NO. 10-16696

ARGUED DECEMBER 6, 2010
(CIRCUIT JUDGES STEPHEN REINHARDT, MICHAEL HAWKINS & N.R. SMITH)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr., et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

On Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James Ware)

SUPPLEMENTAL BRIEF OF DEFENDANT-INTERVENORS-APPELLANTS

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STATEMENT

On January 4, 2011, this Court requested that the Supreme Court of California answer the following certified question:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

Dkt. Entry 292 at 3.[1]

On November 17, 2011, the Supreme Court of California issued a unanimous opinion (attached as Exhibit A) answering "the question posed by the Ninth Circuit in the affirmative." Ex. A at 5. Specifically, based "upon the history and purpose of the initiative provisions of the California Constitution and upon the numerous California decisions that have uniformly permitted the official proponents of initiative measures to appear as parties and defend the validity of measures they have sponsored," *id*. at 57, the Supreme Court of California held that

> when the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, under

[1] Citations to "Dkt. Entry ___" refer to the corresponding entries in this Court's docket in Case No. 10-16696. When specified, page numbers in such citations refer to this Court's ECF pagination, not the internal pagination of the cited documents.

> article II, section 8 of the California Constitution and the relevant provisions of the Elections Code, 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.

Ex. A at 61; *accord id*. at 5, 23-24, 41, 43, 55; *see also id*. at 7-8 (Kennard, J., concurring). Because it correctly determined that this "conclusion is sufficient to support an affirmative response to the question posed by the Ninth Circuit," the Supreme Court of California found it unnecessary to "decide whether, under California law, the official proponents also possess a particularized interest in a voter-approved initiative's validity." *Id*. at 24.

On November 18, 2011, this Court directed the parties to submit supplemental briefs "discussing the effect on this case of the California Supreme Court's decision." Dkt. Entry 377 at 2. Defendant-Intervenors-Appellants Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com (collectively "Proponents") respectfully submit this supplemental brief in response to this Court's order.

ARGUMENT

Binding Supreme Court precedent holds that "a State clearly has a legitimate interest in the continued enforceability" of its laws, *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986), and thus "has standing to defend the constitutionality" of those laws, both in the trial court and on appeal from a decision invalidating those laws,

Diamond v. Charles, 476 U.S. 54, 62 (1986); *see also* Dkt. Entry 292 at 9 ("The State of California itself has an undisputed interest in the validity of its laws"). The Supreme Court's precedents also establish the unremarkable proposition that state law determines who is authorized to assert this interest on behalf of the State. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997); *Karcher v. May*, 484 U.S. 72, 82 (1987); *see also* Dkt. Entry 292 at 10 (noting that the "parties agree that Proponents' standing . . . rises or falls" on Proponents' "interest or authority" under California law) (internal quotations omitted). The decision of the Supreme Court of California in this case confirms that Proponents have "authority under state law," *Karcher*, 484 U.S. at 82, to defend Proposition 8 "as agents of the people" of California "in lieu of public officials" who refuse to do so, *Arizonans*, 520 U.S. at 65. Because Proponents are authorized by California law to assert the State's interest in defending the constitutionality of its laws—an interest that is indisputably sufficient to confer appellate jurisdiction—they plainly have standing to appeal the district court's judgment invalidating Proposition 8.

In *Karcher*, the Supreme Court considered whether the President of the New Jersey Senate and the Speaker of the New Jersey General Assembly "had authority under state law to represent the State's interest" by defending, in federal litigation, a state statute when "neither the Attorney General nor the named defendants would defend the statute." 484 U.S. at 75, 82. The Court concluded that, "as a matter of

New Jersey law," these individuals had authority to defend the statute, both in the trial court and on appeal, because, in at least one other case, the "New Jersey Supreme Court ha[d] 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." *Id*. at 82 (citing *In re Forsythe*, 91 N.J. 141, 144, 450 A.2d 499, 500 (1982)); *see also id*. at 84 (White, J., concurring) ("we have now acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court"); Ex. A 15-18 (discussing *Karcher*).

Here also,

> 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" or, in other words, to enable such proponents to assert *the people's*, and hence *the state's*, interest in defending the validity of the initiative measure.

