No. 12-144

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, *ET AL.*, *Petitioners*,
v.
KRISTIN M. PERRY, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of
Citizens United's National Committee for Family, Faith and Prayer, Citizens United Foundation, U.S. Justice Foundation, Gun Owners Foundation, The Lincoln Institute for Research and Education, Public Advocate of the United States, Declaration Alliance, Western Center for Journalism, Institute on the Constitution, Abraham Lincoln Foundation for Public Policy Research, Inc., Conservative Legal Defense and Education Fund, English First, and Protect Marriage Maryland PAC
in Support of Petitioners

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January 29, 2013

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United and its National Committee for Family, Faith and Prayer, Public Advocate of the United States, Abraham Lincoln Foundation for Public Policy Research, Inc., and English First are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code section 501(c)(4).

Citizens United Foundation, U.S. Justice Foundation, Gun Owners Foundation, The Lincoln Institute for Research and Education, Declaration Alliance, Western Center for Journalism, and Conservative Legal Defense and Education Fund are educational organizations, exempt from federal income tax under IRC section 501(c)(3).

The Institute on the Constitution is an educational organization. Protect Marriage Maryland PAC is a political committee.

In August 2012, several of these *amici* filed an *amicus* brief in this case in support of granting certiorari.[2] In February 2003, several of these *amici* filed an *amicus* brief on the merits in this Court in

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[1] It is hereby certified that counsel for the parties have filed blanket consents with the Court and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] http://lawandfreedom.com/site/constitutional/CA_%20Prop8_Amicus.pdf.

Lawrence v. Texas.[3]

SUMMARY OF ARGUMENT

In the absence of the state's Attorney General or any other authorized state or county official, the California Supreme Court ruled that Petitioners, official proponents of Proposition 8 amending the State Constitution, are authorized by the state law to appear and assert on behalf of the State its defense against a case challenging the initiative's constitutionality under the Equal Protection Clause. While federal law governs whether a federal court has jurisdiction of this matter under the case or controversy requirement, the Tenth Amendment secures to the states and the people of the several states the power to determine the persons authorized to represent the People of California.

Respondents mistakenly assert that, by defining marriage as a union of a man and a woman and enshrining that definition in the state constitution, Proposition 8 violates the equal protection guarantee of the Fourteenth Amendment. They contend that because interracial marriage is mandated by the constitution, so is same-sex marriage. Under the Equal Protection Clause, however, homosexual discrimination is not the same as racial discrimination. The latter is forbidden because it violates the bedrock principle that all men are created equal as human beings whereas discrimination based

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[3] http://lawandfreedom.com/site/constitutional/ Lawrence.pdf.

upon sexual preference or orientation does not deny one's humanity.

Respondents also erroneously claim that, under the Equal Protection Clause, a right to same-sex marriage is the same as a right against miscegenation. But the two rights are very different. This Court's ruling in Loving v. Virginia did not require the State of Virginia to redefine marriage. It only required Virginia to permit a man and a woman to marry without regard to race. In contrast, the very purpose of this law suit is to strike down the Proposition 8's definition of marriage and, thereby, constitutionally impose upon the people of California the same "social standing" on a same-sex unions as is enjoyed by an opposite sex married couple.

Respondents demand that the equal protection guarantee confers upon them such special judicial protection because a long history of discrimination and because their present position of political powerlessness deprive them of redress. But homosexuals are not discriminated against because of identity but based what some may choose to do. In the last decade, the political power of gays and lesbians has grown exponentially, enabling them to achieve influence in the highest executive and legislative offices in the nation and the several states. There is, then, no justification for the special solicitation given them in the courts below in derogation of the power of the People of California to use their initiative powers to make their own domestic relations policies.

Respondents also wrongfully benefitted in the

courts below from the appearance of partiality of the district court judge and one of the court appeals judges that calls for the exercise of this Court's supervisory powers to reverse and remand for trial in an impartial tribunal. They also wrongfully benefitted from the misapplication of Romer v. Evans, a derelict on the body of constitutional law that should not just be distinguished, but overruled.

ARGUMENT

I. THE PROPONENTS OF PROPOSITION 8 HAVE STANDING TO DEFEND THE CALIFORNIA CONSTITUTION.

On November 24, 2008, the sovereign people of California passed Proposition 8, amending the California state constitution to read that "[o]nly marriage between a man and a woman is valid or recognized in California." Calif. Const., Art. I, Sec. 7.5. After Respondents filed suit in the U.S. District Court for the Northern District of California, claiming that the new provision of the California constitution violated the Due Process and Equal Protection clauses of the Fourteenth Amendment, the California Attorney General abandoned the People of California, "conced[ing] that Proposition 8 is unconstitutional." *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) ("Perry I"). While state and county officials "refused to take a position on the merits of plaintiffs' claims," they also "declined to defend" the People's Proposition. *Id*. Thereafter, "the official proponents of Proposition 8 under California election

law ... seized the role of ... defend[ing] [its] constitutionality." *Id*. at 928, 995.

In response to the question certified by the court of appeals below,[4] the California Supreme Court ruled that "the official proponents of the initiative are authorized under California law 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, 52 Cal. 4th 1116, 1127 (Cal. 2011) ("Perry III").

On this basis, the court of appeals concluded that "[i]t is for the State of California to decide who may assert its interests in litigation, and we respect its decision by holding that Proposition 8's proponents have standing to bring this appeal on behalf of the State." Perry II at 1064.

