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

BRIEF FOR RESPONDENTS

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INTRODUCTION

This case is about marriage, "the most important relation in life," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), a relationship and intimate decision that this Court has variously described at least 14 times as a right protected by the Due Process Clause that is central for *all* individuals' liberty, privacy, spirituality, personal autonomy, sexuality, and dignity; a matter fundamental to one's place in society; and an expression of love, emotional support, public commitment, and social status.

This case is also about equality. After a $40 million political campaign during which voters were urged to "protect our children" from exposure to the notion that "gay marriage is okay," J.A. Exh. 56, and "the same as traditional marriage," J.A. Exh. 67, and thus deserving of equal dignity and respect, Proposition 8 engraved into California's constitution the cardinal principle that unions among gay men and lesbians are not valid or recognized as marriages, and therefore second-class and not equal to heterosexual marriages. Proposition 8 thus places the full force of California's constitution behind the stigma that gays and lesbians, and their relationships, are not "okay," that their life commitments "are not as highly valued as opposite-sex relationships," Pet. App. 262a, and that gay and lesbian individuals are different, less worthy, and not equal under the law. That "generates a feeling of inferiority" among gay men and lesbians—and especially their children—"that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

Proponents accuse Plaintiffs (repeatedly) of "redefining marriage." *E.g.*, Prop. Br. 2. But it is Proponents who have imagined (not from *any* of this Court's decisions) a cramped definition of marriage as a utilitarian incentive devised by and put into service by the State—society's way of channeling heterosexual potential parents into "responsible procreation." In their 65-page brief about marriage in California, Proponents do not even mention the word "love." They seem to have no understanding of the privacy, liberty, and associational values that underlie this Court's recognition of marriage as a fundamental, personal right. Ignoring over a century of this Court's declarations regarding the emotional bonding, societal commitment, and cultural status expressed by the institution of marriage, Proponents actually go so far as to argue that, without the potential for procreation, marriage might not "even . . . exist[ ] at all" and "there would be no need of any institution concerned with sex." *Id.* at 35 (internal quotation marks omitted). Thus, under Proponents' peculiar, litigation-inspired concept of marriage, same-sex couples have no need to be married and no cause to complain that they are excluded from the "most important relation in life." Indeed, Proponents' state-centric construct of marriage means that the State could constitutionally deny *any* infertile couple the right to marry, and could prohibit marriage altogether if it chose to pursue a society less committed to "responsible" procreation.

This, of course, reflects a complete "failure to appreciate the extent of the liberty at stake," *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), not to mention matters such as love, commitment, and intimacy that most Americans associate with marriage. As Proponents see it, marriage exists solely to serve *society's*

interest; it makes no sense to speak of an individual's *right* to marry.

Proponents view this case as a referendum on whether the institution of marriage should exist in the first place, focusing almost exclusively on why it makes sense for the States to grant heterosexuals the right to marry. But this case is not about whether marriage should be abolished or diminished. Quite the contrary, Plaintiffs *agree* with Proponents that marriage is a unique, venerable, and essential institution. They simply want to be a part of it—to experience all the benefits the Court has described and the societal acceptance and approval that accompanies the status of being "married."

The only substantive question in this case is whether the State is entitled to *exclude* gay men and lesbians from the institution of marriage and deprive their relationships—their love—of the respect, and dignity and social acceptance, that heterosexual marriages enjoy. Proponents have not once set forth *any* justification for discriminating against gay men and lesbians by depriving them of this fundamental civil right. They have never identified a single harm that they, or anyone else, would suffer as a result of allowing gay men and lesbians to marry. Indeed, the only harms demonstrated in this record are the debilitating consequences Proposition 8 inflicts upon tens of thousands of California families, and the pain and indignity that discriminatory law causes the nearly 40,000 California children currently being raised by same-sex couples.

The unmistakable purpose and effect of Proposition 8 is to stigmatize gay men and lesbians—and them alone—and enshrine in California's Constitution that they are "unequal to everyone else," *Romer*

v. Evans, 517 U.S. 620, 635 (1996), that their committed relationships are ineligible for the designation "marriage," and that they are unworthy of that "most important relation in life." Neither tradition, nor fear of change, nor an "interest in democratic self-governance" (Prop. Br. 55), can absolve society, or this Court, of the obligation to identify and rectify discrimination in all its forms. If a history of discrimination were sufficient to justify its perpetual existence, as Proponents argue, our public schools, drinking fountains, and swimming pools would still be segregated by race, our government workplaces and military institutions would still be largely off-limits to one sex—and to gays and lesbians, and marriage would still be unattainable for interracial couples. Yet the Fourteenth Amendment could not tolerate those discriminatory practices, and it similarly does not tolerate the permanent exclusion of gay men and lesbians from the most important relation in life. "In respect of civil rights, all citizens are equal before the law." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

STATEMENT

1. In 2000, California voters adopted Proposition 22, which amended the Family Code to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Fam. Code § 308.5. In May 2008, the California Supreme Court struck down Proposition 22, holding that it violated the due process and equal protection guarantees of the California Constitution, and ordered the State to issue marriage licenses without regard to the sex of the prospective spouses. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

In response to the California Supreme Court's decision in the *Marriage Cases*, Proponents financed and orchestrated a $40 million campaign to "[c]hange[the] California Constitution to eliminate the right of same-sex couples to marry [in California]." J.A. Exh. 53. The measure—Proposition 8—was placed on the ballot for the November 2008 election, and proposed to add a new Article I, § 7.5 to the California Constitution stating that "[o]nly marriage between a man and a woman is valid or recognized in California." The Official Voter Information Guide urged voters to support Proposition 8 in order to protect California's children. *See* J.A. Exh. 56 ("[v]oting YES protects our children"); *see also*, *e.g.*, J.A. Exh. 154 (campaign poster with text "Restoring Marriage and Protecting California Children").

Proposition 8 was approved by the voters and went into effect on November 5, 2008, the day after the election. *See Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009). The California Supreme Court subsequently upheld Proposition 8 against a state constitutional challenge, but held that the new amendment to the California Constitution did not invalidate the 18,000 marriages of same-sex couples that had been performed before its enactment. *See id.* at 122; *see also* Pet. App. 142a-143a.

Proposition 8 did not alter existing California law allowing same-sex couples to form so-called "domestic partnerships," Cal. Fam. Code § 297, which provides that "domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties . . . as are granted to and imposed upon spouses." *Id.* § 297.5(a). Accordingly, same-sex couples registered as domestic partners in California share community property, *see id.* § 297.5(k), file state taxes

jointly, *see* Cal. Rev. & Tax. Code § 18521(d), and make medical decisions on behalf of an incapacitated partner, *see* Cal. Prob. Code § 4716.

In addition, California protects the right of same-sex couples to be foster parents and to adopt children by forbidding discrimination on the basis of sexual orientation. *See* Cal. Welf. & Inst. Code § 16013(a). Thus, when same-sex couples choose to raise children, they are treated identically to opposite-sex parents under California law. Pet. App. 237a-238a. In fact, 18% of same-sex couples in California are raising children under the age of 18. Pet. App. 238a.

2. As a direct result of Proposition 8, Plaintiffs—gay and lesbian Californians who are in committed, long-term relationships and who wish to marry—were deprived of the right to marry solely because their prospective spouses are of the same sex. Because Proposition 8 denies their family relationships the same dignity and respect afforded to opposite-sex couples and their families, Pet. App. 243a-245a, Plaintiffs filed suit to challenge the constitutionality of Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Governor and Attorney General of California continued to enforce, but refused to defend, Proposition 8, and the district court permitted Proponents to intervene to defend the measure. The district court also permitted the City and County of San Francisco to intervene as a plaintiff in the case.

The district court conducted a twelve-day bench trial, during which the parties were "given a full opportunity to present evidence in support of their positions." Pet. App. 152a. At trial, the parties called 19 witnesses—17 of them by Plaintiffs—and played the video depositions of other witnesses as well. Pet.

App. 153a. Plaintiffs' witnesses included leading experts in American history, sociology, psychology, and political science. Pet. App. 172a-181a.

After hearing more than six hours of closing arguments and considering hundreds of pages of proposed findings of fact and conclusions of law submitted by the parties, the district court declared Proposition 8 unconstitutional under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and permanently enjoined its enforcement. *See* Pet. App. 287a (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)); Pet. App. 294a-295a (citing *Zablocki*, 434 U.S. at 388); Pet. App. 313a-316a (citing *Lawrence*, 539 U.S. at 579; *Romer*, 517 U.S. at 634); Pet. App. 316a-317a. The district court issued 80 separate findings of fact, summarizing the evidence that supported each one. Pet. App. 202a-285a.