Ex. A at 3 (quoting *Building Industry Ass'n v. City of Camarillo*, 41 Cal. 3d 810, 822 (1986) (emphasis in original). Indeed, the California Supreme Court previously allowed these Proponents—Appellants here—to intervene to defend Proposition 8, the initiative at issue in this case, against an earlier state constitutional challenge. *See Strauss v. Horton*, 207 P.3d 48, 69 (Cal. 2009); Order of Nov. 19, 2008, *Strauss*, Nos. S168047, S168066, S168078 (Cal.) (ER 1617). More important still, in response to this Court's certified question, the Supreme

Court of California unambiguously confirmed that the official proponents of an initiative measure "are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." Ex. A at 5.

Significantly, the New Jersey case on which the Supreme Court relied in *Karcher* in finding that legislative officials had authority under New Jersey law to represent the State's interest in defending a challenged statute simply allowed the legislative officials to intervene without *any* discussion of the basis for intervention or the officials' authority under New Jersey law. *See In re Forsythe*, 450 A.2d 499, 500 (N.J. 1982). Given the Supreme Court of California's clear recognition of Proponents' authority to assert the State's interest in the validity of its laws, standing in this case follows *a fortiori* from *Karcher*.

Nothing in *Arizonans for Official English v. Arizona*, undermines either the holding in *Karcher* or its clear application here. In dicta in *Arizonans*, the Supreme Court discussed, but ultimately did "not definitively resolve[,] the issue" of the standing of the principal sponsor of an Arizona ballot initiative to appeal a decision striking down that measure. 520 U.S. at 66. Citing *Karcher*, the Court explained that it had previously "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." *Id*. at 65. Unlike in *Karcher*, however, the Court stated that it was "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." *Id*. For this reason, the Court expressed "grave doubts" about the standing of the Arizona initiative sponsors to appeal. *Id*. at 66; *see also* Ex. A at 18-20 (discussing *Arizonans*). Significantly, although the Supreme Court specifically directed the Arizona initiative sponsors to brief the issue of their standing, *see Arizonans*, 520 U.S. at 64, their brief did not cite a single Arizona case on the question of state-law authorization, Brief For Petitioners, *Arizonans*, No. 95-974, 1996 U.S. S. Ct. Briefs LEXIS 333, at *67-77 (May 22, 1996).

Here, by contrast, the California courts have "routinely permitted the official proponents of an initiative . . . to assert *the people's*, and hence *the state's*, interest in defending the validity of the initiative measure." Ex. A at 3 (emphasis in original). And in response to this Court's certified question, the Supreme Court of California squarely held that official proponents of an initiative measure "are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment

decline to do so." *Id*. at 5. Thus, there can be no question that this case is governed by the holding in *Karcher*, not by the dicta in *Arizonans*.

For similar reasons, *Don't Bankrupt Washington Committee v. Continental Illinois National Bank & Trust Co.*, 460 U.S. 1077 (1983), does not control the outcome here, as that case did not address whether California law authorizes initiative proponents to defend the measures they sponsor. Indeed, neither the Supreme Court's summary ruling nor the papers submitted by the initiative sponsors in that case suggested that Washington law permits sponsors to intervene to defend initiatives they have sponsored as California law does, let alone that the Supreme Court of Washington had authoritatively determined, as the Supreme Court of California has here, that initiative sponsors have authority under state law to represent the State's interest in the validity of an voter-approved initiative when the public officials charged with defending that initiative refuse to do so. To the contrary, in its Jurisdictional Statement, the Don't Bankrupt Washington Committee described itself as merely "a citizens' group that drafted and campaigned for Initiative 394," with no suggestion that it had *any* official status or authority under Washington law. *See* Jurisdictional Statement in *Don't Bankrupt Wash. Committee*, No. 82-1445 (filed Feb. 25, 1983) at 3; *see also* Ex. A at 20 n.11 (discussing *Don't Bankrupt Wash. Committee*).

* * *

In short, as this Court recognized in its Certification Order,

> If California does grant the official proponents of an initiative the authority to represent the State's interest in defending a voter-approved initiative when public officials have declined to do so or to appeal a judgment invalidating the initiative, then Proponents would also have standing to appeal on behalf of the State.

Dkt. Entry 292 at 10. Because the decision of the Supreme Court of California authoritatively establishes that California does grant official proponents this authority, Proponents' standing to maintain this appeal is now clear.

CONCLUSION

For the foregoing reasons, as well as those stated in our previous briefing in this case, *see* Dkt. Entry 21 at 37-42; Dkt. Entry 243-1 at 14-17, this Court should hold that Proponents have standing to appeal the judgment invalidating Proposition 8.

Respectfully submitted,

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9th Circuit Case Number(s) 10-16696

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