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 *AMICUS CURIAE* EQUALITY CALIFORNIA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT. .2

ARGUMENT. 4

I. UNDER TRADITIONAL PRINCIPLES OF ARTICLE III STANDING, PETITIONERS CANNOT MAINTAIN THIS APPEAL. 4

A. Petitioners Have Not Suffered a Distinct, Particularized Injury 4

B. Petitioners Cannot Maintain This Suit as Representatives of California Residents, as No California Resident Stands to Suffer a Legally Cognizable Injury if Proposition 8 Is Invalidated. 7

II. *KARCHER V. MAY* DOES NOT CONFER LEGISLATOR STANDING ON PETITIONERS 10

III. THE CALIFORNIA SUPREME COURT'S DECISION DOES NOT CONFER ARTICLE III STANDING ON PETITIONERS. 13

Table of Contents

Page

A. This Court Has an Independent Obligation to Determine Whether Petitioners Have Standing under Article III 13

B. The California Supreme Court, While Entitled to Deference in Ruling on Issues of State Law, Did Not Recognize in Petitioners Any Type of Interest Sufficient to Demonstrate Standing in Federal Court. 17

1. To the extent Petitioners' authority is rooted in a delegation of power by the State of California, Petitioners lack the status necessary to stand in the place of the State Sovereign in federal court 19

2. To the extent Petitioners' authority is rooted in the interest of voters who voted for Proposition 8, it is based on nothing more than a "desire to vindicate value interests," which this Court has repeatedly rejected as a ground for federal standing 25

Table of Contents

Page

3. To the extent Petitioners' authority is based on their personal interests as the parties who put forth and worked to pass Proposition 8, no such interest was recognized by the California Supreme Court or the Ninth Circuit, and no such interest would be sufficient in any event 26

IV. ALTHOUGH PETITIONERS LACK STANDING TO APPEAL, THE DISTRICT COURT'S FINDINGS AND ORDERS ARE CONSTITUTIONALLY SOUND 29

CONCLUSION 31

TABLE OF CITED AUTHORITIES

Page

CASES

Alden v. Maine,
527 U.S. 706 (1999) 20

American Federation of Labor v. Eu,
36 Cal.3d 687 (1984) 6

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) . . . . *passim*

Brown v. Bd. of Educ. of Topeka,
394 U.S. 294 (1955) 30

Clapper v. Amnesty Int'l USA,
568 U.S. __ (2013) 4, 8

Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) 17

Diamond v. Charles,
476 U.S. 54 (1986) . . . . *passim*

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 16

INS v. Chadha,
462 U.S. 919 (1983) 29

Karcher v. May,
484 U.S. 72 (1987) . . . . *passim*

Page

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 2, 5, 14, 20

Maine v. Taylor,
477 U.S. 131 (1986) 5, 17, 20

Massachusetts v. EPA,
549 U.S. 497 (2007) 20

New York State Club Ass'n, Inc. v. City of New York,
487 U.S. 1 (1988) 15

Nogues v. Douglass,
7 Cal. 65 (1857). 6

Perry v. Brown,
671 F.3d 1052 (9th Cir. 2012) . . . . *passim*

Perry v. Brown,
265 P.3d 1002 (2011) . . . . *passim*

Perry v. Schwarzenegger,
704 F.Supp.2d 921 (N.D. Cal. 2010). 9

Richardson v. Ramirez,
418 U.S. 24 (1974) 12

Romer v. Evans,
517 U.S. 620 (1996) 28

Sierra Club v. Morton,
405 U.S. 727 (1972) 2, 4, 7, 21

Page

Simon v. Eastern Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 7

Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers,
357 U.S. 197 (1958) 8

Strauss v. Horton,
46 Cal.4th 364 (2009). 7, 8

United States v. Hays,
515 U.S. 737 (1995) 15

United States v. SCRAP,
412 U.S. 669 (1973) 5

Warth v. Seldin,
422 U.S. 490 (1975) 30

Widders v. Furchtenicht,
167 Cal.App.4th 769 (2008). 6

Ysura v. Pocatello Educ. Ass'n,
555 U.S. 353 (2009) 20

CONSTITUTION, STATUTES AND RULES

U.S. Const. amend. I 9

U.S. Const. amend XIV 30

Page

U.S. Const., art. III . . . . *passim*

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

Cal. Const., art. III, § 6 23

Cal. Gov't Code § 12511 21

OTHER AUTHORITIES

Anne Abramowitz, *A Remedy for Every Right: What Federal Courts Can Learn from California's Taxpayer Standing*, 98 Cal. L. Rev. 1595 (2010) 16

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 6

Beckley v. Schwarzenegger, et al. (Perry), Sept. 8, 2010 Letter Brief from Attorney General Brown to Supreme Court of California 21-22

http://www.calvoter.org/issues/votereng/redistricting/prop11text.html 23

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 24

INTEREST OF THE *AMICUS CURIAE*

Equality California submits this brief as *amicus curiae* in support of Respondents.[1]

Equality California is a statewide advocacy group protecting the needs of lesbian, gay, bisexual, and transgender Californians and their families, including same-sex couples and their children. It is also California's largest lesbian, gay, bisexual, and transgender civil rights organization, with tens of thousands of members. Equality California's members include registered voters in every county in the state of California. Equality California's members also include same-sex couples who wish to marry in the state of California but cannot do so while Proposition 8 is being enforced; same-sex couples who married in California before Proposition 8's enactment; same-sex couples living in California who are married under the laws of other jurisdictions; and same-sex couples who have registered with the State of California as domestic partners. The issues raised in this appeal will directly affect Equality California's members.

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.

