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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

At the heart of Respondents' equal protection claim is the remarkable proposition, adopted by the court below, that the traditional definition of marriage, which has prevailed in virtually every organized society throughout human history, is so utterly irrational, so wholly bereft of any legitimate purpose, that it can only be explained as designed to "dishonor" and "marginalize" gays and lesbians. Plaintiffs concede that "the merits of the . . . equal protection analysis" which yielded this startling conclusion in the court below raises an "obviously" and "undeniably important" issue. Pl. BIO 2, 33. And they further concede that "[i]n some respects, this case is an attractive vehicle for approaching" this issue, especially given that the Court also has before it petitions seeking review of decisions invalidating the Defense of Marriage Act, the federal law adopting the traditional definition of marriage. *Id.* at 2-3. These concessions, standing alone, establish the certworthiness of this case. Indeed, the decision below warrants review even if it could plausibly be confined to California: surely a highly controversial two-to-one decision placing the traditional, age-old definition of marriage "outside the arena of public debate and legislative action," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), in a State that is home to nearly one out of every eight Americans warrants this Court's attention.

But the decision below, even on its own terms, plainly threatens the marriage laws of other States.

Indeed, in emphasizing the Ninth Circuit's reasoning that California's domestic partnership laws render Proposition 8 especially irrational, San Francisco underscores how the decision below casts doubt upon the marriage laws of other States that extend similar rights to their gay and lesbian residents. SF BIO 33-34. And while it is true that a federal district court recently attempted to distinguish the decision below in upholding the constitutionality of Hawaii's traditional marriage laws, *see Jackson v. Abercrombie*, Civ. No. 11-00734 ACK-KSC, 2012 WL 3255201, at *1, *18-*21, *34 n.28 (D. Haw. Aug. 8, 2012), that court also flatly rejected, in a thoroughly supported and well-reasoned opinion, the fundamental premises of the decision below in arriving at its contrary conclusion. *See, e.g., id.* at *5-*6 ("[T]he legislature could rationally conclude that defining marriage as a union between a man and woman provides an inducement for opposite-sex couples to marry, thereby decreasing the percentage of children accidently conceived outside of a stable, long-term relationship. . . . [A]llowing opposite-sex couples to marry furthers this interest and allowing same-sex couples to marry would not do so."); *id.* at *56 ("[T]o say that in preserving the traditional definition of marriage Hawaii – along with at least 41 other states and not to mention numerous judges and justices who have upheld such laws – has acted . . . absurdly, ignorantly, or with bigotry, such that the federal judiciary must take the extraordinary step of intervening and overthrowing the democratic process, is simply untenable."). Even if a decision by this Court here did not resolve the

constitutionality of traditional marriage in Hawaii and throughout the Nation – as it likely would – there is no reason why litigation in Hawaii and other States should continue in the shadow of a decision whose soundness is subject to grave question.

Despite conceding the importance and timeliness of this case, Plaintiffs nonetheless insist that review should be denied, primarily because the decision below, they say, follows directly from *Romer v. Evans*, 517 U.S. 620 (1996), presents no conflict with precedent from this Court or other circuits, and comes to this Court under a jurisdictional cloud. San Francisco, for its part, adds that our petition should be denied to allow further "percolation" of the " 'frontier legal problems' . . . presented in this case," SF BIO 23, thus refuting its own claim that this case is *sui generis*. None of these points is substantial.

A. Plaintiffs have mined this Court's opinion in *Romer* for quotes noting that, *as a factual matter*, one effect of Colorado's Amendment 2 was to repeal a handful of local ordinances prohibiting discrimination on the basis of sexual orientation. *See* Pl. BIO 14. But the Court emphasized that "Amendment 2, in explicit terms, [did] *more* than repeal or rescind these provisions." *Romer*, 517 U.S. at 624. Amendment 2 established an "unprecedented" and "sweeping and comprehensive" ban on any legal protections for gays and lesbians against "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," *id.* at 627, 631,

633, from housing and public accommodations, to employment and education, *id.* at 629. The amendment, in short, deemed gays and lesbians "stranger[s] to [Colorado's] laws," *id.* at 635, and the notion that the age-old and ubiquitous institution of marriage is "remarkably similar" (Pl. BIO 10) to such a measure cannot be taken seriously.

