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STANDING AT THE CROSSROADS: A Review of the Novel Issues of Standing at Play in Perry v. Schwarzenegger

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INTRODUCTION

This paper discusses the litigation surrounding California’s ‘Proposition 8.’ First discussed is the background leading up to the referendum amendment, then the findings made at the district level, and finally the open federal and state law questions regarding Proponents’ ability to defend their law when the state will not.

BACKGROUND

In 2004, San Francisco’s mayor, Gavin Newsom, authorized the issuance of marriage licenses to same sex couples in violation of a statewide voter initiative, Proposition 22, that amended the State’s Family Code to include the prerequisite “[o]nly marriage between a man and a woman is valid or recognized in California.” The California Supreme Court nullified the marriages performed in violation of Proposition 22 and ordered San Francisco to cease issuing marriage licenses. When Proposition 22 was challenged on constitutional grounds, the Supreme Court of California invalidated the law, upholding the superior court’s finding that “California’s bar against

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3 Lockyer v. City and County of San Francisco, 95 P. 3d 459 (Cal. 2004).
marriage by same-sex couples violated the equal protection guarantee of Article I Section 7 of the California Constitution."\(^4\) The California voters responded by enacting Proposition 8, amending the state’s constitution in November of 2008.\(^5\) However, in the three months between the marriage cases and the passage of Proposition 8, 18,000 same sex marriages were performed.\(^6\)

Opponents of Proposition 8 challenged the law, naming California’s Governor, Arnold Schwarzenegger, the Attorney General, the Director of the California Department of Public Health and State Registrar of Vital Statistics, the Deputy Director of Health Information and Strategic Planning for the California Department of Public Health, the Clerk-Recorder of the County of Alameda, and the Registrar-Recorder/County Clerk for the County of Los Angeles, all in their official capacities.\(^7\) Edmund G Brown, Jr. the Attorney General of California conceded that Proposition 8 is unconstitutional\(^8\) and the rest of the named government defendants declined to defend Proposition 8.\(^9\) The official proponents of Proposition 8 were permitted to intervene as Defendants of their law in July of 2009.\(^10\)

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\(^5\) Proposition 8 added Cal Const, Art. I § 7.5 (2011) to the California Constitution. The text of the amendment read: “Only marriage between a man and a woman is valid or recognized in California.”


\(^7\) Perry at 928.


\(^9\) Perry et al. v. Schwarzenegger et al., 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

\(^10\) Id.
THE CASE

On August 4, 2010, the district court’s decision came down, striking down Proposition 8’s Constitutionality on Equal Protection and Substantive Due Process grounds.¹¹ Neither Plaintiffs nor Defendants contested that the right to marry is fundamental.¹² The issue was therefore was “whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right” and whether disallowing same sex couples to wed violated their equal protection rights.¹³ The court found that although marriage has retained certain characteristics in American history, the institution has evolved, and never have the procreative abilities or intent of the parties come into play.¹⁴ The court found that although there have traditionally been distinctions of a male and female prerequisites in marriage, that distinction is founded in outdated gender roles and the subservient status of women throughout history.¹⁵ Because those gender roles are no longer a recognized part of society, marriage is now a union of equals, and the requirement of a man and a woman in marriage is based

¹¹ Id. at 1003.
¹² Id. at 992.
¹³ Id.
¹⁴ Id. The court goes into a lengthy discussion of the right to privacy’s role in marriage and family as discussed in Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) and in Blackmun’s dissent in Bowers v. Hardwick, 478 U.S. 186, 204-05 (1986). The court then looks as the evolution of marriage, citing miscegenation laws and Loving v. Virginia, 388 U.S. 1, 12 (1967) saying that the integration of marriage did not have a negative effect on the institution.
¹⁵ See Perry 704 F. Supp. 2d 921 at 992-993. The court finds that gender roles were required of marriage because of covertures and that as women were increasingly granted equal rights, the institution of marriage itself transformed away from a practice of male dominated institution, to one that allotted equality between the genders. “[T]he exclusion [of homosexuals] exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.” Id.
on antiquated notions, therefore it should no longer be considered a vital part of the institution itself.\textsuperscript{16} Consequently, the right the plaintiffs sought was not a new right “the right of same sex couples to get married,” but instead a recognized fundamental right: the right to marry in general, and Proposition 8’s denial of that right infringed upon the plaintiff’s fundamental rights.\textsuperscript{17} The defendants were unable to proffer a valid defense to this claim.

The court found that homosexuals are a suspect class and should receive heightened scrutiny, but that Proposition 8 would fail even rational basis review.\textsuperscript{18} The court went on to say that “[a] private moral view that same-sex couples are inferior to opposite sex couples is not a proper basis for legislation.”\textsuperscript{19}

\textsuperscript{16} Id. The court further discusses the inferior status of domestic partnerships as compared with marriage and finds that it is not a viable alternative for same sex couples.

