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 ADDRESSING THE MERITS OF THE STATES OF INDIANA, VIRGINIA, ALABAMA, ALASKA, ARIZONA, COLORADO, GEORGIA, IDAHO, KANSAS, MONTANA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether a State may define marriage as the legal union of one man and one woman.

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INTEREST OF THE *AMICI* STATES

Over four-fifths of the states continue to define marriage as the legal union of one man and one woman, consistent with the ancient historical definition of marriage. From the first challenges to traditional marriage laws more than forty years ago, federal courts have refused to interfere with state marriage definitions and policies. Yet the decision below rejects a decision by California voters to reclaim that state's traditional definition of marriage after the California Supreme Court mandated marriage for same-sex couples. The Ninth Circuit's decision undermines the ability of states to define and regulate marriage and uses the *federal* constitution to prevent citizens from overriding a judicial interpretation of a *state* constitution. The *Amici* States have interests in (1) protecting their ability to define and regulate marriage, and (2) preserving the integrity of their constitutions and democratic processes.

SUMMARY OF THE ARGUMENT

In the decision below, the Ninth Circuit overrode a state citizenry's use of state democratic channels to address a state court's interpretation of a state constitution on a matter of core state responsibility. The result is not merely vitiation of California's co-equal sovereignty without a clear constitutional warrant; it is disintegration of perhaps the most fundamental and revered cultural institution of American life: marriage as we know it.

The fundamental equal protection issue here is whether states may confer the special status of "marriage" on qualified opposite sex couples without also conferring it on any other relationships, including same-sex couples. Rather than address that issue, however, the Ninth Circuit presupposed co-equal special status for same-sex and opposite-sex couples and analyzed Proposition 8 as a retraction of that status. In effect, the court implicitly presumed a right to same-sex marriage. It should instead have presumed the legitimacy of designating qualified opposite-sex couples for special treatment and inquired only whether all legitimate explanations for that classification could be negated.

Legitimate justifications for traditional marriage are long-established, even if sometimes forgotten or deemed old-fashioned. In short, a state may rationally confer civil marriage on one man and one woman in order to encourage the couple to stay together for the sake of any children that their sexual union may create. Traditional marriage focuses on protecting children and creating optimal childrearing environments, not on celebrating adult romantic relationships. The male-female relationship alone enables the married persons—in the ideal—to beget children who have a biological relationship to both parents and to serve as role models of both sexes for those biological children. In this way, a state's decision to ratify the sexual union between a man and a woman confirms a deeply significant understanding of human relationships and encourages such unions as the standard for the

human family. The validity of such cultural decisions is not subject to empirical testing or the testimonial opinions of a few elite experts.

In contrast, the decision below supplies no governmental rationale for bestowing special civic status on same-sex couples. While same-sex couples may do an excellent job of raising children, they cannot provide the family structure states seek to encourage with traditional marriage: where those who raise a child combine both legal responsibility for and a biological connection with that child. Instead, the central rationale for same-sex marriage is social approval of the couple's sexual relationship as such. But there is no reason for government to take any interest in that sexual relationship—and certainly nothing like the government's interest in encouraging long-term care for the children produced by heterosexual intercourse. And because any interest in same-sex couples bears no link to any characteristic innately limited to them, it contains no limiting principle for excluding other groupings of individuals. Ultimately, there is no legal argument *for* same-sex marriage, only an argument *against* civil marriage as a special, limited status.

Finally, Proposition 8 is justified as an exercise in popular sovereignty directly checking a state's judiciary. The desire of Californians to determine their own state constitutional fate rather than leave it to their judges represents an entirely separate rationale for Proposition 8. Yet the Ninth Circuit treated this political action as "context" that had to

be independently justified. Furthermore, it discounted Petitioners' responsible procreation arguments because California's political solution did not *also* withdraw legislatively provided same-sex domestic partner benefits. The two-judge majority below thus treated as constitutional vices both the political nature of California's approach and the narrowness of its marriage definition. This deeply erroneous conclusion by the Ninth Circuit should be reversed.

ARGUMENT

I. Rational-Basis Review Applies

A. Deference follows from states' historical, near-absolute dominion over marriage

For over 150 years, the Court has held that the regulation of domestic relations is almost exclusively within the jurisdictional purview of the states. In *Barber v. Barber*, 21 How. 582, 584 (1859), the Court expressly disclaimed federal jurisdiction over divorce and alimony. And in *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878), the Court recognized that "[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."

States' exclusive jurisdiction over the core of family law has continued ever since. *See, e.g.*, *In re Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole

subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."); *Simms v. Simms*, 175 U.S. 162, 167 (1899) ("It may therefore be assumed as indubitable that the circuit courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony[.]"); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern.").

As recently as 1992 the Court explicitly recognized a "domestic relations exception" to federal jurisdiction that "divest[s] the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). And in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 17 (2004), the Court rejected a father's standing to challenge the Pledge of Allegiance on behalf of his daughter amidst a custody dispute because "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute . . . ."

Accordingly, only where a state law materially interferes with core traditional marriage rights does the Court apply heightened scrutiny. *Compare Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (using deferential scrutiny to uphold a one-year residency requirement for marriage dissolution as "a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been

regarded as a virtually exclusive province of the States"), *with Turner v. Safley*, 482 U.S 78, 97-99 (1987) (rejecting a prison restriction on the right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 388-91 (1978) (rejecting state interference with marriage by those having outstanding child-support obligations); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (rejecting prohibition against interracial marriage).