Nor can there be any doubt at all that the Court's analysis of Amendment 2 did not turn on its timing. *See* Pet. 4, 18-20. This Court's ruling was not limited to communities with pre-existing laws protecting gays and lesbians from discrimination, and the measure would plainly have been held unconstitutional even if it had been enacted by a State with no such laws. Pet. 18. Plaintiffs offer no response to these dispositive points.

B.1. The Ninth Circuit's analysis of *Romer*, advanced by Respondents here, not only fails on its own terms, but also brings the decision below squarely into conflict with *Crawford v. Board of Education*, 458 U.S. 527 (1982). *Crawford* emphatically "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." 458 U.S. at 535. It mattered not at all that Proposition 1 simply "remove[d] one *means* of achieving the state-created right to desegregated education." Pl. BIO 21 (quoting *Crawford*, 458 U.S. at 544). To the contrary, this Court made clear that the State "could have conformed its law to the Federal Constitution *in every respect*." 458 U.S. at 542. Indeed, the Court rejected the argument that

Proposition 1 was unconstitutional because it did not go far enough, emphasizing that "preserving a greater right to desegregation than exists under the Federal Constitution . . . most assuredly [did] not render the Proposition unconstitutional." *Id*.

To be sure, "if the purpose of repealing legislation is to disadvantage a *racial* minority, the repeal is unconstitutional for this reason." 458 U.S. at 539 n.21. Plaintiffs seize on this footnote, but tellingly excise the key word – "racial." *See* Pl. BIO 21. *Crawford*'s note simply reflects the well-settled principle that facially neutral laws motivated by racial discrimination, no less than explicit racial classifications, are subject to strict scrutiny. Indeed, *Crawford* expressly recognized that "if Proposition 1 employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest." 458 U.S. at 536. This analysis has no relevance where, as here, rational basis review applies.[1]

2. Respondents' attempts to distinguish *Baker v. Nelson*, 409 U.S. 810 (1972), are likewise unavailing. Plaintiffs' claim that the petitioners in *Baker* did not present a claim of sexual-orientation discrimination is demonstrably wrong. *See, e.g.*, Jurisdictional

[1] In attempting to distinguish *Crawford*, San Francisco also cites *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), but neither case suggests that the timing of a classification, as opposed to the rationality of the classification itself, has any constitutional significance.

Statement at 6-7, *Baker*, 409 U.S. 810 (No. 71-1027) (Minnesota's denial of same-sex marriage license attributable to "prejudice against non-heterosexuals"); *id.* at 10 ("there is no justification in law for the discrimination against homosexuals"); *id.* at 13 ("the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination").

Nor has this Court repudiated *Baker*'s holding through subsequent "doctrinal developments." Pl. BIO 23; SF BIO 19. *Lawrence v. Texas*, 539 U.S. 558 (2003), expressly *declined* to consider "whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id*. at 578, and neither *Romer* nor *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), addressed the issue at all.

Finally, Plaintiffs argue that California's laws regarding marriage and same-sex relationships are "far different" from the Minnesota law upheld in *Baker*. Emphasizing that *Baker* upheld the constitutionality of Minnesota's "outright refusal . . . to afford *any* recognition to same-sex relationships," Pl. BIO 24, Plaintiffs argue that California's constitutional offense was in affording "gay and lesbian individuals the right to enter into domestic partnerships that carry virtually all the same rights and obligations" of marriage but not the official designation of "marriage." *Id.* Plaintiffs thus read *Baker* to give States an all-or-nothing choice: either to refuse to afford *any* recognition to same-sex relationships or to redefine

marriage to include such relationships. This surely cannot be the teaching of *Baker*, and immediate clarification by this Court of the States' constitutional authority in this area is urgently needed.

