

Executive Non-Enforcement: Closing the Initiative Proponent Standing Gap Between State and Federal Court

DRAKE V. TRENT[†]

State executive officers have historically refused or failed to enforce certain state laws, but in recent years selective enforcement has become increasingly pervasive. This trend poses a particular danger to popular sovereignty in states that have adopted voter-initiative power, like California. Further, federal courts have denied voters standing to assert their interest in the enforcement of laws, narrowing voters' ability to protect their power. This Note proposes that blanket non-enforcement policies by a high-ranking executive official violate California law. As a result, the voters must turn to the courts to resolve the issue. California state courts already have remedies in the form of a writ of mandate. However, to resolve the conflict on standing doctrine between federal courts and state courts, the voters should be understood as acting in their legislative capacity.

[†]J.D. Candidate, University of California College of the Law, San Francisco, Class of 2026, and UCLJ Executive SCOCA Editor. B.A. Political Science and Philosophy, Pepperdine University. Special thanks to Professor Kaiser for his help and feedback in preparing this Note. I would also like to thank my partner, Nicole, for sitting through endless conversations and letting me verbalize these ideas for over a year now.

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INTRODUCTION

Throughout history, state officials in the United States have routinely refused to enforce federal laws.¹ More recently, state executives at every level have unilaterally decided not to enforce their own states' laws. In 2004, then Mayor of San Francisco, Gavin Newsom, permitted gay couples to marry,² despite state law to the contrary.³ In 2024, the Arizona Attorney General refused to enforce the state's abortion ban even after the Arizona Supreme Court upheld the ban.⁴ The Sutter County Sheriff and District Attorney have stated they refuse to enforce a gun-control law passed by the California legislature and signed by Governor Newsom.⁵ The progressive prosecutor movement asserts that district attorneys have the right to suspend enforcement of laws with which they disagree.⁶ In *Perry v. Brown*, the California Supreme Court recognized the distinct risk to popular sovereignty that occurs when a government refuses to carry out its duties, such as enforcing and defending laws.⁷

While each refusal has had varying success, such refusal to enforce the law poses a unique danger to popular sovereignty.⁸ If a state executive can choose which laws to enforce or not enforce,⁹ voters' ability to effectuate their will is weakened. This threat is particularly prominent in California, where voters can pass laws and constitutional amendments through the initiative process.¹⁰ To allow executive officials to deny the popular will would effectively grant

1. See *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 433 (1968) (finding that a Virginia school district refused to desegregate after *Brown*); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 14, 30 (1971) (holding federal courts may order bussing where local school officials have failed to implement policies that desegregate schools).

2. Gavin Newsom's decision to permit gay marriage was a morally justified choice. However, this Note will not focus on the merits of an executive refusing to enforce certain laws. Rather, it will focus on the dangers of a rogue executive and the ability of voters to check executive power and discretion through means other than an election.

3. Rachel Gordon, *The Battle over Same-Sex Marriage / Uncharted Territory / Bush's Stance Led Newsom to Take Action*, SFGATE (Feb. 15, 2004), <https://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-Uncharted-2823315.php>.

4. MORNING EDITION, *Arizona Attorney General Says She Won't Enforce a 164-year-old Abortion Law*, NPR, at 00:09 (NPR, Apr. 12, 2024, at 07:17 ET), <https://www.npr.org/2024/04/12/1244265593/arizona-attorney-general-says-she-wont-enforce-a-164-year-old-abortion-law>.

5. Andrew Haubner & Richard Ramos, *Sutter County Sheriff, DA Take Stand Against New State Gun Laws*, CBS NEWS (Jan. 5, 2024, at 16:27 PT), <https://www.cbsnews.com/sacramento/news/sutter-county-sheriff-da-take-stand-against-new-state-gun-laws/>.

6. Zachary Price, *Blanket Non-Enforcement Policies Are Unconstitutional in California*, SCOCA BLOG (Feb. 1, 2022), <https://scocablog.com/616-2/>.

7. See *Perry v. Brown*, 265 P.3d 1002, 1022 (Cal. 2011). For further discussion, see *infra* Subpart.III.A.

8. Popular sovereignty is the concept that the government is subject to the will of its constituents. Here it largely focuses on the ability of California voters to control their government through the direct drafting and passing of legislation and constitutional amendments via the initiative power.

9. This Note is particularly concerned with law enforcement discretion as opposed to enforcement decisions based on lack of resources or other blocks to enforcement outside of an executive's control.

10. CAL. CONST. art. II, § 8.

executive officers quasi-legislative power by rendering certain laws as good as unpassed. Such consolidation of power is dangerous for a healthy democracy.¹¹

Currently, there is a split between the California state courts and the federal courts regarding who can assert an interest in an initiative. Both the California Supreme Court and the United States Supreme Court took up the same case regarding California's Proposition Eight and whether proponents have standing to defend it.¹² In *Perry v. Brown*, the California Supreme Court held that initiative proponents¹³ have standing to assert their interest in enforcing a valid initiative in courts.¹⁴ Meanwhile, in *Hollingsworth v. Perry*, the United States Supreme Court held that initiative proponents or voters lack standing to defend or seek enforcement of validly passed initiatives.¹⁵ Due to this conflicting precedent, California voters' remedies for non-enforcement are limited to state court. To ensure that voters have diverse means to combat abuses of power, the conflicting standing doctrines must be rectified.

The dangers of a blanket non-enforcement policy by the executive branch are particularly manifest in California. Some scholars have recommended California's electorate, with its legislative powers, as a fourth branch of government.¹⁶ When understood to act in a legislative capacity, as if a branch of government, the voters have proper standing in federal courts.

This Note will explain how blanket non-enforcement policies violate the California constitution, and explore the remedies available to the voters in both state and federal courts. This Note proceeds in four Parts. Part I lays out the powers reserved to the people. Part II focuses on how an executive blanket non-enforcement policy violates California law. Part III discusses the conflicting California and Federal precedents and outlines the issue of allowing the United States Supreme Court precedent to go unchecked. Part IV discusses (1) the remedy in California courts when an executive refuses to enforce a law and (2) how to circumvent the standing issue in federal courts.

