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Via electronic submission

May 3, 2011

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

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

Dear Ms. Dwyer:

Enclosed please find courtesy copies of the Application and Brief of Amici Curiae Equality California, National Center for Lesbian Rights, and Lambda Legal Defense and Education Fund, Inc., submitted yesterday to the Supreme Court of California, Case No. S189476, in support of Plaintiffs-Respondents and Plaintiff-Intervener-Respondent, on certification of questions from this Court in the above-referenced matter.

Sincerely,

/s/ David C. Codell

DAVID C. CODELL
Counsel for Amici Curiae
Equality California, National Center
for Lesbian Rights, and Lambda Legal
Defense and Education Fund, Inc.

Enclosures

No. S189476

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KRISTIN PERRY, et al., *Plaintiffs-Respondents*, and
CITY AND COUNTY OF SAN FRANCISCO, *Plaintiff-Intervener-Respondent*,

v.

EDMUND G. BROWN, et al., *Defendants*,
DENNIS HOLLINGSWORTH, et al., *Defendants-Interveners-Appellants*, and
HAK-SHING WILLIAM TAM, *Defendant-Intervener*.

On Request From the United States Court of Appeals for the Ninth Circuit,
Case No. 10-16696

APPLICATION OF EQUALITY CALIFORNIA, NATIONAL CENTER FOR LESBIAN RIGHTS, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND PLAINTIFF-INTERVENER-RESPONDENT

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Lambda Legal Defense and Education Fund, Inc.

Pursuant to California Rule of Court 8.520(f), Amici Curiae Equality California, the National Center for Lesbian Rights ("NCLR"), and Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") apply for permission from the Chief Justice to file the concurrently submitted amicus curiae brief in support of Plaintiffs-Respondents and Plaintiff-Intervener-Respondent in the instant proceeding before this Court on the certified question from the U.S. Court of Appeals for the Ninth Circuit.[1]

Equality California is a state-wide advocacy group protecting the needs and interests of lesbian, gay, bisexual, and transgender Californians and their families, including members of same-sex couples and their children. Equality California is also California's largest lesbian, gay, bisexual, and transgender civil rights organization, with members in every county in the State of California. Equality California's members include same-sex couples who wish to marry in the state of California but cannot do so while Proposition 8 is being enforced; same-sex couples who married in California before Proposition 8's enactment; same-sex couples who are married under the laws of other jurisdictions; and same-sex couples who have registered with the State of California as domestic partners. The outcome of this proceeding will thus directly affect Equality California's members and supporters.

NCLR is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their

[1] Pursuant to California Rule of Court 8.520(f)(4), Amici state (a) that no party or party's counsel authored the brief in whole or in part; (b) that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (c) that no person—other than Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for lesbian, gay, bisexual, and transgender people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in protecting same-sex couples and their children.

Lambda Legal is the nation's oldest and largest nonprofit legal advocacy organization dedicated to achieving full civil rights for lesbian, gay, bisexual, and transgender people and those living with HIV through impact litigation, education, and public policy work. With offices in Los Angeles, Atlanta, Chicago, Dallas, and New York, Lambda Legal litigates cases and engages in public advocacy in all areas of sexual orientation and gender identity discrimination law and policy.

Equality California, NCLR, and Lambda Legal have significant experience and interest in the issues presented in this proceeding. Over the past decade, Equality California has successfully sponsored more than 70 pieces of civil rights legislation in the California Legislature for the lesbian, gay, bisexual, and transgender community in California, including many of the State's anti-discrimination laws and laws concerning marriage and domestic partnership. Equality California was also a plaintiff in *In re Marriage Cases* (2008) 43 Cal.4th 757 and a petitioner in *Strauss v. Horton* (2009) 46 Cal.4th 364. NCLR and Lambda Legal represented plaintiffs, including Equality California, in *Marriage Cases*, *supra*, and also collectively filed the lead challenge to Proposition 8 in *Strauss*, *supra*. NCLR and Lambda Legal have also participated as

counsel or as amici curiae supporting the plaintiffs in numerous other lawsuits around the country seeking the freedom to marry on behalf of same-sex couples.

Together, Amici bring significant experience and expertise to the issues pending before this Court. Moreover, they are able to inform the Court in areas that may not otherwise be addressed adequately in the briefing, including the interests of the numerous lesbian, gay, and bisexual Californians and their families who opposed Proposition 8 during the 2008 election. Because of their unique perspective and their abiding interest in the issues now before the Court, Amici respectfully seek permission from the Chief Justice to file the brief that accompanies this application.

DATED: May 2, 2011

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1000 Wilshire Boulevard, Suite 600, Los Angeles, California 90017-2463.

On May 2, 2011, I served true copies of the following document(s) described as **APPLICATION OF EQUALITY CALIFORNIA, NATIONAL CENTER FOR LESBIAN RIGHTS, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND PLAINTIFF-INTERVENER-RESPONDENT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 2, 2011, at Los Angeles, California.

Mirela Popescu

Perry, et al. v. Brown, et al.
In the Supreme Court of the State of California
No. S189476

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CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number(s): 10-16696

I hereby certify that on May 3, 2011, 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.