SUMMARY OF ARGUMENT

Article III of the Constitution grants federal courts authority to adjudicate "Cases" and "Controversies." No "case or controversy" is presented in this appeal. Dennis Hollingsworth, et al. ("Petitioners") are not the proper parties to request adjudication of the constitutionality of a measure the State of California agrees is unconstitutional.

Petitioners lack Article III standing under this Court's traditional analysis. As they cannot demonstrate how they would suffer an "actual," "concrete and particularized" injury, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted), that is fairly traceable to the invalidation of Proposition 8, Petitioners fail to establish the "irreducible constitutional minimum of standing" under Article III. *Id.* Instead, they assert only their desire to "vindicate their own value preferences through the judicial process," which this Court has ruled insufficient to establish standing. *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). Nor can Petitioners assert representative standing on behalf of California citizens who voted in favor of Proposition 8, for both the California Supreme Court and the District Court recognized as a factual matter that no California voter would experience a legally cognizable injury from the invalidation of Proposition 8.

Although Petitioners argue that this Court's decision in *Karcher v. May*, 484 U.S. 72 (1987), recognized a broad form of federal standing for parties as long as they are "authorized by state law" to represent the interests of the State, and that the California Supreme Court's decision in *Perry v. Brown*, 265 P.3d 1002 (2011) ("*Perry III*"), conferred such authority on Petitioners, Petitioners

misread both this Court's decision in *Karcher* and the California Supreme Court's decision. *Karcher* stands for the limited proposition that standing to defend a state law can be delegated to certain *elected state officials*, who are obliged under state law to represent the state's interests at the time of appeal. Since *Karcher*, this Court has expressed "grave doubts" that initiative proponents can satisfy Article III's standing requirements. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). As such, Petitioners do not qualify for the specialized form of legislator standing recognized in *Karcher*.

Petitioners' suggestion that the California Supreme Court's ruling necessarily confers federal standing is also wrong. While the California Supreme Court is entitled to deference on matters of state law, it expressly did not address the question of whether Petitioners have the type of particularized interest required for standing under Article III. Nor did the California Supreme Court bestow on Petitioners any special status sufficient to support standing to appeal a ruling in federal court. No California statute, constitutional provision, or executive order grants Petitioners the authority to represent the State *qua* Sovereign in enforcing one of its laws. Nor has the California Supreme Court found that Petitioners have been appointed as agents of the State to defend this federal lawsuit. Rather, the limited and narrow interest the California Supreme Court found Petitioners hold by virtue of being the Proposition's official proponents is insufficient, as a matter of *federal* law, to sustain their standing in this appeal.

Petitioners' broad interpretation of what the California Supreme Court actually decided is an attempt to circumvent the requirement of a "direct stake" in

litigation for standing in federal court, a requirement that Petitioners cannot meet. *See Sierra Club*, 405 U.S. at 740. As such, Petitioners seek an unprecedented expansion of federal standing, which not only contravenes this Court's longstanding jurisprudence on the limits of such standing but would also open the door of federal courts to any party claiming to vindicate "the State's interest" or its "initiative power," even though such a party lacks "an injury with a nexus to the substantive character of the statute or regulation at issue." *See Diamond v. Charles*, 476 U.S. 54, 70 (1986). While *amicus curiae* and its members are committed to a robust initiative power as a matter of state law, its members also believe that the traditional rules of standing under Article III serve as a bulwark against any group of unelected persons who seek to "invoke the federal judicial power" to rubber-stamp their legislative acts but who cannot demonstrate a particularized interest beyond wanting a "vehicle for the vindication of value interests." *Diamond*, 476 U.S. at 62.

ARGUMENT

I. UNDER TRADITIONAL PRINCIPLES OF ARTICLE III STANDING, PETITIONERS CANNOT MAINTAIN THIS APPEAL.

A. Petitioners Have Not Suffered a Distinct, Particularized Injury.

"Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.'" *Diamond*, 476 U.S. at 61; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. __ (2013) (slip op. at 8). The exercise of federal jurisdiction thus requires that a "party seeking

judicial resolution of a dispute 'show that he personally has suffered some actual or threatened injury.'" *Diamond*, 476 U.S. at 62 (internal citation omitted). In every case, "[s]tanding to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'" *Arizonans*, 520 U.S. at 64 (quoting *Diamond*, 476 U.S. at 62).

"A direct stake" requires something more than "an interest shared generally with the public at large in the proper application of the Constitution and laws." *Arizonans*, 520 U.S. at 64; *see also Lujan*, 504 U.S. at 581 (federal courts do not "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws"). This Court has refused to adjudicate appeals brought by "concerned bystanders," such as Petitioners, simply pursuing the "vindication of value interests." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Instead, a party seeking resolution of a legal dispute in federal court must satisfy the three requirements that combine to form the "irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560. Namely, the party must establish that (1) it has "suffered an injury in fact," (2) for which there exists "a causal connection between the injury and the conduct complained of," and (3) a favorable judicial ruling would likely redress that injury. *Id*. at 560-61. These principles similarly govern where, as here, interveners in the lower federal courts seek this Court's review. *Maine v. Taylor*, 477 U.S. 131, 136 (1986) (requiring such intervenors to "have a sufficient stake in the outcome of the controversy to satisfy the constitutional requirement of genuine adversity" (internal quotation marks omitted)).

