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IN THE SUPREME COURT OF THE UNITED STATES

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DENNIS HOLLINGSWORTH, ET AL., :

Petitioners : No. 12-144

v. :

KRISTIN M. PERRY, ET AL. :

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Washington, D.C.

Tuesday, March 26, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

CHARLES J. COOPER, ESQ., Washington, D.C.; on behalf of Petitioners.

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of Respondents.

DONALD B. VERRILLI, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondents.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 12-144, Hollingsworth v. Perry.

Mr. Cooper?

ORAL ARGUMENT OF CHARLES J. COOPER

ON BEHALF OF THE PETITIONERS

MR. COOPER: Thank you, Mr. Chief Justice, and may it please the Court:

New York's highest court, in a case similar to this one, remarked that until quite recently, it was an accepted truth for almost everyone who ever lived in any society in which marriage existed. Marriage --

CHIEF JUSTICE ROBERTS: Mr. Cooper, we have jurisdictional and merits issues here. Maybe it'd be best if you could begin with the standing issue.

MR. COOPER: I'd be happy to, Mr. Chief Justice.

Your Honor, the official proponents of Proposition 8, the initiative, have standing to defend that measure before this Court as representatives of the people and the State of California to defend the validity of a measure that they brought forward.

JUSTICE GINSBURG: Have we ever granted standing to proponents of ballot initiatives?

1                   MR. COOPER: No, Your Honor, the Court has  
2 not done that, but the Court has never had before it a  
3 clear expression from a unanimous State's high court  
4 that --

5                   JUSTICE GINSBURG: Well, this is -- this  
6 is -- the concern is certainly, the proponents are  
7 interested in getting it on the ballot and seeing that  
8 all of the proper procedures are followed, but once it's  
9 passed, they have no proprietary interest in it. It's  
10 law for them just as it is for everyone else. So how  
11 are they distinguishable from the California citizenry  
12 in general?

13                   MR. COOPER: They're distinguishable, Your  
14 Honor, because the Constitution of the State of  
15 California and its election code provide, according to  
16 the unanimous interpretation of the California Supreme  
17 Court, that the official proponents, in addition to the  
18 other official responsibilities and authorities that  
19 they have in the initiative process, that those official  
20 proponents also have the authority and the  
21 responsibility to defend the validity of that  
22 initiative --

23                   JUSTICE SCALIA: I guess the attorney  
24 general of this State doesn't have any proprietary  
25 interest either, does he?

1 MR. COOPER: No, Your Honor, nor did --

2 JUSTICE SCALIA: But -- but he can defend  
3 it, can't he --

4 MR. COOPER: -- nor did --

5 JUSTICE SCALIA: -- because the law says he  
6 can defend it.

7 MR. COOPER: That's right, Your Honor. Nor  
8 did the legislative leaders in the Karcher case have --

9 JUSTICE KAGAN: Could the State --

10 MR. COOPER: -- any particular enforcement --

11 JUSTICE KAGAN: -- could -- could the State  
12 assign to any citizen the rights to defend a judgment of  
13 this kind?

14 MR. COOPER: Justice Kagan, that would be  
15 a -- a very tough question. It's -- it's by no means  
16 the question before the Court because -- because it  
17 isn't any citizen. It's -- it is the -- it is the  
18 official proponents that have a specific and -- and  
19 carefully detailed --

20 JUSTICE KAGAN: Well, I just -- if you would  
21 on the hypothetical: Could a State just assign to  
22 anybody the ability to do this?

23 MR. COOPER: Your Honor, I think it very  
24 well might. It very well might be able to decide that  
25 any citizen could step forward and represent the

1 interests of the State and the people in that State --

2 CHIEF JUSTICE ROBERTS: Well, that would  
3 be -- I'm sorry, are you finished?

4 MR. COOPER: Yes, Your Honor.

5 CHIEF JUSTICE ROBERTS: Okay. That -- that  
6 may be true in terms of who they want to represent,  
7 but -- but a State can't authorize anyone to proceed in  
8 Federal court because that would leave the definition  
9 under Article III of the Federal Constitution as to who  
10 can bring -- who has standing to bring claims up to each  
11 State. And I don't think we've ever allowed anything  
12 like that.

13 MR. COOPER: But -- but, Your Honor, I guess  
14 the point I want to make is that there is no question  
15 the State has standing. The State itself has standing  
16 to represent its own interests in the validity of its  
17 own enactments. And if the State's public officials  
18 decline to do that, it is within the State's authority  
19 surely, I would submit, to identify, if not all -- any  
20 citizen or at least supporter of -- of the measure,  
21 certainly those, that that very clear and identifiable  
22 group of citizens --

23 JUSTICE KENNEDY: Well, the Chief -- the  
24 Chief Justice and Justice Kagan have given a proper  
25 hypothetical to test your theory. But in this case the

1 proponents, number one, must give their official  
2 address, they must pay money, and they must all act in  
3 unison under California law. So these five proponents  
4 were required at all times to act in unison, so that  
5 distinguishes -- and to register and to pay money for  
6 the -- so in that sense it's different from simply  
7 saying any citizen.

8 MR. COOPER: But of course it is, and I  
9 think the key --

10 JUSTICE SOTOMAYOR: But can you tell me --  
11 that's a factual background with respect to their right  
12 to put the ballot initiative on the ballot, but how does  
13 it create an injury to them separate from that of every  
14 other taxpayer to have laws enforced?

15 MR. COOPER: Your Honor, the -- the question  
16 before the Court, I would submit, is not the injury to  
17 the individual proponents, it's the injury to the State.  
18 The -- the legislators in the Karcher case had no  
19 individual particularized injury, and yet this Court  
20 recognized they were proper representatives of the  
21 State's interests -- the State's injury --

22 JUSTICE SOTOMAYOR: At least one of the  
23 amici have suggested that it seems counterintuitive to  
24 think that the State is going to delegate to people who  
25 don't have a fiduciary duty to them. That it's going to

1 delegate the responsibility of representing the State to  
2 individuals who have their own views. They proposed the  
3 ballot initiative because it was their individual views,  
4 not necessarily that of the State. So --

5 MR. COOPER: Well --

6 JUSTICE SOTOMAYOR: -- Justice Scalia  
7 proffered the question of the Attorney General. The  
8 Attorney General has no personal interest.

9 MR. COOPER: True.

10 JUSTICE SOTOMAYOR: He has a fiduciary  
11 obligation.

12 MR. COOPER: The Attorney General, whether  
13 it's a fiduciary obligation or not, is in normal  
14 circumstances the representative of the State to defend  
15 the validity of the State's enactments when they are  
16 challenged in Federal court. But when that officer  
17 doesn't do so, the State surely has every authority and  
18 I would submit the responsibility to identify  
19 particularly in an initiative -- an initiative context.

20 JUSTICE SOTOMAYOR: Why isn't the fiduciary  
21 duty requirements before the State can designate a  
22 representative important?

23 MR. COOPER: Your Honor, I would submit to  
24 you that I don't think there's anything in Article III  
25 or in any of this Court's decisions that suggest that a

1 representative of a State must be -- have a fiduciary  
2 duty, but I would also suggest --

3 JUSTICE SOTOMAYOR: Well, generally you  
4 don't need to specify it because generally the people  
5 who get to enforce the legislation of the government are  
6 people who are in government positions elected by the  
7 people.

8 MR. COOPER: And Your Honor --

9 JUSTICE SOTOMAYOR: Here these individuals  
10 are not elected by the people or appointed by the  
11 people.

12 MR. COOPER: And the California Supreme  
13 Court specifically addressed and rejected that specific  
14 argument. They said it is in the context when the  
15 public officials, the elected officials, the appointed  
16 officials, have declined, have declined to defend a  
17 statute. A statute that, by the way, excuse me, in this  
18 case a constitutional amendment, was brought forward by  
19 the initiative process.

20 The Court said it is essential to the  
21 integrity, integrity of the initiative process in that  
22 State, which is a precious right of every citizen. The  
23 initiative process in that State, to ensure that when  
24 public officials -- and after all, the initiative  
25 process is designed to control those very public

1 officials, to take issues out of their hands.

2 And if public officials could effectively  
3 veto an initiative by refusing to appeal it, then the  
4 initiative process would be invalidated.

5 JUSTICE BREYER: That's -- historically, I  
6 think, 40 States, many States have what was called a  
7 public action. A public action is an action by any  
8 citizen primarily to vindicate the interest in seeing  
9 that the law is enforced.

