U.S. Court of Appeals Case No. 10-16751

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, ET AL.,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, ET AL.,
Defendants,
and
COUNTY OF IMPERIAL, ET AL.,
Movants-Appellants

On Appeal From The United States District Court, Northern District of California
Case No. 09-CV-2292 VRW
The Honorable Vaughn R. Walker

BRIEF OF AMICUS CURIAE EQUALITY CALIFORNIA IN SUPPORT OF PLAINTIFFS-APPELLEES AND PLAINTIFF-INTERVENOR-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that Amicus Curiae Equality California is not a corporation that issues stock or has a parent corporation that issues stock.

DATED: October 25, 2010

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

This brief of Amicus Curiae Equality California is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with a motion seeking leave to file the brief.

Equality California is a state-wide advocacy group protecting the needs and interests of lesbian, gay, bisexual, and transgender Californians and their families, including members of same-sex couples and their children. It is also California's largest lesbian, gay, bisexual, and transgender civil rights organization, with tens of thousands of members. Equality California's members include registered voters in every county in the State of California. Equality California's members also include same-sex couples who wish to marry in the state of California but cannot do so while Proposition 8 is being enforced; same-sex couples who married in California before Proposition 8's enactment; same-sex couples who are married under the laws of other jurisdictions; and same-sex couples who have registered with the state of California as domestic partners. The issues raised in this appeal will directly affect Equality California's members and supporters.

Equality California also has developed extensive expertise regarding legal and factual issues raised in this appeal. Equality California regularly sponsors legislation in the California Legislature. Over the past decade, Equality California has successfully sponsored more than 60 pieces of civil rights legislation for the

lesbian, gay, bisexual, and transgender community in California, including many of the state's anti-discrimination laws and laws concerning marriage and domestic partnership.

Equality California also frequently participates in litigation in support of the rights of lesbian, gay, bisexual, and transgender persons, and has done so by bringing lawsuits as a plaintiff, by intervening as a plaintiff, by intervening as a defendant in support of California enactments, and by participating as an amicus curiae. As both a frequent sponsor of legislation and a membership organization, Equality California is familiar with standards governing participation by sponsors of legislation in litigation in federal and California courts, including the limits on such participation.

Equality California has been a party in other judicial proceedings concerning marriage equality. For example, Equality California was a plaintiff in *In re Marriage Cases,* 183 P.3d 384 (2008), and was a petitioner in *Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009). Equality California also spearheaded the "No" on Proposition 8 campaign, and was one of the leading fund-raising organizations for the campaign. Geoffrey Kors, the Executive Director of Equality California, was a co-chair of "No-On-8." As a result of its involvement in marriage equality advocacy, Equality California has developed significant expertise in the movement for the rights of lesbian, gay, bisexual, and transgender persons; the marriage

equality movement; the legal issues surrounding marriage rights in the states and at the federal level; and state and federal constitutional issues specific to Proposition 8.

ARGUMENT

Proposition 8 is a measure that is unprecedented in our nation's history—an amendment to a state constitution purporting to enshrine in that fundamental charter the discriminatory elimination of the fundamental right to marry for one group, same-sex couples, after it had been established that, under the state constitutional guarantee of equal protection, sexual orientation is not a valid basis for the denial of legal rights and the state of California was therefore required to permit same-sex couples to marry. After a careful trial and thorough analysis, the District Court ruled that Proposition 8 violates the equal protection and due process guarantees of the federal Constitution.

The state officials named as defendants in this lawsuit, including Governor Arnold Schwarzenegger and Attorney General Jerry Brown, have chosen not to appeal. As California's elected leaders entrusted by law with the power to make such litigation decisions, they acted on behalf of the people in making the decision not to appeal.[1] In doing so, the state officials presumably considered the District

[1] The California Supreme Court recently declined a request by certain litigants to require state officials to file an appeal of the District Court's judgment in this case. *See Beckley v. Schwarzenegger* (Cal. Supreme Ct. Case No. S186072)

Court's ruling, possible outcomes of an appeal, and the potential length and costs of an appeal (including possible payment of attorney fees to other parties). The state officials also may have considered the harm that would be inflicted during the pendency of appellate proceedings. Such proceedings would result in the continued stigmatizing denial of a fundamental right to thousands of same-sex couples in California, who have been unable to marry for the two years that Proposition 8 has been in effect and who were previously unable to marry during the more than four years of state-court litigation that finally resulted in a ruling recognizing that the California Constitution all along required equal treatment of same-sex couples with respect to marriage. *See In re Marriage Cases,* 183 P.3d 384 (2008).

