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In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, GAIL J. KNIGHT,
MARTIN F. GUTIERREZ, MARK A. JANSSON,
PROTECTMARRIAGE.COM – YES ON 8,
A PROJECT OF CALIFORNIA RENEWAL,

Petitioners,

v.

KRISTIN M. PERRY, SANDRA B. STIER,
PAUL T. KATAMI, JEFFREY J. ZARRILLO,
CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**CITY AND COUNTY OF SAN FRANCISCO'S
BRIEF IN OPPOSITION**

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QUESTION PRESENTED

Prior to November 3, 2008, the California Constitution afforded lesbian and gay couples all of the rights of marriage that opposite-sex couples enjoy, including the title and stature of marriage and its substantive rights and benefits. The question presented is whether California violated the Equal Protection Clause of the Federal Constitution when it removed only the title “marriage” from lesbian and gay couples, without altering their access to its incidents.

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INTRODUCTION

In light of the “unique and strictly limited effect of Proposition 8,” which took away the “important and legally significant designation” of marriage for same-sex couples in California “while leaving in place all of its incidents,” the Ninth Circuit addressed Proposition 8 on “narrow grounds” that did not attempt to resolve whether same-sex couples may ever be denied the right to marry. Pet. App. 17a-18a. Instead, the Ninth Circuit reached the unsurprising conclusion that where a State singles out a disfavored group by removing a benefit, without a rational basis for doing so and as a result of a plebiscite campaign steeped in negative stereotypes and insinuations, it violates the Equal Protection Clause. The lower court’s application of settled equal protection principles to the novel facts of Proposition 8 does not warrant this Court’s review.

As reasons for the Court to grant certiorari, Petitioners contend that the Ninth Circuit wrongly applied this Court’s equal protection cases, Pet. 15-22, and that its decision conflicts with federal and state court cases concerning the constitutionality of marriage laws that exclude same-sex couples, Pet. 23-25, 28-29. But the Ninth Circuit correctly applied *Romer v. Evans*, 517 U.S. 620 (1996), and other cases of this Court in addressing Proposition 8’s unconstitutionality. Even if the Ninth Circuit had erred in that application, Petitioners’ first argument amounts to a plea for error correction that does not warrant certiorari. The second argument rests on a distortion of the

decision below: Only by stretching the Ninth Circuit's language to apply to marriage laws in other States – which the court of appeals expressly disavowed, Pet. App. 60a – do Petitioners arrive at their argument that this decision creates any conflict.

Petitioners' remaining argument for certiorari is that this issue is so important that the Court's immediate intervention is warranted. But that is instead a reason for the Court to reject the petition. The decision below is the first by a federal appellate court to consider a law withdrawing marriage rights from lesbian or gay partners, and the decision had no occasion to address questions of great import to the issue, such as whether heightened scrutiny applies to sexual orientation classifications and whether the Due Process Clause affords gay Americans the fundamental right to marry the person of their choice. Moreover, the landscape of legal rights and recognition for lesbian and gay families continues to mature, meaning that additional federal appellate courts will consider these issues (on varying factual records) in the near future. These developments will allow this Court ultimately to consider the question of marriage equality in a more informed fashion. This is all the more true if this Court issues a ruling on the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7. Any decision this Court reaches concerning DOMA will presumably influence the law in this area.

When a bare majority of voters enacted Proposition 8, they inflicted serious harm on same-sex couples,

their children and families, and gay and lesbian individuals throughout California. Proposition 8 stripped lesbians and gay men of a state constitutional guarantee that their relationships would enjoy equal dignity in the eyes of their government and the law. The measure itself and the campaign to enact it declared instead that their relationships were second-class, and that California's children would be harmed if they learned that gay relationships were not inferior to heterosexual relationships. The Ninth Circuit's ruling did nothing more than restore to gay people the equal dignity of which Proposition 8 had divested them, and Petitioners have offered no reason to disturb that ruling.

◆

STATEMENT OF THE CASE

1. Over the decades, California's legislature and courts have incrementally, and eventually comprehensively, required equal treatment for gay men and lesbians in public and private life. *See generally In re Marriage Cases*, 183 P.3d 384, 413-17, 428-29 (Cal. 2008); *see also* Cal. Civ. Code § 51(b); Cal. Ed. Code § 200; Cal. Gov. Code § 11135; *id.* §§ 12920 *et seq.*; Cal. Health & Safety Code §§ 1365.5, 1374.58; Cal. Ins. Code § 10140; Cal. Lab. Code § 4600.6(g)(2); Cal. Code Regs., tit. 10, § 2632.4. The guarantee of equal treatment extends to family life, granting gay partners rights but also imposing obligations to each other and their children. *See* 2003 Cal. Stat., ch. 421,

§ 4 (codified at Cal. Fam. Code § 297.5) (stating that registered domestic partners have “the same rights, protections and benefits” and “the same responsibilities . . . as are granted to and imposed upon spouses,” and providing that “[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses”); *see also* Cal. Fam. Code § 9000(g) (“stepparent adoption includes adoption by a domestic partner”); Cal. Welf. & Inst. Code § 16013(a) (prohibiting sexual orientation discrimination with respect to adoption and foster parenting); *S.Y. v. S.B.*, 201 Cal. App. 4th 1023 (2011) (applying presumed parentage statute to children adopted by domestic partners); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (holding that same-sex partners are presumed parents of child born during the relationship).

In 2008, the California Supreme Court recognized that these laws are not mere legislative dispensations but are rights guaranteed by the California Constitution. *In re Marriage Cases*, 183 P.3d 384. That constitution’s due process and privacy provisions, the court held, secure to same-sex couples the right “to join together to establish an officially recognized family of their own – and, if the couple chooses, to raise children within that family.” *Id.* at 399; *see also id.* at 418 n.27. Independently, the court determined that same-sex couples are entitled to use the term “marriage,” with all of its history and stature, to describe their relationships. *Id.* at 434-35, 444-53. Allowing the State to distinguish “with regard to this

most fundamental of relationships,” by denying the term “‘marriage’ . . . only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship.” *Id.* at 445.

