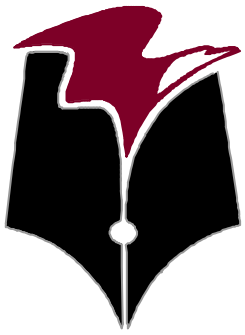

The Claremont Institute

Center for Constitutional Jurisprudence

May 2, 2011

Ms. Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Perry v. Brown*, No. 10-16696

Dear Ms. Dwyer:

Enclosed please find a courtesy copy of the Application for Leave to File and Proposed Brief of *Amicus Curiae* Center for Constitutional Jurisprudence, submitted today to the Supreme Court of California, Case No. S189476, on certification of questions from this Court in the above-referenced matter.

Sincerely,

s/ John C. Eastman

John C. Eastman

Counsel for *Amicus Curiae*
Center for Constitutional Jurisprudence

Enc.

No. S189476

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs and Respondents,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff, Intervenor & Respondent

v.

EDMUND G. BROWN, as Governor, *et al.*;

Defendants,

DENNIS HOLLINGSWORTH, *et al.*,

Intervenor Defendants-Appellants-Petitioners

ON REQUEST FROM THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT FOR ANSWER TO CERTIFIED QUESTIONS OF CALIFORNIA LAW

APPLICIATION AND PROPOSED BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF INTERVENOR DEFENDANTS-APPELLANTS-PETITIONERS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Supreme Court Case Number: S189476

Case Name: *Perry, et al. v. Brown, et al.*

Please check the applicable box:

☑ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

❒ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	

Please attach additional sheets with Entity or Person Information if necessary.

JOHN C. EASTMAN

May 2, 2011.

Printed Name: John C. Eastman
Address: Center for Constitutional Jurisprudence
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State Bar No: 193726
Party Represented: Amicus Curiae
Center for Constitutional Jurisprudence

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

To the Chief Justice:

The Center for Constitutional Jurisprudence respectfully submits this application for leave to file an *amicus curiae* brief in support of Defendants/Intervenors/ Appellants and in support of an affirmative answer to the question that has been certified by the U.S. Court of Appeals for the Ninth Circuit to this Court.[1]

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 attorneys and scholars affiliated with the CCJ and The Claremont Institute have published extensively about the principles of republican self government that underlay the Constitution of the United States and those of the several states, including California. Of particular relevance to the issues presented by this case, those writings include Brian P. Janiskee and Kan Masugi, eds., *Democracy in California: Politics and Government*

[1] Pursuant to Rule 8.520(f)(4), counsel for *amicus curiae* The Center for Constitutional Jurisprudence hereby certifies that no party or its counsel authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. Counsel further certifies that no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

in the Golden State (Rowman & Littlefield, 2d ed., 2007); Edward J. Erler, *Californians and Their Constitution: Progressivism, Direct Democracy, and the Administrative State*, in Brian P. Janiskee and Kan Masugi, eds., *The California Republic: Institutions, Statesmanship, and Policies* (Rowman & Littlefield, 2003); John Marini and Ken Masugi, eds., *The Progressive Revolution in Politics and Political Science* (Rowman & Littlefield, 2005); and John C. Eastman, "*Full Faith and Republican Guarantees: Gay Marriage, FMPA, and the Courts*," 20 BYU L. J. Pub. L. 243 (2006).

In addition, 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); and *Howard Jarvis Taxpayers Ass'n v. Legislature of the State of California*, No. S170071 (Cal. 2009).

The CCJ believes that its nationally-recognized expertise on matters of constitutional governance will be of benefit to this Court in the resolution of the question certified to it by the U.S. Court of Appeals for the Ninth Circuit. Indeed, in its certification order, the Ninth Circuit itself singled out the brief filed by the CCJ in that Court addressing the very jurisdictional issues that motivated the Ninth Circuit's certification of questions to this Court, and directed its clerk to transmit a copy of that brief to this Court for consideration.

For these reasons, CCJ respectfully requests that its application for leave to file an *amicus curiae* brief in support of Defendants/Intervenors/ Appellants and in support of an affirmative answer to the certified question be granted.

