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Notes

Risky Propositions: A New Standard for the Award of Attorney's Fees Against Defendant-Intervenors in Ballot-Initiative Litigation

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In the current federal litigation regarding the constitutionality of Proposition 8, a ballot initiative that amended the California state constitution to ban same-sex marriage, the issue of which party should pay the prevailing plaintiffs' attorney's fees was raised at the district court in 2009. The official proponents of the same-sex marriage ban, who intervened to defend the law at trial and lost, argued that they should not be held liable for the fees. But if they are correct, then the State of California, which did not defend the law and called it unconstitutional, could be made to pay if a final judgment is reached in the plaintiffs' favor. The issue has been postponed as the case moves through the appellate process. Using the Proposition 8 case as a prominent example, this Note explores the issue of who should pay a plaintiff's attorney's fees when the proponent of a successful ballot initiative intervenes to defend its law against a civil rights challenge and loses. It is a significant question not only in the context of the Proposition 8 case, but also in the larger context of the citizen-created ballot initiatives permitted in twenty-five jurisdictions. The Note proposes the adoption of a new standard in both federal and state courts for ballot-initiative litigation, under which the defendant-intervenor will be held liable for the plaintiff's attorney's fees unless it can show that its position was substantially justified.

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TABLE OF CONTENTS

INTRODUCTION

Over seven million California voters went to the polls in November 2008 and voted "yes" on Proposition 8,[1] thus amending the state constitution to ban same-sex marriage.[2] The resulting federal constitutional challenge to that ban, *Perry v. Brown*,[3] is currently progressing through

1. DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOV. 4, 2008, GENERAL ELECTION 13 (2008).

2. Proposition 8 provides, "Only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5; *see also* Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010) (holding that Proposition 8 is invalid under the U.S. Constitution); Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009) (holding that Proposition 8 is a valid amendment to the California state constitution).

3. *See* Perry v. Brown (*Perry IV*), Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7,

the federal courts. In the case, two same-sex couples sued the State of California, alleging that Proposition 8 was an infringement on their civil rights in violation of the Fourteenth Amendment.[4] After state officials refused to defend the law because they too believed it to be unconstitutional, Proposition 8's official proponent, Protectmarriage.com, intervened to defend it.[5] As the case proceeds on appeal, the legal fees for the attorneys on both sides of the case continue to mount. The issue of whether Protectmarriage.com, rather than the State of California, will be liable to pay the plaintiffs' attorney's fees if the plaintiffs prevail has been raised but thus far left open.[6]

The *Perry* case brings into focus a question that has the potential to arise in twenty-four states and the District of Columbia, where citizen-created ballot initiatives are utilized.[7] The issue of who should pay the plaintiff's attorney's fees when an initiative proponent[8] intervenes to defend its law against a civil rights challenge and does not prevail likely will continue to confront both federal and state courts as it has in the past.[9] And cases like *Perry*, where the state refuses to defend the law,

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2012). The Ninth Circuit affirmed, on different grounds, the district court ruling in *Perry I* that Proposition 8 is unconstitutional. *Id.* at *2. The court also found that Protectmarriage.com, Proposition 8's official proponent and defendant-intervenor in the case, had standing to appeal the District Court's judgment. *Id.* at *7. Previously, the Ninth Circuit had certified a question to the California Supreme Court regarding the standing question. Perry v. Schwarzenegger (*Perry II*), 628 F.3d 1191, 1193 (9th Cir. 2011), *certified question answered sub nom.* Perry v. Brown (*Perry III*), 265 P.3d 1002 (Cal. 2011). The state court answered in the affirmative that initiative proponents do have the authority to assert the state's interest in the validity of ballot propositions. *Perry III*, 265 P.3d at 1015.

4. *Perry I*, 704 F. Supp. 2d at 927. In the previous state-court challenge to Proposition 8, the California Supreme Court held that it was a valid amendment to the state constitution. *Strauss*, 207 P.3d at 122.

5. *Perry I*, 704 F. Supp. 2d at 921, 928.

6. Order at 2–3, *Perry I*, No. 09-CV-2292 (N.D. Cal. Aug. 24, 2010) (order granting plaintiffs' motion to extend time). For an early discussion of these issues, see Rebecca Beyer, *Prop. 8 Plaintiffs May Recoup Fees*, DAILY J., Sept. 16, 2010, *available at* www.uchastings.edu/media-and-news/news/2010/09/levine-prop8-fees.html.

7. Initiatives are proposals for new state laws or constitutional amendments created by citizens and added to the electoral ballot upon the acquisition of a set number of citizen signatures. For a detailed explanation of initiatives and other types of ballot propositions, see *What Are Ballot Propositions, Initiatives, and Referendums?*, INITIATIVE & REFERENDUM INST. UNIV. S. CAL., http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm (last visited Feb. 14, 2012). In order of adoption, the states that allow such initiatives are South Dakota, Utah, Oregon, Nevada, Montana, Oklahoma, Maine, Michigan, Missouri, Colorado, Arkansas, California, Arizona, Nebraska, Idaho, Ohio, Washington, Mississippi, North Dakota, Massachusetts, Alaska, Wyoming, Illinois, Florida, and the District of Columbia. D.C. CODE § 1-1001.16 (2010); *State-By State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST. UNIV. S. CAL., http://www.iandrinstitute.org/statewide_i&r.htm (last visited Feb. 14, 2012).

8. The proponent of an initiative measure, as officially recognized by the California Elections Code, is a citizen who has presented a proposed initiative to the State before circulating a petition to have it placed on the ballot. CAL. ELEC. CODE § 9001 (2010).

9. One prominent federal initiative case is *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). In that case (later dismissed for mootness), a state employee challenged an Arizona initiative that made English the official state language, and the initiative sponsors intervened as defendants. *Id.*

may come up again as well. Statutes exist in federal law and in all of the states providing specific exceptions to the general American Rule that litigating parties must pay their own attorney's fees.[10] One ubiquitous exception provides that in a civil rights suit, a prevailing party, other than the government, may recoup its legal fees from the losing party or parties.[11] Federal and state courts, however, have each reached different conclusions as to which branch of government may fashion such exceptions.[12] In the federal system, the U.S. Supreme Court has stated that Congress must create such exceptions.[13] In some states, including California, courts have ruled that exceptions can be fashioned by judges as well as the legislature.[14]

The *Perry* case is a prominent, but not isolated, example of a court being asked to decide whether a defendant-intervenor is liable for paying attorney's fees to the plaintiff under a law that shifts fees in civil rights challenges. In 2004 in *Democratic Party of Washington State v. Reed*, the plaintiffs prevailed in a civil rights challenge to a Washington state law.[15] The Ninth Circuit followed the U.S. Supreme Court's decision in *Independent Federation of Flight Attendants v. Zipes*[16] in finding liability for fees against the defendant-intervenors.[17] The *Zipes* Court held that an intervenor in a civil rights case will be liable for attorney's fees only if the intervenor's action was "frivolous, unreasonable, or without foundation."[18] In *Reed*, the Ninth Circuit applied this standard. Finding the intervenor's

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at 49–50, 56. In California, the initiatives regarding same-sex marriage have been challenged in both state and federal courts. Proposition 8 was preceded in 2000 by Proposition 22, a successful initiative that banned same-sex marriage via statute. CAL. FAM. CODE § 308.5 (2010); Lockyer v. City of S.F., 95 P.3d 459, 463 (Cal. 2004). The California Supreme Court subsequently held that San Francisco public officials had acted unlawfully in issuing marriage licenses to same-sex couples under Proposition 22. *Lockyer*, 95 P.3d at 464. In 2008, the court found Prop. 22 invalid under the state constitution. *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008). Then, before the current federal challenge in *Perry*, the California Supreme Court upheld Proposition 8 as a valid amendment to the state constitution. *Strauss*, 207 P.3d at 122.

10. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (announcing the American Rule); s*ee also* FED. R. CIV. P. 54; CAL. CIV. PROC. CODE § 1021 (2010) (codifying the American Rule); *infra* Part I.A.1.

11. *See, e.g.*, 42 U.S.C. § 1988(b) (2010); CAL. CIV. PROC. CODE § 1021.5 (2010); N.Y. C.P.L.R. 8601 (McKinney 2011); 42 PA. CONS. STAT. ANN. § 8309 (2011); *see also* 1 COURT AWARDED ATTORNEY FEES 5.03 (MB 2011).

12. See *infra* Part I.A for discussion of diverging development of fee-shifting exceptions between the federal system and, by example, the California system.

13. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

14. California, Arizona, Idaho, and Utah all have ruled that fee-shifting exceptions can be judge made. *See* Arnold v. Ariz. Dep't of Health Servs., 775 P.2d 521, 537 (Ariz. 1989); Serrano v. Priest, 569 P.2d 1303, 1313–14 (Cal. 1977); Hellar v. Cenarrusa, 682 P.2d 524, 531 (Idaho 1984); Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 783 (Utah 1994).

15. Democratic Party of Wash. State v. Reed (*Reed II*), 388 F.3d 1281, 1284 (9th Cir. 2004).

16. 491 U.S. 754 (1989).

17. *Reed II*, 388 F.3d at 1288.

