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STATEMENT

FOR IMMEDIATE RELEASE
TUESDAY, JAN. 22, 2013

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Herrera responds to Prop 8 backers' opening brief in U.S. Supreme Court case

'Same arguments used to perpetuate bans on interracial marriage nearly 50 years ago' are defending Prop 8 today, City Attorney says

SAN FRANCISCO (Jan. 22, 2013)—City Attorney Dennis Herrera issued the following statement in response to the opening brief filed with the U.S. Supreme Court earlier today by proponents of Proposition 8, the controversial ballot measure that eliminated marriage rights for same-sex partners in California. The constitutionality of Prop 8 is being challenged in one of the two potentially landmark cases currently before the nation's highest court that address same-sex marriage rights.

"The proponents of Prop 8 are defending discrimination against same-sex couples with the same arguments used to perpetuate bans on interracial marriage nearly 50 years ago," said Herrera. "The U.S. Supreme Court has strongly affirmed the principle of equal protection over states' rights and quaint traditionalism before, and it should do so again here. Twenty-one states had laws against interracial marriage when Barack Obama was born to an interracial couple in 1961. It would take another six years for the high court to strike those laws down once and for all in *Loving v. Virginia.* Judge Vaughn Walker was absolutely right in his original holding in our case that, 'Race and gender restrictions shaped marriage during eras of race and gender inequality, but such restrictions were never part of the historical core of the institution of marriage.' The facts and law make clear that Prop 8 is peculiarly irrational and inexplicable by anything other than prejudice. It violates the Equal Protection Clause, and should be struck down."

The legal issues at stake in the challenge to Prop 8, the controversial 2008 ballot measure that eliminated marriage rights for same-sex partners in California, are two-fold: first, whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman; and second, whether the proponents of Prop 8 have legal standing to litigate the case. Rulings are expected by the end of June. The timeline of San Francisco's legal battle for marriage equality since February 2004 is available on City Attorney Herrera's website at:

http://www.sfcityattorney.org/index.aspx?page=23

The Prop 8 case is: *Hollingsworth v. Perry*, U.S. Supreme Court, Docket No. 12-144. The DOMA case is: *United States v. Windsor*, U.S. Supreme Court, Docket No. 12-307.

# # #

No. 12-144

In The Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

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

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

2. Whether petitioners have standing under Article III, §2 of the Constitution in this case.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, A Project of California Renewal ("ProtectMarriage.com") intervened as defendants in the district court and were the appellants in the court below.

Respondents, plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo and intervening plaintiff City and County of San Francisco, were the appellees below.

Official-capacity defendants Edmund G. Brown, Jr., as Governor of California; Kamala D. Harris, as Attorney General of California; Ron Chapman, as Director of the California Department of Public Health & State Registrar of Vital Statistics; Linette Scott, as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, as Clerk-Recorder for the County of Alameda; and Dean C. Logan, as Registrar-Recorder/County Clerk for the County of Los Angeles and intervening defendant Hak-Shing William Tam were not parties to the appeal below.

CORPORATE DISCLOSURE STATEMENT

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock. Petitioner ProtectMarriage.com is a primarily formed ballot committee under California law. *See* CAL. GOV. CODE §§82013 & 82047.5. Its "sponsor" under California law is California Renewal, a California nonprofit corporation, recognized as a public welfare organization under 26 U.S.C. §501(c)(4).

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OPINIONS BELOW

The Ninth Circuit's opinion is reported at 671 F.3d 1052. Pet.App.1a. The Ninth Circuit's order denying rehearing en banc is reported at 681 F.3d 1065. Pet.App.441a. The district court's findings of fact and conclusions of law are reported at 704 F.Supp.2d 921. Pet.App.137a. The Ninth Circuit's certification order is reported at 628 F.3d 1191. Pet.App.413a. The California Supreme Court's answer is reported at 265 P.3d 1002, 52 Cal.4th 1116. Pet.App.318a.

JURISDICTION

The judgment below was entered on February 7, 2012. The Ninth Circuit denied a timely petition for rehearing en banc on June 5, 2012. This Court granted a timely petition for certiorari on December 7, 2012. J.A.940. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST. art. III, §2, cl. 1.

"[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

"Only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, §7.5.

INTRODUCTION

Over the course of the last decade or so, our Nation has been involved in a "great debate," Pet.App.17a, about whether to redefine the age-old and vitally important institution of marriage to include same-sex couples. That question – which implicates the most profound social, philosophical, religious, moral, political, and legal values of the People – is, as the court below acknowledged, "an issue over which people of good will may disagree." *Id.* The People's democratic institutions are now fully engaged. Nine States have decided to redefine marriage. The rest, California among them, have decided, most by express constitutional amendment, to preserve the traditional definition of marriage as the union of a man and a woman. The voters of California reaffirmed this traditional definition in 2008, passing Proposition 8 after a highly contentious and costly public debate that riveted the attention of voters for months. The arguments advanced by the advocates of redefining marriage attracted substantial support, persuading over 47 percent of the electorate. Indeed, just two months ago those same arguments carried

the day in three states, including Maine, where the voters were acting to reverse a referendum that had rejected the redefinition of marriage just three years earlier. The public debate continues throughout the Nation.

Respondents argue in this case, however, that the public debate over redefining marriage, in California and elsewhere, was and is meaningless; they say that the issue was taken out of the People's hands *in 1868*, when the Fourteenth Amendment was ratified, and that our Constitution itself defines marriage as a genderless institution. Until the decision below, every state and federal appellate court to consider the issue, including this one, *see Baker v. Nelson*, 409 U.S. 810 (1972), had rejected the claim that the Federal Constitution prohibits a State from embracing the traditional gendered definition of marriage. They have thus permitted the "earnest and profound debate about the morality, legality, and practicality" of redefining marriage "to continue, as it should in a democratic society." *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

No precedent or established constitutional precept justifies federal judicial intervention into this sensitive democratic process. This is not a case, like *Lawrence v. Texas*, 539 U.S. 558 (2003), where the State has punished *as a crime* "the most private human conduct, sexual behavior, and in the most private of places, the home," or sought "to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of

persons to choose without being punished as criminals." *Id*. at 567. By reaffirming the traditional definition of marriage, the People of California have not even discouraged, let alone criminalized, any private behavior or personal relationship. Rather, California has simply reserved a special form of recognition and support to those relationships that have long been thought to uniquely further vital societal interests. And it has done so while at the same time providing substantial recognition and support to same-sex couples and their families through expansive domestic partnership laws. This Court has long recognized that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see also Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2989 n.17 (2010) (emphasizing "the distinction between state prohibition and state support"). Indeed, as the California Court of Appeal aptly put it, "[t]he right to be let alone from government interference is the polar opposite of insistence that the government acknowledge and regulate a particular relationship, and afford it rights and benefits that have historically been reserved for others." *In re Marriage Cases*, 143 Cal.App.4th 873, 926 (2006), *rev'd*, 183 P.3d 384 (Cal. 2008); *see also Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) ("Plaintiffs here do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a state-conferred

benefit that the Legislature has rationally limited to opposite-sex couples.").

Nor is this a case like *Romer v. Evans*, 517 U.S. 620 (1996), where Colorado had imposed a "[s]weeping" and "unprecedented" political disability on all individuals identified "by a single trait," *id*. at 627, 633, thus effectively deeming "a class of persons a stranger to its laws," *id*. at 635. For one thing, although California has restored the traditional definition of marriage, it has not in any other way altered or eliminated the numerous laws that provide gays and lesbians in California what that State's largest statewide advocacy organization for gays and lesbians acknowledges are "some of the most comprehensive civil rights protections in the nation." J.A.Exh.2. Further, it is not Proposition 8, which simply restored the venerable definition of marriage that has prevailed in California for all but a few months of its history, but Respondents' claim – that the Fourteenth Amendment requires that this ubiquitous institution be fundamentally redefined in a manner unknown in the record of human history until a few short years ago – that is unprecedented. As this Court has recognized, "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Glucksberg*, 521 U.S. at 723. And no institution has been more universally practiced by common consent – not only throughout the history of this Nation, but until little more than a decade ago, everywhere and always – than that of marriage as a union between man and

woman. This fact alone precludes Respondents' remarkable claim, adopted by the court below, that the traditional definition of marriage is *irrational* and, thus, can be explained only as designed to dishonor gays and lesbians as a class. To the contrary, a social institution that has prevailed continuously in our history and traditions and virtually everywhere else throughout human history – with nearly universal support from politicians, courts, philosophers, and religious leaders of all stripes – can justly be said to be rational *per se*. And we submit that countless Californians of goodwill have opted in good faith to preserve the traditional definition of marriage because they believe it continues to meaningfully serve important societal interests and they cannot yet know how those interests will be affected if marriage is fundamentally redefined.

