S189476

In the

Supreme Court

of the

State of California

EN BANC

KRISTIN M. PERRY, et al.,

Plaintiffs and Respondents,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff, Intervenor and Respondent,

v.

EDMOND G. BROWN, Jr., as Governor, etc. et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.,

Defendants, Intervenors and Appellants

ON REQUEST FROM THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT FOR ANSWER TO CERTIFIED QUESTIONS OF CALIFORNIA LAW · CASE NO. 10-16696

APPLICATION FOR LEAVE TO FILE *AMICUS* CURIAE BRIEF AND *AMICUS* BRIEF OF JOSHUA BECKLEY IN SUPPORT OF DENNIS HOLLINGSWORTH, et al., DEFENDANTS, INTERVENORS and APPELLANTS

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

To the Honorable Chief Justice of this Court:

Dr. Joshua Beckley requests leave to file an amicus brief in this case in support of Dennis Hollingsworth, et al., Defendants, Intervenors and Appellants.

INTEREST OF APPLICANT

Dr. Joshua Beckley is a citizen, voter and taxpayer of the State of California. He is the Senior Pastor of Ecclesia Christian Fellowship in San Bernardino, CA. On August 27, 2010, Dr. Beckley filed a petition in the California Court of Appeal, Third District, for the issuance of a writ of mandamus against Governor Arnold A. Schwarzenegger and Attorney General Edmund G. Brown to compel them to file a notice of appeal in the Ninth Circuit Court of Appeals, in this underlying case. The petition sought issuance of a writ on or before the running of the time to file said notice, i.e., September 11, 2010. The petition was denied without comment. Attorneys for Dr. Beckley then filed an emergency petition (herein "Beckley Petition") to this Court on September 3, 2010. By order of this Court, dated September 7, 2010, the Governor and Attorney General were ordered to file an opposition to Dr. Beckley's Petition

by 9:00 a.m. the next day with Petitioner's response due by noon. On September 8, 2010, Chief Justice George issued an order denying the Petition without comment. (A true and correct copy of the Beckley Petition, cited as *Beckley v. Schwarzenegger* (Sept. 8, 2010) No. S186072, is attached to this Brief as Appendix A).

At oral argument before the Ninth Circuit, Judges Stephen Reinhardt and N.R. Smith expressed grave concerns over the propriety of the Attorney General not filing a notice of appeal. Judge Reinhart further questioned counsel about the Beckley Petition that was filed with this Court. It was not surprising that the Ninth Circuit's certification order used the same language in describing the Governor's actions as that found in the Beckley Petition, i.e., a veto of an initiative. Order Certifying a Question to the California Supreme Court, pp.11-12.

The essence of the argument presented in this Brief will be to demonstrate that private parties and their associations have historically been a part of the enforcement scheme for vindication of public rights in California. Moreover, the California judiciary has historically served as the guardian of the People's rights and has, as necessary, fashioned doctrines to serve that end.

In view of the above, Dr. Beckley has a unique interest and important perspective in the present action which will be useful to this Court. As such, the applicant seeks leave to file the accompanying Brief of *Amicus Curiae* for the Court's consideration.

DATED: May 2, 2011

Respectfully submitted,

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AMICUS CURIAE BRIEF OF JOSHUA BECKLEY

INTRODUCTION

The matter before this Court is not about gay rights. Nor is it about what definition of *marriage* is most appropriate for society. It is about whether the People can continue to peaceably cast their votes to amend their organic law and have a meaningful chance to defend that law in the courts. If all power of government ultimately resides in the People, then by extension they must be afforded an opportunity to defend in court the decisions made in the voting booth. In jealously guarding the People's power to directly amend their constitution, it is the solemn duty of this Court to seek to resolve all doubts in the People's favor. This is necessary in order to preserve one of the most precious rights in the democratic process.

Amicus agrees with the Proponents that *Building Industry Association v. Camarillo*, (1986) 41 Cal.3d 810, 822, is on point and that there is a long line of cases in which official proponents of initiatives or referenda have been allowed to intervene and defend. (Proponents' Opening Brief, pp. 17-18; Proponent's Reply Brief, pp. 1-3 and 8-9). In addition to the arguments put forward in the Proponents' Briefs, there is yet another basis upon which the certified

question[1] can be answered in the affirmative. California courts have a long populist based tradition of using their inherent equitable powers to fashion a rule which serves to guard public rights. This present case provides such an opportunity. Stated another way, this Court does not need a pinpoint case or statute to protect the rights of the People. The California judiciary has a history, spanning one hundred years, of recognizing the compelling interest in protecting and enforcing the People's laws. Thus, when necessary this Court will use its intrinsic constitutional power to create the rule or doctrine needed to give the public an opportunity to be heard in court.

SUMMARY OF ARGUMENT[2]

The primary purpose of this Brief is to demonstrate that private parties have been integrated into the enforcement scheme by

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[1] "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] *Amicus* agrees with the position of the Proponents. For the sake of judicial economy, *amicus* will not repeat those arguments and will only reference them as necessary for this discussion.

California's judiciary. The history of the political and legal development of California underscores a populist tradition which has created a crucial role for the People relative to lawmaking and vindicating public rights in the courts. This role of a private party to essentially fill the shoes of government officials is crucial when said officials impair or seek to defeat a law or refuse to perform a duty owed to the public. To this end, State courts have *created* legal doctrines for which citizens can access the courts to vindicate important public rights. These include the private attorney general doctrine, the public interest exception for writs of mandamus, the public trust doctrine, citizens' suits, and the significant expansion of taxpayer actions.

The Brief will further argue that the initiative power is one of the most precious rights in the State's democratic process. Thus, the Court should generate a doctrine that grants the proponents of an initiative the authority to represent the People when State officials refuse. The creation of such a rule is both consistent with preserving California's constitutional form of governance and the traditional role of the State's judicial branch.