The tradition of state control over marriage arises from the specific historical origins of the Union and more generally the philosophical underpinnings of Western society. States are the original and most fundamental sovereigns of our Nation. *See*, *e.g.*, *The Federalist No. 39* (James Madison) ("Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. . . . [The Constitution] leaves to the several States a residuary and inviolable sovereignty . . . ."). In turn, for millennia the family has supplied the most basic unit of Western society buffering the individual from the state. As Cicero observed, "For since the reproductive instinct is by Nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common. And this is the foundation of civil government, the nursery, as it were, of the state." 1 Marcus Tullius Cicero, *De Officiis* 54 (Walter Miller trans., 1913).

This deep philosophical understanding of the relationship between marriage and the state has endured in America. *See, e.g.*, *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (referring to traditional marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress"); *Cleveland, C. C. & St. L. Ry. v. Marshall*, 182 Ind. 280, 287 (Ind. 1914) (recognizing that "the family was the earliest of our social institutions, and has formed the basis of human progress toward a more perfect civilization" and "has inspired the organization of state governments and guaranteed their perpetuity").

Accordingly, the impact of laws governing the creation, existence, and dissolution of marriage are felt most acutely at the state level. Property rights and distribution, child custody and support, the disposition of estates—to name just a few legal subjects affected by the laws of marriage and divorce—are dealt with primarily, routinely, and exhaustively by states. Laws governing the creation of marriages are critical to how state policies in these areas function. *See Pennoyer*, 95 U.S. at 734-735. It is therefore well within states' purview to encourage family arrangements that they deem most advantageous to the execution of fundamental state policies, and rational-basis scrutiny is the only level of review that affords states appropriate deference on this most core of state responsibilities.

B. No basis for higher scrutiny exists

To the extent that such a thing could ever be known, neither the framers and ratifiers of the Bill of Rights nor those of the Fourteenth Amendment intended to protect a fundamental right to same-sex marriage. Accordingly, Proposition 8 does not abridge any right protected as fundamental by the Constitution.

Nor does it draw heightened scrutiny by way of comparison to anti-miscegenation laws invalidated in *Loving v. Virginia*, 388 U.S. 1 (1967). To begin, unlike Proposition 8, anti-miscegenation laws *contravened* common law and marriage tradition in Western society. The entire phenomenon of banning interracial marriages originated in the American colonies: "There was no ban on miscegenation at common law or by statute in England at the time of the establishment of the American Colonies." Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 Geo. L.J. 49, 49-50 (1964). Maryland and Virginia adopted the first such laws in the late 1600s when interracial marriages began to produce children whose condition of servitude could not readily be determined from the color of their skin. Fay Botham, *Almighty God Created the Races: Christianity, Interracial Marriage, & American Law* 52-53 (2009). Anti-miscegenation laws then spread to northern states, which had previously permitted interracial marriages. *See* Peter Wallenstein, *Tell*

the Court I Love My Wife: Race, Marriage, and Law—An American History 40-42 (2002).

Plainly, anti-miscegenation laws were predicated *not* on a fundamental understanding of the nature and purposes of marriage, but on an ideology of white supremacy. *Loving*, 388 U.S. at 11. ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.")

In contrast, the traditional definition of marriage existed at the very origin of the institution and predates by millennia the current political controversy over same-sex marriage. *See Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974) ("The operative distinction [with *Loving*] lies in the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman."); *see also Goodridge v. Dep't of Pub. Health*, No. 20011647A, 2002 WL 1299135, at *10 n.22 (Mass. Sup. Ct. May 7, 2002), *vacated*, 798 N.E.2d 941 (Mass. 2003) ("By contrast, statutory restrictions on interracial marriage . . . did not have such deep historical roots."). Indeed, *Loving* itself linked the right to marry with procreation. *Loving*, 388 U.S. at 12 ("Marriage is one of the basic civil rights of man,

fundamental to our very existence and survival.") (internal quotation marks omitted).

Loving, in short, invalidated efforts to thwart the traditional parameters of marriage (which took no account of race) based on racial animus. It involved relationships that were plainly within the historical understanding and purposes of marriage. In contrast, same-sex relationships were never thought to be marriages—or to further the purposes of marriage—anywhere at any time, until recently (in some jurisdictions). Accordingly, there is no basis for inferring that group animus underlies traditional marriage, and no basis for subjecting Proposition 8 to heightened scrutiny, as even the decision below acknowledged. Pet. App. 61a.[1]

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[1] The only remaining theory for heightened scrutiny sometimes advanced is that homosexuals constitute a protected "suspect" class. *See, e.g.*, *United States v. Windsor*, 699 F.3d 169, 185 (2d Cir.), *cert. granted*, 2012 WL 4009654 (2012). The *Amici* States do not address whether this is an apt characterization of homosexuals, but instead contend that the issue is irrelevant because traditional marriage laws do not target homosexuals as such. *See Sevcik v. Sandoval*, No. 2:12-cv-00578, 2012 WL 5989662, at *7 (D. Nev. Nov. 26, 2012) ("[T]he distinction is not by its own terms drawn according to sexual orientation. Homosexual persons may marry in Nevada, but like heterosexual persons, they may not marry members of the same sex."). While traditional marriage laws *impact* heterosexuals and homosexuals differently, that is not enough to treat them as creating classifications based on sexuality, particularly in view of the benign history of traditional marriage laws generally. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact on a

C. Rational-basis review permits examination only of a classification, not its effect on the status quo

Notwithstanding its conclusion that the rational-basis test applies here, the Ninth Circuit also announced that "[c]ontext matters . . . . The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is." *Id.* at 1080. The "deliberate purpose" the court divined was for the electorate "to impose upon gays and lesbians, through the public law, a majority's private disapproval of them and their relationships." *Id.* at 1095.

