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California notwithstanding: Why the Ninth Circuit Erred in Following the California Supreme Court's Grant of Standing to the Proponents of Proposition 8

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CALIFORNIA NOTWITHSTANDING: WHY THE NINTH CIRCUIT ERRED IN FOLLOWING THE CALIFORNIA SUPREME COURT’S GRANT OF STANDING TO THE PROPONENTS OF PROPOSITION 8

SARA RAPPAPORT*

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I. INTRODUCTION

The California Constitution expressly states that all political power is inherent in the people.¹ In order to enforce this political power, California has a unique initiative system in which the electors propose statutes and amendments to the California Constitution, and then vote to adopt or reject them.² As a result of this system, California voters possess a great deal of power in influencing California statutes and the California Constitution, and their wishes sometimes differ from those of their elected officials.³

In November 2008, California voters passed Proposition 8, an amendment to the California Constitution that defined marriage in California as between a man and a woman.⁴ The passing of Proposition 8 launched a frenzy of litigation attacking the constitutionality of this state constitutional amendment.⁵ Central to this litigation, beyond questions of Due Process and Equal Protection, is the question of who may challenge the provision in federal court.⁶ This question first arose when, following

1. See CAL. CONST. art. II, § 1 (providing that government exists for the people, and that the people may alter or reform it when public good requires it).

2. See *id.* § 8 (defining the initiative power as the power of electors to propose and vote on amendments to the California Constitution, and outlining the process by which an elector can place an initiative on the ballot).

3. See, e.g., *Bldg. Indus. Ass’n v. City of Camarillo*, 718 P.2d 68, 75 (Cal. 1986) (finding that state officials might not vigorously defend a recently passed ordinance if they have an underlying opposition to the ordinance).

4. See CAL. CONST. art. I, § 7.5 (asserting that only marriage between a man and woman is valid and recognized in California).

5. See *Perry v. Brown (Perry III)*, 671 F.3d 1052, 1063-64 (9th Cir. 2012) (affirming the District Court’s ruling that Proposition 8 is unconstitutional); *Perry v. Schwarzenegger (Perry I)*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010) (holding Proposition 8 unconstitutional under the United States Constitution); *Strauss v. Horton*, 207 P.3d 48, 140 (Cal. 2009) (Moreno, J., concurring and dissenting) (finding that Proposition 8 is unconstitutional under the California Constitution).

6. See *Perry III*, 671 F.3d at 1064 (acknowledging that before the court may consider the constitutional question raised in Proposition 8, it first must decide whether the initiative proponents have standing).

the District Court's finding that Proposition 8 violated the United States Constitution, defendant-intervenors who had sponsored the initiative sought to bring the appeal in the place of the named defendants.⁷ The standing doctrine is the first hurdle that a party must overcome when seeking to bring a case, and this requirement must be met by parties bringing an appeal as well.⁸ In the latest case surrounding the constitutionality of Proposition 8, the Ninth Circuit ultimately decided that the defendant-intervenors were the proper party to bring the appeal, and proceeded to decide the case on its merits.⁹

This Comment argues that the proponents of Proposition 8 do not have standing under *Lujan v. Defenders of Wildlife* and other federal standing precedent to bring an appeal in the Ninth Circuit because they have not suffered a particularized injury.¹⁰ Part II outlines the federal standing doctrine, including an examination of relevant case law, and provides background on the current Proposition 8 litigation.¹¹ Part III argues that the California Supreme Court analyzed the question of whether the Proponents have standing under the incorrect standard.¹² Part III then argues that the Ninth Circuit should not have given deference to the California Supreme Court's decision because it is bound by federal standing law, and the Proponents do not meet the injury-in-fact requirement.¹³ Part IV suggests that *Lujan v. Defenders of Wildlife*'s assertion that statutorily-created injuries do not automatically confer standing should be applied to state courts as well.¹⁴ Finally, Part V concludes that the reviewing court should find that initiative proponents do not meet the injury-in-fact requirement of Article III standing, and therefore the proponents of Proposition 8 do not

7. See *Perry v. Brown (Perry II)*, 52 Cal. 4th 1116, 1130 (2011) (explaining that none of the named defendants sought to appeal from the District Court's ruling, and thus the proponents were the only party to bring an appeal).

8. See *Diamond v. Charles*, 476 U.S. 54, 55 (1986) (holding that standing must be met at every step of the litigation). See generally Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459, 460-63 (2008) (discussing that the three main functions of standing are the concrete-adversity function, the pro-democracy function, and the anti-conscription function).

9. See *Perry III*, 671 F.3d at 1068 (deciding that the initiative proponents are entitled to appeal from a decision that enjoined the enforcement of a measure they sponsored).

10. See *infra* Part V (concluding that the reviewing court should find that the proponents of Proposition 8 do not have standing to bring an appeal in federal court).

11. See *infra* Part II (defining the federal standing doctrine, analyzing the injury-in-fact requirement, and outlining the history of *Perry v. Brown*).

12. See *infra* Part III.A (differentiating between the standard to intervene and the requirements for Article III standing).

13. See *infra* Part III.B (discussing the California Supreme Court's decision and arguing that this decision should not be controlling in federal court).

14. See *infra* Part IV (examining the Supreme Court's ruling in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and applying it to state courts).

have standing to appeal the lower court's decision.¹⁵

II. BACKGROUND

A. Federal Standing Doctrine

While the United States Constitution prescribes Article III federal courts with a great deal of power, these courts are bound by their obligation to solely hear "cases or controversies."¹⁶ This requirement is enforced by the standing doctrine.¹⁷ A party has standing to bring a case if three requirements are met.¹⁸ As articulated by *Lujan*, these requirements are: (1) the plaintiff must have suffered an injury-in-fact; (2) there must be a causal connection between the injury and conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision.¹⁹ Each element must be met for the court to determine that a party has standing.²⁰ Moreover, these requirements must be met by parties seeking to bring an appeal, regardless of whether the party intervened in the previous proceedings.²¹

The injury-in-fact requirement is regarded as the most difficult element to prove, and is the most litigated of the three elements.²² In *Lujan*, the

15. See *infra* Part V (concluding that a strict standing requirement is necessary to uphold important functions of Article III courts and that the reviewing court should find that the proponents of Proposition 8, absent state officials, do not have standing to bring an appeal).

16. See U.S. CONST. art. III, § 2 (providing that Article III courts have jurisdiction over all cases with constitutional questions, in which the United States is a party, and controversies between two or more states, between a state and a citizen, between citizens of different states, or between a state and a federal entity).

17. See Elliot, *supra* note 8, at 461 (explaining that the standing doctrine serves to restrict the cases heard in the federal courts solely to "cases" and "controversies" under Article III).

18. See *Lujan*, 504 U.S. at 560-61 (holding that federal case law has identified a constitutional minimum of three requirements which serve to identify those disputes which are properly resolved through the judicial process).

19. See *id.* (setting forth the three recognized requirements for Article III standing, most commonly known as injury-in-fact, causation, and redressability); see also Allen v. Wright, 468 U.S. 737, 751 (1984) (holding that to have standing, a party must allege a personal injury that is fairly traceable to the defendants' conduct and likely to be redressed by a favorable court decision).

20. See *Lujan*, 504 U.S. at 561-62 (holding that if the injury-in-fact requirement is not met, standing may not be granted).

