



# Iowa General Assembly

## 2013 Legal Updates

Legislative Services Agency – Legal Services Division

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**Purpose.** *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

### **STANDING DENIED REGARDING CALIFORNIA PROPOSITION ON SAME-SEX MARRIAGE PREVIOUSLY HELD UNCONSTITUTIONAL**

Filed by the United States Supreme Court  
June 26, 2013

**Hollingsworth v. Perry**

No. 12-144

[http://www.supremecourt.gov/opinions/12pdf/12-144\\_8ok0.pdf](http://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf)

**Background.** In May 2008, in *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384, the California Supreme Court held that limiting marriage under two California statutes to only opposite-sex couples violated the Equal Protection Clause of the California Constitution, and thereafter same-sex couples were allowed to marry in the State of California (State). Following the decision, in November 2008, Proposition 8, a ballot initiative, was passed amending the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. The measure was challenged in the California Supreme Court, which held in *Strauss v. Horton*, 207 P. 3d 48 (May 26, 2009), that Proposition 8 was properly enacted, but that marriages performed before it went into effect would remain valid. The California Supreme Court reasoned that because California law recognized domestic partnerships, Proposition 8 created only a narrow and limited exception to the constitutional rights guaranteed same-sex couples: that of the official designation of the term “marriage.”

Two same-sex couples who wished to marry filed an appeal in federal district court challenging Proposition 8 under the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution. The named defendants included the governor, attorney general, and other state and local officials responsible for enforcing the State's marriage laws. However, the named officials refused to defend the law even while continuing to enforce it. The federal district court allowed petitioners, the official proponents of the Proposition 8 initiative, to intervene to defend the initiative. The federal district court held Proposition 8 to be unconstitutional and permanently enjoined the California officials named as defendants from enforcing the law. The California officials chose not to appeal, but the petitioners appealed to the Ninth Circuit Court of Appeals. After briefing and argument, the Ninth Circuit certified a question to the California Supreme Court inquiring whether the official proponents of an initiative measure possess a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity when the public officials charged with the duty of defending the constitutionality of the initiative refuse to do so. The California Supreme Court responded in the affirmative that the official proponents of the initiative are authorized under California law to appear and assert the State's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials charged with this duty decline to do so.

Based on this response, the Ninth Circuit determined that the petitioners had standing under federal law to defend the constitutionality of Proposition 8, since the State, as an independent sovereign, could decide who may assert its interest. The Ninth Circuit affirmed the federal district court decision that Proposition 8 violated the Equal Protection Clause, that taking away the official designation of marriage while affording all of the rights and obligations to same-sex couples did not further any legitimate state interest of the State, and that Proposition 8 only served to impose a majority's private disapproval through public law on gays and lesbians.

The United States Supreme Court (Court) granted certiorari to review the determination and directed the parties to brief and argue whether the petitioners had standing under Article III of the United States Constitution. Chief Justice Roberts delivered the opinion of the Court in which Justices Scalia, Ginsburg, Breyer, and Kagan joined.

**Issue—Article III Standing.** The judicial power of the federal courts is limited to deciding actual cases or controversies.

Standing is one aspect of this requirement. To demonstrate standing, a litigant must prove that the person has suffered a concrete and particularized injury, fairly traceable to the challenged conduct, that is likely to be redressed by a favorable judicial decision. That is, a party must seek a remedy for a personal and tangible harm. Article III also requires that the actual controversy persist throughout all stages of litigation.

**Particularized Interest.** The parties did not contest that the respondents, the couples wishing to marry, had Article III standing to challenge enforcement of Proposition 8. However, once the federal district court held Proposition 8 to be unconstitutional and enjoined state officials from enforcing the law, the respondents did not have an injury to redress and the state officials did not appeal. The only parties that remained interested in appealing the decision were the petitioners, the interveners in the case.

The petitioners argued that the California Constitution and election laws give them a special role in the initiative process. Once they submit the proposed initiative to the attorney general, they become the official proponents. The Court, however, noted that while the petitioners have a special role during the process of enacting the law, once Proposition 8 was approved, the petitioners no longer had a special role in enforcing the law, nor a personal stake distinguishable from the general public in its enforcement. The petitioners' interest is not the particularized interest required by Article III to create a case or controversy.

**Representing the Interest of the State.** The petitioners next argued that while they might not have a particularized interest of their own, they were representing the interest of the State of California. The Court responded that a litigant must assert the litigant's own legal rights and interests, the litigant's own injury in fact, and not that of a third party.

The petitioners contended that the case before the Court was different as to their assertion of the State's interest because the California Supreme Court had previously determined that they were authorized to appear and assert the State's interest regarding Proposition 8. The district court had then agreed that all the federal court needed to determine was that the State had suffered a harm sufficient to confer standing, and that the party seeking to invoke the jurisdiction of the court was authorized by the State to represent the State. The petitioners asserted that they need not show a personal injury separate from the State's interest in the validity of the law, as with the attorney general or legislative leaders held to have standing in *Karcher v. May*, 484 U.S. 72 (1987).