Date: May 2, 2011

Respectfully submitted,

CENTER FOR CONSTITUTIONAL JURISPRUDENCE
John C. Eastman
Karen J. Lugo

EDWIN MEESE III

By: 

Attorneys for *Amicus Curiae Center for Constitutional Jurisprudence*

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QUESTION PRESENTED

Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so. *Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1191, 1193 (Order Certifying a Question to the Supreme Court of California) ("*Perry III*"); *see also Perry v. Schwarzenegger*, Order of Feb. 16, 2011 (Cal. S.Ct. No. S189476) (granting certification request).

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.* (1971) 402 U.S. 936, 957 [91 S.Ct. 1624, 29 L.Ed.2d 107] (Black, J., dissenting from denial of cert.); *see also Murphy v. Ramsey* (1885) 114 U.S. 15, 45 [5 S.Ct. 747, 29 L.Ed. 47] (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 this Court rebuffed that blatant disregard of the law, *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 [17 Cal.Rptr.3d 225, 95 P.3d 459], it ultimately ruled that Proposition 22 was unconstitutional under the state constitution. *In re Marriage Cases* (2008) 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384].

In anticipation of such a result, a group of citizens and legislators, Petitioners here, had already qualified a measure for the November 2008 ballot, becoming the official proponents of Proposition 8, which was

adopted as a constitutional amendment on November 4, 2008, effectively overturning the decision in *In re Marriage Cases*. 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, this Court allowed Proponents of the Initiative to intervene in order to provide the defense of the Initiative that the governmental defendants would not. *Strauss v. Horton* (2009) 46 Cal.4th 364, 399 [93 Cal.Rptr.3d 591, 616, 207 P.3d 48, 69]. This Court thus recognized Proponents' preferred status under California law (it simultaneously denied a motion to intervene by other supporters of Proposition 8 who were not official Proponents of the measure) and specifically authorized them to respond to the Court's Order to Show Cause that it issued to the governmental defendants. App. 50. Persuaded by the Proponents' arguments, this Court upheld Proposition 8 as a valid amendment to the state constitution. *Strauss,* 46 Cal.4th at 388.

Another group of plaintiffs, supported by many of the same organizations that had just lost in *Strauss*, then filed an 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, instead agreeing with Plaintiffs' contention that the Proposition was unconstitutional. *See Perry v. Proposition 8 Official Proponents* (2009) 587 F.3d 947, 949 ("*Perry II*"). 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, *Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 921 ("*Perry I*") (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. Aug. 19, 2009 Hearing Tr. at 56, *Id*. (Dkt.#162); Aug. 19, 2009 Minute Order at 2, *Id.* (Dkt.#160); App. 68-69.

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. App. 12-16; *Perry I*, 704 F.Supp.2d at 929. 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 position that, in fact, it is constitutionally infirmed (sic)." 7/2/09 Hearing Tr. at 8:12-25, *Perry I* (emphasis added); App. 100; *see also Perry II*, 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, *Perry I* (Dkt.#709).

On August 4, 2010, the District Court 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 the Ninth Circuit, as well as persuasive authority from every other state and federal appellate court to have considered the issues presented by the case. *Perry I*, 704 F.Supp.2d at 921. 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 the Ninth Circuit would even have jurisdiction to consider the appeal absent an appeal by the named governmental defendants, who were all actively siding with Plaintiffs. Order of Aug. 12, 2010, *Perry I* (Dkt.#727).

Finally, despite concerted efforts by the People of California[2] to have Defendants—their elected Governor and elected Attorney General—

[2] *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.

file a notice of appeal to guarantee that the Ninth Circuit had jurisdiction to consider whether the decision by the District Court invalidating a solemn act of the sovereign people of California was erroneous, none of the governmental defendants filed a notice of appeal within the 30-day window specified by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

In granting the motion for a stay pending appeal by the Initiative Proponents, the Ninth Circuit ordered briefing on whether the Intervenor-Defendants had standing to pursue the appeal, a matter of federal constitutional law that turns on whether California law provides authority for Proponents of an Initiative, either personally or on behalf of the State, 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. After oral argument on December 6, 2010, the Ninth Circuit certified to this Court questions of California law that it deemed necessary for its determination of Proponents' standing to file the appeal when the California officials whose duty it was to "defend all causes to which the State . . . is a party," Cal. Gov't Code § 12512, refused to do so. *Perry III*, 628 F.3d at 1193. This Court granted the Ninth Circuit's request to decide the questions of California law on February 16, 2011. *Perry v. Brown*, S189476, Order of Feb. 16, 2011 (granting certification request).

