***Perry v. Brown,* S189476**
California Supreme Court Rough Transcript
September 6, 2011

Frederick K. Ohlrich:	The Honorable Chief Justice and Associate Justices of the Supreme Court of California. Hear ye, hear ye, hear ye. The Supreme Court sitting en banc in now in session. Please be seated.
Chief Justice Cantil-Sakauye:	Good morning. Welcome to oral argument at the California Supreme Court. Before we begin and before I ask the clerk to call the calendar we'd like to welcome Justice Goodwin Liu to the California Supreme Court, welcome.
Justice Liu:	Thank you.
Chief Justice Cantil-Sakauye:	You may call the calendar.
Clerk:	Calendar for the Supreme Court of California holding oral argument in San Francisco on Tuesday, September 6, 2011 at 10:00 a.m. is as follows: Case No. S189476 Kristin M. Perry et al. Plaintiffs and Respondents, City and County of San Francisco, Intervenor and Respondent, Edmund G. Brown, Jr. as Governor, et al., Defendants, Dennis Hollingsworth, et al., Intervenors and Appellants. For the Appellants, Mr. Cooper.
Mr. Cooper:	Ready.
Clerk:	And for the Respondents, Mr. Olson.
Mr. Olson:	Ready.
Chief Justice Cantil-Sakauye:	Thank you, Mr. Cooper. You may proceed.
Mr. Cooper:	Thank you very much Chief Justice Cantil-Sakauye. May it please the Court, I'm Charles Cooper, I represent the Appellants who, in the Federal proceedings underlying this case were the Intervenor Defendants. I appear today by leave of Court and I am grateful for that. As recently as 2009 in the *Straus* case this Court reemphasized what it calls the solemn duty, it's solemn duty jealously to guard the sovereign people's initiative power and the Court added this.

	The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter. We are required to resolve any reasonable doubts in favor of the exercise of this precious right. And we would submit that it follows in this case your Honors.
Justice Kennard:	Before you go any further I just want to get a little bit more clarity as to the legal position that you are espousing. Would you agree that whether or not your side has standing depends on whether the representatives of your side have authority to represent the State's interest in defending the law's validity and I mean the State law's validity, or whether you representing the proponents of the initiative at issue here, have a particularized interest that may be affected by a decision invalidating the law. Are you relying on both or mostly on one of them, or what?
Mr. Cooper:	Your Honor, we are relying on both propositions and we affirmatively submit to the Court that both propositions are correct.
Justice Corrigan:	But if we agree with you on either, that would be sufficient for you to prevail. Correct?
Mr. Cooper:	Yes, your Honor, we believe that it would. So long as the official proponents have a cognizable interest either representing their own interest in their own shoes as official proponents. A direct interest in the outcome of a case challenging their initiative.
Chief Justice Cantil-Sakauye:	Mr. Cooper, do you think either one of those two interests may be stronger than the other?
Mr. Cooper:	Your Honor, I do believe that this Court's cases and this Court's statements make much clearer that the official proponents do have a direct interest, either as intervenor or as real parties in interest in cases in the courts of this state challenging the initiatives that they have proposed.
Chief Justice Cantil-Sakauye:	But do you think either a particularized interest or a state interest is stronger, or are they equal in strength?
Mr. Cooper:	Your Honor, I would submit to you they are equal in strength. But I would also submit to you it is much rarer that this Court has had to grapple with the proposition whether or not individual official proponents are empowered to represent the State's interest acting as agents of the people.

Justice Werdegar:	Mr. Cooper, you said it's rarer. We have never had this question before, have we?
Mr. Cooper:	Your Honor, I would disagree. I believe the Court has had -
Justice Werdegar:	That we have held that the proponents represent the State's interests? It's my understanding that the California courts have allowed a liberal intervention and as a consequence, have never had to address the issue which is now before us, whether I believe the question is whether there's a matter of right for proponents to intervene.
Mr. Cooper:	Your Honor, this Court has allowed in every case -
Justice Werdegar:	It has allowed. I say that. And it's been discretionary as far as I understand the case law.
Mr. Cooper:	Well your Honor, I would submit to you that the Court has recognized consistently that official proponents have a direct interest and they satisfied what are the demanding standards.
Justice Werdegar:	Oh so is that the particularized interest part of the question when you say direct interest?
Mr. Cooper:	Yes your Honor. Both with respect to intervening in proceedings in which their initiatives are being challenged and in connection with being named as real parties in interest. There has never been a single case, the respondents have not cited to a single case in which the official proponents have not been allowed to intervene or have, or there's been any objection to their being named as real parties in interest in cases in which their initiatives are ---
Justice Chin:	Counsel, how do you square your position with your state interests argument with *Karcher v. May* when the Assembly Speaker and President of the Senate were removed and therefore had no longer had a state interest to protect.
Mr. Cooper:	Well, in that case, the State's interest didn't go away. It simply was transferred to a different set of hands. When the Speaker and the President, the Legislative leaders and the New Jersey Legislature in that case were changed, the new Legislative Leaders decided not to pursue the State's interest. But in this case your Honor, the official proponents are the ones who are standing essentially as agents of the people to represent the State's interest, it's clear and undisputed interest – excuse me – in the validity of

