No. 12-144

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,
v.
KRISTIN M. PERRY, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment for a State to use the ballot-initiative process to extinguish the state constitutional right of gay men and lesbians to marry a person of the same sex.

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BRIEF IN OPPOSITION

Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo ("Plaintiffs") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Dennis Hollingsworth et al., private individuals designated the "official proponents" of Proposition 8 ("Proponents"). Pet. 8.

OPINIONS BELOW

The court of appeals' opinion is reported at 671 F.3d 1052 (Pet. App. 1a). The court of appeals' order denying rehearing and rehearing en banc is reported at 681 F.3d 1065 (Pet. App. 441a). The district court's findings of fact and conclusions of law are reported at 704 F. Supp. 2d 921 (Pet. App. 137a). The court of appeals' order certifying a question to the California Supreme Court is reported at 628 F.3d 1191 (Pet. App. 413a). The California Supreme Court's answer is reported at 265 P.3d 1002 (Pet. App. 318a).

JURISDICTION

The court of appeals filed its opinion on February 7, 2012. It denied Proponents' timely petition for rehearing or rehearing en banc on June 5, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Proposition 8 enshrined in California's governing charter a permanent proscription that only marriages between a man and a woman would be valid and recognized in the State and thereby abolished the right to marry that gay men and lesbians in California had previously enjoyed. Applying this Court's precedents, the court of appeals isolated the particu-

lar challenged governmental action—Proposition 8's withdrawal of the right to marry from gays and lesbians—and examined the various justifications advanced by Proponents. The court concluded that none of those proffered justifications was rationally advanced by the California electorate's act to permanently withdraw the right to marry from gay men and lesbians. Instead, Proposition 8 served only to proclaim to Californian gay men and lesbians, "through the public law, [the] majority's disapproval of them and their relationships." Pet. App. 92a. The court of appeals accordingly held that Proposition 8 violated the Equal Protection Clause of the Fourteenth Amendment.

Proponents now seek review before this Court, disputing the merits of the Ninth Circuit's equal protection analysis. That issue, of course, is undeniably important—not least to the Plaintiffs in this action but also to the tens of thousands of Californian same-sex couples who continue to suffer the daily humiliation of having the State designate their relationships and their families as second-rate. Indeed, it fairly could be maintained that the question whether the States may discriminate against gay men and lesbians in the provision of marriage licenses is the defining civil rights issue of our time.

In some respects, this case is an attractive vehicle for approaching—if not definitively resolving—that issue. This case comes to this Court on a fully-developed factual record—indeed, the most comprehensive record ever developed in a case challenging a restriction on the right to marry. Moreover, quite fortuitously, the case comes to the Court contemporaneously with challenges to the federal Defense of Marriage Act ("DOMA") that will place squarely be-

fore the Court the question of which standard of equal protection scrutiny properly applies to laws targeting gay men and lesbians. This coincidence of circumstances could enable the Court to benefit from the extensive records developed in both this case and the DOMA cases as it analyzes the various justifications tendered in support of laws discriminating against gay men and lesbians with respect to their relationships.

Yet, this Court's traditional standards for the exercise of certiorari jurisdiction lead inexorably to the conclusion that this Court's review is not warranted. *See* Sup. Ct. R. 10. The decision below scrupulously applied this Court's established precedent in *Romer v. Evans*, 517 U.S. 620 (1996), which invalidated a Colorado ballot initiative that deprived gay men and lesbians of legal protections they previously had enjoyed, to a California ballot initiative that deprived gay men and lesbians of a legal right they previously had enjoyed. That holding, which necessarily is bound up with the particular state action effectuated by Proposition 8 and the legal backdrop of substantive rights otherwise accorded to gay men and lesbians under California law, does not—indeed, could not—conflict with any decision of this Court or any decision of a court of appeals or state court of last resort. Moreover, substantial doubts as to Proponents' Article III standing to appeal—both to the Ninth Circuit and now this Court—call into question whether this Court could reach Proponents' question presented at all. The petition should be denied.

1. In 2000, California voters adopted Proposition 22, which amended the Family Code to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Fam. Code

§ 308.5. In May 2008, the California Supreme Court struck down Proposition 22, holding that it violated the due process and equal protection guarantees of the California Constitution, and ordered the State to issue marriage licenses without regard to the sex of the prospective spouses. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

After the California Supreme Court's decision in the *Marriage Cases*, Proposition 8's proponents financed and orchestrated a $40 million campaign to amend the California Constitution to abolish the fundamental right of gay men and lesbians to marry that was recognized by the state supreme court. The measure was placed on the ballot for the November 2008 election, and proposed to add a new Article I, § 7.5 to the California Constitution stating that "[o]nly marriage between a man and a woman is valid or recognized in California."

The Official Voter Information Guide informed voters that Proposition 8 would "[c]hange[ ] the California Constitution to eliminate the right of same-sex couples to marry in California." Pet. App. 26a. The Voter Guide's "Argument in Favor of Proposition 8"—an official statement of the Yes on 8 campaign—urged voters to support the measure because "[w]e should not accept a court decision that may result in public schools teaching our own kids that gay marriage is okay." Pet. App. 81a, 147a. The Argument asserted that "while gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else," and told Californians that voting YES "*protects our children*." Pet. App. 147a.

