

GIBSON DUNN

Gibson, Dunn & Crutcher LLP

555 Mission Street  
San Francisco, CA 94105-2933  
Tel 415.393.8200  
www.gibsondunn.com

Enrique A. Monagas  
Direct: 415.393.8353  
Fax: 415.374.8403  
EMonagas@gibsondunn.com

Client: T 36330-00001

May 9, 2011

Ms. Molly C. Dwyer  
Clerk of the Court  
United States Court of Appeals  
for the Ninth Circuit  
James R. Browning U.S. Courthouse  
San Francisco, CA 94119-3939

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

Dear Ms. Dwyer:

Enclosed please find a courtesy copy of Plaintiffs-Respondents' Reply to *Amicus Curiae* Briefs, filed today in the Supreme Court of California, Case No. S189476.

Very truly yours,

/s/ *Enrique A. Monagas*  
Enrique A. Monagas

Enclosure

cc: All counsel via ECF

No. S189476

**IN THE SUPREME COURT OF CALIFORNIA**

---

KRISTIN M. PERRY et al., Plaintiffs and Respondents,

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, Intervenor and Respondent,

v.

EDMUND G. BROWN, JR., as Governor, etc. et al., Defendants,

DENNIS HOLLINGSWORTH et al., Defendants, Intervenors and Appellants.

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Question Certified from the U.S. Court of Appeals for the Ninth Circuit  
The Honorable Stephen R. Reinhardt, Michael Daly Hawkins,  
and N. Randy Smith, Circuit Judges, Presiding  
Ninth Circuit Case No. 10-16696

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**PLAINTIFFS-RESPONDENTS' REPLY TO  
*AMICUS CURIAE* BRIEFS**

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DAVID BOIES\*  
BOIES, SCHILLER & FLEXNER LLP  
333 Main Street  
Armonk, NY 10504  
(914) 749-8200

JEREMY M. GOLDMAN, SBN 218888  
THEODORE H. UNO, SBN 248603  
BOIES, SCHILLER & FLEXNER LLP  
1999 Harrison Street, Suite 900  
Oakland, CA 94612  
(510) 874-1000

\* *Pro hac vice*

THEODORE B. OLSON, SBN 38137  
*Counsel of Record*  
MATTHEW D. MCGILL\*  
AMIR C. TAYRANI, SBN 229609  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 955-8500

THEODORE J. BOUTROUS, JR., SBN 132099  
CHRISTOPHER D. DUSSEAULT, SBN 177557  
ENRIQUE A. MONAGAS, SBN 239087  
GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, CA 90071  
(213) 229-7000

*Attorneys for Plaintiffs and Respondents*  
*Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo*

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## REPLY TO *AMICUS CURIAE* BRIEFS

Nothing in the *amicus curiae* briefs filed in support of proponents alleviates the fundamental flaw in proponents' effort to defend Proposition 8 on appeal: The California Constitution grants the Attorney General the *exclusive* authority to ascertain and articulate the position of the State of California in the Judiciary and to represent the State's interest in judicial proceedings. From a jurisprudential standpoint, the interest of initiative proponents in the constitutionality of an already-enacted ballot initiative is indistinguishable from that of any other Californian who supported, and voted in favor of, the measure. Indeed, the *amicus curiae* briefs supporting proponents are most remarkable for what they do *not* say. None of them identifies a case in which initiative proponents have been permitted to represent the interest of *the State*—as opposed to their own interest—in the constitutionality of an initiative. Similarly, none of the briefs identifies any provision of California law that affords initiative proponents a particularized interest in the constitutionality of a ballot initiative that distinguishes the proponents from the millions of other Californians who supported the measure.

