No. S189476

IN THE SUPREME COURT OF CALIFORNIA

KRISTIN M. PERRY, et al., Plaintiffs and Respondents,
CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, Intervenor and Respondent

v.

EDMUND G. BROWN, JR., as Governor, etc., et al., Defendants;
DENNIS HOLLINGSWORTH, et al., Defendants, Intervenors and Appellants.

Question Certified from the U.S. Court of Appeals for the Ninth Circuit
The Honorable Stephen R. Reinhardt, Michael Daly Hawkins and N. Randy Smith, Circuit Judges, Presiding
Ninth Circuit Case No. 10-16696

AMICUS BRIEF OF LEAGUE OF WOMEN VOTERS OF CALIFORNIA FILED IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND CITY AND COUNTY OF SAN FRANCISCO

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APPLICATION BY LEAGUE OF WOMEN VOTERS OF CALIFORNIA TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND CITY AND COUNTY OF SAN FRANCISCO

The League of Women Voters of California applies for leave to file the attached amicus curiae brief.

Interests of the League:

Formed in 1920, the League is a nonpartisan political organization that encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. It does not support or oppose any political party or any candidate.

The League has a dual mission: educating voters and the community at large, and advocating for changes in public policy. In its education role, the League strives to present information in a completely neutral manner. The goal is to provide voters with the information they need to make their own decisions and to create a well-informed community in general. In its advocacy role, the League bases all its work on positions that are arrived at through member education, discussion and consensus.

In both its voter education and advocacy roles, the League has been deeply involved in the initiative process. In educating the public, the League provides nonpartisan information about all propositions on the California ballot. In its advocacy role, the League has actively supported particular initiatives and opposed others. In addition, the League has conducted two statewide member studies of the initiative and referendum

process in California and, based on these studies, supports citizens' right of direct legislation through the initiative and referendum process. The League has advocated in the legislature for measures that would improve the initiative process and against measures that would undermine its rational and appropriate operation.

Accordingly, the League respectfully requests permission to file the attached amicus curiae brief, which discusses matters critical to the operation of California government and the initiative process.

Rule 8.520(f) Requirements

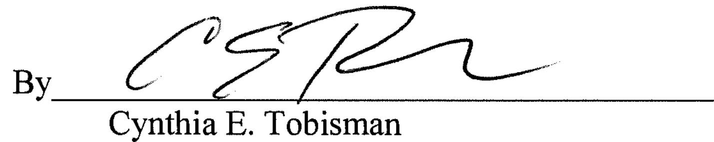
Counsel has read the parties' briefs on the merits and believes that the proposed amicus brief will assist the Court in deciding the issue presented. The proposed brief from an organization concerned with vindicating the broader interests in functional government summarizes the history of the initiative power and discusses the wide-ranging practical problems with permitting private individuals to represent the interests of the State, rather than speaking on behalf of their own private interests (assuming they can establish such particularized interests).

No party, counsel for a party, or anybody other than counsel for amici has authored the proposed brief in whole or in part or funded the preparation of the brief.

Dated: April 29, 2011

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow
Cynthia E. Tobisman

By 
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INTRODUCTION

The path that Intervenors present is an invitation to chaos. The Court should decline to take it.

Because there is no explicit right in the California Constitution for initiative proponents to act on behalf of the State (see Plaintiffs' Ans. Br. 9-19; City of S.F. Ans. Br. 7-32), the question before this Court is whether, as Intervenors argue, "constitutional necessity" *requires* that they be able to do so (see Intervenors' Opening Br. 24). The answer must be no.

Especially in light of the initiative system's legislative excesses, the executive and judicial branches of government play essential roles in ensuring that California's laws remain workable and constitutional. Those roles will become impossible to discharge if, as Intervenors advocate, initiative proponents can stand in the shoes of the State if they disagree with the State's litigation decisions.

The Constitution gives no special status to the official proponents of an initiative. Accordingly, if Intervenors may speak on behalf of the State, there is no principled reason why *any* elector who supported the initiative cannot do the same.

