PACIFIC LEGAL FOUNDATION

January 21, 2011

Supreme Court Copy

Chief Justice Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger (Hollingsworth)*, No. S189476

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Ward Connerly, Glynn Custred, Ron Unz, the Howard Jarvis Taxpayers Association, and the Pacific Legal Foundation (PLF) file this letter brief as Amici Curiae pursuant to Rule 8.548(e)(1) of the California Rules of Court. PLF respectfully requests that this Court grant the request of the Ninth Circuit Court of Appeals, filed on January 4, 2011, to decide the certified issue of whether the official proponents of a ballot measure have standing to defend that measure's validity when the public officials charged with enforcing the measure fail or refuse to do so.

IDENTITY AND INTEREST OF AMICI CURIAE

Ward Connerly is the founder and president of the American Civil Rights Institute. Mr. Connerly was chairman of the California Civil Rights Initiative campaign and chief sponsor of Proposition 209, adopted by the California electorate in 1996 as Article I, Section 31, of the California Constitution. The purpose of Proposition 209 is to eliminate all race- and sex-based discrimination and preferences at all levels of state government in the areas of public contracting, employment, and education. As a sponsor of Section 31, Mr. Connerly has had a particular interest in averting the potential nullification of the constitutional amendment he helped to enact. Mr. Connerly was a member of Californians Against Discrimination and Preferences (CADP), which was formed by the coauthors, sponsors, and supporters of Proposition 209. Because of the frequent refusal of various local and state officials to abide by Proposition 209's mandates, Mr. Connerly in his individual capacity and through the American Civil Rights Foundation has regularly been required to sue government officials and agencies, and to intervene to defend Proposition 209. Thus, Mr. Connerly has a keen interest in the issue of whether ballot sponsors have standing to support and defend their measures.

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Glynn Custred was one of the authors and principal sponsors of Proposition 209, as well as a member of CADP. He, along with Mr. Connerly, has been compelled to defend Proposition 209 in court, as well as to seek its enforcement because of governmental intransigence. Thus, Mr. Custred has a keen interest in the issue of whether ballot sponsors have standing to support and defend their measures.

Ron Unz was the author and co-proponent of Proposition 227, the "English for the Children" initiative, adopted by the California electorate in 1998. Proposition 227 dismantled California's public school bilingual education programs, which taught limited English proficient students in their native language. Proposition 227 replaced bilingual education with a system of sheltered English immersion. Mr. Unz was required to defend his initiative in court against a constitutional challenge and therefore has a keen interest in the issue of whether ballot sponsors have standing to support and defend their measures.

In 1978, the Howard Jarvis Taxpayers Association (HJTA) was founded by Howard Jarvis shortly after the California electorate approved Proposition 13, which limited the power of local governments to impose exorbitant property taxes on their citizens. Since that time, HJTA has repeatedly sponsored and supported successful ballot initiatives, including, in 1986, Proposition 62, which provides that general taxes must receive a majority vote from local voters to be effective, and, in 1996, Proposition 218, which requires local governments to obtain voter approval to impose various fees and assessments. HJTA has regularly been required to sue government officials and agencies to enforce these measures, as well as to intervene to defend Proposition 13's and Proposition 62's constitutionality. Thus, HJTA has a keen interest in the issue of whether ballot sponsors have standing to support and defend their measures.

Pacific Legal Foundation (PLF) is the nation's oldest and most successful public interest legal foundation that fights for the principles of private property rights, limited government, free enterprise, and equal treatment by government of all people regardless of their race or ethnicity. Over the years, PLF attorneys have regularly represented ballot measure sponsors as plaintiffs and as defendant-intervenors to enforce and to defend those measures, such as Proposition 209 and Proposition 140, imposing state term limits. PLF therefore has a keen interest in the issue of whether ballot sponsors have standing to support and defend their measures.

ARGUMENT

California Rule of Court 8.548(a) authorizes this Court to accept a certified question of California law from a court of another jurisdiction if the decision could determine the proceeding in that court and if there is no controlling California precedent. Below, Amici demonstrate, through their own

experiences, that this Court should accept the Ninth Circuit's certified question because the issue is one of central importance to the operation of California's initiative system.

