No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,

Petitioner,

v.

KRISTIN M. PERRY, ET AL.

Respondents.

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

BRIEF OF CALIFORNIA ASSEMBLY SPEAKER JOHN A. PÉREZ AND LAW PROFESSORS CONCERNED WITH REPRESENTATIVE DEMOCRACY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

LEGISLATION

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

This brief is submitted with the written consent of all parties pursuant to Rule 37.3(a).

Amici are California State Assembly Speaker John A. Pérez and law professors concerned with preserving the values of representative democracy and with preventing inappropriate uses of state initiative processes. Many states, including California, have acted to deprive historically disadvantaged minorities, including gay men and lesbians, of substantive rights through the enactment of ballot initiatives that avoid representative democratic institutions.

Amicus Speaker Pérez is concerned that Proposition 8 inhibits his legislative role by preventing him and his peers from moving forward legislation on marriage equality, thereby depriving a historically disadvantaged group from access to the traditional representative democratic process. Speaker Pérez is also openly gay and a member of this historically disadvantaged group.

All *amici* are concerned with how such voter initiatives can deprive members of a historically disadvantaged minority group of access to traditional representative democratic processes as a means of seeking to secure equal rights. *Amici* submit this brief to demonstrate how the enactment of Proposition 8 has deprived gay men and lesbians of access to repre-

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[1] Pursuant to Rule 37.6, counsel for *amici* certify that no counsel for any party had any role in authoring this brief in whole or in part, and that no person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents.

sentative democratic processes in California in connection with the right to marry, and that this political process deprivation is worthy of heightened scrutiny and violates the Fourteenth Amendment.

List of Amici Curiae:

John A Pérez represents the 53rd Assembly District in the State of California. He has been elected by his peers as the Speaker and as such is the leader of the California State Assembly.

Michelle Adams is a Professor of Law and Co-Director of the Floersheimer Center for Constitutional Democracy at the Benjamin N. Cardozo School of Law.

Ellen Aprill is the John E. Anderson Professor of Tax Law at Loyola Law School. She specializes in tax-exempt organizations and writes on the role of nonprofits in the political process, including initiatives.

Rachel D. Godsil is the Eleanor Bontecou Professor of Law at Seton Hall University School of Law. Her scholarship and teaching focus on issues of race, property, constitutional law and civil rights.

Robin A. Lenhardt is a professor of constitutional law and family law at the Fordham Law School. Her scholarship focuses on issues of race, citizenship, and intimate expression.

Laurie L. Levenson is the David W. Burcham Chair in Ethical Advocacy at Loyola Law School. Her scholarship has frequently addressed the vital importance of a legal system that respects the constitutional balance of powers.

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Karl Manheim is a professor of Constitutional Law, with a specialty in California Constitutional Law and the initiative process at Loyola Law School, Los Angeles, California.

Bertrall Ross is a professor of election law and constitutional law with a special concern for voting rights and congressional authority to enforce anti-discrimination laws under the Constitution at University of California, Berkeley School of Law.

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Georgene Vairo is the David P. Leonard Professor of Law at Loyola Law School. She writes in the areas of Federal Courts, including separation of powers and federalism, and the importance of the legal process in protecting individual rights.

Susan Bakhshian, Mary Culbert, Judy Fonda, Kathleen Kim, Eric Miller, John Nockleby, Priscilla Ocen, Maureen Pacheco, Paula Pearlman, Marcy Strauss, and Katherine Trisolini are all professors

on the faculty of Loyola Law School, Los Angeles, California. Their scholarship focuses on a variety of areas of law, and each of them has concerns about the effect of the initiative process on minority representation in the State of California.

SUMMARY OF THE ARGUMENT

Plaintiffs have persuasively demonstrated that Proposition 8 violates the Equal Protection and Due Process Clauses of the U.S. Constitution. Gay men and lesbians, like their heterosexual friends and families, have the capacity and desire to love and be loved. Like straight people, many gay people in California wish to form life-long relationships, which the State will solemnize and dignify to promote stability and family life. Many gay couples in California are raising children. Many gay teenagers in California need a vision of the future in which they are full participants in the life of their families and communities. And many gay men and lesbians have a fundamental longing to know that as they pass through their days, their lives will not go unnoticed. The State recognizes these basic human feelings for heterosexuals, and before the passage of Proposition 8, the California Constitution protected gay people as well, recognizing their fundamental right to marry.

In enacting Proposition 8, however, the 2008 voters eliminated more than the equal right to marry. Under principles of California law and current interpretations by the California Supreme Court, Proposition 8 eliminated the ability of those seeking equal marriage rights to avail themselves of any ability to pursue such rights through the political actions of their accountable elected representatives.

