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

BRIEF OF *AMICI CURIAE* WILLIAM N. ESKRIDGE JR., BRUCE A. ACKERMAN, DANIEL A. FARBER, AND ANDREW KOPPELMAN IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are law professors who have written extensively about the history and practice of judicial review, with a special focus on issues involving sexual and gender minorities. We are committed to the public interest and to the orderly exposition of constitutional law. Based upon our research into the history of constitutional marriage rights, we believe that the issues addressed by the Ninth Circuit in *Perry v. Brown*, 681 F.3d 1065 (9th Cir. 2012), are not ripe for this Court's review.

SUMMARY OF THE ARGUMENT

The judgment below is the first appellate decision, at either the state or the federal level, to consider the constitutionality of a *retrogressive* antimarriage equality initiative (i.e., an initiative taking back the right to marry that the state government had guaranteed as a fundamental right to same-sex couples). It is also the first appellate decision to consider a takeback of full marriage equality from a minority group in a state that offers the legal rights and duties

[1] *Amici curiae* submit this brief pursuant to the written consent of the parties, as reflected in letters the parties have filed with the Clerk. *Amici curiae* provided notice of their intent to file this brief to counsel of record for the parties. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a financial contribution to its preparation or submission.

associated with marriage, but through a separate institution (domestic partnership). *Cf. Jackson v. Abercrombie,* Civ. No. 11-00734 ACK-KSC, 2012 WL 3255201, at *1 (D. Haw. Aug. 8, 2012) (upholding Hawaii's marriage exclusion and interpreting *Perry* narrowly, within the Ninth Circuit). For this reason alone, the issue is not ripe for the Court's review. "It has long been the Court's considered practice not . . . to decide any constitutional question in advance of the necessity for its decision. . . ." *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (internal quotation marks and citation omitted) (citing cases).

Prudential ripeness concerns are especially acute when they are compounded by constitutional justiciability problems. The *Perry* defendants, the relevant state and local officials charged with enforcing the state marriage law, have chosen not to appeal the district court's judgment that Proposition 8 violates the Equal Protection Clause. Whether the supporters of Proposition 8 have Article III standing to represent the state on appeal is an open issue at this Court, with arguments of great moment cutting both ways.[2]

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[2] California's commitment to the popular initiative as a check on representative government inspired its supreme court to find an implicit delegation of authority to the Proposition 8 supporters to "represent" the state. *Perry v. Brown*, 265 P.3d 1002, 1033 (Cal. 2011). But a self-appointed group of interested citizens does not represent the "public" in the same way as the duly elected executive officials who were the named defendants. *Cf. Morrison v. Olson*, 487 U.S. 654, 729-32 (1988) (Scalia, J., dissenting) (criticizing the delegation of executive authority to

(Continued on following page)

However this Court resolves the Article III issue, we submit that this is not the best case to adjudicate the *public* justifications, those advanced by a state's duly elected and publicly accountable officers, for an exclusion of citizens from a fundamental right, namely, civil marriage.

Finally, there is particular reason for this Court to proceed deliberately when the issue is the focus of dueling social movements and concerns core notions of equality. The judicial as well as political and public debate over marriage equality is one that has evolved, and continues to evolve, swiftly. The Ninth Circuit decided the constitutional equality issue on the narrowest possible grounds. Its resolution was correct, and this Court has the discretion to deny further review – a discretion it should exercise here for reasons of institutional prudence. Unless this Court simply affirms the lower court's narrow disposition, evaluating the state discrimination in this appeal requires a delicate judgment about the standard of equal protection scrutiny. Moreover, the "public" interest supporting exclusion of same-sex couples from civil marriage is itself in flux. Under these circumstances, the Court's mature decision of important constitutional issues surrounding marriage equality would benefit from further lower court litigation.

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an unaccountable "mini-Executive"); U.S. Const. art. IV, § 4 (guaranteeing a "Republican Form of Government" to the states).