10 MR. COOPER: In California --

11 JUSTICE BREYER: Now, that's the kind of  
12 action I think that this Court has interpreted the  
13 Constitution of the United States, case in controversy,  
14 to say that it does not lie in the Federal system.

15 And of course, if that kind of action is the  
16 very kind that does not lie, well, then to say, but they  
17 really feel it's important that the law be enforced,  
18 they really want to vindicate the process, and these are  
19 people of special interests. They -- we found the five  
20 citizens who most strongly want to vindicate the  
21 interest in the law being enforced and the process for  
22 making the law be enforced, well, that won't distinguish  
23 it from a public action.

24 But then you say, but also they are  
25 representing the State. At this point, the Dellinger

1 brief which takes the other side of it is making a  
2 strong argument, well, they aren't the State. They are  
3 really no more than a group of five people who feel  
4 really strongly that we should vindicate this public  
5 interest and have good reason for thinking it.

6 So you have read all these arguments that  
7 it's not really the agent and so forth. What do you  
8 want to say about it?

9 MR. COOPER: What I want to say, Your Honor,  
10 is that according to the California Supreme Court, the  
11 California Constitution says in terms that among the  
12 responsibilities of official proponents, in addition to  
13 the many other responsibilities that they step forward  
14 and they assume in the initiative process, among those  
15 responsibilities and authorities is to defend that  
16 initiative if the public officials, which the initiative  
17 process is designed to control, have refused to do it.  
18 It might as well say it in those terms, Your Honor.

19 CHIEF JUSTICE ROBERTS: Counsel, if you want  
20 to proceed to the merits, you should feel free to do so.

21 MR. COOPER: Thank you very much, Your  
22 Honor.

23 My -- my -- excuse me. As I was saying, the  
24 accepted truth -- excuse me. The accepted truth that --  
25 that the New York high court observed is one that is

1 changing and changing rapidly in this country as people  
2 throughout the country engage in an earnest debate over  
3 whether the age-old definition of marriage should be  
4 changed to include same-sex couples.

5           The question before this Court is whether  
6 the Constitution puts a stop to that ongoing democratic  
7 debate and answers this question for all 50 States. And  
8 it does so only if the Respondents are correct that no  
9 rational, thoughtful person of goodwill could possibly  
10 disagree with them, in good faith, on this agonizingly  
11 difficult issue.

12           The issues, the constitutional issues that  
13 have been presented to the Court, are not of first  
14 impression here. In *Baker v. Nelson*, this Court  
15 unanimously dismissed for want of a substantial Federal  
16 question.

17           JUSTICE GINSBURG: Mr. Cooper, *Baker v.*  
18 *Nelson* was 1971. The Supreme Court hadn't even decided  
19 that gender-based classifications get any kind of  
20 heightened scrutiny.

21           MR. COOPER: That is --

22           JUSTICE GINSBURG: And the same-sex intimate  
23 conduct was considered criminal in many States in 1971,  
24 so I don't think we can extract much in *Baker v. Nelson*.

25           MR. COOPER: Well, Your Honor, certainly I

1 acknowledge the precedential limitations of a summary  
2 dismissal. But Baker v. Nelson also came fairly fast on  
3 the heels of the Loving decision. And, Your Honor, I  
4 simply make the observation that it seems implausible in  
5 the extreme, frankly, for nine justices to have -- to  
6 have seen no substantial Federal question if it is true,  
7 as the Respondents maintain, that the traditional  
8 definition of marriage, insofar as -- insofar as it does  
9 not include same-sex couples, insofar as it is a gender  
10 definition, is irrational and can only be explained --  
11 can only be explained, as a result of anti-gay malice  
12 and a bare desire to harm.

13 JUSTICE KENNEDY: Do you believe this can be  
14 treated as a gender-based classification?

15 MR. COOPER: Your Honor, I --

16 JUSTICE KENNEDY: It's a difficult question  
17 that I've been trying to wrestle with it.

18 MR. COOPER: Yes, Your Honor. And we do  
19 not. We do not think it is properly viewed as a  
20 gender-based classification. Virtually every appellate  
21 court, State and Federal, with one exception, Hawaii, in  
22 a superseded the opinion, has agreed that it is not a  
23 gender-based classification, but I guess it is gender  
24 -based in the sense that marriage itself is a gendered  
25 institution, a gendered term. And so in the same way

1 that fatherhood is gendered or motherhood is gendered,  
2 it's gendered in that sense.

3 But we -- we agree that to the extent that  
4 the classification impacts, as it clearly does, same-sex  
5 couples, that -- that classification can be viewed as  
6 being one of sexual orientation rather than --

7 JUSTICE SOTOMAYOR: Outside of the --  
8 outside of the marriage context, can you think of any  
9 other rational basis, reason for a State using sexual  
10 orientation as a factor in denying homosexuals benefits  
11 or imposing burdens on them? Is there any other  
12 rational decision-making that the government could make?  
13 Denying them a job, not granting them benefits of some  
14 sort, any other decision?

15 MR. COOPER: Your Honor, I cannot. I do not  
16 have any -- anything to offer you in that regard. I  
17 think marriage is --

18 JUSTICE SOTOMAYOR: All right. If that --  
19 if that is true, then why aren't they a class? If  
20 they're a class that makes any other discrimination  
21 improper, irrational, then why aren't we treating them  
22 as a class for this one thing? Are you saying that the  
23 interest of marriage is so much more compelling than any  
24 other interest as they could have?

25 MR. COOPER: No, Your Honor, we certainly

1 are not. We -- we are saying the interest in marriage  
2 and the -- and the State's interest and society's  
3 interest in what we have framed as responsible pro --  
4 procreation is -- is vital, but at bottom, with respect  
5 to those interests, our submission is that same-sex  
6 couples and opposite-sex couples are simply not  
7 similarly situated.

8 But to come back to your precise question, I  
9 think, Justice Sotomayor, you're -- you're probing into  
10 whether or not sexual orientation ought to be viewed as  
11 a quasi-suspect or suspect class, and our position is  
12 that it does not qualify under this Court's standard  
13 and -- and traditional tests for identifying  
14 suspectedness. The -- the class itself is -- is quite  
15 amorphous. It defies consistent definition as -- as the  
16 Plaintiffs' own experts were -- were quite vivid on.  
17 It -- it does not -- it -- it does not qualify as an  
18 accident of birth, immutability in that -- in that  
19 sense.

20 Again, the Plaintiffs --

21 JUSTICE SOTOMAYOR: So you -- so what -- I  
22 don't quite understand it. If you're not dealing with  
23 this as a class question, then why would you say that  
24 the government is not free to discriminate against them?

25 MR. COOPER: Well, Your Honor, I would think

1 that -- that -- I think it's a -- it's a very different  
2 question whether or not the government can proceed  
3 arbitrarily and irrationally with respect to any group  
4 of people, regardless of whether or not they qualify  
5 under this Court's traditional test for suspectedness.  
6 And -- and the hypothetical I understood you to be  
7 offering, I would submit would create -- it would --  
8 unless there's something that -- that is not occurring  
9 to me immediately, an arbitrary and capricious  
10 distinction among similarly situated individuals,  
11 that -- that is not what we think is at the -- at the  
12 root of the traditional definition of marriage.

13 JUSTICE KAGAN: Mr. Cooper, could I just  
14 understand your argument. As -- in reading the briefs,  
15 it seems as though your principal argument is that  
16 same-sex and opposite -- sex couples are not similarly  
17 situated because opposite-sex couples can procreate,  
18 same-sex couples cannot, and the State's principal  
19 interest in marriage is in regulating procreation. Is  
20 that basically correct?

21 MR. COOPER: I -- Your Honor, that's the  
22 essential thrust of our -- our position, yes.

23 JUSTICE KAGAN: Is -- is there -- so you  
24 have sort of a reason for not including same-sex  
25 couples. Is there any reason that you have for

1 excluding them? In other words, you're saying, well, if  
2 we allow same-sex couples to marry, it doesn't serve the  
3 State's interest. But do you go further and say that it  
4 harms any State interest?

5 MR. COOPER: Your Honor, we -- we go further  
6 in -- in the sense that it is reasonable to be very  
7 concerned that redefining marriage to -- as a genderless  
8 institution could well lead over time to harms to that  
9 institution and to the interests that society has  
10 always -- has -- has always used that institution to  
11 address. But, Your Honor, I --

12 JUSTICE KAGAN: Well, could you explain that  
13 a little bit to me, just because I did not pick this up  
14 in your briefs.