The Legislature, as a matter of law following Proposition 8, cannot pass legislation to provide equal marriage rights, although it would likely do so if it were allowed. *See infra,* p. 17-18. And although both the democratically elected Governor and Attorney General ran and won in 2010 on platforms supporting equal marriage rights and vowing to oppose the continued effect of Proposition 8, neither of them can take action to end this case as the voters desire them to do.

In this way, the will of the people as expressed through their elected representatives is nullified. The structural protections that our founders recognized as central to the preservation of minority rights and human dignity, along with the promise of equal political participation, are compromised. The courts are the only remaining bulwark to safeguard minority rights.

Gay and lesbian people, a tiny political minority who have suffered a documented history of discrimination in California, have no political recourse other than a new initiative—an effort that entails enormous expense, that provides no avenue for deliberation or accountability, and that is subject to massive manipulation. They cannot recall or vote out the initiative proponents, who were never elected in the first place. And they can do nothing to empower their elected representatives to take action on their behalf. The state's system of checks and balances has become distorted with power concerning this issue held only by the "People" and the courts.

The initiative proponents agree that this is the result they have achieved. While their brief is full of rhetoric concerning democratic decision making,

Pet'rs Br. at 55-59, in fact, Petitioners are careful to say that the only democratic process available now to address same sex marriage is direct democracy, effectively conceding that Proposition 8 has nullified the power of any of the people's duly elected representatives with respect to marriage equality. Yet, prior to Proposition 8, the California Legislature had the power to create marriage equality through simple legislation, the Attorney General had the power to represent the State in civil litigation and to determine when it was in the best interests of the State to acquiesce in a judgment rather than to appeal, and the Governor had power to sign or veto enacted statutes and the power to execute the law.

As the Court addresses the federal constitutional issues in this case, it should be mindful of the unique aspects of California law and the ways in which Proposition 8 has eliminated not just equal marriage rights formerly guaranteed by the State Constitution, but also the ability of gay men and lesbians in California to achieve marriage equality through the normal political process. If gay people can be denied access to representative government to achieve equal treatment with respect to an important status such as marriage, then in California, any other small, historically disadvantaged minority group can also be denied the right to representation with respect to seeking any other fundamental or important right.

This Court's precedents have long recognized as impermissible under the Equal Protection Clause state and local laws that impose structural barriers to political participation, including by racial minorities and by gays and lesbians. *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S.

385 (1969); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); and *Romer v. Evans*, 517 U.S. 620 (1996). These cases protect equal access to the political process and provide an important lens for reviewing the political harms created by Proposition 8. Because Proposition 8 prevents equal political participation for a historically disadvantaged minority group with respect to the right to marry, it should be subject to heightened scrutiny.

Under any level of scrutiny, Proposition 8 should be struck down because there is no permissible reason to deprive gay men and lesbians of the ability to seek equal marriage rights through their duly elected representatives. Indeed, Proponents offer no plausible justification whatsoever for eliminating representative democratic processes as a means of pursuing equality, save for the bald desire to impose greater political obstacles in the way of creating equal marriage rights. Pet'rs Br. at 56 (arguing that voters intended to ensure that equal marriage rights could be restored "only through a vote of the people"). Indeed, unlike representative democracy, the initiative process in California in general, and Proposition 8 in particular, does not promote the values of "give and take," "compromise," and "deliberation" that Proponents unconvincingly claim to value. *Id.* at 56-57. And the desire to impose such political barriers for their own sake with respect to the rights of a historically disadvantaged group to seek equality is the essence of inequality. This Court should stand guard against such deprivation here as it has in similar cases.

ARGUMENT

A. Before Proposition 8, The California Legislature Had The Power To Create Marriage Equality Through Legislation

The effort to realize equal marriage rights in California long predates this case.

From 1977 until 2008, the California Family Code provided that "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization…." Cal. Stats. 1977, ch. 339, § 1 (codified at Cal. Fam. Code § 300(a)); *see In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) ("*Marriage Cases*").

Existing law at that time confirmed the power of the Legislature to modify the qualifications for a lawful marriage. *McClure v. Donovan*, 205 P.2d 17, 24 (Cal. 1949) ("the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated"); *Estate of DePasse*, 118 Cal. Rptr. 2d 143, 148 (Cal. Ct. App. 2002) ("The regulation of marriage is solely within the province of the Legislature.").

Unsatisfied with the possibility that the Legislature might create marriage equality through representative democratic processes, opponents of marriage equality proposed a statutory initiative that would duplicate the Family Code but that could not be amended through simple legislation, and instead

would require a new vote by the "People." *See Strauss v. Horton*, 207 P.3d 48, 65 (Cal. 2009) (discussing Proposition 22, which added section 308.5 to the Family Code, providing by initiative statute that "Only marriage between a man and a woman is valid or recognized in California"); *see also* Cal. Const. Art. II, § 10(c) (providing that Legislature cannot amend initiative statute absent approval "by the electors unless the initiative statute permits amendment or repeal without their approval"); *Perry v. Brown*, 671 F.3d 1052, 1065 (2012) (summarizing history); *Marriage Cases*, 183 P.3d at 409–10 (same). Proposition 22 was passed by California voters in the March 2000 elections.