Proponents' *amici* instead fall back on the same undisguised and unpersuasive policy arguments—and the same inapposite case citations—as proponents themselves. They argue, for example, that failing to grant proponents the right to represent the interest of the State in the

constitutionality of Proposition 8 “would undermine the initiative process” and grant elected officials an “effective veto over initiatives.” Judicial Watch Br. at p. 2 (capitalization altered); Center for Constitutional Jurisprudence Br. at p. 12. But, despite the decision of the Attorney General and Governor that it was not in the interest of the State of California to defend Proposition 8, the measure was afforded a full-throated (albeit substantively anemic) defense by proponents themselves during a twelve-day bench trial. The Attorney General and Governor did not—and could not—exercise a unilateral veto over Proposition 8, but they have determined that the interest of California and its citizens is best served by accepting the thorough, well-grounded, and overwhelmingly persuasive decision of the trial court striking down Proposition 8 as an unconstitutional denial to Californians of due process and equal protection. They have nevertheless enforced and continue to enforce Proposition 8 statewide without regard to their own views on its wisdom or constitutionality. When the enforcement of this discriminatory constitutional amendment comes to an end, it will be because the federal courts have deemed it constitutionally infirm after a full and fair trial on the merits, not because the Attorney General or Governor “vetoed” it.

The fact that proponents lack the authority to continue their defense of Proposition 8 on appeal is a direct result of the decision of the People of California to afford the Attorney General the authority to represent the

State's interest in litigation (Cal. Const. art. V, § 13), as well as the decision of the Framers of the United States Constitution to impose certain limitations on the jurisdiction of federal courts. U.S. Const. art. III. While the initiative power is undeniably an important constitutional right, it does not displace the other provisions of the California Constitution—including those that prescribe the procedures for the representation of the State's interest in litigation. *See* Att'y Gen. Br. at p. 10 ("The Constitution, statutes, and decisions of this Court lead to the conclusion that proponents have no right to assert the state's interest in defending the validity of an adopted initiative measure . . ."). The initiative power enables citizens to initiate legislation and to bring such proposals to fruition, but it does not displace the vital fundamental authority of the State's constitutional officials. And, it certainly cannot in any way modify, diminish, or override the jurisdictional requirements of Article III.

Like proponents themselves, proponents' *amici* attempt to manufacture Article III standing by emphasizing decisions in which ballot initiative proponents have been permitted to intervene to defend the constitutionality of already-enacted initiatives (as proponents were permitted to do here). *See, e.g.*, Center for Constitutional Jurisprudence Br. at pp. 15-16. As discussed in plaintiffs' answering brief, however, none of those decisions permitted proponents to represent the interest of the State—as opposed to their *own* interest in the initiative's constitutionality.

Plaintiffs-Respondents' Answering Br. at p. 14; *see also W. Watersheds Project v. Kraayenbrink* (9th Cir. 2011) 632 F.3d 472, 482 (“An interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by the other parties.”).

Moreover, none of those decisions affords initiative proponents a privileged status under state law that distinguishes them from other supporters of a ballot initiative in a manner sufficient to create a “particularized” interest for Article III purposes. Like other persons who have an interest in the validity of a ballot initiative, proponents have been permitted to intervene in state court litigation when, in the exercise of its discretion, the court deems intervention appropriate. *See, e.g., Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1316 & fn.2 (trial court granted intervention by both proponents of a ballot initiative and other groups that supported the measure). Ballot initiative proponents are thus no different from other supporters of a ballot initiative in possessing the ability to intervene in initiative-related litigation where the trial court deems intervention to be appropriate.

Coincidentally, the California Senate recently *rejected* a bill that would have authorized ballot initiative proponents to intervene *as of right* in all *state court litigation* challenging the constitutionality of a ballot initiative. *See* Senate Bill 5 (proposing to add § 387.5 to the Civil Procedure Code, which would have provided that “[t]he proponent of a



state initiative statute or constitutional amendment that has been approved by the voters shall have the right to intervene and participate in any court action challenging the constitutionality of that initiative statute or constitutional amendment”), *available at* [http://leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0001-0050/sb\\_5\\_bill\\_20110412\\_amended\\_sen\\_v98.html](http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_5_bill_20110412_amended_sen_v98.html). Accordingly, even if a state legislature could modify state law to grant a litigant an interest that is sufficiently “particularized” to create Article III standing—which it plainly cannot (*see* Plaintiffs-Respondents’ Answering Br. at p. 19)—the California Legislature has squarely rejected any effort to afford procedural rights to initiative proponents that are different from those possessed by every other Californian who supported, donated money to, and voted for the measure. In contrast, the California Legislature has granted the Attorney General the “right to intervene and participate in *any* appeal taken” from a decision invalidating a state law. Code Civ. Proc., § 902.1 (emphasis added).\*