A. The Sovereign People of California Have the Right to Amend Their Form of Government.

Consistent with the Declaration of Independence, which states unequivocally "governments ... deriv[e] their just powers from the consent of the governed [and] it is the Right of the People to alter" them, Article II, Section 1 of the Constitution of the State of California states that "[a]ll political power is inherent in the people" and, therefore, "[g]overnment is

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[4] Perry v. Brown, 671 F.3d 1052, 1070 (9th Cir. 2012) ("Perry II").

instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." To that end, in October of 1911, California established through a constitutional amendment the initiative process,[5] "[em]power[ing] the electors [of the state] to propose ... amendments to the Constitution."[6]

According to the State Supreme Court, "the initiative and referendum [process is] 'one of the most precious rights of our democratic process,'" and it is "'the duty of the courts to jealously guard this right of the people....'" Perry III at 1140. The initiative process, the court explained, "grew out of dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process." *Id.*

The people of California, through their ballot initiative process, have spoken, amending their constitution to define marriage as between one man and one woman. The Attorney General of California, their servant, has refused to defend their choice, substituting his judgment for that of the sovereign people. Were the proponents to be denied standing, the will of certain California public officials would be elevated over the will of the people, contrary to Article II, Section 1 of the State Constitution. Indeed, denying standing would nullify the essential purpose

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[5] http://www.sos.ca.gov/elections/init_history.pdf.

[6] Calif. Const., Art. 2, Sec. 8, http://www.leginfo.ca.gov/.const/.article_2.

of the initiative process to effect changes in California law "when current governmental officials have declined to adopt (and often have publicly opposed) the measure in question...." Perry III at 1125. *See* Perry II at 1064. Thus, the California Supreme Court concluded:

> Neither the Governor, the Attorney General, nor any other executive or legislative official has the authority to veto or invalidate an initiative measure that has been approved by the voters. It would exalt form over substance to interpret California law in a manner that would permit these public officials to indirectly achieve such a result by denying the official initiative proponents the authority ... to assert the state's interest in the validity of the measure or to appeal a lower court judgment invalidating the measure when those public officials decline to assert that interest or to appeal an adverse judgment. [Perry III at 1126-1127.]

B. The Tenth Amendment Reserves to the People of California the Right to Amend Their Constitution.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." If the California Attorney General or some other state official were defending Proposition 8 in this case, there would be no doubt that he would have standing. *See*, *e.g.*, Romer v.

Evans, 571 U.S. 620 (1996) (the Colorado Solicitor General argued the cause for a state referendum amending the constitution).

Although it is within the power of this Court to determine if there is a "case or controversy" regardless of state law,[7] the judicial power delegated by Article III, Section 2 does not extend to the question whether the State of California is properly represented by the proponents of Proposition 8. Rather, that is a power reserved to the state and to the people by the Tenth Amendment. *See* Coyle v. Smith, 221 U.S. 559, 580 (1911) ("[T]he people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence.").

II. DENYING TWO PEOPLE OF THE SAME SEX LEGAL RECOGNITION AS A MARRIED COUPLE DOES NOT VIOLATE THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT.

While the question presented in this case is succinctly stated — "Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman" — the equal protection question identified and litigated in the courts below is varied and confusing. Initially, the court of appeals identified the plaintiffs' claim narrowly, as a "right to

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[7] *See, e.g.*, Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

obtain and use the designation of 'marriage' to describe their [same-sex] relationships. Nothing more, nothing less." Perry II at 1063. Then, more broadly, the court phrased the question to be the "constitutionality of denying same-sex couples the right to marry." *Id.* at 1064.

The court then rephrased the issue to be whether "in light of the fact that," under the state's "domestic partnership" law, under which same-sex couples already enjoy all the state's legal benefits of traditional marriage, same-sex couples have "the right to have their committed relationships recognized by the State with the designation of 'marriage,' [and] the societal approval that comes with it." *Id.* at 1076-78. In other words, the court of appeals asserted that the question before it was an issue of "labels," not one of substantive right. On closer examination, however, the court of appeals recognized that even if the question before it was one of nomenclature, the equal protection guarantee required the people of California by law to designate same-sex unions as "marriages," instead of "domestic partnerships," because the latter name did not confer upon same-sex unions "the equal dignity and respect that is a core element of the constitutional right to marry." *Id.* at 1079.

Thus, although the court of appeals claimed that the issue before it was whether the equal protection guarantee was violated because Proposition 8 has "take[n] away from same-sex couples the right to have their lifelong relationships dignified by the official status of 'marriage,'" the court recognized that the right to have a same-sex union designated as a

"marriage" turned on whether the equal protection guarantee secured to same-sex couples a "constitutional right to marry." *Id*.

While the court of appeals deftly obscures the question presented in this case, the Respondents do not. In the closing pages of their Brief in Opposition to the Petition for a Writ of Certiorari, they argue that the California constitutional amendment denies to gay men and lesbians the fundamental right to marry. Respondents based their argument on both equal protection and due process grounds, citing Loving v. Virginia, 388 U.S. 1 (1967) as determinative of the question:

> [J]ust as striking down Virginia's prohibition on marriage between persons of different races did not require this Court to recognize a new constitutional right to interracial marriage in *Loving*, invalidating Proposition 8 would not require recognition of a new right to same-sex marriage. [Brief in Opposition, p. 32.]

A. Homosexual Discrimination Is Not Comparable to Racial Discrimination.

Implicit in Respondents' analogy is that discrimination against homosexuals is no different from racial discrimination, and because miscegenation laws unconstitutionally limit free access to marriage on the basis of race, then statutes limiting access to marriage to heterosexuals only are unconstitutional. According to the original meaning of "equal protection," however, the comparison is false. *See*

Brief of Petitioners, pp. 6-7.

In Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1879), this Court ruled that the equal protection guarantee "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." *Id.* at 306. While the immediate purpose was to protect the newly freed slave class from "unfriendly legislation ... implying inferiority in civil society,"[8] the equality principle embraced the guarantee was "that all persons, whether colored or white, shall stand equal before the laws of the States." *Id.* at 307. In sum, the Court decided the guarantee's aim was against laws that regarded the newly freed slave class "as an inferior and subject race." *Id.* at 306.

While the Court abandoned this principle of racial equality in Plessy v. Ferguson, 163 U.S. 537 (1896), Justice John Marshall Harlan's dissent in that case reemerged in 1954 as the guarantee's controlling principle. After rejecting Plessy's "separate but equal" doctrine in Brown v. Board of Education, 347 U.S. 483 (1954), this Court held that "[s]eparate educational facilities are inherently unequal." *Id.* at 495. In the same term that Brown was decided, this Court struck down racial distinctions governing access to municipal golf courses, and public beaches and bathhouses. *See* Holmes v. City of Atlanta, 350 U.S. 879 (1955) and

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[8] *Id*. at 308.

Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955). And in the very next term, this Court ruled that the equal protection guarantee also forbade racial discrimination in publically owned and operated buses. *See* Gayle v. Browder, 352 U.S. 903 (1956).

By these decisions, Justice Harlan's dissent was vindicated, confirming the original understanding of the purpose and scope of the equal protection guarantee:

> The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States **without regard to race**. [Plessy, 163 U.S. at 560 (Harlan, J., dissenting) (emphasis added).]

Summing up, Justice Harlan stated:

> There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.... **The law regards man as man**.... [*Id.* at 559 (emphasis added).]

Thirteen years after Brown, this Court faced its biggest challenge to restore this original principle to the equal protection guarantee. In Loving v. Virginia, 388 U.S. 1 (1967), the Court addressed the constitutionality of laws prohibiting miscegenation.

The Virginia law at issue did not prohibit "interracial" marriage, as such. Rather, it punished only the interracial marriage of "a white person and a colored person." *See id.* at 4. "Negroes, Orientals, and any other racial class may intermarry without statutory interference." *Id.* at 12, n.11. The purpose of the Virginia law was to protect "only ... the integrity of the white race." *Id.* Indeed, a 1955 Virginia court opinion upholding the validity of the law stated that the law was designed to "prevent ... 'a mongrel breed of citizens'" in pursuit of "the doctrine of White Supremacy." *Id.* at 7. On that basis this Court ruled that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12.

Indeed such a law is violative because it is based upon a doctrine that would employ the law of a civil society to treat some human beings differently from other human beings on the ground that some humans are less than human. As the Virginia court in Naim v. Naim[9] acknowledged, the purpose of the Virginia miscegenation law was to prevent a "mongrel breed,"[10] one that would unite two people in matrimony who are different in kind, one fully human and the other less so. Such a purpose is "invidious" (Loving, 388 U.S. at 10) because it violates the essential principle of equality protected by the Fourteenth Amendment that "man" be treated fully as "man."

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[9] 197 Va. 80, 87 S.E.2d 749 (1955).

[10] *Id.*, 87 S.E.2d at 756.

Prior to the ratification of the Fourteenth Amendment, the Constitution of the United States had been construed by the Supreme Court as foreclosing to a freed Negro slave any opportunity of participating as a citizen of the American republic. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). According to Chief Justice Roger Taney's opinion for the majority, "neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were ... acknowledged as a part of the [American] people" (*id.* at 407):

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race ... and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. [*Id.*]

Even after the constitutional abolition of slavery by the Thirteenth Amendment, the individual members of the newly freed slave class were denied their common law rights by "Black Codes" in many southern states, forbidden "to appear in the towns in any other character than menial servants, ... required to reside on and cultivate the soil without the right to purchase or own it, ... excluded from many occupations of gain, ... not permitted to give testimony in the courts in any case where a white man was a party, [and] liv[ing] at the mercy of bad men, either because the

laws for their protection were insufficient or were not enforced." *See* Slaughter House Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

No wonder Justice Harlan proclaimed that the bedrock principle of the Equal Protection Clause is that the law must regard "man as man." The Clause was specifically inserted into the Constitution to repudiate Dred Scott and Jim Crow and to secure in that document the self-evident truth "that all men are created equal [and] endowed by their Creator with certain unalienable rights ... among [which] are life, liberty and the pursuit of happiness." Declaration of Independence. Racial equality then is based upon the principle that there is only one human race, and no member of that race may be denied rights or privileges that belong to mankind either by the laws of nature or by positive law. Equality, then, as contemplated by the Fourteenth Amendment is equality of status of all mankind. "Distinctions drawn according to race," this Court concluded in Loving, are, therefore, impermissible barriers to the state of marriage. Loving, 388 U.S. at 11.

In contrast, denying a person access to marriage based on the distinction between heterosexuality and homosexuality is very different.

First, the discrimination against homosexuals is different in kind from that suffered by Blacks in America. The district court below found, "[g]ays and lesbians have been victims of a long history of discrimination. Perry I, 704 F. Supp. 2d at 981. But homosexuals have not been discriminated against on

the ground that, as a class, they had no rights as human beings, but could be bought and sold as merchandise. To the contrary, as William Blackstone observed in his Commentaries, persons charged with having committed "the infamous *crime against nature*" were entitled by law to "strict[] and impartial[] pro[of], and, because the crime of sodomy was "so easily charged, and the negative so difficult to be proved, ... the accusation should be clearly made out." IV W. Blackstone, Commentaries on the Laws of England, p. 215 (Univ. Chi. facsimile ed.: 1769) (italics original). In contrast, in the United States a person of African descent had "no rights which the white man was bound to respect." Scott, 60 U.S. at 407. While homosexuals were discriminated against for their sexual deviant behavior, they were never denied, as the Black freedman was, of "the right to make and enforce contracts, sue, give evidence, acquire property and 'to full and equal benefit of all laws and proceedings for the security of person and property,"[11] as was enjoyed by heterosexuals.