	initiative measures.
Justice Corrigan:	Isn't the point of distinction in the New Jersey case that the legislative representatives from the beginning were part of the judicial process because they were members of the Legislature, as opposed to being interested citizens in their own right. So that the logic of New Jersey case made sense when you say, okay they had standing because they were members of the Legislature, now they are not members of the Legislature anymore and people who are now in those positions step into those shoes. But that's not what we have here is it?
Mr. Cooper:	Well, your Honor, what we have here are, and certainly if the members of the Legislature who were there notwithstanding the fact that the State's executive officials were not themselves defending the validity of the law, that the Legislators were able to represent the State's interest. And when those particular officials changed by operation of election, the new Legislators had that responsibility. In this case and in the context of official proponents, the official proponents stand in the same shoes as the Legislators did in that case. The official proponents have an official status in state law.
Justice Liu:	Mr. Cooper, may I go back to a question that Justice Werdegar was asking, I think your briefs do a very nice job of collecting the California cases that have allowed initiative proponents to defend initiatives either at trial or on appeal within the state that plans to do so. Would you agree that your clients would have standing to appeal if this challenge were – if the underlying lawsuit had been litigated in State Court? In other words, we wouldn't even need to be here discussing this issue if you were in the State Court in the underlying litigation. Is that correct?
Mr. Cooper:	I do believe that is correct, Justice Liu, and I believe it follows from that fact that, that same interest, the same interest in the validity of the initiative measure that the proponents themselves brought into being would satisfy and this Court's standards for recognizing that interest which are quite demanding, would satisfy the federal requirement as well.
Justice Liu:	Okay. Well, I think that's a question of federal law, actually, that this Court hasn't been asked to answer, but let me just ask about the state representation question. So, San Francisco says in their brief that your theory about representing the State has no limits. On page 30 of their brief they say, is it the case that the Attorney General would have to obtain the consent of initiative proponents

	before she settled litigation or before she stipulated the facts on the summary judgment motion or before declining to take an enforcement action against someone who violates an initiative? Is it your position that the initiative proponents are representatives of the State only for the purpose of standing to appeal in Federal court? Or is it broader than that?
Mr. Cooper:	Your Honor, I want to be clear that we're making two arguments here. One, that the official proponents are representatives of themselves and their own interests which satisfy this Court's requirements for intervention.
Justice Liu:	Certainly. But just hold that off to one side for one second and for just the purpose of your assertion that you are representing the State when the State declines to do so, does that go any further than just the purpose for which you are here today, which is to gain standing in Federal Court?
Mr. Cooper:	No your Honor. I think it would extend to litigating in the courts of this State as well, representing the interests of the people as their agents when the State executive officials have refused to fulfill their duty to defend the State's interest in the validity of those enactments. And your Honor, I want to recall to the Court's attention the Building Industry Association against City of Camarillo case, which goes specifically to the point of this. In that case the concern was raised because there was a statute that shifted the burden of proving the validity of measures, local initiative measures, to the City and the County. And the claim was made that, that was unconstitutional, invasion and encroachment on the precious right to propose initiatives because local officials might well not be very enthusiastic. They might oppose those measures and would not defend them with vigor and this burden shifting provision would make that all the more tempting to the local officials. And the Court very clearly said that in that circumstance the initiative proponents would clearly be entitled to intervene and here's what the Court said. Permitting intervention by initiative proponents under these circumstances would serve to guard the peoples' right to exercise initiative power, a right that must be jealously guarded by the courts.
Justice Liu:	Mr. Cooper, that statement doesn't say that the initiative proponents are representatives of the State. I mean, I think, you know, what's perplexing to me about the argument here about just this part of the theory is that if we agreed with you on this part of the theory, it seems like we wouldn't be announcing a general

	principal of state law. In other words, all the cases that came before in our jurisprudence never had to decide this issue. I think it was simply based as Justice Werdegar says on a liberal intervention policy that reflected our Court's frankly good judgment that it wants an adversarial process that is fair and so it wants to hear all sides to a particular issue, especially one as important as a challenge to an initiative, a validly enacted initiative. And so this issue that's before us today has never come up definitively in our jurisprudence and it is coming up only in this particular context and so if we were to agree with you, it seems to me we'd be announcing a specific rule just for this specific context. And I'm just trying to understand if that's your position or whether this is some broader theory about the representative status of initiative proponents after enactment of an initiative.
Mr. Cooper:	Your Honor, my theory is limited to the occasion when the State refuses to defend the initiative at issue. It is limited to that context.
Justice Kennard:	Mr. Cooper if I may interrupt since you may soon be running out of time and as we know there are many questions from the Bench. To follow up on your answer where you said that your interest is in pursuing an issue pertaining to the authority of proponents of an initiative to intervene when paid officials who are ordinarily given the obligation to defend the initiative, refuse to do so, I gather then that whatever we are going to hold in this case is not limited to gay issues but our holding would apply to any other circumstance where proponents, often initiatives, are asserting standing to pursue litigation or an appeal when state officials who have been given the obligation to defend the peoples' initiative have refused to do so. Is that the correct summary of your argument?
Mr. Cooper:	Yes it is Justice Kennard.
Justice Kennard:	And then another inquiry, going back to my threshold inquiry, where you indicated to the Court in response to my question that you rely not only on the State interest but on the particularized interest. On the letter I do have a question. It would seem to me and I'm not speaking for the Court, I am just thinking aloud, that with respect to the particularized interest, how would you be able to satisfy the particularized interest, because it would appear that you would have to allege a particular injury. Wouldn't you have an uphill battle?
Mr. Cooper:	No your Honor. I don't think so at all. The official proponents are their fundamental right, what this Court has consistently called their fundamental right to propose initiative measures to the