ARGUMENT

Amicus begins with a brief historical context for the purpose of the initiative power.

a. Historical Context of the Initiative Power and the Role of the Judiciary

The ability of Californians to place proposed laws directly on the ballot for consideration occurred in 1911. Historians have made a compelling case that California was saturated with corruption in the sixty years prior to the launching of the initiative power. John Caughey and Norris Hundley, California: History of a Remarkable State, *see generally*, pp. 145-186, 223-234, 279-292, (Prentice-Hall, Inc.) (4th ed. 1982). The State was controlled primarily by two interests, the railroad (Southern Pacific) and the distillers and brewers (Knights of the Royal Arch). Nathaniel Persily, 2 Mich.L.&Pol'y Rev. 11, 27 (1997). Justice was out of the reach of ordinary Californians for they did not have meaningful access to the political process or the courts. "Virtually every California legislator and judge owed his office to the Southern Pacific...In addition to its control over politics, the railroad openly traded offices such as judgeships. As a result, what the corporations were unable to achieve through the

legislature, they accomplished through litigation." Karl Manheim, (1998) 31 Loy.L.A.L.Rev. 1165, 1184.

Because of this, progressives from the Teddy Roosevelt and Taft Republicans, in conjunction with populists, called for reform in the State. Hiram Johnson became their standard bearer and was elected Governor.[3] Manheim, *Id.*, at 1186. It was against this backdrop that a special election was called in 1911 in which the People amended their Constitution to allow for the initiative.

Speaking for this Court, Justice Tobriner described the progressive constitutional scheme as follows:

> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it the duty of the courts to jealously guard this right of the people, the

[3] In 1908 Johnson gained statewide notoriety in a high profile case in a prosecution of the Mayor of San Francisco for extortion and the District Attorney for bribery. The lead prosecutor (Francis Heney) was lent by President Theodore Roosevelt to investigate and prosecute the case. In the courtroom, Heney was shot in the face by a would be assassin. Johnson substituted in as the lead prosecutor. Byington, Lewis Francis, "History of San Francisco 3 Vols", S. J. Clarke Publishing Co., Chicago, © 1931. Vol. 2 Pages 347-350. http://freepages.genealogy.rootsweb.ancestry.com/~npmelton/sfbjohn2.htm (accessed March 29, 2011).

> courts have described the initiative and referendum as articulating one of the most precious rights of our democratic process. It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it. It is clear that the constitutional right reserved by the people to submit legislative questions to a direct vote cannot be abridged by any procedural requirement. *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591-92 (Citations and quotation marks omitted.)

The judiciary has undertaken the primary role as guardian of this power reserved to the People. The courts have determined that initiatives are entitled to "very special and very favored treatment." *Legislature v. Deukmejian* (1983) 669 P.2d 17, 33; *Amador Valley Joint High School District v. State Board of Equalization* (1978) 583 P.2d 1281, 1302. (Bird, C.J., concurring and dissenting).

Relative to initiatives, the judiciary has described its role as a "solemn duty" requiring the courts to "jealously guard" "one of the most precious rights of our democratic process." *Associated Home Builders etc., Inc. v. City of Livermore*, supra, 18 Cal. 3d 582, 591. The judiciary accords "extraordinarily broad deference to the electorate's power to enact laws by initiative." *Mervynne v. Acker* (1961) 189 Cal. App. 2d 558, 563. Thus, the court's have stated that

"it is our duty" to "construe the relevant constitutional provisions liberally in favor of the people's right to exercise the powers of initiative and referendum. *Rossi v. Brown* (1995) 9 Cal. 4th 688, 695. The rationale for liberally construing initiatives is "to promote the democratic process." *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal. 3d 205, 210, fn.3. The compelling reason for the court's to stalwartly take this stance is found in California's Constitution which states: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." CA Const. Art. II, section 1.

It is fair to state that there is no other right that is guarded more soberly by the courts of this State than the initiative power.

b. California's Courts have Created and Expanded Legal Doctrines to Provide for the Vindication of Public Rights in the Courts.

Since the early part of the twentieth century, California's judicial branch has facilitated the State's unique populist form of government by fashioning legal doctrines whereby citizens and their associations can litigate for the greater public good. Indeed, private

parties have become an important part of California's enforcement scheme.

A. Private Attorney General Doctrine

The private attorney general doctrine has been codified (California Code of Civil Procedure, or CCP, §1021.5). But **prior** to its enshrinement as a statute, this Court established its availability through case law. *Serrano v. Priest* (1977) 20 Cal.3d. 25. The doctrine holds that to enforce state constitutional rights of societal importance which benefit a large number of people, courts are to award plaintiffs' counsel reasonable attorney fees. *Id.*, at 44-45.

Not surprisingly, the courts have expanded the doctrine to include defendants. For example, proponents of an initiative can intervene to defend it and they are thus also entitled to attorney fees under the private attorney general doctrine. *City of Santa Monica v. Stewart* (2nd App. Dist. 2005) 126 Cal.App.4th 43.

In like manner, intervenors who uphold public rights are within the scope of the doctrine. Proponents of a referendum who intervened as a respondent and real party in interest were deemed to have acted as a private attorney general. The intervenors vindicated the rights of the People in their community to be able to cast votes on a

referendum. This "resulted in the enforcement of an important right affecting the public interest." *Walmart v. San Marcos* (4th App. Dist. 2005) 132 Cal.App.4th 614, 617. Hence intervenors were eligible for reimbursement of their attorneys' fees.

