Case No. S189476

SUPREME COURT OF THE STATE OF CALIFORNIA

KRISTIN M. PERRY; SANDRA B. STIER; PAUL T. KATAMI; JEFFREY J. ZARRILLO,

Plaintiffs/Respondents,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervener/Respondent,

vs.

EDMUND G. BROWN JR *ET AL.*,

Defendants,

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Defendants-Interveners/Petitioners,

HAK-SHING WILLIAM TAM,

Defendant-Intervener.

CITY AND COUNTY OF SAN FRANCISCO'S ANSWER BRIEF

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

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☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: April 4, 2011

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INTRODUCTION

The California Constitution expressly delegates the responsibility to represent the State in legal proceedings to the Attorney General. Notwithstanding that delegation, the proponents of Proposition 8—who disclaimed any authority to speak for the State in federal district court proceedings—now seek the mantle of the State because they disagree with executive branch officers' decision not to appeal the district court's judgment that Proposition 8 violates the Federal Constitution. But there is no constitutional text or case law that supports their claim, and this Court should not write into the California Constitution a delegation of the State's authority when to do so would disrupt settled understandings of separation of powers and place the State's power in the hands of an unelected group of private individuals, whose names were never submitted to the voters and who are not subject to any checks on their authority.

Nor should the Court find that Proposition 8's proponents have suffered any meaningful injury to their legal interests. These proponents fully exercised their power to propose an initiative to the electors. In their capacity as proponents, the Constitution promises them nothing more. Any other injury they claim stems from their political or philosophical disappointment with the district court's decision, but this, standing alone, is not an injury that suffices to create standing to sue in either the federal or state courts.

STATEMENT OF THE CASE

On May 22, 2009, Plaintiffs filed suit in federal court challenging Article I, § 7.5 of the California Constitution ("Prop 8"), which was enacted by California voters in the November 4, 2008 election. (Proponents' Appendix at 1.) Plaintiffs argue Prop 8 violates the Federal Constitution's

Due Process and Equal Protection guarantees. The complaint names as defendants California's Governor, Director of Public Health, and Deputy Director of Health Information and Strategic Planning (collectively "the Governor"); California's Attorney General; and the Alameda County Clerk-Recorder and Los Angeles County Registrar-Recorder/County Clerk ("County Defendants").

Before the government defendants answered the complaint, five individual proponents of Prop 8 and the ProtectMarriage.com campaign committee (collectively "Proponents") moved to intervene, arguing that Proponents had a significant protectable interest because they had exercised constitutional and statutory rights to propose the challenged measure, devoted substantial time and resources to see it enacted, and defended it as interveners in a previous challenge. (City's Appendix [hereinafter City App.] at 2-10, 14-15.)[1] They argued that ProtectMarriage.com had a significant protectable interest because it led the campaign in support of Prop 8 and was the only campaign committee endorsed by Proponents. Finally, they argued that the government defendants would not adequately represent Proponents' interests. (*Id.* at 3-4, 11-12.)

Attorney General Edmund G. Brown Jr. answered Plaintiffs' complaint, admitting that Prop 8 violates the federal Constitution but stating he would enforce it as long as it is part of California law. (City

[1] Five proponents, along with ProtectMarriage.com, acted as defendant-interveners in the federal district court. ProtectMarriage.com – Yes on 8, a Project of California Renewal ("ProtectMarriage.com") is a primarily formed ballot measure committee under California law. (See Gov. Code §§ 82013, 82047.5.) In an odd twist, however, proponent Hak-Shing William Tam moved to withdraw as a defendant a few days before trial. The court ultimately denied this motion as moot, but Tam did not join in the appeal by the other proponents and ProtectMarriage.com. He is not a party before this Court.

App. at 22.) The Attorney General explained that he is required to uphold the Federal Constitution as well as the California Constitution, the Federal Constitution is the supreme law of the land, and taking away same-sex couples' right to marry cannot be squared with the Fourteenth Amendment Guarantees of Due Process and Equal Protection. (*Id.* at 24, 29-31.) But he also admitted "that he has enforcement responsibilities in relation to California law, which includes Prop 8," and that "since the passage of Proposition 8 it has not been lawful to issue a marriage license to same-sex couples in California." (*Id.* at 26, 28.)

The Governor, represented by outside counsel with the consent of the Attorney General (see Gov. Code §§ 11040 *et seq.*), answered Plaintiffs' complaint, stating that it "presents important constitutional questions that require and warrant judicial determination." (City App. at 34.) The Governor did not concede that Prop 8 is unconstitutional, and he admitted that unless struck down by a court, it is the law of the State. (*Id.* at 39.)

The County governments answered the complaint but took no position on the constitutional validity of Prop 8.

Proponents' motion to intervene was unopposed, and the district court granted it. The City and County of San Francisco later sought permissive intervention, which the district court also granted.

The court set an expedited schedule for discovery and trial. One month before trial, and long after the district court's intervention deadline, Imperial County and its Board of Supervisors and Deputy County Clerk moved to intervene as defendants for the purpose of ensuring Proponents' ability to pursue their arguments on appeal. The district court denied this motion, finding that the County did not meet the requirements for mandatory or permissive intervention.

In discovery proceedings, Proponents asserted that they did not represent the State or the electorate. They maintained that their internal campaign communications were irrelevant and privileged. They insisted they did not represent the electorate or the State and emphasized their status as a political advocacy organization in arguing their communications were privileged under the First Amendment. (City App. at 57-64, 72.) On interlocutory appeal, the Ninth Circuit held Proponents' internal communications regarding campaign strategy and messages were protected by a First Amendment privilege. (*Perry v. Schwarzenegger* (2009) 591 F.3d 1126.)

Proponents filed a motion to realign the Attorney General as a plaintiff, arguing he was partnering with Plaintiffs in the litigation. The Attorney General and Plaintiffs opposed this motion, and the district court denied it. As the court explained, "[t]he primary purpose of plaintiffs' complaint is to enjoin the enforcement of Proposition 8," whereas "[t]he Attorney General's primary interest in the lawsuit is to act as the chief law enforcement officer in California" and "the Attorney General continues to enforce Proposition 8." (City App. at 83-84.)

The district court conducted a twelve-day bench trial, giving the parties "a full opportunity to present evidence in support of their positions." (*Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 921, 932.) Proponents "vigorously defended the constitutionality of Proposition 8." (*Id.* at 931.) They argued that federal case law supported their position and no evidentiary showing was required. Still, they were permitted to offer whatever evidence they wished and designated six expert witnesses. After Plaintiffs took the experts' depositions, Proponents withdrew four of the experts. Proponents and their campaign consultants were deposed and

refused to answer most questions, claiming privilege. They declined to testify at trial and ultimately "eschew[ed] all but a rather limited factual presentation." (*Ibid.*) Plaintiffs and San Francisco presented testimony from eight lay witnesses and nine expert witnesses, including historians, psychologists, economists, and a political scientist. Proponents cross-examined each of them at length and presented two witnesses of their own. The court admitted over 700 exhibits and took judicial notice of over 200 exhibits.

On August 4, 2010, the district court issued a 138-page opinion that comprehensively addressed the evidence presented at trial and the arguments of counsel. (*Perry v. Schwarzenegger*, *supra*, 704 F.Supp.2d at p. 932.) The opinion set forth detailed findings of fact and conclusions of law holding that Proposition 8 denies lesbians and gay men the fundamental right to marry and disadvantages them for no rational reason, violating federal guarantees of due process and equal protection. All Proponents except Tam filed a notice of appeal. The Imperial County putative interveners also filed a timely notice of appeal from denial of their motion to intervene. The government defendants did not appeal.

Supporters of Proposition 8 who were displeased by the government's decision not to appeal brought a writ proceeding in state court seeking to force the State to appeal. The Attorney General and the Governor opposed the writ, explaining that they have discretion whether or not to pursue an appeal. The Court of Appeal denied the writ, and this Court denied a petition for review. (Request for Judicial Notice ["RJN"], Exhs. A, B.)

The Ninth Circuit expedited the briefing schedule and ordered appellants to brief why the appeal should not be dismissed for lack of

Article III standing. The court ultimately determined it required guidance from this Court before deciding Proponents' standing. It held, however, that neither Imperial County's Deputy County Clerk, its Board of Supervisors, nor the County itself had a significant protectable interest in the litigation and therefore were properly denied intervention. Much of the court's analysis turned on the fact that the *deputy* clerk, rather than the county clerk herself, sought to intervene. The court left open whether a county clerk would have standing. On February 25, 2011, the newly elected clerk of Imperial County filed a motion to intervene as a defendant-appellant. That motion is currently pending before the Ninth Circuit.

CERTIFIED QUESTION

The question as posed by the Ninth Circuit and certified by this Court is as follows:

> 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.[2]

ARGUMENT

The certified question presents two issues for this Court's consideration: First, do initiative proponents have the right make legal decisions for the State and override the decisions of executive branch officials? Second, what kind of injury, if any, do initiative proponents

[2] As noted *infra* in Section I.A.2., the City suggested that this Court should reformulate the certified question to, *inter alia*, remove the implication that government officials failed to discharge their duties here.

suffer when initiatives they have drafted and presented to the voters are later invalidated? We address each issue in turn.