Not only are Petitioners unable to identify an injury to a "legally cognizable right," they do not even attempt to do so in their briefing to this Court.[2] *See* Petitioners' Brief ("Pet. Br.") at 15-18; *Diamond*, 476 U.S. at 64. At best, Petitioners may claim they are California residents who (along with several out-of-state actors) were "ardent proponents" of Proposition 8. But such an interest "does not establish that [a party] has been harmed distinctively—only that [it] assesses the harm as more grave, which is a fair subject for democratic debate in which [it] may persuade the rest of us" but has no place in the courts. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894 (1983). Being offended by same-sex marriage, even morally outraged, does not

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2. Although Petitioners make no claim of a direct, particularized interest in their brief, *amici* in support of Petitioners attempt to argue that Petitioners have a particularized interest based on a "fundamental right to propose initiatives" under California law. *See* Brief of *Amicus Curiae* Center for Constitutional Jurisprudence ("CCJ Br.") at 20. The right to propose initiatives, however, is legislative in nature. *See American Federation of Labor v. Eu*, 36 Cal.3d 687, 715 (1984) (reviewing the history of the initiative power in California and other states and characterizing that power as "a reserved legislative power, a method of enacting statutory law"); *see also Widders v. Furchtenicht*, 167 Cal.App.4th 769, 782 (2008) ("The statutory and constitutional right to petition contemplates the direct enactment of laws."); *Nogues v. Douglass*, 7 Cal. 65, 70 (1857) ("The legislative power is the creative element in the government. . . ."). Petitioners fully exercised their right to "propose initiatives" when they put Proposition 8 on the ballot in California. Their legislative right is distinct from, and not curtailed by, the Governor and the Attorney General's executive decision not to defend a law found unconstitutional by a district court.

grant one the right to force federal courts to adjudicate an appeal, for most laws offend someone at some point. *See Sierra Club*, 405 U.S. at 740 n.16. As such, Petitioners lack the personal and particularized interest necessary to satisfy the constitutional minimum requirement for standing under Article III.

B. Petitioners Cannot Maintain This Suit as Representatives of California Residents, as No California Resident Stands to Suffer a Legally Cognizable Injury if Proposition 8 Is Invalidated.

Under these same principles, Petitioners cannot maintain this appeal as representatives of the people of California—either as a whole, or on behalf of the subset of voters who supported Proposition 8. This is true because no member of any class Petitioners may claim to represent could bring this appeal. *See Arizonans*, 520 U.S. at 65-66; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (finding that organizations with only an "abstract concern with a subject that could be affected by an adjudication" have standing to represent only "those of their members who have been injured in fact, and thus could have brought suit in their own right").

Petitioners do not claim that the fact of same-sex marriage somehow harms California voters. *See, e.g.*, Pet. Br. at 40 (claiming that relevant inquiry is not whether Proposition 8 was necessary "to avoid harm" to the institution of marriage). The California Supreme Court itself explained the unusual effect of Proposition 8 in *Strauss v. Horton*, stating, "Proposition 8 reasonably must be interpreted in a limited fashion as *eliminating*

only the right of same-sex couples to equal access to the designation of marriage . . . ." 46 Cal.4th 364, 408 (2009) (emphasis added). Therefore, rather than conferring any immediate, pecuniary, or substantial benefit on Petitioners or any persons whom Petitioners may claim to represent, Proposition 8 simply *withdrew* a previously recognized right from a discrete group of individuals. *See Arizonans*, 520 U.S. at 48 (explaining that federal courts may not "adjudicate challenges to state measures absent a showing of *actual impact* on the challenger" (emphasis added)); *cf. Clapper*, 568 U.S. __ (2013) (slip op. at 10) ("[W]e have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." (internal alterations and quotations omitted) (emphases in original)). To be sure, Petitioners have cited no case in the history of the Court where a party has had standing to challenge the recognition of another's equal protection rights. It would be remarkable if this Court allowed the federal courts to be used by those who seek not vindication of their own rights, but whose sole "interest" is the elimination of the rights of others. *See Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 210 (1958) (gravity of constitutional questions "is accented in the present case where petitioner, though cast in the role of plaintiff, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another").

The California Supreme Court's explanation of the effect of Proposition 8 is consistent with the detailed factual findings of the District Court, which found:

- Proposition 8 does not affect the First Amendment rights of those opposed to marriage for same-sex couples. Prior to Proposition 8, no religious group was required to recognize marriage for same-sex couples. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 972 (N.D. Cal. 2010).

- Permitting same-sex couples to marry does not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages. *Id.*

- Children do not need to be raised by a male parent and a female parent to be well adjusted, and having both a male and female parent does not increase the likelihood that a child will be well adjusted. *Id.* at 980.

Indeed, only the *application* of Proposition 8 harms Californians, while its repeal harms no one. There are significant harms inflicted on *amicus curiae*'s gay, lesbian, and bisexual members, all of whom—like Respondents—have suffered continuing injuries by the passage and continued enforcement of Proposition 8. As the Ninth Circuit explained, Proposition 8 "stigmatizes same-sex couples as having relationships inferior to those of opposite-sex couples." *Perry v. Brown*, 671 F.3d 1052, 1069, n.4 (9th Cir. 2012) ("*Perry IV*"*)*. Proposition 8 "imposes upon gays and lesbians" a "special disability," and "works a meaningful harm to gays and lesbians, by denying to their committed lifelong relationships the societal status conveyed by the designation of marriage." *Id.* at 1081. Such harms are uniquely felt by same-sex

couples, for they are the only ones who are targeted by Proposition 8 and from whom the Constitution's promise of equality was specifically stripped.

