No. 12-144

In the

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al*,

Petitioners,

v.

KRISTEN 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 *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
jeastman@chapman.edu
(714) 628-2587

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

1. Whether the federal Constitution prohibits the people of a State from defining marriage as it has been traditionally understood, a union of one many and one women, when the procreative function that inheres in such relationships makes them differently situated from same-sex relationships?

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Center for Constitutional Jurisprudence was established in 1999 as the public interest law firm of the Claremont Institute, the stated mission of which is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life." The Center advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the very right of the sovereign people to retain the centuries-old definition of marriage as a cornerstone of civil society, in the face of government officials holding a different personal view, is at stake. The Center has previously appeared as counsel or as *amicus curiae* before this Court and other courts in cases involving the authority of the people, as the ultimate sovereign, to direct and control the actions of their agents, the elected officials of government, through written constitutions, including *United States v. Morrison*, 529 U.S. 598 (2000); *Amodei v. Nevada State Senate*, 99 Fed.Appx. 90 (9th Cir. 2004); *Howard Jarvis Taxpayers Ass'n v. Legislature of the State of California*, No. S170071 (Cal. 2009).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file in support of certiorari. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any 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 *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND PROCEDURAL HISTORY

Over the past decade, the People of California have engaged in an epic battle over the very definition of marriage, a bedrock institution that has long been recognized as "one of the cornerstones of our civilized society." *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 936, 957 (1971) (Black, J., dissenting from denial of cert.)

The battle has pitted the majority of the People of California against every branch of their state government. In 2005, for example, the Legislature attempted, in violation of the California Constitution, art. 2, § 10(c), to negate Proposition 22, a statutory initiative adopted by the People in 2000 that confirmed the age-old definition of marriage, *see* Cal. Fam. Code § 308.5. Similarly, a local elected official, the Mayor of San Francisco, took it upon himself to issue marriage licenses in direct violation of Proposition 22. Although the California Supreme Court rebuffed that blatant disregard of the law, *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (2004), it ultimately ruled that Proposition 22 was unconstitutional under the state constitution. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008).

The People responded immediately, adopting at the very next election an initiative that was already being circulated for consideration at the time of the decision in *In re Marriage Cases*. Proposition 8 was thus adopted in November 2008 as a constitutional amendment, effectively overturning the decision of the California Supreme Court. That initiative was immediately challenged as a supposed unconstitu-

tional revision of the state constitution rather than a valid constitutional amendment. The Attorney General of the State, an opponent of Proposition 8 during the election, not only refused to defend the initiative in court, but affirmatively argued that it was unconstitutional. The California Supreme Court upheld Proposition 8 as a valid amendment to the state constitution only after the initiative's proponents were allowed to intervene and provide a defense. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

Another group of plaintiffs, supported by many of the same organizations that had just lost in *Strauss*, then filed this action in federal court, naming as defendants several government officials, including the same Attorney General who had previously refused to defend the initiative in state court, none of whom offered any defense to the lawsuit.

Despite governing precedent from the Ninth Circuit as well as this Court, the Attorney General again refused to defend Proposition 8, instead supporting Plaintiffs' contention that the Proposition was unconstitutional. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 949 (2009).

After what can only be described as a show trial—the Chief Judge of the District Court, who presided, was even chastised by this Court for attempting to broadcast the trial in violation of existing court rules, *Hollingsworth v. Perry,* 130 S. Ct. 705, 715 (2010)—the District Court issued a 136-page opinion that purported to contain numerous findings of fact ostensibly discrediting all of the oral testimony while simply ignoring the extensive documentary and historical evidence supporting the rationality of Proposition 8. It also articulated conclusions of law that

likewise simply ignored binding precedent of this Court and the Ninth Circuit, as well as persuasive authority from every other state and federal appellate court to have considered the issues presented by the case.

The district judge retired shortly thereafter, and only then revealed that he was in a long-term same-sex relationship—that is, identically situated with the plaintiffs and in a position to be a direct beneficiary of his own ruling in the case. A motion by Proponents to vacate the decision because of the district judge's failure to recuse himself or at least provide the required disclosures were denied by the Chief Judge of the district court.