Following an effort by the City and County of San Francisco to grant marriage licenses to same-sex couples on an equal basis with heterosexual couples, the California Supreme Court in 2004 made clear that no City could grant such licenses in contravention of the Family Code on the grounds that its local officials viewed the Family Code prohibition on same-sex marriage as unconstitutional. *Lockyer v. City and County of San Francisco*, 207 P.3d 459, 475-99 (Cal. 2004) ("*Lockyer*"). In reaching this conclusion, the California Supreme Court included strong language emphasizing that the power to define and to regulate marriage lies firmly with the California Legislature. *Id.* at 468 (noting Legislature's "full control of the subject of marriage" and "primacy" in the area) (quoting *McClure*, and citing *Depasse*).

Consistent with the ruling in *Lockyer*, debate then moved to California's bicameral Legislature, which, after full deliberation, twice passed bills to

equalize marriage rights through simple amendments to the California Family Code. Assem. B. No. 849, 2005–2006 Reg. Sess., § 3(j) (Cal. 2005); Assem. B. No. 43, 2007–2008 Reg. Sess., § 2(j) (Cal. 2007). Then-Governor Arnold Schwarzenegger vetoed these bills.[2]

In May 2008, the California Supreme Court declared Family Code Sections 308.5 and 300 invalid under the California Constitution. *Marriage Cases*, 43 Cal.4th 757. The Court held that the California Constitution provides an equal right to marry to same-sex couples and that this right cannot be abridged through the Family Code. *Id.*

The opponents of equal marriage rights resorted to the initiative process yet again. This time, through Proposition 8, they sought to accomplish two distinct goals. First, they sought to eliminate any prospective effect of the California Supreme Court's constitutional ruling in the *Marriage Cases*. Second, they sought to eliminate any ability for gay and lesbian Californians to pursue equal marriage rights through representative democratic processes. *See* Section B, *infra*.

In November 2008, following a campaign based on stereotyping and vicious scare-tactics, supporters

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[2] *Governor Backs Same-Sex Marriage Ruling*, S.F. Chronicle, May 17, 2008, *available at* http://www.sfgate.com/news/article/Governor-backs-same-sex-marriage-ruling-3213300.php (last visited Feb. 10, 2013) (describing Gov. Schwarzenegger's opposition to Proposition 8, despite his vetoes of prior legislation). The Governor of California has veto power over legislative statutes, Cal. Const. Art. IV, § 10, but not initiative statutes or amendments to the State Constitution created by initiative, Cal. Const. Art. II, § 10.

of Proposition 8 persuaded a slim majority to vote in favor of adding the following language into the California Constitution's Declaration of Rights: "Only marriage between a man and a woman is valid or recognized in California." Cal. Const. Art. I, § 7.5.

B. Under Background Principles Of California Law, Proposition 8 Deprives Gay People Of The Right To Pursue Equal Marriage Rights Through Their Elected Representatives.

1. Ballot materials for Proposition 8 downplayed the elimination of access to the representative democratic processes.

The text of Proposition 8 includes no express language eliminating access to representative democratic processes for pursuing marriage equality. On its face, the text uses only the present tense: "Only marriage between a man and a woman ***is*** valid and recognized…." (emphasis added). Proposition 8 does not (on its face) speak to the future, as it would if, for example, the text stated, "Only marriage between a man and a woman is ***and shall be*** valid and recognized…." The use of only the present tense creates an ambiguity: Did the proposition aim to eliminate the state *constitutional* basis for marriage equality *for the present*, but to leave the Legislature with power to act *for the future*? Or, in the alternative, would the power of the Legislature and other elected officials to authorize marriage equality in the future also be nullified?

The political campaign in support of Proposition 8 downplayed any effort to remove the Legislature

from any future policy making role. Proponents and their supporters focused many of their arguments instead on their disagreement with the California Supreme Court's decision in the *Marriage Cases* and their contempt for the judges who joined in the majority in that case, without making clear that their objective was to nullify the Legislature's role as well. *See generally*, e.g., J.A. Exh. 52-58 (Official Voter Guide).[3] The Arguments in favor of Proposition 8 appearing in the Official Voter Information Guide, for example, do not mention eliminating any legislative role. J.A. Exh. 56. Rather, they focus instead on anti-judicial rhetoric and overturning the decision in the *Marriage Cases*. J.A. Exh. 56 ("four activist judges in San Francisco").

The impartial official title and summary and the analysis prepared by the State Legislative Analyst told voters simply that they were eliminating marriage rights, and spoke not at all of eliminating access to representative democratic processes for seeking to obtain marriage rights in the future. J.A. Exh. 53-55.

