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 OF *AMICI CURIAE* BEVERLY HILLS BAR ASSOCIATION, et al., IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

Beverly Hills Bar Association, Los Angeles County Bar Association, San Francisco Trial Lawyers Association, Women Lawyers of Sacramento, and Monterey County Women Lawyers Association ("Bar Associations"), respectfully submit the attached *Amicus Curiae* Brief in support of respondents.

The Bar Associations comprise approximately 28,000 attorneys licensed to practice law in California. They are committed to protecting the core guarantees of the Constitution and to ensuring that the marriage system in California passes constitutional muster, and have a vital interest in rationality in their state's allocation of marriage rights for same-sex couples.

The Bar Associations have read all briefs filed by the parties. They believe their proposed brief sheds additional light on the important issues presented and will help this Court decide the case.

SUMMARY OF ARGUMENT

Regardless of what level of scrutiny this Court applies to determine the constitutionality of banning

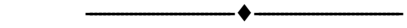
[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus* briefs in this case.

marriage for same-sex couples, and even if this Court were to hold that such bans do not generally violate the Equal Protection Clause, one thing is clear: California's system governing the legality of same-sex marriage, as effectuated by Proposition 8, is unconstitutional.

California's regime is irrational in that it holds that same-sex marriage is *simultaneously* both lawful and unlawful – both recognized and banned. This makes no sense.

What is it that differentiates between those 18,000 marriages that California recognizes as lawful and those that it bans? A date. Namely, the date Proposition 8 became effective – November 5, 2008. Under California law, same-sex marriages occurring *before* November 5, 2008, are valid and lawful; however, no same-sex marriages can occur *after* that date and none occurring after that date (wherever performed) can be recognized as legal in California.

No sustainable rationale supports this state of affairs. This Court's own decisions compel this conclusion. They hold that intra-group distinctions cannot be based on the date on which a right was afforded or terminated unless there is a rational basis for drawing the date-based line. Here, there is no rational basis for the line – there is no reason for holding lawful those marriages falling on one side of the line, and precluding those falling on the other. Accordingly, Proposition 8, which created the line, cannot stand.



PURPOSES UNDERLYING PROPOSITION 8

On November 4, 2008, Proposition 8 was passed, providing that "[o]nly marriage between a man and a woman is valid or recognized in California."[2] Proposition 8's supporters advanced a variety of reasons for the measure both before election day and in subsequent litigation. As demonstrated below, none of these stated purposes can provide any rational basis for the arbitrary date-based line created by Proposition 8. Moreover, the sole *actual* purpose found by the District Court drives home the absence of any possible rational basis for the enactment.

The purposes advanced by Proposition 8's proponents. The official ballot materials accompanying Proposition 8 declared that the ballot initiative's purposes were: (1) to restore the definition of marriage so as to coincide with "what the vast majority of California voters already approved and human history has understood marriage to be," namely, a contract between a man and a woman; (2) to overturn the California Supreme Court's decision in *In re Marriage Cases,* 183 P.3d 384 (Cal. 2008), because its holding that same-sex couples have the right to marry was "outrageous[ly]" promulgated by "activist" judges "who ignored the will of the people"; (3) to protect children from being taught that marriages of

[2] Proposition 8 became effective immediately upon its passage. *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009).

same-sex couples are of equal value to "traditional" marriages; and (4) to protect "the best situation for a child," i.e., to be "raised by a married mother and father." Official Ballot Materials for Proposition 8;[3] J.A. Exh. 56.

Trial-court and appellate litigation concerning the validity of Proposition 8 has addressed additional reasons advanced by its proponents in support of the provision.[4]

The trial court's findings regarding Proposition 8's purpose. On August 4, 2010, following

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[3] Argument in Favor of Proposition 8, available at *California Secretary of State* http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm (last visited February 3, 2013) (mirrored in virtually the same language at the Protect Marriage campaign site at http://protectmarriage.com/ballot-arguments-in-favor-of-prop-8-2008) (last visited February 3, 2013).

[4] *See Perry v. Brown*, 671 F.3d 1052, 1086 (9th Cir. 2012) ("[F]our possible reasons offered by Proponents or *amici* to explain why Proposition 8 might have been enacted: (1) furthering California's interest in childrearing and responsible procreation, (2) proceeding with caution before making significant changes to marriage, (3) protecting religious freedom, and (4) preventing children from being taught about same-sex marriage in schools."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010) ("[I]n this litigation, proponents asserted that Proposition 8: 1. Maintains California's definition of marriage as excluding same-sex couples; 2. Affirms the will of California citizens to exclude same-sex couples from marriage; 3. Promotes stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children; and 4. Promotes 'statistically optimal' child-rearing households; that is, households in which children are raised by a man and a woman married to each other.").

