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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## INTRODUCTION

At the heart of this case are two competing conceptions of marriage. The traditional conception—which has prevailed throughout recorded history in virtually all societies—holds that marriage is by its nature a *gendered* institution. Its central purpose—its *raison d'être*—is to channel potentially procreative sexual relationships into enduring, stable unions for the sake of responsibly producing and raising the next generation. This understanding of marriage has been uniformly recognized throughout history by authorities in every academic discipline who have studied the institution, as well as lawmakers and courts that have given legal recognition and effect to marriage. *See* Pet.Br.31-35; *see also* Scholars of History and Related Disciplines ("History Scholars") Br.10-25.

Plaintiffs deny this historical account, deriding both the gendered definition and the intrinsically procreative purpose of marriage as "newly constructed" and "litigation-inspired." Pl.Br.2, 21. They offer a genderless conception of marriage that is essentially unconcerned with procreation: marriage is designed, they say, to recognize and promote the "liberty, privacy, association, . . . commitment," and "love" of adult couples. Pl.Br.2, 14.

How do Plaintiffs explain away, then, the views of the "dozens of philosophers, sociologists, and political scientists—from Locke to Blackstone, Montesquieu to Kingsley Davis"—on which we rely? Pl.Br.39 n.6.

None of these "historical writings," Plaintiffs proclaim, "expresses an opinion about same-sex marriage." *Id*.

This is not entirely true. Bishop's authoritative 1852 treatise on the law of marriage explained that "it 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." Pet.Br.7. And Davis, writing in 1985, said that "true marriage" is, *inter alia*, a "heterosexual relationship in which reproduction and child care are assumed." CONTEMPORARY MARRIAGE 1, 6-7. But it is certainly true that most historical authorities did not address the idea of marriage between persons of the same sex. There can be no doubt, however, that if they had, they would have said the same thing. After all, they were discussing "marriage," a gendered term whose meaning was unambiguous and known to all. It meant, as Blackstone said, the relationship between "husband and wife," Pet.Br.33, also gendered terms whose meanings were unambiguous and known to all. The idea of a "same-sex marriage" was, literally, *contradictio in terminis* to these authorities, and they would have thought it no more necessary to say that such a marriage is not possible than to say that a female husband or a male wife is not possible.

The truth is that Plaintiffs' genderless, adult-centered understanding of marriage is a recent academic invention; its pedigree originates with the modern movement to redefine marriage to include

same-sex couples. And because it deliberately severs the abiding connection between marriage and the unique procreative potential of male-female unions, Plaintiffs' conception of marriage can offer no explanation whatever for why the institution is a ubiquitous, cross-cultural feature of the human experience, nor why it is, as this Court has *consistently* emphasized, "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *accord Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

Which brings us to this Court's marriage cases. These cases have recognized from the beginning that marriage "ha[s] more to do with the morals and civilization of a people than any other institution, [and] has always been subject to the control of the legislature." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Plaintiffs, nonetheless, say that these cases establish "the constitutional liberty to select the partner of one's choice," Pl.Br.22, a claim that would sweep aside not only the gendered definition of marriage, but other familiar restrictions on marital choice that are deeply rooted in the history and traditions of Western civilization.

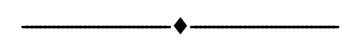
Plaintiffs' reading of this Court's marriage cases is plainly wrong. They were, after all, about "marriage," a term that has always meant "the union for life of one man and one woman." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). And the Court, like the authorities discussed above, has used the term without any concern that this gendered meaning could possibly be misunderstood to include parties of the same

sex. *All* of this Court's cases vindicating the fundamental right to marry have involved opposite-sex couples. And the Court's repeated references to the vital link between marriage and "our very existence and survival" would make no sense if the Court had viewed marriage as a genderless institution with no intrinsic link to procreation. *See also, e.g.*, *Zablocki*, 434 U.S. at 386 (vindicating right to "marry and raise the child in a traditional family setting"); *Bowers v. Hardwick*, 478 U.S. 186, 215 (1986) (Stevens, J., dissenting) (marriage is societal "license to cohabit and to produce legitimate offspring").

