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 THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

2. Whether petitioners have standing under Article III, § 2 of the Constitution in this case.

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INTEREST OF AMICUS CURIAE

Amicus Curiae the State of California has an interest in ensuring the equality of all its citizens, regardless of their sexual orientation, and in protecting the health and welfare of all its families and their children.[1] Allowing gay and lesbian couples to wed would advance these interests. California provides same-sex couples all of the legal rights and responsibilities of marriage, save civil marriage itself. In the judgment of all three branches of California's government, eliminating the last vestige of discrimination by securing to gay and lesbian couples the legal right to wed is necessary to give such couples and their families the respect and dignity to which they are entitled. Resolving whether Proposition 8 is inconsistent with the Fourteenth Amendment's command of equality before the law implicates these interests.

In addition, the State of California has an interest in ensuring that private citizens who lack particularized injury-in-fact cannot invoke federal appellate jurisdiction to defend a state law when state officials have unanimously decided to forego an appeal. Resolving whether petitioners, the proponents of Proposition 8, had standing to seek appellate review in the court of appeals and in this Court implicates these interests.

[1] California submits this brief pursuant to Supreme Court Rule 37.4.

INTRODUCTION AND SUMMARY OF ARGUMENT

Proposition 8, which rescinded the right of gays and lesbians to marry, is both exceedingly narrow and extraordinarily significant. The sole yet profound effect of Proposition 8 was to take away the right of gay and lesbian couples to call their union a "marriage" and to strip loving relationships of validation and dignity under law. It did not change any of the legal rights and responsibilities afforded same-sex couples and their children under California law. To be clear, Proposition 8's singular purpose was to prevent same-sex couples from marrying, and its only function was to stigmatize the relationships of gay and lesbian families. There is absolutely no legitimate or rational state interest in doing so. Proposition 8 is therefore unconstitutional.

Although the Ninth Circuit's conclusion that Proposition 8 violates the Equal Protection Clause is correct, it lacked Article III jurisdiction to reach that conclusion because the proponents of Proposition 8 lacked standing to appeal. Unlike state officials, proponents have no authority to enforce Proposition 8, and suffered no injury-in-fact from the district court's judgment enjoining its enforcement. When a state official appeals from a judgment enjoining state law, standing arises from the injury to her enforcement authority. A state officer thus has a particularized injury-in-fact, satisfying Article III's case or controversy requirement. Proponents, however, can only assert the kind of undifferentiated interest in

the validity of state law that this Court has held to be insufficient for Article III standing.

This Court has recognized that a legislative body may have standing to defend the constitutionality of a state law when so authorized by state law. That line of cases, however, does not suggest that proponents have standing, for three reasons. First, the decision on which that line of authority is premised, *Karcher v. May*, 484 U.S. 72, 78 (1987), applies only when a state legislative body *acting as a body* invokes federal appellate jurisdiction to defend a state statute in lieu of executive officials. Second, when it construed *Karcher* in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), this Court did not hold that a state law authorizing its legislature to represent the state's interest in defending state law was alone *sufficient* to confer Article III standing, only that it was *necessary*. Third, initiative proponents are not Article-III-qualified substitutes for executive officials because they are private citizens with no political accountability.

If this Court concludes that proponents have Article III standing, then it should affirm the decision below that Proposition 8 violates the Fourteenth Amendment. Although the Ninth Circuit focused on whether the classification of same-sex couples violated the Equal Protection Clause, Proposition 8 must also satisfy due process. The timing of Proposition 8 is important under the Due Process Clause, since once recognized, the constitutional right to marry

cannot be rescinded unless *taking away* the right to marry itself furthers a legitimate state interest.

Proposition 8 serves no interest recognized by California as legitimate. The fact that same-sex couples cannot conceive a biological child is not a legitimate reason to deny them civil marriage. A biological distinction is not alone sufficient to satisfy the Equal Protection Clause; rather, that difference must be related to some legitimate governmental interest. Proponents argue that Proposition 8 advances "society's vital interest in responsible procreation and childrearing." Proponents' Br. at 31. Properly understood in the context of California's family law, Proposition 8 has no impact on how children will be reared in California, which affords the same parental rights to same-sex couples as opposite-sex couples. Proponents' related argument, that Proposition 8 advances the state's interest in ensuring that "unplanned pregnancies" occur in a stable, marital relationship, *id.* at 37, also fails. This rationale is premised on an indefensible distinction between planned and unplanned children, trivializes the marital bond, and in any event is not furthered by Proposition 8.

ARGUMENT

I. Initiative Proponents Lack Standing to Pursue Appellate Review

Article III of the Constitution limits the power of federal courts to deciding "Cases" and "Controversies." One aspect of the case and controversy requirement is that a party who invokes federal court jurisdiction must have standing. To establish standing, a party must show as an irreducible minimum that there is (1) injury-in-fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). The injury-in-fact requirement refers to an invasion of a legally protected interest that is concrete, particularized, and actual or imminent. *Id*. at 771-72. A generalized interest in the proper application of law shared by the population at large does not satisfy the injury-in-fact requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-76 (1992).

