless sought to bootstrap their support of the ballot measure into standing to defend it on appeal. This claim was properly denied by the Supreme Court in Arizonans, and it should be denied here as well.

Furthermore, defendant-intervenor-appellants' argument that they have standing, by virtue of their support of the challenged ballot measure, to defend the measure on appeal should be rejected as a matter of public policy. Were standing to be granted in this case, then any citizen who supported or opposed any ballot measure could argue standing to challenge or defend it in court. Such an outcome would run directly counter to the purpose of the doctrine of standing, which is to ensure that "federal courts reserve their

judicial power for 'concrete legal issues, presented in actual cases, not abstractions.'" Associated General Contractors of California v. Coalition for Economic Equity, 950 F.2d 1401, 1406 (9th Cir. 1991) (quoting United Public Workers, 330 U.S. at 89), cert. denied, 112 S. Ct. 1670 (1992).

Were the courts simply to disregard the issue of standing and allow anyone who supported a legislative enactment to step into the shoes of the state and defend it on appeal, the courts could be flooded with thousands of actions seeking review of issues which lack any justiciable controversy. Such an outcome would not further the interests of judicial economy, and cannot be the outcome the Framers intended in establishing the doctrine of Article III standing.

Defendant-intervenor-appellants have not established the concrete and particularized harm necessary to achieve standing to defend Proposition 8, and neither the established Supreme Court jurisprudence or considerations of public policy, militates in favor of granting them such standing now.

This appeal should be dismissed for lack of standing.

ARGUMENT

I. DEFENDANT-INTERVENOR-APPELLANTS HAVE FAILED TO SHOW A CONCRETE AND PARTICULARIZED INJURY SUFFICIENT TO CONFER STANDING TO BRING THIS APPEAL.

It is a long-standing principle of jurisprudence that federal courts should "reserve their judicial power for 'concrete legal issues, presented in actual cases, not abstractions.'" Associated General Contractors of California v. Coalition for Economic Equity, *supra,* 950 F.2d at p. 1406.

In Arizonans, *supra*, the Supreme Court addressed the rights of supporters of a ballot measure to pursue an appeal of the constitutionality of that measure when the official defendants (namely, the state) fail to seek appellate review.

The Supreme Court stated that "Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'" (Arizonans, at p. 64, citing Diamond v. Charles, 476 U.S. 54, 62 (1986)). "An interest shared generally with the public at large", the Supreme Court held, "will not do."

That is the situation with which this Court is faced. Defendant-intervenor-appellants have made no showing, nor can they show, that they

possess a "direct stake in the outcome". They have argued no direct right of theirs that the constitutionality of Proposition 8 vindicates or vitiates. They have made no showing how they, apart from any other California citizens who voted for, or against, Proposition 8, have a "concrete and particularized", "actual or imminent", "invasion of a legally protected interest" at stake in this litigation. (Lujan v. Defenders of Wildlife, 504 U. S. 555, 560 (1992))

Absent that particularized and actual interest, defendant-intervenor-appellants quite simply lack the standing to pursue this appeal. The parties properly possessed of standing to appeal the District Court's ruling are the Governor and Attorney General of California. These public officials have made a reasoned determination not to seek appellate review of the District Court's decision. That defendant-intervenor-appellants disagree with that exercise of executive discretion is simply insufficient to grant them standing to pursue this appeal independently.

Defendant-intervenor-appellants argue that this Court should grant to them standing to pursue this appeal because, if they are held to lack standing, the will of the people may be thwarted on procedural grounds. (See, e.g., defendant-intervenor-appellants' opening brief at p. 24, stating that failure to allow them to defend Proposition 8 on appeal "would fail to

respect the California people's initiative right.") This argument is unavailing.

As the Supreme Court declared in Arizonans, "[t]he decision to seek review 'is not to be placed in the hands of "concerned bystanders,"' persons who would seize it 'as a "vehicle for the vindication of value interests."'" (Arizonans, at p. 65). The Supreme Court stated flatly that "An intervenor cannot step into the shoes of the original party unless the intervenor independently…fulfills the requirements of Article III." (Id.)

Defendant-intervenor-apppellants have failed to establish Article III standing, because they cannot show that their interest in this appeal is other than to use it as a "vehicle for the vindication of value interests." They have failed to establish any concrete and particularized harm that they suffer as a result of the District Court's decision, and therefore they lack standing to appeal.

II. THE FACT THAT DEFENDANT-INTERVENOR-APPELLANTS LACK STANDING TO PURSUE THIS APPEAL DOES NOT IMPLY THAT THE DISTRICT COURT LACKED JURISDICTION TO HEAR THE MATTER BELOW.