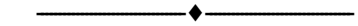
a two-week trial, the District Court in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921,[5] held that Proposition 8 was unconstitutional. In so holding, the District Court made specific factual findings that the *sole* purpose of Proposition 8 was to enshrine animus towards gay people:[6]

- "The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in [moral] disapproval" of gay citizens. *Id.* at 938.
- "The evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples." *Id.* at 1002-03.
- "The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples." *Id.* at 1003.
- "[T]he evidence shows Proposition 8 does nothing more than enshrine in the California

[5] Affirmed by the Ninth Circuit in *Perry v. Brown*, 671 F.3d 1052.

[6] The District Court also made specific factual findings bearing on many of the justifications advanced by Proposition 8's proponents. We discuss those factual findings where relevant below.

Constitution the notion that opposite-sex couples are superior to same-sex couples." *Id.*



ARGUMENT

Because Proposition 8 is not retroactive, it has yielded a California system where same-sex marriages occurring *before* Proposition 8's passage are valid and lawful, yet same-sex marriages occurring *after* its passage are not. What this means is that identically-situated same-sex couples are treated differently, depending on the date of the actual (or contemplated) marriage. There is no constitutional justification for such intra-group discrimination, affording marriage rights to one group of couples, but denying them to identically-situated other couples.

A. Because It Applies Only Prospectively, Proposition 8 Creates An Intra-Group Distinction – Some Same-Sex Couples Are Legally Married While Others Cannot Be.

Under California law, statutory enactments and initiative measures operate prospectively only, unless a contrary intent is clearly expressed. *See Evangelatos v. Superior Court*, 753 P.2d 585, 586-88, 597-98 (Cal. 1988) ("California continues to adhere to the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from

extrinsic sources that the Legislature or the voters must have intended a retroactive application.").

Voter intent is best indicated by a proposition's plain language and official ballot materials, *Strauss*, 207 P.3d at 119-22, and the California Supreme Court confirmed that neither the express language of Proposition 8 nor the official ballot materials in support of the measure expressed any clear intent that the law was to apply retroactively. *Id.* Accordingly, Proposition 8 has erected an intra-group distinction between same-sex couples – some are legally married while others can never attain that legal status.

B. Under This Court's Precedents, Intra-Group Distinctions Based On Dates Are Unconstitutional Unless They Have A Rational Basis.

This Court has repeatedly held that intra-group distinctions between those persons that a state allows to enjoy a right and those denied the same right cannot be based simply on a date, unless the line demarcated by the date is supported by a rational basis:

***Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., W. Va.*, 488 U.S. 336 (1989).** Using the date of a property's transfer, a state tax assessor assessed the value of real property in a manner that yielded vastly different valuations for comparable properties. This Court held the system unconstitutional. It reasoned that even if the state's stated

interest in assessing properties at their true current value was legitimate, the system flunked equal-protection scrutiny because it "in fact bears unequally on persons or property of the same class." *Id.* at 343. In short, the system's disparate treatment of members of the same group – based solely on the date of a property's transfer – violated the Equal Protection Clause. *Id.* at 346.

***Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612 (1985).** A New Mexico statute granted annual property tax exemptions to Vietnam veterans who resided in New Mexico before May 8, 1976. Vietnam veterans who established residence in New Mexico after that date successfully challenged the law on Equal Protection grounds. In declaring the law unconstitutional, this Court observed: "The New Mexico statute creates two tiers of resident Vietnam veterans, identifying resident veterans who settled in the State after May 8, 1976, as in a sense 'second-class citizens.'" *Id.* at 623-24. This Court held "the distinction New Mexico makes between veterans who established residence before May 8, 1976, and those veterans who arrived in the State thereafter" bore no rational relationship to the legislation's objectives of encouraging Vietnam veterans to move to New Mexico. *Id.* at 619.

***Zobel v. Williams*, 457 U.S. 55 (1982).** In 1980, Alaska enacted a dividend program to distribute oil revenues to state residents, giving each resident one dividend unit for each year of residency after 1959.

The appellants, residents of Alaska since 1978, challenged the unequal dividend distribution plan as violating the Equal Protection Clause.