Article III standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans*, 520 U.S. at 64. The decision to invoke appellate review "must be placed 'in the hands of those who have a direct stake in the outcome,'" not "in the hands of 'concerned bystanders' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

Because the district court enjoined the Governor and other state officials from enforcing Proposition 8, these officials suffered injury-in-fact, and thus had Article III standing to seek appellate review of the judgment. *See id.* But all six defendant officials (including the Governor, his appointees, the Attorney General, and the county clerks) decided not to appeal. Proponents have no authority to enforce state law, and so suffer no such injury-in-fact. The decisions below invade proponents' interest only to the extent that they, like other voters, have a generalized interest in the enforcement of Proposition 8. Accordingly, they do not have Article III standing to seek appellate review.

A. Unlike State Officials, Who Suffer Injury-in-Fact from an Order Enjoining Their Enforcement of State Law, Proponents Have No Standing

"[A] State has standing to defend the constitutionality of its statute." *Diamond*, 476 U.S. at 62. A state, however, "can act only through its officers and agents." *Nevada v. Hicks*, 533 U.S. 353, 365 (2001) (internal quotation marks omitted); *see also Ex parte Young*, 209 U.S. 123, 174-75 (1908) (Harlan, J., dissenting). Thus, when a state officer appeals an adverse judgment against the state, she is defending the state's interests. *See Karcher,* 484 U.S. at 78 ("We have repeatedly recognized that the real party in interest in an official-capacity suit is the entity

represented and not the individual officeholder."); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

Nonetheless, a state official must meet the standing requirements of Article III when litigating in her official capacity, including injury-in-fact. When a district court enjoins state law, the injury asserted by a state official is to her authority to enforce that law. This is a straightforward application of Article III. *See Lujan*, 504 U.S. at 560 (setting out requirements of Article III). The significant difference is that the state official is asserting an injury suffered in her official capacity, rather than an injury that is personal to her.

The injury-in-fact asserted by state officials derives from their "interest in the controversy *by reason of their duty to enforce the state statutes* the validity of which has been drawn in question." *Coleman v. Miller*, 307 U.S. 433, 445 (1939) (emphasis added); *see also id*. at 466 (Opinion of Frankfurter, J.) ("And so, an official who is obstructed in the performance of his duty . . . may . . . ask this Court to remove the fetters against enforcement of his duty imposed by . . . an asserted misconception of the Constitution."). For instance, in concluding that Maine could challenge a decision overturning a federal prosecution because the predicate state law was unconstitutional, this Court concluded that it was the injury to Maine's *enforcement* authority that permitted it to do so. *See Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[A] State clearly has a legitimate

interest in the continued enforceability of its own statutes. . . .").

Similarly, federal government officials suffer injury-in-fact from a judgment barring enforcement of a law. In *INS v. Chadha*, 462 U.S. 919 (1983), Congress argued that this Court lacked jurisdiction over an appeal brought by the United States, which agreed with the decision below invalidating the one-house veto. *See id*. at 929-30. This Court disagreed, concluding that the United States was an aggrieved party because it still sought to enforce the law. *See id*. at 930-31. The government's injury was not that the law was held unconstitutional – the United States agreed with that merits determination – but rather that the judgment prevented the government from enforcing that law. *Cf. Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011) (holding that state officials who prevailed on grounds of qualified immunity still had standing to appeal the judgment because it would have changed the way they perform their duties).

A state official charged with enforcement of a law is thus able to meet the two quintessential requirements of Article III standing: that she assert a particularized injury that is not shared by the population as a whole, *see Lujan*, 504 U.S. at 575-76, and that she assert that interest on behalf of the government office she occupies, *see Karcher*, 484 U.S. at 78.

In contrast, proponents of an initiative have no office or corresponding enforcement authority. *See Perry v. Brown* (*Perry III*), 265 P.3d 1002, 1029 (Cal.

2011) (noting that proponents do not become "de facto public officials or possess any official authority to enact laws or regulations or even to directly enforce the initiative measure in question").[2] Accordingly, they do not suffer injury-in-fact from an order the sole effect of which is to enjoin enforcement of state law. The Ninth Circuit's inquiry should have been limited to whether proponents of an initiative have any role in enforcement that they can assert as an Article III injury. As it is clear under California law that they do not, certification of the standing issue to the California Supreme Court was unnecessary; the Ninth Circuit should have dismissed the appeal for lack of jurisdiction at the outset.

Because proponents lack enforcement authority, the only injury they can assert is to a generalized interest that the "Government act in accordance with law," which is "not judicially cognizable." *Lujan*, 504 U.S. at 575; *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (rejecting taxpayer standing where interest is "plainly undifferentiated" and "common to all members of the public"). *See also Perry III,* 265 P.3d at 1021 (noting "one may question whether the official proponents of a successful initiative measure,

[2] Proponents argue only that they have standing to defend Proposition 8 in lieu of state officials. Proponents' Br. at 15. The discussion in this brief is limited to that argument. Proponents appear to have abandoned the argument that they have standing in their own right. In any event, that argument is without merit. *See Diamond*, 476 U.S. at 64-65 (individual lacked standing to appeal decision invalidating state law).

any more than legislators who have introduced and successfully shepherded a bill through the legislative process, can properly claim any distinct or personal legally protected stake in the measure once it is enacted into law."). In these circumstances, the California Supreme Court's determination that proponents had legal authority under state law to represent California's interest in state court is by itself insufficient to confer Article III standing. This inability to demonstrate injury-in-fact is dispositive of the proponents' lack of standing and should end the inquiry.

