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January 24, 2011

Honorable Frederick K. Ohlrich
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Perry v. Schwarzenegger*, No. S189476

Dear Mr. Ohlrich:

Pursuant to Rule 8.548(e)(1) of the California Rules of Court, Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo ("plaintiffs") respectfully submit this letter in opposition to the request of the U.S. Court of Appeals for the Ninth Circuit that this Court answer a Certified Question in the above-captioned appeal. *See Perry v. Schwarzenegger*, _ F.3d _ (9th Cir. Jan. 4, 2011). This Court should deny the request for certification because the Certified Question turns, in significant part, on issues of federal law and because the state-law issues implicated by the Certified Question are already well-settled. Granting the certification request would needlessly prolong the resolution of this case and impose additional, irreparable harm on plaintiffs.

FACTUAL AND PROCEDURAL BACKGROUND

1. Plaintiffs are gay and lesbian Californians who are in committed, long-term relationships and who wish to marry. In 2008, this Court held that the California Constitution protects the right of gay men and lesbians to marry. *In re Marriage Cases* (2008) 43 Cal.4th 757. That decision held that California Family Code sections 300 and 308.5—which limited marriage to individuals of the opposite sex—violated the due process and equal protection guarantees of the state constitution. *Id.* at p. 857.

In response, a group of California voters financed and orchestrated a $40 million campaign to amend the California Constitution to strip gay men and lesbians of their fundamental right to marry recognized by this Court. That measure—Proposition 8—was placed on the ballot for the November 2008 election, and proposed to add a new Article I, Section 7.5 to the California Constitution stating that "[o]nly marriage between a man and a woman is valid or recognized in California." The Official Voter Information Guide informed voters that Proposition 8 would "[c]hange[ ] the California Constitution to eliminate the right of same-sex couples to marry in California."

Proposition 8 passed by a narrow margin, and went into effect on November 5, 2008, the day after the election. During the period between this Court's decision in the *Marriage Cases* on May 15, 2008, and the effective date of Proposition 8, more than 18,000 same-sex couples were married in California. On May 26, 2009, this Court upheld Proposition 8

against a state constitutional challenge, but held that the new amendment to the California Constitution did not invalidate the marriages of same-sex couples that had been performed before its enactment. *See Strauss v. Horton* (2009) 46 Cal.4th 364.

2. On May 22, 2009, plaintiffs filed suit in the United States District Court for the Northern District of California to secure the right to marry. They challenged the constitutionality of Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and named as defendants California's Governor, Attorney General, Director of Public Health, and Deputy Director of Health Information and Strategic Planning. They also named as defendants the Alameda County Clerk-Recorder and the Los Angeles County Registrar-Recorder/County Clerk, who had denied marriage licenses to plaintiffs. In response, the Attorney General admitted that Proposition 8 is unconstitutional, and the remaining government defendants declined to defend Proposition 8.

Five California voters—the official proponents of Proposition 8—and the ballot measure committee that they had formed (collectively, "proponents") moved to intervene in the case to defend Proposition 8. The district court granted their motion on June 30, 2009. In August 2009, the City and County of San Francisco was also granted leave to intervene in the case.

After denying plaintiffs' motion for a preliminary injunction, the district court conducted a twelve-day bench trial in January 2010. At trial, the parties called nineteen live witnesses; the court admitted into evidence more than 700 exhibits and took judicial notice of more than 200 other exhibits.

On August 4, 2010—after hearing more than six hours of closing arguments and considering hundreds of pages of proposed findings of fact and conclusions of law submitted by the parties—the district court found in favor of plaintiffs. The court declared Proposition 8 unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and permanently enjoined defendants—"and all persons under the control or supervision of defendants"—"from applying or enforcing" Proposition 8.

Proponents noticed an appeal to the Ninth Circuit Court of Appeals; the County of Imperial, which had been denied leave to intervene in the case to defend Proposition 8, also noticed an appeal. None of the government officials who were defendants in the case elected to appeal the district court's decision. In an effort to compel the Governor and Attorney General to notice an appeal, a California voter filed a petition for a writ of mandamus in the California Court of Appeal. *See Beckley v. Schwarzenegger*, No. C065920 (Cal. Ct. App. 2010). After the Court of Appeal denied the petition, the voter appealed to this Court. The

Court called for a written response from the Governor and Attorney General, and then denied the petition. *See Beckley v. Schwarzenegger*, No. S186072 (Sept. 8, 2010).