The point of this review of the private attorney general doctrine is twofold. First, it underscores that California has a populist system of governance. Ordinary citizens and their associations can litigate for the public good as either plaintiffs, defendants or intervenors. Second, the court's have spearheaded the development of procedures to vindicate public rights. To encourage citizens to act in behalf of the public, and prior to legislative action, the courts created this mechanism to pay the lawyers of these citizens. This does not necessarily imply that California's judiciary is activist in the sense of creating substantive rights. Rather, the judiciary has pried open the door of justice so that public rights will be adjudicated. The creation by the courts of the private attorney general theory is an example of appropriate judicial guardianship of said rights.

In stark contrast, the Kristin Perry and the City and County of San Francisco (herein "Respondents") are putting their shoulders to the courthouse doors in an attempt to shut the People out. This is

entirely inconsistent with the legal and political traditions of the State for the last one hundred years. But this Court has inherent constitutional powers to allow the Proponents, and all future proponents of initiatives and referenda, the authority to step in the shoes of government officials who would disenfranchise the voters. The legal authority for this Court to fashion such a remedy rests in the premise that "[a]ll political power is inherent in the people." CA Cont., Art., II, section 1. Since the initiation of the empowerment of Californians by the combined efforts of progressives and populists more than a century ago, this Court has consistently and decisively acted to prevent the People from returning to a condition of powerlessness.

B. Public Interest Exception to Petitioning for Writs of Mandamus

Writs of mandamus were instituted in 1872 by the passage of CCP §1085. The purpose of the statute was to provide relief for which common law rights of action were not available. Sixty-five years ago this Court determined that the rules for relator standing required loosening in actions for mandamus. As such, the judiciary created the "public interest exception" doctrine so that the citizenry would not be disenfranchised when the statutory rules of standing

under CCP §1085 were not adequate to protect the community's interest. *Board of Social Welfare v. County of Los Angeles* (1945) 27 Cal.2d 98. Three decades ago this Court explained as follows:

> "[W]here 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" .... The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. *Green v. Obledo*, (1981) 29 Cal.3d 126, 144 quoting, *Board of Social Welfare v. County of Los Angeles* (1945) 27 Cal.2d 98, 100-101.

The First District puts it simply. But for the public interest exception, which creates standing, matters impacting the public interest "will be effectively removed from judicial review." *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1991) 11 Cal.App.4th 1513, 1519. Hence, private citizens have been given the authority by the courts to stand in the shoes of government officials to seek enforcement of the law.

State courts further expanded the public interest exception in *League of Women Voters v. Eu*, (1992) 7 Cal.App.4th 649. There the Governor argued that the citizen public interest exception should not apply to nonprofits, for after all, they are not "citizens." That position

was rejected even though the *Board of Social Welfare Court* used the word "citizen" when it announced the public interest exception. *League of Women Voters v. Eu*, *Id.*, at 657. Hence, today private citizens and their associative bodies have full authority to bring matters to court and seek enforcement of the law, regardless of any injury to themselves. Private parties are necessary parts of California's legal enforcement scheme.

The creation of the public interest exception in mandamus actions is illustrative of judicial guardianship. When the rights of the larger community are at stake, California courts look with disfavor on legal theories which deprive the public of the opportunity to have its day in court.

But this is precisely what Respondents are proposing in the case at bar. As the Ninth Circuit observed, the Governor and Attorney General's behavior "affects the 'fundamental right' under the California Constitution of the State's electors to participate directly in the governance of their State." (Certification Order, pg. 16). Clearly, the matter at stake involves a "fundamental" or "precious right." In finding that the Proponents possess both the particularized interest

and authority to assert the State's interest, this Court would be following a long established legal tradition.

C. Taxpayer Actions and Common Law Authority for the Taxpayer to Sue

Within ten years of the entry of California into the Union, California courts adopted a common law right for taxpayers to seek relief against state and local officials. *Foster v. Coleman* (1858) 10 Cal. 279. Courts of this State did not need statutory permission. Instead, the courts used their inherent equitable powers to allow such claims to be prosecuted. This type of common law claim allowed taxpayers to proceed against the government in cases involving "fraud, collusion, *ultra vires*, or a failure to perform a duty specifically enjoined." *See, Pratt v. Security Trust and Savings Bank* (1936) 15 Cal.App.2d 360, 636 citing, *Nickerson v. San Bernardino County* (1918) 179 Cal. 518; *McConoughey v. City of San Diego* (1900) 128 Cal. 366; *Warfield Anglo and London Parris National Bank* (1927) 202 Cal.2d 345; *Mock v. Santa Rosa* (1899) 126 Cal. 330; *Mines v. Del Valle* (1927) 201 Cal. 273; *Crowe v. Boyle* (1920) 184 Cal. 117; and *Dunn v. Long Beach L & W Co.* (1896) 114 Cal. 605.

In 1909 the Legislature enacted CCP §526a. This law allowed persons who are citizen taxpayers or corporations liable to a tax to file suit to prevent "any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state."[4]

After passage of CCP §526a California courts began to liberally expand the scope and standing requirements beyond the four corners of the statute. Initially the statute was construed narrowly so that only citizens could bring a claim. *Thomas v. Joplin* (1910) 14 Cal.App. 662. But that was a decision by the Second District. Later this Court expanded the statute's reach to include nonresident taxpayers. *Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 18-20.

It did not, however, take the California Supreme Court fifty years to begin to grant expanded access to the People. In less than five years of the decision in *Thomas*, this Court began to liberally interpret the statute. First, it allowed taxpayers to sue on behalf of cities and counties to recover illegally expended funds. *Osburn v. Stone* (1915) 170 Cal. 480, 482.

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[4] Although they are similar, the statutory and common law claims are distinct. *See, Los Altos Property Owners Assn. v. Hutcheon* (1977) 69 Cal.App.3d 22, 26.

