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 *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on many occasions. Judicial Watch and its attorneys also previously filed *amicus curiae* briefs with the California Supreme Court in this case concerning Proposition 8 in 2011, and in the predecessor California marriage initiative proceeding ("Proposition 22") in 2007.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on many occasions.

Amici believe that the decision by the U.S. Court of Appeals for the Ninth Circuit (hereinafter, "Ninth

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

Circuit" or "lower court") unlawfully limits the right of the people to make laws, and are concerned about the effect of that decision on the rule of law. Among the harms caused by the Ninth Circuit's decision are: an unlawful expansion of power by the federal judiciary; a drastic revision of the concept of "rational basis" in Equal Protection analysis; and a dangerous erosion of democratic self-governance. For these and other reasons, *Amici* urge the Court to reverse the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

In order to find that no rational policy reason could support Proposition 8, the Ninth Circuit redefines the purpose of marriage in such a way that would eliminate any rational basis for limiting marriage to opposite sex marriage. The Ninth Circuit's sleight-of-hand decision therefore constitutes a dangerous erosion of the principle of rational basis review, namely that any legitimate interest put forth in support of legislation is sufficient to uphold the law. Furthermore, the Ninth Circuit decision expands the reaches of the Equal Protection clause in such a way as to eclipse the people's sovereign authority to make laws for their own governance, whether directly or through their elected representatives. However, neither Equal Protection nor Substantive Due Process jurisprudence supports the outcome reached below. The ruling, therefore, proclaims that the Constitution prevents states from "withdrawing" rights from groups without legitimate reasons, and that Californians could not have had legitimate

reasons to pass Proposition 8. This is an unjustified conclusion that imputes the worst possible motives to voters, despite the lower court's protestations to the contrary. Finally, this Court should find that petitioners have standing to bring this appeal, as a contrary ruling would undermine the peoples' rights to initiative and referendum in twenty-six states.

ARGUMENT

I. THE COURT SHOULD RE-ESTABLISH RATIONAL BASIS REVIEW.

The Ninth Circuit committed errors of constitutional law that undermine rational basis review. Rational basis review is in itself a bulwark that protects democratic self-governance from intrusion by the less accountable and more insulated actions of the judicial branches. The lower court's decision is therefore dangerous to both the principles and practice of self-governance.

The Ninth Circuit erred in two ways. First, the law that Proposition 8 enacted bears a rational relationship to the legitimate state goal of increasing the chances that both parents will raise children they unintentionally conceive. Second, the Ninth Circuit should never have tried to divine the motives of voters in this case. Well-established precedent guards against precisely this kind of second-guessing of democratically made decisions.

A. The Ninth Circuit Redefines Proposition 8 in Order to Mask the Law's Rational Relationship to Procreation.

Proposition 8 is rationally related to the goal of ensuring that a greater number of children grow up with the involvement of both parents instead of one in those situations where it is least likely to occur. The Ninth Circuit found that preserving the opposite-sex requirement of marriage cannot facilitate more two-parent households in any way that could not also be achieved by including same sex couples in the legal definition of marriage. However, the Ninth Circuit was only able to reach this conclusion by subtly changing the meaning of the word "marriage" as embodied by Proposition 8 and as traditionally understood. The lower court accomplishes this by redefining the purpose of marriage to one the people of California have never considered nor approved. This semantic trick should not be countenanced.

The state action in question – preserving the opposite-sex requirement of marriage – is a rational way to facilitate the goal of maximizing two parent households. The relationship between the two is easy to explain. Placing social pressure on adults to commit to each other after they conceive children unintentionally makes it more likely that they will do so. Having an institution of "marriage" which is understood as an expectation to commit to another person for the benefit of children achieves this social pressure. To the contrary, an institution of "marriage" which is understood as societal

recognition for the sake of the happiness and social acceptance of already-committed adult partners fails to achieve this pressure, and may in fact *alleviate* the pressure to marry. Because only opposite-sex relationships can result in unintentionally conceived children, an institution of "marriage" which includes only opposite-sex couples is rational.