18. 491 U.S. at 760 (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).

position was not frivolous, it held the defendant State of Washington, but not the defendant-intervenors, fully responsible for the fees to be paid to the plaintiffs.[19] A ruling in *Perry*, which is currently before the Ninth Circuit, thus will likely adopt the *Zipes* standard as well. In *Perry,* this could free Protectmarriage.com of liability for fees and would oblige the State of California to pay for the defense of a law it did not support or believe to be constitutional.[20]

A 2006 California Supreme Court case suggested that the *Zipes* standard might be appropriate for civil rights challenges in California courts, too.[21] Such a move would represent a sea change in California law. Because California courts, unlike federal courts, have the power to create fee-shifting exceptions to the American Rule,[22] it would be unnecessary for the California Supreme Court to follow the nonbinding *Zipes* standard.[23] The same applies to the many other states that permit judge-made exceptions.[24]

State laws enacted through the initiative process are, by design, supported by private entities and not the state government.[25] This Note contends that it is illogical to excuse intervening initiative proponents who take an active role in resulting civil rights challenges from bearing a greater risk of liability for attorney's fees when they lose. This is especially true when the government is justified in choosing not to defend the law. The high *Zipes* standard makes it unlikely that these intervenors will be required to pay any portion of the fees. Conversely, a rule whereby initiative proponents are almost always liable for fees if they lose is likely to strongly discourage advocates from intervening to defend their propositions at all, thus conflicting with the rationale behind the American Rule.[26] Such a rule also could have a chilling effect on initiative systems as a whole.

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19. 388 F.3d at 1288.

20. Beyer, *supra* note 6.

21. Connerly v. State Pers. Bd., 129 P.3d 1, 10 n.6 (Cal. 2006).

22. Serrano v. Priest, 569 P.2d 1303, 1313 (Cal. 1977) (noting that it is within the California Supreme Court's "sole competence" to fashion equitable exceptions to the American Rule).

23. The *Zipes* decision is not binding on state courts because its holding concerned congressional fee-shifting legislation that applies only to federal courts. *See* 491 U.S. at 761.

24. *See supra* note 14 (listing examples of states that fall into this category).

25. *See What Are Ballot Propositions, Initiatives, and Referendums?*, *supra* note 7 (defining the various types of propositions).

26. *See* 6 ROBERT L. ROSSI, ATTORNEYS' FEES § 6:1 (3d ed. 2011). The rationale behind the American Rule

> includes a number of broad policy considerations. First, since litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit. Second, requiring each party to be responsible for its own fees is thought to encourage settlement. Moreover, the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. Additionally, the litigation and proof of what constitutes reasonable attorney's fees would pose a substantial burden for judicial administration.

This Note proposes that the *Zipes* rule should not be applied in the context of initiative litigation over civil rights, nor should the lower standard that several lower federal courts used before *Zipes*.[27] This Note explores the relevant law in the federal system and, by example, the State of California. The Note proposes the adoption of a third standard under both federal and state law for proposition intervenors that is analogous to that of the Equal Access to Justice Act ("EAJA"),[28] where the defendant-intervenor would be liable for the plaintiff's attorney's fees unless it could show that its position was substantially justified. The most effective way to implement this rule in the federal system would be for Congress to carve out a statutory exception for initiative litigation. But in some states, like California, this new rule may be fashioned by the courts or the legislature.

This Note is divided into three parts. Part I gives an overview of the modern development of attorney's fees law both at the federal level and in California, and the rationales behind their diverging evolution, with a particular focus on applicability to intervenors. Part II discusses the context of initiative litigation, describing the treatment of attorney's fees in recent initiative litigation in California state courts and the current fee issue raised in federal court in the Proposition 8 case. Part III analyzes and critiques the potential application of the *Zipes* standard in the context of initiative litigation, and the deterrent effect that a general rule holding proponents liable would have on the state proposition system. Seeking a middle ground, this Note then discusses the substantial-justification standard found in the EAJA and other bodies of law. Finally, it concludes by advocating for the adoption of that standard for intervening initiative advocates in both the federal and state systems, and details how implementation could be accomplished at each level.

I. THE LAW OF ATTORNEY'S FEES FOR INTERVENORS IN CIVIL RIGHTS CHALLENGES

In *Alyeska Pipeline Service Co. v. Wilderness Society*, the U.S. Supreme Court held that only Congress may fashion new exceptions to the rule that litigants in federal court must pay their own attorney's

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Allstate Ins. Co. v. Huizar, 52 P.3d 816, 818 (Colo. 2002) (citations omitted).

27. *See, e.g.*, Charles v. Daley, 846 F.2d 1057, 1064–65 (7th Cir. 1988) (holding defendant-intervenors liable for attorney's fees because they made a "unilateral decision" to join the state defendants in "adamantly defending" the challenged law); Haycraft v. Hollenbach, 606 F.2d 128, 132 (6th Cir. 1979) (holding a defendant-intervenor liable for fees when their position created a "substantial barrier" to appellees' ability to achieve their constitutional rights); Moten v. Bricklayers Int'l Union of Am., 543 F.2d 224, 240 (D.C. Cir. 1976) (holding a would-be intervenor liable for fees); Akron Ctr. for Reprod. Health v. City of Akron, 604 F. Supp. 1268, 1272–75 (N.D. Ohio 1984) (holding a defendant-intervenor liable for fees because intervention was voluntary and the intervenor litigated vigorously, causing the plaintiff to expend substantial efforts).

28. *See* 5 U.S.C. § 504 (2010); 28 U.S.C. § 2412 (2010); *see also infra* Part III.B.

fees.[29] Because that decision is not binding on the practices of state courts, the standards for determining fee awards in some states, including California, have developed independently.[30] The standard for determining losing defendant-intervenors' liability for the plaintiffs' fees is not settled at the federal level and has not been directly addressed in California.[31]

A. Evolution Under Federal Law

The modern federal law of attorney's fee awards in civil rights challenges begins with *Alyeska*, where the Supreme Court held that only Congress may fashion exceptions to the American Rule for federal litigation.[32] Subsequently, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, providing such exceptions for prevailing parties in civil rights cases.[33] Throughout the following decade, federal courts' application of that exception to intervenors was inconsistent.[34] The Supreme Court's 1989 decision in *Zipes* set forth a standard for applying a statutory civil rights exception to intervenors.[35] The federal courts of appeals, however, have diverged on how broadly that standard should be applied.[36]

1. The Statutory Civil Rights Exception

In the U.S., the well-established American Rule requires litigants to pay their own attorney's fees, with the prevailing party not entitled to collect such fees from the loser unless a contract or statute provides otherwise.[37] The English Rule, by contrast, typically provides that the loser must pay the attorney's fees of the prevailing party.[38] Two major exceptions to the American Rule were long recognized by courts at common law: the common-benefit and bad-faith doctrines.[39] The

29. 421 U.S. 240, 270–71 (1975).

30. *See infra* Part I.B.1.

31. *See infra* Parts I.A.3, I.B.2.

32. 421 U.S. at 270–71.

33. Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b) (2010)).

34. *See infra* Part I.A.2 and text accompanying notes 53–54.

35. *See* Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 761 (1989).

36. *Compare* Planned Parenthood of Cent. N.J. v. Att'y Gen., 297 F.3d 253 (3d Cir. 2002), *with* Democratic Party of Wash. State v. Reed (*Reed I*), 343 F.3d 1198 (9th Cir. 2003); *see infra* Part I.A.3.

37. *Alyeska*, 421 U.S. at 247 (1975); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). The rule was first announced by the Supreme Court in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) ("The general practice of the United States is in opposition to [an award]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.").

38. *See Alyeska*, 421 U.S. at 247 (1975) (explaining that in England, attorney's fees are regularly awarded to the prevailing party).

39. Henry Cohen, Cong. Research Serv., 94-970, Awards of Attorneys' Fees by Federal Courts and Federal Agencies 1–2 (2008).

common-benefit doctrine provides that a party who maintains a suit for the common benefit may collect fees from those who benefit from the suit, but not from the losing party.[40] The bad-faith doctrine holds a losing party liable for fees for punitive reasons if they have acted "vexatiously, wantonly, or for oppressive reasons."[41]

Prior to the Supreme Court's holding in *Alyeska* in 1975, some federal courts also awarded fees under the "private attorney general theory," which provides that plaintiffs should be entitled to fees as a matter of policy if they win a lawsuit bringing benefits to a broad class of citizens.[42] In *Alyeska*, the plaintiffs sought fee awards under that theory.[43] The Court declined to find the defendant liable for fees, refusing to recognize the private attorney general theory as a viable common law doctrine.[44] The Court held that that only Congress, not the federal courts, may create federal exceptions to the American Rule.[45]

Congress responded to the *Alyeska* decision by passing the Civil Rights Attorney's Fees Awards Act in order to promote the enforcement of civil rights laws by private citizens.[46] The resulting statute, 42 U.S.C. § 1988, provides that courts may award attorney's fees under a variety of civil rights statutes that do not already contain a fee-shifting provision.[47] Under the statute, the fees may be awarded to the prevailing party.[48] The prevailing-party requirement soon resulted in a different standard for awarding fees to plaintiffs versus defendants,[49] and some difficulties arose

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40. *Id.* at 3.

41. *Id.* at 4 (quoting Hall v. Cole, 412 U.S. 1, 5 (1973)).

42. *Id.* at 5.

43. *Alyeska*, 421 U.S. at 270–71.

44. *Id.* at 269.

45. *Id.* at 270–71.

46. Rochelle Cooper Dreyfuss, Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 346 (1980).

47. See 42 U.S.C. § 1988 (2010), which provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, . . . [or] title VI of the Civil Rights Act of 1964 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

Congress has proceeded to carve out fee-shifting exceptions to the American Rule in an ever-increasing number of laws and subject matter areas. 1 COURT AWARDED ATTORNEY FEES 1.03 (MB 2011).

48. *Id.*; *see also* 43 A.L.R. FED. 2d 1 (2010) (discussing the application of "prevailing party"). The Court would later hold that a plaintiff "prevails" when they are awarded relief on the merits, modifying the defendant's behavior in a way that directly benefits the plaintiff so that the legal relationship between the parties is materially altered. Farrar v. Hobby, 506 U.S. 103, 113 (1992).

