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# Proponents' Standing to Defend Their Ballot Initiatives: Post-Hollingsworth Work-Arounds?

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## Introduction

In *Hollingsworth v. Perry*,[1] the United States Supreme Court ruled that state ballot initiatives' official proponents lack standing to defend their enacted initiative in federal courts. This ruling has prompted a broad concern among initiative proponents and other supporters: if proponents lack standing and if state officials — who do have standing — refuse to defend initiatives, then some initiatives may go undefended. Two separate initiatives, Propositions 54 and 60, appeared on California's November 8, 2016, ballot. They attempted to dodge *Hollingsworth* in different ways.

Proposition 60, which failed to pass, would have regulated the adult film industry by, *inter alia*, mandating condom use in films produced in California.[2] Proposition 60's first standing provision specified that the proponent is to pay a $10,000 penalty if Proposition 60 is invalidated by a court.[3] The prospect of this penalty, the proponent would argue, poses a particularized and concrete injury to him.[4] Proposition 60's second standing provision specified that the state shall employ the proponent and grant him or her the authority to defend the initiative if the state's attorney general fails to defend the initiative.[5]

Proposition 54, which did pass, was an initiative with constitutional and statutory provisions. It will reform state legislative procedures by, *inter alia*, mandating that any bill be posted on the Internet at least seventy-two hours before the legislature approves it.[6] One of Proposition 54's provisions eschews the need for actual

1 133 S. Ct. 2652 (2013).

2 *Proposition 60: California Safer Sex in the Adult Film Industry Act, in* Cal. Sec'y of State, Official Voter Information Guide 148-54 (Aug. 15, 2016), http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop60 [hereinafter *Proposition 60*]. California's voters rejected Proposition 60; it received only 46.3 percent of the popular vote. *Statement of Vote Summary Pages*, Cal. Sec'y of State 12 (2016), http://elections.cdn.sos.ca.gov/sov/2016-general/sov/06-sov-summary.pdf.

3 *Proposition 60, supra* note 2, § 7.

4 *See* discussion *infra* Part II-A.

5 *Proposition 60, supra* note 2, § 10.

6 *Proposition 54: the California Legislature Transparency Act*, *in* Cal. Sec'y of State, Official Voter Information Guide 125-28 (Aug. 15, 2016), http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop54 [hereinafter *Proposition 54*]. California's voters approved *Proposition 54*; it received over 65 percent of the popular vote. *See* http://elections.cdn.sos.ca.gov/sov/2016-general/sov/06-sov-summary.pdf.

standing; instead, it mandates that the California Attorney General file a notice of appeal from any judgment that Proposition 54 is invalid.[7] After such a notice is filed, Proposition 54's proponents — and, perhaps, other interested parties — may participate as intervenors or as amici, even if they lack actual standing as appellants.[8]

This Article considers whether, notwithstanding *Hollingsworth*, one or more of these various provisions — or scholars' variations on them or their future progeny — would confer standing on or otherwise allow participation by initiative proponents in California and elsewhere. Part I reviews *Hollingsworth* and its aftermath against the backdrop of California's initiative process and the Supreme Court's doctrine of standing under Article III of the Constitution. Part II assesses the principal rationales available for sustaining standing under the types of provisions contained in Proposition 60 or under other variations designed to give proponents a sufficiently distinct stake in the outcome of legal challenges to establish standing. Part III assesses whether Proposition 54's requirement that the Attorney General file a notice of appeal allows proponents to defend the initiative even in the absence of standing. The Article concludes that none of Proposition 60's justifications avoid the obstacles to standing created by *Hollingsworth* and the Court's wider standing doctrine. Thus, it appears that proponents of initiatives in California and other states with similar initiative provisions must devise other means of securing a place in court when state officials decline to defend their (the proponents') initiative. One of those other means may be similar to Proposition 54, which may allow proponents some rights to participate, even if those rights are limited.

## I. The Impact of *Hollingsworth* on the Law of Standing

The Supreme Court has construed Article III of the United States Constitution to impose requirements for standing that can operate as stringent barriers to access to federal courts. In *Hollingsworth*, failure to meet these criteria defeated the efforts of proponents of Proposition 8 — an initiative to bar recognition of same-sex marriage in California — to serve as its legal defenders. The ruling has evoked strategies for conferring standing on initiative

7 *Proposition 54*, *supra* note 6, §§ 6.1(c), 6.1(d).

8 *See* discussion *infra* Part III.

proponents through state law, lest state officials effectively cause disfavored initiatives to fall for lack of defense.

### *A. The Requisites of Standing Under Article III*

"Article III of the Constitution grants the federal courts the power to decide legal questions only in the presence of an actual 'Cas[e]' or 'Controvers[y].' This restriction requires a party invoking a federal court's jurisdiction to demonstrate standing."[9] While a comprehensive discussion of standing is beyond the scope of this Article,[10] its essential elements can be briefly stated. First, a party must show that he or she has suffered a cognizable "injury in fact."[11] Second, that injury must be "fairly . . . trace[able]" to the government action to which the party objects.[12] Third, the plaintiff must demonstrate the likelihood that the relief sought will redress

9 Wittman v. Personhuballah, 136 S. Ct. 1732, 1736 (2016) (alteration in original) (citation omitted). *See also* Raines v. Byrd, 521 U. S. 811, 818 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976))). Most of the case law and commentary focuses on standing requirements for plaintiffs. *E.g.,* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547-48 (2016) (citing to, *inter alia*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); FW/PBS, Inc. v. Dallas, 493 U. S. 215, 231 (1990); Warth v. Seldin, 422 U. S. 490, 498 (1975)). However, defendants also are required to have standing, including a direct stake in the litigation's outcome. *See*, *e.g.*, Bond v. United States, 564 U.S. 211, 217 (2011) ("One who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, and, in addition, an 'ongoing interest in the dispute' on the part of the opposing party that is sufficient to establish 'concrete adverseness.'" (citations omitted)); Camreta v. Greene, 563 U.S. 692, 701 (2011) (stating that both parties must maintain stake in outcome throughout litigation). *See generally* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 Fordham L. Rev. 1539, 1550-57 (2012).

10 For an overview of Article III standing, see Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law §2.13(f) (5th ed. 2012); William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1998); and Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?* Lexmark International, Inc. v. Static Control Components, Inc., 18 U. Pa. J. Const. L. 213, 218-27 (2015).

11 Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (quoting Lujan, 504 U.S. at 560).

12 Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976).

the injury.[13] As these criteria suggest, parties have the burden of proving their standing to invoke a federal court's jurisdiction.[14]

Further, several additional features of standing doctrine are especially pertinent to the question of defending initiatives. First, federal law generally controls whether parties have standing in federal courts.[15] Second, the requisite injury must be "concrete and particularized."[16] Particularization means that the injury affects the plaintiff "in a personal and individual way."[17] To qualify as concrete, an injury may be "intangible"[18] or even "threatened" (as opposed to "actual"),[19] but it cannot be a "generalized grievance," no matter how sincerely held.[20] Third, a state always has standing to defend the

13 *Lujan*, 504 U.S. at 561; *see* City of Los Angeles v. Lyons, 461 U.S. 95, 128-29 (1983) (requiring plaintiff to show that "the injuries he has alleged can be remedied or prevented by some form of judicial relief"). The Court has sometimes cast standing requirements in additional ways. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 102 (1968) (standing requires "a logical nexus between the status asserted and the claim sought to be adjudicated"). The Court has announced, however, that injury in fact, traceability, and redressability constitute the essential components of standing. *See Lujan*, 504 U.S. at 560-61.

14 *See Susan B. Anthony List*, 134 S. Ct. at 2342; *Lujan*, 504 U.S. at 560-561.

15 Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013). However, this general rule is subject to exception. For example, federal courts may look to state law as to who has standing to represent a corporation organized under the state's laws or who has standing as a guardian to represent a minor child. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-78 (2004); Sanderling v. Comm'r, 66 T.C. 743, 750, 751 (1976). *See also* Karl Manheim, John S. Caragozian, & Donald Warner, *Fixing* Hollingsworth*: Standing in Initiative Cases*, 48 LOY. L.A. L. REV. 1069, 1105-06 & nn.196-200 (2015). *See generally* FED. R. CIV. P. 17(b)(2) & 17(b)(3). Also, as set forth in Section III-B-2 *infra*, federal courts look to state law regarding an initiative's severability (i.e., whether one invalid provision in an initiative invalidates the whole initiative or whether the invalid provision can be severed, with the remainder of the initiative surviving).

16 *Lujan*, 504 U.S. at 560. *Accord Susan B. Anthony List*, 134 S. Ct. at 2341-42 (2014); *see Lance v. Coffman*, 549 U.S. 437, 442 (2007) (denying standing where plaintiffs "assert[ed] no particularized stake in the litigation"); *Warth*, 422 U.S. at 501 (requiring allegation that injury to plaintiff is "distinct and palpable"); Allen v. Wright, 468 U. S. 737, 756 (1984); Sierra Club v. Morton, 405 U.S. 727, 740–741, n. 16 (1972).