Finally, despite concerted efforts by the People of California[2] to have Defendants—their elected Governor and Attorney General—file a notice of appeal to guarantee that the Ninth Circuit had jurisdiction to consider whether the decision by the District Court invalidating a solemn act of the sovereign people of California was erroneous, none of the governmental defendants filed a notice of appeal within the 30-day window specified by F.R.A.P. 4(a)(1)(A).

Nevertheless, after receiving confirmation from the California Supreme Court that initiative proponents have authority on behalf of the State to defend the initiatives they sponsored, thereby meeting Article III standing requirements, the Ninth Circuit reached the merits, holding that the people of the

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[2] *See, e.g.*, "Lawmakers Urge Governor to Appeal Prop 8 Ruling," Associated Press (Sept. 1, 2010), available at http://www.cbsnews.com/stories/ 2010/09/01/national/ main 6827966.shtml.

state could not correct an erroneous decision of their own Supreme Court by amending their constitution to restore the law of marriage to what it had been since before the state was a state.

REASONS FOR GRANTING THE WRIT

I. The Holding Below Altering the Definition of Marriage Is Monumentally Important.

A. Equal Protection Analysis Is Only Triggered If People Who Are "Similarly Situated" Are Treated Differently.

By way of this federal court action, plaintiffs seek to dramatically change both the definition and the purpose of marriage. They claim that for the State to deny same-sex couples the same access to the institution of marriage that is available to opposite-sex couples is a violation of the Equal Protection Clause of the Fourteenth Amendment.

Yet, as this Court has frequently recognized, "[t]he Equal Protection Clause … is essentially a direction that all persons *similarly situated* should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (emphasis added). "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe,* 457 U.S. 202, 216 (1982).

Accordingly, the issue is whether same-sex and opposite-sex relationships are similarly situated. This is a "threshold" inquiry, for the Equal Protection clause is not even triggered if the relationships

are not similarly situated. *See, e.g.*, *Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996).

Moreover, the issue is not whether the relationships might be similarly situated in some respect, but whether they are similarly situated in ways relevant "to the purpose that the challenged laws purportedly intended to serve." *Cleburne*, 473 U.S. at 454 (Stevens, J., joined by Burger, C.J., concurring); *see also Rostker v. Goldberg*, 453 U.S. 57, 78 (1981) (rejecting challenge to male-only selective-service registration on ground that "[m]en and women … are simply not similarly situated *for purposes* of a draft or registration for a draft") (emphasis added); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (upholding Equal Protection challenge to state probate preference for men over women as estate administrators, because men and women were "similarly situated with respect to [the] objective" of the statute").

The district court below erroneously emphasized the ways in which same-sex and opposite-sex relationships *are* similarly situated rather than the ways they *are not* similarly situated. "Like opposite-sex couples, same-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners," Judge Walker found. Pet.App. 235a. "Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions," he concluded. *Id.*

That was error of the first magnitude. No one disputes that if marriage as an institution was only about the relationships adults form among themselves, it would violate Equal Protection not to recognize as marriage any adult relationship seeking

the recognition. But marriage is and always has been about much more than the self-fulfillment of adult relationships, as history, common sense, legal precedent, and the trial record in this case itself demonstrate. Because the institution of marriage is the principal manner in which society structures the critically important function of procreation and the rearing of children, it has long been recognized as "one of the cornerstones of our civilized society." *Meltzer*, 402 U.S. at 957 (Black, J., dissenting from denial of cert.). Indeed, this Court has itself noted that "the union for life of one man and one woman" is "the sure foundation of all that is stable and noble in our civilization." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

This purpose has been recognized in California since the very beginning of the State's existence as a State. "The first purpose of matrimony, by the laws of nature and society, is procreation," held the California Supreme Court in *Baker v. Baker*, 13 Cal. 87, 103 (1859). A century later, the same court recognized that "the institution of marriage" serves "the public interest" because it "channels biological drives that might otherwise become socially destructive" and "it ensures the care and education of children in a stable environment." *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952). And a half century after that, on the eve of the Proposition 8 political fight, the California Court of Appeal recognized that "the sexual, procreative, [and] child-rearing aspects of marriage" go "to the very essence of the marriage relation." *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184-85 (Cal. Ct. App. 2008).