49. *See* Dreyfuss, *supra* note 46, at 353–55. The Court held that successful plaintiffs are entitled to fees unless "special circumstances" would make it unjust. Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968). But the Court then found that the standard for whether a prevailing defendant should be awarded fees was whether the claim against them was "frivolous, unreasonable, or without foundation." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

in determining fees when a plaintiff is successful on some, but not all, of the issues.[50]

2. *Applying the Exception to Intervenors*[51]

Federal courts soon began to reach a range of results in holding intervening parties liable for such fees under the Civil Rights Attorney's Fees Awards Act. In the early 1980s, several federal district court cases held that parties intervening on behalf of defendants were liable for attorney's fees under § 1988 where they "placed themselves in a position to prevent plaintiffs from obtaining relief"[52] and "imposed substantial costs on plaintiffs."[53] Other federal courts ruled differently, finding intervenors not liable based on the fact that they did not themselves obstruct the plaintiff's constitutional rights.[54]

In the 1988 Seventh Circuit case *Charles v. Daley*, a group of physicians prevailed in their civil rights challenge against an Illinois state law regulating abortion.[55] Another group of doctors that supported the law intervened to defend the rights of patients as well as their own interests.[56] The plaintiffs moved for attorney's fees against the defendant-intervenors.[57] In response, the defendant-intervenors raised a First Amendment claim, arguing that holding them liable for attorney's fees would violate their "right to participate in litigation as a means of political expression"[58] and their "fundamental freedoms of association and expression."[59]

The *Charles* court rejected the free speech argument, holding that litigation goes beyond speech and that there is an expectation that

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50. *See* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) ("[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in the suit." (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278–79 (1st Cir. 1978))).

51. This Note discusses "intervenors" in reference to parties who have entered litigation in federal courts under Rule 24 of the Federal Rules of Civil Procedure. In California courts, intervention is provided for under section 387 of the California Code of Civil Procedure.

52. Vulcan Soc'y of Westchester Cnty., Inc. v. Fire Dep't of White Plains, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982).

53. *See, e.g.*, May v. Cooperman, 578 F. Supp. 1308, 1317 (D.N.J. 1984), *aff'd in part*, *dismissed in part*, 780 F.2d 240 (3d Cir. 1985). *See generally* Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979); Moten v. Bricklayers Int'l Union of Am., 543 F.2d 224 (D.C. Cir. 1976); Akron Ctr. for Reprod. Health v. City of Akron, 604 F. Supp. 1275 (N.D. Ohio 1985); Decker v. U.S. Dep't of Labor, 564 F. Supp. 1273 (E.D. Wis. 1983).

54. *See, e.g.*, Kirkland v. N.Y. State Dep't of Corr. Servs., 524 F. Supp. 1214, 1218 (S.D.N.Y. 1981).

55. 846 F.2d 1057, 1059 (7th Cir. 1988).

56. *Id.*

57. *Id.* at 1060.

58. *Id.* at 1061.

59. *Id.* at 1074.

litigation will be costly.[60] The court explained that even though the intervenors themselves did not violate the plaintiffs' constitutional rights, they would nevertheless be held liable for attorney's fees under § 1988.[61] The court noted that the intervenors had made a "unilateral decision" to join the state defendants in "adamantly defending" the state abortion law, and thus could be considered full-fledged parties to the suit.[62] The court found that, because nothing in § 1988 exempted specific classes of defendants from fee liability, holding intervenors liable would be consistent with Congress's intent to provide awards as incentives for civil rights plaintiffs.[63]

Two years later, in *Zipes*,[64] a group of employees brought a sex discrimination action in the Northern District of Illinois against a commercial airline under Title VII of the Civil Rights Act of 1964, which provides for the award of fees to the prevailing party.[65] The intervenor was a union representing current employees of the airline who opposed the terms of the settlement between the parties under the employees' own contractual rights.[66] The intervenor brought an affirmative Title VII claim of its own, which the trial court rejected.[67] The plaintiffs then petitioned for attorney's fees against the intervenor.[68]

Zipes set a landmark standard under which intervenors could be held liable for attorney's fees in a civil rights action. The Supreme Court reasoned that assessing fees against "blameless" intervenors was not essential to Congress's purpose, which was to encourage victims of discrimination to pursue legal action.[69] The opinion also considered that intervention, when pursued in good faith, is not a method of prolonging litigation, but rather protecting the intervenor's own rights.[70] The Court decided that the same standard it had previously established in *Christianburg Garment Co. v. Equal Employment Opportunity Commission*[71] for holding losing plaintiffs liable for fees should be applied to the intervenor in *Zipes*.[72] Thus, the Court explained, an intervenor would be liable for fees only where its own actions were

60. *Id.* at 1075.
61. *Id.* at 1077.
62. *Id.* at 1064.
63. *Id.* at 1063–64.
64. Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).
65. *Id.* at 757–58. The Court had previously stated that all fee-shifting statutes would be treated alike; thus the *Zipes* holding applies to § 1988 fees as well. *Id.* at 758 n.2.
66. *Id.* at 757.
67. *Id.*
68. *Id.* at 757–58.
69. *Id.* at 761.
70. *Id.* at 765.
71. 434 U.S. 412, 417 (1978).
72. *Zipes*, 491 U.S. at 761.

"frivolous, unreasonable, or without foundation."[73] The Court remanded the case to the lower court to make that determination.[74] Justice Marshall, joined by Justice Brennan, dissented, arguing that the majority's suggestion that all intervenors should be treated like civil rights plaintiffs was contrary to the language and objectives of Title VII.[75] Justice Marshall cited the then-recent *Charles* case as an example of a situation where an intervenor's sole purpose in the litigation was to defend the challenged law, and argued that intervenors, therefore, should be held to a different standard for attorney's fee liability.[76]

3. The Reach of the Frivolousness Standard: Circuit Courts Split

The *Zipes* holding has been criticized for treating intervenors the same as civil rights plaintiffs.[77] Critics note that intervenors do not necessarily behave like plaintiffs and bring their own civil rights claims, as the union did in *Zipes*.[78] These arguments assume that under *Zipes* the frivolousness standard applies to all intervenors, not only to intervenors bringing their own affirmative civil rights claims. This view also assumes that *Zipes* abrogated the Seventh Circuit's holding in *Charles*, in which the defendant-intervenor was held liable for fees without a finding that its position was frivolous.[79] And indeed, although the facts of *Zipes* involved an intervenor who was acting as a plaintiff, the language of the Court's holding was broad:

> [W]e conclude that district courts should . . . award Title VII attorney's fees against losing intervenors only where the intervenors' action was frivolous, unreasonable, or without foundation. . . . In every lawsuit in which there is a prevailing Title VII plaintiff there will also be a losing defendant who has committed a legal wrong. That defendant will . . . be liable for all of the fees . . . .[80]

Some courts have gone further, interpreting *Zipes* to extend to "prevailing parties' request[s] for intervention-related attorneys' fees

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73. *Id.* at 766.

74. *Id.*

75. *Id.* at 775, 778. (Marshall, J., dissenting).

76. *Id.* at 778 n.8 ("When [intervenors] . . . voluntarily intervene, they benefit from 'their ability to affect the course and substance of the litigation,' and thus should 'fairly be charged with the consequences,' including the risk of attorney's fees." (quoting Charles v. Daley, 846 F.2d 1057, 1067 (7th Cir. 1988))).

77. *See* Planned Parenthood of Cent. N.J. v. Att'y Gen., 297 F.3d 253, 263–64 (3d Cir. 2002); *see also Zipes*, 491 U.S. at 778 (Marshall, J., dissenting); Cynthia G. Thomas, Note, *Defendant-Intervenors' Liability for Attorneys' Fees in Civil Rights Litigation: A Standing Requirement for Functional Plaintiffs*, 35 WAYNE L. REV. 1499, 1515–16 (1989).

78. *See, e.g.*, Thomas, *supra* note 77, at 1515–16.

79. Brief for Petitioner at 31 n.13, Connerly v. State Pers. Bd., 129 P.3d 1 (Cal. 2006) (No. S125502), 2004 WL 2863084.

80. 491 U.S. at 761.

from the losing defendant."[81] Advocates of a broad view of *Zipes* have also argued that even if *Charles* is still good law, it applies only to defendant-intervenors with a "direct, financial and personal interest in the underlying litigation."[82]

Subscribing to the interpretation that *Zipes* applies to all intervenors, the Ninth Circuit applied the frivolousness standard to civil rights defendant-intervenors in *Reed*.[83] There, the Democratic, Republican, and Libertarian parties successfully challenged the State of Washington's "blanket primary" law on civil rights grounds.[84] The Washington Secretary of State defended the law in his official capacity.[85] The plaintiffs moved for attorney's fees on appeal under § 1988 against both the Secretary of State and the defendant-intervenor, a nonprofit organization that defended the challenged law.[86] The court reasoned that although the intervenor's arguments caused the plaintiffs to spend extra time on the case, that fact alone did not warrant an award against them.[87] The court then expressly relied on *Zipes* to say that all intervenors in civil rights cases should be held liable for fees only if their position was "frivolous, unreasonable, or without foundation."[88] Accordingly, the court ordered the state to pay the attorney's fees award in full and did not find the intervenors liable.[89]

But the law is unsettled on how broadly the Supreme Court intended *Zipes* to apply. Since *Zipes* was published, courts have questioned whether *Zipes* and *Charles* can be reconciled.[90] Several courts have held that *Zipes* created a far more limited rule. The Seventh Circuit, while never having expressly applied its holding in *Charles*, has continued to cite the case post-*Zipes*, examining it in a 2005 decision awarding fees to a prevailing defendant-intervenor.[91] In *Planned*

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81. Gratz v. Bollinger, 353 F. Supp. 2d 929, 940 (E.D. Mich. 2005) (citing Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 176–78 (4th Cir. 1994); Bigby v. City of Chicago, 927 F.2d 1426, 1428–29 (7th Cir. 1991)).