17 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (internal quotation marks and citation omitted).

18 *Id.* at 1549.

19 *Id.* at 1548 (internal quotation marks omitted); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U. S. 464, 472-73 (1982).

20 *Hollingsworth*, 133 S. Ct. at 2662.

validity of its own laws.[21] More generally, federal courts may accord states "special solicitude" in connection with standing.[22] However, a state's representative in federal litigation must be a state official, such as the attorney general; under Article III, "private parties" are ineligible to represent a state.[23]

### *B. Proposition 8 and* Hollingsworth v. Perry

Most states, including California, allow voters to enact state laws through a ballot initiative.[24] In California, an initiative is proposed by one or more registered voters who are formally designated as "proponents."[25] California initiative proponents' responsibilities include drafting the initiative, submitting it to the State Attorney General (for administrative processing), gathering and submitting the requisite signatures to place the initiative on a statewide ballot, and authorizing ballot arguments in the initiative's favor.[26] Following this procedure, in 2008, State Senator Dennis

21 *E.g.*, Maine v. Taylor, 477 U.S. 131, 137 (1986); Diamond v. Charles, 476 U.S. 54, 65 (1986); Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

22 Texas v. United States, 809 F.3d 134, 154 (5th Cir. 2015), *cert. granted*, United States v. Texas, 136 S. Ct. 906 (2016). *See also* Massachusetts v. EPA, 549 U.S. 497, 518 (2007) (explaining that states "are not normal litigants for the purposes of invoking federal jurisdiction").

23 *See Hollingsworth*, 133 S. Ct. at 2664, 2668.

24 Twenty-six states allow voters to enact statutory or constitutional additions or changes by direct initiative (where voters bypass the legislature entirely, such as in California) or indirect initiative (where the legislature has a first opportunity to adopt the proposed initiative, but, if the legislature rejects it, then it goes to the voters). *See Initiative and Referendum States*, Nat'l Conf. of State Legis. (Dec. 2015), http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx.

25 *E.g.*, Cal. Elec. Code §§ 9001, 9002, 9032 (Deering 2016).

26 *See generally* Cal. Elec. Code §§ 9001-9065 (Deering 2016). *See also Hollingsworth*, 133 S. Ct. at 2662. The signature requirement is particularly onerous: a statutory initiative requires signatures numbering five percent of the total votes cast for all gubernatorial candidates in the most recent election, and a constitutional initiative requires eight percent. Cal. Const., art. II, § 8(b). In 2014, approximately 7.32 million votes were cast for all California gubernatorial candidates, meaning that slightly more than 585,000 valid signatures now are required for a constitutional initiative and almost 366,000 for a statutory initiative. *See Statement of Vote*, Cal. Sec'y of State 6 (Nov. 4, 2014), http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf (the California Secretary of State's "Statement of Vote" for the November 4, 2014 general election, which is California's most

Hollingsworth — acting as a private citizen — and four other private citizens proposed a California constitutional initiative to bar legal recognition of same-sex marriage.[27] Known as Proposition 8, the measure was approved by California's voters in 2008.[28]

In 2009, two same-sex couples challenged Proposition 8's constitutionality in the United States District Court.[29] However, neither California's Governor nor Attorney General actively defended Proposition 8.[30] Thereafter, Senator Hollingsworth and the other official proponents successfully intervened as defendants in the District Court.[31] After trial, in which the proponents actively participated, the District Court ruled Proposition 8 unconstitutional on due process and equal protection grounds.[32]

Neither the Governor nor Attorney General appealed the District Court's judgment, but Proposition 8's official proponents did. When the Ninth Circuit Court of Appeals questioned whether the official proponents had standing to appeal, the proponents responded that they had an individualized interest in defending Proposition 8 and had "an alternative and independent additional basis for standing," namely, the ability to assert the State's interest in defending Proposition 8.[33] The Ninth Circuit then certified the standing question to the California Supreme Court: Under California law, do official proponents "possess either [1] a particularized interest in the initiative's validity or [2] the authority to assert the State's interest in the initiative's validity . . . ?"[34] For ease of reference, this Article refers to "prong 1" of this inquiry as whether the proponent

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recent gubernatorial election). With signature gatherers charging $3 to $5 or more per signature, millions of dollars are typically required just to gather signatures. *See, e.g.*, John S. Caragozian, *From Crisis to Solution—California's Problems in Two Books: A Review of* Remaking California *and* California Crackup, 44 LOY. L.A. L. REV. 687, 695 & nn.50-51 (2011); *Petition People Gather Big Bucks*, L.A. TIMES, Aug. 10, 2016, at B1, col. 1.

27 For a more detailed account of the passage of Proposition 8 and the litigation that followed, see Manheim et al., *supra* note 15, at 1077-88.

28 *See Hollingsworth*, 133 S. Ct. at 2659.

29 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *see also* Complaint for Declaratory, Injunctive, or Other Relief, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292), https://ecf.cand.uscourts.gov/cand/09cv2292/files/1-1.pdf.

30 *Schwarzenegger*, 704 F. Supp. 2d at 928.

31 *Id.*

32 *Id.* at 995-1003.

33 Perry v. Schwarzenegger, 628 F.3d 1191, 1196 (9th Cir. 2011).

34 *Id.* at 1193.

has standing on his or her own personal behalf and "prong 2" as whether the proponent may assume the State's standing.

The California Supreme Court unanimously answered "yes" to the Ninth Circuit's prong 2, accepting the proponents' assertion of a representative interest, but expressly declined to answer prong 1 regarding personal standing.[35] The Ninth Circuit accepted the California Supreme Court's answer and accordingly held that the official proponents had standing to represent the State in defending Proposition 8.[36] On the merits, however, the Ninth Circuit affirmed the District Court's judgment of Proposition 8's unconstitutionality.[37]

The official proponents then appealed to the United States Supreme Court, where a five-to-four majority ruled that the official proponents lacked standing.[38] The Court first held that the proponents lacked personal standing — prong 1 of the Ninth Circuit's certified question to the California Supreme Court on which the California Supreme Court declined to rule.[39] According to the *Hollingsworth* majority, once voters approved the initiative, the official proponents lost any unique role in the process.[40] Instead, the proponents had only a general interest in the initiative, an interest shared by all other state citizens.[41] This generalized interest, in turn, was insufficient to confer personal standing on the proponents.[42]

As for the Ninth Circuit's prong 2 — where the California Supreme Court had answered that the official proponents possessed standing to assert the State's interest[43] — the *Hollingsworth* majority rejected the California Supreme Court's opinion, concluding instead that the proponents were not proper agents of the State.[44] As a threshold matter, *Hollingsworth* noted that the proponents were not elected officials.[45] Moreover, the proponents lacked "the most basic

35 Perry v. Brown, 265 P.3d 1002, 1015, 1033 (Cal. 2011).
36 Perry v. Brown, 671 F.3d 1052, 1072-73 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
37 671 F.3d at 1064.
38 *Hollingsworth*, 133 S. Ct. at 2668.
39 *Id.* at 2662-63.
40 *Id.* at 2663.
41 *Id.*
42 *Id.* (internal quotation marks and citations omitted) (stating that after voters approve an initiative, the proponents "have no role" in its enforcement and, apparently, are nothing more than "concerned bystanders," despite their being "deeply committed" or "zealous").
43 Perry v. Brown, 265 P.3d 1002, 1033 (Cal. 2011).
44 *Hollingsworth*, 133 S. Ct. at 2667.
45 *Id.* at 2668 ("We have never before upheld the standing of a private party to

features of an agency relationship."[46] For example, the proponents had no fiduciary obligations to the State and were not subject to the State's control.[47] Further, the majority opinion criticized a policy of granting proponents standing to represent a state, noting that proponents would be "free to pursue a purely ideological commitment to the [initiative's] constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities."[48] Given the absence of *Hollingsworth* appellants — the official proponents lacked standing and the State officials (who had standing) refused to appeal[49] — the Court held that no "case or controversy" existed under Article III.[50] Accordingly, the Court found a lack of jurisdiction and ordered that the Ninth Circuit vacate its judgment and dismiss the appeal, finalizing the District Court's judgment of Proposition 8's unconstitutionality.[51]

Therefore, *Hollingsworth* holds that, under Article III, official proponents generally lack standing to defend "their" approved initiatives.[52] More particularly, proponents qua proponents have

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defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here."). *See also id.* at 2666-67.

46 *Id.* at 2666.

47 *Id.* at 2666-67.

48 *Id.* at 2667.

49 *Id.* at 2660, 2666-67.

50 *Id.*

51 *Id.* at 2668. In 2015 — two years after *Hollingsworth* — the Supreme Court reached the merits of same-sex marriage bans, holding them unconstitutional. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

52 This general rule is subject to some exceptions. For example, in federal court:

A. Initiative proponents probably have standing to defend their initiatives from challenges before the initiatives are approved by voters. *See, e.g.*, *Hollingsworth*, 133 S. Ct. at 2662-63 (ruling that proponents lost their special role "once Proposition 8 was approved by the voters").