Although the District Court's ruling invalidating Proposition 8 is correct on the merits, this Court does not have jurisdiction to reach the merits because no party with standing to appeal has chosen to appeal. The official proponents of Proposition 8 who intervened in the District Court proceedings ("Proponents") lack standing on appeal, for the reasons set forth in the amicus-curiae brief filed by

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(order dated Sept. 8, 2010 denying petition for review). The California Supreme Court previously stated in another case that its "[o]bservation that [state officials in the case] largely declined to defend the challenged statutes does not imply that these agencies committed misconduct" and that "whether they have an obligation to defend such statutes in court is a complex issue, which [the court] need not decide here." *Connerly v. State Personnel Bd.,* 129 P.3d 1, 6-7 (2006).

Equality California in the separate appeal by the Proponents, Appeal No. 10-16696. Nor do the County of Imperial, its Board of Supervisors, or its Deputy County Clerk Isabel Vargas (collectively, "Imperial County" or "Imperial Movants") have standing to appeal. Under California law, the responsibilities of county clerks with respect to the marriage laws are purely ministerial. Deputy Clerk Vargas is not named in the judgment and will not be directly affected by it. Rather, if the judgment stands, then it will be the responsibility of the State Registrar of Vital Statistics ("State Registrar") to take appropriate action to insure uniform statewide enforcement of the state's marriage laws. There is thus no reasonable possibility that Imperial County or its employees will face uncertainty as to how to carry out their ministerial responsibilities.

Were this Court nevertheless to determine that one of the appellants has standing to appeal the judgment, this Court should affirm the judgment in full, including the scope of the injunction, for all of the reasons set forth in the briefs of the Perry Appellees and Appellee City and County of San Francisco. As further explained below, Proposition 8 is "a classification of persons undertaken for its own sake," not in furtherance of any legitimate interest. *Romer v. Evans*, 517 U.S. 620, 635 (1996). "[T]he Constitution 'neither knows nor tolerates classes among citizens,'" *id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)), and Proposition 8 stands in stark violation of the federal

Equal Protection Clause. If the Court reaches the merits of this appeal (which it should not do), then the Court should affirm the District Court's judgment.

I. IMPERIAL COUNTY, ITS BOARD OF SUPERVISORS, AND DEPUTY CLERK VARGAS LACK STANDING TO MAINTAIN THIS APPEAL IN THE STATE'S ABSENCE

The County of Imperial, its Board of Supervisors, and its Deputy County Clerk Isabel Vargas (collectively, "Imperial County" or "Imperial Movants") were not parties to the case below, and as correctly argued by the Appellees/Plaintiffs, *see* Brief for Appellees in Case No. 10-16751 at 10-28, this Court should affirm the District Court's denial of intervention. Because Imperial County is concerned that the State's refusal to appeal the district court's decision leaves Proposition 8 "without a single governmental defender," however, it continues to seek admission into this case as a party on appeal to ensure the resolution of "[t]he momentous issues in this case." Movant-Appellants Opening Brief, Case No. 10-16751 ("Imperial Br."), at 7.

Even "momentous" issues, however, cannot be addressed by the federal courts except at the right moment—when a live case or controversy continues to present itself at each applicable level of the federal court system. *See Richardson v. Ramirez,* 418 U.S. 24, 36 (1974) ("While [a state court] may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy

requirement of Art. III to adjudication of actual disputes between adverse parties."). State officials regularly make decisions not to file appeals concerning the validity of state action, and federal jurisdiction over attempted appeals by other entities or persons does not hinge on the supposed importance of a state measure.