21. See *Diamond v. Charles*, 476 U.S. 54, 62-64 (1986) (ruling that a party that intervened in the lower court still must prove standing to bring an appeal).

22. See *Sierra Club v. Morton*, 405 U.S. 727, 739-41 (1972) (holding that a corporation did not have standing to sue for an injunction against a potentially harmful construction project absent a showing that the corporation or its members would be affected in any meaningful way); see also *Whitmore v. Arkansas*, 495 U.S. 149, 157-66 (1990) (holding that an inmate did not have standing to challenge the death sentence of another inmate because the petitioner did not suffer a concrete injury and did not meet the requirements of "next friend" standing).

seminal case shedding light on the injury-in-fact requirement, a group of organizations dedicated to wildlife conservation brought an action against the Secretary of the Interior, seeking a declaratory judgment that a recently promulgated regulation was outside the Secretary's scope of duties.²³ In evaluating whether the plaintiffs had standing, the Court articulated that to meet the requirement for standing, the plaintiff must have suffered an invasion of a legally protected interest, the interest must be concrete and particularized, and the injury must be actual or imminent.²⁴ Because their injury was not specific and was merely conjectural, the Court found that the plaintiffs did not meet the injury-in-fact requirement for standing.²⁵

The Court in *Lujan* also recognized that while Congress can declare that certain acts constitute injuries to the public, Congress cannot bypass the concrete injury requirement by creating statutes.²⁶ Therefore, a party bringing a grievance against the government still must prove that he or she was injured in some particular way.²⁷ Because of this requirement, the Court acknowledged that it is difficult to establish standing in a case against the government when the party bringing the suit is not the direct and particular object of the government action or inaction in question.²⁸

The *Lujan* Court further provides that a party bringing a generalized grievance that is common to all members of the public does not meet the injury-in-fact requirement.²⁹ This prohibition against generalized grievances is more extensively discussed in *United States v. Richardson*.³⁰ In *Richardson*, the plaintiff brought a suit asking the federal court to

23. See *Lujan*, 504 U.S. at 563-64 (discussing the plaintiffs' claim that they were injured because the environmentally harmful regulation left them unable to continue to observe endangered and threatened species).

24. See *id.* at 560 (holding that an injury-in-fact may not be conjectural or hypothetical).

25. See *id.* at 563-64 (ruling that the plaintiffs' claim that they would be harmed in a hypothetical way at an indeterminate time in the future was insufficient for a finding of standing).

26. See *id.* at 576-78 (holding that Congress cannot legislatively create individual rights, and that allowing Congress to broaden the categories of injury that a party may allege in support of Article III standing is the functional equivalent of abandoning the injury-in-fact requirement altogether).

27. See *id.* at 575 (holding that a party bringing a suit against the government must show either that his injury is not common to the public, or that his injury lies in the failure of the government to follow a statute).

28. See *id.* at 562 (finding that there is a higher/more demanding burden to show that a plaintiff is injured by government action when that action targets someone other than the plaintiff).

29. See *id.* at 573-74 (holding that a generally available grievance about government, common to every citizen's interest in the proper upholding of the law, does not satisfy the case or controversy requirement).

30. See *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (holding that a party may not assert an injury that is shared equally by a substantial portion of the population).

declare that the Central Intelligence Agency's budget was being spent in violation of the Constitution.³¹ In rejecting the plaintiff's claim, the Court noted that his alleged injury was overbroad.³² The Court also rejected the plaintiff's argument that if he was unable to litigate this issue, no one could do so in his place, holding instead that this was the principal purpose of a representative democracy.³³

The Supreme Court in *Diamond v. Charles* established that a plaintiff must prove standing at every step of the proceedings in federal court, and a party seeking to bring an appeal in the place of an original party must show independent standing.³⁴ This principle was explored in *Arizonans for Official English v. Arizona*, in which the plaintiff brought a claim in federal court challenging the validity of a ballot initiative recently passed by the Arizona Legislature establishing English as the official language of the state.³⁵ The plaintiff named as defendants several state officials in their official capacities.³⁶ The District Court found that the new law was unconstitutional.³⁷ The proponents of the ballot initiative, the Arizonans for Official English (AOE), then moved to intervene as defendants to support the initiative in light of the Governor's failure to appeal, and sought to bring the appeal in this capacity.³⁸ AOE asserted standing based on the funds and efforts that the group expended in sponsoring a successful ballot

31. *See id.* at 169 (noting that the plaintiff's alleged injury was his inability to obtain a document that set out the agency's expenditures, and therefore he could not fulfill his obligations as an informed member of the electorate).

32. *See id.* at 176-80 (finding that the impact on the plaintiff was common to all members of the public, and reasoning that the standing doctrine is designed to prevent these generalized grievances); *see also Ex parte Levitt*, 302 U.S. 633, 636 (1937) (requiring the plaintiff to show that he has sustained or is in immediate danger of sustaining a direct injury as the result of government action).

33. *See Richardson*, 418 U.S. at 179 (finding that a citizen who is unsatisfied with a law may appeal to the electoral process rather than rely solely on the courts for a remedy).

34. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) (holding that intervenors must show independent standing to bring an appeal when the original party fails to do so). *But see People v. Perris Irrigation Dist.*, 64 P. 399, 400 (Cal. 1901) (holding that, under California law, an intervenor has standing to appeal from an adverse judgment in California court).

35. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 49-50 (1997) (explaining that the plaintiff was concerned that the initiative would prevent her from adequately performing the duties of her job).

36. *See Yniguez v. Mofford*, 730 F. Supp. 309, 310 (D. Ariz. 1990) (naming Arizona Governor, Arizona Attorney General, and Director of Arizona's Department of Administration as defendants).

37. *See id.* at 310, 314-16 (finding that the new law was "facially overbroad" because it imposed a sweeping ban on the use of any language except for English rather than simply requiring that official business be conducted in English).

38. *See Yniguez v. Arizona (Yniguez II)*, 939 F.2d 727, 729-30 (9th Cir. 1991) (noting that the Arizona Governor was the only remaining defendant, leaving no one else to file an appeal).

initiative.³⁹ The District Court denied its motion, finding that AOE had no standing to bring the appeal.⁴⁰ The Ninth Circuit, however, found that AOE did have standing to bring the case as appellants, but noted that this was a limited right.⁴¹ After granting certiorari to review whether AOE had standing to bring the appeal, the Supreme Court first reestablished the principle that a party seeking Article III standing must show an invasion of a legally protected interest that is concrete and particularized.⁴² The Court then affirmed that it has never granted standing to initiative proponents to defend measures for which they advocated and declined to do so in this case.⁴³

A party must show standing to appeal even if it was previously granted the right to intervene because there is a lower threshold to be an intervenor than an original party.⁴⁴ A judge must allow intervention when a party meets a specific burden demonstrating that it would be unjust to keep the party out of the litigation.⁴⁵ Alternatively, a judge may grant a motion to intervene to a party who shares a common question of law or fact with the main parties.⁴⁶ On the other hand, the burden to prove standing is stringent, and certainly harder to meet than the requirement a party must prove in order to be granted intervention.⁴⁷

39. *See Arizonans*, 520 U.S. at 65 (noting the proponents' argument that they have a quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored).

