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# Fixing Hollingsworth: Standing in Initiative Cases

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# FIXING *HOLLINGSWORTH*: STANDING IN INITIATIVE CASES

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*In* Hollingsworth v. Perry*, the Supreme Court dismissed an appeal filed by the "Official Proponents" of California's Proposition 8, which banned same-sex marriage in California. Chief Justice Roberts' majority opinion held that initiative sponsors lack Article III standing to defend their ballot measures even when state officials refuse to defend against constitutional challenges. As a result,* Hollingsworth *provides state officers with the ability to overrule laws that were intended to bypass the government establishment—in effect, an "executive veto" of popularly-enacted initiatives.*

*The Article examines this new "executive veto" in depth. It places* Hollingsworth *in context, discussing the initiative process in California, and the history of the federal lawsuit challenging Proposition 8.*

*An in-depth discussion of* Hollingsworth *follows. The particular issue presented by the appellants, their claim to standing based on their status as representatives of the People of California, and the Court's treatment of that issue, is scrutinized. This includes the Court's rejection of California law on the legal status of initiative proponents, and its adoption of the Restatement of Agency as the basis for Article III standing.*

*After concluding that* Hollingsworth *establishes an "executive veto" over the initiative process, the Article proceeds to examine the potential effect of this in California and the thirty-six other "direct democracy" states.*

*Finally, the authors present a series of "fixes" to* Hollingsworth*'s executive veto. These could assure defense of initiatives in the future, protecting them from the fate that Proposition 8 suffered in* Hollingsworth*.*

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## I. INTRODUCTION

In *Hollingsworth v. Perry*,[1] the United States Supreme Court held that official sponsors of successful state initiatives lack standing to defend their initiatives, even when state officials charged with defending and enforcing state law refuse to do so.[2] In so holding, the Court has provided state officials with an "executive veto" over voter-created laws, because, without their active defense, these laws may now go undefended in federal court.[3] The substantive issue in *Hollingsworth*—the constitutionality of California's Proposition 8, a voter-approved initiative that banned same-sex marriage—was controversial in itself.[4] But the Court's decision to dispose of the case on standing grounds produced additional controversy. The very purpose of initiatives in California, and in the thirty-seven other states with this traditional form of direct democracy,[5] is to allow voters to overrule officialdom, but *Hollingsworth* inverts the initiative process by allowing executive officials to overrule voters.

*Hollingsworth* was decided on the same day as *United States v. Windsor*,[6] which invalidated key provisions of the Defense of Marriage Act (DOMA).[7] By refusing to recognize same-sex marriages at the federal level, DOMA was similar to Proposition 8 in substance. Also similar were the procedural postures of the two cases. In *Windsor*, federal executives declined to defend the law in federal court, just as their California counterparts had declined to defend their state's initiative. But the symmetry ended with the Supreme Court's decisions. Different five-to-four majorities held that the absence of executive officials did not deprive the Court of jurisdiction to decide *Windsor*, but did in *Hollingsworth*.

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1. 133 S. Ct. 2652 (2013).

2. *Id.* at 2668.

3. *See* William Peacock, Perry *and* Windsor*: Threads of Standing, Constitutional Quandaries*, FINDLAW (July 8, 2013, 11:55 AM), http://blogs.findlaw.com/supreme_court/2013/07/perry-and-windsor-threads-of-standing-constitutional-quandaries.html.

4. Just before this Article went to press, the Supreme Court ruled that state laws barring same-sex marriage violated the due process and equal protection clauses. Obergefell v. Hodges, 135 S. Ct. 1039 (2015).

5. *See* John G. Matsusaka, *Fiscal Effects of the Voter Initiative in the First Half of the Twentieth Century*, 43 J. LAW & ECON. 619, 620–22 (2000).

6. 133 S. Ct. 2675 (2013).

7. *Windsor*, 133 S. Ct. at 2696 (invalidating DOMA, (Pub.L. 104–199, 110 Stat. 2419, 1 U.S.C. § 7 and 28 U.S.C. § 1738C)).

This Article provides a critical examination of *Hollingsworth* and the Supreme Court's treatment of standing in initiative cases. It proposes that the Court severely undermined direct democracy as a check on government abuses. It concludes that *Hollingsworth* was wrongly decided, and that, absent corrective action, state executives possess the ability to veto the people's sovereign power, as exercised through the initiative.[8]

## II. THE CALIFORNIA INITIATIVE PROCESS

### *A. A Brief History of the Initiative in California*

Ever since the state's admission to the Union in 1850, the California Constitution has embodied a core concept of popular sovereignty. "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."[9] The initiative process is a dramatic manifestation of this political power that has lasted for more than a century.

In 1911 California became the eleventh American state to provide for voter-initiated statutes and state constitutional amendments.[10] The passage of the constitutional amendment that brought in the initiative was ultimately the product of a nationwide reform effort usually called the "Progressive Movement."[11] In

8. In one way, this is an odd article for us to write since we have criticized California's initiative process. We believe it has done more harm than good. *See* Karl Manheim et al., *Rebooting California—Initiatives, Conventions And Government Reform*, 44 LOY. L.A. L. REV. 393, 402–04 (2011); Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165 (1998). Despite our views, in this writing we conclude that, if initiatives are to remain a check on the perceived failures of state government, some "fix" to *Hollingsworth* will be necessary.

We have also been critical of Proposition 8 on the merits. *See, e.g.*, John Caragozian, *Avoiding Future Embarrassment*, L.A. DAILY JOURNAL, Sept. 19, 2008, at 6; Brief for Karl M. Manheim as Amicus Curiae Supporting Petitioners at 2, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (Nos. S168047, S168066, S168078).

9. CAL. CONST. art. II, § 1 (derived from U.S. CONST. art. I, § 2 (amended 1849)).

10. THE INITIATIVE AND REFERENDUM INSTITUTE, http://www.iandrinstitute.org /statewide_i&r.htm (last visited Nov. 6, 2013). For an historical overview of the initiative process, *see generally* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, No. 13-1314, slip op. at 3–6 (U.S. June 29, 2015).

11. V.O. KEY & WINSTON CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 423 (G.M. McBride et al. eds., 1939); *see also Strauss*, 207 P.3d at 84 (Cal. 2009) ("As we have observed in past cases, '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.'").

California, Progressives focused much of their efforts in breaking the Southern Pacific Railroad's "control of . . . political and economic institutions."[12] As the California Supreme Court recently explained:

> [T]he progressive movement in California that introduced the initiative power into our state Constitution grew out of dissatisfaction with the then-governing public officials and a widespread belief that the people had lost control of the political process. In this setting, "[t]he initiative was viewed as one means of restoring the people's rightful control over their government . . . ."[13]

The amendment establishing the initiative passed by a margin of more than three to one.[14] Among its provisions was a requirement that any initiative, whether for a statute or constitutional amendment, could be brought before the voters by a petition with signatures equal to 8 percent or more of the voters in the previous gubernatorial election.[15]

In the century plus since establishing the initiative, there has been a great deal of litigation over individual propositions. This often

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12. KEY & CROUCH, *supra* note 11, at 423; *see also Strauss*, 207 P.3d at 84 ("In California, a principal target of the movement's ire was the Southern Pacific Railroad, which the movement's supporters believed not only controlled local public officials and state legislators but also had inordinate influence on the state's judges.").

13. Perry v. Brown (*Perry III*), 265 P.3d 1002, 1016 (Cal. 2011) (second alteration in original) (citations omitted); *see also* JOHN M. ALLSWANG, THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 1898–1998 5 (2000) (discussing a growing desire of average citizens to take back legislative power).

As the discussion in text below describes, the action that became *Hollingsworth v. Perry* in the Supreme Court went through four forums. It produced a large number of ancillary proceedings and decisions. For the sake of clarity, this Article will use the following nomenclature with regard to the five principal proceedings in the matter:

(1) *Perry I*—The district court's judgment, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010);

(2) *Perry II*—The Ninth Circuit order certifying a question re California law to the California Supreme Court, Perry v. Schwarzenegger, 628 F.3d 1191 (9th Cir. 2011);

(3) *Perry III*—The California Supreme Court's response to the Ninth Circuit, Perry v. Brown, 265 P.3d 1002 (Cal. 2011);

(4) *Perry IV*—The Ninth Circuit's decision on the merits, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012); and

(5) *Hollingsworth*—The U.S. Supreme Court's decision, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

14. KEY & CROUCH, *supra* note 11, at 440. The amendment is now found primarily in Article II, sections 8 and 10, of the California Constitution. CAL. CONST. art. II, §§ 8, 10.

15. KEY & CROUCH, *supra* note 11, at 441. Currently, the requirement is 5 percent for statutory initiatives, 8 percent for proposed constitutional amendments. CAL. CONST. art. II, § 8(b).

has been with regard to two constitutional issues, the so-called "single subject rule,"[16] and the distinction between an "amendment" to the Constitution, which may be enacted by initiative, and a "revision," which may not.[17] The validity of Proposition 8 was itself initially challenged in state court as an invalid "revision" due to its sweeping effect on the equality principle set forth in the California Constitution. It was only after that challenge failed[18] that the federal lawsuit in *Hollingsworth* was filed.

Opposition has developed, not only to particular proposed or enacted initiatives, but also to the process itself. One aspect of initiative law that has produced some of that criticism is the restriction on the Legislature's ability to amend an initiative statute.[19] This, in its effect, elevates initiative statutes to a status above other statutes, to a near-constitutional level.[20]

Criticism has also arisen out of the fact that the petition requirement, combined with the ever-increasing number of voters in California, has effectively turned the process over to those who can pay for extensive, and thus expensive, petition circulation drives.[21]

Notwithstanding these criticisms, the California Supreme Court has consistently and zealously guarded the people's right of "direct democracy," the right to superintend or correct the state legislature by way of initiative.

### *B. The Initiative Power Is a Sovereign Power*

The California Supreme Court has held:

> 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

16. CAL. CONST. art. II, § 8(d); *see, e.g.*, Raven v. Deukmejian, 801 P.2d 1077, 1083–84 (Cal. 1990) (en banc).

17. *See, e.g.*, *Strauss*, 207 P.3d at 78–122.

18. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

19. CAL. CONST. art. II, § 10(c) ("The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.").

20. *See* CTR. FOR GOVERNMENTAL STUDIES, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 9–10 (2d ed. 2008), *available at* http://policyarchive.org/collections/cgs/index?section=5&id=5800. California is the only state among more than thirty direct-democracy states that has a constitutional provision forbidding legislative amendment or repeal of initiative statutes. *Id.*

21. *See id.* at 10–12; LARRY J. SABATO ET AL., DANGEROUS DEMOCRACY? (2000); DAVID S. BRODER, DEMOCRACY DERAILED (2000).

> people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' . . . '*[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged . . . If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.*'[22]

Deference to the initiative power goes beyond that which courts ordinarily give to legislation. The California Supreme Court has noted that the power of initiative "is essentially a legislative authority."[23] When acting in that capacity, however, the people are not merely acting as an alternative legislature; rather, they are exercising their fundamental sovereignty:[24] it is "that safeguard which the people should retain for themselves, to supplement the work of the legislature by initiating those measures *which the legislature either viciously or negligently fails or refuses to enact*."[25]

In exercising the initiative power, the voters act as a super-legislature,[26] with power greater than that of the institutional legislature in at least three ways:[27]

(1) A statutory initiative cannot be amended by the Legislature, unless the initiative's own language allows for such amendment.[28]

(2) An initiative may not be vetoed by the governor.[29]

(3) The people also have the power to amend the California Constitution.[30] The Legislature has no such power. The Legislature, by two-thirds vote of both houses, may propose a constitutional

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22. Perry v. Brown (*Perry III*), 265 P.3d 1002, 1016 (Cal. 2011) (alteration and emphasis in original).

23. *Id.* at 1027.

24. Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 345 (Cal. 1979) (citation omitted) ("The California Constitution declares that 'people have the right to . . . petition government for redress of grievances . . . .' That right in California is, moreover, vital to a basic process in the state's constitutional scheme—direct initiation of change by the citizenry through initiative, referendum, and recall."), *aff'd*, 447 U.S. 74 (1980).

25. *Perry III*, 265 P.3d at 1016 (emphasis in original) (quoting Sec'y of State, Proposed Amends to Const. with Legis. Reasons, Gen. Elec. (Oct. 10, 1911)).

26. *See* Manheim & Howard, *supra* note 8, at 1232.

27. *See* Amwest Sur. Ins. Co. v. Wilson, 906 P.2d 1112 (Cal. 1995).

28. CAL. CONST. art. II, § 10(c). The disablement of amendment by the Legislature is unique to California. People v. Kelly, 222 P.3d 186, 200 (Cal. 2010).

29. *Perry III*, 265 P.3d at 1007.

30. CAL. CONST. art. II, § 8.

amendment, but the amendment does not become effective without the people's approval.[31]

The printed argument in favor of adopting the initiative process in 1911 claimed that it would give "people power to control legislation of the state [and] the power to pass judgment upon the acts of the legislature."[32] This furthers James Madison's prescription: "The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people."[33] Accordingly, when acting by initiative, the people displace the institutional legislature and assume that role themselves. But, as noted, the people's power of initiative is more than an ordinary legislative power; it is a reserved sovereign power.

## III. THE HISTORY OF PROPOSITION 8

### *A. Genesis of the California Marriage Protection Act—Proposition 8*

The right of same-sex couples to marry has been a prominent issue on America's political, legal and cultural agenda for more than a decade. Many state constitutions have been amended, either to allow or to prohibit same-sex marriage.[34] Courts have also faced the issue, with several holding that gays and lesbians have a state or federal constitutional right to marry.[35] Congress too became enmeshed with gay rights, passing two laws in the 1990s—Don't Ask Don't Tell[36] and the Defense of Marriage Act (DOMA).[37]

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31. *Id.* art. XVIII, §§ 1, 4.

32. *California Proposition 7, the Initiative & Referendum Amendment (October 1911)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_7,_the_Initiative_%26_Referendum_Amendment_(October_1911) (last visited Feb. 21, 2015).

33. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, No. 13-1314, slip op. at 30–31 (U.S. June 29, 2015) (quoting THE FEDERALIST NO. 37, at 223 (James Madison)).

34. William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FL. COASTAL L. REV. 233 (2005).

35. Obergefell v. Hodges, 135 S. Ct. 1039 (2015); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012).

36. Don't Ask, Don't Tell, 10 U.S.C. § 654 (repealed 2010).

37. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2012)) (barring same-sex married couples from federal marriage benefits and being recognized as "spouses" for purposes of federal laws, while also allowing states to refuse to recognize same-sex marriages granted under the laws of other states).

As has been the case with many social issues, California became a battleground in the fight over same-sex marriage. In 2000, the voters approved an initiative statute—Proposition 22—that limited marriage to heterosexual couples.[38] Proposition 22 was challenged on many fronts. While a constitutional challenge was pending in state court, some local public officials determined they were constitutionally required to issue marriage licenses to same-sex couples, notwithstanding the initiative. The California Supreme Court enjoined that action, holding that state and local officials had to comply with Proposition 22 until there was a judicial determination of invalidity.[39] In the meantime, the California Legislature passed two bills authorizing same-sex marriage,[40] but they were vetoed by Governor Arnold Schwarzenegger.[41] Then in 2008, the California Supreme Court invalidated Proposition 22, holding that discrimination against same-sex couples violated the state constitution.[42]

Subsequently, opponents of same-sex marriage mounted another effort, this time to amend the state constitution. The "California Marriage Protection Act," designated "Proposition 8,"[43] was approved at the November 2008 general election by a margin of 52 to 48 percent.[44] Another state court challenge was mounted on state constitutional grounds. Opponents of the initiative argued that Proposition 8 had "revised," rather than merely "amended" the state

38. California Defense of Marriage Act, CAL. FAM. CODE § 308.5 (repealed 2015) ("Only marriage between a man and a woman is valid or recognized in California.").

39. Lockyer v. City of San Francisco, 95 P.3d 459 (Cal. 2004).

40. *See* Assemb. B. 43, 2007 Assemb. (Cal. 2007); Assemb. B. 849, 2005–2006 Sess. (Cal. 2005).

41. Governor's Veto Message to Cal. Assemb. on A.B. 43, 2007–2008 Sess. (Cal. 2007), http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_vt_20071012.html; Governor's Veto Message to Cal. Assemb. on A.B. 849, 2005–2006 Sess. (Cal. 2005), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0801-0850/ab_849_vt_20050929.html. The Governor stated that the Legislature could not reverse an initiative passed by the people of California, and that the appropriate venue for the resolution of same-sex marriage was the California Supreme Court, where the challenge to Proposition 22 was then pending. *See* Assemb. B. 43; Assemb. B. 849.

42. *In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008).

43. CAL. CONST. art. I § 7.5, *invalidated by* Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921 (N.D. Cal. 2010). The initiative added article I, section 7.5 to the California Constitution. It reads: "Only marriage between a man and a woman is valid or recognized in California."

44. Debra Bowen, Cal. Sec'y of State, *Statement of Vote: November 4, 2008, General Election* 1, 13 (2008), https://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf.

constitution.[45] This time the California Supreme Court sided with the initiative proponents, holding that Proposition 8 was an "amendment," and therefore valid under state law.[46]

### *B. Proceedings in District Court (Perry I)*

The next phase in the legal struggle over marriage equality took place in federal court. In 2009, two same-sex couples who had applied for, but had been denied, marriage licenses, filed suit in the United States District Court for the Northern District of California.[47] They alleged that Proposition 8 violated the Fourteenth Amendment's guarantees of due process and equal protection. Because the Eleventh Amendment prohibits suits against states,[48] plaintiffs named as defendants Governor Schwarzenegger, Attorney General Jerry Brown, other state officials, and the clerks of Alameda and Los Angeles counties (who had refused to issue marriage licenses to plaintiffs).

In their pleadings in district court, the state defendants stated their belief that Proposition 8 was unconstitutional, and indicated they would not defend the measure. Proposition 8's official proponents, including State Senator Dennis Hollingsworth,[49] moved to intervene as defendants. No one opposed the motion, and in a minute order of four brief paragraphs, District Judge Vaughn Walker granted it.[50] Judge Walker began by stating that, under Federal Rule

45. *See supra* text accompanying note 20. *Compare* CAL. CONST. art. XVIII, §§ 1, 2 (amendment or revision by Legislature or convention), *with id.* § 3 (amendment by initiative).

46. Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009).

47. *Perry I*, 704 F. Supp. 2d 921; complaint available at https://ecf.cand.uscourts.gov/cand/09cv2292/files/1-1.pdf.

48. U.S. CONST. amend. XI.; Hans v. Louisiana, 134 U.S. 1 (1890). The Eleventh Amendment embodies unwritten pre-constitutional visions of state sovereignty, and forecloses suits against states in both state and federal court, with limited exception. *See* Alden v. Maine, 527 U.S. 706 (1999). However, per the "stripping doctrine" of *Ex parte* Young, 209 U.S. 123 (1908), state officials charged with enforcing state law can be sued as surrogates for the state, at least with regard to injunctive relief. Thus, it is commonplace for challenges to state law to name either the state governor or attorney general, or both, as defendants.