82. Brief for Petitioner, *supra* note 79, at 31 n.13.

83. *Reed II*, 388 F.3d 1281, 1288 (9th Cir. 2004).

84. *Id.* at 1284. Under the "blanket primary" law, Washington voters were not restricted to voting for candidates of a particular political party. *Reed I*, 343 F.3d 1198, 1201 (9th Cir. 2003). The parties all challenged the law, claiming it restrained their supporters' freedom of association. *Id.*

85. *Reed II*, 388 F.3d at 1282.

86. *See id.* at 1288.

87. *Id.*

88. *Id.* (The court acknowledged that while *Zipes* dealt with an action under Title VII, it could not find any reason why the *Zipes* holding should not extend to § 1988).

89. *Id.*

90. *See* United States v. City of S.F., 132 F.R.D. 533, 537 (N.D. Cal. 1990), *aff'd sub nom.* Davis v. City of S.F., 976 F.2d 1536 (9th Cir. 1992), *vacated in part on denial of reh'g*, 984 F.2d 345 (9th Cir. 1993) (discussing the significance of the Supreme Court's *Zipes* decision in tandem with its earlier denial of the writ of certiorari in *Charles*).

91. King v. Ill. State Bd. of Elections, 410 F.3d 404, 412–13, 421–23 (7th Cir. 2005) (considering an attorney's fees award against the plaintiff in favor of a prevailing defendant-intervenor).

Parenthood of Central New Jersey v. Attorney General, the Third Circuit quoted a case from the District of New Jersey that considered fees against defendant-intervenors in a civil rights case, expressing "serious doubts" about *Zipes*' applicability:

> In *Zipes*, the Supreme Court reasoned that the intervenors were completely "blameless," having had no part in the constitutional violation of which plaintiffs complained, and intervened *only to protect their own rights* . . . . Moreover, the Court reasoned that there were present in the action "guilty" defendants, who would be liable, in any event, for the counsel fees and costs incurred by plaintiffs. [The court] question[s] the defendants-intervenors' qualifications as "blameless" intervenors, in light of the vigorous battle fought defending an unconstitutional statute, and, in addition, *cannot ignore the absence in this case of a "guilty" defendant who otherwise would be liable for these fees*.[92]

The Third Circuit also quoted the Southern District of Florida, which took a similar position in awarding fees against a defendant-intervenor, based on a finding that the *Zipes* frivolousness standard should be applied only when the intervenor was "innocent."[93] The Florida case held that *Zipes* should not apply when "[the intervenor] entered the case early in the proceedings and vigorously defended the constitutionality of the statute throughout the entire proceeding."[94] In adopting this reasoning, the Third Circuit opined that an application of *Zipes* to cases where defendant-intervenors vigorously defended against a successful civil rights challenge would "thwart the purpose of the fee-shifting statutes."[95]

The view that *Charles* is still good law is further supported by the fact that the Supreme Court was aware of the Seventh Circuit's then-recent *Charles* ruling when deciding *Zipes*. This is evident in Justice Marshall's dissent, in which he cited *Charles* in arguing that intervenors not affirmatively asserting their own civil rights claim should have to take the risk of liability for attorney's fees.[96] The majority, however, did not respond to Justice Marshall on this point or cite *Charles* in its opinion. The absence of any reference to *Charles* from the majority's analysis suggests the two cases could be read together.

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92. 297 F.3d 253, 263–64 (3d Cir. 2002) (quoting Daggett v. Kimmelman, Nos. 82–297, 82–388, 1989 WL 120742, at *7 n.6 (D.N.J. July 18, 1989)).

93. *Id.* at 264 (quoting Mallory v. Harkness, 923 F. Supp. 1546, 1553 (S.D. Fla. 1996), *aff'd*, 109 F.3d 771 (11th Cir. 1997)).

94. Mallory v. Harkness, 923 F. Supp. 1546, 1553 (S.D. Fla. 1996).

95. *Planned Parenthood*, 297 F.3d at 265.

96. Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 778 n.8 (1989) (Marshall, J., dissenting).

B. Attorney's Fees Under California Law

California, like several other states,[97] has followed a different path in its development of attorney's fees law over the past few decades, as state courts are not bound by the federal court decisions just discussed.[98] For example, the California Supreme Court has expressly rejected the *Alyeska* doctrine and ruled that judges may create fee-shifting exceptions for California courts.[99] California courts have proceeded to develop those exceptions through case law in the decades since.[100] But in 2006, the California Supreme Court implied that it might implement the *Zipes* standard for defendant-intervenors.[101]

1. A History of Independent, Judge-Made Exceptions

Two years after the U.S. Supreme Court's 1975 *Alyeska* ruling, the California Supreme Court issued its opinion in *Serrano v. Priest*, in which the prevailing plaintiff moved for an award of attorney's fees under the same common law doctrine that *Alyeska* had recently rejected: the private attorney general theory.[102] The plaintiffs in *Serrano* had succeeded in a constitutional claim regarding the state public school financing system.[103] They asked the state court to use its equitable powers to fashion a judicial exception to the American Rule.[104] In its resulting opinion, the California Supreme Court expressly rejected the *Alyeska* holding that statutory authorization was needed for courts to recognize a private attorney general theory[105] and affirmed the award of attorney's fees to the plaintiffs under such a theory.[106] Besides allowing for relief under the private attorney general theory as a common law doctrine,[107]

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97. *See supra* note 14.

98. *See* Serrano v. Priest (*Serrano II*), 569 P.2d 1303, 1312 (Cal. 1977).

99. *Id.*

100. *See infra* text accompanying notes 102–07.

101. *See* Connerly v. State Pers. Bd., 129 P.3d 1, 10 n.6 (Cal. 2006); discussion *infra* Part I.B.2.

102. 569 P.2d at 1312.

103. Serrano v. Priest (*Serrano I*), 557 P.2d 929, 958 (Cal. 1976).

104. *Serrano II*, 569 P.2d at 1306–1307. In California, the American Rule is codified at California Code of Civil Procedure section 1021, which provides:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

105. *Serrano II*, 569 P.2d at 1316.

106. *Id.* at 1313.

107. The California legislature subsequently codified the private attorney general theory. *See* Cal. Civ. Proc. Code § 1021.5 (2010) ("Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest [if certain requirements are met].").

the *Serrano* court held that it was in its "sole competence" to fashion equitable exceptions to the state's codification of the American Rule.[108]

The California Supreme Court has continued on this trajectory by using its power to approve additional fee-shifting exceptions. In 1983, the court approved the "catalyst" theory for awarding attorney's fees to a plaintiff.[109] Under this theory, a court can award attorney's fees even when the litigation does not result in a decision from the court, so long as the litigation provides the primary relief sought, thereby causing the defendant to substantially change its behavior.[110] More recently, the court refined its interpretation of this doctrine in *Graham v. DaimlerChrysler Corp.*, holding that liability for fees is warranted only if the underlying lawsuit had merit and the plaintiff engaged in a reasonable attempt to settle before commencing litigation.[111] In doing so, the California court again refused to follow the U.S. Supreme Court, which recently had rejected the catalyst theory.[112] In *Tipton-Whittingham v. City of Los Angeles*, a companion case to *Graham* that was decided on the same day, the California Supreme Court, at the request of the Ninth Circuit, provided a three-part test for what a plaintiff must show to obtain fees under the state's version of the doctrine.[113]

The California Supreme Court has used this power to create other exceptions to the American Rule in specific areas of the law. For example, in *Brandt v. Superior Court*, it held that attorney's fees are recoverable from an insurance company that breaches its duty of good faith by unfairly withholding benefits.[114] Also, California has adopted a more lenient standard than the U.S. Supreme Court on the issue of enhancement of attorney's fees due to the attorney's superior performance.[115]

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108. *Serrano II*, 569 P.2d at 1313.

109. Westside Cmty. for Indep. Living, Inc. v. Obledo, 657 P.2d 365, 367 (Cal. 1983). While affirming the doctrine, the court denied fees under the catalyst theory because it found no causal connection between the litigation and defendant's change in behavior. *Id.* at 368.

110. *Id.* at 367. As the court noted, some federal courts at that point had used the same reasoning to award fees under federal fee-shifting statutes. *Id.* (citing, inter alia, Sullivan v. Pa. Dep't of Labor & Indus., 663 F.2d 443, 465 (3d Cir. 1981)).

111. 101 P.3d 140, 144 (Cal. 2004).

112. *Id.* at 147–56 (examining Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 622 (2001)).

113. 101 P.3d 174, 177 (Cal. 2004) ("[A] plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . . and, (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.").

114. 693 P.2d 796, 800 (Cal. 1985).

115. *Compare* Perdue v. Kenny A. *ex rel.* Winn, 130 S. Ct. 1662, 1674 (2010) (holding that an enhancement of fees due to exceptional performance should be allowed only in "rare" and "exceptional" circumstances), *with* Ketchum v. Moses, 17 P.3d 735, 746 (Cal. 2001) (affirming a fee enhancement due to exceptional performance based on counsel's documentation).