In order for California's government to function in an orderly manner, the State must speak with one voice in cases involving initiative measures. This means that initiative proponents cannot be permitted to speak on behalf of anyone other than themselves.

ARGUMENT

A. As Conceived By The Progressives, The Initiative Power Is The Electorate's Check On The Legislature, While The Recall Power Is Electorate's Check On The Executive Branch.

By its terms, the initiative power is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. II, § 8(a).) As the City of San Francisco has already demonstrated, ample case law makes clear that this is a *legislative* power. (City of S.F. Ans. Br. 16-17.)

The history of the initiative process supports this conclusion. In 1911, Governor Hiram Johnson called a special election and the Legislature placed the initiative, referendum, and recall proposals on the ballot. (See comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislature Procedure* (1986) 74 Cal. L.Rev. 491, 502-508.) This effort was the culmination of the Progressive Party's reform movement to wrest control of the political process from private interests, primarily the railroads. (*Ibid.*) To achieve this goal, Governor Johnson's proposals gave the electorate tools to check abuses by the legislative and executive branches of government.

The Initiative Power. The ballot materials in the campaign to ratify the initiative proposal make clear that the initiative power was designed to act as the check on the Legislature. They described the initiative power: "It is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves

to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and *to hold the legislature in check*, and to veto or negative such measures as it may viciously or negligently enact." (Manheim & Howard, *Symposium on the California Initiative Process: A Structural Theory of the Initiative Power in California* (1998) 31 Loyola L.A. L.Rev. 1165, 1189 [*Structural Theory of Initiative Power*], citing Const. Amend. No. 22, in California Ballot Pamphlet, Special Election (Oct. 11, 1911) (Comments of Lee C. Gates, Senator, 34th District, and William C. Clark, Assemblyman, 59th District), emphasis added.) Thus, "Hiram Johnson and his allies in the Progressive movement sought to restore the connection between government and the majority will by allowing the people to bypass an unresponsive Legislature and enact their own legislation." (*Strauss v. Horton* (2009) 46 Cal.4th 364, 489 (conc. & dis. opn. of Moreno, J.).)

The Recall Power. With respect to the executive branch, the *recall* power was the proposed vehicle to check abuses. (See Klatchko, *The Progressive Origins of the 2003 California Gubernatorial Recall* (2004) 35 McGeorge L.Rev. 701, 703, citing Parke De Witt, *The Progressive Movement: A Non-Partisan, Comprehensive Discussion of Current Tendencies in American Politics* (1915) pp. 213-215.) As Governor Johnson described the recall power, it was "the precautionary measure by which a recalcitrant official can be removed." (*Id.*, citing Hiram Johnson, Gov. of California, Inaugural Address (Jan. 3, 1911) <http://www.governors.library.ca.gov/address/23-hjohnson01.html> (as of Apr. 28, 2011).)

Thus, the Progressives proposed a regime in which the initiative power permitted the electorate to enact laws, while the recall power permitted the electorate to remove public officials who failed to enforce laws.

There is no indication that the Progressives intended to subvert the judiciary's role in reviewing the constitutionality of initiative measures. (See *Strauss, supra,* 46 Cal.4th at p. 489 (conc. & dis. opn. of Moreno, J.).) Nor is there any indication that they intended to subvert the executive branch's institutional roles, including its right to make decisions regarding whether or how to defend a law against constitutional challenge. (See City of S.F. Ans. Br. 19-21.)

B. The Initiative Power Has Resulted In Rampant Micromanagement Of The Legislative Process.

California voters have been busy at the ballot box ever since they approved the slate of Progressive reforms in 1911. "A comparison of the phone book sized ballot pamphlets of recent years with the more moderate epistles of ten or twenty years ago indicates how rapidly the amount of initiatives has increased." (Stein, *The California Constitution and the Counter-Initiative Quagmire* (1993) 21 Hastings Const. LQ. 143, 150 [*Cal. Const. and Counter-Initiative Quagmire*], citing Eule, *Judicial Review of Direct Democracy* (1989) 99 Yale L.J. 1503, 1506-1508, fn. 18.)[1]

