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* COLUMBIA LAW SCHOOL SEXUALITY & GENDER LAW CLINIC AND THE SOCIETY OF AMERICAN LAW TEACHERS IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

The Columbia Law School Sexuality & Gender Law Clinic (the Clinic), founded in 2006 as the first such clinical law program in the United States, has extensive expertise in all aspects of litigation related to marriage for same-sex couples, including the Article III standing requirements at issue in this case. While the Clinic supports the equal right to marry for same-sex couples, its interest here is in addressing the preliminary yet fundamental question whether, under Article III, a non-governmental actor can assert the government's standing in a federal court, whatever its capacity to do so in state court. In particular, the Clinic's interest is in highlighting the difficulties that would result from expanding Article III standing to private actors who lack authority to enforce the underlying law at issue. The Clinic is also interested in highlighting difficulties for federal courts if the same private actors are authorized to take up a state government's Article III standing while advancing "government interests" that are antithetical to the government's policies, as Proposition 8's

[1] Pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court, all parties have consented to the filing of this *amicus curiae* brief. Letters of consent to the filing of all *amicus curiae* briefs were filed by each party with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

sponsors do here regarding the relationship between parenting and sexual orientation.

The Society of American Law Teachers ("SALT") is an association of law faculty, administrators, and legal education professionals from over 170 law schools. Incorporated in 1974, SALT was founded by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to societal concerns. SALT has worked within the legal academy to develop a jurisprudence to end discrimination of historically underrepresented groups, including discrimination based on sexual orientation and has appeared as *amicus curiae* in federal and state courts to further these claims to equal access to education, employment, and to full participation in civic life.

SUMMARY OF ARGUMENT

Unless this Court is prepared to dramatically expand the set of injuries that give rise to an Article III-qualified "direct stake," the petition in this case must be dismissed for lack of standing for two reasons. First, a government's Article III standing to defend its laws derives from its interest in enforcing those laws. While the state can confer its interest on anyone it chooses, Article III cannot recognize that delegation for purposes of federal court standing. Instead, like donors or citizens who supported Proposition 8, the sponsors are simply private actors who

lack authority to defend or enforce the California law in the courts of the United States, whatever their status in the state courts. If this Court were to give governments, such as California, discretion to delink enforcement authority from standing and to confer their "interest" on private actors, Article III's requirement that litigants have a direct and particularized interest before invoking federal jurisdiction, which generally bars citizen and taxpayer suits, would become nothing more than a nominal obstacle, easily sidestepped if states are so inclined.

Second, the linchpin of the sponsors' standing claim is that California officials are not defending Proposition 8 as the sponsors would like. Yet neither this thwarted preference nor their devotion of time and resources toward passage of the marriage restriction generates for the sponsors the concrete and individualized injury that Article III has long been understood to require. (This would be true also of donors who gave monetary support and ordinary citizens who devoted their time.) Instead, they are simply citizens whose complaint is that their state's officials, for one reason or another, are not defending a provision of state law. Without a significant doctrinal shift, the sponsors' passion for Proposition 8 cannot carry them across the Article III threshold.

Indeed, this Court has already flagged the serious consequences for our government's structure should initiative promoters be permitted to invoke federal jurisdiction when the government declines to defend a law consistently with their wishes. Rejecting

Article III standing for a passionate citizen and taxpayer who sought to enforce a constitutional provision against the federal government, the Court wrote that "[a]ny other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *United States v. Richardson*, 418 U.S. 166, 179 (1974); *see also Fairchild v. Hughes*, 258 U.S. 126 (1922). To allow private actors to invoke federal jurisdiction for purposes of defending a state law when the state's chief law enforcement officer has concluded that the challenged law is unconstitutional, as Proposition 8's sponsors seek to do here, would be a similar – if not more severe – breach of both the Framers' understanding of the role of the federal courts and long-settled Article III standing doctrine.

ARGUMENT

I. Proposition 8's Sponsors Lack the Government's Concrete and Particularized Interest in Law Enforcement so They Cannot Properly Claim the Government's Article III Standing.

Longstanding doctrine establishes that governments derive their Article III standing from their interest in preserving their law enforcement power, and that they cannot confer that standing on private

actors, such as Proposition 8's sponsors, who have no authority to enforce the law at issue.

A. Government Standing Derives from the Government's Authority to Enforce its Laws.

When a government invokes federal jurisdiction to defend one of its laws, its stake is clear. As this Court explained in *Maine v. Taylor*, 477 U.S. 131, 137 (1986), "a State clearly has a legitimate interest in the continued enforceability of its own statutes." Indeed, *Taylor* offers one of few explanations for government standing in the case law, perhaps because the source of government standing is so obvious.

