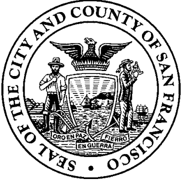
CITY AND COUNTY OF SAN FRANCISCO



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May 13, 2011

Ms. Molly C. Dwyer
Clerk of the Court
United States Court of Appeals for the Ninth Circuit
James R. Browning U.S. Courthouse
San Francisco, CA 94119-3939

Re: *Perry v. Brown*, No. 10-16696 (9th Cir.)

Dear Ms. Dwyer:

Please find attached courtesy copies of amicus curiae briefs of the League of Women Voters of California and the County of Santa Clara, et al., filed in the Supreme Court of California, Case No. S189476.

Very truly yours,

DENNIS J. HERRERA
City Attorney

/s/*Mollie Lee*

Mollie Lee
Deputy City Attorney

Enclosures

cc: All counsel via ECF

No. S189476

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KRISTIN M. PERRY, et al., *Plaintiffs and Appellants,*
v.
EDMUND G. BROWN, JR., as Governor, etc. et al., Defendants,
DENNIS HOLLINGSWORTH, et al., Defendants-Interveners-Appellants.

APPLICATION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS AND PROPOSED *AMICI CURIAE* BRIEF OF COUNTY OF SANTA CLARA; COUNTY OF SANTA CRUZ; CITY OF OAKLAND; CITY OF CLOVERDALE; COUNTY OF SAN MATEO; CITY OF SANTA CRUZ; COUNTY OF SONOMA

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APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 8.520(f) of the California Rules of Court, the County of Santa Clara, the County of Santa Cruz, the City of Oakland, the City of Cloverdale, the County of San Mateo, the City of Santa Cruz, and the County of Sonoma (collectively "*amici*") respectfully request leave to file the attached *amicus curiae* brief, in support of Plaintiff/Respondents Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarillo, and Plaintiff-Intervener/Respondent the City and County of San Francisco.[1]

Amici respectfully submit that their participation as *amici curiae* will assist the Court by providing the valuable and distinct perspective of local governments, whose interests stand to be harmed if initiative proponents are granted the authority to speak for the government in judicial proceedings.

Amici are cities and counties in California that have an interest in the outcome of this litigation. We submit this amicus brief to add the important local perspective to the Court's consideration of the Certified Question from the Ninth Circuit. The Proposition 8 Proponents take the position that initiative proponents have standing to assert the State's interest on appeal. If the Court adopts the resulting rule, it will disrupt the State's governmental structure by conferring on unelected individuals the executive authority to make litigation decisions on behalf of the State. Such a disruption will affect local jurisdictions' ability to rely on existing checks and balances regarding issues of statewide concern. In addition, because the Proponents' rule, if adopted, would presumably apply to the local initiative process, it will impact local jurisdictions directly by usurping the

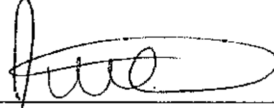
[1] No party or counsel for a party in this pending appeal authored any part of this *amicus curiae* brief or made any monetary contribution intended to fund the preparation or submission of this brief. Cal. R. Ct. 8.520(f)(4)(A). Further, no person or entity other than *amici* made a monetary contribution to fund the preparation or submission of this brief. Cal. R. Ct. 8.520(f)(4)(B).

authority of local officials to direct and control litigation to which their jurisdictions are party. *Amici* therefore urge this Court to grant this application and accept the accompanying brief.

Dated: April 29, 2011

Respectfully submitted,

MIGUEL MÁRQUEZ
County Counsel

By: 

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I.

INTRODUCTION

The Proposition 8 Proponents urge this Court to adopt a blanket rule allowing initiative proponents to speak for the State in judicial proceedings. Yet no basis exists in either the California Constitution or existing case law for the proposed rule. Extending the initiative power to enable initiative proponents to usurp the executive branch's authority to make litigation decisions on the State's behalf would disrupt the separation of powers enshrined in the California Constitution by allowing unelected individuals to undermine the official position taken by government officials relating to litigated matters. Such a rule would lead to legal uncertainty and a potential waste of government resources.

Adopting Proponents' recommended rule would also cause direct harm to California's cities and counties. When state laws are challenged, local governments depend on the State's elected officers to make reasoned litigation decisions and to exercise their legal expertise appropriately. Allowing initiative proponents who are not accountable to the electorate to make decisions on behalf of the State could prevent local governments from relying on the checks and balances inherent when the State executive branch plays its intended role vis-à-vis the other branches of government. Stripping the Attorney General of her constitutionally-conferred power to defend and enforce the State's laws would create a state of legal uncertainty for cities and counties, which are subject to statewide obligations.

Furthermore, if this Court answers the Certified Question in the affirmative, and holds that the official proponents of an initiative measure have either a particularized interest in the initiative's validity or the authority to assert the State's interest in its validity, it is likely that subsequent cases will extend an equivalent power to proponents

of local initiatives. In order to effectively serve their jurisdictions, city and county governments must retain the authority to exercise discretion when making litigation decisions that may have broad implications for their jurisdictions. Granting local initiative proponents the authority to countermand the decisions of duly elected local government officials on litigation matters would weaken local governments and bring harm to the people who rely on them. For these reasons, *amici* urge this Court to reject the rule advocated by Proponents and answer the Certified Question in the negative.

II.

ARGUMENT

A. INITIATIVE PROPONENTS DO NOT HAVE STANDING UNDER CALIFORNIA LAW TO ASSERT THE STATE'S INTEREST IN JUDICIAL PROCEEDINGS

Contrary to the assertions in their opening brief, California law provides no authority for Proponents to defend the validity of Proposition 8 at this procedural juncture. The power Proponents seek—to make litigation decisions regarding when to appeal a lower court ruling on the State's behalf—is fundamentally an executive power, which the Constitution explicitly delegates to elected State officials, the Governor and the Attorney General. Cal. Const., art. V, § 1; Cal. Const., art. V, § 13. California law grants these officials the discretion to decide when to appeal a trial court judgment or whether to defend initiatives that may be unconstitutional, and for good reason: they have both the expertise required to make complex litigation decisions that will affect the State's varied interests and a duty to protect the public interest. *State v. Super. Ct.*, 184 Cal. App. 3d 394, 397-98 (1986) ("The decision of the Attorney General whether to participate in a lawsuit. . .is a decision purely discretionary. . ."); *Connerly v. State Personnel Bd.*, 37 Cal.4th 1169, 1183 (2006) (acknowledging that whether state agencies have an obligation to defend laws that they believe are unconstitutional is an open issue); *D'Amico v. Bd. of*

Med. Examiners, 11 Cal.3d 1, 15 (1974) (calling the Attorney General's obligation to protect the public interest his "paramount duty").