From that decision the next logical extension was that the plaintiff need not have a personal interest in the litigation, as this Court determined shortly thereafter. *Crowe v. Boyle* (1920) 184 Cal. 117, 152. It is noteworthy that this Court began to abandon its narrow interpretation of the taxpayer statute almost immediately after the progressive and populist reforms had taken hold in the State such as the passage of the initiative power by the People in 1911.

Examples of expansion of populist doctrine by this Court are enlightening. First, the unlawful expenditure need not come from tax dollars but can be derived from entities for which the government has granted a monopoly, e.g., public utility or gas revenues. *Mines v. Del Valle* (1927) 201 Cal. 273, 279-80; *Trickey v. City of Long Beach* (1951) 101 Cal.App.2d 871, 881. It is further immaterial that the amount of expenditure is small or even if the unlawful conduct actually saves money. *Wirin v. Parker* (1957) 48 Cal.2d 890, 894. Mere expenditure of government employee time on unlawful conduct is sufficient to fall under the statute. *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18.

This Court explained its liberality forty years ago. "The primary purpose of this statute, originally enacted in 1909, is to

'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.'" *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-68 quoting Comment, Taxpayers' Suits: A Survey and Summary (1960) 69 Yale L.J. 895, 904.[5]

Due to space limitations, *amicus* will not analyze other doctrines for which private parties are part of the enforcement schemes. For example: the public trust doctrine a member of the public has standing to enforce public trust over wildlife (*Center for Biological Diversity, Inc. v. FPL Group* (2008) 166 Cal.App.4th 1349); *ex relatione* which are proceedings that can be brought by a private party in the name of the state (*The People, ex relatione, Casserly v. Fitch* (1951) 1 Cal 519; *People ex rel. Curtis v. Peters*

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[5] Due to space limitations, *amicus* will not analyze other doctrines for which private parties are part of enforcement schemes. For example: under the public trust doctrine a member of the public has standing to enforce a public trust over wildlife (*Center for Biological Diversity, Inc. v. FPL Group* (2008) 166 Cal.App.4th 1349); *ex relatione* which are proceedings that can be brought by a private party in the name of the state (*The People, ex relatione, Casserly v. Fitch* (1951) 1 Cal 519; *People ex rel. Curtis v. Peters* (1983) 143 Cal.App.3d 597); a *quo warranto* suit can be brought by a citizen to test the validity of claims or charters (*People ex rel. Kerr v. Orange County* (2003) 106 Cal.App.4th 914, 920 at footnote 3; in a action the *qui tam* plaintiff stands in the shoes of the state (*Wells v. One2One Learning* (2006) 39 Cal.4th 1164, 1184).

(1983) 143 Cal.App.3d 597) or *quo warranto* which tests the validity of claims or charters (*People ex rel. Kerr v. Orange County* (2003) 106 Cal.App.4th 914, 920 at footnote 3; a *qui tam* plaintiff stands in the shoes of the State (*Wells v. One2One Learning* (2006) 39 Cal.4th 1164, 1184).

c. Consequences of Not Answering the Certified Question in the Affirmative.

In sad contrast to these principles stands Respondents. They have two objectives: (1) disenfranchise the voters of California; and, (2) disenfranchise the judiciary. Their premise is simple. The executive branch (i.e., the Governor or Attorney General) has the right to veto a provision of the constitution by not defending it in court and no other party can step in and take their place. That is not all. The executive has the power to override the judicial branch by divesting it of jurisdiction. But this is not a power contemplated in California's Constitution. It is an ambitious reach for supremacy.

That is why this Court determined that failing to allow an official opponent to intervene in a case defending a law put directly before the voters would be an abuse of discretion when government officials will not remain honorable to their constitutional commitments. *Building Industry Association of Southern California*

v. City of Camarillo (1986) 41 Cal.3d 810, 822. This reasoning is consistent with California's overall populist system in which private parties are integrated into the enforcement scheme.

Respondents protest that allowing Proponents authority to represent the State violates separation of powers. This premise is misguided. Opening the courthouse doors no more transgresses separation of powers than granting taxpayer citizens the authority to prosecute cases for the public good when government officials have not, or will not, perform their duties under the law.

Respondents' vision of the California Constitution is anything but populist. It is authoritarian. In addition to the current attempt to disenfranchise the voters in the case at bar, the consequences of their premise must be examined in other contexts as well.

First, a governor who vetoed a law but was overridden by the legislature (CA Const. Art IV, section 10) could work what would be a second veto by not defending a challenge to the law made in court. Second, through this same means a governor could essentially nullify any law passed by the People's representatives and signed by prior governors simply by not defending the law in court. This maneuver would strip the judiciary of its constitutional role to decide what the

law is. *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 469-470 quoting *Marbury v. Madison* (1803) 5 U.S. 137, 137.

Put simply, through this ploy an attorney general or governor would have ultimate authority over the legislature, the judiciary, and the People. In view of that, it is not Proponents theory that would work a violation of the separation of powers. It is Respondents.

For nearly a century now, this Court has consistently given authority to private citizens and their associations to vindicate the general rights of the public. The Proponents stand in such a position now. It would be a tragic reversal of fortune for the People of California if the doors to the courthouse were suddenly locked.

d. Respondents Continued Protest Over the Form of the Certified Question Should Be Ignored.

It is too late to argue for a reformulation of the question. Respondents attempted to reshape the question in prior letter briefs. They are unable to come to terms with the reality that the issue has been framed. Hence, any arguments proffered in support of retrofitting the question to match their legal theory, or points discussed in support of a question not before this Court, are irrelevant.