The district court began by examining the history, purpose, and benefits of civil marriage in the United States and, particularly, in California based on the evidence submitted during the trial. Pet. App. 202a-285a. The court found that marriage had long been predicated upon a "presumption[ ] of a division of labor along gender lines" and, under the doctrine of coverture, the "husband was the legal head of [the] household." Pet. App. 214a-215a. With the end of the doctrine of coverture, however, "marital partners [began to] share the same obligations to one another and to their dependents," "[r]egardless of their sex or gender." Pet. App. 219a. Thus, marriage is no longer defined in this country by the traditional gender roles of the respective spouses. Rather, marriage is animated by "recognition and approval of a couple's choice to live with each other, and to remain committed to one another and to form a household based on their own feelings about one another and to join in

an economic partnership and support one another and any dependents." Pet. App. 220a-221a. Other animating purposes include "[f]acilitating governance and public order by organizing individuals into cohesive family units," "[d]eveloping a realm of liberty, intimacy and free decision-making by spouses," "[c]reating stable households," "[l]egitimating children," "[a]ssigning individuals to care for one another and thus limiting the public's liability to care for the vulnerable," and "[f]acilitating property ownership." Pet. App. 221a-223a; *see also* J.A. 409.

Marriage also "expresses the . . . liberty to be able to consent validly." Pet. App. 211a (internal quotation marks omitted). Indeed, "[b]ecause slaves were considered property of others at the time, they lacked the legal capacity to consent and were thus unable to marry. After emancipation, former slaves viewed their ability to marry as one of the most important new rights they had gained." Pet. App. 212a. "[F]ree consent" has "always" been a requirement for marriage in all States. Pet. App. 212a. California, however, "has never required that individuals entering a marriage be willing or able to procreate." Pet. App. 211a.

The district court found that there are many unique benefits to marriage. Marriage "creates economic support obligations between consenting adults," "promot[es] physical and psychological health," results in "legal protection and social support," "allows spouses to specialize in their labor," and "encourages spouses to increase household efficiency by dividing labor to increase productivity." Pet. App. 223a-225a. Married people are "less likely to engage in behaviors detrimental to their health, like smoking or drinking heavily," and "live longer on

average than unmarried individuals." Pet. App. 223a.

In addition, these "benefits of marriage flow to a married couple's children," regardless whether the married couple is an opposite-sex or same-sex pairing. Pet. App. 226a, 247a. In fact, the testimony and other evidence regarding the welfare of children of same-sex couples shows that the sex of a child's parents is not a factor in a child's adjustment. Pet. App. 263a-264a. "Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted." Pet. App. 263a. And "California law . . . encourages gays and lesbians to become parents." Pet. App. 237a.

The district court therefore concluded that unions between individuals of the same sex "encompass the historical purpose and form of marriage." Pet. App. 291a. As the district court explained, Plaintiffs are "not seek[ing] recognition of a new right," but access to the fundamental right to marry constitutionally guaranteed to all persons. Pet. App. 291a. Because Proposition 8 "unconstitutionally burdens the exercise of the fundamental right to marry" and "cannot withstand rational basis review"—let alone the strict scrutiny required when a measure infringes on a fundamental right—the district court concluded that it violates the Due Process Clause. Pet. App. 286a, 295a.

The district court also held that Proposition 8 violates the Equal Protection Clause because it "creates an irrational classification on the basis of sexual orientation." Pet. App. 286a. As an initial matter, "the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was

designed to protect." Pet. App. 300a (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam)); *see also infra* Part III.A. "All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation." Pet. App. 301a.

The court found it unnecessary, however, to evaluate Proposition 8 under strict scrutiny because the measure fails even rational basis review. Pet. App. 301a. Proponents abandoned at trial the Protect Our Children rationale that had been the hallmark of the Proposition 8 campaign. And "[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex-marriages." Pet. App. 245a-247a (discussing studies by the U.S. Department of Health and Human Services, the American Anthropological Association, and other evidence). Moreover, as with the elimination of anti-miscegenation laws, Pet. App. 212a-214a, and the advent of no-fault divorce laws, Pet. App. 217a-218a, eliminating the barriers to marriage by individuals of the same sex would do nothing to "deprive[ ] the institution of marriage of its vitality." Pet. App. 219a.

In fact, the district court found, the only direct effect of Proposition 8 is to make it "*less* likely that California children will be raised in stable households" by reducing the number of families who can be married. Pet. App. 308a (emphasis added). As Proponents' principal expert testified, "adopting same-sex marriage would be likely to improve the well-being of gay and lesbian households and their children." J.A. 903 (Blankenhorn). Indeed, nearly

40,000 children in California are being raised by gay and lesbian couples. Pet. App. 238a.

"[D]espite ample opportunity and a full trial," the district court concluded that Proponents "failed to identify any rational basis Proposition 8 could conceivably advance." Pet. App. 312a. "In the absence of a rational basis, what remains of proponents' case is an inference . . . that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples." Pet. App. 312a-313a. And, as the district court found, that inference is "amply supported by evidence in the record." Pet. App. 312a. For example, "[t]he campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships." Pet. App. 284a. The "campaign [also] relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian" and "that parents should dread having a gay or lesbian child." Pet. App. 279a-280a. The campaign materials even suggested that Proposition 8 was necessary to protect children from gay men and lesbians themselves. *See*, *e.g.*, J.A. Exh. 103.

3. Proponents appealed the district court's decision to the Ninth Circuit after the State defendants elected not to do so. As a preliminary matter, the court asked the parties to address Proponents' standing to seek review of the district court's order in light of *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Pet. App. 420a. The Ninth Circuit then certified to the California Supreme Court the question whether, under California law, "the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity." Pet. App. 416a.

In response, the California Supreme Court concluded that "the official proponents of the initiative 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. In so ruling, the court declined to "decide whether the official proponents of an initiative measure possess a particularized interest in the initiative's validity once the measure has been approved by the voters." Pet. App. 351a.

After receiving the California Supreme Court's answer to its certified question, the Ninth Circuit affirmed the district court's decision. On the jurisdictional issue, the court ruled that Proponents had standing to appeal because they "are authorized to represent the People's interest" in upholding Proposition 8. Pet. App. 40a.

Addressing the merits, the Ninth Circuit focused on the "unprecedented" and "unusual" nature of Proposition 8—an initiative that left gay men and lesbians with "the incidents [of marriage] but took away the status and dignity." Pet. App. 53a-54a; *see also* Pet. App. 59a-60a. Although the court of appeals assumed, *arguendo*, the legitimacy of the governmental interests supposedly advanced by Proposition 8, it determined that Proponents had failed to "explain how *rescinding* access to the designation of 'marriage' is rationally related" to any of those interests. Pet. App. 74a. As in *Romer*, the court therefore concluded that "[Proposition 8] was enacted with only the constitutionally illegitimate basis of 'animus toward the class it affects.'" Pet. App. 62a (quoting 517 U.S. at 632). The court of appeals found it unnecessary to decide "the more general questions pre-

sented"—namely, whether Proposition 8 infringes on Plaintiffs' fundamental right to marry, or whether laws that discriminate on the basis of sexual orientation are subject to heightened scrutiny. Pet. App. 94a; *see also* Pet. App. 46a-47a.

SUMMARY OF ARGUMENT

Proposition 8 is an arbitrary, irrational, and discriminatory measure that denies gay men and lesbians their fundamental right to marry in violation of the Due Process and Equal Protection Clauses. The judgment below should be affirmed.

I. As an initial matter, Proponents lack standing to pursue their appeal. Proponents have never contended—and do not contend before this Court—that they would personally suffer any injury if gay men and lesbians were permitted to marry in California. And their mere desire to defend Proposition 8 is insufficient to satisfy the requirements of Article III. *Arizonans*, 520 U.S. at 65.

II. Proposition 8 violates the Due Process Clause because it denies gay men and lesbians their fundamental right to marry without furthering a legitimate—let alone a compelling—state interest.

A. This Court has recognized on more than a dozen occasions that the right to marry is "one of the liberties protected by the Due Process Clause." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974); *see also Loving*, 388 U.S. at 12. The Court has never limited that right to persons willing or able to procreate, *see*, *e.g.*, *Turner v. Safley*, 482 U.S. 78, 96 (1987), but has instead recognized that "the right to marry is of fundamental importance *for all individuals*." *Zablocki*, 434 U.S. at 384 (emphasis added). Indeed, the decision of whom to marry is at

the core of individual autonomy and personal liberty. *See Lawrence*, 539 U.S. at 574.

B. The evidence at trial confirms that liberty, privacy, association, and commitment are defining purposes of marriage. Over time, marriage has shed its attributes of inequality, including race-based restrictions and gender-based distinctions, but its essential character has not changed. Eliminating the final discriminatory feature of California's marriage law—its prohibition on marriage by individuals of the same sex—thus would not require the recognition of a new right, but would instead afford gay men and lesbians access to the fundamental right to marry guaranteed to all persons.