Initiative proponents are not granted similar executive authority, either by the Constitution or by case law. The initiative power, while broad, is exclusively legislative. Article IV, Section 1 of the Constitution, in which the initiative power is reserved by the people, is entitled "Legislative Power." Cal. Const., art. IV, § 1. Article 2, Section 8(a) confers on voters the authority to "propose statutes and amendments to the Constitution and to adopt or reject them," functions that are clearly legislative in nature. Cal. Const., art. II, § 8(a). This Court's precedent confirms that initiative proponents act in a legislative capacity when they exercise their authority under Article 2, Section 8(a). *See, e.g., Prof'l Engineers in Cal. Gov't v. Kempton*, 40 Cal. 4th 1016, 1042 (2007); *Fair Political Practices Comm'n v. Super. Ct.*, 25 Cal.3d 33, 42 (1979). Implying into this legislative power the executive authority to make litigation decisions on the State's behalf would violate separation of powers and intrude on the Attorney General's core function. *See* City and County of San Francisco's Answer Br. (hereinafter "SF's Answer Br.) at 19-21, *Perry v. Brown*, No. S189476, On Request from the United States Court of Appeals for the Ninth Circuit, No. 10-16696 (Cal. Apr. 4, 2011).

In fact, the proponents of an initiative have exhausted their power once an initiative has been voted into law. After an initiative's adoption, the proponents' interest in the validity of the initiative is no more particularized than that of any voter who supported the proposition. Statutes implementing the constitutional initiative authority grant proponents of initiatives limited powers in order to effectuate their right to place a proposed measure on a ballot. Cal. Const., art. II, § 8(a); Elec. Code §§ 9000 *et seq.* However, once a measure has been placed on the ballot, and duly enacted by the electorate, its proponents have no further rights or responsibilities with respect to it; their limited powers have been exercised, and their interest in the validity of the enacted

proposition is shared equally by all voters who supported the initiative. *See* SF's Answer Br. at 36. It is the Attorney General—who has been elected as the State's chief law officer—who has a particularized interest in defending an initiative once it becomes law.

That California courts have allowed proponents of popularly-enacted propositions to *intervene* in litigation in which the propositions were challenged does not indicate that the interests of the proponents are any more particularized than those of other individuals who voted for the proposition. Under Article III of the United States Constitution, a party only has standing to seek relief from the federal courts if he can establish a concrete, particularized, and actual or imminent injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). While California cases allowing *intervention* may establish that initiative proponents have some individual interest in the propositions they have promoted, they certainly do not establish a concrete, particularized interest sufficient to confer standing under Article III of the federal Constitution. Plaintiffs-Respondents' Answering Br. at 21-25, *Perry v. Brown*, No. S189476, On Request from the United States Court of Appeals for the Ninth Circuit, No. 10-16696 (Cal. Apr. 4, 2011); SF's Answer Br. at 37-46.

B. THE RULE ADVOCATED BY PROPONENTS WOULD HARM LOCAL GOVERNMENTS IN CALIFORNIA

Although absent from the text of the Constitution itself, Proponents contend that this Court should imply into the initiative power a right of initiative proponents to speak for the State by defending enacted propositions in court. If adopted, such a rule would disrupt the State's constitutional separation of powers by usurping the authority of the executive branch, and supplanting the duties of elected representatives with the will of a small group of unelected individuals pursuing a singular interest. It may also subject the

State to expensive attorneys' fees, depleting the resources available to fund the State's other obligations.[1]

Accordingly, Proponents suggested rule would cause harm to *amici* and other local governments in California. Local governments rely on the State and its elected officers in a myriad of ways: for a set of governing laws, for consistent and fair enforcement of those laws, and for financial support. The rule advocated by Proponents would disrupt the State structures upon which local governments rely. Furthermore, if adopted in this case, Proponents' suggested rule is likely to be extended in subsequent cases to the proponents of local initiatives, which will directly undermine the ability of local government officials to govern effectively and protect the interests of their jurisdictions.

1. Granting Proponents Of Statewide Initiatives Standing To Speak For The State In Judicial Proceedings Would Adversely Affect Local Governments In California

The rule advocated by Proponents is not only unsupported by California law; it is also unworkable in practice, and would impose harm on California's local governments. The Constitution grants elected officials the authority to make difficult litigation decisions on behalf of the State because they have the experience and expertise to competently weigh the strength of a particular case and the potential outcome of the litigation on the State, and because they have a duty to protect the public interest.

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[1] As Plaintiff-Intervener San Francisco has noted, the Proposition 8 Proponents have claimed that they cannot be held liable for attorneys' fees, citing to a Ninth Circuit decision, *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1288 (9th Cir. 2004), which held that attorneys' fees could not be assessed against a defendant-intervener, because its position was not "frivolous, unreasonable, or without foundation." SF's Answer Br. at 28. Under this logic, if plaintiffs of a case challenging an initiative prevail, and their cause of action entitles them to recover their attorneys' fees, the State, as a defendant, would be liable for their fees, even if the initiative proponents, rather than the State, chose to litigate the case to the end.

Allowing members of the public pursuing a singular interest to represent the State in litigation would interfere with this essential function.

Cities and counties in California rely on the State's elected officers to govern the state efficiently and to enforce the State's laws fairly and consistently. While cities and counties, especially those that have adopted charters, have some independence, they are fundamentally dependent on the State in a variety of ways. Counties, as legal subdivisions of the State, must have their charters approved by the State Legislature. Cal. Const., art. XI, § 1(a); Cal. Const., art. XI, § 4(g). Cities and counties are entitled to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations," but these regulations must not "conflict with general laws" of the State. Cal. Const., art. XI, § 7. Although charter cities have independent authority to regulate municipal affairs, they too are bound by the Legislature's enactments on issues of statewide concern. *Committee of Seven Thousand v. Super. Ct.*, 45 Cal.3d 491, 505, 510 (1988) (holding that while charter cities can supersede state law as to municipal affairs, as to matters of statewide concern, charter cities are subject to state general law, even when the state law incidentally affects a municipal affair); *Baggett v. Gates*, 32 Cal.3d 128, 139 (1982) (citing *Prof'l Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal.2d 276, 292, 295 (1963) ("[G]eneral laws seeking to accomplish an objective of statewide concern may prevail over conflicting [charter city] regulations even if they impinge to a limited extent upon some phase of local control.").