B. In the Ninth Circuit, parties without standing (presumably including initiative proponents) may have "piggyback" standing: they may intervene as defendants if parties with standing (such as state officials) are also defending the lawsuit. *See, e.g.*, State of Cal. Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 845-46 & n.9 (9th Cir. 2003). However, other circuits — including the D. C., Seventh, and Eighth Circuits — disallow such piggyback standing. *See* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U.L.Q. 215, 270 (2000).

C. Again, in the Ninth Circuit, initiative proponents may defend their initiative during an appeal if they are appellees (though not as appellants). *See, e.g.*, Vivid Entm't, LLC v. Fielding, 774 F.3d 566, 573

neither personal standing (prong 1) nor a right to represent the State (prong 2). This lack of standing, in turn, may well be dispositive in suits challenging popular initiatives when the state itself refuses to defend. After all, under our adversary system, courts are more likely to invalidate an undefended initiative.

### *C.* Hollingsworth's *Aftermath*

Various scholars and others have criticized *Hollingsworth* for giving state officials a practical veto over voter-approved initiatives.[53] Without a defense, Proposition 8 was — and, critics fear, other state initiatives will be — invalidated by federal courts.[54]

Attempts by recent initiative proponents to avoid *Hollingsworth* involve drafting initiative language appointing themselves "as agents of the people and the State" with authority to defend the initiative "in any legal proceeding."[55] This attempt to obtain representational standing is likely to fail for at least two reasons. First, under the California Constitution, "no statute proposed to the electors . . . by initiative, that names any individual to hold any office . . . may

(9th Cir. 2014); Latta v. Otter, 771 F.3d 456, 465-66 (9th Cir. 2014).

D. With regard to some initiatives, proponents who would benefit from them — say, by lowered taxes — would have personal standing to defend such initiatives at trial and on appeal, though without reference to their status as proponents. *See generally* Manheim et al., *supra* note 15, at 1121-22, 1125-27 & n.286.

Likewise, in state court, depending on state law, proponents may have authority to represent the state, thereby having standing to defend their initiatives at trial and on appeal. *See Hollingsworth*, 133 S. Ct. at 2667 ("Nor do we question . . . the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply."); Perry v. Brown, 265 P.3d 1002, 1016-20 (Cal. 2001). *See also* Manheim et al., *supra* note 15, at 1121.

53 *See, e.g.*, Scott L. Kafker & David A. Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives after* Hollingsworth v. Perry, 71 Wash. & Lee L. Rev. 229, 280-83 (2014); Manheim et al., *supra* note 15, at 1072 & n.3, 1120-21.

54 *See* Kafker & Russcol, *supra* note 53, at 242-43.

55 *See* Jamie Court, *Request for Title and Summary for Proposed Online Privacy Act, No. 14-0007*, Initiative Coordinator, Cal. Att'y Gen. Office §§ 5(a), 5(b)(1) (Jan. 16, 2014), https://oag.ca.gov/system/files/initiatives/pdfs/14-0007%20%2814-0007%20%28Online%20Privacy%20V2%29%29.pdf?. Implicit in such efforts is the proposition — also implicit in *Hollingsworth* — that a defendant must have proper standing in order to appear as a formal party in a legal proceeding. The Court has indicated this principle expressly elsewhere. *See* Bond v. United States, 564 U.S. 211, 217 (2011); Camreta v. Greene, 563 U.S. 692, 701 (2011). *See generally*, Hall, *supra* note 9.

be submitted to the electors or have any effect."[56] Second, under federal law, a bare designation of an initiative's proponent as a state's agent — without fiduciary obligations and without the policy responsibilities of resource constraints and other state priorities — is unlikely to satisfy *Hollingsworth*.[57]

Other recent initiatives specify that special counsel must be appointed to defend the initiative.[58] This solution probably passes *Hollingsworth* muster.[59] Still, some proponents may resist it, because the special counsel — and not the proponents — would control the initiative's defense.

## II. Seeking to Avoid *Hollingsworth*: Embedding Standing in the Initiative Itself

The solutions discussed above in Part I-C — the rights of proponents or special counsel to represent the state and thus acquire the state's standing to defend its own laws — are based on prong 2 of the Ninth Circuit's and Supreme Court's decisions. A different approach, namely an attempt to create personal standing under prong 1, was illustrated by Proposition 60, the statutory initiative, which appeared — but did not pass — on the November 8, 2016, California ballot.[60] While Proposition 60 was a California initiative, the standing issues that it exemplifies apply broadly to all states with initiatives.[61] Furthermore, as discussed in Part II-B below, scholars have suggested variations on Proposition 60's penalty, and those

56 CAL. CONST. art. II, § 12. Other states have this same prohibition. *See* note 115 *infra*. The prohibition is further discussed at notes 114-17 *infra* and accompanying text.

57 *See* Manheim et al., *supra* note 15, at 1141.

58 *See, e.g.*, High Quality Teachers Act of 2014, Pub. L. No. 13-0062, § 14(a) (Cal. 2013), https://oag.ca.gov/system/files/initiatives/pdfs/13-0062%20(13-0062%20(Teachers%20V2)).pdf; No Blank Checks Initiative, Pub. L. No. 14-0009 (Cal. 2014), https://oag.ca.gov/system/files/initiatives/pdfs/14-0009%20(14-0009%20(Bond-funded%20Projects)).pdf. *See also* Manheim et al., *supra* note 15, at 1140.

59 In *Morrison v. Olson*, 487 U.S. 654, 696 (1988), the Supreme Court upheld the right of special prosecutors to represent the United States. The *Hollingsworth* Court reaffirmed *Morrison*'s holding. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2665 (2013). For additional analysis and detail (including proposed model language) regarding the appointment of special counsel to defend initiatives, see Manheim et al., *supra* note 15, at 1137-38, 1140.

60 *Proposition 60*, *supra* note 2, § 7.

61 *Id*.

variations also apply beyond California.

Proposition 60 — to regulate the adult film industry in California — was proposed by a single individual and received the requisite number of signatures to qualify for the statewide ballot.[62] Proposition 60 included two provisions relevant to this new standing approach:

> Section 7. Proponent Accountability.
>
> The People of the State of California hereby declare that the proponent of [Proposition 60] should be held civilly liable in the event [Proposition 60] is struck down, after passage, by a court for being constitutionally or statutorily impermissible. Such a[n] . . . impermissible initiative is a misuse of taxpayer funds and electoral resources and [Proposition 60]'s proponent, as the drafter . . . must be held accountable . . . .
>
> In the event [Proposition 60], after passage, is struck down . . . in whole or in part, as unconstitutional or statutorily invalid, and all avenues for appealing and overturning the court decision have been exhausted, the proponent shall pay a civil penalty of $10,000 to the . . . State of California for failure to draft a wholly constitutionally or statutorily permissible initiative . . . . No party of entity may waive this civil penalty.[63]
>
> . . . .
>
> Section 9. Severability.
>
> If any provision of [Proposition 60], or part thereof, . . . is for any reason held to be invalid or unconstitutional, the remaining provisions and parts

62 Michael Weinstein, *Request for Title and Summary for Proposed California Safer Sex in the Adult Film Industry Act, No. 15-0004*, Initiative Coordinator, Cal. Att'y Gen. Office (Feb. 12, 2015), https://oag.ca.gov/system/files/initiatives/pdfs/15-0004%20%28Safer%20Sex%29_8.pdf?.

63 *Proposition 60*, *supra* note 2, § 7.

> shall not be affected, but shall remain in full force and effect, and to this end the provisions and parts of [Proposition 60] are severable. The voters hereby declare that [Proposition 60], and each portion and part, would have been adopted irrespective of whether any one or more provisions or parts are found to be invalid or unconstitutional.[64]

Proposition 60's Section 10 also dealt with standing, but unlike Section 7, it was designed to achieve standing via prong 2.[65] Section 10 would appoint the proponent as a state employee if "the Attorney General fails to defend [Proposition 60] . . . or fails to appeal an adverse judgment . . . ."[66] Upon the proponent's appointment, he would be: removable only for "good cause" as voted by "each house of the Legislature"; required to take same the oath of office that all state employees take, subject to "all fiduciary . . . duties prescribed by law"; and allowed to defend Proposition 60.[67] The state would be required to pay for the proponent's "reasonable expenses and other losses incurred . . . in defending . . . [Proposition 60]."[68] Under Section 10, and upon the Attorney General's failure to defend, the proponent would become a salaried state employee and would be entitled to engage outside counsel — at the State's expense — to appear on behalf of the State in defending the initiative.[69]

64 *Id.* § 9.
65 *Id.* § 10.
66 *Id.*
67 *Id.*
68 Proposition 60's proponent had reason to apprehend that California officials might refuse to defend Proposition 60. The same proponent proposed a similar initiative to regulate the adult film industry in Los Angeles County. That initiative, titled Measure B, was approved by Los Angeles County's voters in 2012, but no county officials actively defended it when its constitutionality was challenged in federal court. Vivid Entm't, LLC v. Fielding, 965 F. Supp. 2d 1113, 1121-22 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566, 573 (9th Cir. 2014). *See also* Manheim et al., *supra* note 15, at 1123-27 & nn.281, 286 & 299-300. Instead, the county officials filed an answer that the complaint "presents important constitutional questions that require and warrant judicial determination," but the officials otherwise took "a position of neutrality regarding whether Measure B is constitutional . . . ." Vivid Entm't. v Fielding, No. 13-00190, 2013 U.S. Dist. LEXIS 54060, at *12 & n.1 (C.D. Cal. Apr. 16, 2013). *See also* Manheim et al., *supra* note 15, at 1123 & n.281.
69 *Proposition 60*, *supra* note 2, § 10.