B. Even if a State May Authorize a Legislative Body to Defend State Law or to Appeal an Adverse Judgment, That Authority Is Inadequate to Cloak Proponents in Article III Standing

1. A state legislature may have limited Article III standing to represent a state's interests in federal court.

When a federal court bars enforcement of a law, only those government officials with enforcement authority typically have injury-in-fact sufficient to satisfy Article III standing requirements to appeal that judgment. *See Raines v. Byrd*, 521 U.S. 811, 818-20 (1997) (rejecting argument that Members of Congress had standing to bring suit challenging the Line Item Veto Act). Federal courts require even state officials to demonstrate Article III standing to bring

suit. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600-01 (1982).

This Court may have recognized one narrow exception to this rule, but if so, it does not fit proponents. When a state legislature acts as a body, pursuant to state law authorizing it to defend state law in lieu of executive officials with enforcement authority, this Court has implied that the legislature may have Article III standing to appeal. *Karcher*, 484 U.S. at 82; *Arizonans*, 520 U.S. at 65; *cf. Chadha,* 462 U.S. at 931 (holding that both houses of Congress were proper appellants to defend the one-house veto pursuant to federal law, in lieu of the Executive Branch, which declined to defend).

In *Karcher*, the New Jersey Legislature, through its Assembly Speaker Karcher and its Senate President Orechio, intervened in federal court to defend an Establishment Clause challenge to a law permitting a moment of silence in the classroom, which state executive officers declined to defend. The district court issued a declaratory judgment in the plaintiffs' favor; the Legislature (through Karcher and Orechio) appealed, and the court of appeals affirmed. After the proceedings in the court of appeals concluded, Karcher and Orechio lost their majority, and although they held their seats in the Legislature, they lost their leadership positions. The new leadership declined to petition this Court for review, but Karcher and Orechio petitioned on behalf of the *earlier* Legislature that had passed and defended the law in the courts below. This Court held that Karcher and

Orechio, because they no longer served in a capacity to represent the New Jersey Legislature, had no authority to petition the Supreme Court for review. The majority opinion did not mention Article III standing or injury-in-fact. 484 U.S. at 77-81.

Going on to address the next argument that the Court should not only dismiss the petition, but also vacate the decisions of the court of appeals and district court for want of a proper defendant, this Court concluded that New Jersey's Legislature (acting through then-Assembly Speaker Karcher and then-Senate President Orechio) "had authority under state law to represent the State's interests in both the District Court and the Court of Appeals." 484 U.S. at 82 (citing both Karcher and Orechio's representations to the district court, and *In re Forsythe*, 450 A.2d 499 (1982)).[3] Again, the majority opinion concerned itself only with the offices held by Karcher and Orechio, and did not mention, much less discuss, Article III standing or injury-in-fact. *See* 484 U.S. at 81-83.

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[3] Reliance on *Forsythe* may have been misplaced. The *Forsythe* decision does not discuss the authority of the New Jersey Legislature or its officers to represent the state's interest in federal courts, but merely notes in passing that the New Jersey Supreme Court "granted the applications of the Speaker of the General Assembly and the General Assembly, and the President of the Senate and the Senate to intervene as parties-respondent" thus permitting them to defend *alongside* the state attorney general, who was a named respondent in state court. 450 A.2d at 500.

Karcher stands at most for the proposition that state officials may represent the state legislature in court so long as they continue to hold office in a leadership position; it may or may not imply that a state legislature, acting as a body, has Article III standing to contest a case challenging the constitutionality of a state statute, and pressing that cause on appeal. But this Court need not address the implications of *Karcher*,[4] because it plainly does not apply to proponents: they are in no sense either a legislative body or the officers of one.

This Court's subsequent decisions confirm that *Karcher* is not so broad as to accord initiative proponents standing. In *Arizonans*, this Court observed that *Karcher*'s reach is limited to state legislative bodies. There, the Court said in dicta that "[w]e have recognized 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 (citing *Karcher*, 484 U.S. at 82). Yet, the Court expressed grave doubt

[4] To be sure, if *Karcher* is construed as a standing case under Article III, it is difficult to understand how the New Jersey Legislature or its officers asserted injury-in-fact, since they had no authority to enforce the moment of silence law. Theirs would seem to fall into the category of interests "shared generally with the public at large in the proper application of the Constitution and laws," which "will not do." *Arizonans,* 520 U.S. at 64. As set forth more fully below, the answer may lie in the democratic process, and the political accountability of a legislative body – attributes that cannot be ascribed to initiative proponents.

that the proponents of an initiative constitutional amendment recognizing English as the official language of Arizona had Article III standing to defend its constitutionality in that case. *Id.*

This Court questioned the proponent petitioners' claim to Article III standing under *Karcher* for three reasons. First, unlike in *Karcher* or *Chadha,* the initiative proponents in *Arizonans* were not elected legislative officials acting as a body. *Arizonans,* 520 U.S. at 65 & n.20. Second, the Court was unaware of any "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." *Id*. at 65. Third, the Court observed that it had never "identified initiative proponents as Article-III-qualified defenders of the measures they advocated." *Id*. The fact that Arizona law did not authorize initiative proponents to represent Arizona's interest in litigation was just one reason among others that this Court doubted their standing to appeal.