Local governments also depend directly on the Attorney General, as the chief law officer of the State. The Constitution grants the Attorney General the authority to "have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices," and imposes a duty on the Attorney General to "prosecute any violations of law" whenever she believes "any law of the State is not being adequately

enforced in any county." Cal. Const., art. V, § 13. Under statutory law, the Attorney General has the authority to bring antitrust actions on behalf of the State's political subdivisions or other public agencies. Bus. & Prof. Code § 16750(c). Local governments' ability to enforce the law and protect the interests of their constituents is therefore directly affected by the decisions the Attorney General makes in the exercise of her authority.

Because the Attorney General is required by the Constitution to "see that the laws of the State are uniformly and adequately enforced," local governments, and the people who rely on them, are assured consistency, fairness, and predictability in their legal rights and obligations. Cal. Const., art. V, § 13. As in the Proposition 8 context, if the Attorney General were required to chose between defending a law she believes to violate core constitutional rights or allowing proponents to control the position taken in regard to a constitutionally-suspect enactment, the Attorney General's obligation to the State could be corrupted by special interests. This would throw local jurisdictions, and the rights of the constituents they represent, into a state of legal uncertainty.

a. Allowing Unelected Initiative Proponents To Usurp The Authority Of State Officials Would Be Detrimental To Local Governments

State officers, who have been elected to govern the State fairly and efficiently, and who swear an oath to uphold the law, are accountable to the State's entire electorate. This deters them from making policy decisions that favor one region of the State over another, or choosing to divert all of the State's resources to promote a single issue, because doing so would likely cause them to lose re-election, or even to be recalled. SF's Answer Br. at 26. As described above, local governments rely on the accountability of the State's governing officers to ensure they make reasoned decisions about how to uphold the State's laws.

Proponents of initiatives have no duty to enforce the State's laws or to protect the public interest, and because they are unelected, they have no incentive to balance the

varied interests in the State or to consider the effects of their litigation decisions on the State's resources. Because their loyalty is to the single issue they have chosen to promote in their proposition, initiative proponents are likely to make litigation decisions that discount the many other complex factors officials must consider when litigating on behalf of the State, such as the State's likelihood of success in the case, its overall financial resources, and the potential that it may be exposed to further liability depending on its litigation strategy.

Initiative proponents will be unlikely to consider, for example, that continuing to defend a measure that state officials have already determined is unlawful could harm the constitutional rights of protected individuals, subject the State to expensive additional litigation, and have an overall negative impact on the State's budget and its ability to serve its constituents. Instead, they are likely to defend such an initiative in appeal after appeal, consuming significant judicial resources and creating uncertainty in the state of the law. They will do so in the name of the People of the State of California, even though the people who voted for their initiative would not necessarily support it taking precedence over the State's other important legal protections and obligations.

Local governments in California would face a state of legal uncertainty from a rule granting this broad power to initiative proponents. Because they are subject to state law in areas of statewide concern, cities and counties would not know the parameters of their legal obligations if state executive officers' decisions relating to litigated matters could be overruled by initiative proponents.

For example, initiative proponents could spend years litigating the merits of a proposition that would strip local governments of the right to receive state subventions for state-imposed mandates, in violation of the Constitution. Cal. Const., art. XIIIB, § 6(a). In such a situation, cities and counties would have to decide whether to continue to perform their obligations under the mandate, without any assurance that they would be

reimbursed, or to cease providing the mandated service, and risk significant liability. Or an initiative could be passed granting the State Legislature statutory authority to reallocate to the State General Fund tax revenue local governments levied solely for their own purposes, in contravention of Article XIII, section 24(b) of the Constitution. Local governments would virtually lose their ability to function if the initiative's proponents were entitled to override the Attorney General's determination that the proposition violated local governments' constitutionally-protected rights. Such uncertainty disrupts the essential government structure of the State and extends the initiative power beyond what is constitutionally allowed.

2. The Rule Advocated By Proponents Would Likely Be Extended To Proponents of Local Initiatives And Be Used To Supplant Local Governments' Discretion To Defend Initiatives In Court

The rule advocated by Proponents will likely have an even more direct impact on cities and counties. A rule permitting initiative proponents to stand in the shoes of the government once a statewide initiative becomes law would likely be extended to proponents of local initiatives as well. Allowing initiative proponents to trump local government discretion regarding the legal merits of challenging a court ruling on appeal could have negative impacts on local officials' ability to carry out their essential functions, such as designing a budget that balances all of the jurisdiction's interests.[2]

[2] In addition to the financial uncertainty that could result if the initiative in question imposes government costs, the government could be required to bear the cost of any applicable attorneys' fees if the challengers of an initiative ultimately prevail, as explained in footnote 1, *supra*.

a. If This Court Adopts The Proponents' Recommended Rule, Subsequent Courts Are Likely To Apply It To Proponents Of Local Initiatives

While the question certified to this Court from the Ninth Circuit Court of Appeals is limited to the issue of whether the 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,"[3] it is likely, if not inevitable, that the rule adopted by this Court will be subsequently applied to proponents of local initiatives. The right of the electorate in a local jurisdiction to propose and pass initiatives is derived from the same reservation of political power to the people as the statewide initiative authority, and therefore has essentially the same character as the statewide initiative power. Cal. Const., art. II, § 1; Cal. Const., art. IV, § 1; Cal. Const., art. II, § 11; *Hopping v. City of Richmond*, 170 Cal. 605, 609 (1915); *Midway Orchards v. County of Butte,* 220 Cal. App. 3d 765, 777 (1990) (citing *Hill v. Board of Supervisors of Butte County*, 176 Cal. 84, 86 (1917)).

