No. 12-144

In the
Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,
Petitioners,
v.
KRISTIN M. PERRY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WARD CONNERLY, RON UNZ, GLYNN CUSTRED, AND THE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether petitioners have standing under Article III, Section 2, of the Constitution in this case.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation, Ward Connerly, Ron Unz, Glynn Custred, and the Howard Jarvis Taxpayers Association respectfully submit this brief amicus curiae, in support of neither party, to address solely the additional question posed by the order granting certiorari: "Whether petitioners have standing under Article III, Section 2, of the Constitution in this case."[1]

Pacific Legal Foundation (PLF) is a public interest legal foundation that litigates for limited government, private property rights, free enterprise, and individual rights. PLF has been the leading courtroom champion of several historic California ballot measures that promoted PLF's core principles. For instance, PLF took the lead as counsel in cases directly enforcing Proposition 209 (Article I, Section 31, of the California Constitution), which bars discrimination and preferences in government contracting, employment, and education on the basis of race, ethnicity, or sex. *See*, *e.g.*, *Coral Constr., Inc. v. City & County of San Francisco*, 235 P.3d 947 (Cal. 2010); *C&C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284 (2004); *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002); *Connerly v.*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

State Pers. Bd., 92 Cal. App. 4th 16 (2001); and *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

PLF has also represented Proposition 209's sponsors to defend the measure from legal challenges. *See*, *e.g.*, *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012) (representing Proposition 209 sponsor Ward Connerly and the American Civil Rights Foundation to defend Proposition 209 against a federal Equal Protection challenge); *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir. 1997) (representing Californians Against Discrimination and Preferences—the political committee that led the electoral campaign for Proposition 209—against a federal challenge to the initiative). In like manner, PLF represented sponsors of Proposition 140, the legislative term-limits initiative, in their defense of the initiative against a constitutional challenge. *See Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991).

Ward Connerly is founder and president of the American Civil Rights Institute and was chief sponsor of Proposition 209. Because of the frequent refusal of various local and state officials to abide by Proposition 209's mandates, Mr. Connerly in his individual capacity and through the American Civil Rights Foundation, litigated against violations of the initiative and intervened to defend Proposition 209. *See*, *e.g.*, *Connerly*, 92 Cal. App. 4th 16; *American Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (2009); and *American Civil Rights Found. v. Los Angeles Unified Sch. Dist.*, 169 Cal. App. 4th 436 (2008). Through Proposition 209's sponsorship

committee, Mr. Connerly intervened to defend the measure from a constitutional challenge when some of the government defendants agreed with the challenge. *Coal. for Econ. Equity*, 122 F.3d 692. Recently, Mr. Connerly and the American Civil Rights Foundation intervened to successfully defend Proposition 209 in another federal challenge where the state defendants failed to defend Proposition 209 on the merits. *See Coal. to Defend Affirmative Action*, 674 F.3d 1128.

Glynn Custred was one of the authors and principal sponsors of Proposition 209. He joined Mr. Connerly, as part of Proposition 209's sponsorship committee, in intervening to defend the measure in *Coal. for Econ. Equity*, 122 F.3d 692.

Ron Unz was the author and co-sponsor of Proposition 227, the "English for the Children" initiative, adopted by the California electorate in 1998. Proposition 227 replaced California's bilingual education programs in public schools with a system of sheltered English immersion. Through his organization One Nation/One California, Mr. Unz intervened to defend his initiative against a constitutional challenge. *See Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1011 n.3 (N.D. Cal. 1998), *aff'd sub nom.*, *Valeria G. v. Davis*, 307 F.3d 1036 (9th Cir. 2002).