II. *KARCHER V. MAY* DOES NOT CONFER LEGISLATOR STANDING ON PETITIONERS.

Recognizing that they neither suffer nor represent others who suffer the type of distinct, particularized injury required by this Court to establish standing, Petitioners argue instead that they qualify for a specialized category of standing that, under Petitioners' reasoning, does not require a "direct stake." Relying on *Karcher v. May*, 484 U.S. 72 (1987), Petitioners claim that the California Supreme Court's analysis about Petitioners' "authority under state law" definitively answers the question about whether they have standing to appeal in federal court. *See* Pet. Br. at 15. While *amicus curiae* takes issue with Petitioners' claims about what the California Supreme Court actually concluded about the extent of Petitioners' "authority under state law" and whether those conclusions about state law are actually dispositive of standing issues as a matter of federal law, *see* Part III *infra*, it is important as a threshold matter to correct Petitioners' assumption that *Karcher* extended federal standing to *any* party with "authority under state law to represent the State's interests." *See* Pet. Br. at 16.

In *Karcher*, the President of the New Jersey Senate and the Speaker of the New Jersey Assembly intervened in district court on behalf of the New Jersey State Legislature to defend the constitutionality of a state "moment of silence" statute. *Karcher*, 484 U.S. at 74. The President and the Speaker were specifically "empowered

by the rules of both houses to represent the House in litigation," and were doing so "only in their representative capacities" on behalf of the Legislature. *Id.* at 79-80 & n.1. After the District Court held that the statute was unconstitutional and the Third Circuit affirmed, this Court held that the President and the Speaker lost their standing to appeal on behalf of the entire New Jersey Legislature when they lost their posts as presiding legislative officers between the Third Circuit's decision and the appeal before this Court. *See id.* at 77 ("The authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded Karcher and Orechio in office.").

Petitioners interpret *Karcher* as holding that "[t]hese individuals 'had authority under state law to represent the State's interests.'" Pet. Br. at 16. Petitioners, however, conflate two distinct parts of this Court's analysis. The Court first held that these individuals "lack authority to pursue this appeal *on behalf of the legislature,*" as that authority was vested in the offices of the presiding members and Karcher and Orechio no longer held those leadership posts. *Karcher*, 484 U.S. at 81 (emphasis added). After concluding that this required "dismiss[ing] their appeal for want of jurisdiction," *id.*, the Court went on to state in a single sentence that "*the New Jersey Legislature* had authority under state law to represent the State's interest." *Id.* at 82 (emphasis added). *Karcher* simply did not contain any sweeping pronouncement about standing on appeal as Petitioners now suggest. *See id.* at 81-82.

Petitioners are differently situated than the New Jersey Legislature in *Karcher*, which was comprised of legislators who were elected officials, who took an oath of office, who were vested with a portion of the sovereign

power of the state that must be exercised in the public interest, and who were subject to electoral recriminations if their exercise of sovereign power was not in the public interest. The President and the Speaker, in turn, were the legally authorized agents of the Legislature. *Id.* at 77-78. At most, *Karcher* stands for the limited proposition that standing to defend a state law rests only with specifically authorized state officials, who are obliged under state law to represent the state's interests at the time of appeal. *Id.* at 82.[3]

This narrower reading of *Karcher* is consistent with this Court's later discussion of the case in *Arizonans*. In *Arizonans*, this Court cited *Karcher* for the limited proposition that "*state legislators* have standing to contest a decision holding a state statute unconstitutional if state law authorizes *legislators* to represent the State's interest." 520 U.S. at 65 (emphases added). The Court then concluded that the proponents of a state initiative amending the Arizona Constitution to establish English as the official language were *not* similarly situated to the "legislators" in *Karcher*. *Id.* (noting that proponents were "not elected representatives"). Notably, the constitutional amendment approved by the voters of Arizona contained its own "citizen suit" provision that "grant[ed] standing to any person residing or doing business in the State to

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3. *Richardson v. Ramirez*, 418 U.S. 24 (1974), cited by Petitioners below, is not to the contrary. That appeal was based on a real dispute between the class of California ex-felons and *a state elections official*—to whom California law delegated specific enforcement responsibilities. *See id.* at 28 & n.4. California law gives Petitioners no such interest in the enforcement of Proposition 8, and indeed the California Supreme Court did not suggest they would be properly named defendants in any such suit.

bring suit to enforce [the initiative] in state court." *Id.* at 49 (internal quotation marks omitted). Notwithstanding that specific grant of standing to enforce the initiative in state court, this Court found that provision did not "support standing . . . *in federal court*." *Id.* at 66 (emphasis added).

Although this Court expressed "grave doubts" as to whether the initiative proponents in *Arizonans* had "standing under Article III to pursue appellate review," *id.*, Petitioners and their supporters minimize the Court's discussion of federal standing as "dicta." *See* Pet. Br. at 17; CCJ Br. at 12. While the Court did not ultimately rule on lack of standing grounds because it ruled on the separate jurisdictional issue of mootness, *see Arizonans*, 520 U.S. at 66, its analysis of the standing issues was extensive and considered. *See id.* at 64-67. Therefore, contrary to Petitioners' claims, the "grave doubts" this Court expressed in *Arizonans* about standing for initiative proponents confirms that *Karcher* recognized only a limited form of legislator standing but did not extend such standing to any and every party claiming to be "authorized by state law" to represent the state.

III. THE CALIFORNIA SUPREME COURT'S DECISION DOES NOT CONFER ARTICLE III STANDING ON PETITIONERS.

A. This Court Has an Independent Obligation to Determine Whether Petitioners Have Standing under Article III.

Petitioners claim that the California Supreme Court's discussion of state law is dispositive of the federal question about standing. Pet. Br. at 15-16. This claim is incorrect.