Second, while the discrimination against Blacks in America denied them their rightful status as a member of the human race vis-a-vis their white counterparts, the discrimination against homosexuals affirmed their status as full and equal members of the human race. Indeed, the very definition of the "crime against nature," was employed to emphasize that the sexual behavior condemned was contrary to the law of human nature. Homosexual behavior, then, while

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[11] *See* G. Stone, L. Seidman, C. Sunstein & M. Tushnet, Constitutional Law, p. 482 (Little, Brown: 2d ed. 1991).

unnatural did not mean that those guilty of it were any less human.

B. The Right to "Same-Sex" Marriage Is Not the Same as the Right against Miscegenation.

In their Brief in Opposition to the Petition, Respondents' claim of right to same-sex marriage would not require a new definition of marriage today, any more than Loving's rejection of miscegenation required a new definition in the 1960's. *See* Opp. Br. at 32. Although the Loving Court did state that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" (*id*., 388 U.S. at 12), neither that statement, nor like statements in other cases cited by Respondents,[12] can be construed to have meant any union other than the one between a man and a woman as defined at common law. To imply otherwise, as Respondents have done, is disingenuous.

Additionally, it is demonstrably false for Respondents to state that "[t]he right to marry has always been based on, and defined by, the constitutional liberty to select the partner of one's choice...." Opp. Br. at 32. There are a host of heterosexuals who are barred from reaping the benefits of state-recognized matrimony. Fathers cannot marry daughters; mothers cannot marry sons; brothers cannot marry sisters; a married man cannot

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[12] Opp. Br. at 31.

marry another woman and vice versa; persons under a statutory fixed age cannot marry each other even though one is male and the other is female. Homosexuals have never been singled out for special discriminatory treatment, and never singularly excluded from the benefits of marriage.

Marriage has always been, and still is, a discriminate institution. Two people cannot just join themselves in any kind of sexual union and call it a marriage, forcing the government to conform to the pair's sexual desires and practices. Yet that is precisely what Respondents is asking this Court to do in the name of the equal protection guarantee of the Fourteenth Amendment. This case does not, then. concern whether homosexuals have a constitutional right to marry in California. Nor does it concern whether homosexuals have been discriminated against by the marriage laws of California. Rather, it concerns whether homosexuals, who desire the benefits of marriage, have a constitutional basis for a federal court to compel California to redefine marriage to accommodate their sexual preferences and practices.

As the court of appeals below has repeatedly said, the California domestic partnership law already confers all the legal benefits upon same-sex unions that it can confer upon opposite sex unions. Perry II at 1065. But Respondents want more. They want their domestic partnership enshrined as a marriage so as to

appropriate to themselves the "honored status,"[13] the "societal approval,"[14] the "unique meaning,"[15] the "sense of significance,"[16] and "the dignity and respect"[17] that accompanies the name marriage in America. Indeed, at the hearing before the district court, many witnesses in a same-sex relationship testified that they wanted the benefit of marriage so that they and others would feel better about their relationship if it were called a marriage rather than a domestic partnership. *See, e.g.,* Perry I at 970-72.

Viewed in this light, homosexuals in California are not being discriminated against as a matter of law, but as a matter of feelings. The reason for their exclusion has nothing to do with homosexual powerlessness, or opprobrium, or social standing. Rather, it has to do with the very nature of marriage. By definition marriage must be a union of two persons, one male and one female, neither of whom is married to someone else. According to the innate definition of marriage, the male is, by nature the husband, and the female by nature is the wife. By nature a female cannot be a husband; and a male cannot be a wife. Thus, it is impossible for two lesbians to marry, or for two homosexual men to marry. The only way that

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[13] *Id.* at 1076.

[14] *Id.* at 1078.

[15] *Id.*

[16] *Id.* at 1079.

[17] *Id.* at 1079, n.12.

they can marry is to redefine marriage as "same-sex marriage" in which two persons are united as partner one and partner two. Such a union is a far cry from the covenant relationship between a husband and a wife. "Same-sex marriage," then, is truly "anti-marriage," in the same way that "adulterous marriage" or "incestuous marriage" would be if the rules against bigamy and incest were swept aside as unlawfully discriminating against a discrete and insular minority.

Thus, the homosexual claim of a fundamental right to marry is very different from the claim of right in Loving. The Virginia anti-miscegenation law was targeted against members of a "mongrel breed" of human beings unworthy of being legally equal to a member of a superior Caucasian race. Such racial distinctions are the precise target of the equal protection guarantee of the Fourteenth Amendment which requires all members of the human race to be treated as fully "man." *See* Plessy, 163 U.S. at 559 (1896) (Harlan, J., dissenting). Homosexuals have never been denied the "right to marry" because of any forbidden racial policy that denied them their full status as human beings. They, like bigamists and close family members, simply cannot be, in the nature of things, married, without destroying the essential nature of the husband-wife marital relationship.

Despite the fact that the homosexual claim to marriage cannot be accommodated without changing the very nature of marriage, and despite the further fact that the homosexual claim cannot be based upon homosexual being a "suspect" class and or upon a "fundamental right" the courts below have ripped open

the Fourteenth Amendment to deposit an entirely new "constitutional right." A careful examination of the opinions of the courts below, however, demonstrates without question that neither court could provide a coherent, principled basis upon which to rest the claim that homosexuals have a constitutional right to marry.