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[1] Between 1912 and 2002, 1,187 initiatives were drafted and circulated. (Comment, *The "Overlooked Hermaphrodite" of Campaign Finance: Candidate-Controlled Ballot Measure Committees in California Politics* (2007) 95 Cal. L.Rev. 123, 129 citing Allswang, *The Initiative and Referendum in California* 1898-1998 (2000) p. 13.) Between 1912 and 2008, 325 initiatives qualified for the ballot, and 111 were approved by the

By 1948 the Constitution had grown from 7300 words to 95,000 words.[2] (*Structural Theory of Initiative Power*, *supra*, 31 Loyola L.A. L.Rev. at p. 1189 citing Ooley, *State Governance: An Overview of the History of Constitutional Provisions Dealing with State Governance* (1996), p. 6, fn. 16 <http://www.californiacityfinance.com/CCRChistory.pdf> [as of Apr. 28, 2011].)

The frequency of initiative measures has increased significantly over the last several decades. The number of initiatives qualified for the ballot rose from 10 in the 1960s to 24 in the 1970s, and then to 54 in the 1980s. During the 1990s, California saw 61 qualified initiatives out of the nearly 400 circulated. (Office of the Secretary of State, *A History of California Initiatives* (Dec. 2002), pp. 11-13 <http://www.sos.ca.gov/elections/init_history.pdf> [as of Apr. 28, 2011].)

While the Progressives intended the initiative process to avoid the domination of the legislature by powerful interest groups, interest groups now dominate the initiative process. (Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter* (1993) 21 Hastings Const. L.Q. 95, 121 citing Grodin, *In Pursuit Of Justice* (1989) & Lee, *California, Referendums: A Comparative Study of Practice and*

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voters. (Levinson & Stern, *Ballot Box Budgeting in California: The Bane of the Golden State or an Overstated Problem?* (2010) 37 Hastings Const. L.Q. 689, 694-695; Office of the Secretary of State, *A History of California Initiatives* (Dec. 2002), pp. 10-13 <http://www.sos.ca.gov/elections/init_hictory.pdf.)

[2] The Constitution has shrunk somewhat since then, principally due to the deletion of 14,500 words providing for the San Francisco Panama-Pacific Exposition. (See, *supra*, 31 Loyola L.A. L.Rev. at p. 1189, fn. 175.)

Theory (Butler & Ranney edits) (1978) pp. 88-89.) For example, the insurance industry alone spent 88 million dollars on California initiatives in 1988—more than George Bush spent on his entire presidential campaign. (*Structural Theory of Initiative Power*, *supra*, 31 Loyola L.A. L.Rev. at p. 1189.)

Chief Justice George described the result: "Initiatives have enshrined a myriad of provisions into California's constitutional charter, including a prohibition on the use of gill nets and a measure regulating the confinement of barnyard fowl in coops. This last constitutional amendment was enacted on the same 2008 ballot that amended the state Constitution to override the California Supreme Court's decision recognizing the right of same-sex couples to marry. Chickens gained valuable rights in California on the same day that gay men and lesbians lost them." (Remarks of Ronald M. George, Chief Justice, *The Perils of Direct Democracy: The California Experience*, address at induction into American Academy of Arts and Sciences (Oct. 1, 2009) <http://jurist.law.piH.edu/pdf/aaspeech.pdf> [as of Apr. 28, 2011] (George Remarks).)

Thus, as one commentator concluded: "Hiram Johnson would not recognize the electoral device he begat nearly a century ago. It is the driving force in California politics and lawmaking. In major policy areas, it has supplanted the legislature, not checked it . . . ." (*Structural Theory of Initiative Power*, *supra*, 31 Loyola L.A. L.Rev. at p. 1190; see also George, *Golden Gate University School of Law Chief Justice Ronald M. George Distinguished Lecture Access to Justice in Times of Fiscal Crisis* (2009) 40 Golden Gate U. L.Rev. 1, 13 ["I doubt that Hiram Johnson and the other progressives who saw the initiative power as a means to combat the power

of the railroad barons who controlled our state's government in an earlier era would recognize or approve of where that power has brought us"].)

C. Permitting Initiative Proponents To Speak On Behalf Of The State Would Render Litigation Over Initiative Measures Unworkable.