ARGUMENT

I. Social Movements, the Equal Protection Clause, and This Court

The Equal Protection Clause is a constitutional foundation for the rule of law: it assures all Americans that they will be treated neutrally by the law and not relegated to discrimination because of their status. *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). By its terminology as well as its original purpose, the Equal Protection Clause demands comparisons that are rendered more difficult for definitive judgment when a social movement is challenging long-accepted and legally enforced differences.[3]

States long discriminated against racial minorities without serious constitutional challenge because legislative majorities considered the races inherently different. The central normative goal of the twentieth century civil rights movement was to persuade Americans that a racist caste system is unconscionable. Because they implicated combustible sexual mores, different-race marriage exclusions were the last hurdle for the civil rights movement to overcome. Part II will show how this Court played a constructive role in implementing the Constitution's equality guarantee,

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[3] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 377-79 (1985); William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2087-89 (2002).

after a fruitful period of lower court and legislative deliberation. When this Court intervened with a final judgment, it was properly confident that laws barring different-race marriages reflected race-based social hierarchies that enjoyed no robust public justification. That these issues had been clarified by continued debate enabled this Court to settle a contentious issue.

States long discriminated against sexual minorities without serious constitutional challenge because people considered "homosexuals" inherently different (i.e., mentally ill menaces to social order) from "normal" heterosexuals. *Cf. Kameny v. Brucker,* 365 U.S. 843, 843 (1961) (denying certiorari to a petition challenging this claim). The central normative goal of the lesbian, gay, bisexual, and transgender (LGBT) rights movement was to persuade Americans that an antigay caste system is unconscionable. Since the 1960s, the nation's understanding of LGBT people has undergone a significant change comparable to the change in American attitudes toward racial minorities after World War II. Most Americans have been persuaded that LGBT minorities are neither mentally ill nor menaces to social order. Once the earlier social consensus was shattered, the nation's constitutional culture changed.

Part III will explore the consequences of this Court's premature intervention in *Bowers v. Hardwick,* 478 U.S. 186 (1986), which authorized the criminalization of consensual "homosexual" sodomy but not necessarily "heterosexual" sodomy. This decision was

poorly timed, given the breakdown of the traditional consensus on these issues – requiring the Court to rethink the matter in a series of cases beginning with *Romer v. Evans*, 517 U.S. 620 (1996). This recent history counsels a deliberate approach before this Court addresses the most far-reaching LGBT rights issue, marriage equality.

Under the circumstances, it would be institutionally wise to follow the prudential approach this Court took in the different-race marriage cases, rather than the hasty approach followed in *Bowers*. *Cf*. Ginsburg, 63 N.C. L. Rev. at 381-83, 385-86 (opining that this Court's disposition in *Roe v. Wade* was, likewise, premature and needlessly broad). As we shall argue in Part IV, more lower court deliberation and public debate would be useful to test the arguments raised or rejected in *Perry*, to clarify the level of scrutiny appropriate in these cases, and to determine whether there is a stable public justification for state marriage discrimination against lesbian and gay couples.

II. The Different-Race Marriage Cases, 1948-1967

The civil rights movement seeking equal treatment for people of color was the most important social movement of the twentieth century and had a pervasive effect on the meaning of the U.S. Constitution.[4]

[4] Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (1976); Eskridge, *supra* note 3, at 2194-2236, 2250-2332.

An important target was *Plessy v. Ferguson*, 163 U.S. 537 (1896), which seemed to place state-sanctioned racial segregation beyond constitutional attack, except insofar as "separate" state benefits were not "equal." The judgment in *Plessy* was itself premature, resting upon factual assumptions (racial differences are biologically grounded, *id.* at 544, 551-52) and normative judgments (law cannot regulate social prejudices, *id.* at 552) that were undermined and ultimately upended by the civil rights movement.

No issue was trickier for the judiciary than the constitutionality of antimiscegenation laws – that is, state statutes prohibiting recognition of civil marriages between persons of different races (or, in many states, between a Caucasian person and a person of another race). Until World War II, most lawyers and judges considered these laws constitutional, because most Americans believed that interracial marriages were materially different from traditional (same-race) marriages. *Plessy*, 163 U.S. at 545.

