IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al., Plaintiffs/Appellees, vs. ARNOLD SCHWARZENEGGER, et al., Defendants.	No. 10-16696 U.S. District Court Case No. 09-cv-02292 VRW

APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S SEPARATE OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

On Appeal from the United States District Court
for the Northern District of California

The Honorable Chief District Judge Vaughn R. Walker

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INTRODUCTION

Appellee City and County of San Francisco ("City") joins fully in the opposition filed by Appellees Perry, et al. The City files this separate opposition solely to respond to Appellants' contention that they have standing to appeal. Their contention is based on the theory that California law authorizes them to act as the State's chief legal officer, representing the interests of the entire State. As discussed below, that is wrong as a matter of law. The official proponents of Proposition 8 do not have standing to represent the interests of the State of California in this litigation, and therefore they lack standing to appeal.

DISCUSSION

Article III of the United States Constitution requires that an individual must have "standing" to be an original party to a federal appeal. To have standing, the individual must show, first and foremost, an "actual" stake in the litigation that is "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do" to confer standing on an individual. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("*AOE*").

Even if an individual has intervened in a federal lawsuit, that does not mean he has standing to appeal, as would an original party to the lawsuit. And when the original party to the lawsuit does not appeal, this will in many cases preclude the intervenor from doing so. As the Supreme Court has explained:

> Although intervenors are considered parties entitled, among other things, to seek review by this Court . . . an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.

Diamond v. Charles, 476 U.S. 54, 69 (1986) (citations and quotations omitted). *See also AOE*, 520 U.S. at 65 ("An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III") (internal quotations omitted). Accordingly, the fact that the proponents of Proposition 8 intervened in the proceedings below does not answer the question whether they have independent standing to pursue an appeal.

In fact, the proponents of Proposition 8 cannot appeal, because sponsors of ballot measures do not have Article III standing. Although this Court previously had ruled that initiative sponsors can have standing, *see Yniguez v. Arizona*, 939 F.2d 727, 733 (9th Cir. 1991), the Supreme Court vacated that ruling in *AOE*, where all nine Justices expressed "grave doubts" about whether initiative sponsors "have standing under Article III to pursue appellate review." 529 U.S. at 66.

Appellants do not appear to dispute the general rule that initiative proponents lack Article III standing. Instead, they invoke an apparent exception to the "no standing" rule discussed in *AOE*. There, the Court stated:

> We 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. See *Karcher v. May*, 484 U.S. 72, 82, 108 S.Ct. 388, 395, 98 L.Ed.2d 327 (1987). [The initiative sponsor] and its members, however, are not elected representatives, and we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State.

520 U.S. at 65.[1] According to Appellants, California decisional law authorizes initiative sponsors to step into the shoes of California's chief legal officer and make legal decisions on behalf of the entire State of California.

[1] Incidentally, it is not at all clear that *Karcher* stands for the proposition that *individual legislators* can ever have Article III standing to defend legislative enactments. In *Karcher*, the Supreme Court concluded that the Speaker of the New Jersey General Assembly and the President of the New Jersey Senate had standing to appear in federal court on behalf of *the entire New Jersey Legislature*

The decisional law Appellants cite, however, does not stand for that proposition. Most of the cases they cite involve *preelection* challenges to *proposed* initiatives – i.e., attempts to keep initiatives off the ballot in the first place, or to alter the description of a measure. See, e.g., *Independent Energy Producers Ass'n v. McPherson*, 38 Cal.4th 1020 (2006) (whether initiative may appear on ballot); *Senate of the State of Cal. v. Jones*, 21 Cal.4th 1142 (1999) (whether initiative violated single-subject rule); *Legislature v. Deukmejian*, 34 Cal.3d 658 (1983) (whether initiative violated time restrictions); *Brosnahan v. Eu*, 31 Cal.3d 1(1982) (whether adequate number of valid signatures was collected); *Sonoma County Nuclear Free Zone, '86 v. Superior Court*, 189 Cal. App. 3d 167, 173 (1987) (whether late argument against proposed initiative could appear on the ballot); *Vandeleur v. Jordan*, 12 Cal.2d 71 (1938) (whether initiative was defective in form). In such proceedings, the initiative proponents are obviously representing their very specific interests in ensuring the proposed measure reaches the ballot, and in the desired form. They are not representing "the State," and indeed they are named separately as real parties in interest precisely because the state does not ordinarily defend the merits of proposed legislation before it is enacted by the voters. See, e.g., *Legislature v. Deukmejian*, 34 Cal.3d 658, 679 (1983).