I. THE CALIFORNIA CONSTITUTION CONFERS NO AUTHORITY ON INITIATIVE PROPONENTS TO SPEAK FOR THE STATE OF CALIFORNIA IN JUDICIAL PROCEEDINGS.

The California Constitution, not any particular initiative, is the ultimate embodiment of the people's sovereign will in this State. It establishes a system of checks and balances, expressly delegating the power of the people to designated officials. This transparent delegation of powers promotes accountability. Although the people have reserved to themselves the legislative powers of initiative and referendum, they have unequivocally assigned to the executive branch the power to represent the State in litigation.

Proponents ask the Court to redraft the Constitution and carve out a new delegation of executive power to initiative proponents to allow them to make the State's litigating decisions. They frame the issue as one of "constitutional necessity." (Opening Br. at 24.) But Proponents' argument strikes at the heart of California's separation-of-powers regime, reallocating executive powers to legislative actors without any textual justification to support this dramatic reordering. Moreover, Proponents are simply wrong to claim it "necessary" to imply executive powers to them where the Constitution expressly grants none. Initiatives rarely go undefended, either in federal or state court, belying Proponents' argument that this Court must invent powers for them in order to vindicate the people's initiative right. Indeed, Proposition 8 had its day in court, where Proponents had a full opportunity to litigate its constitutionality at trial. And the "necessity" Proponents claim is of their own making: If initiative drafters wish to alter

the constitutional delegation of enforcement powers, they always have the option of including a specific enforcement provision in the text of the their measure and presenting it to the voters. That Proponents chose not to do so is not reason to rewrite the Constitution now.

The harms that would follow from adopting Proponents' "necessity" argument are grave: private citizens, whose names appeared nowhere on the ballot and who are subject to no checks on their decisionmaking, would be vested with the executive power to make litigation decisions for the State that could have far-reaching effects on the State's manifold legal interests and expose the State to liability for millions of dollars in damages and attorneys' fees. This cannot be the law.

A. The California Constitution Expressly Delegates To The Executive Branch The Power That Proponents Seek To Appropriate.

The California Constitution divides the State's power among legislative, executive, and judicial branches and prohibits each branch from exercising the others' powers "except as permitted by this Constitution." (Const., art. III, § 3.) Proponents do not cite this or any constitutional provision concerning the executive branch of California's government. But it is beyond dispute that the power they seek—to make the State's legal decisions—is an executive power. There is no authority for the proposition that the Constitution vests private individuals who propose initiatives with this power.

1. The Governor Is The Supreme Executive Of California, And The Attorney General Is The Chief Law Officer For The State.

"The supreme executive power [of California] ... is vested in the Governor. The Governor shall see that the law is faithfully executed."

(Const., art. V, § 1.[3]) The Governor is sworn to uphold the Federal and California Constitutions (*id.*, art. XX, § 3), and the federal Constitution takes precedence over state law. (U.S. Const., art. VI, § 2.) Except where the law establishes an express mandatory duty, the Governor has discretion in exercising his executive authority. (*Ballard v. Anderson* (1971) 4 Cal.3d 873, 884-85 [mandamus unavailable to control an officer's discretion].) The Attorney General represents the Governor in litigation, except where the Attorney General consents to the Governor's retention of special counsel. (Gov. Code §§ 11040 *et seq.*)

In a further delegation of executive authority, the Constitution provides that "[s]ubject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State" and "[i]t shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." (Const., art. V, § 13.) Statutes flesh out this duty, providing that "[t]he Attorney General has charge, as attorney, of all legal matters in which the State is interested" (Gov. Code, § 12511), and "shall ... prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity." (*Id.* § 12512; see also *People v. Birch Securities Co.* (1948) 86 Cal.App.2d 703, 707 [Attorney General has power to "institute, conduct, and maintain all civil actions involving the rights and interests of the state"].)

Importantly, California law charges the Attorney General not only with representing the State and its officers and agencies but also with "the protection of the public interest" as her "paramount duty." (*D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal.3d 1, 14, 15 [hereinafter *D'Amico*]; see

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[3] All constitutional references are to the California Constitution unless otherwise noted.

also *Pierce v. Superior Court* (1934) 1 Cal.2d 759, 761-62.) The Attorney General is held to higher standards than private litigants, and must act impartially when wielding the power of the government. (*County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 57 [civil attorney acting on behalf of a public entity is entrusted with unique power of government and must therefore act in evenhanded manner].) The Attorney General, like the Governor, swears an oath to support and defend the federal and state constitutions. (Const., art. XX, § 3.)

2. Whether To Appeal An Adverse Legal Decision Is Within The Discretion Of Executive Branch Officials, Who Did Not Abuse Their Discretion Here.

Proponents do not argue that the Governor and Attorney General lack any power to make litigation decisions concerning initiative constitutional amendments generally. Instead, although Proponents do not explain with much precision, they apparently contend instead that the Governor and Attorney General possess the State's authority except when they fail in their "duty to defend" initiative amendments (Opening Br. at 23 [quotation omitted])—as if there were somehow a contingent grant of power in the Constitution, where authority shifts from the executive branch to initiative proponents when officials fail to exercise their power in the way proponents wish.

There is, of course, no such textual grant of power in the Constitution, as we address in Section I.B., *infra*. But Proponents' very argument is based on two false premises: that executive branch officials have failed in this case to perform a duty, and that the issue here is the "defense" of Proposition 8, rather than the narrower issue of whether to

notice an appeal from the district court's decision.[4] It is untrue that the government officials did not defend: the Governor answered Plaintiffs' complaint in a way that put Plaintiffs' constitutional claims at issue. The Governor and Attorney General enforced Proposition 8 while the case was pending. Neither opposed Proponents' motion to intervene or interfered with Proponents' defense of Proposition 8 in a full trial on the merits. By their actions, the state defendants ensured that Prop 8 in fact received a full and fair defense in the district court. Only after a trial in which Plaintiffs' and the City's evidence dwarfed the evidence proffered by Proponents, and only after the district court issued a thorough, well-reasoned decision addressing all of the evidence and constitutional issues, did the state defendants exercise their discretion not to appeal. Fairly stated, the issue for this Court is whether initiative proponents have a state constitutional right to interfere with that exercise of discretion.

Nor did the Governor or Attorney General fail to discharge any duty in connection with the appeal of the Prop 8 judgment. It would be absurd to find a mandatory duty for the Governor or the Attorney General to file a notice of appeal in all cases to which they or the State are a party. (See, *e.g., Jenkins v. Knight* (1956) 46 Cal.2d 220, 223-24 ["The critical question in determining if an act required by law is ministerial in character is whether it involves the exercise of judgment and discretion."]) Indeed, the Court of Appeal and this Court have already rejected a mandamus petition to compel the state officials to file a notice of appeal.

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[4] The City noted in its letter brief to this Court concerning certification that the Ninth Circuit's question erroneously implies that public officials have refused to discharge their duty to defend Proposition 8, and the City continues to believe the question should be reformulated to remove the implication.

Since the decision whether to appeal "involves the exercise of judgment," it is discretionary. Curiously, however, Proponents do not argue that the Governor or Attorney General have abused their discretion, and this Court should deem the argument waived. (*Utility Consumers' Action Network v. Pub. Utils. Comm'n of California* (2010) 187 Cal.App.4th 688, 697.) Regardless, the argument has no merit. This Court has acknowledged that it is an open question whether state agencies have any duty to defend laws that may be unconstitutional (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1183) and has suggested that the Attorney General may sue to invalidate initiative constitutional amendments. (*Schmitz v. Younger* (1978) 21 Cal.3d 90, 93.)

If it is uncertain whether executive branch officials have a duty to defend a law *at all*, it cannot be that the Governor and Attorney General abused their discretion in deciding, after an exhaustive trial, not to appeal the trial court's judgment that an initiative measure was unconstitutional. There are many reasons why officials might choose not to appeal, including conserving resources, avoiding liability for an opponent's attorneys' fees,[5] and forestalling a precedential decision adverse to the State's other interests. And they include the reason that then-Attorney General Edmund G. Brown Jr. offered to this Court: that the Attorney General has sworn an oath to uphold both the California Constitution and the Federal Constitution and believes the law at issue is unconstitutional. (RJN Exh. C.)