The civil rights movement challenged the factual and normative foundations of antimiscegenation laws. As a factual matter, "racial purity" was a myth reflecting prejudice rather than science. As a normative matter, persons of color deserved the same dignified treatment as white persons. As Americans changed their minds about these matters, there arose a constitutional issue that had been legally invisible before 1945: Did state antimiscegenation laws violate the Equal Protection Clause? Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and*

Adoption 244-80 (2003) (account of the miscegenation litigation).

The California Supreme Court interpreted the Equal Protection Clause to be inconsistent with the state's antimiscegenation statute in *Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948). The dissenting justices objected that the antimiscegenation norm had long been entrenched in the statutory law of California and most other states. *Id.* at 38-39 (Schenk, J., dissenting). Moreover, the court's interpretation was inconsistent with *Pace v. Alabama*, 106 U.S. 583, 585 (1883), which held that it was not racial "discrimination" when the state punished different-race couples more severely in an anticohabitation statute. Before *Perez,* all state court decisions upheld antimiscegenation laws based on *Pace*. *See Perez*, 198 P.2d at 39-41 (Schenk, J., dissenting) (citing cases).

California chose not to appeal in *Perez* – but if the state had sought review, what should this Court have done? Although many constitutional cases required mandatory review in 1948, this Court had discretion whether to review state court judgments invalidating state statutes as inconsistent with the U.S. Constitution.[5]

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[5] Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 90 (1988). The statutes provided for mandatory review where a state court *rejected* a constitutional challenge to a state statute or where a federal court *accepted* such a challenge.

It would have been a mistake for this Court to have granted review and reversed the California Supreme Court, presumably applying *Pace*. Such an opinion would have reinforced views that black and white races were fundamentally "different," and that would have undermined the ability of Americans of color to secure the ordinary protections of the rule of law. Indeed, reaffirming *Pace*'s holding that such laws did not even constitute "discrimination" would have exposed this Court to sharp critique. *Cf*. Alexander M. Bickel, *The Supreme Court 1960 Term – Foreword: The Passive Virtues,* 75 Harv. L. Rev. 40, 48-50 (1961) (the "legitimating" features of this Court's ruling that a statute is constitutional).

Should this Court, instead, have granted discretionary review in *Perez* and overruled *Pace*? This would have been a better ruling, yet it appears that this Court in 1948 was not at rest on the standard of review that should have been applied or on the prudence of taking up the miscegenation issue then.[6] School segregation was vulnerable to constitutional question, but would such a judgment be undermined if the Court triggered a backlash by a too-early ruling against antimiscegenation laws?

The best course for this Court was further deliberation, which was possible under the Court's discretionary jurisdiction. Unfortunately, the first major

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[6] Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 Geo. L.J. 1 (1979).

miscegenation case came to this Court under its mandatory jurisdiction. In *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955), the Virginia Supreme Court reaffirmed the state's Act to Preserve Racial Integrity, ch. 371, 1924 Va. Acts. This Court vacated and remanded *Naim* to secure a better development of the factual record, *see* 350 U.S. 891, 891 (1955), but the lower court replied that the record was complete as regards the relevant legal issues, *see* 90 S.E.2d 849, 850 (Va. 1956). This Court summarily dismissed the ensuing appeal on the ground that the lower court's obduracy left the case "devoid of a properly presented federal question." *Naim v. Naim,* 350 U.S. 985, 985 (1956).

Because the record established that the interracial couple were domiciliaries of Virginia who had married out of state in violation of the anti-miscegenation law, the stated reason for not reviewing the lower court judgment was not entirely persuasive. But Justice Frankfurter persuaded this Court that the marriage issue was not ripe, given the difficult task of reaching agreement as to the standard of review and other important matters.[7] *Naim* applied Justice Frankfurter's view that this Court ought not

[7] William N. Eskridge Jr. & Philip P. Frickey, *Historical and Critical Introduction* to Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, at cix-cx (William N. Eskridge Jr. & Philip P. Frickey eds., 1994) (discussing letters found in the Frankfurter Papers on *Naim*).

address constitutional issues when "the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see." *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting).