In *Taylor*, the federal government had brought a prosecution that led the First Circuit to invalidate a Maine statute, but then decided not to pursue an appeal. *Id*. at 136 n.5. When Maine sought to maintain the case and defend its law before this Court, the Court had little difficulty finding jurisdiction based on Maine's enforcement interests. *Id*. at 136-37.

The Court used similar reasoning to explain why a private actor could not stand in for a state to defend a challenged law. "Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' . . . in defending the standards embodied in that code" that Article III standing jurisprudence requires. *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (citation omitted); *cf. Alfred L. Snapp & Son, Inc. v.*

Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982) (explaining that enforcement of a civil and criminal code is an "easily identified" sovereign interest).

Federal statutory law reinforces this link between a government's law enforcement interests and its stake in federal litigation, authorizing states to intervene in federal court whenever "the constitutionality of any statute of that State affecting the public interest is drawn in question." 28 U.S.C. § 2403(b) (2006). Non-state actors, by contrast, do not have any similar statutory authorization.

B. The State's Enforcement Interest Cannot Properly Be Transferred to, or Claimed by, Private Initiative Promoters.

Although the California Supreme Court authorized Proposition 8's sponsors "'to assert the state's interest in the initiative's validity'" because "'the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline[d] to do so,'" *Perry v. Brown*, 671 F.3d 1052, 1072 (9th Cir. 2012) (alteration added) (quoting *Perry v. Brown*, 265 P.3d 1002, 1033 (Cal. 2011)), that determination, presumably sufficient for state court litigation, is not sufficient for Article III purposes. "Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's . . . standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *cf. City of*

Los Angeles v. Lyons, 461 U.S. 95, 113 (1983) ("[T]he state courts need not impose the same standing . . . requirements that govern federal-court proceedings.").

Moreover, unlike those public officials cited by the California court, who are charged with enforcing the laws that they have standing to defend, Proposition 8's sponsors do not, and cannot, enforce the state's marriage laws that are governed by "their" initiative. Nor can they step into the role of the state by assignment, by analogy to the legislature, or otherwise.

First, the state cannot assign its enforcement interest to Proposition 8's sponsors as it might assign its interest in a qui tam case. While "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor" is well settled, *see Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000), there is an important difference between the financial interest underlying a qui tam fraud prosecution and the interest asserted here. Financial interests are among the most traditionally assignable. *See, e.g.*, *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 286, 289 (2008) (describing assignment of collection right as conferring a "property right"). By contrast, the state's interest in validating marriage, which underlies Proposition 8, is not. Proposition 8's sponsors, like other private citizens in California, cannot grant official sanction to a marriage. California also has not taken any steps to move away from

that tradition and assign its marriage-validation power to private actors in the state.

Further, even assuming *arguendo* that a state assigned its initiative-defense interest to private actors[2] while not assigning its authority to enforce the underlying law affected by the initiative, that assignment could not overcome the sponsors' "direct stake" deficit. As this Court has explained, Article III's standing requirement cannot be erased "by

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[2] The initiative law does not actually attempt to assign the state's initiative-defense interest to sponsors. Instead, the state's initiative law specifies procedural steps, such as petition approval and signature gathering, that sponsors must take to qualify a measure for a statewide ballot and provides for sponsor control over arguments favoring the measure in the official voter guide. *See Perry*, 265 P.3d at 1015-18 (reviewing California's constitutional and statutory provisions that govern the initiative process). These rules give sponsors a procedurally focused interest only; if the state deviated from these provisions, the sponsors might suffer, at most, a distinct and palpable injury related to their petition efforts. *Cf. Coleman v. Miller*, 307 U.S. 433, 445-46 (1939) (finding standing for legislators where lawmaking rules were allegedly disregarded in ways that nullified their votes).

