

No. S189476

IN THE SUPREME COURT OF CALIFORNIA

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

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

v.

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

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

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

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

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
REPLY TO <i>AMICUS CURIAE</i> BRIEFS.....	1
CONCLUSION	6

TABLE OF AUTHORITIES

CASES

Citizens for Jobs & the Economy v. County of Orange
(2002) 94 Cal.App.4th 1311 4

Reycraft v. Lee
(2009) 177 Cal.App.4th 1211 5

W. Watersheds Project v. Kraayenbrink
(9th Cir. 2011) 632 F.3d 472 4

STATUTES

Code Civ. Proc., § 902.1 5

CONSTITUTIONAL PROVISIONS

Cal. Const. art. V, § 13 3

U.S. Const. art. III 3, 4, 5

REPLY TO *AMICUS CURIAE* BRIEFS

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

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

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

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

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

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

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

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

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

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

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

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* * *

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

CONCLUSION

The Court should answer the Certified Question in the negative.

DATED: May 9, 2011

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[Footnote continued from previous page]

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

CERTIFICATION OF WORD COUNT

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

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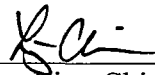
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