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 OF *AMICI CURIAE* DECLARATION ALLIANCE & UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITIES

## BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS[1]

## STATEMENT OF INTEREST

Amicus, Declaration Alliance (hereinafter referred to as "DA"), is a nonprofit social welfare organization, exempt from federal income tax under IRS section 501(c)(4). DA promotes liberty as the duty to respect freedom's foundation in the Laws of Nature and Nature's God.

DA has filed numerous amicus briefs regarding the social institution of marriage, and promoting the proper interpretation of State and Federal constitutions and statutes pertaining thereto.

Amicus, the United States Justice Foundation (hereinafter referred to as "USJF"), is a nonprofit, public interest, legal action organization, dedicated to instruct, inform, and educate the public on, and to litigate, significant legal issues confronting America. Founded in 1979 by attorneys seeking to advance the conservative viewpoint in the judicial arena, USJF has since submitted testimony to the U.S. Senate on virtually every United States Supreme Court appointee, sponsored conferences on a variety of important legal issues, published studies and reports on topical issues, and litigated numerous

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have each been given 10 days notice of *amici*'s intention to file this brief.

Constitutional cases, including up to this court. USJF is committed to preserving the traditional institution of marriage as a union of one man and one woman, and brings a unique perspective to this matter as USJF filed one of the first suits challenging the issuance of marriage licenses to same-sex couples in California (Logue, et al., v. California Department of Public Health, Office Of Vital Records (2008) Sacramento County Superior Court Case No. 34-2008-00013281).

The issue of 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 is important, because the California electorate should have the right to decide if they want to keep marriage as it has been for 5,000 years, or to change it to something else. Such a change should not be thrust on a state that has repeatedly affirmed its intention to keep the definition unchanged, by a politically well-connected, well funded, group.

## INTRODUCTION

The "right" for same sex couples to marry did not exist in California until May 15, 2008, when, in the case of *In Re Marriage Cases*[2] the California State Supreme Court held that, since the California Legislature had granted same sex couples civil union status, which the Court found to be nearly identical to marriage status, then denial of the title of "marriage" to same sex couples was unconstitutional. However, whatever the intent of the California Legislature towards same sex couples with

2. *In Re Marriage Cases* (2008) 43 Cal.4th 757, 183 P.3d 384.

regard to the title of "marriage," the legislature could not bestow the title of "marriage" on same sex couples because of California Family Code § 308.5 (hereinafter referred to as "Prop 22"), and the State Legislature cannot supersede a voter approved initiative with subsequent legislation.

In 2000, an initiative known as Prop 22 was placed on the California ballot to clarify ambiguous language in the California Family Code with regard to marriage. The initiative passed with a 61% vote of approval. In 2008, a subsequent initiative, titled the California Marriage Protection Act (hereinafter referred to as "Prop 8"), was proposed in order to add the language of Prop 22 to the California Constitution. On May 15, 2008, before the initiative process to qualify for the ballot was complete, a California Court held, in the matter of *In Re Marriage Cases*, that Prop 22 was unconstitutional. Two weeks later, on June 2, 2008, proponents Prop 8 submitted a sufficient number of signatures to qualify for the November 2, 2008, election ballot. Prop 8 passed with a 52.24% vote of approval, and was added to the California State Constitution as Article 1, § 7.5. Immediately after Prop 8 was approved, the underlying case was filed in Federal District Court.

## SUMMARY OF ARGUMENT

THE ISSUE OF 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 IS IMPORTANT, BECAUSE THE CALIFORNIA ELECTORATE SHOULD HAVE THE RIGHT TO

DECIDE IF THEY WANT TO KEEP MARRIAGE AS IT HAS BEEN FOR 5,000 YEARS, OR TO CHANGE IT TO SOMETHING ELSE. SUCH A CHANGE SHOULD NOT BE THRUST ON A STATE THAT HAS REPEATEDLY AFFIRMED ITS INTENTION TO KEEP THE DEFINITION UNCHANGED, BY A POLITICALLY WELL-CONNECTED, WELL-FUNDED, VOCAL MINORITY.

## ARGUMENT

### I. PETITIONERS SHOULD BE FOUND TO HAVE STANDING TO BRING THIS WRIT OF CERTIORARI, OR ELSE THE ENTIRE ACTION SHOULD BE DISMISSED AS LACKING ANY CASE OR CONTROVERSY FROM THE OUTSET.