1. Initiative measures regularly result in litigation, requiring the courts and the executive branch to harmonize conflicting laws and resolve questions of constitutionality.

The frequent use of initiatives has yielded frequent litigation. This litigation is a natural outgrowth of several problems inherent in the initiative process. These same problems make it essential for the judiciary and the executive branch to be able to perform their institutional roles, including harmonizing the state's laws and addressing issues of constitutionality.

First, "[u]nlike elected representatives, whose full-time employment includes analyzing proposed legislation, members of the electorate may find it difficult to devote much time to examining the voter handbook containing the proposed new law." (*Constitution in Conflict*, *supra*, 21 Hastings Const. L.Q. at p. 120, citing Butler & Ranney, *Theory*, *Referendums: A Comparative Study of Practice and Theory* (1978).) As a result, voters sometimes enact initiative measures that are poorly conceived and poorly drafted, requiring courts to step in to make sense of them and to harmonize them with other laws. In this context, the executive branch must make

decisions regarding how to defend and enforce the measures that the voters have enacted without a full understanding of their potential complexity.

Second, the initiative process does not possess the same checks as representative government—i.e, the opportunity to deliberate, debate, revise, and compromise before a vote on the final version of a bill. (See *Constitution in Conflict*, *supra*, 21 Hastings Const. L.Q. at pp. 120-121.) Instead, once the Attorney General has certified a measure, there may be only limited changes to the language of the initiative. (*Ibid.*) Moreover, California is "unique among all American jurisdictions in prohibiting its legislature, without express voter approval, from amending or repealing even a statutory measure enacted by the voters, unless the Initiative measure itself specifically confers such authority upon the legislature." (George Remarks, *supra*.) Again, the result is that the judiciary and the executive branches are left to smooth the rough edges in initiative measures and to harmonize them with existing laws.

Third, "constitutional change by voter initiative allows for unchecked 'majority tyranny,'" since "popular will may restrict unpopular rights." (*Constitution in Conflict*, *supra*, 21 Hastings Const. L.Q. at p. 121.) Nothing in the Constitution precludes voters from attempting to enact laws that constrict the rights of disfavored minorities, such as criminal defendants. (*Ibid.*; see also *Raven v. Deukmejian* (1990) 52 Cal.3d 336 [voters enacted measure that would have vested in the United States Supreme Court all interpretive power as to certain fundamental procedural rights of criminal defendants under the state Constitution].)

Yet, "[w]hile the majority may vote to curtail unpopular rights, they may do so only to the extent that such changes do not fall below the level of

protection provided for in the Federal Constitution." (*Constitution in Conflict*, *supra*, 21 Hastings Const. L.Q. at p. 122.) It thus falls to the judicial and executive branches to check exercises of initiative powers that transgress minority rights. Because the Attorney General has a constitutional obligation to uphold the federal constitution (see City of S.F. Ans. Br. 27), he or she must weigh enforcement decisions against the backdrop of the federal constitution. And because the judiciary is charged with "protecting persecuted minorities from the majority will" (*Strauss*, at p. 489 (conc. & dis. opn. of Moreno, J.) it must decide critical questions of constitutionality.

Fourth, the initiative process frequently requires the judicial and executive branches to resolve inconsistencies between contradictory initiative measures that purport to govern the same subject matter. This is so because the problems of the initiative process have been magnified by the development in recent years of a political strategy that the Progressives surely never foresaw: placing two conflicting initiatives, or counter-initiatives, on the ballot simultaneously. "While the subject matter of initiatives have always had some overlap, in the mid-1980s, groups started strategically qualifying measures that explicitly contradicted another measure." (*Cal. Const. and Counter-Initiative Quagmire*, *supra*, 21 Hastings Const. L.Q. at p. 155.) The reason for this phenomenon is simple: "While the one-half to one million dollar price tag for drafting and qualifying an initiative measure may be daunting to citizen groups and grassroots organizations, for corporations or industry groups opposed to an initiative measure, the cost of qualifying a counter-initiative is a bargain

compared to spending ten to twenty million dollars in contributions for advertising to defeat an initiative." (*Ibid.*)

The result is that when two or more initiatives with contrary provisions receive a majority of votes, "courts must decide which of the provisions of the various measures will become law." (*Id.* at pp. 145-146.) Courts are tasked with preventing unworkable laws—laws that the Legislature cannot touch—from going into effect. (*Judicial Review of Direct Democracy*, *supra*, 99 Yale L.J. at pp. 1506-1507.)