Finally, this is not a case like *Loving v. Virginia*, 388 U.S. 1 (1967), or *Brown v. Board of Education*, 347 U.S. 483 (1954), where the State had embraced explicit "racial discrimination" of the sort "it was the object of the Fourteenth Amendment to eliminate." *Loving*, 388 U.S. at 11. By enforcing "the central meaning of the Equal Protection Clause" in those cases, *id*. at 12, this Court vindicated a constitutional norm that the People of this Nation had fought and died to establish and had expressly and democratically enacted as an Amendment to the Constitution. And while the antimiscegenation laws invalidated in *Loving* had existed in *some* (though by no means all) of the States for *part* of this Nation's history, race was

never understood to play a fundamental part in the *definition* of marriage. Indeed, even in antebellum America, the leading treatise on the law of marriage described racial restrictions on marriage as mere "impediments, which are known only in particular countries, or States." JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE §213 (1st ed. 1852). By contrast, the same scholar categorically stated that "[i]t has *always* . . . been deemed requisite to the *entire* validity of *every* marriage . . . that the parties should be of different sex," and that "[m]arriage between two persons of one sex could have no validity." *Id*. §225 (emphasis added). Neither *Loving* nor *Brown* provides any support for judicially restructuring the vital social institution of marriage.

In short, there is no warrant in precedent or precept for invalidating marriage as it has existed in California for virtually all of its history, as it was universally understood throughout this Nation (and the world) until just the last decade, and as it continues to be defined in the overwhelming majority of States and Nations – and in diverse philosophical and religious traditions – throughout the world. Further, the definition of marriage has always been understood to be the virtually exclusive province of the States, which, subject only to clear constitutional constraints, have "absolute right to prescribe the conditions upon which the marriage relation between [their] citizens shall be created." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). More important still, the institution of marriage has also always been understood

to owe its very existence to society's vital interests in responsibly creating and nurturing the next generation. As this Court has aptly put it, marriage is "fundamental to our very existence and survival." *Loving*, 388 U.S. at 12. Marriage is thus inextricably linked to the objective biological fact that opposite-sex couples, and only such couples, are capable of creating new life together and, therefore, are capable of furthering, or threatening, society's existential interests in responsible procreation and childrearing. That fact alone is dispositive of Respondents' equal protection claim, for this Court's precedents make clear that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Indeed, it was only by "undervalu[ing] the State's interest," *Planned Parenthood v. Casey*, 505 U.S. 833, 873, 875 (1992) (plurality), in the traditional definition and purposes of marriage that the Ninth Circuit and the district court were able to conclude that Proposition 8 is unconstitutional.

Our Constitution does not mandate the traditional gendered definition of marriage, but neither does our Constitution condemn it. This Court, accordingly, should allow the public debate regarding marriage to continue through the democratic process, both in California and throughout the Nation.

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STATEMENT OF THE CASE

1. "From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." *In re Marriage Cases*, 183 P.3d 384, 407 (Cal. 2008). In 2000, Californians passed Proposition 22, an initiative statute reaffirming that understanding. *See* CAL. FAM. CODE §308.5. In 2008, the California Supreme Court interpreted the State constitution to require that marriage be redefined to include same-sex couples and invalidated Proposition 22. *See In re Marriage Cases*, 183 P.3d 384. Less than six months later, the People of California adopted Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." The California Supreme Court rejected a state constitutional challenge to Proposition 8. *See Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

2. The plaintiff respondents ("Plaintiffs," or, with City and County of San Francisco, "Respondents") filed suit against public officials responsible for enforcing California's marriage laws, claiming that Proposition 8 violates the Fourteenth Amendment to the United States Constitution. These officials informed the court that they would not defend Proposition 8. Petitioners, official proponents of that measure and their primarily formed ballot measure committee, *see* CAL. ELEC. CODE §342; CAL. GOV'T CODE §82047.5(b), intervened. *See* N.D. Cal. Doc. No. ("Doc. No.") 76 at 2-3. After a trial, the district court ruled

that Proposition 8 violates the Fourteenth Amendment. Pet.App.137a. The Ninth Circuit stayed the district court's judgment pending Petitioners' appeal.

3. The Ninth Circuit certified to the Supreme Court of California the question whether "under California law, the official proponents of an initiative measure" have authority to "defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so." Pet.App.416a. The Supreme Court of California issued a unanimous opinion answering "the question posed by the Ninth Circuit in the affirmative." Pet.App.326a.

4. Relying on this opinion, the Ninth Circuit unanimously held that Petitioners have standing to appeal the district court's decision:

> Because the State of California has Article III standing to defend the constitutionality of Proposition 8, and because both the California Constitution and California law authorize the official proponents of an initiative to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so, we conclude that [Petitioners] are proper appellants here.

Pet.App.43a.

On the merits, a divided panel held that Proposition 8 violates the Equal Protection Clause. The panel majority ruled that Proposition 8 is unconstitutional on the "narrow grounds" that the initiative's effect was to "take away" from same-sex couples "the official designation of 'marriage,'" while "leaving in place all of its incidents," which are available to same-sex couples through California's expansive domestic partnership laws. Pet.App.17a-18a. According to the Ninth Circuit, under this Court's decision in *Romer*, this "unique and strictly limited effect of Proposition 8" distinguished it from other State laws defining marriage as the union of a man and a woman, Pet.App.17a, and rendered it wholly unsupported by any conceivable legitimate rational basis. Judge Smith dissented.

The Court of Appeals denied Petitioners' timely petition for rehearing en banc but stayed its mandate pending the timely filing and disposition of a petition for writ of certiorari. Pet.App.444a. Judge O'Scannlain, joined by Judges Bybee and Bea, dissented, explaining that the panel opinion had declared unconstitutional the "definition of marriage that has existed for millennia" on the basis of a "gross misapplication of *Romer v. Evans*." Pet.App.445a. Judge Smith also would have granted the petition. Pet.App.443a.

SUMMARY OF ARGUMENT

1. Petitioners have standing to defend Proposition 8 in lieu of public officials who have declined to do so. A State unquestionably has standing to defend the constitutionality of its laws, and this Court's decisions establish that state law determines who is authorized to assert this interest on behalf of the State. Here, the California Supreme Court has squarely held that the proponents are authorized to assert this interest when public officials decline to defend an initiative.

2. The Fourteenth Amendment does not "require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Crawford v. Board of Educ.*, 458 U.S. 527, 540 (1982). The validity of Proposition 8 thus turns not on the fact that California's Supreme Court interpreted the state constitution to require the redefinition of marriage before the People could vote on Proposition 8, but on whether the Equal Protection Clause required California to redefine marriage "in the first place." *Id.* at 538. Nothing in *Romer* supports a different analysis.

3. The Equal Protection Clause does not require California to redefine marriage to include same-sex couples. The age-old definition of marriage distinguishes between relationships of a man and a woman and all other types of relationships, including same-sex relationships. This distinction is rooted in a basic

biological fact that goes to the heart of the State's interest in regulating marriage: the unique capacity of intimate relationships between men and women to create new life. This indisputable difference between same-sex and opposite-sex relationships demonstrates that Proposition 8 is constitutional, for the Constitution requires only that a State "treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981).

4. Throughout human history, societies have regulated sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, an animating purpose of marriage is to increase the likelihood that children will be born and raised in stable and enduring family units by their own mothers and fathers. Because relationships between persons of the same sex do not have the capacity to produce children, they do not implicate this interest in responsible procreation and childrearing in the same way. The Equal Protection Clause does not require the State to ignore this difference. *See*, *e.g.*, *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001).

5. Redefining marriage as a genderless institution would work a profound change in an institution critical to the stable progression of society from generation to generation. The Equal Protection Clause does not require California to disregard reasonable concerns that this profound change, by severing any

inherent connection between marriage and the creation and nurture of the next generation, could impair the ability of marriage to serve this critical societal function.

6. Redefining marriage would affect not only same-sex couples but all members of society. By adopting Proposition 8, the People of California demonstrated their belief that this matter is best resolved by the People themselves, not by their courts. The Equal Protection Clause does not prohibit the People of California – or of any State – from making this choice. To the contrary, it leaves them free to do what they are doing – debating this controversial issue and seeking to resolve it in a way that will best serve their families, their children, and, ultimately, their society as a whole.

7. Because Proposition 8 plainly furthers important interests, the Ninth Circuit's speculation regarding the motives of the voters who enacted it was neither necessary or appropriate. *See*, *e.g.*, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 472 n.7 (1981) (plurality). In all events, whether marriage should be defined to include same-sex relationships is an important question of social policy about which reasonable people of good will can and do disagree in good faith.

ARGUMENT

I. Petitioners Have Standing To Defend Proposition 8.

"[A] State clearly has a legitimate interest in the continued enforceability" of its laws, *Maine v. Taylor*, 477 U.S. 131, 137 (1986), and thus "has standing to defend the constitutionality" of those laws, both in the trial court and on appeal, *Diamond v. Charles*, 476 U.S. 54, 62 (1986). This Court's decisions leave no doubt that State law determines who is authorized to assert this interest on behalf of the State. *See*, *e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997); *Karcher v. May*, 484 U.S. 72, 81-82 (1987). Article III does not purport to control the manner in which States allocate their sovereign powers, and "principles of federalism require that federal courts respect such decisions by the states as to who may speak for them." Pet.App.35a-36a. Indeed, such decisions are "of the most fundamental sort," for it is "[t]hrough the structure of its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Here, the Supreme Court of California has unanimously confirmed that Petitioners have "authority under state law," *Karcher*, 484 U.S. at 82, to defend Proposition 8 "as agents of the people" of California "in lieu of public officials" who refuse to do so, *Arizonans*, 520 U.S. at 65. The Ninth Circuit was thus

plainly correct in holding that Petitioners have standing to defend Proposition 8.

