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Perry v. Schwarzenegger: Can the Proponents of Proposition 8 Stand Up When the State Stands Down?

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PERRY V. SCHWARZENEGGER: CAN THE PROPONENTS OF PROPOSITION 8 STAND UP WHEN THE STATE STANDS DOWN?

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I. INTRODUCTION

In 2008, citing state constitutional grounds, the California Supreme Court invalidated the California Defense of Marriage Act, eight years after California voters first ratified a change to California's Family Code defining marriage as being between a man and a woman only.¹ Moving quickly, opponents of same-sex marriage renewed their efforts and successfully ratified Proposition 8, an initiative that amended the California

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1. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (relying on the privacy, due process, and equal protection guarantee clauses of the California Constitution to declare California Family Code § 308.5 unconstitutional).

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Constitution with the same definition.² In 2009, the California Supreme Court upheld the new ban.³ Opponents of Proposition 8 mounted a federal constitutional challenge, and, in *Perry v. Schwarzenegger*, U.S. District Chief Judge Vaughn Walker held that Proposition 8 violated the Fourteenth Amendment and the Equal Protection Clause of the United States Constitution.⁴

The official proponents⁵ of Proposition 8 under California election law have appealed on the merits, but the dispute may turn on a startling technicality.⁶ The Ninth Circuit must confront the question of whether the official proponents have standing to defend the constitutionality of their initiative on appeal, when the state defendants have declined to do so.⁷

Part II.A of this Note explains that the proponents must have standing in order to appeal on their own.⁸ Part II.B briefly summarizes the relevant case law on standing.⁹ Part III examines two questions: whether proponents have special status under California law as the official sponsors of the initiative and whether they might assert general voter standing.¹⁰ Part IV concludes that the proponents should be allowed to assert voter standing due to the case's exceptional circumstances.¹¹

2. Proposition 8 became law in 2008. See CAL. CONST. art. I, § 7.5, *invalidated by* *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009).

3. See *Strauss*, 207 P.3d at 122 (concluding Proposition 8 did not violate the limitations on initiative power, because it was a constitutional amendment and not a constitutional revision).

4. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994-95, 997-1004 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Aug. 16, 2010) (concluding that Proposition 8 can advance no rational basis for discriminating between hetero- and homosexual couples nor meet strict scrutiny review for impairing the fundamental right of marriage).

5. *Id.* at 928 (identifying "Protectmarriage.com – Yes on 8, a Project of California Renewal" as the official proponents of Proposition 8).

6. See, e.g., Erwin Chemerinsky, *Who Has Standing to Appeal Prop. 8 Ruling?*, L.A. TIMES, Aug. 15, 2010 (arguing that conservative standing rules will prevent the proponents from having standing to appeal).

7. See Defendant-Intervenors'-Appellants' Emergency Mot. for Stay Pending Appeal at 19-23, 704 F. Supp. 2d 921 (N.D. Cal. Aug. 3, 2010) (No. 09-CV-2292 VRW) [hereinafter Proponents' Motion] (arguing that the proponents have either personal standing or standing to represent state interests); Pl.'s & Plaintiff-Intervenor's Joint Opp. to Defendant-Intervenors' Mot. for Stay Pending Appeal at 3-4, 704 F. Supp. 2d 921 (N.D. Cal. Aug. 6, 2010) (No. 09-CV-2292 VRW) [hereinafter Joint Opp. to Defendant-Intervenors' Mot. for Stay] (arguing that the proponents cannot show a constitutionally cognizable harm).

8. See *infra* Part II.A (concluding that Supreme Court precedent requires interveners who appeal, without other parties, to meet standing requirements).

9. See *infra* Part II.B (explaining that courts have supplemented constitutional standing requirements with prudential rules).

10. See *infra* Part III (rejecting proponents' arguments and arguing for voter standing instead).

11. See *infra* Part IV (concluding that relaxing prudential standing requirements in the exceptional circumstances of *Perry* vindicates voting rights).