In general-law local jurisdictions, the initiative and referendum powers have been held to be "coextensive" and "identical" to the powers reserved to the People of the State, and constitutional limitations on the statewide initiative and referendum powers also generally restrict the power of a local electorate. *See Pala Band of Mission Indians v. Bd. of Supervisors*, 54 Cal. App. 4th 565, 581-82 (1997); *Midway Orchards*, 220 Cal. App. 3d at 777 (citing *Hill*, 176 Cal. at 86); *Ortiz v. Madera County Bd. of Supervisors*, 107 Cal. App. 3d 866, 871 (1980) (citing *Geiger v. Bd. of Supervisors*, 48 Cal. 2d 832, 836 (1957)). And while charter jurisdictions are entitled to reserve initiative and referendum

[3] Order Certifying a Question to the Supreme Court of California at 2, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Jan. 4, 2011) (emphasis added). Note that after the Certification Order was issued, Governor Edmund G. Brown replaced former Governor Arnold Schwarzenegger.

powers broader than what is reserved in the state context, any powers that are included in the state initiative or referendum power, including implied powers, must be incorporated into the local power, in both charter and general law jurisdictions. *Rubalcava v. Martinez*, 158 Cal. App. 4th 563, 570-73 (2007) (citing *Rossi v. Brown*, 9 Cal.4th 688, 698 (1995)) ("Under these provisions, charter cities cannot deny their citizens the [initiative or] referendum powers reserved in the California Constitution, although charters may properly reserve broader [] powers to voters.").[4] Thus, if this Court adopts the rule advocated by Proponents, it is very likely that courts in later cases will apply the rule to grant equivalent standing to proponents of local initiatives. For the reasons discussed below, allowing the local initiative power to encompass such broad authority would cause further harm to California cities and counties.

b. Allowing Proponents Of Local Initiatives Standing To Defend Propositions Will Usurp The Authority Of Elected Local Governments To Balance Their Jurisdiction's Interests And Protect Its Resources

Cities and counties in California struggle, especially in these difficult economic times, to provide efficient and comprehensive services to their constituents. Allowing the unelected proponents of local initiatives to stand in the shoes of local government officials to defend their initiatives in court would directly undermine the ability of cities

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[4] Although *Rubalcava v. Martinez* analyzed the limits charter cities may place on the referendum power, the same analysis would apply to limits on the initiative power of charter city residents. Courts frequently apply precedent analyzing the referendum power to discussions of the initiative power, and vice versa. *See, e.g., Galvin v. Bd. of Supervisors of Contra Costa County*, 195 Cal. 686, 690 (1925) (relying on *Hopping v. City of Richmond*, 170 Cal. at 609, which analyzed the local referendum power, to derive a rule regarding the local initiative power.); *Ortiz*, 107 Cal. App. 3d at 870 n. 3 ("[B]ecause the nature of the initiative and the referendum are identical insofar as the power reserved is concerned any discussion in the decisional law regarding the initiative also applies to the referendum.").

and counties to serve their jurisdictions. Similar to the State's elected officers, local government officials are charged with the responsibility of making litigation decisions on behalf of their jurisdictions. For example, under California law, county boards of supervisors are explicitly assigned the duty to "direct and control the conduct of litigation in which the county, or any public entity of which the board is the governing body, is a party," and the county counsel, or if none, the district attorney, is charged with "attend[ing] and oppos[ing] all claims and accounts against the county" that in his or her discretion are "unjust and illegal." Gov. Code § 25203; Gov. Code § 26526. In general law cities, city attorneys must "advise the city officials in all legal matters pertaining to city business" and "perform other legal services required from time to time by the legislative body." Gov. Code § 41801; Gov. Code § 41803.[5] Local government officials, like their state counterparts, are responsible for maintaining the overall wellbeing of their jurisdictions, and therefore must make reasoned decisions in cases to which their jurisdictions are party that balance the entire range of issues that affect their constituents.

Local officials are ultimately responsible to the electorate; if they fail to perform their delegated responsibilities appropriately, they may be replaced by the voters. Proponents suggested rule could interfere with the relationship between the electorate and their elected representatives. For example, the proposed rule could interfere with the local government's authority to pass a budget until the litigation over a given measure has been resolved. Because the "management of the financial affairs of [a local] government," including the "fixing of a budget," is considered "an essential function" of the governing

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[5] Charter cities are entitled to structure their own governments, under the principle of municipal home rule, and therefore could theoretically delegate to any person the authority to make litigation decisions on behalf of the city, including initiative proponents. Cal. Const., art. XI, § 5(a); *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 598-99 (1949). However, *amici* know of no charter city that has chosen to grant this authority to proponents of initiatives.

body of a local jurisdiction, enabling initiative proponents to commandeer the process in this way would encroach on the authority and expertise of the individuals who have been elected to allocate the jurisdiction's resources. *Geiger*, 48 Cal.2d at 840; *see also Totten v. Board of Supervisors*, 139 Cal. App. 4th 826, 838-39 (2006); *County of Butte v. Superior Court*, 176 Cal. App. 3d 693, 699 (1985) ("The budgetary process entails a complex balancing of public needs in many and varied areas with the finite financial resources available. . .It involves interdependent political, social and economic judgments which cannot be left to individual officers acting in isolation; rather, it is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available."). Such an encroachment would not necessarily fulfill the objectives of the voters who passed the initiative; when an electorate votes to adopt a proposition, it does not necessarily contemplate that doing so will allow the initiative to take precedence over other laws or programmatic responsibilities of the jurisdiction.

Enabling local initiative proponents to represent the interests of local jurisdictions in court would also fundamentally restrict the discretion of local government officers who have the experience and expertise necessary to weigh the legal merits of a particular case. Local government officers have a mandatory duty to place on the ballot an initiative measure that has garnered the requisite number of qualifying signatures. *Save Stanislaus Area Farm Economy v. Board of Supervisors*, 13 Cal. App. 4th 141, 148 (1993); *Citizens for Responsible Behavior v. Superior Court*, 1 Cal. App. 4th 1013, 1021 (1991). Yet local initiatives, like all local legislation, may not conflict with state law when they deal with an issue of statewide concern, and courts will invalidate initiatives when they find that the Legislature intended to bar the use of the local initiative power to legislate in the area. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897-98 (1993); *Committee of*

Seven Thousand, 45 Cal.3d at 509-12; *DeVita v. County of Napa*, 9 Cal.4th 763, 776 (1995).

Therefore, when a local initiative explicitly contradicts state law in an area of statewide concern, but has received the required number of signatures to qualify for the ballot, local officials have only one mechanism for preventing the initiative's implementation: by declining to appeal a judicial ruling invalidating the law. If proponents of local initiatives were instead entitled to bring such an appeal, they would be able to override the reasoned judgment of the jurisdiction's officials and continue to litigate the merits of an improper enactment. By doing so, they would waste judicial resources, subject the local jurisdiction to liability for attorneys' fees, and leave the jurisdiction in a state of legal limbo about its obligations while the litigation made its way through the court system. Such a rule would be unworkable for cities and counties in California that depend on the reasoned judgments of officials who know when it is appropriate to cease litigation in order to protect the overall welfare of their jurisdictions.

III.

