No. 12-144

In the
# Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al*,

*Petitioners*,

v.

KRISTEN M. PERRY, *et al.*

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether the federal Constitution prohibits the people of a State from defining marriage as it has been traditionally understood, a union of one many and one women, when the procreative function that inheres in such relationships makes them differently situated from same-sex relationships?

2. Whether the proponents of a voter initiative, conclusively determined under state law to have the authority to act on behalf of the state in defense of the initiative they authored when the attorney general of the state refuses to do so, have standing under Article III, § 2 of the Constitution to appeal an adverse district court judgment?

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## INTEREST OF AMICUS CURIAE[1]

*Amicus Curiae* Center for Constitutional Jurisprudence was established in 1999 as the public interest law firm of the Claremont Institute, the stated mission of which is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life." The Center advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the very right of the sovereign people to retain the centuries-old definition of marriage as a cornerstone of civil society, in the face of government officials holding a different personal view, is at stake. *Amicus* is located in California, and believes that it can shed light on the importance that the California constitution gives to the voter initiative process.

## INTRODUCTION AND PROCEDURAL HISTORY

Over the past decade, the People of California have engaged in an epic battle over the very definition of marriage, a bedrock institution that has long been recognized as "one of the cornerstones of our civilized society." *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 936, 957 (1971) (Black, J., dissenting from denial of cert.); *see also Murphy v. Ramsey,* 114 U.S.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief, and letters are on file with the Clerk. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution toward preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

15, 45 (1885) (describing marriage, "the union for life of one man and one woman," as "the sure foundation of all that is stable and noble in our civilization").

The battle has pitted the majority of the People of California against every branch of their state government. In 1994, the Legislature added Section 308 to its Family Code, mandating that marriages contracted in other states would be recognized as valid in California if they were valid in the state where performed. As other states (or their state courts) started moving toward treating same-sex relationships as "marriages," it became clear that Section 308 would require California to recognize those relationships as "marriages," even though another provision of California law, Family Code Section 300, specifically limited marriage to "a man and a woman." This result was foreclosed by the People at the March 2000 Election with the passage of Proposition 22, a statutory initiative adopted by a 61% to 39% majority that provided: "Only marriage between a man and a woman is valid or recognized in California." Cal. Fam. Code § 308.5.

In 2005, however, the Legislature passed a bill in direct violation of Proposition 22, A.B. 849, which would have eliminated the gender requirement found in Family Code Section 300. That bill was vetoed by the Governor as a violation of the state constitutional requirement that the Legislature cannot repeal statutory initiatives adopted by the people. Cal. Const. art. 2, § 10(c).

Meanwhile, the Mayor of San Francisco took it upon himself to issue marriage licenses in direct violation of Proposition 22. Although the California Supreme Court rebuffed that blatant disregard of the

law, *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 481 (2004), it ultimately ruled that Proposition 22 was unconstitutional under the state constitution. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008).

More than six months before the California Supreme Court's decision in *In re Marriage Cases*, however, several California citizens, petitioners here, sought to strengthen the State's commitment to traditional marriage by proposing a *constitutional* initiative[2] that would codify the language of Proposition 22 into the state constitution. That initiative proposal was submitted in November 2007. Signatures qualifying that proposition ("Proposition 8") for the ballot were submitted for verification *before* the California Supreme Court issued its opinion in the *Marriage Cases* in May 2008, and Proposition 8 officially qualified for the November 2008 ballot on June 2, 2008, before the decision in the *Marriage Cases* became final on June 16, 2008, and even before the California Supreme Court denied, on June 4, 2008, a request that the Court "stay the effectiveness of its decision" until after the upcoming November 2008 election. *Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009).

The People of California approved Proposition 8 in November 2008, thus correcting the interpretation that their Supreme Court had given to their state constitution at the first opportunity. That initiative

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[2] The California Constitution provides voters with the power to adopt either statutes or constitutional amendments by initiative. Cal. Const. Art. 2, § 8(a). The threshold for qualifying a constitutional initiative for the ballot is higher. *Id.* § 8(b).

was immediately challenged as a supposed unconstitutional revision of the state constitution rather than a valid constitutional amendment. The Attorney General of the State, an opponent of Proposition 8 during the election, not only refused to defend the initiative in court, but affirmatively argued that it was unconstitutional, despite his statutory duty to "defend all causes to which the State . . . is a party." Cal. Gov't Code § 12512. As a result, the Supreme Court allowed Proponents of the Initiative to intervene in order to provide the defense of the Initiative that the governmental defendants would not, recognizing Proponents' preferred status under California law and specifically authorizing them to respond to the Court's Order to Show Cause that it had issued to the governmental defendants. *Strauss*, 207 P.3d at 69. Persuaded by the Proponents' arguments, the California Supreme Court upheld Proposition 8 as a valid amendment to the state constitution. *Strauss*, 207 P.3d at 122.

Another group of plaintiffs, supported by many of the same organizations that had just lost in *Strauss*, then filed this action in federal court, naming as defendants several government officials, including the same Attorney General who had previously refused to defend the initiative in state court and the Governor, none of whom offered any defense to the lawsuit. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 928 (N.D. Cal. 2010) ("*Perry I*").

Despite strongly favorable, if not dispositive, governing precedent from the Ninth Circuit as well as this Court, the Attorney General again refused to defend Proposition 8, instead supporting Plaintiffs' contention that the Proposition was unconstitutional.