In short, the right upheld in this Court's cases was the right to enter the relationship of husband and wife, and there can be no doubt that they would have come out differently had the parties claimed the constitutional right to enter the relationship of husband and husband, or wife and wife. We know this with certainty because *Baker v. Nelson*, 409 U.S. 810 (1972), which Plaintiffs relegate to the end of a long footnote, was brought by a same-sex couple who challenged Minnesota's gendered definition of marriage and, relying primarily on *Loving*, raised the same equal protection and due process claims raised here. This Court (including four Justices who joined the decision in *Loving*) denied those claims on the merits, summarily and unanimously. Plaintiffs simply cannot escape the fact that they are asking this Court to redefine marriage.

Although the *constitutional* case for a right to same-sex marriage thus lacks merit, the *political* case

for redefining marriage has resonated with growing numbers of Americans in recent years, and has carried the day in several States. At the same time, the long-term implications of redefining marriage are profound, for they go to the basic nature of our civilization, and are still impossible to predict with confidence. It is therefore hardly surprising that the People of most States have decided, at least for now, not to redefine this bedrock social institution. Perhaps, their views will change as experience with same-sex marriage in other States matures. And perhaps not. But whether marriage should be redefined is for the People to decide.



## ARGUMENT

### I. Petitioners Have Standing.

A. California's Constitution and election laws give official proponents a "unique," "special," and "distinct" role in the initiative process—one "involving both authority and responsibilities that differ from other supporters of the measure." Pet.App.325a, 357a, 392a. Given their established state-law authority to represent "*the people's*, and hence *the state's*, interest in defending the validity" of Proposition 8, Pet.App.324a—which distinguishes them from the petitioners in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), and the appellant in *Don't Bankrupt Washington Committee v. Continental Illinois National Bank & Trust Co.*,

460 U.S. 1077 (1983)—proponents need no more show a personal injury, separate from the State's indisputable interest in the validity of its law, than would California's Attorney General or did the legislative leaders held to have standing in *Karcher v. May*, 484 U.S. 72 (1987). Moreover, Petitioners submit that under California law they *do* have a unique, personal stake in the validity of Proposition 8 that is "directly affected" by this litigation. *Connerly v. State Pers. Bd.*, 129 P.3d 1, 6-7 (Cal. 2006).[1]

Nor does it matter that Petitioners are not elected officials. The California Supreme Court rejected this argument as a matter of California law, Pet.App.394a; Pet.App.374a-375a, and this Court's Article III cases carry no hint of such an extraordinary restriction on a State's autonomy to decide who should represent its interests. Actions filed by private citizens suing as relators on behalf of States, for instance, are cognizable under Article III. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (citing examples); *cf. Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (federal *qui tam* relator has standing to seek recovery *for the Government* as its authorized agent).

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[1] Neither the Ninth Circuit nor the California Supreme Court found it necessary to resolve this contention. *See* Pet.App.41a-42a. Accordingly, it may be appropriate again to certify this question to the California Supreme Court if this Court concludes that Petitioners, despite their established authority to represent the State's interest, must also demonstrate personal injury to satisfy Article III.

B. Plaintiffs decided not to seek certification of a class, yet the district court entered a statewide, class-based injunction. The injunction exceeded the court's remedial jurisdiction, which was limited to redressing the injuries suffered by the plaintiffs before it. *See* Pet.Br.18. This "point relates to standing, which is jurisdictional and not subject to waiver." *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). Although Plaintiffs claim the rule restricting relief to the parties before the court is not jurisdictional, Pl.Br.19, the case they cite refutes this remarkable proposition.

The injunction in *Lewis* required improvements in prison law library facilities and services for a class of inmates that included illiterate, non-English-speaking, and locked-down inmates. The evidence, however, showed that only illiterate inmates had suffered actual injury from inadequate library services; inadequacies in services related to the other inmates had "not been found to have harmed any plaintiff in this lawsuit." 518 U.S. at 358. The provisions of the injunction directed at remedying such inadequacies thus exceeded "the proper scope" of the court's remedial power under Article III. *Id*. & n.6. Article III likewise prohibits the entry of injunctive relief for third parties who are not even "plaintiff[s] in this lawsuit" where, as here, such relief is unnecessary to

provide complete relief to the plaintiffs before the court.[2]

## II. Proposition 8 Furthers Vital Interests.

A. Proposition 8 furthers California's vital interest in increasing the likelihood that children will be born and raised in stable family units by the mothers and fathers who brought them into the world. *See* Pet.Br.31-48. We have never disputed that marriage serves *additional* purposes, or that couples marry for love, commitment, emotional support, personal fulfillment, and a variety of other reasons. But these purposes cannot explain why marriage is "fundamental to our very existence and survival," *Loving*, 388 U.S. at 12, let alone why it has existed in every known society throughout history. *See supra* 1-3.