\textsuperscript{17} Id.

\textsuperscript{18} Interest (1) was the preservation of marriage in its traditional definition: as existing between a man and a woman. The court said that “[t]radition alone . . . cannot form a rational basis for a law.” Id. at 998 (citing Williams v. Illinois, 399 U.S. 235, 239 (1970)). Interest (2) was “Proceeding with caution when implementing social changes.” Plaintiffs rebutted this claim at trial by showing that same sex marriage has, if not a positive effect, at least a neutral one on heterosexual marriage. Further, the court found allowing gay marriage would not affect the rights of those opposed to it. Interest (3): promoting opposite-sex parenting over same-sex parenting. The court rejected this because (1) same-sex parents and opposite-sex parents are of equal quality, and (2) Proposition 8 does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents. Interest 4: protecting the freedom of those who oppose marriage for same sex couples. This argument was based essentially in first amendment rights, but failed as a matter of law because Californians are already prohibited from discriminating based on sexual status in public accommodations or because of antidiscrimination laws. Heterosexual couples are simply unaffected by same-sex marriage, the court rules. Interest 5, treating same-sex and opposite-sex couples differently was found to have no legitimate state interest.

\textsuperscript{19} Id. at 213. To see all of the commercials advocating Proposition 8 submitted to the court, see https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html (the majority of these ads inform the viewer that shortly after the legalization of marriage in Massachusetts, second graders were read a fairytale about to kings who fell in love and got married. The ad then “warns” its viewers that, unless Proposition 8 passes, their children too could be told at a young age that being gay is just as valid as being straight.)
As such, Proposition 8 was ruled to violate the Federal Constitution of the United States and its enforcement was enjoined.

APPEAL

Two attempts have been made to appeal the Perry decision. The first, brought by the county of Imperial, the Board of Supervisors of the County of Imperial, and Isabel Vargas, in her official capacity as Deputy Clerk/Deputy Commissioner of Civil Marriages for the County of Imperial, failed. The ninth circuit dismissed the appeal on the merits for lack of standing. Ms. Vargas claimed that she had standing because “[a]ny injunctive relief granted by [the district court] would directly affect the Clerk’s performance of her legal duties.” Because a deputy clerk serves entirely at the pleasure and discretion of the County Clerk, who was not part of this action, the Ninth Circuit ruled that she had no significant protectable interest. The court alludes to the fact that the actual county clerk may have had injury, but the deputy did not.

The second case was brought by the Proponents of Proposition 8. The Ninth Circuit issued an order certifying a question to the Supreme Court of California questioning whether the Appellees had standing to

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20 Perry et al. v. Schwarzenegger et al., 630 F.3d 898, 906 (9th Cir. 2011).
21 Id. at 906.
22 Id. at 8.
23 Id. at 9.
24 Perry v. Schwarzenegger, 628 F. 3d 1191 (9th Cir. 2011).
appeal the decision. The Supreme Court is supposed to hear arguments on this no later than September of 2011.

**FEDERAL STANDING**

The federal standing requirement is derived from the Cases and Controversies Clause of Article III of the United States Constitution.

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

In order to prove injury, the "plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or

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25 Id. at 1193. “Pursuant to Rule 8.548 of the California Rules of Court, we request that the Court answer the following question: ‘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.’ We understand that the Court may reformulate our question, and we agree to accept and follow the Court’s decision. Cal. R. Ct. 8.548(b)(2), (f)(5).” Id.

threat of injury must be both real and immediate.”\textsuperscript{27} The court, at times, has read this requirement very narrowly.\textsuperscript{28}

Governments have standing to defend their law.\textsuperscript{29} State legislators have standing to contest decisions holding state statutes unconstitutional.\textsuperscript{30} However, in Perry v. Arnold, the Government is sitting on their right to appeal the constitutionality of Proposition 8.

The Proponents of Proposition 8 claim they have standing to appeal the Perry v. Arnold decision. Although it is unquestioned that they met the test to intervene at the trial level,\textsuperscript{31} and would at the appellate level, should the other parties bringing the appeal have standing, where no named party appeals, the “case or controversy” requirement of Article III also qualifies an applicant’s right to

\textsuperscript{27}City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983).

\textsuperscript{28}See generally Lujan 504 U.S. 555 (environmental organizations lack standing to challenge regulations to a geographic area to which the Endangered Species Act of 1973 applies) and Allen v. Wright, 468 U.S. 737 (1984) (citizens do not have standing to sue a federal government agency based on the influence that the agency’s determinations might have on third parties) and Sierra Club v. Morton, 405 U.S. 727 (1984) (mere “interest in a problem,” no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization “adversely affected” or “aggrieved”) and City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (fear of a possible injury resulting from city authorized choke hold previously administered not enough to confer Article III standing to challenge constitutionality of city ordinance) contra United States v. Students Challenging regulatory Agency Procedures, 412 U.S. 669 (1973) (group of George Washington University law students allowed to challenge a railroad freight rate increase because the increase in cost would discourage the use of recycled goods, which would lead to using natural resources, mining and pollution).