Once an initiative is presented and passed, however, the state's initiative law does not grant sponsors any further interest. To the extent the California Supreme Court has concluded otherwise, its determination lacks "fair or substantial support" in state law to warrant this Court's deference. *Cf. Howlett v. Rose*, 496 U.S. 356, 366 n.14 (1990) ("[W]e have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds 'fair or substantial support' in state law.").

statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

The sponsors also cannot overcome their enforcement-authority deficit by claiming to act as the state's "agents," rather than as simple citizens. For one, they filed their certiorari petition on their own behalf, not on behalf of the state. None of the government defendants appealed the district court's invalidation of Proposition 8, filed a petition with this Court, or indicated that their decision not to defend the measure was contingent on the sponsors pursuing this appeal in their stead. In addition, the sponsors' position in this litigation is adverse to that of the California government, further undermining any agency-based theory.[3]

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[3] The state's chief legal officer, the Attorney General, has agreed with the plaintiffs that Proposition 8's exclusion of same-sex couples from marriage is unconstitutional. *See* Answer of Attorney General Edmund G. Brown Jr. at 4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292) (admitting that "in his official capacity he is the chief law officer of the state; that it is his duty to see that the laws of the state are uniformly and adequately enforced") *and* at 2 ("Taking from same-sex couples the right to civil marriage that they had previously possessed under California's Constitution cannot be squared with guarantees of the Fourteenth Amendment."). Acknowledging the Attorney General as the state's chief legal officer, the other state defendants, including the governor, did not take a position on the measure's merits. *See* The Administration's Answer to Complaint for Declaratory, Injunctive, or

(Continued on following page)

Indeed, this case can proceed only if California can bifurcate the enforcement interest that is the basis for its Article III standing – by not pursuing a defense of Proposition 8, on the one hand, and by enabling the sponsors to pursue the measure's defense, on the other. *See* Suzanne B. Goldberg, *Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest*, 161 U. Pa. L. Rev. Online 164, 169-70 (2013), http://www.pennlawreview.com/essays/2-2013/Goldberg.pdf. Yet even if this type of bifurcation is permissible, the "direct stake" in defending Proposition 8 has been handed off to ordinary citizens. Moreover, the handoff is little more than an empty shell, given the state's chief legal officer's position against the measure. Put simply, there is no pending conflict between the plaintiffs and the government defendants about the constitutionality of the challenged amendment; only by contorting Article III can the sponsors successfully claim to act on the state's behalf and engineer the instant case for review.

Perhaps most fundamentally, the sponsors cannot identify an established federal interest in federal court involvement on the issue of whether state

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Other Relief at 2, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292); *see also Perry*, 265 P.3d at 1008 ("In their answers, the named defendants other than the Attorney General refused to take a position on the merits of plaintiffs' constitutional challenge and declined to defend the validity of Proposition 8.").

executive officials are defending a state law. None of the existing precedents can be extended so far.

A claim that the sponsors are akin to elected legislators working on their constituents' behalf is also unavailing for Article III purposes because, even assuming the analogy *arguendo*, individual lawmakers do not have a government interest sufficient for standing. Instead, as this Court made clear in *Raines*, lawmakers' claims that an enactment unconstitutionally diminished their political power were "wholly abstract and widely dispersed" and did not give rise to "a sufficient 'personal stake' . . . [or] a sufficiently concrete injury to have . . . standing." *Raines*, 521 U.S. at 829-30; *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-44 (1986) (holding that a school board member who had "no personal stake in the outcome of the litigation" lacked Article III standing to represent the Board as a whole).

Even to the extent a full lawmaking body is understood to have an Article III interest in defending its enactments, *see INS v. Chadha*, 462 U.S. 919, 940 (1983) (recognizing Congress's standing); *Karcher v. May*, 484 U.S. 72, 77-78 (1987) (recognizing a state legislature's standing), Proposition 8's sponsors, any more than its monetary supporters, cannot successfully analogize themselves to the legislature and gain government standing in that way. First, the analogy is factually weak. Proposition 8's sponsors did not enact Proposition 8; the voters did. Consequently, Proposition 8's sponsors are more like individual lawmakers who, as just discussed, lack an Article III

stake in a law's enforcement. Second, even if sponsors are treated as the voters' representatives, voters' interest in having the state defend or enforce a law in a particular way has long been deemed too generalized to support Article III standing. *See infra* Point II.

Setting aside claims that the sponsors are analogous to, or agents of, the government, settled doctrine also makes clear that Proposition 8's sponsors cannot overcome their lack of an individualized stake in the outcome simply by claiming to act on the government's behalf. They are, after all, no more than citizens, even with their activities and interest related to the measure. In *Diamond*, 476 U.S. at 65, for example, the Court rejected a doctor's proposed intervention to defend on appeal a state abortion restriction on the ground that it was "simply an effort to compel the State to enact a code in accord with [the doctor's] interests." This "expression of a desire that [a law] as written be obeyed" is one available to the sovereign, which has a "direct stake" in defending its laws, as noted above. *Id*. at 66. But an Article III interest in the rule of law is not one similarly available to non-governmental actors with no individualized injury. *Id*.