3. Respondents likewise fail meaningfully to distinguish the other appellate decisions that have rejected constitutional challenges to the traditional definition of marriage. As we have demonstrated, the decision below is at odds not only with the holdings of these decisions, but also with their core rationales. *See* Pet. 17-18, 28-29. Indeed, Plaintiffs highlight this conflict by arguing that Proposition 8 is irrational because infertile opposite-sex couples have always been allowed to marry, Pl. BIO 17-18 – an argument repeatedly raised and rejected in these and other challenges to traditional marriage laws. *See, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971); *Standhardt v. Superior Ct. of Ariz.*, 77 P.3d 451, 462-63 (Ariz. Ct. App. 2003); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); *Jackson*, 2012 WL 3255201 at *40; *Hernandez v. Robles*, 855 N.E.2d 1, 11-12 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (plurality); *Conaway v. Deane*, 932 A.2d 571, 631-34 (Md. Ct. App. 2007); *Morrison v. Sadler*, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005).

C. Apart from raising the oft-rejected infertility argument, Respondents merely echo the rational basis analysis of the decision below. Respondents offer no meaningful response to our demonstration that the Ninth Circuit's analysis conflicts with the

decisions of other courts and with binding principles of rational basis review established by this Court. *See* Pet. 29-35.

As we have demonstrated, Pet. 37, because California's adherence to the traditional definition of marriage serves legitimate societal purposes, Proposition 8 simply "cannot run afoul" of the Fourteenth Amendment, and judicial inquiry should be at an end. *Heller v. Doe*, 509 U.S. 312, 320 (1993). It was thus unnecessary and improper for the Ninth Circuit to attempt the impossible task of divining the subjective motivations of over seven million voters in passing Proposition 8. *See, e.g.*, *Crawford*, 458 U.S. at 543-45 (characterizing "claim of discriminatory intent on the part of millions of voters as but 'pure speculation'" and refusing to "impugn the motives of the State's electorate").

Respondents see nothing but animus and antigay prejudice on our side of the public debate over redefining marriage. *See* Pl. BIO 18-20; SF BIO 36-37. Support for preserving the traditional definition of marriage not only is wrong-headed, they say, but is *irrational*, and *all* who oppose same-sex marriage seek *only* to dishonor and demean gays and lesbians. It is true, of course, that at the extreme edges of *both sides* of this public debate are those who are animated by hostility or irrational fears and prejudice.[2]

[2] Respondents attempt to smear millions of Californians who supported Proposition 8 with a handful of carefully selected

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See, e.g., THOMAS M. MESSNER, THE PRICE OF PROP 8 (2009) (DIX0458). The voices at the extremes can be heard whenever divisive social issues implicating deeply held values are debated. But the question under this Court's rational basis precedents is whether people of good will can in good faith oppose fundamentally redefining the vital institution of marriage. Respondents say, as they must under this Court's precedents, that the answer is no, that support for Proposition 8 is "inexplicable by anything but animus toward" gays and lesbians. *Romer*, 517 U.S. at 632. We submit that the answer is yes, and if there is even a fair chance that we are correct, the Court should grant review of the decision below invalidating the will of the People of California.

D. The issue of Petitioners' standing does not present a meaningful vehicle problem. A State

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snippets from the cacophony of messages that were before the voters – and even with testimony from trial that obviously was not before the voters. *See* Pl. BIO 19. Plaintiffs cite, for example, Dr. Hak-Shing William Tam as an authority on Petitioners' "campaign messages." *Id*. But Tam testified that he had no involvement in formulating the official ProtectMarriage.com campaign's strategy or messaging, Trial Tr. 2002, and that he did not share his views on homosexuality, which are uninformed and invidious, with anyone from ProtectMarriage.com at any time during the campaign, Trial Tr. 1989. Indeed, Tam's less-than-negligible influence on the campaign is illustrated by the very "campaign message" quoted by Plaintiffs, *see* Pl. BIO 19 (quoting Pet. App. 281a-282a (quoting PX0513)), which is a letter Tam testified that he sent to a mailing list of about 100 people. *See* Trial Tr. 1982.