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 Express 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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INTRODUCTION

The question that the Ninth Circuit certified to this Court consists of two inquiries. One inquiry concerns whether initiative proponents "'have *authority* to assert the State's interest in [an] initiative's validity'" in circumstances such as those presented in this litigation, when state officials have declined to appeal from a federal district court ruling invalidating the initiative. (*Perry v. Brown*, No. 10-16696, Order Certifying a Question to the Supreme Court of California at p. 2 [9th Cir. Jan. 4, 2011] [emphasis added] ["Certification Order"].) The other inquiry concerns whether initiative proponents have "'a *particularized 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 state officials choose not to appeal such a judgment. (*Ibid.* [emphasis added].) Amici Curiae Equality California, the National Center for Lesbian Rights, and Lambda Legal Defense and Education Fund, Inc. ("Amici") respectfully contend that the questions this Court should decide are more focused questions than the ones posed by the Ninth Circuit and addressed by Proponents in their briefing.

First, with respect to authority to represent the State's interests, the U.S. Supreme Court's decision in *Arizonans for Official English v. Arizona* ("*Arizonans*") (1997) 520 U.S. 43 makes plain that Proponents' federal-court standing will not turn on the question that Proponents address—whether as a broad matter "initiative proponents have authority under state law to represent the State's interest in defending the validity of initiatives" (Proponents' Reply Br. at p. 1)—or on the question framed by the Ninth Circuit, which

vaguely refers to "'authority to assert the State's interest in [an] initiative's validity'" (Certification Order at p. 2.) Rather, the *Arizonans* opinion points to a narrower inquiry on which Article III standing depends in circumstances such as those presented here. Specifically, under the analysis in *Arizonans,* this Court should answer the question whether, under California law, the official proponents of an initiative are authorized *to appeal a judgment* invalidating an initiative (not whether proponents more generally are permitted "to defend the constitutionality of [an] initiative upon its adoption") *as representatives of the State* (not simply "assert[ing] the State's interest") *in federal court* (not generally in any court). (Certification Order at p. 2.)

With respect to both inquiries posed by the Ninth Circuit, the Proponents' briefing, by focusing diffusely on various contexts in which state courts have permitted initiative proponents to present arguments regarding their proposed measures—for example, in the intervention context, in cases concerning the initiative process rather than the validity of initiatives post-enactment, and in cases in which initiative proponents actually were affected by the measures they proposed—Proponents have confused the issues this Court must decide and have avoided the inquiry for which *Arizonans* calls. Properly framed, this inquiry is straightforward. Proponents can point to no provision of California law—whether constitutional, statutory, or decisional—that confers on official proponents the authority to file an appeal in federal court on behalf of the State to defend an initiative they proposed. Nor can Proponents identify any law creating in initiative proponents a particularized interest in the substantive validity of an initiative after it has been enacted. Rather, Proponents' arguments boil down to the contention that such authority and such

an interest are constitutionally necessary to safeguard the initiative power reserved to the people by the California Constitution. (See Proponents' Opening Br. at p. 24.) As explained below, however, Proponents' warnings regarding potential injury to the constitutional initiative power are entirely without merit. In reality, the initiative power would suffer greater harm from a ruling expanding its contours to afford Proponents the authority they seek in this case.

The possibility that Proposition 8's proponents may lack standing to appeal from the District Court judgment invalidating that measure is a product, in part, of the nature of Proposition 8. That measure eliminated the fundamental right to marry for one group of people, but did not confer any benefit on anyone. As a result, Proponents have not been able to demonstrate how the invalidation of Proposition 8—and the restoration of the fundamental right to marry for same-sex couples—will have any adverse effect on them. The possible dismissal of the federal appeal in this litigation turns in large part on these unique circumstances, and such a dismissal would not pose any harm to California's initiative power. The instances in which state officials choose not to appeal from judgments invalidating state laws are few and far between, and the Attorney General historically and today has exercised the discretion to make such decisions with care. Normally, there will be someone adversely affected by such judgments who can seek judicial review. That there is no such person here does not warrant a reinterpretation of the state constitutional and statutory law governing the initiative power. California law does not recognize either the authority or the interest about which the Ninth Circuit

inquired. Amici respectfully request that this Court answer the certified question in the negative.

ARGUMENT

I. INITIATIVE PROPONENTS ARE NOT AUTHORIZED UNDER CALIFORNIA LAW TO PURSUE AN APPEAL IN FEDERAL COURT ON BEHALF OF THE STATE TO DEFEND AN INITIATIVE'S VALIDITY WHEN STATE OFFICIALS HAVE NOT APPEALED

In *Arizonans*, the U.S. Supreme Court unanimously expressed "grave doubts" as to whether proponents of an initiative have Article III standing to represent the interests of a state by pursuing an appeal from a federal district court judgment invalidating the initiative when state officials have declined to appeal from that judgment and where there is no state law authorizing the proponents to pursue an appeal in federal court. (520 U.S. at p. 66.) The *Arizonans* Court observed that it had never "identified initiative proponents as Article-III-qualified defenders of the measures they advocated" and indeed cited to one of its decisions in which it had summarily dismissed for lack of Article III standing an appeal by initiative proponents from a judgment invalidating an initiative. (See *id.* at p. 65 [citing *Don't Bankrupt Washington Comm. v. Continental Ill. Nat. Bank & Trust Co. of Chicago* (1983) 460 U.S. 1077].) Although the U.S. Supreme Court acknowledged that it "ha[d] 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 interest*" (*ibid.* [citing *Karcher v. May* (1987) 484 U.S. 72, 82] [emphasis added]), the Court observed that the initiative sponsor in *Arizonans* "and its members . . . [were] not elected representatives," and the Court was "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" (*ibid.*).