The Howard Jarvis Taxpayers Association was founded by Howard Jarvis, shortly after California voters approved his property tax limitation measure, Proposition 13, in 1978. Since that time, the Howard Jarvis Taxpayers Association repeatedly sponsored and supported successful ballot initiatives, including, in 1986, Proposition 62, which provides that general

taxes must receive a majority vote from local voters to be effective, and, in 1996, Proposition 218, which requires voter approval for various fees and assessments at the local level. The Howard Jarvis Taxpayers Association regularly sues government officials and agencies to enforce these measures. *See*, *e.g.*, *Howard Jarvis Taxpayers Ass'n v. City of Fresno*, 127 Cal. App. 4th 914 (2005); *Howard Jarvis Taxpayers Ass'n v. County of Orange*, 110 Cal. App. 4th 1375 (2003); *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, 98 Cal. App. 4th 1351 (2002); *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 23 P.3d 601 (Cal. 2001); and *Howard Jarvis Taxpayers Ass'n v. State Bd. of Equalization*, 20 Cal. App. 4th 1598 (1993). Recently, in a case resulting in an unpublished decision, the association intervened to successfully defend Proposition 13 from legal attack. *Young v. Schmidt*, No. B230629, 2012 Cal. App. Unpub. LEXIS 5435 (Cal. Ct. App. July 24, 2012). *See* Kenneth Ofgang, *State Supreme Court Declines to Hear Proposition 13 Challenge*, METRO. NEWS-ENTER., Nov. 21, 2012.[2] In *Santa Clara County Local Transp. Auth. v. Guardino*, 902 P.2d 225 (Cal. 1995), Howard Jarvis Taxpayers Association appealed as the real party in interest to defend Proposition 62 against a local government's constitutional attack. 902 P.2d at 236-51.

A threshold issue in this case is whether sponsors of successful California ballot initiatives have standing to defend their handiwork in federal court, in particular when elected officials decline to provide a defense. Because all of the Amici on this brief have

[2] *Available at* http://www.metnews.com/articles/2012/conf112112.htm.

authored, sponsored, and/or defended successful California ballot initiatives against legal challenges, they share a vital interest in having sponsors' standing conclusively recognized, and they bring litigation experience and an informed perspective that can assist this Court's deliberations.

SUMMARY OF ARGUMENT

If California voters enact a ballot measure, may elected officials effectively veto it—simply by refusing to defend it in the face of legal challenges—or may the initiative's sponsors step in to provide legal representation?

This Court, in assessing whether sponsors of a state ballot initiative may defend their handiwork in federal court, asks whether the state's law allows sponsors to be, in essence, deputized for that duty. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997).

The California Supreme Court answered that California law does indeed assign sponsors this authority, when elected officials choose not to exercise theirs. In response to a certified question from the Ninth U.S. Circuit Court of Appeals in this case, the state's highest court verified that sponsors of successful California ballot initiatives are accorded standing in order to ensure that measures approved at the polls—and, by extension, the voters who approved them—do not lack for legal representation. *Perry v. Brown*, 265 P.3d 1002, 1007-08 (Cal. 2011).

This brief is submitted in support of neither party, but rather to demonstrate that the state Supreme Court's holding accurately reflects the initiative power's purpose, structure, and process. The holding

also protects the constitutionally guaranteed prerogatives of the people of California, ensuring that their rights, interests, and legislative enactments should not be deprived of a legal defense.

ARGUMENT

I

SPONSORS' STANDING TO DEFEND THEIR BALLOT MEASURES IS GROUNDED IN THE INITIATIVE POWER'S PURPOSE, STRUCTURE, AND PROCESS

The constitutionally based purpose and structure of the initiative power, and its statutorily based process, establish that sponsors of successful California ballot initiatives have authority to defend them in court, particularly when elected officials decline to do so.

A. The Purpose of the Initiative—to Allow the People to Exercise Their Sovereignty and Bypass Elected Officials—Bars Elected Officials From Interfering by Act or Omission

The California Supreme Court's holding that sponsors may defend voter-enacted initiatives, particularly when elected officials refuse to do so, is mandated by the purpose of the California initiative process: to ensure voters a direct means of redressing abuse or bypassing intransigence among the elected branches of government. *See* Cal. Const. art. II, § 8(a) ("The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them."). This purpose would be

nullified if initiatives could effectively be repealed by elected officials declining to defend them in court.