49. The other proponents of the initiative were Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson, organized as "ProtectMarriage.com" (collectively, "Individual Proponents"). Request for Title and Summary of Proposed Initiative, ProtectMarriage.com (Oct. 1, 2007), *available at* https://oag.ca.gov/system/files/initiatives/pdfs/07-0068%20%28i737_07-0068_Initiative%29.pdf? (last visited Nov. 10, 2013).

50. Perry v. Schwarzenegger, No. C 09-2292 VRW, 2009 U.S. Dist. LEXIS 55594 (N. D. Cal. June 30, 2009). The plaintiffs decided not to oppose proponents' intervention motion, because, inter alia, "a vigorous, competent defense of Proposition 8 . . . would make [an] ultimate

of Civil Procedure 24(a),[51] Senator Hollingsworth and the other sponsors (whom California law terms "Official Proponents") have a right to intervene if:

> (1) their motion is timely; (2) they have a significant protectable interest relating to the transaction that is the subject of the action; (3) they are so situated that the disposition of the action may practically impair or impede their ability to protect their interest; and (4) that interest is not adequately represented by the parties to the action.[52]

Judge Walker found that the Official Proponents satisfied all of the Rule 24(a) factors, noting that, with regard to factor (4), "no defendant has argued that Prop 8 is constitutional."[53] He then added, "[s]ignificantly, with respect to the last factor, although the responsibilities of the Attorney General of California contemplate that he shall enforce the state's laws in accordance with constitutional limitations, Attorney General Brown has informed the court that he believes Prop 8 is unconstitutional."[54]

At the end of a lengthy trial, Judge Walker ruled that Proposition 8 was unconstitutional and enjoined its enforcement.[55] After judgment, both Jerry Brown, who had been elected governor in the interim, and Kamela Harris, who had been elected Attorney General, declined to appeal. The County Clerks of the County of Alameda and the County of Los Angeles, who had also been named Defendants, also chose not to appeal. Hollingsworth and the other Official

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victory . . . that much more credible." DAVID BOIES & THEODORE B. OLSON, REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY 69 (2014).

51. Rule 24(a) provides:

> (a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. FED. R. CIV. P. 24(a).

52. *Perry*, 2009 U.S. Dist. LEXIS 55594, at *5–6.

53. *Id.* at *6.

54. *Id.* at *6–7 (citations omitted). Judge Walker also granted in part the City of San Francisco's motion to intervene, but denied all other requests by both proponents and opponents of the initiative. *See* Perry v. Proposition 8 Official Proponents, 587 F.3d 947 (2009) (affirming denial of intervention by the Campaign for California Families, since it was adequately represented by the Official Proponents).

55. Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921 (N.D. Cal. 2010).

Proponents, as intervenor-defendants, filed and prosecuted the appeal.[56]

Judge Walker denied proponents' motion for stay of the injunction pending appeal, holding that their moving papers failed to demonstrate a likelihood of success on appeal.[57] Moreover, he expressed doubt that they had standing to appeal, even though he had allowed them to intervene.[58]

The rationale for this apparent turn-about was not altogether clear, but three factors may have been involved. First, Judge Walker suggested that his injunction did not prohibit proponents from engaging in any activity. Specifically, he noted that "California does not grant proponents the authority or the responsibility to enforce Proposition 8."[59] He added that, as "private citizens," the proponents lacked "authority regarding the issuance of marriage licenses or registration of marriages," which were the acts covered by the injunction.[60]

Second, the judge held that proponents lacked any individual injury that might confer standing. After proponents had intervened, Judge Walker had asked them "to identify a harm they would face 'if an injunction against Proposition 8 is issued,'" but they "failed to articulate even one specific harm they may suffer as a consequence . . . ."[61]

Third, Judge Walker stated that when he granted proponents' intervention motion, he "did not address their standing independent of the existing parties."[62] While he did not explain this statement, he appeared to hold that the proponents' "significant protectible [sic] interest," while sufficient for Rule 24 purposes, did not necessarily confer standing independent of that of other parties.[63] Once the parties with standing (i.e., named state defendants) chose not to

56. Brief of Petitioners, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 457384.

57. Perry v. Schwarzenegger, 702 F. Supp. 2d 1132, 1135–37 (N.D. Cal. 2010).

58. *Id.*

59. *Id.* at 1136. The California Supreme Court later disagreed with Judge Walker's assessment. *See infra* Part III.F.

60. *Id.* The permanent injunction was entered against all defendants, including the Official Proponents, but it did not require them "to refrain from anything, as they are not (and cannot be) responsible for the application or regulation of California marriage law." *Id.*

61. *Id.*; *see also id.* at 1137 ("[Official] proponents make no argument that they . . . will be irreparably injured absent a stay . . . .").

62. *Id.* at 1136.

63. *Id.*

appeal, intervenors had to establish standing on their own. While this conclusion was not expressed in Judge Walker's order, it was later validated by the Supreme Court's decision in *Hollingsworth*.

Although Judge Walker denied proponents' motion for a stay during the appeal, he did stay the injunction for six days in order to allow the Ninth Circuit to decide whether to issue a stay.[64] Proponents, as defendant-intervenors, filed an emergency motion for stay with the Ninth Circuit, which was granted,[65] despite the state defendants' opposition.[66] Attorney General Brown again agreed with plaintiffs that Proposition 8 was unconstitutional and indicated that the state would not appeal the district court order.[67]

Other than the Attorney General's appearance in the Ninth Circuit to argue against a stay, none of the original state defendants formally participated in the case thereafter.[68]

### *C. Initial Proceedings in the Ninth Circuit (Perry II)*

Since the named state defendants chose not to appeal Judge Walker's decision,[69] the proponents, as defendant-intervenors, filed a formal Notice of Appeal.[70] This created the standing problem that is the focus of this Article, as well as some ancillary procedural questions.[71]

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64. *Id.* at 1138–39.

65. Order for Perry v. Schwarzenegger, No. 10-16696 (9th Cir. Aug 5, 2010).

66. Attorney Gen.'s Opposition to Defendant-Intervenors' Motion for Stay Pending Appeal, Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW).

67. *Id.* at 1–2. State defendants remained in the caption of the case as Appellees and the attorney general "appeared" in the Court of Appeals for the purpose of opposing the stay. Notwithstanding these formalisms, state defendants were treated as non-parties on appeal. The significance of the caption notation and the attorney general's limited appearance was not discussed by either the Ninth Circuit or the Supreme Court. But such appearances are apparently insufficient to cure jurisdictional defects. *See* Diamond v. Charles, 476 U.S. 54, 61 (1986) (attorney general may be a "party" of interest without being an appellant).

68. The Attorney General did file an amicus brief in the Supreme Court urging affirmance. *See* Brief for the State of California as Amicus Curiae in Support of Respondents, Hollingsworth v. Perry, (No. 12-144), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/02/12-144-bsac-California.pdf.

69. The County Clerk and Board of Supervisors of Imperial County, California, filed a "protective notice of appeal" along with an appeal of the district court's denial of its motion to intervene as defendant. The Ninth Circuit affirmed the denial of intervention and then dismissed the county's protective appeal for lack of standing. Perry v. Schwarzenegger, 630 F.3d 898, 903 (9th Cir. 2011).

70. Notice of Appeal, Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292), ECF No. 713.

71. In his concurrence dismissing Imperial County's appeal for lack of standing, Judge Reinhardt criticized both plaintiffs and defendants for their pleadings and tactics. Plaintiffs, he

In granting the stay pending appeal, the Ninth Circuit directed proponents to brief the issue of their standing to prosecute the appeal.[72] In response, proponents argued that they had an individualized interest in upholding the validity of the initiative they had sponsored.[73] As "an alternative and independent additional basis for standing," proponents also claimed that, pursuant to California law, "they may directly assert the State's interest in defending" Proposition 8 "as agents of the people."[74]

The Ninth Circuit concluded that if either of these interests existed, proponents would have standing. But that this question "rises or falls on whether California law affords them the interest or authority" they assert.[75] Since California law on that point was not clear to the court, the Ninth Circuit certified that issue to the California Supreme Court.[76] Specifically, the Ninth Circuit asked the California Court a two-pronged question:

> [under California's laws, do] 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?[77]

Certification is discretionary with the California Supreme Court.[78] It accepted the certified question and agreed to answer it.[79]

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opined, could have avoided jurisdictional uncertainty by naming a broader range of defendants, including the clerks of all of California's fifty-six counties. Perry v. Schwarzenegger, 630 F.3d 898, 907–08. (9th Cir. 2011) (Reinhardt, J., concurring). He also chastised the governor and attorney general for not defending the initiative "as was ordinarily their obligation." *Id.* at 908.

72. Order for Perry v. Schwarzenegger at 2, No. 10-16696 (9th Cir. Aug. 5, 2010).

73. Perry v. Schwarzenegger (*Perry II*), 628 F.3d 1191, 1196 (9th Cir. 2011).

74. *Id.*

75. *Id.* (internal quotations omitted).

76. *Id.* at 1193 ("[I]t is critical that we be advised of the rights under California law of the official proponents of an initiative measure to defend the constitutionality of that measure upon its adoption by the People when the state officers charged with the laws' enforcement, including the Attorney General, refuse to provide such a defense.").

77. *Id.*

78. CAL. CT. R. 8.548.

79. Perry v. Schwarzenegger, No. S189476, 2011 Cal. LEXIS 1658 (Cal. Feb. 16, 2011).

### *D. The California Supreme Court's Answer to the Ninth Circuit* (Perry III)

In *Perry III*, the California Supreme Court unanimously answered yes to the second prong of the Ninth Circuit's question, holding that "the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative."[80] However, the California Supreme Court expressly declined to rule on the first part of the Ninth Circuit's question, as to whether the proponents possess any "particularized interest in the initiative's validity."[81]

In holding that an initiative's official proponents may assert the state's interest, the California Supreme Court analyzed proponents' role in the initiative process. The Court began by emphasizing the long-held importance of initiatives in California.[82] The Court then added that protecting the primacy of the initiative process, especially from interference from elected officials, had led to the proponents' official status.[83]

> Neither the Governor, the Attorney General, nor any other executive or legislative official has the authority to veto or invalidate an initiative measure that has been approved by the voters. It would exalt form over substance to interpret California law in a manner that would permit these public officials to indirectly achieve such a result by denying the official initiative proponents the authority to step in to assert the state's interest in the validity of the measure or to appeal a lower court judgment invalidating the measure when those public officials decline to assert that interest or to appeal an adverse judgment.[84]

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80. Perry v. Brown (*Perry III*), 265 P.3d 1002, 1033 (Cal. 2011).

81. *Id.* at 1015.

82. *Id.* at 1005.

83. *Id.* at 1006.

84. *Id.* at 1007; *see also id.* at 1022 ("[I]n instances in which the challenged law has been adopted through the initiative process there is a realistic risk that the public officials may not defend the approved initiative measure 'with vigor.' This enhanced risk is attributable to the unique nature and purpose of the initiative power, which gives the people the right to adopt into law measures that their elected officials have not adopted and may often oppose.") (citation omitted).

As a consequence, California courts have routinely permitted the official proponents of an initiative to intervene or appear as real parties in interest to defend a challenged voter-approved initiative measure in order "to guard the people's right to exercise initiative power."[85]

*Perry III* acknowledged that, despite the above case law and the policy argument, initiatives' official proponents may be flawed defenders of their initiatives. Proponents' legal arguments "are not always the strongest or most persuasive . . . regarding the validity or proper interpretation of the initiative . . . ."[86] Still, "[s]uch participation by the official initiative proponents enhances both the substantive fairness and completeness of the judicial evaluation and the appearance of procedural fairness . . . ."[87]

Moreover, constitutional and statutory provisions regarding the initiative process give proponents a "distinct" and "unique" role, which led to the proponents being "the most logical and appropriate choice to assert the state's interest in the validity of the initiative measure . . . ."[88] Indeed, "it would be an abuse of discretion to preclude the official proponents from intervening to defend a challenged initiative measure when the named government defendants have declined to defend the initiative measure."[89] Importantly, proponents' right to intervene should be recognized, even when the government defendants are defending the initiative: "there is a realistic risk that the public officials may not defend the approved initiative measure with vigor."[90]

The California Supreme Court concluded, "The initiative power would be significantly impaired if there were no one to assert the state's interest in the validity of the measure when elected officials

85. *Id.* at 1006. The Court acknowledged that, with one exception (*see* Bldg. Indus. Ass'n of S. Cal v. City of Camarillo, 718 P.2d 68 (Cal. 1986)), initiative proponents' standing had not been expressly countenanced by prior cases, because proponents' roles—as real parties in interest or amicus curiae—had never been challenged. Still, the Court noted, past cases permitting a particular practice, even without challenge or analysis, "have much weight, as they show that the asserted flaw in the procedure neither occurred to the bar nor the bench." *Perry III*, 265 P.3d at 1145 (quoting Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 88 (1809) (Marshall, C.J.)).

86. *Perry III*, 265 P.3d at 1024.

87. *Id.*

88. *Id.* at 1017–18, 1024.

89. *Id.* at 1023.

90. *Id.* at 1022 (internal quotation marks and citation omitted).

decline to defend it in court or to appeal a judgment invalidating the measure."[91] Accordingly,

> [e]ven though the official proponents of an initiative measure are not public officials, the role they play in asserting the state's interest in the validity of an initiative measure in this judicial setting does not threaten the democratic process or the proper governance of the state, but, on the contrary, serves to safeguard the unique elements and integrity of the initiative process.[92]

### *E. Further Proceedings in the Ninth Circuit* (Perry IV)

The Ninth Circuit accepted as binding the California Supreme Court's determination that Proposition 8's Official Proponents were "authori[zed] to represent the People's interest in the initiative measure they sponsored."[93] The circuit court noted that when state officers are sued on behalf of a state, as a result of the Eleventh Amendment, either the officers or the state itself may appeal. While the decision to appeal is "most commonly made by state executive branch . . . the states need not follow that approach."[94] "It is their prerogative, as independent sovereigns, to decide for themselves who may assert their interests and under what circumstances, and to bestow that authority accordingly."[95]

Since proponents' capacity "to bring this appeal on behalf of the State"[96] was conclusive as a matter of state law, Article III standing was satisfied.[97]

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91. *Id.* at 1024.

92. *Id.* at 1030–31; *see also id.* at 1024 (Proponents' ability to defend their initiatives, even when state officials are also doing so, "is essential to ensure" that voters' interests "are not consciously or unconsciously subordinated" by those officials.). Indeed, proponents' rights to be co-defendants are as important as their rights to be sole defendants. When no official defense is mounted, the responsible officials may be identified and—at least in theory—held politically accountable for their inaction. On the other hand, accountability may dissipate when the public officials are able to claim that they defended the initiative—albeit, without vigor—and then blame courts for striking down the initiative.

93. Perry v. Brown (*Perry IV*), 671 F.3d 1052, 1072–73 (9th Cir. 2012) *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

94. *Id*. at 1052.

95. *Id.* at 1071.

96. *Id.* at 1064.

97. The Court of Appeal, like the California Supreme Court before it, failed to address proponents' lack of a particularized injury. *Id.* at 1074.

On the merits, the Ninth Circuit affirmed Judge Walker, although on narrower grounds.[98] Following denial of a rehearing en banc,[99] proponents filed for certiorari.

### *F. Proposition 8 in the Supreme Court and Afterward*

In granting certiorari,[100] the Supreme Court asked for briefing on petitioners' standing. This issue then consumed much of the oral argument and served as the basis for the Court's judgment. Chief Justice Roberts, writing for a five-member majority, held that petitioners lacked standing. That judgment vacated the decision of the Ninth Circuit, but not that of the district court. As named defendants, state officials clearly had standing to defend the law in the trial court, so there was no defect in that court's judgment.[101] By leaving that judgment intact, the Supreme Court implicitly held the failure of state defendants to mount a defense did not deprive the district court of jurisdiction.[102] However, in the Ninth Circuit and Supreme Court, no state officials appealed; only the initiative's proponents did so. This fact, the Supreme Court ruled, deprived the appellate courts of jurisdiction.

The ultimate fate of Proposition 8 was unclear for a while. On the same day the Supreme Court decided *Hollingsworth*, the California State Registrar issued a letter to all county clerks in California directing them to start issuing marriage licenses to same-sex couples.[103] Proponents then filed for a Writ of Mandate in the California Supreme Court, asserting that the district court judgment extended only to the two counties whose clerks had been named as defendants.[104] The California Supreme Court rejected this theory.[105] As a result, Proposition 8 was effectively nullified.

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98. *Id.* at 1064.

99. Perry v. Schwarzenegger*,* 592 F.3d 971 (2009).

100. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013).

101. *See generally* Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 831 (2004) (named defendants have both the right and obligation to defend).

102. This may be a problematic outcome. While parties who are sued ordinarily have standing to defend, the case might not otherwise be justifiable. *See infra*, note 213.

103. Letter from Tony Agurto, State Registrar of Cal., to County Clerks and County Recorders (June 26, 2013), *available at* http://gov.ca.gov/docs/Letter_to_County_Officials.pdf.

104. Petition for Writ of Mandate and Request for Immediate Stay or Injunctive Relief at 43, Hollingsworth v. O'Connell, 2013 Cal. LEXIS 6809 (Cal. Aug. 14, 2013), *available at* http://www.adfmedia.org/files/HollingsworthMandamusAction.pdf. Counties and other political

*Windsor* also left state marriage bans in limbo. While Justice Kennedy's decision invalidating DOMA was based on respect for the states' right to define marriage without federal interference, several lower courts and state officials began to extend *Windsor* to state laws soon after the decision.[106]

The uncertainty created by the contrast between the holdings on standing in *Windsor* and *Hollingsworth* is not dissipated by the Court's decision in *Obergefell*, finding a constitutional right to same-sex marriage. It also relates to the continued vitality of direct democracy—the power of the people to create, amend, and repeal state law through the initiative. Addressing that problem is the primary purpose of this Article.

## IV. DECONSTRUCTING *HOLLINGSWORTH*

### *A. Initiative Proponents' Standing: Framing the Analysis*

Prior to *Hollingsworth*, the Supreme Court had only once before considered the standing of initiative proponents to defend their efforts in federal court. In *Arizonans for Official English v. Arizona*,[107] voters adopted an initiative constitutional amendment that declared English as the official language of Arizona. In a federal suit brought by a state employee, the district court ruled that the initiative violated the First Amendment, but denied the employee relief since she could not show that any enforcement threats had been made against her.[108] The court also dismissed all state defendants on Eleventh Amendment grounds except for the governor. The governor, however, indicated she would not appeal the judgment invalidating the initiative.[109] The district court then denied the initiative's proponents' post-judgment motion to intervene to

subdivisions of a state do not enjoy Eleventh Amendment immunity, so they can be named as defendants in their political capacities.