III. Proposition 8 violates the Equal Protection Clause because in denying the right to marry on the basis of sexual orientation and the sex of one's chosen spouse, it prevents gay men and lesbians from marrying, thereby making them "unequal to everyone else." *Romer*, 517 U.S. at 635.

A. Restrictions like Proposition 8 are subject to heightened equal protection scrutiny because marriage is a fundamental right and because gay men and lesbians are a suspect class. Gay men and lesbians meet all of the criteria that this Court traditionally considers in determining suspect-class status. It is undisputed that gay and lesbian individuals have been the victims of a long and reprehensible history of discrimination based on a characteristic that has absolutely no bearing on their ability to contribute to society. That fact alone is sufficient to afford gay men and lesbians heightened equal protection scrutiny. *See Mass. Bd. of Ret.*, 427 U.S. at 313. This conclusion is reinforced by the immutability of sexual orientation and the relative political powerlessness

of gay and lesbian individuals to overcome a deeply engrained pattern and practice of discrimination in this country.

B. Proposition 8 cannot satisfy the requirements of strict scrutiny—or any other standard of constitutional review. Although Proponents proffer several state interests that may have been furthered by the existence of the institution of marriage in the first place and for granting heterosexual couples access to it, they fail to identify a single legitimate state interest that supports *excluding* gay men and lesbians from that institution. While they no longer rely on the Protect Our Children argument they used during the campaign, they instead now principally contend that Proposition 8 is rationally related to the State's interest in "responsible procreation." But denying gay and lesbian individuals the right to marry does not increase the likelihood that opposite-sex couples capable of procreating will decide to get married; nor would permitting gay men and lesbians to marry decrease that likelihood. And it is undisputed that the Constitution protects the right of *all* heterosexual individuals—including the infertile, the elderly, and the incarcerated—to marry irrespective of their ability or desire to procreate. Proposition 8 singles out gay men and lesbians, and them alone, for disfavored treatment.

Nor can Proposition 8 be justified based on voters' fears about the repercussions of allowing individuals of the same sex to marry. The evidence at trial exposed those fears as wholly unsubstantiated. In any event, permitting a tradition of discrimination, or uncertainty about the consequences of eliminating discrimination, to justify that discrimination would make inequality self-perpetuating.

C. The absence of any rational basis for Proposition 8—together with the evidence of anti-gay rhetoric in the Yes on 8 campaign—leads inexorably to the conclusion that Proposition 8 was enacted solely for the purpose of making gay men and lesbians unequal to everyone else. Because a "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest," *Romer*, 517 U.S. at 634 (internal quotation marks omitted; alteration in original), Proposition 8 is unconstitutional.

ARGUMENT

I. PROPONENTS LACK STANDING TO APPEAL.

To invoke the jurisdiction of the federal courts, an appellant must meet the requirements of Article III standing. *See Arizonans*, 520 U.S. at 64-65. Because Proponents cannot satisfy this threshold requirement for appellate jurisdiction, their Ninth Circuit appeal should have been—and this appeal should be—dismissed.

A. Throughout this litigation, Proponents have never once suggested that permitting same-sex couples to marry could harm them—or anyone else—personally. *See*, *e.g.*, Pet. App. 150a-151a; J.A. 307. Proponents' claim of standing therefore rests solely on the California Supreme Court's decision that they "are authorized under California law to appear and assert *the state's interest* in the initiative's validity . . . ." Pet. App. 327a (emphasis added).

That decision, however, does not—and cannot—alter Proponents' inability to meet the "irreducible constitutional minimum" requirements of standing established by Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Vt. Agency*

of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). As this Court has explained, "[s]tanding to defend on appeal in the place of an original defendant . . . demands that the litigant possess a *direct* stake in the outcome" (*Arizonans*, 520 U.S. at 64 (emphasis added; internal quotation marks omitted)), which cannot be satisfied by the invocation of another party's interests. *See*, *e.g.*, *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *Warth*, 422 U.S. at 499.

Further, this Court has already determined that status as an initiative proponent is insufficient to confer Article III standing. *See Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 460 U.S. 1077 (1983); *Arizonans*, 520 U.S. at 66 (expressing "grave doubts" whether initiative proponents have standing to defend an initiative on appeal). And Proponents, who are not public officials, do not have a close relationship with the State like the state legislators did in *Karcher v. May*, 484 U.S. 72, 81-82 (1987). Because Proponents themselves will suffer no judicially cognizable injury if gay men and lesbians are permitted to marry, they have no standing to appeal. *See Diamond v. Charles*, 476 U.S. 54, 68-69 (1986).[1]

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[1] There can be no question, however, that the district court had jurisdiction even though the Attorney General agreed that Proposition 8 was unconstitutional. Such a concession does not deprive a federal court of jurisdiction to redress constitutional injuries. *See INS v. Chadha*, 462 U.S. 919, 939 (1983) ("[It] would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General . . . agreed with the legal arguments asserted by the individual."); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In any event, not all of the parties before

B. Faced with their own lack of standing on appeal, Proponents assert that the district court "lacked remedial jurisdiction to award any relief beyond a default judgment limited to the four named plaintiffs." Prop. Br. 18. But Proponents did not object to the scope of the injunction in the district court and further waived the issue when they failed to raise it in their petition for certiorari. *See Baldwin v. Reese*, 541 U.S. 27, 34 (2004). In addition, if this Court holds that Proponents lack standing to appeal the district court's decision, then they also lack standing to challenge the scope of the district court's injunction.

Nor is Proponents' argument a jurisdictional issue that this Court must address irrespective of waiver or Proponents' lack of standing. *See* Prop. Br. 18 (citing *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). The rule that Proponents invoke—that "the scope of injunctive relief is dictated by the extent of the violation established"—is a waivable "principle[ ] of equity jurisprudence," not a requirement of Article III. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Lewis*, 518 U.S. at 360 n.7 ("Our holding regarding the inappropriateness of systemwide relief for

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[Footnote continued from previous page]

the district court agreed that Proposition 8 was unconstitutional or sought "precisely the same result" from that court. *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 383 (1980) (internal quotation marks omitted). At that stage, Proponents themselves were parties to the proceedings and vigorously argued in defense of Proposition 8's constitutionality. Moreover, the Governor of California, who is charged with executing state law (Cal. Const. art. V, § 1), filed an answer stating that he intended to enforce Proposition 8 until enjoined from doing so. *See* Pet. App. 28a, 331a, 419a. And, in fact, he has continued to enforce Proposition 8 throughout this litigation.

illiterate inmates does not rest upon the application of standing rules . . . ."); *Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753, 765 & n.3 (1994). Article III is satisfied as long as the district court's injunctive relief redresses injuries that Plaintiffs themselves have suffered—which is unquestionably the case here. *Lewis*, 518 U.S. at 357.

In any event, the district court's injunction in this case was entirely appropriate because Proposition 8 imposes an identical injury on all gays and lesbians throughout California—there is no possible non-injurious application of the law. *Contra Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2760 (2010) (injunction overbroad because the Department of Agriculture could have issued a narrower, non-injurious regulation); *Lewis*, 518 U.S. at 360 n.7 ("Our holding . . . [rests] upon the respondents' failure to prove that denials of access to illiterate prisoners pervaded the State's prison system.") (internal quotation marks omitted). The district court therefore was within its power to enjoin enforcement of the amendment statewide. *See Warth*, 422 U.S. at 499 (a court's judgment is proper "even though [it] may benefit others collaterally," so long as the plaintiff has suffered the actual injury being remedied); *see also Craig v. Boren*, 429 U.S. 190, 193-95 (1976) (citing *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)).

II. PROPOSITION 8, BY DENYING GAY MEN AND LESBIANS THE RIGHT TO MARRY, VIOLATES DUE PROCESS.

In more than a dozen cases over the last century, this Court has reaffirmed that the right to marry is "one of the liberties protected by the Due Process Clause," *Cleveland Bd. of Educ.*, 414 U.S. at 639; "es-

sential to the orderly pursuit of happiness by free men," *Loving*, 388 U.S. at 12; and "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).[2] Based on this settled line of precedent, the district court held that Proposition 8 unconstitutionally denies gay men and lesbians the fundamental right to marry. Although the Ninth Circuit perceived it to be unnecessary to address that ruling, this Court can and should affirm on that ground. *See Loving*, 388 U.S. at 12 (striking down anti-miscegenation law on both equal protection and due process grounds).

As the Court noted in *Lawrence*, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances *both* interests." 539 U.S. at 575 (emphasis added). Thus, "[t]o deny [gay and lesbian Americans] th[e] fundamental freedom" to marry would not only be "directly subversive of the principle of equality at the heart of the Fourteenth Amendment," *Loving*, 388 U.S. at 12, but

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[2] *See also Lawrence*, 539 U.S. at 574; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Turner*, 482 U.S. at 95-96; *Zablocki*, 434 U.S. at 384; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971); *Griswold*, 381 U.S. at 486; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Maynard v. Hill*, 125 U.S. 190, 205 (1888). The summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972)—on which Proponents rely (Prop. Br. 27-28)—was issued well before many of these cases, including *Lawrence* and *Turner*, and thus lacks any precedential or persuasive force.

would also deny them "their dignity as free persons." *Lawrence*, 539 U.S. at 567. Because Proposition 8 prevents gay men and lesbians from expressing this most basic aspect of their autonomy and personhood, and is not "narrowly drawn" to further a "compelling state interest[ ]," *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977), it violates due process.