2. *The California Supreme Court Might Follow the Federal Case Law*

After spending years carving its own path in the many areas of attorney's fees law, the California Supreme Court has suggested that it may follow federal standards for civil rights defendant-intervenors. In the 2006 case *Connerly v. State Personnel Board*, that court considered a plaintiff's motion for attorney's fees against amici curiae under the private attorney general theory.[116] In the underlying litigation, the plaintiff had prevailed in a civil rights challenge to portions of a California statutory scheme that provided for affirmative action programs for state agencies.[117] In the suit, the state agencies named as defendants had opted not to defend the statutes, and instead various amici curiae advocacy groups that supported affirmative action were designated as real parties in interest.[118] The trial court then awarded attorney's fees to the plaintiff under the private attorney general theory, to be paid by the state agencies and only one of the advocacy groups, the California Business Council, with the agencies collectively owing five-sixths of the award.[119] The Court of Appeal upheld the award.[120]

The California Supreme Court held that the advocacy group was not liable for fees because, although the group had actively participated in the litigation as a real party in interest, as amici they did not have a direct interest in the litigation and were not even partly responsible for the statutory policy that had given rise to the litigation.[121] The court reasoned that it did not want to construe the California fee-shifting statute in a way that would discourage amici curiae participation.[122] The court further justified holding the state agencies liable for fees by noting that the state had the exclusive power to abandon or change the challenged law, but had declined to do so.[123]

In a footnote, the *Connerly* court acknowledged that both parties had cited *Zipes* and *Charles* as persuasive authority.[124] The defending advocacy group had argued that the *Zipes* standard should be adopted in California to apply to amici, while the plaintiff relied on *Charles*.[125] The court dismissed both cases as inapplicable, explaining that each dealt

116. 129 P.3d 1, 2 (Cal. 2006).

117. *Id*. The statutory scheme was invalidated as unconstitutional under article I, section 31 of the California Constitution, a proposition-enacted 1996 amendment that outlawed such programs. *Id.*

118. *Id.*

119. *Id.* at 4.

120. *Id.*

121. *Id.* at 9–10.

122. *Id.* at 9.

123. *Id.* at 10.

124. *Id.* at 10 n.6.

125. *See* Brief for Petitioner, *supra* note 79, at 29–34; Brief for Respondent at 28–33, *Connerly*, 129 P.3d 1 (No. S125502), 2004 WL 3256433.

with intervening parties, not amici curiae.[126] The question of which standard applies to defendant-intervenors in California was thus left undecided.[127] Significant to the discussion here is the fact that by noting this, the court left open the question of whether it would be willing to adopt the *Zipes* or *Charles* rules as persuasive authority in the future.

II. The Context of Initiative Litigation

In twenty-four states and the District of Columbia, citizens may introduce ballot initiatives.[128] When the state declines to defend enacted initiatives against civil rights challenges and initiative proponents intervene as defendants and lose, it raises the issue of whether the proponent or the state should pay the plaintiff's attorney's fees. An ongoing line of cases in state and federal court, concerning challenges to California initiatives banning same-sex marriage, are illustrative.

A. Non-Intervenor Initiative Proponents Found Liable in California

A 2009 decision suggests that California state courts might be willing to find intervening initiative proponents liable for fees. The California Court of Appeal held in *In re Marriage Cases* that an initiative proponent who was *not* an intervenor was liable for fees after the law it defended was struck down on civil rights grounds.[129] The underlying litigation concerned Proposition 22[130] and had begun when the initiative's official proponent, Campaign for California Families, filed suit against the City of San Francisco under the enacted statute to prohibit the city from issuing same-sex marriage licenses.[131] The proponent prevailed at the California Supreme Court, which issued a writ of mandate compelling the city to comply with the statute absent a judicial determination that Proposition 22 was unconstitutional.[132] That suit was then consolidated in an action before the California Supreme Court in 2008 to determine the validity of Proposition 22 under the state constitution.[133] The proponent, however, was not granted standing in the constitutional challenge, and thus only participated as amicus curiae at

126. *Connerly*, 129 P.3d at 10 n.6.

127. *Id.*

128. *See What Are Ballot Propositions, Initiatives, and Referendums?*, *supra* note 7.

129. No. A123634, 2009 WL 2515727, at *7 (Cal. Ct. App. Aug. 18, 2009).

130. Prior to Proposition 8, Proposition 22 created a statute banning same-sex marriage in California. *See* Cal. Fam. Code § 308.5, *invalidated by In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008).

131. Lockyer v. City of S.F., 95 P.3d 459, 462–63 (Cal. 2004).

132. *Id.* at 492, 499.

133. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

that stage.[134] The California Supreme Court then held that Proposition 22 was unconstitutional.[135]

On remand to determine payment of attorney's fees, the California Court of Appeal wrote an unpublished decision awarding fees to the prevailing plaintiffs against the initiative proponent.[136] Asserting that it should not be liable for the fees, the proponent in *In re Marriage Cases* argued that it was amicus curiae and thus, under *Connerly*, attorney's fees liability was precluded.[137] The court disagreed, explaining that although the proponent served as amicus curiae in the constitutional challenge, it should be treated as a party for the purpose of attorney's fees liability because it originally brought its own suit, which had instigated the entire litigation.[138] The court went on to explain that the proponent "chose an active role in the litigation on its own and not at the invitation of the court or opposing parties. . . . [It] steadfastly argued at every level that it had standing to sue as a party and refused to participate solely as an amicus."[139] The court concluded that the proponent was liable for a portion of the attorney's fees.[140]

The proponent in *In re Marriage Cases* was not an intervenor and, as the court noted, "[t]here was no lack of adversity . . . that required [it] to step in."[141] The court's determination regarding fees is unpublished and thus does not serve as precedent. But the court's reasoning could be read to suggest that California courts might be inclined to hold an intervening proponent liable for fees when it has taken an active role in the litigation beyond that of amicus curiae.

B. *PERRY V. BROWN*: THE PROPOSITION 8 PROPONENT'S ARGUMENT

The highly publicized *Perry v. Brown* litigation (originally named *Perry v. Schwarzenegger*) is currently progressing through the federal courts.[142] In *Perry*, the plaintiffs, two same-sex couples, brought a federal

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134. *Id.* at 406. The Campaign was precluded from seeking relief in *In re Marriage Cases* due to the stay the California Supreme Court previously granted in its favor in *Lockyer*. *Id.*

135. *Id.* at 452.

136. *In re* Marriage Cases, No. A123634, 2009 WL 2515727 (Cal. Ct. App. Aug. 18, 2009). Unpublished opinions "must not be cited or relied on" under California Rule of Court 8.1115 (2011).

137. *In re* Marriage Cases, 2009 WL 2515727, at *3.

138. *Id.* at *7.

139. *Id.*

140. *Id.*

141. *Id.* At that point, the State of California was defending the ban on same-sex marriage.

142. *See supra* note 3. At the time of this writing, the Ninth Circuit has issued its decision affirming, on different grounds, the district court finding that Proposition 8 is unconstitutional. *Perry IV*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *2 (9th Cir. Feb. 7, 2012). The district court had held that Proposition 8 is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it denies same-sex couples the fundamental right to marry. *Perry I*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010). The Ninth Circuit did not reach that issue, instead holding more narrowly that Proposition 8 violates the Fourteenth Amendment because it withdrew a right that was

constitutional challenge in the Northern District of California to the state constitutional amendment created by Proposition 8.[143] Proposition 8 provides, "Only marriage between a man and a woman is valid or recognized in California."[144] The plaintiffs alleged that Proposition 8 deprives them of due process and equal protection under the Fourteenth Amendment.[145] In their action, the plaintiffs named as defendants the Governor, Attorney General, several other state government officers, and two county clerks in their official capacities.[146] The Attorney General conceded that Proposition 8 was unconstitutional, and the other named officials refused to take a position on the merits of the claims.[147] Protectmarriage.com, the official proponent of Proposition 8, intervened in the federal case to defend the proposition in the state's absence, and did so vigorously through the trial proceedings.[148] The district court found for the plaintiffs, ruling Proposition 8 unconstitutional, and entered a permanent injunction against its enforcement.[149] Protectmarriage.com then filed an appeal to the Ninth Circuit. The state officials did not join in the appeal.[150] The Ninth Circuit stayed the injunction pending the appeal.[151]

The plaintiffs then filed a motion at the district court to extend the fourteen-day statutory deadline to file their motion for attorney's fees and costs.[152] In their opposition, Protectmarriage.com argued that it should not be held liable for attorney's fees, citing as controlling Ninth Circuit precedent *Reed*'s holding that all intervenors in civil rights cases should be subject to the *Zipes* frivolousness standard.[153] In the ensuing order, the district court ruled that "any motion for fees and costs" would not be decided until "all appeals from the judgment are final."[154] In

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previously held by same-sex couples in California. *Perry IV*, 2012 WL 372713, at *1–2. The Ninth Circuit also held that the defendant-intervenor in the case had standing to appeal. *Id.* at *7.

143. *Perry I*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010). The case was filed immediately after the California Supreme Court upheld Proposition 8 under state law, see Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009).

144. *Perry I*, 704 F. Supp. 2d at 927.

145. *Id.*

146. *Id.* at 928.

147. *Id.* The Attorney General at the time was Jerry Brown, who was later sworn in as Governor in January 2011. Anthony York, *The Brown Inauguration: Difficult Choices in a New Era*, L.A. TIMES, Jan. 4, 2011, at 10.

148. *Perry I*, 704 F. Supp. 2d at 930.

149. *Id.* at 1003–04.

150. *Perry II*, 628 F.3d 1191 (9th Cir. 2011), *certified question answered sub nom. Perry III*, 265 P.3d 1002 (Cal. 2011).

151. Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010).

152. Plaintiffs' and Plaintiff-Intervenor's Motion to Enlarge Time to File a Bill of Costs, *Perry I*, 704 F. Supp. 2d 921 (No. 09-CV-2292).