Observing that the appellants were challenging the propriety of intra-group entitlements based on date, *id.* at 59, *Zobel* held that rational-basis scrutiny was appropriate and that the statute flunked review. After scrutinizing the distinction in light of its purposes, this Court held: "[T]he State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment." *Id.* at 62. Thus, as in the Court's other cases, the random date-based line between similarly situated residents could not survive rational basis review.

* * *

Under these authorities, a state cannot constitutionally condition the privileges it bestows on (or withholds from) its citizens based on a date-based line, unless there is a rational basis that supports the line that is drawn. As we now show, there is no rationale that supports the California system created by Proposition 8.

C. Proposition 8 Should Be Declared Unconstitutional Because None Of The Reasons Advanced In Support Of It Rationally Supports A Date-Based System Of Recognizing Some Same-Sex Marriages As Lawful While Precluding Others.

Had the proponents of Proposition 8 wanted to ensure that the measure applied retroactively, they had every opportunity to expressly so provide. But, they did not – the express language of the proposition contained no retroactivity provision and the official ballot materials promulgated to the public reflected no clear retroactivity intent. Accordingly, as the California Supreme Court confirmed in upholding Proposition 8's enactment, Proposition 8 does not retroactively invalidate existing marriages. *Strauss*, 207 P.3d at 119-22.

The result is that Proposition 8 results in a nonsensical system, that both recognizes as lawful, and precludes, same-sex marriages. The line imposed by Proposition 8 is irrational. It is not – and cannot be – justified by any of the reasons advanced by Proposition 8's proponents.

1. California's Dual System – Both Allowing And Disallowing Same-Sex Marriages – Is Not Rationally Supported By Any Of The Ballot-Measure Reasons Advanced In Support Of Proposition 8.

The official ballot materials supporting Proposition 8 advanced four reasons in favor of its passage. None justifies the irrational system that Proposition 8 has imposed.

a. California's Marriage Regime Is Not Rationally Supported By Proposition 8's Objective Of Restoring The Traditional View That Marriage Is Between A Man And A Woman.

One reason advanced in support of Proposition 8 was to restore the definition of marriage so as to coincide with "what the vast majority of California voters already approved and human history has understood marriage to be," namely, a contract between a man and a woman. *See* pp. 3-4, *ante*; J.A. Exh. 56.

This reason does not support the dual system that Proposition 8 has effectuated in California. There is simply no way that restoration of a so-called traditional view of marriage as between a man and a woman can be deemed advanced by the present California system that continues to recognize as lawful

18,000 same-sex marriages. Far from achieving Proposition 8's purposes, the California system it created is inconsistent with its ostensible objectives.[7]

b. California's Marriage Regime Is Not Rationally Supported By Proposition 8's Announced Purpose Of Overturning The California Supreme Court's Decision Legalizing Same-Sex Marriage.

Another purpose advanced in the ballot materials supporting Proposition 8 is to overturn the California Supreme Court's decision in *In re Marriage Cases,* because the decision was "outrageous[ly]" promulgated by "activist" judges "who ignored the will of the people." *See* pp. 3-4, *ante*; J.A. Exh. 56. That pronounced goal is not advanced by the dual California system that Proposition 8 has effectuated.

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[7] The District Court made related factual findings in the course of rejecting tradition as a rational basis for Proposition 8:

> The evidence shows that the tradition of restricting an individual's choice of spouse based on gender does not rationally further a state interest despite its 'ancient lineage.' Instead, the evidence shows that the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles. *See* FF 26-27. California has eliminated all legally-mandated gender roles except the requirement that a marriage consist of one man and one woman. FF 32. Proposition 8 thus enshrines in the California Constitution a gender restriction that the evidence shows to be nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life.

Perry v. Schwarzenegger, 704 F. Supp. 2d at 998.

If Proposition 8 wanted to overturn the decision in *In re Marriage Cases*, it could have explicitly pronounced that the measure applied retroactively. It did not so provide. Instead, it created a dual system in which same-sex marriages performed prior to Proposition 8's passage continue to remain valid in the post-Proposition 8 world. Creating a system that both recognizes as lawful and simultaneously precludes same-sex marriages based on date bears no rational relationship to the goal of overturning the California Supreme Court's ruling that same-sex couples have the right to marry under the California constitution.

c. California's Marriage Regime Is Not Rationally Supported By Proposition 8's Announced Purpose Of Protecting Children From Being Taught That All Marriages Are Equal.