11. THE FEDERALIST NO. 47 (James Madison).

12. *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) is the California Supreme Court case. *Hollingsworth v. Perry*, 570 U.S. 693 (2013) is the United States Supreme Court case.

13. Initiative proponents are the people who draft, gather signatures, submit, and advocate for any given initiative.

14. *Brown*, 265 P.3d at 1007. Voters can assert the government's interest in upholding a law or even their own independent interest in seeing the law enforced. For a full discussion of voter's abilities to assert an interest in the enforcement of laws in California, see *infra* Subpart.III.A.

15. *Hollingsworth*, 570 U.S. 693, 713 (2013). Voters or proponents of an initiative are unable to maintain an interest in upholding or enforcing a law once it has been passed in the election. For a full discussion of the Court's precedent regarding voter standing, see *infra* Subpart.III.B.

16. See David A. Carrillo, Stephen M. Duvernay & Brandon V. Stracener, *California Constitutional Law: Popular Sovereignty*, 68 HASTINGS L. J. 731, 734 (2017). The authors here are primarily concerned with restraining the power of the voters rather than other branches of government; however, their analysis can cut both ways.

I. THE POWERS OF THE CALIFORNIA ELECTORATE

This Part lays out the people’s powers and responsibilities under the California Constitution. Special attention will be paid to the initiative power and its limitations.

The power the people have most clearly reserved for themselves is the initiative power.¹⁷ The legislature added initiative power to the state constitution in 1911, as the people could not amend the constitution at the time; California only allowed legislatively proposed amendments.¹⁸ Using the initiative power, the people can suggest constitutional amendments and statutes to be placed on the ballot every general election.¹⁹ A statute passed through the initiative process may only be repealed or amended by the state legislature with voter approval or if the statute permits repeal or amendment.²⁰ By its nature, the power of voters to propose laws and vote is a legislative power.²¹ When the people utilize initiative power, it is coequal to the legislature’s powers.²² It is also worth noting that the initiative measure was approved to ensure the people had the political power to enforce their sovereignty when the government refused or failed to act.²³ To get an initiative on the ballot, its proponents must complete a relatively complex process.²⁴

Two key limits on the people’s initiative power are the number of subjects and revisions. The single-subject rule requires that any single initiative measure may not cover more than one subject.²⁵ An initiative’s various provisions and components satisfy the single subject rule so long as they pass the “reasonably germane” test:²⁶ there must exist a reasonable and common sense relationship between an initiatives’ provisions, “in furtherance of a common purpose.”²⁷ Generally, the California courts have been hesitant to use the single-subject rule to frustrate the initiative process, giving substantial deference to the people’s ability to combine multiple provisions in one initiative.²⁸ The extreme

17. CAL. CONST. art. II, § 8.

18. David A. Carrillo, Stephen M. Duvernay, Benjamin Gevercer & Megan Fenzel, *California Constitutional Law: Direct Democracy*, 92 S. CAL. L. REV. 557, 566 (2019). The powers of referendum and recall were also added in the same election; those powers will be discussed in greater detail shortly.

19. *Id.* at 569.

20. CAL. CONST. art. II, § 10.

21. *Pro. Eng’rs in Cal. Gov’t v. Kempton*, 155 P.3d 226, 242–43 (Cal. 2007) (explaining the electorate was permitted to alter contracting practices of the state government because “[u]nder our constitutional system the Legislature is not the exclusive source of legislative power”).

22. *Id.* at 243.

23. *See Perry v. Brown*, 265 P.3d 1002, 1016 (Cal. 2011).

24. *See CAL. SEC’Y OF STATE, STATEWIDE INITIATIVE GUIDE*, at 1–13 (2024) (detailing a time intensive, formalistic, and rule oriented process).

25. CAL. CONST. art. II, § 8.

26. *Briggs v. Brown*, 400 P.3d 29, 38 (Cal. 2017) (holding that a large set of reforms to capital punishment did not violate the single subject rule because, while each provision touched on a different practice, they were all reasonably germane to the initiative’s purpose).

27. *Id.*

28. *Id.* (quoting *Californians for an Open Primary v. McPherson*, 134 P.3d 299, 338 (Cal. 2006)).

leniency²⁹ of the courts to the voters has more or less rendered this rule a “paper tiger,”³⁰ leaving the amendment-revision distinction as the strongest restriction on the initiative power.

The revision restriction holds that voters may amend the constitution, but may not revise it.³¹ Constitutional revisions refer to a fundamental change to the constitutional framework and require a constitutional convention to pass.³² Something constitutes a revision if it either *quantitatively* changes a large number of provisions or *qualitatively* changes the basic structure of the government.³³

California courts liberally construe the initiative power, and if there is any ambiguity, it resolves it in favor of the initiative.³⁴ The California Supreme Court has been hesitant to label voter initiatives as revisions, permitting even “narrow and limited” exceptions to the rights in the California Constitution.³⁵

In addition to the power to amend the Constitution, California voters also have referendum power. Within ninety days of enacting a statute passed by the legislator, the voters may call for a referendum to prevent all or part of the statute from going into effect.³⁶

II. BLANKET NON-ENFORCEMENT IS IMPERMISSIBLE UNDER CALIFORNIA STATE LAW.

Having established how the voters’ powers operate in California, this Note turns to executive policies of blanket non-enforcement. This Part focuses on the executive’s powers and duties. It explains the California Supreme Court’s hostility towards selective enforcement and passive vetoes by the executive and clarifies how such non-enforcement violates the executive’s duties.