*See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 949 (2009) ("*Perry II*"). Indeed, circumstantial evidence from the district court proceedings below strongly suggests that the Attorney General was actively colluding with Plaintiffs to undermine the defense of the Initiative, *see Perry I*, Motion to Realign at 4-5 (Dkt. #216), and the District Court even directed him to "work together in presenting facts pertaining to the affected governmental interests" with San Francisco, whose motion to intervene as a *Plaintiff* was granted by the District Court. *Perry I*, 8/9/09 Hearing Tr. at 56 (Dkt.#162); 8/9/09 Minute Order at 2 (Dkt.#160).

Not surprisingly, given the Attorney General's antipathy toward the Proposition it was his duty to defend, the Proposition 8 Proponents moved for, and were granted, Intervenor-Defendant status. *Perry I*, 704 F.Supp.2d, at 928. The District Court expressly noted, without objection, his understanding that "under California law … proponents of initiative measures have the *standing* to … defend an enactment that is brought into law by the initiative process" and that intervention was "substantially justified in this case, particularly where the authorities, the [governmental] defendants who ordinarily would defend the proposition or the enactment that is being challenged here, are taking the position that, in fact, it is constitutionally infirmed (sic)." *Perry I*, 7/2/09 Hearing Tr. at 8:13-17 (emphasis added); *see also Perry II*, 587 F.3d, at 949-950. That understanding of California law was subsequently ratified by the California Supreme Court, which unanimously held in response to a certified question from the Ninth Circuit that Initiative Proponents have the legal authority under Article II, Section 8 of the California

Constitution and California election law to "assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure," when the public officials of the state decline to defend them. *Perry v. Brown*, 265 P.3d 1002, 1025 (Cal. 2011).

On August 4, 2010, the District Court issued a 136-page opinion that purported to contain numerous findings of fact ostensibly discrediting all of the oral testimony while simply ignoring the extensive documentary and historical evidence supporting the rationality of Proposition 8. It also articulated conclusions of law that likewise simply ignored binding precedent of this Court and the Ninth Circuit, as well as persuasive authority from every other state and federal appellate court to have considered the issues presented by the case.

The Initiative's Proponents moved for a stay pending appeal. Not only the Plaintiffs, but the governmental Defendants, opposed the motion. The district court denied the motion for a stay, holding that there was little likelihood of success on the merits of the appeal, in part because it was questionable whether the Proponents even had standing to pursue the appeal absent an appeal by the named governmental defendants, who were all actively siding with Plaintiffs. *Perry v. Schwarzenegger*, 702 F.Supp.2d 1132, 1136 (N.D. Cal 2010) ("*Perry III*").

After the decision, the district judge retired, and only then revealed that he was in a long-term same-sex relationship—that is, identically situated with the plaintiffs in the case and in a position to be a direct beneficiary of his own ruling in the case. Motions by the Proponents to vacate the decision be-

cause of the taint caused by the district judge's refusal to recuse or at least disclose the circumstances that would lead reasonable people to fear an appearance of bias, were denied by the Chief Judge of the district court and by the Ninth Circuit. *Perry v. Schwarzenegger*, 790 F.Supp.2d 1119 (N.D. Cal. 2011) ("*Perry IV*"), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012) ("*Perry VI*").

Finally, despite concerted efforts by the People of California[3] to have Defendants file a notice of appeal to guarantee that the Ninth Circuit had jurisdiction to consider whether the decision by the District Court invalidating a solemn act of the sovereign people of California was erroneous, none of the governmental defendants filed a notice of appeal within the 30-day window specified by F.R.A.P. 4(a)(1)(A).

Nevertheless, after receiving an affirmative response to the question it had certified to the California Supreme Court, namely, whether *state law* vested in initiative proponents a particularized interest or status as agent for the state that would confer on them Article III standing to unilaterally pursue the appeal in *federal* court,[4] the Ninth Circuit held that the Proposition 8 Proponents did indeed have stand-

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[3] *See, e.g.*, "Lawmakers Urge Governor to Appeal Prop 8 Ruling," Associated Press (Sept. 1, 2010), available at http://www.cbsnews.com/stories/ 2010/09/01/national/ main6827966.shtml.

[4] The Ninth Circuit's Certification Order, dated January 4, 2011, is published at *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011) ("*Perry V*"). The California Supreme Court accepted the request on February 16, 2011, and answered the certified question by published opinion on November 17, 2011. *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011).

ing. *Perry VI*, 671 F.3d at 1074-75. It then effectively held, ostensibly under *Romer v. Evans*, 517 U.S. 620 (1996), that the people of California could not correct an erroneous decision of their own supreme court by amending their constitution to restore the law of marriage to what it had been since before the state was a state. *Perry VI*, 671 F.3d at 1096.

## SUMMARY OF ARGUMENT

The decision of the Ninth Circuit holding, over the objection of plaintiffs (respondents here) that the official proponents of the Proposition 8 voter initiative (petitioners here) had standing to appeal the district court's adverse judgment against the initiative they sponsored is correct, and the same reasoning supports petitioners continued standing in this Court. The determination by the California Supreme Court that initiative proponents are authorized to assert the interest of the state in defending the initiative they authored is dispositive on that jurisdictional question.

Given the importance that California law gives to the initiative process and the unique role that initiative proponents play in that process, Petitioners also have an additional particularized interest in their own right to defend the initiative they sponsored. That interest is sufficient to meet Article III standing requirements as well.