### *A. Creating an Individual Stake in the Validity of Proposition 60: Injury in the Form of Penalty*

Proposition 60's Section 7 raises a fundamental question of standing to defend initiatives: Does a prospective penalty of this nature give the proponent a concrete interest in the initiative sufficient to confer standing to defend it? The answer is far from certain.

In the event that an initiative with this language were approved by voters and challenged in court, the proponent would argue that he has a concrete interest in defending it because he personally faces a monetary penalty if the initiative is invalidated. This interest is not a general one shared by other state citizens. Accordingly, the proponent, as an individual, also has prong 1's particularized standing.

A plaintiff challenging the initiative might object to the proponent's prong 1 standing argument on at least three independent grounds. First, the proponent would not have the fiduciary obligations and would not meet the policy criteria — such as the resource constraints with which state officials contend — required by *Hollingsworth*. Second, the prospect of the monetary penalty may be insufficiently concrete to serve as a basis for standing. Third, even if the penalty is concrete, a court might conclude that, as a self-inflicted injury, it cannot serve as a basis for standing. Each of these objections is discussed below.

#### *1. Absence of Fiduciary Obligations*

One of *Hollingsworth*'s rationales for denying standing to initiative proponents was that proponents lack fiduciary obligations and therefore — unlike state officials — need not account for a state's resource constraints, changes in public opinion, or potential ramifications for other state priorities.[70] This rationale, in turn, might be used by a plaintiff to object to a proponent's standing, because the monetary penalty does not imbue the proponent with a state official's fiduciary obligations or a state official's resource constraints and other policy considerations.

On the other hand, *Hollingsworth*'s policy rationale here was aimed at prong 2: whether a proponent could represent the state and thereby assume the state's standing. An individual's standing

70 Hollingsworth v. Perry, 133 S. Ct 2652, 2666-67 (2013).

under prong 1 — the personal standing created *arguendo* by the monetary penalty — would presumably be unaffected by such policy considerations. After all, a litigant with his or her own "particularized" injury would seem, by definition, not to need the fiduciary or policy obligations of a state. Accordingly, an objection based on a proponent's lack of fiduciary duty and attendant lack of policy constraints appears to be inapposite to prong 1's personal standing.

### *2. Lack of Concrete Injury*

As discussed earlier,[71] the injury in fact must be not only particularized to the party claiming standing (which it is here), but also concrete. A concrete injury may be "threatened" and still be sufficient, but the injury cannot be "abstract."[72] In assessing how "real" the "risk" of concrete injury must be, the Supreme Court has looked to tort law, specifically the Restatement of Torts, for principles governing what damages may and may not be recovered by tort victims.[73] In other words, whether damages are real enough for purposes of Article III standing may relate to whether such damages are recoverable under tort law.

Unfortunately, but unsurprisingly, the Restatement's text provides only the most general guidance here. For example, with regard to the "certainty" of damages, a tort victim must "establish[] by proof the . . . adequate compensation with as much certainty as the nature of the tort and the circumstances permit."[74] The Restatement's comments are no more helpful. The victim must prove damages "with reasonable certainty" but, with regard to future harm, "[t]here is no mathematical formula that will determine the chance of the harm occurring . . . ."[75]

While the $10,000 penalty incurred under Proposition 60 might appear on the surface to pose a real threat, Section 7's actual language creates uncertainty in at least three separate ways. First, if the entire initiative were invalidated, then the proponent would not be penalized, because the only basis for the penalty was a provision in the now-defunct initiative. On the other hand, if — as contemplated

71 *See supra* notes 11-20 and accompanying text.
72 *Spokeo*, 136 S. Ct. at 1548 (internal citations and quotation marks omitted).
73 *See, e.g., id.* at 1549; Doe v. Chao, 540 U.S. 614, 625 (2004); Metro-N. Commuter R. Co. v. Buckley, 521 U.S. 424, 439-41 (1997).
74 RESTATEMENT (SECOND) OF TORTS § 912 (AM. L. INST. 1979).
75 *Id.* at cmts. a & e.

under Section 7 — a court invalidates only part of the initiative, it is unclear whether the monetary penalty would survive the *arguendo* invalidity of some or all of the rest of the initiative. To be sure, Proposition 60's Section 9 contains standard boilerplate that all of the initiative's provisions are severable.[76] However, depending on each initiative's particular circumstances (including its language and what parts are or are not valid), a court may disregard an initiative's severability language[77] and strike down the entire initiative, including its otherwise valid parts.[78] The likelihood of the prospective penalty's survival, in turn, affects whether the penalty is sufficiently concrete to support the proponent's standing.

Severability, like damage certainty, is an inexact concept, not capable of precise application.[79] In general, federal courts look to state law regarding initiatives' severability.[80] Under California law, a severability clause such as Proposition 60's Section 9, "[a]lthough not conclusive," provides some support for severability.[81] Among the criteria for severability, courts look to "volitional" severability, which is whether an initiative's remaining provisions (i.e., those provisions not determined to be invalid) are "substantive" and "would likely have been adopted by the people had they foreseen the invalidity

76 *See Proposition 60*, *supra* note 2, § 9.

77 *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes,* 46 Stan. L. Rev. 235, 291 (1994) (noting that in *INS v. Chadha*, 462 U.S. 919 (1983), Court treated severability clause under consideration as "raising only a presumption of severability" (citing *Chadha*, 462 U.S. at 932, 934)); David H. Gans, *Severability as Judicial Lawmaking,* 76 Geo. Wash. L. Rev. 639, 652 (2008) (discussing discretion exercised by Supreme Court to treat statutes' provisions as nonseverable).

78 *See, e.g.*, Mulkey v. Reitman, 413 P.2d 825, 835-36 (Cal. 1966), *aff'd sub nom.* 387 U.S. 369 (1967) (holding an initiative's severability clause to be "ineffective," because the unconstitutional provisions were "fully integrated and . . . not severable" (citation omitted)); *Ex parte* Blaney, 184 P.2d 892, 900-01 (Cal. 1947) (refusing to use authority under a statute's severability clause, because the statute failed "to differentiate" between protected and unprotected speech).

79 *See* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 110-11 (1937) ("[T]he Court is free to decide each case [involving severability] the way it pleases without having its discretion fettered by any restraining doctrine."); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 749, 777 (2010) (describing severability doctrine as "destructive and manipulable").

80 *E.g.*, Nat'l Broiler Council v. Voss, 44 F.3d 740, 748 n.12 (9th Cir. 1994).

81 Calfarm Ins. Co. v. Deukmejian, 771 P.2d 1247, 1256 (Cal. 1989) (quoting Santa Barbara Sch. Dist. v. Superior Court, 13 Cal.3d 315, 331 (1975); Metromedia, Inc. v. City of San Diego, 32 Cal.3d 180, 190 (1982)).

of the [challenged provision] . . . ."[82] It appears, therefore, that a severable and otherwise valid non-substantive provision — such as a monetary penalty on the proponent — might not survive if all of the initiative's substantive provisions are invalidated.[83]

A court's determination of severability becomes more difficult when severability bears on standing. Typically, a court decides severability after trial, when rendering judgment on the initiative's validity. For example, initiative sections *x* and *y* are adjudged to be invalid, but initiative section *z* is valid and is (or is not) severable.[84] However, this timing is disrupted when the court must assess severability to determine standing, because standing is a "threshold question"[85] which is to be determined as early as the pleading stage.[86] A court, then, in order to determine whether the penalty is "real" enough to constitute a sufficiently concrete injury, would preliminarily assess the initiative's likely validity and the monetary penalty's likely severability before trial.[87] Thus,

82 *See Calfarm Ins.,* 771 P.2d. at 1256 (internal quotation marks and citations omitted); Gerken v. Fair Political Practices Comm'n, 863 P.2d 694, 716 (Cal. 1994). *See also* League of Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 766-67 (C.D. Cal. 1995).