C. The Equal Protection Guarantee Does Not Confer upon Homosexuals Special Judicial Protection.

Unable to establish that Loving supports their claim that limiting marriage to opposite sex monogamous unions violates the equal protection guarantee, Respondents fall back on three of this Court's precedents applying heightened scrutiny to classifications "'reflect[ing] prejudice and antipathy'" or "'stereotyped characteristics." Opp. Br. at 27. Based upon these and other like cases, Respondents argue that:

> [t]he *undisputed* fact that gay men and lesbian women have been subjected to a history of discrimination based on a **trait** that bears no relationship to their ability to contribute to society is sufficient, in and of itself, to render classifications based on sexual orientation 'suspect' (or, at the very least, quasi-suspect) and to give rise to heightened scrutiny. [Opp. Br. at 28 (italics original; emphasis added).]

This plea fails on at least three independent grounds.

First, gay men and lesbian women have not been

treated to a history of discrimination based on a "trait." There is no evidence that such people have been discriminated against on the basis of a characteristic or a propensity. For example, in the enforcement of the criminal law prohibiting sodomy, there must be proof of an *actus reus*. Likewise, in the enforcement of the law of marriage, a homosexual pair is being denied a marriage license on the ground of sexual behavior, not sexual orientation. In short, Respondents have cited not law prohibiting homosexuality, that is, being sexually attracted to a person of the same sex. Homosexuals are discriminated against not because of who they are, but only for what some may choose to do.

Second, as Second Circuit Court Judge Chester John Straub has observed "[t]he Supreme Court has reserved heightened scrutiny for a small number of subject classifications — principally race, alienage, nationality, sex, and illegitimacy." Windsor v. United States, 699 F.3d 169, 208 (2d Cir. 2012) (concurring and dissenting). Additionally, as Judge Straub has documented, this Court has never extended such scrutiny to "sexual orientation," even though it had ample opportunity to do so in Romer v. Evans, 517 U.S. at 641, n.1. *See* Windsor, 699 F.3d at 209. Not only is this so because of "the Supreme Court's reluctance to apply heightened scrutiny to new categories of discrimination" (*id.*), but also — contrary to the claim of political impotency made by Respondents in their brief in opposition (Opp. Br. at 28) — since Romer "there can be no serious doubt that the political power of gays and lesbians has grown exponentially," to the extent that President Obama

now supports same-sex marriage as do others in Congress who voted for the Defense of Marriage Act in 1996. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, pp. 51-54 (United States v. Windsor: (Supreme Court Docket No. 12-307). Yet, it is precisely such proof of "political powerlessness" that this Court has required to establish a classification to be found to be "suspect" or "quasi-suspect," deserving heightened scrutiny. *See Amicus Curiae* Brief of Citizens United, *et al*., pp. 22-30 (United States v. Windsor, Supreme Court Docket No. 12-307).

Third, this Court's decisions extending heightened scrutiny to classifications based on sex, alienage, and illegitimacy have no foundation in the original equality principle of the Fourteenth Amendment. That principle is limited to race because the Equal Protection Clause was designed to eliminate only those classifications that relegated a class of human beings to a subclass and, on that basis, denied the subclass rights that would otherwise be enjoyed by all mankind. While no doubt women, aliens, and illegitimates were discriminated against for certain purposes, it was never based on them being considered less than a human being. Unlike Blacks, none of them could be bought and sold as ordinary articles of merchandise; rather all had rights to life, liberty, and property that were recognized and enforceable by law.

D. The Courts Below Usurped the Power of the People.

While the district court purported to conduct a judicial-type hearing, its opinion reads more like a report of a legislative committee, than a judicial opinion. In a section denominated "Trial Proceedings and Summary of Testimony," the district court stated that "the evidence covered a range of issues ... focused on ... broad questions," which the district court summarized to be "whether any evidence supports California's refusal to recognize marriage between two people because of their sex." Perry I at 932. By phrasing the issue in this manner, it appears that the purpose of the evidentiary hearing was to enable the district court to make a policy decision, not to resolve a legal question. Indeed, in the court's summary of the evidence, it appears that it was concerned whether there was any credible evidence that a same-sex marriage policy would be detrimental to homosexual persons, the raising of children, public health, etc. *Id.* at 932-38.

To be sure, after making its findings of fact, the court purported to link those findings to conclusions of law. However, under another section labeled "Standard of Review," concerned whether Proposition 8's proponents could satisfy the district court that there was a rational interest in reserving marriage as a union between a man and a woman to the exclusion of any other relationship. In assessing whether such a policy was rational, the court ticked off a number of purposes for defining marriage as a union of a man and a woman — ranging from "tradition" to caution

when implementing social changes, to parenting, to religious freedom, to treating same-sex unions differently from opposite sex unions, to what the court called "the catchall interest." *Id*. at 1001. Expressing dissatisfaction with every proposed rationale, the court dismissed "the purported interests identified by proponents [as] nothing more than a fear or unarticulated dislike of same-sex couples," indeed, as "nothing more than post-hoc justifications." *Id*. at 1002. Summing up, the court concluded that "the purported states interests **fit so poorly** with Proposition 8 that they are **irrational**." *Id*. (emphasis added).

This kind of rhetoric is the kind that may be fit for a candidate seeking election to public office or even a legislator seeking to belittle his opposition, but it does not pass the test of judicial reasoning. In fact, it is a misuse of the rational basis test developed and applied by this Court as a restraint upon judicial power, rather than as a tool to be used to extend the exercise of judicial power. Typically, the rational basis inquiry has been deferential, upholding a legislative policy if there is any conceivable basis for it. *See* Windsor v. United States, 699 F.3d 169, 210 (Straub, J. dissenting) ("[R]ational basis review is ... highly deferential to the legislature, not a mechanism for judges to second-guess properly enacted legislative judgments and the paradigm of restraint."). In disregard of this cautionary approach, the district court stepped over the boundary separating judicial from legislative power.