	people, is what is at stake here. It is the exercise by initiative proponents of that right what is --
Justice Kennard:	But where is the actual injury?
Mr. Cooper:	Your Honor, if a court invalidates an initiative and it does so in error, in error, because no one was before it to defend the validity of that initiative, then surely it should be clear that the exercise of the fundamental right to propose that initiative will have been nullified.
Justice Kennard:	Mr. Cooper, assuming that just for purposes of oral argument that you'd have more of an uphill battle with respect to the particularized interest, I presume your fallback position is that you, representing the proponents of the initiative, have in your view, an argument or a solid argument to make in your view to this Court. Is that the correct interpretation of where you are?
Mr. Cooper:	Yes your Honor. We believe --
Justice Kennard:	Well, in light of that answer let's take a look then at the U.S. Supreme Court decisions in Karcher and in the Arizona case. With respect to Karcher you may recall that the opposing side has argued that Karcher is simply not on point here. Karcher, the opposing side has pointed out, did not involve an initiative as here. Is that the correct interpretation of what the opposing side has said?
Mr. Cooper:	Karcher didn't involve an initiative, that's true.
Justice Kennard:	So why would it be on point here then? Wouldn't there be some merit to the opposing side's view that Karcher is not on point and as you may recall the opposing side relies on the Arizonans case, and I'd like to hear from you your response to what I've just said.
Mr. Cooper:	Your Honor, Karcher didn't involve an initiative measure. It involved a regular statute. But Karcher recognized that the State of New Jersey, because the State's Supreme Court in New Jersey, had permitted the intervention of legislative officers when the executive officers charged with the responsibility for defending a statute, refused to do so.
Justice Kennard:	So do you construe, I'm sorry. Go ahead. I thought you were finished.

Mr. Cooper:	And our proposition is that this Court's decisions are precisely analogous to the decision, the Forsyth decision in the New Jersey Supreme Court, which gave rise to that decision in Karcher.
Justice Werdegar:	Well Mr. Cooper, in order – what Karcher held was a matter of Federal law. Am I correct?
Mr. Cooper:	Relying on --
Justice Werdegar:	All right. So the question to us as I have it from the Ninth Circuit is, rather than rely on our own understanding of California law, we certify the question so the California court may provide an authoritative answer as to the rights, interests and authority under California law of the official proponents. Once we do that, it's back to the Ninth Circuit to determine whether that satisfies standing under Federal jurisprudence.
Mr. Cooper:	Yes.
Justice Werdegar:	Now would it suffice if we were to write an opinion saying under California law we have generous, liberal intervention policies so that irrespective of whether the executive branch in the person of the Attorney General is supporting an initiative or not supporting an initiative, either way, we liberally allow intervention so that the courts will have the full benefit of all views in resolving the validity of an initiative. Would an answer such as that in our opinion, suffice?
Mr. Cooper:	Your Honor, I believe that it would but I would add that the way I read this Court's decisions, the requirements for intervention and the requirements for qualifying as a real party in interest are really quite, quite demanding and they do require, consistently require that the intervenor or the real party must demonstrate a direct interest in the outcome of the case.
Justice Werdegar:	You mean intervention as a matter of right.
Mr. Cooper:	Or intervention, permissive intervention.
Justice Werdegar:	Discretionary intervention we have allowed without any attention to those particulars that you now are enunciating. The intervention statute however, says in 387 subdivision (b), if any provision of law confers an unconditional right to intervene, the court must allow intervention. Are you making the argument that there's an unconditional right of proponents to intervene under state law?

Mr. Cooper:	I do believe that the proponents qualify under the (b) subsection of that provision. But even under the (a), the permissive provision, your Honor, as I read this Court's and the Court of Appeal decisions, every time an intervenor steps forward and seeks to intervene in a case, that intervenor must demonstrate a direct interest and immediate and direct interest.
Chief Justice Cantil-Sakauye:	Mr. Cooper. I'm sorry I'll let you finish, but I want to ask you this question that's been brought. We have shown that the cases in the California Supreme Court and even in the Court of Appeals have liberally allowed intervention. And it's most often in instances that's been discretionary when government officials have also been defending shoulder to shoulder with the official proponents. It's under those circumstances, even Building Associations spoke to that. That it almost always should be discretionary, be an abusive discretion otherwise not to permit official proponents to intervene in instances when government officials stand shoulder to shoulder in defense of the initiative. But in a situation in the question asked by the Ninth Circuit, the government officials have dropped out of the equation. So what we have are whether or not official proponents can assert the authority of the State interest in defending the initiative. So in that circumstance where it's discretionary historically in a situation where shoulder to shoulder government officials have stood with official proponents, is it your argument that when official proponents are alone in the defense of, and government officials drop out, that it's no longer discretionary. That it is a matter of right in order to safeguard the precious power of the initiative.
Mr. Cooper:	Yes it is, Chief Justice. And I believe that the Business Industry Council case stands for that very proposition.
Justice Werdegar:	No, I might say it implies that because that wasn't the issue there. They said it would be an abuse of discretion were intervention not allowed. But that wasn't the case. The city officials in that case actually supported the initiative didn't they?
Mr. Cooper:	Your Honor, whether they actually supported it or not, the fear was they didn't support it with vigor --
Justice Werdegar:	And the court was thinking what would happen if they didn't and that it would possibly, likely be an abuse of discretion not to allow the proponents.
Mr. Cooper:	Exactly you Honor.

Justice Werdegar:	Right.
Chief Justice Cantil-Sakauye:	Mr. Cooper your time has expired.
Mr. Cooper:	Thank you.
Chief Justice Cantil-Sakauye:	You have seven minutes on rebuttal.
Mr. Olson:	Madam Chief Justice may it please the Court. There is nothing in the California Constitution or its statutes that give private citizens the right to take over the Attorney General's constitutional responsibility to represent the State in litigation in which the State or its officers are a party.
Justice Chin:	In your brief you mention that there is no authority for the proponents to second guess either the Governor or the Attorney General. Is that your position?
Mr. Olson:	Yes. With respect to the Constitution.
Justice Chin:	Is there any authority to your knowledge for the Governor and the Attorney General to second guess the majority of the population?
Mr. Olson:	Yes. The California Constitution expressly gives the Attorney General the responsibility subject to the control of the Governor to be the Chief Law Enforcement Officer of the United States and to take care that the laws are executed.
Justice Chin:	So the Attorney General and the Governor get to pick the laws that they want to enforce?
Mr. Olson:	The Attorney General – and by the way, there is no charge that the Attorney General abused her discretion here, both the former Attorney General and this current Attorney General abused their discretion in not deciding to appeal. That is not an issue that's presented by Mr. Cooper and this petition was to force the Attorney General to appeal was rejected by this Court.
Justice Corrigan:	Okay now we know what we're not arguing about. Let's get down to what we are arguing about which takes us back to Justice Chin's question, which is, not whether or not the Attorney General is an independent agent empowered with discretion, but whether or not they can veto an initiative passed by the Sovereignty of the People who have specifically reserved this power unto themselves by simply opting not to participate in the defense of the peoples'