40. *See Yniguez II*, 939 F.2d at 730 (discussing the District Court's ruling that the labor and funds AOE spent to promote the ballot initiative did not meet the requirement for standing to sue or defend in a federal court).

41. *See id.* at 733 (ruling that AOE only had standing to make an argument on the question of the initiative's constitutionality).

42. *See Arizonans*, 520 U.S. at 64 (holding that the Article III standing requirement must be met by parties seeking appellate review as well as parties appearing in courts of first instance).

43. *See id.* at 65 (holding that initiative sponsors are not agents of the people, and thus have no authority to defend the constitutionality of initiatives in the place of public officials).

44. *See* FED. R. CIV. P. 24 (outlining the requirements for intervention of right and permissive intervention).

45. *See id.* at 24(a)(2) (providing that a judge must grant a party's motion to intervene when the party filed a timely motion, has an interest relating to the subject of the action, might be unable to defend or protect this interest, and will not be protected in that interest by the present parties); *see also* Motion to Intervene at *6-11, *Perry v. Schwarzenegger*, No. 09-CV-2292 VRW, 2009 WL 1499309 (N.D. Cal. 2009) (describing when a party must be granted intervention as of right, and arguing that the Proponents met this burden).

46. *See* FED. R. CIV. P. 24(b)(1)(B) (declaring that a judge may grant a motion to intervene if the party is given a right to intervene by statute or the party has a claim or defense that shares a common question with the main action).

47. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (holding that unless all standing requirements of Article III are met, a party is unable to bring a case in federal court).

B. Proposition 8 Litigation

In November 2008, California voters passed Proposition 8, an initiative that created a constitutional ban on same-sex marriage in California.⁴⁸ Following the passage of Proposition 8, several same-sex couples filed suits in California seeking to invalidate the proposition on state constitutional grounds.⁴⁹ In *Strauss v. Horton*, the California Supreme Court considered whether Proposition 8 was a permissible change to the California Constitution, and, if so, what effect it had on the marriages performed before it was adopted.⁵⁰ The court ruled that Proposition 8 was constitutional under the California Constitution; however, California enjoyed a five-month period prior to the passage of Proposition 8 in which same-sex marriage was legal, and the court left the 18,000 marriages performed during this time intact.⁵¹

Three days before the California Supreme Court issued a ruling in *Strauss*, two same-sex couples in California filed a separate lawsuit in the United States District Court challenging the validity of Proposition 8 under the Fourteenth Amendment; this federal case, *Perry v. Schwarzenegger* (later *Perry v. Brown*) forms the basis of the current Proposition 8 litigation.⁵² The plaintiffs in this case, Perry et. al., sought to prevent state and local officials from enforcing Proposition 8 on federal constitutional grounds.⁵³ The suit named several state officials as defendants in their official capacities.⁵⁴ In July 2009, before any of the defendants were able to respond to the suit, the District Court granted the official proponents of Proposition 8 (“Proponents”) permissive intervention to defend the validity of the initiative they had sponsored.⁵⁵ Following the Proponents’ motion

48. See CAL. CONST. art. I, § 7.5 (stating that only marriage between a man and a woman is recognized in California).

49. See generally *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (examining the validity of Proposition 8 under the California Constitution).

50. See *id.* at 57 (discussing that the court must address this issue because a 2008 California Supreme Court decision, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), allowed same-sex couples to marry in California).

51. See *id.* at 64 (holding that Proposition 8 was a valid amendment to the California Constitution because it was approved by a majority of the voters).

52. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010) (asserting that Proposition 8 violates the United States Constitution on Due Process and Equal Protection grounds).

53. See *id.* at 928 (finding that Proposition 8 violates the Fourteenth Amendment to the United States Constitution).

54. See *id.* (naming California’s Governor, California’s Attorney General, California’s Director and Deputy Director of Public Health, the Alameda County Clerk-Recorder, and the Los Angeles County Registrar-Recorder/County Clerk as defendants).

55. See *id.* at 930 (citing the considerable time and effort the Proponents spent campaigning for the initiative as a reason to grant intervention).

for intervention, then-Attorney General Brown conceded that Proposition 8 violated the United States Constitution, and the other defendants refused to take a position on the initiative.⁵⁶ None of the named defendants chose to defend the initiative, and as a result, the Proponents have been the sole party defending the initiative.⁵⁷

On August 4, 2010, the District Court ruled that Proposition 8 was unconstitutional.⁵⁸ In his opinion, Judge Walker first found that the proposition did not meet the rational basis test required by Due Process because California has no interest in discriminating against gays and lesbians.⁵⁹ Second, he found that Proposition 8 violated the Equal Protection Clause of the United States Constitution.⁶⁰ Because it violated the United States Constitution, the court permanently enjoined California from enforcing Proposition 8.⁶¹ Following this decision, the Ninth Circuit Court of Appeals stayed the District Court's order pending appeal; consequently, Proposition 8 will stay in effect until the termination of the litigation.⁶²

Shortly after the District Court issued its ruling, the Proponents, in their capacity as defendant-intervenors, filed an appeal in the Ninth Circuit.⁶³ In a brief to the Ninth Circuit, the plaintiffs argued that the Proponents lacked standing to appeal.⁶⁴ The Proponents responded that they did meet the standing requirements in both California and federal courts.⁶⁵ On January 4, 2011, the Ninth Circuit certified a question to the California Supreme

56. *See Perry II*, 52 Cal. 4th 1116, 1129 (2011) (noting that Attorney General Brown went further in his answer to the complaint filed by the plaintiff, claiming that Proposition 8 was constitutionally infirm).

57. *See id.* at 1130 (stating that the Proponents, unlike the other parties to the litigation, presented witnesses and argued in favor of the initiative in the District Court).

58. *See Perry I*, 704 F. Supp. 2d at 1003 (finding that California has no legitimate interest in discriminating against same-sex couples and that Proposition 8 prevents California from providing marriages equally).

59. *See id.* (holding that to survive rational basis review, a law must have a purpose other than to place a particular group at a disadvantage).

60. *See id.* (reasoning that Proposition 8 prevents California from providing marriages on an equal basis).

61. *Cf. id.* at 1003-04 (allowing California to issue marriage licenses to same-sex couples).

62. *See Perry II*, 52 Cal. 4th at 1130 (allowing parties to file an appeal before the ruling goes into effect).

63. *See Perry III*, 671 F.3d 1052, 1064 (9th Cir. 2012) (finding that the Proponents filed a timely appeal); *see also Perry II*, 52 Cal. 4th at 1130-31 (noting that none of the named defendants appealed from the District Court's decision, and, as a result, none of the initially named defendants are a party to the appeal).

64. *See Perry II*, 52 Cal. 4th at 1131 (contending that the case should be dismissed for lack of standing).

65. *See id.* (arguing that Proponents had standing to intervene both in the present litigation and in *Strauss*).