Respondents argue that Petitioners lack standing to bring this writ of certiorari, because they are not directly impacted by the decision in the courts below. However, when the initial lawsuit was filed, neither California Governor Schwarzenegger, nor California State Attorney General Jerry Brown, were willing to defend the initiative. Because the State of California refused to defend the lawsuit, the District Court permitted a motion to intervene by Petitioners, so that there would be a defending party. Petitioners defended the suit throughout the trial, but, in its judgment, the District Court held that Petitioners lacked standing to appeal on the same grounds that Respondents are arguing. If the U. S. Supreme Court were to accept the argument of Respondents, and of the District Court, regarding the standing of Petitioners, then this case was not properly litigated, and, therefore, could not have been properly decided by the District and U. S.

Circuit Court of Appeals. As already stated, the Governor and the Attorney General of the State of California would not defend Prop 8, in effect nullifying, by inaction, an amendment to the California State Constitution that was approved by the California electorate. Such a refusal by the Attorney General to defend Prop 8 was, and is, unlawful (Attorney General has a duty to defend all cases in which the state or one of its officers is party. (*California Air Resources Bd. v. Hart* (App. 2 Dist. 1993) 26 Cal. Rptr.2d 153, 21, Cal.App.4th 289.)). Even if the Attorney General were to be compelled to defend the suit, he would likely not defend it with the zeal or enthusiasm required for a legitimate defense. For this reason, if Petitioners do not have standing to bring this writ of certiorari, and, likewise, lacked standing to bring an appeal to the U. S. 9th Circuit Court of Appeals, then they also would not have standing to defend the suit as intervenors, and this matter could not have been properly litigated at any stage, as lacking any case or controversy, as required under Article III of the United States Constitution. For this reason, *Amicus* respectfully requests that Petitioners be found to have standing, or, in the alternative, for this Court to dismiss the entire matter as lacking the requisite case or controversy from the outset.

## II. THE DEFINITION OF MARRIAGE IS NOT A CONSTRUCT OF THE STATE.

Marriage, as an institution, has existed throughout all of recorded history, even prior to the advent of any governing bodies. In all of that time, marriage has consisted only of unions between men and women, opposite sexes. Even when there were situations where a man could be married to more than one woman, the basic definition

remained unchanged, a union between a man and a woman. Respondents, in support of their argument that this definition no longer applies, insist that the roles of men and women in times past are no longer applicable to modern people, and that any law that restricts marriage on the basis of sex violates the Equal Protection Clause of the 14th Amendment. The problem with this argument is that marriage is not a creation of the state, or of society in general. If it were, then the definition of marriage would be subject to alteration in any manner that the state, or society in general, would so dictate. But this is not what marriage is. Marriage is not created by any state or society, it is merely recognized by the same. This is shown by the fact that, in every country, and in every culture throughout the entire world, there exists marriage within the basic definition. Even the argument that after the Emancipation Proclamation was signed that many former slaves rushed to get married as a sign that they were free, is not completely accurate, as slaves did enter into marriage prior to being emancipated. Even with the recognition that men and women are to be treated equally under the law, there remain significant differences between men and women, differences that do not dissipate simply because one chooses to ignore them, or to pretend that they are not really there. It is a truism that men and women are very different, as any biology textbook would confirm, and that difference is confirmed in many areas of the law. Prop 8 was not promoted to deny same sex couples anything, but, instead, it was proposed to prevent judicial meddling with the definition of marriage, as acknowledged by the voters of California.

Finally, Prop 8 does not prevent homosexuals from being married within the definitional limitations, but

it does restrict anyone from taking any relationship, and simply calling it "marriage." No one should be able to change the definition of a word, or a concept, or an institution, simply because they consider it to be outdated or unfair. Respondents make mention that homosexuals are traditionally a politically oppressed group, which would justify special consideration and protections. However, this characterization is not true today. Homosexuals today are politically connected, have access to resources necessary to promote their positions, and have many sympathetic supporters. Otherwise, major current candidates for the position of Mayor in both San Diego and in Los Angeles would not be homosexual. Nor would the current District Attorney in San Diego be a homosexual.

Further, it is not an accurate, or fair, to compare the homosexual community and the African American community during the Civil Rights Movement, since the former cannot truthfully claim that they have no means to redress grievances other than turning to the courts to enact what they cannot do politically.

## CONCLUSION

For the reasons stated above, *Amici* respectfully request that this Court grant Petitioners' writ of certiorari.

Respectfully Submitted,

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