A. In *Karcher*, this Court held that the presiding officers of the New Jersey Legislature were "proper" defendants, both in the trial court and in the court of appeals, in federal litigation challenging the constitutionality of a state statute when "neither the Attorney General nor the named defendants would defend the statute." 484 U.S. at 75, 82. These individuals "had authority under state law to represent the State's interests" because, in at least one other case, the "New Jersey Supreme Court ha[d] granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment." *Id*. at 82.

Here too, as the Supreme Court of California has recognized, "California courts have routinely permitted the official proponents of an initiative to intervene or appear as real parties in interest to defend a challenged voter-approved initiative measure . . . to enable such proponents to assert *the people's*, and hence *the state's*, interest in defending the validity of the initiative measure." Pet.App.324a. Further, that Court has expressly confirmed that the official proponents of an initiative measure "are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." Pet.App.327a.

B. Nothing in *Arizonans for Official English* undermines *Karcher*'s clear application here. In dicta, this Court discussed, but ultimately did "not definitively resolve" whether the principal sponsor of an Arizona ballot initiative had standing to appeal a decision striking down that measure. *Arizonans*, 520 U.S. at 66. Citing *Karcher*, the Court explained that it had previously "recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests." *Id*. at 65. Unlike in *Karcher*, however, the Court was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Id*. For this reason, the Court expressed "grave doubts" about the standing of the Arizona initiative sponsors to appeal. *Id*. at 66. Here, by contrast, the California Supreme Court has definitively held that California law does grant initiative sponsors such authority.

C. If this Court holds, contrary to the foregoing, that Petitioners lack standing to defend Proposition 8 on appeal, the Court would then "have an obligation . . . to inquire not only into this Court's authority to decide the questions petitioners present, but to consider, also, the authority of the lower courts to proceed." *Id*. at 73. Obviously, the Ninth Circuit's judgment would have to be vacated. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235-36 (1990). In addition, the sweeping opinion and state-wide injunction

entered by the trial court should be vacated as well. At least as a prudential matter, Plaintiffs' case, brought against a handful of carefully selected, congenial official defendants, none of whom offered any defense of Proposition 8, may not have presented even a case or controversy appropriate for adjudication. *See INS v. Chadha*, 462 U.S. 919, 939-40 (1983).

More important, Article III requires that a "remedy . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Thus, even if the Court concludes that this case was justiciable in the district court, that court lacked remedial jurisdiction to award any relief beyond a default judgment limited to the four named plaintiffs. Plaintiffs did not purport to represent a class, and an injunction permitting them, and only them, to marry would have provided them complete relief for the injuries they alleged. *See Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2760, 2767 n.6 (2010); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). It is well settled that a plaintiff lacks standing to seek relief for the injuries of *others* not before the court. *See*, *e.g.*, *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Accordingly, "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to" enforce those laws against others. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

II. Proposition 8's Validity Does Not Turn on the Timing of its Adoption.

A. This Court has established that a State is not required to adhere forever to policies that exceed federal constitutional requirements.

The lynchpin of the Ninth Circuit's decision invalidating Proposition 8 was its insistence that a different analysis is required when a state-law right is "withdrawn" than when it is not extended in the first instance. Pet.App.68a. But this proposition is foreclosed by this Court's decision in *Crawford*, which makes clear that when a State repeals a law the relevant inquiry is simply whether that law was "required by the Federal Constitution in the first place." 458 U.S. at 538. Indeed, *Crawford* emphatically "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." *Id.* at 535. Such a rule, the Court reasoned, would be "destructive of a State's democratic processes and of its ability to experiment," *id*., and it would affirmatively "discourage[ ] the States from providing greater protection" to their citizens than the Fourteenth Amendment requires, *id*. at 539.

Crawford involved an equal protection challenge to a California constitutional amendment (Proposition 1) that superseded in part a decision of the California Supreme Court interpreting the State Constitution to require public school districts to remedy *de facto* segregation and, thus, to go beyond the mandates of the Federal Constitution. Upholding Proposition 1,

this Court refused to "interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Id.* at 540. Instead, this Court held, "having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." *Id.* at 542.

The Ninth Circuit's attempts to distinguish *Crawford* fail. First, this Court's findings that Proposition 1 did not draw a racial classification and was not motivated by race, *see* Pet.App.67a-68a, meant only that it was subject to rational-basis review, rather than heightened scrutiny. *See Crawford*, 458 U.S. at 536-38, 543-45; *compare Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (applying strict scrutiny to law "effectively drawn for racial purposes"). These findings are of no moment here, where the panel majority itself purported to apply rational-basis review.

Second, the court below emphasized that even after Proposition 1, California's Constitution still provided a "more robust 'right . . . than exists under the Federal Constitution.'" Pet.App.67a (quoting *Crawford*, 458 U.S. at 542). But Proposition 8, like Proposition 1, was "*less than* a 'repeal'" of any provision of the California Constitution, *Crawford*, 458 U.S. at 541 (emphasis added), for the California Constitution continues to guarantee a broad range of rights to gays and lesbians, including the right "to establish . . . an

officially recognized and protected family," *Strauss*, 207 P.3d at 77. More fundamentally, the lesson of *Crawford* is that a State is no less free to withdraw state constitutional rights that exceed federal constitutional requirements than it was to extend them (or not) in the first place. Whether a State withdraws such a right entirely or only partially is for it to decide. Indeed, in *Crawford* this Court emphasized that "preserving a greater right . . . than exists under the Federal Constitution . . . most assuredly [did] not render the Proposition unconstitutional." 458 U.S. at 542. Conversely, California "could have conformed its law to the Federal Constitution in every respect" rather than "pull[ing] back only in part." *Id*.

B. Proposition 8 is not unconstitutional under *Romer*.

1. The Ninth Circuit's holding that "*Romer*, not *Crawford* controls" this case, Pet.App.68a, rests on a "gross misapplication of *Romer*," Pet.App.445a. Central to the Ninth Circuit's error is its assertion that *Romer* turned on the *timing* of Colorado's Amendment 2 rather than its *substance*.

This is how the Ninth Circuit framed the issue: "The relevant inquiry in *Romer* was not whether the *state of the law* after Amendment 2 was constitutional. . . . The question, instead, was whether the *change in the law* that Amendment 2 effected could be justified by some legitimate purpose." Pet.App.64a. But nothing in *Romer* suggests that Amendment 2

would have been valid had it only been enacted before Aspen, Boulder, and Denver passed ordinances banning discrimination on the basis of sexual orientation. Nor did *Romer* suggest that a constitutional amendment identical to Amendment 2 would be valid in a State that had no preexisting local laws protecting gays and lesbians from discrimination. Indeed, this Court struck down Amendment 2 *on its face*, not merely as applied to the handful of jurisdictions in Colorado that had previously enacted antidiscrimination ordinances protecting gays and lesbians. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

The Ninth Circuit read *Romer* to turn on the fact that Amendment 2 "withdrew" from gays and lesbians "elective" local antidiscrimination protections "that the Fourteenth Amendment did not require . . . to be afforded to gays and lesbians." Pet.App.63a-64a. But Amendment 2 "in explicit terms [did] *more* than repeal or rescind" antidiscrimination laws that were not required by the Federal Constitution. *Romer*, 517 U.S. at 624 (emphasis added). It imposed a "broad and undifferentiated disability on a single named group" by prohibiting "all legislative, executive or judicial actions at any level of state or local government designed to protect the named class [of] homosexual persons or gays and lesbians." *Id.* at 624, 632. Amendment 2 "identifie[d] persons by a single trait and then denie[d] them protection across the board" – "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary life in a free society." *Id*. at 631, 633.

In short, Amendment 2 "deem[ed] a class of persons a stranger to [the] laws." *Id*. at 635. These were the "peculiar," "exceptional," "unusual," and indeed "unprecedented" characteristics of Amendment 2 that concerned the Court, *id.* at 632-33, not the Amendment's repeal of a handful of local antidiscrimination laws.

In any event, there is no merit, legal or logical, in the panel majority's theory that "[w]ithdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade." Pet.App.55a. Obviously the rationality of a *classification* does not turn on the timing of its adoption – if it was reasonable for California to draw a line between opposite-sex couples and other types of relationships (including same-sex relationships) for 158 years *before* the California Supreme Court's ruling in the *Marriage Cases*, it is also reasonable for California to draw the same line, for the same reasons, *after* the 142-day hiatus caused by that short-lived decision. And if it is rational for Congress and 40 other States to distinguish between opposite-sex couples and other types of relationships for purposes of marriage, surely it is rational for California to do so as well.