105. Hollingsworth v. O'Connell, S211990, 2013 Cal. LEXIS 6809 (Cal. Aug. 14, 2013); *see also* Letter from Kamala Harris, Attorney Gen., to The Honorable Edmund G. Brown, Jr., Governor of the State of Cal. (June 3, 2013), *available at* http://gov.ca.gov/docs/AG_Letter.pdf (stating that the injunction, if it were to go into effect, would apply statewide.).

106. This was done mostly on the basis of the *Windsor* majority's reliance on Due Process and Equal Protection principles. *See, e.g.*, Jenkins v. Miller, 983 F. Supp. 2d 423 (D. Vt. 2013); Dep't of Health v. Hanes, 78 A.3d 676 (Pa. Commw. Ct. 2013).

107. Arizonans for Official English v. Arizona, 520 U.S. 43, 49 (1997).

108. Yniguez v. Mofford, 730 F. Supp. 309, 317 (D. Ariz. 1990).

109. Yniguez v. Mofford, 130 F.R.D. 410, 412 (D. Ariz. 1990).

defend.[110] On cross-appeals by the employee and the proponents, the Ninth Circuit observed that proponents could intervene on appeal only if they independently satisfied Article III standing.[111] The court held that they did, by analogizing them to state legislators who have been recognized in appropriate circumstances as proper parties to defend their legislative actions.[112]

The Supreme Court dismissed the case for lack of jurisdiction. Justice Ginsburg wrote for the Court:

> We have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests. [Proponents] however, are not elected representatives, and we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona 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.[113]

Although expressing "grave doubts" about proponents' standing,[114] the Supreme Court declined to decide the issue, holding instead that the case was moot since the complaining employee had resigned her state position. Confusingly, in discussing the district court's jurisdiction, Justice Ginsburg wrote that initiative proponents "had an arguable basis for seeking appellate review."[115]

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110. *Id.*

111. Yniguez v. Arizona, 939 F.2d 727, 731 (9th Cir. 1991) (citing Diamond v. Charles, 476 U.S. 54, 68 (1986)) ("'[A]lthough intervenors are considered parties entitled, among other things, to seek review . . . an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.' This requirement assures the jurisdictional prerequisite of a live 'case or controversy.'").

112. *Id.* at 733 ("AOE argues that as the principal sponsor of the initiative, it stands in an analogous position to a state legislature. We agree.").

113. Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (citations omitted).

114. *Id.* at 66. At another point in her decision, Justice Ginsburg wrote that proponents "had an arguable basis for seeking appellate review." *Id.* at 74.

115. *Id.* at 74. Elsewhere, Justice Ginsburg faulted the lower courts for not certifying to the Arizona Supreme Court the substantive interpretation of the challenged initiative. *Id.* at 62–63.

Perhaps the most that can be said for *Arizonans* as precedent[116] is that, absent specific state authority, initiative proponents lack standing to assert either the state's interest or their own "legislative" interest on appeal. That is at least how lower courts have read the case.[117]

Thus, when the same standing issue arose in *Perry II*, the Ninth Circuit asked the California Supreme Court if proponents had the specific state authority found lacking in *Arizonans*.[118] In formulating its question to the California Supreme Court, the Ninth Circuit may have had the legislative standing aspect of *Arizonans* in mind.[119] The question was expressed in two parts: "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 . . . ."[120]

California Constitution Article II, Section 8 sets forth the initiative power, which the California Supreme Court has repeatedly described as legislative in character.[121] Thus, when asking whether proponents had a "particularized interest" *under California law*, the Ninth Circuit was likely asking about proponents' role in the initiative process, and corresponding status, rather than about other legal injuries they might have suffered (for which a certified question would have been unnecessary).[122]

In further explaining its first prong, the Ninth Circuit repeatedly referred to the "particularized *state-law interest*" that proponents might have.[123] The terminology employed by the court echoed that

116. Later courts have characterized Arizonans' discussion of standing as dicta. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2657 (2013); Perry v. Schwarzenegger, 628 F.3d 1191, 1198 n.9 (9th Cir. 2011) ("obiter dictum").

117. *See, e.g.*, Prete v. Bradbury, 438 F.3d 949, 955 (9th Cir. 2006); Planned Parenthood v. Ehlmann, 137 F.3d 573, 578 (8th Cir. 1998).

118. *Perry II*, 628 F.3d at 1193.

119. *Id.* ("[I]n light of [*Arizonans*,] it is critical that we be advised of [proponents'] rights under California law.").

120. *Id.* (emphasis added).

121. *See infra*, Part IV.D.2.

122. Had the standing question related to proponents' non-state law injuries, the Ninth Circuit could have resolved that core Article III question without certifying the issue to the California Supreme Court. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) (holding that a federal court must decide whether a party has standing under federal law).

123. *Perry II*, 628 F.3d at 1198 (emphasis added).

which it used in its *Arizonans* opinion in describing initiative proponents' standing as legislators.[124] Given that Judge Stephen Reinhardt authored *Arizonans* at the Ninth Circuit, and was on the *Perry II* panel,[125] when formulating its certified question the panel may have been referring back to Judge Reinhardt's holding in *Arizonans* that initiative proponents possessed legislative standing—a holding that was questioned but not foreclosed by the Supreme Court in its *Arizonans*' opinion. This interpretation of the Ninth Circuit's first prong is also consistent with the rest of its opinion in *Perry II* recounting the many California state court decisions describing the initiative power as a legislative power superior to that of the Legislature.[126]

The Ninth Circuit saw proponents' standing in the alternative; *either* because they had a particularized injury under California law *or* because they could assert the state's interest. Under the second prong, proponents would not need a particularized injury of their own, but could simply act as "agents of the People, in lieu of public officials who refuse to do so."[127]

In *Perry III*, the California Supreme Court reframed the Ninth Circuit's first question and, in doing so, started down a different path. It stated the question as whether "official proponents may have their own *personal* 'particularized' interest in the initiative's validity."[128] It repeated the modifier "personal" several times,[129] even

124. Yniguez v. Arizona, 939 F.2d 727, 733 (9th Cir. 1991) ("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 . . . . Arizona law recognizes the ballot initiative sponsor's heightened interest in the measure by giving the sponsor official rights and duties distinct from those of the voters at large . . . the added interest necessary to confer Article III standing—a particularized injury that distinguishes AOE from 'concerned bystanders,' *Diamond*, 476 U.S. at 62—is present here.").

125. Judge Reinhardt joined the *per curiam* Order and filed a separate concurrence where he criticized the Supreme Court's standing doctrine and the parties for creating an avoidable standing problem. *Perry II*, 628 F.3d at 1200–01.

126. The Ninth Circuit continues to treat "the initiative power [in California as] a legislative power. And rightly so," concluding that "it is more like legislation." Chula Vista Citizens for Jobs & Fair Competition v. Norris, 755 F.3d 671, 677, 679 (9th Cir. 2014). The Supreme Court reached a similar conclusion regarding Arizona law. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, No. 13-1314, slip op. at 5–6 (U.S. June 29, 2015). The initiative power in California is uniquely protected from interference by the Legislature. *See Perry II*, 628 F.3d at 1197 n.4.

127. *Id.* at 1197.

128. Perry v. Brown (*Perry III*), 265 P.3d 1002, 1011 (Cal. 2011) (emphasis added).

129. The court also referred to "proponents' own particularized personal interest" and "proponents' own personal interests." *Id.* at 1019, 1022.

though the Ninth Circuit never used that term. And despite lengthy citations to Article III standing cases, including *Arizonans*, the California court found it unnecessary to answer the Ninth Circuit's first prong.[130] Instead—as noted in Part III above—it found it sufficient to answer the second prong, holding that "proponents of [an] initiative are authorized under California law to appear and assert the *state's* interest in the initiative's validity."[131]

The California Supreme Court in *Perry III* recognized Official Proponents "quasi-legislative interest in defending the constitutionality of the measure,"[132] drawing significant support from *Karcher v. May*,[133] a case involving legislative standing. However, the court seems to have viewed legislative standing as a subset of representational standing (on behalf of the state),[134] rather than as a species of proponents' own "particularized interest."[135] That might explain why the court answered only the second prong of the certified question. However, assuming that proponents can assert a form of legislative standing—a matter more fully discussed in Section D below—it seems important to place it in the right category, either representational, on behalf of the state, or on their own behalf, based on proponents' status as quasi-legislators.

Those are the two prongs of the Ninth Circuit's certified question. Which one better describes proponents of a state initiative might have been important in *Hollingsworth*. However, following the California Supreme Court's lead, the point was not fully addressed by Chief Justice Roberts' majority opinion. He found that: a) proponents lacked any personal injury of their own, and b) could not

130. *Id.* at 1015.

131. *Id.* at 1007 (emphasis added).

132. *Id.* at 1013.

133. 484 U.S. 72 (1987).

134. *See*, Perry v. Brown (*Perry III*), 265 P.3d 1002, 1013 (Cal. 2011) ("[L]ogic suggests that a state should have the power to determine who is authorized to assert *the state's own interest* in defending a challenged state law.") (citing *Karcher*) (emphasis in original); *see also id.* at 1025 (concluding that proponents may "assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure").

135. *See id.* at 1021 ("[O]ne may question whether the official proponents of a successful initiative measure, any more than legislators who have introduced and successfully shepherded a bill through the legislative process, can properly claim any distinct or personal legally protected stake in the measure once it is enacted into law.").

represent the state of California.[136] But, like the court in *Perry III*, he did not discuss proponents' possible legislative standing under either prong. At least in retrospect, that may have been proponents' strongest argument.

Was the California Supreme Court correct to treat proponents' possible quasi-legislative status as representing the state under the second prong? We think the court was in error, but recognize that the mistake might not have been entirely of that court's own making. Instead, the confusion may stem from Justice O'Connor's 1987 opinion in *Karcher v. May*.[137]

In *Karcher*, Alan Karcher and Carmen Orechio, in their official capacities as the state general assembly speaker and state senate president, intervened in district court to defend the constitutionality of New Jersey's moment-of-silence statute after the state attorney general declined to defend it.[138] The Court ruled that Karcher and Orechio had Article III standing to defend the statute.

> The New Jersey Supreme Court has granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on *behalf of the legislature* in defense of a legislative enactment. . . . Since the New Jersey Legislature had authority under state law to *represent the State's interests* in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant.[139]

The quoted language creates an ambiguity. The first sentence describes the named legislators as representing the New Jersey "legislature." The second sentence describes the legislature as representing the "State." Are these the same—legislature and state? In some contexts the answer is yes, such as in suits against states, where the "state's" sovereign immunity can be waived only by the legislature.[140] But in legislative standing cases the answer appears to be no. Indeed, in most such cases the legislature has taken a position

136. The state was undoubtedly injured by the district court's invalidation of state law and was entitled to assert that injury through a representative. But, as we discuss in Part IV.C *infra*, the Court held that only elected officials can represent the state in federal court.

137. 484 U.S. 72 (1987).

138. *Id.* at 74.

139. *Id.* at 82 (citation omitted; emphasis added).

140. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 56–57 (1996).

adverse to executive officials (who ordinarily represent "the state" in litigation) and are often formally opposing parties.[141] At the very least, then, different branches or entities of a "state" may have distinct interests, each of which gives rise to Article III standing.[142]

Is the "state" a unitary entity for Article III purposes? If legislators can represent only the *state's* interest, rather than their own, the state would then have two opposing representatives—legislative and executive.[143] A legion of separation-of-powers cases suggest that these branches often have distinct and adverse interests sufficient to create a case or controversy for federal court.[144] Accordingly, to the extent that initiative proponents, and legislators generally, have standing to defend their enactments, it may be because they have their own "particularized interests" that are distinct from the state's interests (at least as framed by the executive branch).[145] In sum, the equivalence created by Justice O'Connor in *Karcher* may be conceptually problematic.[146]

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141. *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997); INS v. Chadha, 462 U.S. 919 (1983); Goldwater v. Carter, 444 U.S. 996 (1979).

142. The notion that separate entities within a state must speak with a unified voice was implicitly rejected in *Arizona State Legislature v. Arizona Ind. Red. Comm'n*, 576 U.S. __ (2015), in that two state entities—the legislature and the independent redistricting commission—were adverse, yet the Supreme Court held the legislature had standing and then adjudicated the dispute. *Id*. at 2–3. See also *Virginia Office for Protection & Advocacy v. Stewart*, where the Court held that "a federal court [may] adjudicate a dispute between [a state's] components" despite the fact that "the opposing parties are both creatures of the Commonwealth." 131 S. Ct. 1632, 1640–41 (2011) (Scalia, J.); *see also* Suzanne B. Goldberg, *Article III Double-Dipping: Proposition 8's Sponsors, Blag, and the Government's Interest*, 161 U. PA. L. REV. ONLINE 164, 167 (2013) (describing the state's split interest as "double dipping" for standing purposes).

143. In *Perry III*, the California Supreme Court found it unremarkable that different state entities may have different views and take opposing positions in litigation. *Perry III*, 265 P.3d at 1025–28 (and cases cited therein). But neither *Perry III* nor its cited cases involved federal standing.

144. *See, e.g.*, *Chadha*, 462 U.S. 919; U.S. House of Representatives v. U.S. Dep't Commerce, 11 F. Supp. 2d 76 (D.D.C. 1998), *aff'd* U.S. Dep't Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999). Even if a state legislature and governor are not in direct conflict, a legislature's distinct interest may be a basis for the legislature's own standing. *See Arizona State Legislature v. Arizona Independent Redistricting Commission*, 997 F. Supp. 2d 1047, 1050 (D. Ariz. 2014), *cert. granted* __U.S. __ (2014) (a state legislature has standing to challenge, under U. S. CONST., art I, § 4, cl. 1, an independent redistricting commission which was enacted by popular initiative, because the legislature "has demonstrated that its loss of redistricting power constitutes a concrete injury.").

145. This point is reinforced by the legislative standing cases discussed *infra* in Part IV.D, which speak of legislat*or*s' and legislat*ure*'s injuries as distinct from that of the broader government of which they are a part.

146. Moreover, it was based on a misreading of New Jersey law. The Supreme Court of New Jersey case cited by Justice O'Connor involved a different matter than was before the Court in *Karcher*. In *In re Forsythe*, the New Jersey court granted the Legislature's motion to intervene on

Notwithstanding the above discussion, if Justice O'Connor was correct in *Karcher*, then legislators (and possibly quasi-legislators like proponents) are properly seen as representatives of the state. This would put initiative proponents under the second prong of the Ninth Circuit's certified question, where they would need to establish their authority to represent the state. On the other hand, if the equivalence were false, then legislators—and quasi-legislators—would be representing their own "particularized interests" and fall under the Ninth Circuit's first prong. To be sure, in either case, legislators would be suing or defending in their official capacities, rather than asserting an interest personal to themselves.

Why does this subtle distinction matter? Because it goes to the unanswered question in *Arizonans* and suggests that the Court in *Hollingsworth* missed an opportunity to settle the issue of proponents' "quasi-legislative" standing. It is also at the heart of the republican government vs. direct democracy subtext of *Hollingsworth*. If only elected state representatives can assert the state's interest, and that is the only interest that has standing under Article III, then the people's effort to reserve sovereign power to themselves via initiative will fail in federal court.

*Perry III*'s reframing of proponents' non-representational interest—in their personal rather than their quasi-legislative capacities—persisted throughout the remainder of the appeals, both at the Ninth Circuit[147] and at the Supreme Court. Even proponents adopted this reframing by arguing in their brief only their standing based on their authority to represent the state. Accordingly, proponents' legislative status, as a possible distinct basis for standing, disappeared from the case.

We concede that our foregoing theory about *Perry II*—namely, that the Ninth Circuit's first prong of "particularized interest" should

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the same side as the attorney general in defense of state law. 450 A.2d 499, 500 (N.J. 1982). Whether or not they were all "representing the state," they were certainly joined in interest in that case. *Id.* In her amicus brief in *Hollingsworth*, Attorney General Harris also noted that *Karcher*'s "[r]eliance on Forsythe may have been misplaced." Brief for the State of California as Amicus Curiae in Support of Respondents, *supra* note 68, at 12 n.3. It should also be noted that had *Forsythe* been in federal court, the Legislature's intervention might have been inappropriate if the state, as represented by the attorney general, already "adequately represent[ed] [the Legislature's] interest." *See* FED. R. CIV. P. 24(a)(2).

147. If the Ninth Circuit in *Perry II* had legislative standing in mind as a distinct theory, it did not re-raise it anywhere in *Perry IV*. Judge Reinhardt also authored the Ninth Circuit's opinion on the merits in *Perry IV*. *Perry IV*, 671 F.3d at 1052.

be read to include legislative standing—may be incorrect. Perhaps the strongest argument that it is incorrect is that the Ninth Circuit in *Perry IV* could have clarified the matter, but did not do so. In other words, if the California Supreme Court in *Perry III* had erroneously failed to include legislative standing under the first prong, the Ninth Circuit in *Perry IV* could have pointed out the error; by not pointing out the "error," perhaps the Ninth Circuit saw none.

We return to the question of proponents' quasi-legislative status in Section D below, where we treat it as a possible third prong of proponents' standing. In the meantime, it is sufficient to observe that all the appellate courts, with the exception of the Ninth Circuit in *Perry II*—treated the first prong of the certified question as pertaining to proponents' *personal* injuries, rather than their injuries as quasi-legislators. We follow that structure in Sections B and C below.

Chief Justice John Roberts wrote for the five-justice majority in *Hollingsworth*,[148] holding that the official proponents lacked standing to appeal the district court's decision in *Perry I* and subsequently the Ninth Circuit's *Perry IV* decision. The chief justice's majority opinion began with a threshold principle of Article III standing: "standing in federal court is a question of federal law, not state law."[149] Using federal law, the majority then addressed the two prongs as reframed by the California Supreme Court.

### *B. The First Prong: Proponents' Particularized Injury as Individuals*

Although the California Supreme Court did not answer the Ninth Circuit's first question, even as reformulated by that court as one of *personal* injury, Chief Justice Roberts did. He first stated the familiar Article III rule—"To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way.' He must possess a 'direct stake' in the outcome of the case."[150] The primary test for standing in federal court is the requirement that plaintiff must have suffered an injury that is both "distinct and

148. Joining the chief justice were Justices Breyer, Ginsburg, Kagan, and Scalia.

149. Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013). This holding is not controversial. The California Supreme Court in *Perry III* and the *Hollingsworth* dissent agreed: in federal court, standing is a matter of federal law. *Perry III*, 265 P.3d at 1011; Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (Kennedy, J., dissenting).