SUMMARY OF ARGUMENT

California treats the initiative power that the sovereign people have reserved to themselves as "one of the most precious rights of [California's] democratic process," giving it a more authoritative position than exists anywhere else in the country. Initiative Proponents in California have a special role in guarding that fundamental right, both as agents of the people of California and on their own behalf to protect the fundamental right to Initia-

tive afforded to them under the California Constitution. Affirming that special role is especially important in circumstances, such as those presented here, where the elected officials of the State refuse to defend an initiative adopted by the People.

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 Ninth Circuit 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* (9th Cir. 2007) 506 F.3d 822, 830 (Kozinski, C.J., dissenting). The Ninth Circuit is clearly concerned about the apparent manipulation of the judicial process evident in this case. Happily, for the reasons set out below, California law and existing precedent of this Court provide ample grounds for this Court to answer the Ninth Circuit's certified question in the affirmative, thus confirming that Initiative Proponents do indeed have a special role in defending the initiative they sponsored, when the elected officials of the State whose duty it was to provide that defense chose instead to align themselves with those who challenged the initiative's constitutionality.

I. 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* (1982) 32 Cal.3d 236, 241 [186 Cal.Rptr. 30, 651 P.2d 274] (*quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d

208, 219-20 [149 Cal.Rptr. 239, 583 P.2d 1281]). Added to the California Constitution in 1911 along with the referendum and recall powers, "[t]hese devices of direct democracy were designed to allow the people to take action in the face of government that was either unwilling or unable to serve the public interest." Edward J. Erler, *Californians and Their Constitution: Progressivism, Direct Democracy, and the Administrative State* ("Erler, *Californians*"), in Brian P. Janiskee and Kan Masugi, eds., *The California Republic: Institutions, Statesmanship, and Policies* 99 (Rowman & Littlefield, 2003). 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* (1998) 31 Loy. L.A. L. Rev. 1165, 1195. 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* (2010) 47 Cal.4th 1008, 1030 [103 Cal.Rptr.3d 733, 751, 222 P.3d 186, 200].

To fully understand why this Court has given such importance to 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*, *supra* 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* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41, 557 P.2d 473] (Tobriner, J.). It is "the duty of the courts to jealously guard this right of the people," *id.* (quoting *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117 [1 Cal.Rptr. 307]), "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 es-

sence 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* (1990) 52 Cal.3d 336, 357 [276 Cal.Rptr. 326, 801 P.2d 1077] (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 challenges. For the reasons set out in Section II below, that special authority is more than sufficient to answer the Ninth Circuit's certified question in the affirmative, thus allowing the Ninth Circuit to confirm the Article III standing of the official Proponents of Proposition 8, so that the Proponents can continue to provide on appeal the defense of the Initiative they sponsored, as they did as Intervenor-Defendants in the federal district court.

II. Initiative Proponents in California Have a Special Role in the Initiative Process, Guarding the Right of the People to Exercise Sovereign Authority by Voting Upon Initiatives and In the Exercise of Their Own Fundamental Right to Propose Initiatives.

Relying in part on *dicta* in Justice Ginsburg's opinion for the U.S. Supreme Court in *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 67 [117 S.Ct. 1055, 137 L.Ed.2d 170], the federal district court in this case 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, *Perry I* (Dkt.#727) (App. 100). Justice Ginsburg expressed "grave doubts" about whether *Arizona* initiative proponents had Article III standing to pursue an appeal in federal court because she found nothing *in Arizona law* that authorized initiative proponents to defend their own initiative and thereby gain the necessary Article III standing to press their appeal in the fed-

eral courts.[3] The Ninth Circuit had held that the official proponents did have standing. *Yniguez v. State of Arizona* (9th Cir. 1991) 939 F.2d 727, 730, *ultimately dismissed as moot on other grounds sub nom. Arizonans for Official English v. Arizona* (1997) 520 U.S. 43 [117 S.Ct. 1055, 137 L.Ed.2d 170]. That holding, arguably still valid,[4] is even more applicable to *California* initiative proponents, given the preferred place that California law gives to them. In short, California law provides what Justice Ginsburg found lacking in Arizona law.