As the nation debated the future of state race-based discriminations, this Court followed Justice Frankfurter's prudential approach, denying discretionary review to federal court decisions striking down race-discriminatory laws on equal protection grounds, *see, e.g.*, *Morrison v. Davis,* 252 F.2d 102 (5th Cir. 1958), *cert. denied*, 356 U.S. 968, 968 (1958), or summarily affirming decisions where a mandatory appeal was taken, *see, e.g.*, *Dawson v. Mayor & City Council of Baltimore City,* 220 F.2d 386 (4th Cir. 1955), *aff'd mem.*, 350 U.S. 877, 877 (1955). Meanwhile, state judges and legislators nullified or repealed antimiscegenation laws, until only the states of the Deep South retained such laws.[8]

By 1967, the debate was largely settled in favor of the civil rights norm that racial variation is benign and racial hierarchy is not. It had become clear that there was no neutral (nonracist) state justification for antimiscegenation laws. And when these laws had been invalidated or repealed, there were no public

[8] Brief of the NAACP as *Amicus Curiae* at 2-3 & nn.1-2, *Loving v. Virginia*, 388 U.S. 1 (1967) (1966 Term, No. 395), 1967 WL 93611.

calamities, as citizens moved on to other issues. In 1967, this Court unanimously ruled that the Virginia law violated the Fourteenth Amendment. *Loving v. Virginia,* 388 U.S. 1, 11-12 (1967). Although most Americans were still not comfortable with different-race marriage, *Loving* was legally impregnable in 1967 in ways that it would not have been in 1948 or 1955. After twenty years of deliberation, it had become clear that antimiscegenation laws were discriminatory and that the discrimination was not justified by a public-regarding reason that held up under close examination.

III. The Sodomy Cases, 1976-2003

The deftness this Court showed in the mid-century race cases was not repeated in its early gay rights cases. *See, e.g.*, *Boutilier v. INS*, 387 U.S. 118, 120 (1967) (interpreting an exclusion of "persons afflicted with psychopathic personality" to include all "homosexuals"). After 1969, thousands of LGBT persons "came out of the closet" and followed the lead of the civil rights movement to claim that sexual and gender variation, like racial variation, is not malignant. A primary target of this social movement was consensual sodomy laws, because states used them as a reason to discriminate against gay people as presumptive criminals.

A three-judge court upheld Virginia's consensual sodomy law in *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1203 (E.D. Va. 1975), and plaintiffs

appealed. Like *Naim, Doe* was an example of the dilemma the Court's mandatory jurisdiction created when social issues were not ripe for definitive constitutional appraisal. This Court handled the dilemma by a summary affirmance, 425 U.S. 901, 901 (1976). Where appeal was discretionary, this Court usually denied review, *Enslin v. N. Carolina,* 425 U.S. 903, 903 (1976); *New York v. Onofre*, 451 U.S. 987, 987 (1981), or dismissed the petition as improvidently granted, *New York v. Uplinger,* 467 U.S. 246, 249 (1984) (solicitation case following *Onofre*).

This Court considered the constitutionality of consensual sodomy laws in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Eleventh Circuit had ruled that the state needed to show a compelling interest to regulate such private activities, and the state filed a petition for writ of certiorari.[9] This Court was faced with the same kind of choices that we hypothesized for it after *Perez*. Although there was a conflict with another federal appellate decision as to the level of scrutiny, the Eleventh Circuit had remanded the case for trial to determine the state's interest. The prudent approach would have been to deny the petition, as six Justices originally voted in *Bowers*.[10] (Because Hardwick was never prosecuted, there were potential

[9] The state did not take a mandatory appeal because there was no final order invalidating the sodomy law. *Hardwick v. Bowers,* 760 F.2d 1202, 1212-13 (11th Cir. 1985).