Instead, the Imperial Movants must demonstrate that they independently fulfill the requirements of Article III on appeal, regardless of the outcome of the Imperial Movants' appeal from the District Court's denial of their intervention motion. *Arizonans for Official English v. Arizona* ("*Arizonans"*), 520 U.S. 43, 64-65 (1997); *Diamond v. Charles*, 476 U.S. 54, 62 (1986). Specifically, Imperial County, its Board of Supervisors, and Deputy Clerk Vargas must each demonstrate that they have "standing now based on a concrete injury *related to the judgment*." *Western Watersheds Project v. Kraayenbrink*, Nos. 08-35359, 08-35360, -- F.3d --, 2010 WL 3420012, at *7 (9th Cir. Sept. 1, 2010) (emphasis added) (explaining that a putative appellant "must establish that the district court's judgment causes . . . a concrete and particularized injury that is actual or imminent and is likely to be redressed by a favorable decision" (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992))). Because the Imperial Movants cannot make such a showing, they lack the direct stake necessary to serve as Proposition 8's "governmental defender," no matter how strongly they believe such a defender is needed.

A. Deputy Clerk Vargas Has No Direct Stake in the District Court's Judgment and Lacks Standing to Appeal

Imperial County asserts that the District Court's ruling "purports to dictate the manner in which Deputy Clerk Vargas performs her official duties" relating to marriages. Imperial Br. at 9; *see also id.* at 8, 10, 15-21. That assertion reflects a fundamental misunderstanding of the nature of the duties performed by California's county clerks with respect to marriage.

1. Deputy Clerk Vargas has only ministerial duties relating to marriage and has no interests that will be injured in any way by the District Court's judgment

In *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (2004), the California Supreme Court clearly demarcated "the respective roles of state and local officials with regard to the enforcement of the marriage statutes (in particular, the issuance of marriage licenses and the registering of marriage certificates), and . . . the nature of the duties of local officials under the applicable statutes." *Id.* at 471. The Court explained that the execution of California's marriage statutes is statutorily charged to the State Registrar, who in turn "has supervisory power over local registrars, so that there shall be uniform compliance with all the requirements of this part." *Id.* at 470 (citing Health & Safety Code § 102180). The Court rejected the argument that county officials had the independent duty and authority to judge the constitutionality of state marriage laws, finding no provision in the California Constitution or the applicable marriage statutes "that purports to grant

the county clerk or the county recorder (or any other local official) the authority to determine the constitutionality of the statutes." *Id.* at 476. Instead, the Court concluded that "the duties of the county clerk and the county recorder at issue in this case properly are characterized as *ministerial* rather than discretionary." *Id.* at 472.

Therefore, to the extent that "Deputy Clerk Vargas's interest in the validity of Proposition 8 derives from whether she is charged with enforcing it," Imperial Br. at 19, the California Supreme Court has already answered that question: Local officials are not charged with "enforcing" Proposition 8 in any discretionary sense requiring them to exercise their judgment about its constitutionality. They simply administer the prescriptions of the State Registrar. Deputy Clerk Vargas "ha[s] no personal interest in the litigation. [She has] certain duties as a public officer to perform. The performance of those duties [is] of no personal benefit to [her]. Their nonperformance [is] equally so." *Smith v. Indiana*, 191 U.S. 138, 149 (1903).

The Imperial Movants erroneously contend that Imperial County's local officials are "directly affect[ed]" by the District Court's judgment. Imperial Br. at 9, 16-17. Imperial County's local officials are not bound by the judgment;[2] they

[2] Imperial County implicitly concedes that it is not directly bound when it acknowledges that Deputy Clerk Vargas's purported injury is wholly dependent on the State's discretion in how to comply with the district court's injunction.

will only become bound *by state regulations* at some future date if the State Registrar exercises its supervisory power and issues instructions to county clerks in light of the District Court's judgment. By no means does that chain of possible future events, involving future action by state officials over which local officials have no discretion and in which local officials have no interest, satisfy Article III's requirement of actual or imminent concrete injury related to the judgment.