15 What harm you see happening and when and how  
16 and -- what -- what harm to the institution of marriage  
17 or to opposite-sex couples, how does this cause and  
18 effect work?

19 MR. COOPER: Once again, I -- I would  
20 reiterate that we don't believe that's the correct legal  
21 question before the Court, and that the correct question  
22 is whether or not redefining marriage to include  
23 same-sex couples would advance the interests of marriage  
24 as a --

25 JUSTICE KENNEDY: Well, then are -- are you

1 conceding the point that there is no harm or denigration  
2 to traditional opposite-sex marriage couples? So you're  
3 conceding that.

4 MR. COOPER: No, Your Honor, no. I'm not  
5 conceding that.

6 JUSTICE KENNEDY: Well, but, then it -- then  
7 it seems to me that you should have to address Justice  
8 Kagan's question.

9 MR. COOPER: Thank you, Justice Kennedy. I  
10 have two points to make on them.

11 The first one is this, the Plaintiffs'  
12 expert acknowledged that redefining marriage will have  
13 real-world consequences, and that it is impossible for  
14 anyone to foresee the future accurately enough to know  
15 exactly what those real-world consequences would be.  
16 And among those real-world consequences, Your Honor, we  
17 would suggest are adverse consequences.

18 But consider the California voter, in 2008,  
19 in the ballot booth, with the question before her  
20 whether or not this age-old bedrock social institution  
21 should be fundamentally redefined, and knowing that  
22 there's no way that she or anyone else could possibly  
23 know what the long-term implications of a profound  
24 redefinition of a bedrock social institution would be.  
25 That is reason enough, Your Honor, that would hardly be

1 irrational for that voter to say, I believe that this  
2 experiment, which is now only fairly four years old,  
3 even in Massachusetts, the oldest State that is  
4 conducting it, to say, I think it better for California  
5 to hit the pause button and await additional information  
6 from the jurisdictions where this experiment is still  
7 maturing.

8 JUSTICE SCALIA: Mr. Cooper, let me -- let  
9 me give you one -- one concrete thing. I don't know why  
10 you don't mention some concrete things. If you redefine  
11 marriage to include same-sex couples, you must -- you  
12 must permit adoption by same-sex couples, and there's --  
13 there's considerable disagreement among -- among  
14 sociologists as to what the consequences of raising a  
15 child in a -- in a single-sex family, whether that is  
16 harmful to the child or not. Some States do not -- do  
17 not permit adoption by same-sex couples for that reason.

18 JUSTICE GINSBURG: California -- no,  
19 California does.

20 JUSTICE SCALIA: I don't think we know the  
21 answer to that. Do you know the answer to that, whether  
22 it -- whether it harms or helps the child?

23 MR. COOPER: No, Your Honor. And there's --  
24 there's --

25 JUSTICE SCALIA: But that's a possible

1 deleterious effect, isn't it?

2 MR. COOPER: Your Honor, it -- it is  
3 certainly among the --

4 JUSTICE GINSBURG: It wouldn't be in  
5 California, Mr. Cooper, because that's not an issue, is  
6 it? In California, you can have same-sex couples  
7 adopting a child.

8 MR. COOPER: That's right, Your Honor. That  
9 is true. And -- but -- but, Your Honor, here's --  
10 here's the point --

11 JUSTICE SCALIA: I -- it's true, but  
12 irrelevant. They're arguing for a nationwide rule which  
13 applies to States other than California, that every  
14 State must allow marriage by same-sex couples. And so  
15 even though States that believe it is harmful -- and I  
16 take no position on whether it's harmful or not, but it  
17 is certainly true that -- that there's no scientific  
18 answer to that question at this point in time.

19 MR. COOPER: And -- and that, Your Honor, is  
20 the point I am trying to make, and it is the  
21 Respondents' responsibility to prove, under rational  
22 basis review, not only that -- that there clearly will  
23 be no harm, but that it's beyond debate that there will  
24 be no harm.

25 JUSTICE GINSBURG: Mr. Cooper, you are

1 defending -- you are opposing a judgment that applies to  
2 California only, not to all of the States.

3 MR. COOPER: That's true, Your Honor. And  
4 if there were a way to -- to cabin the arguments that  
5 are being presented to you to California, then the  
6 concerns about redefining marriage in -- in California  
7 could be confined to California, but they cannot, Your  
8 Honor.

9 JUSTICE KENNEDY: I -- I think there's --  
10 there's substantial -- that there's substance to the  
11 point that sociological information is new. We have  
12 five years of information to weigh against 2,000 years  
13 of history or more.

14 On the other hand, there is an immediate  
15 legal injury or legal -- what could be a legal injury,  
16 and that's the voice of these children. There are some  
17 40,000 children in California, according to the Red  
18 Brief, that live with same-sex parents, and they want  
19 their parents to have full recognition and full status.  
20 The voice of those children is important in this case,  
21 don't you think?

22 MR. COOPER: Your Honor, I certainly would  
23 not dispute the importance of that consideration. That  
24 consideration especially in the political process where  
25 this issue is being debated and will continue to be

1 debated, certainly, in California. It's being debated  
2 elsewhere. But on that -- on that specific question,  
3 Your Honor, there -- there simply is no data.

4 In fact, their expert agreed there is no  
5 data, no study, even, that would examine whether or not  
6 there is any incremental beneficial effect from marriage  
7 over and above the domestic partnership laws that were  
8 enacted by the State of California to recognize,  
9 support, and honor same-sex relationships and their  
10 families. There is simply no data at all that would --  
11 that would permit one to draw -- draw that conclusion.

12 I would recall, Justice Kennedy, the point  
13 made in Romer, that under a rational basis of review,  
14 the provision will be sustained even if it operates to  
15 the disadvantage of a group, if it is -- if it otherwise  
16 advances rationally a legitimate State interest.

17 CHIEF JUSTICE ROBERTS: Mr. Cooper, we will  
18 afford you more time. You shouldn't worry about losing  
19 your rebuttal time, but please continue on.

20 MR. COOPER: Oh --

21 JUSTICE BREYER: As long as you are on that,  
22 then I would like to ask you this, assume you could  
23 distinguish California, suppose we accept your argument  
24 or accept Justice Scalia's version of your argument and  
25 that distinguishes California. Now, let's look at

1 California. What precisely is the way in which allowing  
2 gay couples to marry would interfere with the vision of  
3 marriage, as procreation of children, that allowing  
4 sterile companies -- couples of different sexes to marry  
5 would not?

6 I mean, there are lots of people who get  
7 married who can't have children. To take a State that  
8 does allow adoption and say -- there, what is the  
9 justification for saying no gay marriage? Certainly not  
10 the one you said, is it?

11 MR. COOPER: You're --

12 JUSTICE BREYER: Am I not clear?

13 Look, you said that the problem is marriage  
14 as an institution that furthers procreation.

15 MR. COOPER: Yes, Your Honor.

16 JUSTICE BREYER: And the reason there was  
17 adoption, but that doesn't apply to California. So  
18 imagine I wall off California and I'm looking just  
19 there, where you say that doesn't apply. Now, what  
20 happens to your argument about the institution of  
21 marriage as a tool towards procreation? Given the fact  
22 that, in California, too, couples that aren't gay, but  
23 can't have children get married all the time.

24 MR. COOPER: Yes, Your Honor. The concern  
25 is that redefining marriage as a genderless institution

1 will sever its abiding connection to its historic  
2 traditional procreative purposes and it will refocus,  
3 refocus the purpose of marriage and the definition of  
4 marriage away from the raising of children and to the  
5 emotional needs and desires of adults -- of adult  
6 couples.

7 Suppose, in turn --

8 JUSTICE KAGAN: Well, suppose a State  
9 said -- Mr. Cooper, suppose a State said that because we  
10 think that the focus of marriage really should be on  
11 procreation, we are not going to give marriage licenses  
12 anymore to any couple where both people are over the age  
13 of 55. Would that be constitutional?

14 MR. COOPER: No, Your Honor, it would not be  
15 constitutional.

16 JUSTICE KAGAN: Because that's the same  
17 State interest, I would think, you know. If you are  
18 over the age of 55, you don't help us serve the  
19 government's interest in regulating procreation through  
20 marriage. So why is that different?

21 MR. COOPER: Your Honor, even with respect  
22 to couples over the age of 55, it is very rare that both  
23 couples -- both parties to the couple are infertile, and  
24 the traditional --

25 (Laughter.)

