No. 12-144

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

SAN FRANCISCO CITY ATTORNEY'S OFFICE

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
Counsel of Record
CHRISTINE VAN AKEN
AILEEN M. MCGRATH
VINCE CHHABRIA
MOLLIE M. LEE
SARA J. EISENBERG
LEILA K. MONGAN
Deputy City Attorneys

City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, California 94102
Telephone: (415) 554-4800
Facsimile: (415) 554-4763
E-Mail: therese.stewart@sfgov.org

Counsel for Respondent
City and County of San Francisco

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Do Petitioners, the proponents of Proposition 8, a California constitutional amendment adopted via ballot initiative, have standing under Article III of the U.S. Constitution to appeal the federal district court's judgment enjoining enforcement of Proposition 8 as unconstitutional?

2. Does Proposition 8 violate the Equal Protection Clause of the U.S. Constitution by extinguishing lesbian and gay couples' right to marry under the California Constitution for no purpose other than to classify them as unequal?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. Petitioners Lack Standing To Challenge The District Court's Judgment 11

A. Petitioners Cannot Invoke Article III Jurisdiction Because They Suffer No Cognizable Injury 11

B. Petitioners Cannot Challenge The Scope Of The District Court's Injunction 16

II. Proposition 8 Violates The Equal Protection Clause Even Under Rational Basis Review 20

A. The Particular Context And Effect Of Proposition 8 Must Inform The Equal Protection Inquiry 20

B. Proposition 8's Sole Purpose And Effect Is To Denigrate Lesbian And Gay Relationships 25

1. Proposition 8 classifies same-sex relationships in a separate and unequal category 26

TABLE OF CONTENTS – Continued

Page

2. The campaign made clear Proposition 8's purpose to denigrate same-sex relationships 30

3. Proposition 8's removal of rights from an unpopular minority makes it especially suspect 36

III. Proposition 8 Does Not Advance The Justifications Petitioners Claim For It 40

A. Proposition 8 Is Not Rationally Related To Any Interest California Has Relating To Children Or Procreation 40

1. Marriage in California has many purposes in addition to procreation 41

2. Before and after Proposition 8, same-sex couples may parent children on an equal basis regardless of their marital status 43

3. Withdrawing rights from same-sex couples does not promote responsible procreation 49

B. Proposition 8 Does Not Advance Any Interest In "Going Slowly" Before Altering Marriage Rights 53

IV. That Public Debate On Marriage Rights Continues Does Not Save Proposition 8.... 56

CONCLUSION..... 61

TABLE OF AUTHORITIES

Page

CASES

Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) 12

Alicia R. v. Timothy M., 34 Cal. Rptr. 2d 868 (Cal. Ct. App. 1994) 46

Anderson v. Martin, 375 U.S. 399 (1964) 50

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 13, 14

Astrue v. Capato ex rel. B.N.C., ___ U.S. ___, 132 S. Ct. 2021 (2012) 52

Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217 (2000) 14

Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) 36

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) 16

Bowen v. Gilliard, 483 U.S. 587 (1987) 24

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 35

Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294 (Cal. Ct. App. 2000) 46

Brown v. Bd. of Educ., 347 U.S. 483 (1954) 59

TABLE OF AUTHORITIES – Continued

Page

Brown v. Plata,
___ U.S. ___, 131 S. Ct. 1910 (2011) 18

Califano v. Yamasaki,
442 U.S. 682 (1979).....17, 19

Camreta v. Greene,
___ U.S. ___, 131 S. Ct. 2020 (2011) 15, 16

Carney v. Carney,
598 P.2d 36 (Cal. 1971) 47

Cent. State Univ. v. American Ass'n of Univ. Professors,
526 U.S. 124 (1999).....24

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985).....20, 50, 53

City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,
538 U.S. 188 (2003).....35

City of New Orleans v. Dukes,
427 U.S. 297 (1976).....24

Comino v. Kelley,
30 Cal. Rptr. 2d 728 (Cal. Ct. App. 1994).....46

Craig L. v. Sandy S.,
22 Cal. Rptr. 3d 606 (Cal. Ct. App. 2004).....46

Crawford v. Bd. of Educ. of Los Angeles,
458 U.S. 527 (1982).....22, 37, 40

Dep't of Mental Hygiene v. Kolts,
55 Cal. Rptr. 437 (Cal. Ct. App. 1966).....42

TABLE OF AUTHORITIES – Continued

Page

Diamond v. Charles,
476 U.S. 54 (1986).....16

Dist. Attorney's Office for Third Judicial Dist. v. Osborne,
557 U.S. 52 (2009).....58

Doe No. 1 v. Reed,
___ U.S. ___, 130 S. Ct. 2811 (2010).....17

Don't Bankrupt Washington Comm. v. Cont'l Illinois Nat'l Bank & Trust Co. of Chicago,
460 U.S. 1077 (1983).....13

E.C. v. E.V.,
136 Cal. Rptr. 3d 339 (Cal. Ct. App. 2012).....47

Edwards v. Aguillard,
482 U.S. 578 (1987).....35

Eisenstadt v. Baird,
405 U.S. 438 (1972).....23

Elden v. Sheldon,
758 P.2d 582 (Cal. 1988).....26, 42

Elisa B. v. Superior Court,
117 P.3d 660 (Cal. 2005).....47

Ezell v. City of Chicago,
651 F.3d 684 (7th Cir. 2011).....17

Glona v. American Guar. & Liab. Ins. Co.,
391 U.S. 73 (1968).....51, 52

Goodridge v. Dep't of Pub. Health,
798 N.E.2d 941 (Mass. 2003).....50

TABLE OF AUTHORITIES – Continued

Page

Gregg Dyeing Co. v. Query,
286 U.S. 472 (1932).....23

Griswold v. Connecticut,
381 U.S. 479 (1965).....42, 43

Heller v. Doe,
509 U.S. 312 (1993).....20

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006) 49

Hunter v. Erickson,
393 U.S. 385 (1969).....55

In re M.C.,
123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011).....44, 46

In re Marriage Cases,
183 P.3d 384 (Cal. 2008) 3, 4, 5, 28, 44

In re Marriage of Buzzanca,
72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).....47

INS v. Chadha,
462 U.S. 919 (1983).....16

Jimenez v. Weinberger,
417 U.S. 628 (1974).....52

Johnson v. Calvert,
851 P.2d 776 (Cal. 1993) 45

Jones v. Barlow,
154 P.3d 808 (Utah 2007).....29

Karcher v. May,
484 U.S. 72 (1987).....13, 14, 16

TABLE OF AUTHORITIES – Continued

Page

Knight v. Superior Court,
26 Cal. Rptr. 3d 687 (Cal. Ct. App. 2005).....44

Kristine H. v. Lisa R.,
117 P.3d 690 (Cal. 2005).....47

Langan v. St. Vincent's Hosp. of New York,
802 N.Y.S.2d 476 (N.Y. App. Div. 2005).....29

Lawrence v. Texas,
539 U.S. 558 (2003).....58

Lewis v. Casey,
518 U.S. 343 (1996).....17, 18

Lockyer v. City & County of San Francisco,
95 P.3d 459 (Cal. 2004) 19

Loving v. Virginia,
388 U.S. 1 (1967).....55, 58, 60

Lucas v. Forty-Fourth Gen. Assembly,
377 U.S. 713 (1964).....60

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....15

Lunding v. New York Tax Appeals Tribunal,
522 U.S. 287 (1998).....60

Lyng v. Int'l Union, United Auto. Workers of America,
485 U.S. 360 (1988).....24

Maine v. Taylor,
477 U.S. 131 (1986).....13

Marin County v. Superior Court,
349 P.2d 526 (Cal. 1960) 19

TABLE OF AUTHORITIES – Continued

Page

Marvin v. Marvin,
557 P.2d 106 (Cal. 1976) 42

Massachusetts v. EPA,
549 U.S. 497 (2007).....15

Michael H. v. Gerald D.,
491 U.S. 110 (1989).....44

Michael M. v. Superior Court,
450 U.S. 464 (1981).....34

Monsanto Co. v. Geertson Seed Farms,
___ U.S. ___, 130 S. Ct. 2743 (2010).....18

New Jersey Welfare Rights Org. v. Cahill,
411 U.S. 619 (1973).....51, 52

Northeastern Florida Chapter Associated Gen. Contractors of America v. City of Jacksonville,
508 U.S. 656 (1993).....18

Pac. Bell Tel. Co. v. Linkline Commc'ns,
555 U.S. 438 (2009).....16

Palmore v. Sidoti,
466 U.S. 429 (1984).....50

Pedersen v. Office of Personnel Mgmt.,
881 F. Supp. 2d 294 (D. Conn. 2012).....56

People v. Sorenson,
437 P.2d 495 (Cal. 1968) 47

Perry v. Brown,
265 P.3d 1002 (Cal. 2011).....15

TABLE OF AUTHORITIES – Continued

Page

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) 6

Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833 (1992).....30, 60

Plessy v. Ferguson,
163 U.S. 537 (1896).....30

Plyler v. Doe,
457 U.S. 202 (1982).....40

Powers v. Ohio,
499 U.S. 400 (1991).....12

Raines v. Byrd,
521 U.S. 811 (1997).....13

Reitman v. Mulkey,
387 U.S. 369 (1967).....21, 22, 35, 38, 50

Reynolds v. Sims,
377 U.S. 533 (1964).....58

Richardson v. United States,
526 U.S. 813 (1999).....60

Romer v. Evans,
517 U.S. 620 (1996).....*passim*

Schweiker v. Wilson,
450 U.S. 221 (1981).....21

Sharon S. v. Superior Court,
73 P.3d 554 (Cal. 2003) 47

Sierra Club v. Morton,
405 U.S. 727 (1972).....12

TABLE OF AUTHORITIES – Continued

Page

Sprint Commc'ns Co. v. APCC Servs., Inc.,
554 U.S. 269 (2011) 12

Stepanek v. Stepanek,
14 Cal. Rptr. 793 (Cal. Ct. App. 1961) 42

Steven W. v. Matthew S.,
39 Cal. Rptr. 2d 535 (Cal. Ct. App. 1995) 46

Strauss v. Horton,
207 P.3d 48 (Cal. 2009) 5, 25, 38, 45

Sweatt v. Painter,
339 U.S. 629 (1950) 29

Trimble v. Gordon,
430 U.S. 762 (1977) 51, 52

Turner v. Safley,
482 U.S. 78 (1987) 42, 60

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 20, 23

U.S. R.R. Ret. Bd. v. Fritz,
449 U.S. 166 (1980) 24

United States v. Salerno,
481 U.S. 739 (1987) 17

United States v. Virginia,
518 U.S. 515 (1996) 29, 51

Vermont Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 12

TABLE OF AUTHORITIES – Continued

Page

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1982) 23

Vill. of Hoffman Estates v. Flipside, Hoffman Estates Inc., 455 U.S. 489 (1982) 17

Warth v. Seldin, 422 U.S. 490 (1975) 12, 18

Washington v. Glucksberg, 521 U.S. 702 (1997) 57, 58

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) 35

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) 51, 52

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 57

Williams v. Vermont, 472 U.S. 14 (1985) 23, 56

Windsor v. United States, 699 F.3d 169 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012) 29

Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009) 24

Zablocki v. Redhail, 434 U.S. 374 (1978) 60

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS AND STATUTES

U.S. Const. art. III, § 2 ..... *passim*
U.S. Const. amend. XIV, § 1 ..... *passim*
750 Ill. Comp. Stat. Ann. § 75/20 37
Cal. Const. art. I, § 7.5 (Proposition 8) ..... *passim*
Cal. Fam. Code § 297.5 ..... 4, 25, 44
Cal. Fam. Code § 760 26
Cal. Fam. Code § 3040 47
Cal. Fam. Code § 4300 26
Cal. Fam. Code § 4301 42
Cal. Fam. Code § 7602 45
Cal. Fam. Code § 7611 45
Cal. Fam. Code § 7612 ..... 45, 46
Cal. Fam. Code § 7613 45
Cal. Fam. Code § 7614 45
Cal. Fam. Code § 9000 45
Cal. Stats. 1977, ch. 339, § 1 3
Cal. Stats. 1999, ch. 588, § 2 3
Cal. Stats. 2003, ch. 421 3
Cal. Welf. & Inst. Code § 16013 47
Colo. Const. art. II, § 30 (Amendment 2) 22, 33, 36
Del. Code Ann. tit. 13, § 212 37
Del. Code Ann. tit. 13, § 214 37

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Civ. P. 55 16

Fed. R. Civ. P. 65 19

Haw. Rev. Stat. § 572B-9 37

N.J. Stat. § 37:1-31 37

N.J. Stat. § 37:1-32 37

Nev. Rev. Stat. § 122A.200 37

Or. Rev. Stat. § 106.340 37

R.I. Gen. Laws § 15-3.1-6 37

R.I. Gen. Laws § 15-3.1-7 37

OTHER AUTHORITIES

Alexander M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Bobbs-Merrill Co. 1986) (1962) 57, 59

Brief for Respondents, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 417786 33

Darlene Clark Hine, *The* Briggs v. Elliot *Legacy: Black Culture, Consciousness, and Community Before* Brown, *1930-1954*, 2004 U. ILL. L. REV. 1059 30

David Blankenhorn, Op.-Ed., *How My View on Gay Marriage Changed*, N.Y. TIMES, June 22, 2012, http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html 27

TABLE OF AUTHORITIES – Continued

Page

Howard N. Rabinowitz, *From Exclusion to Segregation: Health and Welfare Services for Southern Blacks, 1865-1890*, 48 SOC. SERV. REV. NO. 3 (Sept. 1974) 30

Jesse H. Choper, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) 57

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993) 13

INTRODUCTION

When Proposition 8 was enacted by California voters in November 2008, it took away lesbian and gay couples' right to marry. Yet it left intact their well-established rights to form families and raise children on the same basis as opposite-sex couples. Indeed, the same rights and benefits that California offers to married couples remain available to same-sex couples who enter into domestic partnerships. In many ways, this case is about a name.

But what a name it is. Marriage has a social meaning and significance that no other relationship designation can approach – certainly not "domestic partnership," a label whose very purpose is to differentiate the relationships of same-sex couples from marriages. Removing the title and honor of marriage from lesbian and gay relationships inflicted harm and humiliation on these couples, and it must be justified, at a minimum, by some legitimate purpose.

The justification for Proposition 8 cannot be that the hundreds of thousands of gay couples in California are not the equals of opposite-sex couples in taking on mutual and lifelong responsibilities of care and support; those duties are equally imposed by domestic partnership. Nor can it be that the many gay couples raising children together in California are not equally capable as parents; the laws of parenthood in California are as indifferent to sexual orientation and gender after Proposition 8 as they were before it. Instead, the true justification for

Proposition 8 is simply to signify that lesbian and gay couples are still not *accepted* as equals even though they function as equals in society. As the messages of the Proposition 8 campaign showed, and as its peculiar effect on a cherished name alone confirms, asserting the inferiority of same-sex couples was the purpose and effect of Proposition 8. But relegating gay couples to a lesser status simply to brand them as different and less worthy than opposite-sex couples is not a legitimate purpose.

Petitioners contend that the purpose of Proposition 8 is to reserve the honor of marriage as an incentive to opposite-sex couples, to encourage them to raise their accidental children in wedlock. Any effect on the rights of gay couples, they claim, is merely an unavoidable consequence of the traditional definition of marriage. The problem with this argument is that it says nothing about why, once gay couples received the right to marry in California, their right had to be *rescinded* for marriage to remain an incentive for opposite-sex couples to take responsibility for their children. It is implausible that more opposite-sex couples will marry, and have children in wedlock, if same-sex couples cannot marry as well. Nor can Proposition 8 be justified as an exercise in promoting the well-being of children or families. It has no effect on gay couples' ability to raise children, and in fact it denies tens of thousands of children who have same-sex parents the security and esteem of living in a marital family.

Extinguishing the equal stature of gay people's relationships was not simply a side effect of Proposition 8; it was the measure's overriding purpose. And the justifications Petitioners offer for Proposition 8 are so far removed from its actual effects that it is impossible to credit them. Proposition 8 thus fails even rational basis scrutiny under the Equal Protection Clause.

STATEMENT OF THE CASE

In 1977, California amended its civil marriage statute, which previously made no reference to gender, to specify that marriage was restricted to opposite-sex couples. Cal. Stats. 1977, ch. 339, § 1.[1] In 1999, California created a statewide domestic partnership registry for same-sex couples. Cal. Stats. 1999, ch. 588, § 2. Domestic partnership in 1999 offered few substantive benefits beyond hospital visitation privileges, but the California Legislature gradually expanded the rights available to same-sex domestic partners with new enactments. This process culminated in 2003, when California enacted the Domestic Partner Rights and Responsibilities Act. Cal. Stats. 2003, ch. 421. The act granted registered domestic partners the same rights, and imposed on

[1] Voters later adopted this definition of marriage in an initiative statute that also forbade California from recognizing marriages of same-sex couples solemnized elsewhere. *See In re Marriage Cases*, 183 P.3d 384, 409, 410 (Cal. 2008).

them the same legal obligations, "as are granted to and imposed upon spouses." Cal. Fam. Code § 297.5(a). It also provided that "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses." *Id.* § 297.5(d).

In 2008, the California Supreme Court determined that providing official recognition to same-sex couples' intimate relationships, and allowing them to form families and parent children, are guaranteed to lesbians and gay men by the California Constitution. *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008). Independent of that holding, the California Supreme Court ruled that excluding same-sex couples from the designation of marriage violated their state constitutional rights. *Id.* at 401-02, 433-46. It reasoned that where marriage is a universally known and cherished institution, relegating same-sex couples' family relationships to the novel and little-recognized designation of domestic partnership could send a message that their families were of "lesser stature," mark them as "second-class citizen[s]," and invite further discrimination against gay people. *Id.* at 445-46, 452.

Shortly after the California Supreme Court's decision, Petitioners qualified Proposition 8, an initiative constitutional amendment, for the November 2008 ballot. The measure proposed to amend the California Constitution to eliminate same-sex couples' constitutional right to marry, providing that "[o]nly marriage between a man and a woman is valid or

recognized in California." J.A. Exh. 58. Petitioners and their allies launched a heated campaign with the central message that while same-sex couples could retain all of the legal incidents of marriage through domestic partnership, the State must not recognize their relationships as "the same" as traditional marriages. J.A. Exh. 56. Proposition 8 was adopted with a slim majority of votes and was codified as article I, section 7.5 of the California Constitution. Pet. App. 26a.

After Proposition 8's enactment, San Francisco joined with gay couples and advocacy groups in a suit challenging the measure as not adopted in accordance with the procedural requirements of the California Constitution. While the California Supreme Court affirmed the measure's procedural validity, it held that Proposition 8 did not repeal the *Marriage Cases* holdings. Instead, Proposition 8 created a "new substantive state constitutional rule" that "carv[ed] out an exception" to the state constitution's liberty, privacy, and equality guarantees for gay people alone. *Strauss v. Horton*, 207 P.3d 48, 63, 75, 78, 103 (Cal. 2009). This exception eliminated same-sex couples' right to the title and stature of marriage, but left untouched their constitutional rights to form family relationships and raise children on the same basis that opposite-sex couples enjoy. *Id.* at 75, 102. The California Supreme Court also determined that Proposition 8 did not invalidate the marriages of more than 18,000 same-sex couples who wed before its passage. *Id.* at 121-22.

California government officials enforced Proposition 8 and refused marriage licenses to same-sex couples. Pet. App. 28a. Plaintiffs-Respondents filed this action challenging Proposition 8's validity in May 2009, and San Francisco intervened as a plaintiff shortly thereafter. *Ibid.* The government defendants opposed Plaintiffs' motion for a preliminary injunction and answered the complaint, making clear they would continue to enforce Proposition 8 absent a court order to the contrary.[2] Petitioners intervened as the official proponents of Proposition 8. *Id.* at 28a-29a.

During a twelve-day bench trial, Respondents called seventeen witnesses and submitted evidence to establish many points, including that sexual orientation is a normal manifestation of human sexuality, same-sex relationships are as healthy and functional as opposite-sex relationships, the children of same-sex couples fare as well as those of opposite-sex couples, and Proposition 8 was motivated by hurtful and misguided stereotypes about gay people. Petitioners presented testimony from two witnesses. Pet.

---

[2] *See* Pet. App. 143a and filings in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C-09-2292): Administration's Answer to Complaint for Declaratory, Injunctive, or Other Relief at ¶ 49; [Los Angeles County Registrar's] Answer to Complaint for Declaratory, Injunctive, or Other Relief at 9; Answer of Defendant Patrick O'Connell at ¶ 36; Administration's Opposition to Plaintiffs' Motion for Preliminary Injunction; Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction.

App. 181a-202a. Based on this evidence, the district court made extensive findings. *Id.* at 202a-285a. It ultimately held that Proposition 8 denies gay people the fundamental right to marry and fails any level of scrutiny under the Equal Protection Clause. *Id.* at 294a, 299a.

Petitioners, but not the government defendants, appealed to the Ninth Circuit. That court questioned whether Petitioners had standing to seek review of the judgment and accordingly certified questions about their status under state law to the California Supreme Court. Pet. App. 415a. After the California Supreme Court determined that initiative proponents are authorized by state law to defend initiative measures where state officials do not, the Ninth Circuit held that Petitioners had standing to appeal. *Id.* at 43a.