Not surprisingly, this Court has consistently applied the same constitutional analysis to laws withdrawing legal rights or benefits as it has to laws refusing to extend rights or benefits in the first instance. *See*, *e.g.*, *Ysursa v. Pocatello Educ. Ass'n*, 555

U.S. 353, 356, 360 n.2 (2009); *Central State Univ. v. American Ass'n of Univ. Professors*, 526 U.S. 124, 127 (1999); *Lyng v. Automobile Workers*, 485 U.S. 360, 371 (1988); *Bowen v. Gilliard*, 483 U.S. 587, 598-601 (1987); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176-77 (1980); *City of New Orleans v. Dukes*, 427 U.S. 297, 303-05 (1976). And this Court has squarely rejected the proposition that there is a legally material difference between repealing a benefit and declining to extend it in the first instance, emphasizing that "*[f]or legal purposes . . . the two situations are identical*." *Bowen*, 483 U.S. at 604 (emphasis added).

Finally, characterizing Proposition 8 as "withdrawing" or "eliminating" rights is misleading. The Attorney General issued the initiative's title and summary for signature petitions in November 2007. Signatures qualifying Proposition 8 for the ballot were submitted for verification *before* the California Supreme Court issued its decision requiring the State to redefine marriage, and that decision did not become final until *after* Proposition 8 officially qualified for the ballot. Indeed, but for the California Supreme Court's refusal to stay its decision pending the People's vote, *see Strauss*, 207 P.3d at 68, California never would have recognized same-sex relationships as marriages.

2. Putting aside the red herring of its timing, it is plain that Proposition 8 differs sharply from Amendment 2 in every material respect. First, far from being "unprecedented in our jurisprudence" or alien to "our constitutional tradition," *Romer*, 517 U.S.

at 633, it is difficult to think of a law with deeper roots in California's and our Nation's history, practices, and traditions than one defining marriage as the union of a man and a woman. That definition has prevailed for all but 142 *days* of California's 162-*year* history, and it continues to prevail in federal law and in the overwhelming majority of the States, most often through constitutional provisions much like Proposition 8.

Nor is it in any way "unprecedented" or even unusual that in restoring the traditional definition of marriage, the People of California exercised the "inalienable," "fundamental" right that they have reserved to themselves to "amend the[ir] Constitution through the initiative process when they conclude that a judicial interpretation or application of a pre-existing constitutional provision should be changed." *Strauss*, 207 P.3d at 108. To the contrary, "past state constitutional amendments that diminished state constitutional rights . . . refut[e] [the] description of Proposition 8 as 'unprecedented.'" *Id*. at 105.

Second, far from imposing a "broad and undifferentiated disability on a single named group" or denying that group "protection across the board," *Romer*, 517 U.S. at 632-33, Proposition 8's purpose was "simply to restore the traditional definition of marriage as referring to a union between a man and a woman," *Strauss*, 207 P.3d at 76. And it achieved this purpose in the narrowest possible manner, leaving undisturbed the numerous other laws – including the expansive domestic partnership laws – that provide

gays and lesbians in California "with some of the most comprehensive civil rights protections in the nation." J.A.Exh.2 As the California Supreme Court itself recognized, there is simply no comparison between Proposition 8 and a law, such as Colorado's Amendment 2, that "sweepingly . . . leaves [a minority] group vulnerable to public or private discrimination in *all* areas without legal recourse." *Strauss*, 207 P.3d at 102.

The Ninth Circuit's assertion that Proposition 8's narrow focus "makes it even more suspect" than Amendment 2, Pet.App.59a, cannot be reconciled with *Romer*'s emphasis on Amendment 2's "sheer breadth," 517 U.S. at 632. Indeed, by restoring the traditional definition of marriage in the narrowest possible manner – particularly when a competing and "much more sweeping initiative" was proposed and available, *Strauss*, 207 P.3d at 76 n.8 – the People of California expressed solicitude for *both* traditional marriage *and* the rights of committed same-sex couples, not an invidious or irrational desire to harm or dishonor gays and lesbians.

Finally, though Amendment 2 was so bereft of any conceivable legitimate state purpose that it could be explained only as resulting from "a bare . . . desire to harm a politically unpopular group," *Romer*, 517 U.S. at 634, the Ninth Circuit correctly disclaimed any "suggest[ion] that Proposition 8 is the result of ill will on the part of the voters of California," Pet.App.87a. As discussed more fully below, the gendered definition of marriage has prevailed in all

societies throughout human history not because of anti-gay animus but because marriage is closely connected to society's vital interests in the uniquely procreative nature of opposite-sex relationships. It has always been, and is now, supported by countless people of good faith who harbor no ill will toward gays and lesbians. *See*, *e.g.*, Pet.App.17a (recognizing that redefining marriage to include same-sex couples is "an issue over which people of good will may disagree"). As President Obama recognized, even as he announced his support for same-sex marriage, many people who "feel very strongly" about preserving the traditional definition of marriage do so not "from a mean-spirited perspective" but rather because they "care about families." http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043&singlePage=true; *see also infra* III.D.

III. The Equal Protection Clause Does Not Forbid California from Defining Marriage as the Union of a Man and a Woman.

As the foregoing demonstrates, whether the Equal Protection Clause prohibits the People of California from restoring the traditional definition of marriage turns on whether the redefinition of marriage to include same-sex couples was "required by the [Equal Protection Clause] in the first place." *Crawford*, 458 U.S. at 538. It was not. Indeed, this Court has already rejected that contention, unanimously dismissing for want of a substantial federal question an appeal squarely presenting the question whether a

State's refusal to recognize same-sex relationships as marriages violates the Equal Protection Clause. *Baker*, 409 U.S. 810; *see also Baker*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *cf. Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Baker was correctly decided. The first task in evaluating an equal protection claim is, of course, to identify the precise classification at issue. *See*, *e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973). By defining marriage as the union of man and woman, societies throughout history have drawn a line between opposite-sex couples and all other types of relationships, including same-sex couples. This is the precise classification at issue here, and it is based on an obvious difference between same-sex and opposite-sex couples: the natural capacity to create children, which as a matter of indisputable biological fact is limited to sexual relationships between a man and a woman. As demonstrated below, this distinction goes to the heart of society's traditional interest in regulating intimate relationships. Given this undeniable biological difference, the traditional definition of marriage satisfies the Equal Protection Clause under any standard of review, for even when heightened scrutiny applies, "[t]he Constitution requires that [a State] treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Rostker*, 453 U.S. at 79. And "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal

protection superficial, and so disserving it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *see also Michael M.*, 450 U.S. at 471.

In all events, this relevant biological distinction dictates that the traditional definition of marriage be subject only to rational-basis review:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441-42 (1985).[1]

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[1] Unlike laws that explicitly classify individuals based on sexual orientation, the traditional definition of marriage classifies on the basis of sexual orientation only to the extent that it distinguishes between same-sex couples and opposite-sex couples. And this distinction reflects biological realities closely related to society's traditional interest in marriage. To resolve this case, the Court thus need hold only that the biologically based, plainly relevant distinction drawn by the traditional definition of marriage calls for nothing more than rational-basis review. This Court need not determine what level of scrutiny should apply to other sorts of laws that classify individuals based on sexual orientation. *Cf. Cabell v. Chavez-Salido*, 454 U.S. 432,

(Continued on following page)

Rational-basis review, of course, constitutes a "paradigm of judicial restraint," under which courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "A statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993). Thus, Proposition 8 "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" it. *Id*. at 320. Furthermore, because "the institution of marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential" in this context. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006).

As demonstrated below, Proposition 8 clearly satisfies this deferential standard of review. Indeed, aside from the panel majority below – whose analysis rested on a flawed interpretation of *Romer* – no appellate court applying the Federal Constitution has held that the traditional definition of marriage fails it. *See Bruning*, 455 F.3d 859; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App. 2010);

438-39 (1982) (although classifications based on alienage are ordinarily subject to strict scrutiny, "strict scrutiny is out of place when the [classification] primarily serves a political function" because "citizenship . . . is a relevant ground for determining membership in the political community").

Standhardt v. Superior Court of Ariz., 77 P.3d 451 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker*, 191 N.W.2d 185; *see also Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) ("We . . . decline to join issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review."); *Massachusetts v. HHS*, 682 F.3d 1, 9-10 (1st Cir. 2012) (challenge to DOMA "cannot prevail" under "classic rational basis review").[2]

A. Proposition 8 advances society's vital interest in responsible procreation and childrearing.

1. Responsible procreation and childrearing has been an animating purpose of marriage in virtually every society throughout history.

The definition of marriage as a union "between a man and a woman," CAL. CONST. art. I, §7.5, has prevailed throughout this Nation since before its

[2] As our amici will demonstrate, Proposition 8 advances other important societal interests in addition to those we address, including accommodating the First Amendment and other fundamental rights of institutions and individuals who support the traditional definition of marriage on religious or moral grounds.

founding, including the period when the Fourteenth Amendment was framed and adopted. *See*, *e.g.*, BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE §225 ("It has always . . . been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex. . . ."). Indeed, until very recently "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez*, 855 N.E.2d at 8. And "the family – based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children – appears to be a practically universal phenomenon, present in every type of society." CLAUDE LEVI-STRAUSS, THE VIEW FROM AFAR 40-41 (1985); *see also*, *e.g.*, JAMES Q. WILSON, THE MARRIAGE PROBLEM 24 (2002) (noting that "a lasting, socially enforced obligation between man and woman that authorizes sexual congress and the supervision of children" exists and has existed "[i]n every community and for as far back in time as we can probe").

