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 FOR AMICUS CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The National Center for Lesbian Rights ("NCLR") is a non-profit legal organization dedicated to protecting and advancing the civil rights of gay, lesbian, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education.[1] Since its founding in 1977,

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a

NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in protecting same-sex couples and their children.

NCLR served as lead counsel for numerous plaintiffs in the litigation that culminated in the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), in which that court held that all forms of discrimination against gay, lesbian, and bisexual people are subject to strict scrutiny under the equal protection guarantee of the California Constitution, and that the exclusion of same-sex couples from the status and designation of marriage violated the state's constitutional equal protection requirement. NCLR also served as counsel for the petitioners in the lead state-law challenge to Proposition 8, which resulted in the California Supreme Court's decision in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), in which that court authoritatively construed Proposition 8 as creating an exception to the state constitution's equal protection requirement, but nevertheless upheld the measure under state law. NCLR has also participated as amicus curiae in this case in the District Court and the Court of Appeals, as well as in numerous other actions challenging laws that bar same-sex couples from marriage.

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monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

> "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'"
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> *Romer v. Evans*, 517 U.S. 620, 633-34 (1996) (citations omitted).

> "Proposition 8 must be understood as creating a limited exception to the state equal protection clause …."
>
> *Strauss v. Horton,* 207 P.3d 48, 78 (Cal. 2009).

Proposition 8 violates the federal Equal Protection Clause in a rare and striking way. According to the California Supreme Court, Proposition 8 carves out an "exception to the state equal protection clause" for one group of California residents—same-sex couples. *Strauss*, 207 P.3d at 78. The circumstances of Proposition 8's enactment are unprecedented in our nation's history. Unlike other state laws barring same-sex couples from marriage, Proposition 8 was enacted after a state's highest court determined that the state equal protection clause required the state to permit same-sex couples to marry. *See In re Marriage Cases*, 83 P.3d 384, 400 (Cal. 2008) ("[A]n individual's sexual orientation—like a person's race or gender—does not constitute a legitimate basis upon which to deny or withhold legal rights."). Shortly thereafter, the California Supreme Court held that Proposition 8 created a "limited exception to the state equal protection clause" only for same-sex couples. *Strauss*, 207 P.3d at 78. Proposition 8

violates the federal Equal Protection Clause in the most literal sense—by creating an "exception" to the requirement of equal protection only for one group, while preserving the requirement for all others.

Other states have amended their constitutions to prohibit marriage by same-sex couples. But no state other than California has determined that its constitutional equal protection guarantee requires the state to permit same-sex couples to marry and then amended that constitution to create an "exception" to the state's equal protection guarantee that reinstates an acknowledged inequality. This unique set of circumstances, present only in California and no other state, is determinative of Proposition 8's invalidity under the federal Equal Protection Clause. "It is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 U.S. at 633.

ARGUMENT

BY CREATING AN EXCEPTION TO THE CALIFORNIA CONSTITUTION'S EQUAL PROTECTION CLAUSE FOR ONE GROUP, PROPOSITION 8 VIOLATES THE FEDERAL EQUAL PROTECTION CLAUSE

In 2008, a series of events unprecedented in the history of this nation unfolded in California. On May 15, 2008, the Supreme Court of the State of California ruled that excluding same-sex couples from the right to marry under state law violated the equal protection clause of the state constitution. On June 16, 2008, California began issuing marriage licenses to same-sex couples, and approximately 18,000 same-sex couples married in the ensuing

months. *See Strauss,* 207 P.3d at 59. On November 4, 2008, the voters in California passed Proposition 8, an initiative amendment to the state constitution's equal protection clause, providing that "only marriage between a man and a woman is valid or recognized in California." *Id.* The next day, the state ceased licensing marriages between same-sex couples. *See id.* at 68. On May 26, 2009, the California Supreme Court upheld the measure as a procedurally valid initiative under state law, concluding that Proposition 8 created a "limited exception to the state equal protection clause" that reinstated intentional discrimination against a particular group—same-sex couples. *Id.* at 78.[2]

That conclusion stands as a stark pronouncement from a state's highest court to its gay, lesbian, and bisexual residents. As the California Supreme Court recognized, by enacting Proposition 8, the State of California has expressly declared that one group of people within its jurisdiction is *not* entitled to the full protection of the state equal protection requirement. Proposition 8 violates the Fourteenth Amendment's command that "[n]o state shall deny . . . to any person within its jurisdiction the equal protection of the laws" in the most literal sense—by creating an exception to equal protection only for one group, while leaving all other groups in the state fully protected by the state's equal protection guarantee.

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[2] In *Strauss*, the parties challenging Proposition 8's validity raised only state constitutional claims. The California Supreme Court therefore had no occasion to address whether Proposition 8 complies with the commands of the federal Constitution.