1 JUSTICE KAGAN: No, really, because if the  
2 couple -- I can just assure you, if both the woman and  
3 the man are over the age of 55, there are not a lot of  
4 children coming out of that marriage.

5 (Laughter.)

6 MR. COOPER: Your Honor, society's --  
7 society's interest in responsible procreation isn't just  
8 with respect to the procreative capacities of the couple  
9 itself. The marital norm, which imposes the -- the  
10 obligations of fidelity and monogamy, Your Honor,  
11 advances the interests in responsible procreation by  
12 making it more likely that neither party, including the  
13 fertile party to that --

14 JUSTICE KAGAN: Actually, I'm not even --

15 JUSTICE SCALIA: I suppose we could have a  
16 questionnaire at the marriage desk when people come in  
17 to get the marriage -- you know, are you fertile or are  
18 you not fertile?

19 (Laughter.)

20 JUSTICE SCALIA: I suspect this Court would  
21 hold that to be an unconstitutional invasion of privacy,  
22 don't you think?

23 JUSTICE KAGAN: Well, I just asked about  
24 age. I didn't ask about anything else. That's not an  
25 -- we ask about people's age all the time.

1 MR. COOPER: Your Honor, and even asking  
2 about age, you would have to ask if both parties are  
3 infertile. Again --

4 JUSTICE SCALIA: Strom Thurmond was -- was  
5 not the chairman of the Senate committee when Justice  
6 Kagan was confirmed.

7 (Laughter.)

8 MR. COOPER: Very few men -- very few men  
9 outlive their own fertility. So I just --

10 JUSTICE KAGAN: A couple where both people  
11 are over the age of 55 --

12 MR. COOPER: I --

13 JUSTICE KAGAN: A couple where both people  
14 are over the age of 55.

15 MR. COOPER: And Your Honor, again, the  
16 marital norm which imposes upon that couple the  
17 obligation of fidelity --

18 JUSTICE SOTOMAYOR: I'm sorry, where is  
19 that --

20 CHIEF JUSTICE ROBERTS: I'm sorry, maybe you  
21 can finish your answer to Justice Kagan.

22 JUSTICE SOTOMAYOR: I'm sorry.

23 MR. COOPER: It's designed, Your Honor, to  
24 make it less likely that either party to that -- to that  
25 marriage will engage in irresponsible, procreative

1 conduct outside of that marriage. Outside of that  
2 marriage. That's the marital -- that's the marital  
3 norm. Society has an interest in seeing a 55-year-old  
4 couple that is -- just as it has an interest of seeing  
5 any heterosexual couple that intends to engage in a  
6 prolonged period of cohabitation to reserve that until  
7 they have made a marital commitment, a marital  
8 commitment. So that, should that union produce any  
9 offspring, it would be more likely that that child or  
10 children will be raised by the mother and father who  
11 brought them into the world.

12 JUSTICE GINSBURG: Mr. Cooper, we said that  
13 somebody who is locked up in prison and who is not going  
14 to get out has a right to marry -- has a fundamental  
15 right to marry, no possibility of procreation.

16 MR. COOPER: Your Honor is referring, I'm  
17 sure, to the Turner case, and --

18 JUSTICE GINSBURG: Yes.

19 MR. COOPER: -- I think that, with due  
20 respect, Justice Ginsburg, way over-reads -- way  
21 over-reads Turner against Safley. That was a case in  
22 which the prison at issue -- and it was decided in the  
23 specific context of a particular prison -- where there  
24 were both female and male inmates, many of them minimum  
25 security inmates. It was dealing with a regulation,

1 Your Honor, that had previously permitted marriage in  
2 the case of pregnancy and childbirth.

3 The Court -- the Court here emphasized that,  
4 among the incidents of marriage that are not destroyed  
5 by that -- at least that prison context, was the  
6 expectation of eventual consummation of the marriage and  
7 legitimation of -- of the children. So that --

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 Mr. Cooper.

10 MR. COOPER: Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Mr. Olson?

12 ORAL ARGUMENT OF THEODORE B. OLSON

13 ON BEHALF OF THE RESPONDENTS

14 MR. OLSON: Thank you, Mr. Chief Justice,  
15 and may it please the Court:

16 I know that you will want me to spend a  
17 moment or two addressing the standing question, but  
18 before I do that, I thought that it would be important  
19 for this Court to have Proposition 8 put in context,  
20 what it does.

21 It walls-off gays and lesbians from  
22 marriage, the most important relation in life, according  
23 to this Court, thus stigmatizing a class of Californians  
24 based upon their status and labeling their most  
25 cherished relationships as second-rate, different,

1     unequal, and not okay.

2                   CHIEF JUSTICE ROBERTS:   Mr. Olson, I cut off  
3     your friend before he could get into the merits.  So I  
4     think it's only fair --

5                   MR. OLSON:   I was trying to avoid that, Your  
6     Honor.

7                   CHIEF JUSTICE ROBERTS:   I know --

8                   (Laughter.)

9                   CHIEF JUSTICE ROBERTS:   Well, I think it's  
10    only fair to treat you the same.  Perhaps you could  
11    address your jurisdictional argument?

12                   MR. OLSON:   Yes.  I think that our  
13    jurisdictional argument is, as we set forth in the  
14    brief, California cannot create Article III standing by  
15    designating whoever it wants to defend the State of  
16    California in connection with the ballot.

17                   JUSTICE KENNEDY:   But this is not whoever it  
18    wants.  These are five proponents of -- of the measure  
19    and if we were to accept your argument, it would give  
20    the State a one-way ratchet.  The State could go in and  
21    make a defense, maybe a half-hearted defense of the  
22    statute, and -- and then when the statute is held  
23    invalid, simply -- simply leave.  On the other hand,  
24    if -- if the State loses, the State can appeal.

25                   So this is a one-way ratchet as it favors

1 the State and allows governors and other constitutional  
2 officers in different States to thwart the initiative  
3 process.

4 MR. OLSON: That's the -- that's the way the  
5 California Supreme Court saw it with respect to  
6 California law. The governor and the Attorney General  
7 of California are elected to act in the best interests  
8 of the State of California. They made a professional  
9 judgment given their obligations as officers of the  
10 State of California.

11 The California Supreme Court has said that  
12 proponents -- and by the way, only four of the five are  
13 here. Dr. Tam withdrew from the case because of some --  
14 many things he said during the election -- campaign.

15 JUSTICE ALITO: Well, Mr. Olson, is it your  
16 position that the only people who could defend a  
17 ballot -- a law that's adopted in California through the  
18 ballot initiative are the Attorney General and the  
19 governor, so that if the Attorney General and the  
20 governor don't like the ballot initiative, it will go  
21 undefended? Is that your position?

22 MR. OLSON: I don't -- I don't think it's  
23 quite that limited. I think one of your colleagues  
24 suggested that there could be an officer appointed.  
25 There could be an appointee of the State of California

1 who had responsibility, fiduciary responsibility to the  
2 State of California and the citizens of California, to  
3 represent the State of California along --

4 JUSTICE SCALIA: Who -- who would appoint  
5 him? The same governor that didn't want to defend the  
6 plebiscite?

7 MR. OLSON: Well, that happens all the time.  
8 As you recall in the case of -- well, let's not spend  
9 too much time on independent counsel provisions, but --

10 (Laughter.)

11 MR. OLSON: The governor -- the government  
12 of the State of California frequently appoints an  
13 attorney where there's a perceived conflict of  
14 interest --

15 JUSTICE SCALIA: I suppose --

16 MR. OLSON: -- and that person would have a  
17 responsibility for the State and might have  
18 responsibility for the attorneys' fees.

19 CHIEF JUSTICE ROBERTS: I suppose there  
20 might be people out there with their own personal  
21 standing, someone who performs marriages and would like  
22 that to remain open to everyone but would prefer not to  
23 perform same-sex marriages, or other people. We seem to  
24 be addressing the case as if the only options are the  
25 proponents here or the State. I'm not sure there aren't

1 other people out there with individual personalized  
2 injury that would satisfy Article III.

3 MR. OLSON: There might well be in -- in a  
4 different case. I don't know about this case. If there  
5 was, for example, this was an initiative measure that  
6 allocated certain resources of the State of California  
7 and the people -- maybe it was a binary system of people  
8 got resources and other people didn't get resources,  
9 there could be standing. Someone would show actual  
10 injury.