Indeed, in carrying out their "paramount duty" to the public interest and the California and Federal Constitutions (*D'Amico, supra*, 11 Cal.3d at

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[5] If Plaintiffs are ultimately successful here, it is the State of California and not Proponents who will likely be liable for their attorneys' fees. (See *infra*, Section I.C.5.)

p. 15), California's executive officials have not only regularly decided whether to appeal adverse decisions but have also exercised their discretion to decline to defend agencies or officials whose acts they concluded were *ultra vires*, to make concessions in litigation, and even at times to mount direct attacks on unconstitutional laws. (See, *e.g.*, *Ex Parte People ex rel. Attorney General* (1850) 1 Cal.85 [California's first Attorney General filed suit to *invalidate* a license fee imposed by state law on ground it was preempted by federal law]; *Connerly v. State Personnel Bd.*, *supra*, 37 Cal.4th at p. 1174 [state agencies represented by Attorney General, largely declined to defend state statutes challenged under Proposition 209]; *Schmitz v. Younger*, *supra*, 21 Cal.3d at p. 93 [holding Attorney General had ministerial duty to draft title and summary for initiative measure but "[t]his does not mean that the Attorney General may not challenge the validity of the proposed measure by timely and appropriate legal action"]; *D'Amico*, *supra*, 11 Cal.3d at p. 15 [Attorney General may make concessions about facts in litigation concerning validity of state statute]; Brief of the State of California as *Amicus Curiae*, *Reitman v. Mulkey* (1966) U.S. Sup. Ct. No. 483, at 2, 16 [RJN Exh. D] [Attorney General filed *amicus* brief arguing initiative amendment to California Constitution violated federal Equal Protection Clause];[6] *Cal. Democratic Party v. Lungren* (N.D. Cal. 1996) 919 F.Supp. 1397 [no appeal taken from judgment striking down initiative constitutional amendment prohibiting political parties from endorsing or opposing candidates for nonpartisan office]; *Fouke Co. v. Brown & Younger* (E.D. Cal. 1979) 463 F.Supp. 1142 [no appeal taken from order striking down California's endangered species statute].)

[6] Prior to the enactment of Proposition 14 challenged in *Reitman*, the Attorney General signed a ballot pamphlet argument stating it was unconstitutional and urging its defeat. (RJN Exh. E, at p. 3.)

The Attorney General's counterparts in the federal government and other states exercise the same discretion, exemplified by the United States Attorney General's recent decision not to defend section 3 of the Defense of Marriage Act, which defines "marriage" under federal law as "a legal union between one man and one woman" (1 U.S.C. § 7), against pending constitutional challenges on grounds that section 3 is unconstitutional and that discrimination against gay men and lesbians must be subjected to strict scrutiny. (See RJN Exh. F; see also *Dickerson v. United States* (2000) 530 U.S. 428, 442 n.7 [U.S. Dept. of Justice (DOJ) declined to defend constitutionality of federal statute that altered *Miranda* warning requirement]; Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Metro Broadcasting, Inc. v. FCC* (1990) U.S. Sup. Ct. No. 89-453 [U.S., through Acting Solicitor General John Roberts, filed *amicus* brief urging Supreme Court to invalidate affirmative action policy of Federal Communications Commission under Equal Protection Clause]; *Morrison v. Olson* (1988) 487 U.S. 654, 666-67 [U.S., through DOJ, filed *amicus curiae* brief arguing that federal statute concerning appointment of independent counsel was unconstitutional]; *Diamond v. Charles* (1986) 476 U.S. 54, 61 [Illinois did not appeal decision invalidating state statute regulating abortion]; *INS v. Chadha* (1983) 462 U.S. 919, 928-29 [U.S. Solicitor General argued one-house veto provision violated separation of powers]; Brief for the United States, *Bob Jones Univ. v. United States* (1982) U.S. Sup. Ct. Nos. 81-1 and 81-3 [DOJ, represented by Special Assistant Charles Cooper, argued on appeal from Internal Revenue Service ruling that IRS lacked power to deny tax-exempt status to university that prohibited interracial dating]; *Buckley v. Valeo* (1976) 424 U.S. 1, 134-36 [DOJ officials represented Federal Election Commission defending

constitutionality of statute but also argued appointment of FEC members by Congress was unconstitutional); *United States v. Lovett* (1946) 327 U.S. 303, 306 [Solicitor General argued federal statute was unconstitutional bill of attainder]; *Myers v. United States* (1926) 272 U.S. 52, 108 [DOJ argued statute requiring congressional approval of presidential removal of Postmaster was invalid]; *Providence Baptist Church v. Hillandale Committee, Ltd.* (6th Cir. 2005) 425 F.3d 309, 312 [city entered consent judgment admitting zoning ordinance was unconstitutional as applied]; *ACLU v. Mineta* (D.C. Cir. 2005) 2005 WL 263924 [DOJ dismissed appeal from district court decision declaring federal agency's advertising policy violated First Amendment, 319 F.Supp.69]; *Kendall-Jackson Winery, Ltd. v. Branson* (7th Cir. 2000) 212 F.3d 995 [Illinois did not appeal order invalidating state legislation]; *Simkins v. Moses H. Cone Mem. Hosp.* (4th Cir. 1963) 323 F.2d 959, 962 [DOJ intervened as plaintiff to challenge Surgeon General regulation allowing federal funding to hospitals that provided "separate but equal" facilities to nonwhites]; *Gavett v. Alexander* (D.D.C. 1979) 477 F.Supp. 1035, 1043-44 [DOJ informed district court it would not defend, and believed to be unconstitutional, Army regulation allowing sale of surplus rifles only to NRA members]; see also *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 55 [Arizona Governor did not seek review of decision invalidating English-only state constitutional amendment initiative].)

These extensive examples demonstrate that executive branch officials exercise discretion concerning whether or how to appeal or defend. Courts "may not control the discretion conferred upon another public official to determine whether to seek ... relief." (*People v. Karriker* (2007) 149 Cal.App.4th 763, 787.) If decisions concerning whether and how to

defend a law are committed to the sound discretion of the Governor and Attorney General, then it cannot be that by exercising that discretion they have somehow forfeited their powers to act, respectively, as the "supreme executive" or "chief law officer" of the State and to bind the State with their decisions. (Const., art. V, §§ 1, 13.)

B. The Initiative Power Is A Quintessential Legislative Power That Expressly Confers No Executive Authority On Interest Groups Or Individuals Who Propose Initiatives.

Proponents ignore the constitutional provisions concerning executive branch powers, focusing exclusively on the initiative power and arguing that the importance of vindicating the people's will concerning Proposition 8 compels this Court to supplant the power of executive branch officials. But the initiative provisions of the Constitution offer no support to Proponents' argument because they describe a power that is intrinsically legislative, not executive. To decide in favor of Proponents, the Court would first have to find an implied delegation of executive power to initiative proponents, and then find that this implied delegation trumps the express grants of executive power to the Governor and Attorney General. Such a decision would ignore the Constitution's text and defy logic and precedent.

The initiative power is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Const., art. II, § 8(a).) This provision reserves two discrete powers to the electors: (1) the power to propose constitutional amendments and (2) the power to vote for them.

Constitutional text and case law make clear that electors who propose initiative statutes and amendments exercise a legislative power.

Section 1 of Article IV states: "The *legislative* power of this State is vested in the California Legislature ..., but the people reserve to themselves the powers of initiative and referendum" [emphasis added]. Case law confirms that an elector who proposes an initiative constitutional amendment acts in a legislative capacity. In *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, construing an initiative that amended the Constitution and enacted a statute, this Court unanimously described the initiative as "the power to legislate." (*Id.* at 1038; see also *id.* at 1042 [initiative is "electorate's legislative power"]; *id.* at 1045 ["the electorate acting through its initiative power" is "a constitutionally empowered legislative entity"]; *AFL-CIO v. Eu* (1984) 36 Cal.3d 687, 715 [initiative functions as a "reserved legislative power"]; *Fair Political Practices Comm'n v. Superior Court* (1979) 25 Cal.3d 33, 42 ["The people hav[e] reserved the legislative power to themselves as well as ... granted it to the Legislature"]; *cf. Nougues v. Douglass* (1857) 7 Cal. 65, 70 ["The legislative power is the creative element in the government, and was exercised partly by the people in the formation of the Constitution."].)

California's constitutional history also demonstrates that the initiative power is legislative. The Legislature has possessed the power to propose constitutional amendments to the people since 1849 and continues to possess the power today. (Const. of 1849, art. X, § 1; Const., art. XVIII, § 1.) The electors gained this power to propose with the enactment in 1911 of Senate Constitutional Amendment 22, and this amendment stated that it "relat[ed] to legislative powers." (Senate Constitutional Amendment 22, 1911 General Election.)

Legislative powers do not include the power to override litigating decisions of the executive branch. Indeed, in challenges to legislatively

proposed constitutional amendments, the Legislature is sometimes permitted to act as a party in pre-enactment challenges to initiatives or post-enactment challenges that relate to the initiative *process* (such as whether an initiative relates to a single subject) rather than to its substance. (See, *e.g.*, *Californians For An Open Primary v. McPherson* (2006) 38 Cal.4th 735 [Legislature, which had placed successful initiative amendment on ballot, was real party in interest defending initiative against challenge based on separate-vote requirement].) Where legislators have sued to invalidate an initiative measure, this Court has held that their standing turns on whether a measure has "a significant and direct effect upon the role and operation of the legislative branch." (*Senate v. Jones* (1999) 21 Cal.4th 1142, 1156 fn. 9.[7]) No case of which the City is aware recognizes a general authority by the Legislature to assume the role of the Attorney General where a statute the Legislature has enacted is under attack and the Attorney General is alleged not to be adequately defending it. It would be strange, in the absence of any constitutional text, to recognize such a role for electors who propose initiative constitutional amendments, when elected officials who present amendments to the voters have no such power.