In the entire Official Voter Information Guide, only a single sentence addresses the question of who will have power to create marriage equality in the future, and even then, the statement is oblique. That single sentence is found buried in the *rebuttal* to the argument against Proposition 8, which says that a Yes vote for the Proposition: "overturns the flawed reasoning of four judges in San Francisco who

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[3] As discussed by Respondents and other amici, Proponents bundled with their anti-judicial sentiment rhetoric about protecting children that that was designed to instill unwarranted fear and anxiety among voters. *See e.g.,* J.A. Exh. 59-60.

wrongly disregarded the people's vote, and ***ensures that gay marriage can be legalized only through a vote of the people***." J.A. Exh. 57 (rebuttal to argument against Proposition 8) (emphasis added).

This statement is not signed by the initiative Proponents, the Legislative Analyst, or any elected government official, but rather by three individuals: a physician, a Council Commissioner of the San Diego and Imperial County Boy Scouts of America, and the director of an organization known as Parents and Friends of Ex-Gays. *Id.* Their statement was "not checked for accuracy by any official agency." *Id.*

As described in more detail below, under California's initiative process—the most extreme initiative scheme in the United States—nothing more was needed to eliminate the previously clear power of the Legislature to enact equal marriage rights by simple legislation for the future. It is undisputed by the parties that Proposition 8 had this effect.

2. Two lines of California authority compel a conclusion that Proposition 8 eliminated access to representative democratic processes as a means of pursuing equal marriage rights.

(a) California Constitution Article I, Section 26

Article 1, Section 26 of the California Constitution provides that "[t]he provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Cal. Const. Art. I, § 26.

This provision means that Constitutional provisions are generally "self-executing" and operate to bar every branch of government from undertaking any action that would contradict the implied mandatory or prohibitory meaning. *Robison v. Payne*, 66 P.2d 710, 711 (Cal. Ct. App. 1937) (words "may impose" and "shall have power" given a mandatory interpretation); *Jenkins v. Knight*, 293 P.2d 6, 8 (Cal. 1956) (mandatory requirement to fill vacancies) (citing earlier codification of Art. I, Sec. 26); *State Board of Educ. v. Levit*, 343 P.2d 8, 18-19 (Cal. 1959) (citing cases and discussing history of provision); *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 342 (Cal. 2002) ("all branches of government are required to comply with constitutional directives or prohibitions") (citations and quotation marks omitted); *Oakland Paving Co. v. Hilton*, 11 P. 3, 5 (Cal. 1886) ("Every constitutional provision is self-executing to this extent, that everything done in violation of it is void.").

Under these cases, Proposition 8 would necessarily be construed as prohibiting legislative action to create marriage equality.

(b) Use of Ballot Materials to Construe Voter Initiatives

A second line of cases also results in the necessary conclusion that Proposition 8 eliminates the ability of the Legislature to enact marriage equality through a simple amendment to the Family Code. This line of authority holds that statements in the official ballot materials are a source for discovering the meaning of a voter initiative. *Robert L. v. Supe-*

rior Court, 69 P.3d 951, 958-960 (Cal. 2003) (relying on rebuttal argument in voter information pamphlet to construe initiative); *Legislature v. Eu*, 816 P.2d 1309, 1314-15 (Cal. 1991) (relying on voter information pamphlet and adopting broad interpretation of term limits initiative).

The question in *Robert L.* was whether California Penal Code section 186.22(d), which related to sentencing for gang-related crimes and was passed by a voter initiative in 2000 as Proposition 21, applied to all misdemeanors and all felonies. 69 P.3d at 953. Relying on the rebuttal to the arguments made in the official voter information guide in favor of the initiative, the California Supreme Court construed the initiative as having such broad effect. The majority of the California Supreme Court made clear the importance of rebuttal statements in the Official Voter Information Guide:

> Finally, as a reviewing court is directed to look at the arguments contained in the official ballot pamphlet to ascertain voter intent, it is well settled that such an analysis necessarily includes the arguments advanced by both the proponents and opponents of the initiative. Here, the opponent's rebuttal to the argument in favor of Proposition 21 specifically made the voters aware that Proposition 21 would enhance the punishment of gang-related misdemeanors.

Id. at 959 (citing *Legislature v. Eu*) (footnotes omitted).

The reliance on arguments in the Voter Information Guide in *Legislature v. Eu*, is to the same ef-

fect. There, the California Supreme Court interpreted ambiguous language in an initiative concerning legislative term limits as imposing a life-time term limit for office-holders rather than a more limited restriction on holding office for consecutive terms. *Eu*, 816 P.2d at 1315 (relying on opponents' ballot arguments against Proposition 140).