153. Defendant-Intervenors Opposition to Motion to Enlarge Time at 2, *Perry I*, 704 F. Supp. 2d 921 (No. 09-CV-2292).

154. Order, *Perry I*, No. 09-CV-2292 (N.D. Cal. Aug. 24, 2010). Chief Judge Vaughn Walker, who

February 2012, the Ninth Circuit affirmed, on different grounds, that Proposition 8 is unconstitutional.[155] Still, pending an appeal to the U.S. Supreme Court, presumably the attorney's fees issue will not be decided for "at least months and possibly years."[156]

III. Finding a Different Standard

Zipes created a high standard for finding an intervenor liable for attorney's fees. This creates a likelihood that initiative proponent intervenors who lose will not be made liable for the civil rights plaintiff's fees. This is unfair, especially in cases like *Perry* where the state does not defend the law at all. Fortunately, a more appropriate standard for determining attorney's fees liability exists elsewhere in the law. This standard, found in a federal statutory scheme creating a fee-shifting exception for suits against the federal government, should be applied to defendant-intervenors in initiative litigation.

A. The Problem

The Ninth Circuit's *Reed* decision suggests that the court is willing to apply the *Zipes* standard in any constitutional challenge where the prevailing plaintiff moves for fees against a defendant-intervenor.[157] The California Supreme Court's footnote distinguishing *Zipes* in *Connerly* signaled that it too might use that standard when the facts are similar.[158] But in litigation arising from a ballot initiative, this is unjustified. State laws enacted via initiative are generated, advocated for, and placed on the ballot by private entities, not the state government.[159] It is unfair for defendant-intervenors in initiative litigation to be subject to the cost of the successful challenger's attorney's fees only if the high *Zipes* standard is met. Such a practice would mean that the state would be liable for all attorney's fees unless the initiative proponent's position was frivolous, unreasonable, or without foundation. In a case like *Perry,* where the state has chosen not to defend the proposition and the proponents are the only defendants, such a low risk for fee liability to those proponents is unreasonable.

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issued the order, has since retired. *See* Bob Egelko, *Judge Who Struck Down Prop. 8 to Retire*, S.F. Chron., Sept. 30, 2010, at C-1. Thus, a different judge in the Northern District of California will ultimately decide the issue.

155. *Perry IV*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *1–2 (9th Cir. Feb. 7, 2012). The court also held that Protectmarriage.com had standing to bring the appeal on behalf of the state. *Id.* at *7.

156. Beyer, *supra* note 6 (making this prediction in September 2010).

157. *See supra* Part I.A.3.

158. *See* Connerly v. State Pers. Bd., 129 P.3d 1, 10 n.6 (Cal. 2006).

159. *See What Are Ballot Propositions, Initiatives, and Referendums?*, *supra* note 7 (defining the various types of propositions).

Arguably, *Zipes* need not be applied to defendant-intervenors at all. As discussed previously, the standard may be appropriately applied only to plaintiff-intervenors, not all intervenors.[160] The reasoning in *Zipes* turned on the fact that the intervenor in that case brought its own cause of action in good faith and was interested in protecting its own civil rights.[161] The Supreme Court treated the *Zipes* intervenor as a plaintiff, which is why it imported the *Christianburg* rule that had been created for actual plaintiffs.[162] It should follow, as Justice Marshall argued in his *Zipes* dissent, that defendant-intervenors who instead take a defending position that the challenged law does not violate the plaintiff's constitutional rights should not be put in the same category as the *Zipes* intervenors.[163] This interpretation could be adopted in California, where the *Zipes* rule is not controlling and where the courts have taken an independent path in creating fee-shifting jurisprudence. The California Supreme Court could either read *Zipes* narrowly or expressly reject its holding, just as it did with *Alyeska*.[164]

But, as discussed, in the past twenty years *Zipes* often has been read more broadly.[165] That interpretation is grounded in the broadly worded holding[166] as well as other language in the opinion, which states that the fact that "an intervenor can advance the same argument as a defendant does not mean that the two must be treated alike for purposes of fee assessments."[167] The Ninth Circuit, having adopted *Zipes* for a defendant-intervenor in *Reed*,[168] would have to overrule or distinguish *Reed* to adopt such a narrow interpretation of *Zipes*.

Even if courts continue to interpret *Zipes* to apply to defendant-intervenors, as in *Reed*, an exception is appropriate for initiative litigation. The argument that intervenors should not be liable for fees often focuses on the fact that they themselves did not violate the

160. *See supra* Part I.A.2.

161. Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 762 (1989) ("[The intervenor entered the lawsuit] not because it bore any responsibility for the practice alleged to have violated Title VII, but because it sought to protect the bargained-for seniority rights of its employees.").

162. *See id.* at 765.

163. *See* Planned Parenthood of Cent. N.J. v. Att'y Gen., 297 F.3d 253, 265 (3d Cir. 2002) (asserting that an application of *Zipes* to cases where defendant-intervenors vigorously defend against a successful civil rights challenge "would thwart the purpose of the fee-shifting statutes"); *see also Zipes*, 491 U.S. at 778 (Marshall, J., dissenting); *supra* Part I.A.2.

164. *See* Graham v. DaimlerChrysler Corp., 101 P.3d 140, 154 (Cal. 2004) (rejecting the reasoning of Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001)); Serrano v. Priest, 569 P.2d 1303, 1316 (Cal. 1977) (rejecting the reasoning of Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)); *see also* discussion *supra* Part I.B.1.

165. *See supra* Part I.A.2.

166. *See Zipes*, 491 U.S. at 761; *supra* Part I.A.3.

167. *Zipes*, 491 U.S. at 765.

168. *Reed II*, 388 F.3d 1281, 1284 (9th Cir. 2004).

plaintiffs' constitutional rights.[169] That was true in *Zipes*, where the court emphasized the need for a "crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes."[170] That was also true in *Reed*, where the challenged law had been in place for over seventy years, and the defendant-intervenors were a nonprofit organization that now supported it.[171] And that fact was also acknowledged in *Charles*, where fees were granted anyway.[172]

But in initiative litigation, where the losing defendant-intervenors are the initiative's proponents, they have in fact contributed to the violation of the plaintiff's constitutional rights, albeit indirectly. Even though only the state can grant court-ordered relief, and the violation results from the state's enforcement of the enacted law, the defendant-intervenors' action is the root of the violation; the enactment and enforcement of an initiative results from the proponent and the state working in tandem. Thus, unlike many defendant-intervenors, who as in *Charles* or *Reed* are merely advocacy groups that support the challenged law, initiative proponents are more like true defendants.

Indeed, proponents who intervene to defend the law take an active role in the litigation beyond that of amicus curiae. Proponents that choose to take that extra step should be given different treatment. The California Court of Appeal's logic in holding the proponent of Proposition 22 liable for fees is illustrative.[173] The proponent in that case was a party, not an intervenor, and thus the court did not need to consider an application of the *Zipes* standard. But the court grounded its reasoning in the fact that the proponent had chosen to become an active party in the litigation, having brought the original suit as a plaintiff and thus took on a role that differed significantly from that of the many amici curiae who also participated.[174] The same rationale justifies holding proponents liable for attorney's fees when they take on a similarly active role as intervenors. In *Perry*, for example, Protectmarriage.com participated fully in the litigation, putting on a full defense with its own witnesses, because the state put on no defense whatsoever.[175]

An extreme solution would treat initiative advocates who have intervened and effectively stepped fully into the shoes of the absent state defendants as regular defendants when it comes to the assessment of

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169. *See, e.g.*, *Zipes*, 491 U.S. at 761 (calling the intervenors "blameless"); Charles v. Daley, 846 F.2d 1057, 1064 (7th Cir. 1988).

170. 491 U.S. at 762.

171. *Reed II*, 388 F.3d at 1284.

172. *Charles*, 846 F.2d at 1077.

173. *See In re* Marriage Cases, No. A123634, 2009 WL 2515727, at *7 (Cal. Ct. App. Aug. 18, 2009); *supra* Part II.A.

174. *In re* Marriage Cases, 2009 WL 2515727, at *7.

175. *See Perry I*, 704 F. Supp. 2d 921, 944–52 (N.D. Cal. 2010).

fees.[176] In that scenario, the defendant-intervenors would be held fully liable for fees under the relevant fee-shifting statute as if they were the state. However, a policy holding initiative proponents always liable by law for fees is likely to be met with valid objections. A clear-cut rule could have a chilling effect on initiative proponents' willingness to defend their adopted law in court.[177] That policy also would seem to thwart the basic policy behind the American Rule, which is to keep from discouraging litigation by imposing a requirement to pay the opposing party's attorney's fees.[178] Second, one could raise the argument, made in *Charles*, that assessing fees against defendant-intervenors infringes on their association and expression rights. Advocates would be strongly discouraged from defending their initiatives, given the risk that they would be responsible for attorney's fees if they lose. While this argument was rejected in *Charles* when applied to an advocacy group, it is more likely to be accepted in initiative litigation, where the initiative proponent's vigorous defense of the enacted law is an extension or continuation of their political expression in championing it.[179]

In *Perry v. Brown*, the defendant-intervenor, Protectmarriage.com, is the official proponent responsible for placing Proposition 8 on the ballot, and the State of California has taken the position that the law is unconstitutional and has refused from the start of the federal litigation to defend it.[180] If the challengers to Proposition 8 prevail, and the Northern District, Ninth Circuit, or U.S. Supreme Court applies the *Zipes* standard in assessing fees, it is more than likely that the State of California will shoulder the full cost of attorney's fees for the lengthy litigation, unless Protectmarriage.com's position is found to be "frivolous, unreasonable, or without foundation."[181] That is because, besides the fact that

176. Such a treatment of Protectmarriage.com is not out of the question, given the Ninth Circuit's and the California Supreme Court's reasoning in holding that Protectmarriage.com has Article III standing to appeal the district court's judgment. *See Perry IV*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *10 (9th Cir. Feb. 7, 2012) ("When the Attorney General of California . . . defend[s] the validity of a state statute . . . she stands in the shoes of the State to assert its interests in litigation. . . . The same is true of Proponents here . . . ."); *see also Perry III*, 265 P.3d 1002, 1023 (Cal. 2011) ("[T]he role played by the proponents in [initiative] litigation is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law and raising all arguable legal theories upon which a challenged provision may be sustained.").