II. BACKGROUND

Standing encompasses a set of both constitutional and judge-made (“prudential”) rules that ensure courts only entertain those controversies that they have the judicial power to remedy.¹² This background explains, first, why the proponent interveners in *Perry* must assert standing and then, second, which requirements they must meet in order to prevail.¹³

A. *Interveners Who Pursue an Appeal Alone*

The Supreme Court has not clearly announced whether standing is always necessary to intervene under Federal Rule of Civil Procedure 24.¹⁴ The Supreme Court has, however, required standing for intervener-appellants when there is no other party with standing joining them on appeal.¹⁵ The Supreme Court reaffirmed this principle recently in a case explicitly concerned with ballot initiative proponents.¹⁶

In *Arizonans for Official English v. Arizona*, the Supreme Court questioned whether the sponsors of an Arizona ballot initiative, which created a law requiring English to be the official language of Arizona, had standing to appeal alone.¹⁷ In dicta, the Court offered three reasons why the sponsors should not have standing: the sponsors were not elected, there was no state law authorizing their suit, and the Court had never identified the proponents as the proper defenders of their initiatives.¹⁸ Because the Court resolved *Arizonans* on mootness grounds,¹⁹ the Court vacated the

12. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583 (1992) (explaining that the purpose of standing is to limit the role of courts in a democratic society to deciding those cases involving parties with concrete, adverse interests, instead of resolving hypothetical injuries).

13. See *infra* Parts II.A and II.B.

14. See, e.g., Kerry C. White, Note, *Rule 24(A) Intervention of Right: Why the Federal Courts Should Require Standing to Intervene*, 36 LOY. L.A. L. REV. 527, 544, 551-52, 558-59 (2002) (arguing that if interveners require standing to appeal, they should also need standing to intervene, because interveners may otherwise be stuck with an adverse ruling should the parties with standing opt not to appeal).

15. See *Diamond v. Charles*, 476 U.S. 54, 58 (1986) (requiring a doctor who had intervened at the district level to show standing on appeal when no other parties on his side had also appealed).

16. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-66 (1997) (questioning quasi-legislative standing of initiative proponents but deciding the case on mootness grounds).

17. See *id.* at 55-57, 65-66 (questioning the Ninth Circuit’s theory that a sponsor of a ballot initiative has the same standing to defend the constitutionality of a state statute as an actual legislature does).

18. See *Karcher v. May*, 484 U.S. 72, 81-82 (1987) (upholding the standing of the Speaker of the New Jersey General Assembly and the President of the New Jersey Senate, because the New Jersey Supreme Court had granted their applications to intervene on behalf of the legislature).

19. See 520 U.S. at 67-68 (where a state employee, who alleged a law unconstitutionally prohibited her from speaking Spanish in the course of her duties, left

Ninth Circuit's decision to grant standing to initiative proponents under a "quasi-legislative" theory and never formally overruled it.²⁰ *Arizonans*, at least, stands for the principle that under current Supreme Court precedent, appellant-intervenors, including ballot initiative proponents, must have standing in order to independently argue an appeal.²¹

B. Basic Standing Requirements

Article III of the United States Constitution authorizes federal courts to entertain only actual cases or controversies.²² In addition to constitutional limits on standing, courts have imposed judicially crafted "prudential standing" limitations to deny standing when an injury is generalized among a population and not specific to an individual or a "distinct group."²³

To show Article III standing, a party must assert injury in fact, causation, and redressability.²⁴ Injury in fact means that there has been an invasion of a "legally protected interest" that is "concrete and particularized," while causation means that it is possible to trace the injury to the challenged action of the defendant.²⁵ Finally, redressability means that a court must be capable of taking some action to address the complained of injury.²⁶

The Court has recognized circumstances in which prudential standing requirements do not bar a suit. In *FEC v. Atkins*, for example, the Supreme Court found injury in fact where voters sought to compel the Federal Election Commission to enforce disclosures regarding membership, contributions, and expenditures by a political organization that arguably

the state's employment, the controversy became moot); *see also id.* at 74-75 (vacating the lower court's decision because it would be inequitable to allow a party to obtain a favorable result in a lower court and then act to moot the controversy before the case could be evaluated on appeal).

20. The quasi-legislative standing theory is beyond the scope of this Note. *See generally* Yniguez v. Arizona, 939 F.2d 727, 731-33 (9th Cir. 1991) (granting the official sponsors of an initiative quasi-legislative standing, because their efforts in obtaining the initiative's successful passage would be "essentially nullified" by allowing a ruling below to stand without appeal).

21. *See also* Order Granting Stay at 2, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Aug. 16, 2010) (requiring parties to brief the issue of proponents' standing).

22. U.S. CONST. art. III, § 2; *see also* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (noting that standing rules keep courts focused on issues that are resolvable through the judicial process).

23. *See, e.g.*, *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107-08 (1984) (denying standing when the Sierra Club could not show injury to itself or members living near an alleged polluter).

24. *See Steel Co.*, 523 U.S. at 102-03; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

25. *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

26. *See id.* at 568 (explaining that the plaintiffs failed to show redressability when a ruling would not bind non-party agencies whose regulations the plaintiffs sought to alter).