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\* The Center for Constitutional Jurisprudence also relies on cases in which initiative proponents appealed decisions regarding the validity of a ballot initiative, and asserts that these cases are instructive because “the relevant California standing rules parallel those applied by the federal courts under Article III.” Center for Constitutional Jurisprudence Br. at p. 17. In fact, California law is clear that, “[i]n assessing standing, California courts are *not* bound by the ‘case or controversy’ requirement of article III of the United States Constitution.” *Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1217 (emphasis added; internal quotation marks omitted). In any event, in none of the cited cases did the court address the initiative

[Footnote continued on next page]

\* \* \*

Proposition 8 was robustly defended in a twelve-day trial. After a full and fair trial on the merits, a federal court concluded that the measure is irrational, discriminatory, and unconstitutional. Under the California Constitution, the Governor and Attorney General—not private individuals—possess the authority to decide whether Californians should continue to suffer irreparable constitutional injury during a prolonged appeal. Proponents lack the authority under state law to displace and override the considered judgment of these elected officials that Proposition 8 does not warrant further defense.

#### CONCLUSION

The Court should answer the Certified Question in the negative.

DATED: May 9, 2011

GIBSON, DUNN & CRUTCHER LLP

By: Theodore B. Olson /s/  
THEODORE B. OLSON

Attorneys for Plaintiffs and Respondents  
KRISTIN M. PERRY, SANDRA B.  
STIER, PAUL T. KATAMI,  
AND JEFFREY J. ZARRILLO

---

[Footnote continued from previous page]

proponents' standing to appeal. *See* Plaintiffs-Respondents' Answering Br. at p. 19.

### CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that Plaintiffs-Respondents' Reply to *Amicus Curiae* Briefs contains 1,340 words, excluding tables and this certificate, according to the word count generated by the computer program to produce this brief.

By: Theodore B. Olson /   
THEODORE B. OLSON

Attorneys for Plaintiffs and Respondents  
KRISTIN M. PERRY, SANDRA B.  
STIER, PAUL T. KATAMI,  
AND JEFFREY J. ZARRILLO

### CERTIFICATE OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of San Francisco. My business address is 555 Mission Street, Suite 3000, San Francisco, California 94105. On May 9, 2011, I caused to be served the following documents:

#### **PLAINTIFFS-RESPONDENTS' REPLY TO *AMICUS CURIAE* BRIEFS**

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- BY EMAIL:** By agreement of the parties, a copy was emailed to the email addresses listed below.

#### **Counsel**

Charles J. Cooper  
David H. Thompson  
Howard C. Nielson, Jr.  
Peter A. Patterson  
Cooper & Kirk, PLLC  
1523 New Hampshire Avenue, N.W.  
Washington, DC 20036  
[ccooper@cooperkirk.com](mailto:ccooper@cooperkirk.com)  
[dthompson@cooperkirk.com](mailto:dthompson@cooperkirk.com)

Andrew P. Pugno  
Law Offices of Andrew P. Pugno  
101 Parkshore Drive, Suite 100  
Folsom, CA 95630  
[andrew@pugnow.com](mailto:andrew@pugnow.com)

#### **Attorneys For**

Attorneys for Defendants-  
Intervenors-Appellants

Attorneys for Defendants-  
Intervenors-Appellants

Brian W. Raum  
James A. Campbell  
Alliance Defense Fund  
15100 North 90th Street  
Scottsdale, AZ 85260  
[braum@telladf.org](mailto:braum@telladf.org)  
[jcampbell@telladf.org](mailto:jcampbell@telladf.org)