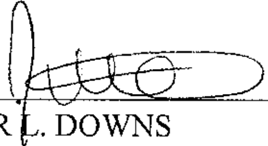
CONCLUSION

The rule advocated by the Proposition 8 Proponents is not supported by California law, and would have damaging effects on *amici* and other cities and counties in California. *Amici* therefore respectfully request that this Court answer the Certified Question in the negative.

Dated: April 29, 2011

Respectfully submitted,

MIGUEL MÁRQUEZ
County Counsel

By: 
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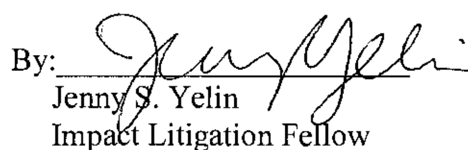
I hereby certify that this brief has been prepared using proportionately 1.5 spaced 13 point Time New Roman typeface. Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the number of words contained in the foregoing amicus curiae brief, including footnotes but excluding the Table of Contents, Table of Authorities, the Application for Leave to Brief as Amici Curiae, and this Certificate, is 4513 words as calculated using the word count feature of the program used to prepare this brief.

By: 
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SUPREME COURT OF THE STATE OF CALIFORNIA

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Perry, et al v Brown, et al S189476

I, Hosetta P Zertuche, say:

I am now and at all times herein mentioned have been over the age of eighteen years, employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is 70 West Hedding Street, 9th Floor, East Wing, San Jose, California 95110-1770. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I served a copy of the attached **APPLICATION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS AND PROPOSED *AMICI CURIAE* BRIEF OF COUNTY OF SANTA CLARA; COUNTY OF SANTA CRUZ; CITY OF OAKLAND; CITY OF CLOVERDALE; COUNTY OF SAN MATEO; CITY OF SANTA CRUZ; COUNTY OF SONOMA** by placing said copy in an envelope addressed to:

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which envelopes were then sealed, with postage fully prepaid thereon, on **April 29, 2011**, and placed for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at San Jose, California, on the above-referenced date in the ordinary course of business; there is delivery Service by United States mail at the place so addressed.

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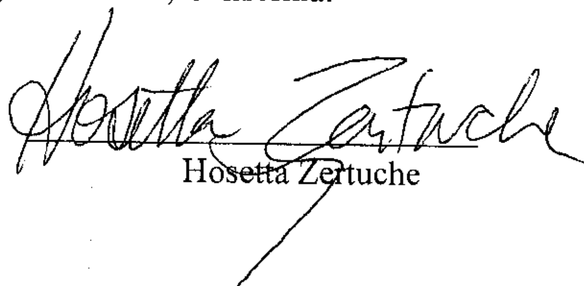

Hosetta Zertuche

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

AMICUS BRIEF OF LEAGUE OF WOMEN VOTERS OF CALIFORNIA FILED IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND CITY AND COUNTY OF SAN FRANCISCO

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APPLICATION BY LEAGUE OF WOMEN VOTERS OF CALIFORNIA TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND CITY AND COUNTY OF SAN FRANCISCO

The League of Women Voters of California applies for leave to file the attached amicus curiae brief.

Interests of the League:

Formed in 1920, the League is a nonpartisan political organization that encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. It does not support or oppose any political party or any candidate.

The League has a dual mission: educating voters and the community at large, and advocating for changes in public policy. In its education role, the League strives to present information in a completely neutral manner. The goal is to provide voters with the information they need to make their own decisions and to create a well-informed community in general. In its advocacy role, the League bases all its work on positions that are arrived at through member education, discussion and consensus.

In both its voter education and advocacy roles, the League has been deeply involved in the initiative process. In educating the public, the League provides nonpartisan information about all propositions on the California ballot. In its advocacy role, the League has actively supported particular initiatives and opposed others. In addition, the League has conducted two statewide member studies of the initiative and referendum

process in California and, based on these studies, supports citizens' right of direct legislation through the initiative and referendum process. The League has advocated in the legislature for measures that would improve the initiative process and against measures that would undermine its rational and appropriate operation.

Accordingly, the League respectfully requests permission to file the attached amicus curiae brief, which discusses matters critical to the operation of California government and the initiative process.

Rule 8.520(f) Requirements

Counsel has read the parties' briefs on the merits and believes that the proposed amicus brief will assist the Court in deciding the issue presented. The proposed brief from an organization concerned with vindicating the broader interests in functional government summarizes the history of the initiative power and discusses the wide-ranging practical problems with permitting private individuals to represent the interests of the State, rather than speaking on behalf of their own private interests (assuming they can establish such particularized interests).

No party, counsel for a party, or anybody other than counsel for amici has authored the proposed brief in whole or in part or funded the preparation of the brief.

Dated: April 29, 2011

Respectfully submitted,

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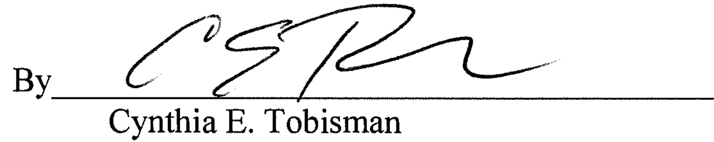
By 
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INTRODUCTION

The path that Intervenors present is an invitation to chaos. The Court should decline to take it.

Because there is no explicit right in the California Constitution for initiative proponents to act on behalf of the State (see Plaintiffs' Ans. Br. 9-19; City of S.F. Ans. Br. 7-32), the question before this Court is whether, as Intervenors argue, "constitutional necessity" *requires* that they be able to do so (see Intervenors' Opening Br. 24). The answer must be no.

Especially in light of the initiative system's legislative excesses, the executive and judicial branches of government play essential roles in ensuring that California's laws remain workable and constitutional. Those roles will become impossible to discharge if, as Intervenors advocate, initiative proponents can stand in the shoes of the State if they disagree with the State's litigation decisions.

The Constitution gives no special status to the official proponents of an initiative. Accordingly, if Intervenors may speak on behalf of the State, there is no principled reason why *any* elector who supported the initiative cannot do the same.

In order for California's government to function in an orderly manner, the State must speak with one voice in cases involving initiative measures. This means that initiative proponents cannot be permitted to speak on behalf of anyone other than themselves.

ARGUMENT

A. As Conceived By The Progressives, The Initiative Power Is The Electorate's Check On The Legislature, While The Recall Power Is Electorate's Check On The Executive Branch.

By its terms, the initiative power is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8(a).) As the City of San Francisco has already demonstrated, ample case law makes clear that this is a *legislative* power. (City of S.F. Ans. Br. 16-17.)