Notably, in the course of its analysis of whether the initiative sponsor before it had standing, the *Arizonans* Court did not "discern anything flowing from [the initiative's] citizen suit provision—which authorize[d] suits to enforce [the initiative] in *state* court—that could support standing for Arizona residents in general, or [the initiative sponsor] in particular, to defend the [initiative's] constitutionality in *federal* court." (520 U.S. at p. 66 [emphases added].) Under the analysis in *Arizonans*, for Article III standing to be based on an initiative proponent's purported representation of the State or the State's interests, there must be a state law authorizing the initiative proponent *to represent the State* and to do so *in federal court*.

As Amicus Equality California explained in its brief before the Ninth Circuit, which was transmitted to this Court in this matter, and as amply demonstrated by Plaintiffs and by the City and County of San Francisco in their respective Answering Briefs, nothing in the California Constitution or California statutory law affords official proponents any power to make litigation decisions on behalf of the State. (See *Perry*, *supra*, No. 10-16696, Brief of Amicus Curiae Equality California In Support of Plaintiffs-Appellees and Plaintiff-Intervener-Appellee and In Support of Affirmance at pp. 8-19 (9th Cir. Oct. 25, 2010) at pp. 8-19; Plaintiffs-Respondents' Answering Br. at pp. 9-11; San Francisco Answer Br. at pp. 8-18.) Indeed, there is no positive enactment of any kind that grants initiative proponents any form of litigation authority on behalf of the interests of the State, let alone the power to pursue an appeal in federal court on

behalf of the State where the state officials charged with litigation decisions have determined not to appeal. Accordingly, the repeated refrain of Proponents' briefing that "official proponents act as agents of the People" is baseless. (Proponents' Opening Br. at p. 2; Proponents' Reply Br. at p. 1.) As the Supreme Court noted in *Arizonans*, initiative proponents are unelected. Moreover, the voters have never authorized the Proponents of Proposition 8 to represent "the People" or the State.

Unable to identify any constitutional or statutory provisions affording them authority to act on behalf of the State, Proponents focus on state decisional law permitting official proponents to participate as interveners or "real parties in interest" in state-court proceedings involving the initiatives they have sponsored. (See Proponents' Opening Br. at pp. 31-34.) None of Proponents' cited cases support the proposition that initiative proponents are authorized to represent the interests of the State in defending an initiative's validity. As the Court of Appeal noted in *City & County of San Francisco v. State of Cal.* (2005) 128 Cal.App.4th 1040, many of the cases relied upon by the proposed interveners in that case and again by the Proponents in this case do not even "address[] whether intervention was proper," and therefore do not speak to the propriety of intervention, much less to the question whether initiative proponents have authority to participate in litigation as representative of the State's interests. (See *ibid.* at pp. 1041-42 [citing *Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250-51, *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241-42, and *Legislature of Cal. v. Eu* (1991) 54 Cal.3d 492, 499-500, as cases not addressing the propriety of intervention by initiative proponents].) The same is true of other cases on which Proponents attempt to rely. (See

Strauss v. Horton (2009) 46 Cal.4th 364, 398-99 [unopposed intervention motion by initiative proponents]; *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1331 [no indication that intervention was opposed]; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476 [same]; *Community Health Assn. v. Board of Supervisors* (1983) 146 Cal.App.3d 990 [same]; *Vandeleur v. Jordan* (1938) 12 Cal.2d 1191 [same].) Other cases on which Proponents attempt to rely did not involve intervention by actual initiative proponents, who are defined by statute as persons, not organizations.[1] (See, *e.g.*, *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146 [addressing intervention by advocacy group that campaigned for local initiative, not intervention by actual proponents]; *Sonoma County Nuclear Free Zone '86 v. Superior Court* (1987) 189 Cal.App.3d 167, 171 [concerning "group supporting the initiative," not actual initiative proponents].)

In sum, not a single case cited by Proponents stands for the proposition even that initiative proponents are necessarily entitled to intervene in existing proceedings, much less that initiative proponents are authorized *to represent the interests of the state* or *to initiate proceedings*, whether in the first instance or by filing an appeal, and much less

---

[1] See Elections Code section 342 ["'Proponent or proponents of an initiative or referendum measure' means, for statewide initiative and referendum measures, the elector or electors who submit the text of a proposed initiative or referendum to the Attorney General with a request that he or she prepare a circulating title and summary of the chief purpose and points of the proposed measure; or for other initiative and referendum measures, the person or persons who publish a notice or intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body."]; *id.*, § 321 ["'Elector' means any person who is a United States citizen 18 years of age or older and a resident of an election precinct at least 15 days prior to an election."].

that they have any authority to initiate an appeal *in federal court.* Even if there were a rule or convention that initiative proponents generally may intervene in existing California state-court proceedings to present arguments regarding an initiative's validity, a state court's decision that it will hear argument from initiative proponents does not translate into an authorization by California law for initiative proponents either to represent the State or to initiate an appeal in federal court where State officials have chosen not to appeal.