	initiative.
Mr. Olson:	What the people have reserved through the initiative power is the legislative power. They have not reserved the executive power.
Justice Corrigan:	But isn't the legislative power hollow if the people can be estopped from defending their own initiative?
Mr. Olson:	The people never give responsibility under the initiative power. The initiative power specifically said it's the power to propose and the power to enact. It does not say it is the power to defend. The separation of powers under California Constitution gives the Executive Branch authority with respect to making discretionary decisions with respect to the enforcement of the law or decisions not to appeal or to appeal.
Justice Werdegar:	Mr. Olson, if this law had been passed not by initiative but by the legislature, and everything else were the same, could any members of the legislature appeal its invalidation?
Mr. Olson:	No, your Honor. I found no case in which it was said that the California Legislature could exercise the power that the proponents are claiming and in the Building Industry case, which Mr. Cooper mentioned several times, the Court made the point, this Court made the point that the legislative power granted to the people through the initiative is co-extensive with the legislative power exercised by the Legislature and doesn't, is not superior to the legislative power given.
Justice Liu:	But historically, Mr. Olson, the initiative process is a check, isn't it? On the representative democracy process?
Mr. Olson:	Yes.
Justice Liu:	And so, our cases have recognized that that's a very important check. It's described as a very important right that the courts must solemnly and zealously guard, it seems to me here the Ninth Circuit has set up a hoop that the initiative proposed have to sort of jump through to get to the appeal, and the Ninth Circuit has said, and you apparently agree, that if State law recognizes them as representatives of the State, then the proponents will have Article Three standing, like, I have no idea whether that's correct or not, but that's not our business here. But my question is, given how protective we have been in our own cases, in California, and given the fact that the initiative proponents clearly would have standing to appeal if this litigation were – the underlying litigation were in

	the State Court – why shouldn't we read Article II, section 8 of the California Constitution to offer the initiative proponents what they need to jump through that hoop? In other words, why shouldn't we read it in a way that is consonant with the initiative protective tenor of our cases under State law.
Mr. Olson:	You would be, I submit, respectfully amending the Constitution. There is a way in which proponents of constitutional amendments could do this. In Proposition 27 in the year 2000, the same year that Proposition 22, the big predecessor to Proposition 8, was in the process – the proponents of that ballot proposition put in Section 4, they called it standing, the proponents of this initiative shall have standing to defend its provisions.
Justice Chin:	So is it your position that if that is not in the proposition and the elected officials refuse to defend it, no one else can?
Mr. Olson:	If the elect – that's correct. Unless there is a case for example, between private citizens as there was in Reitman versus Mulkey. A number of years ago in the mid-sixties where there was a challenge by an individual claiming a right under California statutes to purchase a home without discrimination. The Attorney General declined to defend Proposition 14 in those days, and there was a litigation that went all the way to the Supreme Court between private parties that had a direct interest in the case. What I am saying and I believe it's sustained by every decision by this Court and the way that this Court had construed the Constitution, is that, yes, the initiative power is extremely important. It is a check on the Legislature. It is something that this Court has repeatedly said is important and must be construed favorably. But it is only the – it is described in the California Constitution as a reservation of the legislative power. There are other checks built into the California --
Justice Liu:	Mr. Olson, I don't know how you can say that because the cases that we've decided under California law that deal with this type of issue when it comes up after enactment, have quoted the same language about how important the initiative process is and that courts, when they grant liberal intervention to send cases at trial or to take an appeal, wouldn't you say that they are at least informed by that important constitutional overlay?
Mr. Olson:	Of course. I believe that when the court under a California law is a liberal intervention policy, is informed by all of those things and the court in California can do what it wants with respect to intervention, but when those parties are intervened, they are

	representing themselves and their interest. They are not representing the State of California. What I was about to say is that the Constitution of California, like the Federal Constitution, provides additional checks and balances and part of that is the separation of the legislative power from the executive power, from the judicial power. Mr. Cooper could be making the same arguments with respect to the power of the people with respect to the judicial power.
Justice Kennard:	But Mr. Olson, you just mentioned the term the power of the people and I've been listening to the questions posed to you from the Bench that focused on the power that the people of California have reserved to them and as we've heard, it is a great power and it is the power where the people can directly propose and adopt _____[1] constitutional amendments. If we were to agree with the argument that you have urged this Court to adopt it would appear to me and again I'm not speaking for the Court but it would appear to me that to agree with you would nullify the great power that the people have reserved to them pertaining to proposing and adopting State constitutional amendments.
Mr. Olson:	The power to propose and enact, which are the words of the California Constitution, have not been nullified, they have not been vetoed. The Attorney General and the Governor are enforcing Proposition 8; otherwise my clients would be married today. Proposition 8 is being enforced. The only authority --
Justice Kennard:	Did the Attorney General present any briefs or any arguments when you mention to the Court that the Attorney General has enforced Proposition 8? On this issue in this case did the Attorney General file any briefs?
Mr. Olson:	The Attorney General filed a brief in this Court in this case as an amicus curiae, and it's a very persuasive brief with respect to the importance of the authority of the executive to check the legislature by determining that certain laws can be enforced under a certain way. Let me make the point that Mr. Cooper makes very forcefully in his briefs and his argument. His position is that the proponents could step in to represent the State whenever the Attorney General did not enforce with sufficient vigor the proposition enacted by an initiative. What does that sufficient vigor mean? Mr. Cooper himself --