The official ballot materials for Proposition 8 stated: "State law may require teachers to instruct children as young as kindergarteners about marriage. (Education Code § 51890.) If the gay marriage ruling is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is no difference between gay marriage and traditional marriage. . . ." *See* pp. 3-4, *ante*; J.A. Exh. 56.

Even if it were true that education about marriage equality was both undesirable and required (which, as *amicus curiae* California Teachers Association has explained, it is not), Proposition 8 would not

alter that situation. This is so because the 18,000 same-sex marriages performed prior to Proposition 8's passage remain legal in California and same-sex marriage is now legal in nine other states and the District of Columbia. Proposition 8 does nothing to alter either those real-world facts or any educational requirement that existed prior to its passage.

d. California's Marriage Regime Is Not Rationally Supported By Proposition 8's Announced Purpose Of Ensuring That A Child Is Raised By Married Opposite-Sex Parents.

The final ballot-measure goal in support of Proposition 8 is that it would protect "the best situation for a child" – namely, "to be raised by a married mother and father." *See* pp. 3-4, *ante*; J.A. Exh. 56. That goal is not advanced by the present California system, which simultaneously allows and disallows same-sex marriage.

Proposition 8 prevents same-sex couples from marrying, but marriage and childrearing are not coterminous – children can be conceived, adopted, and raised by non-married persons. And, even if marriage were a prerequisite to having or raising children and the goal of the ballot measure was to prevent childrearing by same-sex couples, the goal would not be advanced by creating a system (as does Proposition 8) that continues to recognize thousands of same-sex

marriages as lawful. Yet again, drawing the line that Proposition 8 draws does nothing to rationally advance the articulated goal.[8]

2. California's Dual System – Both Allowing And Disallowing Same-Sex Marriages – Is Not Rationally Supported By Any Other Reason Advanced By Proposition 8's Proponents.

In addition to the reasons set forth in the ballot materials supporting the passage of Proposition 8, proponents have advanced other reasons during the course of this litigation. Those additional reasons, advanced in the District Court and Ninth Circuit, equally lack any rational relationship to the dual system created by Proposition 8.

First, the proponents argued that Proposition 8 advanced the policy of proceeding with caution before making significant changes to marriage. *See* pp. 3-4, *ante*. But this policy is inconsistent with the reality that,

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[8] The District Court made related factual findings to the effect that "[t]he evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes. FF 70. Moreover, Proposition 8 has nothing to do with children, as Proposition 8 simply prevents same-sex couples from marrying. FF 57. Same-sex couples can have (or adopt) and raise children. When they do, they are treated identically to opposite-sex parents under California law." *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 1000.

after Proposition 8's passage, 18,000 pre-Proposition 8 marriages remain lawful – in other words, the "change to marriage" already exists and continues to exist.[9]

Second, the proponents argued that Proposition 8 protects religious freedom. *See* p. 4, *ante*. However, if there is some constitutionally valid religious objection to same-sex marriage, the dual system confirming the legality of some marriages does not advance that goal. Nothing on the face of Proposition 8 affects or protects any religion's ability to recognize or not recognize whatever unions it sees fit.

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[9] The District Court made related factual findings rejecting the assertion that permitting marriages of same-sex couples amounted to sweeping social change:

> Plaintiffs presented evidence at trial sufficient to rebut any claim that marriage for same-sex couples amounts to a sweeping social change. *See* FF 55. Instead, the evidence shows beyond debate that allowing same-sex couples to marry has at least a neutral, if not a positive, effect on the institution of marriage and that same-sex couples' marriages would benefit the state. *Id.* Moreover, the evidence shows that the rights of those opposed to homosexuality or same-sex couples will remain unaffected if the state ceases to enforce Proposition 8. FF 55, 62. The contrary evidence proponents presented is not credible. Indeed, proponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage. The process of allowing same-sex couples to marry is straightforward, and no evidence suggests that the state needs any significant lead time to integrate same-sex couples into marriage.

Perry v. Schwarzenegger, 704 F. Supp. 2d at 999.

D. This Court's Decision In *Nordlinger* Does Not Support The Intra-Group Distinction Created By Proposition 8 – Quite The Contrary, *Nordlinger* Supports Striking It Down.

We cannot fairly cite *Allegheny Pittsburgh Coal Co.*, 488 U.S. 336, without discussing the case that followed: *Nordlinger v. Hahn*, 505 U.S. 1 (1992). There, this Court held that in contrast with the unequal property tax assessment method that the Court struck down in *Allegheny*, California's Proposition 13 acquisition-value property tax scheme passed constitutional muster. However, the Court distinguished *Allegheny* on grounds that support the conclusion that Proposition 8 is unconstitutional.