On the merits, neither the Due Process nor the Equal Protection Clauses require that marriage be radically redefined to encompass relationships other than the union of one man and one woman. The fundamental right to marry recognized by this Court in *Loving* as protected by the Due Process Clause

was tied to the unique procreative capacity of opposite-sex unions, a fact that also renders same-sex and opposite-sex relationships not "similarly situated" for purposes of Equal Protection analysis, a threshold inquiry. At bottom, both constitutional questions turn on whether the Constitution deprives the people of the authority to make basic policy judgments about the definition and purpose of an institution as important to civil society as marriage. The decisions by the courts below negating the policy judgment made by the citizens of California should be reversed.

## ARGUMENT

### I. The Initiative Proponents Have Standing to Defend Proposition 8 as Agents of the State.

#### A. The Principal Purpose of the Initiative Power In California Is To Allow The People To Act Directly, When Their Government Officials Will Not.

The California Supreme Court has described the initiative power in California as central to ensuring that the government is responsive to its citizens, and as "one of the most precious rights of [California's] democratic process." *Brosnahan v. Brown*, 651 P.2d 274, 289 (Cal. 1982). Initiatives in California are designed to circumvent unresponsive government officials who wield the power to create law. Initiative proponents in California, therefore, retain a power that is superior to that of the State legislature. Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 Loy. L.A. L. Rev. 1165, 1195 (1998). For example, the legislature

may not repeal or amend an initiative statute unless the enactment permits it, Cal. Const. art. 2, § 10(c), a prohibition that no other state carries to such lengths as California, *People v. Kelly*, 222 P.3d 186, 200 (Cal. 2010).

To fully understand the importance of the initiative power in California, it is helpful to review why it was adopted. Starting in the late 19th century, Californians grew frustrated at the unresponsive, corrupt nature of their legislature. Special interests essentially governed the state. *See* Center for Governmental Studies, *Democracy by Initiative: Shaping California's Fourth Branch of Government* 3 (2nd. ed. 2008). "Representative government seemed unresponsive to the popular will, and legislative decisions seemed biased in favor of special interests." Steven Piott, *Giving Voters a Voice: The Origins of the Initiative and Referendum in America* 148 (2003). Voters were searching for a way to regain control. *Id.*

The initiative movement actually began in the cities of San Francisco and Los Angeles. Organized citizen groups succeeded in passing city charters that gave voters the right to propose city ordinances and future charter amendments. Piott, *supra* at 151; George Mowry, The California Progressives 39 (1951). Success at the local level spurred action at the state level, but the state legislature remained unresponsive. Piott, *supra* at 163; Mowry, *supra* at 56-57. That changed when the initiative movement swept Governor Hiram Johnson into office in 1910, and he immediately proposed legislation intending to "'return the government to the people' and to give them honest public service untarnished by corruption and corporate influence." Spencer C. Olin, Jr.,

California's Prodigal Sons 35 (1968). Pressed by the Governor, the Legislature put before voters a reform package that consisted of Proposition 7 (the initiative power), Proposition 4 (granting women the right to vote), and Proposition 8 (providing for the recall of government officials). This package of reforms "gave citizens the techniques to check the influence of special interest groups, alter the state's political agenda and public policies and remove unresponsive or corrupt officeholders." Democracy by Initiative at 42. Together, these initiatives satisfied the demand of the people of California to directly control government when elected representatives become unresponsive to their needs.

"Drafted in light of the theory that all power of government ultimately resides in the people, the amendment [providing for the initiative] speaks of initiative and referendum, not as a right granted the people, but as a power reserved by them." *Associated Home Builders v. City of Livermore,* 557 P.2d 473, 477 (Cal. 1976) (Tobriner, J.). It is "the duty of the courts to jealously guard this right of the people," *id.* (quoting *Martin v. Smith*, 176 Cal.App.2d 115, 117 (Cal.App. 1959), "and to prevent any action which would improperly annul that right," *Martin*, 176 Cal.App.2d at 117.

Given the importance of the initiative in the California constitutional scheme, it is not surprising that California law confers special authority on the official proponents of initiatives to defend their initiatives against legal challenge. For the reasons set out in subsections B and C below, that special authority is more than sufficient to confer Article III standing on the official Proponents of Proposition 8, so that

they can continue to provide here in this Court the defense of the Initiative they sponsored, as they did below as Intervenor-Defendants and Appellants in the District Court and Court of Appeals, respectively.

### B. California Law Authorizes Proponents of Initiatives to Stand in as Agents of the State to Defend The Initiative They Sponsored, At Least When Government Officials Will Not, Thereby Providing Them Standing in Federal Court for Article III Purposes.

In *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997), this Court in *dicta* expressed "grave doubts" about whether the proponents of the Arizona initiative at issue in that case had standing under Article III to pursue an appeal after the public officials of the state declined to do so. The Court noted that it was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Id*., at 65.

Recognizing that this *dicta* rendered the authority given by state law potentially dispositive on the Article III standing issue, the Ninth Circuit appropriately certified the question to the California Supreme Court for resolution. Specifically, the Ninth Circuit asked the California Supreme Court to answer:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized

> interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

*Perry V*, 628 F.3d, at 1193.