177. When costs for obtaining signatures and campaigning for a ballot initiative are very expensive, the added burden of ultimately paying plaintiff's attorney's fees may not always have a strong deterrent effect. In the case of Proposition 8, campaign contributions for the initiative totaled approximately $40 million (and campaign contributions against Proposition 8 totaled $43 million). Jesse McKinley, *California Releasing Donor List for $83 Million Marriage Vote*, N.Y. TIMES, Feb. 3, 2009, at A13.

178. *See* ROSSI, *supra* note 26, § 6:1.

179. *See* McKinley, *supra* note 177.

180. *Perry I*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

181. However, it is certainly possible. The district court in *Perry I* found that Proposition 8

Proposition 8 was supported and voted on by millions of Californians,[182] the stance that marriage should be defined as a union between a man and a woman has significant support throughout in the U.S.[183]

For these reasons, the *Zipes* standard is inappropriate for *Perry*. Protectmarriage.com is not asserting its own affirmative civil rights claim like the intervenor was in *Zipes*. And although the constitutional rights violation created by Proposition 8 would have been caused directly by California's enforcement of the law, and only the state would be able to provide relief, it can hardly be said that Protectmarriage.com was blameless in causing the violation. And just like the proponent of Proposition 22 in *In re Marriage Cases*, which was held liable for fees,[184] Protectmarriage.com chose to go beyond mere participation as amicus curiae and take an active role in the *Perry* litigation. However, treating Protectmarriage.com as a *full* defendant, subject by law to fee-shifting statutes, could have an undue chilling effect on California's initiative and

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"fail[ed] to possess even a rational basis." *See id.* at 997. In rejecting each of Protectmarriage.com's rationales, the court remarked that they were "nothing more than a fear or unarticulated dislike of same-sex couples" and "post-hoc justifications." *Id.* at 1002. The Ninth Circuit found that "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California." Nos. 10-16696, 11-16577, 2012 WL 372713, at *1 (9th Cir. Feb. 7, 2012). It also found that "Proposition 8 is not rationally related . . . to either of [the] purported interests" advanced by the defendant-intervenors. *Id.* at *20. Given this harsh treatment of Protectmarriage.com's arguments, a finding that its position falls below the *Zipes* standard is not inconceivable. Still, the fact that the Ninth Circuit panel ruling was 2–1 signals that a finding of frivolousness is not the most likely outcome. *See id.* at *29–45 (Smith, J., concurring in part and dissenting in part).

182. Beyer, *supra* note 6 ("[Protectmarriage.com] lost decisively [at the district court], yes, but I don't think you can say that what they did was frivolous or without foundation . . . . They defended a proposition that was voted on by seven million plus voters in California." (quoting Professor David Levine)).

183. The most prominent and current example is the litigation over the Defense of Marriage Act ("DOMA"), the federal law passed in 1996 that defines marriage as "a legal union between one man and one woman." *See* 1 U.S.C. § 7 (2010). DOMA has been defended in numerous court challenges since its passage, notably being held unconstitutional in the District of Massachusetts. *See* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (holding that DOMA is a violation of the Fifth Amendment); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding that DOMA violates the Tenth Amendment). Several other challenges to DOMA are pending in the federal courts at the time of this writing. The Department of Justice had previously defended the law. In February 2011, Attorney General Eric Holder sent a letter to the House of Representatives, explaining that the Department of Justice will cease to defend the statute in constitutional challenges based on his and President Obama's determination that it is unconstitutional. *See* Jerry Markon and Sandhya Somashekhar, *In Gay Rights Victory, Obama Administration Won't Defend Defense of Marriage Act*, WASH. POST, Feb. 24, 2011, at A1. The House of Representatives has since taken up defending DOMA in court. Felicia Sonmez, *House to Defend the Defense of Marriage Act in Court*, WASH. POST (Mar. 10, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/09/AR2011030906188.html.

184. *See In re* Marriage Cases, No. A123634, 2009 WL 2515727, at *1 (Cal. Ct. App. Aug. 18, 2009); *supra* Part II.A.

referendum process by deterring proponents who wish to defend laws approved by the voters.[185]

In sum, even if *Zipes* were meant to apply to ordinary defendant-intervenors, an exception of some kind should be made for initiative litigation both in California and at the federal level. Given the competing policy interests, it is not fair to assess fees against losing intervening initiative proponents only if their position was "frivolous, unreasonable, or without foundation," nor does it make sense to assess fees against them as a matter of course. This is because the proponents have contributed to the violation of the plaintiff's constitutional rights, whether the state joins them in defending the law in court, or steps out of the picture like in *Perry*. Therefore, finding a new, middle-ground standard for assessing fees against those proponents is appropriate.

B. A Middle Ground: The Substantial-Justification Standard

A standard that exists elsewhere in attorney's fees law, both in federal and state statutory schemes, could be the answer. The Equal Access to Justice Act[186] provides a standard for attorney's fees to be awarded to eligible plaintiffs against the federal government.[187] The EAJA widened the scope of claims for which fees could be awarded beyond those dealing with civil rights.[188] Its effect was to supplement, not supersede, the federal fee-shifting statutes already in existence.[189] The EAJA provides that a court must award fees to any party who prevails in a non-tort civil action against the federal government, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[190]

The EAJA had three objectives: to give private citizens an incentive to challenge government wrongdoing, to deter such wrongdoing, and to provide better compensation for the injured plaintiffs.[191] On the other hand, Congress did not want potential fee liability to have a chilling

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185. *See Perry III*, 265 P.3d 1002, 1016 (2011) ("[T]he initiative and referendum [process] . . . articulat[es] 'one of the most precious rights of our democratic process.'" (quoting Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976))).

186. Congress first passed the Act in 1980 as temporary program, which lapsed in 1984. Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325, 2327 (1980). In 1985, the Act was reenacted as a permanent statute. Pub. L. No. 99-80, 99 Stat. 183 (1985).

187. 5 U.S.C. § 504 (2010) (applying to administrative proceedings); 28 U.S.C. § 2412 (2010) (providing for court proceedings).

188. *See, e.g.*, 42 U.S.C. § 1988(b) (2010); 42 U.S.C. § 2000e-5(k) (2010).

189. *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217, 251 (1994).

190. 28 U.S.C. § 2412(d)(1)(A) (2010).

191. Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 Yale L. & Pol'y Rev. 458, 458 (1993).

effect on government action.[192] Therefore, instead of requiring mandatory fees from the government, Congress opted for a middle ground with the substantial-justification standard.[193]

The term "substantial justification," although not defined within the EAJA, was not a new standard.[194] It was a concept borrowed from the Federal Rules of Civil Procedure, which provide a court with the ability to impose attorney's fees on parties who fail to cooperate with a discovery request, unless they can show substantial justification.[195] In that context, the term is measured by whether a reasonable person would consider the party to be bound to comply with discovery.[196] Accordingly, the Supreme Court has interpreted the EAJA's use of "substantially justified" under the same reasonableness test.[197] The Court said that to avoid liability for fees, the government has the burden to show that its position has a "reasonable basis both in law and fact."[198] The Ninth Circuit has noted that the government's "position" includes not only the position taken during litigation, but also in the action on which the litigation is based.[199]

It is well established that, under the EAJA, the fact that the government has lost on the merits does not by itself raise a presumption that the government's position was without substantial justification.[200] Instead, the inquiry takes "a fresh look at the case" and considers the government's decision to pursue a claim or to defend one.[201] In *Pierce v. Underwood*, the Supreme Court affirmed an award under the newly-enacted EAJA.[202] The dispute arose from a challenge to the Secretary of Housing and Urban Development's refusal to implement a subsidy program authorized by federal statute.[203] After the case settled, the plaintiffs moved for an attorney's fees award under the EAJA.[204] In affirming the award granted by the lower courts, the Court reexamined the merits of the government's position to determine whether it was

192. H.R. REP. NO. 99-120, at 10 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 139.

193. H.R. REP. NO. 96-1418, at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4993.

194. *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1, 18 (1995) [hereinafter Sisk, *Part Two*].

195. FED. R. CIV. P. 37(a)(5), (b)(2).

196. 8B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2288 (3d ed. 2010).

197. Pierce v. Underwood, 487 U.S. 552, 556 (1988).

198. *Id.* at 565.

199. Meinhold v. U.S. Dep't of Def., 123 F.3d 1275, 1278 (9th Cir. 1997), *amended by* 131 F.3d 842 (9th Cir. 1997).

200. Sisk, *Part Two*, *supra* note 194, at 23–24.

201. *Id.* at 24.

202. 487 U.S. at 571.

203. *Id.* at 555.

204. *Id.* at 557.

substantially justified.[205] The Court found that it was not, noting that the government had weak legal support for its argument and pointing to the government's erroneous statutory interpretation and misplaced reliance on precedent.[206]

In contrast to the EAJA, the "frivolous, unreasonable, or without foundation" standard advanced in *Zipes* and *Christianburg* places the burden of persuasion on the prevailing party instead of the losing one. In *Pierce*, the Court drew a specific distinction between the two standards, explaining that "substantially justified" means "more than merely undeserving of sanctions for frivolousness."[207] In other words, the EAJA standard sets a standard for the government more demanding than simply a showing that their position was *not* frivolous. Thus, under the EAJA, the government must make a significant showing that their position was substantially justified in order to *avoid* fees, unlike the *Zipes* rule, where a prevailing party must make a stronger showing of frivolousness in order to *collect* fees from an intervenor. One final key difference between the standards is that the EAJA, unlike many other civil rights fee-shifting statutes, sets a specific ceiling on the hourly rate of attorney's fees that may be awarded, unless the court determines that some special factor warrants higher fees.[208]

California courts are no strangers to the substantial-justification standard. The language regarding sanctions for discovery misconduct in the Federal Rules of Civil Procedure (from which the substantial-justification standard in the EAJA was borrowed) is mirrored in the counterpart rule in the California Code of Civil Procedure.[209] Elsewhere in California law, the standard is already used in reference to prevailing parties' entitlement to attorney's fees against the state government, specifically in the rules governing tax[210] and insurance proceedings.[211]

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205. *Id.* at 569–71.