150. *Hollingsworth*, 133 S. Ct. at 2662.

palpable."[151] That requirement has been formulated in recent years as one of "concrete and particularized" injury.[152] Plaintiff must be harmed in a unique way, as opposed to presenting only a "generalized grievance," common to the public as a whole.[153] Moreover, the harm suffered, even if unique, must be one that is "cognizable" in federal court. The terms "cognizable," "palpable," and "concrete" have been used interchangeably over the years, but all enforce the same jurisprudential limit of "cases of a judiciary nature."[154]

Because the notion of proponents' legislative standing had disappeared from the case, the majority focused on their "personal" injuries. It found them lacking. Rather, according to the majority, proponents had only a "generalized" interest in upholding Proposition 8.

> Here, . . . [the Official Proponents] had no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.
>
> We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant
>
> > raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[155]

151. Warth v. Seldin, 422 U.S. 490, 501 (1975).

152. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

153. *Id.* at 575.

154. This was the term that James Madison used in his notes to describe the scope of Article III jurisdiction. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 430 (Max Farrand ed., 1966). But whether an injury is "cognizable" is in the eyes of the beholder. The term often works to restrict standing when the Justices fail to appreciate the nature of plaintiff's injury. *See, e.g.*, Clapper v. Amnesty Int'l, 133 S. Ct. 1138, 1148, 1151 (2013) (plaintiffs' challenge to surveillance by U.S. intelligence agencies was based on "highly speculative fear" that their communications were being intercepted, and burdensome protective measures they undertook to guard against interception were self-inflicted).

155. *Hollingsworth*, 133 S. Ct. at 2662. Justice Roberts further noted, "the District Court [in *Perry I*] had not ordered [proponents] to do or refrain from doing anything." *Id.*

The notion that proponents' personal stake in Proposition 8 was indistinguishable from the general interest of every citizen of California[156] would be disputed by any initiative proponent. They might argue—and the Proposition 8 proponents did argue—that they "go to great lengths" in exercising their right to invoke the people's sovereign right of direct democracy,[157] putting their efforts, resources, reputations[158] and political careers on the line to draft an initiative, gather signatures to qualify it for the ballot, and then campaign for its passage.[159] They have taken unique risks, their views are likely to carry greater weight, and they have "a distinct role—involving both authority and responsibilities that differ from other supporters of the measure."[160] However, Chief Justice Roberts found that the interests of proponents were distinct and particularized only while an initiative was pending.[161] Once it was adopted by the voters, proponents no longer had any special role in the process or any unique interests at stake. They were then like any other Californian.

In sum, the Court in *Hollingsworth* did not recognize the peculiar personal injuries allegedly suffered by the initiative's

156. *Id.* at 2663.

157. *Id.* at 2669 (Kennedy, J., dissenting).

158. The reputational interests of proponents of controversial ballot initiatives were argued by an initiative's proponents in *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), *rev'd* 771 F.3d 456 (9th Cir. 2014). In *Sevcik*, the Coalition for the Protection of Marriage ("Coalition") was the official proponent of Nevada's same-sex marriage ban. In seeking to intervene in a challenge to that ban, the Coalition argued that it had personal standing, because, *inter alia*, its "reputational interest" was at stake, in that the Coalition was accused of bigotry. *See* Coalition's Motion to Intervene at 13, Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012) (No. 12CV00578).

159. Petition for Writ of Mandate and Request for Immediate Stay or Injunctive Relief, *supra* note 104, at 2, par. 6; *see* Kyle La Rose, *The Injury-in-Fact Barrier to Initiative Proponent Standing: How Article III Might Prevent Federal Courts from Enforcing Direct Democracy*, 44 ARIZ. ST. L.J. 1717, 1729 (2012); Thomas M. Messner, *The Price of Prop 8*, BACKGROUNDER (No. 2328) Oct. 22, 2009, *available at* http://www.heritage.org/research/reports/2009/10/the-price-of-prop-8. The Proposition 8 proponents also claimed in the trial court that their personal safety was compromised by their sponsorship and defense of the controversial initiative. *See* Defendant-Intervenors' Motion for a Stay, Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-02292); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 481 (2010) (Thomas, J., concurring) (detailing threats to Proposition 8 proponents). However, it is unclear whether any causal link—between the proponents' personal safety and the validity of Proposition 8—existed here. In any event, the proponents failed to raise their personal safety (or any evidence of their alleged personal stake in proposition 8's validity) before the U.S. Supreme Court.

160. Chula Vista Citizens for Jobs & Fair Competition v. Norris, 755 F.3d 671, 696 (9th Cir. 2014) (Graber, J., dissenting); *id.* at 679 (Bea, J., concurring).

161. *Hollingsworth,* 133 S. Ct. at 2662.

sponsors. The Court seemed to hold generally that, as a matter of law, initiative proponents lack Article III standing as individuals. Regardless of whether this result is a proper reading of Article III, Proposition 8's proponents' inability to "articulate even one specific harm they may suffer . . . ."[162] contributed to their failure to satisfy *Perry II*'s first prong under the Supreme Court's current standing jurisprudence.[163]

### *C. The Second Prong: Proponents' Standing as Representatives*

In the Supreme Court, proponents' asserted basis for standing was that the California Supreme Court in *Perry III* had confirmed their "authority under state law . . . to defend Proposition 8 as agents of the people of California in lieu of public officials who refuse to do so."[164] The *Hollingsworth* majority disagreed. They held that the constitutional and statutory provisions relied upon by the state's high court were limited to "enacting" the initiative. Thus, rejecting the California Supreme Court's interpretation of state law, the majority concluded that once Proposition 8 was passed by the voters, the proponents "ha[d] no role—special or otherwise—in the enforcement of Proposition 8."[165] We question this conclusion.

First, we note that the *Hollingsworth* majority seemed to suggest that they had a better understanding of California initiative law than the state Supreme Court. This is a remarkable proposition, especially coming from the drafter of the majority opinion, the chief justice,

162. *Perry I*, 702 F. Supp. 2d at 1136. In contrast to the *Hollingsworth* proponents, the proponents of the Nevada initiative banning same-sex marriage proffered several individual and particularized interests in upholding the ban, including: (a) the Coalition's "reputational interests," *supra* note 153, at 13, and (b) the Coalition's members' associational and religious liberty interests in having a "marriage" undiluted by being broadly defined to include same-sex couples. Coalition's Motion to Intervene, *supra* note 153, at 14–15. It is doubtful whether any of the Nevada proponents' personal standing arguments would survive the Supreme Court's subsequent holding in *Hollingsworth*.

163. A detailed explanation of personal standing jurisprudence is beyond the scope of this Article. A comprehensive overview can be found in Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915 (1986).

164. *See* Brief of Petitioners at 15, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144) (internal quotations and citations omitted).

165. *Hollingsworth*, 133 S. Ct. at 2663. Indeed, the majority seemed to imply that, once Proposition 8 passed, the proponents—regardless of "how deeply committed" or "zealous" they remain—are only "concerned bystanders." *Id.*

who has been a staunch advocate of states' rights federalism.[166] Ordinarily, how a state structures its own government and internal processes is conclusively a matter for state law, as authoritatively construed by the state Supreme Court.[167] This rule also applies to the core Article III question of party standing. That is why, for instance, the Supreme Court in *Arizonans* cited to the Supreme Court of New Jersey's grant of intervention in *Karcher* but was unable to resolve proponents' standing under Arizona law.[168] It was also the basis for the dissent in *Hollingsworth*. As Justice Kennedy's dissent put it, "the State Supreme Court's definition of proponents' powers is binding on this Court. And that definition is fully sufficient to establish . . . standing."[169] The California Supreme Court was of a similar view: "It is not for a federal court to tell a state who may appear on its behalf any more than it is for Congress to direct state law-enforcement officers to administer a federal regulatory scheme."[170]

But even given the chief justice's contrary reading of California law—that proponents did not qualify under state law to serve as representatives—we think he distorted the rule on representational standing; namely, whether the "Official Proponents" of an initiative can represent the people's interest when executive officials decline to do so. We think there were three errors in the chief justice's approach to this question: (1) he wrongly held that representatives of an injured party must have standing in their own right; (2) he discarded state law and developed a federal common law rule that representatives must be "agents" of the party they represent; and (3) he conflated the constructs of "the State" and "the People," thus failing to appreciate that in exercising the power of initiative, sovereignty is reposed in the voters, not the established state government.

166. Michael C. Dorf, *Whose Ox is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497, 511 (2011).

167. *See* Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632 (2011); *see also* Perry v. Brown (*Perry IV*), 671 F.3d at 1070 (and cases cited therein); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, No. 13-1314, slip op. at 27 (U.S. June 29, 2015).

168. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997) ("[W]e are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona.").

169. *Hollingsworth*, 133 S. Ct. at 2668.

170. *Perry IV*, 671 F.3d at 1072 (internal quotations omitted).

### 1. Representative Standing Is Based on the Party Represented, Not the Representative

*Hollingsworth*'s first basis for rejecting the Official Proponents as representatives of the state was that, even where litigants are allowed "to assert the interests of others, the litigants themselves still must have suffered an injury in fact . . . ."[171]

We believe that this requirement lacks validity. The majority seems to have confused representational standing with the separate issue of *jus tertii* or "third-party" standing. *Jus tertii* allows a litigant, who otherwise meets the standing requirements of Article III (e.g., has suffered her own particularized injury), to assert not her own interests but those of a third-party.[172] Justice Roberts' statement correctly describes the law of *jus tertii* standing as it relates to "other" (usually absent) parties. But it is different than representational standing, where the named litigant need not have an injury of her own, but acts on behalf of the injured party. In *Hollingsworth*, proponents claimed they stepped into the shoes of state executive officials when the latter chose not to defend Proposition 8 in the district court and then chose not to appeal that court's *Perry I* judgment. In other words, they were acting *on behalf of* the injured party (the People or the State) for purposes of appealing the decision in *Perry I*.

The Court does not usually ask whether state officials are proper *jus terii* champions to assert a state's interests. If it did, most such cases could not get into federal court since officials seldom have a personal injury of their own. Nor should have it done so in *Hollingsworth*.[173] By contrast, representational standing, by definition, allows a litigant to represent someone else, without regard to the litigant's own injury. Examples of such representational

171. *Hollingsworth*, 133 S. Ct. at 2663.

172. This was the issue in the case—Diamond v. Charles, 476 U.S. 54 (1986)—that Justice Roberts cited for disallowing the official proponents legislative standing. *See Hollingsworth*, 133 S. Ct. at 2663. In *Diamond*, a private physician had sought to defend an Illinois law restricting abortion rights. *Diamond*, 476 U.S. at 54. He had no connection to the state law other than as a concerned citizen. *Id.* at 64. The *Hollingsworth* proponents did not claim standing on that basis. *Hollingsworth*, 133 S. Ct. at 2664.

173. Even if it were germane to proponents' standing, *jus tertii* is a prudential doctrine, not constitutionally required. As such, "weighty countervailing policies" create exceptions to the rule, such as where rights holders "have no effective avenue of preserving their rights themselves." Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973); *see* Eisenstadt v. Baird, 405 U.S. 438, 444–46 (1972).

standing can be found in *qui tam* and "next friend" actions and where a special prosecutor is allowed to stand in for the government in criminal proceedings.

In *Vermont Agency of Natural Res. v. United States ex rel. Stevens*,[174] the Court found that a relator had standing to bring a False Claims Act action on behalf of the United States, despite the fact that the relator himself had no "concrete private interest in the outcome of the suit."[175] The Court analogized the relator to an assignee of a claim, a form of representational standing that the Court has long recognized.[176] Because the United States had suffered injury, the relator had standing to assert it.[177]

In *Hollingsworth*, Chief Justice Roberts distinguished *Stevens* on the basis of the ancient tradition that supports *qui tam* actions. The chief justice held that this form of representational standing was implicitly incorporated into Article III. Yet that was only an alternative "confirming" basis for the Court's holding in *Stevens*.[178] He provided the same historical explanation for another form of representational standing—"next friend" status.[179] Justice Kennedy's dissent correctly viewed these histories as irrelevant to the Article III question.[180] Even if the jurisdiction of federal courts were confined to "matters that were the traditional concern of the courts at Westminster,"[181] the broader category of representative lawsuits would still be well within Article III.

The Supreme Court has allowed other non-officials to be designated to represent the government. An example of such a designation is that of a special prosecutor, a process that the

174. 529 U.S. 765 (2000).

175. *Id.* at 787. Although Justices Stevens and Souter dissented on the merits, the Court was unanimous that relators in *qui tam* actions had standing to sue on behalf of the government. *Id.* at 793–94 (Stevens, J., and Souter, J., dissenting).

176. *Id.* at 773.

177. *Id.* at 774. *But see* Myriam Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 338 (2001) (*qui tam* actions lie only for injuries to the government in its proprietary, not sovereign, capacity). However, the point is not that Official Proponents can maintain a *qui tam* action on behalf of the state, but only that the Supreme Court has long recognized representational standing without requiring the relator to have personally been injured.

178. Vt. Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 775 (2000). The common law tradition of *qui tam* actions "confirmed" Justice Scalia's earlier conclusion, as well as the theory for, relator's standing as "assignee" of the government's claim.

179. *Hollingsworth*, 133 S. Ct. at 2665 (citing Whitmore v. Arkansas, 495 U.S. 149 (1989)).

180. *Id.* at 2674 (Kennedy, J., dissenting).

181. *Stevens*, 529 U.S. at 774.

Supreme Court upheld in *Morrison v. Olson*.[182] The *Hollingsworth* majority acknowledged special prosecutors' "independence," but distinguished them by noting that they are "subject to the ultimate authority of the court that appointed them."[183]

Yet, the *Hollingsworth* proponents were similarly authorized by a court, in *Perry III*, to represent the state of California. Accordingly, there was no absent third party—and, therefore, no need for the proponents to show their own injury, as in *jus tertii* cases—since proponents were authorized to act on behalf of the state for the purpose of defending Proposition 8 in federal court.[184]

### 2. A State's Choice of Representatives Should be Governed by State Law, Not by the Restatement of Agency

The more important question raised by the *Hollingsworth* majority is whether and how an initiative's proponents can be authorized to represent the state, even apart from their own injury (or lack of injury). The *Hollingsworth* proponents argued that they could rely on *Perry III*, in which the California Supreme Court expressly held that Official Proponents had the same status as elected state officials to defend Proposition 8 on behalf of the state. In other words, California continued to be the real party in interest, just as it would had the governor, attorney general, or another named defendant prosecuted the appeal. Under this theory, proponents were authorized "to act 'as agents of the people' of California."

The *Hollingsworth* majority disagreed, stating, "All that the California Supreme Court decision [in *Perry III*] stands for is that, so far as California is concerned, [the Official Proponents] may argue in defense of proposition 8."[185] However, *Hollingsworth* continued, the

182. 487 U.S. 654, 696 (1988). The employment of special counsel is also an ancient practice. For instance, the English government historically employed private barristers to represent the Crown in criminal prosecutions. Indeed, there were few public prosecutors until the Prosecution of Offenses Act in 1985 (1985 Chapter 23) established the Crown Prosecution Service. *See* Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 672 (2009) (describing transition from "private prosecutions" to the crown following adoption of the Prosecution of Offenses Act).

183. *Hollingsworth*, 133 S. Ct. at 2665.

184. *See* Perry v. Brown (*Perry IV*), 671 F.3d 1052, 1074 (9th Cir. 2012) *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) ("The requirements of third-party standing, however, are beside the point: the State of California is no more a 'third party' relative to Proponents than it is to the executive officers of the State who ordinarily assert the State's interest in litigation.").

185. *Hollingsworth*, 133 S. Ct. at 2666.

Official Proponents did not become "de facto public officials" and did not become "agents of the State, formal or otherwise."[186] "Agency requires more than mere authorization to assert a particular interest."[187]

According to the *Hollingsworth* majority, Article III standing on behalf of a state is proper only in an "agent," although no authority was cited for that limiting requirement. Agency thus becomes a matter of federal law, at least for standing purposes—superseding any contrary state law—thereby justifying the Court in rejecting California law with regard to proponents' official status. Having established "agency" as a requirement for standing, *Hollingsworth* then went on to create a federal common law of agency for Article III. Per the Restatement of Agency, "an essential element . . . is the principal's right to control the agent's actions," but the Official Proponents "answer to no one; they decide for themselves what arguments to make and how to make them."[188]

The Official Proponents are "not . . . elected at all. No provision provides for their removal. [T]he proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it."[189]

Again, per the Restatement of Agency, "the agent owes a fiduciary obligation to the principal. But [the Official Proponents] owe nothing of the sort to the people of California."[190]

The Official Proponents "are free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities."[191]

Applying these principles, the majority concluded that the proponents "plainly do not qualify as [agents of the State] . . . [N]o matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary."[192]

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186. *Id.* (citation and internal quotation marks omitted).
187. *Id.*
188. *Id.*
189. *Id.* at 2666–67.
190. *Id.* at 2667.
191. *Id.* at 2667 (citations and internal quotation marks omitted).
192. *Id.*

As a threshold matter, the Court's use of agency law to determine standing is inapposite in the case of direct democracy, a matter discussed below.[193] Also, the Restatement of Agency—which was the source of the majority's discussion—is primarily a compilation of the fifty states' common law. Accordingly, it is odd to rely on a general compendium of state law (namely, the Restatement) and ignore state law that is directly on point (namely, *Perry III*).[194]

Moreover, the *Hollingsworth* majority—and the dissent—failed to consider existing federal precedent concerning the intersection of state law and Article III standing. For example, in *Elk Grove Unified School District v. Newdow*,[195] the question of whether a father could sue in federal court on behalf of his minor child—in that case, to challenge the constitutionality of the Pledge of Allegiance—turned on whether the state court, in a family law proceeding, granted the father the right to assert his daughter's legal rights.[196] Likewise, who may represent a corporation in federal court turns on the relevant state's corporate statutes.[197] Indeed, Federal Rule of Civil Procedure 17(b), which is titled "Capacity to Sue or be Sued," consistently refers to state law in determining capacity.[198]

We assume that limits do exist as to whom a state may designate to stand in for a party in federal court. For example, it is doubtful that even the *Hollingsworth* dissent would allow California—whether by express statute or by judicial decision—to grant every one of the state's 39 million residents the right to represent California in

193. *See infra*, Part IV.C.3.

194. While this does not create an Erie problem (*cf.* Erie R.R. v. Tompkins, 304 U.S. 64 (1938)), it does recall the "mischievous results" (*id.* at 74) of Swift v. Tyson, 16 Pet. 1 (1842), allowing unwritten "general law" to preempt state law on point.

195. 542 U.S. 1 (2004).

196. *Id.* at 17–18 (2004) ("We conclude that, having been deprived under California law of the right to sue as next friend, [the father] lacks prudential standing to bring this suit in federal court."); *see also* Stanton v. Stanton, 421 U.S. 7, 11–12 (1975) (A divorced mother's right to child support awarded to her under state law conferred Article III standing on her when she alleged that a termination of that support violated the U.S. Constitution.).

197. Aarona v. Unity House Inc., CV. NO. 05-00197 DAE/BMK, 2007 U.S. Dist. LEXIS 47979, at *7–8 (D. Haw. July 2, 2007); Sanderling, Inc. v. Comm'r, 66 T.C. 743, 751 (1976).