Early in their brief, Respondent San Francisco complains that the Ninth Circuit and the California Supreme Court have asserted that

the public officials charged with the duty to defend the initiative have refused to do so (SF Brief at pg. 6). Consistent with the certified question, the Beckley Petition for writ of mandamus framed the issue as follows: "Does the Attorney General have a duty to defend a provision of the State Constitution enacted by the People by filing papers with the courts to keep the case viable to ensure judicial review?" *Beckley v. Schwarzenegger* (Sept. 8, 2010) No. S186072, pg. 1 (Appendix A of this *Amicus* Brief). Likewise, in the certified question, both the California Supreme Court and the Ninth Circuit merely stated what is a painful fact. The three judges from the Ninth Circuit[6] and all seven justices from this Court agreed that there was in fact a duty to defend the initiative and the Attorney General refused to perform said duty.

Article III, § 3.5 states: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional *unless an appellate court has made a determination* that such statute is unconstitutional." (Emphasis added). It stands to reason that since

[6] Stephen Reinhardt, N.R. Smith, and Michael Hawkins.

section 3.5 states "unless an appellate court has made a determination" there is a presumption that the chief law enforcement officer (i.e. the Attorney General) must appeal adverse rulings. Further, if that is true of statutes, there is no reason under law for that not to encompass amendments passed by the People. Indeed, Government Code §12512 states: "The Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity." It is beyond debate that said duty includes providing a defense of amendments to the California Constitution that have been lawfully enacted by the People when a constitutional provision has been directly challenged in Court.

It is unusual to describe the background of those on the bench in a brief. But that background sheds important light on certification of the question. The Ninth Circuit panel which framed the question has a total of 127 years of experience as lawyers and judges. Justices sitting on this Court have a collective 269 years of experience. In addition to the nearly 400 years of combined legal experience, eight have been employed as government attorneys prior to appointment to the bench. Of the ten sitting on the bench, six are Democratic

appointees and four are Republican. The judicial philosophy of the ten jurists includes all hues – moderate, liberal and conservative. It was the unanimous judgment of both the federal and State benches that the question be framed to reflect the clear failure of a Republican Governor and a Democratic Attorney General to perform a duty owed to the People. As the U.S. Supreme Court stated more than half a century ago, "justice must satisfy the appearance of justice." *Offutt v. United States* (1954) 348 U.S. 11, 14.

Respondents also disapprove of that portion of the question which seeks resolution as to whether official proponents have "a particularized interest...or the authority to assert the State's interest" *under California law*. Instead, Respondents devote a significant portion of their submissions to standing doctrine under Article III of the U.S. Constitution. But the question before the Court is proper. The U.S. Supreme Court opined twenty-five years ago that a state "has the power to create new interests, the power of which may confer standing." *Diamond v. Charles* (1986) 476 U.S. 54, 66, footnote 17. When that occurs the requirements for Article III standing have been met. *Id.* The question that has been certified seeks to resolve whether under California law such an interest has been created

relative to official proponents of an initiative when there has been a failure to protect the People's interest by a governor and attorney general.

In light of that proper inquiry, the portions of the Respondents' brief which protest the question and instead analyze standing under Article III should be ignored as irrelevant. If Respondents are convinced that this Court has no authority to decide the question that has been certified, they could have filed an emergency application for stay to the U.S. Supreme Court (Sup.Ct. R. 23).

CONCLUSION

One hundred years after the People, under the leadership of Governor Hiram Johnson, amended their Constitution to allow for the initiative power, Respondents are now proposing a tyrannical vision of the future. For Respondents fundamentally disagree with the proposition that "power ultimately rests with the People." *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, *Id.*, 591-92. Instead, ultimate power will be held in the hands of any governor or attorney general with the hubris to defy the legislature, the judiciary, and the People. To avoid a constitutional crisis, this Court must resist the temptation to willingly cede power to the

executive branch. It is its solemn duty to liberally construe the State's Constitution such that the precious right reserved to the People is fully protected.

DATED: May 2, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for *Amicus Curiae* hereby certifies that the foregoing brief complies with the type-volume limitation of Rule 14(c)(1) of the California Rules of Court, because the brief contains 4,974 words based upon the properties and statistics of Microsoft Word.

DATED: May 2, 2011

Respectfully submitted,

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Dr. Joshua Beckley

APPENDIX A
PETITION FOR REVIEW

Beckley v. Schwarzenegger (Sept. 8, 2010) No. S186072

In the

Supreme Court

of the

State of California

JOSHUA BECKLEY,

Petitioner,

v.

ARNOLD ALOIS SCHWARZENEGGER,
as Governor, etc. et al.,

Respondents,

KRISTIN M. PERRY et al.,

Real Parties in Interest.

California Court of Appeal · Third Appellate District · Case No. C065920
(Concerning the Federal Action *Perry, et al. v. Schwarzenegger, et al.;* U.S. District Court, Northern District, San Francisco Division · Case No. 3:09-cv-2292 · Courtroom 6, 17th Floor)
IMMEDIATE AND EXPEDITED REVIEW AND DECISION REQUESTED BASED ON IMPENDING EXPIRATION OF CRITICAL DATE OF SEPTEMBER 11, 2010
(THE TIME FOR FILING A NOTICE OF APPEAL IN THE FEDERAL ACTION EXPIRES)

PETITION FOR REVIEW

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I.

ISSUE PRESENTED FOR REVIEW

Does the Attorney General have a duty to defend a provision of the State Constitution enacted by the People by filing papers with the courts to keep the case viable to ensure judicial review? Stated another way, does the Attorney General have authority to constructively veto a provision of the State Constitution by refusing to make an appearance in an action challenging the law?

II.

REVIEW SHOULD BE GRANTED TO SETTLE A CRITICAL POINT OF LAW

Government Code § 12512 states: "The Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity." When the Attorney General asserts that a provision of the State's Constitution is inconsistent with the Federal Constitution, does section 12512 of the Government Code place a clear and present duty on the Attorney General to defend the law in the event of a court challenge? Until now, no California Court has faced this issue.