C. Finding An Implied Delegation of Executive Authority To Initiative Proponents Would Disrupt The Separation Of Powers And Have Far-Reaching Negative Consequences.

Nowhere does the Constitution expressly assign the litigating power of the State to initiative proponents. This section discusses why the Court should not imply such a power.

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[7] The measure challenged in *Senate v. Jones* involved reapportionment of legislative districts and legislator pay, and *Senate v. Jones* cited *Legislature v. Eu* (1991) 54 Cal.3d 492, which involved legislative term limits. (*Senate v. Jones*, *supra*, 21 Cal.4th, at p. 1156 fn. 9.)

1. Giving Proponents The Ability To Override The Attorney General's Litigation Decisions Would Invade The Attorney General's Core Function.

Article III of the Constitution divides the State's governmental power into the legislative, executive and judicial branches and forbids "[p]ersons charged with the exercise of one power" from "exercis[ing] either of the others except as permitted by this Constitution." (Const., art III, § 3.) Although the Court has not interpreted this provision rigidly, it nonetheless "limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." (*Marine Forests Society v. Cal. Coastal Comm'n* (2005) 36 Cal.4th 1, 24-25 [quotation omitted].) An intrusion on core functions is one that, "viewed from a realistic and practical perspective, operate[s] to defeat or materially impair the executive branch's exercise of its constitutional functions," such as by "improperly intrud[ing] upon a core zone of executive authority." (*Id.* at p. 45.)

Making litigating decisions for the State—including and especially deciding whether to file a notice of appeal—is a core zone of the Attorney General's authority; indeed, acting as the chief law officer of the State is "a matter that the California Constitution assigns" to the Attorney General. (*Marine Forests Society, supra*, 36 Cal.4th at p. 46.)[8] The swath of authority that Proponents would arrogate to themselves is potentially broad: they claim authority to step in and make legal decisions for the State in any instance when the Attorney General does not fulfill what they deem to be her "duty to defend" a popular initiative "with sufficient vigor" based on "underlying opposition" to the measure. (Opening Br. at 23 [quotation

[8] Although other actors may sometimes represent the State, these delegations are express, narrow, and typically subject to the Attorney General's supervision. (See Section I.C.3, *infra*.)

omitted].) In operation, proponents' incursion on the Attorney General's powers could be broader still. Who would decide when the Attorney General was not defending an initiative vigorously enough? Would courts have to determine when and how the litigating authority of the State is transferred from the Attorney General to initiative proponents? Why would Proponents' authority be limited to overriding the Attorney General's decision whether to appeal? What if they objected to settlement or to litigation concessions?

Since Proponents' argument hangs not on constitutional text but on "necessity" (*id.* at 17), it would be left to courts to determine whether the Attorney General makes binding legal decisions for the State in particular instances—further diluting the Attorney General's power in her core function by distributing it to the judiciary as well as to initiative proponents. Nor is there any reason why the invasion of executive branch authority could logically be limited to litigation. What if Proponents believed an official's decision to permit a male-to-female transsexual to marry a man violated Proposition 8? If Proponents can override decisions of the Attorney General, why not the decisions of other executive branch officials as well?

If an initiative sought expressly to amend the Constitution in this manner—such as by providing that "the Attorney General must seek review by official proponents of her litigation decisions concerning laws enacted by initiative" or "executive branch officials may make no discretionary decision inconsistent with the purposes of a law enacted by initiative"—it would risk being invalidated as a revision to the Constitution. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 442 [qualitative revision makes "a substantial change in the governmental plan or structure established by the

Constitution"].) This Court should avoid construing the initiative power in a way that raises such constitutional questions. (*Cf. People v. Engram* (2010) 50 Cal.4th 1131, 1161 ["a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question"].)

2. Inferring From The Initiative Power An Intent To Delegate Executive Authority To Proponents Would Impliedly Repeal The Constitution's Express Grant Of Authority To The Attorney General.

A fundamental principle of constitutional interpretation is that implied repeal is disfavored. As this Court has held,

> In choosing between alternative interpretations of constitutional provisions we are ... constrained by our duty to harmonize various constitutional provisions in order to avoid the implied repeal of one provision by another. Implied repeals are disfavored. So strong is the presumption against implied repeals that we will conclude one constitutional provision impliedly repeals another *only when the more recently enacted of two provisions constitutes a revision of the entire subject addressed by the provisions.* ... [A]s between an interpretation that results in a conflict between the two provisions, requiring us to choose one over the other, and an interpretation that harmonizes them, we are bound to harmonize the two constitutional provisions.

(*City & County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563 [internal citations and quotation omitted; emphasis added].)

Proponents would have this Court find that their decision to appeal on behalf of the State trumps the decision of the State's "chief law officer" not to appeal. Since Article V, section 13 contains no exception to the Attorney General's legal authority, such a rule would require the Court to find that 1911's Senate Amendment 22, granting the electors the power to propose and adopt initiatives, impliedly partially repealed the Constitution's grant of legal authority to the Attorney General, even though Senate Amendment 22 said nothing about litigation powers, much less revised the

entire subject addressed by the provisions. The Court should not imply a conflict between these constitutional texts where none exists.[9]

3. The Only Recognized Delegations Of The State's Litigating Power Are Express, Not Implied.

There are occasions where the Legislature has granted limited power to act in the name of the State or its people in regard to legal matters to others besides the Attorney General. These include, for example, criminal cases, where district attorneys prosecute cases but do so under the supervision of the Attorney General (Gov. Code § 12550); and Unfair Competition Law cases, where district attorneys and some county counsels and city attorneys may bring actions in the name of the people (Bus. & Prof. Code § 17204). In the case of *quo warranto* proceedings, private individuals may bring actions in the name of the people, but only with the express consent of the Attorney General. (See, *e.g.*, *People ex rel. Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 920 fn. 3.)

Initiative proponents have also expressly created legal authority to enforce or defend particular initiative constitutional amendments, and Proponents presumably could have proposed such a provision to the voters here. California's official-English amendment provides that "[a]ny person who is a resident of ... California shall have standing to sue the State of California to enforce this section." (Const., Art. III, § 6 [enacted in 1986 by Proposition 63].) Proposition 11, which created the Citizens Redistricting Commission, reassigned the Attorney General's power to defend redistricting plans to the commission. (Const., Art. XXI, § 3 ["The

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[9] Nor is there any conflict between the text of Proposition 8 and Article V, section 13. Proposition 8 states only that "[o]nly marriage between a man and a woman is valid or recognized in California." (Const., art. I, § 7.5.) It says nothing about who exercises the State's litigating power.

commission has the sole legal standing to defend any action regarding a certified final 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."].) Article V, section 10 of the Constitution provides that "[s]tanding to raise questions of [the Governor's] vacancy or temporary disability is vested exclusively in a body provided by statute."[10]

All of these express delegations indicate that when drafters of statutes or amendments wish to reassign litigating authority away from the Attorney General, they understand how to do so. But in no instance of which the City is aware has a court found that a government official, much less a private individual, has the power to litigate on behalf of the State without express constitutional or statutory authorization or the consent of the Attorney General. To the contrary, at least one court has held that where a delegation of power to the Attorney General is express, courts may not reassign that power. (*People v. Municipal Court etc.* (1972) 27 Cal.App.3d 193, 208 [where constitution assigned Attorney General right to

[10] Currently pending Senate Bill 5 states, "This bill would require the Attorney General to defend against constitutional challenge, at the trial court level or as a respondent or appellant at the court of appeal or the Supreme Court, a constitutional amendment or an initiative statute that has been approved by the voters, unless an appellate court has made a determination that the amendment or statute is unconstitutional or otherwise in conflict with, or in violation of, federal law or regulation. The bill would authorize the proponents of the constitutional amendment or initiative statute, if any, to defend the amendment or statute in the place of the Attorney General, if he or she is disqualified. The bill would authorize the Attorney General to appoint special counsel if the proponents do not defend the amendment or statute when the Attorney General is disqualified." (RJN Exh. G.) If Proponents were authorized to act for the State, Senate Bill 5 would be superfluous. (*Cf. People v. Sparks* (2002) 28 Cal. 4th 71, 88 [considering unpassed bill as legislative history].)

supervise district attorney, court had no power to supervise district attorney by appointing a special prosecutor].)

4. There Is No "Constitutional Necessity" For This Court To Adopt Proponents' Textless Constitutional Argument.

Proponents' chief argument in favor of their claim to exercise the power of the State is consequential: Because the people are sovereign (Const., art II, § 1), and because the people reserve to themselves the power of initiative (*id.* art. IV, § 1), then the Constitution *must* impliedly delegate to initiative proponents the executive power to defend the State's laws. (Opening Br. at 17-24.) Otherwise, they warn, initiatives will be nullified through elected officials' *de facto* veto. (*Id.* at 22-23.) Proponents characterize their argument as one of "constitutional necessity." (*Id.* at 24.) Their argument is wrong.