The record of human history leaves no doubt that the institution of marriage owes its existence to the undeniable biological reality that opposite-sex unions – and only such unions – can produce children. Marriage, thus, is "a social institution with a biological foundation." Claude Levi-Strauss, *Introduction*, *in* 1 A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (Andre Burguiere, et al. eds., 1996). And

that biological foundation – the unique procreative potential of sexual relationships between men and women – implicates vital social interests. On the one hand, procreation is necessary to the survival and perpetuation of the human race; accordingly, the responsible creation, nurture, and socialization of the next generation is a vital – indeed existential – social good. On the other hand, irresponsible procreation and childrearing – the all-too-frequent result of casual or transient sexual relationships between men and women – commonly results in hardships, costs, and other ills for children, parents, and society as a whole. As eminent authorities from every discipline and every age have uniformly recognized, an overriding purpose of marriage in virtually every society is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.

This animating purpose of marriage was well explained by Blackstone. Speaking of the "great relations in private life," he described the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must

be confined and regulated." WILLIAM BLACKSTONE, 1 COMMENTARIES *410. Blackstone then immediately turned to the relationship of "parent and child," which he described as "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated." *Id*.; *see also id*. *435.

Throughout history, other leading thinkers have likewise consistently recognized the essential connection between marriage and responsible procreation and childrearing. *See*, *e.g.*, JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §78 (1690); DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 66 (1751); MONTESQUIEU, 2 THE SPIRIT OF LAWS 96 (1st American from the 5th London ed., 1802); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828); BRONISLAW MALINOWSKI, SEX, CULTURE, AND MYTH 11 (1962); G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988); ROBERT P. GEORGE, ET AL., WHAT IS MARRIAGE? 38 (2012). In the words of the sociologist Kingsley Davis:

> The family is the part of the institutional system through which the creation, nurture, and socialization of the next generation is mainly accomplished. . . . The genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents . . . the social system powerfully motivates

> individuals to settle into a sexual union and take care of the ensuing offspring.

The Meaning and Significance of Marriage in Contemporary Society, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION 1, 7-8 (Kingsley Davis ed., 1985); *see also*, *e.g.*, WILSON, THE MARRIAGE PROBLEM 41 ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.").

Indeed, prior to the recent movement to redefine marriage to include same-sex relationships, it was commonly understood and accepted, without a hint of controversy, that an overriding purpose of marriage is to further society's vital interest in responsible procreation and childrearing. That is why this Court has repeatedly recognized marriage as "fundamental to our very existence and survival." *E.g.*, *Loving*, 388 U.S. at 12. And certainly no other purpose can plausibly explain why marriage is so universal or even why it exists at all. As Bertrand Russell put it, "[b]ut for children, there would be no need of any institution concerned with sex." BERTRAND RUSSELL, MARRIAGE & MORALS 77 (Liveright Paperbound Edition, 1970). Indeed, if "human beings reproduced asexually and . . . human offspring were born self-sufficient[,] . . . would any culture have developed an institution anything like what we know as marriage? It is clear that the answer is no." GEORGE, WHAT IS MARRIAGE? 96.

2. Proposition 8 furthers society's vital interests in responsible procreation and childrearing.

By providing special recognition, encouragement, and support to committed opposite-sex relationships, the traditional institution of marriage preserved by Proposition 8 seeks to channel potentially procreative conduct into stable, enduring relationships, where that conduct is likely to further, rather than harm, society's vital interests in responsible procreation and childrearing. And by reaffirming the age-old definition of marriage, Proposition 8 preserves the abiding link between that institution and this traditional purpose. Proposition 8 thus plainly bears a close and direct relationship to society's interest in increasing the likelihood that children will be born to and raised by the mothers and fathers who brought them into the world in stable and enduring family units. Indeed, given the close connection between the traditional definition of marriage and the vitally important interests that institution has always been understood to serve, we submit that Proposition 8 satisfies any level of equal protection scrutiny. *Cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 629 (1995) ("history, consensus, and 'simple common sense'" may satisfy even strict scrutiny).

a. "[I]t seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount

goals." *Adams v. Howerton*, 486 F.Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982). Indeed, "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). These interests are, indeed, "fundamental to our very existence and survival." *E.g.*, *Loving*, 388 U.S. at 12.

Underscoring the state's interest in marriage is the undisputed truth that children suffer when procreation and childrearing take place outside stable family units, which is the *usual* result, unfortunately, of unintended pregnancies outside of marriage. A leading survey of social science research explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. Parental divorce is also linked to a range of poorer academic and behavioral outcomes among children. There is thus value for children in promoting strong, stable marriages between biological parents.

KRISTEN ANDERSON MOORE, ET AL., MARRIAGE FROM A CHILD'S PERSPECTIVE, CHILD TRENDS RESEARCH BRIEF 6 (June 2002).

In addition, when parents, and particularly fathers, do not take responsibility for raising their children, society is often forced to assist through social welfare programs and other means. Indeed, a recent study estimates that divorce and unwed childbearing "costs U.S. taxpayers at least $112 billion each and every year, or more than $1 trillion each decade." THE TAXPAYER COSTS OF DIVORCE AND UNWED CHILDBEARING: FIRST-EVER ESTIMATES FOR THE NATION AND ALL FIFTY STATES 5 (Benjamin Scafidi, Principal Investigator 2008). The adverse outcomes for children associated with single parenthood harm society in other ways as well. As President Obama has emphasized:

> We know the statistics – that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of school, and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.

Barack Obama, Speech on Fatherhood (June 15, 2008), *transcript available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.

b. Because same-sex relationships cannot naturally produce offspring, they do not implicate the State's interest in responsible procreation and childrearing in the same way that opposite-sex relationships do.

Same-sex relationships "are thus different, immutably so, in relevant respects" from opposite-sex relationships for purposes of marriage. *Cleburne*, 473 U.S. at 442. And given this biological reality, as well as marriage's central concern with responsible procreation and childrearing, the "commonsense distinction," *Heller*, 509 U.S. at 326, that our law has always drawn between same-sex couples and opposite-sex couples "is neither surprising nor troublesome from a constitutional perspective." *Nguyen*, 533 U.S. at 63. For, again, as this Court has made clear, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Garrett*, 531 U.S. at 366-67. Simply put, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

The Ninth Circuit thus erred in concluding that the traditional definition of marriage must be deemed *irrational* unless "opposite-sex couples were more likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of 'marriage.'" Pet.App.74a-75a. For although there plainly *is* a reasonable basis for concern that officially redefining marriage as a genderless institution would necessarily entail a significant risk of negative consequences over time to the institution and the interests it has always served, *see infra* III.B,

the possibility of such harm need not be shown in order to uphold Proposition 8.

To the contrary, this Court's precedent makes clear that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson*, 415 U.S. at 383. Conversely, a law may make special provision for a group if its activities "threaten legitimate interests . . . in a way that other [groups' activities] would not." *Cleburne*, 473 U.S. at 448. Thus, the relevant inquiry here is not, as the Ninth Circuit would in effect have it, whether restoring the traditional definition of marriage was *necessary* to avoid harm to that institution. Rather, the question is whether recognizing opposite-sex relationships as marriages furthers interests that would not be furthered, or would not be furthered to the same degree, by recognizing same-sex relationships as marriages. *See*, *e.g.*, *Jackson v. Abercrombie*, 2012 WL 3255201, at *2 (D. Haw. Aug. 8, 2012); *Andersen v. King County*, 138 P.3d 963, 984 (Wash. 2006) (plurality); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. Ct. App. 2005); *Standhardt*, 77 P.3d at 463.[3]

[3] Even where heightened scrutiny applies, this Court has rejected the argument that a classification may be upheld only if it is necessary to achieve the government's purpose. *See Michael M.*, 450 U.S. at 473 (rejecting argument that statutory rape law punishing only males was "not *necessary* to deter teenage pregnancy because a gender-neutral statute, where both male

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The answer to that question is clear. Sexual relationships between men and women, and only such relationships, can produce children – often unintentionally. *See*, *e.g.*, Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 CONTRACEPTION 478, 481 Table 1 (2011) (finding that nearly half of all pregnancies in the United States, and nearly 70 percent of those pregnancies that occurred outside of marriage, were unintended). And as demonstrated above, it is the procreative capacity of heterosexual relationships – including the very real threat it can pose to the interests of society and to the welfare of children conceived unintentionally – that the institution of marriage has always sought to address. Nor can there be any doubt that providing recognition and support to committed opposite-sex couples through the institution of marriage generally makes those potentially procreative relationships more stable and enduring and thus promotes society's interest in responsible procreation. *See*, *e.g.*, ELIZABETH WILDSMITH ET AL., CHILDBEARING OUTSIDE OF MARRIAGE: ESTIMATES AND TRENDS IN THE UNITED STATES, CHILD TRENDS RESEARCH BRIEF 5 (Nov. 2011); Wendy D. Manning, et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 POPULATION RESEARCH & POL'Y REV.

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and female would be subject to prosecution, would serve that goal equally well" as, *inter alia*, not reflecting "[t]he relevant inquiry" given that "virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female").