Proposition 8 passed by a narrow margin, and went into effect on November 5, 2008, the day after the election. *See Strauss v. Horton*, 207 P.3d 48, 68

(Cal. 2009). During the period between the California Supreme Court's decision in the *Marriage Cases* on May 15, 2008, and the effective date of Proposition 8, more than 18,000 same-sex couples were married in California. Pet. App. 142a. On May 26, 2009, the California Supreme Court upheld Proposition 8 against a state constitutional challenge, but held that the new amendment to the California Constitution did not invalidate the marriages of same-sex couples that had been performed before its enactment. *See Strauss*, 207 P.3d 48; *see also* Pet. App. 143a.

By eliminating the right of individuals of the same sex to marry, Proposition 8 relegated same-sex couples seeking government recognition of their relationships to so-called "domestic partnerships." Under California law, domestic partners are granted nearly all the substantive rights and obligations of a married couple, but are denied the venerated label of "marriage" and all of the respect, recognition and public acceptance that goes with that institution. *See* Cal. Fam. Code § 297; *see also Marriage Cases*, 183 P.3d at 402, 434-35, 444-45.

2. Plaintiffs are gay and lesbian Californians who are in committed, long-term relationships and who wish to marry. As a direct result of Proposition 8, Plaintiffs were denied the right to marry solely because their prospective spouses are of the same sex.

On May 22, 2009, Plaintiffs filed suit to secure the right to marry. They challenged the constitutionality of Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and named as defendants California's Governor, Attorney General, and other officials involved in the enforcement of Proposition 8. In response, the

Attorney General admitted that Proposition 8 is unconstitutional, and the remaining government defendants denied that Plaintiffs were entitled to relief but otherwise declined to defend Proposition 8. Proponents moved to intervene in the case to defend Proposition 8, and the district court granted their motion.

The district court conducted a twelve-day bench trial, during which the parties were "given a full opportunity to present evidence in support of their positions." Pet. App. 152a. At trial, the parties called 19 witnesses—17 of them by Plaintiffs—and played the video depositions of other witnesses as well. Pet. App. 153a. The court admitted into evidence more than 700 exhibits and took judicial notice of more than 200 other exhibits.[1]

On August 4, 2010—after hearing more than six hours of closing arguments and considering hundreds of pages of proposed findings of fact and conclusions of law submitted by the parties—the district court found in favor of Plaintiffs. The court declared Proposition 8 unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and permanently enjoined its enforcement. Pet. App. 316a-317a.

The district court concluded that Proposition 8 violates the Equal Protection Clause because it "cre-

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[1] The district court's decision to resolve disputed factual issues through the trial process was consistent with a long line of constitutional cases. *See*, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 523 (1996); *Plyler v. Doe*, 457 U.S. 202, 207 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.10 (1954); *Cleburne Living Ctr. v. City of Cleburne*, 726 F.2d 191, 192 nn.1-2 (5th Cir. 1984).

ates an irrational classification on the basis of sexual orientation." Pet. App. 286a. As an initial matter, the district court found that "the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect." Pet. App. 300a (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam)). Based on the trial record, the district court concluded that "[a]ll classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation." Pet. App. 301a.

The court found it unnecessary, however, to evaluate Proposition 8 under strict scrutiny because the measure failed even rational basis review. Pet. App. 301a. In reaching that conclusion, the district court carefully evaluated each of Proponents' proffered justifications for Proposition 8. Ultimately, the district court concluded that, "despite ample opportunity and a full trial," Proponents "have failed to identify any rational basis Proposition 8 could conceivably advance." Pet. App. 312a. And, "[i]n the absence of a rational basis," the court continued, "what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples." Pet. App. 312a-313a.

The district court also held that Proposition 8 violates the Due Process Clause because it "unconstitutionally burdens the exercise of the fundamental right to marry" and "cannot withstand rational basis review"—let alone the strict scrutiny required when a measure infringes on a fundamental right. Pet.

App. 286a, 295a. The district court found that the right to marry is fundamental for both heterosexuals and for gay men and lesbians, and that unions between individuals of the same sex "encompass the historical purpose and form of marriage." Pet. App. 291a. Accordingly, Plaintiffs were "not seek[ing] recognition of a new right," but access to the fundamental right to marry constitutionally guaranteed to all persons. *Id.*

Having found that "Proponents' evidentiary presentation was dwarfed by that of plaintiffs" and that Proponents "failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest," Pet. App. 153a, the district court concluded that Plaintiffs were entitled to a permanent injunction against the enforcement of Proposition 8. Pet. App. 317a.

3. Proponents appealed the district court's decision to the Ninth Circuit after the State defendants elected not to do so, and obtained a stay of the judgment from the Ninth Circuit pending resolution of an expedited appeal. As a preliminary matter, the court asked the parties to address Proponents' standing to seek review of the district court's order in light of *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Pet. App. 420a. After oral argument, the court concluded that Proponents' "claim to standing depends on [their] particularized interests created by state law or their authority under state law to defend the constitutionality of the initiative." Pet. App. 420a. Thus, on January 4, 2011, the Ninth Circuit certified to the California Supreme Court the question whether, under California law, "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." Pet. App. 416a.

In response to the Ninth Circuit's certified question, the California Supreme Court concluded that, "[i]n a postelection challenge to a voter-approved initiative, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." Pet. App. 326a-327a. In so ruling, the court declined to "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." Pet. App. 351a.

4. On February 7, 2012, the Ninth Circuit affirmed the district court's decision. On the jurisdictional issue, the court ruled that Proponents had standing to appeal. According to the court, "[a]ll that matters, for federal standing purposes, is that the People have an interest in the validity of Proposition 8 and that, under California law, Proponents are authorized to represent the People's interest. That is the case here." Pet. App. 40a.