I

THE CERTIFIED QUESTION SHOULD BE ACCEPTED

A. The Initiative Process Is an Important Component of California Democracy

Sometimes referred to as the "fourth branch of government," the initiative process complements the representative system "by bringing government closer to the people and making legislatures more accountable." Jodi Miller, *"Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 Ann. Surv. Am. L. 1, 6-7. This exercise of direct democracy enables ordinary citizens to propose a law or constitutional amendment and have it be enacted without involving the Legislature. Yet "[p]olls consistently demonstrate that citizens like the initiative process and trust its outcomes more than they trust legislation enacted by their representatives." Elizabeth Garrett & Matthew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. Cal. L. Rev. 299, 310 (2007). The use of the initiative process has surged in recent decades. John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 Colum. L. Rev. 1437, 1438 n.5 (2007) (between 1990 and November 2006, 680 initiatives appeared on state ballots). For the first 90 years of the California initiative process (1912-2002), about 34% of the measures passed. *See* History of California Initiatives, at 9, *available at* http://www.sos.ca.gov/elections/ballot-measures/resources-and-historical-information.htm (last visited Jan. 20, 2011).

This Court has long acknowledged the importance of the initiative process to California democracy.

> 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 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.

Fair Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 41 (1979) (citations and quotation marks omitted). *See, e.g., Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1142, 1157 (1999) ("[T]he initiative process occupies an important and favored status in the California constitutional scheme."); *Raven v. Deukmejian*, 52 Cal. 3d 336, 341 (1990) ("[I]t is [the courts'] solemn duty jealously to guard the sovereign people's initiative power, it being one of the most precious rights of our democratic process.") (quotation marks omitted); *AFL v. Eu*, 36 Cal. 3d 687, 722 (1984) ("[Courts must] resolve all doubts in favor of the exercise of the initiative power, especially where the subject matter of the measure is of public interest and concern."). As the foregoing underscores, this Court has repeatedly proclaimed the great importance of the initiative system to California's democracy.

B. The Ability of Initiative Sponsors To Defend Their Measures Is Critical To Vindicating the Power of the Initiative Process

The question of whether the sponsors of initiatives can defend their measures in court, and in so doing, vindicate "one of the most precious rights of our democratic process," is of high interest and importance to all Californians, particularly to Amici. Government officials regularly have failed faithfully to execute initiatives, or to defend them adequately, when challenged by those initiative opponents who were defeated in the election. "[W]hen state officials block initiatives by surreptitiously undermining them, they follow their own preferences rather than those of the voters, and they do so in ways designed to reduce accountability." Garrett & McCubbins, *supra*, at 309. That dynamic should not be surprising; after all, initiatives are enacted because the mainstream political process has become unresponsive to the popular will. K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 Temp. L. Rev. 821, 833 (2006). Thus, the ability of initiative sponsors to defend their measures is important to maintaining a healthy faith in the fairness of the political system. Further, the frequency with which ballot sponsors must resort to the courts just to enforce their measures is also relevant to the certified question here, because it evidences how state officials cannot be relied on to defend measures which they would not willingly enforce. The experience of Amici in enforcing and defending their measures supports these points.

For example, because of the California Attorney General's refusal to enforce Proposition 209, Mr. Connerly and ACRF have had to take it upon themselves to ensure that all levels of California government abide by the state constitution's colorblind command. *See Connerly v. Schwarzenegger*, 146 Cal. App. 4th 739 (2007) (challenging an attempt by the California Legislature to redefine the terms of Section 31); *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001) (successfully challenging several state statutes as violating Section 31). *See also American Civil Rights Foundation v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (2009) (challenging a school assignment plan as violating Section 31); *American Civil Rights Foundation v. Los Angeles Unified Sch. Dist.*, 169 Cal. App. 4th 436 (2008) (whether a desegregation order meets an exception of

Section 31); *American Civil Rights Foundation v. City of Oakland*, No. RG07334277 (Alameda County Super. Ct. filed July 6, 2007) (challenging the constitutionality of Oakland's Airport Concession Disadvantaged Business Enterprise Program on the grounds that it violates Section 31). Messrs. Connerly and Custred, through Proposition 209's sponsorship committee, intervened permissively to defend their measure against legal attack when some of the government defendants in fact agreed with the plaintiffs that Proposition 209 was illegal. *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir. 1997) (challenge to federal constitutionality of Proposition 209). Recently, Mr. Connerly and the American Civil Rights Foundation intervened to defend Proposition 209 in another federal challenge where, to this point at least, the state defendants have refused to defend Proposition 209 on the merits. *See Coalition to Defend Affirmative Action v. Brown*, Doc. No. 3:10-CV-00641-SC (N.D. Cal.), *appeal filed*, Doc. No. 11-15100 (9th Cir.).