The Ninth Circuit, on the other hand, writes that "societal recognition" for committed adult couples is the true purpose of marriage, and therefore there is no rational justification to exclude same-sex couples from marriage other than prejudice. *Perry v. Brown,* 671 F.3d 1052, 1064 (9th Cir. 2012). The Ninth Circuit achieves this act of redefinition by allowing itself to focus on the similarities between same-sex and opposite-sex relationships while ignoring the categorical differences. Perhaps the most consequential difference between same-sex and opposite-sex relationships is that one can result in unplanned children and the other cannot. The Ninth Circuit states that "the underlying drama for same-sex couples is no different" from that of opposite-sex couples. *Perry* at 1078. However, that statement is not entirely accurate. The "underlying drama" of what is known figuratively as a "shotgun marriage" is something no same-sex couple has ever experienced.

The Ninth Circuit's decision also ignores the drama of already married opposite-sex couples who conceive children they had not planned for. Such unplanned pregnancies can happen while couples are using birth control, and can occur to couples who

were planning to have children later or who have already had as many children as they wish. The drama such incidences can create even within happy marriages is significant and can seriously test a marriage, especially when both partners do not initially react to the unplanned pregnancy in the same way. Laws that encourage unintentionally-conceiving couples to stay together for their children, and not necessarily for the sake of their own happiness, therefore serve the interest of a child who might otherwise grow up without the involvement of both parents. Based on this rational policy preference, it is wholly irrelevant whether same-sex couples are as equally skilled as opposite-sex couples in the tasks of raising children. Rather, the intended area of impact is on the most vulnerable of couples who unintentionally conceive children.

At the heart of opposite-sex relationships is a biological asymmetry: women are more vulnerable to being left to raise children alone. The legal and social obligatory aspects of the traditional institution of marriage bind a father to his children and their mother.[2] By ignoring this key element of opposite-sex relationships, the Ninth Circuit is able to devise a new "purpose" for marriage that applies equally to same-sex couples. In the Ninth Circuit's view,

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[2] William Blackstone, Commentaries on the Laws of England (1765-1769), available at: http://www.lonang.com/exlibris/blackstone/bla-116.htm ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown.").

marriage is no longer necessary as a tool to pressure uncommitted adults who conceive children to marry. Rather, the Ninth Circuit believes that marriage is about bestowing laurels on committed couples. The lower court has therefore changed the purpose of marriage to one of conferring a *benefit* on marrying couples, rather than as imposing a social expectation on couples conceiving children, the ultimate beneficiaries of which are unintentionally conceived children.

With this new judicially imposed purpose, the Ninth Circuit reconceives marriage as "the recognition that the State affords to those who are in stable and committed lifelong relationships" and "the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it." *Perry* at 1079. The Ninth Circuit therefore justified its flawed conclusion that there is no legitimate reason that marriage cannot be stretched to include the union of same-sex couples by dictating a new *purpose* for the institution of marriage in California according to its own policy preferences.

This new definition of the purpose of marriage departs widely from the traditional understanding of why societies use the concept of "marriage" to begin with, and opens up many new problems. Indeed, it is unclear why the Ninth Circuit's purpose for "marriage" would not also apply to unmarried adult siblings who live together with the intention of always doing so, or to lifelong committed platonic roommates. If marriage is to be redefined as a legal

relationship where the sex of the participants is irrelevant, it is difficult to imagine why the law should proclaim that "the highest form of a committed relationship" is one where the participants intend to engage in a physically intimate relationship. Such a bias could be considered irrationally prejudiced against those who are not interested in sex, or those who are unable to find committed partners.

The traditional view of marriage, on the other hand, avoids these outcomes by putting the focus on the parenting needs of children rather than on the emotional needs of grown adults. Proposition 8 views marriage as designed to influence the behavior of a targeted group of males who prefer not to partner with females in child-raising efforts after conceiving children – not as an institution that functions as an award of state recognition for adults who achieve stable and committed relationships. When reserved for opposite-sex couples, marriage therefore increases the chances that couples unintentionally conceiving will enter into "stable and committed" sexual relationships when they might prefer to do otherwise.

Completing its circular argument, the Ninth Circuit goes on to state that "[t]here is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging California's opposite-sex couples to procreate more responsibly," and adds that it is impossible to believe that the people of California could have "conceived such an argument to be true."

Perry at 1088, 1089. However, the Ninth Circuit's new revisions to the historical *purpose* of marriage are the *only* thing that makes this untrue. Basic logic therefore shows the plausibility of what the Ninth Circuit could not imagine to be possible.