198. Under Federal Rules Civil Procedure 17(b)(2) and 17(b)(3), a corporation's capacity is determined "by the law under which it was organized," and "all other parties[']" capacity is determined "by the law of the state where the court is located." Accordingly, federal courts routinely look to state law in determining who are proper parties, including who are proper public parties. *See, e.g.*, Finch v. Miss. State Med. Assoc., 585 F.2d 765, 774 n.11 (5th Cir. 1978) ("In the case of a public official, such as a governor, it is clear that capacity to sue is determined by the law of the state.").

defending an initiative in federal court. In other words, some Article III limits exist on a state's ability to confer standing to act on the state's behalf.

What are those limits? Where is the line between where a state has the ability to decide who has standing (e.g., *Elk Grove*) and where a state lacks this ability (e.g., the "citizen suit" hypothetical above)? *Hollingsworth* holds that a state may not designate initiative proponents as the state's representatives, but fails to otherwise illuminate how far a state's *Elk Grove*-type authority extends.

Regardless of this broad issue, the specific holding in *Hollingsworth* weighs heavily in limiting states' own ability to create and apply the law of agency, including the identity of a state's own agents. Indeed, by rejecting California's choice of who may represent its interests, the Supreme Court does more than just displace state law with federal common law.[199] It denigrates the state's sovereignty by interfering with internal structural matters.[200]

### 3. In Initiative Cases, the "Master," for Purposes of Representative Standing and Agency, Is "the People," and Not the Government Establishment

The *Hollingsworth* proponents styled themselves as representing "the People" of California.[201] So did the Ninth Circuit[202] and California Supreme Court.[203] While Chief Justice Roberts noted that formulation, he apparently did not appreciate the distinction between the "people" and the "state" with regard to initiatives. Instead his opinion primarily discussed whether proponents were "agents of the State" or "agents of California."[204] In contrast, the dissent made much of the distinction reflected in the nomenclature. "The essence

199. Of course, the Court may do this when interpreting the Constitution, including Article III. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011).

200. *Cf.* Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632 (2011) (State may decide for itself that a state agency has legal capacity to sue the state.); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, No. 13-1314, slip op. at 27 (U.S. June 29, 2015) ("[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes.") (citations omitted).

201. Brief for Petitioners at 15, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), available at http://www.supremecourt.gov/docket/PDFs/12-144_Brief_of_Petitioners.pdf; Petition for Writ of Certiorari, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), *passim*.

202. *Perry II*, 628 F.3d 1191 *passim*.

203. Perry v. Brown (*Perry III*), 265 P.3d 1002 *passim* (Cal. 2011).

204. *See, e.g.*, *Hollingsworth*, 133 S. Ct. at 2667 ("Neither the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State.").

of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government."[205]

This was the revolutionary concept of popular sovereignty embodied in the United States Constitution. As James Madison noted in Federalist No. 46, "federal and State governments are in fact but different agents and trustees of the people . . . ultimate authority, wherever the derivative may be found, resides in the people alone."[206] This is, of course, reinforced by the opening words of the preamble, "[w]e the people . . . ."[207]

The distinction between "people" and "state," which may seem overly formalistic at first, goes to the heart of direct democracy and the motivating purpose of the initiative process. The foundational distinction between "the people" and "the State" was embodied in California's original constitution and remains a centerpiece of initiative law today. "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."[208] This was a common precept of popular sovereignty in the 19th Century. When enacting a state constitutional amendment by initiative, the "people" withdraw the power they had previously delegated to their institutional government, and reclaim it for themselves. Thus, the state constitution "speaks of the initiative and referendum, not as a right granted the people, but as a power *reserved* by them."[209]

To hold, as *Hollingsworth* does, that only "elected state officials" may represent the state's interest, reverses the hierarchy of power. Put in terms of agency law, initiative proponents are not agents of the state; rather, they are the principal, and the established state is *their* agent.[210]

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205. *Id.* at 2675. *See also Ariz. State Legislature*, slip op. at 18.

206. THE FEDERALIST NO. 46 291 (James Madison) (Clinton Rossiter ed., 2003).

207. *Ariz. State Legislature*, slip op. at 24 ("[T]he animating principle of our Constitution [is] that the people themselves are the originating source of all the powers of government."); *id.* at 30.

208. CAL. CONST. art. II, § 1 (derived from U.S. CONST. art. I, §2 (amended 1849)).

209. *Perry III*, 265 P.3d at 1016 (emphasis added). A similar statement is in the Arizona Constitution, where the Supreme Court found that the initiative is a legislative power. *Ariz. State Legislature*, slip op. at 5–6.

210. In her amicus brief supporting respondents in the Supreme Court, Attorney General Harris argued that only elected state officials had standing because they "are more likely to reflect the public support, or lack thereof, for a particular law." Brief for the State of Cal. as Amicus

This difference between republican government and direct democracy is well noted in California history and case law. As recounted in *Perry III*:

> "[t]he initiative was viewed as one means of restoring the people's rightful control over their government, by providing a method that would permit the people to propose and adopt statutory provisions and constitutional amendments." The primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt. The 1911 ballot pamphlet argument in favor of the measure described the initiative as "that safeguard which the people should retain for themselves, to supplement the work of the legislature by initiating those measures *which the legislature either viciously or negligently fails or refuses to enact*.[211]

So, to ask whether initiative proponents are "agents" of the institutional state, as Chief Justice Roberts does, completely upends the governance framework in California and, presumably, that of other direct democracy states.[212] It might be germane to ask instead whether proponents can act as agents of the "people" acting directly in their sovereign capacity, ignoring the established state structure in the instance. But *Hollingsworth* did not inquire into that question.

### *D. The Missing Third Prong: Proponents' Particularized Injury as Legislators*

Finally, we consider whether a third prong exists: do an initiative's proponents have Article III standing analogous to that of legislators? This may be what the Ninth Circuit intended by its first certified question, which then was altered by later courts and by proponents themselves.

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Curiae in Support of Respondents, *supra* note 68, at 18. Whatever merit that statement has with regard to ordinary legislation, it does not apply to initiative measures.

211. *Perry III*, 265 P.3d at 1016 (citations omitted; emphasis in original).

212. *See Ariz. State Legislature*, slip op. at 28 ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."). Chief Justice Roberts dissented, continuing the distinction he made in *Hollingsworth* between the institutional legislature and the people's legislative power. *Id*. at 1–2 (Roberts, J., dissenting).

This legislative standing theory is based on a distinctive right of federal or state legislatures to defend the validity of statutes they have enacted, even if the executive branch refuses to defend them. In other words, legislatures have Article III standing rights, not necessarily to represent federal or state government, but to represent their own interests in "their" official actions. If initiative proponents are analogous to legislators, then perhaps they have Article III standing, even if they do not have standing as individuals (the first prong discussed above) or as representatives of the state (the second prong).[213]

At the threshold, it is important to note that Article III may not be the only obstacle to legislative lawsuits. As Professors Grove and Devins argue,[214] two distinct separation-of-powers concerns may disable Congress from defending federal law when the executive demurs. The "Take Care" clause[215] and the requirement of Bicameralism[216] suggest that Congress has no role in the enforcement of federal law, even more so when one house acts alone.[217] But, these separation-of-powers principles are federal and thus may not apply to the standing of state legislators.[218]

213. There may be a distinction between the standing of legislat*ures* (suing as a body) and legislat*ors* (suing individually, but in their official capacities), which we discuss at the end of Part IV.D.1.

214. Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 574 (2014). Apart from Professors Grove and Devins' arguments over whether courts have articulated a proper constitutional basis for Congressional standing, Professor Nat Stern has questioned whether, under Supreme Court case law, Congressional standing exists at all. Nat Stern, The Deflection of Congressional Standing (2015) (forthcoming in the *Pepperdine Law Review*; manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592045.).

215. U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

216. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

217. *See also* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1354 (2014) (arguing that constitutional structure forecloses standing by Congress).

218. *See* Raines v. Byrd, 521 U.S. 811, 832 n.3 (1997) (Souter, J., concurring) ("As the Court explains, *Coleman* may well be distinguishable on the further ground that it involved a suit by state legislators that did not implicate either the separation-of-powers concerns raised in this case or corresponding federalism concerns (since the Kansas Supreme Court had exercised jurisdiction to decide a federal issue).").

1. Legislative Standing Background

The first Supreme Court case on legislative standing was *Coleman v. Miller*,[219] where the Court held that Kansas legislators had standing to challenge the lieutenant governor's participation (as president of the state senate) in a vote to ratify the Child Labor Amendment. In dissent, Justice Frankfurter wrote that the legislators' interest in the matter was no different from that of any other citizen. "The fact that these legislators are part of the ratifying mechanism while the ordinary citizen of Kansas is not, is wholly irrelevant to th[e standing] issue."[220] But the majority disagreed. "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes."[221] Subsequent cases have built upon *Coleman*, confirming the doctrine both for state legislators and members of Congress.

A recent case that considered legislative standing is the companion to *Hollingsworth*, *United States v. Windsor*.[222] Plaintiff Edith Windsor, the surviving spouse of a same-sex married couple, filed a federal lawsuit, challenging the constitutionality of section 3 of the federal Defense of Marriage Act (DOMA).[223] That section defined marriage to exclude same-sex couples; this exclusion, in turn, had the effect of denying inheritance tax and other benefits to Ms. Windsor. By direction of President Obama, Attorney General Holder refused to defend DOMA's constitutionality. The House of Representatives voted to have its long-standing Bipartisan Legal Advisory Group (BLAG)[224] intervene in the lawsuit to defend the law.

Justice Kennedy's majority opinion in *Windsor* found it unnecessary to "decide whether BLAG would have standing to challenge the district court's ruling and its affirmance in the Court of Appeals on BLAG's own authority."[225] To Justice Kennedy, the Executive Branch's agreement on the merits with Edith Windsor raised a different justiciability question—whether lack of adverseness deprived the federal courts of jurisdiction—but not a

219. 307 U.S. 433 (1939).
220. *Id.* at 464.
221. *Id.* at 438.
222. 133 S. Ct. 2675 (2013).
223. 1 U.S.C. § 7 (2012).
224. 2 U.S.C. § 130(f) (2012).
225. *Windsor*, 133 S. Ct. at 2688.

question of standing.[226] Because BLAG created the requisite adverseness, Article III allowed the Court to decide *Windsor* on the merits. The similarity between the postures of *Windsor* and *Hollingsworth* caused Justice Kennedy to dissent in the latter on the standing issue. But three of the four justices who joined him in *Windsor* disagreed with him in *Hollingsworth*, instead voting that initiative proponents did not have standing.

Indeed, the two cases produced a strange alignment on the Court. Only Justices Alito and Sotomayor agreed with Justice Kennedy that both were justiciable.[227] Justices Roberts and Scalia thought neither was. Justices Breyer, Ginsburg, and Kagan thought *Windsor* justiciable, but not *Hollingsworth*. Justice Thomas reached the opposite conclusion—that Senator Hollingsworth had standing but BLAG did not.[228]

Justice Alito wrote separately in *Windsor* to argue that Congress—by its designee BLAG—has standing as a matter of law "whenever federal legislation it had passed was struck down" (or the statute's "validity" was challenged).[229] Justice Alito's view on legislative standing appeared to be subject to one or, possibly, two conditions. First, the injury must be to Congress as a whole, as opposed to individual members of Congress.[230] Second, while Justice

226. *Id.* at 2686–88. The Supreme Court's reasoning included two conclusions: (i) failing to decide DOMA's constitutionality would result in litigation scattered in district courts "throughout the nation" involving "over 1,000 federal statutes [which DOMA affects] and a myriad of federal regulations" and (ii) with the attorney general refusing to defend DOMA and with BLAG willing to vigorously defend DOMA, it is prudent for the Supreme Court to grant standing to BLAG.

227. Justice Alito disagreed with Justices Kennedy and Sotomayor on the merits in *Windsor* and would presumably disagree on the merits in *Hollingsworth*, had Justice Kennedy's opinion reached that far. *Windsor*, 133 S. Ct. at 2711.

228. This unusual alignment may have been a product of compromise.

229. As for the United States as a distinct party, Justice Alito's dissent said that because the government was aligned with the plaintiff on the merits, who had prevailed below, it could not appeal merely to seek affirmance. For the Court to grant the United States status in such a case, "would be to render an advisory opinion." *Windsor*, 133 S. Ct. at 2712. Although Justice Alito did not cite caselaw, his conclusion seems to be well-supported. *See* United States v. Johnson, 319 U.S. 302, 304 (1943) (absent "a genuine adversary issue between . . . parties," federal court "may not safely proceed to judgment."); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 47–48 (1971) ("We are thus confronted with the anomaly that both litigants desire precisely the same result. . . . There is, therefore, no case or controversy within the meaning of Art. III of the Constitution.") (citing Muskrat v. United States, 219 U.S. 346 (1911)).

230. *Windsor*, 133 S. Ct. at 2713 (Individual members who "have not been authorized to represent their respective Houses of Congress in this action" lack standing.).

Alito was not explicit, Congress's standing might depend on the Executive Branch's refusal to defend the statute.[231]

More recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[232] the Supreme Court reaffirmed that state legislatures have standing to challenge actions that affect their power. There, an initiative divested the Legislature of its redistricting authority and reposed that power in an independent commission. Justice Ginsburg's majority opinion held the Legislature to be a proper "institutional plaintiff asserting an institutional injury."[233]

While *Arizona State Legislature* and *Windsor* are the latest legislative standing cases, *INS v. Chadha*[234] may be the best known. There, INS, as the relevant Executive Branch agency, agreed with an immigrant facing deportation that a "legislative veto" embodied in the Immigration and Nationality Act[235] was unconstitutional. The House and Senate filed separate actions against INS, arguing that they had standing to defend the validity of the Act, which they had passed and which otherwise lacked a defense. The Supreme Court held that the House and Senate were "proper parties" to defend the Act. "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."[236]

While the *INS* opinion affirms Congress's standing to defend its statutes—at least in the absence of the Executive branch's defense—legislative standing has limits. First, if Congress's power is merely diluted rather than nullified, then Congress lacks standing. In *Raines v. Byrd*,[237] Senator Harry Byrd sued to declare that the Line Item Veto Act violated separation-of-powers principles. The

231. *See id.* at 2714 ("Congress is the proper party to defend the validity of a statute when the Executive refuses to do so on constitutional grounds.") (internal quotation marks omitted); *see also id.* at 2712 ("Congress is the proper party to defend the validity of a statute when an agency of government . . . agrees . . . that the statute is . . . unconstitutional.").

232. No. 13-1314, slip op. (U.S. June 29, 2015).

233. *Id.* at 12.

234. 462 U.S. 919 (1983).

235. 8 U.S.C. § 1254(c)(2) (2000) (repealed 1996).

236. INS v. Chadha, 462 U.S. 919, 940 (1983). Professors Grove and Devins take issue with the "history" recounted in *Chadha*, as well as the decision itself. Grove & Devins, *supra* note 214, at 630.

237. 521 U.S. 811 (1997).

Supreme Court held that Senator Byrd lacked standing, because, *inter alia*, a line item veto could be overridden according to procedures specified in the Act.[238] Accordingly, Congress's authority was merely "diluted," not "nullified," as it had been in *Coleman v. Miller*.[239] Under *Raines*' modified test for legislative standing, dilution of legislative power was too abstract an injury to satisfy Article III.

A second possible limit on legislative standing stems from the distinction between legislat*ures* and legislat*ors* as parties. The Supreme Court has been unclear as to whether individual legislators can sue in their own right or only as representatives of their body. Until recently, official capacity suits by individual legislators were relatively common.[240] But recent cases have suggested that lawsuits by legislators acting without the body's blessing raise questions.[241] For instance, in *Goldwater v. Carter*,[242] Senator Barry Goldwater challenged President Carter's abrogation of the Mutual Defense Treaty between the United States and Taiwan, thereby recognizing the People's Republic as the sole government of China.[243] The Supreme Court dismissed the case without a majority opinion. Justice Powell concurred on ripeness grounds:

> In this case, a few Members of Congress claim that the President's action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to a

238. *Raines*, 521 U.S. at 812. On the merits, Senator Byrd was clearly right, and the Supreme Court so declared a few years later in *Clinton v. City of New York,* 524 U.S. 417 (1998).

239. Coleman v. Miller, 307 U.S. 433, 438 (1939) ("[P]laintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught . . . [w]e think [they] have a plain, direct and adequate interest in maintaining the effectiveness of their votes."); *see* Raines v. Byrd, 521 U.S. 811, 822–23 (1997).

240. There is an extensive discussion of congressional standing in Synar v. United States, 626 F. Supp. 1374, 1381–82 (D.C. Cir. 1984), where a special 3-judge district court (including then Judge Scalia) invalidated the Balanced Budget Act in a suit brought by Rep. Synar on his own. The court held that "specific injury to a legislator in his official capacity may constitute cognizable harm sufficient to confer standing upon him." *Id.* Also, "a Member of Congress may have standing where he alleges a 'specific and cognizable' [injury] arising out of an interest 'positively identified by the Constitution.'" *Id.* at 1382; *see also* Barnes v. Kline, 759 F.2d 21, 26 (D.C. Cir. 1984) (individual members of Congress have standing), *rev'd on other grounds*, Burke v. Barnes, 479 U.S. 361 (1987).

241. This is not the case when a legislator sues to vindicate a personal, rather than institutional interest. *See* Powell v. McCormack, 395 U.S. 486 (1969). In contrast to *Powell*, most cases involving legislative standing are brought by individual legislators in their institutional capacities. The legislator claims injury to the office rather than to the person holding office.

242. 444 U.S. 996 (1979).

243. *Id.*

> change in the supreme law of the land. Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches. . . . It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so.[244]

The Court also questioned the propriety of individual legislator suits in *Karcher* and *Raines*. In *Karcher*, the Court dismissed an appeal by individual legislators after they lost their leadership positions. Since they had intervened "in their official capacities as presiding officers on behalf of the New Jersey Legislature," once they lost those posts, "the authority to pursue the lawsuit on behalf of the legislature belong[ed] to those who succeeded [them] in office."[245]

Similarly in *Raines*, after holding that Senator Byrd's injury was inadequate for standing (because his power was "diluted" rather than "nullified"), the Court added: "[w]e attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."[246] Thus, in a way, Byrd was challenging his fellow Senators and Representatives—an "intra-parliamentary controversy."[247] "Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take."[248] But even there, the Court was circumspect, noting that state law might entitle a lone legislator "to protect 'the effectiveness of [his][vote].'"[249]

Perhaps the most that can be said in this regard is that legislative standing will be more likely to be found where the legislative body

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244. *Id.* at 997–98 (Powell, J., concurring).

245. Karcher v. May, 484 U.S. 72, 77 (1987).

246. Raines v. Byrd, 521 U.S. 811, 829 (1997). Justice Ginsburg stressed this point in *Arizona State Legislature*, noting that unlike *Raines*, the Arizona Legislature had authorized the suit involved there. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, No. 13-1314, slip op. at 12 (U.S. June 29, 2015).