Attorneys for Defendants-  
Intervenors-Appellants

Terry L. Thompson  
Law Office of Terry L. Thompson  
P.O. Box 1346  
Alamo, CA 94507  
[tl\\_thompson@earthlink.net](mailto:tl_thompson@earthlink.net)

Attorneys for Defendant-Intervenor  
Hak-Shing William Tam

Dennis J. Herrera  
Therese Stewart  
Christine Van Aken  
San Francisco City Attorney's Office  
City Hall 234  
One Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4682  
[therese.stewart@sfgov.org](mailto:therese.stewart@sfgov.org)  
[christine.van.aken@sfgov.org](mailto:christine.van.aken@sfgov.org)

Attorneys for Plaintiff-Intervenor-  
Appellee City and County of San  
Francisco

Tamar Pachter  
Daniel Powell  
Deputy Attorney General  
California Department of Justice  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102  
[tamar.pachter@doj.ca.gov](mailto:tamar.pachter@doj.ca.gov)

Attorneys for Defendant Edmund G.  
Brown, Jr., in his official capacity as  
Attorney General of California

Kenneth C. Mennemeier, Jr  
Andrew W. Stroud  
Mennemeier, Glassman & Stroud LLP  
980 9th Street, Suite 1700  
Sacramento, CA 95814  
[kcm@mgsllaw.com](mailto:kcm@mgsllaw.com)  
[stroud@mgsllaw.com](mailto:stroud@mgsllaw.com)

Attorneys for Defendants Arnold  
Schwarzenegger, in his official  
capacity as Governor of California;  
Mark B. Horton, in his official  
capacity as Director of the California  
Department of Public Health & State  
Registrar of Vital Statistics; and  
Linette Scott, in her official capacity  
as Deputy Director of Health  
Information & Strategic Planning for  
the California Department of Public  
Health (the "Administration  
Defendants")

Claude Franklin Kolm  
Office of County Counsel  
1221 Oak Street, Suite 450  
Oakland, CA 94612-4296  
[claud.kolm@acgov.org](mailto:claud.kolm@acgov.org)

Attorneys for Defendant Patrick  
O'Connell, in his official capacity as  
Clerk-Recorder for the County of  
Alameda

Judy W. Whitehurst  
Principal Deputy County Counsel  
Los Angeles County Counsel  
648 Kenneth Hahn Hall of  
Administration  
500 West Temple Street, 6th Floor  
Los Angeles, CA 90012-2713  
[jwhitehurst@counsel.lacounty.gov](mailto:jwhitehurst@counsel.lacounty.gov)

Attorneys for Defendant Dean C.  
Logan, in his official capacity as  
Registrar-Recorder/County Clerk for  
the County of Los Angeles

Office of the Governor  
Attn: Legal Department  
State Capitol Building  
Sacramento, CA 95814  
(VIA U.S. MAIL ONLY)

Attorneys for the Governor  
Edmund G. Brown, Jr.

Office of the Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004  
(VIA U.S. MAIL ONLY)

Attorneys for the Attorney General  
Kamala D. Harris

Ms. Molly C. Dwyer  
Clerk of the Court  
United States Court of Appeals  
for the Ninth Circuit  
James Browning Courthouse  
95 7th Street  
San Francisco, CA 94103  
(VIA ECF ONLY)

United States Court of Appeals for  
the Ninth Circuit

Harold Johnson  
Damien M. Schiff  
Pacific Legal Foundation  
3900 Lennane Drive, Suite 200  
Sacramento, CA 95834  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
Pacific Legal Foundation, et al.

Cynthia Tobisman  
Greines Martin Stein & Richland, LLP  
5900 Wilshire Boulevard, 12th Floor  
Los Angeles, CA 90036  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae League  
of Women Voters of California

Eric A. Isaacson  
Coughlin Stoia et al. LLP  
655 W. Broadway, Suite 1900  
San Diego, CA 92101  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
California Faith for Equality, et al.

