Because the redevelopment law does not really limit the amount of revenue the agencies can collect per year (so long as it does not exceed the given agency's total debt), some blighted municipalities have been able to shield all of their property tax revenue.[6] In an attempt to remedy the inequity, the Legislature has put certain tax transfer obligations on redevelopment agencies.[7] Some of these obligations have been more successful than others,[8] but the tax increment financing remains controversial. It gives the redevelopment agencies and their sponsoring municipalities a great advantage over school districts and other entities that rely on tax revenues, subsequently burdening the state, which scrambles to fill in the budgetary gaps. As a result of one of the most recent skirmishes between state and local interests (and pertinent to this case), in 2010, voters passed Proposition 22, which amended California's state constitution in order to limit the state's ability to require payments from redevelopment agencies for the state's benefit.[9]

Last summer California's Governor, Jerry Brown, responding to a declared state fiscal emergency and a $25 billion operating deficit, proposed the elimination of redevelopment agencies to redirect property tax revenues back to state and local governmental units. At the time, *four hundred* redevelopment agencies were receiving 12% of all property tax revenues in California.[10] The Legislature, employing a slightly different approach, enacted Assembly Bill 26[11] and Assembly Bill 27,[12] two measures intended to stabilize school funding (thereby easing the deficit) by reducing or eliminating the diversion of property tax revenues to community redevelopment agencies. AB26 provided

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California: Traditional Marriage Proponents Have Standing When Public Officials Refuse to Defend It

by Jonathan Berry

The U.S. Court of Appeals for the Ninth Circuit made headlines recently when a divided panel declared unconstitutional California's Proposition 8, which affirmed that the state would recognize marriages only between one man and one woman.[1] Before the Ninth Circuit could decide the merits, however, it had to deal with the fact that state officials had all declined to defend the law.[2] In the district court below, the law was defended by the official proponents of Proposition 8, the organizers who put it on the 2008 ballot. On appeal, the plaintiffs attacking the law argued that its proponents lacked standing to defend it in court; to resolve any doubts about its jurisdiction, then, the Ninth Circuit certified the following question to the California Supreme Court:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.[3]

By a unanimous vote, the seven justices of the California Supreme Court agreed that Proposition 8's official proponents had standing to defend the initiative in court, by the proponents' authority to assert the state's own interest in the law's validity.[4] Having thus affirmed the proponents' standing, the court did not reach the question whether they possessed a particularized interest in the initiative's validity.[5]

Federal Courts Look to State Law

To properly frame its response to the Ninth Circuit, the California court first examined the U.S. Supreme Court's two most relevant cases on standing. The earlier case, *Karcher v. May*,[6] considered the standing of New Jersey legislators who had intervened before the district court to defend a state statute's constitutionality when neither the state attorney general nor any of the named government defendants were willing to defend it.[7] When they originally intervened, the lawmakers did so in their official capacities as Speaker of the state General Assembly and President of the state Senate, but after the Third Circuit held the statute unconstitutional, they lost their posts as presiding legislative officers, and their successors chose not to continue defending the statute.[8] When the lawmakers petitioned the U.S. Supreme Court regardless, their appeal was dismissed for lack of standing.[9] In response to the lawmakers' argument that dismissal should also vacate the judgments below, restoring the invalidated statute, the Court upheld the judgments instead, relying "on the fact that New Jersey law permitted the current

presiding legislative officers, acting on behalf of the state legislature, to represent the state's interest in defending a challenged state law."[10]

Unlike the statute challenged in *Karcher*, the law at issue in *Arizonans for Official English v. Arizona*[11] was an initiative added to the state constitution by popular vote. Like the Proposition 8 proponents before the California Supreme Court, it was the Arizona initiative's principal sponsor who intervened on behalf of a law that state officials decided not to defend.[12] The initiative amended Arizona's constitution to require the state government to operate in English only, but was struck down by a federal district court after a state employee sued.[13] When the governor declined to appeal, the initiative's sponsor attempted to intervene.[14] Ultimately, the U.S. Supreme Court declined to rule on the sponsor's standing to defend the initiative, but only because the plaintiff had left state employment, mooting the lawsuit and spurring the Court to vacate the judgments below.[15] Though not deciding the initiative sponsor's standing, the U.S. Supreme Court expressed "grave doubts" about its standing, because of the Court's "uncertainty concerning the authority of official initiative proponents to defend the validity of a challenged initiative under Arizona law."[16]

While *Arizonans for Official English* cast doubt on a state initiative sponsor's federal standing to defend that initiative, the California Supreme Court read the case as potentially countenancing federal standing for the Proposition 8 proponents—if they had standing under state law.[17]

Standing to Assert the State's Interest Under State Law

Having predicted that federal courts will look to state law to determine an initiative proponent's standing to assert the state's interest,[18] the California court turned to its main work: determining the Proposition 8 proponents' standing under California law.