Defendant-intervenor-appellants and *amici curiae* argue that, if they lack standing to pursue this appeal, this Court must therefore find that the

District Court lacked standing to hear the case below. Therefore, they argue, all that transpired below should be declared void, the factual and legal record wiped clean. (See, e.g. opening brief of defendant-intervenor-appellants at p. 29, stating that "[i]f this Court concludes that Proponents and the Imperial Intervenors lack standing to appeal, the judgment below must nevertheless be vacated.")

This position is, quite simply, unsupported by the law. As the Supreme Court noted in Arizonans, "The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." (Arizonans, 520 U.S. at p. 63)

In Arizonans, the plaintiff had standing initially to bring her challenge as an employee of the state, but lost that standing based upon subsequent events – namely, the decision of the Arizona governor not to appeal the ruling of this Court and the plaintiff's departure from state employment. (Arizonans, at p. 48, stating that after plaintiff's departure from state employment, "[t]he case had lost the essential elements of a justiciable controversy and should not have been retained for adjudication on the merits by the Court of Appeals".

That is precisely the situation faced by defendant-appellant-intervenors here. At the time the District Court rendered its factual and legal

findings in the case below, California's Governor and Attorney General were parties to the proceeding. As such, defendant-intervenor-appellants possessed standing to intervene below.

However, subsequent events exactly analogous to those in Arizonans, occurred here. The Governor and Attorney General both determined not to pursue an appeal of the District Court's ruling. That decision effectively mooted the "justiciable controversy" of this appeal. Without a justiciable controversy, there exists no live case into which defendant-intervenor-appellants can inject themselves.

III. NO PROVISION OF CALIFORNIA LAW AUTHORIZES THE SUPPORTERS OF A BALLOT INITIATIVE TO DEFEND IT ON APPEAL WHEN THE GOVERNOR AND ATTORNEY GENERAL DECLINE TO DO SO.

As the Supreme Court noted in Arizonans, the calculus of standing to appeal may be different if there existed a state law delegating to the supporters of an initiative the right to defend their proposed initiatives on appeal. (Arizonans), at p. 65, stating that "[w]e have recognized that state legislators have standing to contest a decision holding a state statute

unconstitutional if state law authorizes legislators to represent the State's interests", citing Karcher v. May, 484 U. S. 72, 82 (1987))

The California statutory scheme governing ballot measures envision the initiative power of the voters as an extension of the legislative branch of government. (Cal. Const., Art. 4, Sec. 1, stating that "[t]he legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

If, as the Supreme Court in Arizonans and Karcher v. May suggested, state law could authorize legislators to represent the State's interest in the constitutionality of laws, state law could equally grant the same power to ballot initiative proponents. The State of California has not chosen to grant such power to its legislators, or the proponents of ballot measures, this Court should decline to judicially create or recognize such a right now.

CONCLUSION

Defendant-intervenor-appellants face a difficult situation here. The District Court below has held a ballot initiative they supported to be unconstitutional under any standard of review. They disagree with this decision, but the Governor and Attorney General of California have exercised their lawful discretion and chosen not to appeal the District Court's determination. Defendant-intervenor-appellants would now like to step into the shoes of the State, to defend their initiative – and, by extension, their religious and moral viewpoint about the issue of gay marriage – on appeal when the State has declined to do so.

Defendant-intervenor-appellants, however, have shown no particularized harm, no imminent or actual injury in fact, which would grant them standing to appeal here. The Supreme Court has already held that "[t]he decision to seek review 'is not to be placed in the hands of "concerned bystanders,"' persons who would seize it "as a "vehicle for the vindication of value interests."'" Furthermore, no statute grants initiative supporters the independent standing to defend their favored initiatives on appeal.

Defendant-intervenor-appellants ask this Court to make an extraordinary leap, to recognize such a right with no authority so that they can continue to use the courts to attempt to vindicate their religious and moral values through the force of law. This Court should decline to do so.

Without an appeal by the California Governor or Attorney General, this case has "lost the essential elements of a justiciable controversy." Defendant-intervenor-appellants should be denied standing, and this appeal should accordingly be dismissed.

Dated: September 27, 2010

Respectfully Submitted,

s/Tamara L. Cravit

Tamara L. Cravit (pro se)

CERTIFICATE OF LENGTH

In accordance with FRAP rules 28 and 29, I hereby certify that:

1. The length of this brief, as reported by Microsoft Word, is 3,634 words; and
2. That this length is less than the maximum allowed length for amicus curiae briefs in this case, which is 7,000 words.

Dated: September 27, 2010

Respectfully Submitted,

s/Tamara L. Cravit

Tamara L. Cravit (pro se)

CERTIFICATE OF SERVICE

I, the undersigned, am not a party to the above action, and over the age of 18.

My business address is: PO Box 2445, Lompoc CA 93438-2445.

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 27, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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I declare under penalty of perjury under the Laws of the United States that the foregoing is true and correct and that this declaration was executed on September 27, 2010.

s/Tamara L. Cravit

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Tamara L. Cravit (pro se)
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