While it is true that county clerks are sometimes named in lawsuits challenging denials of marriage licenses or other actions taken by county clerks and may assert an injury on appeal from judgments against them,[3] Deputy Clerk Vargas has no such claim here. The Imperial Movants were not sued below. They

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Imperial Br. at 8 (noting that its local officials, including Deputy Clerk Vargas, will be affected "*if the state officials bound by the district court's ruling* that Proposition 8 is unconstitutional seek to compel statewide compliance with that ruling" (emphasis added)).

[3] The cases cited by Imperial County and its supporters on this point are distinguishable because they involved clerks with an actual or imminent stake in the judgment. In *Zablocki v. Redhail,* 434 U.S. 374 (1978), the county clerk defending the state law was a named defendant who had denied a marriage license at issue in the case and against whom judgment had been entered by a three-judge district court. *Id.* at 378-79, 381. In *Richardson v. Ramirez*, the County Clerk of Mendocino County was a member of a class of county clerks who had been sued in connection with California's felony disenfranchisement laws, and the U.S. Supreme Court understood from the case's procedural history that at least some members of the class apparently resided in Mendocino County. 418 U.S. 24, 38-39 (1974). In addition, *Richardson* involved county clerks who were not simply carrying out ministerial duties. *See id.* at 33 n.12 (noting allegation and evidence that county clerks were not interpreting and applying felony disenfranchisement laws consistently).

have not alleged that any same-sex couple has applied for a marriage license in Imperial County. Given that Imperial County and its officials were not sued here and face no reasonable prospect of uncertainty in the ministerial application of state marriage law as a result of the District Court's judgment, they assert nothing more than a "conjectural or hypothetical" injury that is insufficient to confer standing on appeal. *Lujan*, 504 U.S. at 560-61.

2. Deputy Clerk Vargas faces no conflicting obligations as a result of the District Court's judgment

There is no merit to the Imperial Movants' contention that Deputy Clerk Vargas has standing because she faces "conflicting duties" from the District Court's judgment. As explained above, the District Court's judgment does not alter the duties of local officials, who have only ministerial responsibilities when it comes to the administration of marriages in California. Moreover, the supposed conflict in duties that the Imperial Movants posit simply does not exist.

The Imperial Movants attempt to argue that Imperial County officials, "just like the clerks involved in *Lockyer*, took an oath to uphold the State Constitution in fulfilling their duties," Imperial Br. at 21, and will face conflicting obligations because they "will be forced to choose" between that oath and complying with the judgment. *Id.* at 8. The California Supreme Court, however, rejected such an argument in *Lockyer*, concluding that local executive officials do not violate their

oath of office by performing a ministerial act that they personally believe violates the Constitution. *Lockyer*, 95 P.3d at 485.

The Imperial Movants attempt to rely on a footnote about oath-based standing in *Board of Education v. Allen,* 392 U.S. 236, 241 n.5 (1968). That cursory footnote acknowledged that the standing of appellants in that case had not been challenged, *id.*, and a later Supreme Court decision that revisited the footnote explained that the Board's standing in *Allen* was justified specifically because of the Board members' likely "expulsion from office and also a reduction in state funds for their school districts." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986) (holding that member of school board lacked standing to appeal district court's ruling that school district chose not to appeal). Moreover, this Court has thoroughly examined the *Allen* footnote in light of later Supreme Court precedents that "significantly tightened standing requirements" and expressly held that the *Allen* footnote cannot "be considered as binding Supreme Court precedent" and "that [public officials'] desire not to violate their oaths of office does not confer standing." *City of S. Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 236-37 (9th Cir. 1980), *cert denied,* 449 U.S. 1039 (1980).