Thus, in *Arizonans,* this Court suggested that to establish Article III standing to appeal it is necessary, *but not sufficient*, to show that state law authorizes the initiative sponsor to represent the state's interests. In addition, the Court indicated that it will independently examine whether those so authorized are elected officials and whether they are, in the judgment of the Court, "Article-III-qualified defenders." *Id.*

2. There is no authority for the proposition that states may confer Article III standing on private citizens.

Clearly, a state or federal law authorizing *private citizens* to appear in federal court to litigate the constitutionality of a state statute would not alone be sufficient to satisfy Article III. *Diamond*, 476 U.S. at 64-65.[5] State or federal law may create a substantive right, the violation of which may cause injury sufficient to meet the standing requirements of Article III. *See Lujan*, 504 U.S. at 578. Nevertheless, whether a particular litigant has Article III standing remains a question of federal law. *Id*. at 577; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). Congress (to say nothing of a state) "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3. The case and controversy requirement of Article III would trump state law governing who may assert its interests in court. *See* U.S. Const. art. VI, § 2. For instance, even though the "prerogative of *parens*

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[5] *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), is not to the contrary. There, this Court concluded that a qui tam relator met the requirements of Article III standing. The injury-in-fact in a qui tam or private attorney general case, however, is grounded in the United States' assignment of a cause of action to a relator, and in the long tradition of such actions in England and the American Colonies. *See id*. at 773-78. There is no analog for proponents' claim to standing.

patriae is inherent in the supreme power of every State," the ability of a state to represent the interests of its citizens is insufficient to confer standing. *Alfred L. Snapp & Son,* 458 U.S. at 600-01. Contrary to the Ninth Circuit's decision, a state does not have an entitlement to determine who may invoke federal jurisdiction on its behalf. *Perry IV*, 671 P.3d at 1071; Proponents' Br. at 15. Rather, federal courts decide whether the individual chosen is "Article-III-qualified." *Arizonans*, 520 U.S. at 65.

The Ninth Circuit failed to undertake this inquiry. It erroneously ruled that a state law conferring a right to assert the state's interest in litigation is alone sufficient to determine Article III standing, ignoring the other concerns raised in *Arizonans*. *See Perry v. Schwarzenegger* (*Perry II*), 628 F.3d 1191, 1196 (9th Cir. 2011) (agreeing with the proposition that "'Proponents' standing' – and therefore our ability to decide this appeal – 'rises or falls on whether California law' affords them the interest or authority described in the previous section" and certifying the question to the California Supreme Court). After receiving the California Supreme Court's answer to its certified question, the Ninth Circuit continued to believe that it was "bound to accept the California court's determination" of who could assert the state's interest, *Perry v. Brown* (*Perry IV*), 671 F.3d 1052, 1072 (9th Cir. 2012) and that it was "enough for Proponents to have Article III standing when state law authorizes them to assert the State's interest." *Id.* at 1074. Under the Ninth Circuit's reasoning,

states would appear to have *carte blanche* to grant any private citizen Article III standing to defend that state's laws in federal court. But, as even the Ninth Circuit recognized, this is not the law. *Perry IV*, 671 F.3d at 1074 (state law has no "power to directly enlarge or contract federal jurisdiction" (quoting *Duchek v. Jacobi*, 646 F.2d 415, 419 (9th Cir. 1981))).

The California Supreme Court's opinion in *Perry III* is insufficient to establish that proponents have Article III standing. Proponents in this case, like the proponents in *Arizonans* and unlike the New Jersey Legislature in *Karcher*, are not elected representatives, and no intervening precedent suggests that initiative proponents have Article III standing. There has been no indication since 1983, when this Court summarily dismissed for lack of standing an appeal by an initiative proponent from a decision holding an initiative unconstitutional, *see Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 460 U.S. 1077 (1983) (cited in *Arizonans*, 520 U.S. at 65), that this Court is more likely to view initiative proponents as Article-III-qualified litigants.

C. Constitutional Principles of Democratic Process and Political Accountability Counsel Against Finding that Initiative Proponents Have Article III Standing to Appeal

To the extent that *Karcher* represents an exception to the requirement that a state official show

injury-in-fact in order to invoke a federal court's jurisdiction, *see supra,* note 4, it is perhaps best understood as an exceedingly narrow exception that applies only to legislative bodies as a whole, as a practical solution for the rare instances when executive officials who would ordinarily defend a law decline to do so. Permitting a legislative body to stand in for an executive official with injury-in-fact may satisfy Article III because legislative bodies – like executive officials and unlike private citizens – are politically accountable as part of the democratic process.