unquestionably has standing to defend the validity of its laws, both in the first instance and on appeal. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986); *Diamond v. Charles*, 476 U.S. 54, 62 (1986). And the question who is authorized to represent the State's interest in the validity of its laws is plainly an issue of state law. *Compare Karcher v. May*, 484 U.S. 72, 81-82 (1987) (legislative leaders "had authority under state law to represent the State's interests"), *with Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (questioning petitioners' standing where 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"). Here, the California Supreme Court has unanimously and emphatically confirmed Petitioners' authority under California law to represent the State's interests when, as here, the responsible state officials decline to do so. *See* Pet. 10-11; Pet. App. 323a-327a. This Court has frequently considered jurisdictional issues in cases presenting important questions, *see, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 516-27 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 260-68 (2003), and the insubstantial standing question raised by Respondents here provides no basis for denying certiorari.[3]

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[3] Furthermore, because none of the named defendants defended Proposition 8, if Petitioners are not proper representatives of the State's interests, then this case has never satisfied Article III's case-or-controversy requirement. *See GTE Sylvania,*

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Nor do the other supposed "vehicle problems" urged by Plaintiffs provide any warrant for denying certiorari. This Court ordinarily does not consider issues not addressed by the court of appeals, and the fact that a respondent identifies such issues has never been thought to provide a basis for denying certiorari. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430-31 (2012); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 469-70 (1999).

In all events, Plaintiffs' alternative theories are insubstantial and have been roundly rejected by the overwhelming majority of appellate courts to consider them. *See Jackson*, 2012 WL 3255201, at *28 & n.25 (all eleven circuits that have considered the issue have rejected claim that classifications based on sexual orientation are subject to heightened scrutiny under the Federal Constitution); *id.* at *27 ("vast majority" of courts to consider the issue have rejected claim that the traditional definition of marriage discriminates on the basis of sex); *id.* at *24-*25 &

Inc. v. Consumers Union of U.S., Inc., 445 U.S. 375, 383 (1980). Thus, if Respondents were right that Petitioners lack standing, the proper course would be for this Court to grant certiorari, vacate the judgments of the court of appeals and the district court below, and remand with instructions to dismiss the case. At a minimum, because this case is not a class action, the only relief that possibly could be justified if Petitioners lack standing would be a district court judgment enjoining enforcement of Proposition 8 solely against the four Plaintiffs. *See*, *e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011).

n.21 (collecting numerous decisions rejecting claim that the traditional definition of marriage infringes the fundamental due process right to marry).

E. San Francisco urges the Court to deny review of the "frontier legal problems . . . presented in this case," despite their "profound significance," to allow them to "percolat[e]" further in the lower courts. SF BIO 23. But the issues presented by this case have "percolated" for years in numerous state and federal courts, and there is very little, if anything, to be gained by delaying this Court's inevitable consideration of them. Besides, this Court will very likely consider this Term the constitutionality of the traditional definition of marriage anyway in connection with the DOMA case, and this Court's analysis would no doubt be assisted by considering at the same time the validity of this definition as adopted by a State. Moreover, as San Francisco acknowledges, the issues presented here "are currently the subject of intense legislative and popular debate," *id.* at 24, and clarification from this Court on the States' constitutional latitude is urgently needed, particularly in light of the Ninth Circuit's holding that experimentation in this area is permanent and irrevocable. Finally, as the stays entered by the Ninth Circuit in this case illustrate, California should not be judicially mandated to redefine marriage to include same-sex couples contrary to the express will of its voters while the soundness of the judicial invalidation of that will remains subject to grave doubt.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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