[10] William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003,* at 233-64 (2008) (account of the *Bowers* litigation at this Court).

justiciability concerns as well.) Our society and its judges still had a steep learning curve as regards the issues presented by consensual sodomy laws. What significance did these private activities have for the lives of LGBT and other Americans? Was there an important public interest served by making these activities a crime?

Notwithstanding these problems, this Court granted review – but its disposition confirmed the pitfalls of resolving important constitutional issues too early. For example, the majority opinion announced that the only issue before it was whether the state could criminalize "homosexual sodomy." But the Georgia statute under challenge explicitly applied to sodomy among all persons, straight couples as well as gay and lesbian couples. By "misapprehending" the claim in this way, *Lawrence v. Texas*, 539 U.S. 558, 567-68 (2003), this Court suggested that "homosexuals" were not going to receive neutral treatment.

The majority opinion then engaged in a historical inquiry into whether "homosexual sodomy" had traditionally been subjected to state regulation – but its survey was filled with factual errors and anachronistic analyses. *Lawrence,* 539 U.S. at 567-71; Eskridge, *Dishonorable Passions* at 252-56. Finally, the majority offered no cogent account for the state's "rational basis." The opinion held that "majority sentiments about the morality of homosexuality" were a sufficiently rational basis for the law (as revised by the Court to regulate just "homosexual sodomy"). *Bowers*, 478 U.S. at 196. The Chief Justice

added that early English authority posited that the "crime against nature" was a crime "of deeper malignity than rape." *Id.* at 197 (Burger, C.J., concurring) (internal quotation marks and citation omitted). Many Americans read these opinions to reflect not only incomplete research, but also lack of basic knowledge about the people whose lives were affected by the statute. *Cf.* John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 521-22 (1994) (personal ignorance regarding "homosexual[s]" led one of the majority Justices to premature conclusions that he publicly retracted).

This Court's decision in *Bowers* encountered strong critique from all quarters.[11] We can think of few (if any) decisions from this Court *upholding a statute* that encountered as much immediate, near-universal, and continuing criticism as the decision in *Bowers*. Indeed, the criticisms of *Bowers* escalated in the 1990s, when public opinion rejected the norm that LGBT persons ought to be objects of legal discrimination or persecution.[12] A decision that was premature in 1986 swiftly became an embarrassment.

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[11] William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 149-73 (1999); Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* 81-84 (1991); Richard A. Posner, *Sex and Reason* 341-50 (1992); Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 Ga. L. Rev. 629, 645 (1990) (citing 33 law review articles critical of *Bowers*).

[12] Eskridge, *supra* note 10, at 267-69.

This Court was responsive. Striking down a state constitutional initiative that threatened to place LGBT persons outside the normal protections of the law, this Court in *Romer v. Evans,* 517 U.S. 620, 644 (1996), ruled that antigay "animus" could not be the basis for discrimination under the Equal Protection Clause. This Court, wisely, did not announce how far the *Romer* principle swept, but that principle triggered new constitutional challenges to consensual sodomy laws, especially those targeting only "homosexual" sodomy.[13] Seventeen years after *Bowers,* this Court ruled that *Bowers* was incorrect the day it was decided. *Lawrence,* 539 U.S. at 578; *see id.* at 574-78 (overruling *Bowers,* in part because of the equality-denying effect of consensual sodomy laws on LGBT persons).

If *Bowers* represented the dangers of premature constitutional decisionmaking, *Lawrence* represented the prudential virtue of finding the right case at the right time. If, as Professor Bickel opined, there is a productive "Lincolnian tension between principle and expediency," Bickel, 75 Harv. L. Rev. at 50, *Lawrence* advanced constitutional principle with a practical confidence that had been unobtainable in *Bowers*.

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[13] *Id.* at 278-98 (*Romer* declared an important principle but also triggered expedient deliberation subjecting antihomosexual sodomy laws to critical scrutiny all over the country).