To be sure, a conception of marriage has arisen in recent years that deemphasizes responsible procreation and the interests of children in favor of personal

[2] *Lewis* also discussed a *different* limitation on federal remedial authority: a court cannot impose systemwide relief absent proof of a systemwide violation. 518 U.S. at 359. This *geographic* limitation on remedial authority applies even if a systemwide class of plaintiffs has been certified and is before the court, and thus it "does not rest on the application of standing rules." *Id.* 360 n.7. But if a systemwide class of plaintiffs has *not* been certified and is *not* before the court, there is no doubt that the court cannot impose a systemwide remedy, and this rule *does* rest on Article III.

fulfillment and the desires of adults. *See* National Association of Evangelicals, *et al*. Br.6-11. But so long as responsible procreation remains *one* of the purposes of marriage (as Plaintiffs have conceded, *see, e.g*., Pl.Opp.17; Pl.Br.15, 25; Doc.No.202 at 25)—indeed so long as the Constitution does not prohibit the People from recognizing this purpose—Plaintiffs cannot prevail. For although same-sex couples (like various other relationships not recognized as marriages) may be similarly situated to opposite-sex couples with respect to love, commitment, fulfillment, and other such purposes of marriage, they are not so situated with respect to society's purpose of promoting responsible procreation and childrearing. And as this Court has made clear, "a common characteristic shared by beneficiaries and nonbeneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups." *Johnson v. Robison*, 415 U.S. 361, 378 (1974).

1. The equal protection inquiry in this case, then, is whether "the inclusion of [opposite-sex couples] promotes a legitimate governmental purpose, and the addition of [same-sex couples] would not." *Johnson*, 415 U.S. at 383. This is simply common sense: the Constitution does not compel a State to include groups that do not advance a state purpose alongside those that do. Nor is this commonsense rule limited to cases where some line must be drawn to preserve scarce resources. *See* CA9 Reply 54-56,

Dkt.Entry 243-1. Rather, it represents an application of the general principle that "[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). Simply put, "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." *Board of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001).

Respondents are therefore wrong in insisting that we must show that *excluding* same-sex couples from marriage itself is necessary to promote (or avoid harm to) the State's interests in responsible procreation. Rather, the constitutionality of the traditional definition of marriage is established by the fact—indisputably rooted in biology and conceded by Plaintiffs, *see* Pet.Br.42—that recognizing opposite-sex relationships as marriages furthers societal interests that would not be furthered, or that would not be furthered to the same extent, by recognizing same-sex relationships as marriages.

Indeed, even when applying heightened scrutiny, this Court has upheld classifications based on biological differences without requiring that the classification be necessary to prevent harm to the Government's interest. *See* Pet.Br.40-41 n.3; *Nguyen v. INS*, 533 U.S. 53, 63 (2001) (upholding statute imposing stricter requirements for a foreign-born child of unwed parents to establish citizenship through a

father than through a mother because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood").

2. Nor does the fact that "[n]o state requires that heterosexual couples who wish to marry be capable or even desirous of procreation," Pl.Br.23, undermine the traditional definition of marriage or its long-recognized procreative rationale.

First, it is equally true, of course, that no State *requires* opposite-sex couples who wish to marry to be in love, to provide each other "emotional support," or "to share their . . . most intimate and private dreams." Pl.Br.1, 53.