\textsuperscript{29}Diamond v. Charles et al., 476 U.S. 54, 62 (1986).

\textsuperscript{30}Karcher v. May, 484 U.S. 72 (1987). See also INS v. Chadha, 462 U.S. 919, 39 (1983) holding that when the Executive Branch agreed that the statute was unconstitutional, Congress’ defense on appeal of the statute guaranteed Article III’s “concrete adverseness” requirement was satisfied.

\textsuperscript{31}Fed. R. of Civ. Procedure 24. The Ninth Circuit has interpreted intervention to be allowable should the application be (1) timely, (2) the proposed intervener have an interest in the subject matter of litigation, (3) should the intervening party’s interest be impaired absent their intervention, and (4) the other parties to the litigation inadequately represent the intervening party’s interests. Sagebrush Rebellion, Inc. v. Walt, 713 F.2d 525 (9th Cir. 1983). See also Cedars-Sinai Medical Ctr. v. Shalala, 125 F.3d 765 (9th Cir. 1997) (citing Sagebrush criteria in a California case.)
intervene post-judgment.” That is to say, at the federal level, the test for standing requires an additional component of particularized injury that is not part of Rule 24.

A distinction between standing to intervene and to appeal makes particular sense when the “case or controversy” limitation on the federal judicial power is recalled. Adding C to the litigation between A and B may pose no problems under Article III of the Constitution, but permitting C to be the sole adversary of B on appeal, when his interest in the case may be only in its value as precedent, certainly does give difficulty since there is not real controversy between A and C.

So, in order to appeal, the Proponents must meet more than the Sagebrush Rebellion criteria, but have standing in their own right. The Proponents proffer that because they were allowed to intervene when others were not, that they have standing to appeal. However, the two have very different test. The Proponents of Proposition 8 must been Article III “standing criteria by alleging a threat of particularized injury from the order they seek to reverse that would be avoided or redressed if their appeal succeeds.” So, what is the injury?

When Illinois declined to appeal a decision ruling its abortion law unconstitutional, a physician attempted to appeal alleging standing based on his status as a pediatrician who would potentially

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33 Id.
34 Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 753-54 (1968).
35 Supra Rule 24 note 31.
36 Legal Aide Soc’y v. Brennan, 608 F.2d 1319, 1328 (9th Cir. 1979).
get more patients if there were fewer abortions (resulting in more people), his status as a father of a daughter of child bearing years, and as a protector of the unborn.\textsuperscript{37} The Court ruled his first claim as too speculative saying “unadorned speculation will not suffice to invoke the federal judicial power.”\textsuperscript{38} He failed to show that his daughter was a minor and that he would benefit from a parental notice requirement, thus his second claim also failed.\textsuperscript{39} The Court also rejected his third claim, saying that “only the State may invoke the power of the courts when those regulatory measures are subject to challenge.”\textsuperscript{40} The Court also reinforced the fact that “[The ability to seek appellate review] is not to be placed in the hands of ‘concerned bystanders,’ who will use it simply as a ‘vehicle for the vindication of value interests.’”\textsuperscript{41} The person or persons appealing a decision must have an individualized case or controversy, and an “abstract concern . . . does not substitute for the concrete injury required by Art. III.”\textsuperscript{42}

Dr. Diamond further alleged standing based procedurally on the facts that he both was permitted to intervene at the district level and because the lower court ordered him to pay plaintiffs’ attorney’s fees, he had a financial interest, thus financial injury. The Court dismissed the first claim saying “Diamond's status as an intervener

\begin{itemize}
\item\textsuperscript{37} Diamond v. Charles et al., 476 U.S. 54 (1986).
\item\textsuperscript{38} Id. quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44 (1976).
\item\textsuperscript{39} Diamond, 476 U.S. at 67.
\item\textsuperscript{40} Id.
\item\textsuperscript{41} Id. at 62 quoting United States v. SCRAP, 412 U.S. 669, 687 (1973).
\item\textsuperscript{42} Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. at 40.
\end{itemize}
below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal."\(^{43}\) The Court made clear that Rule 24(a)(2)\(^{44}\) which sets the standards for interveners, is not as strict of a test as required under Article III standing.\(^{45}\) In regards to the attorney’s fees, the Court stated “[a]ny liability for fees is, of course, a consequence of Diamond’s decision to intervene, but it cannot fairly be traced to the Illinois Abortion Law.”\(^{46}\) Therefore the Court denied his standing on both procedural claims.