247. See *id*. at 830 n.11 ("it is far from clear that this injury is "fairly traceable" to appellants, as our precedents require, since the alleged cause of appellees's injury is not appellants' exercise of legislative power but the actions of their own colleagues in Congress in passing the Act.").

248. *Id.* at 829 n.10 (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544 (1986)).

249. *Id.* at 824 n.6.

as a whole authorizes suit, typically through designated members. We see this more as a prudential separation-of-powers concern, as noted in *Goldwater*, than as a categorical Article III rule.[250] When a federal court is asked to intervene in a "constitutional confrontation"[251] between Congress and the Executive, there at least ought to be a "true impasse" between the two branches.[252]

### 2. Applying Legislative Standing to Initiative Proponents

Does legislative standing provide a basis for initiative proponents to claim Article III standing to defend "their" initiatives? In *Arizonans for Official English v. Arizona*, this question of proponents' authority under state law was unasked and unanswered by the Supreme Court (although answered affirmatively by the Ninth Circuit). By contrast, the California Supreme Court in *Perry III* did rule on proponents' authority to represent the state's interest, holding that, under state law, the proponents had such authority. But the California court did not rule on whether proponents were analogous to the legislature.[253] *Perry III* also did not expressly consider whether proponents were quasi-legislators for purposes of defending Proposition 8. Had the Ninth Circuit asked that precise question in *Perry II* and had the California Supreme court answered it

250. *See also* Barnes v. Kline, 759 F.2d 21, 28 (D.C. Cir. 1984) ("In congressional lawsuits against the Executive Branch, a concern for the separation of powers has led this court consistently to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process."); *rev'd on other grounds*, Burke v. Barnes, 479 U.S. 361 (1987).

251. *See* Neal Devins & Michael A. Fitts, *The Triumph of Timing:* Raines v. Byrd *and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351, 365 (1997).

252. Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring).

253. Not only was the posture of the litigation in *Arizonans* different than that in *Hollingsworth*, so too was the effect of dismissal. Because even the district court lacked jurisdiction in *Arizonans*. 520 U.S. at 74. Its judgment invalidating the measure was vacated, leaving the constitutional provision intact. (It was ultimately invalidated by the state supreme court, *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998)). In contrast, Proposition 8 is now inoperative, under the district court's judgment in *Hollingsworth*, a judgment that is unaffected by the subsequent withdrawal of parties defendant. That contrast must be seen in light of an admonition in the Court's opinion in *Arizonans*: that "[r]espect for the place of the States in our federal system" requires a closer examination of the standing question. *Arizonans*, 520 U.S. at 75. We have found one other case where initiative proponents' lack of standing resulted in the lower court's judgment of unconstitutionality becoming final. The Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Trust Co., 460 U.S. 1077 (1983). That was a summary dismissal without opinion, so it provides little guidance here.

affirmatively, might this theory of standing have allowed the Supreme Court to reach the merits in *Hollingsworth*?

An argument in favor of such standing would begin with the presumption that, had Proposition 8 been a statute enacted by the Legislature, the Legislature would have had standing to defend it in federal court once Attorney General Brown declined to do so. This presumption would seem to follow directly from *Karcher* and *Chadha*. However unlike those cases, the relevant law in *Hollingsworth*—Proposition 8—was not a statute enacted by the Legislature, but was an initiative proposed and passed by the voters.

The California Supreme Court has described California's initiative power as "essentially a legislative authority," one manifesting the people's ultimate sovereignty under the state constitution.[254] It is the principal organ of direct democracy. Since through the initiative the people act as a super-legislature, their standing as legislators should be no less than that of elected legislators. True, as the chief justice wrote in *Hollingsworth*, the people are not "public officials" in the republican sense, but the very purpose of the institution of direct democracy is to bypass—or surpass—officialdom. By proposing and then approving Proposition 8, the people withdrew the power previously delegated to such officials and reasserted the "inherent political power"[255] that they have "reserved" to themselves.[256] Direct democracy is not republican democracy.[257]

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254. *Perry III*, 265 P.3d at 1027; *see also* Builders Ass'n of Santa Clara-Santa Cruz Cntys. v. Superior Court, 529 P.2d 582, 586 (Cal. 1974) (The initiative "represents an exercise by the people of their reserved power to legislate."). The Supreme Court has generally agreed with this characterization. *See* Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 567 (1916) (people may act as the legislature for purposes of Art. I, § 4; "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof."); City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668, 678 (1976) (a municipal referendum "is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation").

255. CAL. CONST. art. II, § 1.

256. *Id.* art. IV, § 1.

257. *See* Sherman J. Clark, *Tales Of Popular Sovereignty: Direct Democracy In America*, 97 MICH. L. REV. 1560, 1569 (1999) (direct democracy "always trumps republican democracy"). Chief Justice Roberts seemingly disagreed with this assessment, claiming that the Constitution recognizes only representative institutions as "legislatures." Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, No. 13-1314, slip op. at 5 (U.S. June 29, 2015). His dissent in that case reinforced the preference for republicanism over direct democracy that he displayed in *Hollingsworth*. *Id.*

While the Supreme Court has not itself embraced the theory that initiative proponents are analogous to legislators, it recognized for some purposes the constitutionality of states' authority to establish "'the electorate . . . as a coordinate source of legislation' on equal footing with the representative legislative body."[258] There is also state law and scholarly support for the notion that initiative voters are quasi-legislators. Some writers start from the premise that "initiative proponents are . . . unelected lawmakers" exercising delegated power.[259] Others accept the formal analogy but note structural differences between "voter-legislators" and elected legislators, such as the lack of deliberation and party discipline.[260]

There remains an important step in completing the analogy between the proponents of an initiative and a legislature defending its powers or enactments. As *Karcher*, *Raines*, and *Goldwater* intimate, individual legislators might lack standing on their own behalf, and may need authorization from their legislative body to bring or intervene in a case. Proponents do have an "official" status under California law, but they are akin to individual sponsors of legislation, rather than to the legislature as a whole.[261] If it is the "people" collectively who are analogous to the legislature, must proponents obtain the "people's" authorization before they can assert legislative standing?

In answering these questions, we should keep in mind the reasons why the Supreme Court might require individual legislators to be authorized by their bodies. There are at least two prudential concerns: first, to avoid internecine warfare in the form of "intra-parliamentary disputes," and second, to avoid embroiling the federal courts unnecessarily in inter-branch disputes, which often merely compounds the separation-of-powers problem the case was intended to redress.[262]

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258. *See, e.g.*, *Ariz. State Legislature*, slip op. at 5 (citations omitted) (demonstrating that initiatives and referenda are part of the legislative power).

259. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 400 (2003).

260. Glenn C. Smith, *More D (Deliberation) for California's DD (Direct Democracy)*, 48 CAL. W. L. REV. 1, 24 (2011).

261. Chula Vista Citizens for Jobs & Fair Competition v. Norris, 755 F.3d 671, 679 (9th Cir. 2014).

262. See *supra* notes 216–20 and accompanying text.

These problems do not generally arise with initiatives. Presumably, proponents, the petition signers who qualify a measure for the ballot, and the electorate are not acting at cross-purposes. But if formalism is the key, as it often is in standing, then we should more carefully consider the analogy between proponents and legislatures as made by the lower courts in *Arizonans* and *Perry III*.

California has two forms of initiatives: statutory and constitutional. With statutory initiatives, the electorate is analogous to the legislature, since the ballot measure does not become law until approved by the voters. Thus, if one formally analogizes initiative proponents to legislators, legislative standing might not be a viable theory for proponents of an initiative statute, at least without some expression of voter authorization for the proponents to defend the measure.

When it comes to constitutional initiatives, such as Proposition 8, the analogy is more complex. Under California's constitution, constitutional amendments may be proposed in either of two ways. First, the legislature, upon a two-thirds vote of both houses, may propose a constitutional amendment for the ballot; the amendment is then put to the voters for approval.[263] Second, a constitutional amendment may be proposed by the people: proponents draft the proposed amendment and then gather the required signatures (currently, approximately 800,000) to have the proposed amendment put on the ballot for voter approval.[264]

For constitutional initiatives, then, it is not the voters who are analogous to the legislature, but the electors who sign the qualifying petitions. Once the constitutional initiative qualifies for the ballot, the legislative role is complete. The voters are no longer mere legislators; they are the ultimate sovereign in reforming their state's constitution. The process of qualifying an initiative for the ballot is the functional equivalent of a proposed amendment being voted out of both houses of the legislature. Then the question arises whether the signers of the qualifying petitions have authorized proponents to defend the initiative should it pass, and should state officials decline to defend it. We think that constructive authorization might be

263. CAL. CONST. art. XVIII, § 1.

264. CAL. ELEC. CODE § 9000–18 (West 2015); CAL. CONST. art. II, §§ 8, 10; *id.* art. XVIII, § 3.

implied in the act of signing the initiative petition.[265] More particularly, the proponents' obligations under the Elections Code to submit the proposed initiative to the attorney general for captioning, to gather signatures, to submit signed petitions for verification, and to sign ballot arguments[266] all may suggest signers'—and even voters'—understanding of proponents' authority vis-à-vis the initiative. It seems a small leap to extend this authority to defending the initiative.

Does the proponent *qua* legislator analogy hold for standing purposes? Perhaps not, if "republican" government is the only possible context for Article III standing. A court could require that the case or controversy requirement be read in *pari passu* with the Guaranty Clause.[267] But that would lead to an anomalous result, because the Guaranty Clause is itself non-justiciable.[268] Also, this connection was not made in *Hollingsworth*.

In *Perry II*, the Ninth Circuit asked the California Supreme Court whether "proponents of an initiative may possess a particularized interest in defending the constitutionality of their initiative upon its enactment" or "were authorized to defend that initiative, as agents of the People."[269] Perhaps, a third question should have been asked: do the proponents have particularized legislative or other *institutional* interests at stake that is separate from the state's interests? This third question might have been implicit in the Ninth Circuit's reasoning for certifying the question. The court stated:

> Rather than rely on our own understanding of this balance of power under the California Constitution, however, we certify the question so that the [California Supreme] Court may provide an authoritative answer as to the rights, interests, and authority under California law of the official proponents of an initiative measure to defend its validity

265. If the signatories/proponents-as-legislature analogy were strictly applied, proponents might be able to defend a constitutional initiative, but not a statutory one. This result would seem to lack any basis in policy.

266. *See* CAL. ELEC. CODE §§ 9001, 9004(b), 9032, and 9067(b).

267. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a republican form of government . . . .").

268. Luther v. Borden, 48 U.S. (7 How.) 1, 26 (1849); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149–51 (1912).

269. Perry v. Schwarzenegger (*Perry II*), 628 F.3d 1191, 1197 (9th Cir. 2011).

> upon its enactment in the case of a challenge to its constitutionality, where the state officials charged with that duty refuse to execute it.[270]

The context of the question, the "balance of power" terminology, together with the notion of an executive veto of an initiative, raises the possibility that the court was asking about proponents' legislative authority. And while the California Supreme Court unanimously believed it was confirming proponents' authority to defend their initiative, it did so in a way that sidestepped what, in retrospect, may have been a superior theory, namely legislative standing.[271]

## V. WHAT *HOLLINGSWORTH* MEANS FOR CALIFORNIA AND OTHER INITIATIVE STATES.

### *A.* Hollingsworth *Creates an Executive Veto over Initiatives*

From a practical perspective, state officials' failure to defend an initiative challenged in federal court could make a judgment of invalidity more likely, either because the officials admit the invalidity in their answer (as they did in *Perry I*), stipulate to a judgment of invalidity, or fail to answer and thereby default.[272] Such a judgment by the trial court would be conclusive since, under *Hollingsworth*, initiative proponents lack standing to appeal.

The executive veto created by *Hollingsworth* undermines both state sovereignty and core principles of democracy. As Justice Kennedy noted in his dissent in *Hollingsworth*,

> The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government. The California initiative process embodies these principles and has done so for over a century. "Through the structure of its government, and the

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270. *Id.*

271. Notwithstanding this theoretical possibility, the *Hollingsworth* majority's language might be inhospitable to using the proponents-are-legislators analogy as a basis for standing. The majority, in discussing *Karcher*, states that proponents "hold no office and have always participated in this litigation solely as private parties." Hollingsworth v. Perry, 133 S. Ct. 2652, 2665 (2013). The majority then concludes, "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here." *Id.* at 2668.

272. *See* FED. R. CIV. P. 8(b)(1)(B), 55(a), 55(b)(2).

> character of those who exercise government authority, a State defines itself as sovereign."[273]

The *Hollingsworth* majority also ignores the foundational principle of direct democracy. Rather than "reserving to the people" the powers of initiative and referendum,[274] *Hollingsworth* allows executive officials to veto that power, perhaps in a way that escapes judicial review. A state official's actions may have political consequences, but, in the meantime, the purpose of the initiative process has been compromised.

Nevertheless, it is important to note that at least two, or possibly three, types of private parties' standing remain viable:

(1) The majority's decision would be inapplicable in state court proceedings.[275] For example, after Proposition 8 was approved by the voters, it was challenged in state court as being an impermissible constitutional revision rather than a permissible constitutional amendment. There, Proposition 8's proponents had standing to assert the state's interest in upholding the initiative.[276]

(2) Even in federal court, private parties could defend an initiative if they could show that invalidating it would affect them in a "personal and individual way." In such cases, private parties could assert their own standing (under the first prong of the Ninth Circuit's *Perry II* inquiry), even absent the private parties' ability to assert the state's interest or legislative standing. For example, if a federal constitutional challenge were made to California's tax-limiting Proposition 13, any real property owner whose own taxes would be affected by a finding of unconstitutionality would have standing to defend it, even without an official defense of the law. This individual standing possibility may lead to unfortunate policy implications. Any pro-business initiative could be defended by a business that would stand to benefit from the initiative. By contrast, some initiatives supported for social reasons—such as Proposition 8—would lack

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273. *Hollingsworth*, 133 S. Ct. at 2675 (Kennedy, J., dissenting) (citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

274. CAL. CONST. art. IV, § 1. (*Hollingsworth* does not expressly apply to referenda—where the people have the power to approve or reject legislation—but the standing principles announced there would seem to apply equally to that form of direct democracy as well.).

275. *Hollingsworth*, 133 S. Ct. at 2667 ("Nor do we question . . . the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply.").

276. *See* Strauss v. Horton, 207 P.3d 48, 63–64, 69 (Cal. 2009). More generally, the California Supreme Court's *Perry III* decision that proponents have standing to represent the state would be binding on California state courts.

defenders with standing. The ironic result is that, while California's initiative process was adopted to reduce the power of Southern Pacific Railroad and other big businesses, *Hollingsworth* has reversed this policy. After *Hollingsworth*, pro-business initiatives will always have defenders with standing, but some social initiatives may lack such defenders.

(3) While the *Hollingsworth* majority did not expressly so hold, it may be that, *before the election*, proponents would have standing to defend their initiatives in federal court.[277] It is theoretically possible that signature gathering, signature verification, the election itself, or some other pre-enactment activity could be challenged under federal law. Under such a scenario, the various California Elections Code sections that the majority held inapposite to a challenge after the election, might confer standing on the proponents prior to the election.

Apart from these scenarios, we conclude that *Hollingsworth* has created the power of executive veto over those initiatives challenged in federal courts.[278]

Finally it is important to note that the effect of the holding in *Hollingsworth* does not appear to be limited to California. While *Hollingsworth* dealt with California law, the principles set forth by the majority would appear to be generally applicable, especially because the majority disregarded state law on the question of agency. In sum, all states that provide for initiative laws face the likely prospect that proponents would lack standing to defend passed initiatives in federal court.

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277. *See Hollingsworth*, 133 S. Ct. at 2662–63 ("[Proponents] argue that the California Constitution and its election laws give them a 'unique,' 'special,' and 'distinct' role in the initiative process—one 'involving both authority and responsibilities that differ from other supporters of the measure.' True enough—but only when it comes to the process of enacting the law. . . . [*O*]*nce Proposition 8 was approved by the voters*, the measure became 'a duly enacted constitutional amendment or statute.' [Proponents] have no role—special or otherwise—in the enforcement of Proposition 8. They therefore have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of California." (emphasis added) (citations omitted) (internal quotation marks omitted).

278. While Proposition 8 was a statewide initiative, the Supreme Court's reasoning and the above analysis would appear to apply in the same way to local initiatives in California. *Cf.* City of Santa Monica v. Stewart, 24 Cal. Rptr. 3d 72, 93–94 (Ct. App. 2005) (citing to statewide initiative case law as precedent for local initiatives), *as modified on denial of reh'g* (Feb. 28, 2005).

### *B. Unanswered Questions in* Hollingsworth

#### 1. What is the Effect of *Hollingsworth* in Trial Courts?

The Supreme Court expressly held that Proposition 8's proponents could not appeal from the district court's decision in *Perry I*, and accordingly vacated the Court of Appeals judgment. However, *Perry I*—in which the proponents had successfully intervened—was left intact, thereby possibly leaving open the question of whether initiatives' proponents may intervene as defendants at trial.

A recent district court decision dealt with this question by narrowly reading *Hollingsworth*'s applicability at trial. *Vivid Entertainment v. Fielding*[279] involved a challenge to a voter-approved Los Angeles County initiative—Measure B—that, *inter alia*, required the use of condoms in adult films made in the county.[280] Plaintiffs were producers and actors who challenged Measure B on First Amendment grounds. The named defendants—the county and certain officials—appeared by outside counsel who filed an answer that lacked "vigor" (using *Perry III* terminology). The answer stated that the complaint "presents important constitutional questions that require and warrant judicial determination" and was otherwise noncommittal about Measure B's validity.[281]

Early in the case—before *Hollingsworth*—Measure B's proponents successfully moved to intervene as defendants. After *Hollingsworth*, plaintiffs asked the district court to reconsider its grant of intervention.[282] The district court denied reconsideration, holding that *Hollingsworth*, by leaving *Perry I* intact, "implicitly approved of the framework currently at issue: at the district court level, intervention by initiative proponents is proper when the government is enforcing the initiative but refuses to defend it, regardless of whether the interveners have standing independent of the government defendants."[283] *Vivid* also held that, while plaintiffs

279. 774 F.3d 566 (9th Cir. 2014).

280. *Id.* at 571.

281. *See* Defendants' Answer To Plaintiffs' Complaint at 1, Vivid Entm't LLC v. Fielding, No. CV 13-00190 DDP (AGI) (C.D. Cal. Feb. 27, 2013), ECF No. 21.