California's Constitution was amended in 1911 to allow voters "the authority to directly propose and adopt state constitutional amendments and statutory provisions through the initiative power."[19] Understanding it "not as a right granted the people, but as a power reserved by them," the California Supreme Court gives the initiative power a liberal construction, resolving reasonable doubts in favor of its preservation.[20]

That constitutional framework is extended by the state Elections Code, which gives a ballot initiative's official proponents "a distinct role[,]involving both authority and responsibilities that differ from other supporters of the measure."[21] The law puts on proponents an obligation "to manage and supervise the process by which signatures for the initiative petition are obtained" and, after signatures have been collected, gives them the exclusive right to file the petition.[22] The Elections Code also vests proponents "with the power to control the arguments in favor of an initiative measure," by requiring their approval before any arguments before or against the initiative are printed in the official ballot pamphlet.[23]

California case law, the court found, "repeatedly and uniformly" attests to an official proponent's standing under the state Constitution and Elections Code to defend an initiative in court.[24] In pre-election challenges testing the initiative campaign's procedural compliance, proponents "assert[] their own personal rights and interests," not the state's interest.[25] Once the initiative is voted into law, the court reasoned, its proponents' interest in the law arguably becomes no more personal than any other Californian's.[26]

But official proponents have uniformly been permitted to intervene to defend enacted initiatives, despite the lack of any particularized interest.[27] Instead, California courts have viewed proponents' participation—even alongside public officials also defending the law—as "essential" to ensuring the legitimacy of any court decision that might limit or invalidate an initiative.[28] California law creates a "unique relationship" between an initiative and its proponents that makes them "especially likely to be reliable and vigorous advocates for the measure and to be so viewed by those whose votes secured the initiative's enactment into law."[29] When public officials decline to defend an initiative, then, the California Constitution and the applicable provisions of the Elections Code authorize its official proponents to assert the state's interest in the initiative's validity.[30] Accordingly, the Proposition 8 proponents have standing under state law to defend the initiative, as agents authorized to assert California's own interest in court.

Conclusion: The Ninth Circuit Rules on the Merits

The California Supreme Court having thus spoken, the Ninth Circuit followed through,[31] ensuring that the high-profile *Perry* controversy would continue through the federal courts, free of any jurisdictional bar. Because the State of California has Article III standing to defend its own laws' validity and because state law authorizes official proponents to assert the state's own interest, the Ninth Circuit held, the Proposition 8 proponents have standing to defend the law in federal court.[32]

With confirmation that the litigants presented a justiciable controversy, the Ninth Circuit went on to hold that Proposition 8 violated the Equal Protection Clause of

the Fourteenth Amendment.[33] While that ruling ensures continued litigation of the same-sex marriage issue, both courts' holdings on standing may not face as much opposition. California's uniquely robust initiative system[34] presents one of the strongest cases possible for proponent standing, but other states' regimes might suffice as well. When a court evaluates an initiative proponent's standing under another state's law, then, it will likely consider whether that state's initiative regime needs to be as strong as California's to authorize standing.

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Endnotes

1 Perry v. Brown (*Perry VIII*), Nos. 10-16696 & 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012). The initiative's proponents have petitioned the Ninth Circuit for rehearing en banc. Appellants' Petition for Rehearing En Banc, Perry v. Brown, Nos. 10-16696 & 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. filed Feb. 21, 2012).

2 *See Perry VIII*, 2012 U.S. App. 2328 at *50-51.

3 *Id.* at *36-37 (quoting Perry v. Schwarzenegger (*Perry V*), 628 F.3d 1191, 1193 (9th Cir. 2011)).

4 Perry v. Brown (*Perry VII*), 265 P.3d 1002, 1007 (Cal. 2011). Associate Justice Joyce Kennard also wrote a separate concurrence. *Id.* at 1033-37 (Kennard, J., concurring).

5 *Perry VII*, 265 P.3d at 1015.

6 484 U.S. 72 (1984).

7 *Perry VII*, 265 P.3d at 1011-12. The statute required public schools to observe a minute of silence at the start of each school day. *Id.* at 1011.

8 *Id.* at 1012.

9 *Karcher*, 484 U.S. at 76-77.

10 *Perry VII*, 265 P.3d at 1012.

11 520 U.S. 43 (1997).

12 *Id.* at 56.

13 *See id.* at 55.

14 *See id.* at 56.

15 *Id.* at 73-75.

16 *Perry VII*, 265 P.3d at 1013 (emphasis omitted). The *Arizonans for Official English* Court said 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." 520 U.S. at 65.

17 *Perry VII*, 265 P.3d at 1014 ("In our view, nothing in [*Arizonans for Official English*] indicates that if a state's law does authorize the official proponents of an initiative to assert the state's interest in the validity of a challenged state initiative when the public officials who ordinarily assert that interest have declined to do so, the proponents would not have standing to assert the state's interest in the initiative's validity in a federal lawsuit in which state officials have declined to provide such a defense.").

18 The parties and the Ninth Circuit all also agreed with the California Supreme Court that "if the official proponents do have authority under California law to assert the state's interest in such a case, then under federal law the proponents would have standing in a federal proceeding to defend the initiative and to appeal a judgment invalidating it." *Id.* at 1014.

19 *Id.* at 1016 (emphasis omitted).

20 *Id.*

21 *Id.* at 1017-18.

22 *Id.* at 1017.

23 *Id.*

24 *Id.* at 1018.

25 *Id.* at 1020-21.

26 *Id.* at 1021.

27 *Id.*

28 *Id.* at 1024.

29 *Id.*

30 *Id.* at 1025.

31 *Cf. supra* note 18 (discussing the Ninth Circuit and the parties' agreement that, if the Proposition 8 proponents had standing under state law to assert the state's interest in the initiative's validity, they would also have standing in federal court). The Ninth Circuit also denied as untimely a county clerk's motion to intervene in Proposition 8's defense, in light of the court's affirmation of the official proponents' standing. *Perry VIII*, 2012 U.S. App. 2328 at *36.

32 *Id.* at *50-51.

33 *See id.* at *20 ("The People may not employ the initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry.").

34 *Cf.* People v. Kelly, 222 P.3d 186, 200 (Cal. 2010) ("California's bar on legislative amendment of initiative statutes stands in stark contrast to the analogous constitutional provisions of other states. No other state in the nation carries the concept of initiatives as 'written in stone' to such lengths as to forbid their legislatures from updating or amending initiative legislation.") (internal quotation marks and citations omitted).