Addressing the merits, the Ninth Circuit did not decide whether heightened scrutiny applies to laws, like Proposition 8, that target gay and lesbian individuals for disfavored treatment. Pet. App. 57a n.13 (citing *Romer*, 517 U.S. at 631-32). Nor did the court decide whether same-sex couples have a fundamental right to marry under the Due Process Clause. *See* Pet. App. 60a. Instead the court focused on the "unprecedented" and "unusual" nature of Proposition 8—an initiative it concluded "has no practical effect

except to strip" gay men and lesbians of a right that California's Constitution had previously guaranteed. Pet. App. 59a-60a; *see also* Pet. App. 53a-54a ("Before Proposition 8, California guaranteed gays and lesbians both the incidents and the status and dignity of marriage. Proposition 8 left the incidents but took away the status and dignity."). The court of appeals then applied rational basis review to that particular and peculiar state action, framing its inquiry as whether "the People of California ha[d] legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples" the status and dignity state law previously accorded their relationships. Pet. App. 54a.

As the Ninth Circuit explained, because "Proposition 8 is remarkably similar to" the Colorado constitutional amendment struck down by this Court in *Romer*, 517 U.S. 620, "*Romer* governs our analysis" and "compels that we affirm the judgment of the district court." Pet. App. 57a-60a; *see also* Pet. App. 56a ("This is not the first time the voters of a state have enacted an initiative constitutional amendment that reduces the rights of gays and lesbians under state law.").

Integral to its analysis was an examination of the various rationales advanced by Proponents and their *amici* in support of Proposition 8. Pet. App. 69a-85a. After assuming *arguendo* the legitimacy of the governmental interests supposedly advanced by Proposition 8, the court of appeals determined that Proponents had failed to "explain how *rescinding* access to the designation of 'marriage' is rationally related" to any of those interests. Pet. App. 74a. "As in *Romer*," the court therefore concluded that "[Proposition 8] was enacted with only the constitutionally

illegitimate basis of 'animus toward the class it affects,'" Pet. App. 62a (quoting *Romer*, 517 U.S. at 632), and held "Proposition 8 to be unconstitutional on this ground." Pet. App. 94a.

5. The Ninth Circuit denied Proponents' request for rehearing or rehearing en banc on June 5, 2012, over the dissent of Judge O'Scannlain, joined only by Judges Bybee and Bea. Pet. App. 441a-446a. The court ordered that its stay remain in place until final disposition of the case by this Court. Pet. App. 444a.

REASONS FOR DENYING THE PETITION

The petition should be denied because the court of appeals' decision striking down Proposition 8 does not satisfy any of this Court's traditional standards for the exercise of certiorari jurisdiction. The Ninth Circuit's opinion reflects a careful and straightforward application of *Romer v. Evans*, 517 U.S. 620 (1996), which held that the Constitution does not allow for "laws of this sort" that single out gay men and lesbians for discriminatory treatment. *Id.* at 633. Reviewing an extensive trial record and reaching the same conclusion as the district court, the Ninth Circuit found that "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples." Pet. App. 17a. That decision does not conflict with any decision of this Court or any other court of appeals. Indeed, it is the only outcome consistent with the Equal Protection Clause and this Court's precedents.

In addition, this case is, at best, a problematic vehicle for review of Proponents' claims because their claim of Article III standing to appeal is predicated

on a novel legal theory: that a ballot initiative proponent who has suffered no injury personal to himself nevertheless may seek to vindicate the State's interests in the validity of the initiative. Further, even if this Court were to find that Proponents have standing, any decision rejecting the Ninth Circuit's invalidation of Proposition 8 under rational basis review would require this Court to consider several alternative grounds for affirmance. As Plaintiffs argued below, Proposition 8 should be subject to heightened scrutiny under the Equal Protection Clause because it imposes a special disability on a disfavored minority group based on two suspect classifications—sexual orientation and sex. Proponents do not even attempt to defend Proposition 8 under heightened scrutiny, as that discriminatory measure is obviously not tailored to serve any important or compelling state interest. Moreover, Proposition 8, which prevents hundreds of thousands of gay and lesbian Californians from exercising their fundamental right to marry the person of their choice, cannot possibly be squared with the protections afforded to all Americans by the Due Process Clause.

I. THE DECISION BELOW IS A CORRECT APPLICATION OF THIS COURT'S DECISION IN *ROMER V. EVANS*.

Far from conflicting with any of this Court's case law, the court of appeals' decision reflects a correct and straightforward application of settled Supreme Court precedent. It has been more than a century since Justice Harlan proclaimed that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Indeed, "[n]o duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to

secure that equality of rights which is the foundation of free government." *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897). The Equal Protection Clause safeguards equality by "secur[ing] every person within the State's jurisdiction against intentional and arbitrary discrimination." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

Proposition 8 is antithetical to the "principles of equality" on which this "Nation . . . prides itself." *Plyler v. Doe*, 457 U.S. 202, 219 (1982). It creates a permanent "underclass" of hundreds of thousands of gay and lesbian Californians, *id.*, who are denied the right to marry available to all other Californians simply because a majority of voters deems gay and lesbian relationships inferior, morally reprehensible, religiously unacceptable, threatening to children, or simply not "okay." In the words of Plaintiffs' expert witness Ilan Meyer, it is "quite clear that the young children do not aspire to be domestic partners. But, certainly, the word 'marriage' is something that many people aspire to." Trial Tr. 827:14-20. With the full authority of the State behind it, Proposition 8 sends a clear and powerful message to gay men and lesbians: Your relationships are not recognized on the same footing or entitled to the same dignity or respect as those of heterosexuals, they are not "okay," and they are threatening to children.