Those opposing same sex marriages cannot appeal the decision of Proposition 8 based upon their personal morals alone. Federal standing is not placed upon anyone with a value interest that differs from the law. There must be a particularized and concrete harm for standing to exist. Contrived or non-specific harms are not enough. Dr. Diamond’s ascertain that he may gain more clients in the future, was not a specific enough harm. Abstract individualized harms proponents might proffer seem unlikely to grant standing as well. Further, as the Court said it was solely up to the state to “invoke


\(^{44}\) Federal Rule of Civil Procedure 24(a)(2) provides for intervention "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Diamond v. Charles, 476 U.S. 54, 69 (U.S. 1986). See Sagebrook Test Supra note 31.

\(^{45}\) Id. Although the Court seemed suspicious as to whether interveners themselves also possess Article III standing. See id. “[T]he precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals. We need not decide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.”

\(^{46}\) Diamond 476 U.S. at 70 (1986).
regulatory measures to protect [interests of the unborn] . . .” from abortion.

In Karcher v. May, the state attorney general declined to defend the constitutionality of a state law requiring a moment of silence to be observed in public classrooms prior to the start of the day. The Speaker of the New Jersey General Assembly and the President of the New Jersey Senate were both permitted to intervene to defend the law as representatives of the Legislature and were deemed to have standing to appeal it after they lost at the trial level. However, during the appeals process was an election where both individuals lost their status as leaders of the legislature and their successors withdrew the legislative appeal. The Court noted that Federal Rule of Appellate Procedure 43(c)(1) provides "[w]hen a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency . . . ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party." The two former leaders of the legislature were not permitted to appeal because they had not been listed as "individual legislatures" below, but as the leaders of the House and Senate of New Jersey. The new leaders of the House and Senate could have continued the appeal as representatives of their new position, but chose not to. What is clear from this case is that "the New Jersey legislature and its authorized representative have the

48 Id. at 80.
49 Id. at 81.
50 Id. quoting Fed. R. App. P. 43(c)(1).
authority to defend the constitutionality of a statute attacked in federal court.” However, it is unclear whether individual legislators have standing. If they had, in the lower court case, intervened not only as the leaders of the Legislature, therefore on behalf of the legislature, but also intervened as just “generic” legislators, the case may have come out differently.

If the Legislature has standing to bring suit to defend its laws when the Executive will not, does it follow that proponents of a bill can under similar circumstances? The Ninth Circuit has once addressed this issue in Yniguez v. Mofford. An Arizona voter initiative led to a law declaring state officials “shall act in English and in no other language.” This law was challenged under the first and fourteenth Amendments of the U.S. Constitution, and the district court found it to be unconstitutional. The sponsors of the bill moved to intervene post judgment, but the district court denied their request saying they lacked Article III standing. Upon review, the Ninth Circuit found that because the statute would have been defendable by the state legislature had they been the ones to enact it, the principle sponsors

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51 Karcher, 484 U.S. at 83 (White, B., concurring.)

52 Id. This will prove particularly interesting since the White House has declared that it will no longer be defending DOMA. Speaker of the House John Bohener has declared that he will be defending it on behalf of the House of Representatives, but if he were not, the law is still divided as to whether individual house members could step to the plate. See generally http://www.scotusblog.com/2011/03/house-will-defend-dom/.  


55 Yniguez, 939 F.2d 727.

56 Id at 730. “[T]he court held that the prospective interveners did not satisfy the Article III requirement of injury-in-fact necessary for there to be a judiciable controversy . . . [and] that [the Sponsors] . . . did not have an adequate interest in the litigation under Fed. R. Civ. P. 24(a)(2).” Id.
of the ballot initiative would too because they were comparable to the legislature in the case at hand.\textsuperscript{57} The court held

The official sponsors of a ballot initiative have a strong interest in the vitality of a provision of the state constitution which they proposed and for which they vigorously campaigned. The district court’s decision striking down [the statute] essentially nullified the considerable efforts . . . made to have the initiative placed on the ballot and to obtain its passage.\textsuperscript{58}

The Ninth Circuit emphasized the extra measures a ballot sponsor must go through to get their bill passed and because voter initiatives generally come into play when the people of the state “do not believe that the ordinary processes of representative government are sufficiently sensitive to the popular will with respect to a particular subject.”\textsuperscript{59} Therefore, “[w]hile the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariable depend on its sponsors to do so.”\textsuperscript{60} Thus, the Ninth Circuit Court of Appeals held that the Proponents of the Arizona Law had standing to appeal a decision that nullified the law they worked to pass.\textsuperscript{61}

However, the Supreme Court disagreed.\textsuperscript{62} Justice Ginsburg wrote the unanimous opinion, emphasizing that the Sponsors of the ballot initiative were “not elected representatives” and there is not an

\textsuperscript{57} Yinglez, 939 F.2d at 732.