Miguel A. Marquez  
Office of the County Counsel  
70 W. Hedding Street  
San Jose, CA 95110  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
County of Santa Clara, et al.

James J. Lynch  
Attorney at Law  
P.O. Box 4144  
Sacramento, CA 95821-8802  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
Margie Reilly

Laura W. Brill  
Kendall Brill & Klieger, LLP  
10100 Santa Monica Boulevard, Suite  
1725  
Los Angeles, CA 90067  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
Jon Eisenberg and Laurie Levenson

David C. Codell  
Caldwell Leslie & Proctor, PC  
1000 Wilshire Boulevard, Suite 600  
Los Angeles, CA 90017  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
Equality California, National Center  
for Lesbian Rights and Lambda Legal  
Defense and Education Fund, Inc.

Jon W. Davidson  
Lambda Legal Defense & Education  
Fund, Inc.  
3325 Wilshire Boulevard, Suite 1300  
Los Angeles, CA 90010  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
Equality California, National Center  
for Lesbian Rights and Lambda Legal  
Defense and Education Fund, Inc.

Shannon P. Minter  
National Center for Lesbian Rights  
870 Market Street, Suite 370  
San Francisco, CA 94102  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
Equality California, National Center  
for Lesbian Rights and Lambda Legal  
Defense and Education Fund, Inc.

Julie B. Axelrod  
Judicial Watch, Inc.  
425 Third Street, SW, Suite 800  
Washington, DC 20024  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
Judicial Watch, Inc.


Kevin T. Snider  
Pacific Justice Institute  
212 Ninth Street, Suite 208  
Oakland, CA 94607  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae  
Joshua Beckley

John C. Eastman  
Center for Constitutional Jurisprudence  
c/o Chapman University School of Law  
One University Drive  
Orange, CA 92866  
(VIA U.S. MAIL ONLY)

Attorneys for Amicus Curiae Center  
for Constitutional Jurisprudence

I certify under penalty of perjury that the foregoing is true and correct,  
that the foregoing document(s) were printed on recycled paper, and that this  
Certificate of Service was executed by me on May 9, 2011, at San Francisco,  
California.



---

Ling Chiou



9th Circuit Case Number(s) 10-16696

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Please see attached service list.

Signature (use "s/" format)

/s/ Enrique A. Monagas

**SERVICE LIST**

Thomas Brejcha  
THOMAS MORE SOCIETY  
29 S. La Salle Street, Suite 440  
Chicago, IL 60603

Anthony R. Picarello, Jr.  
Michael F. Moses  
UNITED STATES CATHOLIC  
CONFERENCE  
3211 Fourth Street, N.E.  
Washington, DC 20017

Lincoln C. Oliphant  
COLUMBUS SCHOOL OF LAW  
The Catholic University of America  
3600 John McCormack Road, NE  
Washington, DC 20064

Arthur Bailey, Jr.  
HAUSFELD LLP  
44 Montgomery Street  
Suite 3400  
San Francisco, CA 94104

Anita L. Staver  
LIBERTY COUNSEL  
P.O. Box 540774  
Orlando, FL 32854

Mathew D. Staver  
LIBERTY COUNSEL  
1055 Maitland Center Commons  
2nd Floor  
Maitland, FL 32751

Hon. Vaughn Walker  
c/o PILLSBURY WINTHROP  
SHAW PITTMAN LLP  
50 Fremont Street  
San Francisco, CA 94105-2228

Hon. Vaughn Walker  
c/o BERKELEY LAW  
215 Boalt Hall  
Berkeley, CA 94720-7200

Thomas R. Burke  
Rochelle L. Wilcox  
DAVIS WRIGHT TREMAINE LLP  
505 Montgomery Street, Suite 800  
San Francisco, CA 94111