A. Proponents claim that "the root of the Ninth Circuit's error is its assertion that *Romer* turned on the *timing* of Colorado's Amendment 2 rather than its *substance*." Pet. 18. But *Romer*'s plain language belies Proponents' argument, demonstrating that the relative timing of the Colorado amendment was an important factor in understanding its substance and

effect: Just like Proposition 8, Colorado Amendment 2 *repealed* provisions that previously advanced non-discriminatory treatment of gay men and lesbians, placing a special disability on those groups and raising the specter that it was motivated by an improper purpose.

In *Romer*, this Court explained that "[t]he impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities . . . which banned discrimination." 517 U.S. at 623-24. "Amendment 2 *repeals* these ordinances to the extent they prohibit discrimination on the basis of" sexual orientation. *Id.* at 624 (emphasis added); *see also id.* at 626 ("'The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes . . . that barred discrimination based on sexual orientation.'") (quoting *Evans v. Romer*, 854 P.2d 1270, 1284 (Colo. 1993) (en banc)). As the Court emphasized, "[t]he amendment *withdraws* from homosexuals, but no others, specific legal protection" and "imposes a special disability upon those persons alone." *Id.* at 627, 631 (emphasis added); *see also Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (invalidating a voter-enacted California constitutional provision that extinguished state-law protections that minorities had previously possessed against housing discrimination).

Because "laws of th[is] kind" uniquely *reduce* the status of a minority group by taking away legal rights and privileges previously accorded, the Court closely examined the various "rationale[s] the State offer[ed]" to justify the constitutional amendment, which included "other citizens' freedom of association," "the liberties of landlords or employers who

have personal or religious objections to homosexuality," and the State's "interest in conserving resources to fight discrimination against other groups." *Romer*, 517 U.S. at 634-35. After finding that the amendment was "far removed from these particular justifications," such that it was "impossible to credit them," the Court was left with "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *see also id.* at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

In this case, the Ninth Circuit performed the same analysis, and because Proposition 8 made gay men and lesbians "unequal to everyone else" with respect to the availability of civil marriage, reached the same conclusion. The fact that Proposition 8 "*rescind[s]* access [of same-sex couples] to the designation of 'marriage,'" Pet. App. 74a, the court reasoned, suggests it was motivated by animus against gay men and lesbians rather than some legitimate governmental aim. *See* Pet. App. 55a ("The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is.").

The court of appeals then examined the fit between Proposition 8 and the purported state interests that Proponents and their *amici* claim it serves: "responsible procreation and childrearing," "encourag[ing] heterosexual couples to enter into matrimony," "bolster[ing] the stability of families headed by one man and one woman," "proceed[ing] with caution when considering changes to the definition of marriage," "protecting religious liberty," and "pro-

tect[ing] our children from being taught in public schools that same-sex marriage is the same as traditional marriage." Pet. App. 70a, 78a, 81a, 82a (internal quotation marks omitted). After carefully considering the parties' arguments, the trial court's factual findings, the California Supreme Court's findings and interpretation of Proposition 8, and the campaign literature distributed to voters, Pet. App. 69a-85a, 89a-92a, the Ninth Circuit concluded there is no "conceivably plausible" relationship between Proposition 8 and the rationales proffered in its defense by Proponents. Pet. App. 75a; *see also* Pet. App. 78a ("[T]he People of California could not reasonably have conceived such an argument to be true.") (internal quotation marks omitted); Pet. App. 78a (Proponents' argument "lacks any such footing in reality"). The court was therefore left with the same "'inevitable inference . . . of animosity'" that doomed the amendment in *Romer*. Pet. App. 86a (quoting *Romer*, 517 U.S. at 634).

In short, the Ninth Circuit found that eliminating the ability of gay and lesbian couples to have their relationships designated as marriages—and relegating them to separate and unequal domestic partnerships—achieves nothing except the marginalization of gay and lesbian individuals and their relationships, and therefore cannot withstand constitutional scrutiny. That holding is fully consistent with this Court's jurisprudence, which has long held that marginalizing a group of citizens for its own sake violates the Fourteenth Amendment.

B. Proponents nevertheless argue that two of the governmental interests described above "warrant specific mention" in explaining why, in their opinion, this Court should grant review. Pet. 25.

First, Proponents contend that the Ninth Circuit overlooked the origins of marriage and that "the institution of marriage owe[s] its very existence to society's vital interest in responsible procreation and childbearing." Pet. 28; *see also* Pet. at 37-38 ("[S]upport for the traditional definition of marriage is rooted precisely in . . . maintain[ing] the inherent link between the institution and its traditional procreative purposes."). As the Ninth Circuit held, however, Proponents have never explained the relevance of this history to Proposition 8. It may very well be that the *creation* of marriage and the government's decision to "'extend[ ] a variety of benefits to married couples'" are "'rationally related to the government interest in steering procreation into marriage.'" Pet. 28 (quoting *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006)). But depriving gay men and lesbians of the uniquely "cherished status of 'marriage,'" Pet. App. 52a, obviously does not affect the likelihood that heterosexuals will procreate responsibly or raise their children in Proponents' preferred family structure. It only ensures that gay and lesbian couples will be denied the "worth and dignity" afforded opposite-sex couples and that their children will be raised by parents who cannot marry. Pet. App. 88a; *see also* Pet. App. 237a ("Approximately eighteen percent of same-sex couples in California are raising children.").