These cases are not anomalies but carry forward a long and rich historical and philosophical tradition. Henri de Bracton wrote in his thirteenth-century treatise, for example, that from the *jus gentium*, or "law of nations," comes "the union of man and woman, entered into by the mutual consent of both, which is call marriage" and also "the procreation and rearing of children." 1 H. Bracton, *On the Laws and Customs of England* 27 (S. Thorne ed. 1968). William Blackstone described the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that and regulated." 1 William Blackstone, Commentaries *410. He then described the relationship of "parent and child" as being "consequential to that of marriage, being its principal end and design." *Id.* And John Locke, whose influence on the American constitutional order is perhaps unsurpassed, described the purpose of marriage, "the end of the conjunction of the species," as "being not barely procreation, but the continuation of the species." John Locke, Second Treatise of Civil Government §§ 78, 79 (1690).

This long-standing view was confirmed by the sociological and anthropological evidence introduced into the trial record. The work of the late Claude Lévi-Strauss, the "father of modern anthropology"[3] and former Dean of the Académie Française, forms part of the trial record, for example, and includes this observation: "the family—based on a union, more or less durable, but socially approved, of two

[3] http://www.euronews.com/2009/11/03/death-of-french- anthropologist-claude-levi-strauss/.

individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society."[4] Marriage is thus "a social institution with a biological foundation," he wrote in another work.[5] And historian G. Robina Quale's comprehensive sociological survey of the development of marriage from prehistoric times to the present, also part of the trial record, reveals that "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring can be found in all societies."[6]

Given the near universal view, across different societies and different times, that a principal, if not *the* principal, purpose of marriage is the channeling of the unique procreative abilities of opposite-sex relationships into a societally beneficial institution, it is beyond peradventure that same-sex and opposite-sex couples are *not* similarly situated with respect to that fundamental purpose.

That is undoubtedly why Plaintiffs' own expert admitted at trial that redefining marriage to include same-sex couples would profoundly alter the institution of marriage. Trial Tr. 268 (testimony of Harvard Professor Nancy Cott). And why Yale Law Professor William Eskridge, a leading gay rights activist, has noted that "enlarging the concept to embrace

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[4] Claude Lévi-Strauss, The View From Afar 40-41 (1985) (Trial Ex. DIX63).

[5] Claude Lévi-Strauss, *Introduction*k in Andre Burguiere, et al. (eds.), 1 A History of the Family: Distant Worlds, Ancient Worlds 5 (1996).

[6] G. Robina Quale, A History of Marriage Systems 2 (1988) (Trial Ex. DIX79).

same-sex couples would necessarily transform [the institution of marriage] into something new." William N. Eskridge, Jr. & Darren R. Spedale, Gay Marriage: For Better or for Worse? What We've Learned from the Evidence 19 (2006) (Plaintiffs' Tr. Ex. PX2342). In short, "[s]ame-sex marriage is a breathtakingly subversive idea." E. J. Graff, Retying the Knott, The Nation at 12 (June 24, 1996) (Tr. Ex. DIX1445). If it ever "becomes legal, [the] venerable institution [of marriage] will ever after stand for sexual choice, for cutting the link between sex and diapers." *Id.*

Yet despite all this evidence, the trial court found, as a "finding," that "Same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions." Finding #48, Pet.App. 235a. This because, in its view, "Marriage is [only] the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents." Finding #34, Pet.App. 220a-221a. (citing Plaintiff's expert, Nancy Cott); *see also id.* at 155a ("The state's primary purpose in regulating marriage is to create stable households").