\textsuperscript{58} Id.

\textsuperscript{59} The court listed the filing of an application with the secretary of state, to which the secretary of state must respond with a written statement of why he denied the request (if he did so), and the sponsor then has the right to submit an argument in favor of the initiative. Id. 733.

\textsuperscript{60} Id.

\textsuperscript{61} Id.

“Arizona law appointing initiative sponsors as agents of the people . . . to defend, in lieu of public officials, the constitutionality of initiatives made law of the state. Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.”\(^63\) However, although the Court had “grave doubts” whether the sponsors had standing, they assumed arguendo, that there was standing in order to dismiss the case altogether on the issue of mootness.\(^64\) Although the standing discussion was obiter dictum, the Ninth Circuit said “[they] would be unwise to disregard it.”\(^65\)

A similar Supreme Court opinion “dismissed for want of jurisdiction” due to a “lack[] [of] standing” a case where the ballot initiative’s sponsor group attempted a unilateral appeal.\(^66\) The one sentence decision gave little guidance beyond that fact.

So, it seems probable that the Supreme Court is unwilling to extend Karcher to include the Proponents of Proposition 8, and thus they lack standing under Article III of the United States Constitution. And since it was the Ninth Circuit specifically who was

\(^63\) Id. at 65. She also said that the group who sponsored would also not have representational or associated standing because the individual group members would not have standing. Id at 65-66. She said there is no concrete injury because they were non parties in the District Court, and not bound by the judgment, and that the judgment itself really had very little precedential effect (the statute authorized any person residing in Arizona to sue in state court to enforce the Article). See Id. at 66 and 58 n. 11.

\(^64\) Id. at 66 and 71. The original plaintiff voluntarily quit her position working for the state and had no intention of returning to a state position in the future. Id. “When a civil case becomes moot pending appellate adjudication, the established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.” Id. at 71 internal quotations omitted.

\(^65\) Perry v. Schwarzenegger, 628 F.3d 1191, 1198 n. 9 (9th Cir. 2011).


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scolded by a unanimous Supreme Court, it is unlikely they push the issue of Federal Standing in the case at hand.

Further, those opposed to same sex marriage cannot make the government of California appeal the constitutionality of its laws.

This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. The Court has rejected a claim of citizen standing to challenge Armed Forces Reserve commissions held by Members of Congress as violating the Incompatibility Clause of Art. I, § 6, of the Constitution. As citizens, the Court held, plaintiffs alleged nothing but the abstract injury in nonobservance of the Constitution. We have rejected a claim of standing to challenge a Government conveyance of property to a religious institution. Insofar as the plaintiffs relied simply on their shared individuated right to a Government that made no law respecting an establishment of religion, we held that plaintiffs had not alleged a judicially cognizable injury. Assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." Respondents . . . have no standing to complain simply that their Government is violating the law.67

If the people cannot make the government enforce its laws, it certainly cannot make the government take judicial action to appeal them.

THE ISSUE OF PROONENTS’ STANDING UNDER CALIFORNIA STATE LAW

Based on dicta from the Supreme Court’s Arizonans for Official English decision, the Ninth Circuit has forwarded the issue to the California Supreme Court to answer the question of whether the

Proponents of Proposition 8 have standing under Article II, Section 8 of the California Constitution, or otherwise under California state law. The California Supreme Court must determine whether state law creates a liberty interest for Proponents of a Statewide Initiative. “State law may create new interests, the invasion of which may confer standing.” “[T]he injury required by Art. III may exist solely by virtue of statues creating legal rights, the invasion of which creates standing.”

In order to have standing in a California Court, the plaintiff must establish that they have standing to bring suit “as a real party in interest, except as otherwise provided by statute.” There is no statute explicitly granting the proponents of an initiative standing to appeal its validity. However, Proponents allege they have standing because they have a “particularized interest” under state law. Plaintiffs must show an “actual and substantial interest in the subject matter of an action, and [that they] would benefit or be injured by a judgment in the action” in order establish themselves as a “real party in interest.” “The real party in interest is the

68 Perry v. Schwarzenegger, 628 F.3d 1191 (9th Cir. 2011).
69 The California Supreme Court will hear oral arguments September of 2011.
74 Supra 69.

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person possessing the right sued upon by reason of the substantive law.”

Even though California standing requirements are broader than federal requirements, “[California] Code of Civil Procedure § 367 requires that the real party in interest assert its own substantive rights.” An actor cannot meet the standing burden if he has “neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.”