More important, the overriding societal purpose of marriage is *not* to ensure that all marital unions produce children. Rather, it is to channel the presumptive procreative *potential* of opposite-sex relationships into enduring marital unions so that *if* any children are born, they will be more likely to be raised in stable family units by both their mothers and fathers. In other words, because society prefers married opposite-sex couples without children to children without married mothers and fathers, it encourages marriage for all (otherwise eligible) heterosexual

relationships, including those relatively few that may not produce offspring.[3]

Even if some society (implausibly) desired to *mandate* that all married couples be willing and able to procreate, such a policy would presumably require enforcement measures—from premarital fertility testing to eventual annulment of childless marriages—that would surely trench upon constitutionally-protected privacy rights. And such Orwellian measures would be unreliable in any event. Most obviously, many fertile opposite-sex couples who do not plan to have children may have "accidents" or simply change their minds. And some couples who do not believe they can have children may find out otherwise, given the medical difficulty of determining fertility. Moreover, even where a couple's infertility is clear, rarely are both spouses infertile. In such cases, marriage still furthers society's interest in responsible procreation by decreasing the likelihood that the fertile spouse will engage in sexual activity with a third party and by strengthening the social norm that sexual relationships between men and women should occur in marital unions.

In addition, although marriage must be redefined to accommodate same-sex couples, the same is not true for infertile opposite-sex couples. Indeed, it would

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[3] Nearly 90% of married women have given birth to a child by their early forties. *See* Table 69, http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf.

be necessary to alter the traditional definition of marriage to *exclude* such couples, an action that would violate the fundamental right to marry. For as a matter of history, tradition, and practice, that right has always extended to opposite-sex couples as a class without inquiring into fertility (or love or emotional commitment) on a case-by-case basis.

It is thus not surprising that state and lower federal courts have repeatedly rejected the same infertility argument that Plaintiffs advance here. *See* Cert. Reply 7. The line that California and, until very recently, all other societies have drawn between opposite-sex couples, who in the vast majority of cases are capable of procreation, and same-sex couples, who are categorically infertile, is precisely the type of "commonsense distinction" between groups that "courts are compelled under rational-basis review to accept." *Heller v. Doe*, 509 U.S. 312, 321, 326 (1993). Indeed, even when heightened scrutiny applies, this Court has held that a classification need not be accurate "in every case" so long as "in the aggregate" it advances the underlying objective. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579, 582-83 (1990), overruled on other grounds, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *see also Nguyen*, 533 U.S at 69 (upholding "easily administered scheme" that avoids "the subjectivity, intrusiveness, and difficulties of proof" of an "inquiry into any particular bond or tie"); *Michael M. v. Superior Ct.*, 450 U.S. 464, 475 (1981) (plurality) (rejecting as "ludicrous" argument that law criminalizing statutory

rape to prevent teenage pregnancy was "impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant").

3. Plaintiffs argue that the children of same-sex couples from prior heterosexual relationships, adoption, or the assistance of a third-party donor are harmed by the traditional definition of marriage. *See* Pl.Br.6, 42-43. But California provides the legal incidents of marriage to same-sex couples and their children through the parallel institution of domestic partnerships. *See* CAL. FAM. CODE §297.5. And Respondents offer no empirical evidence that gays and lesbians or their children would obtain any incremental benefits through marriage above and beyond those available through domestic partnerships. Indeed, Plaintiffs' expert Professor Lamb was unaware of any study "that looks at the specific benefits flowing to children whose parents are together under domestic partnership law in California." J.A.616; *see also* PX0753, Tr.1029, *reaffirmed* 125 PEDIATRICS e444 (2009) (American Academy of Pediatrics' statement that "civil unions . . . can also attend to providing security and permanence for the children of those partnerships"); J.A.921 (Blankenhorn) (similar); CA9 Reply 70-73; J.A.522-23.

4. Nor do California's progressive laws recognizing and supporting families of same-sex couples (and other unmarried individuals) somehow cast doubt on the validity of Proposition 8. *See* Pl.Br.43-44; S.F.Br.43-49. Plaintiffs' assertion that "[c]hildren

raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted," Pl.Br.44, *does* contradict their repeated claims that Proposition 8 harms the children of same-sex couples. But, even if true (*but see* Social Science Professors Br.13-29), it *does not* undermine the need for a unique institution to address the unique societal risks and benefits posed by the unique procreative potential of sexual relationships between men and women. Pet.Br.46-48.

