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

DAVID BOIES*
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

JEREMY M. GOLDMAN, SBN 218888
THEODORE H. UNO, SBN 248603
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
(510) 874-1000

* *Pro hac vice*

THEODORE B. OLSON, SBN 38137
Counsel of Record
MATTHEW D. MCGILL*
AMIR C. TAYRANI, SBN 229609
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

THEODORE J. BOUTROUS, JR., SBN 132099
CHRISTOPHER D. DUSSEAULT, SBN 177557
ENRIQUE A. MONAGAS, SBN 239087
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Attorneys for Plaintiffs and Respondents
Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

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

DAVID BOIES*
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

JEREMY M. GOLDMAN, SBN 218888
THEODORE H. UNO, SBN 248603
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
(510) 874-1000

* *Pro hac vice*

THEODORE B. OLSON, SBN 38137
Counsel of Record
MATTHEW D. MCGILL*
AMIR C. TAYRANI, SBN 229609
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

THEODORE J. BOUTROUS, JR., SBN 132099
CHRISTOPHER D. DUSSEAULT, SBN 177557
ENRIQUE A. MONAGAS, SBN 239087
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Attorneys for Plaintiffs and Respondents
Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

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

[Footnote continued on next page]

* * *

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

GIBSON, DUNN & CRUTCHER LLP

By: Theodore B. Olson /sc
THEODORE B. OLSON

Attorneys for Plaintiffs and Respondents
KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, AND JEFFREY J. ZARRILLO

[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.

By: Theodore B. Olson / kc
THEODORE B. OLSON

Attorneys for Plaintiffs and Respondents
KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, AND JEFFREY J. ZARRILLO

CERTIFICATE OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of San Francisco. My business address is 555 Mission Street, Suite 3000, San Francisco, California 94105. On May 9, 2011, I caused to be served the following documents:

PLAINTIFFS-RESPONDENTS' REPLY TO *AMICUS CURIAE* BRIEFS

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown, in the following manner:

SEE SERVICE LIST BELOW

☑ **BY MAIL**: I placed a true copy in a sealed envelope for deposit in the U.S. Postal Service through the regular mail collection process at Gibson, Dunn & Crutcher LLP on the date indicated above. I am familiar with the firm's practice for collection and processing of correspondence for mailing with the U.S. Postal Service. It is deposited with the U.S. Postal Service with postage prepaid on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if the postal cancellation date or the postage meter date is more than one day after the date of deposit for mailing in the declaration.

☑ **BY EMAIL**: By agreement of the parties, a copy was emailed to the email addresses listed below.

Counsel	**Attorneys For**
Charles J. Cooper David H. Thompson Howard C. Nielson, Jr. Peter A. Patterson Cooper & Kirk, PLLC 1523 New Hampshire Avenue, N.W. Washington, DC 20036 ccooper@cooperkirk.com dthompson@cooperkirk.com	Attorneys for Defendants-Intervenors-Appellants
Andrew P. Pugno Law Offices of Andrew P. Pugno 101 Parkshore Drive, Suite 100 Folsom, CA 95630 andrew@pugnolaw.com	Attorneys for Defendants-Intervenors-Appellants

Brian W. Raum James A. Campbell Alliance Defense Fund 15100 North 90th Street Scottsdale, AZ 85260 braum@telladf.org jcampbell@telladf.org	Attorneys for Defendants-Intervenors-Appellants
Terry L. Thompson Law Office of Terry L. Thompson P.O. Box 1346 Alamo, CA 94507 tl_thompson@earthlink.net	Attorneys for Defendant-Intervenor Hak-Shing William Tam
Dennis J. Herrera Therese Stewart Christine Van Aken San Francisco City Attorney's Office City Hall 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94102-4682 therese.stewart@sfgov.org christine.van.aken@sfgov.org	Attorneys for Plaintiff-Intervenor-Appellee City and County of San Francisco
Tamar Pachter Daniel Powell Deputy Attorney General California Department of Justice 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102 tamar.pachter@doj.ca.gov	Attorneys for Defendant Edmund G. Brown, Jr., in his official capacity as Attorney General of California
Kenneth C. Mennemeier, Jr Andrew W. Stroud Mennemeier, Glassman & Stroud LLP 980 9th Street, Suite 1700 Sacramento, CA 95814 kcm@mgslaw.com stroud@mgslaw.com	Attorneys for Defendants Arnold Schwarzenegger, in his official capacity as Governor of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; and Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health (the "Administration Defendants")