This plausibility is established by the mere fact that there is a difference between an expectation and a reward. If the state-imposed purpose of "marriage" is that of an arrangement designed to ensure biological parents commit to collaborating to raise their offspring, the institution imposes social pressure on opposite-sex couples to enter into matrimony. If, on the other hand, the state-imposed purpose of "marriage" is the one that the Ninth Circuit prefers – that the legal title of "marriage" is a reward for entering into a committed lifelong relationship – it is reasonable to project that more opposite-sex couples will forgo it. The social disapproval costs borne by not doing something one is *supposed* to do even when doing so is not mandatory (such as recycling plastics, or marrying after conceiving), are *different in kind* from those borne by failing to achieve some social distinction of merit. The former is something expected of *everyone* in a certain situation, for which failure to comply constitutes *violating a social norm*. The latter denotes a special achievement of social maturity, for which failure to achieve can be attributed to a variety of causes: bad luck, divergent opinions about the merit of monogamous relationships, or a mere lack of interest in laurels. As reasonable minds may disagree over which marriage model will have the desired impact on unintentionally conceived

children, the choice is therefore one that must be left to the people of California. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Same-sex marriage advocates might point out that most opposite-sex couples marry without an unplanned pregnancy, or that some opposite-sex couples marry without any intention of raising children in the first place. However, the fact that marriage is only sometimes the result of inadvertent conceptions does not undermine the basis for rational distinction between the same-sex and opposite-sex couples. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (internal citation omitted). The inclusion of opposite-sex relationships in the institution of marriage promotes the governmental purpose of encouraging the two natural parents of children whose conception was unplanned to enter into a stable relationship that would be best for those children's upbringing. The inclusion of same-sex relationships would not promote such a purpose. Conversely, because the same-sex inclusive justification for marriage is one of a reward rather than a uniform expectation, couples may be less inclined to endure it, which would therefore undermine the purpose of ensuring unintended pregnancies more often lead to marriage. "When, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and

nonbeneficiaries is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

In sum, only by severing the meaning of marriage from procreation can the Ninth Circuit deny that Proposition 8 is rationally related to responsible procreation. The Ninth Circuit's reasoning should not be allowed to stand. If courts can overturn laws by reimagining their purpose, the judiciary's power over the legislative process will be enormous.

B. The Ninth Circuit Unlawfully Claimed the Right to Judge California Voters' Hearts and Minds.

The Ninth Circuit unlawfully judged seven million California voters as motivated by either disapproval of or ignorance about same-sex couples. *Perry* at 1093. As explained in Section I.A. *supra*, the lower court justified this conclusion primarily by twisting the meaning of marriage itself into one that could *only* be denied to same-sex couples *because of* ill motives. The decision therefore rests on the false rejection of the policy goal of maximizing adult resources devoted to child rearing in order to arrive at its conclusion that Proposition 8 was based on nothing more than malice or disapproval towards homosexual couples. *Perry* at 1086.

As further justification, the Ninth Circuit argues that it is merely following *Romer v. Evans*, 517 U.S. 620 (1996) by striking down the law, holding that *Romer* means Proposition 8 was inexplicable for any

reason other than animus towards the affected group. *Perry*, 671 F.3d at 1092-1095. This argument from precedent, however, fares no better than the Ninth Circuit's semantic argument.

The Ninth Circuit claims that, because Proposition 8 continues to allow civil unions as an option for same-sex couples, "Proposition 8 therefore could not have been enacted to advance California's interest in childrearing or responsible procreation." *Id*. at 1063. While the Ninth Circuit may not believe that a special designation for opposite-sex couples could possibly advance the cause of responsible procreation, the court has overstepped its authority by refusing to credit supporters of Proposition 8 with such a reasonable belief.

For a law to survive rational basis review, it is not necessary that there be no other, better legislative method to achieve a legitimate state goal. If the Ninth Circuit's decision stands, this canon of review would be jeopardized. This in turn would severely undermine the purpose of this lessened-scrutiny standard of judicial review and reduce the circumstances under which Americans may govern themselves. "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC*, 508 U.S. at 313. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is unwarranted no matter how unwisely we may think a political branch has acted." *Id*. at 314.