A. A Ruling by this Court that Initiative Proponents Do Not Have Authority to Represent the State's Interests Would Be Consistent with the Full Scope of the Initiative Power

Recognizing that California law does not expressly authorize official proponents to file a federal appeal on behalf of the State's interests, Proponents ultimately resort to the non-textual argument that this authority is constitutionally necessary to safeguard the people's exercise of the initiative power. (See Proponents Opening Br. at pp. 17-24.) Underlying Proponents' theory is the concern that absent a ruling in their favor, initiatives with which the executive branch disagrees will go undefended on appeal, thereby impinging upon the people's constitutional prerogative to propose and enact initiatives. This worry, however, rests on two false assumptions: (1) that the executive branch's decision not to appeal a judgment invalidating an initiative somehow impairs the constitutional initiative power; and (2) that a decision precluding Proponents from defending Proposition 8 on appeal would set a precedent preventing other initiative supporters from similarly defending their own initiatives on appeal. These mistaken assumptions are addressed in turn.

There is no merit to Proponents' suggestion that a decision by the executive branch not to appeal a judgment invalidating a voter initiative somehow undermines the people's exercise of the constitutional initiative power. In support of their theory, Proponents rely heavily on a portion of this Court's decision in *Building Industry Association v. City of Camarillo* (1986) 41 Cal.3d 810, addressing the propriety of allowing official proponents of a ballot initiative to intervene in litigation involving the initiative measure. (See Proponents' Opening Br. at pp. 2, 18-19; Proponents' Reply Br. at pp. 2-4.) In that case, this Court opined that "[p]ermitting intervention by the initiative proponents" in a case where the public officials charged with the duty to defend the initiative "might not do so with vigor . . . would serve to guard the people's right to exercise initiative power." (*Building Industry Assn.*, *supra*, 41 Cal.3d at p. 822.) As explained by Plaintiffs and San Francisco, and as the Court of Appeal noted in *City & County of San Francisco v. State of California* (2005) 128 Cal.App.4th at 1040, 1042, fn. 9, that portion of *Building Industry Association* is dictum and therefore not binding precedent for even the limited subject upon which it speaks. (See Plaintiffs-Respondents' Answering Br. at pp. 15-16, 22; San Francisco Answer Br. at pp. 41-42.) Moreover, intervention in an existing proceeding to present arguments in defense of an initiative differs fundamentally from an authority to *initiate* a proceeding, such as a federal appeal. The federal standing inquiry is focused on the latter issue, and the authority to file an appeal to assert the State's interests raises serious questions about the constitutional and statutory allocation of executive power that may not be present in the intervention context.

Proponents warn that, absent a ruling in their favor on the certified questions, the Governor and Attorney General may "improperly annul" the people's exercise of the initiative power by refusing to appeal a decision invaliding a successful voter initiative. (See Proponents' Opening Br. at p. 23.) That provocative claim, however, has no basis in California law and does not reflect the circumstances of this case. Because the initiative power is inherently legislative in nature, the people's exercise of this reserved right is in no way "annulled" by the executive branch's decision not to appeal a ruling against a successful initiative. In truth, the greater threat to the initiative power comes from Proponents' attempt here to expand this constitutional prerogative beyond what is contemplated by California law.

The California Constitution provides that, "[t]he legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum." (Cal. Const., art. IV, § 1.) The Constitution further specifies that, "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8(a).) Thus, by its very terms, the initiative power reserves to the people but two rights—the right "to propose statutes and amendments to the Constitution," and the right "to adopt or reject them"—both of which are indicative of a legislative grant of power. (See *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 715 [reviewing the history of the initiative power in California and other states and characterizing that power as "a reserved legislative power, a method of enacting statutory law"]; see also *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 782 ["The statutory and constitutional right to

petition contemplates the direct enactment of laws."]; *Nogues v. Douglass* (1857) 7 Cal. 65, 70 ["The legislative power is the creative element in the government . . . ."].)

Given the intrinsically legislative character of the initiative power, a post-enactment decision by state officials not to appeal a federal district court ruling invalidating an initiative as violative of the federal Constitution does not threaten to nullify the initiative power. The Attorney General's and Governor's decision not to appeal the district court ruling invalidating Proposition 8 did not inhibit the people's *exercise* of their legislative authority. Thus, the executive official's litigation decision here in no way impedes the core constitutional rights reserved to the people by the initiative power: the authority to propose statutes and constitutional amendments, and to vote on the same. (Cal. Const., art. II, § 8(a).)

Nor can the decision of the state officials not to appeal in this case be fairly understood as any sort of "veto" of Proposition 8 by those officials. State officials are under no obligation to appeal every adverse decision or even to defend every state enactment. This Court has recently explained that whether state officials "have an obligation to defend [state] statutes in court is a complex issue, which [the court] need not decide here." (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1184.) This Court also recently declined to require the Attorney General to file an appeal of the District Court ruling invalidating Proposition 8. (See *Beckley v. Schwarzenegger*, No. S186072 (Sept. 8, 2010).) This litigation raises no concern that state officials are seeking to "undo" the vote of the electors or somehow "veto" Proposition 8. State officials have been *enforcing* Proposition 8 since its enactment; the state officials answered the

complaint in this case; and the District Court proceedings, which were adversarial, resulted in a comprehensive judgment finding Proposition 8 unconstitutional and unsupported by legitimate state interests. This case does not stand alone as an example of federal court litigation invalidating initiatives in which state officials ultimately did not pursue an appeal. (See, e.g., *California Democratic Party v. Lungren* (N.D. Cal. 1996) 919 F.Supp. 1397 [no appeal taken from judgment striking down Cal. Const., art, II, § 6(b)].) That such instances occur only rarely indicates that there is no broad problem of the sort of which Proponents warn.[2] Accordingly, this Court should not use this case to announce a new power of initiative proponents to represent the interests of the State by initiating a federal appeal where state officials have chosen not to file an appeal.