This Court and the lower courts in California have routinely permitted initiative proponents to intervene in defense of the initiatives they sponsored. *See, e.g.*, *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241 [32 Cal.Rptr.2d 807, 878 P.2d 566]; *Amwest Surety Ins. Co. v. Wilson*

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[3] Respondents Kristin Perry *et al*. ignore that important caveat in Justice Ginsburg's *dictum.* Compare Perry Br. at 6 ("In [*Arizonans*], the U.S. Supreme Court expressed 'grave doubts' as to whether ballot initiative proponents have Article III standing to pursue an appeal from a decision invalidating an initiative where the State itself has declined to appeal") with *Arizonans*, 520 U.S. at 65 ("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" (emphasis added)).

[4] Judge Reinhardt's 1991 opinion in *Yniguez* was not vacated. *See Yniguez v. Arizonans for Official English* (9th Cir. en banc 1997) 118 F.3d 667 (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* (9th Cir. 1997) 119 F.3d 795 (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* (9th Cir. 1997) 131 F.3d 1297, 1305 n.5 (mistakenly stating that the 1991 decision, rather than the 1995 decision, was vacated); *Prete v. Bradbury* (9th Cir. 2006) 438 F.3d 949, 955 n.8 (same). The 1991 panel decision, and its reasoning, therefore remains, at least arguably, the law of the Ninth Circuit, binding on other panels. *See Sanchez v. Mukasey* (9th Cir. 2008) 521 F.3d 1106, 1110.

(1995) 11 Cal.4th 1243, 1250 [48 Cal.Rptr.2d 12, 906 P.2d 1112]; *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 626 [251 Cal.Rptr. 511]; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 480 n.1 [204 Cal.Rptr. 897, 683 P.2d 1150]; *Community Health Assn. v. Board of Supervisors* (1983) 146 Cal.App.3d 990, 992 [194 Cal.Rptr. 557]; *cf. Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812 [258 Cal.Rptr. 161, 771 P.2d 1247] (initiative proponents appeared as real parties in interest to defend against constitutional challenge).

Because the test for intervention in state courts need not be identical to or as stringent as that for standing in the federal courts, and because none of the cases cited above fully explained why initiative proponents were allowed to intervene to defend the initiatives they sponsored, the Ninth Circuit felt that it was unable to determine on its own whether initiative proponents were allowed to intervene in the above cases for reasons that would qualify for Article III standing in the federal courts. This Court should now make clear that initiative proponents serve as "agents of the state" when defending the initiatives they sponsored, and that they also have a particularized interest in the defense of their own initiative that is distinct from that of the general public.

A. 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.

Given the fundamental importance of the initiative in the California constitutional scheme, and particularly its purpose of allowing the people to legislative directly when recalcitrant elected officials do not, it would make no sense to give those same recalcitrant officials an effective veto over initiatives by the simple expedient of refusing to defend them in court. Indeed, as the Ninth Circuit quite correctly observed, "the [California] Constitution's purpose in reserving the initiative power to the People would ap-

pear to be ill-served by allowing elected officials to nullify either proponents' efforts to 'propose statutes and amendments to the Constitution' or the People's right 'to adopt or reject' such propositions." *Perry III*, 628 F.3d at 1197 (quoting Cal. Const. art. II, § 8(a)).

It is not surprising that California law gives a preferred position to initiative proponents because of 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 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.

This is precisely the concern that this Court highlighted in *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810 [226 Cal.Rptr. 81, 718 P.2d 68]. Recognizing that a governmental entity might not defend a citizen-enacted initiative "with vigor if it has underlying opposition" to the initiative, it directed that courts "should allow intervention by proponents of the initiative." Indeed, failure to do so "may well be an abuse of discretion." *Id.* at 822.

Although this Court did not use the magic phrase, "agents of the State," in its *Building Industry Assn.* opinion, the reasoning of the opinion is clearly grounded on that concept. Justice Lucas, the opinion's author, described the initiative "not as a right granted the people, but as a power reserved by them." *Id.* at 821. Because it is the "duty of the courts to jealously guard" the initiative power, "one of the most precious rights of our democratic process," he reiterated the long-standing "judicial policy" of this Court "to apply a liberal construction to [the initiative] power wherever it is challenged in order that the right be not improperly annulled." *Id.* "Permitting intervention by the initiative proponents under these circums-

tances," he concluded, "would serve to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." *Id.* at 822.