3. The Ninth Circuit stayed the district court's injunction pending appeal, and set the case for expedited briefing and argument. In granting the stay, the Ninth Circuit directed proponents "to include in their opening brief a discussion of why this appeal should not be dismissed for lack of Article III standing. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997)." In the opinion cited in the Ninth Circuit's order, the U.S. Supreme Court expressed "grave doubts" as to whether ballot initiative proponents have Article III standing to pursue an appeal from a decision invalidating an initiative where the State itself has declined to appeal. *Ibid.*

The appeal was argued on December 6, 2010. On January 4, 2011, the Ninth Circuit issued an opinion that affirmed the denial of Imperial County's motion to intervene. *Perry v. Schwarzenegger*, No. 10-16751. It also issued an order certifying the following question to this Court:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official 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, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

REASONS FOR DENYING THE REQUEST FOR CERTIFICATION

This Court should deny the Ninth Circuit's request to answer the Certified Question. The question presents two distinct issues: (1) whether proponents have a particularized interest in the validity of Proposition 8 that would afford them standing to appeal the district court's decision; and (2) whether proponents possess the authority to assert the State's interest in the validity of Proposition 8. The first issue is a matter of federal law because the question whether proponents' interests in the constitutionality of Proposition 8 are sufficiently "particularized" to distinguish them from the millions of other California voters who supported the initiative—and thus to afford them standing to pursue an appeal in defense of the initiative—is governed exclusively by Article III of the United States Constitution. This Court cannot provide any unique insights into the resolution of that question. And while the second issue does implicate state law, it is already well-settled under California law that initiative proponents do *not* possess the authority to represent the *State's* interest—as opposed to their own interest—regarding an initiative's validity. Accordingly, an order granting the Ninth Circuit's certification request would unnecessarily

delay resolution of the appeal pending in that court and needlessly prolong the irreparable harm that plaintiffs suffer each day that they are denied their federal constitutional right to marry.

I. The Existence Of A Particularized Interest In The Outcome Of A Case Is Determined Under Federal Law.

The question whether proponents possess a "particularized interest" in the validity of Proposition 8 sufficient to permit them to pursue an appeal in federal court is a question of federal law that does not warrant certification to this Court.

"The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans*, 520 U.S. at p. 64; *see also Diamond v. Charles* (1986) 476 U.S. 54, 68-71 (status as an intervenor-defendant in the district court cannot itself confer standing to appeal). An "irreducible constitutional minimum" requirement of Article III standing is that the party invoking the jurisdiction of a federal court demonstrate an "actual" stake in the litigation that is "concrete and particularized." *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560. A particularized stake is one that "affect[s] the plaintiff in a personal and individual way." *Id.* at p. 560, fn. 1. "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do" to confer Article III standing. *Arizonans*, 520 U.S. at p. 64.

"The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *United States v. Hays* (1995) 515 U.S. 737, 742 (citation omitted). A federal court therefore must determine for itself—as a matter of *federal* constitutional law—whether a party's interest in the outcome of a case is sufficiently "particularized" within the meaning of Article III to permit the party to initiate litigation or appeal an adverse judgment. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332, 343 (status as state taxpayers was insufficient to confer Article III standing to challenge the constitutionality of a state tax credit because "interest in the moneys of the Treasury . . . is shared with millions of others") (internal quotation marks omitted). State law cannot unilaterally confer a particularized interest on a party who would otherwise lack Article III standing. *See Raines v. Byrd* (1997) 521 U.S. 811, 820, fn. 3 ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

Accordingly, the first issue presented in the Certified Question—whether "the official proponents of an initiative measure possess . . . a particularized interest in the initiative's validity . . . which would enable them to . . . appeal a judgment invalidating the initiative"—

is exclusively a federal question. The Ninth Circuit must decide whether proponents' interest in the constitutionality of Proposition 8 is sufficiently distinct from the interest of the millions of other Californians who voted for the measure to satisfy the requirements of Article III. California law has no bearing on the answer to that question because state law cannot be used to manufacture Article III standing. *See Raines*, 521 U.S. at p. 820, fn. 3. And because this issue is controlled by principles of federal constitutional law, this Court does not have any peculiar insights to provide the Ninth Circuit—just as the Ninth Circuit would not be able to provide this Court with meaningful guidance in determining whether a party satisfied the requirements of state law for pursuing an appeal in state court.