Moreover, the circumstances presented by Proposition 8 are unusual because Proposition 8 confers no benefit whatsoever upon any individual or entity. As this Court

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[2] Proponents exaggerate the consequences of unappealed federal district court rulings invalidating state measures. In *Arizonans*, the U.S. Supreme Court observed that a federal district court ruling invalidating a state initiative had "slim precedential effect" and did not foreclose the possibility of future state-court litigation involving issues related to the initiative. (See 520 U.S. at p. 66.) Amici here take no position as to whether any person or entity would have sufficient basis to maintain any state-court action concerning Proposition 8. Indeed, given that Proposition 8 confers no benefit on any person or entity, the measure's non-enforcement due to a federal court injunction causes no harm to any person or entity and it is unclear on what basis any state-court litigation concerning Proposition 8 could proceed. Nevertheless, what is clear from the U.S. Supreme Court's discussion in *Arizonans* is that, in general, the inability of initiative proponents to appeal from a federal district court ruling invalidating a measure does not pose a threat to the ability of initiative proponents to obtain from state courts whatever relief may be authorized by state law. (Cf. *ASARCO Inc. v. Kadish* (1989) 490 U.S. 605, 617 ["[S]tate courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law."].)

explained in *Strauss v. Horton,* Proposition 8 "car[ved] out an exception to the preexisting scope of the privacy and due process clauses of the California Constitution." (46 Cal.4th at p. 408.) "Proposition 8 reasonably must be interpreted in a limited fashion as *eliminating* only the right of same-sex couples to equal access to the designation of marriage . . . ." (*Ibid.* [emphasis added].) Thus, far from conferring any immediate, pecuniary, or substantial benefit on Proponents (or anyone else, for that matter), Proposition 8 withdrew a previously recognized right from a discrete group of individuals. The measure's invalidation therefore simply restores the former right to that group of people and cannot be said to withdraw any legally cognizable benefit from Proponents. That key feature of Proposition 8 explains why Proponents have not been able to identify a basis for Article III standing that would permit them to maintain an appeal from the District Court's judgment.

B. A Holding that Initiative Proponents Have Authority to Represent the State's Interests Would Be At Odds with this Court's Jurisprudence Regarding Construction of Initiatives and Would Itself Pose Harms to the Initiative Power

Contrary to Proponents' various arguments, Proponents' suggested reading of the initiative power would require a radical departure from ordinary principles of construing initiatives. The People's initiative power would be harmed if the Proponents were permitted to stand in the shoes of state officials and prosecute an appeal of the District Court's ruling, because such sweeping power was not presented to or authorized by the voters either in connection with Proposition 8's passage or when the voters enacted the initiative power itself.

The People's power to legislate, in order to be effective, must include not only the power to enact broad measures, but also the power to legislate in a limited manner. Accordingly, the People's initiative power is damaged, not enhanced, by a judicial construction of an initiative that is broader than what the electorate contemplated. As this Court has explained: "[W]e may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114; see also *People v. Superior Court* ("*Pearson*") (2010) 48 Cal.4th 564, 571; *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 26.)

This Court has explained that interpretation of initiatives follows ordinary principles of construction and that the courts "may not add to [an initiative] or rewrite it to conform to some assumed intent not apparent from th[e] language." (*Pearson*, *supra*, 48 Cal.4th at p. 571; see also *Knight*, *supra*, 128 Cal.App.4th at p. 18 [declining invitation to construe initiative broadly where "the electorate was not given the opportunity to vote on [an] undisclosed [purported] objective [of the initiative]"; explaining that "courts are precluded from interpreting [an initiative] in a manner that was not presented to the voters"].) Because the voter-enacted measures that created the initiative say nothing about initiative proponents having any power to represent the state or to defend an initiative's substantive validity on appeal post-enactment, this Court cannot read any such authority into the California Constitution. To do so would be to impose on the voters a construction of the initiative power that the electorate was not given an opportunity to consider. Proponents' argument would require this Court to

make numerous assumptions about the intent of the electorate, including that the electorate intended for initiative proponents to be able to exercise essentially executive authority by standing in the place of the State to prosecute appeals when state officials decide not to do so. The Constitution is silent as to any such power, but instead limits the initiative power to proposing measures and voting on them. Proponents' argument for extended, post-enactment litigation authority would lead to an incongruous result that, in a state with term limits for elected officials, unelected initiative proponents could continue to wield litigation power on behalf of the State years or even decades after a measure's enactment.