2. Shortly after that decision, Petitioners submitted signatures qualifying Proposition 8, an initiative constitutional amendment, for the California ballot. That measure sought to amend the California Constitution to eliminate same-sex couples’ right to the title and stature of marriage, but as Petitioners informed voters in the official ballot guide, “Proposition 8 WILL NOT change” those California laws that provide domestic partners the “same rights, protections, and benefits as married spouses.” Pet. App. 77a n.22 (quotation marks omitted). Petitioners and their supporters conducted a heated campaign to pass Proposition 8, relying on outdated stereotypes about gays and lesbians and the suggestion that children must be protected from gay relationships and gay people. Pet. App. 279a-285a, 314a-315a. Campaign leaders depicted gay relationships as immoral, unnatural, depraved, deviant, and threatening. Pet. App. 274a-276a, 279a-284a; Exs. PX0401 & PX504B (available at <https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html>) (last visited Aug. 23, 2012). In November 2008, Proposition 8 passed by a slim majority of California voters.

San Francisco and others challenged whether Proposition 8 was properly enacted by initiative

amendment. In rejecting that challenge, the California Supreme Court held that Proposition 8 did not overrule the *Marriage Cases* but instead “establishe[d] a new substantive state constitutional rule that took effect upon the voters’ approval of Proposition 8.” *Strauss v. Horton*, 207 P.3d 48, 63 (Cal. 2009). Proposition 8’s new substantive rule “carve[d] out a narrow exception” to the California Constitution’s liberty, privacy and equality guarantees for gay men and lesbians alone, eliminating their right to designate their relationships “marriages” but not repealing other constitutional rights of same-sex couples recognized in the *Marriage Cases*. *Id.* at 63, 75, 78, 102. Proposition 8 thus left intact same-sex couples’ constitutional and statutory rights to form families and have and raise children. *Id.* at 75-76. Finally, the court held that Proposition 8 did not retroactively invalidate the approximately 18,000 marriages that same-sex couples entered into before it passed. *Id.* at 119-22.

3. In May 2009, Plaintiffs filed this action in the district court. Petitioners, the official proponents of Proposition 8, see Cal. Elec. Code § 342, intervened as defendants, and San Francisco intervened as a plaintiff. Pet. App. 144a. The district court conducted a 12-day bench trial, and Plaintiffs and San Francisco proffered 17 witnesses to testify on myriad topics concerning marriage and same-sex relationships.¹

¹ These topics included the histories of marriage and of discrimination against gay people, the similarities between same-sex and opposite-sex couples as couples and as parents,

(Continued on following page)

Pet. App. 168a-181a. Petitioners declined to offer significant evidence, calling only two witnesses, one regarding purported justifications for excluding same-sex couples from marriage and the other to testify about gay people's political power. Pet. App. 181a-202a. Following the trial, the district court determined that Proposition 8 violated same-sex couples' fundamental right to marry and that it failed either strict scrutiny or rational basis scrutiny under the Equal Protection Clause because it had no justification other than to place an official stamp of inferiority on same-sex relationships. Pet. App. 248a-250a, 260a-263a, 295a, 301a, 316a.²

4. The State and county defendants did not appeal from the judgment, but Petitioners did. After

the well-being of children raised by same-sex couples and the benefits to those children of recognition of their parents' relationships as "marriages," the harms to same-sex couples and their children from Proposition 8, the costs to government of discriminatory laws, the immutability of sexual orientation, the inability of gay people to protect themselves from discrimination through the political process, the messages of the Proposition 8 campaign, and those messages' similarity to earlier ballot measure campaigns to restrict the rights of gay people.

² After the district judge who presided over the trial and issued this decision retired, Petitioners sought to vacate the judgment because the judge, who is gay and in a same-sex relationship, did not affirmatively disavow his interest in marrying his partner. The Ninth Circuit made short work of this argument. Pet. App. 93a-94a. Petitioners also made the baseless argument that one of the circuit judges who decided this case should have recused himself. *Perry v Brown*, 630 F.3d 909 (9th Cir. 2011).

briefing and argument, the Ninth Circuit certified to the California Supreme Court open questions of state law affecting Petitioners' standing to maintain their appeal. Pet. App. 415a-416a. After that court held that initiative proponents are authorized by the State to represent its interests in defending an initiative measure where state officials decline to do so, Pet. App. 378a, the Ninth Circuit held that Petitioners had standing, Pet. App. 43a.

On the merits, the Ninth Circuit affirmed the district court's judgment but, "adher[ing] to the principle of deciding constitutional questions only in the context of the particular case before the Court," it did not decide "[w]hether under the Constitution same-sex couples may *ever* be denied the right to marry." Pet. App. 17a. Instead, it inquired whether "the People of California have legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples the right to have their lifelong relationships dignified by the official status of 'marriage,' and to compel the State and its officials and all others authorized to perform marriage ceremonies to substitute the label of 'domestic partnership' for their relationships?" Pet. App. 54a. Applying *Romer*, 517 U.S. 620, the Ninth Circuit observed that Proposition 8 withdrew from same-sex couples alone an existing right to the revered title of marriage, while allowing them to continue to enjoy *all* of the other rights and incidents of marriage, Pet. App. 54a. The Ninth Circuit rejected the rationales that Petitioners offered to justify this

“discrimination of an unusual character,” Pet. App. 62a (quotation marks omitted), finding that eliminating the right of same-sex couples to designate their relationships as “marriages,” but leaving intact all of their other relationship rights, did not advance any of the interests that Petitioners identified. As for Petitioners’ claimed interest that children be raised by two biological parents, the Ninth Circuit found this justification to be “totally inconsistent” with Proposition 8’s effect on California’s laws and policies. Pet. App. 73a. Both before and after Proposition 8, California law “recognize[s] that gay individuals are fully capable of . . . responsibly caring for and raising children,” Pet. App. 72a (quotation marks omitted), and offers them and their families rights identical in every respect to those of “biological” families, except access to the title “marriage.” As for Petitioners’ claim that withdrawing the title of marriage from same-sex couples would advance responsible procreation by encouraging opposite-sex couples to marry and take responsibility for their children, the Ninth Circuit found this justification not even “conceivably plausible.” Pet. App. 71a-75a.