The circumstances under which Proposition 8 was enacted, and its effect as determined by the California Supreme Court, distinguish it from other state marriage bans.[3] Other states have amended their constitutions to prohibit marriage by same-sex couples, including by initiative measures. *See*, *e.g.*, Kan. Const. art. 15, § 16; La. Const. art. 12, § 15; Mich. Const. art. 1, § 25. But no state other than California has determined that its constitutional equal protection guarantee requires the state to permit same-sex couples to marry and then amended that constitution to create an "exception" to the state's equal protection guarantee, targeted at only one group, that reinstates an acknowledged inequality. This unique set of circumstances, present only in California and no other state, is determinative of Proposition 8's invalidity under the federal Equal Protection Clause.

In *Strauss*, the state supreme court held that Proposition 8 did not abrogate its prior holding that sexual orientation is a suspect classification under

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[3] The California Supreme Court held that its interpretation of Proposition 8 was "critical" to its resolution of the case *Id.* at 389 (discussing the need to determine "the actual effect of Proposition 8 on same-sex couples' state constitutional rights, as those rights existed prior to adoption of the proposition"). Under this Court's precedents, a state high court's interpretation of the scope and impact of a state measure is generally deemed to be authoritative. *See Johnson v. Fankell,* 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."); *Romer*, 517 U.S. at 626 (relying on "the authoritative construction of Colorado's Supreme Court" in determining the effect of an initiative that amended Colorado's state constitution).

the state equal protection clause, nor did it alter the court's prior conclusion that same-sex couples and their families are entitled to full equality. Rather, the court authoritatively determined that, by enacting Proposition 8, the voters created "a limited exception to the state equal protection clause" so that the state could treat same-sex couples unequally in a specific respect (by excluding them from the designation of "marriage"), while preserving the requirement of equal treatment "in all other contexts." *Strauss,* 207 P.3d at 78 (holding that the "exception" created by Proposition 8 applies only "to the specific matter it addresses"). [4] While other states have enacted marriage bans, none has done so in this extraordinary manner—by literally amending a state equal protection clause to require disparate treatment of a particular group, after the state has acknowledged that disparate treatment to be both harmful to the disfavored group and ungrounded in any relevant distinctions between the disfavored group and others.

That California is the only state to have enacted such a measure is itself instructive. In *Romer*, this

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[4] In the *Marriage Cases*, the California Supreme Court determined that excluding same-sex couples from the designation of "marriage" would "as a realistic matter, impose appreciable harm on same-sex couples and their children" and likely be seen by them and others as a "mark of second-class citizenship." *In re Marriage Cases,* 183 P.3d at 452. The court in *Strauss* affirmed its prior determination, stating: "[W]e by no means diminish or minimize the significance that the official designation of 'marriage' holds for both the proponents and opponents of Proposition 8; indeed, the importance of the marriage designation was a vital factor in the majority opinion's ultimate holding in the *Marriage Cases* . . . ." *Strauss,* 207 P.3d at 61.

Court noted that "[r]espect for th[e] principle [of equal protection] explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Romer,* 517 U.S. at 633. Laws that purport to create an express "exception" to the requirement of equal protection for a particular group are even more unusual. In fact, even apart from its specific subject matter, Proposition 8 may be unique insofar as it constitutes the alteration of a state's equal protection clause to permit official discrimination on a basis already recognized under that state's constitutional law to be inherently suspect.[5]

Under any level of equal protection review, this Court must consider the specific measure before it and the circumstances surrounding its enactment. *See*, *e.g.*, *Reitman,* 387 U.S. at 373 (holding that courts must evaluate a challenged measure in light of its "historical context and the conditions existing prior to its enactment," as well as the measure's "immediate objective" and "ultimate effect"). Here, the Court must determine whether California permissibly could enact Proposition 8 *as an exception*

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[5] The closest analogue may be the proposition struck down on federal equal protection grounds in *Reitman v. Mulkey*, 387 U.S. 369 (1967). In *Reitman*, this Court held that Proposition 14, which amended the California Constitution to prevent any limitations on the sale or rental of private property, not only repealed state laws prohibiting race discrimination in housing, but "create[d] a [state] constitutional right to discriminate on racial grounds." 387 U.S. at 376. Similarly, in *Castro v. State*, 466 P.2d 244, 258-59 (Cal. 1970), the California Supreme Court struck down, on federal equal protection grounds, an 1894 amendment to the California Constitution that overtly discriminated based on national origin by limiting the right to vote only to persons who were literate in English.

to its constitution's equal protection guarantee, after the state's highest court had acknowledged that there is no constitutional justification for discriminating against same-sex couples. Amicus agrees with respondents that *all* laws that subject gay, lesbian, and bisexual people to discrimination cannot stand unless they survive heightened equal protection scrutiny. Amicus also agrees with respondents that all state laws barring same-sex couples from marriage violate the federal equal protection requirement because those laws discriminate based on sexual orientation and sex, causing severe harms to same-sex couples and their children, while serving no legitimate purpose. But Proposition 8 violates the federal Equal Protection Clause in an even more basic way—by literally carving out one group of citizens from full protection under the state's constitutional equal protection guarantee.