83 While federal courts look to state law regarding severability, federal courts also should avoid nullifying an entire statute in the absence of a clear legislative intent to withdraw the valid portions of a statute if the challenged provision is struck down. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 & n.15 (1985).

84 *See, e.g., Calfarm Ins.*, 771 P.2d at 1255-56.

85 Linda R. S. v. Richard D., 410 U.S. 614, 616 (1973).

86 National Organization for Women v. Scheidler, 510 U.S. 249, 255-56 (1994). *See also* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) ("Where . . . a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element [of standing]." (quoting Warth v. Seldin, 422 U.S. 490, 518 (1975))).

87 With specific regard to Proposition 60, its proponent could be confident that some of Proposition 60's substantive provisions would have survived constitutional challenge. The same proponent previously proposed Measure B, which was a similar adult-film initiative passed by Los Angeles County voters in 2012. *See* sources cited *supra* note 68 and accompanying text. Measure B had a condom requirement and other provisions which were challenged by plaintiff adult film producers and actors on free speech and due process grounds. Vivid Entm't, LLC v. Fielding, 965 F. Supp. 2d 1113, 1132-34 (C.D. Cal. 2013). When plaintiffs sought a preliminary injunction against the condom requirement's enforcement, the Ninth Circuit upheld the condom requirement's constitutionality (at least at the preliminary injunction stage). Vivid Entm't, LLC v. Fielding, 774 F.3d 566, 575 (9th Cir. 2014). The same condom requirement, in turn, was copied word for word into Proposition 60. *See Proposition 60*, *supra* note 2, § 4. Accordingly, Proposition 60's condom

the severability of any of an initiative's provisions depends on the language and circumstances of that particular initiative. Whether the proponent would be able to bear his or her burden of proving standing based on a prospective monetary penalty will vary from initiative to initiative.

Second, even if a monetary penalty survived because it is severable from other provisions' *arguendo* invalidity, Proposition 60's penalty would be imposed only after "all avenues for appealing *and overturning* the court decision have been exhausted."[88] What does it mean that all avenues for "overturning" — as distinguished from "appealing" — the court decision have been exhausted? For example, if a court invalidated an initiative in such a way that further legislation could cure its (the initiative's) defects, would the introduction of such legislation mean that proponents have yet to exhaust "all avenues," thereby keeping any penalty in abeyance? Likewise, would an additional initiative proposed to cure the invalidity keep a penalty in abeyance? Without answers to such questions, a proponent might be unable to bear his or her burden of proving that such a prospective penalty is sufficiently real.

Third, a monetary penalty along the lines of Proposition 60's Section 7 might have been deemed a bill of attainder in violation of the Constitution.[89] Bills of attainder are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."[90] Put another way, the Constitution provides "a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[91] The specific argument here is that the monetary penalty does not apply to all initiatives' proponents; rather, it only imposes a $10,000 fine on

requirement would probably have survived a challenge, too. With one of Proposition 60's substantive provisions likely to have been valid, Proposition 60's Section 7 fine would have been likely severable from any invalid provisions. However, the severability issue discussed here is not limited to Proposition 60. In the future, other initiatives may lack the close precedent exemplified by Measure B, so the survival of future initiatives' substantive provisions — and the resulting severability of a fine — would be an open question.

88 *Proposition 60*, *supra* note 2, § 7 (emphasis added).

89 U.S. Const. art. I, § 9, cl. 3.

90 United States v. Lovett, 328 U.S. 303, 315 (1946).

91 United States v. Brown, 381 U.S. 437, 442 (1965). *See also* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1867) (acknowledging that punishment for purposes of bill of attainder can be civil as well as criminal sanction).

this one individual proponent and, accordingly, is unconstitutional. Once again, the fine's uncertainty, this time based on concerns that it is a bill of attainder, raises the question: Is the threatened injury — the only basis for the proponent's individual standing — adequately real?

In light of the above uncertainties, whether singly or in combination, might the Supreme Court or other federal courts nonetheless accept an initiative's Proposition 60-type penalty as a sufficiently concrete basis for a proponent's individual standing? On the one hand, a federal court would have to evaluate all of these uncertainties at a lawsuit's beginning — when a proponent first seeks to appear — and *Hollingsworth*'s hostility to initiative proponents' standing might auger that proponents have not met their burden. On the other hand, proponents might argue that the Court's citation to tort damages suggests a low level of proof, because "[c]ourts have traditionally required greater certainty in the proof of damages for breach of a contract than in the proof of damages for a tort."[92] Oddsmakers might set the line here at "pick 'em."

### *3. The Bar Against Self-Inflicted Injury*

The Supreme Court has long held that a party cannot base a claim to standing on a self-inflicted injury.[93] Accordingly, a party objecting to an initiative proponent's standing here could argue that the proponent manufactured his own injury. The proponent himself or herself drafted the threat of a monetary penalty and then further gathered signatures, approved ballot arguments, and undertook such other legal and political actions as were necessary to obtain the initiative's passage. The proponent might respond that the voters who approved the initiative enacted the penalty and not the proponent (who lacked power to enact anything). The proponent

92 RESTATEMENT (SECOND) OF CONTRACTS, §352, cmt. a (AM. L. INST. 1981).

93 For example, in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam), various states, including Pennsylvania, complained about other states' tax policies, because those policies, in combination with the complaining states' tax credits, reduced the complaining states' tax revenues. The Court held that Pennsylvania and the other complaining States lacked standing, because "nothing prevents Pennsylvania from withdrawing that [tax] credit . . . . No State can be heard to complain about damage inflicted by its own hand." *Id.* at 664. *See also* Clapper v. Amnesty Int'l USA, 133 S. Ct. at 1152-53 (finding that parties' "self-inflicted injuries are not fairly traceable to the [defendant]'s purported activities" and therefore do not create standing).

might add that, as a corollary, he or she cannot unilaterally undo — and cannot avoid — the already-enacted penalty. To counter such reasoning, a party objecting to the proponent's standing might then reply that, but for the proponent's drafting and other pro-initiative activities, no voter approval would have occurred and no penalty would exist.

There does not appear to be direct precedent shedding light on whether a self-inflicted-injury objection defeats an initiative proponent's standing. Still, *Clapper v. Amnesty International USA*[94] is instructive on the Court's expansive conception of what qualifies as a self-inflicted injury negating standing. There, the Court rejected a facial challenge to a law[95] that allowed the Attorney General and the Director of National Intelligence to authorize the surveillance of noncitizens thought to be located outside the United States.[96] Among the plaintiffs were attorneys and human rights organizations asserting that their work involved communications with probable targets of surveillance under the law.[97] They argued that risk of surveillance had forced them to take "costly and burdensome measures" to keep their communications confidential.[98] In the Court's eyes, however, the plaintiffs sought to "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm."[99]

It hardly seems likely that the plaintiffs in *Clapper* went to the cost and trouble of shielding their communications from federal surveillance simply to create the opportunity to gain access to court. By contrast, Proposition 60's proponent obviously inserted the monetary penalty into the initiative for the very purpose of securing a place in court. Applying *Clapper*'s approach, a court could well ignore the technical niceties of who enacted the initiative and hold the proponent responsible for bringing the harm on himself or herself.

Additionally, whatever the merits of competing arguments over whether an initiative's penalty provision creates Article III standing, a broader consideration may prevent creation of standing through this means. For over four decades, the Court has taken a notably restrictive approach to standing.[100] Rigorous enforcement of

94 *Clapper*, 133 S. Ct. 1138.
95 50 U.S.C. § 1881a (2012).
96 *Clapper,* 133 S. Ct. at 1142-43.
97 *Id.* at 1145.
98 *Id.*at 1146.
99 *Id.* at 1151.
100 *See, e.g.*, *Clapper*, 133 S. Ct. 1138; Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Allen

standing requirements is rooted largely in the Court's commitment to observing the "properly limited . . . role of the courts in a democratic society."[101] In light of this philosophy, it seems unlikely that the Court would countenance devices to circumvent *Hollingsworth* by empowering proponents to draft their own Article III injuries. Perhaps the circumstances of *Hollingsworth* are sufficiently infrequent that recognizing an injury constructed this way would not open floodgates to federal litigation on initiatives. Still, it would encourage an increase of the occasions on which federal courts assess initiatives that runs counter to a central aim of modern standing doctrine. Moreover, if accepted, the rationale for standing through this means could open the door to mechanisms with potential to widen the range of individuals with personal standing to defend initiatives.

### *B. Variations on Creation of Standing via a Penalty*

Scholars Scott Kafker and David Russcol propose two variations on Proposition 60's penalty,[102] both intended to create prong 1's personal standing.

#### *1. Variation 1: Bounty*

Whether by general state law or as embedded in an initiative, a successful defense of the initiative would entitle the defender to a monetary bounty.[103] While this bounty proposal might avoid the uncertainty and self-inflicted injury concerns of the penalty discussed above, we doubt whether such a bounty would pass *Hollingsworth* muster. In principle, such a bounty lacks any limits on who could claim standing. For example, an initiative could offer a bounty to any persons — not just proponents — who successfully defend the initiative. Indeed, a bounty could be attached to any law, whether federal or state and whether traditional legislation or initiative, thereby giving everyone prong 1 personal standing to defend an initiative's or other law's validity.

v. Wright, 468 U.S. 737, 750 (1984); United States v. Richardson, 418 U.S. 166 (1974).