First, the California Supreme Court expressly did *not* rule that Petitioners possessed a particularized interest sufficient to confer standing to appeal in federal court. *See Perry v. Brown*, 265 P.3d 1002, 1015 (2011) ("*Perry III*") ("we need not decide whether the official proponents of an initiative measure possess a particularized interest in the initiative's validity once the measure has been approved by the voters"); *see also id.* at 1021 (noting that state precedents permitting *intervention* by initiative proponents "has never been contingent upon the proponents' demonstration that their own personal property, liberty, reputation, or other individually possessed, legally protected interests would be adversely or differentially affected by a judicial decision invalidating the initiative measure"); *Perry IV*, 671 F.3d at 1074 ("Although we asked the California Supreme Court whether 'the official proponents of an initiative measure possess either a *particularized interest* in the initiative's validity or the authority to assert the *State's interest* in the initiative's validity,' the Court chose to address only the latter type of interest." (citation omitted) (emphases in original)).[4] Rather, it determined

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4. The Ninth Circuit's question to the California Supreme Court asking whether Petitioners "possess *either* a particularized interest in the initiative's validity *or* the authority to assert the State's interest in the initiative's validity" was itself incorrect. As this Court has made clear, any party who seeks to invoke the jurisdiction of the federal courts "must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. This Court has not announced any exceptions to this "irreducible constitutional minimum of standing," *id.*, when private parties seek to invoke the Court's jurisdiction, even when that private party may have "authority to assert the State's interest." *Perry IV*, 671 F.3d at 1074; *see* Part III.B.1 *infra.*

that this Court's precedents "impose[] no impediment to a *state* court's determination that, under *state* law, an initiative proponent has the authority to intervene as of right in an action in *state* court challenging the validity of an initiative measure." *Perry III*, 265 P.3d at 1033 n.27 (emphases added); *see also Arizonans*, 520 U.S. at 66 (noting availability of state remedy even though initiative proponents lacked standing in federal court).

Second, the California Supreme Court's interpretation of its own laws does not obviate this Court's obligation (nor did it obviate the Ninth Circuit's obligation below) to determine independently whether the requirements of Article III are met. "[F]ederal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995). In particular, this Court long ago established the requirement that federal courts independently consider whether an appellant has standing to pursue an appeal. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 8 n.2 (1988) ("The state trial court found that appellant has standing to challenge the validity of the Law . . . . Nonetheless, an independent determination of the question of standing is necessary in this Court, for the special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts . . . . Accordingly, this Court has dismissed cases on appeal from state courts when it appeared that the complaining party lacked standing to contest the law's validity in the federal courts.").

In *Perry III*, the California Supreme Court granted Petitioners a narrow interest under state common law that is insufficient as a matter of federal law to support standing. The California Supreme Court concluded that "when the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, . . . the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative." *Perry III*, 265 P.3d at 1033. Again, this holding was limited—as it must be—to standing in California state courts.

In *Perry IV*, the Ninth Circuit incorrectly held that it was "bound to accept the California [Supreme Court's] determination" that Petitioners have "the authority to represent the People's interest in the initiative measure they sponsored." *Perry IV*, 671 F.3d at 1072-73. Although federal courts ordinarily defer to decisions of state courts on issues of state law, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938), the Ninth Circuit failed to discern independently the precise type of authority the California Supreme Court afforded Petitioners and whether that conferral, as a matter of *federal* law, was sufficient to establish Article III standing.[5] The Ninth Circuit was

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5. California state courts have a broader view of standing than does this Court. *See* Anne Abramowitz, *A Remedy for Every Right: What Federal Courts Can Learn from California's Taxpayer Standing*, 98 Cal. L. Rev. 1595 (2010). Furthermore, even though Petitioners were permitted to intervene as a matter of state law, such participation does not automatically confer a right to appeal in federal court. As this Court has held, "[t]he standing Article III requires must be met by persons seeking appellate

wrong when it held that as a federal court it was "bound" by the California Supreme Court decision. *Perry IV*, 671 F.3d at 1072. To the contrary, the California Supreme Court could never bind a federal court on questions of federal law.

B. The California Supreme Court, While Entitled to Deference in Ruling on Issues of State Law, Did Not Recognize in Petitioners Any Type of Interest Sufficient to Demonstrate Standing in Federal Court.

While the California Supreme Court's analysis is an important consideration for this Court in determining matters of state law, it is necessary to examine closely the nature of any interest the California Supreme Court recognized to determine whether it meets the requirements for standing in federal court. Under the California Supreme Court's analysis, Petitioners possess a limited, common-law interest in the enforcement of voter-enacted propositions. The "state's interest" that proponents of an initiative may assert is limited to a

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review, just as it must be met by persons appearing in courts of first instance." *Arizonans*, 520 U.S. at 64; *see also Maine v. Taylor*, 477 U.S. at 136; *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 347-48 (1980) (Powell, J., dissenting) ("As we have held repeatedly . . . Art. III itself requires a live controversy in which a personal stake is at issue 'throughout the entirety of the litigation.' It is this constitutional limitation . . . that has impelled federal courts uniformly to require a showing of continuing adverse effect in order to confer 'standing to appeal.'" (internal citations omitted)). California law, by contrast, permits a party who has intervened "in a lower court proceeding to . . . appeal from an adverse judgment" as a matter of right. *Perry III*, 265 P.3d at 1012 n.7.

defense of "the initiative's validity," and such a defense is "on behalf of the voters who enacted the measure." *Perry III*, 265 P.3d at 1006. No statute or provision of the California Constitution expressly grants initiative proponents any authority to defend the initiative's validity in any capacity or in any court. *Compare id.* at 1018 ("Neither the state constitutional provisions relating to the initiative power, nor the statutory provisions relating to the official proponents of an initiative measure, expressly address the question whether, or in what circumstances, the official proponents are authorized to appear in court to defend the validity of an initiative measure the proponents have sponsored."), *with Arizonans*, 520 U.S. at 65 ("[W]e are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State."). Rather, the California Supreme Court traced the authority of initiative proponents back to general provisions about "the nature and purpose of the initiative process" and "the unique role of initiative proponents in the constitutional initiative process." *Perry III*, 265 P.3d at 1006.