135, 136 (2004). Indeed, even Plaintiffs have conceded that "'responsible procreation' may provide a rational basis for the State's recognition of marriages by individuals of the opposite sex." Doc. No. 202 at 25; *see also* Plaintiffs' BIO 17.

Sexual relationships between individuals of the same sex, by contrast, neither advance nor threaten society's interest in responsible procreation in the same manner, or to the same degree, that sexual relationships between men and women do. As even Plaintiffs' lead counsel was forced to acknowledge below, "heterosexual couples who practice sexual behavior outside their marriage" present "a big threat to irresponsible procreation," but same-sex couples "don't present a threat of irresponsible procreation." J.A.933-34. Under *Johnson* and *Cleburne*, that is the end of the matter. It is plainly reasonable for California to maintain a unique institution to address the unique challenges posed by the unique procreative potential of sexual relationships between men and women. Respondents' contrary contention – that when California recognizes committed opposite-sex relationships as marriages because they serve society's interests in responsible procreation and childrearing, the State is constitutionally compelled to extend the same recognition to same-sex couples even though they do not similarly further those interests – is a *non sequitur* that is plainly not the law. *See*, *e.g.*, *Vance v. Bradley*, 440 U.S. 93, 109 (1979) (law may "dr[aw] a line around those groups . . . thought most generally pertinent to its objective"); *Johnson*, 415 U.S. at 378 (classification

will be upheld if "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups").

It is thus not surprising that "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867-68; *see also Dean*, 653 A.2d at 363; *Baker*, 191 N.W.2d at 186-87; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Standhardt*, 77 P.3d at 461-64; *Singer*, 522 P.2d at 1195, 1197; *Sevcik v. Sandoval*, 2012 WL 5989662, at *17 (D. Nev. Nov. 26, 2012); *Jackson*, 2012 WL 3255201, at *38-*41; *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308-09 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145-47 (Bankr. W.D. Wash. 2004); *Adams*, 486 F.Supp. at 1124-25; *Conaway v. Deane*, 932 A.2d 571, 630-34 (Md. 2007); *Hernandez*, 855 N.E.2d at 7-8; *Andersen*, 138 P.3d at 982-85; *Morrison*, 821 N.E.2d at 23-31.[4]

[4] A number of foreign nations have reached the same conclusion. *See*, *e.g.*, Conseil Constitutionnel, decision no.2010-92, ¶ 9, Jan. 28, 2011 (Fr.), *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/201092QPCen201092qpc.pdf (English version) (deferring to legislature's judgment that "the difference of situation between couples of the same sex and those composed of a man and a woman can justify a difference in treatment with regard to the rules regarding the right to a family"); Corte Costituzionale, judgment no.138 of 2010, p. 26-27, Apr. 15, 2010 (It.), *available at* http://www.cortecostituzionale.it/

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3. That Proposition 8 did not eliminate domestic partnerships does not render it irrational.

The Ninth Circuit also reasoned that Proposition 8 does not go far enough to truly advance society's interest in responsible procreation and childrearing, that it "changes the law far too little to have any of the effects it purportedly was intended to yield." Pet.App.91a. Proposition 8's flaw, according to the panel majority, is that it only limits the use of "the designation of 'marriage,' while leaving in place all the substantive rights and responsibilities of same-sex partners." Pet.App.84a. But even the Ninth Circuit could not accept the necessary corollary of this argument, for it elsewhere disclaimed any intent "to suggest that Proposition 8 would be constitutional if only it had gone further – for example, by also

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documenti/download/doc/recent_judgments/S2010138_Amirante_Criscuolo_EN.doc (English version) (recognizing "the (potential) creative purpose of marriage which distinguishes it from homosexual unions," and thus holding that limiting marriage to opposite-sex unions "does not result in unreasonable discrimination, since homosexual unions cannot be regarded as homogeneous with marriage"); Marriage Equality Amendment Bill 2009, Australian Senate Legal & Constitutional Affairs Legislation Committee Report at 37, *available at* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/marriage_equality/report/index.htm (noting "range of compelling evidence from those in opposition to the Bill" including evidence related to "preserving the narrower and common definition [of marriage] on the basis of 'natural procreation' and on the potential effect of same-sex parenting on children").

repealing same-sex couples' equal parental rights or their rights to share community property or enjoy hospital visitation privileges." *Id.* at 76a. The majority's schizophrenia on this point is neither sustainable nor difficult to resolve: surely California's extraordinary solicitude for gays and lesbians and their families does not uniquely doom its ability to retain the traditional definition of marriage. Proposition 8 obviously cannot stand on *weaker* constitutional footing than would an amendment that restored the traditional definition of marriage *and* repealed California's generous domestic partnership laws.

a. By reaffirming the traditional definition of marriage, California preserves the established public meaning of that institution, as well as the inherent link between marriage and its vital purpose of channeling potentially procreative conduct into committed, lasting relationships. *See infra* III.B. Reserving the name "marriage" to committed opposite-sex couples is designed, now as always, to provide special recognition, encouragement, and support to those relationships most likely to further society's vital interests in responsible procreation and childrearing.

The Ninth Circuit's assertion that reserving to opposite-sex couples this time-honored designation, as opposed to the more tangible benefits traditionally associated with marriage, could not even plausibly "encourage heterosexual couples to enter into matrimony" or "bolster the stability of families headed by one man and one woman," Pet.App.78a, cannot be reconciled with its repeated "emphasi[s]" of "the

extraordinary significance of the official designation of 'marriage,'" *id*. at 51a. Indeed, the panel majority elsewhere insisted, correctly, that "[t]he official, cherished status of 'marriage' is distinct from the incidents of marriage," and these incidents, "standing alone," do not "convey the same governmental and societal recognition as does the designation of 'marriage.'" *Id*. at 52a-53a. The Ninth Circuit cannot have it both ways.

It may be true that reserving to opposite-sex couples not only the name of marriage, but also the benefits and obligations traditionally associated with that institution, would provide additional incentives for such couples to marry and thereby further advance society's interest in "steering procreation into marriage." *See Bruning*, 455 F.3d at 867. But it would do so at the expense of the separate interests served by California's domestic partnership laws. And even where heightened scrutiny applies, the Constitution "does not require that a regulatory regime single-mindedly pursue one objective to the exclusion of all others." *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 610 (9th Cir. 2010); *see also Mohamed v. Palestinian Auth.*, 132 S.Ct. 1702, 1710 (2012) ("No legislation pursues its purposes at all costs . . . ."). In all events, it is well settled that a law "is not invalid under the Constitution because it might have gone farther than it did." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

b. The Ninth Circuit also believed that "[i]n order to be rationally related to the purpose of

funneling more childrearing into families led by two biological parents, Proposition 8 would have had to modify . . . in some way" California's laws granting same-sex couples the rights to form families and raise children. Pet.App.72a. This, too, is a *non sequitur*. The animating purpose of marriage is not to prevent gays and lesbians from forming families and raising children. Rather, it is to steer potentially procreative conduct into stable and enduring family units in order to increase the likelihood that children will be raised by the mothers and fathers who brought them into the world.

As noted earlier, *see supra* III.A.2.b., sexual relationships between men and women commonly result in unintended pregnancies. And the question in nearly every case of unintended pregnancy is *not* whether the child will be raised by two opposite-sex parents or by two same-sex parents, but rather whether the child will be raised by both its mother and father or by its mother alone, often relying on the assistance of the State. *See*, *e.g.*, William J. Doherty, et al., *Responsible Fathering*, 60 J. MARRIAGE & FAMILY 277, 280 (1998) ("In nearly all cases, children born outside of marriage reside with their mothers."). And there can be no dispute that children raised by both their mother and father generally do better than children raised by their mother alone, and that the State has a direct and compelling interest in avoiding the public financial burdens and social costs too often associated with single motherhood. *See supra* III.A.2.a. Thus, regardless of any provisions the State may make

regarding the families of gays and lesbians, it is plainly rational for the State to make special provision through the institution of marriage to minimize the social risks uniquely posed by potentially procreative sexual relationships between men and women.

B. Proposition 8 serves California's interest in proceeding with caution before fundamentally redefining a bedrock social institution.

Marriage has long been understood as "the parent, and not the child of society," JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 100 (1834), and "of all human actions that in which society is most interested," MONTESQUIEU, 2 SPIRIT OF LAWS 173. As this Court has recognized, marriage is thus "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). It is "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), and "fundamental to the very existence and survival of the race," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

Given that "the western tradition has seen that marriage and the family are indispensable to the integrity of the individual and the preservation of the social order," JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT 329 (2012), many people of good will agree with Justice O'Connor that "preserving the

traditional institution of marriage" is itself a "legitimate state interest," *Lawrence*, 539 U.S. at 585-86 (O'Connor, J., concurring in judgment). And it is plainly reasonable for the People of California to proceed with caution when considering a fundamental change to the institution.

1. Almost everyone, including prominent advocates of same-sex marriage, admits that redefining marriage would alter that institution. For example, when the Massachusetts Supreme Judicial Court redefined marriage, Plaintiffs' own expert Professor Cott stated publicly that "[o]ne could point to earlier watersheds [in the history of marriage], but perhaps none quite so explicit as this particular turning point." J.A.429. Indeed, as Professor William Eskridge, a prominent advocate for redefining marriage, explains, much gay and lesbian support for redefining marriage is *premised* on the understanding that "enlarging the concept [of marriage] to embrace same-sex couples would necessarily transform it into something new." WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 19 (2006). It is plainly reasonable for the People of California to be concerned about the potential consequences of such a profound redefinition of a bedrock social institution.