Even setting aside the Ninth Circuit's unsupported and insulting insinuation that California voters adopted Proposition 8 out of sheer bigotry against homosexuals, the court was wrong to say that "context matters." To the contrary, with rational-basis review, "a classification must be upheld against [an] equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). The necessary corollary is that actual contexts, purposes, and motivations do *not* matter.

Furthermore, rational-basis equal-protection scrutiny addresses *classifications*, not rights or

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suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose).

benefits. *See, e.g.*, *id.* at 320 ("[A] *classification* cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." (emphasis added)). Even in *Romer v. Evans*, 517 U.S. 620, 631 (1996), the Court stated that "we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."

It follows that whether a state creates a classification by "changing something" or merely leaves a pre-existing classification "as it is," Pet. App. 55a, is irrelevant. The Court has "reject[ed] the contention that once a state chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." *Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 535 (1982). Furthermore, rescission of prior government action is constitutionally questionable only if the agency "was under a constitutional duty to take the action which it initially took." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 414 (1977). If not, "then the rescission of the initial action in and of itself cannot be a constitutional violation." *Id.*

Yet the Ninth Circuit in effect used the Equal Protection Clause not to evaluate the classification drawn by Proposition 8—which was merely restoration of the same traditional marriage definition that had prevailed until the California Supreme Court interceded—but to question the political withdrawal of a judicially bestowed right

not itself protected by the U.S. Constitution. This was a manifestly improper inquiry under the Fourteenth Amendment. Whatever else the Fourteenth Amendment requires of state marriage laws, it surely does not impose different standards based on whether a state adopted its definition of marriage amidst a controversial national debate or merely as a matter of course as part of a rich and durable American tradition.

The Ninth Circuit's misdirected analytical approach had significant consequences. Because the court considered it critical to view Proposition 8 as withdrawing previously vested rights, the question it addressed was, essentially, "how does *withdrawing* the right to same-sex marriage promote responsible procreation and child rearing by biological parents?" Under the properly deferential rational-basis test, however, the question it should have addressed was "how does *bestowing* the right to same-sex marriage promote responsible procreation and child rearing by biological parents?" The answer is that it does *not*, which underscores the point that the central rationale for traditional civil marriage has nothing whatever to do with same-sex couples. *See infra* Part II.B.

All courts that have invalidated traditional marriage laws under their state constitutions have used the same semantic trick as the Ninth Circuit. That is, all have asked whether same-sex marriage *interferes with* the rationales for traditional marriage instead of whether it *advances* them. *See,*

e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003) (concluding that same-sex marriage "does not disturb the fundamental value of marriage in our society"); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 473 (Conn. 2008) ("[G]ranting same sex couples the right to marry will not alter the substantive nature of the legal institution of marriage." (internal quotation marks omitted)). This backward approach to constitutional review in effect presumes the illegality of traditional marriage laws, contrary to centuries of presumably constitutional state regulation of marriage, not to mention this Court's long-established equal-protection doctrine.

II. Traditional Marriage Is Historically, Culturally, and Socially Legitimate

A. Traditional marriage carries forth centuries of Western tradition

Marriage is ubiquitous in every state of human history and development, and its function has always been to provide a norm for sexual activity between men and women in view of the children that it produces. For the ancient Greeks and Romans, for example, marriage was "an institution designed for the production of legitimate children." Susan Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* 8 (1993); *Encyclopedia of Ancient Greece* 450 (Nigel Wilson ed., 2006) ("For antiquity, and for Classical Athens in particular, marriage was informed by two

dominant and purposive imperatives: first, the production of legitimate children . . . second, the formation and maintenance of social and interfamilial alliances.")

Marriage is antecedent to the state, not merely in natural law theory, but in fact. *See, e.g.*, Treggiari, *supra*, at 13 ("The Romans saw marriage as a matter of human practice, varying in different cultures, but in Roman law accompanied by precise legal results."). As the Indiana Supreme Court long ago observed, "[i]n every enlightened government [marriage] is pre-eminently the *basis* of civil institutions, and thus an object of the deepest public concern." *Noel v. Ewing*, 9 Ind. 37, 50 (1857) (emphasis added). According to *Noel*, marriage "giv[es] character to our whole civil polity," a characterization that implies an independent status for marriage. *Id.* And of course, until very recently, marriage in all cultures has exclusively been a union of opposite-sex individuals. *See, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 93 S. Ct. 37 (1972) ("The institution of marriage as a union of a man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.").