29. *See id.* at 39 (offering an initiative that made over thirty changes to various code sections as an example of an initiative that did not violate the single-subject rule); *Brosnahan v. Brown*, 651 P.2d 274, 279 (Cal. 1982) (citing *Fair Pol. Pracs. Comm’n v. Superior Court*, 599 P.2d 46, 38 (Cal. 1979)).

30. *Carrillo et al.*, *supra* note 16, at 770.

31. *Strauss v. Horton*, 207 P.3d 48, 60 (Cal. 2009) (“[T]he initiative process may be used to propose and adopt *amendments* to the California Constitution, under its governing provisions that process may not be used to *revise* the state Constitution.”).

32. *Id.* at 61.

33. *Id.* at 89. Quantitative revisions require that the number of alterations or deletions change nearly the entire state constitution. *See Raven v. Deukmejian*, 801 P.2d 1077, 1086–87 (Cal. 1990) (holding a criminal justice reform initiative was not a quantitative revision because it did not alter the substantial entirety of the state constitution). Whereas qualitative revisions to the basic structure of government normally require some significant change in the way the government’s powers are allocated and permitted to be exercised. *See Legislature of Cal. v. Weber*, 549 P.3d 884, 896 (Cal. 2024).

34. *Raven*, 801 P.2d at 1080.

35. *Strauss*, 207 P.3d at 61.

36. CAL. CONST. art. II, § 9. Voters are permitted to call for a referendum on anything besides urgency bills, statutes calling elections, and statutes providing for tax levies or appropriations for the state’s usual, current expenses.

A. THE EXECUTIVE'S DUTY OF UNIFORM AND ADEQUATE ENFORCEMENT

Under the California Constitution, the attorney general is responsible for ensuring that the state's laws are "uniformly and adequately" enforced.³⁷ The attorney general also supervises all local district attorneys and sheriffs to ensure the laws are being adequately enforced, with the ability to step in and take over local positions if necessary.³⁸ Thus, when the attorney general adopts a blanket non-enforcement policy, they breach their constitutional duty to uniformly and adequately enforce the law.³⁹ The governor has the statutory requirement to supervise all ministerial and executive officers.⁴⁰ If an executive officer defaults on their duty, the governor must try to remedy the default,⁴¹ and see that the laws are faithfully executed.⁴²

Consequently, since the attorney general is an executive officer,⁴³ the governor has the statutory duty to supervise the attorney general and ensure they adequately and uniformly enforce the law.⁴⁴ Thus, it is the governor's duty to ensure that the laws are enforced. The executive branch may have discretion in enforcing the laws, but the issue here is not an exercise of discretion. By refusing to enforce the laws, the executive refuses to exercise discretion, opting for what amounts to a passive veto.⁴⁵ The passive veto has the most potential to harm the voters when exercised by high-ranking executive officials, such as the attorney general or governor.

Turning specifically to the non-enforcement of valid and passed voter initiatives, it seems a truism to say that a categorical refusal to enforce a valid law fails to meet the requirement of adequate enforcement.⁴⁶ It follows that blanket non-enforcement policies exceed the scope of the executive's powers and their constitutional mandate.

To permit the executive to issue blanket non-enforcement policies could allow them to invalidate any act of the legislature, electorate, or judiciary. To permit such an understanding of executive power renders the executive the judge of its own powers. But under California Supreme Court precedent, "[t]he different departments cannot be each left the sole and conclusive judge of its

37. CAL. CONST. art. V, § 13.

38. *See id.*

39. Price, *supra* note 6.

40. CAL. GOV'T. CODE § 12010 (West 2024).

41. *Id.* § 12011.

42. CAL. CONST. art. V, § 1.

43. CAL. CONST. art. V, § 13. Article V creates the office of the attorney general, and is specifically dedicated to the executive, so it is safe to say the attorney general is a member of the executive in the California Constitution.

44. Price, *supra* note 6.

45. *See infra* Subpart.III.C. A passive veto is an act by the executive that renders a law ineffective as if it had never been passed despite the law being duly enacted. In *Perry v. Brown* this took the form of the executive refusing to defend the challenged statute in court. *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011).

46. *See* Price, *supra* note 6.

own powers.”⁴⁷ Further, while the governor may have the ability to veto legislation,⁴⁸ the California Supreme Court has held that the governor may not veto initiatives through direct or indirect means that achieve the same effect.⁴⁹ Therefore, when an executive official, whether local or statewide, fails to carry out the state’s laws, a constitutional violation has occurred, and there must be some remedy or check, lest California’s Constitution be rendered optionally enforceable.

B. *LOCKYER V. CITY AND COUNTY OF SAN FRANCISCO*

Lockyer v. City and County of San Francisco typifies the California Supreme Court’s hostility toward executive officials handpicking which laws to enforce. While *Lockyer* primarily focuses on the ministerial actions of city and county-level executives,⁵⁰ its reasoning applies far more broadly.

In 2004, then-mayor of San Francisco, Gavin Newsom, ordered the county clerk to alter the forms necessary to issue marriage licenses to include same-sex couples because he felt it violated the state Constitution’s Equal Protection Clause.⁵¹ At the time, California law limited marriage to marriage between a man and a woman.⁵² The City immediately began issuing marriage licenses to same-sex couples, and by the time the court ordered a stay, approximately 4,000 licenses had been issued.⁵³ The attorney general ultimately sought a writ of mandate because San Francisco’s actions violated state law,⁵⁴ asserting his duty to see that the laws of the state are uniformly and adequately enforced.⁵⁵ The City argued that an executive official may decline to enforce laws they believe to be unconstitutional, and that a court may not issue a writ of mandate without first determining the law’s constitutionality.⁵⁶

The California Supreme Court framed the *Lockyer* issue narrowly: whether a local executive official charged with a ministerial duty exceeds their authority, by refusing to enforce a statute that the executive deems unconstitutional.⁵⁷ The Court held that executive officials lack the authority to refuse to enforce statutes,

47. *Nougues v. Douglass*, 7 Cal. 65, 70 (1857).