The constraints inherent in the democratic process, which influence the decision making of executive officials, similarly circumscribe the conduct of legislative bodies. Because these constraints make it less likely that a state will invoke federal jurisdiction, they help reinforce Article III's limitations on the exercise of federal judicial power. Thus, legislative bodies may be Article-III-qualified litigants not merely because of state authorization, but because they, like executive officials, are politically accountable.

The litigation decisions of state officials are more likely to reflect the public support, or lack thereof, for a particular law. Thus in *Karcher*, the Court looked to whether the *then-current* officers of the New Jersey Legislature sought to continue the defense of the law at issue, rather than to the prior officers of the legislature that had enacted the statute. 484 U.S. at 81. Where state officials find that public support for a

law has waned, the problem the law addressed is no longer at issue, or the constitutionality of the statute has been called into question, their decision to defend or not to defend state law is most likely to reflect current public opinion. When California officials decline to defend a challenged law, and that decision is unpopular, they can be removed from office at the next election or in extraordinary instances recalled. Cal. Const. art. II, §§ 13-19. Notably, California voters have had opportunities to hold accountable the state officials who declined to appeal in this case. As California Attorney General, Edmund G. Brown Jr. admitted the material allegations of the complaint and declared that he would not defend Proposition 8 or appeal; he was subsequently elected Governor of the State of California by a wide margin. Similarly, California Attorney General Kamala D. Harris ran for office, in part, based on her opposition to Proposition 8 and she, too, was elected by popular vote.

There are myriad reasons state officials may forego an appeal of a federal district court judgment, all of which involve policy choices they are elected to make. State officials may make a considered decision to control the progress of litigation. Bypassing an appeal may circumscribe the state's risk because a single district court judgment may have limited effect. *See Arizonans*, 520 U.S. at 58 n.11. For example, to the extent they are not bound by a district court's injunction, *see* Fed. R. Civ. P. 65, state and local governmental entities in California must continue to enforce state law until an appellate court

rules it unconstitutional. Cal. Const. art. III, § 3.5. A delay in federal appellate review may allow for a change in the law; as time passes, the voters may come to agree with the courts' decision, or repeal the law, making court action unnecessary. Choosing to forego federal appellate review in one case may create opportunities for state courts to "intelligently mediate federal constitutional concerns and state interests." *Moore v. Sims*, 442 U.S. 415, 429-30 (1979). Avoiding federal appellate review may permit the legal issue to be presented in another case that better presents the legal issues to be decided. Or instead, (as here) state officials may agree with the legal conclusions of the court. Because elected state officials are entrusted with enforcing state law, and are politically accountable, they have a real stake in weighing these competing considerations and deciding whether a particular federal appeal is in the state's interest.

Proponents, however, have no political accountability, and no incentive to think twice before invoking the jurisdiction of a federal court. At best, initiative proponents represent public opinion at the moment in time when the measure was enacted. They become proponents solely by virtue of paying a refundable $200 fee. Cal. Elec. Code § 9001(c). The proponents of an initiative "seek to do no more than vindicate their own value preferences through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). *See also* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal. L. Rev. 1309, 1315 (1995); Maxwell L. Stearns, *Standing*

and Social Choice: Historical Evidence, 144 U. Pa. L. Rev. 309, 327-30, 337-38 (1995) (contending that standing doctrine makes it more difficult for interest groups to manipulate the critical path of cases to the Supreme Court in order to "make law"). Allowing proponents to assert standing will expand the number of constitutionally significant cases in the federal courts, contrary to the purpose of Article III as a limitation on the power of the federal judiciary.

In addition to limiting the instances in which a state invokes the jurisdiction of the federal courts, the political accountability of persons who defend state law is an important source of individual liberty. An official's decision to enforce and to defend a law operates as an independent check on the states' power, because the officials who enforce the law are subject to democratic restraints. As Judge Easterbrook has observed,

> No one may go to jail . . . unless multiple holders of power concur in the constitutionality of that decision. Congress must enact the law; the executive branch must prosecute; the court must convict. . . . Each branch brings to the problem its distinctive perspective, enriching our civic discourse, and consensus supports any action eventually taken.

Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 927 (1990). For this system to work, each branch of government, including the officials who enforce and defend a law, must be democratically accountable.

Like many structural aspects of the Constitution, Article III can thus be seen as promoting individual liberty. Federalism, for instance, protects individual liberty by ensuring that laws enacted in excess of delegated governmental power cannot be enforced, and by denying to any one government complete power. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Similarly, requiring that a democratically accountable official defend state law ensures that any law continues to have democratic support. When state officials forego appealing an adverse judgment, the state can no longer enforce that law. By contrast, permitting a private citizen to continue to defend a state law that officials have declined to defend has the effect of perpetuating that law even after majority support for it has evaporated. *Cf. Diamond*, 476 U.S. at 65 (observing that a private citizen's attempt to appeal a decision invalidating state law is "an effort to compel the state to enact a code in accord with Diamond's interests."). Any exception recognized by *Karcher* to the typical injury-in-fact requirement may thus remain consistent with Article III's limit on judicial power, so long as it applies only to politically accountable officials, as suggested by *Arizonans*.