In the end, the court concluded, the peculiar effect of Proposition 8 left only the inference that its true purpose was to “dishonor a disfavored group by taking away the official designation of approval of their committed relationships,” thereby diminishing their dignity. Pet. App. 91a. This inference found further support in evidence that the campaign to pass

Proposition 8 was based on stereotypes “that gay people and relationships are inferior, that homosexuality is undesirable, and that children need to be protected from exposure to gay people and their relationships.” Pet. App. 89a-91a. Because a purpose to “impose on gays and lesbians, through the public law, a majority’s private disapproval of them and their relationships” was not a legitimate basis, the Ninth Circuit affirmed the district court’s judgment invalidating Proposition 8. Pet. App. 92a.

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ARGUMENT

I. THE NINTH CIRCUIT’S APPLICATION OF SETTLED EQUAL PROTECTION PRINCIPLES DOES NOT CONFLICT WITH OTHER DECISIONS.

1. The Ninth Circuit faithfully applied *Romer*, 517 U.S. 620, to the unique facts presented by California’s marriage and family laws, and its application does not conflict with other decisions of this Court. In doing so, the Ninth Circuit carefully followed each step of the *Romer* analysis. First, it examined Proposition 8’s “singular and limited change to the California Constitution.” Pet. App. 47a; *see also Romer*, 517 U.S. at 627-28. Relying on the California Supreme Court’s authoritative construction, the court below held that Proposition 8’s only effect was to remove the “cherished status of ‘marriage’” from lesbian and gay couples, while leaving intact the rights of those couples to form families and raise children on the

same basis as opposite-sex couples. Pet. App. 52a-53a. Moreover, Proposition 8 accomplished this result by carving out a narrow exception, applicable to lesbians and gay men alone, from the California Constitution's equal protection, liberty, and privacy provisions that had previously guaranteed them the right to marry. Pet. App. 55a (citing *Strauss*, 207 P.3d at 61, 76). Petitioners argue that the Ninth Circuit misapplied *Romer* by distinguishing between removing an existing right from same-sex couples and never granting that right in the first place. Pet. 19-20. But the Ninth Circuit's understanding of Proposition 8 was compelled by the California Supreme Court, which had already determined as a matter of law that Proposition 8 did not "restor[e] the traditional definition of marriage," Pet. 21, but instead eliminated an existing state constitutional right, Pet. App. 54a-55a, just as in *Romer* Colorado's Amendment 2 "eliminated various substantive rights," Pet. App. 59a; see *Romer*, 517 U.S. at 624. Moreover, Petitioners' argument, which would treat the timing of Proposition 8 and its withdrawal of existing rights as irrelevant, conflicts with *Romer*, which found the "[s]weeping and comprehensive" change worked on Colorado's laws by Amendment 2 "evident from the ordinances" that it repealed. 517 U.S. at 627; see also *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (courts must analyze a measure "in terms of its immediate objective, its ultimate effect and its historical context and the conditions existing prior to its enactment") (quotation marks omitted).

Next, the Ninth Circuit searched for a link between “the classification adopted and the object to be obtained,” *Romer*, 517 U.S. at 632, noting the peculiar characteristics of the law at issue. While Colorado’s Amendment 2 was unusual in its breadth, “imposing a broad and undifferentiated disability on a single named group,” 517 U.S. at 632, Proposition 8 is equally unusual in its “surgical precision,” operating solely to exclude a historically despised group from a title and stature that are bestowed by the state and honored by society, Pet. App. 59a-60a. In both cases, the peculiar operation of the statute made it difficult to conceive of legitimate rationales. Proposition 8’s proponents offered several purported rationales, chief among them an interest in responsible procreation by opposite-sex couples. But as discussed further in Section V, the Ninth Circuit correctly found no rational connection between heterosexual conduct and a law affecting only same-sex couples. As in *Romer*, Proposition 8 was “so far removed from th[e] particular justifications [offered by its proponents] that [the court found] it impossible to credit them.” *Romer*, 517 U.S. at 635; Pet. App. 84a. Because there was no credible rationale for Proposition 8 in light of its actual effects, the Ninth Circuit followed *Romer* in inferring that it created a classification solely to make a disfavored group of people unequal to others. *Romer*, 517 U.S. at 635; Pet. App. 89a.

2. Contrary to Petitioners’ claims, the Ninth Circuit’s decision is consistent with *Crawford v. Board of Education*, 458 U.S. 527 (1982). Before 1979,

the California Constitution required schools to remedy de jure and de facto school segregation, including by busing students in some circumstances. *Crawford* upheld an initiative that amended the California Constitution to prohibit state courts from ordering busing as a remedy except where required by the Federal Constitution. Petitioners cite *Crawford* for “reject[ing] the contention that once a State chooses to do ‘more’ than the Fourteenth Amendment requires, it may never recede.” Pet. 15 (quoting *Crawford*, 458 U.S. at 535). But they err in taking this to mean that a State may *always* choose to recede to the federal constitutional baseline. To the contrary, the Court upholds state laws withdrawing rights only when those laws are rationally designed to serve a legitimate government purpose. *See Crawford*, 458 U.S. at 543 (upholding challenged initiative because it furthered legitimate purpose of promoting neighborhood schools). In other cases, the Court has not hesitated to invalidate laws withdrawing rights or protections where they lack a legitimate purpose or are motivated by animus. *See, e.g., U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 537-38 (1973) (invalidating federal regulations stripping food stamp benefits from households containing unrelated members); *See also Crawford*, 458 U.S. at 539 n.21 (“Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason.”).