48. CAL. CONST. art. IV, § 10.

49. *Perry*, 265 P.3d at 1007.

50. *Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459, 464 (Cal. 2004).

51. *Id.* at 464–65.

52. CAL. FAM. CODE § 308.5 (West 2000) (repealed 2015).

53. *Lockyer*, 95 P.3d at 465.

54. *Id.* at 466.

55. *Id.*

56. *Id.* at 472.

57. *Id.* at 462. In California, a ministerial act is one that a public officer must perform in a prescribed manner without regard to their judgment. *Id.* at 473 (quoting *Kavanaugh v. W. Sonoma Cnty. Union High School Dist.*, 62 P.3d 54, 58 (Cal. 2003)).

which the executive believes are unconstitutional, when the Court has not ruled on the statute's constitutionality.⁵⁸

In reaching this conclusion, the Court laid out two fundamental principles. The first is that a statute, once passed, is presumed to be constitutional, and unconstitutionality must be shown clearly.⁵⁹ If there are any doubts, they are to be resolved in favor of constitutionality.⁶⁰ Second, a public official's capacity to act is wholly derived from statute, and they have only the powers conferred upon them by statute and the Constitution.⁶¹ The Court largely boils down determinations on constitutionality to depend on grants or delegations of judicial power.⁶² Where a public official is not granted any judicial or quasi-judicial power by the California Constitution, they are not permitted to make a decision on a statute's constitutionality.⁶³ As a result, where no determination of unconstitutionality has been made, local executive officials lack the authority to refuse to enforce statutes.⁶⁴ The Court also reasoned that there are methods for executive officials to bring the constitutionality of a statute before the Court, other than refusal to enforce.⁶⁵ Where an executive official believes a law to be unconstitutional, they should encourage suit by the affected parties rather than obtain a ruling after "wholesale defiance."⁶⁶ While officials may believe, in good-faith, that a law is unconstitutional and therefore should not be enforced, such action runs contrary to their oath to uphold the Constitution.⁶⁷ Allowing an executive official to refuse to enforce a law does not uphold the Constitution because upholding the Constitution requires abiding by the legislature's mandate.⁶⁸ Holding that the City had no authority to refuse to enforce the statutes, the Court rendered all same-sex marriages null and ordered the correction of the relevant records.⁶⁹

Despite the Court's narrow framing of the issues, *Lockyer* may still be useful in our context. *Lockyer* indicates a strong likelihood that the Court will not permit executive officials to circumvent the mandates of the legislature without first going through the adjudicative process. Since executive officials' capacity to act is derived from the law, allowing them the capacity to disregard it would render the law self-defeating.

58. *Id.* at 473.

59. *Id.* at 475.

60. *Id.*

61. *Id.* at 476.

62. *See id.* at 481.

63. *Id.*

64. *Id.*

65. *Id.* at 485.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 498.

III. THE CONFLICT BETWEEN THE CALIFORNIA SUPREME COURT AND THE SUPREME COURT OF THE UNITED STATES

This Part examines the diverging non-enforcement precedents between the California and federal courts. The conflict is most clearly shown in the difference between *Perry v. Brown* (“*Perry*”) from the Supreme Court of California and *Hollingsworth v. Perry* (“*Hollingsworth*”) from the Supreme Court. Here, the courts ruled on the same exact issue, with the same exact parties, presenting excellent ground for comparison. While *Perry* still governs in California courts,⁷⁰ understanding how to circumvent *Hollingsworth* in federal courts is necessary to ensure voters have every possible option in vindicating their interests. It is better to lose on the merits of their claims than get thrown out of court over a procedural hurdle like standing.

A. *PERRY V. BROWN*

Perry addressed the issue of whether the proponents of a passed ballot initiative are permitted to defend it in court when the relevant executive officials refuse to do so.⁷¹ In *Perry*, the voters passed a constitutional amendment, advanced through an initiative, limiting marriage to a man and a woman.⁷² In a lawsuit challenging the validity of the ballot initiative, Perry listed the governor and the attorney general, among others, as defendants.⁷³ All listed defendants answered the complaint but refused to defend against the allegations.⁷⁴ Believing their interests were not being adequately represented, the proponents⁷⁵ of the law sought to intervene and defend the law on behalf of the California government.⁷⁶ The Ninth Circuit asked the California Supreme Court for certification on the standing issue.⁷⁷

The California Supreme Court ruled that initiative proponents may assert the state’s interest in the initiative’s validity, when the relevant government officials fail to do so.⁷⁸ One reason the Court permitted proponents to appear is that, from the inception of the initiative power, proponents have been permitted

70. *Legal Research: An Overview: Mandatory v. Persuasive Authority*, HUGH & HAZEL DARLING L. LIBR., UCLA (last updated Dec. 15, 2025), <https://libguides.law.ucla.edu/c.php?g=686105&p=5160745> (explaining that state courts have controlling interpretive power on state law issues and federal courts have controlling interpretive power on federal law issues).

71. *Perry v. Brown*, 265 P.3d 1002, 1005 (Cal. 2011).

72. *Id.* at 1007.

73. *Id.* at 1008.

74. *Id.*

75. Proponents of an initiative are the electors who submit the proposed text of the statute or amendment to the attorney general. CAL. ELEC. CODE § 342 (West 2025).

76. *Perry*, 265 P.3d at 1008. The District Court ruled in favor of Perry on the claim’s merits; however, the government of California refused to appeal the ruling to the Ninth Circuit. *Id.* at 1009. At that point, the proponents sought to appeal the decision on the merits and argue before the Ninth Circuit on behalf of the government. *Id.*

77. *Id.* at 1005.