The Ninth Circuit then affirmed the district court's judgment. On the principle of deciding constitutional questions narrowly where possible, the circuit court addressed not whether "same-sex couples may *ever* be denied the right to marry," Pet. App. 17a (emphasis in original), but instead whether there was a rational basis for enacting Proposition 8, the purpose and effect of which was to revoke gay couples' access to marriage in California and label their relationships as domestic partnerships instead, *id.* at 54a. The court held that none of the rationales Petitioners offered to justify revoking same-sex couples' marriage rights withstood rational basis review. It held that any purported interest in encouraging the

formation of families with "two biological parents" was irrational in light of California law, which expresses no preference for "biological" families and treats various family structures equally, including families headed by gay people. *Id.* at 70a-72a. The court rejected Petitioners' proffered justification of encouraging "responsible procreation," because "[g]iven the realities of California law" and "human nature," Proposition 8 could have no effect on the extent to which opposite-sex couples would choose to marry or take responsibility for their children. *Id.* at 74a-75a. The court also refused to credit Petitioners' argument that Proposition 8 was an effort to "proceed cautiously" in expanding access to marriage, holding that Proposition 8's targeted exclusion of gay people through a constitutional amendment could not be construed as an attempt merely "to study the matter further." *Id.* at 81a.

The Ninth Circuit ultimately found it impossible to conclude that Proposition 8 had any purpose other than to give effect to "private disapproval" of same-sex couples by proclaiming the "lesser worth" of gay men and lesbians as a class. Pet. App. 88a, 92a. It affirmed the district court's judgment holding Proposition 8 unconstitutional, *id.* at 92a, and denied Petitioners' request for en banc review, *id.* at 444a.

SUMMARY OF ARGUMENT

Petitioners lack standing to appeal because they are not personally injured by the district court's judgment that Proposition 8 is unconstitutional. Although the California Supreme Court held that Petitioners are authorized to represent the interests of the State of California in this case, that state-law determination cannot expand the bounds of federal jurisdiction. This Court has never before held that Article III is satisfied by a State's delegation of litigation authority to a private person who has neither suffered a personal injury nor possesses a concrete interest in the case's outcome. If Petitioners have standing in this case, then any private person to whom the State has assigned an interest may have recourse to sue in federal court. This result cannot be squared with the actual injury requirement.

On the merits, San Francisco joins fully in Plaintiffs-Respondents' arguments that heightened scrutiny should apply here, and Proposition 8 fails that scrutiny. But even on rational basis review, the Equal Protection Clause forbids the classification of people for the purpose of branding them as inferior. *Romer v. Evans*, 517 U.S. 620, 635 (1996). In light of the unique circumstances of its enactment, Proposition 8 does precisely that. The measure is unlike any other State's marriage law in that it takes away same-sex couples' existing right to marry. But even as it denies these couples the revered title of marriage, it leaves untouched long-established California laws treating them as equal to opposite-sex couples in all matters

touching parenting and family relationships. And the campaign to enact Proposition 8 sent an unequivocal message that revoking same-sex couples' marriage rights was necessary because including them in marriage would taint the institution beyond repair.

Under these circumstances, Proposition 8 cannot be explained as helping children, because it only harms the children of same-sex couples by diminishing the stature of their families. Nor can it be explained as preventing opposite-sex couples from having children out of wedlock, because it is inconceivable that removing same-sex couples' marriage rights would have that effect. And Proposition 8 cannot be deemed to serve any legitimate interest in "going slowly" in recognizing new family structures, because Proposition 8 is not about family structures at all – it is about taking away the title of marriage from gay couples even while California encourages them to raise children. California, of all places, cannot credibly claim that it needs more time before deciding to recognize these families. Instead, Proposition 8 can only be explained as a "status-based enactment" that relegates gay families to the separate and inferior status of domestic partners, "not to further a proper legislative end but to make them unequal to everyone else." *Romer*, 517 U.S. at 635.

At the end of the day, Petitioners stake their justifications for Proposition 8 not in any claim that California had to revoke same-sex couples' marriage rights to prevent concrete consequences, but instead in nebulous claims of harm to children and families.

In similar vein, they warn this Court that the issue of marriage for same-sex couples is simply too controversial for the Court to do anything but allow public debate on the matter to continue. But in contrast to the substantive due process cases that Petitioners rely on to buttress their warning, where social consensus about the existence of the right informs the inquiry, this case involves the equal protection rights of a minority group. The Court has never held that an equal protection violation can wait for resolution by the political process, and the prospect of future democratic consensus about marriage rights for same-sex couples does not redress the harm these couples suffer today.

ARGUMENT

I. Petitioners Lack Standing To Challenge The District Court's Judgment.

A. Petitioners Cannot Invoke Article III Jurisdiction Because They Suffer No Cognizable Injury.

The Ninth Circuit held that Petitioners have standing solely by virtue of the California Supreme Court's ruling that they have the authority to litigate this case in place of state officials. But Article III's bounds are a matter of federal law that cannot be expanded by the States. This Court has never held that initiative proponents like Petitioners may rely on state-law litigating authority to invoke Article III

jurisdiction, and it should not do so here. Extending Article III to grant Petitioners standing is inconsistent with the actual-injury requirement and would undermine Article III's vital gatekeeping function.

This Court has steadfastly required a party invoking federal jurisdiction to identify "a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). A plaintiff appointed as a "representative of the public" may not sue in federal court unless he is personally affected by the conduct he challenges. *Sierra Club v. Morton*, 405 U.S. 727, 736-37 (1972). The same is true of other plaintiffs suing on behalf of third parties, *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991), including States who seek to sue as *parens patriae*, *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600-01 (1982). Even parties who sue as assignees of another's injury must have some concrete interest in the outcome of the case, and their standing is only assured by the federal courts' long tradition of adjudicating assignees' claims. *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285, 287 (2011); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000) (*qui tam* relators).

Petitioners suffer no personal injury from a judgment enjoining Proposition 8's enforcement, and their interest in Proposition 8's validity is no different from that of any Californian who campaigned or voted for it. This Court has never before recognized that an initiative proponent is injured by a judgment

striking down the initiative. *See Don't Bankrupt Washington Comm. v. Cont'l Illinois Nat'l Bank & Trust Co. of Chicago*, 460 U.S. 1077 (1983); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 45 (1997). Rather, it is the State alone that has an interest in the "continued enforceability" of its laws. *Maine v. Taylor*, 477 U.S. 131, 137 (1986).

Petitioners assert that once the State has delegated its litigating authority, Article III is satisfied. Br. at 16. But complete deference to a State's delegation cannot be squared with the rule that legislatures may not expand Article III's boundaries. *See Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). While a State may have some power to decide who may assert its interest in litigation, *see Karcher v. May*, 484 U.S. 72, 81-82 (1987), its delegation must be consistent with Article III's limits. *Cf.* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993) ("[O]ne thing [Congress] may not do is ask the courts in effect to exercise . . . oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue.").

This Court has found a State's delegation of litigating authority to legislative officials permissible under Article III. *Karcher*, 484 U.S. at 77-78, 81-82. But it has never held that a State may designate private individuals who suffer no personal injury, and will receive no bounty if they prevail, to litigate on its behalf in federal court. Petitioners mistakenly rely on dicta from *Arizonans for Official English* as indicating that any delegate of the State's litigating authority

axiomatically has Article III standing. 520 U.S. at 64-65. This Court in *Arizonans* did note that it had "grave doubts" regarding initiative sponsors' standing in part because state law did not appoint them representatives of the State to defend the validity of ballot measures. *Id.* at 65-66. But in light of the principles that a litigant must show actual injury and that federal constitutional law alone determines Article III's boundaries, the Court's observation cannot be understood to mean that the federal courts must defer to any delegation of litigating power a State may make. Rather, *Arizonans* is better understood as explaining that a State's choice to delegate litigating power will satisfy Article III only where two conditions are met: the designee is a public official, *and* state law appoints that official as an "agent[ ] of the people." *See ibid.* ("[Proponents] are not elected representatives, *and* we are aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend . . . the constitutionality of initiatives. . . .") (emphasis added). This understanding is consistent with *Karcher* but does not go further than that case.

Drawing a distinction for Article III purposes between elected leaders like those in *Karcher* and private individuals like Petitioners is sensible. Elected leaders have official responsibility to protect the State's interests, remain accountable to the electorate for their decisions, and are likely to balance the costs and benefits to the State in deciding whether and how to defend a law. *See Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235

(2000). Their duties are often directly affected by the outcome of the case. *See Camreta v. Greene*, ___ U.S. ___, 131 S. Ct. 2020, 2029 (2011). There are no comparable checks on initiative proponents, who remain "private individuals" and not state officials. *Perry v. Brown*, 265 P.3d 1002, 1030 (Cal. 2011). They are typically self-interested and issue-specific actors, are unlikely to balance the totality of the State's interests when making litigation decisions, are not subject to removal by election, and will enjoy lifetime tenure to make litigation decisions at their whim.

If Petitioners' view of standing prevailed, there would likely be a sharp increase in the number of plaintiffs who could litigate in federal court without satisfying Article III's otherwise "irreducible" personal injury requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Drafters throughout the country could include a provision granting themselves full litigation authority in every constitutional initiative. Nor does Petitioners' argument find a logical stopping point at initiatives. If States have full authority to delegate their litigating power, presumably they could grant statutory authorization to private citizens to file federal suits vindicating other state interests as well. Given that Article III requirements are already relaxed for States, *see Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007), requiring the federal courts to defer to any state delegation of litigating authority could fill their dockets with litigants who have nothing more than generalized grievances. *See Lujan*, 504 U.S. at 575.

Because Petitioners lack standing to seek review of the district court's judgment, the Ninth Circuit lacked authority to decide Petitioners' appeal. *See Diamond v. Charles*, 476 U.S. 54, 64 (1986). This Court should vacate the Ninth Circuit's opinion and remand with instructions to dismiss the appeal. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 548-49 (1986).

B. Petitioners Cannot Challenge The Scope Of The District Court's Injunction.

Petitioners offer an additional "standing" argument that is not really about standing at all. They contend that even if the district court had jurisdiction, it lacked authority to enter anything beyond a default judgment and an injunction directing that Plaintiffs alone may marry. But a default judgment is only appropriate where defendants fail to "plead or otherwise defend." Fed. R. Civ. P. 55(a). Here, the government defendants answered the complaint and put Plaintiffs to their proof, and there is no question they would have continued to enforce Proposition 8 unless the court ordered otherwise. Article III's requirements were satisfied, *see INS v. Chadha*, 462 U.S. 919, 939-40 (1983), and the district court had the full benefit of adversity and clash on the issues before it, *see Camreta*, 131 S. Ct. at 2028; *Pac. Bell Tel. Co. v. Linkline Commc'ns*, 555 U.S. 438, 447 (2009). The district court's entry of a judgment on the merits was proper, and Petitioners' lack of standing to appeal does not affect it. *See Karcher*, 484 U.S. at 82.

Petitioners' challenge to the scope of the district court's injunction likewise fails. Petitioners assert that the district court could not enjoin Proposition 8's enforcement because Plaintiffs did not represent a class. Br. at 18. There is no rule that a *facial* constitutional challenge to a state law must proceed as a class action for the plaintiffs to obtain an injunction prohibiting the law's enforcement. Petitioners rely on cases standing for the proposition that a remedy is "dictated by the extent of the violation established," such that a court may only enjoin practices proven unlawful. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996). This authority reflects the understanding that some laws have both constitutional and unconstitutional applications. But when an unconstitutional law has uniform effects on its subjects, it is "incapable of any valid application." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 495 n.5 (1982) (internal quotation marks omitted). Proposition 8 operates identically on all lesbian and gay Californians by denying them the ability to marry; "no set of circumstances exists" in which it can constitutionally be applied. *United States v. Salerno*, 481 U.S. 739, 745 (1987). It was therefore proper for the district court to "reach beyond the particular circumstances of these plaintiffs" and issue an injunction prohibiting Proposition 8's enforcement altogether. *Doe No. 1 v. Reed*, ___ U.S. ___, 130 S. Ct. 2811, 2817 (2010); *see also Ezell v. City of Chicago*, 651 F.3d 684, 697-99 (7th Cir. 2011) (enjoining enforcement of Chicago gun ordinance was proper because "the

claimed [Second Amendment] violation inheres in the terms of the statute").