In any event, Proposition 8 is part of California's Constitution and thus carries greater force as a statement of California's family policy than do the statutes and case law cited by Plaintiffs. And Proposition 8 reflects the policy that "[w]hile death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father." J.A.Exh.56 (Official Voter Guide). This familiar axiom of Western civilization is plainly supported by evidence. *See* Pet.Br.36-38; Social Science Professors Br.5-13. To be sure, California has also enacted laws addressing the practical realities that some gays and lesbians raise children, that some children will be born outside of marriage, and that some marriages end due to death or divorce or otherwise do not suffice to care for children. But the fact that California recognizes that the family structure it regards as ideal will not be achieved in all circumstances does not disable it from providing special

recognition and support to the only relationships capable of achieving that ideal.[4]

* * *

When one turns from the trees to the forest, the strained nature of Plaintiffs' constitutional claim comes fully into view. Plaintiffs believe that for California to rationally maintain the traditional definition of marriage, it must (1) prohibit opposite-sex couples who are infertile or unwilling to procreate from marrying; (2) prohibit same-sex couples from raising children; and (3) repeal its domestic partnership laws. Our Constitution does not compel so high a price simply for preserving marriage as it has always existed.

B. There is ample cause for concern that redefining marriage could over time have negative societal consequences. *See* Pet.Br.48-55; Robert P. George, *et al*. Br.16-29; Helen Alvare Br.23-35. The district court's contrary determination, Pet.App.245a, like its other "findings," addresses *legislative fact*, not *adjudicative fact*. *See* FED. R. EVID. 201(a), 1972 advisory committee note. Such findings receive no appellate deference, and this Court's analysis is not limited to the record below. *Id.*; *see* CA9 Br.35-38, Dkt.Entry 21;

[4] The United States argues that California's domestic partnership laws and Proposition 8 cannot constitutionally coexist. U.S.Br.9-12. But if the Fourteenth Amendment dooms either one or the other (*but see* Pet.Br.44-48), California's statutes must yield to its Constitution. *See Strauss v. Horton*, 207 P.3d 48, 66 (Cal. 2009).

CA9 Reply 20-24. Indeed, under rational-basis review, "courtroom factfinding" is irrelevant and Plaintiffs must show that the issue is not even "arguable." *Heller*, 509 U.S. at 320, 333.

Further, this finding exemplifies the extraordinarily flawed nature of the district court's remarkable "findings." *See* CA9 Br.4-6, 38-43; Ethics and Public Policy Center ("EPPC") Br.9-26. It ignores Plaintiffs' expert's concession that "[t]he consequences of same-sex marriage is an impossible question to answer" because "no one predicts the future that accurately," J.A.429 (Cott),[5] and it rests largely on the testimony of Professor Peplau, who found Massachusetts marriage and divorce rates "informative" but nothing more. J.A.523-24; *see also* J.A.437-38 (Cott). And it disregards all contrary evidence in the record, including data showing that the Netherlands' rising marriage rate (1994-2000) declined substantially after 2001 (when the Netherlands redefined marriage) while its rising rates of nonmarital child rearing

[5] Petitioners' counsel acknowledged below that he too did not *know* what harm would arise from redefining marriage. As he explained, "same-sex marriage is a very recent innovation. Its implications of a social and cultural nature, not to mention its impact on marriage over time, can't possibly be known now." J.A.308; *see* EPPC Br.15-20. The purportedly "seminal" study Plaintiffs reference (Pl.Br.45) likewise acknowledged that "it may be too early to tell exactly what the effects of laws regulating same-sex marriage are" and disclaimed having "disproved the existence of a link between laws permitting gay marriage and a negative impact on 'family-values' indicators." 90 SOCIAL SCIENCE QUARTERLY 292, 306 (June 2009).

accelerated substantially. *See* Petitioners' Proposed Finding of Fact ("Pet.FOF") No.94, Doc.No.606; Tr.1443-54, 1458-60, 1472-75. Further, the data cited by Plaintiffs in this Court show that Massachusetts' divorce rate was 22.7% *higher* in 2011 than it was in 2004 when Massachusetts redefined marriage. *See* http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf. The national divorce rate, by contrast, was 2.7% *lower*. *See* http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm. Thus, the limited evidence available does not dispel concerns regarding the potential negative effects of redefining marriage, let alone do so "beyond debate." Pet.App.305a.