Proponents nonetheless claim that marriage—and thus the fundamental right to marry—excludes same-sex couples as a definitional matter. They contend that "marriage" categorically excludes same-sex couples because society's alleged interest in "responsible procreation and childrearing" is the defining purpose of marriage. Prop. Br. 34. Proponents' newly constructed understanding of the contours, implications, and meaning of marriage conflicts with longstanding controlling precedent from this Court and the overwhelming record evidence in this case.

A. The Right To Marry Is Fundamental For All People.

This Court has characterized the right to marry as one of the most fundamental rights—if not *the* most fundamental right—of an individual. *Loving*, 388 U.S. at 12. The Court has defined marriage as a right of liberty (*Zablocki*, 434 U.S. at 384), privacy (*Griswold*, 381 U.S. at 486), intimate choice (*Lawrence*, 539 U.S. at 574), and association (*M.L.B.*, 519 U.S. at 116). "Marriage is a coming together for better or for worse, hopefully enduring, and intimate *to the degree of being sacred*." *Griswold*, 381 U.S. at 486 (emphasis added). The right "is of fundamental importance *for all individuals*." *Zablocki*, 434 U.S. at 384 (emphasis added).

The right to marry has always been based on, and defined by, the constitutional liberty to select the partner of one's choice. *See generally Loving*, 388 U.S. 1; *Turner*, 482 U.S. 78. As this Court explained in *Lawrence*, "our laws and tradition afford constitutional protection to personal decisions relating to marriage . . . [and] family relationships" because of "the respect the Constitution demands for the autonomy of the person in making these choices"—and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." 539 U.S. at 574.

This Court has never conditioned the right to marry on the ability to procreate. Rather, the Court has expressly recognized that the right to marry extends to individuals not in a position to procreate with their spouse, *see Turner*, 482 U.S. at 95, and that married couples have a fundamental right *not* to procreate. *See Griswold*, 381 U.S. at 485-86. And the Court has held that the liberty interest in an individual's choice of marriage is so fundamental that it prohibits filing fee barriers to divorce—barriers that would seem unobjectionable, or even desirable, if the right to marry were tied to the State's interest in responsible (marital) procreation. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971); *see also* Prop. Br. 37-38 (discussing the adverse effects of "parental divorce" on children).

Further, this Court has expressly distinguished between the right to marry and the right to procreate. In *Turner*, for example, this Court held that incarcerated prisoners—even those with no right to conjugal visits—have a fundamental right to marry because "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including the] expressions

of emotional support and public commitment," the "exercise of religious faith," and the "expression of personal dedication," which "are an important and significant aspect of the marital relationship." 482 U.S. at 95-96. These attributes of the right to marry extend far beyond the limited procreational purpose Proponents advocate. Indeed, *Turner* acknowledged procreation as only *one* among *many* goals of marriage. *Id.* at 96. And it recognized that, while many "inmate marriages are formed in the expectation that they ultimately will be fully consummated," some are not. *Id*.

Similarly, in *Zablocki*, the Court struck down a Wisconsin statute that barred residents with child support obligations from marrying. 434 U.S. at 376-77. The Court distinguished between the right to marry and the separate rights of "procreation, childbirth, child rearing, and family relationships." *Id.* at 386; *see also Carey*, 431 U.S. at 685 (distinguishing between separate rights of "marriage" and "procreation"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, *married or single*, to . . . [decide] whether to bear or beget a child.") (emphasis altered).

Undeterred by this long and consistent line of authority from this Court, Proponents unabashedly contend that their procreative understanding of marriage has been universally "understood and accepted" throughout history. Prop. Br. 35. But "[n]o State marriage statute mentions procreation or even the desire to procreate among its conditions for legal marriage," and "[n]o State requires that heterosexual couples who wish to marry be capable or even desirous of procreation." Amy Doherty, *Constitutional Methodology and Same-Sex Marriage*, 11 J. Con-

temp. Legal Issues 110, 113 (2000); *cf. Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting) (absent "moral disapprobation . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.") (citations and alteration omitted).

In California, for example, "the constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children." *Marriage Cases*, 183 P.3d at 431. Indeed, the California Supreme Court has held "that the right to marry is the right to enter into a relationship that is 'the center of the personal affections that ennoble and enrich human life.'" *Id.* at 432 (citation omitted).

Nor is there any "authority whatsoever to support the proposition that an individual who is physically incapable of bearing children does not possess a fundamental constitutional right to marry." *Marriage Cases*, 183 P.3d at 431. Indeed, many persons become parents through adoption or assisted reproduction and exercise their constitutional rights to marry and raise those children in a recognized family unit. *Id*. Yet Proponents' assertions about marriage—and that is all that they are—would leave adoptive parents and infertile couples without any constitutional protection against a State that prohibits them from marrying.

B. The Trial Record And Factual Findings Establish That "Responsible Procreation" Is Not The Defining Purpose Of Marriage.

Proponents completely disregard the extensive evidence and detailed factual findings of the district court. But that evidence and fact-finding also clearly establish that liberty—not simply "responsible procreation"—is a defining purpose of marriage. The trial record amply supports the district court's finding that "[t]he right to marry has been historically and remains the right to choose a spouse and . . . join together and form a household." Pet. App. 290a. And spouses have never been required to "have an ability or willingness to procreate in order to marry." Pet. App. 290a.

The district court further found that "California, like every other state, has never required that individuals entering a marriage be willing or able to procreate." Pet. App. 211a. Indeed, as Professor Nancy Cott testified, and Proponents did not refute, "[t]here has never been a requirement that a couple produce children in order to have a valid marriage," "people beyond procreative age have always been allowed to marry," and "procreative ability has never been a qualification for marriage." J.A. 410-11. Rather, civil marriage serves society primarily by "creat[ing] stable households, which in turn form the basis of a stable, governable populace." Pet. App. 288a; *see also* Pet. App. 155a (citing J.A. 409).

The trial evidence also demonstrates that not every historical characteristic of marriage is core to the purpose or definition of marriage. Over time, marriage has "shed its attributes of inequality"—including race-based restrictions and gender-based

distinctions such as coverture—and "has been altered to adjust to changing circumstances so that it remains a very alive and vigorous institution today." J.A. 435. In "as many as 41 states and territories," including California, laws once placed restrictions on "marriage between a white person and a person of color." J.A. 415. Racially restrictive marriage laws "prevented individuals from having complete choice on whom they married, in a way that designated some groups as less worthy than other groups." J.A. 424. Like defenders of same-sex marriage bans, defenders of race-based restrictions on the right to marry argued that these laws were "naturally-based and God's plan"; "people who supported [racially restrictive marriage laws] saw these as very important definitional features of who could and should marry, and who could not and should not." J.A. 425-26.

"When [this] Court invalidated race restrictions in *Loving*, the definition of the right to marry did not change." Pet. App. 289a (citing *Loving*, 388 U.S. at 12). Rather, "the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry." Pet. App. 289a.

The only trial testimony presented by Proponents on the history and purpose of marriage was that of think-tank founder David Blankenhorn, who conceded that the willingness or ability to procreate or consummate a relationship is not a precondition to marriage. *See* J.A. 916-17. Based on this unequivocal and uncontradicted evidentiary record, the district court therefore quite correctly found that the purposes of marriage go far beyond procreation, and include "the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based

on their own feelings about one another and to join in an economic partnership and support one another and any dependents." Pet. App. 220a-221a (citing J.A. 395-96, 399).

This is precisely the venerated, officially sanctioned relationship that Plaintiffs seek to enter. *See*, *e.g.*, Pet. App. 154a (Plaintiff "Zarrillo wishes to marry Katami because marriage has a 'special meaning' that would alter their relationships with family and others.") (citing J.A. 333); J.A. 341 (Plaintiff Katami); J.A. 387 (Plaintiff Stier). And it is precisely the relationship that Proposition 8 forbids. For that reason, Proposition 8 can withstand constitutional scrutiny only if it is "narrowly drawn" to serve a "compelling state interest[ ]." *Carey*, 431 U.S. at 686; *see also* Pet. App. 294a-295a. But, as explained below, Proponents do not come remotely close to establishing a permissible basis for denying gay men and lesbians this essential aspect of their autonomy, personhood, and freedom. *See infra* Parts III.B, C. Because Proposition 8 denies Plaintiffs a fundamental right without a compelling—or even legitimate—or even rational—reason, it is unconstitutional under the Due Process Clause.