As an initial matter, the People of California could reasonably fear that redefining marriage without first securing a broad-based democratic consensus for the change could weaken that institution, which has traditionally drawn much of its strength not from

the State, but from social norms derived from and sustained by public opinion, the community, and the private organizations (such as churches) that have long partnered with the State in encouraging marriage, performing marriage ceremonies, providing marriage counseling, and otherwise supporting this vital institution. As one prominent supporter of redefining marriage has put it, social "consensus" is important in this context, because marriage's "unique strength is its ability to fortify, not just ratify, the bond that creates family; and that ability comes from the web of social expectations and support that the community brings to the marriage." Jonathan Rauch, *How Can the Supreme Court Help Gay Rights? By Keeping Out Entirely*, TNR.COM, Dec. 12, 2012, http://www.tnr.com/blog/plank/110949/the-only-way-the-supreme-court-can-help-gay-marriage-staying-out-it. Concerns that precipitately redefining marriage in the absence of democratic consensus could weaken that institution are heightened by the fact that many of marriage's most steadfast supporters hold its age-old definition dear, even sacred.

2. More fundamentally, it is simply impossible to "escape the reality that the shared social meaning of marriage . . . has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin." *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006). Indeed, even "[r]evisionists agree that it matters what California or the

United States *calls* a marriage, because this affects how Californians or Americans come to *think* of marriage." GEORGE, WHAT IS MARRIAGE? 54. Plaintiffs' expert Professor Cott, for example, conceded at trial that redefining marriage by law would "definitely ha[ve] an impact on the social meaning of marriage," and that changing the public meaning of marriage would "unquestionably ha[ve] real world consequences." J.A.431-33. Professor Cott also admits the self-evident truth that it is impossible to accurately predict the long-term social consequences of changing the public meaning of marriage. J.A.429.

In light of this uncertainty, there are reasonable grounds for concern that officially changing the public meaning of marriage from a gendered to a genderless institution would necessarily entail a significant risk of adverse consequences over time to the institution of marriage and the interests it has always served. Indeed, a large group of prominent scholars from all relevant academic fields recently expressed "deep[] concerns about the institutional consequences of same-sex marriage for marriage itself." WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD 18 (2008). As they explained:

> Same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm

> that men should take responsibility for the children they beget.

Id. at 18-19. A leading thinker on these matters has further explained that by redefining marriage, the law would teach that marriage is "essentially an emotional union" without any inherent connection "to procreation and family life." GEORGE, WHAT IS MARRIAGE? 7. And "[i]f marriage is understood as an essentially emotional union, then marital norms, especially permanence and exclusivity, will make less sense." *Id*. at 67.

The People of California could reasonably share these concerns. Perhaps ironically, the reasonableness of concerns such as these is *underscored* by the decisions of the courts below invalidating Proposition 8 in this very case. The district court repeatedly denigrated the traditional definition of marriage, characterizing it as a mere historical "artifact" that lacks "*any* historical purpose" and "advances *nothing*." Pet.App.290a, 304a (emphases added). The district court likewise "found" that children derive no benefit at all from "having both a male and a female parent," and that the "genetic relationship between a parent and a child" is irrelevant to a child's upbringing. Pet.App.264a. And according to the district court, marriage focuses primarily on adults having "happy, satisfying relationships and form[ing] deep emotional bonds and strong commitments" to one another. *Id.* at 235a. The court of appeals similarly viewed marriage as simply "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.

These decisions would thus *put the force of our Constitution* behind a conception of marriage that (1) severs it from any inherent connection to its traditional purposes of promoting responsible procreation and childrearing, (2) transforms marriage from a public institution with well-established, venerable purposes focused on children into a private, self-defined relationship focused on adults, and (3) denigrates the importance of mothers and fathers raising the children they create together. It is certainly reasonable to fear that officially changing the public meaning of marriage in this manner will send a message that the desires of adults, as opposed to the needs of children (or any other social good that transcends the marriage partners), are the paramount concern of marriage and may weaken the social norms encouraging parents, especially fathers, to make the sacrifices necessary to marry, remain married, and play an active role in raising their children.

Indeed, some gay rights advocates favor redefining marriage *because* of its likely adverse effects on the traditional understanding and purposes of marriage. They argue that redefining marriage "is a breathtakingly subversive idea," E. J. Graff, *Retying the Knot*, THE NATION, June 24, 1996, at 12, that "will introduce an implicit revolt against the institution [of marriage] into its very heart," Ellen Willis, contribution to *Can Marriage be Saved? A Forum*, THE NATION, July 5, 2004 at 16, such that "that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers," Graff, *Retying the*

Knot, at 12. *See also*, *e.g.*, Michelangelo Signorile, *Bridal Wave*, OUT MAGAZINE 161 (Dec./Jan. 1994). Statements such as these, of course, do nothing to alleviate the concerns that many Californians reasonably have about redefining marriage.

3. More generally, even some supporters of redefining marriage to include same-sex relationships, such as Professor Andrew Cherlin of Johns Hopkins University, identify such a redefinition as "the most recent development in the deinstitutionalization of marriage," which he defines as the "weakening of the social norms that define people's behavior in . . . marriage." Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAMILY 848, 848, 850 (2004). This weakening of social norms entails shifting the focus of marriage from serving vital societal needs to facilitating the personal fulfillment of individuals. *See id*. at 853. Cherlin predicts that if deinstitutionalization continues, "the proportion of people who ever marry could fall further," and, "because of high levels of nonmarital childbearing, cohabitation, and divorce, people will spend a smaller proportion of their adult lives in intact marriages than in the past." *Id*. at 858. The process of deinstitutionalization could even culminate, Cherlin writes, in "the fading away of marriage," to the point that it becomes "just one of many kinds of interpersonal romantic relationships." *Id*.

Other scholars agree. Professor Norval Glenn, for example, believes that the traditional purposes of marriage – "regulation of sexual activity and the

provision for offspring that may result from it" – have been weakened by the gradual "blurring of the distinction between marriage as an institution and mere 'close relationships.'" Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 SOC'Y 25, 25-26 (2004). He fears that "acceptance of the arguments made by some advocates of same-sex marriage would bring this trend to its logical conclusion, namely, the definition of marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of society, the community, or any social entity larger than the couple." *Id.* at 26.

4. In sum, many thoughtful people, including respected scholars from a variety of relevant disciplines and perspectives, reasonably believe that redefining marriage as a genderless institution will have deeply harmful consequences for society, especially if brought about by judicial decree. To be sure, other thoughtful people disagree. But no one can reasonably dispute that the ultimate outcome of redefining marriage cannot yet be foreseen with confidence from our current vantage point. It was entirely reasonable, therefore, for the People of California to proceed with caution in these still uncharted waters.

C. Proposition 8 restores democratic authority over an issue of vital importance to the People of California.

1. Proposition 8 also furthers the California electorate's unquestionably legitimate interest in democratic self-governance. As the ballot arguments

they offered make clear, Proposition 8's supporters believed that advocates of same-sex marriage had "gone behind the backs of voters and convinced four activist judges" of the California Supreme Court "to redefine marriage." J.A.Exh.56. Exercising what California considers "one of the most precious rights of [its] democratic process," *Strauss*, 207 P.3d at 107, the People of California amended their Constitution to ensure "that the will of the people is respected" and that marriage could be redefined "only through a vote of the people." J.A.Exh.57.

2. It was plainly reasonable for the People of California to return control over the definition of marriage to the democratic process. The question whether the venerable institution of marriage should be redefined to include same-sex couples implicates various important but potentially conflicting interests, as well as competing values and understandings of the public good that are strongly and sincerely held by both supporters and opponents of such change. Indeed, "it is difficult to imagine" an issue "more fraught with sensitive social policy considerations." *Smelt v. County of Orange, Cal.*, 447 F.3d 673, 681 (9th Cir. 2006). And as even the court below recognized, this question "is currently a matter of great debate in our nation, and an issue over which people of good will may disagree, sometimes strongly." Pet.App.17a. Controversial social policy issues such as this are particularly well suited, of course, for the give and take of the democratic process, where individuals may persuade or be persuaded, and where broad public participation, compromise, and incremental change are not only

possible but likely. Decisions reached through this process are more likely to be regarded by a free people as legitimate and to be widely accepted than decisions reached in any other manner. And if such decisions prove unpopular or unwise, they are subject to further deliberation and revision, for the People remain free to refine their "preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed." *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007); *cf. Strauss*, 207 P.3d at 60 ("more than 500 amendments to the California Constitution have been adopted since ratification of California's current Constitution in 1879").