Initiative Proponents should thus be permitted to intervene in order to "guard the people's right to exercise the initiative power," a provision of the California Constitution that was "[d]rafted in light of the theory that all power of government ultimately resides in the people." *Id.* at 821. When intervening to defend an initiative, the initiative's Proponents are more than just agents of a particular state entity or office-holder; they are agents of the people themselves, the ultimate sovereign authority in the state. The logic of Justice Lucas's opinion is compelling, and this Court should apply it here to hold that initiative proponents have the authority to represent the People's interest in the validity of the initiative they sponsored and the People approved.

B. California Also 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.

Quite apart from their position as "agents of the State," ready "to guard the people's right to exercise initiative power" when the elected officials of the State refuse to do so, the California Constitution also distinguishes between the power to sponsor an initiative and the power to vote for an initiative, thus giving to initiative proponents an interest in the initiatives they sponsor that is separate and distinct from the voting interest shared by the citizenry as a whole.

California law recognizes the "right of the people to propose statutory or constitutional changes through the initiative process" as "fundamental." *Costa v. Superior Court* (2006) 37 Cal.4th 986 [39 Cal.Rptr.3d 470, 128 P.3d 675]. The California Constitution articulates two facets of the in-

itiative 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(a). The first power, that of electors "to propose" initiatives, is further defined in subsection (b):

> An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

Cal. Const. Art. 2, § 8(b). The separate power to "propose" (as opposed to "adopt or reject") an initiative, is then elaborated upon in several statutes, including Election Code Section 342 (proponents draft the text of proposed Initiatives), Section § 9002 (sole authority to submit amendments to the proposed text), Sections §§ 9001, § 9012, and § 9014 (preparation of forms for gathering of signatures), Sections §§ 9607 and § 9609 (managing signature gatherers), Section § 9032 (submitting completed signature petitions to election officials and thus qualifying the measure for the ballot), and Sections §§ 9065 and § 9067 (exclusive control over the arguments in favor of the initiative that are published in the official voter guide).

Initiative proponents, parties that actually exercise the first part of the initiative 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* (1987) 189 Cal.App.3d 167 [234 Cal.Rptr. 357].

Apparently recognizing the import of this distinction, the California courts have routinely permitted intervention by the official proponents of an

initiative, even while on occasion denying intervention to other initiative supporters. *See, e.g.*, *20th Century*, 8 Cal.4th at 241; *Amwest Surety Ins. Co. v. Wilson*, 11 Cal.4th at 1250; *City of Westminster*, 204 Cal.App.3d at 626; *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d at 480 n.1; *Community Health Assn. v. Board of Supervisors*, 146 Cal.App.3d at 992; *compare* Order of Nov. 19, 2008, *Strauss v. Horton* (2009) 46 Cal.4th 364 (granting motion to intervene by official initiative proponents but denying motion to intervene by non-proponent supporters) (App. 50).

Although the test for intervention is not identical to that for federal court 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* (1986) 476 U.S. 54, 62 [106 S.Ct. 1697, 90 L.Ed.2d 48], 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* (2002) 94 Cal.App.4th 1311, 1321-22 [115 Cal.Rptr.2d 90] (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 (1979) 92 Cal.App.3d 146, 151-53 [154 Cal.Rptr. 676]; *cf. Greif v. Dullea* (1944) 66 Cal.App.2d 986, 993 [153 P.2d 581] ("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.* (9th Cir. 2001) 260 F.3d 997, 999-1000; *Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1217 [99 Cal.Rptr.3d 746], but California has not done so here. Instead, the relevant California 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 in California—"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*, 21 Cal.4th at 361-62 (quoting *Carsten v. Psychology Examing Com.* (1980) 27 Cal.3d 793, 795 [166 Cal.Rptr. 844, 846, 614 P.2d 276, 278]). As this Court has noted, 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.'" *Associated Builders*, 21 Cal.4th at 362; *see also Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 561 [112 S.Ct. 2130, 119 L.Ed.2d 351].

Thus, the relevant California standing requirements have already been 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* , 21 Cal.4th 362, should be dispositive. Clarification from this Court that initiative proponents have a concrete and particularized injury, different in kind from those who merely supported the initiatives brought to life by the initiative proponents, would provide added insurance that initiative proponents, including the proponents of Proposition 8 at issue here, will continue to be able to "guard the people's right to exercise the initiative power" when elective officials have abdicated their duty to do so.

III. Because Governing Precedent of the U.S. Supreme Court and of the Ninth Circuit Supports Proposition 8, the Attorney General's Refusal to Defend the Initiative Highlights Even More the Importance of Recognizing that Initiative Proponents Can Defend the Initiatives They Sponsor.