The question, then, is whether this authority recognized by the California Supreme Court is sufficient to confer the type of interest that meets the requirements for Article III standing. Given the California Supreme Court's analysis of state law, the interest of Petitioners may be characterized in three ways: (1) the State's interest in the validity of its own laws; (2) the voters' interest in the enforcement of initiatives that they pass; and (3) Petitioners' own interest as the proponents who put forth and worked to pass Proposition 8. None of those three possible interests, however, is sufficient for Article III standing.

1. To the extent Petitioners' authority is rooted in a delegation of power by the State of California, Petitioners lack the status necessary to stand in the place of the State Sovereign in federal court.

First, the California Supreme Court's decision may be read as recognizing Petitioners' authority to assert the State's interest in the validity of its own laws. *See, e.g.*, Pet. Br. at 16. The theory is that States routinely delegate their right to defend the validity of state laws to elected officials such as Attorneys General and, therefore, should be entitled to delegate that right to non-elected parties when elected officials refuse to exercise that right. *See Perry III*, 265 P.3d at 1006 ("the official proponents of an initiative . . . are the most obvious and logical persons to assert the state's interest in the initiative's validity" in cases "when the public officials who normally assert that interest decline to do so"); *Perry IV*, 671 F.3d at 1071 (citing States' prerogatives "to decide for themselves who may assert their interests and under what circumstances, and to bestow that authority accordingly"). While the California Supreme Court's comparison between initiative proponents and elected statewide officials deserves deference as a matter of state law, initiative proponents and elected statewide officials are *not* similarly situated "delegates" for the purposes of federal standing. As such, they are not entitled to equal deference as "agents of the State" who can circumvent the federal rules of standing.

As Petitioners, their supporters, and the Ninth Circuit all acknowledge, a State's right to delegate powers to certain elected officials is rooted in the State's unique status as a Sovereign. *See* Pet. Br. at 15 (discussing manner in which States "allocate their sovereign powers"); CCJ

Br. at 17 ("As agents of the State, [Petitioners] no more need to demonstrate an additional particularized injury in order to assert the State's interests than would the Attorney General of the state herself . . . ."); *Perry IV*, 671 F.3d at 1071 (noting that States' standing to defend their own laws stem from their status "as independent sovereigns"). States, under our federal system, retain "a residuary and inviolable sovereignty," *Alden v. Maine*, 527 U.S. 706, 715 (1999), and as such they have standing to defend the constitutionality of their laws. *See Maine v. Taylor*, 477 U.S. at 137.

In this important respect, States are "not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."). For example, "although private parties . . . have no legally cognizable interest in the prosecutorial decisions of the Federal Government, . . . a State clearly has a legitimate interest in the continued enforceability of its own statutes." *Maine v. Taylor*, 477 U.S. at 136. In essence, the threat to the State's residual sovereignty represents the direct stake necessary for the State to defend its own laws in federal court. *See*, *e.g.*, *id.* at 137 ("Maine's stake in the outcome of this litigation is substantial . . . .").

In limited circumstances, States are permitted to delegate the responsibility to represent the State and its officers—along with the decision as to whether to assert the State's interest—to certain state officeholders. *See*, *e.g.*, *Ysura v. Pocatello Educ. Ass'n*, 555 U.S. 353, 354 (2009) (Idaho state officers represented by state Attorney

General). For example, California's Constitution and Government Code expressly delegate this authority to the California Attorney General, but contain no comparable provision conferring any such authority to represent the State on proponents of a ballot initiative. *See, e.g.*, Cal. Gov't Code § 12511 ("The Attorney General has charge, as attorney, of all legal matters in which the State is interested . . . ."). Where a state duly delegates to a state officeholder the authority to bring suit in such a capacity, the aura of sovereignty is maintained. *See*, *e.g.*, *Karcher*, 484 U.S. at 77-78 (elected officials may maintain suit in their official capacities as legislators, but not in their individual capacity as individual representatives of the majority). In other words, in the case of an elected statewide official participating in a lawsuit on behalf of the State, he or she is fulfilling the legal duty vested in his or her office to protect the interests of the State Sovereign. *See* City of San Francisco Merits Br. at 14-15.

Petitioners, however, have not been duly delegated with this legal authority and obligation to defend the interests of the State of California, and thus cannot assert *the Sovereign's* direct stake in the continued enforcement of California law. As such, Petitioners cannot establish standing in federal court by claiming they act as an agent of the Sovereign. *See Arizonans*, 520 U.S. at 65; *Sierra Club*, 405 U.S. at 740 (the party making the decision "as to whether [judicial] review will be sought" must be "in the hands of those who have a direct stake in the outcome"). State officials, endowed by and accountable to the People to represent their interests, must be permitted to make their own decisions about when further appeals are not in the state's interest.[6]

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6. The California Attorney General has made clear that defending a law is the decision of the Attorney General. *Beckley*

Notably, Petitioners' authority is not coextensive with any California state official. The California Supreme Court explicitly recognized that, even while representing the interests of certain California residents, Petitioners do not "become de facto public officials" nor do they "possess any official authority to enact laws or regulations even to directly enforce the initiative measure in question." *Perry III*, 265 P.3d at 1029. They are not elected public officials, are not under any oath to uphold the California Constitution or laws, are not subject to recall or impeachment, and are not bound by the conflict of interest rules or other ethical standards that apply to public officials. *Id.* Rather, "[t]his authority is extremely narrow and does not imply any authority to act on behalf of the state in other respects." *Id.* The only authority granted to initiative proponents, under the California Supreme Court's view, is "simply the authority to participate as a party in a court action." *Id.* But this authority is not enough to appeal the invalidation of the State's laws in a federal action because, unlike public officials, Petitioners have not been vested with a portion of the sovereign power of the State normally required by Article III.