Because proponents do not have standing, the constitutionality of Proposition 8 is not properly before this Court, nor was it properly before the Court of Appeals. The decision of the Court of Appeals should be vacated.

II. Proposition 8 Violates the Fourteenth Amendment

If this Court instead concludes that proponents have standing to appeal, it should affirm the decision of the Ninth Circuit. On the merits, that court correctly ruled that Proposition 8 is unrelated to any legitimate state interest and thus violates the Equal Protection Clause under a rational basis standard of review. Read, as it must be, in the context of California law as a whole, Proposition 8 has no rational basis. Unlike state-wide officials, proponents and their amici lack this perspective. The justifications they offer are not rationally related to any legitimate state interests and conflict with numerous other provisions of the state's family law. And even if these dubious rationales were legitimate state interests, none are in fact advanced by Proposition 8.

Because Proposition 8 fails rational basis review, this Court can avoid reaching the larger constitutional issues pressed by proponents. Nevertheless, the Attorney General agrees with the district court that "gays and lesbians are the type of minority strict scrutiny was designed to protect." *Perry v. Schwarzenegger* (*Perry I*), 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). Since Proposition 8 cannot even be justified by a legitimate state interest, it certainly does not serve a compelling interest, and is unconstitutional. The Attorney General also agrees with the district court's alternative holding that Proposition 8 violates the Due Process Clause by depriving plaintiffs of the fundamental right to marry. *See id*. at

991-95 (citing, *inter alia*, *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)). Just as interracial couples were not seeking to "redefine" the institution of marriage in *Loving v. Virginia*, 388 U.S. 1 (1967), same-sex couples are not seeking to redefine marriage, but to participate in it. None of the reasons this Court has offered for recognizing marriage as a fundamental right suggest it is limited to opposite-sex couples. Rather, like opposite-sex couples, same-sex couples seek the ability to enter into a relationship that is "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Perry I*, 704 F. Supp. 2d at 993 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). Nonetheless, even under rational basis review Proposition 8 is invalid.

A. The Timing of Proposition 8 Is Relevant to the Constitutional Analysis

The fact that Proposition 8 took away the existing right to marry from gay and lesbian couples is not, as proponents contend, irrelevant to the constitutional analysis. *See* Proponents' Br. at 19. While the Ninth Circuit focused exclusively on the Equal Protection Clause, Proposition 8 must also satisfy the requirements of due process.

Under the Due Process Clause, even a law not implicating a fundamental right must still be rationally related to some legitimate governmental interest. *See United States v. Comstock*, 130 S. Ct. 1949, 1966

(2010) (Kennedy, J., concurring) (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955)); *see also Reno v. Flores*, 507 U.S. 292, 305 (1993) ("The impairment of a lesser interest [than a fundamental right] demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose."). This due process analysis is the same as the one that applies to determine whether a particular classification is rational under the Equal Protection Clause. *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (equating the rational-basis test under the Due Process Clause and the Equal Protection Clause). As this Court has recognized, these concepts are "linked," *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), and indeed the Due Process Clause of the Fifth Amendment has been interpreted to have an equal protection component, *see Lyng v. Castillo*, 477 U.S. 635, 636 n.2 (1986). The difference is that under the Due Process Clause, the Court determines whether the law, standing alone, is rationally related to a legitimate purpose; under the Equal Protection Clause, the Court determines whether the classification drawn by the law is rationally related to a legitimate governmental purpose.

To satisfy the Due Process Clause, taking the right to civil marriage away from same-sex couples must further some legitimate governmental interest. This inquiry is different than whether the state was required to affirmatively permit same-sex couples to marry in the first place. Under rational basis review,

a legislature is permitted to address a problem incrementally. *F.C.C. v. Beach Comm., Inc.*, 508 U.S. 307, 316 (1993) (citing *Williamson*, 348 U.S. at 489). Moreover, a state's refusal to act typically will not be subject to review under the Due Process Clause, which is "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)). However, taking away a right, once given, is an affirmative exercise of the powers of government and must be justified by a legitimate state interest.

Even assuming the state had a legitimate interest in withholding the right to marry as an initial matter, that would not answer the question of whether California has a legitimate interest in taking away that right, once recognized. In the context of a limited resource, that interest is typically obvious. If a state has a limited amount of money to spend on police officers, for example, it has a legitimate interest in shifting those officers from a safer area of the state to an area with higher crime to ensure that those areas most in need will have adequate police protection.

Marriage, however, is not a finite resource; taking it away from same-sex couples would not mean that more marriages are available for opposite-sex couples. Moreover, in California, government benefits associated with marriage are as available to same-sex couples who are domestic partners as they are to opposite-sex couples who marry. The timing of Proposition 8 then, does matter: proponents must

show that taking away the right to marry furthers legitimate state objectives. If California obtains no benefit in rescinding the right of same-sex couples to marry, then Proposition 8 cannot be said to further a legitimate interest, or any interest at all.