11 The point, I guess, at the bottom of this is  
12 the Supreme Court -- this Court, decided in  
13 *Raines v. Byrd* that Congress couldn't specify members of  
14 Congress in that context even where the measure depleted  
15 or diminished powers of Congress --

16 JUSTICE SOTOMAYOR: Mr. Olson, I think the  
17 bottom line --

18 JUSTICE ALITO: The States are not bound by  
19 the same separation of powers doctrine that underlies  
20 the Federal Constitution. You couldn't have a Federal  
21 initiative, for example. They're free of all that.

22 So start from the proposition that a State  
23 has standing to defend the constitutionality of a State  
24 law -- beyond dispute. The question then is, who  
25 represents the State?

1                   Now, in a State that has initiative, the  
2 whole process would be defeated if the only people who  
3 could defend the statute are the elected public  
4 officials. The whole point -- you know this better than  
5 I do because you're from California -- the whole point  
6 of the initiative process was to allow the people to  
7 circumvent public officials about whom they were  
8 suspicious.

9                   So if you reject that proposition, what is  
10 left is the proposition that the State -- State law can  
11 choose some other person, some other group to defend the  
12 constitutionality of a State law. And the California  
13 Supreme Court has told us that the Plaintiffs in this  
14 case are precisely those people.

15                   So how do you get around that?

16                   MR. OLSON: The only -- that's exactly what  
17 the California Supreme Court thought. The California  
18 Supreme Court thought that it could decide that the  
19 proponents, whoever they were, and this could be  
20 25 years after the election, it could be one of the  
21 proponents, it could be four of the proponents. They  
22 could have an interest other than the State because they  
23 have no fiduciary responsibility to the State. They may  
24 be incurring attorneys' fees on behalf of the State or  
25 on behalf of themselves, but they haven't been

1 appointed. They have no official responsibility to the  
2 State.

3 And my only argument, and I know it's a  
4 close one because California thinks that this is the  
5 system. The California Supreme Court thought that this  
6 was a system that would be a default system. I'm  
7 suggesting from your decisions with respect to Article  
8 III that that takes more than that under --

9 JUSTICE SOTOMAYOR: Mr. Olson, I think that  
10 you're not answering the fundamental fear. And so --  
11 and -- and the amici brief that sets forth this test of  
12 fiduciary duty doesn't quite either.

13 The assumption is that there are not  
14 executive officials who want to defend the law. They  
15 don't like it. No one's going to do that. So how do  
16 you get the law defended in that situation?

17 MR. OLSON: I don't have an answer to that  
18 question unless there's an appointment process either  
19 built into the system where it's an officer of  
20 California or --

21 JUSTICE SOTOMAYOR: So why -- why isn't this  
22 viewed as an appointment process that the in -- the  
23 ballot initiators have now become that body?

24 MR. OLSON: And that's the argument --

25 JUSTICE SOTOMAYOR: That your argument --

1           MR. OLSON: That's our -- that's the  
2 argument our opponents make. But it -- but it must be  
3 said that it happens all of the time. That Federal  
4 officials and State officials decide not to enforce a  
5 statute, to enforce a statute in certain ways. We don't  
6 then come in and decide that there's someone else ought  
7 to be in court for every particular --

8           JUSTICE BREYER: What the brief says is, of  
9 course, you can appoint people. It's not just that you  
10 appoint them, it's that the State's interest when it  
11 defends a law is the interest in executing the law of  
12 the State. So all you have to do is give a person that  
13 interest. But when a person has the interest of  
14 defending this law, as opposed to defending the law of  
15 the State of California, there can be all kinds of  
16 conflicts, all kinds of situations.

17           That's what I got out of the brief. So give  
18 the person that interest. And that, they say, is what's  
19 missing here. And you'll say -- I mean, that's --  
20 that's here, and you say it's missing here.

21           MR. OLSON: Yeah, I don't --

22           JUSTICE BREYER: Why is it missing here?

23           MR. OLSON: It is -- what is missing here  
24 because you're not an officer of the State of  
25 California. You don't have a fiduciary duty to the

1 State of California. You're not bound by the ethical  
2 standards of an officer of the State of California to  
3 represent the State of California. You could have  
4 conflicts of interest. And as I said, you'd be -- could  
5 be incurring enormous legal fees, on behalf of the  
6 State, when the State hasn't decided to go that route.  
7 I think --

8 CHIEF JUSTICE ROBERTS: You should feel free  
9 to move on to the merits.

10 MR. OLSON: Thank you, Your Honor. As I  
11 pointed out at the -- at the outset, this is a measure  
12 that walls off the institution of marriage, which is not  
13 society's right. It's an individual right that this  
14 Court again and again and again has said the right to  
15 get married, the right to have the relationship of  
16 marriage is a personal right. It's a part of the right  
17 of privacy, association, liberty, and the pursuit of  
18 happiness.

19 In the cases in which you've described the  
20 right to get married under the Constitution, you've  
21 described it as marriage, procreation, family, other  
22 things like that. So the procreation aspect, the  
23 responsibility or ability or interest in procreation is  
24 not a part of the right to get married. Now, that --

25 CHIEF JUSTICE ROBERTS: I'm not sure,

1 counsel, that it makes -- I'm not sure that it's right  
2 to view this as excluding a particular group. When the  
3 institution of marriage developed historically, people  
4 didn't get around and say let's have this institution,  
5 but let's keep out homosexuals. The institution  
6 developed to serve purposes that, by their nature,  
7 didn't include homosexual couples.

8           It is -- yes, you can say that it serves  
9 some of the other interests where it makes sense to  
10 include them, but not all the interests. And it seems  
11 to me, your friend argues on the other side, if you have  
12 an institution that pursues additional interests, you  
13 don't have to include everybody just because some other  
14 aspects of it can be applied to them.

15           MR. OLSON: Well, there's a couple of  
16 answers to that, it seems to me, Mr. Chief Justice. In  
17 this case, that decision to exclude gays and lesbians  
18 was made by the State of California.

19           CHIEF JUSTICE ROBERTS: Oh, that's only  
20 because Proposition 8 came 140 days after the California  
21 Supreme Court issued its decision.

22           MR. OLSON: That's right.

23           CHIEF JUSTICE ROBERTS: And don't you think  
24 it's more reasonable to view it as a change by the  
25 California Supreme Court of this institution that's been

1 around since time immemorial?

2 MR. OLSON: The California Supreme Court,  
3 like this Supreme Court, decides what the law is. The  
4 California Supreme Court decided that the Equal  
5 Protection and Due Process Clauses of that California  
6 Constitution did not permit excluding gays and lesbians  
7 from the right to get married --

8 JUSTICE SCALIA: You -- you've led me right  
9 into a question I was going to ask. The California  
10 Supreme Court decides what the law is. That's what we  
11 decide, right? We don't prescribe law for the future.  
12 We -- we decide what the law is. I'm curious, when --  
13 when did -- when did it become unconstitutional to  
14 exclude homosexual couples from marriage? 1791? 1868,  
15 when the Fourteenth Amendment was adopted?

16 Sometimes -- some time after Baker, where we  
17 said it didn't even raise a substantial Federal  
18 question? When -- when -- when did the law become this?

19 MR. OLSON: When -- may I answer this in the  
20 form of a rhetorical question? When did it become  
21 unconstitutional to prohibit interracial marriages?  
22 When did it become unconstitutional to assign children  
23 to separate schools.

24 JUSTICE SCALIA: It's an easy question, I  
25 think, for that one. At -- at the time that the -- the

1 Equal Protection Clause was adopted. That's absolutely  
2 true.

3 But don't give me a question to my question.

4 (Laughter.)

5 JUSTICE SCALIA: When do you think it became  
6 unconstitutional? Has it always been unconstitutional?

7 MR. OLSON: When the -- when the California  
8 Supreme Court faced the decision, which it had never  
9 faced before, is -- does excluding gay and lesbian  
10 citizens, who are a class based upon their status as  
11 homosexuals -- is it -- is it constitutional --

12 JUSTICE SCALIA: That -- that's not when it  
13 became unconstitutional. That's when they acted in an  
14 unconstitutional matter -- in an unconstitutional  
15 manner. When did it become unconstitutional to prohibit  
16 gays from marrying?

17 MR. OLSON: That -- they did not assign a  
18 date to it, Justice Scalia, as you know. What the court  
19 decided was the case that came before it --

20 JUSTICE SCALIA: I'm not talking about the  
21 California Supreme Court. I'm talking about your  
22 argument. You say it is now unconstitutional.