The history of the initiative process supports this conclusion. In 1911, Governor Hiram Johnson called a special election and the Legislature placed the initiative, referendum, and recall proposals on the ballot. (See comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislature Procedure* (1986) 74 Cal. L.Rev. 491, 502-508.) This effort was the culmination of the Progressive Party's reform movement to wrest control of the political process from private interests, primarily the railroads. (*Ibid.*) To achieve this goal, Governor Johnson's proposals gave the electorate tools to check abuses by the legislative and executive branches of government.

The Initiative Power. The ballot materials in the campaign to ratify the initiative proposal make clear that the initiative power was designed to act as the check on the Legislature. They described the initiative power: "It is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves

to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and *to hold the legislature in check*, and to veto or negative such measures as it may viciously or negligently enact." (Manheim & Howard, *Symposium on the California Initiative Process: A Structural Theory of the Initiative Power in California* (1998) 31 Loyola L.A. L.Rev. 1165, 1189 [*Structural Theory of Initiative Power*], citing Const. Amend. No. 22, in California Ballot Pamphlet, Special Election (Oct. 11, 1911) (Comments of Lee C. Gates, Senator, 34th District, and William C. Clark, Assemblyman, 59th District), emphasis added.) Thus, "Hiram Johnson and his allies in the Progressive movement sought to restore the connection between government and the majority will by allowing the people to bypass an unresponsive Legislature and enact their own legislation." (*Strauss v. Horton* (2009) 46 Cal.4th 364, 489 (conc. & dis. opn. of Moreno, J.).)

The Recall Power. With respect to the executive branch, the *recall* power was the proposed vehicle to check abuses. (See Klatchko, *The Progressive Origins of the 2003 California Gubernatorial Recall* (2004) 35 McGeorge L.Rev. 701, 703, citing Parke De Witt, *The Progressive Movement: A Non-Partisan, Comprehensive Discussion of Current Tendencies in American Politics* (1915) pp. 213-215.) As Governor Johnson described the recall power, it was "the precautionary measure by which a recalcitrant official can be removed." (*Id.*, citing Hiram Johnson, Gov. of California, Inaugural Address (Jan. 3, 1911) <http://www.governors.library.ca.gov/address/23-hjohnson01.html> (as of Apr. 28, 2011).)

Thus, the Progressives proposed a regime in which the initiative power permitted the electorate to enact laws, while the recall power permitted the electorate to remove public officials who failed to enforce laws.

There is no indication that the Progressives intended to subvert the judiciary's role in reviewing the constitutionality of initiative measures. (See *Strauss, supra,* 46 Cal.4th at p. 489 (conc. & dis. opn. of Moreno, J.).) Nor is there any indication that they intended to subvert the executive branch's institutional roles, including its right to make decisions regarding whether or how to defend a law against constitutional challenge. (See City of S.F. Ans. Br. 19-21.)

B. The Initiative Power Has Resulted In Rampant Micromanagement Of The Legislative Process.

California voters have been busy at the ballot box ever since they approved the slate of Progressive reforms in 1911. "A comparison of the phone book sized ballot pamphlets of recent years with the more moderate epistles of ten or twenty years ago indicates how rapidly the amount of initiatives has increased." (Stein, *The California Constitution and the Counter-Initiative Quagmire* (1993) 21 Hastings Const. LQ. 143, 150 [*Cal. Const. and Counter-Initiative Quagmire*], citing Eule, *Judicial Review of Direct Democracy* (1989) 99 Yale L.J. 1503, 1506-1508, fn. 18.)[1]

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[1] Between 1912 and 2002, 1,187 initiatives were drafted and circulated. (Comment, *The "Overlooked Hermaphrodite" of Campaign Finance: Candidate-Controlled Ballot Measure Committees in California Politics* (2007) 95 Cal. L.Rev. 123, 129 citing Allswang, *The Initiative and Referendum in California* 1898-1998 (2000) p. 13.) Between 1912 and 2008, 325 initiatives qualified for the ballot, and 111 were approved by the

By 1948 the Constitution had grown from 7300 words to 95,000 words.[2] (*Structural Theory of Initiative Power*, *supra*, 31 Loyola L.A. L.Rev. at p. 1189 citing Ooley, *State Governance: An Overview of the History of Constitutional Provisions Dealing with State Governance* (1996), p. 6, fn. 16 <http://www.californiacityfinance.com/CCRChistory.pdf> [as of Apr. 28, 2011].)

The frequency of initiative measures has increased significantly over the last several decades. The number of initiatives qualified for the ballot rose from 10 in the 1960s to 24 in the 1970s, and then to 54 in the 1980s. During the 1990s, California saw 61 qualified initiatives out of the nearly 400 circulated. (Office of the Secretary of State, *A History of California Initiatives* (Dec. 2002), pp. 11-13 <http://www.sos.ca.gov/elections/init_history.pdf> [as of Apr. 28, 2011].)

While the Progressives intended the initiative process to avoid the domination of the legislature by powerful interest groups, interest groups now dominate the initiative process. (Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter* (1993) 21 Hastings Const. L.Q. 95, 121 citing Grodin, *In Pursuit Of Justice* (1989) & Lee, *California*, *Referendums: A Comparative Study of Practice and*

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voters. (Levinson & Stern, *Ballot Box Budgeting in California: The Bane of the Golden State or an Overstated Problem?* (2010) 37 Hastings Const. L.Q. 689, 694-695; Office of the Secretary of State, *A History of California Initiatives* (Dec. 2002), pp. 10-13 <http://www.sos.ca.gov/elections/init_hictory.pdf.)

[2] The Constitution has shrunk somewhat since then, principally due to the deletion of 14,500 words providing for the San Francisco Panama-Pacific Exposition. (See, *supra*, 31 Loyola L.A. L.Rev. at p. 1189, fn. 175.)

Theory (Butler & Ranney edits) (1978) pp. 88-89.) For example, the insurance industry alone spent 88 million dollars on California initiatives in 1988—more than George Bush spent on his entire presidential campaign. (*Structural Theory of Initiative Power*, *supra*, 31 Loyola L.A. L.Rev. at p. 1189.)

Chief Justice George described the result: "Initiatives have enshrined a myriad of provisions into California's constitutional charter, including a prohibition on the use of gill nets and a measure regulating the confinement of barnyard fowl in coops. This last constitutional amendment was enacted on the same 2008 ballot that amended the state Constitution to override the California Supreme Court's decision recognizing the right of same-sex couples to marry. Chickens gained valuable rights in California on the same day that gay men and lesbians lost them." (Remarks of Ronald M. George, Chief Justice, *The Perils of Direct Democracy: The California Experience*, address at induction into American Academy of Arts and Sciences (Oct. 1, 2009) <http://jurist.law.piH.edu/pdf/aaspeech.pdf> [as of Apr. 28, 2011] (George Remarks).)