In response, the California Supreme Court unanimously held that, under the California Constitution and state election law, "the official proponents of the initiative are authorized … to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." *Perry v. Brown*, 265 P.3d at 1007.[5]

The California Court's holding was not a novel one, but fully consistent with (indeed, all but compelled by) "a number of [its] past decisions." It reflected the view, expressed in Article II, Section 1 of the California Constitution, that "[a]ll political power is inherent in the people," and that the people "have the right to alter or reform [their government] when the public good may require." *Perry v. Brown*, 265 P.3d at 1015-16. The initiative process was added to the state constitution in 1911 to provide a mechanism for the exercise of that inherent power by "af-

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[5] The California Court declined to address whether initiative proponents also had a "particularized injury" in the validity of the initiative they sponsored. *Perry v. Brown*, 265 P.3d at 1015. But as described in Part C below, prior California decisions strongly suggest an affirmative answer to that question as well.

ford[ing] the voters of California the authority to *directly* propose and adopt state constitutional amendments and statutory provisions." *Id*. at 1016. Because "[t]he primary purpose of the initiative was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt," *id*., the Court recognized the "distinct role" that California law recognizes for the official proponents of an initiative "with regard to the initiative measure the proponents have sponsored," *id.* at 1017-18.

It was for this reason that "decisions of both [the California Supreme Court] and the Courts of Appeal have repeatedly and uniformly permitted the official proponents of initiative measures to participate as parties—either as interveners or as real parties in interest—in both preelection and postelection litigation challenging the initiative measure they have sponsored." *Id.* at 1018. And this intervention had been routinely permitted, the Court noted, "whether or not the Attorney General or other public officials were also defending the challenged initiative measure in the judicial proceeding in question." *Id*. The Court then described the number of such cases in which such intervention was permitted as "legion." *Id*. And the Court specifically noted that initiative proponents had been permitted not just to appear as formal parties but "to appeal from an adverse judgment." *Id.* at 1019 (*citing Amwest Surety Ins. Co. v. Wilson,* 906 P.2d 1112, 1116 (Cal. 1995); *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 598 (Cal. 1994); *People ex rel. Deukmejian v. County of Mendocino,* 683 P.2d 1150, 1152 (Cal. 1984); *Simac Design,*

*Inc. v. Alciati*, 92 Cal.App.3d 146, 153 (Cal.Ct.App. 1979)).

All this because, as the Court had previously recognized, "in instances in which the challenged law has been adopted through the initiative process there is a realistic risk that the public officials may not defend the approved initiative measure 'with vigor'." *Id.* at 1022 (citing *Building Industry Assn. v. City of Camarillo*, 718 P.2d 68, 75 (Cal. 1986)). Allowing initiative proponents to intervene in such cases "would serve to guard *the people's right to exercise the initiative power*." *Id.* (emphasis in original). It was therefore apparent to the Court "that the official proponents of the initiative are participating on behalf of the people's interest, and not solely on behalf of the proponents' own personal interest." *Id.* In other words, particularly when defending initiatives that the public officials normally tasked with such a duty decline to defend, "the role played by the proponents in such litigation is comparable to the role ordinarily played by the Attorney General . . . in vigorously defending a duly enacted state law. . . ." *Id.* at 1023.

Under this Court's decisions in *Karcher* and *Arizonans*, the definitive interpretation of California law by the California Supreme Court that initiative proponents are authorized under California law to assert the state's interest in the validity of the initiative is dispositive on the question of the Article III standing of California initiative proponents.

A State clearly has standing to defend the constitutionality of its own statutes. *Maine v. Taylor*, 477 U.S. 131,136-37 (1986); *Diamond v. Charles*, 476 U.S. 54, 62 (1986). That principle extends to legislators who are authorized by state law to intervene in

their official capacities as presiding officers of the Legislature, in order to defend the constitutionality of a statute when the Attorney General of the state declines to do so. *Karcher v. May*, 484 U.S. 72, 82 (1987). This Court dismissed the *Karcher* case only after the legislators had lost their leadership positions and no longer had the authority to pursue an appeal "on behalf of the legislature." *Id.*, at 81. But as the Ninth Circuit recognized in *Yniguez v. Arizona*, by leaving in place rather than vacating the lower court decisions in the case, this Court "clearly indicated" in *Karcher* "that jurisdiction had been proper in the district court and the court of appeals so long as the legislators held office, notwithstanding the fact that the Attorney General had declined to defend the suit." *Yniguez v. Arizona*, 939 F.2d 727, 732 (9th Cir. 1991). The fact that the Supreme Court of New Jersey had authorized the legislative leaders to intervene on behalf of the legislature in the lower courts obviated the need to "vacate the judgments [issued by those courts] for lack of a proper defendant-appellant." *Karcher*, 484 U.S. at 81-82.

*Arizonans* also recognized that state law might appoint elected officials or initiative sponsors to defend the constitutionality of a state statute on behalf of the state. In her opinion for the Court, Justice Ginsburg explicitly noted that, in *Karcher,* the Court "recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests. *Arizonans*, 520 U.S. at 65 (citing *Karcher*, 484 U.S. at 82). She then expressed "grave doubts" about the standing of the Arizona initiative proponents *only* after noting that the Court was "aware of no Arizona law appointing initiative

sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Arizonans*, 520 U.S. at 65 (citing *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, 460 U.S. 1077 (1983) ("DBWC")).

California law is to the contrary. By definitive interpretation of the California Supreme Court, initiative proponents of a California initiative are authorized to assert the interests of the state in defending the initiative they sponsored, at least when the Attorney General of the state declines to do so. *Perry v. Brown*, 265 P.3d at 1007. Because there is no question that the State itself has standing to defend state statutes and initiatives in federal court, *Taylor*, 477 U.S. at 136-37; *Diamond*, 476 U.S. at 62, neither can there be any question that those who are duly authorized by state law to represent the interests of the state in such matters likewise have standing, *see Karcher*, 484 U.S. at 82.