[1] Time: 34:10

Justice Corrigan:	Well, before we get to your sufficient vigor argument, that's really not the question that we have posed by the Ninth Circuit. The question posed to us by the Ninth Circuit is what happens when the elected representatives in the executive branch decline to participate. I appreciate that you may want to nibble around the edges on an argument that you think is overreaching, but I think we may find our time more helpfully spent if we focus on the issue we do have to discuss.
Mr. Olson:	Well I would be happy to do that. However, the question was asked earlier of Mr. Cooper what are the limits of what the – where would this decision go because if it has to do with the power to appeal, does it have to do with the power to petition for certiorari? Does it have to – have the power to appeal certain issues? Does it have the power to push certain arguments? Does it have the power to end, render into respond to request for admissions or stipulations or a settlement?
Chief Justice Cantil-Sakauye:	Mr. Olson, it seems to me that those are all questions belonging in Federal Court. But getting back to the question that the Ninth Circuit has certified to us. My question to you is, it appears to me that a voter approved initiative measure is an indication of the voters, the people of California's will. And in that situation when we have a voter approved initiative measure and the government officials decline to represent, what happens to the State interest? Does it evaporate?
Mr. Olson:	The law – the Proposition 8 is being enforced.
Chief Justice Cantil-Sakauye:	No I am not talking about Proposition 8 in particular. I'm talking about the initiative measure, the purpose and integrity of the initiative. Because this issue, the standing issue, transcends Prop. 8. It transcends and applies to all initiative measures which we know are legion in California. So my question is, when there's a state interest as is obvious when the voters approve an initiative measure, and the government officials decline to defend that initiative measure, does the State interest as indicated by voter approval, evaporate?
Mr. Olson:	No it does not!
Chief Justice Cantil-Sakauye:	What happens to it?
Mr. Olson:	It remains – Proposition 8 and these other propositions are initiative measures that you mention, which are indeed legion in

	California, remain in effect, they remain the law, they may be enforced through a writs of mandate with respect to that the Attorney General in this case is enforcing it, it's only because the judiciary, which provides that other check in the California Constitution or in the Federal Constitution, determines – let's say that this was Proposition 9 and it prohibited people of different races from getting married which was something this State dealt with a long time ago. The Attorney General, after deciding that he would enforce it --
Justice Chin:	So, Mr. Olson your position is that the initiative stays in effect but when it's challenged in court, no one can defend it.
Mr. Olson:	No, the Attorney General has the discretion as the Chief Executive Officer --
Justice Chin:	Okay. If the Governor and the Attorney General do not defend it, no one can defend it.
Mr. Olson:	The Constitution does not give authority to the people through the proponents or any other persons to come in and represent the State of California.
Justice Corrigan:	So your answer to Justice Chin's question is yes, Mr. Olson?
Mr. Olson:	Yes it is.
Justice Corrigan:	Thank you.
Mr. Olson:	Yes it is. Because the --
Chief Justice Cantil-Sakauye:	Doesn't make that the initiative process illusory?
Mr. Olson:	No, I don't believe – in the first place most of these cases are going to be challenged and have been challenged in State courts, where your liberal intervention policies will apply. Secondly, the Federal judiciary has a responsibility which the Supreme Court has repeatedly emphasized, to make an independent judgment with respect to the constitutionality of a measure brought before it. Judges in the Federal judiciary are not going to declare something like Proposition 8 unconstitutional unless the judge decided that it violates the Unites States Constitution. And this case is a classic example. This judge held a thirteen day trial and entered into a 134 pages of findings and conclusions with respect to the very issues – every issue presented with respect to Proposition 8. Now, I stand here as not someone who wants the intervenors not to have

	certain rights to make certain arguments or to present certain briefs or something. But standing is something that we cannot waive.
Justice Werdegar:	Well, Mr. Olson, on the point of standing, were this Court to state in an opinion that under California law which is what we're asked about, we traditionally have allowed liberal intervention, never in any recorded instance, have proponents been denied the opportunity to advance their interests in an initiative, and we sent that over to the Ninth Circuit, because that is the present state of California law as I understand it. The present state. We're being asked to extend that to say when the executive doesn't defend it in Federal court, proponents have a right. But the present state of California law is we allow liberal intervention. If we sent that over to the Federal court would it not be up to that court to then decide? We've answered their question. This is what we do in California. To decide whether that confers standing on the proponents under Article III.
Mr. Olson:	Yes your Honor. And you could say that and it would be true and the Ninth Circuit already knows it because this issue was briefed extensively in the Ninth Circuit.
Justice Werdegar:	Then they can discuss under Federal law whether this is sufficient under the circumstances to allow the proponents to have standing under Federal law. A question that has no relevance in California.
Mr. Olson:	I agree completely. But I would not say that those cases that you cited state that the intervenors are representing the State. Because they weren't representing the State. They were representing their own interest.
Justice Werdegar:	We would say that we've allowed liberal intervention.
Mr. Olson:	Yes.
Justice Chin:	Mr. Olson, you seem to agree that it is better in our court system to have both sides represented. To give the Court the benefit of the legal argument from both sides of the proposition. Do you agree with that?
Mr. Olson:	I do. I think in an abstract world where we don't have a separation of powers, you might invite all kinds of citizens to present --
Justice Chin:	I don't want to invite all kinds of everything. I just want to have the best arguments on both sides given to the Court so we can make the best decision possible. But when you have one side not