78. *Id.* at 1033.

to appear as both real parties in interest and as interveners.⁷⁹ Proponents had appeared to defend their interests in pre-election and post-election cases and appeals, regardless of whether the government officials decided to defend the law from suit.⁸⁰ Proponents maintain an interest in defending the initiative in pre-election suits because the laws have not yet been passed, and the state has not yet developed an interest in defending its validity.⁸¹ The proponents are particularly interested in defending the initiative because they are trying to “vindicate” their constitutional rights.⁸² In post-election suits, proponents have been permitted to participate as parties merely because they are the initiative’s official proponents.⁸³ This post-election standing exists even where the proponents do not have individualized property, liberty, reputation, or otherwise recognized legal interests in upholding the initiative’s validity.⁸⁴

The Court went on to explain that, because California courts have a history of permitting intervention to supplement state defense where state officials may not be acting with “vigor,” it is appropriate to allow proponents to stand in for state officials to ensure the people’s initiative power is protected.⁸⁵ The Court further reasoned that proponents adopt an “analogous and complementary” power to the state, by defending the law.⁸⁶ As such, when proponents defend a validly passed law, they do not act in their own interest; rather, they act on behalf of the people’s or state’s interests, both in defending a law and protecting the initiative power.⁸⁷ Furthermore, the Court denied that appearing in court to assert the people’s interest in a validly passed law is exclusively the domain of the executive branch.⁸⁸ To hold otherwise would allow the executive branch to indirectly exercise a veto over the people’s will.⁸⁹

The Court’s decision in *Perry* expressly clarifies voters’ direct role in interpreting and enforcing the law in California. Not only can voters advocate for particular interpretations of the law,⁹⁰ they can exercise power analogous to the governor or attorney general by appearing as a party in a suit challenging the law.⁹¹

79. *Id.* at 1018.

80. *Id.* at 1018–19.

81. *Id.* at 1020–21.

82. *Id.* at 1020.

83. *Id.* at 1021.

84. *Id.*

85. *Id.* at 1022.

86. *See id.*

87. *Id.* (indicating that the state’s interest is the same as the people’s).

88. *Id.* at 1027. Addressing objections, the Court clarified that while the Constitution awards the governor executive power and places the duty of enforcement on the attorney general, there is no limitation that only those entities be permitted to exercise those powers. *Id.* at 1025; *see* CAL. CONST. art. V, § 1 (vesting supreme executive power in the governor); CAL. CONST. art. V, § 13 (charging the attorney general with uniform enforcement of state law).

89. *Perry*, 265 P.3d at 1007.

90. *Id.* at 1024.

91. *Id.* at 1021.

B. *HOLLINGSWORTH V. PERRY*

In *Perry*, the California Supreme Court held that proponents had sufficient standing to defend the proposed amendment under California law. Meanwhile, in *Hollingsworth*, the federal counterpart to *Perry*, the United States Supreme Court ultimately ruled that proponents of Proposition 8 lacked standing to defend its validity after it became law.⁹² Following the Ninth Circuit's ruling that the proponents had sufficient standing under federal law, the Supreme Court decided to take the *Hollingsworth* case to resolve the question of federal standing.⁹³ The *Hollingsworth* Court reasoned that standing must exist when a lawsuit is initiated, and it must be maintained by any person seeking appellate review.⁹⁴ An actual controversy must exist for the life of the case.⁹⁵

The plaintiff in *Hollingsworth*, also *Perry*, had standing to initiate the suit because she suffered an injury by being denied the right to marry her partner.⁹⁶ She sought to receive official sanction from the state, and Proposition 8 denied it to her.⁹⁷ *Perry* sued under the Equal Protection and Due Process clauses of the United States Constitution in the Northern District of California.⁹⁸ After California refused to offer an argument in favor of upholding the law, the district court redressed *Perry*'s injury by ruling in her favor, prohibiting state officials from enforcing Proposition 8.⁹⁹ However, the initiative's proponents, not the state or its officials, sought to appeal, despite not being subject to any obligations under the district court's order.¹⁰⁰

Since the district court order had no personal effect on the proponents, they had no direct stake in the case's outcome, only a generalized grievance concerning the enforcement of the laws and state constitution.¹⁰¹ Such a generalized grievance fails to generate federal standing because, if the court granted relief for executive non-enforcement, the proponents would receive no direct and tangible benefits.¹⁰²

The proponents may have had a special interest in the law before it was passed. However, once the law was passed, they failed to maintain the interest on a personal level because they had no personal stake in enforcing or defending the law more than any other California citizen.¹⁰³ Even if the proponents assert the interest of the state on behalf of the state, they have not suffered an

92. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).

93. *Id.* at 704.

94. *Id.* at 705.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 702.

99. *Id.*

100. *Id.* at 705.

101. *Id.* at 705–6.

102. *Id.*

103. *Id.* at 707.

individualized injury necessary to assert another party's interest.¹⁰⁴ While the state has continued interest in enforcing laws, it must designate an agent to represent those interests in court, and such agents must act in their official capacity as state officers.¹⁰⁵

In *Hollingsworth*, the Court held that the proponents were neither state officials nor authorized by state law, and thus could not assert the state's interest.¹⁰⁶ The Court explained that the Proposition 8 proponents failed to satisfy any agency relationship with the state.¹⁰⁷ The state did not control the proponents, provide a mechanism to review their arguments, or elect them at regular intervals.¹⁰⁸ The Court took particular issue with the fact that proponents could seek to defend a law without considering other state burdens, such as changes in public opinion or other state priorities.¹⁰⁹

C. THE ISSUE OF DIFFERING APPROACHES TO PROPONENT STANDING

By allowing lawsuits to move forward in state courts but not federal courts, the Supreme Court has effectively undermined the initiative power in California.¹¹⁰ If any initiative were to be challenged on federal grounds, *Hollingsworth* allows state executives to passively veto the initiative even if their state does not permit such action. The executive can lose the case on procedural technicalities or refuse to defend the law. By refusing to offer arguments or defend a law, district courts may enter judgment without hearing argument in favor of the law, as no party beyond the state has standing to offer arguments. In effect, initiatives can be overturned by nothing more than a default judgment, if the executive refuses to defend a challenged law. In that case, a law duly enacted by the majority of the voters is overturned and there is no one left to assert the interest of the voters in having the laws they passed enforced. Additionally, the Court's stance affords broad powers to the district courts in state matters with little to no oversight from the appellate courts or the Supreme Court.¹¹¹ In the case of non-enforcement policies, the differing precedents leave a significant gap in coverage.