Plaintiffs' arguments below that a duly authorized agent of the state would also have to show a separate particularized injury in their own right misses the point of the California Supreme Court's holding that official initiative sponsors are authorized to assert the State's interests. Although, for the reasons discussed in Section II below, initiative sponsors do have a particularized injury in their own right, the authority given to them to assert the interests of the State is sufficient for Article III. As agents of the State, they no more need to demonstrate an additional particularized injury in order to assert the State's interests than would the Attorney

General of the state herself (had she chosen to defend the constitutionality of the initiative at issue here). Without having made any separate showing of additional particularized injury in their own right, the legislative leaders in *Karcher* had standing to defend a state statute as long as they held the leadership positions in which they were authorized by state law to assert the state's interests in that defense. *Karcher*, 484 U.S. at 75, 82. So too here. The authority to assert the state's interests that was provided to the state legislators in *Karcher* was provided in exactly the same manner as the authority provided to the official initiative proponents here – by action of the state Supreme Court, both in the decision responding to the Ninth Circuit's certification request, *Perry v. Brown*, and in the prior state court action appointing the initiative proponents to defend the initiative they sponsored, *Strauss v. Horton*. Indeed, the authority provided by the California Supreme Court here is even more explicit than that provided by the New Jersey Supreme Court in the matter at issue in *Karcher*. The relevant state court decision relied upon by *Karcher*, *Application of Forsythe*, 450 A2d 499, 500 (N.J. 1982), simply granted the motion by the legislative leaders to intervene in defense of the statute without discussion or express statement that they did so in order to assert the interests of the state; necessarily, then, the decision of the California Supreme Court in *Perry v. Brown* discussing the question at length and explicitly holding that the initiative proponents were authorized by state law to assert the interests of the state is dispositive.

The authority to assert the interests of the State distinguishes the official proponents of an initiative

from the general mass of voters who supported the initiative, and it distinguishes this case from this Court's decision in *Don't Bankrupt Washington Committee*. The summary dismissal in *DBWC* was "triggered by the Solicitor General's argument [in an *amicus curiae* brief filed by the United States] that 'where the State has litigated the validity of its law and decided to acquiesce in a holding that it is unconstitutional, it is not the prerogative of *private citizens* to revive the law through further litigation, even if they might benefit in an abstract way by doing so.'" Brief of Appellee the United States of America to Dismiss or Affirm, *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, No. 82-1445 (Oct. Term, 1982) (*cited in* Brief for Respondents In Opposition to the Judgment, *Arizonans for Official English v. State of Arizona*, No. 95-974, at 25 (Oct. Term 1995) (emphasis added)); *see also* Jurisdictional Statement at 3, *DBWC,* No. 82-1445 (U.S., Feb. 25, 1983) (appellant's self-description as merely "a citizens' group that drafted and campaigned" for the initiative at issue in the case, without ever suggesting that it had any official status or authority under Washington law to act as an agent of the state). It does not appear that the *DBWC* Court was ever presented with, much less considered, the argument that in a state such as California, initiative proponents are not merely "private citizens," but are expressly authorized to assert the interests of the State*, Perry v. Brown*. Quite simply, "[a]s the principal sponsors, ... their relationship to [the Initiative is] closely analogous to the relationship of a state legislature to a state statute." *Yniguez*, 939 F.2d, at 732.

In sum, because of the importance California places on the right to initiative as a way for the people of the state to take action when their own elected officials do not, and the serious risk that those same elected officials might not defend a duly-passed initiative with vigor (or at all, as here), the California Supreme Court has expressly held that the official initiative proponents are authorized under the California Constitution and election law to assert the interests of the state. The standing requirements of Article III require no more.

## II. California Law Also Recognizes a Fundamental Right of Citizens to Propose Initiatives, and this Right Becomes A Particularized Interest for Citizens Who Serve as an Initiative's Official Proponents.

The California Supreme Court did not address in *Perry v. Brown* whether initiative proponents also have a distinct and particularized interest in their own right, and not just on behalf of the state, to defend the constitutionality of the initiative they sponsored. But prior decisions by the California Supreme Court and several lower state court decisions strongly suggest that they do, providing another basis for holding that proponents have Article III standing here.

In one recent case, the California Court of Appeal treated the initiative proponent as potentially an "indispensible person," and allowed him to appeal from a trial court decision invalidating the initiative he sponsored when the governmental defendant, who had joined with plaintiffs in challenging portions of the initiative, did not. *Citizens for Jobs and the Economy v. County of Orange*, 94 Cal.App.4th 1311,

1321-22 (Cal. App. 4.Dist. 2002) (citing Cal. Code Civ. Proc. § 389, "Joinder as party, conditions; indispensable person, factors . . . ."). In another, the proponent of a local initiative was held to be an "aggrieved party" that could file a motion to vacate a writ of mandate issued in conflict with the initiative it supported and appeal from the denial of its motion as well as the judgment, even though the City defendant did not appeal and even though the proponent of the initiative was not a party to the trial court proceeding. *Simac Design,* 92 Cal.App.3d, at 151-53; *cf. Greif v. Dullea*, 66 Cal.App.2d 986, 993 (1944) ("A party in interest, but not of record, who accepts complete control in the conduct of a case, but suddenly is confronted with his lack of legal capacity to take an appeal, is an aggrieved party"). The California Supreme Court followed similar reasoning to hold in *Connerly v. State Personnel Bd.*, 129 P3d 1, 7 (Cal. 2006), that the proponent of an initiative has a "special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large" that is "directly affected" by litigation involving the initiative they sponsored.