Claude Franklin Kolm Office of County Counsel 1221 Oak Street, Suite 450 Oakland, CA 94612-4296 claude.kolm@acgov.org	Attorneys for Defendant Patrick O'Connell, in his official capacity as Clerk-Recorder for the County of Alameda
Judy W. Whitehurst Principal Deputy County Counsel Los Angeles County Counsel 648 Kenneth Hahn Hall of Administration 500 West Temple Street, 6th Floor Los Angeles, CA 90012-2713 jwhitehurst@counsel.lacounty.gov	Attorneys for Defendant Dean C. Logan, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles
Office of the Governor Attn: Legal Department State Capitol Building Sacramento, CA 95814 (VIA U.S. MAIL ONLY)	Attorneys for the Governor Edmund G. Brown, Jr.
Office of the Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004 (VIA U.S. MAIL ONLY)	Attorneys for the Attorney General Kamala D. Harris
Ms. Molly C. Dwyer Clerk of the Court United States Court of Appeals for the Ninth Circuit James Browning Courthouse 95 7th Street San Francisco, CA 94103 (VIA ECF ONLY)	United States Court of Appeals for the Ninth Circuit
Harold Johnson Damien M. Schiff Pacific Legal Foundation 3900 Lennane Drive, Suite 200 Sacramento, CA 95834 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae Pacific Legal Foundation, et al.

Cynthia Tobisman Greines Martin Stein & Richland, LLP 5900 Wilshire Boulevard, 12th Floor Los Angeles, CA 90036 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae League of Women Voters of California
Eric A. Isaacson Coughlin Stoia et al. LLP 655 W. Broadway, Suite 1900 San Diego, CA 92101 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae California Faith for Equality, et al.
Miguel A. Marquez Office of the County Counsel 70 W. Hedding Street San Jose, CA 95110 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae County of Santa Clara, et al.
James J. Lynch Attorney at Law P.O. Box 4144 Sacramento, CA 95821-8802 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae Margie Reilly
Laura W. Brill Kendall Brill & Klieger, LLP 10100 Santa Monica Boulevard, Suite 1725 Los Angeles, CA 90067 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae Jon Eisenberg and Laurie Levenson
David C. Codell Caldwell Leslie & Proctor, PC 1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae Equality California, National Center for Lesbian Rights and Lambda Legal Defense and Education Fund, Inc.
Jon W. Davidson Lambda Legal Defense & Education Fund, Inc. 3325 Wilshire Boulevard, Suite 1300 Los Angeles, CA 90010 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae Equality California, National Center for Lesbian Rights and Lambda Legal Defense and Education Fund, Inc.

Shannon P. Minter National Center for Lesbian Rights 870 Market Street, Suite 370 San Francisco, CA 94102 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae Equality California, National Center for Lesbian Rights and Lambda Legal Defense and Education Fund, Inc.
Julie B. Axelrod Judicial Watch, Inc. 425 Third Street, SW, Suite 800 Washington, DC 20024 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae Judicial Watch, Inc.
Kevin T. Snider Pacific Justice Institute 212 Ninth Street, Suite 208 Oakland, CA 94607 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae Joshua Beckley
John C. Eastman Center for Constitutional Jurisprudence c/o Chapman University School of Law One University Drive Orange, CA 92866 (VIA U.S. MAIL ONLY)	Attorneys for Amicus Curiae Center for Constitutional Jurisprudence

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Certificate of Service was executed by me on May 9, 2011, at San Francisco, California.

Ling Chiou