An injunction precluding Proposition 8's enforcement is particularly appropriate in light of the injury Proposition 8 inflicts. It harms lesbians and gay men not simply by denying them marriage licenses, but by marking them as second-class citizens. *See infra* Part II.B. The injury to be remedied is not only the denial of a benefit but also the stigmatizing effect of Proposition 8 – that is, the "denial of equal treatment resulting from the imposition of the barrier" itself. *See Northeastern Florida Chapter Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The remedy for that injury must be tailored to the "inadequacy that produced" it – here Proposition 8's very existence. *Lewis*, 518 U.S. at 357. The district court acted well within its discretion to eliminate that barrier by enjoining Proposition 8 altogether.[3]

In any case, whether a remedial order is overbroad is a question of the district court's discretion, not its jurisdiction, as the cases Petitioners rely on make clear. *See Monsanto Co. v. Geertson Seed Farms*, ___ U.S. ___, 130 S. Ct. 2743, 2761 (2010);

---

[3] Nor does the district court's injunction impermissibly give relief to non-parties. Pet. Br. at 18. The fact that other gay couples will benefit from the judgment is simply a permissible collateral consequence of an otherwise proper injunction. *See Brown v. Plata*, ___ U.S. ___, 131 S. Ct. 1910, 1940-41 (2011); *Warth*, 422 U.S. at 499.

Califano, 442 U.S. at 702-03. Thus, because Petitioners lack standing to appeal, this Court has no jurisdiction to consider their objections to the scope of the district court's injunction.[4]

---

[4] Also not before the Court is the state-law question whether county officials other than those named as defendants in this case are enjoined from enforcing Proposition 8 under the district court's ruling. The answer, in any event, is yes. The ruling states: "Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing" Proposition 8. Pet. App. 419a. This is in accordance with the rule that injunctions bind the "officers" and "agents" of a party, as well as "other persons who are in active concert or participation with" a party or its officers and agents. Fed. R. Civ. P. 65(d)(2). With respect to administration of marriage laws, not only are county clerks in active concert with the State, they are officers and agents of the State, and are therefore bound by an injunction against the state defendants.

Counties in California are subdivisions of state government, and therefore exercise "only the powers of the state, granted by the state." *Marin County v. Superior Court*, 349 P.2d 526, 530 (Cal. 1960) (internal quotation marks omitted). Although state law leaves some functions to the discretion of county officials, marriage administration is not among them. Marriage is indisputably a matter of "statewide concern" in which county officials act solely in a "ministerial" role on behalf of the State. *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 471 (Cal. 2004). In fact, when it comes to marriage, the county clerk or recorder acts "as a state officer." *Id*. at 472. This is because of "the importance of having uniform rules and procedures apply throughout the state to the subject of marriage." *Id*. at 471. Accordingly, the district court's injunction requires the state defendants responsible for uniform execution of the marriage laws to notify county officials of the injunction and instruct them not to enforce Proposition 8.

II. Proposition 8 Violates The Equal Protection Clause Even Under Rational Basis Review.

A. The Particular Context And Effect Of Proposition 8 Must Inform The Equal Protection Inquiry.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Where a law does not rely on classifications deemed inherently suspect, it is subject only to rational basis review. *Id.* at 446. But even under that standard, the classification must "find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. Such a purpose is never legitimate. *See, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

Petitioners contend that in assessing whether Proposition 8 serves a legitimate state purpose, this Court should disregard the fact that Proposition 8 removed the existing marriage rights of same-sex

couples. On their view, a law removing rights is treated the same as a law that does not grant them in the first place, Br. at 23-24, and thus this Court simply asks whether allowing opposite-sex couples to marry advances some policy aim, Br. at 40, without considering Proposition 8's effect on the very people whose rights it eliminated. Moreover, Petitioners would have the Court disregard the particular context in which Proposition 8 operates – whereby California law treats same-sex couples as equals with respect to family responsibilities and child rearing, and eliminates only their right to the stature of marriage.

Petitioners' cabined approach to equal protection is wrong for several reasons. First, legislation must classify "*the persons it affects* in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (emphasis added). Taking away marriage from same-sex couples is not merely an "unavoidable consequence" of Proposition 8, as Petitioners have put it, J.A. 235 (internal quotation marks omitted), but its entire effect. Its constitutionality cannot be evaluated without focusing on how it affected gay people.

Second, far from disregarding the particular circumstances of Proposition 8's enactment, the Court evaluates a challenged law based on its "immediate objective," along with "its ultimate effect and its historical context and the conditions existing prior to its enactment." *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967) (internal quotation marks omitted). The fact

that gay Californians once enjoyed the right to marry and then had it taken away is therefore relevant to the equal protection inquiry. This is apparent from *Reitman*, which struck down an initiative that repealed fair housing laws in California on equal protection grounds, *id.* at 375-76, even though the Fourteenth Amendment did not require States to prohibit private housing discrimination, *id.* at 374-75. Similarly, in *Romer* the Court invalidated Colorado's Amendment 2, which repealed anti-discrimination provisions and made protections against discrimination for gay people alone unattainable through ordinary political processes. 517 U.S. at 624, 631. *Romer* did not hold that Colorado was required to prohibit sexual orientation discrimination in the first place; indeed, many jurisdictions, including the federal government, still offer no such statutory protection. J.A. 743-44. *Crawford v. Board of Education of Los Angeles* also makes clear that removing rights matters. 458 U.S. 527 (1982). While *Crawford* allows that a State may "recede" from granting more rights than the Fourteenth Amendment requires where it has a legitimate reason to do so, *id.* at 535, this Court nonetheless made clear that withdrawing a right without a legitimate purpose would be unlawful, *id.* at 539 n.21. For this reason, *Crawford* examined the particular enactment – withdrawing busing as a remedy that can be imposed for state constitutional violations – to determine its constitutionality, instead of merely resting on the fact that California offered all remedies required by the Fourteenth Amendment. *Id.* at 537.

Third, in determining whether a law classifies arbitrarily, this Court does not confine its review to the "four corners" of a challenged law. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-80 (1932). Rather, it "read[s] together" the law with related enactments and determines whether the State's action "taken in its totality, is within the state's constitutional power." *Id.* at 480; *see also Williams v. Vermont*, 472 U.S. 14, 15, 26 (1985) (rejecting Vermont's proffered justification for sales and use tax regime where it was contradicted by other sales tax provisions); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1982) (discerning the purpose of a law is a "sensitive inquiry" turning on "circumstantial and direct evidence," "the impact of the official action," and the "historical background"); *Moreno*, 413 U.S. at 536-37 (separate anti-fraud provisions in Food Stamp Act "cast[ ] considerable doubt" on anti-fraud justification offered by the government); *Eisenstadt v. Baird*, 405 U.S. 438, 449-50 (1972) (law prohibiting distribution of contraceptives could not be deemed anti-fornication provision where conviction for distributing contraceptives carried sentence 20 times longer than fornication conviction). Thus, in this case, it is relevant not only that California has abrogated same-sex couples' existing right to marry, but also that California continues to treat them as similarly situated to opposite-sex couples in all other respects, *see infra* Section III.A.2 – a fact Petitioners would have this Court ignore.

Petitioners bolster their claim that the withdrawal of a right is treated identically to the failure to grant it by citing cases that do not aid their argument. Br. at 23-24. In each of the equal protection cases they cite, this Court held not that withdrawal of a right or benefit was *irrelevant*, but that the withdrawal was *rational* because it advanced the purpose of the statutory scheme. *See Cent. State Univ. v. American Ass'n of Univ. Professors*, 526 U.S. 124, 128 (1999) (eliminating collective bargaining concerning professors' teaching loads would advance objective of "increas[ing] the time spent by faculty in the classroom"); *Lyng v. Int'l Union, United Auto. Workers of America*, 485 U.S. 360, 372-73 (1988) (excluding striking workers from eligibility for food stamps "is rationally related to the stated objective of maintaining neutrality in private labor disputes"); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 169 (1980) (eliminating "windfall benefits" from retirees would "place the [pension] system on a 'sound financial basis'"); *City of New Orleans v. Dukes*, 427 U.S. 297, 304 (1976) (per curiam) (excluding pushcart vendors from historic area helped preserve "charm and beauty" of area).[5] These cases teach that the question here is whether

[5] Other cases Petitioners cite for the proposition that this Court makes no distinction between state action to eliminate rights and state action to grant them are irrelevant here because they do not concern equal protection jurisprudence. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 356, 360 n.2 (2009) (First Amendment claim); *Bowen v. Gilliard*, 483 U.S. 587, 598-601 (1987) (Takings Clause claim).

California's rescission of same-sex couples' right to marry served any legitimate purpose in light of its history, context, and actual effects.

B. Proposition 8's Sole Purpose And Effect Is To Denigrate Lesbian And Gay Relationships.

Proposition 8 had a peculiar effect: It removed only the honored stature of marriage from same-sex couples, yet altered none of their rights to the traditional incidents of marriage, including the rights to form a family and raise children. *Strauss*, 207 P.3d at 75, 102. The official ballot pamphlet admitted as much, stating that Proposition 8 "doesn't take away any rights or benefits of gay or lesbian domestic partnerships," which give them the "'same rights, protections, and benefits' as married spouses." J.A. Exh. 56 (quoting Cal. Fam. Code § 297.5). Nonetheless, the ballot pamphlet insisted, Proposition 8 must pass to avoid the message that "there is *no difference* between gay marriage and traditional marriage." J.A. Exh. 56 (emphasis in original). In short, the stated purpose of Proposition 8 was to ensure that even as lesbians and gay men keep the rights and responsibilities of marriage, they cannot and must not have its honored status.

Because Proposition 8 operates only on the status and honor accorded to same-sex couples' relationships, it is a "status-based enactment." *Romer*, 517 U.S. at 635. It classifies these couples "not to further

a proper legislative end" but only to brand them as unequal. *Ibid*. Whatever differences Petitioners or their *amici* claim exist between same-sex couples and opposite-sex couples as a justification for this differential treatment – capacity for bearing accidental children, parenting ability, permanence of commitment – have already been disavowed by California as relevant to its legislative ends. Because California recognizes same-sex couples as identical to opposite-sex couples with respect to the legal incidents of marriage and parenting, it can claim no rational justification to exclude them from the honor and status of marriage. The fact that Proposition 8 has no rational justification is only confirmed by the pernicious and degrading campaign to enact it, and by the fact that it withdrew rights from gay couples in an unprecedented way.