Confirming this deeply ingrained heritage, the Court has acknowledged that "[m]arriage is one of the most basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*,

316 U.S. 535, 541 (1942)). Indeed, though the majority below implies that marriage exists in California only by the free choice of the state, Pet. App. 19a ("Upon its founding, the State of California recognized the legal institution of civil marriage for its residents."), it hardly had the historical option of *not* recognizing it.

B. Traditional marriage advances important state interests in promoting responsible procreation and optimal childrearing

To understand Proposition 8's legitimacy, it is critical to consider why states have traditionally valued marriage in the first place. This is not a situation where *exclusion* achieves an objective so much as one where *inclusion* would itself fail to advance a state interest. As the Court expressly recognized in *Johnson v. Robinson*, 415 U.S. 361, 383 (1974), "[w]hen . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory." Accordingly, states need not provide marital recognition to same-sex couples if doing so would not promote the state's reason for recognizing marriages in the first place.

1. Traditional marriage promotes responsible procreation

The basic rationale for traditional marriage is to encourage biological parents to remain together for the sake of their children. The hope is that the availability of marriage makes it more likely that unintended children, among the weakest members of society, will be cared for. "[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 47 (2004).

Historically, that is, civil marriage has not advanced a state interest in adult relationships in the abstract. It is instead predicated on the positive, important, and concrete societal interests in the procreative nature of opposite-sex relationships. Marriage is how the state promotes a particular family structure, where biological parents care for their children in one household. Traditional marriage is not about imposing disadvantages on homosexuals, but about promoting behavior exclusive to opposite-sex couples, namely procreation through sexual intercourse where a baseline condition for optimal childrearing—the cohabitation and mutual dedication of the parents—is present.

In this regard, the laws of marriage generally reflect the state's interest in the welfare of children, their protection, and their well-being. *See Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (N.Y. App. Div.

2005), *aff'd* 7 N.Y.3d 338 (2006). Traditional marriage creates the norm that potentially procreative sexual activity should occur in a long-term, cohabitative relationship. *See* John Finnis, *Sexual Morality and the Possibility of "Same-sex Marriage,"* 42 Am. J. Juris. 97, 131 (1997) ("[Marriage] is fundamentally shaped by its dynamism towards, appropriateness for, and fulfillment in, the generation, nurture, and education of children who each can only have two parents and who are fittingly the primary responsibility (and the object of devotion) of those two parents."). It provides the greatest likelihood that both biological parents will nurture and raise the children they beget, which is optimal for children and society at large.

Parental rights are an important aspect of traditional marriage, but it does not follow that marriage rights go wherever parental rights lead. The purpose of traditional marriage is not to encourage just *any* two people to assume parental responsibility for children. It is instead to encourage the two biological parents to care for their children in tandem. Neither same-sex couples nor any other inherently non-procreative grouping of individuals fits that bill.

Nor is this fundamental purpose of traditional marriage undermined by marriages among the infertile, the elderly, or those who simply choose not to have children. Opposite-sex couples without children who are married model the optimal, socially

expected behavior for other opposite-sex couples whose sexual intercourse may well produce children. Moreover, inquiring of every applicant for a marriage license whether they can or intend to procreate would impose serious, constitutionally questionable intrusions on individual privacy. The state is not required to go to such extremes simply to prove that the purpose of marriage is to promote procreation and child rearing in the traditional family context. It suffices to observe that only members of the opposite sex have even a chance at procreating, so it is fair to limit marriage to opposite-sex unions as an initial matter, regardless whether there are further regulations of marriage.

In contrast, rejecting the traditional definition of marriage would irremediably separate procreative sexuality from marriage as the context for childbearing. The state has an interest in encouraging that children be raised by parents who are married. The Ninth Circuit rejected the claim that restoring the traditional definition of marriage could have any logical connection to this task. Pet. App. 78a ("It is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman."). Defining marriage to include a relationship that cannot naturally bear children, however, cleaves sexuality from childbearing. Same-sex marriage will always require a separation between sexuality, the natural parents of the child, and the legal same-sex parents.

In this regard, it is important to observe that both state and federal law presume a biological relationship where a child is born to married parents. 42 U.S.C. § 666(a)(5)(G); *see also, e.g.*, Ind. Code §§ 31-14-7 *et seq.* This presumption is justified insofar as marriage carries with it a tradition and expectation of monogamy and fidelity. While children may occasionally result from extramarital liaisons or donor-enabled assisted reproductive technology, the vast majority of children born within marriage are biologically related to their mother's husband. Traditional marriage is a reliable indicator of the biological relationship between parent and child. *See Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (upholding naturalization rules that presume a child's biological relationship to married parents but not to unmarried parents).

Moreover, the presumption of a biological relationship where a child is born to married parents furthers the government's important interest in protecting the integrity of the family unit by "excluding inquiries into the child's paternity that would be destructive of family integrity and privacy." *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (upholding a California statute creating a presumption that the child born to a married woman living with her husband is a child of the marriage). Thus, traditional marriage, and the uniquely suitable parentage expectations that accompany it, facilitates family privacy in a way that same-sex marriage cannot.