IV. The Same-Sex Marriage Cases, 1993-Present

As with the civil rights movement, the LGBT rights movement's most challenging campaign has been to persuade Americans to include their committed relationships within state marriage laws. Most Americans long felt that lesbian and gay relationships were too different from straight married relationships to justify a change in state marriage laws. But in the 1990s, tens of thousands of LGBT persons came out of the closet as committed couples, many of whom were raising children. Once the notion that "homosexuality" is inconsistent with commitment and family eroded, not only was the fate of *Bowers* sealed, but more Americans wondered whether same-sex couples are really so different from different-sex couples.

Since 2003, ten states and the District of Columbia have recognized marriage equality for LGBT persons.[14] The voters overturned marriage equality in California and Maine. Reconsideration of marriage equality will be on the ballot this November in Maryland and Washington. It is estimated that more than 100,000 lesbian and gay couples are now married in

[14] California (2008), Connecticut (2008), District of Columbia (2009-10), Iowa (2009), Maine (2008), Maryland (2012), Massachusetts (2003-04), New Hampshire (2009-10), New York (2011), Vermont (2009), Washington (2012).

this country; 31% of them are raising children within their marital households.[15]

We respectfully suggest that constitutional issues implicated in the marriage equality debate are not ripe for the same reasons the marriage equality issue of *Perez* was not ripe in 1948 and the consensual sodomy issue of *Bowers* was not ripe in 1986. As an institutional matter, this Court will be in a better position to decide the constitutional issues surrounding marriage equality if its deliberation is informed by more decisions by federal and state appellate courts.

To begin with, this Court would benefit from lower court debate regarding the reasoning and precise meaning of *Perry*; this is a classic reason to deny certiorari. *See California v. Carney*, 471 U.S. 386, 398-401 (1985) (Stevens, J., dissenting). Second, unless this Court simply affirms the approach of the court below, there are thorny standard-of-review issues that would benefit from more deliberation. Third, the public reasons advanced by the opponents of marriage equality are not settled. As in the different-race marriage cases and the consensual sodomy cases, this Court should be especially leery of validating

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[15] Gary J. Gates & Abigail M. Cooke, Williams Inst., *United States Census Snapshot: 2010* (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf.

marriage discriminations when the public justifications for those discriminations are in a state of flux.

A. Will the Ninth Circuit's Reasons Be Persuasive to Other Judges?

Given its lack of discretion to decline the appeal, the Ninth Circuit properly concluded that even a narrow reading of *Romer* requires invalidation of Proposition 8's denigration of lesbian and gay relationships. Unlike any decision of this Court, the lower court's decision and reasoning only apply to California and other states in its circuit. There is already debate within the Ninth Circuit as to how broadly to read *Perry.* The district court in Hawaii recently ruled that Hawaii's voter-sponsored marriage exclusion is constitutional and that *Perry* is distinguishable because the Hawaii voters were not taking back a right that state law recognized as fundamental. *Jackson*, 2012 WL 3255201 at *1. Presumably, there will be an appeal to the Ninth Circuit, which will have an opportunity to elaborate on the principles announced in *Perry.*

Moreover, state and federal judges outside the Ninth Circuit will have opportunities to evaluate the arguments accepted in *Perry* as well as those rejected. Those judges will provide reasons, which will in turn be considered and evaluated by judges elsewhere. There is every reason to believe that *Perry* will generate a vigorous legal debate, and that this Court

would benefit from the reason-giving and argumentation – just as this Court did in *Loving* and in *Lawrence*.