Finally, as a factual matter, Proposition 8's sponsors did not identify themselves as advancing the state's interests when they moved to intervene in the district court. Instead, they argued that their significant protectable interest, necessary for Federal Rule of Civil Procedure 24 intervention, derived from their

"unique legal statuses" associated with their sponsorship role and the fact that they "ha[d] indefatigably labored in support of Proposition 8." Proposed Intervenors' Notice of Motion and Motion to Intervene, and Memorandum of Points and Authorities in Support of Motion to Intervene at 8-9, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292). Again, neither of these interests comes close to satisfying Article III's standing requirements.

II. Proposition 8's Sponsors' Interest in Having "Their" Measure Defended Consistently with Their Preferences Is a Generalized, Non-Cognizable Injury that Does Not Give Rise to Article III Standing.

Proposition 8's sponsors also cannot claim Article III standing by virtue of their hard work as sponsors or their passionate interest in excluding same-sex couples from marriage, or, more generally, their status as citizens and taxpayers. It is familiar doctrine that taxpayers and citizen-activists, even enthusiastic ones, do not have more of an interest than other members of the general public in having governments defend or enforce the law consistently with their views. *Cf. Arizonans for Official English v. Arizona,* 520 U.S. 43, 45 (1997) (stating that "this Court has never identified initiative proponents as Article-III-qualified defenders"). As this Court has written, "[a]n interest shared generally with the

public at large in the proper application of the Constitution and laws will not do." *Id*. at 64 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-76 (1992)).

A. Initiative Sponsors Do Not Gain Article III Standing by Virtue of Their Time and Resource Investment in Promoting a Measure.

This Court squarely faced the question whether litigants' strong commitment to an issue could give rise to standing over 40 years ago, in *Sierra Club v. Morton*, 405 U.S. 727 (1972). There, addressing an environmental protection suit brought under the Administrative Procedure Act, the Court explained that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved.'" *Id*. at 739.

Since then, this Court has reiterated the point in other contexts as well, making clear that while an individual's or organization's interests might conflict sharply with the government or other adverse party, "motivation is not a substitute for the actual injury needed by the courts." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226 (1974); *see also id*. at 225-26 ("[T]he essence of standing 'is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct.'" (alteration

in original) (quoting *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435 (1952))); *Richardson*, 418 U.S. at 177 ("While we can hardly dispute that this respondent has a genuine interest . . . that . . . may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute.").

In *Asarco Inc. v. Kadish*, 490 U.S. 605, 616 (1989), this Court similarly considered a teachers association's standing to invoke federal jurisdiction regarding a state law. Finding that although members might have a particular interest in the state's educational system, the Court found that interest did not distinguish them, for standing purposes, from others (including students, parents, and other citizens) who might also be interested but would not have standing. *Id*. As the Court wrote, "claims of injury that are purely abstract, even if they might be understood to lead to 'the psychological consequence presumably produced by observation of conduct with which one disagrees,' do not provide the kind of particular, direct, and concrete injury" required for standing in federal court. *Id*. (citation omitted).

In short, the devotion of energy and resources, while surely important to the political process, is not sufficient to confer Article III standing. At the end of the day, an initiative "sponsor," like contributors of money or time, is no more than a citizen. As this Court explained regarding the Sierra Club, which surely has at least as much of a claim to environmental

interests as Proposition 8's promoters do to their view of marriage, "if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization [e.g., initiative campaign donors], however small or short-lived." *Sierra Club*, 405 U.S. at 739. It continued: "And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so." *Id*. at 739-40.

B. Citizens and Taxpayers Also Do Not Have the "Individualized Stake" that Article III Requires.

A similarly long line of cases holds that Proposition 8's sponsors' strong interest as state taxpayers and citizens in having California defend Proposition 8 consistently with their preferences falls short of the individualized stake that Article III requires. Nearly a century ago, for example, the Court rejected a taxpayer and citizen-activist's challenge to the Nineteenth Amendment, holding that his concerns about the diminished effectiveness of the votes of "free citizens" and the rise in election expenses were insufficiently particularized to generate Article III standing. Citizens and taxpayers, the Court explained, cannot assert an interest that amounts to no more than a claim of official maladministration of law. *Fairchild*, 258 U.S. at 128-29. Decades later, the

Court reinforced the point in rejecting taxpayer standing to challenge a state law, explaining that the party invoking federal jurisdiction "'must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.'" *Doremus*, 342 U.S. at 434 (alterations added) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

Likewise, responding to a citizen's claim that he could not "properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office" without certain information regarding the Central Intelligence Agency's expenditures, the Court reiterated that a claim to have the law enforced in a particular way "is surely . . . a generalized grievance . . . since the impact on him is plainly undifferentiated and 'common to all members of the public.'" *Richardson*, 418 U.S. at 176-77 (quoting *Ex parte Lévitt*, 302 U.S. 633, 634 (1937) (per curiam)).