The Ninth Circuit's interpretation of Proposition 8 is consistent with these lines of authority. It specifically stated, citing the State Voter Information Guide: "Proposition 8 superseded the *Marriage Cases* and then went further, by prohibiting the Legislature or even the People (except by constitutional amendment) from choosing to make the designation of 'marriage' available to same-sex couples in the future." *Perry*, 671 F.3d at 1090 & n.25; *see also id.* ("In California, '[b]allot summaries … in the "Voter Information Guide" are recognized sources for determining the voters' intent.") (citing *People v. Garrett*, 112 Cal. Rptr. 2d 643, 650-651 (Cal. Ct. App. 2001) and *Hodges v. Super. Ct.*, 980 P.2d 433, 438-39 (Cal. 1999)).

None of the parties before this Court contests this aspect of the Ninth Circuit's ruling.

3. In addition to eliminating access to the Legislature, Proposition 8 also eliminated gays' and lesbians' ability to pursue equal marriage rights through access to representative executive officials.

After the passage of Proposition 8, gay men and lesbians again sought to pursue equality through representative democratic processes. In 2009, the

Legislature passed, and Governor Schwarzenegger signed, legislation protecting the rights of same-sex couples married outside of California. *See* S.B. No. 54 (Cal. 2009) (codified at Family Code § 308(b) & (c)).

In 2010, Californians elected Attorney General Kamala Harris and Governor Jerry Brown, both of whom ran on a platform of equal marriage rights; their opponents, Steve Cooley and Meg Whitman, both opposed marriage equality.[4]

In 2012, following decennial redistricting of State Assembly and Senate lines, Californians elected a new Legislature with Democrats holding a two-thirds supermajority. Evan Halper and Anthony York, *Blue Reign In Sacramento*, L.A. Times, Nov. 8, 2012, *available at* http://articles.latimes.com/2012/nov/08/local/la-me-sacramento-democrats-20121108 (last visited Feb. 19, 2013). In light of these elections, but for Proposition 8 and the barriers to the political process that it creates, marriage equality would likely already have been democratically enacted in California. *See* Jim Saunders, *California Democrats Say They Won Supermajority Control of Legislature,* Sacramento Bee, at A1, Nov. 8, 2012, *available at*

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[4] Phil Willon, *Attorney General Candidates Offer Differing Visions Of Post*, L.A. Times, Oct. 6, 2010, *available at* http://articles.latimes.com/2010/oct/06/local/la-me-attorney-general-20101005/2 (last visited Feb. 19, 2013); Shane Goldmacher and Anthony York, *Harsh Words Mark Wild Final Gubernatorial Showdown Between Meg Whitman And Jerry Brown*, L.A. Times, Oct. 12, 2010, *available at* http://articles.latimes.com/2010/oct/12/local/la-me-whitman-brown-debate-mobile (last visited Feb. 19, 2013).

http://www.sacbee.com/2012/11/08/4969450/california-democrats-say-they.html.

Yet because of Proposition 8 and the later decision of the California Supreme Court that the initiative proponents can substitute their wholly unaccountable voices for those of the responsible elected officials, representation through the executive branch has also been eviscerated. *Perry v. Brown*, 52 Cal. 4th 1116 (2011).[5]

4. Eliminating the ability of a small and historically disadvantaged minority group to pursue equal treatment with respect to a fundamental right is antithetical to our nation's core values.

The founders of our nation were skeptical of direct democracy in general and recognized the risks it posed for the protection of the rights of minorities.

As James Madison recognized, legislative Representatives "must be limited to a certain number, in order to guard against the confusion of a multitude." The Federalist No. 10 at 77 (James Madison) (Clinton Rossiter ed. 1999); *see also* The Federalist No. 51 at 318 (James Madison) (describing importance of separation of powers to avoid tyranny); The Federalist No. 48 at 306 (James Madison) ("In a democracy, where a multitude of people exercise in person the legislative functions and are continually exposed, by their incapacity for regular deliberation and concert-

[5] *Amici* do not here address the question whether the initiative proponents have Article III standing to pursue their appeal. This question is addressed by Respondents and other *amici curiae*.

ed measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter."); The Federalist No. 63 at 383 (James Madison) (describing representative government as a "safeguard against the tyranny of their own passions").

The framers of the Constitution frequently cited the protection of minority rights as justification for representative government. James Madison asserted the value of guarding "one part of the society against the injustice of the other part," and warned that where, "a majority be united by a common interest, the rights of the minority will be insecure." The Federalist No. 51 at 320 (James Madison). Direct democracy avoids the filtering mechanisms of representative government. Filtering mechanisms inherent in representative democracy limit the "mischiefs of (majority) factions" by encouraging deliberation, consensus building and compromise. The Federalist No. 10 at 17 (James Madison); *see also* Daniel C. Lewis, *Bypassing the Representational Filter? Minority Rights Policies under Direct Democracy Institutions in the U.S. States*, 11 St. Pol. & Pol'y Q. 198, 200 (2011) (Representative democracy encourages "deliberation, consensus-building and compromise.").