In addition, Proponents' argument fails even on its own terms because the line Proposition 8 draws bears no relationship whatsoever to Proponents' stated objective of channeling procreative activity into marriage. There are many classes of heterosexual persons who cannot procreate unintentionally, including the old, the infertile, and the incarcerated. And there are still other classes of heterosexual per-

sons who might have the capacity to procreate, but who have no desire to do so. *All* of these classes of heterosexual persons are as unlikely to engage in "[ir]responsible procreation and childbearing" as a same-sex couple, yet Proposition 8 leaves these classes of heterosexual persons free to marry. Proposition 8 targets gay men and lesbians for exclusion and them alone. *See* Pet. App. 76a ("Proposition 8 in no way alters the state laws that govern childrearing and procreation. It makes no change with respect to the laws regarding family structure. As before Proposition 8, those laws apply in the same way to same-sex couples in domestic partnerships and to married couples. Only the designation of 'marriage' is withdrawn and only from one group of individuals.").

Second, Proponents assert that "it is not irrational for Californians to proceed cautiously on this sensitive and controversial social issue." Pet. 36. But that is not what happened here; California voters did *not* cautiously opt to "observe and assess" the status quo to determine how to proceed. Pet. 36. Rather, they upended the status quo by enshrining a blanket prohibition on same-sex marriage in the State's charter, preventing the legislature from authorizing same-sex unions. *See* Pet. App. 79a ("[T]here could be no rational connection between the asserted purpose of '*proceeding* with caution' and the enactment of an absolute ban, unlimited in time, on same-sex marriage in the state constitution."). Proponents' supposedly noteworthy justifications for Proposition 8 thus provide no justification whatsoever.

3. Proponents conclude by asserting that "there is *no truth* to the panel majority's charge that Proposition 8 is nothing more than an effort to 'dishonor a

disfavored group' and to proclaim the 'lesser worth' of gays and lesbians as a class." Pet. 37 (emphasis added). But the time and place for uncovering the "truth" is at trial, and the trial court found otherwise. The trial record, for example, included testimony from Dr. George Chauncey, Professor of History at Yale University, who explained that the public messages disseminated by the Yes on 8 campaign evoked fears of gay people as child molesters and recruiters of children (Pet. App. 279a-284a), and from Hak-Shing William Tam, an official proponent of Proposition 8 called by Plaintiffs as an adverse witness, who testified that the campaign messages were designed to convince people that "legalizing same-sex marriage" "would lead children to become gay" and "fantasize marrying someone of the same sex," a lifestyle associated with "disease." Pet. App. 165a, 281a-284a. According to Dr. Tam, there is a "gay agenda" that includes legalizing prostitution and sex with children, and permitting gays and lesbians to marry in California would "cause states one-by-one to fall into Satan's hands." Pet. App. 165a, 281a-284a.

Even Proponents' own expert witness—the *only* witness who purported to provide any rational basis for Proposition 8, and on whose testimony Proponents continue to rely, *see* Pet. 36—recently concluded that "the time has come for [him] to accept gay marriage and emphasize the good that it can do." David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. Times, June 22, 2012. This decision was driven by Mr. Blankenhorn's acknowledgement that "to [his] deep regret, much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus." *Id.*; *see also* Trial Tr. 2608:16-18 (testimony of Proponents' expert witness

Kenneth Miller, expressing his view that "at least some people voted for Proposition 8 on the basis of anti-gay stereotypes and prejudice"). Indeed, even before his recent change of heart, Mr. Blankenhorn testified at trial that the elimination of Proposition 8 would make us all "more American" by affirming that "the principle of equal human dignity must apply to gay and lesbian persons." Pet. App. 196a. There is accordingly no reason for this Court to disturb the trial court's considered factual finding that animus was, indeed, the driving force behind Proposition 8, or the Ninth Circuit's decision affirming that determination. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985); Fed. R. Civ. P. 52(a).[2]

II. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS.

A. Proponents contend that "[t]he Ninth Circuit's decision cannot be squared with *Crawford v. Board of Education*, 458 U.S. 527 (1982)." Pet. 15. But *Crawford* itself demonstrates that Proponents are wrong. In fact, *Crawford* supports the Ninth Circuit's approach in this case.

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[2] Proponents point to "California's generous domestic partnership laws," Pet. 34, which they say represent "some of the Nation's most sweeping and progressive protections of gays and lesbians," Pet. 6, as proof that California's "gay-friendly" voters could not have acted with animus in enacting Proposition 8. But there is no "Mostly Equal Protection Clause" or "Separate But Equal Protection Clause" in the U.S. Constitution, and minorities need not be satisfied with mere graciousness from the majority. *See United States v. Virginia*, 518 U.S. 515, 554 (1996).

In *Crawford*, this Court affirmed the constitutionality of an amendment to the California Constitution instructing state courts to stop ordering the busing of students—which they had previously required as a means of desegregating schools—unless the Fourteenth Amendment of the U.S. Constitution required it. 458 U.S. at 529. Unlike Proposition 8, the amendment at issue in *Crawford* did not reduce or eliminate the substantive rights of any particular group. This Court was crystal clear on that point:

> [T]he Proposition simply removes one *means* of achieving the state-created right to desegregated education. School districts retain the obligation to alleviate segregation regardless of cause. And the state courts still may order desegregation measures other than pupil school assignment or pupil transportation.