Thus, as one commentator concluded: "Hiram Johnson would not recognize the electoral device he begat nearly a century ago. It is the driving force in California politics and lawmaking. In major policy areas, it has supplanted the legislature, not checked it . . . ." (*Structural Theory of Initiative Power*, *supra*, 31 Loyola L.A. L.Rev. at p. 1190; see also George, *Golden Gate University School of Law Chief Justice Ronald M. George Distinguished Lecture Access to Justice in Times of Fiscal Crisis* (2009) 40 Golden Gate U. L.Rev. 1, 13 ["I doubt that Hiram Johnson and the other progressives who saw the initiative power as a means to combat the power

of the railroad barons who controlled our state's government in an earlier era would recognize or approve of where that power has brought us"].)

C. Permitting Initiative Proponents To Speak On Behalf Of The State Would Render Litigation Over Initiative Measures Unworkable.

1. Initiative measures regularly result in litigation, requiring the courts and the executive branch to harmonize conflicting laws and resolve questions of constitutionality.

The frequent use of initiatives has yielded frequent litigation. This litigation is a natural outgrowth of several problems inherent in the initiative process. These same problems make it essential for the judiciary and the executive branch to be able to perform their institutional roles, including harmonizing the state's laws and addressing issues of constitutionality.

First, "[u]nlike elected representatives, whose full-time employment includes analyzing proposed legislation, members of the electorate may find it difficult to devote much time to examining the voter handbook containing the proposed new law." (*Constitution in Conflict*, *supra*, 21 Hastings Const. L.Q. at p. 120, citing Butler & Ranney, *Theory*, *Referendums: A Comparative Study of Practice and Theory* (1978).) As a result, voters sometimes enact initiative measures that are poorly conceived and poorly drafted, requiring courts to step in to make sense of them and to harmonize them with other laws. In this context, the executive branch must make

decisions regarding how to defend and enforce the measures that the voters have enacted without a full understanding of their potential complexity.

Second, the initiative process does not possess the same checks as representative government—i.e, the opportunity to deliberate, debate, revise, and compromise before a vote on the final version of a bill. (See *Constitution in Conflict*, *supra*, 21 Hastings Const. L.Q. at pp. 120-121.) Instead, once the Attorney General has certified a measure, there may be only limited changes to the language of the initiative. (*Ibid.*) Moreover, California is "unique among all American jurisdictions in prohibiting its legislature, without express voter approval, from amending or repealing even a statutory measure enacted by the voters, unless the Initiative measure itself specifically confers such authority upon the legislature." (George Remarks, *supra*.) Again, the result is that the judiciary and the executive branches are left to smooth the rough edges in initiative measures and to harmonize them with existing laws.

Third, "constitutional change by voter initiative allows for unchecked 'majority tyranny,'" since "popular will may restrict unpopular rights." (*Constitution in Conflict*, *supra*, 21 Hastings Const. L.Q. at p. 121.) Nothing in the Constitution precludes voters from attempting to enact laws that constrict the rights of disfavored minorities, such as criminal defendants. (*Ibid.*; see also *Raven v. Deukmejian* (1990) 52 Cal.3d 336 [voters enacted measure that would have vested in the United States Supreme Court all interpretive power as to certain fundamental procedural rights of criminal defendants under the state Constitution].)

Yet, "[w]hile the majority may vote to curtail unpopular rights, they may do so only to the extent that such changes do not fall below the level of

protection provided for in the Federal Constitution." (*Constitution in Conflict*, *supra*, 21 Hastings Const. L.Q. at p. 122.) It thus falls to the judicial and executive branches to check exercises of initiative powers that transgress minority rights. Because the Attorney General has a constitutional obligation to uphold the federal constitution (see City of S.F. Ans. Br. 27), he or she must weigh enforcement decisions against the backdrop of the federal constitution. And because the judiciary is charged with "protecting persecuted minorities from the majority will" (*Strauss*, at p. 489 (conc. & dis. opn. of Moreno, J.) it must decide critical questions of constitutionality.

Fourth, the initiative process frequently requires the judicial and executive branches to resolve inconsistencies between contradictory initiative measures that purport to govern the same subject matter. This is so because the problems of the initiative process have been magnified by the development in recent years of a political strategy that the Progressives surely never foresaw: placing two conflicting initiatives, or counter-initiatives, on the ballot simultaneously. "While the subject matter of initiatives have always had some overlap, in the mid-1980s, groups started strategically qualifying measures that explicitly contradicted another measure." (*Cal. Const. and Counter-Initiative Quagmire*, *supra*, 21 Hastings Const. L.Q. at p. 155.) The reason for this phenomenon is simple: "While the one-half to one million dollar price tag for drafting and qualifying an initiative measure may be daunting to citizen groups and grassroots organizations, for corporations or industry groups opposed to an initiative measure, the cost of qualifying a counter-initiative is a bargain

compared to spending ten to twenty million dollars in contributions for advertising to defeat an initiative." (*Ibid.*)

The result is that when two or more initiatives with contrary provisions receive a majority of votes, "courts must decide which of the provisions of the various measures will become law." (*Id.* at pp. 145-146.) Courts are tasked with preventing unworkable laws—laws that the Legislature cannot touch—from going into effect. (*Judicial Review of Direct Democracy*, *supra*, 99 Yale L.J. at pp. 1506-1507.)

2. In order for litigation over initiative measures to remain workable, the State must speak with one voice.

Given frequent and complex litigation over initiative measures, the ground rules must be clear. Most important, in order for litigation over initiative measures to be practicable, the State must speak with a single voice: The courts must know whom to listen to. Fortunately, the constitutional framework dictates that there *is* a single voice—the Attorney General. (See Plaintiffs' Ans. Br. 9-10; City of S.F. Ans. Br. 8-10.)

a. Permitting initiative proponents—or any elector who disagrees with the Attorney General's litigation decisions—to speak on behalf of the State is a recipe for confusion.

Intervenors argue that "the official proponents of an initiative have authority under California law to assert the People's interest in the validity of that initiative when it is challenged in litigation, at least when public officials refuse to defend it." (Opening Br. 15.)