The serious governance problems that face California as a result of its most extreme form of direct democracy are widely known and the subject of grave concern. *See*, *e.g.*, Former California Chief Justice Ronald M. George, Remarks at the American Academy of Arts and Sciences Induction Ceremony, The Perils of Direct Democracy: The California Ex-

perience (Oct. 10, 2009), *available at* http://www.courts.ca.gov/7884.htm (last visited Feb. 7, 2013) (condemning effects of initiative process on state government and predicting that without reform "we shall continue on a course of dysfunctional state government, characterized by a lack of accountability on the part of our officeholders as well as the voting public."); Joe Mathews & Mark Paul, *California Crackup: How Reform Broke the Golden State and How We Can Fix It*, 7 (2010) ("The worst thing about California's fix is that, under the state's current system of government, [fundamental] problems can't be fixed."); *When Too Much Democracy Threatens Freedom*, The Economist, Dec. 17, 2009, http://www.economist.com/blogs/democracyinamerica/2009/12/when_too_much_democracy_threat ("voters infringe upon and impair representative democracy").

The problems that the nation's founders understood with respect to the impact of direct democracy on the rights of minorities have come to pass, as the initiative process has repeatedly been used to undermine the rights of historically disadvantaged minority groups. Ballot initiatives are all too frequently employed by political majorities precisely to limit the civil rights of unpopular minorities, and states with ballot initiatives generally see worse anti-minority outcomes. *See* Barbara Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 253-54 (1997) (Analysis of civil rights-related ballot initiatives from 1959 through 1993 found that 92% of such initiatives sought to limit minority rights, and passed at a rate of 78%, whereas only 8% of initiatives sought to expand minority rights, and

passed only 17% of the time); *id.* at 255-56 (71% passage rate of initiatives to block desegregation programs or busing; 80% passage rate of initiatives to limit the scope of fair housing and accommodation laws); *id.* at 260 (100% passage rate for English-only initiatives); *see also* Lewis, *supra*. (Comparative study of 600 anti-minority policy proposals from 1995 to 2004, including both legislative proposals and ballot initiatives, found that "[a]nti-minority proposals in direct democracy states pass at more than double the rate of anti-minority proposals that are considered in states without direct democracy.").

The popular ballot initiative has for decades been a particularly potent weapon for majoritarian action against homosexuals. Analyzing the period 1959 to 1996, Professor Barbara Gamble found that "Gay men and lesbians have seen their civil rights put to a popular vote more often than any other group." Gamble, *supra*, at 257. "Of the 43 gay rights initiatives that have reached the ballot, 88% have sought to restrict the rights of gay men and lesbians by repealing existing gay rights laws or forbidding legislatures to pass new ones. Voters approved 79% of these restrictive measures." *Id.* at 257-58. Even today, when lesbians and gay men have made remarkable strides toward public acceptance of their relationships, the ballot initiative remains an impediment to democratic progress. *See, e.g.*, J.A. at 751 (trial testimony of Professor Gary Segura: "There is no group in American society who has been targeted by ballot initiatives more than gays and lesbians."); *id.* at 754 ("The obvious effect is that legislative gains that are [] hard earned get overturned and in some instances gays and lesbians find themselves,

even in the events where they win, contesting the same issues over and over again and spending a lot of resources on this ….[E]ven if it were the case that every elected official in California decided that Prop 8 were a bad idea, there is, frankly, nothing they can do to change it unless there is a vote of the people.").

C. This Court Has Repeatedly Held That Eliminating The Right Of A Historically Disadvantaged Minority Group To Pursue Simple Equality Concerning Important Rights Through Their Elected Officials Violates The Fourteenth Amendment.

This Court has repeatedly struck down state initiatives that eliminate rights of historically disadvantaged minority groups and impose structural barriers to the restoration of those rights through the normal political process. Initiatives that have removed the ability of minority groups to address housing, busing and antidiscrimination laws in a legislative forum have been found repeatedly by this Court to violate the Fourteenth Amendment. This Court's decisions protecting minorities from political process abuses with respect to important rights include the following:

1. *Reitman v. Mulkey*, 387 U.S. 369 (1967)

Proposition 14, a 1963 initiative amendment passed in reaction to California's 1959 Unruh Act and other fair housing legislation, amended the California Constitution to provide in prior Article I, § 26:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses.

On a challenge by victims of housing discrimination, the California Supreme Court held that the initiative violated federal equal protection guarantees. 387 U.S. at 373. This Court upheld the California Supreme Court's decision, reasoning that the initiative not only limited the ability of the government to adopt open housing laws, but also kept a minority from using the political process to combat discrimination:

> Unruh and Rumford were thereby *pro tanto* repealed. But the section struck more deeply and more widely. Private discriminations in housing were not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive or judicial regulation at any level of the state government.

