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Prop 8 Standing Ruling Shakes Up Citizen Lawmaking

By **Gavin Broady**

Law360, New York (June 26, 2013, 7:42 PM ET) -- In rejecting an appeal by private supporters of California's Proposition 8 on standing grounds, the U.S. Supreme Court installed new limitations on the citizen initiative process that will strip ballot measure backers of judicial redress and effectively immunize some court decisions from appeal, experts say.

In a long-awaited decision in Hollingsworth v. Perry, the high court ruled 5-4 that private citizens seeking to reinstate California's ban on same-sex marriage lacked standing under Article III of the U.S. Constitution to mount a federal appeal of the ruling that put the brakes on Prop 8.

The majority opinion, written by Chief Justice John Roberts, rejected the right of citizens to bring such a challenge where they have not shown injury and where the state has refused to come to a law's defense, a decision attorneys say may empower state officials in efforts to dismantle measures passed through the citizen initiative process.

"What this decision does is it really gives the governors and attorneys general of various states a green light to basically decide which laws they want to defend and not to defend," Ricardo Cestero of Greenberg Glusker said. "The ones they choose not to defend will be much easier to overturn."

Cestero noted that the decision may make it easier for those seeking to overturn same-sex marriage bans across the country in states where more liberal governors are in charge.

The impact will be especially profound in California, placing a check on what is the most extensive citizen lawmaking platform of the 27 states that permit ballot initiatives or popular referendums, according to Laura Brill of Kendall Brill & Klieger LLP.

"I think the opinion is really good for the political process in California, and will be very healthy going forward," said Brill, who authored an amicus brief in the dispute on behalf of the California state assembly speaker warning the court of the discriminatory potential of unchecked citizen initiatives. "We have the most extreme initiative process in the country in California. This puts a brake on that process and gives back to elected officials the power to determine whether and how to defend laws."

A dissenting opinion authored by Justice Anthony Kennedy nodded to the significant implications of the ruling on states with ballot initiative procedures, but claimed the majority misinterpreted the basic premise of the system, which he said is explicitly designed to establish a lawmaking process that does

not depend on public officials. He blasted the ruling for its potential to create a situation where state officials undertake litigation at the district court level with the intention of losing, knowing the result would be effectively immune from appellate review.

“I do think Kennedy’s right to a large degree that certain state executives might take advantage to railroad legislation,” Cestero said. “It’s a very Machiavellian view of things, but what you could end up with is state officials who mount a lackluster defense at a district court level, and when that defense fails and they choose not to appeal it, there’s no avenue for review.”

Cestero noted that this would not apply universally, as the defeat of some initiatives — such as, say, a health care or school prayer referendum — might allow private citizens to make a case for some form of injury and thus retain a right to appeal.

“It’ll be interesting to see if it has the effect of encouraging state governors or attorney generals to put forward lukewarm defenses,” Northeastern University School of Law professor Martha Davis said. “Essentially, the parties would all collaborate in staging a controversy where there isn’t one. This would have the effect of less full and fair litigation than if the state was allowed to appoint a private party.”

Even absent such extreme outcomes, experts say the ruling adds a new strategic layer to the initiative process and will force proponents to more thoroughly assess the political climate of the state where they’re launching a ballot measure. Davis noted that this is especially true of advocates who use initiatives as part of a “domino process” to seek national social change.

“As is happening in many instances in California, where you file your case is going to be critically important,” Brad Seiling of Manatt Phelps & Phillips LLP said. “If there are issues going forward in federal court, and the state itself chooses not to defend, proponents will not be able to defend.”

Seiling added that the California Supreme Court has shown “great deference and respect” for the initiative process, and noted that proponents still maintain standing in ballot initiative fights being waged in state courts.

That distinction between state and federal authority lies at the heart of the high court’s decision, according to Richard Broughton, a professor at the University of Detroit Mercy School of Law.

“The majority seems to say, 'We’re not trying to intrude on state’s initiative process, but state law cannot supplant federal law on standing ground,'” Broughton said. “This is a very restrictive decision, as cases that find no standing typically are. They simply were not willing to carve out a new area that would allow these kinds of litigants to get relief from federal court.”

But despite the potential limitations placed on appellate review by the high court’s ruling, it is nonetheless unlikely that the Hollingsworth decision will derail the ballot measure process, Davis said.

“The decision maybe adds a level of uncertainty,” she said. “Looking at the way the initiative procedures have burgeoned, it’s hard to imagine uncertainty at end of line would chill process at outset. This one opinion wouldn’t be enough.”

Seiling also said the process was unlikely to change dramatically, noting that the situation that led up to Hollingsworth was unique.

“I don’t think it’s going to undermine the initiative process,” Seiling said. “This was a pretty unique situation in terms of state officials choosing not to defend an initiative. I think if anyone’s claiming the sky is falling in terms of the California initiative process, they’re not looking at big picture in terms of how the initiative came about and how it was litigated.”

Seiling added that he sees the standing issue on which the majority relied in its decision as primarily a “safety valve,” allowing the high court to tailor a narrow ruling and stop short of finding in favor of a constitutional right to marriage equality. Lance Lange of Faegre Baker Daniels LLP suggested that, as a result, the Supreme Court may have simply kicked the can down the road.

“The practical effect of this decision is that when a law happens to come up through the referendum process — and it’s likely to be a controversial political issue like gay marriage — how do we properly get this issue in front of the courts to determine whether or not its constitutional?” Lange said. “I’m not sure that down the road, the Supreme Court isn’t going to take a look at this again and wonder if it shouldn’t provide for some way for a ballot initiative law to get before the court.”

--Editing by Elizabeth Bowen and Chris Yates.