III. PROPOSITION 8, BY DENYING GAY MEN AND LESBIANS THE RIGHT TO MARRY, VIOLATES EQUAL PROTECTION.

Proposition 8 also violates equal protection, as it is antithetical to the "principles of equality" on which this "Nation . . . prides itself." *Plyler v. Doe*, 457 U.S. 202, 219 (1982). It creates a permanent "underclass" of hundreds of thousands of gay and lesbian Californians, *id.*, who are denied the fundamental right to marry available to all other Californians simply because a majority of voters deems gay and lesbian re-

lationships inferior, morally reprehensible, religiously unacceptable, or simply not "okay." With the full authority of the State behind it, Proposition 8 sends a clear and powerful message to gay men and lesbians: You are not good enough to marry. Your loving relationship is not equal to or respected enough to qualify to be called a marriage. As Plaintiff Kris Perry explained at trial, "if Prop. 8 were undone," and gay and lesbian "kids . . . could never know what this felt like, then . . . their entire lives would be on a higher arc. They would live with a higher sense of themselves that would improve the quality of their entire life." J.A. 377; *see also* Pet. App. 248a-249a; J.A. 912.

A. Discrimination On The Basis Of Sexual Orientation Triggers Heightened Scrutiny.

As an initial matter, because Proposition 8 creates unequal access to the fundamental right to marry, *see supra* Part II, it violates the Equal Protection Clause unless Proponents can demonstrate that it is narrowly tailored to further a compelling state interest. *See*, *e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632-33 (1969); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality).

In addition, Proposition 8 discriminates against gay men and lesbians, a group that has experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Ret.*, 427 U.S. at 313 (internal quotation marks omitted). The *undisputed* fact that gay men and lesbians have been subjected to a history of discrimination based on a trait that bears

no relationship to their ability to contribute to society is sufficient, in and of itself, to render classifications based on sexual orientation "suspect" and to give rise to heightened scrutiny.

Classifications based on sexual orientation also trigger heightened scrutiny because sexual orientation is "immutable" or beyond the group member's control, *see Lyng v. Castillo*, 477 U.S. 635, 638 (1986), and because gays and lesbians are "a minority" that is "politically powerless" to prevent discrimination by the majority. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (internal quotation marks omitted).[3] Indeed, *all four* factors recently led the President and Attorney General to conclude that "classifications based on sexual orientation should be subject to a more heightened standard of scrutiny." Letter from Eric H. Holder Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011) ("AG Letter") at 5. This Court should reach the same conclusion.

History of Discrimination. Proponents do not—and cannot—dispute that gay men and lesbians have been subjected to a history of pervasive and intolerable discrimination. *See* J.A. 924. This undisputed history of public and private discrimination has been recognized by numerous courts, including this Court. *See*, *e.g.*, *Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."); *Kerri-*

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[3] This Court has not considered these additional factors in every case (*see*, *e.g.*, *Mass. Bd. of Ret.*, 427 U.S. at 313), and has applied heightened scrutiny in cases where those factors were not present. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).

gan v. Comm'r of Pub. Health, 957 A.2d 407, 434 (Conn. 2008). And it has been acknowledged by the Government. *See* AG Letter at 2 ("There is, regrettably, a significant history of purposeful discrimination against gay and lesbian people . . . ."). In fact, the Government has accepted responsibility for contributing to such discrimination. *See* Br. for the United States at 16, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335, 12-2435) ("U.S. Windsor Br.") ("The federal government has played a significant and regrettable role in the history of discrimination against gays and lesbian individuals.").

Further, the evidence at trial confirms, beyond question, that gay men and lesbians have faced and continue to face severe discrimination based on naked prejudice and unfounded stereotypes. *See* Pet. App. 264a-279a. As one expert testified, gay men and lesbians "have experienced widespread and acute discrimination from both public and private authorities over the course of the 20th century." J.A. 438 (Chauncey). Gay men and lesbians have been banned from federal employment, J.A. Exhs. 192-99, excluded from public accommodations, J.A. 445, denied child custody and visitation rights, U.S. Windsor Br. at 21, categorically denied entry into the United States as noncitizens, *id.* at 19, and, until last year, were barred from serving in the military unless they concealed their sexual orientation, J.A. 450-55, *i.e.*, denied who they were. Even the IRS, in denying tax exempt status to Pride Foundation, declared the goal of advancing the welfare of the gay community to be "perverted and deviate behavior" and "contrary to public policy." J.A. Exhs. 203-04.

Such pervasive discrimination continues to this day. *See* Pet. App. 266a-268a; *see also* J.A. 504. In

29 States, it is legal to fire an employee and deny housing on the basis of sexual orientation. J.A. 743. Religious and political leaders continue to condemn homosexual conduct as immoral. *See Lawrence*, 539 U.S. at 571; *see also* Pet. App. 272a. Gay men and lesbians continue to be stereotyped as "disease vectors" and "child molesters who recruit young children into homosexuality," even though "[n]o evidence supports these stereotypes." Pet. App. 268a. For example, official proponent William Tam—one of the people who put Proposition 8 on the ballot—posted a letter on his website warning voters that, after gay men and lesbians secured the right to marry, they would continue to pursue their agenda, including "legaliz[ing] having sex with children," and that, without Proposition 8, "[m]ore children would become homosexuals." J.A. Exh. 103. And, in recent years, "there has actually been an increase in violence directed toward gay men and lesbians," to the point that there "is simply no other person in society who endures the likelihood of being harmed as a consequence of their identity than a gay man or lesbian." Pet. App. 267a; *see also id.* (in 2008, hate crimes motivated by sexual orientation comprised 71% of all hate-motivated murders and 55% of all hate-motivated rapes).

Ability to Contribute to Society. It is equally clear and uncontroverted that an individual's sexual orientation bears no relation to his or her ability to perform or contribute to society. Once again, Proponents admit as much. *See* J.A. Exh. 121 ("same-sex sexual orientation does not result in any impairment in judgment or general social and vocational capabilities"). And their admission is consistent with extensive, unrefuted evidence that gay men and lesbians make meaningful contributions to all aspects of soci-

ety without the slightest impairment attributable to their sexual orientation. *See*, *e.g.*, J.A. 827 (Herek: "There's no inherent relationship between a person's sexual orientation and their ability to be productive and contributing members of society"); AG Letter at 3; U.S. Windsor Br. at 31-32.

Immutability. Based on the extensive trial record before it, the district court found that "[i]ndividuals do not generally choose their sexual orientation" and that "[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation." Pet. App. 231a; *see also* Pet. App. 158a-159a; Pet. App. 232a ("[M]any people . . . most likely because of societal stigma, wanted very much to change their sexual orientation and were not able to do so.").

Even if sexual orientation could shift over time for some individuals, as Proponents, without the benefit of evidence, argued below, that would not affect this Court's immutability analysis. *Cf. Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Alito, J.) (defining an "immutable characteristic" as one that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences") (internal quotation marks omitted). As the Government has explained, "[s]exual orientation . . . is fundamental to one's identity, and gay and lesbian individuals should not be required to abandon it to gain access to fundamental rights guaranteed to all people." U.S. Windsor Br. at 25 (internal quotation marks omitted).

Moreover, even if a minority of gay men and lesbians may report that their sexuality experienced

changes over their lifetime, that does not establish that they *chose*, or could choose, to make such a change. To the contrary, Ryan Kendall testified at trial about the devastating effects of the "reversal therapy" that his parents forced him to attend as a juvenile. *See* J.A. 734-35 ("I realized, at one point, that if I didn't stop going [to reversal therapy] . . . I would have probably killed myself."). Nor would evidence of change in the sexual orientation of a *small minority* of gay men and lesbians justify denying the protection of heightened scrutiny to the *vast majority* of gay men and lesbians who are "consistent in self-identification, behavior, and attraction throughout their adult lives." Pet. App. 227a.

The district court also properly rejected Proponents' argument that sexual orientation is too "complex" and "amorphous" to warrant heightened scrutiny as refuted by the evidence. *See* Pet. App. 228a-230a. This Court had no difficulty treating gays and lesbians as an identifiable class in *Romer*. *See* 517 U.S. at 633, 635; *see also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("[o]ur decisions have declined to distinguish between [homosexual] status and conduct"). And the Proposition 8 campaign itself, and its many references to "homosexuals," "assumed voters understood the existence of homosexuals as individuals distinct from heterosexuals." Pet. App. 230a.