Petitioners’ suggestion that States act with impunity when they rescind rights to a federal constitutional baseline is inconsistent with other cases

as well. In *Reitman*, 387 U.S. 369, the Court invalidated Proposition 14, a California constitutional amendment that repealed the State's fair housing laws. The Court acknowledged that prior to Proposition 14, the State's fair housing laws went beyond what the federal Constitution required in prohibiting private racial discrimination in property transactions. *Id.* at 376. But in light of the "historical context and the conditions existing prior to its enactment," *id.* at 373, the Court concluded that Proposition 14 served the illegitimate purpose of encouraging private discrimination. *Id.* at 381; see also *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (invalidating law prohibiting busing for the purpose of desegregation, but allowing it for all other purposes, because it "was enacted because of, not merely in spite of, its adverse effects upon busing for integration") (internal quotation marks omitted).³

3. The Ninth Circuit's decision is also consistent with this Court's cases holding that the desire to disfavor unpopular groups can never be a legitimate purpose. In *City of Cleburne v. Cleburne Living*

³ These cases involved allegations of race discrimination, and in *Seattle School District No. 1*, the Court explicitly applied heightened scrutiny. 458 U.S. at 471. The level of scrutiny is immaterial, however, because even the most relaxed scrutiny requires a legitimate governmental purpose. See *Moreno*, 413 U.S. at 537-38.

Center, 473 U.S. 432 (1985), this Court applied rational basis review to invalidate a zoning law requiring special permits for homes for people with mental retardation. It found that the relationship between the law's classification and the law's supposed ends was "so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446. Because the government's justifications for the law simply did not make sense, the law "appear[ed] . . . to rest on an irrational prejudice against the mentally retarded" and could not be sustained. *Id.* at 450. Similarly, in *Moreno*, 413 U.S. 528, the poor fit between the ends claimed for withdrawing food stamp benefits – preventing fraud – and its means led the Court to conclude that animus against an unpopular group was its purpose. *Id.* at 534, 537. In concluding that Proposition 8 could not be justified by the State's purported interest in privileging couples who could produce children unintentionally because it had no effect on the California laws that govern parenting, the Ninth Circuit followed the guidance of *City of Cleburne* and *Moreno*. In any event, supervision of lower courts' application of settled decisions to unique circumstances does not present a compelling reason for this Court to grant review.

4. Nor does this case present an occasion for the Court to resolve a conflict concerning federal law among lower courts. *See* Pet. 17-18, 28-29. The Ninth Circuit explained that the constitutional injury it addressed "has little to do with the substance of the right or benefit from which a group is excluded, and

much to do with the act of exclusion itself.” Pet. App. 65a. Ignoring this admonition, Petitioners insist that the decision below is a wholesale rejection of the responsible-procreation rationale and therefore conflicts with cases holding that marriage need not be extended to lesbians and gay men in the first instance. While the Ninth Circuit correctly rejected the responsible-procreation rationale as applied to Proposition 8, it did not create a conflict with decisions accepting that rationale in other contexts.

In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the Eighth Circuit credited Nebraska’s claim that its state constitutional amendment prohibiting recognition of the marriages or civil unions of same-sex couples served its interest in steering procreation into marriage by conferring a benefit on opposite-sex couples alone. *Id.* at 867. The Eighth Circuit’s determination concerned the laws of Nebraska, which offer *no recognition* at all to same-sex couples and do not recognize same-sex partners’ adoption of each other’s children. *See In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002). Nebraska’s laws could hardly differ more from California’s, which offer identical family and parenting rights to same-sex and opposite-sex couples in all respects except as to the title of marriage. *See* pp. 3-4, *supra*. In the decision below, the Ninth Circuit said nothing about whether a State can ever decide that the risks of accidental procreation justify benefits exclusively for opposite-sex couples. Its rejection of the responsible-procreation rationale was instead based on its determination that

Proposition 8 “had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California” and thus “is not rationally related . . . to . . . [this] purported interes[t], whether or not the interes[t] would be legitimate under other circumstances.” Pet. App. 71a; *see also infra* Section V. The Ninth Circuit’s opinion thus did not call the Eighth Circuit’s views into question, as even the panel’s dissenting opinion recognized. Pet. App. 127a.

The decision below does not conflict with the state-court cases Petitioners cite. These cases address marriage laws that exclude same-sex couples from the title *and all* the incidents of marriage, rather than laws selectively withdrawing the title of marriage while continuing to grant all of its incidents. *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *In re Marriage of J.B. & H.B.*, 327 S.W.3d 654 (Tex. App. 2010); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). Because these decisions involve different domestic relations laws and answer different legal questions, the Ninth Circuit’s decision poses no conflict with them.

II. *BAKER V. NELSON* HAS NO BEARING ON THIS CASE.

Petitioners incorrectly assert that this Court has already resolved the marriage rights of same-sex partners in its summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.). Pet. 23. But a summary disposition by this Court has extremely narrow precedential effect, extending “no farther than the precise issues presented and necessarily decided” by the Court’s action. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979) (internal quotation marks omitted); see also *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Properly viewed through this lens, *Baker* does not control this case. Neither the legal issue “necessarily decided” in *Baker* nor the facts underlying that case are sufficiently similar to the present case for *Baker* to have any relevance. The legal issue presented in *Baker* was whether the State of Minnesota’s “refusal, pursuant to Minnesota marriage statutes, to sanctify appellants’ marriage because both are of the male sex violates their rights under the equal protection clause” or deprives them of due process rights. Appellant’s Jurisdictional Statement at 3, *Baker v. Nelson*, No. 71-1027 (Oct. Term 1972). By contrast, the Ninth Circuit resolved solely the question whether California was justified in withdrawing the title of “marriage” from same-sex couples. Pet. App. 61a-62a. Even the dissenting judge on the Ninth Circuit panel agreed that this narrow question differed from that decided by this Court in *Baker*. Pet. App. 101a-103a.