The California Supreme Court in *Strauss* characterized as "narrow and limited" the equal protection exception that Proposition 8 imposes. *Strauss,* 207 P.3d at 61. "But even a narrow and limited exception to the promise of full equality strikes at the core of, and thus fundamentally alters, the guarantee of equal treatment . . . . Promising equal treatment to some is fundamentally different than promising equal treatment to all." *Id.* at 131 (Moreno, J., dissenting). In the *Marriage Cases*, the California Supreme Court held that "an individual's sexual orientation—like a person's race or gender—does not constitute a legitimate basis upon which to deny or withhold legal rights." *In re Marriage Cases,* 83 P.3d at 400. Enacting an express exception to the requirement of equal protection for a particular

racial or religious group, or for one gender, would be unthinkable under the state or federal Constitutions. Yet, according to the California Supreme Court, that is what Proposition 8 does to gay, lesbian, and bisexual Californians.

Through their legislative and judicial processes, states may at times reach changed understandings about what equal protection requires under state law, and such changes are permissible under this Court's precedents provided that they apply equally to all persons within the State's jurisdiction. For example, in *Crawford v. Board of Education*, this Court upheld a 1979 proposition ("Proposition 1") that prohibited California courts from applying California's equal protection clause to require a broader use of busing as a remedy for school segregation than would be required under the federal Constitution. *Crawford v. Bd. of Ed.,* 458 U.S. 527, 541-542 (1982) (holding that Proposition 1 "forbids state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation"). This Court held that Proposition 1 did not violate the federal Equal Protection Clause because "[t]he benefit it seeks to confer—neighborhood schooling—is made available regardless of race." *Id*. at 537 (holding that Proposition 1 did not "embody a racial classification").[6]

In contrast, the burden imposed by Proposition 8 is placed only on a particular group. In enacting

[6] The Court also found that "even if Proposition 1 had a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way." *Id*. The discriminatory impact of Proposition 8, however, falls expressly and exclusively on same-sex couples.

Proposition 8, the State of California did not reach a changed understanding of what equal protection requires and apply that new constitutional rule to all Californians. Instead, California enacted what the California Supreme Court acknowledged was an exception to the state equal protection clause only for one group of Californians. *See Strauss,* 207 P.3d at 78.[7] Thus, Proposition 8 subjects same-sex couples alone to a discriminatory state constitutional rule excepting them from full protection under the state's guarantee of equal protection of the laws, while leaving that guarantee unchanged for all other Californians.[8]

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[7] The court in *Strauss* held that Proposition 8 also "must be understood as carving out an exception to the preexisting scope of the privacy and due process clauses with respect to the particular subject matter encompassed by the new provision." *Strauss,* 207 P.3d at 75.

[8] Proposition 8 also differs from Proposition 209, an earlier ballot initiative that amended the California Constitution to prohibit governmental discrimination or "preferential treatment" based on race, sex, color, ethnicity or national origin. The Ninth Circuit upheld the proposition because it concluded that Proposition 209 did not single out a particular group or groups for disfavored treatment. *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (concluding that Proposition 209 passes muster under "conventional equal protection analysis" because it "does not classify individuals by race or gender."). *See also Coral Const., Inc. v. City and County of San Francisco*, 235 P.3d 947, 957 (Cal. 2010) (same). In contrast, the Sixth Circuit recently struck down a similar state constitutional amendment based on the court's determination that its purpose and effect were to selectively burden racial minorities, thereby violating the federal requirement of equal protection of the laws. *See Coalition to Defend Affirmative Action v. Regents of Univ. of Michigan,* 701 F.3d 466, 477 (6th Cir. 2012) (en banc). While the Ninth and Sixth Circuits reached different conclusions

A state constitutional amendment that purposefully excludes a particular group of citizens from the state's guarantee of the equal protection of the laws gravely offends the federal principle of equal protection. As this Court recognized early in its equal protection jurisprudence and repeatedly has confirmed, "[t]he guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Romer*, 517 U.S. at 633 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))). "[O]ur salvation" from the selective denial of legal protections "is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *see also Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). In enacting Proposition 8, the California voters did not subject everyone within the state to an exception from the state's guarantee that its laws would protect all equally. Rather, Proposition 8 carved out only for same-sex couples an "exception to the state equal protection clause." *Strauss,* 207 P.3d at 78. Such an extraordinary action violates in the most basic way the Fourteenth

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about how the relevant federal equal protection test applied, they agreed that any amendment to a state equal protection requirement must apply equally to all persons within a State's jurisdiction. *See Coalition for Econ. Equity,* 122 F.3d at 707 ("A denial of equal protection entails, at a minimum, a classification that treats individuals unequally."); *Coalition to Defend Affirmative Action*, 701 F.3d at 474 (holding that "equal protection of the laws is more than a guarantee of equal treatment under existing law") (citations omitted).

Amendment's "'pledge of the protection of equal laws,'" *Romer,* 517 U.S. at 634 (citations omitted), and cannot stand.

CONCLUSION

For the foregoing reasons, and those in respondents' briefs, the judgment below should be affirmed.

Respectfully submitted,

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