IV. INITIATIVE LAWSUITS IN CALIFORNIA AND FEDERAL COURTS

Having established the current issue of executive non-enforcement policies and related standing impediments, this Note now turns to how voters, particularly the proponents of initiatives, can bring suit in state and federal court. The judiciary is the key dispute resolution mechanism. As a result, this Note

104. *Id.* at 708.

105. *Id.* at 710.

106. *Id.*

107. *Id.* at 712–14.

108. *Id.* at 713.

109. *Id.* at 714.

110. *Id.* at 716–17 (Kennedy, J., dissenting).

111. *See id.* at 726 (Kennedy, J., dissenting).

suggests that initiative proponents should also seek to sue the relevant executive official over the non-enforcement. This Part primarily focuses on the gaps in coverage discussed above¹¹² and the voters' ability to seek enforcement of a valid initiative law or amendment. First, it examines the ability of voters to bring a lawsuit ordering some degree of enforcement in state courts. Second, it turns to the voters' ability to defend challenges of initiative-based laws or amendments in federal court, focusing primarily on standing.¹¹³

A. CALIFORNIA STATE COURT ACTIONS

The most straightforward remedy for non-enforcement is a lawsuit challenging the constitutionality of non-enforcement of the voter initiative, seeking a writ of mandate. Under California law, the mandate petitioner must show two necessary elements before a court may issue the writ: first, a clear and present duty (usually ministerial) on the part of the respondent; second, the petitioner must have a beneficial interest in the performance of that duty.¹¹⁴

First, petitioners must establish that the executive has a clear and present duty¹¹⁵ As discussed above,¹¹⁶ the attorney general and the governor are under combined constitutional and statutory obligations to adequately enforce the law.¹¹⁷ These obligations are the duties of the office.¹¹⁸ While a writ of mandate cannot be issued to control discretion or compel the executive to act in a particular manner,¹¹⁹ a blanket non-enforcement policy does not qualify as an exercise of discretion.¹²⁰ If there is no enforcement, no discretion is being exercised.

While a writ of mandate is generally only issued for ministerial acts,¹²¹ there is a major exception allowing courts issue a writ for discretionary acts.¹²² The exception largely developed based on the idea that there cannot be a "wrong

112. *Supra* Subpart.III.C.

113. The focus on standing issues is in part because the merits of each claim against a blanket non-enforcement policy will differ greatly from case to case. It also seems that the greatest obstacles to these kinds of claims are procedural rather than merit-based, hence the focus on meeting those early procedural hurdles.

114. 8 B.E. WITKIN, WITKINS CALIFORNIA PROCEDURE § 74, at 940 (6th ed. 2021).

115. *Id.*

116. *See supra* Subpart.II.A.

117. *See supra* Subpart.II.A.

118. CAL. CONST. art. XX, § 3. The oath of office for all public officials of any branch of the government requires that they uphold and support the "duties" of their office, seemingly making all constitutional and statutory obligations duties of the office. Note that the oath has been abrogated but only regarding a pledge not to have been a member of a party advocating for overthrowing the government in the past five years. For the abrogation of the oath, see *Jesson v. Davis*, 118 Cal. Rptr. 839, 842 (Cal. App. 4th 2002).

119. 8 B.E. WITKIN, *supra* note 114, at 971.

120. *See Price*, *supra* note 6. While *Price* is describing prosecutorial discretion and criminal law specifically, the underlying reasoning seems to be that non-enforcement places legislative power in executive officers' hands.

121. 8 B.E. WITKIN, *supra* note 114, at 971.

122. *See id.* at 978.

without a remedy.”¹²³The exception permits courts to order officials to utilize their discretion when the law so requires.¹²⁴ In *Hollman v. Warren*, the California Supreme Court held that an executive official, including a governor, can be directed by a writ of mandate to exercise discretion where they have otherwise refused to do so, despite the ministerial requirement.¹²⁵ The court reasoned that the governor can be compelled to exercise his discretion because the legislature could not have intended to leave the application of the law up to the “whim or caprice of the Governor.”¹²⁶ While this exception does not permit the court to mandate a particular outcome or application of discretion,¹²⁷ it lets proponents sue and seek some exercise of discretion where there has been blanket non-enforcement. Furthermore, a court may settle any disputes about what discretion the statute awards and what counts as a proper exercise of discretion under the statute.¹²⁸

In the case of blanket executive non-enforcement, passive vetoes are excellent candidates for the *Hollman* exception. Refusal to enforce leaves the law subject to the “whim and caprice” of the relevant executive official.¹²⁹ In California, refusing to enforce a successful initiative is ripe for description as a “failure of justice.”¹³⁰ Not allowing such inaction to fall under the exception would permit it to go without a remedy. It would also allow office-holders to determine the extent of their duties and the law independently, without checks. So, while the court may not be able to order a particular method of enforcement under the *Hollman* exception,¹³¹ it has the power to order the executive to use some level of discretion and begin some level of enforcement.¹³²

Next, to satisfy the second element, the people must show that they have a beneficial interest in the executive’s duty to enforce the voter initiative.¹³³ The court in *Perry* held that the statute’s proponents are entitled to defend an initiative because they are protecting the people’s interests in the initiative power.¹³⁴ To hold otherwise would allow the executive to exercise an impermissible veto and render the initiative power moot.¹³⁵ The most apt petitioners are the proponents of the legislation due to their preexisting ability to appear as a party and defend the initiative. Furthermore, the bar for beneficial

123. *People ex rel. McDougall v. Bell*, 4 Cal. 177, 180 (1854) (holding that the Comptroller must conduct an audit, but mandamus would not lie to say how the Comptroller must audit).