California law gives much deference to citizen initiatives. An initiative cannot be repealed or amended by the state legislature without approval of the citizens of California. Overall, “California’s bar on legislative amendment of initiative statues stands in stark contrast to the analogous constitutional provisions of other states. No other state in the nation carries the concept of initiatives as ‘written in stone’ to such lengths as to forbid their legislatures from updating or amending initiative legislation.”

Perhaps more to the point, the Governor of California cannot veto a citizen initiative. So, as the assistance Ninth Circuit has pointed out, “it is not clear whether [the Governor] may, consistent with the


76 Ventura County, 45 Cal. Rptr. 2d at 364.

77 City of Santa Monica v. Stewart, 24 Cal. Rptr. 3d 72, 85 (Cal. Ct. App. 2nd D. 2005). (City lacked standing because they bore minimal responsibilities under challenged statute. Their only concern was that “implementation of the Initiative might prospectively affect the rights of its volunteer and paid public officials.”) Id.


79 People v. Kelly, 222 P.3d 186, 200 (Cal. 2010).

California Constitution, achieve through a refusal to litigate what he may not do directly: effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it, if no one else—including the initiative’s proponents—is qualified to do so.”

Proponents assert they have standing because of “an interest that is created and secured by California law— an interest in the validity of the voter-approved initiative they sponsored . . . .” They also claim to have standing in that they may assert State of California’s undisputed interest in the validity of its laws if the state refuses to do so. Plaintiff-Respondents argue that “the Governor and Attorney General have followed and enforced Proposition 8 from the day it took effect, and they continue to do so.” They allege that the state’s responsibility ends there and if the people do not approve, they can speak at the polls.

Whether proponents of an initiative have standing independent of the state is a matter that has seldom come up in the courts. In Simac Design, Inc. v. Alciati, the First Appellate District of the Court of Appeals for California held that “an unincorporated association of residents of and registered voters . . . whose purpose was to draft and organize voter support for [the] initiative . . . is an aggrieved

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81 Perry 628 F.3d at 1197.
82 Id. at 1196 internal quotations omitted.
83 Id.
84 Brief of Plaintiff-Respondents at 13, Perry v. Brown, No. S189476 (Cal. April 4, 2011) (formerly Perry v. Schwarzenegger). They further point out that “[t]he Governor and Attorney General did not ‘nullify’ Proposition 8; they simply exercised their prerogative not expend California’s finite resources challenging the district court’s well-reasoned application of federal law to this case.” Id. at 14.
85 See generally Id. at 13.
party that may appeal the order denying the . . . motion to vacate the judgment." 86 However, as the Ninth Circuit points out, “the issues in that case were in some regard dissimilar . . . and it was decided by only an intermediate court has not been discussed in subsequent decisions of the Supreme Court of California.” 87

Still, numerous cases over the years have referred to the initiative as “precious to the people and [a right] which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.” 88 Or, when it comes to initiatives it is "the duty of the courts to jealously guard this right of the people." 89 “[It] has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.” 90

The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. 91

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87 Perry 628 F.3d at 1198 citing Simac Design, Inc. v. Alciati, 92 Cal. App. 3d 146 (1979) Intervener was an attorney who happened to be in court on a different matter when the case came up. He moved to intervene based on his representation of a group of voters who campaigned for and sought to implement the measure that opponents were seeking to disregard, as well as a group formed to preserve land in two specific areas under question. Here, the plaintiffs were seeking to build upon land they own in violation of a law the intervenor-proponents passed, and they were permitted to defend its enforcement. The initiative itself was never challenged. In Perry v. Schwarzenegger, the law has been ruled unconstitutional and the proponents want to defend its validity.
91 Associated Home Builders etc., Inc. v. City of Livermore, 18 Cal. 3d 582, 591 (Cal. 1976).
So, it seems that the Supreme Court of California is inclined to give deference to initiatives.

In the Defendant-Interveners-Appellants’ (Proponents’) Brief to the Supreme Court of California they stress the difference in being an official sponsor of the bill, verses being an interested advocacy group.\textsuperscript{92} As examples of this, Proponents show how although they were allowed to intervene at the trial level, advocacy groups were not.\textsuperscript{93} However, as discussed above, in federal court there is a different test between the right to intervene under Rule 24(a)(2) and the rule of Article III standing.\textsuperscript{94} One does not confer the other.\textsuperscript{95} The right to intervene under California law is governed by the Cal. Code of Civ. P. § 387, subd. (a).

The trial court has discretion to permit a nonparty to intervene where . . . (1) the proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action.\textsuperscript{96}

The choice of whether to let a party intervene is left to the discretion of the trial court. “A person has a direct interest justifying intervention in litigation where the judgment in the action of itself adds to or detracts from his legal rights.”\textsuperscript{97} “An interest


\textsuperscript{93} Id.

\textsuperscript{94} See Diamond v. Charles et al., 476 U.S. 54, 62 (1986).