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fell under a statutory reporting requirement.²⁷ The Court found that the voters had standing, even though the grievance was widely shared, because the Federal Election Campaign Act authorized voter lawsuits and because Congress could relax prudential standing requirements through statute.²⁸ In this case, the Court also accorded voter standing a higher status than standing in other contexts.²⁹

III. ARGUMENT

Contrary to the contentions of proponents of Proposition 8, California state law does not “authorize” proponent standing.³⁰ There should be a reevaluation of the issue of voter standing when state officials fail to defend a popular initiative in federal court.³¹

A. State Law Does Not Authorize Proponent Standing

The proponents rely on *Karcher v. May* and a pair of California cases to argue that California law authorizes them to defend the constitutionality of Proposition 8.³² This argument is unpersuasive for two reasons. First, California has peculiar state standing rules that are distinct from federal standards.³³ Second, proponents cite cases that either reflect such local practice or are factually distinct.³⁴

In *Karcher*, the Supreme Court focused on the New Jersey Supreme Court’s willingness to grant the “application” of the leaders of the New Jersey legislature to assert standing on the legislature’s behalf.³⁵ However,

27. See *FEC v. Atkins*, 524 U.S. 11, 20-21 (1998) (noting that prudential standing requirements are satisfied when an injury is within the “zone of interests” provided for by a statute).

28. *Id.* at 19 (pointing to specific legislative language in the FECA allowing parties to file a complaint with the Commission and to dispute the result in federal court).

29. Compare *United States v. Richardson*, 418 U.S. 166, 176-80 (1974) (holding that a taxpayer alleging a Constitutional requirement for the CIA to report its expenditures had too generalized a grievance to obtain standing), with *Atkins*, 524 U.S. at 22 (distinguishing *Richardson*, in part, as being concerned with taxpayer, and not voter, standing).

30. See *infra* Part II.A.

31. See *infra* Part II.B.

32. See Proponents’ Motion, *supra* note 7, at 19.

33. See *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 16-18 (Ct. App. 2001) (explaining that the California Constitution does not have a “case or controversy” limitation and does not impose federal standing standards).

34. The cases proponents cite in footnote 8 of their brief involve factually distinct pre- or postelection reviews or have additional parties with standing on both sides. See, e.g., *Independent Energy Prod. Ass’n v. McPherson*, 136 P.3d 178, 179-81, 184-85 (Cal. 2006) (allowing initiative sponsors to defend postelection challenge to constitutionality of a defeated initiative).

35. See *Karcher v. May*, 484 U.S. 72, 81-82 (1987) (pointing out that when a new

in contrast to proponents' interpretation, the issue was not whether the New Jersey Supreme Court had granted the leaders special standing under federal law but whether it had granted them standing to represent the legislature, since U.S. Supreme Court precedent already allowed legislative standing.³⁶ The proponents of Proposition 8 exaggerate *Karcher*; state courts cannot simply grant anyone standing, as a matter of state law, to sue in federal courts.³⁷ Even if they could, in considering Proposition 8, the California Supreme Court never granted proponents such special standing, nor authorized them to represent the legislature or initiative voters.³⁸

Connerly v. State Personnel Board and *Costa v. Superior Court*—the primary cases that the proponents cite in their brief—offer little support for the theory that state law specifically authorizes initiative-proponent standing.³⁹ *Costa* concerned a preelection procedural challenge to the manner by which the proponents therein had prepared their ballot for a vote.⁴⁰ Since California election law tasks proponents in general with following certain procedures to bring a proposed initiative to vote, such proponents naturally have standing to make and answer procedural challenges.⁴¹

Proponents of Proposition 8 also misconstrue *Connerly* as expounding the point that initiative proponents have a direct interest in their initiative, once it has become law, above and beyond the general public.⁴² The language on which proponents rely comes from an earlier case asserting that initiative proponents have a “direct interest . . . over and above the interest held in common with the public.”⁴³ However, in that case, the dispute was also procedural and took place before any vote: those

election ousted the majority leaders from majority leadership positions, they could no longer represent the legislature).

36. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 823 (1997) (granting standing to legislators where their votes had been “nullified”).

37. See *id.* at 820 (noting that even Congress cannot abolish the requirements of injury, causation, and redressability).

38. See *Strauss v. Horton*, 207 P.3d 48, 69 & n. 5 (Cal. 2009) (noting without analysis that the court had granted proponents' application for intervention).

39. Cf. *Jasmine Networks, Inc. v. Superior Court*, 103 Cal. Rptr. 3d 426, 432 (Cal. Ct. App. 2009) (noting that California courts do not follow federal standing principles and have more lax requirements).