The initiative power permits voters to act as citizen-legislators, by enacting laws and constitutional amendments through direct democracy. *Id.* California voters added this power to the state constitution in 1911, along with two other instruments of direct democracy—the referendum and recall—in the heyday of California's Progressive Movement. *See* Joseph R. Grodin, et al., *The California State Constitution: A Reference Guide* 16 (1993).[3]

The immediate target of the reformers was the Southern Pacific-Central Pacific Railroad and what was seen as its oppressive use of political, lobbying, and financial power. Spencer C. Olin, *California's Prodigal Sons: Hiram Johnson and the Progressives* 5, 12-17 (1968). But the reforms were founded on a doctrine that transcended the moment—the declaration of Article I, Section 2, of the state constitution: All political power is inherent in the people. Grodin, *supra*. The link drawn by the constitution's text, between the voters' sovereignty and the voters' power of initiative, is unambiguous: "The legislative power of this State is vested in the California Legislature . . ., but the people reserve to themselves the powers of initiative and referendum." Cal. Const. art. IV, § 1.

The initiative's purpose of providing the people a means of protection and redress from corruption or laxness of elected officials was made clear from the

[3] Joseph R. Grodin was a justice of the California Supreme Court from 1982 to 1987. *See* "Past and Present Justices," *available at* http://www.courts.ca.gov/12523.htm.

outset—by the chief proponent of enacting the initiative process, Gov. Hiram Johnson, in his 1911 inaugural address:

> How can we best arm the People to protect themselves hereafter? If we can give to The People the means by which they may accomplish such other reforms as they desire, the means as well by which they may prevent the misuse of the power temporarily centralized in the Legislature and an admonitory and precautionary measure which will ever be present before weak officials, ... This means for accomplishing other reforms has been designated the "Initiative and the Referendum," and the precautionary measure the "Recall." And while I do not by any means believe [they] are the panacea for all our political ills, yet they do give to the electorate the power of action when desired, and they do place in the hands of The People the means by which they may protect themselves. [They represent] the first step in our design to preserve and perpetuate popular government.

Quoted in V.O. Key, Jr. & Winston W. Crouch, *The Initiative and the Referendum in California* 435 (1939).

Time and again, voters have taken the reins and used the initiative for precisely the purpose articulated by Gov. Johnson—to respond to inaction or perceived wrongs by elected officials. *See*, *e.g.*, *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 881 (Cal. 2011) (voters acted to curb "shakedown lawsuits" being filed under a state consumer-protection law); *Hi-Voltage*,

12 P.3d 1068 (voters outlawed race- and sex-based discrimination in public employment, contracting, and education); *Valeria G.*, 12 F. Supp. 2d 1007, *aff'd*, 307 F.3d 1036 (voters replaced California's bilingual education programs in public schools with a system of sheltered English immersion); *Eu*, 816 P.2d 1309 (voters approved term limits for state legislators); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978) (voters limited property taxes).

In litigation over Proposition 140, the initiative that imposed term limits on members of the Legislature, the California Supreme Court opined that permitting elected officials to interfere with the people's initiative power would dilute its purpose to allow voters to pull rank on elected officials and enact reforms at which the elected branches have balked.

> To hold that reform measures such as Proposition 140, which are directed at reforming the Legislature itself, can be initiated only with the Legislature's own consent and approval, could eliminate the only practical means the people possess to achieve reform of that branch. Such a result seems inconsistent with the fundamental provision of our Constitution placing "[a]ll political power" in the people. (*Id.*, art. II, § 1.) As that latter provision also states, "Government is instituted for [the people's] protection, security, and benefit, and they have the right to alter or reform it when the public good may require."

Eu, 816 P.2d at 1320.

If a voter-enacted initiative can take effect only if the governor or the attorney general agrees to defend it against legal challenges, then the initiative power's primary, constitutionally grounded purpose—as a "means [for] *the people* . . . to achieve reform," *id.* (emphasis added)—is subverted; what is supposed to be a right of the electorate becomes a *privilege* that can be bestowed or withheld by elected officials at whim.