The Ninth Circuit claims that Proposition 8 is unconstitutional because "it is at once too narrow and too broad for it changes the law far too little to have any of the effects it purportedly was intended to yield…" *Perry* at 1095. However, laws reviewed under the rational basis test do not have to meet such a standard. "[T]he legislature must be allowed leeway to approach a perceived problem incrementally." *FCC* at 316; *see also Heller*, 509 U.S. at 321.

Detractors of California's Proposition 8 might argue that the purpose of responsible procreation could be better achieved by strengthening child support obligations for fathers who conceive without marrying, or by restricting the availability of divorce. While both propositions may be true, they are also irrelevant to Proposition 8's Constitutionality. The people of California have the right to decide for themselves the ways in which they want to either restrict or liberalize their marriage laws – or not. Moreover, it is virtually incontestable that almost *any* significant liberalization of the marriage laws will have at least *some* effect on the broader social structure.[3] Accordingly, it would be

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[3] *See e.g.* Lynn D. Wardle, *The "Withering Away" of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917-1926*, 2 Geo. J. L. & Pub. Policy 469, at 470,479, and 489 (Summer 2004) (The Bolsheviks believed, along ideological Marxist lines, that marriage as it existed in Western society would eventually "wither away," but that the new state should help that process along since "bourgeois, monogamous" traditional marriage perpetuated an oppressive, unjust socio-economic order. The dissolution of marriage would legally facilitate the advent of a true communist state. Bolshevik

the rare marriage law change that would *not* be rationally related to some legitimate state purpose. As this Court has stated:

> [N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth… than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

Accordingly, the people of California may make a distinction between sets of couples based on their relative risks of unplanned conception in order to increase the chances of responsible procreation *even if* that goal could be achieved in other ways. "The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Heller*, 509

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family law sought to transfer the responsibility of child rearing from parents to the state, since the family, together with all property relations, was considered to be the root of all social ills.). The consequences of early Bolshevik family engineering were documented as: an epidemic of divorces; economic hardship on women and children, particularly among the peasantry; an increase in "shelterless" (*bezprizorni*) children; and an ultimately diminished social status for women despite the feminist Bolshevik rhetoric. *See* "The Russian Effort to Abolish Marriage," The Atlantic, July 1926, available at http://www.theatlantic.com/magazine/archive/1926/07/the-russian-effort-to-abolish-marriage/306295/

U.S. at 321 (internal citation omitted). The Ninth Circuit's arguments attacking the logic of Proposition 8's supporters could be made against virtually any law or set of laws that gives benefits to some but not others (such as provisions of the tax code, for instance). As this Court has explained:

> But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination… …Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure….

Dandridge v. Williams, 397 U.S. 471, 486-487 (1970) (internal citation omitted).

II. DEMOCRATIC DECISION-MAKING SHOULD BE PROTECTED FROM THE OVERBEARING JUDICIAL POWER RESPONDENTS PREFER.

The Ninth Circuit's decision relies on the creative argument that Proposition 8 is unlawful because it functioned to "take away" a previously granted right. *Perry* at 1085, 1088, 1092, 1095. That holding is a judicial overreach at odds with precedent and must be reversed. If allowed to stand, the Ninth Circuit's ruling would create a new "one-way ratchet" rule allowing state judiciaries to grant new rights which are instantly irrevocable by the citizens of that state. This Court has held that

"there are limits on the Federal Government's power to affect the internal operations of a State." *Va. Office for Protection & Advocacy v. Stewart,* 131 S. Ct. 1632, 1641 (2011). If there are such limits, then the Ninth Circuit's unilateral decision to create a new law in its nine-state jurisdiction awarding expanded powers to the state judiciaries over their legislatures and citizens appears to have crossed them.

Neither Equal Protection nor Substantive Due Process analysis supports the outcome reached below. The Ninth Circuit incorrectly reads *Romer v. Evans* as holding that states violate the Equal Protection Clause if one branch of state government grants same-sex marriages, but is then overruled by a higher state authority. No federal precedent requires that rights not required by the Constitution initially become mandatory once granted. In particular, the Ninth Circuit's ruling conflicts with this Court's precedent in *Crawford v. Board of Education*, 458 U.S. 527 (1982). In *Crawford*, the Supreme Court rejected the notion that "once a state chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." *Crawford* at 535. The Ninth Circuit's decision and interpretation of *Romer v. Evans* cannot be reconciled with *Crawford*, and its attempts to do so are unpersuasive. *Perry* at 1084-1085.