To be sure, state courts can recognize a broader standing than is permitted in federal court under Article III, *Lee v. American Nat. Ins. Co.*, 260 F.3d 997, 999-1000 (9th Cir. 2001); *Reycraft v. Lee*, 177 Cal.App.4th 1211, 1217 (Cal.App. 4 Dist. 2009), but California has not done so here. Instead, its relevant standing rules parallel those applied by the federal courts under Article III. "To have standing to seek a writ of mandate"—one of the procedures used to obtain appellate court review in California—"a party must be 'beneficially interested' (Code Civ. Proc. §

1086), i.e., have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.'" *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal.4th 352, 361-62, 981 P.2d 499 (Cal. 1999) (quoting *Carsten v. Psychology Examing Com.*, 614 P.2d 276 (1980)). The California Supreme Court has noted that this standard "is equivalent to the federal 'injury in fact' test, which requires a party to prove by a preponderance of the evidence that it has suffered 'an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* at 362; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, the relevant California standing requirements are interpreted as equivalent to Article III standing in federal courts. That the California courts recognize standing for Initiative Proponents to unilaterally pursue appeals, *Citizens for Jobs*, 94 Cal.App.4th at 1322; *Simac Design*, 92 Cal.App.3d at 153, using a test "equivalent" to that used by federal courts to determine Article III standing, *Associated Builders and Contractors,* 21 Cal.4th 362, should be dispositive.

It is not surprising that California law gives such a preferred position to initiative proponents, given the "precious right" status of the initiative power and the concern about unresponsive government that motivated its adoption. In the present case, the Governor and Attorney General both refused to defend Proposition 8, as was their duty. Absent defense by the Initiative Proponents, the risk of mischief by elected officials bent on nullifying an initiative that they did not like is not hypothetical or speculative,

but very real. The California courts have recognized this potential harm, and ruled that in such instances initiative proponents are to be allowed to intervene and given standing to pursue an appeal even absent appeal by the governmental defendants. *Camarillo*, 41 Cal.3d, at 822; *Citizens for Jobs*, 94 Cal.App.4th, at 1321-22; *Simac Design*, 92 Cal.App.3d, at 151-53.

That initiative proponents have a particularized interest in their own right is further bolstered by the fact that California law recognizes a "fundamental right of the people to propose statutory or constitutional changes through the initiative process." *Costa v. Superior Court*, 128 P.3d 675, 686 (Cal., 2006). The California Constitution describes two facets of the initiative power: 1) "the power of the electors to propose statutes and amendments to the Constitution"; "and" 2) the power of electors "to adopt or reject" those proposed statutes and constitutional amendments. Cal. Const. art. 2, § 8. Initiative proponents, parties that actually exercise the first part of that authority, thus have an interest distinct from the entire body of electors who adopt or reject their handiwork. In other words, initiative proponents in California have a "sufficient beneficial interest" and a "special interest to be … preserved or protected over and above the interest held in common with the public at large." *Sonoma County Nuclear Free Zone v. Superior Court*, 189 Cal.App.3d 167, 175 (Cal.App.1.Dist.1987).

This Court's decision in *Diamond* is not to the contrary. There, the Court stated that since "the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' identified in *Sierra Club v. Morton*, [405 U.S. 727, 740 (1972)], in de-

fending the standards embodied in that code." *Diamond*, 476 U.S., at 65. But as the initiative provisions of the California Constitution make clear, the power to "create a legal code" in California does not rest exclusively with the State or its legislature. The people, as the ultimate sovereign, have retained the right to "create a legal code" for themselves. They have retained the power to "propose" statutes and constitutional amendments, and the power "to adopt or reject" them. Cal. Const. art. 2, § 8.

The *Diamond* Court specifically noted that the "legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Article III may be met." *Diamond*, 476 U.S., at 65 n.17. Necessarily, then, because California recognizes that "[a]ll political power is inherent in the people," Cal. Const. art. 2, § 1, the people have the power to create new interests sufficient to confer standing, and the people of California have done so here. Proponents of initiatives thus have a "sufficient beneficial interest" in their own right for Article III standing. *Connerly*, 129 P.3d, at 6-7; *Sonoma County Nuclear Free Zone*, 189 Cal.App.3d, at 175. That's why California courts "allow intervention by proponents of the initiative," *Camarillo.*, 41 Cal.3d, at 822, why initiative proponents are frequently treated as "real parties in interest," *e.g., Independent Energy Producers Ass'n v. McPherson*, 136 P.3d 178, 180 (Cal. 2006); *Senate of the State of California v. Jones*, 988 P.2d 1089, 1091 (Cal. 1999), and why such intervenors have specifically been allowed to unilaterally appeal from adverse judgments, *Citizens for Jobs*, 94 Cal.App.4th, at 1321-22; *Simac Design*, 92 Cal.App.3d, at 151-53.

## III. Neither Due Process Nor Equal Protection Requires the Redefinition of Marriage to Encompass Anything Other Than a Union of One Man and One Woman.

### A. The Fundamental Right to Marry Recognized in *Loving v. Virginia* as Protected by the Due Process Clause Was Explicitly Tied to the Procreative Purposes of Marriage.