The few post-election cases cited by Appellants do not address standing but rather involve intervention. But cases in which initiative sponsors were permitted to intervene are only that – cases in which initiative sponsors were permitted to

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in litigation involving the validity of a measure it had enacted, because New Jersey law authorized those officials to do so. But it was "the New Jersey Legislature," not individual legislators, that had standing. 484 U.S. at 82 ("Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant"); see also *id*. at 79 ("The course of proceedings in this case from the District Court to this Court make it clear that the only party-intervenor in this case was the incumbent New Jersey Legislature").

intervene. In none of these cases did they assert or establish independent standing to defend a law "in lieu of public officials." *AOE*, 520 U.S. at 65. Rather, they defended a law *alongside* public officials, representing their own interests. See *Amwest Surety Ins. Co. v. Wilson*, 11 Cal.4th 1243, 1250 (1995); *20th Century Ins. Co. v. Garamendi*, 8 Cal.4th 216, 241(1994); *Legislature of the State of Cal. v. Eu*, 54 Cal. 3d 492, 500 (1991). And the case relied on most heavily by Appellants, *Building Indus. Ass'n of So. Cal. v. City of Camarillo*, 41 Cal.3d 810, 822 (1986), did not even involve intervention by an initiative sponsor; rather, the Court opined in *dicta* that it would generally be an abuse of discretion to deny intervention to an initiative sponsor where there is a risk public officials will not vigorously defend the measure. Here, of course, the district court allowed the Appellants to intervene, so that case is not implicated.

The most directly relevant California case is one that Appellants do not cite: *City and County of San Francisco v. Proposition 22 Legal Defense and Education Fund*, 128 Cal.App.4th 1030 (2005), which involved an attempt on the part of an organization to intervene in the litigation involving the validity of the statutory marriage exclusion that was ultimately struck down by the California Supreme Court. Although the organization itself was not the official sponsor of the initiative statute being defended in that litigation, the official sponsor sat on its Board, and many of its members campaigned for the initiative. The court held that the "interests of [those] who worked to put the initiative on the ballot, or who contributed time and money to the campaign effort," were not "sufficiently direct and immediate . . . to support intervention." There was no showing that "a ruling about the constitutionality of denying marriage licenses to same-sex couples [would] impair or invalidate the existing marriages of [the proposed intervenor's] members, or affect [their] rights . . . to marry persons of their choice in the future"

or otherwise diminish their "legal rights, property rights or freedoms." *Id*. at 1038-39. Moreover, the "fundamental nature of interest" the proposed intervenor asserted was merely "philosophical or political." *Id*. at 1039. Initiative supporters' beliefs and principles were not enough to justify intervention. "The California precedents make it clear such an abstract interest is not an appropriate basis for intervention." *Id*. (citing *Socialist Workers Etc. Committee v. Brown*, 53 Cal. App. 3d 879 (1975) and *People ex rel. Rominger v. County of Trinity*, 147 Cal. App. 3d 655, 662-63 (1983)).[2]

At the end of the day, the California decisional law pertaining to the right of initiative sponsors to intervene in litigation to represent their interests is no different from the decisional law that existed in Arizona prior to the Supreme Court's decision in *AOE*. There too, courts allowed initiative sponsors to intervene in litigation to defend their own interests. See, e.g., *May v. McNally*, 203 Ariz. 425, 427 (2002); *Citizens Clean Elections Com'n v. Myers*, 196 Ariz. 516, 518 (2000); *Slayton v. Shumway*, 166 Ariz. 87, 88 (1990); *Energy Fuels Nuclear, Inc. v. Coconino County*, 159 Ariz. 210, 211 (1988) (superseded by statute on other grounds); *Transamerica Title Ins. Co. Trust Nos. 8295, 8297, 8298, 8299, 8300 and 8301 v. City of Tucson*, 157 Ariz. 346, 347 (1988). But that did not cause the Supreme Court to conclude that Arizona law conferred authority upon initiative sponsors to effectively represent the state itself. Rather, the Court concluded that no Arizona law existed that appointed initiative sponsors to represent the State.

[2] The Court of Appeal in the Proposition 22 case also dismissed the import of many of the cases relied upon by Appellants here, saying, "none of the California cases cited addresses whether intervention was proper. Some simply note that an initiative sponsor was permitted to intervene in earlier proceedings . . . . while others refer to initiative sponsors as 'intervenors' without mentioning whether an objection was ever made to their intervention." 128 Cal.App.4th at 1041-42.