California provides same-sex couples all the rights and benefits associated with marriage, while denying them only the title. Pet. App. 49a-50a. Minnesota, by contrast, did not and does not provide even domestic partnership recognition to same-sex couples, let alone the benefits and incidents of marriage. Appellant's Jurisdictional Statement at 11-14, *Baker v. Nelson*; Minn. Stat. § 517.03. The underpinnings of the two cases are sufficiently different that *Baker* cannot control.

Moreover, since *Baker* was decided, this Court has determined that laws prohibiting consensual sodomy violate the Due Process Clause, *Lawrence v. Texas*, 539 U.S. 558 (2003); that there is no distinction between laws prohibiting homosexual conduct and laws targeting gay people as a class, *Christian Legal Soc. etc. v. Martinez*, 130 S. Ct. 2971, 2990 (2010); and that the elimination of rights from gay people alone must serve at least a rational purpose to be justified under the Equal Protection Clause, *Romer*, 517 U.S. at 634-35. These subsequent "doctrinal developments" in the Court's sexual orientation jurisprudence have eliminated any precedential effect *Baker* once had. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

III. THE COURT'S CONSIDERATION OF THE CONSTITUTIONALITY OF LAWS DENYING MARRIAGE RIGHTS TO LESBIANS AND GAY MEN WILL BENEFIT FROM FURTHER PERCOLATION.

A. The Ninth Circuit's Decision Does Not Compel Revision To The Marriage Laws Of Any Other State.

Petitioners claim a particular urgency for review of this case on the ground that other jurisdictions' marriage laws are now poised to fall because of it: The Ninth Circuit's decision, in their view, "is tantamount to a judicial death sentence for traditional marriage laws throughout this Circuit." Pet. 6. This is empty hyperbole. The Ninth Circuit's decision turns on the peculiar operation of Proposition 8's elimination of the stature of marriage for gay people in a State where they otherwise enjoy equal opportunities to form families and have and rear children. As the Ninth Circuit recognized, this unique and limited effect permitted it to reach a decision on narrow grounds in an opinion that "express[ed] no view" concerning "whether same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so." Pet. App. 60a.

Petitioners' speculative claims of far-reaching effects are already undercut by a district court's recent rejection of a challenge to Hawaii's marriage laws based on the Ninth Circuit's decision. See *Jackson v. Abercrombie*, Civ. No. 11-00734 ACK-KSC,

___ F. Supp. 2d ___, 2012 WL 3255201 (D. Haw. Aug. 8, 2012). That court held that the Ninth Circuit's decision in this case was not dispositive because Hawaii's marriage laws did not take away the designation of marriage while leaving in place all of its incidents – even though that State amended its constitution to override a state supreme court decision holding that its existing marriage laws were subject to strict scrutiny. *Id.* at *1, *18-*21. If the Ninth Circuit's decision is not “a judicial death sentence” for Hawaii's marriage laws, it is even less so for other States' laws. No other State has recognized that same-sex couples have a constitutional right to the title and incidents of marriage and then withdrawn only the title. Petitioners claim that Nevada, Oregon, and Washington marriage laws are poised to be invalidated by the Ninth Circuit's decision. But none of these States, or any other State that provides robust domestic partnership rights, has withdrawn the designation of marriage from same-sex couples alone. And in the event the Ninth Circuit disagrees with the Hawaii district court and concludes that the decision below requires invalidation of a different kind of marriage ban, the Court will have the opportunity to review that decision.

There is no merit to Petitioners' further speculation that the Ninth Circuit's decision will discourage States from expanding domestic partnership rights and the like for same-sex couples. At least one State has expanded rights for same-sex couples since the decision below, *see* 2012 Haw. Laws Act 267 (H.B.

2569) (expanding civil unions), and there is no reason to believe that other States will shy away from similar legislation. Indeed, even after the district court issued its ruling in this case, States continued to enact civil union and domestic partner laws. *See* Del. Code Ann. tit. 13, § 201 *et seq.* (recognizing civil unions effective 2011); Ill. Stat. Ch. 750 § 751 *et seq.* (recognizing civil unions effective 2010); R.I. Gen. Laws Ann. § 15-3.1-2 (recognizing civil unions effective 2011). And if it later should happen that a State has a *legitimate* reason to withdraw these expanded rights, the decision below would not prevent it from doing so.

B. Further Judicial Deliberation Concerning The Marriage Rights Of Same-Sex Couples Can Only Assist In The Court's Ultimate Consideration Of The Issue.

As Petitioners do not dispute, the Ninth Circuit is the first, and only, federal court of appeals to have invalidated a state law withdrawing the right to marry from same-sex couples. Future cases concerning the constitutional marriage rights of same-sex couples will no doubt arise. As debate on the constitutional merits of same-sex couples' claims to equal treatment in regard to marriage and family evolves, the cases that inevitably will follow will provide superior vehicles for this Court to consider these issues.

This Court has frequently preferred to resolve significant constitutional questions only after they have percolated in the courts such that the “perspective of time” helps to shed more light on the weighty issues they present. *See Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting). “To identify rules that will endure, [the Court] must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.” *California v. Carney*, 471 U.S. 386, 400-01 (1985) (Stevens, J., dissenting). As one “perceptive study,” *id.* at 398, of this Court’s docket explained:

Disagreement in the lower courts facilitates percolation – the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts.

Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984). These principles apply with particular force here. The issue of marriage equality is undoubtedly of profound significance. But it is precisely because “frontier legal problems” are presented in this case that further percolation is warranted and will “yield a better informed and more enduring final pronouncement by

this Court.” *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). After additional lower courts have grappled with the important issues this case raises, the Court’s final pronouncement on the matter will be better informed by that robust debate.

The need for percolation is all the greater because this case raises issues that are currently the subject of intense legislative and popular debate. Constitutional amendments, state referenda and initiatives, and ballot questions implicating marriage equality for same-sex couples are in process in Indiana, Maine, Maryland, Minnesota, Ohio, and Washington. H.J. Res. 6, 117th Gen. Assembly, 1st Reg. Sess. (Ind. 2011); An Act To Allow Marriage Licenses for Same-sex Couples and Protect Religious Freedom, L.D. 1860, 125th Leg. (Me. 2012); Veto Referendum of H.B. 438, 431st Gen. Assembly, Reg. Sess. (Md. 2012); S.F. No. 1308, 87th Leg. Sess. (Minn. 2011); The Freedom to Marry and Religious Freedom Amendment, Initiative Petition No. 273 (Ohio filed Mar. 26, 2012); Referendum 74, Veto Referendum of S.B. 6239, 62nd Leg., Reg. Sess. (Wash. 2012). Lawsuits seeking marriage rights for same-sex couples are pending in Hawaii, Illinois, Minnesota, Nevada, and New Jersey. *Jackson*, 2012 WL 3255201; *Darby v. Orr*, No. 12-CH-19718 (Ill. Cir. Ct. filed May 30, 2012); *Lazaro v. Orr*, No. 12-CH-19719 (Ill. Cir. Ct. filed May 30, 2012); *Benson v. Alverson*, No. 27 CV 10 11697 (Minn. Dist. Ct. filed May 11, 2010); *Sevcik v. Sandoval*, No. 12-CV-00578 (D. Nev. filed Apr. 10, 2012); *Garden State Equality v. Dow*, No. MER-L-1729-11 (N.J. Superior

Ct. filed Jun. 29, 2011). National polling numbers show increased public support, particularly among younger people, for marriage rights for same-sex partners. See CNN/ORC Poll, conducted May 29-31, 2012 (finding that 54% of Americans, and 73% of Americans under age 34, believed in May 2012 that same-sex couples' marriages should be recognized as valid, compared to 44% of Americans in June 2008); 2012 Gallup Values and Beliefs Poll, conducted May 3-6, 2012 (finding that 50% of Americans believe that same-sex marriages should be legally valid).⁴ These developments will likely lead to further judicial consideration of marriage equality issues, which will ultimately serve as a resource for this Court to draw upon when it considers those issues in the future. The Ninth Circuit – which, unlike this Court, was obligated to review the district court's decision – recognized the importance of issuing an incremental ruling grounded in the unique circumstances surrounding California's marriage and domestic partnership laws, allowing further judicial consideration to continue even within that circuit. This Court should do the same by declining to hear the issue in this case now.⁵

⁴ Reflecting the evolution of views, since the Ninth Circuit issued its decision, Petitioners' sole trial witness who testified in support of the responsible-procreation rationale has recanted his opinion. See David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. Times, Jun. 22, 2012.

⁵ Respondent does not suggest that there is any policy interest on the part of California, or for that matter any other State, in "proceeding cautiously" by denying equal marriage rights to same-sex couples, as Petitioners have argued. Pet. 36.

(Continued on following page)

C. A Grant Of Certiorari In The Cases Addressing The Defense Of Marriage Act Would Further Counsel Against Granting The Petition.

Presently pending before this Court are six petitions seeking review of decisions invalidating the constitutionality of DOMA, which changed the longstanding deference federal law had accorded States to regulate marriage by defining marriage as a union “between one man and one woman for purposes of federal law.” See *Bipartisan Legal Advisory Grp. v. Gill*, No. 12-13 (docketed July 3, 2012); *Dep’t of Health and Human Servs. v. Massachusetts*, No. 12-15 (docketed July 3, 2012); *Office of Pers. Mgmt. v. Golinski*, No. 12-16 (docketed July 3, 2012); *Windsor v. United States*, No. 12-63 (docketed July 17, 2012); *Massachusetts v. Dep’t of Health and Human Servs.*, No. 12-97 (docketed July 24, 2012); *Pedersen v. Office of Pers. Mgmt.*, No. 12-231 (docketed Aug. 22, 2012). Every party to these cases that has filed a brief expressing its views has urged this Court’s consideration of DOMA’s constitutionality. Assuming this Court grants certiorari in one or more of those cases, it should deny certiorari in cases involving the ability of

On the contrary, this Court has soundly rejected such justifications for discriminating against a minority group. See, e.g., *Hunter v. Erickson*, 393 U.S. 385, 392 (1969). Rather, Respondent addresses here the Court’s institutional concern, particularly when addressing constitutional issues, in exercising the power of certiorari in a manner that best enables it to issue a well-informed decision.

States to deny marriage rights to same-sex couples until States and lower courts have had the opportunity to understand the Court's DOMA decision and apply its teachings.