2. In order for litigation over initiative measures to remain workable, the State must speak with one voice.

Given frequent and complex litigation over initiative measures, the ground rules must be clear. Most important, in order for litigation over initiative measures to be practicable, the State must speak with a single voice: The courts must know whom to listen to. Fortunately, the constitutional framework dictates that there *is* a single voice—the Attorney General. (See Plaintiffs' Ans. Br. 9-10; City of S.F. Ans. Br. 8-10.)

a. Permitting initiative proponents—or any elector who disagrees with the Attorney General's litigation decisions—to speak on behalf of the State is a recipe for confusion.

Intervenors argue that "the official proponents of an initiative have authority under California law to assert the People's interest in the validity of that initiative when it is challenged in litigation, at least when public officials refuse to defend it." (Opening Br. 15.)

But this raises more questions than it answers, including these:

1. Can anyone who wants to speak on behalf of the State? The Constitution grants no special status to initiative proponents. Rather, the initiative power is "is the power of *the electors* to propose [and vote on] statutes and amendments to the Constitution." (Cal. Const., art. II, §8(a), emphasis added.) Thus, if the official proponents can speak on behalf of the State, there is no principled reason why every other "elector" cannot assume the same mantel. And if anyone—and everyone—can speak on behalf of the State, the resulting cacophony will make it impossible to manage litigation over initiative measures.

2. What does "refuse to defend it" mean? Does "refus[a]l" mean only the complete failure to defend, or could any official proponent—or other elector—"assert the People's interest" whenever the Attorney General provides only a limited defense to the validity of an initiative? And what happens if the proponents of an initiative disagree among themselves regarding whether the Attorney General is adequately defending an initiative measure, or how it should be defended—who then would speak for the State? (See also City of S.F. Ans. Br. 27-30.)

3. Who decides and how does the determination get made, that a given initiative measure is being left undefended or inadequately defended, such that its supporters have the right to step in to speak on behalf of the State? Does any elector who might disagree with the Attorney General's enforcement decisions have the right to petition a court for a declaration that the Attorney General has unjustifiably refused to defend an initiative or is taking an inappropriate position in litigation? And if this is the procedure, why doesn't this violate separation of powers principles?

(Cf. *State of California v. Superior Court* (1986) 184 Cal.App.3d 394, 397-398 [trial court could not order Attorney General to be joined as a defendant in a case involving defense of a law; "We believe the trial court has exceeded its discretion, if not its powers, in compelling the Attorney General's participation. Our decision to liberate the State here is influenced both by the lack of any specific authority for the court to order the State's participation and also by the doctrine of separation of powers"].)

Intervenors argue that allowing initiative proponents to act on behalf of the State "when public officials will not do so is necessary to preserve the People's initiative power, . . ." (Intervenors' Opening Br. 16.) But given the practical problems outlined above, the cure that Intervenors propose is worse than the disease. Permitting initiative proponents to speak for the State would compound the problems wrought by a runaway initiative process and hamper the ability of the courts to resolve litigation over initiative measures.

b. There are avenues for initiative proponents to speak when they believe the Attorney General is failing to defend a law, but those avenues require the proponents to speak in their *own* voices.

This is not to say there is no recourse for initiative proponents who believe the Attorney General has failed to discharge his or her constitutional duty to defend an initiative.

Most important is the recall power to "fire" state officials who make litigation decisions with which they disagree. Indeed, this is exactly what

the Progressives had in mind as a check on executive branch abuses. (See § A, *ante*; see also *The Progressivist Origins of the 2003 California Gubernatorial Recall*, *supra*, 35 McGeorge L.Rev. at p. 705 [noting that 1911 ballot pamphlet materials advocated passage of recall by stressing that if the people had the right "to hire" public servants then they must also have the right "to fire" them if they were "unsatisfactory"].)