First, although they claim it is "necessary" to grant power to initiative proponents, these Proponents do not cite a single case where a California initiative amendment has gone undefended in federal or state court for want of a delegation to proponents. This alone should defeat their claim of exigency.[11]

Second, constitutional necessity, standing alone, cannot overcome the lack of textual authority for Proponents' position. In *Nougues v. Douglass* (1857) 7 Cal. 65, the Court held unconstitutional a law permitting issuance of bonds to fund the construction of the State Capitol. (*Id.* at 68.) In rejecting an argument "based upon the supposed injurious consequences that it is alleged must flow" from the Court's interpretation of the

[11] Proponents characterize this case as undefended but as discussed above the state officials permitted it to be defended vigorously throughout the district court proceedings.

Constitution, the Court held that it had no power to disregard express language of the Constitution. (*Id.* at 67.) Here, the only express delegation of litigating power in the Constitution is to the Attorney General, and the Court may not reassign that power.

Third, initiative proponents themselves are capable of safeguarding their measures by delegating defense or enforcement powers to people whom they believe will use them properly, as discussed *supra* in Section I.C.3. The voters can then adopt or reject this delegation. Indeed, Proponents themselves had notice that they would likely disagree with the litigating decisions of the Attorney General, and that California law did not guarantee initiative proponents the right to step into the State's shoes: the General Counsel of ProtectMarriage.com was also counsel to the Proposition 22 Legal Defense Fund (the "Fund"), which was denied the right to intervene in a case challenging Prop 22. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1035.) The Fund later petitioned this Court to grant review to determine "whether initiative proponents, or an organization they establish to represent their interests, have standing to defend attacks on the validity or scope of the initiative" (RJN Exh. H, at p. 13), and this Court ultimately held that the Fund lacked standing to seek declaratory relief concerning the validity of Prop 22. (*In re Marriage Cases* (2008) 43 Cal. 4th 757, 790-91.)

Although these Proponents were on notice that the Attorney General would not defend Proposition 8 as they preferred and that it was unlikely they would have standing to defend a substantive challenge to the measure, they apparently elected not to include a provision in Proposition 8 granting standing to anyone besides the Attorney General to defend it, and the voters

never had the opportunity to approve any such provision. Proponents cannot now complain of their drafting choice.

Fourth, it is untrue that, if Proponents do not prevail here then the voters will have no recourse if elected officials do not defend initiatives. Statewide elected officials are subject to the people's will because—unlike initiative proponents—they stand for election. Indeed, Edmund G. Brown Jr., as Attorney General, admitted in his answer to Plaintiffs' federal complaint that Proposition 8 is unconstitutional and informed this Court, by letter of September 8, 2010, that he would not take an appeal from the district court's decision because Proposition 8 is unconstitutional. (City App. 22, RJN Exh. C, at 5.) The voters shortly thereafter elected him to the office of Governor, and elected Proposition 8 opponent Kamala Harris to the office of Attorney General.

Beyond their accountability in regular elections, elected officials are subject to recall if they defy voters' mandates. (Const., art. II, §§ 13-17.) Indeed, the initiative permitting recall of statewide elected officials was enacted in 1911 (Senate Amendment 23), the same year the electors were given the power to propose initiatives (1911 Senate Amendment 22), suggesting that the drafters of the initiative power envisioned recall as the proper check on elected officials' accountability to the people in enforcing initiatives.[12]

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[12] If elected officials decline to enforce an initiative on constitutional grounds, its proponents can obtain a judicial decision concerning the validity of the measure by filing a mandamus action asserting a public right to performance of a public duty. (See *Green v. Obledo* (1981) 29 Cal.3d 126, 144.) Whether the initiative violated the Federal Constitution could be tested by the state court, and absence of Article III standing by initiative proponents to defend an initiative in federal court will not prevent them from having their day in court.

In short, the implications of a ruling that Proponents may not stand in the shoes of the State for purposes of filing a notice of appeal are minimal. As discussed below, however, the consequences of a contrary ruling would be severe.

5. The Court Should Not Delegate Public Power To A Secretive Single-Interest Group Of Proponents.

The Attorney General stands for election (Const., art. V, § 11); is subject to age, citizenship, and residency requirements (Gov. Code §§ 1020, 241); must have been admitted to practice law in California for at least five years (*id.* § 12503); is required to devote her entire time to service of the State (*id.* § 12504); is subject to strict conflict of interest laws (Const., art. V, § 14) and campaign finance laws (Gov. Code §§ 81000 *et seq.*); heads a department of the State (Gov. Code §); and reports to the Governor. (Gov. Code § 12522; Const., art. V, § 4). And the Attorney General is obliged to uphold all of the laws that govern the State and its citizens, including the federal constitution and laws. (Const., art. XX, § 3.) These requirements ensure the Attorney General will represent the State in a manner that takes into account all of its laws and policies, that is accountable to our citizens rather than monied interests or special interest groups, and that pays appropriate allegiance to constitutional principles.

But no one elected these Proponents; their names appeared on no ballot.[13] They owe no loyalty and are unaccountable to California's citizens. They are not attorneys, nor are they subject to conflict-of-interest or campaign finance laws. Nothing prevents these single-issue advocates and their counsel from answering to and being compensated by out-of-state

[13] Indeed, the official ballot pamphlet did not even include their names. (City App. 65-79.)

interest groups, whose agenda may derogate from the federal and state constitutions and conflict with the broader interests of California and its citizens. They owe no fealty to the federal constitution or laws and need not concern themselves with provisions of the state constitution or laws other than the measure they put on the ballot. They have no interest in harmonizing their measure with other state laws and are indifferent to the effects and implications an overreaching interpretation of their measure may have on the state's laws, policies and overall governance.[14]

Whereas the Attorney General must consider the cost of litigation, including damages and attorneys' fee liability, these Proponents have argued that they are not liable for any attorneys' fees the State will incur by taking an unsuccessful appeal. (City App. 101 [citing *Democratic Party of Washington State v. Reed* (9th Cir. 2004) 388 F.3d 1281, 1288 [holding that attorneys' fees in federal civil rights action may be assessed against a defendant-intervener only where intervener's action was frivolous, unreasonable, or without foundation]].)

Moreover, the Attorney General is subject to the Public Records Act, requiring her to conduct her business on behalf of the State in public. (Gov. Code § 12514.) Nor can she accept funding or allow herself to be

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[14] This is no minor matter. In the federal courts, for example, Proponents argued that if Proposition 8 could not be reconciled with California's recognition of the 18,000 marriages of same-sex couples that took place after *In re Marriage Cases* was decided but before Prop 8 took effect, or with "any other feature of California law" (such as, presumably, California's equal treatment of same-sex couples with respect to adoption and parentage rights), then it would be proper for a federal court to "sustain[] Proposition 8 by giving it retrospective effect or invalidating the conflicting feature of California law." (City App. at 108.) In the name of upholding Prop 8, then, Proponents invited the federal district court to annul 18,000 solemnized marriages and perhaps to undo California's recognition of the inherent equality of same-sex couples as parents and families as well.

influenced by private parties in carrying out her duties. (*People v. Eubanks* (1996) 14 Cal.4th 580, 596 [affirming dismissal of case where district attorney obtained reimbursement from crime victim for costs incurred to prosecute case because "the public and individual defendants are entitled to rest assured that the public prosecutor's discretionary choices will be unaffected by private interests, and will be 'born of objective and impartial consideration of each individual case'"].) The position she takes in litigation binds the State. By contrast, Proponents argued strenuously in the federal courts that they were entitled to keep their lawmaking efforts "private" and insisted that they did *not* represent the State: "Plaintiffs surely are not serious in suggesting that Proponents' communications, whether public or private, could somehow constitute an admission that is binding on the electorate and the State of California." (City App. at 72.) They also argued that, because "*anonymity* is vital to the freedoms of speech and association," Plaintiffs could not even learn the *identities* of the executive committee of ProtectMarriage.com. (*Id.* at 59-62.) Proponents were and continue to be funded by private entities and persons. Proponents and the executive committee they organized claimed to be and continue to act as private individuals exercising their own political rights—not public actors subject to transparency and accountability requirements. To hand public power to Proponents now would be repellant to California's strong public policy that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state" (Gov. Code § 6250) and that those who carry out the public's business are accountable to the public at large and not to groups or persons with special interests.

Moreover, to adopt Proponents' view would raise significant practical issues. Here, all five proponents of Proposition 8 moved the federal district court to intervene. But after proponent William Hak-Shing Tam was subject to discovery in the federal litigation, he unsuccessfully sought to withdraw as an intervener. Only the remaining four proponents noticed an appeal of the district court's judgment, and only these four are now petitioners before this Court. What if three official proponents did not appeal—does each of the proponents hold the State's litigating authority, or must there be a majority vote? What if they disagree on strategy? Are they delegated the authority to represent the State for their lifetimes, or only for a period of time after the election? Since Proponents' argument rests only on "necessity," not constitutional text, there is no constitutional provision or statute that courts can consult to resolve these questions.