Relative Political Powerlessness. Plaintiffs presented extensive evidence at trial regarding the political powerlessness of gays and lesbians, including their repeated inability to eliminate significant statutory disadvantages at the state and federal level. *See*, *e.g.*, J.A. 738-764. For example, gay and lesbian individuals have been unable to secure federal legislation to protect themselves from discrimination

in housing, employment, or public accommodations; and they lack similar protections in 29 States, including seven of the ten largest. J.A. 743. Moreover, "there is no group in American society who has been targeted by ballot initiatives more than gays and lesbians." J.A. 750. Same-sex marriage aside, gays and lesbians have lost approximately 70% of initiatives pertaining to other issues in the last 20 years—typically initiatives to pass, or prevent the repeal of, basic antidiscrimination protections that the majority and other minority groups already enjoy. *See* J.A. 741, 750. And voters nationwide have used initiatives or referenda to repeal or prohibit marriage rights for gay and lesbian individuals *34 times*; in contrast, such measures have been defeated just five times—and one of those victories was undone by voters in the next election cycle. J.A. 752.

In addition, there remain large and influential segments of the population, including some of the proponents of Proposition 8, who consider gays and lesbians immoral and unworthy of the concern and respect extended to other citizens—so much so that "elected officials [feel] that they can say bad things about gays and lesbians, and that could be politically advantageous to them because, indeed, many parts of the electorate feel the same way." J.A. 756. Few, if any, other minority groups in this country can claim that dubious distinction.

To be sure, gays and lesbians have achieved limited recent success at the ballot box in some areas of the country. *See* Ned Martel, *For a Change, Gay Rights Activists Welcome Election Day Results*, Wash. Post, Nov. 8, 2012, at A38 (describing victories in Maryland, Maine, Minnesota, and Washington, but noting that "North Carolina voters delivered another drubbing in a string of 30-plus statewide losses

for gay-marriage activists"). Those recent results, however, do not alter the discrimination that gays and lesbians have faced, and continue to face, nationwide—and do not affect the applicability of heightened scrutiny to laws targeting gays and lesbians. *See Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973) (plurality) (even though "the position of women in America has improved markedly in recent decades," there is a "long and unfortunate history of sex discrimination"). Indeed, women had achieved far more legislative success when this Court first declared gender classifications to be subject to heightened scrutiny in 1973, including the 1963 Equal Pay Act, *see* 29 U.S.C. § 206(d), and the 1964 Civil Rights Act, *see*, *e.g.*, 42 U.S.C. § 2000e-2.

Moreover, the fact that the current Administration and a narrow majority in a handful of States have expressed support for marriage equality is no guarantee that a future Administration or populace will not target gays and lesbians for discrimination. *See Romer*, 517 U.S. at 623-24 (describing the anti-discrimination ordinances enacted by several Colorado municipalities, which were then repealed by statewide referendum). In fact, in 15 of 21 referenda held on the sole question whether an existing law or executive order prohibiting sexual orientation discrimination should be repealed, a majority voted for repeal. *See* U.S. Windsor Br. at 28. Thus, as much as any other minority group, gay men and lesbians require the protections of heightened scrutiny to shield them from the often-discriminatory whims of the political process.

B. Laws That Prohibit Gay Men And Lesbians From Marrying Cannot Survive Rational Basis Review, Let Alone Heightened Scrutiny.

Proponents make no serious attempt to defend Proposition 8 under heightened scrutiny, insisting instead that rational basis review must apply to any challenge to Proposition 8's enshrinement of inequality. But Proposition 8 fails even this most relaxed level of constitutional scrutiny.

As an initial matter, Proponents again frame the wrong inquiry, asking whether it is rational for a State to support opposite-sex marriage (Prop. Br. 28-31) rather than whether it was rational for California to *exclude* same-sex couples from marriage. When the inquiry is properly framed, the Ninth Circuit was of course correct that Proposition 8—which "has no practical effect except to strip" gay men and lesbians of a preexisting right to marry, Pet. App. 59a—is irrational. Proponents quote this Court as "'reject[ing] the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede.'" Prop. Br. 19 (quoting *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982)). But Plaintiffs do not dispute that contention; the problem is that Proponents ignore the important corollary to that rule: *Crawford*, even before *Romer*, recognized that "if the purpose of repealing legislation is to disadvantage a . . . minority, the repeal is unconstitutional for this reason." 458 U.S. at 539 n.21; *see also Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (invalidating a voter-enacted California constitutional provision that extinguished state-law protections that minorities had previously possessed against housing discrimination). Moreover, unlike Proposition 8, the amendment at issue in *Crawford*

did not reduce or eliminate the substantive rights of any particular group, but "simply remove[d] one *means* of achieving the state-created right to desegregated education." 458 U.S. at 544 (emphasis added).

This Court's precedent makes clear that rational basis review does not mean no review at all. Government action that discriminates against a discrete class of citizens must "bear[ ] a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. The State's supposed rationales "must find some footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 509 U.S. 312, 321 (1993), and must be ones that could "reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). And, of course, "'a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer*, 517 U.S. at 634 (alteration in original) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

Further, even if there is a legitimate purpose that the State conceivably might have adopted in enacting the law at issue, the Equal Protection Clause requires that the State's disparate treatment bear at least a rational relationship to the governmental objective. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). A State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Id*. at 447. By "insist[ing] on knowing the relation between the classification adopted and the object to be attained," courts "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 632, 633.

Proponents objected to a trial in this case and, of course, deride the district court's decision to develop a factual record regarding the purpose and effects of Proposition 8, Prop. Br. 52, while essentially ignoring every one of the factual findings resulting from the trial. But the resolution of these disputed factual issues through the trial process is consistent with a long line of constitutional cases. *See*, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 523 (1996); *Plyler*, 457 U.S. at 207; *Brown*, 347 U.S. at 494 n.10; *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 193 (5th Cir. 1984), *aff'd in part*, 473 U.S. 432.[4] Measured against the factual record that the district court compiled, Proponents' hypothesized rationales for Proposition 8 disintegrate.[5]

Responsible Procreation. Having abandoned at trial the main Protect Our Children argument they made during the Proposition 8 campaign, Pro-

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[4] This Court's statement in *FCC v. Beach Communications, Inc.* that "a legislative choice is not subject to courtroom fact-finding" is not to the contrary. 508 U.S. 307, 315 (1993). *Beach* itself explains that its statement was just "other words" for the uncontroversial proposition that, to sustain its classification under rational basis review, the government is not required to adduce "legislative facts explaining the distinction on the record." *Id*. (internal quotation marks and alteration omitted). And this Court's subsequent decision in *Heller v. Doe* (which itself quotes *Beach*'s statement on "courtroom factfinding," 509 U.S. at 320) makes clear that a State's classification "must find some footing in the realities of the subject." *Id.* at 321.

[5] The district court's findings are entitled to deference on appeal. *See* Fed. R. Civ. P. 52(a)(6); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (the clearly-erroneous standard "does not make exceptions or purport to exclude certain categories of factual findings [or] divide facts into categories"); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991).

ponents' primary argument in this Court—that denying gay men and lesbians their right to marry somehow "furthers society's vital interests in responsible procreation and childrearing" (Prop. Br. 36)—is one that consumed very little of their attention at trial. Proponents now contend that prohibiting *same-sex* couples from marrying is consonant with the State's desire to channel those *opposite-sex* couples who might beget children "unintentionally" into marital family units. *Id.* at 41. Although they make what some might consider a superficially plausible argument for *including* heterosexual couples in the marriage institution, Proponents offer no rational basis whatsoever for *excluding* gay couples from that institution.[6]

Even applying a standard of mere rationality, Proponents' non-sequitur argument cannot sustain Proposition 8. In the words of the court of appeals,

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[6] Rather than rely on witnesses at trial, who would have been exposed to cross-examination, Proponents now rely on historical writings by dozens of philosophers, sociologists, and political scientists—from Locke to Blackstone, Montesquieu to Kingsley Davis (a sociologist who advocated "zero population growth" while fathering four children with three different women, including a son at age 79)—to support their view that marriage is suited only to opposite-sex couples. *See* Prop. Br. 31-35. None of those authorities, however—not one—expresses an opinion about same-sex marriage or argues that allowing gay men and lesbians to marry would harm the institution. In fact, to provide but one example, Blackstone enumerates the four "disabilities" that render marriage legally void *ab initio*—(1) prior marriage to another living spouse (polygamy), (2) want of age, (3) want of consent of parents or guardians, and (4) want of reason—and touches upon interracial marriage, a servant's marrying without consent of his or her master, and other illegal marriages, but does not even mention same-sex marriage. 1 William Blackstone, *Commentaries* 424-28.

"There is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging California's opposite-sex couples to procreate more responsibly." Pet. App. 75a. And, of course, no one testified to this assertion at trial.

1. As authoritatively construed by the California Supreme Court, Proposition 8 does one thing and one thing only: It "eliminates the ability of same-sex couples to enter into an official relationship designated 'marriage.'" *Strauss*, 207 P.3d at 77. Proponents suggest no reason to believe—indeed, they make no argument at all—that prohibiting same-sex couples from entering relationships designated "marriage" will make it more likely that heterosexual couples in California will marry.