Necessarily, given that conclusion, the court also had to deny that procreation was part of the historical purpose of marriage. *See* Pet.App. 290a ("The evidence did not show *any* historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry") (empha-

sis added). And it had to make the further, preposterous claim that "[g]ender no longer forms an essential part of marriage." Pet.App. 291a. Only then, after discarding the very thing that is critical to the threshold Equal Protection inquiry, could the trial court conclude that "[r]elative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law." *Id.*

The stakes of this case involve more than just factual error correction, however. If the Ninth Circuit's decision is allowed to stand, the very definition and purpose of marriage will necessarily be altered. Redefining marriage to encompass same-sex relationships "will introduce an implicit revolt against the institution into its very heart." Ellen Willis, *"Can Marriage Be Saved? A Forum*, The Nation at 16-17 (June 24, 1996). Indeed, same-sex marriage is "the most recent development in the deinstitutionalization of marriage," the "weakening of the social norms that define people's behavior in . . . marriage." Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Fam. 848, 850 (2004) (DIX49).

B. Fundamentally, The Issue Here is Who Makes The Policy Judgment About the Purpose of Marriage, The People, or the Courts?

When the California Supreme Court considered the initial state constitutional challenge to Proposition 8, it recognized that "the principal issue before [it] concerns the scope of *the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself* through

the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution." *Strauss*, 46 Cal. 4th at 385, (2009). While that case involved a unique question of California constitutional law (the difference between a constitutional amendment, which can be accomplished by voter initiative, and a constitutional revision, which requires a constitutional convention), because *federal* Equal Protection analysis requires, as a threshold matter, an inquiry into the purpose served by a classification in order to ascertain whether different groups of people are similarly situated, the same issue pertains. What is the scope of the right of the people under the federal constitution to make basic policy judgments about the purposes served and to be served by society's fundamental institutions, when that definition of purpose will determine whether the groups on opposite sides of the resulting classification are "similarly situated"?

Justice Baxter's observations in *In re Marriage Cases*, the decision from the California Supreme Court's opinion that created the state constitutional right to same-sex marriage and that lead the people of the state to adopt Proposition 8 and return the definition of marriage to what it had always been, are particularly apropos. Recognizing that such policy judgments are quintessentially the stuff of the democratic political process, he criticized the court's majority for engaging in "legal jujitsu," "abruptly forestall[ing] that process and substitute[ing], by judicial fiat, its own social policy views for those expressed by the People themselves." *In re Marriage Cases*, 43 Cal. 4th at 863-64 (Baxter, J., concurring and dissenting).

The trial court here did exactly the same thing when presented with this *federal* constitutional challenge. By discounting to near zero all the precedential and historic evidence demonstating that procreation has always been a significant purpose of marriage, it substituted its views about that threshold policy judgment for those of the millions of Californians who, in voting for Proposition 8, necessarily determined that the historic purpose still mattered. And in affirming the judgment of the district court, the Court of Appeals likewise substituted its policy judgment about the threshold "purpose" inquiry for that of the people of the State of California.

Whether, en route to the threshold Equal Protection inquiry whether different groups of people are similarly situated with the respect to the purpose served by the classification, the courts or the people are responsible for determining the purpose that will be pursued, is an issue that this Court has not squarely confronted, and yet it is critically important to the constitutional analysis.

Plaintiffs-Respondents contend that the ruling below is limited to California, and therefore does not warrant this Court's attention. Yet, "[f]or better or worse," the Ninth Circuit is "the Court of Appeals for the Hollywood Circuit. Millions of people toil in the shadow of the law" it makes, not just in California but in all of the states within the Ninth Circuit's jurisdiction. *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1992) (Kozinski, J., dissenting from denial of rehearing). Millions more—indeed, the entire country—will be affected by the decision, both because Hollywood's influence in altering cultural norms has a way of affecting the

rest of the country, and because many of the people who will be married in California under the new policy imposed by the Ninth Circuit will, at least over time, fan out to every corner of the nation, forcing other states to deal with the societal and family-law implications of the new institutional definition and purpose. The collateral issues are simply too numerous, and the impact of the Ninth Circuit's decision in pre-determining them for others too great, for this Court to await another case.

II. The Ninth Circuit Has Intervened in a Heated Political and Policy Dispute, An Arena Where Judicial Authority Is At Its Lowest Ebb.