II. It Is Well-Settled That Proponents Do Not Possess Authority Under California Law To Represent The State's Interest In The Validity Of Proposition 8.

The second issue on which the Ninth Circuit requested guidance—whether California law affords official proponents "the authority to assert the State's interest in the initiative's validity"—is equally unworthy of resolution by this Court. It is already a well-established principle of California law that proponents lack the authority under state law to represent the interest of the State.

Proponents claim that initiative proponents may speak for the State in defending initiatives they sponsored. Proponents contend that this places them on the same footing as the state legislators who were permitted to defend a New Jersey statute "on behalf of the legislature" in *Karcher v. May* (1987) 484 U.S. 72, 75. The United States Supreme Court held that the legislators possessed standing to appeal that case to the Third Circuit because, as Speaker of the New Jersey General Assembly and President of the New Jersey Senate, they were "authorize[d]" under "state law . . . to represent the State's interests." *Arizonans*, 520 U.S. at p. 65 (citing *Karcher*, 484 U.S. at p. 82). The Court further held, however, that once the legislators lost their leadership posts in the New Jersey Legislature, they "lack[ed] authority to pursue [an] . . . appeal on behalf of the legislature" to the U.S. Supreme Court because "[t]he authority to pursue the lawsuit on behalf of the legislature belong[ed] to those who succeeded [them] . . . in office." *Karcher*, 484 U.S. at pp. 77, 81. The Court did not permit the former legislative leaders to pursue the appeal in their capacities as individual legislators or as representatives of the prior legislature that had passed the measure they sought to defend. *Id.* at p. 81.

Arizonans itself distinguished *Karcher* on the ground that ballot initiative sponsors "are not elected representatives." *Arizonans*, 520 U.S. at p. 65. But, even if proponents were elected representatives, they are unable to point to any provision of California law that even remotely resembles the provisions referenced in *Karcher*. California law confers only a narrow set of rights on ballot initiative proponents—such as the right to have their arguments in favor of the measure reproduced in the ballot pamphlet (Elec. Code § 9067); the right to

receive election-related information from the State, including information about the status of their petition efforts (*id.* §§ 9030-9031), and the right to inspect petition signatures, Gov. Code § 6253.5. There is nothing in California law that authorizes a proponent to represent the interest of the State in litigation challenging the constitutionality of a ballot initiative.

To be sure, California initiative proponents have been permitted to *intervene* in state-court litigation. *See, e.g.*, *Strauss*, 46 Cal.4th at p. 399. But those decisions have allowed proponents to pursue their *own* interests in the validity of the ballot initiative, not to represent the interests of the *State*. In this respect, California initiative proponents are no different from their counterparts in Arizona, who have also been permitted to intervene to represent their own interests in state court cases but whose standing in federal court is subject to "grave doubt[ ]." *Arizonans*, 520 U.S. at p. 66; *see, also, e.g.*, *Slayton v. Shumway* (Ariz. 1990) 800 P.2d 590, 591.

Where ballot initiative proponents have sought not merely a right to intervene, but *standing* to maintain a suit in their own right, this Court has determined that they lack standing. In the *Marriage Cases*, for example, this Court held that the Proposition 22 Legal Defense and Education Fund, representing the proponent of that initiative, lacked standing to defend the provision, which had amended the Family Code to limit marriage to individuals of the opposite sex. The Fund asked this Court to grant review to determine "whether initiative proponents, or an organization they establish to represent their interests, have standing to defend attacks on the validity or scope of the initiative." Petition for Review of Proposition 22 Legal Defense and Education Fund at p. 13, *Marriage Cases*, 43 Cal.4th 757 (No. S147999), 2006 WL 3618498; *see id.* at p. 13, fn. 6 ("The Fund represents the proponents and organizers of the campaign to enact Proposition 22."). In support of its petition, the Fund argued that initiative proponents should be allowed to defend the constitutionality of their enactments because elected officials were not uniformly vigorous in defending initiatives—which was particularly true in the *Marriage Cases*. *Id*. at pp. 15-16. This Court granted review and held that the Fund's strong interest in Proposition 22 was "not sufficient to afford *standing to the Fund* to maintain a lawsuit" concerning the constitutionality of Proposition 22. *Marriage Cases*, 43 Cal.4th at pp. 790-91 (emphasis added). The Court explained that "the Fund is in a position no different from that of any other member of the public having a strong ideological or philosophical disagreement with a legal position advanced by a public entity that, through judicial compulsion or otherwise, continues to comply with a contested measure." *Ibid*.