282. Vivid Entm't, LLC v. Fielding, No. CV 13-00190 DDP AGRX, 2013 WL 3989558, at *1 (C.D. Cal. Aug. 2, 2013).

283. *Id.*

must have standing, Ninth Circuit precedent, "though somewhat ambiguous, generally indicates that interveners are not required to demonstrate Article III standing independent of the defendants."[284] *Vivid* distinguished away the *Hollingsworth* holding in two ways: (i) *Hollingsworth* does not apply at trial, and (ii) even if *Hollingsworth* generally applies at trial, it does not apply to intervening defendants, provided that the intervenors are allied with parties having standing to defend the initiative.

With regard to point (i), however, *Hollingsworth*'s language appears broad enough to apply at trial: "Article III demands that an 'actual controversy' persist throughout all stages of litigation. That means that standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."[285]

With regard to point (ii), the question seems more complex, because, as often occurs with initiatives, putative intervening proponents may not be allied with the governmental defendants or other parties with standing. Perhaps an intervenor need only satisfy Rule 24(a) if she enters a case on the side of a party with standing,[286] but if there is no such party, then the intervenor would need to show standing in her own right.[287] Thus, in a case such as *Arizonans*, where state defendants are dismissed on Eleventh Amendment grounds, initiative proponents may not be able to intervene, even at trial.

For example, could proponents intervene as defendants at trial when:

- state defendants defend without vigor? (This question was specifically raised in *Vivid*.)

284. *Id.* at *2.

285. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013).

286. Ninth Circuit precedent, unless overruled by *Hollingsworth*, permits so-called "piggyback" standing, allowing an intervenor to use the standing of a party from the same side already in the action. State of Cal. Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 846 n.9 (9th Cir. 2003) (a plaintiff-intervenor "did not need to meet Article III standing requirements to intervene"). However, other circuits do require intervenors to demonstrate Article III standing. *E.g.*, Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U.L.Q. 215, 270 (2000) ("Three courts of appeals have held that a proposed intervenor must demonstrate interests sufficient to satisfy the standing inquiry in order to intervene."). These courts are the D.C. Circuit, the Seventh Circuit, and the Eighth Circuit.

287. That is essentially what Judge Walker ruled in *Perry I*.

- state defendants default so that a judgment—invalidating the initiative—could be entered?[288]
- state defendants stipulate to entry of judgment of the initiative's invalidity?

All of these scenarios could result in an "executive veto" of an initiative.

The last scenario listed above, that of a stipulated judgment, is perhaps especially problematic. If an initiative's proponents lack party status prior to judgment, they may object to a stipulated judgment of invalidity but may not by right, derail it. While the district judge must consider the public interest in entering a stipulated judgment,[289] proponents would be relegated to the position of "bystanders."[290]

### 2. Under *Hollingsworth*, Must *Appellees* Have Standing?

Apart from these trial court issues, a further question remains when a *Hollingsworth*-type case is on appeal: must proponents have standing as *appellees*? If a district court has ruled an initiative *constitutional*, the plaintiffs—who had alleged the initiative's unconstitutionality—may appeal. Would the proponents be allowed to defend the initiative as appellees, even if the elected officials are inactive (or affirmatively agree with appellants) in the appeal?

The Ninth Circuit may have partially answered the question in two 2014 opinions. In the first case, *Latta v. Otter*,[291] plaintiff same-sex couples sued Nevada's governor and three county officials, seeking to overturn Nevada's same-sex marriage ban.[292] The ban had been enacted as a constitutional initiative proposed by the Coalition for the Protection of Marriage ("Coalition").[293] At trial, the Coalition, with the plaintiffs' consent, was permitted to intervene as a

288. *See* FED. R. CIV. P. 8(b)(1)(B).

289. Consumer Advocacy Grp., Inc. v. Kintetsu Enters. of Am., 45 Cal. Rptr. 3d 647, 659–60 (Ct. App. 2006).

290. *See Hollingsworth*, 133 S. Ct. at 2663 ("[O]nce Proposition 8 was approved by the voters, [the Official Proponents] have no role—special or otherwise—in the enforcement of Proposition 8. . . . They therefore have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of California.").

291. 771 F.3d 456 (9th Cir. 2014).

292. *Id*. at 464.

293. Coalition's Motion To Intervene, at 6, 13 & App.1, at 2, 28–29.

defendant.[294] The district court upheld the constitutionality of Nevada's same-sex marriage ban, and plaintiffs appealed.[295] In the Ninth Circuit, Nevada's governor and county officials filed answering briefs, but then—after *Windsor* and *SmithKline Beecham Corp. v. Abbott Labs*[296] were decided—withdrew the briefs. Nevada, however, continued to enforce the initiative. The Coalition then appeared via briefs and oral argument without objection by plaintiffs-appellants.[297] The Ninth Circuit accepted the Coalition's appearance: "[h]earing from the Coalition helps us to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[298]

The second case, *Vivid*, extended *Latta*, holding that initiative proponents would be allowed to appear as appellees even without the plaintiff-appellants' consent and without an indication that the challenged law was being enforced. In *Vivid*, the district court largely upheld Measure B, and plaintiffs appealed. The county defendants "elect[ed] not to file an answering brief" in the Ninth Circuit.[299] Measure B's proponents, who had intervened as defendants at trial, asserted their own right to appear as appellees. Plaintiffs opposed this assertion, citing *Hollingsworth*.[300] The Ninth Circuit sided with Measure B's proponents, holding that an intervenor-appellee who does not "initiate an action" or "seek review on appeal" and who "performs . . . no other function that *invokes* the power of the federal courts need not meet Article III standing requirements."[301] The court added that it was not deciding whether the proponents satisfied the

294. Sevcik v. Sandoval, 911 F. Supp. 2d 996, 998 (D. Nev. 2012), *rev'd,* 771 F.3d 456 (9th Cir. 2014).

295. *Id.* at 1021.

296. 740 F.3d 471 (9th Cir. 2014) (applying heightened scrutiny to classifications based on sexual orientation), *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014).

297. Latta v. Otter, 771 F.3d 456, 465–66 (9th Cir. 2014).

298. *Id.* at 466.

299. Letter from Joel N. Klevens, Attorney for Defendant-Appellees Jonathan Fielding, Jackie Lacey & Cnty. of Los Angeles, to Molly C. Dwyer, Clerk of Court, U.S. Court of Appeals for the 9th Circuit (Oct. 7, 2013), *available at* http://www.aidshealth.org/wp-content/uploads/2013/06/Vivid-Entertainment-LLC-Letter-to-Ms.-Molly-C.-Dwyer.pdf.

300. Brief of Plaintiffs-Appellants Vivid Entertainment, LLC; Califa Productions, Inc.; Jane Doe a/k/a Kayden Kross & John Doe a/k/a Logan Pierce *passim*, Vivid Entm't, LLC v. Fielding, 774 F.3d 566 (9th Cir. 2014) (No. 13–56445), 2013 WL 5314681 *passim* (citing Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)).

301. *Vivid*, 774 F.3d at 573.

standing requirements, but that standing was simply not required of appellees.[302]

In sum, *Latta* and *Vivid* hold that, even when government appellees do not actively participate on appeal, initiative proponents may do so without independently meeting standing requirements.[303] But the opinions leave unresolved the question of whether such a case is otherwise justiciable if government appellees are not merely passive, but affirmatively agree with appellants that the challenged law is unconstitutional. In that event, the federal case might be non-justiciable for lack of a threshold "case or controversy."[304] Perhaps such a case could not proceed unless the court found that other appellees, such as proponents who would provide the necessary "genuine controversy" on appeal, independently had standing as appellees, an issue that every court has sidestepped thus far.

## VI. FIXING *HOLLINGSWORTH*

*Hollingsworth* has created both practical and theoretical obstacles to the exercise of direct democracy. Some remedy would seem necessary going forward if "that safeguard which the people should retain for themselves" is to have meaning.[305] Some have called for structural reform. For instance, in

302. *Id.*

303. As a matter of general appellate procedure, even if the U.S. Supreme Court were to reverse *Latta* or *Vivid* on appellees' standing, such a decision might not dispose of a *Latta*- or *Vivid*-type appeal. First, the official defendants could remain as appellees, albeit as passive ones. Under Federal Rule of Appellate Procedure 31(c), a failure to file an appellee's brief means only that the party "will not be heard at oral argument unless the court grants permission." FED. R. APP. P. 31(c). Accordingly, the circuit court will still decide the appeal on the merits, and need not automatically decide against a party failing to file a brief. *See* Latta v. Otter, 771 F.3d 456, 465 (9th Cir. 2014) (citing Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 887 n.7 (9th Cir. 2010)) ("Although the state defendants withdrew their briefs, we are required to ascertain and rule on the merits arguments in the case, rather than ruling automatically in favor of plaintiffs-appellants."). Second, proponents, even if not appellees, can still have their arguments considered by the court as amici. *See* FED. R. APP. P. 29. Thus, official state defendants may have less ability to "veto" an initiative once the district court has upheld it. In sum, proponents' lack of standing on appeal is probably less of a threat to their initiative than is their lack of standing at trial.

304. In *Windsor*, Justice Kennedy stated that Article III's case-or-controversy requirement was satisfied so long as the government continued to enforce the challenged law, even if it agreed with petitioners on the merits. United States v. Windsor, 133 S. Ct. 2675, 2686 (2013). *But see supra* note 214. With such continued enforcement, Kennedy felt that the government's lack of defense raised only a prudential concern. *Windsor*, 133 S. Ct. at 2687. However, as noted above, the enforcement element did not appear in *Vivid*, yet the Ninth Circuit still decided the appeal on the merits, never addressing the issue of whether a case or controversy existed.

305. Perry v. Brown (*Perry III*), 265 P.3d 1002, 1016 (Cal. 2011).

*ProtectMarriage.com-Yes on 8 v. Bowen*,[306] Judge Clifford Wallace suggested that:

> [T]he State of California would do well to consider legislating a process whereby the State's elected officials would be obliged to defend the State's duly enacted laws in court, rather than leaving it to the unfettered discretion of the Attorney General to pick and choose which of the State's laws he or she elects to defend.[307]

We agree with this general sentiment. But, as a threshold matter, any reform must reckon with three general criteria set forth by the Court in *Hollingsworth*: (1) the state's representatives must be "public officials;" (2) the state must be able to exercise some control over its representatives, perhaps including the right to terminate the representation; and (3) the representatives must owe fiduciary obligations to the state.[308]

We examine four potential solutions: (1) the possibility that California's existing constitution or statutes may already provide a mechanism for forcing state officials to defend passed initiatives; (2) a new independent state agency charged with defending state initiatives; (3) the appointment of an ad hoc special counsel with the same responsibilities; and (4) language within an initiative itself that would allow proponents to seek the appointment of a special counsel.

### *A. Existing California Law*

Several California state constitutional provisions and statutes suggest that the attorney general and other executive officers have affirmative duties in connection with state laws. In this Section we discuss whether those laws may be used to force the attorney general (or equivalent officer of a local agency) to defend an initiative.[309]

306. 752 F.3d 827 (9th Cir. 2014).

307. *Id.* at 852 n.2 (Wallace, J., dissenting).

308. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2665–67 (2013).

309. Similar obligations and remedies may lie in states beyond California, but we express no opinion on them.

### 1. State Executive Officials' Duty to Defend State Law

#### *(a). California Constitution, Article III, Section 3.5 and the Associated Rule*

Article III, Section 3.5 of the California Constitution states, inter alia:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; (b) To declare a statute unconstitutional.[310]

This constitutional amendment was proposed by the Legislature and adopted by voters in 1978 in response to a California Supreme Court holding that the state Public Utilities Commission's quasi-judicial powers included the power to declare a state statute unconstitutional.[311] That holding was overruled by section 3.5, the voters agreeing with the Legislature that only the courts should rule on constitutional matters.

In *Lockyer*,[312] the California Supreme Court found it unnecessary to decide whether section 3.5 applied to local executive officials. There, a city clerk had decided that state law[313] prohibiting same-sex marriage was unconstitutional, and began issuing marriage licenses. The attorney general filed an original action in the California Supreme Court to enjoin the clerk's actions as violating section 3.5. The court held that, quite apart from section 3.5, background principles prohibited the city clerk from ignoring state law, even law she believed was unconstitutional.[314]

The *Lockyer* court noted that section 3.5 left undisturbed the prior case law that executive officials, not just agencies with

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310. CAL. CONST. art. III, § 3.5.

311. S. Pac. Transp. Co. v. Pub. Utils. Comm'n, 556 P.2d 289 (Cal. 1976), *superseded by constitutional amendment*, CAL. CONST. art. III, § 3.5; *see also* Walker v. Munro, 2 Cal. Rptr. 737 (Ct. App. 1960) (holding, similarly to the *Southern Pacific* court, that an administrative agency vested with quasi-judicial powers could rule on the constitutionality of a statute it was charged with enforcing), *superseded by constitutional amendment*, CAL. CONST. art. III, § 3.5, *as recognized in* Lockyer v. City of San Francisco, 95 P.3d 459 (Cal. 2004).

312. 95 P.3d 459 (Cal. 2004).

313. *See supra* Part III.A (discussing Proposition 22).

314. *Lockyer*, 95 P.3d at 476.

quasi-judicial powers, lacked the authority to declare state law unconstitutional.[315] Thus, drawing on core principles of divided government, *Lockyer* held that local officials had no power to determine the constitutionality of statutes they are charged with enforcing.[316] For purposes of simplicity, we call this the "Section 3.5 *Rule*," even though it includes background case law and goes beyond the text of section 3.5.

Does the Section 3.5 Rule apply to the state's elected attorney general and governor, the officials who are typically named in constitutional challenges to state law? They are not "administrative agencies" under a literal interpretation of section 3.5. But, as noted above, the Section 3.5 Rule goes further and could possibly be extended to state constitutional officers. However, in the Proposition 8 litigation, neither the governor nor attorney general "declared" Proposition 8 unenforceable or unconstitutional; rather, a federal court in *Perry I* did so.[317] Indeed, until *Perry I*'s injunction became final, the governor and attorney general continued to enforce, although not to defend, Proposition 8. Does the Section 3.5 Rule include such a duty to defend?

Some scholars have argued that the president's Article II obligation to "take Care that the Laws be faithfully executed"[318] creates an affirmative duty, not only to enforce, but also to defend federal law, even law he feels is unconstitutional.[319] Is a similar argument viable under the California Constitution where "[t]he Governor shall see that the law is faithfully executed"?[320] Similarly, "[i]t shall be the duty of the Attorney General to see that the laws of

315. *Id.* at 478–79.

316. *See id.* at 482 ("[I]t is abundantly clear that this constitutional amendment did not *expand* the authority of such officials so as to permit them to refuse to enforce a statute solely on the basis of their view that the statute is unconstitutional. Accordingly, we conclude that under California law a local executive official generally lacks such authority.").

317. Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921 (N.D. Cal. 2010). Of course, as noted above, *supra* Part III.E, the Ninth Circuit also decided that Proposition 8 was unconstitutional, Perry v. Brown (*Perry IV*), 671 F.3d 1052 (9th Cir. 2012), but *Hollingsworth* vacated this decision. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

318. U.S. CONST. art. II, § 3.

319. *See, e.g.*, Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1336 n.105 (2014) (arguing in favor of a duty to defend). *But cf.* Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 221–29 (2014) (arguing that the duty is more nuanced and limited).

320. CAL. CONST. art. V, § 1.

the State are uniformly and adequately enforced."[321] In addition to these express obligations, separation-of-powers principles may also impose an affirmative duty on executive officials to defend federal or state law, so as not to usurp the judicial power.[322] Indeed, unlike the federal Constitution, where separation-of-powers is merely implied, the California Constitution makes it explicit.[323] The Section 3.5 Rule reinforces that principle.[324]

Perhaps an initiative's proponents could argue that (i) California's governor and attorney general are subject to the Section 3.5 Rule and (ii) their failure to defend an initiative (or their express concession that an initiative is unconstitutional) has the same effect as declaring the initiative unconstitutional. Thus the Section 3.5 Rule might require state executive officials not merely to enforce state law, but to provide for a defense as well.[325] This would require extending *Lockyer* and reconsidering case law that gives the attorney general discretion not to defend, at least where doing so deprives a court of jurisdiction.[326] But given the "executive veto" such officials now have under *Hollingsworth*, a state court's expansion of the Section 3.5 Rule might not be out of the question.

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321. CAL. CONST. art. V, § 13.

322. *See* United States v. Windsor, 133 S. Ct. 2675, 2688 (2013) ("[I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review . . . . [I]t poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.").

323. CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."); *see generally* Shaw, *supra* note 319 (discussing state officials' "duty to defend" in greater depth).

324. We discuss possible exceptions to this principle below. *See infra* Part VI.A.1.(b).

325. We note that the attorney general has the ethical and professional obligation not to present frivolous or legally erroneous arguments to a court. If, in her judgment, a state law is not defensible, her sole obligation under an expanded Section 3.5 Rule might be to preserve a court's jurisdiction while others provide a defense. That was the course taken by U.S. Attorney General Holder in *Windsor*. *Windsor*, 133 S. Ct. 2675. Also, under existing California law, if a conflict arises "in any case" between, on the one hand, a county assessor or county sheriff and, on the other hand the county district attorney or county counsel, then the county "shall contract with and employ legal counsel to assist the assessor or the sheriff . . . ." CAL. GOV'T CODE § 31000.6 (West 2014).

326. *See infra* text accompanying notes 307–08 (discussing People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206 (Cal. 1981)). Moreover, such a requirement might conflict with separation-of-powers principles.

### *(b). Government Code Sections 12511 and 12512*

The attorney general's constitutional "duty . . . to see that the laws of the State are uniformly and adequately enforced,"[327] is made more specific by California Government Code sections 12511, which provides that the "Attorney General has charge, as attorney, of all legal matters in which the State is interested" and 12512, which provides that "[t]he Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity."[328] Later decisions have extended the attorney general's authority to defend the state at all judicial proceedings, not just those in the supreme court.[329]

While the attorney general has the ethical obligation not to advance arguments lacking merit, it is problematic if she takes a position antagonistic to state law. In *Deukmejian*, California's attorney general filed an independent action to invalidate a statute that a state agency believed was valid. The agency sought to enjoin the attorney general from proceeding with his action on the ground that he could not take a position adverse to that of the agency. The California Supreme Court agreed, holding that the California State Bar's Rules of Professional Conduct—which applied to the attorney general, notwithstanding his status as an elected constitutional officer—barred him from taking a position adverse to his "client" (namely, the agency), especially after earlier advising the agency regarding the statute. If the attorney general believes a state law, presumably even an initiative constitutional amendment, to be unconstitutional, "the Attorney General could . . . properly withdraw as counsel for his state clients and authorize them to employ special counsel."[330]

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327. CAL. CONST. art. V, § 13.

328. CAL. GOV'T CODE §§ 12511, 12512. Section 12512 is entitled "Attendance at Supreme Court; prosecution and defense of causes." *Id.* § 12512.