Proponents instead argue that, under rational basis review, they *need not* show that Proposition 8 furthers their proffered interest in seeing heterosexual couples of childbearing capacity marry. Rational basis review, Proponents contend, permits a State to "'dr[aw] a line around those groups'" not "'pertinent to its objective'" and exclude them from a state-conferred benefit—here, the "special recognition, encouragement, and support" of a state-recognized marriage—even though excluding the group serves no purpose at all. Prop. Br. 42, 45 (quoting *Vance*, 440 U.S. at 109). That is incorrect.

As an initial matter, this Court's cases upholding "line-drawing" exercises under rational basis review all have been premised on the fundamental truth that where resources of the State are scarce, "some line is essential, [and] any line must produce some harsh and apparently arbitrary consequences." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (Medicare

benefits); *see also U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (railroad retirement benefits); *Vance*, 440 U.S. at 109 (mandatory retirement from government employment); *Johnson v. Robison*, 415 U.S. 361, 383 (1974) (veterans' educational benefits). Marriage licenses, however, are not remotely a scarce commodity. Because limitations on marriage licenses are not essential or inevitable, they must advance some legitimate objective.

But Proponents' argument fails even on its own terms because "the line" Proposition 8 "draws" bears no relationship whatsoever to Proponents' stated objective of tying marriage to procreation. There are many classes of heterosexual persons who cannot procreate unintentionally, including the old, the infertile, and the incarcerated. And there are still other classes of heterosexual persons who might have the capacity to procreate, but who have no desire to do so. *All* of these classes of heterosexual persons are as unlikely to procreate by accident as a same-sex couple, yet Proposition 8 is concerned with *none* of them. Proposition 8 targets gay men and lesbians for exclusion and them alone.

Sometimes, a "means of pursuing [an] objective" can be "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Romer*, 517 U.S. at 633 (holding that Amendment 2 "confounds" the "normal process of judicial review" under rational basis scrutiny because it is "at once too narrow and too broad"). This is not a question of an enactment having merely an "imperfect fit between means and ends" or drawing a line that lacks "mathematical nicety." *Heller*, 509 U.S. at 321 (internal quotation marks omitted). If Proposition 8 is intended to reserve the "special recognition"

of marriage for couples that can procreate "by accident" (an argument not presented to California voters, J.A. Exhs. 52-57, 71-73), it "ma[k]e[s] no sense in light of how [it] treat[s] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001).

Further, even if same-sex couples are somehow different from infertile or incarcerated heterosexual couples, any such difference is "irrelevant unless [same-sex couples] would threaten [Proponents' interest] in a way that [infertile heterosexual couples] would not." *Cleburne*, 473 U.S. at 448. Same-sex couples pose no *unique* threat to Proponents' effort to channel instances of accidental procreation into marriage, and thus the same-sex nature of the union is not a "rational[ ] justif[ication]" for singling them out for disfavored treatment. *Id.* at 450.

Ironically, the surest and most direct impact of Proposition 8 on children is not to increase the likelihood that they will be raised in stable and enduring family units, but, instead, as the district court found, to make it "*less* likely that California children will be raised in stable households" by reducing the number of families who can be married. Pet. App. 308a (emphasis added). And because Proponents acknowledge "the undisputed truth that children suffer when procreation and childrearing take place outside stable family units," Prop. Br. 37, they must also acknowledge that the undeniable effect of Proposition 8 is to cause "suffer[ing]" among the nearly 40,000 children in California being raised by gay and lesbian couples. *See* Pet. App. 238a. Indeed, Proponents' principal expert testified that "adopting same-sex marriage would be likely to improve the well-being of gay and lesbian households and their children." J.A. 903 (Blankenhorn). By categorically

denying all those children the benefits of marriage, Proposition 8 reveals itself to be not merely "imprecise," but "wholly without any rational basis." *Moreno*, 413 U.S. at 538.

2. To the extent Proponents and their *amici* are asserting that Proposition 8 furthers a purported interest in raising children in what Proponents have deemed to be the "optimal social structure" for child development (Prop. Br. 37)—"that children will be born to and raised by the mothers and fathers who brought them into the world" (*id*. at 36)—that, too, fails even the most cursory scrutiny. As the California Supreme Court has explained, the State's "current policies and conduct . . . recognize that gay individuals are fully capable of . . . responsibly caring for and raising children." *Marriage Cases*, 183 P.3d at 428. California law not only permits gay men and lesbians to raise children, but the California Supreme Court has also recognized that, under the state constitution, it is their "basic civil right of personal autonomy and liberty" to do so—a right that they enjoy on the same terms and to the same extent as heterosexual persons. *Id*. at 429.

In accordance with that constitutional command, the California Legislature has enacted some of the Nation's most progressive gay-rights protections, broadly prohibiting any discrimination in any business's provision of services on the basis of sexual orientation, *see* Cal. Civ. Code § 51, and specifically prohibiting discrimination against foster parents or adoptive parents on the basis of sexual orientation, *see* Cal. Welf. & Inst. Code § 16013(a). Proposition 8 diminished none of these protections. *See Strauss*, 207 P.3d at 61.

Moreover, Proponents' view has no "footing in the realities" of parenting, as the evidence before the district court overwhelmingly demonstrated. *Heller*, 509 U.S. at 321. In fact, the district court squarely and unequivocally found 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." Pet. App. 263a. Proponents offered no evidence to the contrary.

Thus, in suggesting that Proposition 8 could be predicated on a belief that heterosexual couples create an "optimal" environment for childrearing that gay and lesbian couples cannot, Proponents ask this Court to foist upon the State a rationale that its robust antidiscrimination laws and, indeed, its constitution, reject. For this reason alone, Proponents' "optimal social structure" rationale is not one the State possibly could "conceive[ ] to be true," *Vance*, 440 U.S. at 111, and thus cannot support Proposition 8.

Proceeding With Caution. Proponents' second proffered justification for depriving gay men and lesbians of their right to marry is the purported interest in "proceed[ing] with caution," Prop. Br. 49, which supposedly will forestall the possibility of "long-term social consequences" from allowing gay men and lesbians equal access to marriage. *Id.* at 51. More specifically, Proponents speculate that marriage equality might sever civil marriage from its "traditional [procreative] purposes," resulting in a corrosion of marital norms and ultimately social devaluation of marriage as an institution. *Id.* at 52-53.

1. It bears noting at the outset that Proponents are not proffering as a justification a *factually supported* belief that permitting gay men and lesbians to marry is likely to cause the parade of horribles their

brief conjures. While that was their argument during the campaign and perhaps even at the outset of this case, that changed dramatically as this litigation progressed. Indeed, when the district court asked their counsel point blank what harm would come to opposite-sex married couples if gay and lesbian couples could marry, Proponents' counsel mustered only "I don't know. I don't know." Pet. App. 151a; *see also* J.A. 307.[7]

Moreover, Proponents presented no witness who discussed data or studies tending to show that permitting gay men and lesbians to marry harms the institution of marriage. Proponents' "deinstitutionalization" expert, David Blankenhorn, had not even seen a seminal 2009 study that empirically tested his theory of deinstitutionalization—a study that concluded that "laws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women." Pet. App. 194a (internal quotation marks omitted). Mr. Blankenhorn offered "absolutely no explanation why manifestations of the deinstitutionalization of marriage would be exacerbated (and not, for example, ameliorated) by the presence of marriage for same-sex couples." Pet. App. 195a. In fact, he declared during his direct testimony that "heterosexuals . . . did the deinstitutionalizing" through the growing prevalence of divorce, nonmarital cohabitation, and other factors. J.A. 896.

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[7] Counsel later stated that he regretted those words. J.A. 928-929. But he did not—and could not—answer the question differently.

In the absence of any factually supported belief that marriage equality would have negative effects on society, Proponents have nothing but a *theory*—unsupported by empirical evidence or other facts—that marriage equality *might* have negative effects. *See* Prop. Br. 55 ("[T]he ultimate outcome of redefining marriage cannot yet be foreseen with confidence from our current vantage point."). The question is whether that theory constitutes a basis for perpetuating inequality. For at least two reasons, it does not.

First, Proponents' unsubstantiated fear that negative externalities might flow from marriage equality fails to come to grips with the fact that, before Proposition 8 was enacted, some 18,000 same-sex couples were married in California, and those marriages remain valid and recognized today. *Strauss*, 207 P.3d at 121-22. Even beyond that, California has among the most robust legal protections for same-sex couples in the Nation, providing them with all the rights, incidents, and benefits of marriage under state law, save the designation of their relationships as "marriages." *Marriage Cases*, 183 P.3d at 434-35. Yet, despite the thousands of instances in which California has distinguished between marriage (and its incidents) and its purported "traditional procreative purposes," Proponents do not even suggest that the purported "deinstitutionalization" of marriage is occurring more rapidly in California than in other States. They submitted not one affidavit—not even an unverified allegation—that a single resident of California either was less likely to get married or viewed his or her marriage as less valuable or less stable because California had extended some measure of marriage equality to same-sex couples.