Id. at 544 (emphasis added). Further, the amendment at issue in *Crawford* could not have violated the U.S. Constitution because, by its own terms, it required state courts to take whatever actions were constitutionally required. *See id.* at 535 ("It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it.").

Proponents repeatedly point to *Crawford*'s language "'reject[ing] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede.'" Pet. 4 (quoting 458 U.S. at 535); Pet. 15 (same). But they ignore the important corollary to that rule: *Crawford*, even before *Romer*, recognized that "if the purpose of repealing legislation is to disadvantage a . . . minority, the re-

peal is unconstitutional for this reason." 458 U.S. at 539 n.21. *Crawford*, just like *Romer* and the decision below, therefore examined the purposes allegedly served by the amendment—for example, "the educational benefits of neighborhood schooling"—by looking at the state court's findings and the relevant campaign literature. *Id.* at 543-44. Unlike *Romer* and this case, however, there was ample evidence in *Crawford* to demonstrate that Proposition I was "not motivated by a discriminatory purpose." *Id.* at 545. The decision below—based on a different record concerning a different ballot proposition purportedly justified by different interests—does not even implicate, much less contradict, *Crawford*'s case-specific conclusion.

B. Proponents also claim the decision below conflicts with *Baker v. Nelson*, 409 U.S. 810 (1972). *See* Pet. 23-24. The Ninth Circuit panel majority and dissent, however, both agreed that *Baker* does not control: As Judge N.R. Smith explained in his dissent, "the constitutionality of withdrawing from same-sex couples the right of access to the designation of marriage does not seem to be among the 'specific challenges' raised in *Baker*." Pet. App. 103a; *see also* Pet. App. 60a n.14.

The Ninth Circuit panel's unanimous conclusion that it was not bound by *Baker* is unquestionably correct. In *Baker*, this Court dismissed "for want of a substantial federal question," 409 U.S. at 810, an appeal from a Minnesota Supreme Court decision rejecting federal due process and equal protection challenges to the State's refusal to issue a marriage license to a same-sex couple, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). This Court's summary dismissals are binding on lower courts only "on the

precise issues presented and necessarily decided" by the Court, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added), and only to the extent that they have not been undermined by subsequent "doctrinal developments" in the Court's jurisprudence, *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation marks omitted); *see also Turner v. Safley*, 482 U.S. 78, 96 (1987).

The Court's summary disposition of the equal protection question in *Baker* does not meet either of these requirements. As an initial matter, *Baker* presented an equal protection challenge based *solely* on sex discrimination and therefore cannot conceivably foreclose Plaintiffs' claim that Proposition 8 discriminates against gay and lesbian individuals on the basis of their sexual orientation. *See* Jurisdictional Statement at 16, *Baker*, 409 U.S. 810 (No. 71-1027) ("The discrimination in this case is one of gender."). In any event, *Baker*'s summary treatment of the sex-based equal protection challenge to Minnesota's marriage law cannot survive later doctrinal developments because *Baker* was decided before this Court recognized that sex is a quasi-suspect classification. *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality). And, to the extent *Baker*'s equal protection ruling ever applied to classifications involving sexual orientation, that ruling has been undermined by subsequent doctrinal developments, including *Romer*.

Moreover, the Court's summary dismissal in *Baker* addressed an equal protection challenge to a marriage framework that is far different from the one that Plaintiffs are challenging here, and therefore cannot be controlling on *any* component of Plain-

tiffs' claims. Whereas *Baker* concerned the constitutionality of an outright refusal by a State to afford *any* recognition to same-sex relationships, Plaintiffs' suit challenges California voters' use of the ballot initiative process to withdraw from unmarried gay and lesbian individuals their preexisting state constitutional right to marry and relegate them to the inherently unequal institution of domestic partnership. Whatever the constitutional flaws in Minnesota's blanket denial of recognition to same-sex relationships, Proposition 8 is uniquely irrational and discriminatory: California voters used the initiative process to single out unmarried gay and lesbian individuals for a "special disability" (*Romer*, 517 U.S. at 631) by extinguishing their state constitutional right to marry, while at the same time preserving the 18,000 existing marriages of gay and lesbian couples (but not allowing those individuals to remarry if divorced or widowed) and affording unmarried gay and lesbian individuals the right to enter into domestic partnerships that carry virtually all the same rights and obligations—but not the highly venerated label—associated with opposite-sex marriages (and existing same-sex marriages).[3]

C. Proponents also incorrectly claim that the court of appeals' decision conflicts with the Eighth Circuit's decision in *Bruning*, 455 F.3d 859. *See* Pet.

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[3] Nor does the Ninth Circuit's decision conflict with *Johnson v. Robison*, 415 U.S. 361 (1974). *See* Pet. 30-31. That Congress had a rational basis for declining to extend scarce veterans' benefits to "conscientious objectors" who refused to "serve their country on active duty in the Armed Forces," 415 U.S. at 374, does not remotely establish that California had a rational basis for dispossessing members of a discrete minority group of their right to marry.

24. The amendment to the Nebraska Constitution at issue in *Bruning* not only declared that same-sex couples could not be designated as "married," but, unlike Proposition 8, also prevented the State from recognizing civil unions, domestic partnerships, or any other same-sex relationship. *See* 455 F.3d at 863. Unlike Proposition 8, it also refused to grant Nebraskan same-sex couples the full "basket of rights and benefits [afforded] to married heterosexual couples." *Id.* at 867.