Before conducting its review of the district court opinion, the court of appeals expressed concern that the district court had wandered away from the role of judge to that of a state legislator. It found "debatable whether some of the district court's findings of fact concerning matters of history or social science are more appropriately characterized as 'legislative facts' [than] 'adjudicative facts,'" the former of which "are generally not capable of being found" in a judicial proceeding. Perry II at 1075. Instead of reviewing the district court's legislative wanderings, however, the court of appeals narrowed the legal question before it to whether it was a denial of equal protection to denominate same-sex unions as "domestic partnerships" and opposite sex unions as "marriages" in light of the fact that in California the two unions enjoy the same legal benefits. *Id.*

In reviewing this question, the court of appeals was no more deferential to people's legislative judgment than the district court. Instead of exercising restraint, the court of appeals substituted its judgment that because same-sex "domestic partnerships" do not have the same social standing as opposite-sex marriages, the court is justified to take a closer look than the mere rational basis test would otherwise permit. Denigrating the people's ability to make legislative judgments to make a constitutional change, the court of appeals likened Proposition 8 to a very different constitutional referendum in Colorado. Pretending not to resolve the question whether Proposition 8 infringed upon same-sex couples' right to marry, the court of appeals nonetheless substituted its judgment for that of the people because the difference

in the social status of same-sex domestic partnerships and opposite sex marriages did not overcome the "'inevitable inference' of animus to which Proposition 8's **discriminatory effects** otherwise give rise." *Id.* at 1085 (emphasis added). To reach this conclusion, the court of appeals reviewed the same reasons for Proposition 8 that were proffered in the district court, and making the same policy judgments, concluded that Proposition 8 "has no more **practical effect** than to strip gays and lesbians of their right to use the official designation that the State and society give to committed relationships...." *Id.* at 1096 (emphasis added). This pragmatic assessment is a judgment within the authority of the people of California in the exercise of their power to amend the state's constitution by popular initiative, not within the power of a cloistered federal judiciary.

III. AS PART OF ITS SUPERVISORY JURISDICTION, THIS COURT SHOULD OVERTURN BOTH DECISIONS BELOW ON GROUNDS OF IMPROPRIETY.

The U.S. Constitution establishes the U.S. Supreme Court as the only constitutionally required court in the land, sitting atop the lower federal courts established by Congress. Article III, Section I. It is vested by statute with the authority to review not just improper decisions reached by lower federal courts, but also to remedy significant defects in the judicial process, to do justice, and to preserve the integrity of the federal judiciary. By statute, Congress has provided that "Cases in the courts of appeals may be reviewed by the Supreme Court ... [b]y writ of

certiorari" (28 U.S.C. section 1254) and then this Court "may ... vacate, set aside or reverse any judgment ... and may remand the cause and direct the entry of such appropriate judgment ... or require such further proceedings ... **as may be just** under the circumstances." 28 U.S.C. section 2106 (emphasis added).

A. This Court Has both the Authority, and the Duty, to Remedy the Departures from the Accepted and Usual Course of Judicial Proceedings that Occurred Below.

Supreme Court Rule 10(a) expressly identifies as a consideration governing review on Writ of Certiorari whether a United States court of appeals ... "has so far **departed from the accepted and usual course of judicial proceedings**, or sanctioned such a departure by a lower court, as to call for an exercise of **this Court's supervisory power**" over the lower federal courts. (Emphasis added.) The Petition for Certiorari seeking this Court's review addressed the propriety of the behavior of two judges below. Petitioners brought to this Court's attention that after he decided the case, Judge Vaughn Walker publicly announced that he was gay and in a 10-year committed relationship with another man, critical facts that could have directly and substantially affected his decision below. Pet. Br., p. 11, n.3. Also, Petitioners advised this Court of their unsuccessful motion to disqualify Judge Reinhardt, primarily because of his wife's legal work for the ACLU on this very case. Pet. Br., pp. 9-10. The brief *amicus curiae* of Public Advocate of the United States, *et al.*, filed in support of granting the writ addressed

these issues extensively, pp. 16-19.[18] A review of the facts brought to this Court's attention at the Petition stage concerning actions of these two judges, demonstrates the serousness of the matter.

B. District Court Judge Vaughn Walker.

Only one month after District Court Judge Vaughn Walker issued his opinion invalidating Proposition 8 on August 4, 2010,[19] he resigned from the bench, and later admitted for the first time that he was a homosexual "in a 10 year relationship with another man."[20] As to the case below, "[h]e said he never considered his sexual orientation a reason to recuse...."[21] He never revealed his potential conflict while the case was pending before him. Moreover, Judge Walker appeared to take pride in his service not to the interests of justice, but to his community of fellow homosexuals, as he boasted to the press: "I was the ogre of the gay community when I was nominated, and a hero when I leave."

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[18] http://lawandfreedom.com/site/constitutional/CA_%20Prop8_Amicus.pdf.

[19] Perry v. Schwarzenegger, 671 F. Supp. 2d 921 (2010).

[20] "U.S. gay judge never thought to drop marriage case," Reuters.com (Apr. 6, 2011), http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406.

[21] "Prop 8 Judge Vaughn Walker: I'm Gay," On Top (Apr. 7, 2011) http://www.ontopmag.com/article.aspx?id=8029&MediaType=1&Category=26.