B. Is Sexual Orientation a (Quasi-) Suspect Classification?

What standard of constitutional review should judges apply to discriminations based on sexual orientation? Many commentators maintain (and some courts have held) that sexual orientation is a "suspect" classification that can only be invoked when narrowly tailored to serve a compelling public interest. *See Perry v. Schwarzenegger,* 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (so ruling under the U.S. Constitution); *In re Marriage Cases*, 183 P.3d 384, 440-44 (Cal. 2008) (same under state constitution). This Court has never ruled on the issue and has applied a rational basis "with bite" standard to antigay discriminations in *Romer* and *Lawrence*. Unless this Court simply affirms the lower court judgment, which rested on *Romer*, the question of the standard of review is an issue this Court might not be able to avoid in this case.[16]

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[16] The Court might also have to address the argument that discrimination against same-sex couples is explicit sex discrimination subject to intermediate scrutiny: Kristin Perry would be permitted to marry Sandra Stier if Perry were a man. *See Perry*, 704 F. Supp. 2d at 996 ("Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men*

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Again, a parallel to the race cases is instructive. This Court did not hold that race is a suspect classification triggering strict scrutiny until *McLaughlin v. Florida,* 379 U.S. 184, 191-93 (1964) (followed in *Loving*). While the arbitrariness and inefficiency of race as a classification saturated the antisegregation cases, *see, e.g.*, *Sweatt v. Painter*, 339 U.S. 629, 633-35 (1950) (arbitrariness of creating a separate law school just for black students), this Court was properly cautious before firmly holding that race is *normally* a classification not advancing the public interest and, instead, reflecting prejudice or stereotype-based thinking. After seeing case after case illustrating how race-based classifications were irrational and subordinated minority races, the Court committed to that doctrine in *McLaughlin* and *Loving*. This was a successful example of the orderly development of constitutional principle.

This Court has seen a few cases illustrating the irrationality of sexual orientation-based classifications. Ought such classifications normally be considered suspect (like race) or quasi-suspect (like sex)? This Court has been able to avoid the issue by applying the rational basis approach with more bite than it has done in reviewing economic legislation. *Lawrence,*

Is Sex Discrimination, 69 N.Y.U. L. Rev. 197 (1994). Such a ruling would probably end all bars on same-sex marriage, unless this Court were to take the unwise step of reviving the discredited logic of *Pace*, which held that racial classifications equally imposed on blacks and whites are not race discrimination.

539 U.S. at 579-80 (O'Connor, J., concurring in the judgment). Consistent with this avoidance, the lower court invalidated Proposition 8 as inconsistent with *Romer*, a result this Court can, of course, ratify on appeal. But why do so, when the best course of action is to deny certiorari?

C. What Is the Public Interest in Excluding Same-Sex Couples from Civil Marriage?

Surprisingly, even strong opponents of marriage equality are not at rest on the question of the justification for this discrimination. One justification after another has been advanced, then replaced with a new one when it is refuted or proved false.[17]

An early justification was the *stamp-of-approval* argument. "Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H.R. Rep. No. 104-664 (July 1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919-20. This argument is problematic today, because there is too thin a line between "moral disapproval of homosexuality" and the antigay

[17] William N. Eskridge Jr. & Darren R. Spedale, *Gay Marriage: For Better or for Worse?: What We've Learned from the Evidence* 20-41 (2006).

"animus" rejected in *Romer*. *See Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) (without more, "[m]oral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause").

In the wake of *Romer,* stamp-of-approval arguments were superseded by the *defense-of-marriage* argument: extending marriage licenses to same-sex couples would undermine marriage as an institution. Exactly how defenders of marriage expect lesbian and gay couples to undermine the institution has never been spelled out satisfactorily. *See, e.g.*, *Perry*, 704 F. Supp. 2d at 999 (after full-blown discovery and a twelve-day trial, petitioners identified "no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage"). And the fact that marriage equality in Massachusetts (2003-04) and elsewhere has done nothing to undermine the institution has taken the wind out of that argument as well. *See* Brief of the Commonwealth of Massachusetts in Support of Plaintiffs-Appellees and in Support of Affirmance at 4-14, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696), 2010 WL 4622564.[18]

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[18] Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 Soc. Sci. Q. 292 (2009) (empirically demonstrating that no causal relationship exists between gay-marriage recognition and adverse marriage or divorce rates).