Any decision on DOMA's constitutionality could bear on cases addressing the constitutionality of exclusionary marriage laws. As the cases and petitions concerning DOMA make clear, this Court's assessment of DOMA's constitutionality will unquestionably require consideration of, for example, the justifications for laws categorically excluding same-sex couples from marital rights and benefits, the proper level of constitutional scrutiny to be given to those laws, and the role of this Court's precedents. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012) (considering the proper level of "scrutiny of [the government's] purported justifications" for DOMA); Petition for a Writ of Certiorari, *Bipartisan Legal Advisory Grp. v. Gill*, No. 12-13 (contending that the First Circuit's decision "not only invalidates an Act of Congress on constitutional grounds, but it does so in a way that conflicts with binding precedent of this Court"). Indeed, a group of States have urged this Court to consider the constitutionality of DOMA because of the "likely consequences for state marriage laws" of decisions invalidating that statute. Brief of the States of Indiana et al., as Amici Curiae in Support of the Petition, *Bipartisan Legal Advisory Grp. v. Gill*, No. 12-13 (filed Aug. 2, 2012).

Any decision from this Court regarding DOMA will inform lower courts addressing similar issues in cases implicating same-sex couples' marriage rights, and the law will evolve as the lower courts apply this Court's reasoning to different factual contexts. When those cases inevitably reach this Court, it will have the benefit of a variety of perspectives on claims involving sexual orientation discrimination – perspectives that will help further inform the Court's ruling on this issue. Put simply, the Court will be in a better position to address state marriage rights for same-sex partners after the constitutionality of DOMA has been decided than it will be if it grants the petition for review presented here.

IV. THIS CASE IS A FLAWED VEHICLE BECAUSE THIS COURT MUST ADDRESS PETITIONERS' STANDING.

In addition to not satisfying this Court's traditional criteria for granting certiorari, the petition should be denied because of the threshold issue of whether Petitioners have standing before this Court to assert the constitutionality of Proposition 8 after California's state and local officers declined to appeal the district court's judgment. Petitioners' standing to appeal was disputed below, and their ability to invoke this Court's jurisdiction is not compelled by any of this Court's precedent. Pet. App. 33a-43a. At worst, this threshold issue will prevent the Court from reaching the merits of the question presented; at best, the Court will have to grapple with the complicated

issue of when initiative proponents, delegated the authority by a State to defend the validity of that initiative, satisfy Article III's requirements. Particularly in light of the fact that cases concerning the constitutionality of state marriage laws will recur, the need for this Court to resolve Petitioners' standing to invoke its jurisdiction militates against selecting this case for review.

This Court must assure itself of Petitioners' standing to seek review of the Ninth Circuit's judgment before it can consider the merits of the case. *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997). Before the Ninth Circuit, Petitioners' standing was disputed where state officials did not appeal the district court's judgment and the court of appeals was uncertain whether California law authorized Petitioners to continue to defend Proposition 8's validity. The court certified to the California Supreme Court the questions whether Petitioners had a particular interest in Proposition 8's validity, or whether they have "the authority to assert the State's interest in the initiative's validity." Pet. App. 32a. The California Supreme Court answered only the latter question, holding that California law authorizes initiative proponents to defend the validity of initiative measures on behalf of the State, when state officials decline to do so. Pet. App. 378a. That court grounded its holding not in any textual source but in California's "unique . . . initiative process," Pet. App. 391a, which allows citizens to

“manage and control” the process of qualifying and passing initiatives, Pet. App. 377a, and analogized the role played by proponents in defending an initiative to that “ordinarily played by the [California] Attorney General or other public officials in vigorously defending a duly enacted state law,” Pet. App. 374a. Relying on this analogy, the Ninth Circuit held that because California had delegated to Petitioners the authority to “stand[] in the shoes of the State to assert its interest in litigation,” Petitioners need not show some “personal injury” or “particularized interest” in the outcome of the case. Pet. App. 41a-42a.

Regardless whether the Ninth Circuit’s ruling is correct, any holding that Petitioners satisfy Article III’s limitations on federal judicial power is at the very least a significant expansion of this Court’s Article III jurisprudence. While the Court has indicated that initiative proponents’ *lack* of state-law authority to defend the constitutionality of an initiative is sufficient to place their standing to sue in federal court in “grave doubt[],” *Arizonans for Official English*, 520 U.S. at 66, it has never determined that the converse is true, namely, that delegation of executive authority to a private person, particularly in the absence of any textual justification, is sufficient to confer standing. See *Karcher v. May*, 484 U.S. 72, 82 (1987) (holding that State of New Jersey was properly represented in litigation by Speaker of the General Assembly and President of the Senate). To the contrary, this Court has suggested that Article III may limit the ability of assignees or delegates of

litigating power to invoke federal jurisdiction. For instance, the Court has recognized that plaintiffs suing under federal *qui tam* statutes may invoke Article III jurisdiction by identifying an injury in fact suffered by the government, and not the litigant personally. See *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000). But at the same time, the Court stressed additional factors in finding that Article III is satisfied in the *qui tam* context: (1) the relator is *statutorily* designated by the government to sue on its behalf, *id.* at 772; (2) the *qui tam* function's "long tradition . . . in England and the American Colonies" meant that it was properly included within Article III's restriction of the judicial power to "Cases" and "Controversies," *id.* at 774; and (3) the *qui tam* plaintiff, while lacking an injury in fact, nevertheless retains an "interest" in the outcome of the case by virtue of "the bounty he will receive if the suit is successful," *id.* at 772; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (describing Article III requirement that "the parties before the court have an actual, as opposed to professed, stake in the outcome"). In all other circumstances in which the Court has permitted a plaintiff to sue on behalf of another, it has steadfastly required that plaintiff to identify a personal injury in fact, in addition to other requirements for standing. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

Petitioners have suffered no injury in fact; there is no similar historical support for the defense of state laws by initiative proponents; and Petitioners' stake in the outcome is limited to their ideological interest, similar to that of legislators, in having the initiative they sponsored upheld. *Cf. Raines v. Byrd*, 521 U.S. 811, 824-25 (1997). Their entitlement to invoke federal jurisdiction is not clearly resolved by any of this Court's decisions concerning the boundaries of Article III. If the Court grants review in this case, it will have no choice but to address the questions whether and in what circumstances a State may delegate its litigating authority to private individuals who lack a tangible stake in the case. The import of this question is heightened by the fact that the Court has found that Article III requirements are relaxed for States, *see Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007), such that a State's delegation of litigating power could significantly expand the reach of federal jurisdiction.