The Court responded that in *Karcher*, the two New Jersey state legislators, the presiding officers of the Senate and the House of Representatives, were determined to have standing in their official positions to intervene to defend the constitutionality of a law when the attorney general declined to do so because state law designated them as agents of the state to do so in federal court. However, when the two legislators subsequently lost their elections and their official positions as legislators during the pendency of the litigation, they also lost standing. The Court also distinguished the present case from others highlighted by the petitioners, including a case regarding the constitutionality of English as the official language of Arizona, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1996). In that case, the principal sponsor of the ballot initiative, the Official English Committee, sought to appeal after the district court declared the initiative unconstitutional and the governor announced that she would not pursue an appeal. The Ninth Circuit analogized the Committee to the Arizona Legislature and determined it was qualified to defend the initiative on appeal. Before the case was mooted by other events, the Court expressed grave doubts as to this analysis, noting that while legislators may have standing, the Official English Committee was not comprised of elected officials and there was no Arizona law appointing the Committee as agents of the people of Arizona to defend the initiative in lieu of public officials.

Petitioners responded that by virtue of the California Supreme Court's decision, they are authorized to act as the agents of the people of California. The Court reasoned instead that all the California Supreme Court decision stands for is that the petitioners may argue in defense of Proposition 8, a generalized interest. Petitioners are not agents of the State; the basic features of an agency relationship including the principal's ability to control the agent, the fiduciary duty of the agent to the principal, and the principal's duty to indemnify the agent against expenses incurred in an action, are missing. Neither the Ninth Circuit nor the California Supreme Court ever described the petitioners as agents of the State, and they are not qualified to be agents.

Finally, the Court noted that while the Court did not question California's sovereign right to maintain an initiative process, nor disparage the reasoning of the California Supreme Court in deciding that State law authorized petitioners to defend Proposition 8, standing in federal court is a matter of federal law, not state law. The Article III requirement that a party seek relief for a personal, particularized injury ensures that the limited role of the federal judiciary is maintained. The Court had never upheld standing of a private party to defend the constitutionality of a state statute when state officials chose not to, and declined to do so in this case. The Court concluded that the Ninth Circuit was without jurisdiction to consider the appeal, vacated the judgment of the Ninth Circuit, and remanded the case with instructions to dismiss the appeal for lack of jurisdiction.

**Holding.** The official proponents of Proposition 8, a ballot initiative amending the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California, did not have Article III standing to appeal an adverse decision when public officials refused to do so.

**Dissent.** Justice Kennedy filed a dissenting opinion in which Justices Thomas, Alito, and Sotomayor joined. The dissenting opinion agreed that a proponent's standing to defend an initiative in federal court is a question of federal law.

However, there is a threshold question of how California law defines and elaborates the status and authority of an initiative's proponents who seek to intervene in court after the initiative's adoption by the electorate. Under California law, a proponent is authorized to appear in court and assert the State's interest in defending an enacted initiative when the public officials charged with that duty decline to do so. The majority concluded that the State-conferred authority falls short of meeting federal requirements because the proponents did not receive a formal delegation of authority that meets the requirements of the Restatement of Agency. Article III does not require California to comply with the Restatement of Agency or the Court's view on how the State should make its laws or structure its government. The initiative system in California is based on fundamental principles and dynamics that use the initiative mechanism to bypass and control public officials. This decision will affect other states with initiative processes.

The State of California received a concrete injury when the federal district court nullified Proposition 8. The California Elections Code does not expressly prescribe the terms and duties or rights of proponents once an initiative becomes law. However, it is up to a state to determine the substance of state law, and the California Supreme Court determined that the proponents do have authority under California law to appear and assert the State's interest in the initiative's validity and appeal a judgment invalidating the measure when public officials decline to do so. Official proponents are a small, identifiable group. They know and understand the proposed law, their commitment is substantial, and they have a stake in the outcome. The proponents play a unique role in the initiative process, as specified in the California Constitution and the Elections Code. The very object of the initiative process is to establish a law-making process that does not depend on state officials. Additionally, the conventional agency relationship is inconsistent with the history, design, and purpose of the initiative process. The Court's precedents do not indicate that a formal agency relationship is necessary. Both the California Supreme Court and the Court of Appeals of California determined that the proponents satisfied the requirements of Article III. The Court has permitted individuals to assert claims on behalf of the government and others such as in the case of the appointment of special prosecutors, *qui tam* actions, next friend litigation, and shareholder-derivative suits. The prime purpose of justiciability is to ensure vigorous advocacy, and is meant to ensure that courts are responsible and constrained in their power. The most basic premise of the initiative process is that the right to make law rests in the people and flows to the government. The Court frustrates the choice of the people to govern themselves by nullifying a state supreme court decision holding that state law authorizes an enacted initiative's proponents to defend the law if the usual advocates decline to do so.

**Impact on Iowa Law.** The issue before the United States Supreme Court was whether the petitioners had standing under Article III of the United States Constitution to defend the constitutionality of Proposition 8. Even though the basis for the case was the initiative process, the decision is instructive to states without an initiative process in determining whether certain citizens may act as agents of the state to defend a law when public officials decline to do so. In this case, the Court required the petitioners to assert a particularized interest rather than a generalized interest and to be elected or appointed agents of the state who met the requirements of an agency relationship pursuant to the Restatement of Agency. Additionally, even though the California Supreme Court determined that the petitioners had standing to appeal, standing in federal court is a matter of federal law, and the United States Supreme Court had never upheld standing of a private party to defend the constitutionality of a state statute when state officials chose not and declined to do so.

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