\textsuperscript{95} Id.


is consequential and thus insufficient for intervention when the action in which intervention is sought does not directly affect it although the results of the action may indirectly benefit or harm its owner.”

Proponents argue that because they meet the test to intervene, they meet the test to have individual standing. This matter has not been determined under California law.

The Plaintiff-Respondents, in their brief, allege that the California Supreme Court has already ruled on this issue. The court agreed with the First Appellate District California Court of Appeal’s decision to deny “The Fund”, a group set up to defend Proposition 22 standing. The Fund represented “over 15,000 residents and taxpayers of California who supported and continue to support Proposition 22 . . . [and board members,] Senator . . . Knight, Natalie Williams and Dana Cody . . . .” Senator Knight was the official proponent of Proposition 22. However, the California Supreme Court noted that the Fund itself was “not even created until one year after voters passed the initiative.” Further, Senator Knight was deceased at the time of the action. In fact, the lower court says “this case does not present the question of whether an official proponent of an initiative . . . has a sufficiently direct and

98 Id. at 550.
99 Plaintiffs-Respondents’ Answer Brief supra note 83 at 17. “[T]his Court Held that the Proposition 22 Legal Defense and Education Fund, represent 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.” Id.
101 The California State law that limited marriage to between a man and a woman.
102 City and County of San Francisco 27 Cal. Rptr. 3d at 726.
103 Id. at 728, emphasis in original.
immediate interest to permit intervention in litigation challenging the validity of the law enacted.”104 Although the Appellant-Petitioners in the Marriage Cases asked the Court to review “[w]hether citizen initiative proponents and organizers have a unique interest in defending the constitutionality of an initiative in which they have invested time, money and reputation,”105 the California Supreme Court did not explicitly address the issue. Instead, the Court said the Fund acknowledged they did not establish “a direct legal interest that will be injured or adversely affected.”106

But, standing in California is broader than what is federally required. The Supreme Court of California has said in a footnote that although Article III of the federal Constitution imposes a case-or-controversy limitation for standing, “[t]here is no similar requirement in our state Constitution.”107

In Building Industry Association v. Camarillo, a case the Proponents often cite to, the Court inferred that growth limitation ordinances established by initiatives were to be defended by the government. The California Supreme Court looked beyond the plain language of this burden shifting statute, to say that although the

104 Id. “[I]t can no longer be said to represent Knight’s interest in the litigation because Senator Knight is now deceased. Nor does evidence in the record suggest any other member of the Fund was an official proponent of Proposition 22. Id.


106 In re Marriage Cases, 183 P.3d 384, 406 (Cal. 2008). See also Id. at ft. 8.

107 Grosset v. Wenaas, 175 P.3d 1184, 1196 n. 13 (Cal. 2008). However, one may wonder where this liberal view of standing was when Adolph Lyons was denied the ability to challenge the constitutionality of a law that let four Los Angeles police officers legally choke him until the rendered him unconscious after a routine traffic stop. The Court said that the complaint did not establish a real and immediate threat that the citizen would again be stopped by the police, who without justification or provocation, would again apply the chokehold, the citizen’s claim of future injury being too speculative, and therefore he did not have standing to challenge the chokehold law. See generally City of Los Angeles v. Lyons, 461 U.S. 95 (1983).
statute only called for ordinances established by “governing bod[ies] . . .,” it was the intent of the legislature that initiatives should be included in that term.\textsuperscript{108} However, the statute was ambiguous because under a different subsection, initiatives enacted prior to the statute were specifically excluded.\textsuperscript{109} Further, the Court interpreted the statute to include initiatives, but the “governing bod[ies]” to whom the burden shifted as the “local governments.”\textsuperscript{110} The Proponents point to the fact that the Court says that “the trial court in most instances should allow intervention by proponents of the initiative.”\textsuperscript{111} The court is referring to a specific evidence code requiring cities to defend a statute. Further, the right to defend with the government and the right to appeal without it are not the same.

The Second Appellate District Court of Appeals found this as well. For example, the Safe Drinking Water and Toxic Enforcement Act of 1986 was a citizen initiative granting citizens the right to sue to enforce the act if the Attorney General had been put on 60 days notice and still not commenced a lawsuit action.\textsuperscript{112} The act specifically stated that “[c]itizens bringing such suits need not plead a private injury and instead are deemed to sue in the public interest.”\textsuperscript{113} Two