This is a matter of grave constitutional concern. For if the Attorney General can refuse to take reasonable procedural steps to

maintain the jurisdiction of such a case, then he will be granted a breathtaking power of veto over a constitutional amendment. This Petition for Review presents just that scenario and requires resolution in order to preserve the integrity of our form of government. In view of the above, there is ample ground for review under rule 8.500(b) of the California Rules of Court for case requires the settlement of an important question of law.

By summarily denying the Petition for an Alternative Writ of Mandamus, the Court of Appeal has not only committed error and should be reversed, but it has left the citizens of California precariously close to being disenfranchised.

III.

SUMMARY OF THE CASE

A. Statement of the Facts

The facts in this case are of public knowledge and cannot be subject to reasoned dispute. On November 4, 2008, the people of the State of California amended their Constitution by peacefully casting their ballots. The amendment added section 7.5 to Article I which reads in full: "Only marriage between a man and a woman is valid or recognized in California." The authority for the people to amend

the Constitution was derived from Article II, §§ 1, 8, 10 and Article XVIII, § 3 of the Constitution. On November 5, 2008, an extraordinary writ was filed seeking an immediate stay of the amendment and challenging whether the Constitution was lawfully amended or whether Article I, § 7.5 was an illegally enacted revision. General Brown filed no papers to protect the State from the stay. Despite that, on November 19, 2008, this Court ordered the Office of the Attorney General to show cause why the relief sought by the petitioner should not be granted. During the litigation, the Attorney General argued that Article I, § 7.5 (also known by its ballot designation as "Proposition 8" and the "Marriage Amendment") was unlawfully added to the Constitution because marriage is an "inalienable right." In a 6-1 decision, this Court rejected that argument and found that the people acted lawfully in amending their Constitution. Strauss v. Horton (2009) 46 Cal.4th 364.

On May 22, 2009, a lawsuit was filed in federal court challenging the Marriage Amendment based upon the Fourteenth Amendment to the U.S. Constitution. Governor Schwarzenegger and General Brown, as the chief law officer for the State of California, were named as defendants in their official capacities. Neither

provided a defense, forcing the proponents of Proposition 8 to intervene as defendants ("Intervenor/Defendants"). On August 12, 2010, the federal district court judge, Hon. Vaughn Walker, entered judgment against General Brown and all State defendants and denied a request for a stay pending the appeal. Perry v. Schwarzenegger ---- F.Supp.2d ----, 2010 WL 3170286 (N.D. CA Aug. 12, 2010)

General Brown has publically praised the decision on the website for the Office of the Attorney General, stating that it violates the U.S. Constitution. (See Exhibit 1 attached to the Brief filed in the Court of Appeal).

The Intervenor/Defendants filed a motion for a stay pending appeal. Both the Governor and General Brown actually opposed the motion. In his order denying the stay, Judge Walker indicated that only the Governor and Attorney General would have standing to appeal, and raised doubts that the Intervenor/Defendants have standing. In pertinent part, Judge Walker opined,

> Proponents chose not to brief the standing issue in connection with their motion to stay, and nothing in the record shows proponents face the kind of injury required for Article III standing. As it appears at least doubtful that proponents will be able to proceed with their appeal without a state defendant, it remains unclear whether the court of appeals will be able to reach the merits of proponents' appeal. In light of those concerns, proponents

> may have little choice but to attempt to convince either the Governor or the Attorney General to file an appeal to ensure appellate jurisdiction.
>
> Perry, *Id.*, at 3.

The Intervenor/Defendants immediately filed a notice of appeal. The Ninth Circuit has set an expedited briefing schedule. Importantly for purposes of the present matter before this Court, the Ninth Circuit ordered the Intervenor/Defendants to brief the issue of standing, stating,

> The previously established briefing schedule is vacated. The opening brief is now due September 17, 2010. The answering brief is due October 18, 2010. The reply brief is due November 1, 2010. In addition to any issues appellants wish to raise on appeal, appellants are directed to include in their opening brief a discussion of why this appeal should not be dismissed for lack of Article III standing. See Arizonans For Official English v. Arizona, 520 U.S. 43, 66, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997).
>
> Perry v. Schwarzenegger 2010 WL 3212786 C.A.9 (Cal.), 2010.

Governor Schwarzenegger and General Brown have not, and will not, file a notice of appeal. Absent the filing of a notice of appeal by a party having standing under Article III of the U.S. Constitution, the Ninth Circuit will be without jurisdiction to hear the appeal.

B. Procedural History and Court of Appeal Decision

A petition for an alternative writ of mandamus was filed on August 30, 2010. On September 1, 2010, the Court of Appeal summarily denied the petition. Although a petition for rehearing could have technically been filed, review in this Court has been sought because the Petitioner and People of this State will have no remedy after September 11, 2010. Hence, immediate review by this Court is critical.

There was no opinion issued by the appellate court.

IV.

SUMMARY OF THE ARGUMENT

The State's Attorney General has a clear and present duty of ensuring that a provision of the C lifornia Constitution receives a full and substantive review in court. That would include taking the minimal step of filing a notice of appeal under FRAP 3 so that the Ninth Circuit is not divested of jurisdiction. A fair reading of section 12512 of the Government Code, coupled with his oath of office and duties owed to his client as a member of the State's Bar would demand no less. Further, the language of Article III, §3.5, which prohibits agencies and their officers from declaring a statute as

unconstitutional or refusing to enforce it absent appellate review, provides a strong indication as to what the standard of conduct for the Attorney General should be.

V.