Perhaps the most troubling aspect of the refusal by elected officials of this State to defend Proposition 8, as was their duty, arises from the fact that this was not remotely a case for which there was no colorable defense. Indeed, just the opposite is true, as there is governing precedent of the Supreme Court of the United States and of the Ninth Circuit that supports the constitutionality of Proposition 8.

In *Baker v. Nelson*, a case pressing the identical claims at issue in the federal court action here, namely, that denial of a marriage license to a same-sex couple violated federal due process and equal protection requirements, the Supreme Court of the United States dismissed the appeal from the Minnesota Supreme Court "for want of substantial federal question." *Baker v. Nelson* (1972) 409 U.S. 810 [93 S.Ct. 37, 34 L.Ed.2d 65] . Because the case was before the Supreme Court on mandatory appeal rather than discretionary certiorari, the dismissal 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* (1975) 422 U.S. 332,

344-45 [95 S.Ct. 2281, 45 L.Ed.2d 223] (quoting *Doe v. Hodgson* (2d Cir. 1973) 478 F.2d 537, 539).

There is also binding authority from the Ninth Circuit rejecting a constitutional challenge to a definition of "spouse" in a federal immigration statute that excluded same-sex partners. *Adams v. Howerton* (9th Cir. 1982) 673 F.2d 1036, 1042. And nearly every court to have considered constitutional challenges involving sexual orientation classifications has held that such classifications are subject merely to the highly-deferential rational basis review, a standard of review that almost always results in the challenged statute being upheld. *See, e.g., Romer v. Evans* (1996) 517 U.S. 620, 632-33 [116 S.Ct. 1620, 134 L.Ed.2d 855]; *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* (9th Cir. 2008) 527 F.3d 806, 821; *Flores v. Morgan Hill Unified Sch. Dist.* (9th Cir. 2003) 324 F.3d 1130, 1137; *Holmes v. California Army Nat'l Guard* (9th Cir. 1997) 124 F.3d 1126, 1132; *Philips v. Perry* (9th Cir. 1997) 106 F.3d 1420, 1425; *Meinhold v. United States DOD* (9th Cir. 1994) 34 F.3d 1469, 1478; *High Tech Gays v. Defense Indus. Sec. Clearance Office* (9th Cir. 1990) 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* (2003) 539 U.S. 558 [123 S.Ct. 2472, 156 L.Ed.2d 508] —a position that no federal appellate court has taken—they surely provided the elected officials of this State with more than a colorable defense of the initiative supported by more than seven million Californians.

Far from this being a case, therefore, where the Governor and the Attorney General should get to decide whether some laws are so misguided (assuming that should ever be the test) as to not warrant a defense, as the Perry respondents claim, Perry Br. at 19, there were strong arguments in

support of Proposition 8 that any attorney worth his salt could—and should—easily have made. That the Attorney General of this State declined to do so proves beyond measure that the concerns expressed by this Court in *Building Industry Assn.* were fully warranted, and that formal recognition of the "special role" that Initiative Proponents play in the California initiative process is required to protect the "precious right" of initiative that the sovereign people of California have reserved to themselves.

CONCLUSION

This Court should answer both components of the Ninth Circuit's certified question in the affirmative. Under California law, proponents of an initiative are "agents of the state" who "guard the people's right to exercise initiative power," and also have a concrete, particularized interest in defending the initiatives they sponsored.

Date: May 2, 2011

Respectfully submitted,

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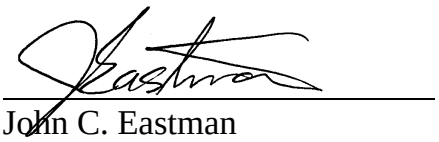
CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 8.204 of the California Rules of Court that the attached amicus brief is proportionally spaced, has a type face of 13 points or more and, pursuant to the word count feature of the word processing program used to prepare this brief, contains 6,239 words, exclusive of the matters that may be omitted under Rule 8.204(c)(3).

Dated: May 2, 2011



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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is Chapman University School of Law, One University Drive, Orange, CA 93866. On May 2, 2011, I served the following document:

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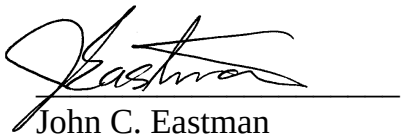

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