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v. Schwarzenegger, et al. (Perry), Sept. 8, 2010 Letter Brief from Attorney General Brown to Supreme Court of California, p.5 ("Although it is not every day that the Attorney General declines to defend a state law, the state Constitution, or an initiative, he may do so because his oath requires him [to] support the United States Constitution as the supreme law of the land, and the law requires him to exercise discretion to enforce both state and federal law . . . . It is within the Attorney General's discretion to determine that it is *or that it is not* appropriate to pursue an appeal." (emphasis in original)).

In fact, the potential long-term consequences of Petitioners' proffered interpretation of the California Supreme Court's decision could stretch traditional limits on federal standing beyond recognition: Initiative proponents could conceivably retain this alleged "authority" indefinitely even though they are not legally or politically accountable for the consequences of their measure. If a constitutional challenge were mounted years after an initiative is enacted, there is an even greater possibility that the views of proponents will not be in line with the State of California or its voters. Indeed, even those Californians who voted in favor of Proposition 8 were not asked to pass on Petitioners' authority to represent their interests, either generally or in court, and may in fact disapprove of Petitioners' efforts.[7] It would

7. On the very same ballot as Proposition 8, California voters approved Proposition 11, an initiative constitutional amendment that created a Citizens Redistricting Commission charged with redrawing congressional districts and that specifically addressed the issue of standing to defend redrawn districts. *See* http://www.calvoter.org/issues/votereng/redistricting/prop11text.html (Section 3(a) of Proposition 11 provided that "[t]he commission has the sole legal standing to defend any action regarding a certified final map"). Proposition 11, therefore, illustrates that initiative drafters can choose to include provisions regarding who may engage in post-enactment litigation related to the initiative. *See also* Cal. Const., art. III, § 6 (official English amendment providing that "[a]ny person who is a resident of . . . California shall have standing to sue the State of California to enforce this section"); City and County of San Francisco's Answer Brief in *Perry III*, 2011 WL 1762440 (April 5, 2011) (discussing other initiatives containing express delegations of litigation authority). Thus, Petitioners have a *weaker* claim for representing the interests of voters in litigation than the initiative proponents behind Proposition 11 or the initiative proponents in *Arizonans*, both of whom expressly

be a perverse "delegation" of authority by the State of California to permit unelected proponents to appeal the constitutionality of an initiative that its elected statewide officials, who were elected to their executive offices in the same election, have repeatedly and publicly declared to be unconstitutional. *See Diamond*, 476 U.S. at 63 ("By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute.").

Elected officials of the State of California are in the best position to determine whether to challenge a judgment against the enforcement of one of the State's laws. They may determine that a particular case may have broad negative effects on the State that are unrelated to the enforcement of one of its statutes. Standing requirements that limit who may represent a state's interests in federal court ensure that the courts do not assume the state's "responsibility of taking care that the laws be faithfully executed." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993). But in instances such as this, where a state putatively conferred this authority to a nonelected entity—with no greater stake in the outcome than that shared by citizens generally and under no obligation to act in the best interests of the Sovereign or her people—the deference to federalism does not apply and the traditional requirement that the

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requested and specifically received authorization from voters to enforce their initiatives even after they were enacted into law. Even had Petitioners included such an enforcement provision in Proposition 8, however, it is doubtful that the provision would automatically confer *federal* standing on them. *See Arizonans*, 520 U.S. at 66 (noting that a similar provision authorized enforcement "in state court" but did not suffice "in federal court").

appellant demonstrate its own particularized interest should be enforced. *Diamond*, 476 U.S. at 62.

2. To the extent Petitioners' authority is rooted in the interest of voters who voted for Proposition 8, it is based on nothing more than a "desire to vindicate value interests," which this Court has repeatedly rejected as a ground for federal standing.

Second, the California Supreme Court's decision may be read as recognizing Petitioners' authority to represent the interests of "the voters who have successfully adopted an initiative measure." *Perry III*, 265 P.3d at 1006 (noting that "the basis upon which an official initiative proponent's ability to participate as a party in such litigation rests" upon voters' "legitimate concern" that public officials may not undertake a defense of the initiative "with vigor or with the objectives and interests of those voters paramount in mind"). However, such an interest, which is shared with voters at large, is insufficient for standing under Article III. "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do." *Arizonans*, 520 U.S. at 64; *Diamond*, 476 U.S. at 65 (recognizing that "concerns for state autonomy [] deny private individuals the right to compel a State to enforce its laws"); *see also* Part I, *supra*.

Here, to the extent Petitioners and their supporters assert an interest in preventing the "nullification" of the initiative power, *see, e.g.*, CCJ Br. at 20-24, such an interest is indistinguishable for purposes of federal standing from the theoretical interest of the 52% of Californians who voted for Proposition 8. In fact, the California Supreme

Court recognized that, once an initiative measure has been enacted, "in the absence of a showing that the particular initiative in question will *differentially* affect the official proponents' own property, liberty or other individually possessed legal right or legally protected interest, it is arguably less clear that the official proponents possess a personal legally protected stake in the initiative's validity *that differs from* that of each individual who voted for the measure or, indeed, from that of the people of the state as a whole." *Perry III*, 265 P.3d at 1021 (emphases added) (noting that, under *state* precedents, permitting intervention by initiative proponents "has never been contingent upon the proponents' demonstration that their own personal property, liberty, reputation, or other individually possessed, legally protected interests would be adversely or differentially affected by a judicial decision invalidating the initiative measure").