Imperial County also vainly attempts to locate a "conflicting obligation" in Article III, Section 3.5(c) of the California Constitution ("Section 3.5"), a measure

with no application here whatsoever because Section 3.5 applies only to statutes, not constitutional amendments such as Proposition 8. Section 3.5 states that administrative agencies have no power to "refuse to enforce a *statute* . . . unless an appellate court has made a determination that the enforcement of such *statute* is prohibited by federal law or federal regulations" (emphases added). Section 3.5 was placed on the ballot by a unanimous vote of the California Legislature in 1978, and "[t]he purpose of the amendment was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature." *Reese v. Kizer,* 760 P.2d 495, 499 (Cal. 1988) (discussing ballot materials). There is no comparable California provision applicable to initiative constitutional amendments such as Proposition 8.[4] The state *statutes* that formerly imposed discriminatory requirements preventing gay and lesbian couples from marrying were stricken by the California Supreme Court in the *Marriage Cases. In re Marriage Cases*, 183 P.3d 384 (2008). Now, only a constitutional provision (Proposition 8) instructs the state to discriminate against same-sex couples in the

[4] The amicus curiae brief of the Center for Constitutional Jurisprudence (CCJ) repeatedly misdescribes Section 3.5 or the cases construing it as though Section 3.5 were applicable to state constitutional amendments, not simply to state statutes. *See, e.g.,* Brief of Amicus CCJ, Case No. 10-16696 at 24 (citing and misdescribing Section 3.5 as applying to *constitutional* provisions); *id.* at 25 (citing *Valdes v. Cory,* 139 Cal.App.3rd 773, 780 1983, without indicating that the court mentioned Section 3.5 only in connection with "contested provisions of chapter 115 [of the Statutes of 1982]"); *id.* at 30 (misdescribing Section 3.5 as applying to "California law," rather than simply to California statutes).

issuance of marriage licenses, and Section 3.5 does not address state constitutional provisions.[5] "When the language of a constitutional provision is clear, there is no need for construction and courts should not indulge in it." *Burlington Northern v. Public Util. Comm'n*, 112 Cal.App.4th 881, 887 (2003) (internal punctuation and citation omitted); *cf. id.* ("On its face, article III, section 3.5 does not prohibit [an administrative agency] from refusing to enforce a statute because it is inconsistent with another statute.").

Any argument that Section 3.5 will add to uncertainty in connection with the District Court's injunction fails to take into account the federal Supremacy Clause. U.S. Const. art. VI, cl. 2. That basic principle of our government requires that state officials named in the District Court's injunction abide by the injunction. Those state officials will presumably comply with the injunction. *See Lockyer*, 95 P.3d at 470; Cal. Health & Safety Code § 102180; *cf. LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1159-60 (9th Cir. 2000) (rejecting parties' proposed sweeping construction of Section 3.5 as "tak[ing] no account of the Supremacy Clause of the United States Constitution"); *People v. Black*, 116 Cal.App.4th 103, 112 (2004) ("Deliberate

[5] Even were Section 3.5 somehow implicated by this case (which it is not), the California Supreme Court expressly stated in the *Lockyer* opinion: "we need not and do not decide in this case what effect the adoption of article III, section 3.5 has on the authority of local executive officials." 95 P.3d at 482. The California Supreme Court's discussion indicates that it is unclear what effect, if any, Section 3.5 might have for county clerks or other local officials even with respect to implementation of California's state-wide marriage statutes. *Id.*

disregard of federal court orders is completely unacceptable, as is nonchalant treatment of the terms of a district court order."); *Gates v. Municipal Court*, 9 Cal.App.4th 45, 54 (1992) (holding that, where state sheriff may have violated state law because it was "necessary to comply with [a] federal court order, the supremacy clause of the Constitution of the United States afforded the sheriff immunity from state prosecution").

If the District Court's injunction stands without a ruling on the merits on appeal, the state actors named in that injunction will have their marching orders under federal law. And the county clerks will later obtain their marching orders under state law from the enjoined state officials, who are expected to prescribe uniform regulations and forms for marriage that the county clerks must follow and use, respectively, statewide and as to which the county clerks have no discretion. *Lockyer*, 95 P.3d at 470. There is likely to be no uncertainty as to how to apply the State Registrar's instructions. But if Imperial County and its officials later disagree with how state officials interpret and comply with the District Court's injunction, Imperial County officials may seek any remedies available as a matter of state law in state court.[6]