Drafters of certain initiatives *have* specifically included provisions regarding post-enactment enforcement when submitting their initiatives to the voters. (See San Francisco Answer Br. at pp. 22-24 [discussing initiatives containing express delegations of litigation authority].) Proponents claim that Proposition 8's proponents had no reason to think such delegations of litigation authority were necessary when Proposition 8 was drafted and enacted. (See Proponents' Reply Br. at p. 7.) However, one initiative that does delegate post-enactment litigation authority related to the initiative was *on the very same ballot as Proposition 8*. In 2008, California voters approved Proposition 11, an initiative constitutional amendment that created a Citizens Redistricting Commission that took over the role of redrawing congressional districts from the Legislature. Notably, Proposition 11 anticipated and addressed in the text of the proposed constitutional amendment the issue of standing to defend redrawn districts:

> SEC. 3.4. Section 3 is added to Article XXI of the California Constitution, to read:
>
> SEC. 3. (a) The commission has the sole legal standing to defend any action regarding a certified final map, and shall inform the Legislature if it determines that funds or other resources provided for the operation of the commission are not adequate. The Legislature shall provide adequate funding to defend any action regarding a certified map. The commission has sole authority to determine whether the Attorney General or other legal counsel retained by the commission shall assist in the defense of a certified final map.

(http://www.calvoter.org/issues/votereng/redistricting/prop11text.html.) Proposition 11 illustrates that initiative drafters can choose to include provisions regarding who may engage in post-enactment litigation related to the initiative. (See also Cal. Const., art. III, § 6 [official English amendment providing that "[a]ny person who is a resident of . . . California shall have standing to sue the State of California to enforce this section"].)

Therefore, notwithstanding Proponents' attempts to portray themselves as champions of "the sovereign People's initiative power" (See Proponents' Reply Br. at p. 2), Proponents' suggested reading of the initiative power to authorize them to represent the State's interests in a federal appeal in defense of Proposition 8 would require a serious departure from this Court's jurisprudence regarding construction of initiatives. The authority that Proponents assert is a matter that could have been expressed and considered by voters, either in connection with the enactment of the initiative power or the enactment of Proposition 8. Given this Court's admonition that the initiative power should be interpreted so that voters "get what they enacted, not more and not less" (*Hodges*, *supra*, 21 Cal. 4th at p. 114), this Court should reject Proponents' attempt to

construe the initiative power in a manner that "the electorate was not given the opportunity to vote on." (*Knight*, *supra*, 128 Cal.App.4th at p. 18.)

II. PROPONENTS DO NOT HAVE A PARTICULARIZED, PERSONAL INTEREST IN THE VALIDITY OF PROPOSITION 8

The Ninth Circuit has asked this Court to determine whether under California law, an official proponent of an initiative personally possesses a "particularized interest" in the initiative's validity. As San Francisco accurately explains, the critical inquiry is not whether an official proponent has *any* interest in an initiative he sponsors, but rather, *the nature* of any interest he may possess. (See San Francisco Answer Br. at p. 34.) Therefore, in this case, where Proponents seek to defend the constitutionality of a successfully enacted voter initiative, the relevant issue is whether the official proponents of an initiative measure possess a particularized, personal interest in the substantive validity of the initiative after it has been properly proposed to the electorate and passed into law. (See Certification Order at p. 2 [asking whether official proponents possess a particularized interest "in the initiative's validity, which would enable them to defend the constitutionality of the initiative *upon its adoption*"] [emphasis added].)

On this issue, Proponents claim to have "a special and particularized *personal* interest in the initiatives they sponsor that arises from the unique rights and responsibilities vested in them by California law." (Proponents' Opening Br. at p. 32.) Specifically, Proponents point to their constitutional right as electors "'to propose statutory or constitutional changes through the initiative process'" and to the "numerous statutory rights and responsibilities" afforded to official proponents of an initiative under

California law. (*Ibid.*) Those purported "rights and responsibilities," however, all involve the proposal and preparation of an initiative *prior to its enactment*, and therefore cannot give rise to any particularized interest in the initiative's validity after it becomes law. Certainly, initiative proponents cannot claim a particularized interest from the act of *voting* for an initiative because their interests are no different from those of any other voter. Rather, the nature of the interest Proponents assert is similar to the interest of a sponsor of legislation in the Legislature.

This Court has yet to provide an authoritative pronouncement of the interests held by individual legislators in the laws they sponsor. (Cf. *Serrano v. Priest* (1976) 18 Cal.3d 728, 750-53 [holding that the Legislature is not an "indispensable party" in a case involving public school financing because its only interest in the dispute was "that of lawmakers concerned with the validity of statutes enacted by them"].) However, in the absence of controlling state precedent, relevant federal authority is instructive, as is related case law from other states. (See, e.g., *Obrien v. Jones* (2000) 23 Cal.4th 40, 65-67 [reviewing federal and sister state authority on separation of powers doctrine to inform a decision under California law regarding the legislative appointment of state bar judges].)