1. Proposition 8 classifies same-sex relationships in a separate and unequal category.

In California, as in many States, marriage is a combination of legal contract, intimate and spiritual union, and social symbol. Marriage in California binds a couple together as an economic unit. Cal. Fam. Code §§ 760, 4300. But marriage is more than a bundle of state-created rights. For two people seeking to build a life together, marriage is an expression to each other of their mutual dedication and devotion, and California's recognition of marriage signifies that it, too, supports the vows they have made. *See Elden*

v. Sheldon, 758 P.2d 582, 586 (Cal. 1988). The unique social meaning of marriage joins not merely a couple but their extended families. Marriage is also the way a couple signals to the community their commitment to each other, shaping how they are perceived by their families, neighbors, and colleagues and enlisting the community to help the couple sustain their bond. It confers a social status and prestige that no other institution can. In the testimony of historian Nancy Cott, "there is nothing that is like marriage except marriage." J.A. 404. Petitioners' trial expert David Blankenhorn agreed: "When we say the word 'marriage,' . . . it's much bigger, much more powerful and potent as a role in society than merely or only the enumeration of its legal incidents." Trial Tr. ("Tr.") 2790:5-9.[6]

Taking marriage away from same-sex couples is therefore of great significance for those couples, their children, and their communities, and this harm is not remedied by the availability of domestic partnerships. Domestic partnerships cannot offer the intangible benefits that flow from the immense social meaning of marriage. *See* J.A. 412 (Cott testimony); *see also* J.A. 575 (testimony of psychiatric epidemiologist Ilan

[6] Since the trial, Blankenhorn has changed his views on whether same-sex couples should be allowed to marry, based in part on his realization that "the time for denigrating or stigmatizing same-sex relationships is over." David Blankenhorn, Op.-Ed., *How My View on Gay Marriage Changed*, N.Y. TIMES, June 22, 2012, http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html.

Meyer that "domestic partnership has almost no meaning, . . . it's incomprehensible to people as a social institution"); J.A. 654-55 (testimony of witness Helen Zia describing family members' struggle to understand or describe her domestic partnership); *see generally* Brief of Bay Area Lawyers for Individual Freedom *et al*. as *Amici Curiae* in Support of Respondents. Same-sex couples have likened forming a domestic partnership to signing a will: a dry chore, not an event to be celebrated. J.A. 371-72; *see also* J.A. 647.

Indeed, the whole point of domestic partnerships is that they are *not* marriages; the designation exists "solely to differentiate same-sex unions." Pet. App. 294a. For that reason, they are a mark not of prestige but of "second class citizenship." J.A. 335-36; *see also* J.A. 716; Tr. 1342:14-23. As the California Supreme Court recognized, withholding a title with a "long and celebrated history," amounted to an official statement "that the family relationship of same-sex couples is not of comparable stature or equal dignity" to married couples. *Marriage Cases*, 183 P.3d at 452. Furthermore, by taking affirmative steps to eject same-sex couples from the institution of marriage, Proposition 8 sends a message that gay people are less deserving of fair treatment in all aspects of life. J.A. 554-55. California's official message of inferiority, in turn, "becomes an excuse for the public to do exactly the same thing." J.A. 676 (testimony of San Diego Mayor and former Police Chief Jerry Sanders).

Relegating gay couples to domestic partnership inflicts more tangible harms as well. For instance, domestic partners' relationships with each other or their children may not be recognized in other States. *See, e.g.*, *Langan v. St. Vincent's Hosp. of New York*, 802 N.Y.S.2d 476, 479 (N.Y. App. Div. 2005) (finding that member of Vermont civil union lacked standing as spouse in New York wrongful death action); *Jones v. Barlow*, 154 P.3d 808, 810, 812 (Utah 2007) (refusing to recognize lesbian ex-partner as parent of child born into Vermont civil union through assisted reproduction). If this Court determines in *Windsor v. United States*, No. 12-307, that the federal government must recognize the marriages of same-sex couples, California domestic partners will continue to be denied the many rights and benefits granted to married couples under federal law. *See Windsor v. United States*, 699 F.3d 169, 187 (2d Cir.), *cert. granted,* 133 S. Ct. 786 (2012).

Petitioners claim that the continued existence of domestic partnerships has no relevance to whether Proposition 8's classification of same-sex couples is rational. Br. at 44-46. To the contrary, the fact that Proposition 8 returned same-sex couples to a parallel but undeniably inferior designation only confirms the equal protection violation. Maintaining separate institutions to reinforce status-based distinctions does not cure a denial of equal protection. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 553-54 (1996); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). Instead, over time, society has come to understand that the

very existence of separate institutions "stigmatize[s] those who [are] segregated with a 'badge of inferiority.'" *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 863 (1992) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)). Here, California's understanding of the ability of same-sex couples to shoulder the rights and obligations of marriage has led it to disavow any differences between gay and heterosexual couples with respect to those rights. It therefore has no reason to create a separate designation for same-sex couples except to mark them as inferior.[7]

2. The campaign made clear Proposition 8's purpose to denigrate same-sex relationships.

The fact that Proposition 8 was aimed squarely at diminishing same-sex couples' status in society is apparent from the fact that it altered only their right to the title "marriage" and not its legal incidents. This is further confirmed by the Yes on 8 campaign

[7] It is irrelevant that advocacy groups have lauded California's protections for gay families, as Petitioners note. Br. at 25-26. Black communities also fought for segregated schools and public facilities because segregated facilities were better than no facilities at all. *See* Darlene Clark Hine, *The* Briggs v. Elliot *Legacy: Black Culture, Consciousness, and Community Before* Brown*, 1930-1954*, 2004 U. ILL. L. REV. 1059, 1065-66; Howard N. Rabinowitz, *From Exclusion to Segregation: Health and Welfare Services for Southern Blacks, 1865-1890*, 48 SOC. SERV. REV. NO. 3, pp. 342-43 (Sept. 1974).

messages that were ubiquitous in California in the months leading up to November 2008. J.A. 390, 643; J.A. Exh. 111. These messages make clear that Proposition 8 declared the inferiority of lesbians and gay men by removing the equal status that marriage had all too briefly given them.

Proposition 8 is hardly the first popular initiative to target the rights of gay people. Far from it: "There is no group in American society who has been targeted by ballot initiatives more than gays and lesbians." J.A. 750. Their rights have been subject to more than 200 state and local initiatives and referenda in the past 40 years. *Ibid.* During that time, gay people have lost more than 70% of elections concerning their rights to matters other than marriage and adoption, and at the time of trial in January 2010, they had lost every single election concerning their rights to marry or adopt. *Ibid.* Their handful of successes at the ballot box this past November, Pet. Br. at 58, does not erase this overwhelming history, or the decades of public and private discrimination against them. *See generally* J.A. 438-94 (testimony of historian George Chauncey); Brief of the Organization of American Historians and the American Studies Association as *Amici Curiae* in Support of Respondents.

The Proposition 8 campaign tapped directly into this history, playing on many of the same stereotypes and tropes as past ballot campaigns. A primary theme of the Yes on 8 campaign, and one that appeared even in the official ballot pamphlet, was that children must

be protected from learning that "there is *no difference* between gay marriage and traditional marriage." J.A. Exh. 56 (emphasis in original); *see also* Trial Exh. PX0042, at 2 ("The impact of gay marriage on California public schools has emerged as the top issue in the Proposition 8 campaign."); J.A. Exh. 75, 105. The campaign presented mere exposure to gay people, and the normalization of gay relationships, as threatening to children. *See, e.g.*, J.A. Exh. 87, 89 (if Proposition 8 does not pass "children will face a constant onslaught of the message that homosexuality is not only something to tolerate, it's something to celebrate"); J.A. Exh. 87, 90 (video advertisement asserting that "the specter of children being raised in same-sex homes also turns nature on its head"); Trial Exh. PX0514, at 2 (deeming marriages of same-sex couples "a 'frontal attack on the rights of children, and an attack on humanity and reason'"). Those messages were intended to animate "fears that children exposed to the concept of same-sex marriage might become gay or lesbian themselves." Pet. App. 279a; *see also* J.A. 488-89; J.A. Exh. 103 (statement by official proponent that "[i]f we lose . . . [e]very child, when growing up, would fantasize marrying someone of the same sex. More children would become homosexuals."). The Yes on 8 campaign's "Protect Your Children" theme sharply echoed past campaigns to roll back gay rights, such as Anita Bryant's notorious "Save Our Children" campaign of 1977, which successfully sought repeal of an anti-discrimination ordinance by portraying gay people as child molesters who sought to turn children

gay. J.A. 156, 477-82, 486-89; Trial Exh. PX0864, at 303-04, 309.[8]

Trial evidence showed that while the Proposition 8 campaign was at times "more polite" than older campaigns like Bryant's, it nonetheless reflected and reinforced the same stereotypes as past campaigns. J.A. 488-92. These stereotypes included describing gay sexual orientation as "*the gay lifestyle*," a choice gay people could make "in their private lives" but that society should not have to acknowledge. J.A. Exh. 56 (emphasis in original). At other times the campaign spoke more directly, asserting the immorality or perversion of gay people. *See, e.g.*, Trial Exh. PX0506, at 12 (transcript of campaign event asserting that if same-sex couples can marry, "any combination would have to be allowed" including marriages to children and horses); J.A. Exh. 176 (print materials claiming "[h]omosexuality is linked to pedophilia" and arguing that "[h]omosexuals are 12 times more likely to molest children"); J.A. Exh. 81 (claim that same-sex relationships "harm the body of society"); J.A. Exh. 102 (message from official proponent that the "gay

[8] The success of the Bryant campaign spawned many imitators. *See, e.g.,* PX0618, at 13-3 to 13-10 (describing campaigns in many States that attempted to roll back protections for gay people, often based on characterizations of gay people as perverse or deviant); Brief for Respondents, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 417786, at *7 (describing campaign materials for Colorado's Amendment 2 vilifying gay people as "morally depraved" and child molesters).

agenda" is "Satan[ic]" and wishes to "legalize prostitution" and "legalize having sex with children").

The campaign also insisted that including gay couples in the institution of marriage would irredeemably taint it, and perhaps even destroy it. For example, the arguments in the ballot pamphlet exhorted that gay couples "*do not have the right to redefine marriage* for everyone else." J.A. Exh. 56 (emphasis in original). As one of the architects of the Yes on 8 campaign put it, "[w]e needed to convince voters that gay marriage was not simply 'live and let live,'" but that if Proposition 8 did not pass "they would have to accept gay marriage as being equivalent to traditional marriage." J.A. Exh. 109; *see also* J.A. Exh. 67 ("If Proposition 8 is defeated, the sanctity of marriage will be destroyed. . . ."); J.A. Exh. 104 ("The narrow decision of the State Supreme Court effectively renders all civil marriage meaningless. . . ."). The proponents of Proposition 8 likened same-sex couples' marriage rights to the September 11th attacks and to an oncoming freight train that would destroy marriage and the family itself. J.A. Exh. 91 (video), 86 (video). This portrayal of members of a minority group as dangerous outsiders itself reflected prejudice.