[6] *Cf. Arizonans*, 520 U.S. at 66 (noting that, "[a]s nonparties in the District Court," intervening organization's members "were not bound by the judgment for [plaintiff]" and "could pursue whatever relief state law authorized"); *Smith v. Indiana*, 191 U.S. at 148 (explaining that, while the Court had "no doubt of the power of state courts to assume jurisdiction" over a county auditor's refusal to

Here, Imperial County is attempting to force the defense and enforcement of a measure that the State has determined should not be defended on appeal. "The exercise of judicial power . . . can so profoundly affect the lives, liberty, and property of those to whom it extends . . . that the decision to seek review must be placed in the hands of those who have a direct stake in the outcome." *Diamond*, 476 U.S. at 62 (internal punctuation and citations omitted). Imperial County and its officials lack the "direct stake" in the constitutionality of Proposition 8 needed to stand in the place of the State. Indeed, Deputy Clerk Vargas enjoys no more standing than any other clerk or deputy clerk who is involved in the issuance of marriage licenses but who has not been sued in this action for having denied marriage licenses to the plaintiffs. Those local officials do not have any particularized interest in the *substance* of the marriage laws they ministerially administer, and there is no realistic possibility that the deputy clerks will face uncertainty arising directly from the judgment that would give rise to standing on appeal.

B. The County of Imperial and its Board of Supervisors' stake in this litigation is even more indirect and fails to meet the requirements

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apply a state exemption law on constitutional grounds, "[d]ifferent considerations . . . apply to the jurisdiction of this court"); *Lockyer*, 95 P.3d at 493 (noting cases finding that a public official's question about how the constitutionality of a state statute bears on enforcement is "purely a question of state (not federal) law" that does not confer "a sufficient personal interest in the litigation to support jurisdiction" in federal court).

for a cognizable "injury in fact"

All other interests in Proposition 8 asserted by Imperial County on behalf of itself and its Board of Supervisors are even more indirect than those relating to Deputy Clerk Vargas and, therefore, do not constitute concrete and particularized "injuries in fact." First, to the extent that Imperial County is asserting its own interest in the constitutionality of Proposition 8, the County is a subdivision of California whose interests may not diverge from the State's interest. *City of South Lake Tahoe*, 625 F.2d at 233 ("It is well established that '[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.'") (citation omitted). Counties are "merely [] political subdivision[s] of state government, exercising only the powers of the state, granted by the state, created for the purpose of advancing the policy of the state at large." *Star-Kist Foods, Inc. v. County of Los Angeles*, 719 P.2d 987, 989 (Cal. 1986) (quotation marks and citation omitted; alterations in original).

Second, Imperial County's assertion that its Board of Supervisors has "ultimate responsibility" to "ensure that county clerks and their deputies faithfully perform their legal duties" (Imperial Br. at 21) is irrelevant when the Board of Supervisors has no *direct* obligation with respect to the marriage laws. *Lockyer*, 95 P.3d at 471 ("the only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are the *county clerk* and

the *county recorder*" (emphasis in original)). And the Board of Supervisors' contingent obligation to ensure the performance of their county clerks and deputies' legal duties is not implicated where their county clerks and deputies' legal duties do not include judging the constitutionality of marriage laws.[7]

Third, Imperial County and its Board of Supervisors' subjective belief that "promoting opposite-sex marriage" will prevent a litany of social ills is unsupported as a matter of fact and insufficient as a matter of law. *See* District Court Findings of Fact, ¶¶ 47-56, 69-73 (concluding that opposite-sex marriage is not harmed by and offers no more societal benefit than same-sex marriage); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) (noting that standing should not be conferred so that parties can "convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders'") (citation omitted). Rather than asserting their own injuries, Imperial County and its Board of Supervisors are inappropriately attempting to ride coattail on the rights and

[7] In addition, any threat of suit against the Board of Supervisors is purely "conjectural" and "hypothetical." *Lujan*, 504 U.S. at 560; *see also City of S. Lake Tahoe*, 625 F.2d at 238-39 (noting that city councilmembers' allegations of exposure to civil liability from conflicting obligations of state and federal law were "wholly speculative" where "no lawsuit is currently threatened" and immunities likely protected those officials).

interests of its voters and citizens.[8] *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

II. IF THE COURT REACHES THE MERITS, THE COURT SHOULD CONCLUDE THAT PROPOSITION 8 VIOLATES THE FEDERAL EQUAL PROTECTION CLAUSE

As noted above, there is no need for this Court to reach the merits of this appeal, because no party with Article III standing has appealed. Should this Court nevertheless disagree and find that a justiciable controversy exists on appeal, this Court should affirm the District Court's judgment in full, for all of the reasons presented by the Perry Appellees and Appellee City and County of San Francisco.