23 MR. OLSON: Yes.

24 JUSTICE SCALIA: Was it always  
25 unconstitutional?

1 MR. OLSON: It was constitutional when we --  
2 as a culture determined that sexual orientation is a  
3 characteristic of individuals that they cannot control,  
4 and that that --

5 JUSTICE SCALIA: I see. When did that  
6 happen? When did that happen?

7 MR. OLSON: There's no specific date in  
8 time. This is an evolutionary cycle.

9 JUSTICE SCALIA: Well, how am I supposed to  
10 know how to decide a case, then --

11 MR. OLSON: Because the case that's before  
12 you --

13 JUSTICE SCALIA: -- if you can't give me a  
14 date when the Constitution changes?

15 MR. OLSON: -- in -- the case that's before  
16 you today, California decided -- the citizens of  
17 California decided, after the California Supreme Court  
18 decided that individuals had a right to get married  
19 irrespective of their sexual orientation in California  
20 and then the Californians decided in Proposition 8, wait  
21 a minute, we don't want those people to be able to get  
22 married.

23 CHIEF JUSTICE ROBERTS: So -- so your  
24 case -- your case would be different if Proposition 8  
25 was enacted into law prior to the California Supreme

1 Court decision?

2 MR. OLSON: I would make -- I would make  
3 the -- also would make the -- that distinguishes it in  
4 one respect. But what also -- also -- I would also make  
5 the argument, Mr. Chief Justice, that we are -- this --  
6 marriage is a fundamental right and we are making a  
7 classification based upon a status of individuals, which  
8 this Court has repeatedly decided that gays and lesbians  
9 are defined by their status. There is no question about  
10 that.

11 JUSTICE SCALIA: So it would be  
12 unconstitutional even in States that did not allow  
13 civil unions?

14 MR. OLSON: We do, we submit that. You  
15 could write a narrower decision.

16 JUSTICE SCALIA: Okay. So I want to know  
17 how long it has been unconstitutional in those --

18 MR. OLSON: I don't -- when -- it seems to  
19 me, Justice Scalia, that --

20 JUSTICE SCALIA: It seems to me you ought to  
21 be able to tell me when. Otherwise, I don't know how to  
22 decide the case.

23 MR. OLSON: I -- I submit you've never  
24 required that before. When you decided that -- that  
25 individuals -- after having decided that separate but

1 equal schools were permissible, a decision by this  
2 Court, when you decided that that was unconstitutional,  
3 when did that become unconstitutional?

4 JUSTICE SCALIA: 50 years ago, it was okay?

5 MR. OLSON: I -- I can't answer that  
6 question and I don't think this Court has ever phrased  
7 the question in that way.

8 JUSTICE SCALIA: I can't either. That's the  
9 problem. That's exactly the problem.

10 MR. OLSON: But what I have before you now,  
11 the case that's before you today is whether or not  
12 California can take a class of individuals based upon  
13 their characteristics, their distinguishing  
14 characteristics, remove from them the right of privacy,  
15 liberty, association, spirituality, and identity that --  
16 that marriage gives them.

17 It -- it is -- it is not an answer to say  
18 procreation or anything of that nature because  
19 procreation is not a part of the right to get married.

20 JUSTICE KENNEDY: That's really -- that's a  
21 broad argument that you -- that's in this case if the  
22 Court wants to reach it. The rationale of the Ninth  
23 Circuit was much more narrow. It basically said that  
24 California, which has been more generous, more open to  
25 protecting same-sex couples than almost any State in the

1 Union, just didn't go far enough and it's being  
2 penalized for not going far enough.

3 That's a very odd rationale on which to  
4 sustain this opinion.

5 MR. OLSON: This Court has always looked  
6 into the context. In, for example, the New Orleans case  
7 involving the gambling casinos and advertising, you look  
8 at the context of what was permitted, what was not  
9 permitted, and does that rationalization for prohibiting  
10 in that case the advertising, in this case prohibiting  
11 the relationship of marriage, does it make any sense in  
12 the context of what exists?

13 JUSTICE ALITO: Oh seriously, Mr. Olson,  
14 if California provides all the substantive benefits of  
15 marriage to same-sex domestic partnerships, are you  
16 seriously arguing that if California -- if the State --  
17 if the case before us now were from a State that doesn't  
18 provide any of those benefits to same-sex couples, this  
19 case would come out differently?

20 MR. OLSON: No, I don't think it would come  
21 out differently because of the fundamental arguments  
22 we're making with respect to class-based distinctions  
23 with respect to a fundamental right. However, to the  
24 extent that my opponent in the context of California,  
25 talks about child-rearing or adoptions or -- or of

1 rights of people to live together and that sort of  
2 thing, those arguments can't be made on behalf of  
3 California because California's already made a decision  
4 that gay and lesbian individuals are perfectly suitable  
5 as parents, they're perfectly suitable to adopt, they're  
6 raising 37,000 children in California, and the expert on  
7 the other side specifically said and testified that they  
8 would be better off when their parents were allowed to  
9 get married.

10 JUSTICE ALITO: I don't think you can have  
11 it both ways. Either this case is the same, this would  
12 be the same if this were Utah or Oklahoma or it's  
13 different because it's California and California has  
14 provided all these --

15 MR. OLSON: I -- I think that it's not that  
16 we're arguing that those are inconsistent. If the -- if  
17 the fundamental thing is that denying gays and lesbians  
18 the right of marriage, which is fundamental under your  
19 decisions, that is unconstitutional. If it is -- if the  
20 State comes forth with certain arguments -- Utah might  
21 come forth with certain justifications. California  
22 might come forth with others. But the fact is that  
23 California can't make the arguments about adoption or  
24 child-rearing or people living together because they  
25 have already made policy decisions. So that doesn't

1 make them inconsistent.

2 CHIEF JUSTICE ROBERTS: So it's just  
3 about -- it's just about the label in this case.

4 MR. OLSON: The label is like --

5 CHIEF JUSTICE ROBERTS: Same-sex couples  
6 have every other right, it's just about the label.

7 MR. OLSON: The label "marriage" means  
8 something. Even our opponents --

9 CHIEF JUSTICE ROBERTS: Sure. If you  
10 tell -- if you tell a child that somebody has to be  
11 their friend, I suppose you can force the child to say,  
12 this is my friend, but it changes the definition of what  
13 it means to be a friend.

14 And that's it seems to me what the -- what  
15 supporters of Proposition 8 are saying here. You're --  
16 all you're interested in is the label and you insist on  
17 changing the definition of the label.

18 MR. OLSON: It is like you were to say you  
19 can vote, you can travel, but you may not be a citizen.  
20 There are certain labels in this country that are very,  
21 very critical. You could have said in the Loving case,  
22 what -- you can't get married, but you can have an  
23 interracial union. Everyone would know that that was  
24 wrong. That the -- marriage has a status, recognition,  
25 support, and you -- if you read the test -- you know --

1 CHIEF JUSTICE ROBERTS: How do we know --  
2 how do we know that that's the reason, or a necessary  
3 part of the reason, that we've recognized marriage as a  
4 fundamental right? That's -- you've emphasized that and  
5 you've said, well, it's because of the emotional  
6 commitment. Maybe it is the procreative aspect that  
7 makes it a fundamental right.

8 MR. OLSON: But you have said that marriage  
9 is a fundamental right with respect to procreation and  
10 at the same level getting married, privacy -- you said  
11 that in the Zablocki case, you said that in the Lawrence  
12 case, and you said it in other cases, the Skinner case,  
13 for example.

14 Marriage is put on a pro -- equal footing  
15 with procreational aspects. And your -- this Court is  
16 the one that has said over and over again that marriage  
17 means something to the individual. The privacy,  
18 intimacy, and that it is a matter of status and  
19 recognition in this --

20 JUSTICE SOTOMAYOR: Mr. Olson, the bottom  
21 line that you're being asked -- and -- and it is one  
22 that I'm interested in the answer, if you say that  
23 marriage is a fundamental right, what State restrictions  
24 could ever exist? Meaning, what State restrictions with  
25 respect to the number of people, with respect to -- that

1 could get married -- the incest laws, the mother and  
2 child, assuming that they are the age -- I can -- I can  
3 accept that the State has probably an overbearing  
4 interest on -- on protecting a child until they're of  
5 age to marry, but what's left?