3. With respect to the public debate regarding the redefinition of marriage, these virtues of the democratic process are not theoretical; they are real and demonstrable. In California and throughout the Nation, individuals are debating, listening, and persuading one another. And in the best traditions of our democracy, even where the People sharply disagree among themselves, they have often reached compromises that attempt to accommodate the competing interests and needs of all concerned. Thus, although California has chosen, at least for now, to retain the traditional definition of marriage, it has simultaneously sought to accommodate the interests of gays and lesbians through domestic partnerships offering virtually all of the benefits and responsibilities traditionally associated with marriage. *See* CAL. FAM. CODE §297.5; *In re Marriage Cases*, 143 Cal.App.4th at 935-36 ("By maintaining the traditional definition of

marriage while simultaneously granting legal recognition and expanded rights to same-sex relationships, [California] has struck a careful balance to satisfy the diverse needs and desires of Californians."). Many States have taken a similar approach. Others have chosen to extend marriage to same-sex couples through the democratic process, sometimes providing substantial protections for institutions and individuals who support the traditional definition of marriage on religious or moral grounds. *See*, *e.g.*, N.Y. DOM. REL. LAW §§10-b, 11.

Moreover, public opinion and State laws are evolving rapidly as the democratic conversation regarding marriage continues to unfold. Indeed, at the last election the People of Maine, Maryland, and Washington voted to redefine marriage. Notably, in Maine, the People had rejected a similar proposal just three years before. Even in California, proponents of redefining marriage have vowed to seek to repeal Proposition 8 by initiative if it is upheld by this Court. *See* Joe Garofoli, *California left behind on pot, marriage*, SFGATE.COM, Nov. 11, 2012, http://www.sfgate.com/politics/joegarofoli/article/California-left-behind-on-pot-marriage-4028563.php.

4. In short, "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality" of redefining marriage, and this Court should "permit[ ] this debate to continue, as it should in a democratic society." *Glucksberg*, 521 U.S. at 735. Affirming the Ninth Circuit's ruling would necessarily "short-circuit" this debate. *District Att'y's*

Office v. Osborne, 557 U.S. 52, 73 (2009). Even a decision embracing the narrow grounds on which the Ninth Circuit purportedly relied would stifle democratic compromise and experimentation by suggesting that any change in the definition of marriage is irrevocable and by creating strong disincentives against experiments with civil unions or domestic partnership laws. Such a decision would, as a practical matter, "pretermit other responsible solutions" to the emerging and novel social issues raised by same-sex relationships, *id.*, and would force States to make an all-or-nothing choice between retaining the traditional definition of marriage without any recognition of same-sex relationships and fundamentally and irreversibly redefining an age-old institution that continues to play a vital role in our society today. And a broader decision requiring the redefinition of marriage throughout the Nation as a matter of federal constitutional law would bring the democratic process regarding marriage to a grinding and divisive halt.

5. Considerations of federalism likewise counsel against affirming the judgment below. Few matters are so "firmly within a State's constitutional prerogatives," *Gregory*, 501 U.S. at 462, as the regulation of marriage, "an area to which States lay claim by right of history and expertise," *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). Indeed, this Court has long recognized that, subject only to clear constitutional constraints, a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created." *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877),

quoted in Sosna, 419 U.S. at 404; *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

Our federal system of government is designed to permit a diversity of approaches to difficult and uncertain social issues, and the democratic process regarding marriage that is unfolding throughout the Nation shows the genius of that system at work. As Justice Brandeis long ago observed, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The people of California, like those of the numerous other States that have decided, at least for now, to adhere to the venerable definition of marriage, are entitled to await the results of experiments with redefining marriage in other jurisdictions before charting that course for themselves. Indeed, Plaintiffs' own expert Professor Badgett believes "that social change with respect to same-sex marriage in this country is taking place at a sensible pace at this time with more liberal states taking the lead and providing examples that other states might some day follow." J.A.701. *See also* Transcript: President Obama, May 9, 2012, http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043&singlePage=true (disclaiming any desire to "nationalize the issue" of redefining marriage and thereby cut off the "healthy process and . . . healthy debate" that is

occurring in the States and resulting in "[d]ifferent communities . . . arriving at different conclusions, at different times").

The "earnest and profound" debate regarding marriage is not, of course, limited to the United States but is global in scale. The European Court of Human Rights recently declined to "rush to substitute its own judgment in place of that of the national authorities," holding that the right to marry secured by Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not require Council of Europe member nations to redefine marriage in the absence of a "European consensus regarding same-sex marriage." *Schalk & Kopf v. Austria*, App. No. 30141/04 ¶¶ 58, 61-62 (Eur. Ct. H.R. 2010). Our Constitution does not take this sensitive, controversial social issue out of the hands of the People themselves.

D. Proposition 8 does not "dishonor" gays and lesbians.

Because "there are plausible reasons" for California's adherence to the traditional definition of marriage, judicial "inquiry is at an end." *Fritz*, 449 U.S. at 179; *see also Romer*, 517 U.S. at 634-46 (drawing "inference" of animus only because Amendment 2 was not "directed to any identifiable legitimate purpose or discrete objective"). Proposition 8 simply "cannot run afoul" of the Fourteenth Amendment. *Heller*, 509 U.S. at 320. Indeed, even when heightened scrutiny applies, "[i]t is a familiar practice of constitutional law

that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Michael M.*, 450 U.S. at 472 n.7. These principles apply with special force in the context of a challenge to an initiative or referendum, for the difficulties inherent in assessing the subjective motivations of a multi-member legislative body are most acute when the legislative body consists of the entire voting populace of a State.

At any rate, the panel majority clearly erred in concluding that the People of California restored the traditional definition of marriage to express official "disapproval of [gays and lesbians] and their relationships." Pet.App.92a. As the First Circuit recently explained, "preserv[ing] the heritage of marriage as traditionally defined over centuries of Western Civilization . . . is not the same as mere moral disapproval of an excluded group." *Massachusetts*, 682 F.3d at 16; *see also Lawrence*, 539 U.S. at 585-86 (O'Connor, J., concurring in judgment) ("Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."). And even California's then-Attorney General (now Governor) Edmund G. Brown, Jr., who embraced nearly every other allegation made by Plaintiffs, denied that "Prop. 8 was driven by moral disapproval of gay and lesbian individuals." J.A.Exh.147.

Nor does reserving the designation of marriage to committed opposite-sex couples "dishonor a disfavored

group" or proclaim the "lesser worth [of gays and lesbians] as a class." Pet.App.88a, 91a. Providing special recognition to one class of individuals does not demean others *who are not similarly situated* with respect to the central purpose of the recognition. It is simply not stigmatizing for the law to treat different things differently, *see*, *e.g.*, *Johnson*, 415 U.S. at 383, or to call different things by different names.

Again, societies throughout human history have uniformly defined marriage as a gendered relationship not because individuals in such relationships are virtuous or morally praiseworthy, but because of the unique potential such relationships have either to harm, or to further, society's vital interest in responsible procreation and childrearing. That is why the right to marry has never been conditioned on an inquiry into the virtues or vices of individuals seeking to marry. Conversely, that same-sex relationships are not recognized as marriages does not reflect a public judgment that individuals in such relationships are "inferior" or "of lesser worth as a class," Pet.App.88a, but simply the fact that such relationships do not implicate society's interest in responsible procreation in the same way that opposite-sex relationships do.

Even some leading advocates for redefining marriage have recognized that most traditional marriage supporters are "motivated by a sincere desire to do what's best for their marriages, their children, their society." JONATHAN RAUCH, GAY MARRIAGE 7 (2004); *cf.* J.A.498 (Chauncey); J.A.769 (Segura). Indeed, as Plaintiffs' experts have recognized, many gays and

lesbians themselves oppose redefining marriage to include same-sex couples. *See* J.A.Exh.49 (26.5% of self-identified LGBT individuals did not support redefining marriage); Gregory M. Herek, et al., 7 SEXUALITY RESEARCH & SOC. POL'Y 176, 194 (2010) (22.1% of self-identified LGB individuals did not agree with redefining marriage); M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED 129 (2009). Gay and lesbian opposition to same-sex marriage surely does not reflect a desire to dishonor gays and lesbians or to proclaim their lesser worth.

The Ninth Circuit's charge that Proposition 8 seeks to dishonor gays and lesbians is, moreover, at war with its own acknowledgments that Proposition 8 is not "the result of ill will on the part of the voters of California," Pet.App.87a, and that the question whether marriage should be redefined to include same-sex couples is one "over which people of good will may disagree," Pet.App.17a. A person who seeks to dishonor gays and lesbians and to proclaim their lesser worth is not, obviously, a person "of good will" who has no desire to harm gays and lesbians. The Ninth Circuit's charge thus "impugn[s] the motives" of over seven million California voters and countless other Americans who believe that traditional marriage continues to serve society's vital interests, *Crawford*, 458 U.S. at 545, including the citizens and lawmakers of 40 other States, the Members of Congress and President who supported enactment of the federal Defense of Marriage Act, the large majority of state and federal appellate judges who have addressed the

issue, and until very recently President Obama. In sum, as one of Plaintiffs' own expert witnesses acknowledges, there are "millions of Americans who believe in equal rights for gays and lesbians . . . but who draw the line at marriage." BADGETT, WHEN GAY PEOPLE GET MARRIED 175 (quoting Rabbi Michael Lerner).

CONCLUSION

For these reasons, the Ninth Circuit's decision invalidating Proposition 8 should be reversed.

Respectfully submitted,

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