For this reason, the state supreme court's recognition that elected officials are not the only parties permitted by California law to defend initiatives—but that sponsors may step forward if politicians step back—is the only possible holding, the only interpretation that comports with the initiative's constitutionally articulated purpose of empowering the people.

B. The Structure of the Initiative—Which Denies Elected Officials Any Role in Approving or Disapproving Ballot Measures—Bars Either Direct or Indirect Vetoes of Initiatives

The California initiative power is structured to reflect its purpose—*i.e.*, to give voters a means to bypass elected officials through the exercise of direct democracy. As an institutional expression of the people's sovereignty, the initiative is explicitly structured to be free from political interference. For instance, the Legislature may not amend or repeal a law so adopted without voter approval, unless the ballot measure provides otherwise. Cal. Const. art. II, § 10(c). California is the only state with an initiative process that denies legislators this power. *See* Grodin, *supra*, at 69. Moreover, the governor has no authority either to ratify or to block an initiative proposal. *See*

Cal. Const. art. II, § 10(a); and *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360, 1364 n.5 (Cal. 1991).

These provisions reflect a shared conviction among the California Progressives: They "did not like intermediaries" between the electorate and its right to turn popularly supported proposals into law. Jim Moroney, *The Initiative in Theory and Practice* 7 (1980) (citations omitted). A veto power, either by the legislative or executive branch, is therefore incompatible with the constitutional structure of the initiative power. Indeed, to forbid alternative means of defense—when politicians refuse to represent an initiative in court—would, in essence, arbitrarily *amend* (and undermine) the constitutional structure of the initiative power. The California Supreme Court's holding that sponsors have standing in such cases—to provide a defense so that politicians may not perpetrate pocket vetoes—enforces the constitution's principle that there should be no vetoes of initiatives by elected officials.

The holding also flows from the state constitution's recognition of the people's sovereignty, because that sovereignty would be diminished by permitting politicians to arbitrarily derail initiatives—either directly or indirectly. "[W]hen state officials block initiatives by surreptitiously undermining them," they assault the electorate's role in the governing process, because "they follow their own preferences rather than those of the voters, and they do so in ways designed to reduce accountability." Elizabeth Garrett & Matthew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. Cal. L. Rev. 299, 310 (2007). In summary, the California Supreme Court's holding is

mandated by the constitution's structure, in particular its prohibition on political vetoes of initiatives.

C. The Process of Enacting Initiatives—According Special Status to Sponsors—Makes Sponsors the Logical Parties to Defend Their Initiatives When Elected Officials Refuse to Do So

The seminal role of initiative sponsors—as "propos[ers]" of ballot measures—is explicitly recognized in the California Constitution. *See* Cal. Const. art. II, § 8(a) ("The initiative is the power of the electors to *propose* statutes and amendments to the Constitution and to adopt or reject them." (emphasis added)).

The California Election Code fleshes out the special status of initiative sponsors. For instance, sponsors must "submit the text of [the proposed measure] to the Attorney General" for preparation of a title and summary. Cal. Elec. Code § 342. They must oversee the signature-gathering process (*id.* §§ 9607, 9608, and 9609). And, following signature-gathering, they *alone* may file the petition with election officials. *Id.* § 9032.