40. Cf. *Costa v. Superior Court*, 128 P.3d 675, 684-85, 693 (Cal. 2006) (distinguishing a procedural challenge from a challenge to a statute's substantive validity).

41. Compare CAL. ELEC. CODE § 10 (Deering 2010) (calling the Secretary of State the “chief elections officer”), with § 342 (defining proponents in narrow, procedural terms).

42. See Proponents' Motion, *supra* note 7, at 21-22 (citing *Connerly v. State Personnel Bd.*, 129 P.3d 1, 6-7 (Cal. 2006)).

43. *Connerly*, 129 P.3d at 7-8 (quoting *Sonoma Cnty. Nuclear Free Zone '86 v. Superior Court*, 234 Cal. Rptr. 357, 362 (1987)).

proponents were asserting that opponents to their proposed initiative could not file a ballot argument past a certain deadline.⁴⁴ Proponents simply cannot rely on California cases granting standing to initiative proponents in *procedural* disputes to argue that such cases grant a postelection stake in a successful initiative.⁴⁵

Ultimately, the California Constitution states that the people of California—not initiative proponents—directly possess the initiative power.⁴⁶ Only “the state, through its elected representatives[,] . . . possess[es] the exclusive power, to abandon or change the statutory scheme.”⁴⁷ Initiative proponents lack this power; they cannot change or abandon an adopted initiative unilaterally; rather, they must lobby the legislature or seek a new initiative to change the law.⁴⁸ If the people of California want state law to authorize initiative proponents to litigate the constitutionality of future propositions in federal court, they have a possible solution: they could attempt to exercise the initiative power to create such authorization.⁴⁹

B. The Proponents Should be Permitted to Assert Voter Standing Because the Exceptional Failure of the California Officials to Defend Initiative Interests Arguably Violates California Law and Requires Special Remedial Measures

In their opposition to the proponents’ stay motion, the respondents argue that no special injury distinguishes the proponents from the California voting public.⁵⁰ While it is true that the courts have prevented parties from asserting standing based upon a generalized grievance, this is not a constitutional requirement.⁵¹ In fact, the Supreme Court has explicitly distinguished abstract injuries, where there is no injury in fact, from

44. See *Sonoma Cnty.*, 234 Cal. Rptr. at 364 (holding that courts cannot exercise discretion and review argument deadlines).

45. See CAL. ELEC. CODE §§ 9000-96 (prescribing the procedural role of proponents in bringing an initiative to ballot).

46. See CAL. CONST. art. IV, § 1 (stating that “the people reserve to themselves the powers of initiative and referendum”).

47. See *Connerly*, 129 P.3d at 10 (holding that when an amicus curiae stepped in to defend challenged statutes and state agencies declined to do so, the agencies had to pay any awarded plaintiff’s fees).

48. See *Bldg. Indus. Ass’n v. City of Camarillo*, 718 P.2d 68, 74 (Cal. 1986) (noting that the people’s initiative power is coextensive with the power of the legislature).

49. Whether this could pass constitutional muster is beyond the scope of this Note. Cf. *Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986) (stating that the Illinois legislature “has the power to create new interests, the invasion of which may confer standing”).

50. Joint Opp. to Defendant-Intervenors’ Mot. for Stay, *supra* note 7, at 4.

51. See *Gladstone v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979) (holding that Congress can abrogate prudential standing limits).

generalized injuries.⁵²

Nevertheless, prudential concerns arise in *Perry*, because, unlike the voters in *Atkins*, the California proponents lack any statutory authorization to assert a generalized grievance.⁵³ In *Atkins*, a congressional grant overcame the prudential standing bar.⁵⁴ Proponents cannot point to a similarly favorable grant under California law.⁵⁵ Proponents might argue that the constitutional language granting initiative voting rights shows California's desire to "cast the standing net broadly,"⁵⁶ but the California Constitution does not actually "grant" anything. Instead, it reserves to the people a legislative power, not a judicial one.⁵⁷

A better argument is that, in an exceptional case such as this, the policy rationales for prudential standing do not apply.⁵⁸ A plurality of the Supreme Court once suggested in the third-party standing context that courts can temper prudential standing requirements when the underlying policy rationales for them are absent.⁵⁹ The plurality studied (1) whether the lawsuit would actually affect the enjoyment of a right of an absent party and (2) whether there was a genuine obstacle preventing the absent party, from asserting the right herself.⁶⁰ Although *Perry* is not a third-party standing case, it is analogously impractical for California's voters to assert their voting rights, such as through a new initiative because the lawsuit will be over too soon for one to take effect.⁶¹ Second, any decision for or against proponents would be binding on the people of California, because

52. See, e.g., *FEC v. Atkins*, 524 U.S. 11, 23-24 (1998) (noting that widely shared injuries are not always abstract injuries).