These important differences do not mean "that Proposition 8 would be constitutional if only it had gone further," Pet. App. 76a, but they do alter the rational basis analysis because they create an entirely distinct means-end fit between Nebraska's law and its purported purposes. *Compare Bruning*, 455 F.3d at 868 ("The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of . . . purposes. The legislature . . . may rationally choose not to expand in wholesale fashion the groups entitled to those benefits."), *with* Pet. App. 59a-60a ("A law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful designation is all the more 'unprecedented' and 'unusual' than a law that imposes broader changes, and raises an even stronger inference that the disadvantage imposed is born of animosity toward the class of persons affected.") (internal quotation marks omitted). Thus, there is no conflict between the decision below and the conclusions reached by the Eighth Circuit under different circumstances in *Bruning*.

III. ALTERNATIVE GROUNDS REQUIRE THE SAME OUTCOME REACHED BY THE COURT OF APPEALS.

This Court should also deny the petition because it requires the Court first to resolve an unsettled threshold question of Article III standing. Then, if it reached the merits and rejected the Ninth Circuit's reasoning, the Court still would be confronted with several alternative grounds for affirmance upon which the district court relied.

A. Proponents Lacked Standing To Appeal The District Court's Decision.

If this Court granted review, it would be required to decide whether Proponents had standing to appeal a decision that has no direct effect on them. The California Supreme Court's ruling that Proponents may represent the State's interests on appeal does not—and cannot—alter Proponents' inability to meet the "irreducible constitutional minimum" requirements of standing established by Article III of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To satisfy Article III, a party must establish, among other things, that it has suffered an "injury" that is "personal, particularized, concrete, and otherwise judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 820 (1997); *see also Lujan*, 504 U.S. at 560. In other words, the "'Art[icle] III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*.'" *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (emphasis in *Stevens*).

Proponents would not suffer any personalized injury as a result of the invalidation of Proposition 8

and thus are unable to satisfy the requirements of Article III, even if, under state law, they have the right to represent *the State's* interests in Proposition 8. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). Because the California Supreme Court's decision cannot override Article III, this Court would have to decide, as a threshold matter, whether the Ninth Circuit should have dismissed the appeal for lack of jurisdiction. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) ("Standing to sue in any Article III court is . . . a federal question which does not depend on the party's prior standing in state court.").

B. Denying Gay Men And Lesbians The Fundamental Right To Marry Violates Equal Protection.

Were this Court to find that Proponents had standing to appeal but disagree with the Ninth Circuit's rational basis analysis, it would then be required to address whether some form of heightened scrutiny should apply under the Equal Protection Clause.

1. Strict and intermediate equal protection scrutiny apply to classifications based on factors "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). This Court has consistently applied heightened scrutiny where a group has experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Ret. v. Murgia*, 427 U.S.

307, 313 (1976) (per curiam) (internal quotation marks omitted); *see also United States v. Virginia*, 518 U.S. 515, 531-32 (1996) (noting "long and unfortunate history of sex discrimination") (internal quotation marks omitted).

In this case, the district court found that "the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect." Pet. App. 300a. That finding follows inexorably from this Court's equal protection jurisprudence, the extensive trial record, and Proponents' repeated concessions that gay men and lesbians have faced a history of discrimination based on a trait that has no bearing on their ability to contribute to society. As Plaintiffs' expert Gary Segura explained, "[t]here is no group in American society who has been targeted by ballot initiatives more than gays and lesbians," and "[t]hey have essentially lost a hundred percent of the contests over same-sex marriage." Trial Tr. 1552:6-12. Indeed, the *undisputed* fact that gay men and lesbians have been subjected to a history of discrimination based on a trait that bears no relationship to their ability to contribute to society is sufficient, in and of itself, to render classifications based on sexual orientation "suspect" (or, at the very least, quasi-suspect) and to give rise to heightened scrutiny.[4]

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[4] Among other things, the district court's findings of fact examine the painful history of discrimination faced by gay men and lesbians, their lack of political power (including the frequent successful targeting of them through ballot initiatives), their ability to contribute equally to society, and the immutability of sexual orientation. *See* Pet. App. 228a-234a, 264a-279a. Because it applied rational basis review, the court of appeals did not have occasion to address these findings. It thus would

Proponents do not even attempt to argue that Proposition 8 would survive heightened scrutiny if sexual orientation were declared to be a suspect classification, as it plainly would not.

2. Heightened scrutiny is also warranted because Proposition 8 discriminates on the basis of sex. Proposition 8 prohibits a man from marrying a person whom a woman would be free to marry, and vice-versa. As the district court explained: "Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex." Pet. App. 297a-298a.

The fact that Proposition 8's discriminatory restrictions apply with equal force to both sexes does not cure its constitutional deficiencies. As this Court held in *Loving v. Virginia*, the mere "fact" that Virginia's anti-miscegenation law had "equal application [to both the white and African-American member of the couple] d[id] not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." 388 U.S. 1, 9 (1967). "[E]qual application" is thus a plainly insufficient basis for defending discriminatory restrictions on the right to marry.

The district court also found that the sex-based restriction embodied in Proposition 8 is based on, and inextricably intertwined with, outdated and un-

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[Footnote continued from previous page]

be left to this Court to determine in the first instance the level of deference to be accorded to the district court's factual findings on these topics.

founded stereotypes about the roles that men and women should play in society and in the family. As the district court explained, "[T]he evidence shows that the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles." Pet. App. 303a. Today, "California has eliminated all legally-mandated gender roles except the requirement that a marriage consist of one man and one woman." Pet. App. 303a.