Thus, both Proposition 8 itself, as well as the classification drawn by it, must serve a legitimate state interest. "If a legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.'" *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)). A law must, however, "find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). Courts do not undertake this inquiry in isolation, but rather consider the law in context, and will consider the overarching statutory scheme in assessing whether a law actually furthers a legitimate interest. *See, e.g., U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973) (rejecting argument that classification in Food Stamp Act was required to combat fraud where other provisions addressed this concern); *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (noting that the California Supreme Court "quite properly undertook to examine the constitutionality of [a state constitutional amendment] in terms of its immediate objective, its ultimate effect and its historical context and the conditions existing prior to its enactment") (internal quotation

marks omitted). A court must judge the constitutionality of a state statute in context and determine whether the action, when "taken in its totality, is within the state's constitutional power." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480 (1932). Here, it is not.

B. Proposition 8 Does Not Further the Interests Identified by Proponents

1. Since same-sex couples can raise children under California law, the biological fact that opposite-sex couples can have genetically related children is irrelevant.

Although it is true that many opposite-sex couples are able to conceive a child without reproductive assistance, this biological difference is insufficient to justify differential treatment under the Equal Protection Clause. The classification based on a biological difference must be rationally related to some legitimate interest. *See, e.g., Tuan Anh Nguyen v. INS*, 533 U.S. 53, 62 (2001) (classification according to biological distinction between mothers and fathers valid in that it served two governmental objectives). While the fact that opposite-sex couples may conceive a child that is biologically related to both parents serves to distinguish them from same-sex couples, that distinction does not further any interest recognized under California law.

Proponents' argument ignores the realities of California law and everyday life: despite their biological

differences, both same-sex couples and opposite-sex couples can conceive and raise children, and some opposite-sex couples cannot or do not wish to conceive and raise children. Proponents suggest that marriage is "inextricably linked to the objective biological fact that opposite-sex couples, and only such couples, are capable of creating new life together." Proponents' Br. at 8. Under California law, however, same-sex couples have the same right to conceive, adopt, and raise children as opposite-sex couples. Gay and lesbian couples have the right to raise children, and have the same parental rights and obligations as do opposite-sex couples. Cal. Fam. Code § 297.5(d). They can jointly adopt a child, and can also adopt each other's children. *Id.* § 9000(b), (g). Each member of a same-sex couple may, like opposite-sex couples, be able to conceive a biological child, to which the other partner is presumed also to be a parent. *See Elisa B. v. Super. Ct.*, 117 P.3d 660, 670 (Cal. 2005). Proposition 8 did nothing to change the legal rights of same-sex partners to conceive, adopt, and raise children in precisely the same manner as opposite-sex parents. *See Strauss v. Horton*, 207 P.3d 48, 76 (Cal. 2009) ("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, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship.").

California law thus recognizes that same-sex couples can and do have children, and in fact encourages

them to do so. Since both opposite-sex and same-sex couples can and do have children, the biological difference, standing alone, is insufficient to satisfy rational basis review. "Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy." *Goodrich v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

2. California law does not prefer opposite-sex parents to same-sex parents.

Proponents' related argument – that Proposition 8 furthers a legitimate interest in having a child raised by a man and a woman – falsely assumes that California law prefers children to be raised by their biological parents. Proponents suggest, for example, that limiting marriage to opposite-sex couples will "increase[ ] the likelihood that children will be born to and raised by the mothers and fathers who brought them into the world in stable and enduring family units." Proponents' Br. at 36; *see also id*. at 51 ("Same-sex marriage . . . would undermine the idea that children need both a mother and a father. . . .") (quoting Witherspoon Institute, *Marriage and the Public Good* 18 (2008)); *id*. at 53 (allowing same-sex couples to marry "denigrates the importance of mothers and fathers raising the children they create together"). Even if it were true that limiting marriage to opposite-sex couples would "increase the likelihood that children will be born to and raised by mothers

and fathers who brought them into the world," there is no presumption in California law favoring this family structure.

California law does not recognize an interest in or a preference for ensuring that a child is raised in an opposite-sex household by its biological mother and father. Instead, California law prefers a parenting relationship with a child over a mere biological relationship. *See, e.g., Elisa B*, 117 P.3d at 667-68; *Steven W. v. Matthew S.*, 39 Cal. Rptr. 2d 535, 539 (Cal. Ct. App. 1995) ("A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved. . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity.") (quotation marks omitted). Thus, the classification drawn by Proposition 8 does not have a basis in any supposed interest in children being raised by opposite-sex biological parents that is recognized by California law, nor does it further such interest.

3. Proposition 8 is not justified by and does not further any interest in "responsible procreation."

Perhaps recognizing that California law also allows same-sex couples to have children, proponents seek further to artificially narrow California's interest in marriage to ensuring that children born to opposite-sex couples as a result of an unplanned pregnancy will be born into a stable relationship.

Proponents argue that procreation is necessary to the survival of the human race, but that "irresponsible procreation and childrearing – the all-too-frequent result of casual or transient sexual relationships between men and women – commonly results in hardships, costs, and other ills for children, parents, and society as a whole." Proponents' Br. at 33. Proponents argue that the "overriding purpose" of marriage is "to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society." *Id*. Thus, the argument goes, marriage helps ensure that heterosexual couples who engage in sexual activities will be able to raise a child in a stable environment should the couple unexpectedly become pregnant. Since same-sex couples cannot have an unplanned pregnancy, it does not further what proponents have identified as an "overriding purpose" of marriage to allow such couples to marry.