Mr. Unz's experience has been similar. In *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1011 n.3 (N.D. Cal. 1998), *aff'd*, *Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002), Mr. Unz's organization One Nation/One California successfully intervened to defend Proposition 227 against a federal statutory and constitutional challenge.

The same is true of HJTA. In *Santa Clara County Local Transportation Authority v. Guardino*, 11 Cal. 4th 220 (1995), HJTA appealed as the real party in interest successfully to defend Proposition 62 against a local government's constitutional attack, *see id.* at 239-61. In *Young v. Schmidt*, Los Angeles County Sup. Ct. Case No. BC422770, a case filed last year and still in litigation, HJTA intervened to defend Proposition 13 against the charge that its requirement of a two-thirds vote of each legislative house to impose or increase state taxes is unconstitutional. HJTA has also been at the forefront in enforcing its sponsored propositions against recalcitrant government agencies and officials. *See, e.g.*, *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 25 Cal. 4th 809 (2001) (challenge to city's utility tax under Proposition 62); *Howard Jarvis Taxpayers Ass'n v. City of Fresno*, 127 Cal. App. 4th 914 (2005) (challenge to city's utility fee under Proposition 218); *Howard Jarvis Taxpayers Ass'n v. County of Orange*, 110 Cal. App. 4th 1375 (2003) (challenge to city's excess taxes for retirement benefits under Proposition 13); *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, 98 Cal. App. 4th 1351 (2002) (challenge to city's utility fee under Proposition 218); *Howard Jarvis Taxpayers Ass'n v. State Bd. of Equalization*, 20 Cal. App. 4th 1598 (1993) (challenge to county's ad valorem taxes under Proposition 13).

And, PLF's experience is no different. PLF attorneys have been called upon to enforce and defend ballot measures, oftentimes on behalf of those measures' sponsors. *See, e.g.*, *Coral Constr., Inc. v. City & County of San Francisco*, 50 Cal. 4th 315 (2010) (representing plaintiff in decision holding that Proposition 209 does not conflict with federal law); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) (representing plaintiff challenging a city's minority and woman

owned public contracting program as violating Proposition 209); *C&C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284 (2004) (same); *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002) (representing plaintiff in challenging a school district's race-conscious open-transfer policy and state statute as violating Proposition 209); *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001) (representing plaintiff in challenging state laws as violating Proposition 209 and the Federal Constitution); *Coalition to Defend Affirmative Action v. Schwarzenegger*, Doc. No. 3:10-CV-00641-SC (N.D. Cal) (representing Mr. Connerly and ACRF to defend Proposition 209 against federal challenge); *Coal. for Econ. Equity*, 946 F. Supp. 1480 (representing CADP against federal challenge to Proposition 209), *vacated*, 122 F.3d 692; *Legislature v. Eu*, 54 Cal. 3d 492 (1991) (representing sponsors of Proposition 140 to defend initiative against constitutional challenge).

CONCLUSION

Both the nature of the initiative process, as well as the case law interpreting and applying it, underscore that all too often initiatives can only be effectively enforced and defended because of their sponsors; it is not enough to rely upon government officials. Consequently, the right of initiative sponsors to defend their measures in court is of paramount importance to the vindication of the initiative power, which this Court has recognized as "one of the most precious rights of our democratic process." *Raven*, 52 Cal. 3d at 341. Amici urge the Court to accept the certified question from the Ninth Circuit.

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3900 Lennane Drive, Suite 200, Sacramento, California 95834.

On January 21, 2011, true copies of LETTER BRIEF OF AMICI CURIAE WARD CONNERLY, GLYNN CUSTRED, RON UNZ, THE HOWARD JARVIS TAXPAYERS ASSOCIATION, AND THE PACIFIC LEGAL FOUNDATION TO GRANT THE NINTH CIRCUIT'S REQUEST TO DECIDE THE CERTIFIED ISSUE were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 21st day of January, 2011, at Sacramento, California.

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