101 Warth v. Seldin, 422 U.S. 490, 498 (1975).

102 *See* Kafker & Russcol, *supra* note 53, at 291-95. This variation is the obverse of Proposition 60: In the latter, the proponent is penalized for failing to successfully defend his or her initiative; in the former, the proponent is rewarded for successfully defending his or her initiative.

103 *See id.* at 291-92.

To be sure, as Kafker and Russcol have noted, a bounty may bear some resemblance to a traditional *qui tam* action, which does confer standing on the relator (akin to a plaintiff).[104] However, an essential element of a *qui tam* action is that the government and relator share in a monetary recovery: The relator receives "a partial assignment of the Government's damages claim."[105] In other words, the government and relator share in a monetary recovery,[106] an element which the bounty lacks. Accordingly, the Supreme Court, with its inhospitality to initiative proponents' standing, would be unlikely to countenance bounty-based standing given its limitless applicability and its failure to adhere to traditional *qui tam* requirements.

### *2. Variation 2: Refundable Filing Fee*

Some states, as a matter of existing law, may require all initiative proponents to pay a fee upon the filing of the initiative.[107] Under Kafker and Russcol's variation 2, this filing fee would be wholly or partially refunded to the proponent upon a successful defense of the initiative.[108]

An initiative's refund provision, depending on its exact wording, might or might not avoid Proposition 60's uncertainty problems. The refund would avoid Proposition 60's self-inflicted injury problem, because the original fee is required of any proponent who files a proposed initiative. The refund also avoids the overbreadth of variation 1, in that variation 2's refund would be available only to

104 *See id*. *Qui tam* is a statutory creation, derived from old English law: Under specified statutes and circumstances, a private party — who has suffered no injury — may sue a wrongdoer to recover a penalty owed to the government, with the recovery divided between the private party and the government. *See, e.g.*, Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 768-72 & nn.1&3 (2000).

105 Hollingsworth v. Perry, 133 S. Ct. 2652, 2665 (2013).

106 *E.g.*, Black's Law Dictionary 1414 (rev. 4th ed. 1968).

107 *See, e.g.*, Miss. Code Ann. § 23-17-21 (West 2017); Wyo. Stat. Ann. § 22-24-302 (West 2016).

108 *See* Kafker & Russcol, *supra* note 53, at 292-95. Of course, this variation 2 would be unavailable in those states which lack a filing fee for initiatives, because nothing could be refunded. For example, California requires a $2,000 filing fee, but the fee is refunded if the initiative "qualifies for the ballot within two years . . . ." Cal. Elec. Code § 9001(c) (West 2016). Accordingly, no refund would be available in California, because, by definition, the fee would have been refunded before the enacted initiative's validity is tested. Without the possibility of a refund, in turn, variation 2 could not create standing in California.

the proponents who paid the original fee, and the refund could not be claimed by just any self-selected defender of the initiative. With these defects avoided, initiative proponents could argue that the refund gives them individual standing: a personal monetary stake which is contingent upon the initiative's validity.

On the other hand, a refund presents a logical tangle. More particularly, this variation 2 might run afoul of the Supreme Court's hostility toward "manufacture[d] standing."[109] The proponent's original "injury in fact" is the filing fee.[110] However, this injury is "not fairly traceable to [the challenged law]."[111] Indeed, the injury and the refund are unconnected, save for the language in which the proponent himself or herself inserted into the initiative.[112]

### *C. Representational Standing Through State Employment*

As earlier discussed, Proposition 60's Section 10 sought to gain standing through the separate route of conferring prong 2's representational status on the proponent in the event that the Attorney General fails to defend the initiative.[113] Such a provision raises the question of whether an initiative can delegate the state's standing to a proponent by appointing him or her as a state official. Here, the answer appears to be clearer than with regard to prong 1's personal standing: "No." Three independent reasons undermine Section 10 and, more generally, other proposed prong 2 language.

First, Section 10 would likely run afoul of California's constitution, which bars a proposed initiative from naming "any individual to hold any office"[114] — perhaps a violation as well under comparable provisions in the constitutions of other states authorizing initiatives.[115] Here, the proponent would become a state employee

109 Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1151 (2013).

110 *Cf.* Wittman v. Personhuballah, 136 S. Ct. 1732, 1736 (2016) (requiring evidence of the injury in fact).

111 *Clapper*, 133 S. Ct. at 1151.

112 It is true that the Court has recognized standing for a *qui tam* relator under an assignor-assignee rationale. Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 773-74 (2000). Still, the circumstances there — where the government enlisted private support to recover from a concrete monetary injury that it has suffered — seem well removed from a scheme crafted for the sole purpose of slipping the plaintiff into court rather than to redress a monetary injury to the government. *See id.*

113 *See supra* notes 65-69 and accompanying text.

114 CAL. CONST. art. II, § 12. *See also* discussion *supra* Part I-C.

115 *See, e.g.*, ARIZ. CONST. art. IV pt. 2, § 19, cl. 13; COLO. CONST. art. V, §25, cl. 8

if California's Attorney General failed to defend Proposition 60. The contingency of the proponent's status raises the question of whether such a conditional appointment violates the state constitution's prohibition. It seems a fair reading of the California Constitution's prohibition on naming an individual to office that it applies whether the naming is conditional or unconditional. If this argument were to prevail, the California Constitution would then subject the initiative to a pre-election challenge to prevent its "submi[ssion] to the electors."[116] Even if this California constitutional violation occurred only when the Attorney General failed to defend the initiative — that is, Proposition 60's Section 10 condition precedent is met — and the proponent's appointment becomes unconditional, plaintiffs could still successfully challenge the initiative.[117] Proposition 60's Section 10, then, appears to have been an impermissible naming of the proponent to office.

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(barring as "[s]pecial legislation," *inter alia,* laws "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever"); N.J. Const. art. IV, § 7, ¶ 9, cl. 8 (same); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 Clev. St. L. Rev. 719, 721 n.6 (2012) (collecting state constitutional prohibitions of "special" laws); *see generally* Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints,* 40 J. Legis. 39 (2013-2014) (examining the widespread prohibitions on states' abilities to enact "special laws," including laws which identify particular persons).

116 Cal. Const. art. II, § 12.

117 *See id.* While the California Constitution's language is that no such initiative "shall have any effect," the California Supreme Court has ruled that an initiative provision which impermissibly names an individual to office might be severed, with the rest of the initiative remaining valid. *See, e.g.*, Calfarm Ins. Co. v. Deukmejian, 771 P.2d 1247, 1263, 1266 (Cal. 1989) (an initiative's identification of a "private corporation" to perform a "function" in violation of California Constitution, art. II, § 12 may be severed, such that the remainder of the initiative is valid). This severability option might not save a proposed initiative which is challenged under Cal. Const. art. II, § 12 (and other states' similar provisions, *see supra* note 114) before the initiative is enacted by voters. While no case law on this question appears to exist, an initiative's opponents could argue: (a) severability under *Calfarm Ins.* was in connection with an already "enacted" initiative, 771 P.2d at 1249, (b) an initiative's severability language can have no legal effect if the initiative — including the severability language — has not been enacted, and (c) the plain language of Cal. Const. art. II, § 12 is that no initiative naming "any individual to hold any office . . . may be submitted to the electors . . . , " and this pre-election remedy contains no provision for severability. In sum, language such as Proposition 60's Section 10 might doom an entire initiative notwithstanding severability language — if the initiative is challenged before the election.

Second, Proposition 60's Section 10 appeared to conflict with Proposition 60's Section 7. Section 10 would have subjected the proponent to "all fiduciary duties" prescribed by law, presumably including all such duties imposed on state employees. However, Section 7 posed the possibility of a $10,000 penalty on the proponent if any part of the initiative was invalidated by a court.[118] In some instances, a state could benefit from conceding the invalidity of a specific provision: for example, to delete a possibly unconstitutional provision, so as to preserve the remainder of the initiative. Under ordinary circumstances, a state employee might have a fiduciary duty to so concede. However, the proponent would have a contrary personal interest in conceding nothing — that is, defending every single provision of the initiative — lest he or she personally be penalized $10,000.