But this raises more questions than it answers, including these:

1. Can anyone who wants to speak on behalf of the State? The Constitution grants no special status to initiative proponents. Rather, the initiative power is "is the power of *the electors* to propose [and vote on] statutes and amendments to the Constitution." (Cal. Const., art. II, §8(a), emphasis added.) Thus, if the official proponents can speak on behalf of the State, there is no principled reason why every other "elector" cannot assume the same mantel. And if anyone—and everyone—can speak on behalf of the State, the resulting cacophony will make it impossible to manage litigation over initiative measures.

2. What does "refuse to defend it" mean? Does "refus[a]l" mean only the complete failure to defend, or could any official proponent—or other elector—"assert the People's interest" whenever the Attorney General provides only a limited defense to the validity of an initiative? And what happens if the proponents of an initiative disagree among themselves regarding whether the Attorney General is adequately defending an initiative measure, or how it should be defended—who then would speak for the State? (See also City of S.F. Ans. Br. 27-30.)

3. Who decides and how does the determination get made, that a given initiative measure is being left undefended or inadequately defended, such that its supporters have the right to step in to speak on behalf of the State? Does any elector who might disagree with the Attorney General's enforcement decisions have the right to petition a court for a declaration that the Attorney General has unjustifiably refused to defend an initiative or is taking an inappropriate position in litigation? And if this is the procedure, why doesn't this violate separation of powers principles?

(Cf. *State of California v. Superior Court* (1986) 184 Cal.App.3d 394, 397-398 [trial court could not order Attorney General to be joined as a defendant in a case involving defense of a law; "We believe the trial court has exceeded its discretion, if not its powers, in compelling the Attorney General's participation. Our decision to liberate the State here is influenced both by the lack of any specific authority for the court to order the State's participation and also by the doctrine of separation of powers"].)

Intervenors argue that allowing initiative proponents to act on behalf of the State "when public officials will not do so is necessary to preserve the People's initiative power, . . ." (Intervenors' Opening Br. 16.) But given the practical problems outlined above, the cure that Intervenors propose is worse than the disease. Permitting initiative proponents to speak for the State would compound the problems wrought by a runaway initiative process and hamper the ability of the courts to resolve litigation over initiative measures.

b. There are avenues for initiative proponents to speak when they believe the Attorney General is failing to defend a law, but those avenues require the proponents to speak in their *own* voices.

This is not to say there is no recourse for initiative proponents who believe the Attorney General has failed to discharge his or her constitutional duty to defend an initiative.

Most important is the recall power to "fire" state officials who make litigation decisions with which they disagree. Indeed, this is exactly what

the Progressives had in mind as a check on executive branch abuses. (See § A, *ante*; see also *The Progressivist Origins of the 2003 California Gubernatorial Recall*, *supra*, 35 McGeorge L.Rev. at p. 705 [noting that 1911 ballot pamphlet materials advocated passage of recall by stressing that if the people had the right "to hire" public servants then they must also have the right "to fire" them if they were "unsatisfactory"].)

Moreover, in cases where an initiative proponent—or any other elector—believes that the Attorney General has wrongly declined to defend a law on the ground that it is unconstitutional, the proponent may petition the courts for a writ of mandate compelling the Attorney General to defend the law.[3] (See Code of Civ. Proc., § 1085, subd. (a) [writ of mandate lies to compel performance of "a duty resulting from an office"]; *Environmental Protection Information Center, Inc. v. Maxxam Corp.* (1992) 4 Cal.App.4th 1373, 1380 [writ of mandate "lies to compel the performance of a legal duty imposed on a government official"]; *Styring v. City of Santa Ana* (1944) 64 Cal.App.2d 12, 16 ["A duty resting on a public official which the law requires him to perform may be enforced by a writ of mandate"].) In that context, the courts can decide the question of constitutionality. (See City of S.F. Ans. Br. 26, fn. 12.) If the courts conclude that, contrary to the Attorney General's opinion, a given law is constitutional, the Attorney General could be compelled to defend it. But even then, the Attorney General would be doing so in his or her *own* voice, avoiding the perils described above.

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[3] The Court of Appeal and this Court rejected a voter's attempt in this case to compel the Attorney General to file a notice of appeal in the Ninth Circuit in order to challenge the district court's conclusion that Proposition 8 was unconstitutional. (See City of S.F. Ans. Br. 5.)

Finally, in any instance where an initiative proponent has an actual interest in the initiative measure, he or she can intervene to vindicate that interest.[4]

The bottom line: The proponents of an initiative may speak, but they must speak in their own voice.

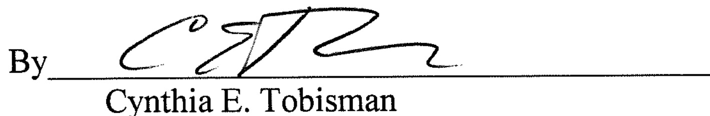
CONCLUSION

The Court's decision on the critical standing questions posed by this case will have a wide-ranging impact on litigation across the state. The rule this Court announces will apply not just to high-profile cases like this one, but to cases involving initiative measures touching all matters of California life, from budgeting to criminal laws to gill nets. Because intractable practical problems will result if the Court adopts Intervenors' position that initiative proponents may act on behalf of the State when they disagree with the Attorney General's enforcement decisions, the Court should reject it.

Dated: April 29, 2011

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow
Cynthia E. Tobisman

By 
Cynthia E. Tobisman

Attorneys for Amicus Curiae
LEAGUE OF WOMEN VOTERS OF CALIFORNIA

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[4] We agree with the Plaintiffs and the City of San Francisco that the Intervenors cannot show a particularized interest in this case sufficient to create Article III standing. (See City of S.F. Ans. Br. 47; Plaintiffs' Ans. Br. 25.)

CERTIFICATION

Pursuant to Rules 8.204(c)(1) & (4) and 8.520(c) of the California Rules of Court, I certify that this **APPLICATION OF LEAGUE OF WOMEN VOTERS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; [PROPOSED] AMICUS CURIAE BRIEF** contains 3,882 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: April 29, 2011

Cynthia E. Tobisman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On April 29, 2011, I served the foregoing document described as: **AMICUS BRIEF OF LEAGUE OF WOMEN VOTERS OF CALIFORNIA FILED IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND CITY AND COUNTY OF SAN FRANCISCO** on the interested parties in this action by serving:

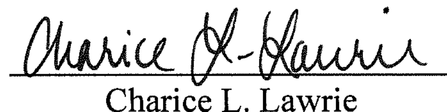
See Attached Service List

(√) **By Envelope** - by placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(√) **By Mail:** As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **April 29, 2011**, at Los Angeles, California.

(√) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



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