Romer v. Evans does not support the idea that the Equal Protection Clause codifies a one-way ratchet by which benefits extended by a state authority can never be removed. Rather, *Romer* is

more properly viewed as a decision protecting citizen freedoms – especially the freedom to petition the government for a redress of grievances. *Romer* struck down a state law not only because it singled out homosexuals for different treatment, but because it infringed upon protected rights of *everyone* who might choose to advocate on their behalf. The law struck down in *Romer* – Colorado Amendment 2 – was understood by both the Colorado Supreme Court and the U.S. Supreme Court to infringe upon a broad array of basic rights. "*Amendment 2*, in explicit terms… prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians." *Romer* at 624. "Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Id*. at 634. Amendment 2 removed "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id*. at 631. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id*. at 633.

It was this far-reaching aspect of Colorado Amendment 2 – the "peculiar property of imposing a broad and undifferentiated disability on a single named group" and the law's "exceptional" nature – which caused the Supreme Court to strike it down upon rational basis review. *Id*. at 632. To extend *Romer's* reasoning to strike down a very

unexceptional definition of marriage as between a man and a woman would open the door to the nullification of many legal classifications with which the courts disagree.

Similarly, this court's Due Process jurisprudence fails to support the notion that the Constitution requires states to award same-sex marriage licenses. Consider *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a state statute criminalizing certain sexual conduct between two people of the same sex. The *Lawrence* court held that individuals had a right to engage in private consensual sexual activity free from the dictates of state governments. In the present case, Respondents ask the Court to dictate the states' codification of voluntary adult relationships. Accordingly *Lawrence*, like *Romer*, should be properly viewed as addressing liberty interests, and so is similarly inapposite to the case at bar.

In addition, this Court's constitutional jurisprudence requires that Proposition 8 be subject to rational basis review rather than heightened scrutiny. The Court has traditionally viewed sexual orientation as a non-suspect classification. A review of the history and purposes of the heightened scrutiny standard, along with a consideration of current events, demonstrates that any case for changing that classification has only grown weaker in recent years. The passage of Proposition 8 therefore does not constitute a failure of democratic processes which heightened scrutiny review was designed to protect against.

The use of heightened scrutiny to evaluate whether democratically-enacted laws violate the Constitutional rights of minority groups was established in *United States v. Carolene Products*, a decision which instructed courts to consider "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. 144, 153 (1938). The *Carolene Products* Court determined this "searching review" was only appropriate where the democratic processes fail to adequately protect the rights of certain groups. While the "heightened review" standard was further elaborated over time, the Court has continually refused to apply it to laws affecting those with a minority sexual orientation. The Court's rationale for using heightened standards demonstrates why strict scrutiny remains inappropriate for sexual orientation:

> When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude … and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes. The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy--a view

> that those in the burdened class are not as worthy or deserving as others. For these reasons and **because such discrimination is unlikely to be soon rectified by legislative means**, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (emphasis added).

The concept of "suspect classifications" was not designed to be changed merely to accommodate changes in social mores. If the class of "suspect" groups were so easily expanded, social policy would largely be made by the courts. As *Carolene Products* noted, the mere presence of a minority group does not trigger heightened scrutiny; the minority group must be unable to access the normal political processes for its own protection. The fact that same-sex marriage proponents won popular statewide initiatives in three states last November shows that rational basis review remains appropriate for these politically empowered same-sex marriage advocates.[4] The strict scrutiny standard should only be used in situations where minorities are consistently and foreseeably politically powerless and unable to persuade the majority through political means. It

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[4] Chelsea J. Carter and Allison Brennan, *Maryland, Maine, Washington approve same-sex marriage; 2 states legalize pot*, CNN, Nov. 7, 2012, available at http://www.cnn.com/2012/11/01/politics/ballot-initiatives/index.html.

can no longer be said that same-sex marriage advocates have no realistic hope of convincing majorities to honestly and fairly consider whether to alter the institution of marriage. As California, Maryland, Maine, and Washington have all shown, democracy is currently working as intended and should not be shut down by this Court.