Third, under federal law, even if the proponent were technically an agent of the state, he or she would not be a true public official entitled as a matter of policy to assume the state's standing. As set forth in *Hollingsworth*, officials with standing on behalf of the state are subject to the state's "resource constraints, changes in public opinion, or potential ramifications for other state priorities."[119] However, an initiative proponent — even if a state employee — is subject to none of these policy considerations. For example, Proposition 60's Section 10 expressly provided that the state must reimburse the proponent's defense expenses, and Section 10 listed no exceptions, even in the face of, say, severe state budgetary constraints.[120]

These policy considerations grow larger and more complex if an initiative has more than one official proponent. For example, as noted earlier, California's Proposition 8 had five proponents.[121] Depending on the initiative's actual language, this multiplicity of proponents could raise vexing issues. Could each of the five proponents become a state employee? If so, would they have to agree on a single counsel, or would each be entitled to appear and engage different outside counsel to defend the initiative? If the former, what if the proponents could not agree on a single attorney? If the latter, the resulting expenses of multiple counsel could be substantial and without a finite cap. In addition, what would happen if the various proponents' defenses conflicted? One proponent might

118 *Proposition 60*, *supra* note 2, § 7.
119 Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013).
120 *Proposition 60*, *supra* note 2, § 10.
121 *See supra* note 27 and accompanying text.

interpret a provision in the initiative in a way inconsistent with another proponent's interpretation. In a similar vein, one proponent might concede the invalidity of a provision, but another proponent might not. If an initiative had five (or more) official proponents, such conflicts might be likely. Would a court be obligated to accept all conflicting positions as representing the state? Thus, it seems improbable that a federal court would accord proponents standing to represent the state in defending initiatives, even if the proponent formally becomes a state employee.[122]

### III. Seeking to Avoid *Hollingsworth*: Allowing Participation in Litigation Without the Need for Standing

Proposition 54, which will reform state legislative procedures by, *inter alia*, requiring that bills are posted on the Internet at least seventy-two hours before being passed, contains the following Section 6.1:

> Section 12511.7 is added to the Government Code[123] to read:
>
> . . . .
>
> If an action is brought challenging, in whole or in part, the validity of [Proposition 54], the following shall apply:
>
> (a) The Legislature shall continue to comply with [Proposition 54] unless it is declared

122 Apart from Proposition 60's section 10 problems vis-à-vis standing, Section 10 is also vague — or even defective — with regard to the meaning of the Attorney General's failure to defend (which is the condition precedent to the proponent's appointment as a State employee with authority to defend the initiative on the State's behalf). What if the Attorney General appears to defend the initiative, but concedes the invalidity of critical parts of the initiative? Or the Attorney General appears, but his or her defense lacks "vigor"? *See* Perry v. Brown, 265 P. 3d 1002, 1022 (Cal. 2011). *See also* Manheim et al., *supra* note 15, at 1085-86 & n.92 (opining that a defense lacking vigor may be worse than no defense at all, because the former is subtler than the latter and might allow the non-vigorous official to escape political accountability).

123 This new Section 12511.7 is added under California Government Code Chapter 6 (titled, "Attorney General"), Article 2 (titled, "General Powers and Duties"). Cal. Gov't Code § 12511.7 (Deering 2016).

> unconstitutional pursuant to a final judgment of an appellate court.
>
> (b) Except as set forth in subdivision (c), the Attorney General shall defend against any action challenging, in whole or in part, the validity of [Proposition 54] . . . .
>
> (c) If the Attorney General declines to defend the validity of [Proposition 54] . . . , the Attorney General shall nonetheless file an appeal from, or seek review of, any judgment of any court that determines that [Proposition 54] is invalid, in whole or in part, if necessary or appropriate to preserve the state's standing to defend [Proposition 54] in conformity with the Attorney General's constitutional duty to see that the laws of the state are adequately enforced.[124]

The apparent theory of Proposition 54's Section 6.1 is to allow the proponents (though without standing under *Hollingsworth*) to participate in federal litigation if Proposition 54 is challenged.[125]

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124 Proposition 54, *supra* note 6, § 6.1. Proposition 54 additionally provides that (i) its "official proponents . . . have an unconditional right to participate, either as interveners [sic] or real parties in interest" in any action regarding Proposition 54's "validity or interpretation" and (ii) if the Governor and Attorney General decline to defend Proposition 54, then the proponents are "authorized to act on the state's behalf in asserting the state's interest in the validity of [Proposition 54] . . . ." *Id*. § 6.1(d). In federal courts, both of these additional provisions — i.e., giving the proponents a blanket right to participate or the right to act on behalf of the state — are directly barred by *Hollingsworth*. *See Hollingsworth*, 133 S. Ct. at 2667 (States cannot "simply . . . issu[e] to private parties who otherwise lack standing a ticket to the federal courthouse."). *See also supra* notes 39-51 and accompanying text.

125 A federal court lawsuit over Proposition 54 appears entirely hypothetical, in that Proposition 54 presents no federal issues. Rather, only matters of the state's constitution and statutes are at issue, and those issues would be litigated in state court, where proponents always have standing as a matter of state law. *See Hollingsworth*, 133 S. Ct. at 2667 ("Nor do we question . . . the right of initiative proponents to defend their initiatives in California courts, where Article III does not apply."); Perry v. Brown, 265 P.3d 1002, 1016-20 (Cal. 2001). *See also* Manheim et al., *supra* note 15, at 1121. However, because future initiatives that do present federal issues may contain Section 6.1-type provisions, Part III of this article will analyze whether such provisions would generally allow proponents to participate in federal court.

As long as the state appears as a party — even as an inactive party refusing to file a brief — and as long as Proposition 54 is enforced during the litigation's pendency, an adverse proceeding may exist. This adverse proceeding, in turn, would allow an initiative's proponents to defend the initiative, albeit as intervenors or amici without the requisite standing to be an actual defendant.

This theory might have been inspired, in part, by the United States Supreme Court's holding in *Windsor v. United States*,[126] decided on the same day as *Hollingsworth*. In *Windsor*, a surviving spouse of a same-sex couple challenged a provision of the federal Defense of Marriage Act ("DOMA") that denied her certain tax benefits.[127] The United States Attorney General refused to defend the validity of the DOMA provision, but (a) continued to enforce it by refusing to issue a tax refund to the plaintiff surviving spouse and (b) filed a notice of appeal — though not a brief — after the trial court and court of appeals found it unconstitutional.[128] At trial and on appeal, a congressional entity, the Bipartisan Legal Advisory Group ("BLAG"), intervened and sought to defend the DOMA provision.[129] The Supreme Court expressly declined to decide whether BLAG had standing, but it held that the case was justiciable because the United States continued to enforce the DOMA provision and would suffer a real injury upon refunding the tax payment to the plaintiff.[130]

Proposition 54 appears to track *Windsor* in that its Section 6.1 obligates the legislature to continue to adhere to Proposition 54's procedural mandates until a judgment of its invalidity becomes final and obligates the California Attorney General to file a notice of appeal, even if he or she does not otherwise defend Proposition 54.[131] Thus, in theory, *Windsor*-type justiciability is established, thereby allowing the proponents to defend Proposition 54 in federal court, even if they — like BLAG — might lack actual standing.

However, Proposition 54's Section 6.1 raises substantial questions under both federal and state law. First, under federal law, it is unclear that initiative proponents are analogous to BLAG. Initiative proponents are private citizens;[132] by contrast, BLAG was

126 133 S. Ct. 2675 (2013).
127 *Id*. at 2683.
128 *Id*. at 2683-84.
129 *Id*. at 2684.
130 *Id*. at 2686, 2688.
131 *See Proposition 54*, *supra* note 6, § 6.1.
132 *See* Cal. Const. art. II, § 8(a) ("The initiative is the power of the electors to propose statutes and amendments to the Constitution . . .").

a governmental entity.[133] *Hollingsworth* held this distinction to be all-important: "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here."[134] Even if the proponents could be treated as BLAG-type intervenors, Section 6.1 does not require the Attorney General to file an answer in the U.S. District Court. Without an answer, the District Court must enter the defendant's default.[135] Proponents may appeal a subsequent default judgment,[136] but the record on appeal would contain little on which to reverse a judgment of the initiative's invalidity.[137] In other words, allowing a proponent to participate in an appeal — via the Attorney General's notice of appeal — might be a hollow victory, unless the proponent was allowed to develop evidence at trial on which an appeals court could hold the initiative to be valid.

Presumably, proponents could cure this specific problem by redrafting Section 6.1 to provide, in Government Code Section 12511.7(c), that "the Attorney General shall nonetheless file an answer sufficient to prevent entry of a default"[138] as well as a

133 *See Windsor*, 133 S. Ct. at 2684.

134 Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013). On the other hand, the Attorney General's filing of a notice of appeal might allow an initiative's proponents to become amici and thereby assert via written briefs and oral argument the initiative's validity, despite the proponents' lack of standing. *See* FED. R. APP. P. 29. Even if proponents could not appear as amici, an Attorney General's failure to file a brief only means that the Attorney General "will not be heard at oral argument unless the court grants permission." FED. R. APP. P. 31(c). The circuit court would still decide the appeal on the merits and would not automatically decide against the party failing to file a brief. *See* Carvalho v. Equifax Info. Servs., 629 F.3d 876, 887 n.7 (9th Cir. 2010).