The necessity of resolving these difficult questions will detract from the Court's consideration of the issues raised in this petition. Even if the Court is inclined to address the constitutional marriage rights of same-sex couples, it should await a better vehicle.

V. THE NINTH CIRCUIT CORRECTLY HELD THAT PROPOSITION 8 SERVED NO LEGITIMATE PURPOSE.

At bottom, the Ninth Circuit's decision was rooted in its understanding of the real and substantiated dignitary harm that Proposition 8 inflicted on same-sex couples. Petitioners do not, because they cannot, dispute that marriage is a universally understood, cherished institution that "symbolizes state legitimization and societal recognition of . . . committed relationships." Pet. App. 16a-17a. Proposition 8 stripped same-sex couples of access to this important institution, relegating them to the status of second-class citizens eligible only for domestic partnerships – an institution that "lack[s] the social meaning associated with marriage" – and thereby "work[ed] a real and appreciable harm upon same-sex couples and their children.'" Pet. App. 25a (quoting *Marriage Cases*, 183 P.3d at 452), 45a, 59a. That the exclusion of same-sex couples from "the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it," Pet. App. 53a, inflicted real harm on lesbian and gay Californians and their families cannot seriously be questioned. See *Marriage Cases*, 183 P.3d at 445.

Petitioners seek to justify this harm with the absurd prediction that California's recognition of same-sex couples' marriages would somehow undermine "responsible procreation" and the purported paramount importance of biological connections

between parent and child. Pet. 26-31; *see also* Brief of the States of Indiana et al., as Amici Curiae in Support of the Petition at 19, *Bipartisan Legal Advisory Grp. v. Gill*, No. 12-13 (filed Aug. 2, 2010) (arguing that laws restricting marriage to opposite-sex couples are justified because “all things being equal, it is better for the biological parents also to be the legal parents”). It is with good reason that these arguments have been rejected at every stage of this litigation. *See* Pet. App. 70a-78a; Pet. App. 245a-285a. These arguments lack even a remote degree of plausibility in California, where opposite-sex and same-sex couples are identical under the law with regard to forming families and raising children, both before and after Proposition 8. Pet. App. 71a. Indeed, any assertion that Proposition 8 could be justified by the State’s preference for biological families is affirmatively *rejected* by California law, which privileges the social, rather than biological, relationship between parent and child, Pet. App. 73a, and has rejected any norm of gendered parenting roles, *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979).

The domestic relations laws of California – where tens of thousands of children are being raised by same-sex couples, Pet. App. 238a – refute Petitioners’ responsible-procreation justification. Petitioners contend the State is justified in extending the title of marriage to opposite-sex couples alone to encourage them to form families to rear children. Pet. 26-27. But because Proposition 8 does not *extend* an honor to anyone but only *removes* an honor from same-sex

couples, this justification can be credited only if it is rational to believe that fewer opposite-sex couples will raise children in marital families if marriage is also available to same-sex couples. This rationale cannot justify Proposition 8. As a matter of law, California courts have recognized that the State's interest in encouraging couples to provide for their children is no less potent for children of same-sex couples than those of opposite-sex couples, *see, e.g., Elisa B.*, 117 P.3d 660, making it implausible to suggest that the State would encourage only opposite-sex couples to form committed and stable families. As a matter of fact, the only evidence adduced at trial that had any bearing on this claim refuted it. Pet. App. 150a-151a, 156a-158a.⁶ Finally, even if there were a "rational reason to think that taking away the designation of 'marriage' from same-sex couples would . . . encourag[e] California's opposite-sex couples to procreate more responsibly," Pet. App. 75a, such a reason would be tantamount to a State pronouncement that permitting same-sex couples access to marriage would diminish that institution. *See* Pet. App. 133a-134a (Smith, J., dissenting) (acknowledging that Petitioners' responsible-procreation rationale operates through the mechanism of encouraging private biases). This Court has already made clear

⁶ When asked by the district court how permitting same-sex marriage impairs or adversely affects the State's "procreative" interest in marriage, the lead counsel for Petitioners answered "I don't know." Pet. App. 150a-151a.

that the creation of a classification to accommodate private biases is not a legitimate state interest. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Reitman*, 387 U.S. at 378-79.

The lack of support for Petitioners' purported rationales for Proposition 8, coupled with the fact that "Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California," Pet. App. 71a, properly led the Ninth Circuit to conclude that Proposition 8's sole purpose was to impose on gay and lesbian Californians the "majority's private disapproval of them and their relationships." Pet. App. 92a. Contrary to Petitioners' suggestion, however, the Ninth Circuit's conclusion does not amount to a "charge [that] defames over seven million California voters and countless other Americans." Pet. 38. The Ninth Circuit grounded its view in uncontroverted evidence that Proposition 8's supporters bombarded California voters with statements conveying the message that "gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships," Pet. App. 90a (internal quotations and citations omitted) – a message that is rooted in historical stereotypes that have long operated to diminish the dignity of gay people, Pet. App. 91a. And in any case, the Ninth Circuit's conclusion that Proposition 8's lack of a legitimate justification indicated that the measure was born of a desire to harm gays and

lesbians does not label Proposition 8 supporters as bigots, just as this Court's *Romer* decision did not label supporters of Colorado's Amendment 2 as bigots. 517 U.S. at 634-35. Indeed, the Ninth Circuit recognized that prejudice need not be based on hatred or spite. Pet. App. 92a. Rather,

[p]rejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.

Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). This Court should disregard Petitioners' efforts to inflame and transform this factbound (and factually supported) justification into a reason for the Court's review.



CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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