In fact, in the five States that were first to allow same-sex marriage, "divorce rates following legalization have been lower on average than the years preceding it, even as the national divorce rates grew." Chris Kirk & Hanna Rosin, *Does Gay Marriage Destroy Marriage?: A Look at the Data*, Slate (May 23, 2012, 8:00 AM), http://www.slate.com/articles/double_x/doublex/2012/05/does_gay_marriage_affect_marriage_or_divorce_rates_.html. And Massachusetts, the State with the longest track record on same-sex marriage, has the third lowest divorce rate in the Nation. *Divorce Rates by State*, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf (last visited Feb. 20, 2013).

That complete failure of proof by Proponents is accurately reflected in the district court's factual finding that "[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages." Pet. App. 245a. The Ninth Circuit agreed, holding that "the argument that withdrawing the designation of 'marriage' from same-sex couples could on its own promote the strength or stability of opposite-sex marital relationships lacks any such footing in reality." Pet. App. 78a. Against the background of California's short, but entirely uneventful, experience with providing marriage rights to same-sex couples, these conclusions are based upon ample, uncontradicted evidence and wholly unassailable.

Second, and perhaps more importantly, if Proponents are correct that an unsubstantiated fear of negative externalities of *equality* is sufficient to justify *inequality*, then discrimination is self-justifying. *See Cleburne*, 473 U.S. at 448 ("mere negative atti-

tudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for" differential treatment). And the more valued the institution from which a class is excluded—which is to say, the more injurious the inequality—then the stronger the self-justification for the inequality becomes. On this view, in *Moreno*, the mere articulation of a *fear* that unrelated persons living in a single household might be fraudsters would have been sufficient to dispose of the equal protection attack on the statute excluding them from Food Stamps benefits. *But see* 413 U.S. at 535-37. And in *Romer*, the actually-stated fear that gay men and lesbians might flood legislatures and city councils with demands for antidiscrimination laws would have been sufficient to sustain Colorado's Amendment 2. *But see* 517 U.S. at 635.

It cannot be the law that public concern about equal treatment itself can justify a denial of equal treatment. *See Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) ("[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."). If it were, then in Little Rock in 1958, the "drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school 'off limits' to colored students" itself could have been enough to justify the continuation of segregation. *Cooper v. Aaron*, 358 U.S. 1, 9 (1958). Of course, it was not. Nor could it be, given the promise of the Equal Protection Clause "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per

curiam); *see also Buchanan v. Warley*, 245 U.S. 60, 81 (1917).

In any event, by enacting Proposition 8, "the People of California" did *not* simply opt to "proceed with caution when considering a fundamental change to the institution of marriage." Prop. Br. 49. Rather, they upended the status quo by enshrining a blanket prohibition on same-sex marriage in the State's charter, preventing the legislature from authorizing same-sex unions. As the court of appeals concluded, "there could be no rational connection between the asserted purpose of '*proceeding* with caution' and the enactment of an absolute ban, unlimited in time, on same-sex marriage in the state constitution." Pet. App. 79a. Proponents' "proceed-with-caution" justification therefore fails on its own terms.

2. Grasping for some justification for Proposition 8, Proponents fall back on the claim that the tradition of restricting marriage to opposite-sex couples is itself a rational justification for continuing to do so. *See* Prop. Br. 6 ("[A] social institution that has prevailed continuously in our history and traditions . . . can justly be said to be rational *per se*."); *see also id.* at 50. It is beyond peradventure, however, that a tradition of discrimination—no matter how continuous or longstanding—cannot justify the perpetual marginalization and exclusion of a minority group. *See Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (internal quotation marks omitted). Indeed, relying on tradition to justify state-sanctioned inequality has an unfortunate pedigree. *See*, *e.g.*, *Plessy*, 163 U.S. at 550-51 (upholding segregation based on "the established usages, customs and traditions of the people").

As this Court recently explained, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579. And "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller*, 509 U.S. at 326-27; *see also Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("the antiquity of a practice" does not "insulate[ ] it from constitutional attack").

Democratic Self-Governance. Finally, Proponents proclaim that Proposition 8 survives constitutional scrutiny because it was enacted through the democratic process and therefore reflects the "will of the people." Prop. Br. 56 (internal quotation marks omitted).

Needless to say, Proponents have it backwards. "[T]he judiciary's role under the Equal Protection Clause is to protect discrete and insular minorities from majoritarian prejudice or indifference," not to yield to the majority's preference. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 495 (1989) (internal quotation marks omitted); *see also The Federalist No. 78*, at 428 (Alexander Hamilton) (E.H. Scott ed., 1898) ("This independence of the Judges is equally requisite to guard the Constitution and the rights of individuals, from . . . serious oppressions of the minor party in the community."). Although our federal system enables States, in many contexts, to serve as laboratories of democracy, *see* Prop. Br. 60 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), our Constitution does not permit States "the power to experiment with the fundamental liberties of citizens." *Griswold*, 381 U.S. at 496 (Goldberg, J., concurring) (internal quotation marks omitted). "[N]either the length of time

a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny." *Bowers v. Hardwick*, 478 U.S. 186, 210-11 (1986) (Blackmun, J., dissenting). If anything, "[i]t is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of" gays and lesbians, even when those rights "upset the majority." *Id.*[8]

C. Proposition 8 Is Unconstitutional Because It Was Motivated By A Bare Desire To Make Gay Men And Lesbians Unequal To Everyone Else.

The absence of any *rational* justification for depriving gay men and lesbians of their right to marry, and marking their relationships as inferior to those of heterosexual couples, leads inexorably to the conclusion that Proposition 8's principal purpose was to advance the majority's moral disapproval of gay rela-

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[8] Proponents' *amici* are equally unsuccessful in their efforts to identify a rational basis for Proposition 8. *Amicus* United States Conference of Catholic Bishops ("USCCB"), for example, contends that Proposition 8 is rationally related to the State's interest in protecting religious liberties, arguing that religious groups will face liability under California antidiscrimination laws if they distinguish between married couples of the opposite sex and married couples of the same sex. USCCB Br. 21-24. Those fears are unfounded. Any such application of California law would raise serious constitutional concerns under the Free Exercise Clause of the First Amendment. And the California Supreme Court has already determined as a matter of state law that "no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs." *Marriage Cases*, 183 P.3d at 451-52.

tionships. As the district court held, that conclusion is "amply supported by evidence in the record," Pet. App. 312a, including campaign materials that "relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships." Pet. App. 284a. The Yes on 8 campaign, for example, publicly argued that, "if we have same-sex marriage legalized, it's really giving implicitly our political blessing to this thing. . . . *It's an affirmation that it's just as good. And then we're going to have this society that eventually is going to come to believe it*." J.A. Exhs. 160-61 (emphasis added). Some of the campaign materials went so far as to suggest that Proposition 8 was necessary to protect children from gay men and lesbians themselves, and to prevent children from becoming gay. *See*, *e.g.*, J.A. Exhs. 90, 103, 169.

Even Proponents' principal expert witness—the *only* witness who purported to provide any rational basis for Proposition 8—recently announced his support for marriage equality and acknowledged that "to [his] deep regret, much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus." David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. Times, June 22, 2012. Such unvarnished discrimination is unconstitutional even when based on sincerely held and widely shared moral beliefs. *See Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (internal quotation marks omitted); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Of course, this does not mean that every voter who supported Proposition 8 was motivated by malice or hostility toward gay men and lesbians—although, to be sure, some of the campaign messages reflected and plainly sought to inspire those feelings. "Prejudice . . . rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

But, whatever the reason that voters supported Proposition 8, the fact remains that it embodies an irrational and discriminatory classification that denies gay men and lesbians the fundamental right to marry enjoyed by all other citizens. *See Romer*, 517 U.S. at 634; *Crawford*, 458 U.S. at 539 n.21. That reason, standing alone, is sufficient to condemn Proposition 8 as unconstitutional.

CONCLUSION

Because of their sexual orientation—a characteristic with which they were born and which they cannot change—Plaintiffs and hundreds of thousands of gay men and lesbians in California and across the country are being excluded from one of life's most precious relationships. They may not marry the person they love, the person with whom they wish to partner in building a family and with whom they wish to share their future and their most intimate and private dreams. Although opening to them participation in the unique and immensely valuable institution of marriage will not diminish the value or status of marriage for heterosexuals, withholding it causes infinite and permanent stigma, pain, and iso-

lation. It denies gay men and lesbians their identity and their dignity; it labels their families as second-rate. That outcome cannot be squared with the principle of equality and the unalienable right to liberty and the pursuit of happiness that is the bedrock promise of America from the Declaration of Independence to the Fourteenth Amendment, and the dream of all Americans. This badge of inferiority, separateness, and inequality must be extinguished. When it is, America will be closer to fulfilling the aspirations of all its citizens.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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