ARGUMENT

The petition filed in the Court of Appeal was straightforward: it requested that the Governor and Attorney General be compelled to perform their duties to defend the California Constitution. The refusal by the State's chief law enforcement officers to defend Article I, § 7.5 of the California Constitution threaten its survival and raises the fundamental question: can the executive branch constructively veto a duly enacted ballot initiative simply by refusing to defend it against a legal challenge? The future of California's unique initiative process demands that the question be answered in the negative.

A. Because the Petitioner satisfied all five elements for issuance of a writ against the Governor and Attorney General, the Appellate Court Committed Error by Not Issuing the Writ.

Pursuant to CCP §1085, a writ of mandate will lie to compel performance when:

(1) the respondent has a clear and present duty;

(2) said duty is usually ministerial in nature;

(3) the petitioner has a clear, present, and beneficial interest in the performance of that duty;

(4) the respondent has failed to perform the duty or has abused his, her, or its discretion in performing the duty; and,

(5) the petitioner has no other plain, speedy, and adequate remedy.

Riverside Sheriff's Ass'n v. County of Riverside (2003) 106 Cal.App.4th 1285, 1289.

Each of these elements is satisfied, as will be discussed below.

1. Defense of actions against the State is an affirmative, clear and present duty placed on the Governor and Attorney General.

a. Attorney General

The duties of the Attorney General are set forth in the Government Code. Government Code § 12512 states: "The Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity." It is beyond debate that said duty includes providing a defense of amendments to the California Constitution that

have been lawfully enacted by the people when a constitutional provision has been directly challenged in Court. To that end, General Brown must undertake at least the minimal procedural step of filing a notice of appeal in Perry to ensure that the Ninth Circuit does not lose jurisdiction. Refusing to do so will rob the people of this State of a full and fair opportunity to vindicate an amendment to their Constitution which they have enacted through peaceful and lawful means.

The Attorney General's duties are also prescribed in section 12511 of the Government Code which states in part: "The Attorney General has charge, as attorney, of all legal matters in which the State is interested...." Preventing what amounts to a default on appeal is a clear duty that General Brown has "as attorney" on a legal matter involving a challenge to a constitutional provision. Indeed, failing to file a timely notice of appeal falls significantly below the standard of care of an attorney. If such is true of lawyers in general, all the more so with the State's chief law official.

To be sure, the Attorney General is afforded wide latitude in exercising his discretion when it comes to *initiating* prosecutions or civil suits. See, e.g., People v. New Penn Mines, Inc. (1963) 212 Cal.

App. 2d 667. The reason is self-evident: the potential for initiating legal actions against criminals or other miscreants under state law is virtually infinite. By contrast, the number of suits filed against the State and, even more specifically, challenges to the validity of a voter-approved provision of the Constitution, are finite. Tasking the Attorney General with defending every challenge to the State and its laws is not a burden on his office – it is his primary job description.

Finally, it should also be noted that the Constitution does not countenance unilateral decisions by state agencies and their officers to declare a statute unconstitutional or refuse to enforce absent a decision by an appellate court. Article III, § 3.5 states in full as follows:

> § 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
> (b) To declare a statute unconstitutional;
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

If such is true of statutes, surely it is all the more true of a provision of the Constitution itself.

b. Governor

As to the Governor, it is proper that a writ also issue requiring the Governor to file a notice of appeal as well. Where a conflict exists between the Governor and Attorney General on the faithful execution of the law, under Article V, §§ 1 and 13 the Governor is the "supreme executive of the State." As per this principle, the Governor "retains the 'supreme executive power.'" The People ex rel. George Deukmejian, as Attorney General v. Edmund G, Brown, Jr., as Governor (1981) 29 Cal.3d 150, 157-158. Since both the Governor and the Attorney General refuse to file a notice of appeal, it is proper that the writ issue as to both executive officers in order to ensure that the voters of California are not disenfranchised. Otherwise, if the writ issues as only to the Attorney General, the Governor could, as the "supreme executive", direct General Brown not to file the notice of appeal. Under that scenario, another petition would have to be filed to bring the Governor into compliance with his constitutional duties.

2. Respondents' duty is ministerial in nature.

A "ministerial" act for which a writ of mandate could issue is,

> an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or

> opinion concerning such act's propriety or impropriety, when a given state of facts exists.

In re Stier (2007) 152 Cal.App.4th 63, 84 (quoting Kavanaugh v. West Sonoma Union High School District (2003) 29 Cal.App.4th 911, 916).

a. The executive branch is not permitted to pick and choose which laws it will defend.

General Brown is likely to argue that his purportedly principled belief that Article I, § 7.5 is at odds with other federal and state constitutional provisions entitles him to refuse to defend it. A similar argument was raised and rejected in Schmitz v. Younger (1978) 21 Cal. 3d 90. There, the Attorney General refused to issue a title and summary for a proposed ballot initiative, asserting his belief that the measure would be unconstitutional. The court found the Attorney General's stance untenable, declaring that he must fulfill his ministerial duty under state law to issue the title and summary, regardless of his personal feelings.

The same principles govern the present controversy. The Attorney General's duty under Section 12512 of the Government Code to defend the State is ministerial in that the statute offers no exceptions or discretion. Defense of the State and its laws, like

issuance of a ballot title and summary, cannot depend on the personal feelings of whomever happens to occupy the executive office at the time.

3. Petitioner has a clear and present beneficial interest in having a full and substantive review by the federal judiciary of Art. I, § 7.5.

Petitioner, and all voters of the State of California, will be disenfranchised if a full and meaningful review by the federal judiciary of the constitutionality of Article I, § 7.5 is denied. The people have a liberty interest, expressed in Article II, §§ 1, 8, 10 and Article XVIII, § 3 of the Constitution, to be able to peaceably amend their own Constitution. Petitioner and the people of the State will be profoundly and irreparably harmed absent relief from this Court if Article I, § 7.5 does not receive a full and meaningful review in the federal appellate courts.