There is some irony in this trivialization of civil marriage in the service of proponents' effort to preserve their idealized vision of it. In the cases recognizing the importance of marriage, not one has identified an interest in protecting against irresponsible procreation as a basis for marriage. In *Griswold,* this Court did not even mention children or procreation: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social

projects." 381 U.S. at 486. In other cases, this Court has included marriage in a list of fundamental rights that makes it clear that marriage is one of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (and including in that list of privileges "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience"). Indeed, the Supreme Court has even recognized the right of inmates to marry, despite the fact that no pregnancy – accidental or intended – was likely to ensue. *Turner,* 482 U.S. at 96.

Moreover, this argument differentiates in a way that California law does not tolerate between children who are "planned" and those who are "unplanned." It is true that one of the purposes of marriage is to provide a stable environment in which to raise children, but that interest is equally implicated for all children. California has no interest in turning a blind eye to the children of same-sex (or opposite-sex) couples simply because they were the result of deliberation; the children of California who are born through artificial insemination or surrogacy, or who are adopted, are just as entitled to the protection of the state as those who are born to an opposite-sex couple as a result of "irresponsible procreation." As California has an identical interest in ensuring that

all of its children are raised in a stable environment, the distinction claimed by proponents here is artificial and does not reflect a legitimate interest supporting Proposition 8.

Even if, however, the Court were prepared to give credit to the idea that limiting marriage to opposite-sex couples is rationally related to a legitimate state interest in protecting children who were born as a result of irresponsible procreation, that interest is not served by Proposition 8. Accepting its validity for purposes of argument, this narrow "interest" might have justified the disparate treatment of same-sex couples before the California Supreme Court reached its decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). That interest is not furthered, however, by *taking away* the right of same-sex couples to marry, which is the only effect of the passage of Proposition 8. Both before and after Proposition 8, marriage remains for heterosexual couples as an encouragement to form a long-lasting, stable social unit should any unplanned children result. While permitting same-sex couples to wed might not further this interest, such marriages do not interfere with that interest either. It borders on the absurd to suggest that California's interest in marriage is limited to protecting children born as the result of irresponsible procreation, but in any event taking the right to marry away from same-sex couples has absolutely no impact on that interest. *See Goodrich*, 798 N.E.2d at 963 ("The department has offered no evidence that forbidding marriage to people of the

same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "'optimal' child rearing unit.").

As the Ninth Circuit recognized, "it is no justification for taking something away to say that there was no need to provide it in the first place; instead there must be some legitimate reason for the act of taking it away." *Perry IV*, 671 F.3d at 1088. Although the Ninth Circuit based its analysis on *Romer*, s*ee id.* at 1088, this result is similarly compelled by the Due Process Clause, which requires that a legislative act be rationally related to a legitimate state interest. Proposition 8 has no rational link to California's interest in ensuring a stable home for unplanned children, and its adoption cannot be justified on that basis.

C. Marriage Equality Best Furthers California's Interests in Ensuring a Stable Home for Its Children

Creating a stable home for children is not the only interest served by marriage under California law, but it is an important one, and it is furthered by allowing both same-sex and opposite-sex couples to marry. *See* Brief of Massachusetts, *et al*. as Amicus Curiae in Support of Respondents. As the district court (and proponents) recognized, there are many

economic, social, physical, and psychological benefits to being married, benefits that are not conferred by an institution such as a domestic partnership. *See Perry I*, 704 F. Supp. 2d at 961-62 (noting benefits of marriage); *id*. at 970-72 (finding that availability of domestic partnership is not equivalent to marriage). As expansive as it is, California's Domestic Partnership Act does not give same-sex couples "the equal dignity and respect that is a core element of the constitutional right to marry." *In re Marriage Cases*, 183 P.3d at 434-35. In rejecting an effort of the Massachusetts Senate to permit same-sex couples to enter into civil unions, but not civil marriages, the Massachusetts Supreme Judicial Court relied on the reasoning of Justice Greaney, who observed:

> [T]he State's refusal to accord legal recognition to unions of same-sex couples has had the effect of creating a system in which children of same-sex couples are unable to partake of legal protections and social benefits taken for granted by children in families whose parents are of the opposite sex. The continued maintenance of this caste-like system is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on "the best interests of the child."

Goodridge, 798 N.E.2d at 972 (Greaney, J., concurring) (cited in *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 567 (Mass. 2004)). The same

is true in California. The state's interest in protecting children, including the over 40,000 children in California being raised by same-sex parents, is poorly served by allowing so many of them to grow up feeling inferior because their family unit is not validated and honored by law. California's interests in protecting all of its children – and their basic dignity and understanding of fairness and justice – are best served by allowing same-sex couples to enjoy the same benefits of marriage as opposite-sex couples.

CONCLUSION

Proponents lack standing to pursue this appeal. If this Court has jurisdiction over their appeal, it should affirm the decision below.

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Respectfully submitted,

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