Court asking whether the proponents have standing under California law.⁶⁶ The Ninth Circuit regarded the state law question as necessary to the threshold determination of whether the Proponents possessed Article III standing.⁶⁷

On November 17, 2011, the California Supreme Court ruled that under California law, the official proponents of an initiative are authorized to assert the state's interest in the initiative's validity because it is essential to the integrity of the initiative power that there be someone to defend the initiative when public officials refuse to do so.⁶⁸ In this ruling, the court relied on California Supreme Court cases that allowed official proponents to intervene as formal parties in California courts to defend their initiatives.⁶⁹ However, the court pointed out that, since it answered the first part of the Ninth Circuit's question in the affirmative, it did not need to answer the second part of whether the proponents possess a "particularized interest."⁷⁰

On February 7, 2012, the Ninth Circuit issued a ruling finding that Proposition 8 was unconstitutional.⁷¹ In doing so, the court first determined that the Proponents had standing to bring the appeal.⁷² In making this determination, the Ninth Circuit gave significant deference to the California Supreme Court's decision granting standing to initiative proponents.⁷³ Following this decision, the Proponents of Proposition 8 filed a request for rehearing en banc by the Ninth Circuit, which was

66. See Order Certifying a Question to the Supreme Court of California, *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. Jan. 4, 2011) (asking whether the proponents may defend the constitutionality of an initiative when the public officials who ordinarily do so decline, or whether under the California Constitution and the initiative power granted therein the official proponents of an initiative measure have a particularized interest in that measure's validity).

67. See *Perry II*, 52 Cal. 4th at 1131-32 (indicating that the California Supreme Court's answer to the question of standing may be determinative on the issue).

68. See *id.* at 1151-52 (reasoning that the official proponents of an initiative are in the best position to defend the initiative's validity); see also *id.* at 1132 (ruling that state officials lack the power to *de facto* invalidate a measure).

69. See *Bldg. Indus. Ass'n v. City of Camarillo*, 718 P.2d 68, 75 (Cal. 1986) (holding that a trial court should ordinarily permit proponents of an initiative to intervene when a city or county is required to defend the initiative).

70. See *Perry II*, 52 Cal. 4th at 1139 (finding that a response to the second part of the question was irrelevant after deciding that the Proponents may defend the initiative in court).

71. See *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012) (finding that Proposition 8 violates the Fourteenth Amendment to the United States Constitution on Due Process and Equal Protection grounds).

72. See *id.* at 1064 (concluding that proponents of a ballot measure must have standing to defend the measure in federal court if the state authorizes the initiative proponents to do so).

73. See *id.* (holding that the state may decide who is authorized to assert its interests in federal courts).

subsequently denied.⁷⁴ The Proponents have since filed a petition for certiorari with the Supreme Court, requesting review of the Ninth Circuit decision.⁷⁵

III. ANALYSIS

A. The California Supreme Court Examined the Incorrect Question Regarding Standing, Because the Plaintiffs Do Not Argue That the Proponents Should Not Have Been Allowed to Intervene in the Proceedings, but Rather That There Is a Stricter Standard in Federal Courts for Standing than for Intervention.

The question before the Ninth Circuit was whether the Proponents have standing in federal court to appeal the District Court's judgment absent the official defendants, not whether the Proponents should be allowed to intervene in the litigation as the California Supreme Court seems to argue.⁷⁶ In response to the Ninth Circuit's certified question, the California Supreme Court acknowledged that there was no statutory law in California that governed the answer to the question before it.⁷⁷ The court also recognized that in most California cases in which initiative proponents have been authorized to assert the interest of the state, there was no challenge to the initiative proponents' participation as a party, and therefore the court was not faced with the question of whether the proponents' participation was proper.⁷⁸ Despite this key distinction, the California

74. See generally *Petition for Rehearing En Banc, Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 541541 (9th Cir. Feb. 21, 2012) (arguing that the panel majority erred in their application of case law and that its decision conflicts with controlling precedent); see also *Perry v. Brown*, 681 F.3d 1065 (2012) (denying petition for rehearing).

75. See generally *Petition for a Writ of Certiorari, Hollingsworth v. Perry*, No. 12-144, 2012 WL 3109489 (July 30, 2012) (requesting that the Supreme Court agree to hear Proponents' argument that Proposition 8 does not violate the Equal Protection Clause of the Fourteenth Amendment).

76. See, e.g., *Perry II*, 52 Cal. 4th 1116, 1147 (2011) (pointing out that the plaintiffs have not cited any instances in which the official proponents of an initiative were prohibited from intervening); see also *id.* at 1149-50 (citing *Bldg. Indus. Ass'n v. City of Camarillo*, 718 P.2d 68 (Cal. 1986) to argue that denying proponents the right to intervene may be an abuse of discretion by the court).

77. See *id.* at 1141 (stating that while the California Constitution establishes the initiative power, it does not explicitly dictate the rights and responsibilities of the official proponents of an initiative); see also *id.* at 1142-43 (recognizing that state law does not address whether the initiative proponents may appear in court to defend the validity of their sponsored measure).

78. See *id.* at 1144 (recognizing that most California cases provide very little guidance on the proper role of initiative proponents in defending the initiative). *But see id.* at 1148-49 (concluding that permitting intervention by initiative proponents would safeguard the California voters' initiative right, which must be closely guarded by courts); *Bldg. Indus. Ass'n*, 718 P.2d at 75 (finding that trial courts should allow proponents of an initiative to intervene when the government is required to defend the

Supreme Court was nevertheless persuaded that the Proponents were the proper party under California law to assert the State's interests in the appellate court.⁷⁹ While the California Supreme Court raised valid arguments regarding the Proponents' Article III standing, it answered the wrong question.

The California Supreme Court did not need to examine whether the Proponents should be allowed to intervene because they had already been allowed to intervene in the California Supreme Court and the District Court.⁸⁰ Moreover, the plaintiffs never argued that the Proponents' intervention was improper.⁸¹ Therefore, the controversy before the court clearly does not lie in whether California has historically allowed proponents of an initiative measure to intervene to defend that measure, nor whether these Proponents should be permitted to do so, but whether the Proponents have standing by themselves to bring an appeal in federal court.⁸²

Under federal law, the Proponents need standing to appeal the District Court's ruling, even if it is undisputed that their intervention in the prior proceeding was valid.⁸³ The question of whether the Proponents have standing to appeal the District Court's decision turns on a different standard than the one California used in determining whether they should be allowed to intervene.⁸⁴ To bring a case in federal court, a party must meet all three

initiative).

79. See *Perry II*, 52 Cal. 4th at 1148-49 (finding that proponents must be allowed to intervene to defend the interests of the state because public officials do not always defend voter-approved initiative measures with "vigor"); see also *id.* (noting the court must guard the people's right to exercise their initiative power, and *Bldg Indus. Ass'n v. City of Camarillo* encourages courts to allow proponents to intervene even when the public officials are defending the initiative so that the proponents may supplement the arguments made by the officials).

80. See *Perry I*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) (stating that the District Court allowed the Proponents to intervene to defend the constitutionality of Proposition 8 in July 2009); *Strauss v. Horton*, 207 P.3d 48, 69 (Cal. 2009) (stating that the California Supreme Court granted the Proponents' motion to intervene on November 19, 2008).

81. See *Perry II*, 52 Cal. 4th at 1129 (stating that neither the plaintiffs nor any named defendants objected to the Proponents' motion to intervene).

82. See Order Certifying a Question to the Supreme Court of California, *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. Jan. 4, 2011) (asking whether the proponents of an initiative have the authority "to defend the constitutionality of the initiative upon its adoption or *appeal a judgment invalidating the initiative*" (emphasis added)).

83. See *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (holding that intervenors must show independent standing to bring an appeal).