Petitioners would erase the Yes on 8 campaign messages from this Court's view, contending that voters' purported motives are irrelevant. Br. at 14 (citing *Michael M. v. Superior Court*, 450 U.S. 464, 472 n.7 (1981) (plurality)). But this Court has frequently considered the "facts and circumstances"

surrounding the passage of popular measures to understand their objective purposes. *Reitman*, 387 U.S. at 378. In the context of an initiative, those factors include not only the text itself but also the initiative's historical background and the public messages of initiative sponsors or campaign leaders. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196-97 (2003) ("statements made by decisionmakers or referendum sponsors during deliberation" may be evidence of intent); *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (considering stated purpose of legislative sponsor); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (citing district court's reliance on statements of initiative sponsor and campaigner to determine initiative's purpose); *Reitman*, 387 U.S. at 373 (considering objective, effect, and historical context of initiative measure).

To say that the messages of the campaign confirm that Proposition 8's purpose was to brand same-sex couples as inferior, however, is not to say the Californians who voted for it did so out of malice. Prejudice need not mean deliberate hatred or spite. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-70 (1993). Rather,

> [p]rejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism

> to guard against people who appear to be different in some respects from ourselves.

Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). San Diego Mayor Jerry Sanders explained in similar terms at trial that he realized his opposition to marriage rights for same-sex couples was "grounded in prejudice" when he finally understood that his view was tantamount to telling his lesbian daughter "that her relationship was less than the relationship and marriage my wife and I had." J.A. 680; *see also* J.A. Exh. 77. Concluding that Proposition 8 serves no legitimate purpose does not impugn the people of California as bigots, just as this Court did not so label Coloradans when it invalidated Amendment 2 in *Romer*.

3. Proposition 8's removal of rights from an unpopular minority makes it especially suspect.

"[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer*, 517 U.S. at 633 (internal quotation marks omitted). Proposition 8 is unusual in the way it deprives lesbians and gay men of the title "marriage" but not its incidents. And it is unique in American law in extinguishing an existing state

constitutional right of lesbians and gay men to marry.[9]

Proposition 8 withers under the "careful consideration" that unusual classifications demand because it strips rights away without reason. It is true that the Equal Protection Clause does not require States to forever adhere to laws granting rights that the federal Constitution does not require. *Crawford*, 458 U.S. at 539-40. But it *does* require a State to have a reason to withdraw rights – and that reason cannot be mere fears or stereotypes. In *Romer*, this Court rejected Colorado's "principal argument" that an initiative constitutional amendment prohibiting gay people from receiving protection from discrimination did nothing more than remove "special rights" that Colorado was not obligated to offer. 517 U.S. at 626. Even if those rights were not required in the first

---

[9] Only seven States besides California have domestic partner or civil union laws that offer same-sex couples all or nearly all of the legal incidents of marriage. *See* Del. Code Ann. tit. 13, §§ 212, 214; Haw. Rev. Stat. § 572B-9; 750 Ill. Comp. Stat. Ann. § 75/20; Nev. Rev. Stat. § 122A.200; N.J. Stat. §§ 37:1-31, 37:1-32; Or. Rev. Stat. § 106.340; R.I. Gen. Laws §§ 15-3.1-6, 15-3.1-7. No State has withdrawn a right to marry that gay couples previously enjoyed.

Petitioners claim that to treat California's withdrawal of marriage rights as significant would discourage other States from offering protections to gay people, for fear those protections could never be withdrawn. Br. at 59. The fact that a State within the Ninth Circuit granted marriage rights to same-sex couples after the Ninth Circuit's decision rebuts this claim. Washington Referendum Measure No. 74, Nov. 2012.

place, taking them away by a constitutional amendment served no purpose other than to harm gay Coloradans and render them "stranger[s] to [the] law." *Id.* at 635. Similarly, this Court in *Reitman* affirmed the California Supreme Court's determination that California's initiative repealing discrimination protections, which were not required by federal law, "was intended to authorize . . . racial discrimination in the housing market," an illegitimate purpose. 387 U.S. at 376, 381.

Proposition 8 is the same. As the Ninth Circuit recognized, "[t]he action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is." Pet. App. 55a. Perhaps for that reason, taking away a right that an unpopular minority has finally come to enjoy is especially stinging. Before 2008, marriage seemed so far out of reach for many gay people that they did not allow themselves even to imagine marrying the person they loved. J.A. 359 (Plaintiff Kristin Perry testimony that "[g]rowing up as a lesbian, you don't let yourself want it, because everyone tells you you are never going to have it"). After the California Supreme Court recognized their right to marry, same-sex couples finally let themselves want marriage, as the 18,000 weddings that took place during the summer of 2008 attest. *See Strauss*, 207 P.3d at 121. Helen Zia described what it felt like to get married: "You know, the idea that we would be families, that we – for a brief moment in time we experienced a feeling of . . . what

equality is . . . . And we tasted the water that was sweeter there." J.A. 662.

But Proposition 8 inflicted the wound of unequal treatment on lesbians and gay men anew, reigniting the feelings of shame, isolation and humiliation they had experienced throughout their lives. J.A. 546, 554-55 (Meyer testimony); J.A. 344-45 (Plaintiff Paul Katami testimony) (Proposition 8 supporter's statement that "marriage is not for you people anyway," brought him "back to that place" where "regardless of how proud you are, you still feel a bit ashamed. . . . [I]n that moment, being gay means I'm unequal. . . . I have been relegated to a corner."); J.A. Exh. 364-65 (Perry testimony) (invalidation of her 2004 marriage to Plaintiff Sandra Stier evoked feelings that as a lesbian she "[didn't] really deserve things," and that she was "not good enough to be married"); J.A. Exh. 376-77 (Perry testimony) (calling the decision to marry "the most important decision I was going to make as an adult"; "There's something so humiliating about everybody knowing that you want to make that decision and you don't get to [do] that, you know, it's hard to face the people at work and the people even here right now. And many of you have this, but I don't."); J.A. Exh. 383-85 (Perry testimony) (because of the outrage, hurt and humiliation she and Stier felt when their 2004 marriage was invalidated, they decided to refrain from marrying until the right could not be taken away); J.A. Exh. 337 (Plaintiff Jeffrey Zarrillo testimony) (since Proposition 8 passed there are "daily reminders of what I can't have").

To impose the kinds of harms that Proposition 8 worked demands justification. *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) ("In light of [the] countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State."). The justifications that Petitioners now offer for it – *post hoc* justifications different from the ones advanced to the voters during the Yes on 8 campaign, Pet. App. 149a-150a – relate mostly to their claims about the benefits of *extending* the honor of marriage only to opposite-sex couples, and say almost nothing about the justification for *removing* same-sex couples' marriage rights. *Crawford* acknowledges that gratuitous benefits may be withdrawn if they prove "unworkable or harmful." 458 U.S. at 540. But surely they cannot be withdrawn for unrelated reasons, as Petitioners apparently believe.

III. Proposition 8 Does Not Advance The Justifications Petitioners Claim For It.

A. Proposition 8 Is Not Rationally Related To Any Interest California Has Relating To Children Or Procreation.

To justify the singular harm that Proposition 8 works on same-sex couples – many of whom are raising children together – Petitioners contend that Proposition 8 serves an abstract interest in the welfare of children that they call "responsible procreation." They argue that it is unnecessary to allow

same-sex couples to marry (and therefore permissible to take that right away) because the purpose of marriage is to steer opposite-sex couples into that institution to diminish the chances that their accidental children will be born out of wedlock. The responsible-procreation argument for rescinding gay people's marriage rights has no connection to reality. Marriage in California is about much more than procreation, and California law is concerned with advancing children's welfare by promoting responsible parenting – including parenting by same-sex couples – regardless of the circumstances of a child's conception. Because tens of thousands of same-sex couples in California have children, and because prohibiting same-sex couples from marrying hurts their children, Proposition 8 is inimical to California's policy interests – something Petitioners' responsible-procreation rationale ignores. What is more, even on its own terms, the responsible-procreation rationale is untenable, because taking away marriage rights from same-sex couples could not conceivably make opposite-sex couples more responsible in their procreative activity.

1. Marriage in California has many purposes in addition to procreation.

Petitioners' exclusive focus on procreation as the "overriding purpose of marriage," Br. at 33, understates and distorts the role of marriage in

society. California has long recognized that two people can choose to marry for many reasons, including to form bonds of support and companionship, to take on mutual responsibilities of care, and to promote their mutual happiness. *See Elden,* 758 P.2d at 586-87; *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976). The State, too, has interests in marriage unrelated to children. Marriage provides "an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society." *Elden*, 758 P.2d at 587 (internal quotation marks omitted). Married couples take on "important responsibilities toward one another," *ibid.*, that can relieve the State from shouldering the costs of their support. *See* Cal. Fam. Code § 4301; *Dep't of Mental Hygiene v. Kolts*, 55 Cal. Rptr. 437, 444 (Cal. Ct. App. 1966) (husband required to pay for care of mentally ill wife). Unsurprisingly in light of the many personal and societal purposes served by marriage beyond reproduction, California does not condition the right to marry on the willingness or ability to conceive or parent a child. *See Stepanek v. Stepanek*, 14 Cal. Rptr. 793, 794 (Cal. Ct. App. 1961).

This Court, too, has understood marriage as an institution founded on more than reproductive capacity. It has defined marriage as a union founded on the "coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *see also Turner v. Safley*, 482 U.S. 78, 95 (1987) (marriages are "expressions of emotional support and

public commitment"). This Court has never adopted an exclusively procreative understanding of marriage. *Griswold* upheld a married couple's right to *prevent* procreation, and described laws restricting birth control as having a "maximum destructive impact upon [the marital] relationship." 381 U.S. at 485. *Turner* held that the constitutional right to marry extends to individuals confined to prison because the "attributes of marriage remain [even] after taking into account the limitations imposed by prison life." 428 U.S. at 96.

On Petitioners' exclusively child-centered account, by contrast, the State could prohibit the infertile or those past childbearing age from marrying, at least without raising equal protection concerns, since the inclusion of those groups would not advance the purpose of marriage. That is plainly not the law, and Petitioners' myopic account of marriage only demonstrates the unreliability of their justifications for Proposition 8.

2. Before and after Proposition 8, same-sex couples may parent children on an equal basis regardless of their marital status.

Even if the purpose of marriage were singularly limited to the bearing and raising of children, Proposition 8 still bears no relation to a legitimate interest in light of California's laws related to families. Proposition 8 cannot be justified as advancing California's

interest in promoting the "optimal social structure" of a man, a woman, and their biological children, Pet. Br. at 37 (internal quotation marks omitted), because California family law does not privilege that social structure in any respect. California recognizes that same-sex couples are fully qualified to parent children by affording the same parenting rights to domestic partners that it grants married couples. Cal. Fam. Code § 297.5(d). Indeed, one of the foundational purposes of California's domestic partnership statute was to signify that "[t]he children of [same-sex couples'] unions are no less deserving of the protections afforded the children of heterosexual marriages." *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 698 (Cal. Ct. App. 2005). "[A] stable two-parent family relationship, supported by the state's official recognition and protection, is *equally as important* for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples. . . ." *Marriage Cases*, 183 P.3d at 433 (emphasis added).