	represented it seems to me that the right is illusory.
Mr. Olson:	Let's examine again, it seems to me, it isn't --
Justice Chin:	I mean, would you really have us here today with only you arguing this proposition?
Mr. Olson:	I'm perfectly happy by the Federal court – pardon me?
Justice Liu:	Isn't Justice Chin's question finally answered by the Federal court and not this Court?
Mr. Olson:	Absolutely. And it was answered in the Arizonans for Official English case where the court unanimously in an opinion by Justice Ginsberg said, we've never found that proponents have standing to represent the state.
Justice Chin:	Okay. So you want the Federal court to answer this question with only one side represented?
Mr. Olson:	I respectfully submit that all I am doing is representing my clients with respect to a federal constitutional question and to the extent that that may be informed by what California law is. I cannot concede or waive standing. The Federal court cannot change what the United States Supreme Court and what Article III, The Case for Controversy Provision of the Federal Constitution requires. For reasons that the Supreme Court has repeatedly discussed and articulated, these rules of standing and separation of powers make sense in the long run, our citizens in our society are served better in the Federal courts' view. Now this court has a more liberal intervention policy.
Justice Kennard:	Mr. Olson, to follow up on the question by Justice Chin to which I would like an answer, as Justice Chin has pointed out, if we were to agree with you, then the people are unrepresented in the defense of the initiative, when public officials who have been given the obligation ordinarily to defend certain initiative measures chose, for whatever reasons, and one can think of several reasons, when these public officials chose not to mount a defense, it we were to agree with you that that is quite proper, then and this goes back to something you mentioned earlier, the importance of having the courts decide the issue. But as Justice Chin has pointed out, without a proper and vigorous defense, the courts are not in a great position at all to consider all aspects of the litigation. So it would appear that agreeing with you would not promote principles of fundamental fairness when the people who have exercised their

	great power of initiative, then don't have anyone to defend the measure. And that goes back to a question I asked you earlier, to agree with that particular argument would nullify the power of the people to pose initiatives.
Mr. Olson:	You are not going to decide that, I submit. And you've not been asked to decide that. That is the Federal question that can only be decided by the Federal courts. What amounts to a particularized interest that is sufficient to ---
Justice Kennard:	I'm not talking about a particularized interest. I was trying to get an answer that Justice Chin posed and I followed up on that and I'm still trying to get a clear answer from you.
Mr. Olson:	Well, there's only two questions. One is, is there a particularized interest and I agree that there isn't a particularized interest.
Justice Kennard:	I'm not talking about a particularized interest.
Mr. Olson:	Then, is, does California law, is the initiative power convey with it the power to represent the State to the proponents? Does the reservation of legislative power constitute a delegation of executive power to represent the State of California in an initiative challenge? And I submit that the answer to that is no. There is no case from this Court or the California courts that say so. There is no constitutional provision, there's no statutory provision. This is not --
Justice Kennard:	Mr. Olson, perhaps I'll ask a simpler question and I hope you'll give an answer to that. I'd like to get some clarification. If we were to agree with you that if the State Attorney General refuses to defend a particular initiative, then it's simply too bad for the Court if it winds up without the mounting of a vigorous defense. Isn't that unfair to the Court too? Who is there to defend the initiative measure? Perhaps you can answer that.
Mr. Olson:	Well, okay. A citizen brought a mandamus petition to require the Attorney General to appeal this question to this Court to file a notice of appeal. This Court denied that mandamus petition. And Mr. Cooper is not saying that was an abuse of discretion. So the judgment and the discretion of the Chief Law Enforcement Officer of California that makes the decision that a proposition violates the Federal Constitution will stop at that point at the District Court decision because the resources of California or the judgment of California or the discretion of California officials say, this is not in

	the best interest of California.
Justice Corrigan:	But it is not for the executive branch to determine questions of constitutionality. It is for them to decide in their discretion whether or not they will pursue a case. But they do not get to by pocket veto, decide whether or not something is constitutional. We aren't talking about depriving the Attorney General if his discretion. We're talking about what happens when the Attorney General decides to, in the best exercise of this case her discretion, not to pursue a case.
Mr. Olson:	Yes.
Justice Corrigan:	Again I understand why you want to hone in on that because I think you're probably right there. But it goes farther than that Mr. Olson.
Mr. Olson:	If the Attorney General exercised properly the discretion vested in her in the California Constitution then the question is, under the California Constitution, does the initiative power carry with it the power of the proponents to represent the State of California? That's the question.
Justice Corrigan:	That is the question.
Mr. Olson:	I submit that is not an implicit power in the initiative process because there's nothing in the initiative process in the California Constitution that says that power exists and because great harm can come of that, that an Attorney General might exercise discretion for lots of reasons not to appeal any particular measure. A legislature – if the proponents don't have initiative power, don't have any more power than the legislature does, then you have members of the legislature or the legislature coming in and deciding well this statute ought to be prosecuted in this way because the Attorney General is not doing it in the right way or this decision ought to be appealed even if the Attorney General says we don't have the resources to do that.
Justice Corrigan:	Are we at all – should we at all be guided by the New Jersey case in which the legislators were recognized as having standing?
Mr. Olson:	The New Jersey case is distinguishable and Supreme Court of the Unites States and the Arizonans case specifically recognized that. They specifically say proponents are elected by no one. In the New Jersey case, the Karcher case, it was the President Pro Tem of the Senate and the Speaker of the House of Delegates who were