This Court is acutely aware of the dangers that flow from judicial interference in policy disputes, particularly hotly contested ones. One such attempt, a century and a half ago, led directly to the Civil War, the bloodiest war in our nation's history. Another has so polarized our nation's politics for almost a half-century now that respected commentators legal scholars from both ends of the ideological spectrum have noted the democracy-destructive consequences. The author of *Roe v. Wade*, 410 U.S. 113 (1973), "did more inadvertent damage to our democracy than any other 20th-century American," wrote David Brooks in the New York Times, for example. "When he and his Supreme Court colleagues issued the *Roe v. Wade* decision, they set off a cycle of political viciousness and counter-viciousness that has poisoned public life ever since." David Brooks, *Roe's Birth, and Death*, N.Y. Times, at A23 (Apr. 21, 2005); *see also* Robert P. George, *Gay Marriage, Democracy, and the Courts*, Wall St. J., at A11 (Aug. 3, 2009)

("By short-circuiting the democratic process, Roe inflamed the culture war that has divided our nation and polarized our politics").

On the other end of the political spectrum, Professor Cass Sunstein has noted that "the decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents." Cass Sunstein, *Three Civil Rights Fallacies*, 79 Calif. L. Rev. 751, 766 (1991). And Professor William Eskridge has written about the political "distrust" that has arisen since the decision because it "essentially declared a winner in one of the most difficult and divisive public law debates of American history" and allowed no recourse to the political process. William N. Eskridge, Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 Yale L.J. 1279, 1312 (2005).

The poisoned well that results from inappropriate judicial intervention was even recognized, but then ignored, by the district court judge who presided over the trial in this very case:

> [I]n other areas where the Supreme Court has ultimately constitutionalized something that touches upon highly-sensitive social issues, and taken that issue out of the political realm, . . . all that has happened is that the forces, the political forces that otherwise have been frustrated, have been generated and built up this pressure, and have, as in a subject matter that I'm sure you're familiar with, plagued our

> politics for 30 years, isn't the same danger here with this issue?"

Transcript of Record at 3095, *Perry v. Schwarzenegger*, No. C 09-2292-VRW (N.D. Cal. June 16, 2010).

The Ninth Circuit's decision below threatens to drag this Court, and the country, into another such quagmire. If the Constitution's commands clearly so require, then it would be the "painful duty" of this Court to say so. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). But absent that clear command—and even the court below studiously avoided holding that the Constitution actually mandates same-sex marriage—self-inflicted wound is the more apt description.

There are powerful democratic forces at play on both sides of this policy dispute. As a result, there is little prospect that those forces can be cabined by a decision from the Ninth Circuit, or any Court, invalidating on anything less than clear constitutional command the results of that political process. Rather, the opposite result, one which not only prolongs and heightens the dispute, but threatens as well to undermine the credibility of the judiciary, is much more likely. This is simply not going to be a case where judicial negation of democratically chosen policy is going to yield full and quiet acceptance of the judicially-imposed rule.

In short, unless there is a "persuasive basis in our Constitution or our jurisprudence to justify such a cataclysmic transformation of th[e] venerable institution" of marriage, *In re Marriage Cases*, 43 Cal. 4th at 865, 183 P.3d at 459 (Baxter, J., concurring and

dissenting), the courts should not countermand the policy judgments of the people. The Ninth Circuit having done so, only review and reversal by this Court can restore the playing field on which the contentious political policy dispute at issue here must be allowed to work itself out.

III. Alternatively, Given the Serious Collusion and Appearance of Bias Concerns That Taint The Decisions Below, Granting the Petition, Vacating the Judgment, and Remanding for New Consideration Would Be An Appropriate Exercise of this Court's Supervisory Function.

The lower courts' foray into this hotly contentious policy dispute is ground enough for this Court to grant review, if history's lesson about the likely consequences is to be heeded and those consequences avoided. But the collusion and disqualification issues in this case make review even more urgent, because the appearance of impropriety has made public acceptance of the ruling even more unlikely.

Plaintiffs-Respondents treat these problems as grounds to *deny* certiorari rather than grant it. They correctly observe that such vehicle problems *normally* counsel this Court to pass over the case, waiting for another case on another day. But landmark cases such as this are, or should be, another matter, particularly when many of the procedural irregularities are of the lower courts' own making.