As originators and, in essence, legally appointed "midwives" of their own initiative measure, an initiative's sponsors have a unique interest in its defense, and expertise in its structure, purpose, and other matters that could be expected to arise in litigation. Indeed, their link to their handiwork is even closer than the connection of some counsel who, simply by virtue of their general expertise, have been invited by this Court to step in to argue on behalf of laws or legal principles that would otherwise go unrepresented

in litigation. For instance, when this Court was considering a statute that was held below to have overruled *Miranda v. Arizona*, 384 U.S. 436 (1966), the Justice Department refused to defend the statute. *See United States v. Dickerson*, 166 F.3d 667, 672 (4th Cir. 1999), *rev'd on other grounds*, *Dickerson v. United States*, 530 U.S. 428 (2000). Therefore, an outside attorney was asked to provide a defense. *Dickerson v. United States*, 528 U.S. 1045 (1999) (inviting Paul G. Cassell to brief and argue in support of the appellate court's holding).[4]

To ensure full and fair resolution of initiative-based disputes, California law also allows appropriate parties outside of the government to be, in essence, deputized when initiatives enacted by voters would otherwise lack legal representation because elected officials have excused themselves. The California Supreme Court's holding—that it is *an initiative's sponsors* whom California law allows to be deputized in such cases—flows naturally, indeed necessarily, from the special status and duties accorded to them by the California Constitution and the California Election Code.

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[4] *See* Professor Michael C. Dorf, *Ballot Initiative Sponsor Standing*, DORF ON LAW BLOG (Aug. 9, 2010, 12:34 AM), http://www.dorfonlaw.org/2010/08/ballot-initiative-sponsor-standing.html

II

SPONSORS' STANDING ENSURES THAT THE PEOPLE OF CALIFORNIA—THEIR RIGHTS, INTERESTS, AND ENACTMENTS—WILL NOT BE DEPRIVED OF A DEFENSE IF CHALLENGED IN COURT

The state constitution establishes the initiative power as "[resting on] the theory that all power of government ultimately resides in the people," and "articulating *one of the most precious rights* of our democratic process." *Fair Political Practices Comm'n v. Superior Court*, 599 P.2d 46, 50 (Cal. 1979) (citations omitted; emphasis added).

The California Supreme Court's holding that California law permits sponsors of voter-enacted initiatives to defend them if elected officials decline to do so, flows by definition from the constitutional doctrine that the initiative is, indeed, a "precious right." Any other holding would amount to a constitutional contradiction—a right that is at once "precious" and yet permitted to be the subject of one-sided legal challenges, with no defense allowed for either the initiative itself or the voters who enacted it, if elected officials choose to stand aside.

Without California law's recognition that the sponsors of voter-enacted initiatives may defend them in court, some landmark ballot measures might have been nullified by the active or passive opposition of public officials. For instance, because of the refusal of successive California Attorneys General to enforce Proposition 209, Ward Connerly and the American Civil Rights Foundation have had to take it upon themselves to ensure that all levels of California

government abide by this provision's ban on discrimination and preferential treatment in public employment, education, and contracting. Similarly, the Howard Jarvis Taxpayers Association has found it necessary to enforce its sponsored initiatives against recalcitrant government jurisdictions. Likewise, attorneys with Pacific Legal Foundation have frequently been called upon to enforce and defend ballot measures, often on behalf of those measures' sponsors. *See* cases listed in Identity and Interest of Amici Curiae, above, pages 1-4.

The many instances where ballot measures enacted by the people have had to be defended from, enforced against, or upheld and applied in spite of the efforts of politicians, demonstrates why officials are given no role in the initiative-enactment process. The initiative power is a "precious right" specifically allowing the people to *bypass* officeholders and directly shape their collective destiny.

The state supreme court's unanimous holding that sponsors may defend initiatives is the only credible interpretation of the state constitution on this point. The holding bars politicians from seizing, indirectly, a veto power that the state constitution explicitly denies, and thereby protects for the public a legislative power that the constitution explicitly grants.

CONCLUSION

On the question of whether sponsors of voter-enacted ballot initiatives have standing in federal court, this Court asks whether state law recognizes their authority to represent their initiatives

in litigation. *Arizonans for Official English*, 520 U.S. at 65-66. With respect to California law, the California Supreme Court has answered in the affirmative—a holding that reflects the relevant state constitutional and statutory provisions, and ensures that successful ballot measures, and the voters who enact them, cannot be denied legal representation at the whim of elected officials. This Court should recognize, therefore, that Petitioners in this case have Article III standing.

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