84. Compare FED. R. CIV. P. 24(a) (providing that a court must permit a party to intervene who files a timely motion, claims an interest relating to the subject of the action, would be unable to protect this interest if the case was dismissed, and whose interests would otherwise go unrepresented), and FED. R. CIV. P. 24(b) (providing that a court may allow a party to intervene who shares a common question of law and fact with the main parties), with *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61

standing requirements set forth by the Supreme Court in *Lujan*.⁸⁵ In a similar case in which initiative proponents intervened in the lower proceedings, the Ninth Circuit granted the proponents standing to defend the initiative in federal court.⁸⁶ However, the Supreme Court reversed, holding that the Ninth Circuit did not engage in the correct analysis when granting standing to the proponents.⁸⁷ The Supreme Court in that case reaffirmed that a party who intervened in a previous stage of the litigation still must show independent standing to bring an appeal.⁸⁸

In determining whether the Proponents have standing to appeal, the California Supreme Court seems not only to be phrasing the argument in terms of the Proponents' undisputed right to intervene in the case, but also appears to be applying the standard used for allowing a party to intervene.⁸⁹ The court's reasoning that the Proponents' participation in the litigation ensures that their arguments as well as the state's arguments are heard is very similar to the standard for intervention of right, but does little to meet the test for standing.⁹⁰ The Proponents already successfully proved that they meet this standard, as evidenced by the fact that they were permitted to intervene in the trial stage; therefore, the federal court has already agreed with the California Supreme Court that the Proponents meet the requirements to intervene.⁹¹ The California Supreme Court's analysis fails to consider that, in federal court, the right to intervene does not give a party standing to appeal the case if the original party fails to do so, and that a

(1992) (holding that Article III standing requires a showing of injury-in-fact, causation, and redressability).

85. See *Lujan*, 504 U.S. at 560 (finding that the three requirements for standing in federal court are important to identify disputes that are properly resolved in court).

86. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 (1997) (explaining that the Ninth Circuit granted standing to the initiative proponents on the basis that the proponents had the same ability as the Arizona Legislature to defend an initiative enacted by the people).

87. See *id.* at 65 (finding that initiative proponents did not meet the requirements of Article III standing, regardless of the Ninth Circuit's reasons for allowing them to appear in court, and thus they could not bring the case in federal court).

88. See, e.g., *Diamond*, 476 U.S. at 68 (holding that a party who files an appeal must independently fulfill every element of standing, regardless of whether that party was an intervenor).

89. See *Perry II*, 1151 (2011) (arguing that allowing proponents to intervene is essential to ensure that all legal arguments are advanced in defense of the proposition); *id.* at 1149 (noting that the Proponents are protecting the people's interest).

90. See FED. R. CIV. P. 24(a)(2) (stating that the court must allow a party to intervene if refusing to do so would impair the movant's ability to assert its interests and those interests are not properly represented by the existing parties).

91. See *Perry I*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) (stating that the court granted the proponents motion to intervene on July 2009); see also *Perry II*, 52 Cal. 4th at 1129 (recalling that none of the existing parties objected to the Proponents' motion to intervene); Motion to Intervene, *supra* note 45, at *6-10 (asserting that plaintiffs are entitled to intervene as of right, and also satisfy the requirements for permissive intervention).

stricter standard must be applied to grant standing to appeal.⁹²

B. Even if California's Standing Analysis Was Pertinent to the Standing Controversy Before the Ninth Circuit, the Ninth Circuit Should Not Have Given Deference to California's Decision Because It Is Bound by Federal Standing Jurisprudence, the Requirements of Which Are Not Taken into Consideration by the California Supreme Court.

Three months after California issued its opinion responding to the Ninth Circuit's certified question, the Ninth Circuit upheld the District Court's finding that Proposition 8 was unconstitutional.⁹³ Before making this ruling, the Ninth Circuit first had to find that the Proponents had standing to bring the appeal.⁹⁴ In doing so, the Ninth Circuit gave a great deal of deference to the California Supreme Court's decision that the Proponents were authorized under state law to defend the initiative in place of elected officials.⁹⁵

1. The Ninth Circuit Gave Too Much Deference to the California Supreme Court's Decision Because California's Decision Is Only Relevant in California State Courts, and Proponents Do Not Meet the Injury-in-Fact Requirement of Article III Standing.

The flaw in the Ninth Circuit's ruling is that, even if California had analyzed the question under the correct standard, its decision would only be relevant, and should only be controlling, in California state court.⁹⁶ California relied extensively on state cases to make its point that the courts should fiercely guard the initiative power, and that proponents of initiatives have historically been granted standing to defend those initiatives in court.⁹⁷ The California Supreme Court did not necessarily err in analyzing

92. See, e.g., *Diamond*, 476 U.S. at 68 (holding that a party must prove standing to appeal in federal court, even if the party intervened in previous proceedings).

93. See *Perry III*, 671 F.3d 1052, 1093 (9th Cir. 2012) (holding that Proposition 8 violates the Fourteenth Amendment to the United States Constitution because it could find no legitimate state reason to treat same-sex couples differently than heterosexual couples).

94. See *id.* at 1064-65 (noting that the court first had to decide whether the Proponents of Proposition 8 were entitled to appeal the lower court's decision).

95. See *id.* (finding that it is for the state to decide who may represent that state's interests in court); *id.* at 1072 (declaring that the court is bound by California's determination that the Proponents have standing to defend the initiative); *id.* at 1073-74 (reasoning that, because California has standing to defend the proposition in federal court and because California gave initiative proponents the power to defend the initiative and appeal a judgment invalidating the measure, Proponents therefore have Article III standing).

96. See, e.g., *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).

97. See *Perry II*, 52 Cal. 4th 1116, 1143-44 (2011) (listing several California cases in which official initiative proponents were permitted to participate as parties in either

the question under state law, because California was only asked to brief the question of whether the initiative proponents have the power to defend the initiative under California law.⁹⁸

However, the Ninth Circuit is bound by federal law to assess Article III standing under federal standards, not under California law.⁹⁹ Under federal law, the parties seeking standing must have suffered an injury-in-fact that is particularized to those individuals, which requires the court to engage in a different analysis from that used by the California Supreme Court.¹⁰⁰

First, the California Supreme Court argues that the Proponents are the most logical and appropriate party to assert the state's interest in the initiative's validity.¹⁰¹ However, the Supreme Court has historically rejected the argument that a party in a unique and logical position to bring a particular claim is necessarily injured such that the party has standing in federal court to bring the claim.¹⁰² In *Lujan*, the Court did not agree with the respondents' argument that they had a special interest in environmental protection and were in a logical position to bring the claim, but instead held that the environmental group did not have standing because they could not prove an injury-in-fact.¹⁰³ Similarly, in *Sierra Club v. Morton*, a conservation organization was a logical choice to bring a claim against a

pre- or post-election challenges to an initiative); *id.* at 1144 (listing cases in which official initiative proponents were permitted to appeal from an adverse judgment).

98. See Order Certifying a Question to the Supreme Court of California, *Perry v. Schwarzenegger*, 628 F.3d 1191, 1192 (9th Cir. Jan. 4, 2011) (asking whether the official proponents of an initiative measure may assert the state's interest in the validity of that initiative under California law).