In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), this Court held that the "freedom to marry" was a fundamental freedom that could not be denied "on so unsupportable a basis as [a] racial classification," thus rendering Virginia's anti-miscegenation statute unconstitutional. Significantly, marriage was deemed "fundamental" because it is one of the "'basic civil rights of man,' fundamental to our very existence and survival," the Court noted. *Id.* Yet marriage is "fundamental to our very existence" only because it is rooted in the biological complementarity of the sexes, the formal recognition of the unique union through which children are produced—a point emphasized by the fact that the *Loving* Court cited a case dealing with the right to procreate for its holding that marriage was a fundamental right. *Id.* (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)). The *Loving* Court correctly recognized that skin color had nothing to do with that basic purpose; the racial classification that lay at the heart of Virginia's anti-miscegenation statute was therefore "invidious" and could not be sustained.

Nothing in the *Loving* decision suggests that the Constitution compels the redefinition of marriage to encompass relationships that do not share that unique attribute of complementarity of the sexes. To the contrary, the Court has repeatedly cautioned against the recognition of new fundamental rights lest the Court end up substituting its own judgment for that of the people. In fact, when the very challenge presented by the current cases was first presented to the Supreme Court 40 years ago, just five years after the *Loving* decision, the Court rejected it. *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing appeal for "want of a substantial federal question").

### B. Equal Protection Analysis Is Only Triggered If People Who Are "Similarly Situated" Are Treated Differently.

Plaintiffs' Equal Protection claim likewise necessarily seeks to fundamentally change the definition and purpose of marriage. The Equal Protection Clause does not mandate such a result.

As this Court has frequently recognized, "[t]he Equal Protection Clause … is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (emphasis added). "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

Accordingly, the issue is whether same-sex and opposite-sex relationships are similarly situated. This is a "threshold" inquiry, for the Equal Protection clause is not even triggered if the relationships

are not similarly situated. *See, e.g., Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996).

Moreover, the issue is not whether the relationships might be similarly situated in some respect, but whether they are similarly situated in ways relevant "to the purpose that the challenged laws purportedly intended to serve." *Cleburne*, 473 U.S. at 454 (Stevens, J., joined by Burger, C.J., concurring); *see also Rostker v. Goldberg*, 453 U.S. 57, 78 (1981) (rejecting challenge to male-only selective-service registration on ground that "[m]en and women … are simply not similarly situated for purposes of a draft or registration for a draft") (emphasis added); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (upholding Equal Protection challenge to state probate preference for men over women as estate administrators, because men and women were "similarly situated with respect to [the] objective" of the statute).

The district court below erroneously emphasized the ways in which same-sex and opposite-sex relationships are similarly situated rather than the ways they are not similarly situated. "Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners," Judge Walker found. Pet.App. 235a. "Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions," he concluded. *Id.*

That was error of the first magnitude. No one disputes that if marriage as an institution was only about the relationships adults form among themselves, it might well violate Equal Protection not to recognize as marriage any adult relationship seeking

the recognition. But marriage is and always has been about much more than the self-fulfillment of adult relationships, as history, common sense, legal precedent, and the trial record in this case itself demonstrate. Because the institution of marriage is the principal manner in which society structures the critically important function of procreation and the rearing of children, it has long been recognized as "one of the cornerstones of our civilized society." *Meltzer*, 402 U.S. at 957 (Black, J., dissenting from denial of cert.). Indeed, this Court has itself noted that "the union for life of one man and one woman" is "the sure foundation of all that is stable and noble in our civilization." *Murphy v. Ramsey*, 114 U.S., at 45).

This purpose has been recognized in California since the very beginning of the State's existence as a State. "The first purpose of matrimony, by the laws of nature and society, is procreation," held the California Supreme Court in *Baker v. Baker*, 13 Cal. 87, 103 (1859). A century later, the same court recognized that "the institution of marriage" serves "the public interest" because it "channels biological drives that might otherwise become socially destructive" and "it ensures the care and education of children in a stable environment." *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952). And a half century after that, on the eve of the Proposition 8 political fight, the California Court of Appeal recognized that "the sexual, procreative, [and] child-rearing aspects of marriage" go "to the very essence of the marriage relation." *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184-85 (Cal. Ct. App. 2008).

These cases are not anomalies but carry forward a long and rich historical and philosophical tradition. Henri de Bracton wrote in his thirteenth-century treatise, for example, that from the jus gentium, or "law of nations," comes "the union of man and woman, entered into by the mutual consent of both, which is call marriage" and also "the procreation and rearing of children." H. Bracton, 1 On the Laws and Customs of England 27 (S. Thorne ed. 1968). William Blackstone described the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that and regulated." William Blackstone, 1 Commentaries *410 (S. Tucker ed., 1803). He then described the relationship of "parent and child" as being "consequential to that of marriage, being its principal end and design." *Id.* And John Locke, whose influence on the American constitutional order is perhaps unsurpassed, described the purpose of marriage, "the end of the conjunction of the species," as "being not barely procreation, but the continuation of the species." John Locke, Second Treatise of Civil Government §§ 78, 79 (1690).

This long-standing view was confirmed by the sociological and anthropological evidence introduced into the trial record. The work of the late Claude Lévi-Strauss, the "father of modern anthropology" and former Dean of the Académie Française, forms part of the trial record, for example, and includes this observation: "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in

every type of society." Claude Levi-Strauss, *The View From Afar* 40-41 (1985) (DIX63). Marriage is thus "a social institution with a biological foundation," he wrote in another work. Claude Levi-Strauss, *Introduction* to 1 *A History of the Family: Distant Worlds, Ancient Worlds* 5 (Andre Burguiere, et al. eds., Belknap Press of Harvard Univ. Press 1996). And historian G. Robina Quale's comprehensive sociological survey of the development of marriage from prehistoric times to the present, also part of the trial record, reveals that "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies." G. Robina Quale, *A History of Marriage Systems* 2 (1988) (DIX79).