53. See *id.* at 19 (discussing how the Federal Election Campaign Act of 1971 allows individuals who suspect a violation of the act to file a complaint with the FEC and to file a petition in federal district court if they are "aggrieved" by an FEC dismissal of their complaint).

54. See *id.* (noting that use of the language "aggrieved" indicates congressional intent to cast the standing net widely).

55. Cf. *Connerly v. State Pers. Bd.*, 129 P.3d 1, 7 (Cal. 2006) (requiring an entity to have an interest "different in substance" from like-minded members of the general public to be a real party in interest for purposes of attorney fee liability).

56. Cf. *Atkins*, 524 U.S. at 19.

57. See *Martin v. Smith*, 1 Cal. Rptr. 307, 309 (Ct. App. 1959) (noting that the referendum is a reserved power of the people, not a granted power).

58. See *Singleton v. Wulff*, 428 U.S. 106, 113-16 (1976) (plurality decision) (arguing that when a third party has a close relationship with an absent litigant and the absent litigant faces a genuine obstacle to asserting her own interests, courts should allow standing).

59. See *id.* (focusing on the relationship between the third party and the one asserting the third party's rights, as well as the ability of the third party to assert rights directly).

60. See *id.* at 115-16; see also *id.* at 116 (Powell, J., concurring) (rejecting a "genuine obstacle" test and adopting an "in all terms impractical" test instead).

61. Cf. Order Granting Stay at 1-2, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Aug. 16, 2010) (expediting the appeal).

the constitutionality of a statute affects everyone who voted for it; in fact, not allowing an appeal would bind voters anyway.⁶² Thus, by analogy, the rationales for prudential standing are muted in this case.

Asking California voters to rely on their representatives to assert their rights does not effectively protect their voting rights, either, because California law only ambiguously imposes an obligation on the executive branch to defend state statutes.⁶³ There is a real possibility that the incumbent state government can collude with a plaintiff to get a case into court, lose by default, and thereby nullify a popular vote.⁶⁴

The proponents' case is distantly reminiscent of *Baker v. Carr*, in which the Court noted that voters could challenge state actions that unconstitutionally deprive citizens of a voting right.⁶⁵ As Justice Clark noted in his concurrence, without standing, the voters of Tennessee had no way to obtain vindication at the polls for a districting scheme that favored rural areas over urban areas.⁶⁶ Similarly, the people of California can only belatedly punish the choice of their state representatives to acquiesce; if the district court decision stands, there is nothing the people of California can do.⁶⁷ This situation conflicts with the importance that California courts have placed upon the initiative power.⁶⁸

IV. CONCLUSION

California law has high regard for the initiative power and likely does not contemplate the disenfranchisement of initiative proponents when the State has declined to defend a statute enacted by initiative. This Note has argued that the exceptional circumstance of named state defendants ignoring their (arguable) duties under a state constitution requires courts to vindicate the people's interests through relaxed prudential requirements for voter

62. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 135 (1986) (pointing out that a lower court's determination of a state's statute as unconstitutional is binding when parties acquiesce below).

63. See *Connerly v. State Pers. Bd.*, 129 P.3d 1, 9-10 (Cal. 2006) (refusing to decide whether state agencies must defend state laws in court).

64. See, e.g., *Yniguez v. Arizona*, 939 F.2d 727, 733 (9th Cir. 1991) (pointing out that the people use the initiative precisely because they do not believe the normal process of government will be "sensitive to popular will with respect to a particular subject").

65. See *Baker v. Carr*, 369 U.S. 186, 207-08 (1962) (explaining that the Constitution protects citizens from state action impairing their vote).

66. See *id.* at 258-59 (Clark, J., concurring) (arguing that the people of Tennessee had no "practical opportunities for exerting their political weight at the polls").

67. Cf. CAL. CONST. art. V, § 7 (imposing a duty on the state Attorney General to enforce the California laws).

68. See *Martin v. Smith*, 1 Cal. Rptr. 307, 309 (Ct. App. 1959) ("[I]t is the duty of the courts to jealously guard this right of the people and to prevent any action which would improperly annul that right.").

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standing. Nor does it make sense to console voters by pointing to their representatives; the people of California used the initiative in the first place because the normal representative process had failed them. Political voting will not always vindicate such rights. It is a quintessential function of the courts to “jealously guard” the people’s rights, and, were it not for the exceptional acquiescence of the California executives, this would be exactly the kind of case or controversy courts routinely resolve.