99. See *Phillips Petroleum Co.*, 472 U.S. at 804 (holding that Article III standing is ultimately a question of federal law, and does not depend on standing in any state court); *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819) (interpreting the Supremacy Clause of the United States Constitution to affirm that federal law is supreme over state law). But see *Perry III*, 671 F.3d at 1071 (stating that California is an independent sovereign, and thus it is the state's prerogative to decide for itself who may assert its interests); *id.* at 1072-73 (arguing that the Ninth Circuit is bound by California's determination about standing).

100. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing that the injury-in-fact requirement of Article III standing requires the plaintiff to suffer a concrete and particularized injury).

101. See *Perry II*, 52 Cal. 4th at 1152 (arguing that the proponents of a voter-approved initiative have a unique relationship to the measure that makes them reliable and vigorous advocates for the measure); *id.* at 1141-42 (citing statutory provisions which give the official proponents of an initiative a distinct role in regard to their sponsored initiative).

102. See, e.g., *Lujan*, 504 U.S. at 578 (denying *Defenders of Wildlife* standing to bring a claim against a potentially harmful regulation, despite the fact that an environmental group is a logical party to bring such a claim); *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (finding that an environmental conservation organization did not have standing to seek an injunction against the development of a ski resort, even though the group claimed a special interest in the matter).

103. See *Lujan*, 504 U.S. at 561-62 (noting that in addition to failing the injury-in-fact test, *Defenders of Wildlife* also failed to prove redressability of the injury).

development that would destroy natural habitats, but the Court still held that its unique position was not sufficient to grant its members standing in federal court.¹⁰⁴ Therefore, the fact that the Proponents are a logical party to file an appeal does not mean that they meet the injury-in-fact requirement for Article III standing.¹⁰⁵

Second, the California Supreme Court concluded that if the Proponents do not defend the initiative, no one will.¹⁰⁶ However, when, in *Lujan*, Defenders of Wildlife was prevented from bringing a suit against the potentially harmful regulation, whether another party would bring the suit was not of clear concern to the Court.¹⁰⁷ The Court came to a similar conclusion in *Sierra Club*, where it was not concerned whether another party would seek an injunction against the development of the ski resort.¹⁰⁸ It follows, therefore, that the Ninth Circuit in this case should not take into consideration whether another party will appeal the case in lieu of the Proponents when deciding whether the Proponents have standing.

Further, the California Supreme Court asserts that it has historically granted standing to initiative proponents.¹⁰⁹ However, California cases on this matter should be of little relevance to the Ninth Circuit. California law provides that a party who has been permitted to intervene in a lower court proceeding may appeal from an adverse judgment in California courts if the original party does not file an appeal.¹¹⁰ On the contrary, the Supreme Court has stated that in federal court, a party who intervened is not permitted to appeal from a lower court decision without first showing

104. See *Sierra Club*, 405 U.S. at 734-35 (stating that the injury-in-fact test requires more than just an injury to a cognizable interest, but also that the party bringing the suit be among the injured).

105. See *Lujan*, 504 U.S. at 560 (affirming that the injury-in-fact requirement dictates that the plaintiff must suffer a concrete and particularized injury).

106. See *Perry II*, 52 Cal. 4th at 1139 (discussing the Proponents' concern that the initiative would be invalidated if they were unable to appeal because no one else would defend the initiative).

107. See *Lujan*, 504 U.S. at 573-77 (reaffirming that every party who brings a case in federal court must show that he or she is in immediate danger of sustaining a direct injury, and finding that the respondents did not have standing because they were not injured in a particularized way).

108. See *Sierra Club*, 405 U.S. at 734-40 (declaring that the respondents did not have standing because they did not assert that they were personally among the injured); see also *United States v. Richardson*, 418 U.S. 166, 179 (1974) (determining that the argument that if the plaintiff could not litigate the issue no one could is not sufficient to confer standing to the plaintiff).

109. See *Perry II*, 52 Cal. 4th at 1125 (stating that California courts have routinely permitted proponents of initiatives to defend their initiatives, and reasoning that this guards the peoples' right to their initiative power).

110. See *People v. Perris Irrigation Dist.*, 64 P. 399, 400 (Cal. 1901) (finding that a party who intervened as a defendant in the previous proceeding in California state court may avail itself of every remedy available to the original defendant, including the right to appeal from an adverse decision in California courts).

independent standing.¹¹¹ California may provide that intervenors do not need to independently fulfill the Article III standing requirement to bring an appeal in state court, but it does not have the authority to assert that the same standard applies in federal court.¹¹² Therefore, the cases that California cites on this matter should not serve to inform the Ninth Circuit of the proper way to dispose of whether the Proponents have standing in federal court.

Moreover, the Ninth Circuit cites to various cases to support its proposition that states should be allowed to affect their own internal operations.¹¹³ However, the cases it cites all clearly deal with internal regulations that do not affect federal matters.¹¹⁴ Who may assert a state's interests in federal court, however, is not a purely internal issue because federal courts are not state actors, and who may appear in federal courts on matters arising under the United States Constitution is a question for federal, not state, law.¹¹⁵ The cases that the Ninth Circuit cites in this regard are, therefore, largely irrelevant in the case at hand.

Finally, the injury-in-fact requirement prohibits parties from asserting injuries that are shared in substantially equal measures by a large portion of the population.¹¹⁶ Here, the Proponents claim that they assert the general interest of the people of California.¹¹⁷ As the plaintiffs correctly point out, and as the Proponents seem to agree with, the initiative power granted by

111. *See* *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (holding that an intervenor who files an appeal absent the original party must independently fulfill every element of standing).

112. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (holding that federal law governs standing in federal court, and that standing in state court does not confer standing to a party in federal court).

113. *See Perry III*, 671 F.3d 1052, 1072 (9th Cir. 2012) (citing *Printz v. United States*, 521 U.S. 898 (1997) and other cases to find that it is not for the federal government to control the practices of a state, including controlling who may assert its interests).

114. *See Printz*, 521 U.S. at 935 (holding that Congress may not direct state law enforcement officers to enforce a federal regulatory scheme); *New York v. United States*, 505 U.S. 144, 149 (1992) (finding that the federal government cannot require a state to accept ownership of waste generated within its borders, or regulate waste according to Congress's orders); *Coyle v. Smith*, 221 U.S. 559, 579-80 (1911) (holding that Congress may not dictate where a state shall locate its capital).

115. *See* U.S. CONST. art. III, § 2 (establishing that federal courts have jurisdiction over all matters arising under the United States Constitution).

116. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (rejecting a claim by a citizen who merely asserted an abstract injury from Congress's nonobservance of the Constitution); *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (establishing that the injury-in-fact requirement demands more than just a generalized grievance, and that the plaintiff must have suffered a particularized injury).

117. *See Perry III*, 671 F.3d at 1073 (stating the Proponents claim that they represent the people's interest in defending the validity of an initiative that the voters enacted).

the California Constitution is granted to the electorate as a whole, and not just those citizens who propose initiatives.¹¹⁸ In 2008, fifty-two percent of the California electorate voted to enact Proposition 8.¹¹⁹ Therefore, the injury that the Proponents assert is a generalized grievance to over half of the voters of the most heavily populated state in the nation.¹²⁰ Supreme Court cases have repeatedly affirmed that this generalized grievance in the validity of an initiative is not sufficient to confer Article III standing to the proponents of the initiative in question.¹²¹

2. The California Supreme Court Erroneously Disregards Precedent Set Forth by Arizonans for Official English v. Arizona, and the Ninth Circuit Should Not Follow California's Lead in Distinguishing This Case.