124. 8 B.E. WITKIN, *supra* note 114, at 978.

125. *Hollman v. Warren*, 196 P.2d 562, 565 (Cal. 1948).

126. *See id.* at 566.

127. *Id.*

128. *See People v. Rodriguez*, 377 P.3d 832, 838 (Cal. 2016) (explaining that the governor is required to exercise his discretion under a proper interpretation of the law).

129. *Hollman*, 196 P.2d at 566.

130. *People v. Olds*, 3 Cal. 167, 171 (1853).

131. *Hollman*, 196 P.2d at 565.

132. *Id.*

133. 8 B.E. WITKIN, *supra* note 114.

134. *Perry v. Brown*, 265 P.3d 1002, 1024–25 (Cal. 2011).

135. *See id.* at 1007.

interest is substantially lowered where the mandate's goal is to enforce a public duty.¹³⁶ When it comes to questions of public interest, the petitioner does not need to show any personalized interest in the outcome.¹³⁷

Given that the governor and attorney general have a clear legal duty to enforce the law, and the initiative's proponents possess a sufficient interest in both enforcement and the preservation of the initiative power, they are entitled to seek a writ of mandate compelling such enforcement.

B. FEDERAL COURT ACTIONS

To close the coverage gap between state and federal courts, proponents must meet the federal standing requirements to overcome *Hollingsworth* and give citizens a judicially recognized interest in the ongoing enforcement of state laws in federal courts.¹³⁸ Otherwise, executive actors may simply circumvent any kind of state court action by awaiting a federal challenge and refusing to defend the challenged law in federal proceedings.¹³⁹ To have standing in federal court, a plaintiff must show an injury in fact, a causal connection between the injury and the defendant's conduct, and that the sought-after remedy will likely redress the injury.¹⁴⁰ The particular bar to standing in *Hollingsworth* was the proponents' failure to satisfy the injury in fact requirement.¹⁴¹ While an initiative's proponents may suffer pre-election injury when, for example, the executive attempts to keep their initiative off the ballot,¹⁴² under *Hollingsworth*, they do not maintain any special interest in an initiative's enforcement or defense once it has passed.¹⁴³

The Supreme Court expressed concerns that permitting initiative proponents to assert state enforcement interests, would allow unelected individuals to act as agents of the people.¹⁴⁴ The Court reasoned that proponents are not agents of the people largely because proponents are unaccountable; the people have no ongoing control over proponents.¹⁴⁵

136. See, e.g., *Green v. Obledo*, 624 P.2d 256, 266–67 (Cal. 1981) (expressing a desire to ensure that the government does not impair public rights); *Common Cause of Cal. v. Bd. of Supervisors*, 777 P.2d 610, 613 (Cal. 1989); 8 B.E. WITKIN, *supra* note 114, at 958.

137. See 8 B.E. WITKIN, *supra* note 114, at 958.

138. Other procedural issues in adjudicating claims include jurisdiction, sovereign immunity, and all other issues related to merits. While such things will need to be resolved for the claims to proceed, they fall slightly outside the scope of this note's discussion of the conflict between *Hollingsworth* and *Perry*.

139. *Hollingsworth v. Perry*, 570 U.S. 693, 721 (2013) (Kennedy, J., dissenting) (discussing how the very purpose of the system is to circumvent elected officials who do not defend the public will).

140. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

141. *Hollingsworth*, 570 U.S. at 700–01.

142. The Court's musings that proponents have a special interest in pre-election efforts support an inference that proponents' pre-election suits may have standing. However, these thoughts are dicta at best, as the Court only considered the proponents' role in a post-election case. See *id.* at 706–07.

143. *Id.*

144. *Id.* at 712.

145. *Id.* at 713–714.

While *Hollingsworth* seems to limit standing for private individuals seeking to combat executive non-enforcement, it provides no clear guidance on who may assert the state's interest and when. Generally, where a legislator acts to assert the state's interest, they must be authorized to do so.¹⁴⁶ Thus, if proponents cast themselves as state officials, acting in their official capacity, with statutory approval and continuing oversight from voters, proponents would significantly strengthen their federal standing claims.

There is an argument to be made that the California electorate functions as a fourth branch of government.¹⁴⁷ In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court addressed the powers exercised by the people when passing a voter initiative.¹⁴⁸ There, the Court recognized that where a state constitution reserves legislative and referendum power to the people, the people exercise coequal power with the legislature when passing an initiative.¹⁴⁹ The Court defined "legislative power," which includes initiative power, as the power to make laws.¹⁵⁰ Furthermore, the California Supreme Court has clarified that the initiative power is a legislative power.¹⁵¹

States have the authority to define their structure of government and who can exercise authority.¹⁵² Thus, a state, through its constitution, has the prerogative to determine the members of its legislative body.¹⁵³ So, when a state delegates legislative authority to the people, granting them the ability to propose laws, it effectively incorporates the people into the lawmaking function of the state legislature.¹⁵⁴

Historically, the fourth-branch theory has been applied only in limited circumstances.¹⁵⁵ This limited application occurs because the California Supreme Court once explained, "[t]here is no fourth branch of government . . . which is represented by the people."¹⁵⁶ However, the court held this way because the people had no constitutionally recognized powers.¹⁵⁷ Such a consideration cannot support the same conclusion in the modern era, since the current Constitution clearly recognizes the political power and legislative power of the people. Thus, the electorate should be understood as the fourth branch of government when exercising its initiative powers.

146. *Id.* at 710; see *Karcher v. May*, 484 U.S. 72, 77 (1987).

147. Carrillo et al., *supra* note 16, at 750.

148. 576 U.S. 787, 792 (2015).

149. While the Court mostly discusses the exercise of power under the Arizona Constitution, it seems apt to say that states with similarly structured powers and constitutions would be read similarly. See *id.* at 795 n.3.

150. *Id.* at 813–14.