An exercise of lawful authority by one branch of government cannot be made to require the consent of another branch before it is valid. People v. Mikhail (1993) 13 Cal. App. 4th 846. In other words, the people's "precious right" to amend the State Constitution by ballot measure (Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal.3d 245, 250) cannot be dependent on the

caprice of the executive branch in choosing whether to defend it or not. It is a maxim that the ability to amend the Constitution through the initiative power is "one of the most precious rights of our democratic process." Jensen v. Franchise Tax Bd. (2009) 178 Cal.App.4th 426, 440. But, if the duties of the Attorney General were ambiguous relative to defending a provision of the State's Constitution enacted by the people, every voter-approved initiative could be defeated after the fact by one disgruntled plaintiff plus an apathetic or antagonistic Governor and Attorney General. Surely, the entire initiative process cannot rest on so flimsy a foundation.

Citing with approval a federal court, the California Supreme Court found that it is "incongruous for an attorney general, purporting to act for the people, to mount 'an attack by the State upon the validity of an enactment of its own legislature." People ex rel. Deukmejian v. Brown (1981) 29 Cal. 3d 150, 158. Undoubtedly, if this is a true proposition within the context of a statue, it is all the more true when the Constitution has been amended by a direct vote of the people.

The present refusal to file an appeal in Perry will work as a constructive veto of a provision of the Constitution which the people have enacted. This would be a usurpation of power by the executive

branch. It is a grievous direct harm to the people of California and will plunge the State into a constitutional crisis. The judiciary is the only entity which can thwart this.

4. The Attorney General has failed to perform a duty mandated by law or has abused his discretion in performing the duty.

The Governor and Attorney General have refused to defend Article I, § 7.5 of the State Constitution. There is no factual dispute as to the positions taken by Governor Schwarzenegger and General Brown against Article I, § 7.5. (See Exhibits 1 and 2 of the Brief filed in the Court of Appeal. The statement reiterates the Attorney General's unequivocal "refusal to defend" Article I, § 7.5. Absent issuance of the writ, the Governor and Attorney General will not appeal the decision adverse to the people of California. "To be entitled to relief...of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice...." (California Teachers Assn. v. Governing Board (1987) 195 Cal.App.3d 285, 300 quoting Brown v. Newby (1940) 39 Cal.App.2d 615, 618)

By refusing to perform the minimal acts necessary to ensure jurisdiction in the Ninth Circuit, Governor Schwarzenegger and

General Brown are engaging in what amounts to a constructive pocket veto of a constitutional amendment. That is an extraordinary act which does violence to the State's constitutional form of government. It is taking on a power which violates the social contract between the people and the governed, memorialized in the Constitution. Hence, the failure to take the *de minimis* yet procedurally crucial step to allow the people to have a provision of their Constitution afforded a fair and substantive review by the federal courts of appeal is "sufficiently grave to amount to a manifest miscarriage of justice." *Id.* In view of that, the Governor's and Attorney General's constructive veto of a constitutional amendment is a clear abuse of discretion.

5. Petitioner has no other plain, speedy, and adequate remedy.

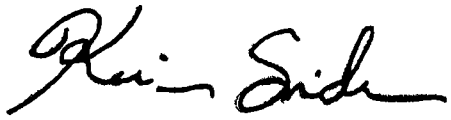
The judgment in Perry was entered on August 12, 2010. Pursuant to FRAP 4, a notice of appeal must be filed within 30 days. Hence, the last day to file a notice of appeal is September 11, 2010. Absent immediate relief from this Court, there is no adequate, speedy or plain remedy available to the Petitioner. Indeed, without decisive action by this Court, the damage to the people of California will be catastrophic and irreversible.

CONCLUSION

It is a matter of speculation as to whether the Ninth Circuit or U.S. Supreme Court will find that the Intervenor/Defendants have standing or whether Imperial County will be successful in the appeal of the denial of the motion to intervene. Time is a luxury that the people of California do not have. By the time that a decision by the Ninth Circuit is reached in December, the clock will have run out for the Governor and Attorney General to file a notice of appeal. It would be irresponsible for California's judiciary to bet the republic on something so uncertain as a decision from the Ninth Circuit on an unsettled area of law involving Article III standing.

In light of the weighty implications for the future of representative democracy, the denial of the Petition by the Court of Appeal should be reversed and a writ of mandamus issued. Surely the people of this State deserve better than to be denied a full and fair appellate review of the laws that they have directly enacted.

Dated: September 3, 2010



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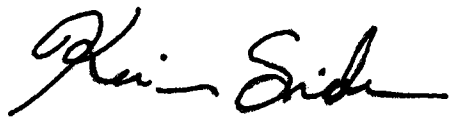
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Petition for Review is produced using 13-point or greater Roman type, including footnotes, and contains 3,486 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: September 3, 2010



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COURT ORDER

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

FILED

SEP - 1 2010

COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT, Clerk
BY _____ Deputy

JOSHUA BECKLEY,
Petitioner,
v.
ARNOLD ALOIS SCHWARZENEGGER, as Governor, etc. et al.,
Respondents;
KRISTIN M. PERRY et al.,
Real Parties in Interest.

C065920
San Francisco County
No. 3:09-CV-2292

BY THE COURT:

The petition for writ of mandamus is denied.

Dated: September 1, 2010

SCOTLAND, P.J.

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cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

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San Francisco County No. 3:09-CV-2292

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I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

On 09/03/2010 declarant served the within: Petition for Review

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I declare under penalty of perjury that the foregoing is true and correct:

Signature: Stephen Moore

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**Admitted pro hac vice*

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County of Los Angeles)
)

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I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

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Perry, et al v. Brown, et al
Case No. S189476

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