The California Supreme Court disregards the precedent set forth in *Arizonans for Official English*, instead distinguishing *Arizonans* from this case.¹²² However, the plaintiffs were correct to rely on that case to argue that initiative proponents do not have standing in federal court to appeal from a decision invalidating their initiatives.¹²³ The Court in *Arizonans* outlines three primary reasons why the proponents of an initiative should not have standing to appeal the lower court's decision.¹²⁴ The California Supreme Court focuses on the one distinguishing factor between *Arizonans*

118. See CAL. CONST. art. II, § 8 (granting the initiative power to the electorate); *Perry II*, 52 Cal. 4th 1116, 1139 (2011) (stating the plaintiff's contention that the proponents of an initiative no longer have a particularized interest in the validity of the initiative once it has been passed by the people because the electorate then equally shares the interest).

119. California Secretary of State, *General Election – Statement of Vote: Votes for and Against State Ballot Measures*, available at http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf.

120. See *id.* (depicting that 7,001,084 people voted in favor of Proposition 8).

121. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997) (holding that initiative sponsors are not recognized agents of the people, and must have suffered a particularized injury beyond that suffered by the entire electorate in order to possess standing to defend their initiative in federal court); cf. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding that an organization's longstanding interest in a problem is not by itself sufficient to give the organization an injury for federal standing purposes).

122. Compare *Perry II*, 52 Cal. 4th at 1136-37 (concluding that, despite precedent to the contrary, the Proponents had standing under state law to assert the state's interest in federal court), with *Arizonans*, 520 U.S. at 66 (finding that initiative proponents do not have standing in federal court to defend the initiative they sponsored because they lack particularized injury).

123. See *Perry II*, 52 Cal. 4th at 1135-36 (noting that the plaintiffs pointed out that, in a similar case, the Supreme Court expressed "grave doubts" that initiative proponents possessed standing in federal court).

124. See *Arizonans*, 520 U.S. at 65 (finding that the proponents should not have standing because they were not elected, there was no state law authorizing them to appear in court on behalf of their initiative, and the Supreme Court had never identified initiative proponents as proper parties to defend their initiative).

and this case, namely that in *Arizonans*, there was no state law that authorized the proponents to be a party to the case.¹²⁵ In contrast, the California Supreme Court argued that because California created such a law, the rationale in *Arizonans* could not be applied to *Perry*.¹²⁶

However, the California Supreme Court failed to consider that the other two reasons put forth by the Supreme Court for denying the proponents' standing in *Arizonans* apply to *Perry* as well.¹²⁷ First, like the initiative proponents in *Arizonans*, the Proponents of Proposition 8 were not elected by the California electorate and were not state officials.¹²⁸ The Ninth Circuit likewise overlooks this key similarity between the two cases in arguing that if California grants authority to the California Attorney General to defend a ballot initiative, it should be able to grant the Proponents the same.¹²⁹

Secondly, *Perry* is indistinguishable from *Arizonans* in that neither the Supreme Court in *Arizonans* nor either relevant court in this case has previously allowed initiative proponents to defend the validity of a state statute in federal court.¹³⁰ The California Supreme Court instead focuses solely on the fact that Arizona did not have a state law authorizing initiative proponents to appear in federal court to defend their ballot measure, and fails to analyze the other factors that the Supreme Court puts forth in

125. See *Perry II*, 52 Cal. 4th at 1136-37 (finding that the Court in *Arizonans* substantially relied on the fact that it was aware of no Arizona law appointing initiative sponsors as agents of the state).

126. See *id.* at 1137 (reasoning that nothing in *Arizonans* suggests that initiative proponents should not have standing if the state has authorized the proponents to assert the state's interest).

127. See *id.* at 1136-37 (failing to note that the Proponents in *Perry* were not elected by the people, and that the Ninth Circuit has never allowed initiative proponents to defend the initiatives that they sponsored).

128. See *Arizonans*, 520 U.S. at 65 (reasoning that AOE and its members were not elected officials); *Perry III*, 671 F.3d 1052, 1067 (9th Cir. 2012) (noting that Proponents were California residents who collected voter signatures and filed petitions with the California government to place an initiative on the 2008 California ballot). But see *Karcher v. May*, 484 U.S. 72, 82 (1987) (granting standing to the Speaker of the New Jersey Assembly and the President of the New Jersey Senate to appeal a decision holding a state statute unconstitutional because they were state legislators).

129. See *Perry III*, 671 F.3d at 1074 (noting that when the Attorney General of California defends the validity of a state statute in federal court, she does not need to independently fulfill the requirements of standing because she is filling in for the state, and arguing the same of the Proponents).

130. See *Arizonans*, 520 U.S. at 65 (noting that the Court had never identified initiative proponents as qualified parties to defend measures under Article III); *Perry III*, 671 F.3d at 1074 (reasoning that the Ninth Circuit based its opinion on California's decision to grant the Proponents authority to assert the interests of the state, but cited no case in which the Ninth Circuit had previously allowed initiative proponents to appeal from a judgment invalidating their initiative); *Perry II*, 52 Cal. 4th at 1149 (finding that *Bldg. Indus. Ass'n* was the only case in which California was faced with whether to allow initiative proponents to participate as a party, and that the court merely allowed them to intervene in the litigation).

Arizonans.¹³¹ Therefore, because the Proponents do not meet two of the three prongs set forth in *Arizonans*, they do not have standing to bring an appeal in federal court in place of state officials.¹³²

IV. POLICY RECOMMENDATION

Congress can create statutes that confer rights on individuals, and the invasion of these rights can permit individuals to bring lawsuits in federal court.¹³³ Moreover, courts have recognized that Article III standing may be based on these statutorily-created injuries.¹³⁴ In *Perry*, the California Supreme Court arguably created an injury when it ruled that initiative proponents are authorized to assert the state's interest in federal court if the state officials fail to do so.¹³⁵ In reasoning that the Proponents had standing solely due to the California Supreme Court's law granting standing to initiative proponents, the Ninth Circuit based its determination that the Proponents had standing to bring the appeal in federal court on this judicially created injury.¹³⁶

However, *Lujan v. Defenders of Wildlife* suggests that the Ninth Circuit's reasoning is flawed, and that the court places too much emphasis on the newly created California law granting power to initiative proponents.¹³⁷ *Lujan* holds that in order for a party to have standing in

131. See *Perry II*, 52 Cal. 4th at 1136-37 (reasoning that the Court in *Arizonans* would have no reason to deny the initiative proponents standing if there was a state law authorizing them to assert the state's interests).

132. See *Arizonans*, 520 U.S. at 65 (holding that proponents were denied standing not just because there was no Arizona law authorizing them to assert the state's interests, but also because the Supreme Court had never identified initiative proponents as proper parties to defend their initiatives in federal court, and because the initiative proponents were not elected state officials).

133. See, e.g., Title IX, 20 U.S.C. §1681 (1972) (holding that no person shall be subject to discrimination based on sex in any federally funded educational program); see also *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (holding that a welfare recipient is injured when she does not receive notice and opportunity for an evidentiary hearing prior to the termination of her benefits).

134. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (holding that the injury requirement of Article III may exist based on the invasion of statutorily-created legal rights).