Judge Walker was required by 28 U.S.C. section 455 to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Yet he did not. After he left the bench, Petitioners' Motion to Vacate Judgment was denied by District Judge James S. Ware, who succeeded Judge Walker as Chief Judge of the Northern District of California, on the theory that it was **irrelevant that Judge Walker would be affected personally** by his own decision if he were to later desire to marry his companion. Judge Ware found Judge Walker's personal interest inadequate to meet the test under 28 U.S.C. section 455(b)(4) of having a non-financial "interest that could be substantially affected by the outcome of the proceeding." *See* Perry v. Schwarzenegger, 790 F. Supp. 2d 1119, 1124-28 (2011). The court appeared to disregard that Judge Walker had "a personal bias or prejudice concerning a party" — here the proponents of Proposition 8, which he viewed as implicitly condemning his secret lifestyle. This extraordinary ruling should be vacated, lest it be relied on by other judges in lowering the bar for compliance with section 455 governing disqualification of all justices, judges, and magistrates.

With the understanding of Judge Walker's personal interest in the outcome of the case, it becomes much easier to understand his finding every fact for the plaintiffs and his willingness to impute ill will to the proponents of Proposition 8. For example, having in his personal life rejected 6,000 years of moral and religious teaching, we can see how Judge Walker could readily determine that California voters were motivated solely by "moral and religious views ... that

same-sex couples are different from opposite-sex couples [and] these interests do not provide a rational basis supporting Proposition 8." 704 F. Supp. 2d at 1011. The same is true for Judge Walker's conclusion that the supporters' motivations were: "fear," "unarticulated dislike," not "rational," based on "animus toward gays and lesbians," "irrational," "without reason," and "born of animus." *Id*. at 1002-03.[22] Petitioners were entitled to have their case heard by an impartial judge — not one who was leading a secret life engaging in behaviors which he appeared to believe were being unfairly judged and criticized by the proponents of Proposition 8.

C. Circuit Court Judge Stephen Reinhardt.

The Circuit Court decision was written by Judge Stephen Reinhardt, whose wife serves as Executive Director of the American Civil Liberties Union of Southern California ("ACLU/SC"). When Judge Reinhardt was asked by Defendant-Intervenors to recuse from the panel below,[23] he declined, issuing a self-serving Memorandum Regarding Motion to Disqualify (Jan. 4, 2011).[24] While the Motion to Disqualify was based on several grounds, the central challenge was that, as head of ACLU/SC, the judge's

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[22] *See generally* Petition for Certiorari, p. 11, n.7.

[23] Appellant's Motion for Disqualification (Dec. 1, 2010), http://www.volokh.com/wp/wp-content/uploads/2010/12/prop8motiontodisqualify.pdf.

[24] http://www.ca9.uscourts.gov/datastore/general/2011/01/04/1016696memo.pdf.

wife had engaged in discussions with plaintiffs' attorneys "before filing this lawsuit" as well as with ACLU/SC representing parties seeking to intervene and serve as *amici*. Yet in his Memorandum, Judge Reinhardt erroneously characterized the basis for the recusal motion as being limited to his "wife's **beliefs**" (emphasis added) and strategically ignored the problem presented by his wife's **active participation** in preparation of the **specific case** challenging Proposition 8 then before the judge.[25]

While Judge Reinhardt was less overtly hostile than Judge Walker to the proponents of Proposition 8, in that he gave lip service to the proposition that "[w]hether under the Constitution same-sex couples may *ever* be denied the right to marry ... is ... an issue over which people of good will may disagree, sometimes strongly", he still had no problem finding "no legitimate reason" for their votes, which he asserted were "born of animosity." 671 F.3d at 1076, 1081) (italics original).

D. Petitioner's Failure to Raise Issue in Its Brief.

Unlike its Petition for Certiorari, Petitioner's Brief fails to address the issue of judicial impropriety.

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[25] *See also* Judge Reinhardt Purports to Explain Himself (Jan 5, 2011), http://www.powerlineblog.com/archives/2011/01/028076.php; Ed Whelan, Reinhardt's Non-Disqualification Memorandum-Part 1, National Review Online (Jan. 5, 2011), http://www.nationalreview.com/bench-memos/256394/reinhardt-s-non-disqualification-memorandum-part-1-ed-whelan.

However, this omission should not give this court any reason to avert its eyes from the way in which this case was resolved below. When this Court observes proceedings which call into question the fair and impartial conduct of a trial or an appeal, it has responsibility to supervise the lower courts to maintain the public's confidence in the federal courts. In Burton v. United States, 196 U.S. 283 (1905), where a conviction was reversed on other grounds, this Court condemned the practice of a judge inquiring of an undecided jury as to the extent of its numerical division: "we do not think that **the proper administration of the law** requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to **improper influences**, and for this reason it ought not to obtain." *Id.* at 308. And in Bransfield v. United States, 272 U.S. 448 (1926), Justice Stone clarified the rule in Burton was not merely hortatory, but binding, stating: "We deem it **essential to the fair and impartial conduct of the trial**, that the inquiry itself should be regarded as ground for reversal." The error was so grievous that it was not required that defendant's counsel particularize an exception. *Id*. at 450.

Indeed, the issue of judicial bias cannot be waived by a party. As Judge Cooley explained, "[n]o one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord *Coke* has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself....' It is not left to the discretion of a judge, or to his sense of decency ... when his own

rights are in question, he has no authority to determine his cause." T. Cooley, A Treatise on the Constitutional Limitations, p. 508.

For these reasons, it is urged that this Court reverse the decision of the court of appeals below, with orders to vacate the district court opinion. (Of course, should this Court believe that the issues have not been fully aired, it could require briefing by the parties.)