Nor would reasonable concerns about the long-term implications of redefining marriage make "discrimination . . . self-justifying." Pl.Br.47. This argument assumes invidious discrimination and is thus hopelessly circular. Further, unlike eliminating racial restrictions on marriage, extending marriage to same-sex couples would require fundamentally redefining the institution. *See* Pet.Br.6-7. It is this fundamental redefinition, not fear that same-sex couples would "taint" marriage, S.F.Br.34, that raises concern about the long-term consequences to marriage and the vital societal interests it has always sought to promote.

Finally, Respondents' suggestion that Proposition 8 prevents California's voters from revisiting the definition of marriage is belied by history: "[M]ore than 500 amendments to the California Constitution have been adopted since ratification of California's current Constitution. . . ." *Strauss*, 207 P.3d at 60.

C. People throughout California, including many gay-rights supporters, believed that the momentous decision whether to redefine marriage should be made through the democratic process rather than imposed by a sharply divided court. Respondents' arguments that the People's insistence on democratic self-governance cannot justify discrimination against "discrete and insular minorities," "experiment[s] with the fundamental liberties of citizens," or "inflict[ing] a constitutional wrong," simply beg the questions they raise here. Pl.Br.50; S.F.Br.59.[6]

## III. Proposition 8 Is Not Subject to Heightened Scrutiny.

A. Assuming it is properly before the Court, *but see* SUP. CT. R. 14.1(a), Plaintiffs' claim that the traditional definition of marriage violates the fundamental right to marry is foreclosed by history, practice, precedent, and everything else relevant to due process analysis. *See* Scholars of Federalism Br. Not surprisingly, the same argument has been repeatedly rejected by the courts. *See* Family Research Council Br.10-11 & n.5.

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[6] Plaintiffs concede that applying antidiscrimination laws to those who support the traditional definition of marriage on religious grounds "would raise serious constitutional concerns under the Free Exercise Clause of the First Amendment." Pl.Br.51 n.8. These concerns, which are not fully alleviated by the California Supreme Court's assurances, provide an additional justification for Proposition 8. *See* Becket Fund Br.

Again, this Court's cases do not support—and indeed foreclose—Plaintiffs' due process claim. *See supra* 3-4. Further, a right to marry without regard to gender is flatly belied by, rather than "objectively, deeply rooted in," our "Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710, 720-21 (1997); *see also supra* 1-3; History Scholars Br.

Nor is the traditional gendered definition of marriage remotely comparable to the antimiscegenation and coverture laws that once prevailed in certain jurisdictions. *See* Pl.Br.25-26. Such restrictions were never universal and were never understood to be *defining* characteristics of marriage. *See* Pet.Br.6-7; CA9 Reply 34-35; History Scholars Br.25-29. By contrast, the requirement that spouses be of opposite sexes has, until very recently, been uniformly regarded as *the* defining characteristic of marriage. *See Id*. 11-25; Pet.Br.7, 31-32; CA9 Br.51-53.

In short, the claim that the fundamental right to marry somehow *invalidates*, rather than *reflects*, what centuries of history, legal tradition, and practice have always and everywhere understood marriage to be is simply untenable.

B. Contrary to Plaintiffs' representation, Pl.Br.31, Petitioners *denied* below that an individual's "sexual orientation bears no relation to a person's ability to perform or contribute to society," on the ground that only opposite-sex couples can procreate naturally. *See* J.A.Exh.120; *see also* Proposed Stipulation 7,

Doc.No.159-1. This fundamental biological distinction goes to the heart of the State's interest in marriage and calls for rational-basis review here, regardless what level of scrutiny may apply to sexual-orientation classifications in other contexts. *See* Pet.Br.29-30 n.1.

In all events, sexual orientation is a complex and amorphous phenomenon that defies consistent and uniform definition and is thus unlike race, sex, alienage, and other suspect or quasi-suspect classifications under the Equal Protection Clause. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985); Dr. Paul McHugh ("McHugh") Br.4-14; Pet.FOF Nos.144-155. Indeed, Plaintiffs' own experts disagree about defining sexual orientation, *compare* J.A.571 (Meyer), *with* J.A.824 (Herek), and concede that "depending upon how it is defined and measured, 1 to 21 percent of the population could be classified as lesbian or gay to some degree," J.A.570 (Meyer); *see also* CA9 Br.72 n.36.