It is clear that California law vests the *Attorney General*—not private litigants—with the authority to represent the State's interest in litigation. The state constitution provides that, "[s]ubject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State." CAL. CONST. art. V, § 13. It is the constitutional "duty of the Attorney General to see that the laws of the state are uniformly and adequately enforced."

Ibid. As part of that duty, the "Attorney General has charge, as attorney, of all legal matters in which the State is interested" (Gov. Code § 12511), and "shall . . . prosecute or defend all causes to which the State, or any State officer, is a party in his or her official capacity." *Id.* § 12512. In discharging these responsibilities, the Attorney General has the discretion to decide whether to defend an unconstitutional measure or to appeal an adverse judgment. *See State v. Super. Ct.* (1986) 184 Cal.App.3d 394, 397-98 ("The decision of the Attorney General whether to participate in a lawsuit, where the State has no financial interest at stake nor possible liability, is a decision purely discretionary and, like decisions regarding the prosecution and conduct of criminal trials, exclusively within the province of the Attorney General's office and not subject to judicial coercion."); *see also D'Amico v. Bd. of Med. Exam'rs* (1974) 11 Cal.3d 1, 14-15 (it is "clearly within the scope of the Attorney General's dual role as representative of a state agency and guardian of the public interest" to make binding admissions relevant to the constitutionality of a state law during discovery, even though those admissions may impair the State's defense).

This Court's decision denying the petition for mandamus attempting to compel the Governor and Attorney General to notice an appeal in the *Perry* litigation reaffirms that the State's discretion as to whether to defend an unconstitutional measure or appeal an adverse judgment may not be second-guessed by private litigants claiming to represent the interests of the State. *See Beckley v. Schwarzenegger*, No. S186072 (Sept. 8, 2010). "By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute." *Diamond*, 476 U.S. at p. 63; *see also id.* at p. 71 (holding that a private citizen lacked standing to appeal a decision invalidating a statute that the State itself chose not to appeal). "Because the State alone is entitled to create a legal code, only the State has . . . [a] 'direct stake' . . . in defending the standards embodied in that code." *Id.* at p. 65. Proponents' "attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with [their] interests." *Ibid.* But nothing in California law permits ballot initiative proponents to defend the constitutionality of a measure on behalf of the State. Proponents thus have no authority to disturb the considered determination of the Governor and Attorney General that, in light of the lengthy and thorough trial that culminated in the invalidation of Proposition 8 and the irreparable harm daily inflicted by that discriminatory measure, this litigation should be brought to a swift conclusion. Proponents may not usurp the power and exclusive discretion of the elected constitutional officers of California to decide when and whether to enforce or defend a state law.

In light of the absence of any California statute conferring on ballot initiative proponents the right to assert the interest of the State—and this Court's controlling precedent confirming that initiative proponents lack standing to defend an initiative measure—the resolution of the second issue posed by the Ninth Circuit is clear. It is settled California law

that initiative proponents do *not* possess the authority to represent the interest of the State regarding the validity of a ballot measure.

* * *

Accepting certification of the question posed by the Ninth Circuit would not facilitate the Ninth Circuit's resolution of the pending appeal. The Certified Question raises issues of federal law and settled state law that do not require elucidation by this Court. Certification proceedings would needlessly delay a decision from the Ninth Circuit, unnecessarily burden this Court's judicial resources, and intolerably prolong the denial of plaintiffs' constitutional rights.

In the event that this Court nevertheless grants the Ninth Circuit's request, plaintiffs respectfully request that the Court expedite its treatment of this matter by setting an accelerated briefing and argument schedule.

Respectfully submitted,

Theodore B. Olson

Theodore B. Olson
Counsel for Plaintiffs

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 January 24, 2011, I caused to be served the following documents:

PLAINTIFFS-APPELLEES' LETTER REGARDING THE NINTH CIRCUIT'S CERTIFICATION REQUEST

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.

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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 January 24, 2011, at San Francisco, California.

Ling Chiou