III. IF PETITIONERS DO NOT HAVE STANDING, DEMOCRATIC SELF-GOVERNANCE ACROSS THE NATION WILL BE THREATENED.

If citizens do not have the right to defend in court the laws they pass by popular initiative, the powers of popular initiative and referendum granted by twenty-six states[5] would be rendered meaningless. It is therefore of critical importance to *Amici* that this Court hold that Petitioners have standing. The political processes of initiative and referendum were introduced into the states to give the people greater control over their governments.[6] These direct democracy laws enable the people to reserve a "larger share of legislative power" for themselves while still leaving some power to their elected representatives. *Kadderly v. Portland*, 44 Ore. 118, 145 (1903). In practice, this often means

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[5] *See* Citizens in Charge Foundation, State Voting Rights, http://www.citizensincharge.org/states (visited January 18, 2012).

[6] Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall*, 53 (Harvard University Press 1999) (initiative processes were designed to reduce corruption in the legislatures and make legislators more attentive to public opinion).

that direct democracy initiatives will implement laws that are unpopular with certain government officials – partly because government officials often prefer not to be instructed on how to do their jobs.[7] Because these same government officials can then withhold state legal defense of these laws in court, popular initiatives would frequently be at risk of being overturned by default in federal court *without* citizens' standing to defend the laws they pass. Furthermore, as both this Court and the Ninth Circuit have recognized, California has extended more popular initiative rights and greater protections to its citizens to defend initiatives in court than perhaps any state in the union. *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 310-311 (1981); *Perry* at 1074-1075. A ruling that Proposition 8's supporters did not have standing to defend their law would therefore constitute a devastating blow to the people's rights to direct democracy across the country.

This Court's past decisions support a finding that Proposition 8's supporters have standing. Federal courts generally defer to states to determine

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[7] *See e.g.* Marta H. Mossburg, *O'Malley's thuggish side: Governor wants the world to see a kind and inclusive Maryland — but don't you dare disagree with him*, Baltimore Sun, Jan. 3, 2013 ("...Governor O'Malley told WBAL that it is 'a little too easy' to petition a law to referendum . . . 'We've been best served in our state over the 200 or more years of our history by a representative democracy, rather than plebiscites,' he said. How clever of him to use the language of democracy to undermine it."), available at http://www.baltimoresun.com/news/opinion/oped/bs-ed-mossburg-omalley-20130102,0,2173154.column.

who has the authority to bring a suit to court, and the federal government also defers to states to decide who may assert the interests of the state itself. *Va. Office for Protection & Advocacy*, 131 S. Ct. at 1641. In *Karcher v. May*, this Court held that the New Jersey Speaker of the General Assembly and President of the Senate were the proper parties to represent the State because "the New Jersey Legislature had authority under state law to represent the State's interests." 484 U.S. 72, 82 (1987); *See also Richardson v. Ramirez*, 418 U.S. 24, 26, 36-38 (1974) (a county clerk was allowed to appeal a judgment invalidating California's felon disenfranchisement law, even though the state officer who had been named in the suit refused to appeal). If California state laws allow Proposition 8's supporters to represent the interests of the state, the federal courts should allow them to do so.

The California Supreme Court has weighed in on this issue, stating: "[t]he role played by the proponents in such litigation is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law and raising all arguable legal theories upon which a challenged provision may be sustained." *Perry v. Brown*, 52 Cal. 4th 1116, 1165 (2011). This is consistent with the purpose of the initiative movement in California, which was conceived specifically to favor the people's choices when elected officials were inclined to ignore them. *Strauss v. Horton*, 46 Cal. 4th 364, 420 (2009). The impetus for direct democracy generally comes from this belief that allowing elected officials to carry out

all legislative tasks is insufficient for modern democratic self-governance. "The initiative was viewed as one means of restoring the people's rightful control over their government, by providing a method that would permit the people to propose and adopt statutory provisions and constitutional amendments." *Strauss*, 46 Cal. 4th at 420.

As the California Supreme Court stated, "the initiative power would be significantly impaired if there were no one to assert the state's interest in the validity of the measure when elected officials decline to defend it in court or to appeal a judgment invalidating the measure." *Perry*, 52 Cal. 4th at 1151-1152. This Court should now affirm the people's rights to control their own governments by holding Petitioners have standing.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

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