It is proper to limit marriage to its traditional context to protect its ability to function as an important indicator of the biological connection between parent and child. Every child has exactly one biological mother and one biological father. Thus, marriage recognizes and protects the one-male/one-female union—the only union that can naturally produce children. Extending marriage to same-sex couples would do nothing to further this important governmental objective, in that children of same-sex couples are necessarily unrelated biologically to at least one of their parents. At the same time, a state's desire to protect the biological relationship between parents and children does not require a state to outlaw adoptions or otherwise to prevent parents from raising children to whom they are not biologically related. It does, however, allow the state to express a preference for biological parents "whom our society . . . [has] always presumed to be the preferred and primary custodians of their minor children." *Reno v. Flores*, 507 U.S. 292, 310 (1993).

Ultimately, there is a cultural connection between government promotion of sexuality apart from conception and the separation of conception from marriage. State efforts to encourage procreative couples to beget children in the context of marriage would be undercut by a constitutional imperative

that inherently negates the underlying connection between childbearing and marriage.[2]

2. Traditional marriage identifies the ideal of family life for children

A related but analytically distinct point is that only the marriage of one man and one woman reflects the complementarity of the sexes and validates the relationship's unique and natural ability to produce children. There is no dispute that this is the way that the vast majority of children are in fact conceived. This immutable characteristic of the human design by itself suggests the traditional definition of marriage because it enables biological parents to image the identity of each sex to the children, and allows the children born of this relationship to enjoy a biological relationship to each parent.[3] Traditional marriage reflects the reality

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[2] The separation of sexuality, childbearing, and marriage is not merely theoretical. The number of children born outside of marriage has risen above 50% for women under the age of 30 for the first time in the history of the United States. *See* Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, NY Times, February 17, 2012, http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-arriage.html?pagewanted=all&_r=0

[3] The idea that a child might more easily identify with an adult of the same sex—imaging inherently available for all children born in the conjugal union of traditional marriages—is commonsensical. *See, e.g.*, *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 678 (Tex. Ct. App. 2010) ("The state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing

that every child is begotten from a father and a mother. These characteristics are unique to traditional marriage.

In establishing marriage laws, states seek to establish standards that its citizens will respect, exhorting the community to order its affairs according to these standards. The conclusion that the ideal ordering of the human family is one in which a child is the fruit of the love of father and mother is not one subject to objective verification at all. It is a conclusion about the ideal nature of family life, not prejudice or animus.

The structure of family life promoted by traditional marriage does not denigrate the capacity of same-sex parents to raise their children in a loving and supporting environment. Nor does it disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children. Rather, it is an acknowledgment that the parent-child relationship is ideal when a child is the offspring of both parents, with a role model of each sex in the family. It enables the biological and legal to be perfectly joined

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attributes a man and a woman individually and collectively contribute to the relationship."). The role of the parent of each sex is helpful in the optimal raising of children, without which "the child must cope with the loss of example, counsel, and experience that living with the missing-gender parent would have provided[.]" Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 863 (1997).

together so that the child's legal parents are also the child's natural parents. In contrast, with inherently infertile relationships, there will be at least one legal parent who is not a biological one, and at least one natural parent who is not a legal one. *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (*en banc*).

The physical complementarity of the sexes indicates the "binary" nature of the relationship. *Andersen*, 138 P.3d at 1002 (Johnson, J., concurring); *Lewis v. Harris*, 875 A.2d 259, 277 (N.J. Sup. Ct. 2005) (Parillo, J., concurring). The union between a man and a woman is the ordinary way that children have been generated from time immemorial. A state's decision to ratify this relationship as the one that constitutes a legal marriage thus confirms a very significant understanding of human relationships. By defining marriage as between one man and one woman, a state establishes this relationship as the normative standard for the human family. *See Hernandez*, 855 N.E.2d at 7 (plurality opinion) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."). And by reserving marriage to opposite-sex couples, a state encourages them and makes a positive statement about the relationship's unique characteristics, not a negative statement about the ability of other relationships to provide a proper setting for raising and nurturing children. It is the combination of the attributes of traditional

marriage, and what they mean for the ideal of family life, that makes the relationship unique.

These justifications are rooted in the acquired wisdom of a state's citizens. The traditional definition of marriage is a reflection of the community's understanding of the human person and the ideal ordering of human relationships. These are deep questions of identity and meaning that are not subject to objective measurement.

C. Proposition 8 is a legitimate attempt to secure the social benefits of traditional marriage

The majority below concluded that, because California extends nearly all marital rights and benefits to same-sex domestic partners, the state believes there is no difference between same-sex and opposite-sex families with respect to childrearing. *See* Pet. App. 72a-73a. It also declared that withdrawing from same-sex couples access to the marriage label will not encourage opposite-sex couples to marry or strengthen traditional marriages. *See id.* at 1088-89. Neither conclusion is sound or even relevant.

First, it is within the realm of rational deliberation that designating relationships inherently incapable of producing children as "marriages" could alter marital norms that otherwise exist owing to the general procreative capacity of a husband-wife relationship. *See* Lynn D.

Wardle, *The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage*, 25 B.Y.U. J. Pub. L. 287, 298-99 (2011). Accordingly, even if analyzed as withdrawal of a right (rather than as restoration of a classification), Proposition 8 is rationally related to the legitimate government purpose of preventing consequences that might follow if citizens no longer associate marriage with responsible procreation.

Second, there is no constitutional requirement that all possible rights and benefits policies must promote responsible procreation in order for the traditional definition of marriage to be legitimate. Legislatures and other politically accountable officials must balance an infinite variety of competing interests and priorities. The result is often incongruent means and ends, but that does not negate the objective of whatever half measures are undertaken. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional.").

Third, even the simple prospect of joining the revered institution of "marriage" promotes responsible procreation among opposite sex couples. As this and other same-sex marriage lawsuits implicitly concede, marriage, regardless of exclusive concrete benefits, is a desirable status. *See Goodridge*, 798 N.E.2d at 955 ("[C]ivil marriage is an esteemed institution[.]").

California's decision to encourage responsible procreation by offering committed opposite-sex couples exclusive status but not exclusive rights does not negate the state's underlying objective. The Ninth Circuit erred grievously in using California's experimentation with separate civil recognition of same-sex couples against the majority of California voters who wish to preserve the traditional definition of marriage as such.

D. There is no coherent reason for government to recognize same-sex marriages

The Ninth Circuit rejected the traditional rationale for civil marriage without supplying any coherent alternative, let alone one that extends no further than mandating recognition of same-sex couples who desire it. Its decision essentially deprives states of a justification for affording any *limited* set of relationships special status and thereby opens states to claims from an infinite variety of groups demanding government recognition.

1. The decision below located the significance of marriage in "intimate," "stable and committed lifelong relationships." Pet. App. 52a-53a; *see also Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (opinion of Marshall, C.J., joined by Ireland & Cowin, JJ.) (equating same-sex and opposite-sex couples because "it is the exclusive and permanent commitment of the marriage partners to

one another, not the begetting of children, that is the sine qua non of civil marriage").

But having identified mutual dedication as one of the central *incidents* of marriage, neither the Ninth Circuit nor the *Goodridge* plurality explained why the state should care about that commitment between romantic partners any more than it cares about other voluntary relationships of two, or even more, adults. *See Morrison v. Sadler*, 821 N.E.2d 15, 29 (Ind. Ct. App. 2005) (lead opinion). Both opinions rejected the assumption that civil marriage is necessarily limited to opposite-sex couples, yet failed even to question whether marriage is necessarily limited to either (1) a limited set of relationships, or (2) people who presumably engage in sex.

By contrast, appellate courts upholding the traditional definition of marriage routinely examine the underlying rationale for civil marriage and conclude that it turns on the procreative capacity of opposite-sex couples, which in turn supplies the rational basis for distinguishing same-sex couples and other inherently non-reproductive relationships. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with

the propagation of the human race." *Id*. This analysis remains dominant in our legal culture, both with regard to federal equal protection doctrine[4] and state constitutional law.[5]

2. A constitutional theory that requires recognition of same-sex couples in contravention of this legal culture, not to mention centuries of human experience, must supply a coherent rationale, not simply attack traditional marriage as antiquated or ill-considered. "Until a few decades ago, it was an accepted truth for almost everyone who ever lived . . . that there could be marriages only between

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[4] *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Fam. Servs.*, 358 F.3d 804, 818-19 (11th Cir. 2004); *Sevcik v. Sandoval*, No. 2:12-cv-00578, 2012 WL 5989662, at *16 (D. Nev. Nov. 26, 2012); *Jackson v. Abercrombie*, 2012 WL 3255201, at *34 (D. Haw. August 8, 2012); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. Dist. of Columbia*, 653 A.2d 307, 362-64 (D.C. 1995) (per curiam) (Steadman, J., concurring); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. Ct. App. 2010); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

[5] *See, e.g.*, *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) (lead opinion); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Hernandez*, 855 N.E.2d at 7; *Anderson v. King County*, 138 P.3d 963, 982-83 (Wash. 2006) (*en banc*).

participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Hernandez*, 855 N.E.2d at 8 (plurality opinion); *see also Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 16 (1st Cir. 2012) (observing that the desire to promote traditional marriage "is not the same as 'mere moral disapproval of an excluded group'" (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring))).

A central argument for recognizing same-sex marriages arises from a fashionable insistence that society and the "modern family" are not what they used to be. There is no refuting that, over the past 50 years, American society and American family life have surely changed in a number of particulars. Same-sex couples now raise children together by virtue of artificial insemination, surrogacy, and adoption. *See, e.g.*, John Bowe, *Gay Donor or Gay Dad*, N.Y. TIMES, Nov. 19, 2006, at E66.

Indeed, there seems to be no end to the variety of *de facto* family permutations that can arise. By virtue of statutory amendment and judicial fiat, some states bestow parental rights and responsibilities on unwed step-parents and even entire groups of "co-parents." In recent years, Delaware and the District of Columbia have passed laws that recognize third "de facto" parents who have parental rights and responsibilities. D.C. Code §§ 16-831.01 *et seq.*; 13 Del. Code § 8-201. Courts in several other states have also recognized three parents. *See In re Parentage of*

L.B., 122 P.3d 161, 176-77 (Wash. 2005) (*en banc*) (recognizing third "de facto" parent); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (same); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (recognizing third "psychological" parent); *LaChappelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000) (recognizing third-parent rights); *see also In re M.C.*, 195 Cal. App. 4th 197, 214, 223 (2011) (observing that "[i]n the abstract, it is not difficult to opine a child might be well served by judicial recognition and preservation of a relationship with three legal 'parents,' all of whom love and care for her, and each of whom has evinced a commitment to providing her a safe and stable family environment" and that "M.C. does have three presumed parents, a situation the Supreme Court has acknowledged may exist," but remanding for reconciliation of competing parentage claims).