Id. at 377.

Justice Douglas, concurring, quoted James Madison:

> And to those who say that Proposition 14 represents the will of the people of California, one can only reply: 'Wherever the real power in a Government lies, there is the danger of oppression. . . . not from acts of government contrary to the sense of its constituents, but from acts in which the government is the mere instrument of the major number of constituents.'

Id. at 387 (Douglas, J., concurring) (quoting 5 Writings of James Madison 272 (Hunt ed. 1904) (Oct. 17, 1799 letter to Thomas Jefferson).

2. *Hunter v. Erickson,* 393 U.S. 385 (1969)

Two years later this Court again found that an initiative that barred a group from redress using the legislative process was an unconstitutional subrogation of the political process. Voters in Akron, Ohio, by petition, amended the City Charter to prevent the City from implementing any ordinance addressing racial, religious, or ancestral discrimination in housing without prior approval of the majority of voters by referendum. 393 U.S. at 387. The Supreme Court of Ohio held that the amendment was not repugnant to the Equal Protection clause and affirmed dismissal of a housing discrimination lawsuit. *Id.* at 388.

This Court reversed, holding that the amendment constituted invidious discrimination and denied equal protection of the laws. Unlike *Reitman*, the amendment in *Hunter* placed no substantive limitation on future anti-discrimination legislation; however, it did explicitly employ a suspect classification in delineating what laws would be subject to majori-

ty approval. *Id.* at 389. And while the amendment on its face applied to everyone and treated everyone equally in requiring referendums, its impact would clearly fall on the minority. *Id.* at 391. Any adverse impact the amendment might have on the majority in enacting new laws, the Court reasoned, would be limited: "a referendum might be bothersome [to the majority] but no more than that." *Id.* On the other hand, the amendment "places special burden on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others." *Id.* The *Hunter* Court rejected democratic justification of the procedure:

> [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote

> or give any group a smaller representation than another of comparable size.

Id. at 392-93 (internal citations omitted).

3. *Washington v. Seattle School District No. 1,* 458 U.S. 457 (1982)

This Court also closely scrutinized and found wanting an initiative relating to school busing programs that placed unique burdens on historically disadvantaged minorities. In Washington, voters passed an initiative to restrict busing. The initiative provided that "no school board…shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." 458 U.S. at 462. Although the initiative did not amend the state constitution, an initiative statute in Washington may not be repealed for at least two years and may be amended in that time only by a two-thirds vote of each house of the legislature. *Id.* at 463.[6]

On a federal court challenge by the District, the Supreme Court affirmed the Ninth Circuit and the district court decisions invalidating the initiative statute. Equal protection "guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute … that given racial or ethnic groups may not be denied the fran-

[6] Washington's initiative system is thus less extreme than California's in which initiative statutes can *never* be amended by a simple vote of the Legislature, including by a supermajority, unless the text of the measure expressly so provides. Cal. Const. Art. II, § 10(c).

chise or precluded from entering into the political process in a reliable and meaningful manner." *Id.* at 467. The Equal Protection Clause "also reaches a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467 (citations and quotation marks omitted).

The Court said of *Hunter*: "The evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests." *Id.* at 475 n.17.

The Court was careful to distinguish political process violations like those found in *Washington* and *Hunter* from "the simple repeal or modification of desegregation or antidiscrimination laws." *Id.* at 483. "Initiative 350, however, works something more than the 'mere repeal' of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decision making authority over the question at a new and remote level of government." *Id.* at 483.

4. *Romer v. Evans,* 517 U.S. 620 (1996)

Although *Hunter*, *Reitman*, and *Washington* addressed racial segregation, this Court addressed similar political process concerns with respect to gay men and lesbians in *Romer v. Evans*. *Romer* was decided before *Lawrence v. Texas* and outside the

context of a state that applied heightened scrutiny to state laws that discriminate based on sexual orientation, as California does today. Despite this, the Court recognized the manner in which a state initiative process can be used to deprive a disadvantaged minority group as its members seek access to protections through their representatives. Following the adoption of anti-discrimination ordinances in the municipalities of Aspen, Boulder, and Denver, Colorado voters adopted by statewide referendum "Amendment 2" to the Colorado Constitution:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

517 U.S. at 624. On an appeal of an injunction, the Supreme Court of Colorado held that Amendment 2 was subject to strict scrutiny because it infringed the fundamental right of gays and lesbians to participate in the political process, following, among other precedents, *Hunter*, *Reitman* and *Washington*. *Id.* at 625.

Justice Kennedy, writing for the Court "affirm[ed] the judgment but on a rationale different from that adopted by the State Supreme Court." *Id.* at 626. Nonetheless, process arguments are central to the fatal-in-fact rational basis review applied by the Court: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.* at 633.