In accord with this policy, all of the parental rights that flow from opposite-sex couples' marriages apply equally to same-sex couples' unions. Just as a husband is the presumed parent of any child born to his wife while he cohabits with her, *see, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989), a woman is the presumed mother of a child born to her wife or domestic partner during their union, regardless of how the child was conceived, *see In re M.C.*, 123 Cal. Rptr. 3d 856, 871-72 (Cal. Ct. App. 2011). Domestic

partners are permitted to adopt each others' children through the same streamlined legal procedure that California affords for step-parent adoptions by married partners. Cal. Fam. Code § 9000. Proposition 8 had no effect on these family rights. *Strauss*, 207 P.3d at 102.[10]

Rather, for married couples and domestic partners alike, the parental rights and responsibilities that rise or fall with marital or partnered status are few, and California has decoupled the rights and responsibilities of marriage or domestic partnership from parenthood in many respects. California's laws establishing parental responsibilities largely disregard marital status. Cal. Fam. Code § 7602; *Johnson v. Calvert*, 851 P.2d 776, 778-79 (Cal. 1993). Instead, California employs a series of presumptions creating a legal claim to parenthood not merely in a person married to a child's parent or biologically related to the child, but also in a person who has caused the child to be conceived through assisted reproduction or who has formed a parental relationship with the child. Cal. Fam. Code §§ 7611-7614. Where there are

[10] Petitioners may claim that Proposition 8 impliedly repealed any policy that same-sex couples are the equal of opposite-sex couples with respect to parenting. This claim is foreclosed by the ballot pamphlet's insistence that the measure would not take away any of same-sex couples' rights or benefits other than marriage, J.A. Exh. 56, and by the California Supreme Court's ruling that Proposition 8 left gay couples' rights to form families and have children untouched, *Strauss*, 207 P.3d at 102.

competing claims of parenthood by different putative parents, neither biology nor marriage to an undisputed parent necessarily trumps. *See, e.g.*, *Steven W. v. Matthew S.*, 39 Cal. Rptr. 2d 535, 539 (Cal. Ct. App. 1995); *In re M.C.*, 123 Cal. Rptr. 3d at 876-77. Instead, courts assign legal parent status to the person whose claim reflects "weightier considerations of policy and logic." Cal. Fam. Code § 7612(b). Where there is an existing parent-child relationship, preserving that relationship is a far weightier concern than connecting a child to a biological parent. *See Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 613 (Cal. Ct. App. 2004) ("[I]ncreasingly over the last three decades, our courts have resolved paternity disputes by looking to the existence and nature of the social relationship between the putative father and child."); *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, 303 (Cal. Ct. App. 2000) (emphasizing "theme of relationship (as distinct from mere biological parenthood)"). Similarly, California courts have repeatedly declined to presume parenthood in a husband whose wife bears a child where it does not further the best interest of the child, often because the child has formed a parent-child relationship with someone else. *See, e.g.*, *Comino v. Kelley*, 30 Cal. Rptr. 2d 728, 731 (Cal. Ct. App. 1994) (putative father's relationship with child trumped husband's "conclusive" presumption of fatherhood); *Alicia R. v. Timothy M.*, 34 Cal. Rptr. 2d 868, 871 (Cal. Ct. App. 1994).

California's parentage presumptions are applied without regard to sexual orientation, even where a

same-sex couple has not formalized a domestic partnership. Thus, a gay man or lesbian can become the legal parent of a child that he or she lives with and holds out as his or her own child, regardless of a lack of biological connection between them. *Elisa B. v. Superior Court*, 117 P.3d 660, 666-67 (Cal. 2005) (biological mother conceived child through insemination during lesbian relationship); *E.C. v. E.V.*, 136 Cal. Rptr. 3d 339, 343, 346-47 (Cal. Ct. App. 2012) (biological mother conceived child in previous romantic relationship with a man). The intended parent doctrine, under which parents who create a child through assisted reproduction are responsible for the child, applies equally to same-sex and opposite-sex couples. *Compare People v. Sorenson*, 437 P.2d 495, 499 (Cal. 1968), and *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998), *with Elisa B.*, 117 P.3d at 666-68. Similarly, California's "public policy favoring that a child have two parents rather than one" applies equally to gay couples. *Kristine H. v. Lisa R.*, 117 P.3d 690, 696 (Cal. 2005). Single gay people and gay couples are afforded the same opportunities to become foster parents and adoptive parents that heterosexual singles and unmarried couples have. *See* Cal. Welf. & Inst. Code § 16013(a); *Sharon S. v. Superior Court*, 73 P.3d 554, 569-70 (Cal. 2003). Nor does California privilege one or the other gender in parenting, or expect people to parent in accordance with traditional gender roles. Cal. Fam. Code § 3040; *Carney v. Carney*, 598 P.2d 36, 41-43 (Cal. 1971). California law simply does not treat sexual orientation or gender as relevant to parental fitness in any respect, before or after Proposition 8.

In sum, California seeks stable, two-parent households for all children, no matter how they are conceived and no matter the gender of the parents. It advances the welfare of children not by discouraging same-sex couples from parenting but by encouraging them, using exactly the same legal rights and responsibilities that it uses to support opposite-sex parents. Petitioners' arguments about the ideal family structure might at least require consideration in evaluating the marriage laws of States that, for example, prefer heterosexual couples as parents or expect parents to reinforce traditional gender roles. But in California, where the laws reflect an understanding of the equal fitness of gay couples as parents, such arguments have no relevance at all.

Indeed, Proposition 8 not only fails to advance California's interest in supporting family relationships, it has precisely the opposite effect insofar as it targets same-sex couples and their families for disfavored treatment. According to trial testimony based on 2000 Census data, nearly 40,000 children in California were being raised by same-sex couples. Tr. 1348-50 (economist Lee Badgett). California law has long endeavored to protect these children to the same extent as any other children. Yet Proposition 8 undercuts the goal of promoting children's welfare by denying these children the greater stability and social status of having married parents – as even Proposition 8's supporters admitted. J.A. 806-07 (official proponent William Tam); J.A. 902-03, 912 (Blankenhorn). In fact, the evidence at trial showed that children of

same-sex couples "suffer" and are "disadvantaged" by their parents' inability to marry. Trial Exh. PX2879, at 3; Trial Exh. PX2880, at 11; *see generally* Brief of Family Equality Council *et al.* as *Amici Curiae* in Support of Respondents. These are anomalous results for a measure intended to protect children and families. Pet. Br. at 37-38.[11]

3. Withdrawing rights from same-sex couples does not promote responsible procreation.

Even though Proposition 8 cannot be justified by a preference for a particular family structure given California's repudiation of such a preference, and even though Proposition 8 actually harms children being raised by same-sex couples in California, Petitioners insist that an interest in promoting responsible procreation justifies the measure. This justification was first crafted as a defense for marriage laws that reserve the honor and financial benefits of marriage to opposite-sex couples in the first instance, *see, e.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006), not a law like Proposition 8 that strips same-sex couples of an existing right to marry. Petitioners attempt to graft the defense onto this case as

[11] Moreover, if Proposition 8 were really intended to advance the welfare of children by excluding people from marriage based on their fitness to raise children, it could have picked better targets, such as people who had harmed children in the past.

a justification for Proposition 8, but they simply cannot explain how *withdrawing* the status of marriage from same-sex couples encourages opposite-sex couples to marry or reduces the likelihood that accidental children will be born out of wedlock. The fact that their brief nowhere asserts that these consequences actually *will* occur, but only makes vague claims of "a significant risk of adverse consequences over time," Br. at 51, demonstrates how implausible Petitioners' responsible-procreation account is here. Surely such a farfetched theory – dubious enough in jurisdictions that have never allowed gay couples to marry, *see Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961-62 (Mass. 2003) – is not enough to justify *removing* a right as precious as marriage. And in fact, evidence at trial disproved Petitioners' claim; jurisdictions where the right to marry has been granted to same-sex couples have seen no meaningful change in opposite-sex couples' marriage rates. J.A. 427, 436-37, 518-20, 703-04, 710.

But even if Petitioners' account were plausible – even if there were reason to suspect that opposite-sex couples began to value the status of marriage less once it became available to same-sex couples – California may not create a separate relationship classification for gay couples simply to give effect to "negative attitudes" or "private biases." *See City of Cleburne*, 473 U.S. at 448; *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Reitman*, 387 U.S. at 378-79; *Anderson v. Martin*, 375 U.S. 399, 404 (1964). Classifications cannot be drawn on the ground that equal

access to a revered institution will somehow diminish it. *Virginia*, 518 U.S. at 542-43 ("The notion that admission of women would downgrade VMI's stature . . . is . . . a prediction hardly different from other self-fulfilling prophec[ies], once routinely used to deny rights or opportunities.") (internal citations and quotation marks omitted).

Finally, if Proposition 8 truly helped stabilize opposite-sex couples' relationships by bestowing an honored title on them alone, then it would do so at the expense of same-sex couples, and their children, whose claim to that title has been extinguished. States once routinely invoked the purpose of promoting "traditional family life" to justify laws disfavoring illegitimate children. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 620 (1973) (per curiam) (internal quotation marks omitted); *see also Trimble v. Gordon*, 430 U.S. 762, 769 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972). In a series of cases, this Court categorically rejected "the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships," denying those children the benefits owed to legitimate children. *Trimble*, 430 U.S. at 769. Punishing illegitimate children, this Court found, is too "attenuated" from the act of extramarital procreative sex to serve as any effective deterrent. *Id.* at 768; *Weber*, 406 U.S. at 173, 175 (finding this purported deterrent ineffectual). Indeed, the Court has deemed this justification "farfetched." *Glona v. American Guar. &*

Liab. Ins. Co., 391 U.S. 73, 75 (1968). The Court has also noted the fundamental unfairness of punishing children for the acts of their parents, stating that "visiting this condemnation on the head of an infant is illogical and unjust." *Weber*, 406 U.S. at 175. After all, "illegitimate children can affect neither their parents' conduct nor their own status." *Trimble*, 430 U.S. at 770. The Court has extended this reasoning to state laws that disfavor not just children but unmarried parents as well. *New Jersey Welfare Rights Org.*, 411 U.S. at 620-21 (invalidating state law denying welfare benefits to nonmarital families).[12]

---

[12] Petitioners may claim these cases are inapplicable because illegitimacy is a quasi-suspect classification. But this Court applies intermediate scrutiny to "laws burdening illegitimate children for the sake of punishing the illicit relations of their parents" precisely because of the Court's determination that "visiting this condemnation on the head of an infant is illogical and unjust." *Astrue v. Capato ex rel. B.N.C.*, ___ U.S. ___, 132 S. Ct. 2021, 2033 (2012) (internal quotation marks and brackets omitted). Moreover, the Court has found that illegitimacy laws lack even a rational basis. *See, e.g., Glona*, 391 U.S. at 75 (finding that there is "no possible rational basis" to believe that burdening illegitimate children will encourage wedlock births); *Weber*, 406 U.S. at 176 (striking down legitimacy classification because "the classification is justified by no legitimate state interest, compelling or otherwise"); *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974) (rejecting claim that excluding illegitimate children from benefits is "reasonably related to the prevention of spurious claims").