Still more states' courts have conferred joint parental rights on unmarried same-sex couples in circumstances that would imply the availability of third-parent rights. *See Raftopol v. Ramey*, 12 A.3d 783, 799 (Conn. 2011) (recognizing paternal rights in both biological father and gay partner, parties to gestational agreement with maternal surrogate); *K.M. v. E.G.*, 37 Cal. 4th 130, 142 (2005) (recognizing maternal rights in both egg-donor mother and birth mother); *T.M.H. v. D.M.T.*, 79 So.3d 787, 803 (Fla. Dist. Ct. App. 2011) (holding it constitutionally mandated that both egg-donor mother and birth mother have parental rights); *see also* Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional*

Parental Rights and Responsibilities to Recognize Multiple Parents, 9 J.L. & Fam. Stud. 309 (2007).

There is even an emerging sector of co-parent clearinghouses that not only match donors and surrogates with would-be parents, but also facilitate the creation of "co-parenting" arrangements among strangers. *See, e.g.*, *About Us: FAQs*, Modamily, http://www.modamily.com/faq/ (last visited Jan. 23, 2013); *Co-Parenting*, Pollentree.com, http://www.pollentree.com/coparenting (last visited Jan. 23, 2013) ("[C]o-parenting is typically where two single people agree to have a child and bring that child up together or it can be two couples who agree to do the same.").[6]

But none of these social changes—whether one views them as good, bad, or inconsequential—justifies marriage for same-sex couples. Surely no one argues that the liberty to engage freely in

[6] Perhaps unsurprisingly, popular culture has begun to celebrate the "co-parenting" phenomenon as a way for people with no romantic connection to raise a child together. In 2012, Lionsgate, a major motion picture company, released "Friends with Kids," starring Adam Scott, Jennifer Westfeldt, Jon Hamm, Kristen Wiig, Maya Rudolph, Chris O'Dowd, Megan Fox, and Edward Burns. According to its official web page, the movie "is a daring and poignant ensemble comedy about a close-knit circle of friends at that moment in life when children arrive and everything changes. The last two singles in the group observe the effect that kids have had on their friends' relationships and wonder if there's a better way. They decide to have a kid together – and date other people." *About*, Friends with Kids, http://www.friendswithkids.com/#about (last visited Jan. 22, 2013).

consensual sex means states must also celebrate (or even acknowledge) each individual's sexuality. Nor, then, does the government's interest in the sexuality of its citizens suddenly spring forth at the origination of particular romantic or cohabitational relationships as such. There has to be something more to justify government involvement. *See* Willystine Goodsell, *A History of the Family as a Social and Educational Institution* 7-8 (1915) ("It seems clear enough that the sexual instinct of itself could not have brought about permanent relationships between male and female.").

As discussed in Part II.B.1, *supra*, for qualified opposite-sex couples, the "something more" is the natural capacity of their relationship to produce children unintentionally. This natural capacity gives rise to the state's interest in encouraging responsible procreation, *i.e.*, where the sexual partners live in a long-term, committed relationship for the sake of any children they may produce, even unintentionally. *See id.* ("The source of marriage . . . must probably be looked for in the utter helplessness of the newborn offspring . . . .").

The ability of same-sex couples to raise children together is not the same thing. The primary rationale for traditional marriage is responsible *procreation*, not responsible parenting more generally. And when two people become parents by way of artificial insemination, surrogacy or adoption, they have not procreated—at least not with one another. Hence, what is missing is society's interest

in encouraging couples to consider and plan for the children that inevitably result from impulsive decisions to act on sexual desires. The sexual activity of same-sex couples implies no consequences similar to that of opposite-sex couples.

Indeed, to the extent same-sex couples must take intentional, non-sexual action to become joint parents, such conduct vitiates the need for government involvement. states may assume that couples who by definition can acquire parental rights only through intentional conduct need no further societal approbation or regulation—they are already focused on the consequences of their actions. It is where the parentage may be unintentional, where couples act impulsively while ignoring the consequences, that social ordering is necessary.

It is no response for same-sex couples to say that the State *also* has an interest in encouraging those who acquire parental rights without procreating (together) to maintain long-term, committed relationships for the sake of their children. Such an interest is not the same as the interest that justifies marriage as a special status for sexual partners *as such*. Traditional marriage reflects the ideal of family life, recognizing the love between a mother and a father and the ability of this relationship to bear children. The same is true for opposite-sex couples that do not procreate because they model the optimal ordering of family life. Responsible *parenting* is not a theory supporting marriage for same-sex couples because, like the Ninth Circuit, it

cannot answer two critical questions: Why two people? Why a sexual relationship?