	explicitly authorized by their legislative bodies to represent the legislature.
Justice Corrigan:	And in California the people by virtue of passing the initiative process have in their Constitution specifically reserved that legislative power to themselves with regard to the initiative process. Isn't that true?
Mr. Olson:	The legislative power, yes. And the legislative power which is conveyed by the initiative is explained in the Constitution itself.
Justice Corrigan:	So if in New Jersey the holder of the legislative power has standing to pursue an appeal, why shouldn't the people who have reserved that legislative power to themselves and do not have to be have it granted to them by anyone since all grant of authority comes initially from the people, why shouldn't they be in the same position as the legislators in New Jersey?
Mr. Olson:	Well, there were specific statutes in New Jersey that gave those legislators the power to do that. They were specifically authorized. They were elected representatives. Proponents are not elected to anything. The Supreme Court in Arizonans specifically says that. The briefs filed by the City of San Francisco points out and the Attorney General here point out that the proponents take no oath to represent the people of California. They are responsible only to themselves.
Justice Chin:	Mr. Olson let me give you a hypothetical. Let's change the statute in New Jersey to an initiative. What result? Would it be different?
Mr. Olson:	Well I think what the Supreme Court in the Karcher case said, I don't there would be any difference in the outcome in the Supreme Court in that context.
Justice Chin:	But then your arguments regarding the leaders of the legislative branch having the authority to challenge it, would fall by the wayside if it were an initiative.
Mr. Olson:	I think --
Justice Chin:	Wouldn't the citizens who were the former legislative leaders of New Jersey then have the right to challenge, to defend the initiative?
Mr. Olson:	I think that if you decided, the California Supreme Court decided, that the initiative statutes as they stand convey the power that

	expressly was articulated in a statute in New Jersey and if there is a specific authorization as there was in New Jersey for officials of the State of New Jersey elected officials which lost that power as soon as they lost their positions of leadership in the legislature, then it could go up to the Supreme Court again and the Supreme Court itself expressed great skepticism about that by talking about proponents and said we've never recognized that power in proponents and it specifically the Supreme Court in Don't Bankrupt Washington which is a denial of an appeal to the Supreme Court on jurisdictional grounds rejected the very arguments that the proponents are making in this case with respect to statutes in Washington that were no really significantly --
Justice Liu:	Mr. Olson can I ask you about a part of the argument we really haven't talked about. The particularized interest aspect. You know, your brief says that the initiative proponents here are situated fundamentally no differently than any voter or other supporter of Prop. 8 who spent money or voted for the proposition. Doesn't that really blink reality? I mean haven't Mr. Cooper's clients put in a substantial amount more time effort, reputational assets, I mean they're the ones who according to the statutes controlled the arguments in favor of Prop. 8 in the ballot pamphlet. And so, isn't it just common sensically, isn't it the case that they are the ones most clearly invested in the success of the proposition and thus distinguishable from any other voter?
Mr. Olson:	I will stipulate that they raised more money and they spent a great deal of time and they exercised the power to propose and encourage people to enact. This particularized interest that you're talking about was discussed in the California cases itself. It was the Proposition 22. Now they were not the proponents but they had exercised all of that authority and spent – they were created to represent the proponents themselves and the Supreme Court in Arizonans talks about this and you talk about it in the Californians case that exercises a lot of – spending a lot of money, exercising a lot of authority, get to be gradations between various different citizens. Fundamentally though, what they're asking for is the power as a result of that to distinguish themselves because of a particularized interest and what the proponents say themselves on the last page of their reply brief when they talk about particularized interest they say that the particularized interest that they are seeking to vindicate is the concern over nullification of their fundamental right to propose an initiative and to fulfill their duties upon them as proponents.
Chief Justice Cantil-Sakauye:	Mr. Olson I want to stop you because I want to ask you a state

	interest. I think I have your point on particularized interest. But on state interest I want to ask you, law made by initiative is as strong if not arguably stronger than law made by legislation. But we've seen that in law made by legislation the Legislature and in California can defend itself as a matter of right to defend that legislation. Why isn't it then in order to safeguard the power reserved to the people in the initiative be a situation where we would allow the official proponents the authority, the right to defend the initiative measure that's been approved by the people when government officials decline to do so?
Mr. Olson:	My understanding of California law in the California cases is the Legislature does not have that power to defend the Constitutionality of legislation that the Legislature enacts unless specifically it deals with the legislative, the exercise or the form of the exercise of the legislative power itself. Those cases are very narrow. There's no case and Mr. Cooper has acknowledged that in his brief. He mentioned no case in which the Legislature has the power that the proponents are claiming here and that's precisely my point. I think that if the initiative power is important and the Court can recognize it, but the Constitution of California fundamentally limits the power of the initiative and the initiative proponents to the exercise of the legislative functions.
Justice Werdegar:	Mr. Olson you earlier referenced some previous initiative where in the initiative it gave the proponents, correct me where I go wrong, the right to defend it in court. Am I correct there?
Mr. Olson:	There was Proposition 27 in 2000 purported to do that.
Justice Werdegar:	Does that infringe on the executive power?
Mr. Olson:	If that was a constitutional amendment that's perfectly permissible.
Justice Werdegar:	But I didn't understand that it was. Was it?
Mr. Olson:	That was a statute. I'm simply saying that the proponents of a constitutional amendment certainly know how to put this provision in the Constitution if they wish.
Justice Werdegar:	But if they put it in an initiative statute not a constitutional amendment, would that give them the authority that they claim?
Mr. Olson:	I submit it would not because there's a specific California constitutional provision that says the Legislature can't change the

	constitutional --
Justice Werdegar:	So it would require a constitutional amendment. I just wanted to clarify that.
Mr. Olson:	Yes.
Chief Justice Cantil-Sakauye:	Thank you Mr. Olson. Your time has expired.
Mr. Olson:	Thank you.
Justice Baxter:	Is there a distinction between the interests of the electorate, the majority of the electorate that votes in favor of an initiative? And the interest of the State itself?
Mr. Cooper:	Your Honor I would submit to you that the majority of the electorate that enacts an initiative would be effectively the people and the people are the State. All sovereignty of the State resides in the people thereof according the Code of California.
Justice Baxter:	So how does – how would the majority of the electorate ever get their interests vindicated?
Mr. Cooper:	If Mr. Olson is right, they wouldn't get their interest vindicated at all. If the Attorney General decided that, that would not happen. Unless official proponents have the authority which I believe this Court recognized in the Building Industry's Council case, when the executive officials refused, represent the State's interest in such a litigation and Justice Chin, we have just heard.
Justice Baxter:	Well how about the argument that the remedy is at the ballot box?
Mr. Cooper:	Your Honor, there is no reason why the State and the official proponents and the majority of Californians who supported Proposition 8 and other propositions to succeed have only one remedy available to them and they are powerless in the meantime to see the State's interest in the validity of that proposition as well as their official proponents own personal and particularized interest vindicated in the courts of this State.
Justice Werdegar:	Mr. Cooper if we agree with you that the proponents have the authority to represent the interests of the State in Federal court, now what would happen if the Attorney General makes an appearance? The Attorney General is named as a party and the Attorney General steps forward and says I am the Attorney General of the State of California. I represent the interests of the