135. See *Perry II*, 52 Cal. 4th at 1126-27 (holding that the proponents of an initiative as well as the electorate as a whole would be injured if state officials could invalidate an initiative measure by failing to defend it in court, and that Proponents must be allowed to step in to prevent this injury).

136. See *Perry III*, 671 F.3d 1052, 1073 (9th Cir. 2012) (asserting that the Ninth Circuit was bound by California's new law, and holding that the only important consideration was that California authorized initiative proponents to represent the interest of the state); *id.* at 1072 (finding that the California Supreme Court announced that California law gives initiative proponents the power to defend the validity of those initiatives in lieu of state officials); see also *Perry II*, 52 Cal. 4th at 1136-37 (reasoning that California law allows initiative proponents to defend the validity of an initiative).

137. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (finding that standing is harder to establish in cases against the government where the plaintiff is not

federal court, that party must have suffered an injury-in-fact.¹³⁸ Courts have held that while Article III standing may be based on injuries arising out of statutes, the mere invasion of statutorily-created rights is not sufficient to grant standing.¹³⁹ Instead, the injury-in-fact requirement demands that the injury suffered as a result of the violation of a statute be particular to the party seeking relief.¹⁴⁰

The Court in *Lujan* reasons that should Congress be allowed to create injuries that automatically confer standing on the injured, it would contravene important functions of standing such as separation of powers and judicial efficiency.¹⁴¹ Because the Court is concerned with the breach of judicial power in adjudicating claims of public rights, the same functions of standing would be violated if California was allowed to confer standing on the Proponents by virtue of their broadly shared injury.¹⁴² Moreover, the United States Congress undoubtedly has more power than states and their judiciaries in controlling the federal standing requirement.¹⁴³ The Constitution and cases interpreting it clearly hold that Congress's laws are supreme over the states' laws.¹⁴⁴ Additionally, cases are explicit in holding

the particular object of the government action or inaction).

138. *See id.* at 563 (requiring a party seeking relief to be directly affected apart from that party's special interest).

139. *See Allen v. Wright*, 468 U.S. 737, 754 (1984) (noting that the assertion of the right to particular government conduct and injury based on the government acting differently, does not alone satisfy the injury-in-fact requirement of Article III standing); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (holding that the appellant's injury does not confer standing unless the appellant can show that she is in immediate danger of suffering a direct and personal injury).

140. *See Lujan*, 504 U.S. at 578 (holding that the concrete injury requirement still must be present in suits against the government regardless of whether the plaintiff asserts a statutorily-created injury); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (recognizing that broadening the categories of injury that may be alleged in support of Article III standing is different from disregarding the requirement that the party seeking relief has suffered a particularized injury).

141. *See Lujan*, 504 U.S. at 577 (noting that permitting Congress to convert the public interest into an individual right would take away the Executive's duty to ensure that the laws be faithfully executed); *see also Stark v. Wickard*, 321 U.S. 288, 310 (1944) (holding that the standing requirement of Article III ensures that courts only adjudicate claims of infringement on individual rights, not public rights).

142. *See Perry II*, 52 Cal. 4th 1116, 1149 (2011) (stating that it is clear that the Proponents assert the people's interest, and not merely their own).

143. *See U.S. CONST.* art. VI, cl. 2 (stating that federal laws shall be supreme over state laws, and that federal courts are bound by federal law).

144. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001) (interpreting the Supremacy Clause of the United States Constitution to hold that laws made by Congress preempt state laws when they expressly exclude state laws, when they already occupy a legislative field, or when state laws conflict with already existing federal laws); *cf. Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) (holding that when the federal government has made laws in a certain field, those laws are supreme in that field, and states may not alter or change those Congressional statutes).

that Article III standing as a field is preempted by federal law.¹⁴⁵ Therefore, if the Supreme Court has established that Congress may not create injuries that surpass the injury-in-fact requirement of Article III standing, certainly state courts may not do so either. As a result, *Lujan*'s determination that statutorily-created injuries are not sufficient to grant standing should extend to state courts as well, and the Ninth Circuit may not find that the Proponents have standing simply because the California Supreme Court determined that they are injured.

V. CONCLUSION

Article III standing serves many important functions.¹⁴⁶ The strict standing doctrine outlined in Article III and further delineated in Supreme Court cases requires that a party suffer a cognizable injury, or an injury-in-fact, in order to bring a lawsuit.¹⁴⁷ This requirement is necessary not only to ensure that courts only hear cases and controversies, but also to guard the fairness of the judicial process.¹⁴⁸ Moreover, should parties be allowed to bring suits in which they are not particularly injured, the rights of the public may be placed at risk.¹⁴⁹

Courts have historically understood these important functions of standing, and have safeguarded the strict standing requirement prescribed in *Lujan* and other Supreme Court cases.¹⁵⁰ However, the Ninth Circuit previously disregarded the established requirements for Article III standing in *Arizonans for Official English*, where it held that initiative proponents asserting only a generalized grievance may defend their initiatives in federal court.¹⁵¹ The Supreme Court in *Arizonans* overturned the Ninth

145. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (holding that whether a party has standing in federal court is a matter of federal law).

146. See *Elliot*, *supra* note 8, at 461-63 (explaining that the standing doctrine serves to limit the cases heard by Article III courts to cases and controversies, allows courts to decline to hear cases that are better resolved through the political process, and prevents Congress from overreaching and conscripting courts).

147. See *supra* Part II.A (outlining the federal standing requirement).

148. See Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1694 (2007) (explaining that a strict standing requirement guards the rights of the parties on both sides of the litigation).

149. See *id.* at 1699-700 (holding that to allow a party to adjudicate an injury shared substantially by a large number of people would negate the right of those not bringing the suit to decide against adjudication).

150. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (holding that an organization did not have standing to sue in federal court because its members were not affected in any meaningful way); see also *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (holding that a party does not have standing if its asserted injury is shared by a substantial portion of the population).

151. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 (1997) (noting that the Ninth Circuit granted standing to AOE so that they might defend the initiative they sponsored because it found that the proponents had the same rights as the Arizona

Circuit's decision, ruling that initiative proponents do not have standing to defend the initiatives they sponsored.¹⁵²

Because the California Supreme Court in *Perry* relied on the wrong standard when granting standing to the Proponents to appeal in federal court, and because the Ninth Circuit is bound by federal law rather than state law when deciding who has standing in Article III courts, the reviewing court should find that the Proponents do not have standing.¹⁵³ Furthermore, because Congress may not bypass Article III standing requirements by statutorily creating injuries that automatically confer standing upon the injured, courts should likewise be prohibited from doing so.¹⁵⁴ Therefore, courts in the future should be barred from basing Article III standing on a judicial finding that the party is injured, as well as solely based on a state court's determination that a party is authorized to assert that state's interests.

Legislature).

152. *See id.* at 65-66 (holding that initiative sponsors do not have standing in federal court because they are not agents of the people, nor do they assert a qualifying injury-in-fact).

153. *See supra* Part III (explaining that the requirement for intervention is different than the requirement for standing, and that Article III standing requirements necessitate a different analysis than that engaged in by the California Supreme Court and the Ninth Circuit).

154. *See supra* Part IV (noting that, while Congress can create injuries that may be alleged in support of standing, these injuries are not sufficient to grant standing in an Article III court, and arguing that this should apply to injuries created by courts as well).