One of the most basic commands of due process in the courts of law is that cases are to be adjudicated by judges who do not have a personal interest in the outcome of the case. *In re Murchison*, 349 U.S. 133,

136 (1955); *see also* 28 U.S.C. § 455(b)(4) (requiring a judge to recuse himself whenever he has an "interest that could be substantially affected by the outcome"); 28 U.S.C. § 455(a)(4) (requiring recusal in any other circumstances in which "impartiality might reasonably be questioned"). Another is that collusive suits are anathema to our adversarial system. *Flast v. Cohen*, 392 U.S. 83, 100 (1968) (citing, e.g., *United States v. Johnson*, 319 U.S. 302 (1943); *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850)).

Both of these precepts of Due Process have been given short shrift in this case, and that has severely undermined the legitimacy of the decisions below.

From the outset of the case, for example, the government defendants—including the Attorney General, who has the statutory duty to "defend all causes to which the State . . . is a party," Cal. Gov't Code § 12512—steadfastly refused to defend the initiative in Court. The misalignment of the parties was so evident that at one point, the district court directed the Attorney General—one of the *defendants*—to "work together in presenting facts pertaining to the affected governmental interests" with the City and County of San Francisco, which had been allowed to intervene in the case as a party *plaintiff*. 8/9/09 Hearing Tr. at 56 (Dkt.#162); 8/9/09 Minute Order at 2 (Dkt.#160). Even more troubling, circumstantial evidence from the district court proceedings below strongly suggests that the Attorney General was actively colluding with Plaintiffs to undermine the defense of the Initiative, providing responses to interrogatories that, because of the early timetable and the substance, appear to have been designed to bolster arguments being made in a brief being prepared

by the plaintiffs. *See* Motion to Realign at 4-5 (Dkt. #216).

As troubling as all that was during the proceedings in the district court, the collusive nature of the suit was brought even more to the forefront once the case moved to the appellate phase. Even before reaching the appellate court, for example, Intervenor-Defendants moved for a routine stay pending appeal. The government *defendants* joined plaintiffs in *opposing* that motion, and the district court denied the motion, holding that there was little likelihood of success on the merits of the appeal, in part because it was questionable whether the Intervenor-Defendants even had standing to pursue the appeal absent an appeal by the named governmental defendants, who were all actively siding with Plaintiffs. (Dkt.#727).[7]

The adversarial process thus took a beating in the courts below. But the concerns about the appearance of judicial bias are even worse.

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[7] The issue about Petitioner's standing to pursue the appeal unilaterally was ultimately resolved when, after the Ninth Circuit certified the question, the California Supreme Court held that official initiative proponents 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. . . ." *Perry v. Brown*, 52 Cal.4th 1116, 1127, 265 P.3d 1002, 1007 (2011). Because the "grave doubts" expressed by this Court in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997), about an initiative sponsor's standing were raised because the Court was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State," the California Supreme Court's definitive resolution of that question under California law is dispositive.

Most notably, the district judge's after-the-fact revelation that he was in a long-term same-sex relationship indicated that he was situated identically with the plaintiffs in the case, able to benefit personally from his own ruling in the case if he chooses.

Intervenor-Defendants filed a motion to vacate shortly after this revelation, noting that this long-term, committed relationship (but notably not Judge Walker's sexuality itself) created at the very least a *waivable* conflict on the grounds that the judge's "impartiality might reasonable be questioned." Motion to Vacate Judgment (Dkt. #768). Such a conflict can only be waived by the parties, though, if it was "preceded by a full disclosure on the record of the basis for disqualification." 28 U.S.C. § 455(e). No such disclosure was ever made, on the record or otherwise, until well after the proceedings in the district court had concluded. Moreover, if Judge Walker and his male partner actually desired to marry, there would be a non-waivable conflict under Section 455(e) because that would be an "interest that could be substantially affected by the outcome of the proceeding."

In a ruling subsequently affirmed by the Ninth Circuit panel as not an abuse of discretion, the district court denied the motion, holding that recusal is not warranted when a judge shares a characteristic with members of the general public and will only be affected in a similar manner because the judge is also a member of the general public. But given that any reasonable observer knowledgeable of all the facts would view the district judge who presided over the case as a likely direct beneficiary of his own ruling, that holding highly suspect. And in a high-profile case such as this, even a hint of the appear-

ance of bias should compel recusal, lest "the public's confidence in the judicial process" be undermined. *Liljeberg*, *v. Health Servs. Acquisition Corp*., 486 U.S. 847, 864 (1988).