The defense-of-marriage argument has recently been superseded by the *responsible-procreation-and-child-rearing* argument. "[T]hrough the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world," Petition at 27, and such inducements are not needed for same-sex couples, who pose no risk of irresponsible procreation, *id.* at 29-30; *accord Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 867-69 (8th Cir. 2006).

This case is a microcosm of the dramatic shifts in justification for marriage discrimination. In the ballot materials provided to voters, the supporters of Proposition 8 emphasized stamp-of-approval arguments denigrating lesbian and gay families as inferior. *See Perry,* 704 F. Supp. 2d at 930. At trial in this case, the supporters of Proposition 8 largely abandoned arguments openly denigrating these families but emphasized defense-of-marriage arguments. *See id.* at 931. On appeal, they now say that the discrimination can be justified by marriage's concern with responsible procreation and child-rearing.

Nor is this new justification the last one that opponents will offer for denying marriage equality – in part because it is so vulnerable under the rational basis analysis this Court performed in *Romer* or even under a weaker standard. The exclusion is completely "discontinuous with the reason[ ] offered for it," *Romer*, 539 U.S. at 632: the *exclusion* of committed lesbian and gay couples from the status of civil

marriage does not plausibly "steer" *any* straight couples toward "responsible" procreation and child-rearing.[19] It defies common sense as well as all the reported evidence to think that the exclusion (and denigration) of lesbian and gay couples steers straight couples away from irresponsible procreation. Indeed, even petitioners' counsel admits the argument is mystifying. *See Perry*, 704 F. Supp. 2d at 931 (court asked petitioners' counsel "how permitting same-sex marriage impairs or adversely affects" the state's interest in marital procreation; counsel replied "Your honor, my answer is: I don't know. I don't know.").

Even worse than the discrimination invalidated in *Romer*, the exclusion here actually undermines the petitioners' stated goal, understood in the context of official California state policy. According to the 2010 Census, more than 100,000 children are being raised by same-sex partners; thousands of those children were conceived by partners who were in a lesbian or gay relationship.[20] California state policy offers these families the same legal protections as marital families, with the exception created by Proposition 8. *Strauss v. Horton*, 207 P.3d 48, 75, 102 (Cal. 2009). Because California's family law focuses on the interests of children, the state's interest in responsible

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[19] There are many state policies that might steer straight couples in that direction, such as tax exemptions or subsidies for "responsible" married parents.

[20] Gates & Cooke, *supra* note 15.

child-rearing is the same for *all* couples, whether gay or straight. So denying marriage to lesbian and gay couples and thereby denigrating their relationships undermines the state's goal that petitioners try to invoke.

Is there a public interest that might justify excluding lesbian and gay couples from civil marriage? Opponents of marriage equality have not yet settled on a stable justification for the discrimination, and the most recent attempt at justification seems the most disconnected from the plausible reasons voters might have had for adopting Proposition 8. The ever-shifting rationales for discrimination – and the proponents' inability to muster any evidence in support of those rationales – also suggest that the stated justifications are pretexts for animus or prejudice, as this Court found in *Romer* and in the miscegenation cases.

CONCLUSION

Faced with one of the "hottest" issues in current constitutional law and not having discretionary jurisdiction to decline the case, the court below followed a most responsible course of action, invalidating the state initiative on the narrowest constitutional grounds. In light of the petition's emphasis on the responsible-procreation argument as the primary justification for state discrimination, the court's analysis remains strikingly cogent. Because there is

no appellate court conflict on the precise issue and because the lower court's decision is so narrowly confined, no significant purpose would be served by taking review in this case and affirming based on *Romer*.

In contrast, taking the case and reversing the lower court (to uphold the state initiative) would require this Court to address a number of issues where continued judicial and legislative deliberation would be not only useful but necessary. Has the state discriminated on the basis of a classification that is suspect or quasi-suspect? Is there a stable public justification that passes even the rational basis test?

In our view, the most prudent, institutionally responsible course of action would be to deny the petition.

Respectfully submitted,

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