In *Harrington v. Schlesinger* (4th Cir. 1975) 528 F.2d 455, 459, four congressmen sued executive branch officials to halt alleged violations of two statutes. The Fourth Circuit acknowledged that an individual legislator has standing to challenge "the diminution of his voting power in the legislative process." (*Ibid.* [citing *Kennedy v. Sampson* (D.C. Cir. 1974) 511 F.2d 430] [footnote omitted].) The court explained,

however, that in the case before it, the laws at issue had already been enacted: "Once a bill has become law . . . [the congressmen's] interest is indistinguishable from that of any other citizen. They cannot claim dilution of their legislative voting power because the legislation they favored became law." (*Ibid.*; *cf. Newdow v. U.S. Congress* (9th Cir. 2002) 313 F.3d 495, 499-500 [holding that the U.S. Senate did not have standing to defend the constitutionality of a statute it enacted because "[a] public law, after enactment, is not the Senate's any more than it is the law of any other citizen or group of citizens in the United States"].)

Similarly, in *Chiles v. Thornburgh* (11th Cir. 1989) 865 F.2d 1197, 1200-02, the Eleventh Circuit dismissed for lack of standing the complaint of a U.S. Senator against Department of Justice officials. The Senator alleged that that the federal government was operating a certain immigration detention facility in violation of legislation that he had sponsored and that was subsequently passed into law. (*Ibid.*) The court found that the Senator lacked standing because he "[was] basically arguing that as a Senator he has a right to see that the laws, which he voted for, are complied with. Such a claim of injury, however, is nothing more than a 'generalized grievance [ ] about the conduct of the government.'" (*Ibid.* [quoting *Flast v. Cohen* (1968) 392 U.S. 83, 106] [alterations in original]; see also *Harrington v. Bush* (D.C. Cir. 1977) 553 F.2d 190, 203-04 [holding that an individual legislator does not have standing to sue the executive for disobeying laws for which the legislator had voted].)

Relevant authority from other states is consistent with these federal precedents in finding that legislators have no particularized interest in the validity of legislation once

enacted. For example, in *Duckworth v. Deane* (Md. Ct. Appeals 2006) 903 A.2d 883, 886-88, eight members of Maryland's General Assembly sought to intervene in an action involving the constitutionality of a state statute providing that "'[o]nly a marriage between a man and a woman is valid in this State.'" The legislators claimed to have an interest in the validity of the law based on their support for the statute "'and the policy which it reflects.'" (*Id.* at p. 887.) Moreover, the legislators expressed "doubt" in the state Attorney General's defense of the measure, suggesting that their "'interest in their legislative authority'" would not be adequately represented in the litigation. (*Ibid.*) Rejecting their appeal for lack of standing, the court ruled that "[t]he interest of the eight legislators . . . in the litigation is no different from the interest of the general public. They would be no more affected by an adverse decision than any resident of Maryland." (*Id.* at p. 892; see also *Bennet v. Napolitano* (Ariz. 2003) 206 Ariz. 520, 526 [holding that individual legislators did not have standing to challenge the Governor's line-item vetoes of certain appropriations that the legislators had sponsored because "[o]nce enacted . . . legislative action on the bills was complete"].)

Applying these principles here, it is clear that Proponents' legislative interest in Proposition 8 does not constitute a particularized, personal interest in the initiative's substantive validity post-enactment. As described above, the constitutional initiative power grants Proponents, and all electors in general, the legislative authority to propose statutes and constitutional amendments, and to vote such proposals into law. Related statutory provisions create additional rights and duties for the official proponents of the initiative with respect to the preparation and presentation of the initiative to the

appropriate government officials. (See San Francisco Answer Br. at pp. 35-36 [describing the statutory provisions implementing the initiative power].) Once the initiative becomes law, however, Proponents' interest in the initiative merges with the general public's interest in all properly enacted laws. (See *Harrington*, *supra*, 528 F.2d at p. 459.) At that point, Proponents cannot claim any particularized, personal interest in the initiative's validity above and beyond that of all other citizens of the state. (Cf. *Chiles*, *supra*, 865 F.2d at pp. 1205-06 [observing that "[t]he Supreme Court has repeatedly made clear that an injury to the 'right possessed by every citizen, to require that the [g]overnment be administered according to law' is insufficient to support a claim of standing"] [quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* (1982) 454 U.S. 464, 483].) Thus, as Plaintiffs aptly describe, Proponents' interest "in the constitutionality of an already-enacted initiative are not materially different from those of any other California voter who supported the measure—and are therefore the antithesis of the 'particularized,' 'personal,' and 'individual' interest that the U.S. Supreme Court has held is necessary to confer Article III standing." (Plaintiffs' Answering Br. at pp. 21-22.)

Proponents' reliance on *Sonoma County Nuclear Free Zone '86 v. Superior Court* ("*Sonoma*") (1987) 189 Cal.App.3d 167 for the contrary position is misplaced. That case concerned the timeliness of ballot arguments. At issue, then, were the processes and procedures relating to a ballot measure's appearance on the ballot, not the substantive

validity of the measure. Initiative proponents have a particularized interest in the former, but not the latter.[3]

Similarly, Proponents gain nothing from their reliance on *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146. In that case, the court held that an organization known as Citizens for Orderly Residential Development ("CORD") was an "aggrieved party" pursuant to California Code of Civil Procedure section 902 and therefore could appeal an order concerning an initiative that it had sponsored and that had been enacted. (*Simac, supra,* 92 Cal.App.3d at 153.) Contrary to Proponents' description, CORD was not an official proponent of the initiative at issue, but rather "an unincorporated association of residents of and registered voters in Morgan Hill, whose purpose was to draft and organize voter support for initiative Measure E." (*Ibid.*; see also Elec. Code § 342 [defining "proponents" as "electors" or "persons"].) However, to the extent that case speaks to the issue of whether an advocacy group has a particularized interest in the continuing validity of the initiative post-enactment, *Simac* is in tension with the federal and sister state authority described above holding that even lawmakers possess only a generalized and abstract interest in the laws they support once those laws are enacted.[4]