Moreover, in cases where an initiative proponent—or any other elector—believes that the Attorney General has wrongly declined to defend a law on the ground that it is unconstitutional, the proponent may petition the courts for a writ of mandate compelling the Attorney General to defend the law.[3] (See Code of Civ. Proc., § 1085, subd. (a) [writ of mandate lies to compel performance of "a duty resulting from an office"]; *Environmental Protection Information Center, Inc. v. Maxxam Corp.* (1992) 4 Cal.App.4th 1373, 1380 [writ of mandate "lies to compel the performance of a legal duty imposed on a government official"]; *Styring v. City of Santa Ana* (1944) 64 Cal.App.2d 12, 16 ["A duty resting on a public official which the law requires him to perform may be enforced by a writ of mandate"].) In that context, the courts can decide the question of constitutionality. (See City of S.F. Ans. Br. 26, fn. 12.) If the courts conclude that, contrary to the Attorney General's opinion, a given law is constitutional, the Attorney General could be compelled to defend it. But even then, the Attorney General would be doing so in his or her *own* voice, avoiding the perils described above.

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[3] The Court of Appeal and this Court rejected a voter's attempt in this case to compel the Attorney General to file a notice of appeal in the Ninth Circuit in order to challenge the district court's conclusion that Proposition 8 was unconstitutional. (See City of S.F. Ans. Br. 5.)

Finally, in any instance where an initiative proponent has an actual interest in the initiative measure, he or she can intervene to vindicate that interest.[4]

The bottom line: The proponents of an initiative may speak, but they must speak in their own voice.

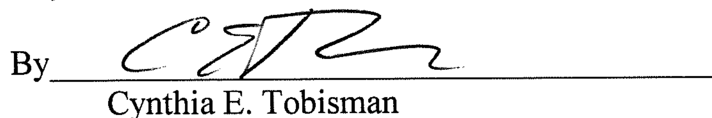
CONCLUSION

The Court's decision on the critical standing questions posed by this case will have a wide-ranging impact on litigation across the state. The rule this Court announces will apply not just to high-profile cases like this one, but to cases involving initiative measures touching all matters of California life, from budgeting to criminal laws to gill nets. Because intractable practical problems will result if the Court adopts Intervenors' position that initiative proponents may act on behalf of the State when they disagree with the Attorney General's enforcement decisions, the Court should reject it.

Dated: April 29, 2011

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow
Cynthia E. Tobisman

By 
Cynthia E. Tobisman

Attorneys for Amicus Curiae
LEAGUE OF WOMEN VOTERS OF CALIFORNIA

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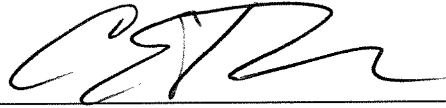
[4] We agree with the Plaintiffs and the City of San Francisco that the Intervenors cannot show a particularized interest in this case sufficient to create Article III standing. (See City of S.F. Ans. Br. 47; Plaintiffs' Ans. Br. 25.)

CERTIFICATION

Pursuant to Rules 8.204(c)(1) & (4) and 8.520(c) of the California Rules of Court, I certify that this **APPLICATION OF LEAGUE OF WOMEN VOTERS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; [PROPOSED] AMICUS CURIAE BRIEF** contains 3,882 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: April 29, 2011



Cynthia E. Tobisman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On April 29, 2011, I served the foregoing document described as: **AMICUS BRIEF OF LEAGUE OF WOMEN VOTERS OF CALIFORNIA FILED IN SUPPORT OF PLAINTIFFS-RESPONDENTS AND CITY AND COUNTY OF SAN FRANCISCO** on the interested parties in this action by serving:

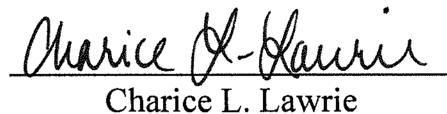
See Attached Service List

(√) **By Envelope** - by placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(√) **By Mail:** As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **April 29, 2011**, at Los Angeles, California.

(√) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



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