With respect to the merits, Equality California here emphasizes in particular that, although many states unfortunately include in their constitutions provisions barring same-sex couples from marrying, even among those numerous unlawfully discriminatory enactments, Proposition 8 stands out as a unique and unprecedented

[8] Imperial County asserts, without elaboration, that it has "a direct financial interest in assuring that the vote of its residents is defended and ultimately upheld." Imperial Br. at 22-23. Imperial Country cannot rely on the fact that the City and County of San Francisco intervened in part because of its allegations of financial harm from the implementation Proposition 8 to establish the converse proposition that Imperial County will be financially harmed if the State's enforcement of Proposition 8 is enjoined. Its conclusory assertion does not suffice to satisfy its burden of showing a concrete injury.

mandate of inequality that the federal Equal Protection Clause simply cannot tolerate.

Despite a longstanding history of discrimination against lesbian, gay, bisexual, and transgender persons in California, including in California's marriage laws, the California Legislature a little more than a decade ago entered a period in which it increasingly enacted into law measures that recognized both that discrimination based on sexual orientation lacked justification and that same-sex couples, notwithstanding a long history of discrimination, formed families just like different-sex couples and were similarly situated with different-sex couples. *See Koebke v. Bernardo Heights Country Club,* 115 P.3d 1212, 1226 (Cal. 2005). Accordingly, the Legislature adopted increasing numbers of protections for same-sex couples who chose to register their "domestic partnerships" with the state, bringing the legal protections of domestic partnership closer and closer to marriage—such that by 2005 domestic partners in California were entitled to nearly all of the benefits of marriage, *id.* at 1228 n.10, though still relegated to a second-class status. The numerous protections enacted by the Legislature bore witness to the basic principle that sexual orientation is irrelevant to one's ability to contribute to society and to participate in family life and is an unjustifiable basis for discriminating with respect to legal rights.

Even as the Legislature moved closer to the ideal of equal protection of the laws with respect to legal protections, the Legislature was mindful that domestic partnership, no matter how closely modeled on marriage, could not afford true equality under the law as long as same-sex couples were excluded from the more cherished, honored, and respected status of marriage. California's courts likewise acknowledged that domestic partnership was a separate, less-respected status. *See Knight v. Superior Court,* 128 Cal.App.4th 14, 31 (2005) (noting that differences between domestic partnership and marriage "indicate marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership").

Finally, in a historic and long-awaited decision, the California Supreme Court in May 2008 articulated that under the California Constitution (1) sexual orientation is not a valid basis for denial of legal rights, and laws that discriminate based on sexual orientation are subject to the strictest level of scrutiny; (2) marriage is a fundamental right guaranteed to couples regardless of sexual orientation; and (3) the state's two-tiered system of family law—excluding same-sex couples from marriage while permitting them to participate in a family status (domestic partnership) that was not accorded equal dignity and respect—impinged on fundamental privacy interests. In the *Marriage Cases*, the California Supreme Court made clear that the California Constitution's equality guarantee required that

same –sex couples be permitted to marry on the same terms as different-sex couples.

During a period of less than five months following the finality of the Supreme Court's order, it is estimated that 18,000 same-sex couples exercised their constitutional right to marry in California. *See Straus,* 207 P.3d 48, 59 (2009). Many of those couples presumably already had registered as domestic partners and so did not obtain significant additional legal benefits from marriage. Nevertheless, they wished to participate in the more highly respected and meaningful status of marriage because of what the word "marriage" and the status of marriage conveyed, and the greater respect it brought to their relationships.