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[3] *Costa v. Superior Court* (2006) 37 Cal.4th 986 is similarly inapposite. Like *Sonoma*, that case involved a challenge to the presentation of an initiative measure to the electorate, rather than to the substantive merits of the initiative itself. (*Costa, supra,* 37 Cal.4th at 994.) Specifically, this Court addressed whether discrepancies between the version of the initiative submitted to the Attorney General and the version of the initiative printed on the voter petition warranted withdrawal of the initiative from the ballot. (*Ibid.*)

[4] Proponents also cite two cases in which official proponents of an initiative measure were named as real parties in interest in cases presenting substantive challenges to initiatives. (See *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th

Moreover, Proponents' citation to this Court's description of the initiative power as a "fundamental right" in *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1007, does not aid Proponents' efforts to create a particularized interest in an initiative's validity. In context, what this Court said in *Costa* was that "the important state interest in protecting the fundamental right of the people *to propose statutory or constitutional changes* through the initiative process requires that a court exercise considerable caution before intervening to remove or withhold the measure from an imminent election." (*Ibid.* [emphasis added].) Moreover, as this Court explained, "[t]he legal challenge in [*Costa* did] not relate to the substantive validity of the initiative measure but rather involve[d] a procedural claim pertaining to the preelection petition-circulation process." (*Id.* at p. 1006.) The fundamental right to propose initiatives is indeed important and worthy of protection. That right, however, does not include or give rise to a particularized interest on the part of an initiative proponent in the initiative's *validity* post-enactment.

An initiative measure can be challenged years after its enactment—as was the case with Proposition 22, which this Court invalidated eight years after its adoption. It seems clear that at some point, an initiative proponent's interest in the validity of a measure is no greater or more particularized than the interests of countless other people who may

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1020; *Hotel Employees & Restaurant Employees Int'l Union v. Davis* (1999) 21 Cal.4th 585.) In neither opinion, however, did the court address the propriety of the real-party-in-interest designation, referencing the term only in passing. (*McPherson*, *supra*, 38 Cal.4th at p. 1023; *Hotel Employees*, *supra*, 21 Cal.4th at p. 590.) Thus, neither of those cases can support Proponents' position that they have a particularized interest in Proposition 8's validity post-enactment. (See *People v. Superior Court* (1991) 1 Cal.4th 56, 65-66 ["[A]n opinion is not authority for a proposition not therein considered."].)

have campaigned for the measure or who may be affected by the measure's terms. That point in time is when the measure is enacted into law. It simply cannot be said that, when the initiative power was enacted as part of the California Constitution, the voters created or had any intent to create a particularized interest in initiative proponents such as the one that Proponents assert here. Once an initiative has been enacted, the initiative's proponents are like the rest of Californians with respect to the validity of the measure. The law belongs to everyone.

This Court should not use the unusual circumstances of this case to announce a new particularized interest on the part of initiative proponents. This case presents an unusual situation because, as noted above, Proposition 8 eliminated a right for one group of people, without conferring a benefit on any other group. In the vast majority of instances, if state officials decline to appeal a judgment invalidating an initiative, there will be someone who, having been benefited by the initiative, will be adversely affected by its invalidation. The Court therefore should not be concerned that there will be any harm to the initiative power if the Court answers the Ninth Circuit's questions in the negative. Nor should the Court carve out any sort of exception for this lawsuit. Proposition 8 received a vigorous defense in the District Court and was found unconstitutional on multiple grounds. State officials have appropriately exercised their discretion as to whether to appeal the judgment, and no person or entity that was aggrieved by that judgment has emerged. This Court should hold that initiative proponents do not have a particularized interest in the validity of an initiative after its adoption.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully submit that the Court should hold (1) that initiative proponents do not have authority under California law to initiate an appeal in federal court to assert the State's interest in the validity of an initiative when state officials decide not to appeal from a judgment invalidating the initiative; and (2) that initiative proponents do not have a particularized interest in an initiative's validity after its enactment.

DATED: May 2, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief uses a proportionally spaced Times New Roman typeface, 13-point, and that the text of the brief contains 7009 words according to the word count provided by Microsoft Word, as required by California Rule of Court, Rule 8.204(c).

DATED: May 2, 2011

By _____ for
DAVID C. CODELL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Los Angeles, State of California. My business address is 1000 Wilshire Boulevard, Suite 600, Los Angeles, California 90017-2463.

On May 2, 2011, I served true copies of the following document(s) described as **AMICUS BURIAE BRIEF OF EQUALITY CALIFORNIA, NATIONAL CENTER FOR LESBIAN RIGHTS, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND PLAINTIFF-INTERVENER-RESPONDENT** on the interested parties in this action as follows:

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Executed on May 2, 2011, at Los Angeles, California.

Mirela Popescu

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In the Supreme Court of the State of California
No. S189476

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CERTIFICATE OF SERVICE

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U.S. Court of Appeals Docket Number(s): 10-16696

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