Moreover, without text, there is no principled way to draw a line between delegating Proponents the authority to *appeal* on behalf of the State and delegating Proponents other decisions. Is the consent of proponents required before the Attorney General settles litigation concerning an initiative? Before the Attorney General stipulates to facts on a summary judgment motion? Before the Attorney General declines to take enforcement action against someone who violates an initiative measure? These are not academic issues; they are the kind of claims that initiative proponents or their proxies have raised in the past. (*Providence Baptist Church v. Hillandale Committee, supra*, 425 F.3d at p. 312 [settlement]; *D'Amico, supra*, 11 Cal.3d at 14-15 [challenging "concessions" made by Attorney General]; *Am. Civil Rights Found. v. Berkeley Unif. Sch. Dist.* (2009) 172 Cal.App.4th 207 [challenging a school assignment plan as in violation of Proposition 209].) In short, if this Court recognizes that

initiative proponents may exercise the power of the State here, courts throughout California will struggle to define the scope and extent of the right, without textual grounding and in the most political and controversial cases of the day.

D. The Federal Cases And Intervention Cases That Proponents Cite Provide No Support For Their Argument That Proponents' Litigating Decisions Can Bind The State.

Beyond their argument that the Constitution must be rewritten to avoid a particular result here, Proponents contend that cases permitting initiative proponents to *intervene* in California cases to defend initiative measures are "probative" of who asserts the State's litigating authority. (Opening Br. at 24.) For this proposition, they rely on *Karcher v. May* (1987) 484 U.S. 72, a Supreme Court case finding that the heads of the New Jersey Legislature had authority under state law to represent New Jersey's interest in the validity of a state statute, based on prior state cases allowing these legislators to intervene to defend other state statutes.

Proponents' reliance on *Karcher* is puzzling. A decision of the United States Supreme Court about state law is not binding on state courts; instead, it is a state's supreme court that issues the authoritative construction of state law. (*Romer v. Evans* (1996) 517 U.S. 620, 626..) Much less is the U.S. Supreme Court's interpretation of New Jersey law binding as to California law. In any event, the intervention cases Proponents cite offer them little help. None of these cases considers whether an official proponent exercises the power of the State, and a case is not authority for a proposition it does not consider and decide. (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1268.) Code of Civil Procedure § 387(a) states that "any person, who has *an interest* in the matter in litigation, or in

the success of either of the parties, or an interest against both, may intervene in the action or proceeding" [emphasis added]. These cases may show that a trial court found the putative intervener to have an interest in the matter, but not that the intervener possesses the *State's* interest.

II. OFFICIAL PROPONENTS SUFFER ONLY A POLITICAL AND PHILOSOPHICAL INJURY WHEN INITIATIVES THEY HAVE PROPOSED ARE INVALIDATED ON FEDERAL CONSTITUTIONAL GROUNDS.

The Ninth Circuit has also asked this Court to articulate what interest in Prop 8 that Proponents possess as individuals. Although standing is ultimately a question for the federal court, this Court authoritatively construes any state-created rights and interests that Proponents possess. The California Constitution and statutes make clear that Proponents have only the right to propose initiative amendments. After an amendment is proposed and adopted, it belongs to all the electors, and initiative proponents have no more than a political or philosophical interest in the validity of the measure. While proponents may find their earnestly held beliefs offended when the measure is struck down, generally they suffer no concrete injury that would support standing.

A. It Is A Federal Question Whether Any Interest State Law Creates In Initiative Proponents Satisfies Article III.

Article III of the United States Constitution requires a party seeking relief from the federal courts (whether in the trial courts or on appeal) to show a concrete, particularized, and actual or imminent injury. (*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560; *Western Watersheds Project v. Kraayenbrink* (9th Cir. 2010) 620 F.3d 1187, 1196.) Whether Proponents have Article III standing to maintain an appeal in federal court based on their own personal interests in the validity of Prop 8 is a federal

question that only the federal courts can definitively answer. (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 804.)

Federal courts have acknowledged that when states confer rights, the denial of those rights may sometimes create an injury that is concrete and particularized enough that it creates standing. (See, *e.g.*, *Sierra Club v. Morton* (1972) 405 U.S. 727, 735.) Whether a state-created statutory right is sufficient for federal standing, however, depends on the nature of the right and the injury suffered. For that reason, the City suggested in its letter brief of January 24, 2011 that the Court reformulate the certified question and describe the nature of any state-created interest that Proponents possess and any injury that they will suffer if they are deprived of that interest.

In *Adar v. Smith* (5th Cir. 2010) 597 F.3d 697, an unmarried same-sex couple from New York sought to compel the State of Louisiana to issue a birth certificate to their adopted son, who was born in Louisiana. (*Id.* at 701.) The State Registrar refused to issue the certificate because Louisiana laws prohibited in-state adoption of children by unmarried couples. (*Ibid.*) The couple invoked a Louisiana statute recognizing a private right of action to obtain an accurate birth certificate, while the Registrar claimed that denial of this statutory right did not give plaintiffs Article III standing. (*Id.* at 705-06.) The Court disagreed, holding that while a statutory right "cannot grant standing to parties whose claims do not rise to the constitutional threshold," the injuries flowing from denial of the couple's statutory right—that they could not travel out of state or obtain health insurance for their son without his birth certificate—were sufficient to give them standing. (*Ibid.*)

By contrast, when California's unfair competition law (Bus. & Prof. Code §§ 17200 *et seq.*) allowed private attorney general actions to be

brought by persons who had not suffered direct injury, federal courts consistently held that private attorneys general did not have federal standing because they could not show a personal, concrete Article III injury, notwithstanding that they had a state-created interest in fair business practices. (See, *e.g.*, *As You Sow v. Sherwin-Williams Co.* (N.D. Cal. Dec. 21, 1993), No. C-93-3577-VRW, 1993 WL 650086; *Mangini v. R.J. Reynolds Tobacco Co.* (N.D. Cal. 1992) 793 F.Supp. 925; *People v. Beltz Travel Serv., Inc.* (N.D. Cal. 1974) 379 F.Supp. 948.) Similarly, California has created statutory authorization for taxpayers to challenge wasteful or illegal government expenditures (Code Civ. Proc. § 526a), while the federal courts do not generally recognize the standing of taxpayers to bring suit. (*Frothingham v. Mellon* (1923) 262 U.S. 447.) Finally, California recognizes that beneficial interest standing can extend to any citizen where a public right is at stake (*Green v. Obledo*, *supra*, 29 Cal.3d at p. 144), but federal courts have not found Article III standing on this basis. (See, *e.g.*, *Brain Injury Policy Institute v. Shewry* (N.D. Cal. July 31, 2006) 2006 WL 2237732, at *4 [beneficial interest standing and Article III standing "are not always equivalent"].)

What is critical is the nature of the injury flowing from deprivation of the state-created right, not whether a state-created right exists. Thus, the City continues to believe and respectfully suggests that, to provide sufficient guidance to the Ninth Circuit, this Court should state not only whether initiative proponents have any ongoing post-enactment interest in the validity of their initiatives beyond that of all of the electors but what is the nature of any such interest and what kind of injury, if any, proponents suffer if the measure they proposed is invalidated.

B. California Law Creates No Rights In Initiative Proponents Other Than the Rights To Propose Initiative Measures And To Vote For Them.

The initiative embodies two enumerated powers: "the power of the electors *to propose* statutes and amendments to the Constitution and *to adopt or reject* them." (Const., art. II, § 8(a) [emphasis added].) To implement these powers, California statutes prescribe the method by which electors may propose laws to the electors (Elec. Code §§ 9000 *et seq.*) and by which the electors may adopt or reject them. (*Id.* §§ 2000 *et seq.*) Neither the Election Code nor any other provision of the California Code prescribes any rights initiative proponents possess after the measure they have proposed has been submitted to the voters.

The meaning of the constitutional power "to propose" a measure is fleshed out by the statutory scheme. A "proponent" is an elector who submits the text of a proposed initiative to the Attorney General for preparation of a circulating title and summary. (Elec. Code §§ 342, 9001.) The proponent may amend the proposed measure before the circulating title and summary have been prepared. (*Id.* § 9002(b).) After the circulating title and summary are complete, any person qualified to be a voter may circulate the proposed measure for petition signatures . (*Id.* §§ 9014, 9020.) After gathering enough signatures, the proponent must file the petition with county election officials. (*Id.* § 9030(a).) Only the proponent may file the petition. (*Id.* § 9032.) County officials verify the number of signatures and forward this information to the Secretary of State. (*Id.* § 9030(b)-(g).) An initiative constitutional amendment is finally "proposed" within the meaning of Article II, section 8(a) "by presenting to the Secretary of State a petition that sets forth the text of the proposed ... amendment ... and is certified to have been signed by registered voters equal in number to ... 8

percent ... of the voters for all candidates for Governor at the last gubernatorial election ...." (*Id.* § 9035.)

Thus, the power to "propose" granted by the Constitution is the power to take these steps, culminating in presentation of the qualified initiative to the Secretary of State. After those steps are completed, the power to "propose" has been discharged, and the proponent may not amend the petition. (Elec. Code § 9030(a).) And although the proponent may withdraw a proposed measure *before* it has been filed with the county elections official, the proponent has no power to withdraw it after filing. (*Id.* § 9604(a).)