IV. ROMER V. EVANS IS BASED ON A MISREADING OF THE EQUAL PROTECTION CLAUSE AND SHOULD BE RECONSIDERED AND REVERSED.

While Petitioners' legal position is fully consistent with the Equal Protection Clause, as demonstrated in Section II, *supra*, their brief has gone to great lengths to try initially to distinguish, then ultimately to show compliance with, Romer v. Evans. Petitioners' brief could be read to at least hint that their underlying position is one of supporting "'equal rights for gays and lesbians,'" but "'draw[ing] the line at marriage....'" Pet. Br. at 65. Petitioners' arguments even suggest Proposition 8 is a way station on its evolution to a more enlightened view of full acceptance of homosexual rights:

> The people of California, like those of the numerous other States that have decided, **at least for now**, to adhere to the venerable definition of marriage, are entitled to **await the results of experiments** with redefining marriage in other jurisdictions **before**

> **charting that course** for themselves. [*Id.*, p. 60 (emphasis added).]

No litigant should be forced to embrace the legitimacy of the cause of homosexual rights based on a misreading of the Fourteenth Amendment in order to be heard and to prevail in this Court, as Romer seems to require, and as employed by Judges Walker and Reinhardt.

While Romer is distinguishable from the instant case, the court of appeals below strived mightily to craft its opinion to fall under what it perceived to be the Romer holding —

> to take away from same-sex couples the right to be granted marriage licenses [serving] no purpose ... other than **to lessen the status and human dignity of gays and lesbians** [something] [t]he Constitution simply does not allow [citing Romer]. [671 F.3d at 1063 (emphasis added).]

This Court's decision in Romer spawned, and shares many of the same flaws with, the court of appeals decision and opinion below. The court below erred in Romer, by imputing both "animus" and "a bare ... desire to harm a politically unpopular group" to the supporters of Colorado Amendment 2, just as Judges Walker and Reinhardt did below to the proponents of California's Proposition 8. *See* Section IV, *supra*. In dissent, Justice Scalia thoroughly refuted any such imputation when he explained that Amendment 2:

> is not the manifestation of a "bare ... desire to harm" homosexuals ... but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. [Romer, 517 U.S. at 636.]

Indeed, the "traditional sexual mores" referred to by Justice Scalia are not secular in origin, even though Petitioner's Brief limits itself to the secular. Petitioner asserts "the gendered definition of marriage has prevailed in all societies throughout human history ... because marriage is closely connected to society's vital interests in the uniquely procreative nature of opposite-sex relationships." Pet. Br., pp. 26-27. Marriage is described as "'a social institution with a biological foundation.'" *Id.*, p. 32. Traditional marriage is described as being sanctioned by "leading thinkers," such as "sociologist[s]," even invoking the authority of British atheist Bertrand Russell and the law of "foreign nations." *Id.*, pp. 34-35, 43. Petitioner's primary reference to "religious or moral grounds" is in a footnote describing anticipated *amicus* briefs. *Id.*, pp. 31, n.2; 58.

Petitioners present their arguments to this Court as they did to Judges Walker and Reinhardt, to appeal to a narrow, secular world view, in which religious and moral values have been jettisoned, recognizing the increasing gap between many members of the federal judiciary and a great swath of the American people. However, many Californians who support Proposition 8 embrace the Holy Bible as the Word of God. Even

Deist Thomas Jefferson, in our nation's Declaration of Independence, five times referenced God and attributed our rights as gifts of our "Creator." That Creator God created us male and female (*see* Genesis 1:26-28) and enabled male and female couples to procreate offspring in his image (*see* Genesis 5:1-3).

> God's mandate and benediction that the **man and the woman** procreate his image is to be exercised within the confines of monogamy. God institutes marriage by giving Adam his bride, defining them as **husband and wife**, and ordains the man to leave his parents and cling to his wife, forming a new home. By instituting marriage in the Garden of Eden ... God represents marriage as an ideal and holy state, an act of worship. (Heb. 13:4). [B. Waltke, An Old Testament Theology, Zondervan (2007), p. 237 (emphasis added).]

It is entirely possible for the people of California, without exhibiting bias, animus or irrationality, to embrace the notion that since God instituted the ordinance of marriage, as created beings we should defer to His definition of marriage. *See* Ecclesiastes 11:5. Yet Romer views adherence to a Biblical views of marriage, and a choice to avoid and discourage behaviors repeatedly declared immoral by God in both testaments,[26] as somehow being Constitutionally illegitimate, in violation of the Equal Protection Clause. Should this Court want to put at risk the

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[26] *See, e.g.,* Leviticus 18:22; Romans 1:18-32; 1 Corinthians 6:9-11.

confidence and trust of the American people, there would be no more sure way than to follow its decision in Romer to impose homosexual marriage on the People of California against their will by judicial fiat.

In truth, as in the opinions below, no effort was made by the court in Romer to examine the textual meaning of the "equal protection of the laws" in the Fourteenth Amendment. As Justice Scalia pointed out, the Romer majority had embraced the position that "opposition to homosexuality is as reprehensible as racial or religious bias [even though] the Constitution of the United States says nothing about the subject [and] it is left to be resolved by normal democratic means...." *Id*. at 636. Romer stands as one of the premier contemporary illustrations of the degradation of our founder's understanding of a written Constitution in which authorial intent[27] is jettisoned in favor of an evolving Constitution based on the policy preferences of the Justices. It should be reviewed, and overruled.

CONCLUSION

For the reason set forth above, the decision of the court of appeals should be reversed.

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[27] *See* E.D. Hirsch, Jr., Validity in Interpretation (Yale Univ. Press 1967), p. viii, 1, 5, 212-13.

Respectfully submitted,

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