135 FED. R. CIV. P. 55(a).

136 *See, e.g.*, Calumet Lumber, Inc. v. Mid-Am. Indust., Inc., 103 F.3d 612, 614-15 (7th Cir. 1997).

137 *See* FED. R. APP. P. 10(a).

138 Mandating this type of minimal, noncommittal answer is intended to accommodate both of the following: (a) an elected attorney general's right to refuse to defend an initiative that the attorney general believes to be unconstitutional, and (b) the litigation's still proceeding on the merits — i.e., without entry of a default — and the initiative's proponents having an opportunity to intervene. *See, e.g., infra* notes 140-47 and accompanying text. For example, in litigation over Los Angeles County's Measure B, the defendant County officials did not plead that Measure B was constitutional, but did answer that the plaintiffs' complaint "presents important constitutional questions that require and warrant judicial determination"; Measure B's proponents successfully intervened, and the litigation continued on the

notice of appeal. Such a filing is critical in the Ninth Circuit, where an initiative proponent might then be permitted to intervene as a defendant, even if the proponent lacked standing on his or her own.[139] Still, while this Section 6.1 may be a ticket to the federal courthouse, it nonetheless poses a state law concern: California's Attorney General has a right not to defend a state law. This principle was established in *People ex rel. Deukmejian v. Brown*.[140]

In *Deukmejian*, California's Attorney General advised a state agency regarding an underlying state court lawsuit filed against the agency, alleging that the agency was attempting to implement an unconstitutional statute.[141] One week after advising the agency, the Attorney General himself sued the agency, also seeking to have the statute declared unconstitutional on the same grounds as the underlying lawsuit.[142] The California Supreme Court enjoined the Attorney General from proceeding, holding that he could not sue his own former client — the state agency — especially after he advised the agency regarding the very law at issue.[143] However, the court also held that the Attorney General, who is an independently elected constitutional officer, "cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to

merits. *See* Defendants' Answer to Plaintiffs' Complaint at 1, Vivid Entm't LLC v. Fielding, No. CV 13-00190 (AGI) (C.D. Cal. Feb. 27, 2013), ECF no. 21; *see also supra* note 68 (citing Manheim et al., *supra* note 15, at 1123-27 & nn.281, 286 & 299-300); Vivid Entm't, LLC v. Fielding, 965 F. Supp. 2d 1113, 1121-22 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566, 573 (9th Cir. 2014).

139 *See* State of Cal. Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 845-46 & n.9 (9th Cir. 2003). *But see* Appel, *supra* note 52, at 270 (not all circuits allow such piggyback standing). Even in the Ninth Circuit, an intervenor on the defense side might be limited to seeking the same relief sought by the defendants with standing. *Cf.* Town of Chester v. Laroe Estates, Inc., ___ U.S. __, 2017 U.S. LEXIS 3555 at *2, *4 (Jun. 5, 2017) ("[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing.") (involving attempt by party to intervene as a plaintiff under Federal Rule of Civil Procedure 24(a)(2)). If the defendants with standing and the intervening proponents seek only the same relief — such as a judgment that the initiative is constitutional — then *Town of Chester*'s limitation would be moot. On the other hand, if the defendants and intervenors were to seek different relief — say, the defendants sought only to validate parts of an initiative, while the intervening proponents sought to validate the entire initiative — then *Town of Chester* might limit the intervenors to the relief sought by defendants.

140 624 P.2d 1206, 1207 (Cal. 1981).

141 *Id.*

142 *Id.*

143 *Id.* at 1210.

law, and he may withdraw from his statutorily imposed duty to act as their counsel . . . ."[144] This right not to defend the state is based, at least in part, on the Attorney General's common law powers to protect "the public interest," which may conflict with the obligation to represent state agencies or officials.[145]

Applying *Deukmejian* to Proposition 54's Section 6.1 poses a fundamental question: May an initiative force an Attorney General to file an answer or a notice of appeal if the Attorney General believes that the initiative is unconstitutional (so that an answer or appeal would be contrary to "the public interest")? Stated differently, would a court mandate that an Attorney General answer or appeal when he or she believes that no good-faith basis exists for the answer or appeal?

No definitive answer exists. Part of the difficulty here is that *Deukmejian*'s discussion of the Attorney General's powers cited to both the State constitution and State statutes.[146] Perhaps, then, an initiative that included a constitutional amendment to require the Attorney General to file an answer or notice of appeal would effectively overrule *Deukmejian*, thus compelling filing of an answer or notice of appeal despite the Attorney General's beliefs about the initiative.[147] Proposition 54's Section 6.1, however, specifically amends a statute — namely, the Government Code — so it is questionable whether it would override the California Supreme Court's ruling in *Deukmejian*.

144 *Id.* at 1209.

145 *Deukmejian*, 624 P.2d at 1207, 1209 (citing D'Amico v. Bd. of Med. Exam'rs, 520 P.2d 10, 20 (1974)).

146 *Deukmejian*, 624 P.2d at 1209.

147 Proponents seeking to qualify such initiatives (which contain constitutional mandates) for statewide ballots may face practical hurdles in states where constitutional initiatives require more signatures than statutory ones. For example, in California, initiatives amending the state's constitution currently require almost 220,000 more signatures than statutory initiatives. *See* CAL. CONST. art. II, § 8(b) (requiring signatures of eight percent of the total votes cast in the most recent gubernatorial election for constitutional initiatives, but only five percent for statutory initiatives); *Statement of Vote*, CAL. SEC'Y OF STATE 6 (Nov. 4, 2014), http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf (reporting that approximately 7.32 million votes were cast in the most recent gubernatorial election). Accordingly, a constitutional initiative — including one where the only constitutional provision is the Attorney General's obligation to file an answer or a notice of appeal — might cost $1 million more than a purely statutory initiative for signature gathering. *See, e.g.*, Caragozian, *supra* note 26, at 695 & n.50 (noting that signature gatherers charge $3 to $5 or more per signature).

## Conclusion

Considerable reason exists for skepticism toward the capacity of Proposition 60's Section 7 — which threatened to fine an initiative's proponent for a partially or wholly invalid initiative — to create personal standing for the proponent. The prospect of a $10,000 penalty is uncertain, and in addition, courts are likely to deem the penalty self-inflicted. Moreover, there is reason to question the validity of scholars' bounty and refund variations: (1) a bounty would appear to have no limits on who could have standing and also departs substantially from the traditional *qui tam* structure; and (2) a refundable filing fee would be available only in states that impose and retain fees, and further, might be outside the logic of traditional standing.[148] Less ambiguity, however, attends Proposition 60's Section 10, which purports to allow the proponent to represent the state and assume the state's standing. That provision appears to be invalid under (a) the California Constitution's bar on initiatives naming a person to hold office; and (b) Article III in making Proposition 60's proponent a state employee in name only without *Hollingsworth*'s substantive attributes such as responsiveness to limited resources and changes in public opinion. Accordingly, initiative drafters in California and other states authorizing initiatives should refrain

148 Until courts rule otherwise, of course, none of these approaches can be categorically dismissed. Also, little disadvantage would appear to result from including such provisions in future initiatives (except for the disadvantage of the proponent perhaps being liable to pay the fine under provisions like Proposition 60's Section 7). Accordingly, absent definitive future case law to the contrary, initiative drafters' best practices might now include language — adapted from Proposition 60 — similar to the following (along with the Proposition 60's Section 9 severability language):

> The People of this State hereby declare that the proponent of this [Initiative] shall be held civilly liable in the event this [Initiative] is struck down, after passage, by a court for being constitutionally or statutorily impermissible. Such an impermissible [Initiative] is a misuse of taxpayer funds and electoral resources and the [Initiative]'s proponent, as the drafter must be held accountable.
>
> In the event this [Initiative], after passage, is struck down, in whole or in part, as unconstitutional or statutorily invalid, and all avenues for appealing the court decision have been exhausted, the proponent shall pay a civil penalty of $10,000 to the State for failure to draft a wholly constitutionally or statutorily permissible initiative. No party of entity may waive this civil penalty.

*See Proposition 60*, *supra* note 2, § 7. Comparable language could be crafted for monetary rewards and refundable filing fees.

from including such representational standing provisions.

Less reason for skepticism exists with regard to the gist of Proposition 54's Section 6.1 mandate that the Attorney General file a notice of appeal. If, as set forth in Part III above, Section 6.1 is revised in two important ways — (1) the mandate is added to the state constitution, not to a statute; and (2) the Attorney General is required to file an answer (even if just a pro forma one[149]), as well as a notice of appeal — initiative proponents may participate in federal litigation. More specifically, proponents in circuits that allow piggyback standing, such as the Ninth Circuit, could intervene as defendants at trial, and proponents in all circuits may be allowed to brief and argue as amici on appeal, despite their lack of actual standing. To be sure, such participation would be less robust than that of full-fledged defendants and appellants, but *Hollingsworth*'s standing restrictions may leave initiative proponents few alternatives.

149 *See supra* note 138 and accompanying text.