The dissent in *Romer* similarly recognized the majority's ruling as grounded in concerns about equal access to the political process:

> The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others.

Id. at 639 (Scalia, J., dissenting).

D. Proposition 8 Constitutes A Similar Intrusion On The Ability Of An Historically Disadvantaged Minority Group To Influence The Political Process With Respect To An Important Right And Is Inherently Suspect

Like the initiative measures in these prior decisions, Proposition 8 places obstacles in the path of political participation uniquely aimed at a minority group based on a suspect classification. Other groups can seek equal protection through representative government, but the right of equal protec-

tion or any representative path to achieving it for same sex couples with respect to equal marriage rights is denied. Other groups may seek to alter the Family Code to respond to evolving understandings of familial commitments. But same sex couples, alone, are singled out and restricted in their ability to do the same. And when gay people do organize politically and unite with fellow citizens to elect through democratic processes executive and law enforcement officials who desire to protect them, these efforts too are nullified. Consequently, although recent events indicate that gay and lesbian people have made significant strides towards equality under law, they are hindered from further progress because of the extent to which discrimination has been enshrined in state law via initiative constitutional amendments, which put marriage equality—and in some states the recognition of same-sex relationships generally—outside the reach of the ordinary political process. Without action by the Court, securing basic rights through the normal political process will be exceedingly difficult.

The burden of being forced to channel political change only through the initiative process is enormous, especially for historically disadvantaged minority groups. Opponents of Proposition 8 spent an estimated $43 million dollars in an effort to defeat the initiative, Jesse McKinley, *Backers of Gay Marriage Rethink California Push*, N.Y. Times, July 26, 2009, at A11, and a new initiative would likely cost at least as much. *See* Ctr. for Governmental Studies, Democracy by Initiative: Shaping California's Fourth Branch of Government 14 (2d ed. 2008) ("Effective campaigns for or against ballot measures can easily

cost tens of millions of dollars, and some have reached $100 million on one side alone.").

The political process is also distorted because the value of deliberative decision making is wholly absent from the initiative process. Cal. Const. Art. II, § 8. Initiatives are not subject to debate in the Legislature. *Id.* Once drafted, there is no process for amendment before they are put to on the ballot. *Id.* There is no power of Gubernatorial veto. *Id.* Art. II, § 10. There is no bicameralism, which California otherwise embraces. *Id.* Art. IV, § 1. Thus minority rights on important issues can be placed into a wholly unique system in which rational examination of policy is unlikely to occur and in which there is no opportunity for "deliberation," "back-and-forth," and "compromise," contrary to Petitioners' argument. Pet'rs Br. at 56-57.

And if this result is acceptable with respect to the right of same-sex couples to marry, then why not also the right of non-procreative couples over the age of 65 to marry as well? Why not access of the children of gay men and lesbians or immigrants to education or to inherit property? Can the majority at its pleasure cast such historically disadvantaged minority groups into a political status in which they cannot pursue their basic political interests with respect to matters regulated by the states through their representatives? And does the Fourteenth Amendment afford no relief when they do?

Restricting the political avenues for pursuing equal marriage rights (or any other important right) based upon a classification that the state itself has recognized as suspect is contrary to principles of equal protection and infringes not only on the right

itself but on the right to vote, to representative democracy, and to political participation itself. *See* Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 Mich. St. L. Rev. 293, 305 (of the Court's decisions in *Hunter*, *Washington*, and *Romer*: "I think what these cases stand for is, if an initiative keeps a minority from using the political process in the way that all others can use the political process, that inherently denies equal protection."). Such an intrusion should be subject to heightened scrutiny. Otherwise the fears our founders had about direct democracy will be realized and fundamental values of our representative institutions will be compromised.

Under any level of scrutiny, Proposition 8's complete elimination of access to representative democracy in connection with efforts to achieve equal marriage rights for same-sex couples fails. Proponents' claimed desire to foster compromise and deliberation, Pet'rs Br. at 56-57, is wholly inconsistent with placing equal marriage rights into a political status that eliminates the power of the very institutions designed to promote these values. There is no fit between any legitimate or important state interest and nullification of the powers of the Legislature, Governor, and Attorney General to speak for the current California electorate. Nor is there any fit between any legitimate or important state interest and the elimination of the rights of gay men and lesbians to have access to representative democratic institutions to pursue marriage equality or any right central to human dignity. Despite the claims of the Proponents that they desire to promote democratic institutions, the effect of Proposition 8 is anti-democratic because none of State's democratically elected offi-

cials can take effective action to promote marriage equality. The imposition of such a political barrier on a historically disadvantaged group, "undertaken for its own sake," is precisely the type of law that the Fourteenth Amendment guards against. *Romer*, 517 U.S. at 635.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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February 27, 2013