6 MR. OLSON: Well, you've said -- you've said  
7 in the cases decided by this Court that the polygamy  
8 issue, multiple marriages raises questions about  
9 exploitation, abuse, patriarchy, issues with respect to  
10 taxes, inheritance, child custody, it is an entirely  
11 different thing. And if you -- if a State prohibits  
12 polygamy, it's prohibiting conduct.

13 If it prohibits gay and lesbian citizens  
14 from getting married, it is prohibiting their exercise  
15 of a right based upon their status. It's selecting them  
16 as a class, as you described in the Romer case and as  
17 you described in the Lawrence case and in other cases,  
18 you're picking out a group of individuals to deny them  
19 the freedom that you've said is fundamental, important,  
20 and vital in this society, and it has status and  
21 stature, as you pointed out in the VMI case. There's  
22 a -- there's a different --

23 JUSTICE SOTOMAYOR: Is there any way to  
24 decide this case in a principled manner that is limited  
25 to California only?

1 MR. OLSON: Yes, the Ninth Circuit did that.  
2 You can decide the standing case that limits it to the  
3 decision of the district court here. You could decide  
4 it as the Ninth Circuit did --

5 JUSTICE KENNEDY: The problem -- the problem  
6 with the case is that you're really asking, particularly  
7 because of the sociological evidence you cite, for us to  
8 go into uncharted waters, and you can play with that  
9 metaphor, there's a wonderful destination, it is a  
10 cliff. Whatever that was.

11 (Laughter.)

12 JUSTICE KENNEDY: But you're -- you're doing  
13 so in a -- in a case where the opinion is very narrow.  
14 Basically that once the State goes halfway, it has to go  
15 all the way or 70 percent of the way, and you're doing  
16 so in a case where there's a substantial question on --  
17 on standing. I just wonder if -- if the case was  
18 properly granted.

19 MR. OLSON: Oh, the case was certainly  
20 properly granted, Your Honor. I mean, there was a full  
21 trial of all of these issues. There was a 12-day trial.  
22 The judge insisted on evidence on all of these  
23 questions. This -- this is a --

24 JUSTICE KENNEDY: But that's not the issue  
25 the Ninth Circuit decided.

1           MR. OLSON: The issue -- yes, the Ninth  
2 Circuit looked at it and decided because of your  
3 decision on the Romer case -- this Court's decision on  
4 the Romer case, that it could be decided on the narrower  
5 issue, but it certainly was an appropriate case to  
6 grant. And those issues that I've been describing are  
7 certainly fundamental to the case. And -- and I don't  
8 want to abuse the Court's indulgence, that what I -- you  
9 suggested that this is uncharted waters. It was  
10 uncharted waters when this Court, in 1967, in the Loving  
11 decision said that interracial -- prohibitions  
12 on interracial marriages, which still existed in 16  
13 States, were unconstitutional.

14           JUSTICE KENNEDY: It was hundreds of years  
15 old in the common law countries. This was new to the  
16 United States.

17           MR. OLSON: And -- and what we have here --

18           JUSTICE KENNEDY: So -- so that's not  
19 accurate.

20           MR. OLSON: I -- I respectfully submit that  
21 we've under -- we've learned to understand more about  
22 sexual orientation and what it means to individuals. I  
23 guess the -- the language that Justice Ginsburg used at  
24 the closing of the VMI case is an important thing, it  
25 resonates with me, "A prime part of the history of our

1 Constitution is the story of the extension of  
2 constitutional rights to people once ignored or  
3 excluded."

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 General Verrilli?

6 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
7 FOR UNITED STATES, AS AMICUS CURIAE,  
8 SUPPORTING THE RESPONDENTS

9 GENERAL VERRILLI: Mr. Chief Justice, and  
10 may it please the Court:

11 Proposition 8 denies gay and lesbian persons  
12 the equal protection of the laws --

13 CHIEF JUSTICE ROBERTS: You don't think  
14 you're going to get away with not starting with the  
15 jurisdictional question, do you?

16 (Laughter.)

17 GENERAL VERRILLI: As an amicus, I thought I  
18 might actually, Your Honor. And -- and, of course, we  
19 didn't take a position on standing. We didn't -- we  
20 didn't brief it. We don't have a formal position on  
21 standing, but I will offer this observation based on the  
22 discussion today and the briefing.

23 We do think that, while it's certainly not  
24 free of doubt, that the better argument is that there is  
25 not Article III standing here because -- I don't want to

1 go beyond just summarizing our position, but -- because  
2 we don't have a formal position.

3 But we do think that with respect to  
4 standing, that at this point with the initiative process  
5 over, that Petitioners really have what is more in the  
6 nature of a generalized grievance and because they're  
7 not an agent of the State of California or don't have  
8 any other official tie to the State that would -- would  
9 result in any official control of their litigation, that  
10 the better conclusion is that there's not Article III  
11 standing here.

12 JUSTICE ALITO: Well, tomorrow you're going  
13 to be making a standing argument that some parties think  
14 is rather tenuous, but today, you're -- you're very  
15 strong for Article III standing?

16 GENERAL VERRILLI: Well, we said this was  
17 a -- we said this was a close question, and -- and our  
18 interests are, Justice Alito, in tomorrow's issues where  
19 we have briefed the matter thoroughly and will be  
20 prepared to discuss it with the Court tomorrow.

21 With respect to the merits, two fundamental  
22 points lead to the conclusion that there's an equal  
23 protection violation here. First, every warning flag  
24 that warrants exacting scrutiny is present in this case.  
25 And Petitioners' defense of Proposition 8 requires the

1 Court to ignore those warning flags and instead apply  
2 highly deferential Lee Optical rational basis review as  
3 though Proposition 8 were on a par with the law of  
4 treating opticians less favorably than optometrists,  
5 when it really is the polar opposite of such a law.

6 JUSTICE GINSBURG: General Verrilli, I could  
7 understand your argument if you were talking about the  
8 entire United States, but you -- your brief says it's  
9 only eight or nine States, the States that permit civil  
10 unions, and that's -- brings up a question that was  
11 asked before. So a State that has made considerable  
12 progress has to go all the way, but at least the  
13 government's position is, if it has done -- the State  
14 has done absolutely nothing at all, then it's -- it can  
15 do -- do as it will.

16 GENERAL VERRILLI: I -- that gets to my  
17 second point, Your Honor, which is that I do think the  
18 problem here with the arguments that Petitioners are  
19 advancing is that California's own laws do cut the legs  
20 out from under all of the justifications that  
21 Petitioners have offered in defense of Proposition 8.  
22 And I understand Your Honor's point and the point that  
23 Justice Kennedy raised earlier, but I do think this  
24 Court's equal protection jurisprudence requires the  
25 Court to evaluate the interests that the State puts

1 forward, not in a vacuum, but in the context of the  
2 actual substance of California law.

3           And here, with respect to California law,  
4 gay and lesbian couples do have the legal rights and  
5 benefits of marriage, full equality and adoption, full  
6 access to assistive reproduction, and therefore, the  
7 argument about the State's interests that -- that  
8 Petitioners advance have to be tested against that  
9 reality, and -- and they just don't measure up. None of  
10 the --

11           JUSTICE BREYER: Well, the argument --

12           JUSTICE ALITO: None of the --

13           CHIEF JUSTICE ROBERTS: Justice Breyer.

14           JUSTICE BREYER: What is the one -- look, a  
15 State that does nothing for gay couples hurts them much  
16 more than a State that does something. And, of course,  
17 it's true that it does hurt their argument that they do  
18 quite a lot, but which are their good arguments, in your  
19 opinion? I mean, take a State that really does nothing  
20 whatsoever.

21           They have no benefits, no nothing, no  
22 nothing. Okay? And moreover, if -- if you're right,  
23 even in California, if they have -- if they're right  
24 or -- you know, if a pact is enough, they won't get  
25 Federal benefits. Those that are tied to marriage

1 because they're not married. So -- so a State that does  
2 nothing hurts them much more, and yet your brief seems  
3 to say it's more likely to be justified under the  
4 Constitution.

5 I'd like to know with some specificity how  
6 that could be.

7 GENERAL VERRILLI: Well, because you have to  
8 measure the -- under the standard of equal protection  
9 scrutiny that we think this Court's cases require.

10 JUSTICE BREYER: I know the principle, but  
11 I'm saying which are their good arguments, in your  
12 opinion, that would be good enough to overcome for the  
13 State that does nothing, but not good enough to overcome  
14 California where they do a lot?