Classifications based on sex are unconstitutional unless the State proves that they are "substantially related" to an "important governmental objective[ ]." *Virginia*, 518 U.S. at 533 (internal quotation marks omitted). As discussed above, Proponents make no serious attempt to satisfy such heightened scrutiny. Proposition 8 is therefore unconstitutional for the additional, independent reason that it impermissibly discriminates on the basis of sex.

3. Even if this Court were to determine that strict and immediate scrutiny are inapplicable to Proposition 8, it would nevertheless need to determine whether a form of heightened rational basis review applies. Indeed, the First Circuit recently applied such a standard in assessing the constitutionality of DOMA, explaining the need for "intensified scrutiny of purported justifications where minorities are subject to discrepant treatment." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012) (citing *Moreno*, *City of Cleburne*, and *Romer*), *petitions for cert. filed*, 81 U.S.L.W. 3006 (U.S. June 29, 2012) (No. 12-13), *and* 81 U.S.L.W. 3006 (U.S. July 3, 2012) (No. 12-15), *and* 81 U.S.L.W. 3065 (U.S. July 20, 2012) (No. 12-97). That court therefore conducted "a more careful assessment of the justifications [for the law] than the light scrutiny

offered by conventional rational basis review," *id.* at 11, ruling that "the rationales offered do not provide adequate support for section 3 of DOMA." *Id.* at 15. Proposition 8 would likewise fail the version of rational basis review applied by the First Circuit.

C. Denying Gay Men And Lesbians The Fundamental Right To Marry Violates Due Process.

If this Court granted review and rejected the Ninth Circuit's holding, it would also be confronted with the question whether gay men and lesbians are entitled to the fundamental right to marry that the Court long ago recognized to be inherent in the Due Process Clause. The "freedom of personal choice in matters of marriage" is a well-established fundamental right. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). In more than a dozen cases over the last century, this Court has reaffirmed that the right to marry is "one of the liberties protected by the Due Process Clause," *id.*; "essential to the orderly pursuit of happiness by free men," *Loving*, 388 U.S. at 12; and "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).[5]

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[5] *See also Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Turner*, 482 U.S. at 95-96; *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

In fact, this Court has characterized the right to marry as one of the *most* fundamental rights—if not *the* most fundamental right—of an individual. *Loving*, 388 U.S. at 12. The Court has defined marriage as a right of liberty (*Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)), privacy (*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)), intimate choice (*Lawrence v. Texas*, 539 U.S. 558, 574 (2003)), and association (*M.L.B.*, 519 U.S. at 116). "Marriage is a coming together for better or for worse, hopefully enduring, and intimate *to the degree of being sacred*." *Griswold*, 381 U.S. at 486 (emphasis added). The right "is of fundamental importance *for all individuals*." *Zablocki*, 434 U.S. at 384 (emphasis added). Indeed, "[w]hen slaves were emancipated, they flocked to get married" because they believed that "the ability to marry legally, to replace the informal unions in which they had formed families and had children . . . with legal, valid marriage . . . would presumably protect their vows to each other." Trial Tr. 202:22-203:9 (testimony of Plaintiffs' witness Nancy Cott, an expert on the history of marriage in the United States (Pet. App. 172a)).

The right to marry has always been based on, and defined by, the constitutional liberty to select the partner of one's choice—not on the partner chosen. *See generally Loving*, 388 U.S. 1; *Turner*, 482 U.S. 78. Thus, just as striking down Virginia's prohibition on marriage between persons of different races did not require this Court to recognize a new constitutional right to interracial marriage in *Loving*, invalidating Proposition 8 would not require recognition of a new right to same-sex marriage. Instead, it would vindicate the longstanding right of *all* persons to exercise freedom of personal choice in deciding whether and whom to marry. *See Lawrence*, 539

U.S. at 566, 574 (invalidating Texas's criminal prohibition on same-sex intimate conduct because it violated the right to personal sexual autonomy guaranteed by the Due Process Clause, not because it violated a "fundamental right" of "homosexuals to engage in sodomy") (internal quotation marks omitted).

Because Proposition 8 burdens that fundamental right, it is unconstitutional unless Proponents can demonstrate that it is "narrowly drawn" to further a "compelling state interest[ ]," *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977), a showing they do not attempt and could not plausibly make.[6]

* * *

As shown above, the decision of the court of appeals is correct and reflects a straightforward application of this Court's decision in *Romer*. Because the Ninth Circuit's decision necessarily is bound up with the particular circumstances presented by Proposition 8, that decision does not conflict with any decision of this Court or any other court of appeals. While there are circumstances that might make review of this obviously important issue attractive at this time—particularly the possibility of resolving this case in conjunction with the challenges to

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[6] This due process argument is not affected by this Court's summary affirmance in *Baker* because subsequent doctrinal developments have deprived *Baker*'s due process holding of any precedential force. This Court's decision in *Lawrence*, a case largely ignored by Proponents, confirmed that the Due Process Clause "afford[s] . . . protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, [and] child rearing" and that "[p]ersons in a homosexual relationship may seek autonomy *for these purposes*, just as heterosexual persons do." 539 U.S. at 574 (emphasis added).

DOMA—those considerations must be weighed against the substantial and irreparable harm the period of additional review would impose on Plaintiffs and those situated similarly to them. Each day Plaintiffs' rights to marry are denied is a day that can never be returned to them—a wrong that can never be remedied. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("substantial loss or impairment" of a constitutional right is an "irreparable injury"). The Ninth Circuit's decision to vindicate those rights in accordance with this Court's precedents does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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