	State. What would happen then?
Mr. Cooper:	Your Honor that is what has happened and the case now pending in Federal court. It's what happened in the Strauss case.
Justice Werdegar:	What would the Ninth Circuit do? The Ninth Circuit would have two entities stating that they represent the interests of the State. Can there be two entities that represent the interests of the State in Federal court?
Mr. Cooper:	In that circumstance there would be only one entity.
Justice Werdegar:	And that would be which?
Mr. Cooper:	No, your Honor. It would be only one entity representing the State's interest in the validity of the measure. That doesn't just evaporate Madam Chief Justice. That remains. And it is that interest which the Attorney General is decidedly and openly not representing and in fact -
Justice Werdegar:	So we divide the State's interest with _____[2] when we go into Federal court and the Attorney General has authority as the elected officer that enforces the State's laws in one instance but the Attorney General doesn't have it in another instance.
Mr. Cooper:	What the Attorney General doesn't have, your Honor, I would submit to you, is the power that she claims and that the respondents claim on her behalf which is the authority not only to refuse to represent the State's interest in the validity of an initiative measure, an authority we do not contest here. But the authority to see to it that that interest will not be represented by anyone.
Justice Werdegar:	Well I'm just questioning, I'm not questioning your point on that. I'm questioning what would the Ninth Circuit do if these two entities appeared and said they each represented the State. Would the Ninth Circuit have to send it back to us again to say, well which one really does?
Mr. Cooper:	Your Honor I think in that circumstance the Ninth Circuit or this Court would accept the proposition that the Attorney General is not representing this interest of the State. And that the official proponents as agents of the people as the Supreme Court put it in Arizonans, is in fact representing the interests of the State and the

[2] Time: 1:01:50

	validity of that measure.
Justice Baxter:	Well we have authority where different constitutional officers have taken contradictory positions on the validity of legislation such as Amwest and other cases where as far as the California authority is concerned, there need not be one unified message. Isn't that correct?
Mr. Cooper:	That is correct Justice Baxter and in fact I don't think there's any dispute that in the underlying Perry case the Governor could have appealed to the Ninth Circuit notwithstanding the Attorney General's determination not to see that case appealed by anyone. I think that also is true of the county clerks who are named as party in that case. And again Justice Chin we have just heard the breathtaking scope of the power claimed on behalf of the Attorney General. Consider what that would mean for the Strauss case where this Court heard an objection, the attack on Proposition 8 under state constitutional law from a variety of parties including the Attorney General by unequivocally attacking its constitutionality but it allowed the intervention of the Proposition 8 proposal.
Justice Werdegar:	But that takes us back to California law which we've acknowledged time and again, does allow intervention as a discretionary matter. But it has never said that these individuals when speaking to us on these issues represent the State.
Mr. Cooper:	Well, you Honor what I would submit to you is the power claimed by the Attorney General was to prevent in even the Strauss case the Proposition 8 proponents from being heard in this Court to defend the constitutionality of Proposition 8.
Justice Liu:	But Mr. Cooper if the state officials have had that intention they have been remarkably unsuccessful in the California courts because as your brief itself notes, the courts have never disallowed initiative proponents from intervening in situations like this. I'd like to get your response to a point that Mr. Olson made. I was confused by the last page of your reply brief when you summed up the particularized interest and I want to just give you a chance to clarify that. It seemed in your statement that you were merging essentially the particularized interest for the State in this argument and I want to know what, in the clearest possible terms, what is the basis of your assertion of a particularized interest. And by the way, I don't mean a particularized interest that necessarily would satisfy the Article III standing requirement. Again, that's not our business here. I just want to hear your own articulation in the

	plainest language possible of what is your particularized interest in this case.
Mr. Cooper:	Your Honor the particularized interest of the official proponents of an initiative measure is to protect and defend their fundamental right in this Court's terms to propose initiative measures to the people for their adoption or rejection. To protect that fundamental right.
Justice Werdegar:	Doesn't that right arise – I'm over here. Doesn't that right arise before the initiative is qualified in order, I mean, if somebody is challenging it, certainly the proponents then have a particularized interest to defend their right to put it on the ballot, and I would be distinguishing their particularized interest after its been put on the ballot and enacted.
Mr. Cooper:	Your Honor, this Court has never recognized any distinction in the proponents standing before it before and after enactment. it has never suggested that intervention is appropriate before but not after enactment or that naming proponents as real parties in interest has something to do with whether or not it's before or after. And it doesn't make sense that it would. The point being, what the proponents of an initiative have a constitutional right to do is propose valid constitutional amendments to the State's Constitution. Valid ones. And so it is integral and inescapable that they have the right to defend the validity of that measure whether it's challenged before enactment or it's challenged after because if the validity of the measure is decided against them, well that right to propose that measure is clearly gone. It is nullified.
Justice Liu:	So your argument counsel is that your clients are the ones who got this thing started, they're the ones who made the arguments for it publicly and those facts survive whether it's before or after.
Mr. Cooper:	Yes, Justice Liu.
Chief Justice Cantil-Sakauye:	Mr. Cooper your time has expired. Thank you.
Mr. Cooper:	Thank you very much, your Honor.
Chief Justice Cantil-Sakauye:	The matter is submitted and we stand in recess until 1:30.
Clerk:	All rise.
	End of Transcription