Moreover, that was not the only recusal issue to have infected the proceedings below. The wife of one of the judges on the panel, Judge Stephen Reinhardt, was at the time the executive director of the ACLU Foundation of Southern California. *Perry v. Schwarzenegger*, 630 F.3d 909, 911 (9th Cir., 2011) (Reinhardt, J., Order Regarding Disqualification). As Judge Reinhardt himself acknowledged, his wife and her organization's legal director were consulted by Plaintiffs' lawyers prior to the filing of the lawsuit. *Id*. at 913. Moreover, the organization itself served as counsel for several groups that unsuccessfully sought to intervene as a party in this case, and then filed two briefs as *amici curiae*. *Id.* at 913-14; *see also* Dkt. Nos. 61, 552.

Canon 3.C of the Code of Conduct for United States Judges provides that the circumstances requiring recusal "includ[e] but [are] not limited to instances in which … the judge's spouse … is (i) a party to the proceeding, or an officer, director, or trustee of a party; or (ii) acting as a lawyer in the proceeding." In the proceedings before the district court that rendered the judgment pending before Judge Reinhardt on appeal, Judge Reinhardt's wife was an officer of an entity that acted as a lawyer on behalf of several *amici curiae*—a variation on the examples given in the Code of Conduct too trivial to warrant

different treatment. Judge Reinhardt should therefore have recused himself from the appeal.[8]

Again, in a high-profile case such as this, the public's confidence in the judicial process is critical. Judge Reinhardt's failure to recuse himself from a case in which his wife's organization participated *as counsel* in the court below has severely undermined that confidence.

We recognize that the recusal issues are not among the questions presented in the petition, and we are cognizant of Rule 14.1(a)'s admonition that only questions "fairly included" in the questions presented "will be considered by the Court." Sup. Ct. Rule 14.1(a). The recusal issues are nevertheless important to the necessity of this Court's review, if for no other reason than to clear the taint of bias from the judgment as it now stands. Moreover, "Rule 14.1(a) . . . is prudential; it does not limit [the Court's] power to decide important questions not raised by the parties," albeit that exception from the norm should be only exercised "in the most exceptional cases." *Izumi Seimitsu Kogyo Kabushiki Kai-*

[8] The Memorandum Regarding Motion to Disqualify that was filed by Judge Reinhardt is mostly devoted to rebutting a claim that Intervenor-Defendants never made, namely, that recusal was required because the Judge's wife had expressed her personal views about the case. *Perry*, 913 F.3d at 911-913. Toward the end of the Memorandum, Judge Reinhardt also relied on a Statement of Recusal Policy prepared in 1993 by seven Justices of this Court, *id.* at 914 and n.6, but that memo (and subsequent reliance on it) was based on the fact that a disqualification by a Supreme Court Justice impairs the functioning of the Court in ways that do not apply to the lower courts. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 914 (2004) (Scalia, J., Memorandum).

sha v. US Philips Corp., 510 U.S. 27, 32 (1993) (internal citations omitted). Given the contentiousness of this case, its high profile, and the very real concern about the public's confidence in the judiciary being undermined, this may be one of those "exceptional cases." Indeed, consideration of the recusal issue (after inviting further briefing by the parties) may allow this Court to decide the case on non-constitutional grounds, furthering its general doctrine of constitutional avoidance. *Id.* at 33 (*citing Boynton v. Virginia*, 364 U.S. 454, 457 (1960); *Neese v. Southern R. Co.*, 350 U.S. 77, 78 (1955)).

CONCLUSION

The petition for writ of certiorari should be *granted* for consideration on the merits of the important constitutional questions it presents or, in the alternative, *granted, vacated and remanded* for new proceedings at both the district court and court of appeals untainted by the collusion of state governmental defendants and the significant appearances of bias by the district judge and one member of the appellate panel that warranted recusal.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
jeastman@chapman.edu
(714) 628-2587

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence