NO. 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.
EDMUND 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 the Certified Questions of California Law

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF DEFENDANTS-INTERVENORS

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Identity and Interest of Amicus Curiae

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation which promotes transparency, accountability and integrity in government, politics and the law. Through its educational endeavors, Judicial Watch advocates high standards of ethics and morality in our nation's public life and seeks to ensure that political and judicial officials do not abuse the powers entrusted to them by the American people. The motto of Judicial Watch is "Because no one is above the law." The issue presented in this case is whether the official proponents of a successful initiative ballot have the authority to defend the constitutionality of an initiative upon its adoption or appeal a judgment invalidating the initiative when the public officials charged with that duty refuse to do so. This issue goes to the core of Judicial Watch's mission. At stake in this case is the ability of California's public officials to thwart the will of the people of California, as expressed through the initiative process, by failing to defend an initiative in court when it is challenged. If this Court finds that the proponents of an initiative have no such recourse when elected officials fail to defend an initiative in court, California's political officials will be given a clear opening to abuse the powers entrusted to them by the people of California in a manner that is not transparent and not accountable.

Introduction

This Court must hold that Defendants-Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com ("Proponents") have standing to defend the constitutionality of Proposition 8 in court, because no California government official who ordinarily would defend the law's constitutionality was willing to do so. The very point of the initiative process is to give the people the opportunity to pass laws that their elected representatives are not willing to pass. If there were no contradiction between what the people of California desire and what their elected representatives are willing to pass, then there would be no initiative process in the first place. If the Proponents of an initiative do not have standing to defend in court the constitutionality of an initiative that the elected and appointed officials of California refuse to defend, the basic premise of the initiative in California is fundamentally undermined.

Argument

A. Refusing to Grant Proponents Standing to Defend Initiatives Which the Attorney General Does Not Defend in Court Would Undermine the Initiative Process.

The initiative movement was conceived specifically to give power to the people's choices when their elected government officials are inclined to

ignore them. "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." (*Strauss v. Horton* (2009) 46 Cal. 4th 364, 420, *quoting Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 591.) The impetus for direct democracy in California came from the belief that trusting in the legislature to carry out the will of the people was not enough. "The progressive movement, both in California and in other states, grew out of a widespread belief that 'moneyed special interest groups controlled government, and that the people had no ability to break this control.'" (*Strauss*, 46 Cal. 4th at 420.) "The initiative was viewed as one means of restoring the people's rightful control over their government, by providing a method that would permit the people to propose and adopt statutory provisions and constitutional amendments." (*Id.*) Initiatives therefore take precedence over laws passed by the legislature and cannot be overruled by the Governor or the Attorney General or repealed or amended by the legislature. (*See* Cal. Const., art. II, § 10.)

Because the initiative process was designed precisely to allow the people to step in when their elected legislators failed to follow their wishes, courts must be particularly careful to protect the right of the people to pass initiatives when elected officials seek to nullify them. The courts have

repeatedly declared it is their duty to "jealously guard this right of the people" and that it has "long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right be not improperly annulled." (*Building Industry Assn. of Southern California, Inc. v. City of Camarillo* (1986) 41 Cal. 3d 810, 821.) (*See also*, *Associated Home Builders* 18 Cal. 3d at 591; *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal. 4th 1020, 1032; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal. 3d 476, 479.) Thus, in most instances, the trial court "should allow intervention by proponents of the initiative." (*Building Industry* 41 Cal. 3d at 822.) In circumstances where there is "underlying opposition to the ordinance," only the availability of intervention can ensure the defense will be carried out "with vigor." (*Id.*) When the state's elected officials refuse to defend an initiative entirely, the Court's duty to allow proponents of the initiative to intervene is even more clear.

B. Plaintiffs' Arguments that the Rights of State Officials Supersede Those of the People Do Not Accurately Reflect the Rights of Californians.

Rather than trying to demonstrate that the initiative process does not require the proponents of an initiative to be granted standing if state officials refuse to defend an initiative in court, Plaintiffs argue that the prerogatives of the Governor and Attorney General are paramount.

Plaintiffs' position ignores the fact that the rights of the people of California are paramount, not the rights of the state apparatus.

Under the California Constitution, "[a]ll political power is inherent in the people. Government is instituted for their protection, security and benefit." (Cal. Const., art. II, § 1). "[A]ll power of government ultimately resides in the people, the amendment [to the California Constitution in 1911] speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them." (*Associated Home Builders*, 18 Cal. 3d at 591.) California goes farther than any other state to protect the people's power of initiative: "[n]o other state in the nation carries the concept of initiatives as 'written in stone' to such lengths...." (*People v. Kelley* (2010) 47 Cal. 4th 1008, 1030.) The prerogatives of the Governor and the Attorney General cannot trump the rights of the people to participate in their governance.

None of Plaintiffs' arguments challenge the fact that denying standing to initiative proponents in such circumstances would mean denying the people of California this power which they have as a right. Plaintiffs' contention that "the People's veto of the Executive Branch's litigation decisions is properly exercised at the ballot box—by voting out of office state officials who decline to defend an initiative"—misses the point of the initiative process, which is to give voice to the people on specific

issues through more direct means than simply the opportunity to vote obstructionist state officials out of office at the end of their terms. (Plaintiffs-Respondents' Answering Brief at 13). Aside from the obvious shortcoming of this solution, namely, that the elected officials' terms will probably not expire at a moment precisely timed to allow voters to save an initiative from being abandoned in court, elections for statewide office often do not turn on a single issue.

In an election, voters do not have the luxury of choosing a candidate who will agree with them on every issue: they must choose from a very limited selection of candidates the one who they believe will agree with them the most often. The inherent limitations of this process mean that, even in the best of circumstances, there may well be specific issues on which a majority of Californians disagree with the position of the winning candidates for governor or attorney general. One of the virtues of direct democracy is that it allows the people to transcend this limitation of representative government and express their will on single issues. Proposition 8 was such an issue.

Allowing the Governor and the Attorney General unbridled power to prevent any defense of an initiative that has been challenged in court does indeed nullify the advantages of the initiative process. By attacking not only the constitutionality of Proposition 8, but also the standing of its

proponents to defend the initiative when Plaintiffs' chosen defendants will not, Plaintiffs also attack the initiative process itself, try as they might to seem as though they are not. Plaintiffs may believe that a system with no initiative process would be preferable, and they are entitled to devote themselves to fighting for a different system. However, Plaintiffs are in the wrong forum to seek this reform: the Court's function is not to overturn the initiative process.

Plaintiffs give some support to the notion that allowing proponents to defend Proposition 8 is appropriate by stating with approval that proponents "had their day in court" with a "full and fair trial on the merits." (Plaintiff-Respondents' Answering Brief at 14). But to presuppose the fullness and fairness of a trial simply assumes away the very need for an appeal. Plaintiffs point out that, under federal law at least, the right to a trial has been given more constitutional protection than the right to an appeal. (*Id.*) However, Plaintiffs have offered no reason why, under these circumstances, Proponents should have standing to defend the law for the duration of a trial but should lose it as soon as the trial judge's ruling is subject to review for legal errors. The circumstance of a law passed by the people being declared unconstitutional by a court does not seem like a prime candidate for more deference to the trial court than is usual in our judicial system, which generally allows for appellate review. When the

judgment of the trial court results in overturning a law that applies to the whole state of California rather than just to the parties in the case, the desirability of appellate review is even greater.

C. Proponents Have a Particularized Interest in Defending the Initiative They Sponsored.

Plaintiffs' claim that, under California law, "the interests of initiative proponents in the constitutionality of an already-enacted initiative are not materially different from those of any other California who supported the measure" is false. (Brief of Plaintiff-Respondents at 21). Under California law, a real party in interest has a "special interest to be served or some particular right to be protected over and above the interest held in common with the public at large." *Connerly v. State Personnel Board* (2006) 37 Cal. 4th 1169, 1178. Plaintiffs' claims imply that proponents have such an interest only in the "pre-enactment setting." (Brief of Plaintiff-Respondents at 23). However, the interest that the proponents have in the pre-enactment setting does not disappear once an initiative has been successful in becoming law. Plaintiffs falsely suggest this interest disappears because the Attorney General and the Governor now have an interest in defending the initiative as well. Plaintiffs argue as if there can be only one real party in interest—the State. However, there are many cases where there "may be more than one real party in interest." *Municipal Court v. Bloodgood* (1982) 137 Cal. App. 3d 29, 44. If anything, the interest Proponents had at the pre-

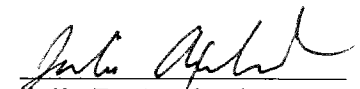
enactment stage has only become stronger: their possibility of passing their initiative by a majority of the voters became a certainty, and so their desire to defend the law should become even stronger than before.

Conclusion

For the reasons stated above, the Court should hold that the official proponents of an initiative measure may defend the constitutionality of an initiative upon its adoption or may appeal a judgment invalidating the initiative when the public officials charged with carrying out these duties fail or refuse to do so.

May 2, 2011

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 8.204 and 8.520(c)

Pursuant to Rule 8.204 and 8.520(c), I certify that the attached brief was prepared on a computer using Microsoft Word, and that, according to the program, contains 1958 words.

May 2, 2011

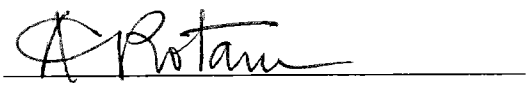
Julie B. Axelrod

PROOF OF SERVICE

I, Cristina Rotaru, declare that I am over the age of eighteen and am not a party to this action. My business address is 425 Third Street, SW, Suite 800, Washington, D.C. 20024. On May 2, 20011, I served Brief of *Amicus Curiae* Judicial Watch, Inc. in Support of Defendants-Intervenors on the interested parties in this action in the manner indicated below:

X By Mail: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail in Washington, D.C. (as indicated on the Service List).

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on May 2, 2011, in Washington, D.C.



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