Similarly, California is not a state where the law "appoints initiative sponsors" to defend the State's interest "in lieu of public officials." *AOE*, 520 U.S. at 65.

In light of Supreme Court's decision in *AOE*, and in light of the fact that California law is no different from Arizona's, Appellants presumably could have included a provision in Proposition 8 that would have authorized them to represent the interests of the State in any litigation involving the measure. Indeed, another initiative measure on *the very same ballot* contained an analogous provision. The measure created a legislative redistricting commission, and gave the commission, rather than the Attorney General, sole authority to defend any action challenging its redistricting decisions. See Cal. Const. Art. 21, § 3(a). The sponsors of this measure presumably believed they might be unsatisfied with the Attorney General's representation of the State's interests in such a case, and amended state law – in this specific instance – to place the power of legal representation elsewhere. Proposition 8's sponsors, having failed to include a similar provision in their initiative, cannot now complain about their lack of Article III standing.

In short, there is nothing in state law or in the cases cited by Appellants to suggest that California permits initiative sponsors to step into the shoes of the Attorney General to represent the interests of the State of California; rather, the law permits them to intervene to represent their own interests. And while, under California law, their own interests may be sufficient to allow them to *participate* in litigation, those interests are no more concrete or particularized than the interests of an individual legislator who introduces a bill that is ultimately enacted by the Legislature and signed into law by the Governor.[3] If that legislation were

[3] Under California law, when the electorate enacts an initiative, it is acting "as a legislative entity." *Professional Engineers in California Government v. Kempton*, 40 Cal. 4th 1016, 1045 (2007).

challenged in court, nobody could reasonably contend that an individual member of the legislature has the power to make legal decisions on behalf of the entire State simply because he was the original author of the bill. *Cf. Raines v. Byrd*, 512 U.S. 811, 829 (1997) (individual Members of Congress lack sufficient personal stake in legislation enacted by Congress to confer Article III standing, even where the legislation effected the operation of Congress itself). Just as the sponsor of legislation cannot make legal decisions on behalf of the entire state merely because the full legislature enacts his measure, individual sponsors of an initiative cannot make legal decisions on behalf of the entire state simply because 52 percent of the electorate ultimately voted for the measure.

Indeed, granting an individual legislative sponsor power to defend legislation in court would upset the balance of power established by California's constitution, which provides that the Attorney General – not the Legislature or individual members of the Legislature – is the chief legal officer of the state, responsible for making legal decisions on behalf of the state. See Cal. Const., Art. 5, § 13 ("the Attorney General shall be the chief law officer of the State"). See also Cal. Gov. Code § 12511 ("The Attorney General has charge, as attorney, of all legal matters in which the State is interested, except the business of The Regents of the University of California and of such other boards or officers as are by law authorized to employ attorneys"); Cal. Gov. Code §§ 12512, 955, 948 (vesting authority in Attorney General to defend suits against the state, its officers and agencies and giving Attorney General power to recommend settlement).

Particularly troubling would be a rule that allows an individual sponsor of a measure, rather than the State's chief legal officer, to decide whether to *appeal* a decision regarding the validity of a state statute or constitutional provision. It is one thing for an individual sponsor to intervene in trial court proceedings – perhaps

to provide the court with a different perspective than that provided by the State's representatives. It is quite another to allow an individual sponsor of a legislative measure to *replace* the State's representatives on a decision so important as whether to appeal. The decision to appeal involves considerations that go beyond the narrow interest of an individual legislative sponsor, including an assessment of collateral risks appellate review could create for the State, the relative merits of the case, the best use of the State's resources, and so forth. Indeed, the usurpation of this decisionmaking power from the State's chief law enforcement officer to a legislative actor could well violate California's separation of powers doctrine.[4]

In sum California law does not empower initiative proponents to represent the State of California in legal proceedings. Indeed, such a conclusion would be contary to the very constitutional structure of the State.

CONCLUSION

The Court should deny the motion for a stay pending appeal.

Dated: August 13, 2010

Respectfully submitted,

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[4] If one branch of government intrudes upon a "core zone" of another branch's constitutionally prescribed functions, there is a separation of powers violation. *Marine Forests Society v. Cal. Coastal Comm'n*, 36 Cal. 4th 1, 45-46 (2005). While the voters act in a legislative capacity when exercising the initiative power, the Attorney General, of course, is a member of the Executive Branch.