3. To the extent Petitioners' authority is based on their personal interests as the parties who put forth and worked to pass Proposition 8, no such interest was recognized by the California Supreme Court or the Ninth Circuit, and no such interest would be sufficient in any event.

Third, Petitioners' supporters (though not Petitioners themselves) attempt to argue that initiative proponents, while they may not be directly benefitted by an initiative or harmed by its invalidation (*see* Part I, *supra*), nonetheless have a "distinct and particularized interest in their own right" based on their private interests in proposing and passing a particular initiative. *See* CCJ Br. at 20. Both the California Supreme Court and the Ninth Circuit, however,

rejected the idea that Petitioners' standing could be rooted in any such "special" private interest.

The California Supreme Court acknowledged that it is "arguably less clear that the official proponents possess a personal legally protected stake in the initiative's validity" following the measure's enactment. *Perry III*, 265 P.3d at 1021. Because permission to intervene in post-election challenges does *not* require an individually protected interest under California law, *id.* (citing California state cases), the California Supreme Court reasoned that initiative proponents have "simply a passive, defensive authority" to assert the interests of the people when the validity of an initiative is challenged. *Id.* at 1030. The Ninth Circuit also explained that "[t]he exclusive basis of our holding that Proponents possess Article III standing is their authority to assert the interests of the State of California, rather than any authority that they might have to assert particularized interests of their *own*." *Perry IV*, 671 F.3d at 1074 (emphasis in original). The reality, however, is that Petitioners are cloaking their private value interests as those of the State and shared with the People, even though those private values "do[] not provide a judicially cognizable interest." *See Diamond*, 476 U.S. at 66. Indeed, any such attempt to blend personal interest with a purportedly delegated interest from the State is precisely what distinguishes Petitioners here from elected officials, who are only authorized under federal law to represent the pure interests of the State Sovereign. *See Arizonans*, 520 U.S. at 65.

Thus, no plausible reading of the California Supreme Court's opinion confers onto Petitioners any state-law interest sufficient to bring an appeal under federal law.

To be sure, *amicus curiae* and its members regularly propose legislation and may engage the state initiative process when it serves the direct and concrete interests of *amicus curiae* and its members. To that end, *amicus curiae* is no less interested in a robust initiative power than Petitioners or the California Supreme Court. However, to the extent that Petitioners now object that dismissal of their appeal for lack of standing will effect a "nullification" of that initiative power, Petitioners are only in this position because they put forth an initiative that (as even the California Supreme Court recognized) did nothing more than "eliminat[e]" the dignity that had finally been recognized for same-sex couples in California. While it was their prerogative to support such an initiative, Petitioners cannot then ask this Court to depart from its rules of standing and ignore the fact that Petitioners lack "an injury with a nexus to the substantive character of the statute or regulation at issue." *Diamond*, 476 U.S. at 70; *see also id.* at 64 (citing cases standing for the proposition that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another" (citations omitted)).

Furthermore, *amicus curiae*'s commitment to the initiative process in California is balanced against its concern when the initiative process is used to effect a surgical harm on one group of Californians with no legally cognizable benefit to another group of Californians. Particularly in light of the history of targeted discrimination against gays and lesbians enacted through majoritarian processes, *see Romer v. Evans*, 517 U.S. 620, 624 (1996) (involving amendment to Colorado Constitution that "prohibit[ed] all legislative, executive or judicial action at any level of state or local government

designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians"), the traditional rules of standing under Article III serve as a bulwark against any group of unelected persons seeking to "invoke the federal judicial power" to rubber-stamp their legislative acts, where they cannot demonstrate a particularized interest beyond wanting a "vehicle for the vindication of value interests." *Diamond*, 476 U.S. at 62.

IV. ALTHOUGH PETITIONERS LACK STANDING TO APPEAL, THE DISTRICT COURT'S FINDINGS AND ORDERS ARE CONSTITUTIONALLY SOUND.

Although Petitioners lacked standing before the Ninth Circuit, as they lack standing in this Court, the findings and orders of the District Court are constitutionally sound because state officials who were enforcing Proposition 8 were party to those proceedings. A plaintiff who seeks to challenge a federal statute on constitutional grounds would find it "a curious result if . . . [the plaintiff] could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." *INS v. Chadha*, 462 U.S. 919, 939 (1983). That result is no less curious when the challenged statute has been enacted on behalf of a state.

Although the state officials named as defendants in the District Court agreed with plaintiffs that Proposition 8 was unconstitutional, they nonetheless have continued to enforce Proposition 8 against Respondents. The District Court's injunction has "real meaning" because, by enjoining that enforcement, it will enable Respondents to marry. *Id.* The state officials' belief that the duties they

were actively carrying out might conflict with federal law does not nullify the Article III "adverseness" that prompted the District Court's remedy. *Id.*

Moreover, the injunction against enforcement of Proposition 8 does no more than redress precisely the harm proven by Respondents. To address incursion on Fourteenth Amendment rights, equity employs "practical flexibility in shaping its remedies" and "facility for adjusting and reconciling public and private needs." *Brown v. Bd. of Educ. of Topeka*, 394 U.S. 294, 300 (1955). The mere fact that the District Court's judgment "may benefit others collaterally" in redressing the harms proven by Respondents at trial does not render the remedy unconstitutionally overbroad. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

The District Court's remedy enjoining the continuing enforcement of Proposition 8 is appropriate and necessary to redress the substantial harms identified by Respondents and by all similarly situated Californians.

CONCLUSION

For the foregoing reasons, Petitioners do not satisfy Article III's requirements for standing.

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