Indeed, California grants proponents only one right after the proposed measure has been filed, the right to draft an argument for the measure that will appear in the ballot pamphlet. Even this right is not exclusive—if the Proponent does not submit an argument, the Secretary of State may select an argument submitted by any voter. (*Id.* §§ 9064, 9067.) Enumeration of this right further indicates that California has granted Proponents no other rights concerning filed measures. (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424 ["[I]f exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary."] [quotation omitted].)

Initiative proponents have no further express constitutional or statutory rights—their right is to "propose" a measure to the voters, as defined in Elections Code section 9035, and the right to submit an argument in support of that measure. Proponents here have fully exercised both rights. To the extent they have an interest in the "adopt[ion] or reject[ion]" of any measure, that interest is shared with all who have the power to "adopt or reject" the measure—that is, with all the electors.

Even if this Court disagrees and finds that Proponents have some heightened interest beyond that of the people as a whole, it cannot be any greater than that of the Legislature, which also drafts legislation, and indeed has the power to propose initiative constitutional amendments to the voters alongside initiative proponents. (Const., art. 18, § 1.) But the Court has recognized that the Legislator possesses only a general interest in the validity of laws it has enacted, and this general interest does not create the right to be a party in challenges to legislation. as discussed below.

C. Cases Where Proponents Have Participated Establish Only That Proponents Have Spent Time And Money In Proposing Measures.

To argue that they have a particularized individual interest, Proponents rely exclusively on California cases that have permitted initiative proponents to participate in litigation as interveners or real parties in interest. But where public rights are at stake, California's rules of standing and cognizable interests are very different from those of federal courts. Therefore, these cases do not stand for the proposition that Proponents have the kind of concrete, particularized injury required for Article III standing.

Generally, plaintiffs and petitioners in California courts are required to show some particularized injury. (See, *e.g.*, *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 480-81.) But this Court has recognized that, in mandamus cases "where the question is one of public right and the object ... is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." (*Green v. Obledo*, *supra*, 29 Cal.3d at p. 144 [quotation omitted].) Thus, status as a party challenging an

issue of public importance in a California court does not demonstrate that a plaintiff or petitioner has Article III injury.

The same is true for intervener status and status as a real party in interest: California law requires only that the party possess an interest. Code of Civil Procedure § 387(a) states that, "[u]pon timely application, any person, who has *an interest* in the matter in litigation ... may intervene in the action or proceeding" [emphasis added]. Intervention is entrusted to the discretion of the trial court, except where a statute expressly requires the court to permit intervention. (C.C.P. § 387(b).) "[I]t is established that the intervener need neither claim a pecuniary interest nor a specific legal or equitable interest in the subject matter of the litigation." (*Simpson Redwood Co. v. California* (1987) 196 Cal.App.3d 1192, 1200.) A real party in interest need only show that he is a "person or entity whose interest will be directly affected by the proceeding." (*Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1178 [quotation omitted].) This standard says nothing about what type of interest a real party must possess.

What is important in determining the nature of any interest possessed by initiative proponents is not whether they have been deemed interveners or real parties in interest—but instead what the cases say about their interest.

1. Proponent-Party Cases Are Not Authority For Propositions They Do Not Consider.

Proponents cite many cases where initiative proponents acted as interveners or real parties in interest without comment by a reviewing court. But *San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1041-42 [hereinafter *San Francisco v. State*] [McGuiness, P.J., with

concurrence of Corrigan and Parrilli, JJ.], holds that such cases are not authority on the question whether that status was appropriate:

> [N]one of the California cases cited addresses whether intervention was proper. Some simply note that an initiative sponsor was permitted to intervene in earlier proceedings (e.g., *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241), while others refer to initiative sponsors as "interveners" without mentioning whether an objection was ever made to their intervention (e.g., *Legislature v. Eu* (1991) 54 Cal.3d 492, 500; *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 626). Because these cases do not address the propriety of intervention, they do not constitute authority supporting the Fund's position. ([citation] ["Dicta is not authority upon which we can rely"].)

[Unofficial reporter citations omitted.] Yet Proponents rely on all of the cases the Court of Appeal in *San Francisco v. State* rejected, in addition to a host of other cases that also do not discuss whether it was proper for an initiative proponent to participate as a party. (*Strauss, supra*, 46 Cal.4th 364 [cited in Opening Brief including at pp. 17, 26-27]; *Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020 [cited at pp. 21, 34]; *Senate v. Jones* (1999) 21 Cal.4th 1142 [cited at pp. 16, 20, 33]; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476 [cited at p. 18]; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 663 [cited at p. 33]; *Vandeleur v. Jordan* (1938) 12 Cal.2d 71 [cited at p. 18]; *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1316 [cited at pp. 18, 27]; *Community Health Ass'n v. Board of Supervisors* (1983) 146 Cal.App.3d 990 [cited at pp. 18, 27].)

The Court of Appeal correctly concluded that these cases provide no authority on the point. If they indicate anything, it is that California courts have sometimes exercised their discretion to allow intervention by initiative proponents because they have some interest that may be affected by the

court's decision.[15] They say nothing about the nature of any injury that a decision striking down an initiative may inflict on its proponents.

Nor are pre-enactment cases in which initiative proponents have participated as parties informative. As Proponents recognize (Opening Br. at 33), pre-enactment challenges to initiatives are typically brought against initiative proponents as real parties in interest, but these procedural cases differ fundamentally from post-enactment cases: they relate to the right to *propose* measures to the voters, a right that California law unmistakably confers on initiative proponents, and a right that was fully exercised by Proponents.[16]

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[15] Decisions whether to allow intervention under section 387(a) are "best determined based on the particular facts in each case" and "generally left to the sound discretion of the trial court." (*San Francisco v. State*, *supra*, 128 Cal.App.4th at p. 1036.)

[16] Procedural challenges that are to the *form* of an initiative measure—such as whether the measure is a revision or an amendment, or whether it impermissibly encompasses more than a single subject—may be brought after enactment as well. (Compare *Strauss v. Horton* (2009) 46 Cal.4th 364 [hereinafter *Strauss*] [post-enactment decision that Proposition 8 was not a revision] with *McFadden v. Jordan* (1948) 32 Cal.2d 330 [pre-enactment decision that measure would improperly enact a revision]; compare *Senate v. Jones* (1999) 21 Cal.4th 1142 [pre-enactment decision that initiative violated the single-subject rule] with *Brosnahan v. Brown* (1982) 32 Cal.3d 236 [deciding single-subject challenge after voters had approved initiative amendment].)

Thus, challenges to initiatives may be categorized as whether an initiative was procedurally proper as to *form* (that is, whether it comported with the procedural requirements of Articles II and XVIII of the Constitution) versus whether the initiative's *substance* is valid (that is, for instance, whether an initiative amendment is valid under the federal Constitution). Cases dealing with the form of an initiative, whether brought pre-enactment or post-enactment, are not relevant to this case because no one disputes that Proponents have a recognized right under state law to propose measures to the voters, and whether an initiative is valid in its form relates to whether it has been properly *proposed*. Even a post-enactment case such as *Strauss, supra*, provides no guidance about what interest Proponents have other than to recognize their interest in proposing a proper initiative to the voters.

2. California Courts Recognize Proponents As Having The Same Philosophical and Political Interests In Initiatives As Advocacy Groups.

Only four reported cases actually discuss what interests initiative proponents have in post-enactment substantive challenges to initiative measures. One such case, *Building Industry Association etc. v. City of Camarillo* (1986) 41 Cal.3d 810, does so only obliquely. In *Building Industry Association*, this Court determined that an evidentiary code provision requiring local governments to bear the burden of proving that a growth-control ordinance was necessary to protect the public welfare applied to growth-control measures enacted by initiative. (*Id.* at 817-20.) The Court found that such an interpretation did not raise constitutional concerns because it did not raise the bar for growth-control initiative measures so high as to effectively prohibit them. (*Id.* at 822.) The Court then noted that, in cases where a local government did not work with sufficient vigor to meet the heightened burden of proof imposed by Evidence Code section 669.5, it might be an abuse of discretion for a trial court to deny intervention to initiative proponents. (*Ibid.*) Proponents place great weight on this discussion, but *Building Industry Association*'s discussion of initiative proponents is *dictum*: "Because the permissibility of intervention under specific facts was not before the court, the court's observation about intervention in cases involving burden-shifting under Evidence Code section 669.5 was dictum and not dispositive here." (*San Francisco v. State, supra*, 128 Cal.App.4th 1030, 1042 fn. 9 [emphasis added].)

Even if this discussion were not *dictum*, it would not help Proponents here. *Building Industry Association*'s discussion of intervention by initiative proponents does not remotely support the proposition that all

initiative proponents have an interest in defending or enforcing measures they put on the ballot sufficient to give them standing as a matter of right in all cases challenging such measures. Indeed, *Building Industry Association* focuses not on the interest of individual proponents but instead on whether an intervener is available to champion voters' interests. (*Id.* at 822.) Allowing intervention satisfies this concern, but *Building Industry Association* says nothing about the *personal* interest proponents possess, or the injury they suffer if the government does not appeal from a decision striking a measure.