\textsuperscript{108} 718 P.2d 68, 73 (Cal. 1986).
\textsuperscript{109} Id at 69. Part 1(a) read “Any ordinance enacted by the governing body of a city, county, or city and county . . . .” and Part (d) limited “[t]his section shall not apply to a voter approved ordinance adopted by referendum or initiative prior to the effect date of this section . . . .” Id.
\textsuperscript{110} Id. at 74.
\textsuperscript{111} Id. at 75. See also Defendant-Interveners-Appellants’ Opening Brief, Case No. S189476 p. 19.
\textsuperscript{113} Id.
associations of paint manufacturers brought suit, saying that authorizing private citizens who have sustained no injury to bring a lawsuit “violates the separation of powers doctrine under the California Constitution, and the due process clauses of the California and United States Constitutions.” The court held that “[t]he California Constitution does not specify, as does the United States Constitution, that the state’s judicial power extends only to ‘cases and controversies.’” Instead, Article VI, § 10 states that the courts have jurisdiction of “all causes” except those given by statute to other trial courts. The court went on to say

[O]ur state Constitution contains no ‘case or controversy’ requirement. The substantial body of federal cases interpreting standing under the United States Constitution does not purport to impose the same requirement in cases arising under the California Constitution . . . . On the contrary, California authority supports the conclusion that a suit by citizens in the undifferentiated public interest is ‘justiciable,’ or appropriate for decision in a California court.

The sixth appellate district decision held that a plaintiff had standing to bring a misappropriation claim even though he had sold his rights to the trade secret in question in a bankruptcy proceeding. The court held that there is not the same “wariness” around the California’s constitutional subject matter jurisdiction as there is at


115 National Paint at 760 citing Article VI, § 1 of the California Constitution.


117 National Paint 68 Cal. Rptr. at 761, emphasis in the original.

118 Jasmine Networks, Inc. v. The Superior Court of Santa Clara County, 103 Cal. Rptr. 3d 426 (Sixth App. District Court of Appeal of Cal. 2009).
the federal level.” The court cites *Grosset v. Wenaas* and *National Paint* and re-emphasizes California’s lack of a “case or controversy” requirement. The court goes on to say that there is also not a standing requirement that originates from the *Code of Civil Procedure* § 367, saying the extent of that rule is simply “that the action be maintained in the name of the person who has the right to sue under the substantive law.” However, in both of these cases there was express standing given: the first, in a Citizens’ Initiative Statute and the second, in a Bankruptcy Agreement. There is no statutory provision explicitly giving Proponents standing.

However, California law seems far hazier. The questions between what is needed to possess a right to intervene, a right the Proponents surely have, verses standing to appeal has not been answered by the case law of California. There is quite a bit of case law discussing the importance of statewide initiatives to California law, and as a matter of public policy. The fact that the state elected governor and legislature cannot veto or overturn a statewide initiative, is an excellent example of how valuable the state believes this right of the people is.

Had there been a state law appointing initiative Proponents as agents of the people, then the Proponents would have Article III

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119 *Id.* at 432.
120 *Id.*
121 *Id.*
122 *Id.* at 429. The bankruptcy proposal included a stipulation allowing the petitioner to maintain his misappropriation claim which was his “most valuable asset.” The respondent challenging standing in this case knew of the request and had opportunity to object prior to the bankruptcy court’s final approval.
standing under *Karcher*.\textsuperscript{123} Now, it is up to the California Supreme Court to determine whether California state law has created an interest that would confer Article III standing.

**CONCLUSION**

Ultimately, I believe the *Perry* decision was decided correctly. At the same time, I believe the Proponents have a right, under California Law, to be permitted to appeal the decision. The California constitution clearly believes that statewide initiatives are of vast importance. This is illustrated through the difficulty in overturning the initiative made law, once enacted, and by language in court decisions saying that deference, whenever possible, should be paid.

The Respondent’s argument suggesting “the people” can remedy are state leaders’ inaction in defending and appealing this law can at the ballot box seems ridiculous. First, statewide initiatives exist because the state elected representatives are not enacting the laws “the people” want. Clearly, if the state had enacted legislation similar to Proposition 8, the Proponents would not have needed to. Further, by the time the electoral process works and the current elected officials can be voted out, the time for appeal would surely be lost, and the likelihood of redressability would be strongly diminished. And finally, “the people” have spoken, twice. First, they enacted Proposition 22, which failed under the California State Constitution.\textsuperscript{124} Then, they enacted Proposition 8 to amend the


\textsuperscript{124} *Perry*, *supra* note 4 at 1.
It seems clear what “the people” want. And though I agree that the government should not be made to extend itself into lengthy and expensive litigation to appeal a decision they agree with, if the Official Proponents of the legislation wish to do so, they should have that right, considering the ambiguity in the law and “the duty of the courts to jealously guard this right of the people.”

So, ultimately, I believe the California Supreme Court will find that Article II, Section 8 of the California Constitution creates a liberty interest for the proponents of an initiative that grants them standing to defend it under Article III of the United States Constitution.

Further, I ultimately believe the LGBT community has a right to achieve this victory in a substantive higher court decision, and not by what procedurally amounts to winning by forfeit.

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125 See Perry supra note 5, at 2.