As a threshold matter, the taxpayers in *Nordlinger* were all treated equally under Proposition 13 in every respect other than tax basis. In this Court's words, Proposition 13 "does not discriminate with respect to either the tax rate or the annual rate of adjustment in assessments. Newer and older owners alike benefit in both the short and long run from the protections of a 1% tax rate ceiling and no more than a 2% increase in assessment value per year. New owners and old owners are treated differently with respect to one factor only – the basis on which their property is initially assessed." *Id.* at 12. In other words, Proposition 13 set up a rolling benefit for all property owners to enjoy over time – at any given time, some would enjoy a lower tax basis for

properties of comparable current value, depending upon when they purchased their home.

In sharp and decisive contrast, there is nothing equal about the treatment of same-sex couples under the regime created by Proposition 8. Unlike the new and old home owners who *Nordlinger* declared would enjoy similar benefits in both the short and longer term, there is no promise of future benefit for those same-sex couples now aspiring to be lawfully married like those who preceded them.

Nordlinger further noted that *Allegheny*'s property tax assessment system was unconstitutional because *Allegheny*'s "facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme" (i.e., the purpose found constitutional in *Nordlinger*). *Id.* at 15. This was so, the Court reasoned, because in *Allegheny*, the legislature had *specifically articulated a purpose* (of uniformity in taxation) which precluded the Court from presuming or inferring an alternate purpose that constitutionally supported a non-uniform assessment scheme. *Id.* Likewise, if a statute's "stated purpose was not legitimate, the other purposes did not need to be considered because '[h]aving themselves specifically declared their purpose, the . . . statutes left no room to conceive of any other purpose for their existence.'" *Id.* at 15 n.7 (citing *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959)).

The present case falls squarely within the *Allegheny* rule, precluding a court from presuming or inferring a legitimate purpose in contrast to that expressed by the relevant governmental decisionmaker – here, California voters in passing Proposition 8, whose purposes were specifically articulated in the official ballot materials. As shown, the intra-group distinction created by Proposition 8 is not rationally supported by any of the stated purposes of Proposition 8 – none provide legitimate means for the perverse end of California's dual marriage regime for same-sex couples. As Proposition 8's announced purposes are illegitimate on their own terms, they leave no room to conceive of any other purpose for the proposition's existence.

Nordlinger further forecloses positing alternate conceivable constitutional purposes because the District Court found that the voters' *sole* purpose in enacting Proposition 8 was anti-gay animus. (*See* p. 4, *ante*.) *Nordlinger* declared that judicial intervention is generally unwarranted in the rational-basis context "*absent some reason to infer antipathy*." 505 U.S. at 17-18, emphasis added, internal citation omitted; *cf. Califano v. Jobst*, 434 U.S. 47, 58 (1977) (favored treatment of marriages between certain disability beneficiaries did not violate equal protection principle of Due Process Clause under rational basis review where "[n]o one suggests that Congress was motivated by antagonism toward any class of marriages or

marriage partners not encompassed by the exception").

Here, there is more than a reason to infer or guess about antipathy. The District Court found as a fact that there *was* antipathy toward same-sex marriages and that this antipathy *was the sole reason prompting the passage of Proposition 8*. As a result, there is no occasion for the Court to try to infer some constitutionally permissible basis for Proposition 8.

In sum, while *Nordlinger* allows courts to infer a legitimate reason in support of a statute, it precludes inferring a reason that is inconsistent with the measure's specifically articulated intent, and it precludes inferring a legitimate reason where a measure's stated purpose is illegitimate or the measure is enacted out of antipathy. Here, the stated purposes of Proposition 8 fail rational basis review on their own terms and the District Court found that the true intent of Proposition 8 was to stigmatize gay citizens. Accordingly, under *Nordlinger*'s principles, too, Proposition 8 fails rational basis review.

CONCLUSION

Regardless of how this Court rules on whether same-sex couples can be precluded from marrying and regardless of the standard of scrutiny this Court applies, Proposition 8 must fall. Proposition 8 creates a legal regime that both recognizes as lawful, while

simultaneously precludes, marriages of same-sex couples in California. There is no legitimate rationale for this intra-group distinction.

Proposition 8 is unconstitutional. This Court should so rule.

Respectfully submitted,

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