Two more cases that discuss the interests of initiative proponents are best considered together: *San Francisco v. State*, *supra*, 128 Cal.App.4th 1030, 1034-35, 1037, 1039, which held that a group created by an initiative proponent to defend Proposition 22 had only a "philosophical or political" interest in the measure, such that denial of intervention in a constitutional challenge to the measure was not an abuse of discretion; and *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153 [hereinafter *Simac*], which held that an advocacy group that campaigned for a local initiative measure had standing as an "aggrieved party" to take an appeal from a decision that undercut the measure, even where the local government party chose not to appeal.

Proponents' analysis of *San Francisco v. State* and *Simac* is curious. They labor mightily to distinguish *San Francisco v. State* on the grounds that it discussed advocacy groups affiliated with an initiative proponent, not the initiative proponent himself. (Opening Br. at p. 28-30.) Yet they rely heavily on *Simac*, which they inaccurately characterize as involving the "proponent" of an initiative. (*Id.* at p. 35.) But *Simac* did not involve an initiative proponent; the real parties in interest in that case were two

advocacy organizations. (*Simac*, *supra*, 92 Cal.App.3d at 157 [real parties were "CORD, a group of voters who had campaigned for [a measure] ... and SETA, a group formed to preserve open space.") Indeed, CORD and SETA could not have been the proponents of the initiative measure, because a proponent must be an "elector." (Const., art. II, § 8(a) [initiative power is held by "electors"]; *id.*, art II, § 11 [extending initiative power to local government legislation]; Elec. Code § 342 ["proponents" are "electors"].)

Simac and *San Francisco v. State* are directly in conflict; one recognizes the interest of an advocacy group and the other does not. *Simac* contains very little analysis, while *San Francisco v. State* explains its decision thoroughly, noting that "the fundamental nature of [the claimed] interest, [] is philosophical or political":

> There is no doubt the Fund's members strongly believe marriage in California should be permitted only between opposite-sex couples, and they believed in this principle strongly enough that they expended energy and resources to have it passed into law. However, because there is no evidence its members will be directly harmed by an unfavorable judgment, the Fund's interest in defending this principle is likewise indirect. California precedents make it clear such an abstract interest is not an appropriate basis for intervention.

(*San Francisco v. State*, *supra*, 128 Cal.App.4th at p. 1039.)

As *San Francisco v. State* recognized, people who work to get an initiative measure enacted are no different from people or groups who seek to ensure it is enforced after it is passed. Neither can show a direct effect sufficient to support intervention "[u]nless the law in question was specifically designed to protect these individuals, and unless they allege a potential injury from the judgment that the law was specifically enacted to prevent." (*Id.* at 1041.) Those like the Fund and its members who opposed

marriage by same-sex couples did not and could not show their existing marriages would be invalidated or harmed, that their right to marry in the future would be adversely affected or that "they would suffer any diminution in legal rights, property rights or freedoms" if Proposition 22 was held unconstitutional. (*Id.* at 1038-39.) Absent such an injury, they lacked a "sufficiently direct and immediate interest to permit intervention," despite their support and campaigning for the measure. (*Id.* at 1044.) Moreover, this Court has cited *San Francisco v. State* with approval (*In re Marriage Cases*, *supra*, 43 Cal. 4th at p. 791, fn. 8), and it has expressly held that the Fund and another advocacy group lacked standing to defend Proposition 22 in their own separately filed cases that were coordinated with *San Francisco v. State* and other cases in *In re Marriage Cases*, *supra*, 43 Cal. 4th 757.

Although *San Francisco v. State* reserved the question whether an initiative proponent himself would have had a sufficiently direct interest to intervene, other authority indicates that there is no difference, for purposes of standing, between official proponents and interest groups. Indeed, Proponents themselves confuse the difference between interest groups and proponents in a host of cases in addition to *Simac*. (See *20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal.4th at p. 241 [intervener Voter Revolt]; *Amwest Surety Ins. Co. v. Wilson*, *supra*, 11 Cal 4th 1243, 1250 [intervener Voter Revolt, an "organization that drafted Proposition 103 and campaigned for its passage"]; *Legislature v. Eu*, *supra*, 54 Cal.3d at p. 500 [intervener Californians for a Citizen Government was "organization that sponsored" initiative]; *City of Westminster v. County of Orange*, *supra*, 204 Cal.App.3d at p. 626 [intervener California Tax Reform Movement was "sponsor[]" of initiative]; *Sonoma County Nuclear Free Zone v. Superior*

Court (1987) 189 Cal.App.3d 167, 171 [petitioner Pro-NFZ was "group supporting the initiative"].) Proponents erroneously describe all of these cases as ones where initiative proponents were interveners or real parties in interest. (Opening Br. at 17-18, 33.)

Thus, what Proponents characterize as a "long and consistent line of ... cases allowing official proponents to defend initiatives or referenda they have sponsored" is not that at all. (Opening Br. at 17.) It is not true that official proponents are afforded "unique and favored treatment" and that they "stand in a position different from that of mere political, ideological, or philosophical supporters of a law." (*Id.* at 29-30.) To the extent these cases are authority at all, they suggest that California courts generally treat advocacy groups the same as initiative proponents, and that they often welcome the participation of motivated parties with strong views who can assist them in fully considering the merits of a dispute, whether those parties are official proponents or interest groups.

Indeed, the single case Proponents cite that discusses the interest of an actual initiative proponent rather than an interest group only confirms that initiative proponents have the same interests as advocacy organizations. In *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400, the Court of Appeal held that an initiative proponent (whose motion to intervene was denied) and an advocacy group that had assisted the proponent in circulating the petition were both "aggrieved part[ies]" with standing to appeal from a judgment that the initiative was unconstitutional. (*Id.* at 417-18.) The court described the interests of these appellants as follows: "Given their involvement in passage of Proposition A, the resources spent in that passage, and their interests as expressed at trial, we conclude both Shelby and San Diegans for the Mt. Soledad National War

Memorial are aggrieved parties for purposes of appeal." (*Id.*) In short, there was no difference, in the court's view, of the interests of the proponent and the advocacy group, and it discussed those interests using the same language. And those interests were not related to a particularized personal interest in the content of state law, but instead in the kind of philosophical and political views that this Court has recognized are not enough to support injury-based standing in the California courts. (*In re Marriage Cases* (2008) 43 Cal. 4th 757, 789-91.)

3. If This Court Recognizes Any Interest Possessed By Initiative Proponents Other Than A Philosophical Or Political Interest, It Should Find That Interest Comparable To That Of Legislative Drafters.

In *Serrano v. Priest* (1976) 18 Cal.3d 728, 750-53, this Court rejected a claim that the Legislature was a necessary party for adjudication of a case involving public school financing. The Court found that the Legislature's only interest was "that of lawmakers concerned with the validity of statutes enacted by them." (*Id.* at 752.) But Proponents' personal interest in Proposition 8 is not even comparable to that of the Legislature's interest in the statute at issue in *Serrano*. The Legislature, acting as a body, can adopt or reject statutes, but initiative proponents can only propose constitutional amendments to the people. They are not analogous to the Legislature but instead to the legislator who drafts and sponsors a particular bill that is eventually passed by the body as a whole. If the Legislature's stake in the public school statute was a mere "concern," Proponents' stake in Prop 8 must be less.

But like legislators, initiative proponents suffer no direct injury when measures they have drafted and presented to the voters are struck down. Federal courts have recognized that there is no standing when

legislators seek to "maintain[] the effectiveness of their votes" by defending measures they have supported or enacted. (*Raines v. Byrd* (1997) 521 U.S. 811, 824-25 [quotation omitted].) In these cases, where the injury alleged is "wholly abstract and widely dispersed," the party seeking relief does not have the kind of concrete, direct injury that Article III requires.

That is the case here. Proponents have no personal right to "maintain the effectiveness" of the proposition they submitted to the voters. No doubt they would feel it deeply if the government defendants were enjoined from enforcing Proposition 8, just as legislators are concerned when statutes they have authored are struck down. It is probably also true that many California voters who supported Prop 8, and people inside and outside of California who gave money in support of the campaign, would feel some sense of aggrievement if Prop 8 were no longer valid.

But Proponents' opening brief never answers the question that goes to the heart of an Article III injury: what have Proponents lost if the district court's judgment is upheld? They are far removed from the same-sex adoptive parents in *Adar v. Smith*, *supra*, who were injured not because they had the legal right to obtain a birth certificate that Louisiana would not provide, but because in the absence of a birth certificate they could not obtain health insurance for their son. This is the kind of injury that supports Article III standing, not the abstract and dispersed interest that Proponents claim.

CONCLUSION

For the reasons offered above, the City respectfully submits that Proponents do not exercise the litigating authority of the State, and that they have no particularized legal interest in the validity of a measure they have proposed to the voters.

Dated: April 4, 2011

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 13,955 words, excluding the tables required under California Rule of Court 8.204(a)(1), field codes that were inserted in the text of the brief in order to create the table of authorities but are not visible in the printed version, the cover information required under Rule 8.204(b)(10), this certificate of compliance, the certificate of interested entities or persons, and the signature blocks.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 4, 2011, in San Francisco, California.

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

Executed April 4, 2011, at San Francisco, California.

Catheryn M. Daly.

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