Further, two of the "traditional indicia of suspectedness"—political powerlessness and immutability—are plainly "lacking in this case." *Johnson*, 415 U.S. at 375 n.14.[7] A minority group is politically

[7] This Court has never recognized a suspect or quasi-suspect classification absent immutability and lack of political power. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), did not recognize such a class. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), simply confirms that race is suspect and that even "reverse" racial discrimination triggers strict scrutiny. And alienage arises from an immutable

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powerless if it cannot "attract the attention of the lawmakers." *Cleburne*, 473 U.S. at 445. There is no question that gays and lesbians command the attention of lawmakers both in California and nationally. *See* Concerned Women for America Br.8-37; Pet.FOF Nos.163-190. Indeed, Plaintiffs themselves emphasize that "the California Legislature has enacted some of the Nation's most progressive gay-rights protections," Pl.Br.43, and, aside from redefining marriage, it is difficult to identify any objective that gays and lesbians in California have not achieved. Nationally, gays and lesbians' substantial political power is demonstrated by important legislative victories and government litigation decisions, *see* BLAG *Windsor* Br.51-54, and by their amicus support here. In short, because the "traditional political process[ ]" has not "broken down," "extraordinary protection from the majoritarian political process" is not warranted. *Johnson*, 415 U.S. at 375 n.14.[8]

Nor is sexual orientation an immutable characteristic—that is, "a trait 'determined *solely* by accident of birth.'" *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991) (Ginsburg, J.) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 229 n.11 (1981)). As Plaintiffs' experts conceded, "we don't

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characteristic—country of birth. *See Parham v. Hughes*, 441 U.S. 347, 351 (1979).

[8] Relative to their numbers, the political power of women in the 1970's paled in comparison to that of gays and lesbians today. *See* Concerned Women for America Br.18-20; CA9 Reply 41.

really understand the origins of sexual orientation in men or in women," J.A.839 (Herek), and "[a]vailable evidence indicates that biological contributions to the development of sexual orientation in women are minimal," DIX1239 at 81 (Peplau), Tr.2138; Tr.2284-85 (Herek). Indeed, "to date there are no replicated scientific studies supporting any specific biological etiology for homosexuality." American Psychiatric Association, http://www.psychiatry.org/mental-health/people/lgbt-sexual-orientation. *See* McHugh Br.15-20; BLAG *Windsor* Br.54-56; Pet.FOF Nos.156-157. And "some people do experience considerable fluidity in their sexuality throughout their lives." Tr.2207 (Herek). *See* DIX1010 at 5 (Peplau), Tr.2227; McHugh Br.20-28; Pet.FOF Nos.158-162.

We have never denied that gays and lesbians have experienced a regrettable history of discrimination. But past discrimination, standing alone, does not warrant heightened scrutiny. *See, e.g.*, *Cleburne*, 473 U.S. at 446. And fortunately, such discrimination has waned dramatically in recent years. As Plaintiffs' own expert acknowledged *a decade ago*, "it is hard to think of another group whose circumstances and public reputation have changed so decisively in so little time." GEORGE CHAUNCEY, WHY MARRIAGE? 166 (2004).

For these reasons, eleven circuits have held that sexual-orientation classifications are subject to rational-basis review. *See* BLAG *Windsor* Br.13 n.4.

## IV. California Is Not Uniquely Disabled From Maintaining the Traditional Definition of Marriage.

A. *Crawford*, not *Romer*, controls here, and under *Crawford* it is the substance of Proposition 8, not its timing, that matters. *See* Pet.Br.19-27. Plaintiffs' attempts to distinguish *Crawford* fail. *See* Cert. Reply 4-5. Nor does *Reitman v. Mulkey*, 387 U.S. 369 (1967), suggest otherwise; as *Crawford* emphasized, "the laws under review [in *Reitman*]"—like that in *Romer*—"did more than merely repeal existing anti-discrimination legislation." *Crawford v. Board of Educ.*, 458 U.S. 527, 538 (1982). Indeed, those laws directly "involved the State in private racial discrimination." *Id*. 538 n.20.