What occurred with the enactment of Proposition 8 in November 2008 was unprecedented in our nation's history. The California electorate enacted a constitutional amendment singling out a group based on a characteristic that, under the California Constitution, is an improper basis for denying legal rights, and denied that group the fundamental right to marry the person's chosen partner.

There can be no doubt that the classification that Proposition 8 creates is a classification drawn simply for the purposes of drawing a distinction, not to serve any legitimate government interest. In *Strauss*, the California Supreme Court made plain that, even after the enactment of Proposition 8, same-sex couples were similarly situated to different-sex couples and would be treated the same under the

law except that "Proposition 8 changes the state Constitution . . . to provide that restricting the family designation of 'marriage' to opposite-sex couples only, and withholding that designation from same-sex couples, no longer violates the state Constitution." 207 P.3d at 78. The Court's description of Proposition 8 crystallized what was clear from Proposition 8's ballot materials: the measure's purpose was to draw distinctions between two kinds of families and to afford one kind a favored, more dignified status. *No other change in family law resulted from Proposition 8.* In a real sense, Proposition 8's goal was complete with its enactment: the demarcation of families into two groups was what the measure's proponents wanted. As in *Romer*, Proposition 8 "is a status-based enactment divorced from any factual context from which [a court] could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

The California Supreme Court acknowledged in *Strauss* that "Proposition 8 must be understood as creating a limited exception to the state equal protection clause." 207 P.3d at 73. That acknowledgment makes plain that what Proposition 8 accomplished—deliberately making one group unequal to all others by carving out an exception to the equal protection of the state's laws for that group—is fundamentally inconsistent with the command of the Fourteenth Amendment that

no state "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. xiv, § 1. As the United States Supreme Court has famously and repeatedly said: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Romer*, 517 U.S. at 633 (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))). As Justice Kennedy wrote for the Court in *Romer*, "[r]espect for this principle explains why laws singling out a certain class of citizens for disfavored legal status . . . are rare." *Romer,* 517 U.S at 633. Yet that is precisely what Proposition 8 did; it singled out same-sex couples in order to deny them the favored legal status of marriage.

The Supreme Court in *Romer* took note of "the absence of precedent for Amendment 2" as " itself instructive, " for "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer*, 517 U.S. at 633 (citing *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37-38, 48 S.Ct. 423, 425, 72 L.Ed. 770 (1928)). Unusual forms of discrimination also, as the *Romer* Court recognized, may "def[y] . . . conventional" constitutional analysis. *Romer*, 517 U.S. at 632. The initiative's very defiance of the notion that a state's laws—even a state's equal protection guarantee—must protect people equally suggests that it

offends the Equal Protection Clause in a more basic way than courts normally encounter.

For purposes of determining whether Proposition 8 violates the federal equal protection guarantee it is *irrelevant* whether federal constitutional law is itself in agreement with the principles espoused in the California Constitution prior to Proposition 8's enactment—namely, that sexual orientation is not a valid basis for denial of legal rights and is subject to the strictest level of judicial review and that marriage is a fundamental right available to persons without regard to sexual orientation. Regardless of whether the federal Constitution were to regard a particular classification to be an impermissible basis for denying legal rights or were to regard a particular right, such as the right to marry the person of one's choice without regard to sexual orientation, to be fundamental, when a state's own foundational law says that a particular classification is suspect and that a particular right is fundamental, the *federal* Equal Protection Clause is offended when the state decides to target a group based on a characteristic that the state regards to be an improper basis for classification, for the selective deprivation of a fundamental right. In that instance, the state, quite literally, has "den[ied] to[a] person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

CONCLUSION

For the foregoing reasons, Equality California respectfully requests that this Court dismiss the Imperial Movants' appeal for lack of Article III standing or, in the alternative, affirm the District Court's judgment.

DATED: October 25, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure ("FRAP") and Ninth Circuit Rule 32-1, the undersigned certifies that the attached amicus-curiae brief is proportionally spaced, has a typeface of 14 points or more, and contains 5339 words, excluding matters that may be omitted under Rule 32(a)(7)(B)(iii) of the FRAP, according to the word court feature of the word processing program used to prepare this brief.

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