206. *Id.* The Court did not consider whether the government's position fell below the lower standard of being "frivolous, unreasonable, or without foundation," because only the "substantially justified" standard was relevant under the EAJA. *See id*. at 578 (Brennan, J., concurring).

207. *Id*. at 566.

208. 28 U.S.C. § 2412(d)(2)(A) (2010). The current limit is $125 per hour. *Id*. To determine the fee rate, courts calculate a lodestar figure by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate. 14A WRIGHT ET AL., *supra* note 196, § 3660.1; *see also* Sisk, *Part Two*, *supra* note 194, at 108.

209. *See* CAL. CIV. PROC. CODE §§ 2023.010–.040 (2010); *see also id.* § 1987.2 ("[T]he court may inits discretion award . . . expenses . . . including reasonable attorney's fees" incurred by a motion or opposition to subpoena documents if done so "in bad faith or without substantial justification . . . .").

210. *See, e.g.*, CAL. REV. & TAX. CODE § 7156(c)(2)(A)(i) (2010) (providing that a prevailing party in a case against the state shall be entitled to reasonable litigation costs if the state's position was not substantially justified); *see also* CAL. REV. & TAX. CODE §§ 32469, 43520 (2010) (providing that taxpayers are entitled to fees and expenses for certain types of hearings before the tax board upon a finding that the board's position was not substantially justified); Nw. Energetic Serv., LLC v. Cal. Franchise Tax Bd., 71 Cal. Rptr. 3d 642, 664–65 (Ct. App. 2008) (contrasting the substantial-justification standard with the private attorney general theory found in CAL. CIV. PROC. CODE § 1021.5

C. The Proposal

This Note's proposal is to hold losing intervening initiative proponents to the same middle-ground standard to which the federal government is held under the EAJA. This would create a possibility that those nonprevailing proponents would be at least partly liable for the plaintiff's attorney's fees under applicable fee-shifting law, because the unsuccessful proponents would be required to show that their position was substantially justified.

The proposal represents a balance of interests, just like the EAJA. First, adopting the substantial-justification standard instead of the frivolousness standard would make a finding of liability for the defendant-intervenor more likely. This is because the burden of persuasion is shifted from the prevailing plaintiff that is moving for fees to the initiative proponent that seeks to avoid paying them. This would result in the same deterrent effect on initiative proponents that is at the core of the public policy behind the EAJA, which is to deter wrongdoing.[212] Proponents would be less likely to promulgate or subsequently defend a potentially unconstitutional initiative if they anticipate being liable for a challenger's attorney's fees as a matter of course.[213] Instead, they would choose to participate merely as amici curiae and not become an active party in litigation, as long as the government is defending the law.

At the same time, using the substantial-justification standard avoids a rule that would almost always hold the intervenor liable as a matter of course. As discussed, such a policy goes against the basic rationale behind the American Rule of not deterring lawsuits, and also might implicate concerns with regard to proponents' political expression as litigants.[214] Like the standard in the EAJA, where Congress wanted to avoid a chilling effect on government action,[215] the substantial-justification standard would not discourage initiative proponents too strongly. And by leaving open the possibility that the state could share in the fee award, an application of this standard would recognize the state's contributory role in enacting voter initiatives, regardless of whether the state then choose to defend them in court.[216]

(2010)).

211. *See* Cal. Ins. Code § 737(d) (2010).

212. *See supra* Part III.B.

213. *But see supra* note 148 (discussing that given the expense of some proposition campaigns, attorney's fees may not have a deterring effect in all cases).

214. *See supra* Part I.A.1 (discussing the First Amendment argument raised in *Charles*); *supra* Part II.A. (discussing the policy behind the American Rule).

215. H.R. Rep. No. 99-120, at 10 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 139.

216. The interest of nondeterrence would also be served by applying a ceiling on the awardable fee rates, much the way the EAJA does. *See* 28 U.S.C. § 2412(d)(2)(A) (2010). However, this Note does not suggest such a limit should be imposed. In *Pierce v. Underwood*, the Court explained that the

Using the substantial-justification standard also would leave room for the courts' discretion in finding joint liability. If the intervenor's position were found not to be substantially justified, the proportion of the fees for which the intervenor was liable would then depend on the facts. The questions of whether the state was an active defendant and whether there were other defendant-intervenors in the case whose positions were not substantially justified would be largely determinative. For example, in a case where the initiative proponents actively defended the law alongside the state and there was a finding that the proponent's position was not substantially justified, the court could order the plaintiff's fees to be split evenly between the proponent and the state. Or, in a case where the initiative proponents defended the law and the state was silent, perhaps the fees could be divided unevenly, with the proponents owing a greater percentage. And at the opposite end of the spectrum, in a case like *Perry*, where the intervenor is the sole defendant and the state has affirmatively stated that it is not behind the challenged law, a court could potentially hold the defendant-intervenors fully liable for fees.

D. IMPLEMENTATION

In the federal system, the implementation of the substantial-justification standard for intervening initiative proponents in civil rights cases could be accomplished in a number of ways. First, initiative-litigation cases could simply be distinguished from the existing precedent. Neither *Zipes*, nor *Charles*, nor *Reed* was a ballot-initiative challenge defended by initiative proponents. Therefore, the new standard could be judicially created, just as the *Zipes* standard was. The Supreme Court or a federal appellate court could create this new standard while still preserving *Zipes* in one of two ways. First, it could limit that case's holding to apply to only plaintiff-intervenors, as the Third Circuit did.[217] Alternately, it could provide that *Zipes* does in fact apply broadly to all civil rights intervenors, but then carve out a specific exception to the *Zipes* standard for initiative proponents. With *Perry* currently progressing through the federal court system, an opportunity may arise to promulgate this new standard. But the most efficient and effective method would be for Congress to create this exception, borrowing the substantial-justification standard from the EAJA just as it did originally from the Federal Rules of Civil Procedure.

EAJA fee cap was put in place because "Congress thought that . . . [it] was generally quite enough public reimbursement for lawyers' fees." 487 U.S. 552, 572 (1988). So if the policy behind the ceiling was to avoid assessing excessive fees against taxpayers, it is not applicable in the case of initiative proponents who have raised millions of dollars in funding to support their law.

217. *See* Planned Parenthood of Cent. N.J. v. Att'y Gen., 297 F.3d 253, 265 (3d Cir. 2002); *supra* Part I.A.2.

In California, as in other states with their own attorney's fees law, putting this new standard into effect would be even simpler. *Zipes* is not binding on state courts, and the *Connerly* decision was an expressly narrow one addressing only the liability of an amicus curiae. Thus the California Supreme Court, particularly with its tradition of independent attorney's fees jurisprudence,[218] has the discretion to adopt a distinct standard for initiative litigation. Further, the unpublished *In re Marriage Cases* decision by the California Court of Appeal already has provided a strong rationale supporting liability for initiative proponents who have taken an active role in the litigation. Finally, because the substantial-justification standard is familiar to California courts,[219] applying it in this context would not be a far stretch. The California Supreme Court could do so in the next civil rights challenge that is brought successfully against an enacted voter initiative in California state courts and in which a proponent intervenes.[220]

CONCLUSION

It is unfair for defendant-intervenors to avoid nearly all chance of liability for attorney's fees for unsuccessful civil rights defenses of laws they sought to enact but which turn out to be illegal. The *Zipes* standard is inappropriate for initiative litigation in any of the twenty-five jurisdictions where such suits may arise. But because automatically holding nonprevailing initiative proponents liable for fees might have too great a deterrent effect on participating in such litigation, a middle ground is needed. The Equal Access to Justice Act, with its substantial-justification standard, provides an ideal solution. Legislators and courts at both the federal and state levels have the ability to apply this standard to defendant-intervenors in initiative litigation. The pending Proposition 8 litigation could provide the perfect opportunity to implement such a standard.

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218. *See supra* Part I.B.1.

219. *See supra* Part III.B.

220. Of which there are likely to be many. *See* Hon. Ronald M. George, *Keynote Address*, 62 STAN. L. REV. 1515, 1518 (2010) ("The [California Supreme Court] frequently is called upon to resolve legal challenges to voter initiatives."). The California Supreme Court's dicta in finding that Protectmarriage.com had standing to appeal makes intervention by proponents seem nearly mandatory. *See Perry III*, 265 P.3d 1002, 1024 (2011) ("The initiative power would be significantly impaired if there were no one to assert the state's interest in the validity of the measure when elected officials decline to defend it in court or to appeal a judgment invalidating the measure."). On February 13, 2012, the Ninth Circuit heard arguments in *Coalition to Defend Affirmative Action v. Brown*, Nos. 11-15100, 11-15241 (9th Cir. filed May 23, 2011), an appeal from a constitutional challenge to California's Proposition 209, in which Governor Jerry Brown has declined to defend the law. Bob Egelko, *Affirmative Action Suit Gets Brown's Support*, S.F. CHRON., Jan. 17, 2012, at C-1; *see* Coal. to Defend Affirmative Action v. Schwarzenegger, 2010 WL 5094278 (N.D. Cal. Dec. 8, 2010) (granting the defendant-intervenors' motion to dismiss the plaintiff's complaint).