In other words, if marriage rights must follow parental rights, and if states cannot restrict *joint* parental rights to opposite-sex couples as an optimal setting for childrearing, there would be no basis for precluding joint parentage—and, hence, marriage—by *any* social grouping, regardless of the existence of a sexual relationship. *See Your Road Map to Co-Parenting: Glossary*, Modamily.com, http://www.modamily.com/learn/best-practices/ (last visited Jan. 22, 2013) (defining "co-parent" as "a parenting situation where the parents are not in a marriage or romantic relationship with one another"). Sisters, brothers, platonic friends, groups of three or more—all would be on equal footing for purposes of the right to parent jointly and, thus, the right to marry.[7]

Consequently, responsible *parenting* is not a justification for same-sex-couple marriage, as distinguished from recognition of any other human

[7] In this regard it is important to bear in mind that, under this model, it is only the *potential* for a group of adults to acquire parental rights—not the *actual* conferral of parental rights on any particular grouping—that would be the necessary predicate for marriage. In other words, taken to its logical conclusion, Plaintiffs' argument for "marriage equality" would insist that, just as opposite-sex couples are eligible for marriage by reference to their *theoretical* procreative capacity, so too would other groups be eligible for marriage by reference to *their* theoretical ability to acquire joint parental rights, regardless whether they actually (or even intend) to do so.

relationships. It is instead a rationale for eliminating marriage as government recognition of a *limited* set of relationships. Once the natural limits that inhere in the relationship between a man and a woman can no longer sustain the definition of marriage, the conclusion that follows is that any grouping of adults would have an equal claim to marriage. *See, e.g.*, Jonathan Turley, *One Big, Happy Polygamous Family*, NY Times, July 21, 2011, at A27 ("[Polygamists] want to be allowed to create a loving family according to the values of their faith.").

Marriage is not a device that governments generally use to acknowledge acceptable sexuality, living arrangements, or *de facto* parenting structures. It is a means to encourage and preserve something far more compelling and precise: the relationship between a man and a woman in their natural capacity to have children. It attracts and then regulates couples whose sexual conduct may potentially create children, which ameliorates the burdens society ultimately bears when unintended children are not properly cared for. Neither same-sex couples nor any other social grouping presents the same need for government involvement, so there is no similar rationale for recognizing such relationships.

III. Judicial Redefinition of Marriage Created a Political Grievance Redressable by Referendum

The mantra of the decision below is that, even using the rational-basis test, "context matters" for state laws being evaluated under the Equal Protection Clause. Yet the Ninth Circuit failed to give full weight to the most salient contextual explanation of Proposition 8: the decision of the Supreme Court of California in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), to redefine marriage under the California Constitution to include same-sex marriages. Proposition 8 can most reasonably be understood as a popular reaction *not* to the extension of rights to gays and lesbians, but to judicial overreach. The supporters of Proposition 8 might reasonably have concluded that the wrong branch of government had wrought a fundamental societal change; they might reasonably have concluded that the court did so employing an improper means by treating a word having a fixed meaning with post-modernist insouciance; and they might reasonably have concluded that this judicial activism justified state constitutional correction.

In our tradition, the conviction that the wrong authority has done the wrong thing in the wrong manner is cognizable as a political grievance subject to a political remedy. *Cf. The Declaration of Independence* para. 2 (U.S. 1776) ("He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws;

giving his Assent to their Acts of pretended Legislation: . . . For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments: For suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.").

Judicial reluctance to circumscribe state sovereignty should therefore be at its apex when doing so cuts short vigorous democratic debates and uses of political processes. This principle recognizes that courts disrupt the democratic process and deprive society of the opportunity to reach consensus when they prematurely end valuable public debate over moral issues. Federal courts should not stultify democratic principles by declaring a winner of the marriage debate.

For this Court to mandate that all states recognize same-sex marriage would be to wreak revolutionary change on American marriage jurisprudence. Sharply departing from the Court's traditional understanding that its role is a modest one of enforcing necessary constitutional standards, a decision affirming the Ninth Circuit would catapult the Court into the role of "superlegislature." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (Rational-basis test does not "authorize the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." (internal quotation

marks omitted)). Such a conclusion would have grave implications for the nature of our democratic institutions when deeply disputed moral questions such as the definition of marriage are subject to judicial fiat. *See* Alexander M. Bickel, *The Least Dangerous Branch* 16-17 (2d ed. 1986) ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people . . . .").

The Court should instead continue to recognize the importance of the people's role in fashioning the standards for marriage and children—traditionally the absolute preserve of the states. The conclusion that marriage should be between one man and one woman should not be gainsaid by the federal courts. *Cf. United States v. Windsor*, 699 F.3d 169, 208 (2d Cir. 2012) (Straub, J., dissenting) ("When, as here, an issue involves policy choices, the Supreme Court has cautioned that the appropriate forum for their resolution in a democracy is the legislature." (internal quotation marks omitted)), *cert. granted*, 2012 WL 4009654 (2012). Any social policy regarding marriage should come by way of democratic processes.

If the Ninth Circuit is correct, traditional marriage can be understood only as a historic means of sexual-orientation discrimination, and the vast majority of the states actuate nothing more than homosexual bigotry by maintaining it. This cannot be correct. What Proposition 8 represents is a legitimate political disagreement over ways, means,

and ends, which fully repels the notion that it was enacted to harm and denigrate homosexuals. In view of the *Marriage Cases*, voter reaffirmation of the historical meaning of marriage is legitimate and rational in itself.

CONCLUSION

The Court should reverse the judgment below.

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