Given the near-universal view, across different societies and different times, that a principal, if not the principal, purpose of marriage is the channeling of the unique procreative abilities of opposite-sex relationships into a societally beneficial institution, it is clear that same-sex and opposite-sex couples are not similarly situated with respect to that fundamental purpose.

That is undoubtedly why Plaintiffs' own expert admitted at trial that redefining marriage to include same-sex couples would profoundly alter the institution of marriage. Trial Tr. 268 (testimony of Harvard Professor Nancy Cott). And why Yale Law Professor William Eskridge, a leading gay rights activist, has noted that "enlarging the concept to embrace same-sex couples would necessarily transform [the institution of marriage] into something new." William N. Eskridge, Jr. & Darren R. Spedale, Gay Marriage: For Better or for Worse? What We've Learned

from the Evidence 19 (2006) (Plaintiffs' Tr. Ex. PX2342). In short, "[s]ame-sex marriage is a breathtakingly subversive idea." E. J. Graff, Retying the Knott, The Nation at 12 (June 24, 1996) (Tr. Ex. DIX1445). If it ever "becomes legal, [the] venerable institution [of marriage] will ever after stand for sexual choice, for cutting the link between sex and diapers." *Id.*

Yet despite all this evidence, the trial court found, as a "finding," that "Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions." Finding #48, Pet.App. 235a. This because, in its view, "Marriage is [only] the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents." Finding #34, Pet.App. 220a-221a. (citing Plaintiff's expert, Nancy Cott); see also id. at 155a ("The state's primary purpose in regulating marriage is to create stable households").

Necessarily, given that conclusion, the court also had to deny that procreation was part of the historical purpose of marriage. See Pet.App. 290a ("The evidence did not show any historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry") (emphasis added). And it had to make the further claim that "[g]ender no longer forms an essential part of marriage." Pet.App. 291a. Only then, after discarding the very thing that is critical to the threshold

Equal Protection inquiry, could the trial court conclude that "[r]elative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to per-form the rights and obligations of marriage under California law." *Id.*

The Ninth Circuit's attempt to limit the reach of the district court's holding is unavailing, for the reasons set out in Petitioners' opening brief. If the Ninth Circuit's decision and its affirmance of the district court's judgment is allowed to stand, the very definition and purpose of marriage will necessarily be altered. Re-defining marriage to encompass same-sex relationships "will introduce an implicit revolt against the institution into its very heart." Ellen Willis, "Can Marriage Be Saved? A Forum, The Nation at 16-17 (June 24, 1996). Indeed, same-sex marriage is "the most recent development in the deinstitutionalization of marriage," the "weakening of the social norms that define people's behavior in . . . marriage." Andrew J. Cherlin, The Deinstitutionalization of American Marriage, 66 J. Marriage & Fam. 848, 850 (2004) (DIX49). As we noted above, the Equal Protect Clause does not compel such a result.

### C. Fundamentally, The Issue Here is Who Makes The Policy Judgment About the Purpose of Marriage, The People, or the Courts?

When the California Supreme Court considered the initial state constitutional challenge to Proposition 8, it recognized that "the principal issue before [it] concerns the scope of the right of the people, under the provisions of the California Constitution, to

change or alter the state Constitution itself through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution." *Strauss*, 46 Cal. 4th at 385. While that case involved a unique question of California constitutional law (the difference between a constitutional amendment, which can be accomplished by voter initiative, and a constitutional revision, which requires a constitutional convention), because federal Equal Protection analysis requires, as a threshold matter, an inquiry into the purpose served by a classification in order to ascertain whether different groups of people are similarly situated, the same issue pertains. What is the scope of the right of the people under the federal constitution to make basic policy judgments about the purposes served and to be served by society's fundamental institutions, when that definition of purpose will determine whether the groups on opposite sides of the resulting classification are "similarly situated"?

Justice Baxter's observations in *In re Marriage Cases*, the decision from the California Supreme Court's opinion that created a state constitutional right to same-sex marriage a few months before the people of the state adopted Proposition 8, codifying in the state constitution the definition of marriage that had existed in California for a century and a half, are particularly apropos. Recognizing that such policy judgments are quintessentially the stuff of the democratic political process, he criticized the court's majority for engaging in "legal jujitsu," "abruptly forestall[ing] that process and substitut[ing], by judicial fiat, its own social policy views for those expressed by the People themselves." *In re Marriage Cases*, 43

Cal. 4th at 863-64 (Baxter, J., concurring and dissenting).

The trial court here did exactly the same thing when presented with this federal constitutional challenge. By discounting to near zero all the precedential and historic evidence demonstating that procreation has always been a significant purpose of marriage, it substituted its views about that threshold policy judgment for those of the millions of Californians who, in voting for Proposition 8, necessarily determined that the historic purpose still mattered. And in affirming the judgment of the district court, the Court of Appeals likewise substituted its policy judgment about the threshold "purpose" inquiry for that of the people of the State of California.

## CONCLUSION

This Court should recognize that it has jurisdiction to consider this appeal because, under California law, initiative proponents are authorized to assert the interests of the state in defending the voter-approved initiatives they sponsored, interests that are sufficient for Article III standing. California law also gives a unique role in the initiative process to official initiative proponents, giving them an additional particularized interest in defending the initiative they sponsored and an additional basis for Article III standing.

On the merits, the decisions below holding that Proposition 8 is unconstitutional should be reversed.

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