In this way, the sponsors contrast sharply with the plaintiffs in this case who, as a result of Proposition 8, suffer the individualized injury of being denied marriage by the state. Unlike those same-sex couples, the sponsors do not allege that Proposition 8 impedes their ability to marry or otherwise causes them any sort of distinct or individualized injury.

C. Article III Standing for Private Initiative Sponsors Would Undermine the Framers' Allocation of Dispute Resolution Power and Impose New Burdens on Federal Courts to Gauge the Plausibility of Privately Proffered "Government" Interests.

Although Proposition 8's sponsors may be frustrated by not being able to take their preference to have "their" initiative defended to this Court, disregarding time-honored Article III constraints for voter initiatives or other popular measures would have dramatic consequences not only for standing jurisprudence but also for fundamental commitments concerning the role of Article III courts in the governmental structure.

As this Court explained in the context of a suit against the federal government, allowing private actors to invoke federal jurisdiction to pursue their vision of the rule of law would undermine the Framers' political vision for the United States, with the allocation of some disputes to the judiciary and others to the political process.

> The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress

> for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.

Richardson, 418 U.S. at 179.

Although the states are not similarly bound by Article III in structuring their interbranch relationships, *Richardson*'s insights clarify the role of Article III courts in disputes such as the instant one. *In essence, this case is before this Court only because a group of concerned citizens disagrees with the government defendants' decision not to defend a provision of state law, here Proposition 8*. The result, if standing is permitted, will be that a state's constituents can engage the federal courts to resolve domestic policy disputes without establishing any independent federal interest in the dispute or without claiming any of the individualized injuries that traditionally have been required for Article III standing.

As the Court also explained in *Richardson*, even if the political process is "[s]low, cumbersome, and unresponsive," that process – and not the federal courts – is the venue our system provides when private actors are irritated, but not injured, by their government's conduct. *Id*. Indeed, because Proposition 8's sponsors have full access to California's courts, they, as disputants with the state rather than the federal government, have multiple forums in which to pursue their grievance. The one thing they

cannot do is engage the federal courts to resolve their state-law-centered dispute.

Further, even if from the standpoint of a robust litigation process, it were desirable to allow those who have invested in an initiative to present the measure's defense, significant additional costs would arise from shifting the government's Article III interest to private actors. Private parties, no matter how engaged in the political process, are not subject to any of the accountability-oriented limitations that constrain government actors when advancing government interests in litigation. There are no transparency requirements, few ethical limitations, and no obligations to carry forward the public interest rather than their own.

As a result, private parties are free to argue whatever they wish in the guise of government interests when they pursue appeals under the government's mantle – including rationales that plainly contradict state law, as Proposition 8's sponsors have done in this case. More specifically, Proposition 8's sponsors have maintained, for example, "that children are better off when raised by two biological parents and that society can increase the likelihood of that family structure by allowing only potential biological parents – one man and one woman – to marry." *Perry*, 671 F.3d 1052, 1086 (9th Cir. 2012). Yet California, for many years, has expressly rejected a preference for heterosexual parents over gay and lesbian parents both legislatively and in court. *See id.* at 1087 ("California's 'current policies and conduct . . .

recognize that gay individuals are fully capable of . . . responsibly caring for and raising children.'" (alterations in original) (quoting *In re Marriage Cases*, 183 P.3d 384, 428 (Cal. 2008))). Indeed, Proposition 8's sponsors could have argued that gay people are mentally ill, child molesters, and otherwise dangerous to society, had they chosen to do so, notwithstanding that California law directly contradicts those positions.

Should the initiative sponsors be accorded Article III standing to assert the government's interests, federal courts will have a new, additional burden of sorting out which proffered interests might plausibly be attributed to the state and which, because of state statutes and case law, would be entirely implausible and contradictory, and possibly repugnant as well. *Cf. Faretta v. California*, 422 U.S. 806, 821 (1975) (explaining, in the context of a criminal defendant who was unconstitutionally denied the right to represent himself, that "[a]n unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction"); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that New Hampshire could not compel motorists to display a license plate phrase that they found abhorrent).

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court dismiss the petition because the petitioners lack Article III standing.

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Respectfully submitted,

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