B. Even under heightened scrutiny this Court "ascertain[s] the purpose of a statute by drawing logical conclusions from its text, structure, and operation." *Nguyen*, 533 U.S. at 67-68. The text, structure, and operation of Proposition 8 establish that its purpose was, as the California Supreme Court held, "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 thus, necessarily, to further the vital societal interests marriage has always served.[9]

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[9] In contrast, the initiative invalidated in *Romer* was "unprecedented." Pet.Br.23. In concluding that the initiative was motivated by animus, this Court cited *none* of the materials

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At any rate, there was nothing improper about the official Yes-on-8 campaign, as demonstrated by the very messages highlighted by Plaintiffs. True, the campaign argued that Proposition 8 would "protect our children," but explained that it would do so by protecting the traditional definition of *marriage*, not by protecting children *from gays and lesbians*. *See, e.g.*, J.A.Exh.56 ("Proposition 8 protects marriage as an essential institution of society. While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father."); J.A.Exh.70 (PX0097) ("Marriage involves a complex web of social, legal, and spiritual commitments that bind men and women for one overriding societal purpose: to create a loving environment for the raising up of children. Protecting the interests of children is the reason the State has for regulating marriage to begin with."); J.A.Exh.67-68 ("The defeat of Prop. 8 would result in the very meaning of marriage being transformed into nothing more than a contractual relationship between adults. No longer will the interests of children and families even be a consideration."). And it is hardly improper that Californians who in good faith oppose redefining

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from the Amendment 2 campaign put before the Court. And *Crawford*, in *refusing* to "impugn the motives of the State's electorate," 458 U.S. at 545, did not address the "Ballot Pamphlet" arguments or "newspaper reports regarding Proposition 1" alleged to evince a racially discriminatory purpose, *see* Pet.Br.81-82 & nn.46-47, *Crawford* (No.81-38).

marriage would also oppose their young children being taught that same-sex marriage is "the same as traditional marriage" or otherwise "okay." J.A.Exh.56. In other words, for the same reasons that an individual of good will may legitimately oppose redefining marriage, that individual may also legitimately oppose having his or her children taught that redefining marriage is "okay."

To be sure, some bigoted statements were made by extremists on *both* sides of the Proposition 8 debate. *See, e.g.*, J.A.Exh.19; Marriage Anti-Defamation Alliance Br.; *Hollingsworth v. Perry*, 130 S.Ct. 705, 713 (2010). Respondents have carefully tweezed from the cacophony of messages before the voters a handful of offensive anti-gay comments, but such sentiments were not espoused by the official Yes-on-8 campaign, as the only actual official campaign messages cited by Respondents demonstrate.[10] The Yes-on-8 campaign, for example, was not even informed of Dr. Hak-Shing William Tam's offensive statements. *See* Cert. Reply 8-9 n.2; CA9 Reply 89-91. Such statements no more reflect the views of the 7 million Californians who voted for Proposition 8 than the offensive statements and acts of violence by some of Proposition 8's opponents reflect the views of the 6.4

[10] *See* J.A.Exh.53, 56-57; J.A.Exh.66; J.A.Exh.71, J.A.Exh.74; J.A.Exh.104; J.A.Exh.153; PX0042. In addition, a few inoffensive statements of official campaign representatives, such as Ron Prentice, are interspersed among some of the other materials cited by Respondents.

million Californians who voted against that measure. *See Garrett*, 531 U.S. at 367; *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("A law conscripting clerics should not be invalidated because an atheist voted for it.").

The vast majority of Proposition 8's supporters bear no ill will at all toward gays and lesbians, let alone a desire to harm them. Nor can their views on marriage be dismissed as reflexive or ill-considered. To the contrary, they are decent, thoughtful citizens from all walks of life, all political parties, and all races and creeds. They are our family members, our friends, our colleagues and coworkers, our community and business leaders, and our public officials. They are, then, just like the vast majority of Proposition 8's opponents. And their views on marriage are entitled to no less consideration and respect, both in the political process and in this Court.

## CONCLUSION

The Ninth Circuit's decision invalidating Proposition 8 should be reversed.

Respectfully submitted,

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