329. *See* California *ex rel.* Lockyer v. U.S. Forest Serv., No. C 04-02588 CRB, 2005 U.S. Dist. LEXIS 14357, at *17–18 (N.D. Cal. July 11, 2005) ("In addition to his common-law powers, the Attorney General also has statutory authority [under sections 12511 and 12512 of the California Government Code] over 'all legal matters in which the State is interested' and the duty to 'prosecute or defend all causes to which the State . . . is a party . . . .'"); *Deukmejian*, 624 P.2d 1206.

330. *Deukmejian*, 624 P.2d at 1207 (citing CAL. GOV'T CODE § 11040). This route—i.e., filing a notice of appeal and appointing special counsel—is the one taken by U.S. Attorney General Holder in *Windsor*.

May *Deukmejian* be extended to hold that, when a state law is challenged as unconstitutional, the attorney general has a mandatory duty (not just a right) to defend, or at least to arrange for independent counsel? We are uncertain here for two reasons. First, *Deukmejian*'s plain language stated that the attorney general has the choice not to represent "his state clients." Second, the *Deukmejian* opinion's actual text stated that the attorney general's option to employ independent counsel was permissive, not mandatory.

However, in *Hollingsworth*, the real party in interest arguably was the state. Named state officials were mere nominal parties.[331] The attorney general's client in such case is not herself or the governor, and she does not represent their particular interests. Accordingly, section 12511 may arguably require the attorney general to provide, or provide for, defense of state law, at least where no one else has standing to do so. This would especially be appropriate in the case of initiatives where the client is not the state in its institutional sense, but rather the People of California.[332]

Perhaps this problem could be vitiated by adding a section to the Government Code, say, section 12512.5: "If, notwithstanding Section 12512 above, the Attorney General decides not to defend an initiative passed by voters, then the Attorney General shall employ special counsel to represent the state."[333]

### 2. Mandamus to Enforce State Officials' Duty

If initiative proponents have a right to force the attorney general to defend their initiative—whether directly or by special counsel—presumably the proponents would file a petition under section 1085(a) of the California Code of Civil Procedure: "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of . . . a duty resulting from an office, trust, or station."[334]

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331. *See supra* text accompanying note 48.

332. *See* Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 566 n.3 (Cal. 1980) (suggesting disapproval of city attorney's refusal to defend a local initiative—"Apparently believing that his duty is to represent the city council instead of the voters of Costa Mesa, the city attorney did not defend the initiative.").

333. We note that even if a duty to defend were to be found under California law, a different result might obtain with respect to the president. *See* Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012).

334. CAL. CIV. PROC. CODE § 1085(a) (West 2014).

*Deukmejian* expressly held that the attorney general may choose not to defend a statute; thus we doubt that a writ of mandate would lie to require the attorney general herself to undertake the defense of an initiative. Perhaps, depending on whether the Section 3.5 Rule or section 12512 of the California Government Code could be extended, a writ might lie that is limited to a mandate that: (1) the attorney general file a bare bones answer (in a trial court) or a notice of appeal (in an appellate court) so as to allow others—perhaps intervenors or amici—to defend, and (2) the attorney general employ special counsel for such officials and agencies that desire to have special counsel.[335]

The attorney general might respond to such a writ petition by arguing that filing an answer or notice of appeal and employing special counsel are discretionary acts. However, even if a duty is discretionary, an attorney general's refusal to answer, appeal, or employ special counsel might be considered an "abuse of discretion." A writ of mandate may "be employed to prevent an abuse of discretion, or to correct an arbitrary action which does not amount to the exercise of discretion."[336] "The fact that the legal duty imposed upon the Attorney General . . . is one which calls for an exercise of discretion does not constitute an insurmountable obstacle under all situations."[337] Mandamus does lie to examine the exercise of discretion.[338]

In addition, given the California Supreme Court's strong defense of the initiative process in *Perry III*, state courts potentially could find that the attorney general has a constitutional obligation to protect initiatives challenged in federal court, at least to the extent of answering, appealing, and employing special counsel. This would include preserving the jurisdiction of federal trial and appellate courts by appearing in those courts, even where the attorney general does not defend on the merits. Whether initiative proponents are permitted to intervene in the law's defense, or simply participate as

335. As noted in footnote 325 *supra*, CAL. GOV'T CODE § 31000.6 already obligates a county to engage counsel in the event of a conflict between the county assessor or sheriff and the county's existing lawyers. If the county refuses to comply with § 31000.6, then a writ of mandate is the appropriate remedy. *See* Rivero v. Lake Cnty Bd. of Supervisors, 181 Cal. Rptr. 3rd 769, 775–76 (Ct. App. 2014).

336. Bales v. Superior Court, 129 P.2d 685, 690 (Cal. 1942).

337. *In re* Veterans' Indus., Inc., 88 Cal. Rptr. 303, 317 (Ct. App. 1970).

338. Hollman v. Warren, 196 P.2d 562, 565 (Cal. 1948) (en banc).

amici curiae, at least federal jurisdiction is preserved and the initiative gets due judicial consideration.

Accordingly, in situations like *Hollingsworth* where it appears state defendants will fail to defend a validly-enacted initiative, a mandamus action in state court may lie forcing them to do so. It would be improper for the mandate to direct the state's litigation strategy or superintend the defense. But, the procedural formalism of a defense—namely, the bare-bones answer or notice of appeal—is important to avoid the executive veto created in *Hollingsworth*.

### *B. Structural Reforms*

If existing law does not afford a remedy for proponents seeking to have their initiatives defended, what new laws might be enacted? We propose structural reforms that could work on either a permanent or a temporary basis. First, California could establish a standing Office of Initiative Support (OIS) that would have authority to defend initiatives that are challenged. Second, California could provide for appointment of a special counsel who could represent the state's interest. We discuss each of these fixes in turn and then discuss how they could be implemented. Either of these fixes would be particularly useful when the state or local officials either fail to defend a passed initiative or defend without vigor.

#### 1. Permanent OIS

One fix might be for California to establish an OIS. A statute might be enacted along the following lines:

(1) The OIS shall be an independent agency of the state of California, governed by five board members selected in the same manner, with the same terms, qualifications and compensation as members of the Fair Political Practices Commission.[339]

(2) The Legislature shall provide funding for the OIS sufficient to hire lawyers and other staff and incur such expenses as may be necessary to carry out its duties.

(3) Upon a statewide or local initiative being passed by voters and challenged in court, the OIS shall be entitled to represent the

339. Members of the Fair Political Practices Commission are appointed by the governor (two members), the attorney general, secretary of state, and the controller (one each). They serve four-year non-renewable terms, and may be removed by the governor with concurrence of the Senate for misconduct and similar defalcations. CAL. GOV'T CODE §§ 83100–83105.

state or locality in that litigation.[340] In connection with this representation, the OIS shall be authorized to take all reasonable steps to defend the initiative, giving due consideration to the views of the proponents as defined in section 9001(a) of the California Elections Code or in equivalent local laws.

(4) The OIS's lawyers and staff shall take the oath required of all California public officers and employees.[341]

(5) The OIS's authority shall not preclude participation in court by (a) other authorized state or local officials who have responsibilities under the law or (b) the initiative's proponents, whether their positions are complimentary or opposing

(6) The attorney general or the Sacramento County Superior Court[342] on its own motion shall have the right to seek to terminate the OIS's representation in a particular proceeding upon a showing in the court that the OIS has abused or exceeded its authority.

The OIS could have additional powers and responsibilities. For example, critics of California's initiative process have suggested that an initiative's proponents should first consult with governmental staff in drafting the initiative's language, so as to reduce the likelihood of an initiative that contains vague, self-contradictory, or even counter-productive language.[343] Accordingly, the OIS's mission could include assisting proponents in drafting initiatives. (Any such additional responsibilities are not necessary in order to fix *Hollingsworth*.)

340. Strictly speaking, no fix is needed to give official proponents standing to defend an initiative in state courts, because, under California law, the proponents already possess such standing. Perry v. Bown (*Perry III*), 265 P.3d 1002, 1033 (Cal. 2011). However, the fixes we propose in this Article are not limited to federal litigation, because having the state pay for lawyers to defend an initiative—instead of relying on the proponents to retain and pay lawyers—may improve the quality of initiative defense, regardless of the court. On the other hand, our proposed fixes could be limited to just federal litigation if such a limitation would enhance the political prospects of a fix being adopted.

341. CAL. CONST. art. XX, § 3.

342. Venue in most pre-election initiative cases, and many other election disputes, is exclusively in the Superior Court for Sacramento County. *See, e.g.*, CAL. ELEC. CODE §§ 9092, 13314, 15001, 16421 (West 2015). For symmetry, and because of that court's acquired expertise, we feel it is the most appropriate venue for the judicial proceedings suggested here.

343. *See, e.g.*, JOE MATHEWS & MARK PAUL, CALIFORNIA CRACKUP: HOW REFORM BROKE THE GOLDEN STATE AND HOW WE CAN FIX IT 175 (2010); Robert M. Stern, *California Should Return to the Indirect Initiative*, 44 LOY. L.A. L. REV. 671, 683 (2011).

### 2. Special Counsel

A second structural solution would be to provide for the appointment of a special counsel to represent California or localities in a way similar to the OIS, but on an ad hoc basis:

(1) Upon petition to the Superior Court for Sacramento County[344] and notice to the parties by one or more of an initiative's proponents, at any time during the pendency of a lawsuit challenging the initiative, the court shall determine within five court days, or such shorter or longer time as the interest of justice may require, whether to appoint special counsel to defend the initiative's validity in court. The governor, attorney general, or other authorized state or local officials may oppose or support the petition.

(2) If the initiative's proponents show, by a preponderance of the evidence, that the governor, attorney general, or other authorized officials are either (a) likely to refuse to defend the initiative at trial or on appeal or (b) likely to be less than vigorous in defending the initiative at trial or on appeal, then the court shall grant the petition and make the appointment described in paragraph (i). The special counsel shall be an active member of the State Bar of California and shall be of such experience and standing as to be able to undertake the representation.

(3) Upon accepting the appointment, the special counsel (and all persons hired by the special counsel) shall take the oath required of all California public officers and employees, and the special counsel then shall be authorized to represent the state or locality in court proceedings to defend the initiative's validity. In providing this defense, the special counsel shall be authorized to take all reasonable steps, giving due consideration to the views of the initiative's proponents as defined in section 9001(a) of the California Elections Code or in equivalent local laws.

(4) The special counsel shall be authorized to employ such lawyers and staff and to incur such reasonable expenses as may be appropriate to undertake this representation.

(5) The special counsel's authority shall not preclude participation in court by (a) other authorized state or local officials who have responsibilities under the law or (b) the initiative's proponents, whether their positions are complimentary or opposing.

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344. *See* note 319, *supra*.

(6) The attorney general or the Sacramento County Superior Court on its own motion shall have the right to seek to terminate the special counsel's representation upon a showing in the court that the special counsel has exceeded or abused his or her authority.

(7) The appointment and authority of the special counsel shall lapse upon the termination of the lawsuit(s), unless the Superior Court of Sacramento County extends his or her term for purposes related to the defense or enforcement of the challenged initiative.

### 3. Enacting the Permanent Fixes

Assuming that one or both of the above fixes would pass Article III standing muster, substantial questions remain as to how they could be implemented.

First, the OIS or special counsel could be added to the California Constitution via an amendment proposed by the Legislature. However, it takes a two-thirds vote in the Senate and the Assembly to propose a constitutional amendment.[345] With the Legislature—or, at least, many legislators—unsympathetic to the initiative process generally, it may be politically difficult for the requisite two-thirds of each house to vote for a constitutional amendment which would enhance the prospect of initiatives being defended.

Second, such a constitutional amendment could be proposed via the initiative process, and thereby bypass the Legislature.[346] However, it may be difficult to raise the millions of dollars needed to gather 800,000 signatures. In addition, whether the constitutional amendment is proposed by the legislature or via the initiative process, it still would take a majority of votes in a statewide election for the amendment to pass.

Third, the OIS or special counsel could be provided by statute enacted by the Legislature, but a statutory fix poses its own problems. To be sure, a statutory enactment requires only a majority vote in each house of the Legislature (instead of two-thirds) and does not require a vote of the people, but even a majority vote in the Legislature might not be forthcoming. In addition, a statute might be vulnerable to a state constitutional challenge. Under the California Constitution, the California attorney general has the duty "to see that

345. CAL. CONST. art. XVIII, § 1.
346. CAL. CONST. art. XVIII, § 3.

the laws of the State are uniformly and adequately enforced."[347] Statutes containing similar provisions exist.[348] If, for example, the attorney general took the position that an initiative was unconstitutional and the OIS or special counsel took the opposite position, would there be an unconstitutional lack of "uniformity" or, more generally, an unconstitutional encroachment of the attorney general's authority? In all likelihood, this challenge would not succeed. The California Supreme Court has expressly held, "These constitutional and statutory provisions . . . have never been interpreted to mean that the Attorney General is the *only* person or entity that may assert the state's interest in the validity of a state law in a proceeding in which the law's validity is at issue."[349] Accordingly, that an OIS or special counsel might have a non-exclusive right to represent California is not a breach of California's existing constitution or statutes.

Fourth, a statute could be proposed via the initiative process. A statutory initiative would require only about 500,000 valid signatures, but still would require millions of dollars to gather signatures and would require a majority of votes in the next statewide election for the statute to pass.

Finally, regardless of which methods might allow an OIS or special counsel to be implemented, initiative proponents might object that the fix would not give them (the proponents) direct control over the litigation. Theoretically, an initiative constitutional amendment or statute might name the proponents as state representatives and require them to take the California officials' oath, in an attempt to meet the *Hollingsworth* standing requirements. However, the *Hollingsworth* criteria listed at the beginning of this part are substantive, not just formal. It is unlikely that those criteria—especially the requirements that the state must exercise control over its representatives and that the representatives owe fiduciary obligations to the state—would be satisfied with the initiative's proponents simply being named as the state's representatives.

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347. CAL. CONST. art. V, § 13.

348. *E.g.*, CAL. GOV'T CODE § 12512 (West 2014) ("The Attorney General shall . . . prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity.").

349. Perry v. Brown (*Perry III*), 265 P.3d 1002, 1025 (Cal. 2011).

In sum, an OIS- or special counsel-type solution, flawed as it is, may be preferable to initiatives' proponents having no role in defending a passed initiative, which is the position they find themselves in now after *Hollingsworth*.

### *C. Initiative Specific Fix*

Given the political difficulty of amending the California Constitution or adding statutes to create an OIS or to authorize a special counsel, we are not optimistic that either of the permanent fixes could be enacted. However, as an alternative, initiative proponents might be able to add language to their proposed initiatives that allows for the appointment of a special counsel similar to that discussed above. It is no surprise that this is the route that many proponents of initiatives filed since *Hollingsworth* have taken. As described below, these efforts will probably not all meet with success.

Specifically, an article could be added to the proposed initiative titled "Defending This Initiative," which would include the authority of any of the initiative's "official proponents" to petition the Superior Court of Sacramento County for appointment of a special counsel under the same terms and conditions set forth above. This fix is similar to the one contained in the proposed "High Quality Teachers Act of 2014": the California attorney general must appoint an independent counsel to "faithfully defend this Act on behalf of the State . . . ."[350]

The option of initiative proponents including language to appoint themselves as "agents" of the state for purposes of defending their measure has been included in several proposed post-*Hollingsworth* California initiatives.[351] This has two critical flaws. First, as a matter of California law, this option—by appointing individual proponents as agents—probably violates California Constitution Article II, Section 12 which prohibits the submission of any statutory or constitutional initiative "that names any individual to

350. High Quality Teachers Act of 2014, Pub. L. No. 13-0062, § 14(a); *see* Cal. Initiative 14-0009-Revenue Bonds. Infrastructure Projects.

351. *E.g.*, The Online Privacy Act, No. 14-0007, § 5(a) (Jan. 16, 2014) ("The people of the State of California declare that the proponents of this Act have a direct and personal stake in defending this Act and grant formal authority to the proponents to defend this Act in any legal proceeding . . . [T]he proponents shall: (1) act as agents of the people and the State."); *see* Cal. Initiative 15-0004—"The California Safer Sex in the Adult Film Industry Act."

hold any office . . . ." Second, as a matter of federal law, it would likely run into the same problems as proponents faced in *Hollingsworth*. In essence, we do not believe that the Supreme Court will accept such designation as satisfying Article III without the "republican" safeguard of supervision by existing state structures. Accordingly, the appointment of an unnamed special counsel seems a safer course. This approach has the added benefit of already having been accepted by the Supreme Court against a federal separation-of-powers challenge.[352] That doesn't guarantee its success for Article III purposes, but it at least avoids having self-appointed "private attorneys general" using the federal courts to vindicate their view of the public interest.

Official proponents pursue narrow interests in the initiatives they craft. Indeed, they must lest they run afoul of the single subject limitation.[353] Accordingly, initiative drafters do not typically consider the full range of competing state interests as they pursue their policy objectives. "Nor do they have a 'fiduciary obligation' . . . to the people of California."[354] Most importantly, they are not under the control of the state, although that is the whole idea of direct democracy. Yet, these features of "agency" are now written into the law of standing. Under *Hollingsworth* initiative drafters are severely limited in their ability to defend their measures. But, they do have the other options described here, if enacted, to help assure that their efforts are not simply vetoed by executive officials who may disagree with them.

## VII. CONCLUSION

This Article first looks backward, presenting certain assertions about the Supreme Court's decision in *Hollingsworth v. Perry*. One of these is the authors' opinion: that the Court wrongly decided the case. It did so by rejecting the California Supreme Court's formulation of the state's law, and choosing instead a federal rule of decision based on the formulae set forth in the Restatement (Third) of Agency. The other assertions are factual: that, after *Hollingsworth*, proponents will no longer be able to appeal lower federal court rulings that have found their initiatives to be unconstitutional, and,

352. *See* Morrison v. Olson, 487 U.S. 654 (1988).
353. *See Perry III*, 265 P.3d at 1020.
354. *Hollingsworth*, 133 S. Ct. at 2657.

following from that conclusion, state constitutional officers do indeed possess a "veto" over challenged initiatives.

Following these assertions, the Article looks forward. First, it presents some informed speculation concerning initiative cases, in the trial courts and on appeal, that may present histories that differ enough from that of *Hollingsworth* so as to allow a different result.

Next, and perhaps most importantly, the Article presents several suggested "fixes" that would: (1) use existing California law to force an energetic defense of challenged initiatives by constitutional officers; or (2) provide for state control over initiative challenge defenses by substituting an officer or an agency that would provide such a defense, or (3) by language included in the initiative itself, allow initiative proponents to initiate a process that will lead to the appointment of such an agent.

The substantive issue underlying *Hollingsworth*—the constitutionality of state laws barring same-sex marriage—was recently resolved in *Obergefell v. Hodges*. But the standing issue remains unsettled. Constitutional scholars, state officials, and initiative drafters will grapple with *Hollingsworth* for years to come. Without some fix, whether one proposed here or some other, the Supreme Court has dealt a severe blow to direct democracy and "the people's rightful control over their government."[355]

355. *Perry III*, 265 P.3d at 1016.