151. *Pro. Eng'rs in Cal. Gov't v. Kempton*, 155 P.3d 226, 242–43 (Cal. 2007).

152. See *Ariz. State Legislature*, 576 U.S. at 816–17.

153. See *id.* at 817.

154. See Carrillo et al., *supra* note 16, at 750.

155. The authors limit their contention only to scenarios where an act of the electorate could be considered to impinge on the core functions of one of the other branches of government. *Id.*

156. *People ex rel. Aylett v. Langdon*, 8 Cal. 1, 16 (1857).

157. *Id.* 15–16.

In the case of an initiative, proponents and the electorate act as legislators; as such, they may authorize specific individuals or groups to represent their interests and ensure the law is enforced.¹⁵⁸ It follows that, when the authorized party seeks to represent the legislature's interests, it acts in its official capacity.¹⁵⁹ Practically, this means that initiative proponents may draft a measure that grants them the authority and capacity to act as agents of California's legislative branch (the voters). This authorization, to act in an official capacity, gives proponents an interest in the law's enactment and enforcement. Further, an initiative may be drafted to give the people continuing oversight. Such oversight addresses the Court's concern that proponents lack supervision from the state or electorate.¹⁶⁰ And, if proponents can be seen as acting in an official capacity on behalf the legislature, they may invoke the theory of legislative standing, to satisfy the injury in fact requirement.¹⁶¹

C. LEGISLATIVE STANDING IN FEDERAL COURT ACTIONS

Legislative standing is a deeply divisive topic that has been the subject of frequent debate.¹⁶² There are several bases for legislative standing.¹⁶³ The most apt basis in the case of a voter as legislator is likely to be Matthew Hall's description of an injury deriving from the deprivation of a legislative prerogative.¹⁶⁴ One basis for a deprivation of prerogative claim arises in *Coleman v. Miller*.¹⁶⁵ There, the Supreme Court acknowledged that state legislators had a cognizable injury where an executive officer effectively nullified their votes.¹⁶⁶ Subsequently, in *Raines v. Byrd*, the Court clarified that such nullification can occur when legislators have sufficient votes to enact legislation, but the legislation does not go into effect.¹⁶⁷

The prerogative being deprived by vote nullification is the legislators' ability to vote on matters before the legislature and have their votes counted.¹⁶⁸ Applying this conception to blanket non-enforcement policies would grant any California voter, who voted in favor of a validly passed initiative, a cause of

158. See *Karcher v. May*, 484 U.S. 72, 80–81 (1987).

159. See *id.*

160. See *supra* notes 109–10, and accompanying text.

161. See *infra* Subpart IV.C.

162. Hall breaks up and applies legislative standing to cases involving an injury from the elimination of a legislative prerogative and standing to defend a challenged law. Most of his focus is based on federal legislators asserting standing. As an aside, despite the name of the theory being legislative standing, it really only seems to be used as a theory for meeting the injury in fact requirements of federal standing. Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 23 (2016).

163. *Id.*

164. *Id.* at 26; see generally *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 803 (2015) (providing as an example of the injury which Hall describes).

165. 307 U.S. 433, 438 (1939); Hall, *supra* note 162, at 29.

166. 307 U.S. 433, 438 (1939).

167. 521 U.S. 811, 823 (1997).

168. Hall, *supra* note 162, at 29.

action for vote nullification.¹⁶⁹ However, given *Hollingsworth*'s desire to see legislators acting in their official capacity, the Court will likely be hesitant to open the court doors to individual-voter suits. Thus, approaching the suit as a legislative institution asserting its prerogative is likely to be more successful.

An institution, asserting a claim that vote nullification has caused a deprivation of its prerogative, may delegate its authority to assert institutional prerogatives to a smaller group.¹⁷⁰ To delegate that authority, proponents can draft initiatives to include language explicitly conferring institutional authority on themselves. In so doing, the proponents, via the initiative's text, position themselves to appear in court as members of the legislative, fourth branch of government. Under this framework, the non-enforcement of an initiative would amount to vote nullification; proponents had sufficient votes to pass the law, but it failed to go into effect. Such vote nullification would be a cognizable injury to the fourth branch of government. Thus, proponents, with a properly drafted initiative, can overcome *Hollingsworth* and meet the injury in fact requirement of standing.

Having satisfied the injury requirement, initiative proponents challenging a blanket non-enforcement policy can easily satisfy the other two federal standing requirements: the causal relationship and suitable remedy elements. Regarding causation, an executive's refusal to enforce a validly enacted ballot initiative causes injury to the proponents' legislative prerogative by nullifying their votes. As for remedies, a writ of mandate, ordering the relevant executive official to enforce the law, would remedy that vote nullification. Thus, with proper draftsmanship of an initiative and subsequent complaint, proponents may establish standing as legislators.

CONCLUSION

While there may be many cases where an executive makes morally justified choices in refusing to enforce laws, it poses too great a procedural risk to the voters to allow it to go unchecked. One man's morally justified choice is another's rogue executive. This risk is particularly outsized in California, where a single executive official can thwart the will of the people by refusing to enforce a duly passed initiative. However, such an action is outside the scope of their constitutional mandate to adequately and uniformly enforce the laws. The most apt remedy comes in the form of a writ of mandate ordering the executive official not to reach a particular outcome, instead ordering them to exercise their discretion. While state courts may be favorable, federal precedent is hostile to voter enforcement. California courts may hold that citizens are injured by non-enforcement and have standing, but the federal courts expressly reject such a proposition. The current conflict between the precedents can allow an executive

169. *See id.* at 30.

170. *See id.* at 30–31.

to achieve a veto by refusing to defend a challenged law. To close the federal loophole and appear in court on behalf of the initiative to at least give it a chance on the merits, voters can utilize a theory of legislative standing to at least gain entry to the courthouse doors. Giving voters a legally cognizable interest in the enforcement of laws is important to protecting the initiative power both in and out of California.