The reasoning of these cases has equal force here. It is "farfetched" to believe that taking an honored title away from lesbian and gay families will make heterosexual couples more likely to marry and have children within wedlock. And denying lesbian and gay couples, and their children, access to the revered institution of marriage in order to promote marriage among other families is just as fundamentally unfair as punishing illegitimate children for their parents' conduct. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. The responsible-procreation justification is so attenuated from the means California uses to safeguard the welfare of children, and so harmful to the children of same-sex couples, that this justification does not supply a rational basis for Proposition 8.

B. Proposition 8 Does Not Advance Any Interest In "Going Slowly" Before Altering Marriage Rights.

Petitioners further argue that it was reasonable for California voters to "proceed with caution" by stripping marriage rights from same-sex couples because of uncertainty about the long-term consequences of granting them marriage rights. Br. at 50-55. Californians were entitled, Petitioners argue, to rescind these couples' marriage rights while they observe the outcome of marriage equality in other jurisdictions.

This justification does not supply a rational basis for Proposition 8 because it is nothing more than a watered-down reframing of other, inadequate justifications. Petitioners assert that "redefin[ing]" marriage as a "genderless institution" severed from natural procreation will make parents less likely to "remain married[ ] and play an active role in raising their children." Br. at 55. But this argument is simply a "what if" restatement of Petitioners' responsible-procreation rationale, which is no rationale at all. The fact that the responsible-procreation interest cannot be credited at all makes any "fear" of an effect on this interest unreasonable.

The same is true of Petitioners' assertion that marriage might be "weaken[ed]" in some undetermined way by including same-sex couples. Br. at 51-52. Petitioners introduced a single witness, David Blankenhorn, in support of this theory at trial. Pet. App. 157a-158a. Blankenhorn presented no data or other evidence supporting the claim that permitting gay men and lesbians to marry diminishes the likelihood that opposite-sex couples will do so, or that the institution of marriage will be affected in any demonstrable way. *Id.* at 151a. Indeed, when the district court asked what harm might come to opposite-sex married couples if gay and lesbian couples could marry, Petitioners' counsel answered "I don't know. I don't know." *Ibid*. The court found, based on the trial evidence, that permitting same-sex couples to marry would have no effect on the number or stability of opposite-sex couples' marriages. *Id.* at 245a.

Furthermore, Petitioners' claim that the voters could reasonably be hesitant about the effects of "redefining marriage" is based on a misconception that gay couples want to marry in order to transform the institution into "essentially an emotional union without any inherent connection to procreation and family life." Br. at 52 (internal quotation marks omitted). This claim – that gay couples seek marriage only to gratify their adult needs and desires – in itself regrettably reflects longstanding, unfounded stereotypes about gay people. All of the evidence at trial showed that lesbians and gay men seek to marry for the same reasons that opposite-sex couples do: to create a stable foundation for having children, J.A. 335, 342, 359-60; to deepen and enrich their commitment to each other, J.A. 519; and to bind their extended families together into a new community, J.A. 653-59. These reasons fully accord with the established understanding of the meaning of marriage.

Petitioners are not the first to offer a "proceed with caution" defense to a discriminatory statute. The State of Virginia contended that "the scientific evidence" regarding the effects of "interracial marriages . . . is substantially in doubt," and that this uncertainty warranted "defer[ence] to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages." *Loving v. Virginia*, 388 U.S. 1, 8 (1967). The City of Akron attempted to justify a popular referendum that entrenched discriminatory housing practices as "simply a public decision to move slowly in the delicate area of race relations." *Hunter*

v. Erickson, 393 U.S. 385, 392 (1969). This Court has unfailingly rejected these justifications – and for good reason. The "proceeding with caution" justification would turn longstanding equal protection principles on their head by "permitting discrimination until equal treatment is proven, by some unknown metric, to be warranted." *Pedersen v. Office of Personnel Mgmt.*, 881 F. Supp. 2d 294, 345-46 (D. Conn. 2012). Indeed, giving credence to a fear that granting equality might alter the "social meaning" of an institution, Pet. Br. at 50 (internal quotation marks omitted), could allow inequality in perpetuity. But the Equal Protection Clause forbids the use of classifications absent some connection to an independent justification. *See Williams*, 472 U.S. at 27 ("[A] classification must reflect pre-existing differences; it cannot create new ones that are supported only by their own bootstraps.").

IV. That Public Debate On Marriage Rights Continues Does Not Save Proposition 8.

Finally, Petitioners argue that because gay couples' marriage rights are being debated throughout the country, the Court should uphold Proposition 8 even if an application of conventional equal protection principles required that it be struck down. Because the issue is controversial, they contend, it is best addressed in the democratic process so that "decisions" about whether gay people can marry "are more likely to be regarded by a free people as legitimate." Br. at 57. At the same time, Petitioners point

to recent ballot measures extending marriage rights to lesbians and gay men, as if to imply that today's discrimination is of less concern because tomorrow's generation will come to understand the harm that Proposition 8 inflicts. Br. at 58.

Petitioners' argument derogates the most important role this Court serves in our democracy: to protect the constitutional rights of minorities from encroachment by an unsympathetic majority. The responsibility to protect individual rights does not transfer to the political process when the dispute happens to be "controversial." Pet. Br. at 56. Quite the contrary. In this circumstance more than any other, constitutional rights "may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The Court must adjudicate those rights "unabated by its judgment about whether a particular result will be subject to criticism, hostility, or disobedience." Jesse H. Choper, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 167 (1980). This is the very principle "whose integrity the Court is charged with maintaining." Alexander M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 129 (Bobbs-Merrill Co. 1986) (1962).

Petitioners rely on cases such as *Washington v. Glucksberg*, 521 U.S. 702 (1997), for the idea that the Court should uphold Proposition 8 to allow the "debate" about marriage rights "to continue, as it should

in a democratic society." Br. at 58-59 (internal quotation marks omitted). It is telling that these cases involve substantive due process, not equal protection. In substantive due process cases, the question whether an asserted right exists in the first place depends on consensus in society about its importance. *Glucksberg*, 521 U.S. at 722-23; *see also Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009).[13]

Equal protection cases, however, are different. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) ("[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."). Equal protection takes as a given the existence of a controversy about whether the government may treat a class of people unequally, and the Court's role is to resolve that controversy by applying constitutional principles objectively to ensure that minorities are not victims of irrational discrimination simply because they are outnumbered. Just as the Court would never have considered legitimizing school segregation by upholding it

[13] Whether a fundamental right exists at all is decided in part by considering whether there is a long tradition of safeguarding that right. *Glucksberg*, 521 U.S. at 723. But disagreement about who has access to a right already acknowledged as fundamental does not depend on societal opinion. *See, e.g.*, *Loving*, 388 U.S. at 6 n.5, 12 (finding interracial couple's due process right to marry infringed by miscegenation ban notwithstanding sixteen states' laws prohibiting interracial marriage); *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

for political reasons in *Brown v. Board of Education*, 347 U.S. 483 (1954), it should not consider upholding Proposition 8 if it concludes the measure inflicts a constitutional wrong on gay people and their families.[14]

To be sure, concerns about the judicial role in our democracy remain relevant in equal protection cases, albeit within the bounds of the Court's responsibility to decide cases objectively. But the Ninth Circuit showed full awareness of this, reserving larger questions involving the right to marry and focusing on the context in which Proposition 8 was enacted and the peculiar harm it inflicted on gay and lesbian Californians. This approach avoided cutting off legislative and political debate throughout the circuit, while vindicating the rights of the minorities directly affected by the discrimination, as was the Ninth Circuit's duty. What the Ninth Circuit did not do, and what no court should do, is legitimize the discrimination by declaring it "not unconstitutional" even when it is. Bickel, *supra*, at 129 (internal quotation marks omitted).

---

[14] Even in an equal protection case, presumably it would be appropriate to consider arguments about controversy and the democratic conversation at the *certiorari* stage. Perhaps these are even reasons to hold that Petitioners lack standing, as one article cited by Petitioners urges the Court to do. Br. at 50. But "Keeping Out Entirely" (as that article is titled) does not mean rejecting valid claims of discrimination for political reasons.

Petitioners also contend that conventional equal protection analysis applies differently here because marriage has long been regulated at the state level. Br. at 59. But while States and the public may have the general right to define the terms on which marriages can take place, the Constitution places firm limits on the barriers the States may impose. *See Turner*, 482 U.S. at 94-99; *Zablocki v. Redhail*, 434 U.S. 374, 390-91 (1978); *Loving*, 388 U.S. at 7. In this respect, marriage is no different from countless other matters traditionally reserved to state control, but subject to limitation by the Federal Constitution. *See, e.g., Richardson v. United States*, 526 U.S. 813, 820 (1999) (state criminal law); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 314 (1998) (state tax law); *Casey*, 505 U.S. at 849. Petitioners' federalism argument is thus question-begging. As in any equal protection case, California may not rest on the fact that marriage is traditionally regulated by the States, but must have a legitimate policy-based reason for its decision to stop gay people from getting married.

That California voters could decide to let same-sex couples marry again someday does not change the substantive constitutional question presented here, where every day that Proposition 8 is in effect it denies the equal protection of the laws to hundreds of thousands of California citizens. The possibility of repeal does not change that reality, nor does it alter this Court's responsibility to apply established equal protection jurisprudence to a case it has determined to review. *See Lucas v. Forty-Fourth Gen. Assembly*,

377 U.S. 713, 736 (1964) ("Courts sit to adjudicate controversies involving alleged denials of constitutional rights" despite the potential "existence of a nonjudicial remedy through which relief against the alleged [denial] . . . might be achieved.").

In short, Petitioners make a plea that no matter what this Court actually believes about the constitutionality of Proposition 8, it should nonetheless uphold the measure based on political concerns. That plea cannot be countenanced. If this Court finds that Proposition 8 takes the right to marry away from same-sex couples for no purpose other than to brand them as inferior, then its duty, consistent with its longstanding and vital role in our system of government, is to hold the measure unconstitutional.

CONCLUSION

Petitioners lack standing to appeal the district court's judgment striking Proposition 8 because they suffer no particularized harm from that judgment. The Court should therefore vacate the Ninth Circuit's opinion with instructions to dismiss the appeal. In the alternative, if the Court finds it has jurisdiction, it should affirm the judgment. Because Proposition 8 does not advance the purposes that Petitioners claim for it, and because it serves only to classify lesbian and gay couples' committed relationships as unequal,

it is unconstitutional under any standard of equal protection review.

Respectfully submitted,

SAN FRANCISCO CITY ATTORNEY'S OFFICE

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
Counsel of Record
CHRISTINE VAN AKEN
AILEEN M. MCGRATH
VINCE CHHABRIA
MOLLIE M. LEE
SARA J. EISENBERG
LEILA K. MONGAN
Deputy City Attorneys

Counsel for Respondent
City and County of San Francisco

February 21, 2013