15 GENERAL VERRILLI: Well, we -- what we're --  
16 what we're saying about that is that we're not prepared  
17 to close the door to an argument in another State where  
18 the State's interests haven't cut the legs out from  
19 under the arguments. And I think -- I suppose the  
20 caution rationale that Mr. Cooper identified with  
21 respect to the effects on children, if it came up in a  
22 different case with a different record, after all here,  
23 this case was litigated by Petitioners on the theory  
24 that rational basis applied and they didn't need to show  
25 anything and so they didn't try to show anything.

1           Our view is that heightened scrutiny should  
2 apply and so I don't want to -- I don't want to kid  
3 about this, we understand, that would be a very heavy  
4 burden for a State to meet. All we're suggesting is  
5 that in a situation in which the -- the State interests  
6 aren't cut out from under it, as they -- as they are  
7 here, that that issue ought to remain open for a future  
8 case. And I -- and I think the caution rationale would  
9 be the one place where we might leave it open. But you  
10 can't leave it open in this case.

11           JUSTICE SOTOMAYOR: General, there is an  
12 irony in that, which is the States that do more have  
13 less rights.

14           GENERAL VERRILLI: Well -- well, I  
15 understand that, Your Honor, but I do think that you  
16 have to think about the claim of right on the other side  
17 of the equation here. And in this situation,  
18 California -- the argument here that -- that gay and  
19 lesbian couples can be denied access to marriage on the  
20 ground of an interest in responsible procreation and  
21 child rearing just can't stand up given that the parents  
22 have full equality, the gay and lesbian parents have  
23 full equality apart from --

24           JUSTICE ALITO: You want us to assess the  
25 effects of same-sex marriage, the potential effects

1 on -- of same-sex marriage, the potential -- the effects  
2 of Proposition 8. But what is your response to the  
3 argument, which has already been mentioned about the  
4 need to be cautious in light of the newness of the --  
5 the concept of -- of same-sex marriage?

6           The one thing that the parties in this case  
7 seem to agree on is that marriage is very important.  
8 It's thought to be a fundamental building block of  
9 society and its preservation essential for the  
10 preservation of society. Traditional marriage has been  
11 around for thousands of years. Same-sex marriage is  
12 very new. I think it was first adopted in The  
13 Netherlands in 2000. So there isn't a lot of data about  
14 its effect. And it may turn out to be a -- a good  
15 thing. It may turn out not to be a good thing, as the  
16 supporters of Proposition 8 apparently believe.

17           But you want us to step in and render a  
18 decision based on an assessment of the effects of this  
19 institution, which is newer than cell phones or the  
20 Internet? I mean we -- we are not -- we do not have the  
21 ability to see the future.

22           On a question like that, of such fundamental  
23 importance, why should it not be left for the people,  
24 either acting through initiatives and referendums or  
25 through their elected public officials?

1                   GENERAL VERRILLI: I have four points I  
2 would like to make to that in response to that,  
3 Justice Alito, and I think they are all important.

4                   First, California did not, through  
5 Proposition 8, do what my friend Mr. Cooper said and  
6 push a pause button. They pushed a delete button. This  
7 is a permanent ban. It's in the Constitution. It's  
8 supposed to take this issue out from the legislative  
9 process. So that's the first point.

10                   Second --

11                   JUSTICE ALITO: Well, just in response to  
12 that, of course the Constitution could be amended,  
13 and -- and I think I read that the California  
14 Constitution has been amended 500 times.

15                   GENERAL VERRILLI: But the --

16                   JUSTICE ALITO: So it's not exactly like the  
17 U.S. Constitution.

18                   GENERAL VERRILLI: But it does -- of course  
19 not. But it is -- but the aim of this is to take it out  
20 of the normal legislative process.

21                   The second point is that, with respect to  
22 concerns that Your Honor has raised, California has been  
23 anything but cautious. It has given equal parenting  
24 rights, equal adoption rights. Those rights are on the  
25 books in California now and so the interest of

1 California is -- that Petitioners are articulating, with  
2 respect to Proposition 8, has to be measured in that  
3 light.

4 JUSTICE SCALIA: Yeah, but the rest of the  
5 country has been cautious.

6 GENERAL VERRILLI: And -- and that's why --

7 JUSTICE SCALIA: And we're -- and you are  
8 asking us to impose this on the whole country, not just  
9 California.

10 GENERAL VERRILLI: No, respectfully  
11 Justice Scalia, we are not. Our position is narrower  
12 than that. Our position -- the position we have taken,  
13 is about States, it applies to States that have, like  
14 California and perhaps other States, that have granted  
15 these rights short of marriage, but --

16 CHIEF JUSTICE ROBERTS: I don't want to -- I  
17 want you to get back to Justice Alito's other points,  
18 but is it the position of the United States that  
19 same-sex marriage is not required throughout the  
20 country?

21 GENERAL VERRILLI: We are not -- we are not  
22 taking the position that it is required throughout the  
23 country. We think that that ought to be left open for a  
24 future adjudication in other States that don't have the  
25 situation California has.

1 JUSTICE SCALIA: So your -- your position is  
2 only if a State allows civil unions does it become  
3 unconstitutional to forbid same-sex marriage, right?

4 GENERAL VERRILLI: I -- I see my red light  
5 is on.

6 CHIEF JUSTICE ROBERTS: Well, you can go on.

7 GENERAL VERRILLI: Thank you.

8 Our position is -- I would just take out a  
9 red pen and take the word "only" out of that sentence.  
10 When that is true, then the Equal Protection Clause  
11 forbids the exclusion of same-sex marriage and it's an  
12 open question otherwise.

13 And if I could just get to the third reason,  
14 which I do think is quite significant.

15 The -- the argument here about caution is an  
16 argument that, well, we need to wait. We understand  
17 that. We take it seriously. But waiting is not a  
18 neutral act. Waiting imposes real costs in the here and  
19 now. It denies to the -- to the parents who want to  
20 marry the ability to marry, and it denies to the  
21 children, ironically, the very thing that Petitioners  
22 focus on is at the heart of the marriage relationship.

23 CHIEF JUSTICE ROBERTS: But you are willing  
24 to wait in the rest of the country. You saying it's got  
25 to happen right now in California, but you don't even

1 have a position about whether it's required in the rest  
2 of the country.

3 GENERAL VERRILLI: It -- if, with respect to  
4 a State that allows gay couples to have children and to  
5 have families and then denies the stabilizing effect --

6 CHIEF JUSTICE ROBERTS: So it's got to  
7 happen right away in those States where same-sex couples  
8 have every legal right that married couples do.

9 GENERAL VERRILLI: Well, we think --

10 CHIEF JUSTICE ROBERTS: But you can wait in  
11 States where they have fewer legal rights.

12 GENERAL VERRILLI: What I said is it's an  
13 open question with respect to those States and the Court  
14 should wait and see what kind of a record a State could  
15 make. But in California you can't make the record to  
16 justify the exclusion.

17 And the fourth point I would make on this,  
18 recognizing that these situations are not --

19 JUSTICE SOTOMAYOR: How would the record be  
20 different elsewhere?

21 GENERAL VERRILLI: Well, they might try to  
22 make a different record about the effects on children.  
23 But there isn't a record to that effect here.

24 And the fourth point I would make, and I do  
25 think this is significant, is that the principal

1 argument in 1967, with respect to Loving and that the  
2 Commonwealth of Virginia advanced was, well, the social  
3 science is still uncertain about how biracial children  
4 will fare in this world, and so you ought to apply  
5 rational basis scrutiny and wait. And I think the Court  
6 recognized that there is a cost to waiting and that that  
7 has got to be part of the equal protection calculus.  
8 And so -- so I do think that's quite fundamental.

9 CHIEF JUSTICE ROBERTS: Can I ask you a  
10 problem about --

11 GENERAL VERRILLI: Sure.

12 CHIEF JUSTICE ROBERTS: -- I -- it seems to  
13 me that your position that you are supporting is  
14 somewhat internally inconsistent. We see the argument  
15 made that there is no problem with extending marriage to  
16 same-sex couples because children raised by same-sex  
17 couples are doing just fine and there is no evidence  
18 that they are being harmed.

19 And the other argument is Proposition 8  
20 harms children by not allowing same-sex couples to  
21 marriage. Which is it?

22 GENERAL VERRILLI: Well, I -- I think what  
23 Proposition 8 does is deny the long-term stabilizing  
24 effect that marriage brings. That's -- that's the  
25 argument for -- for marriage, that --

1 CHIEF JUSTICE ROBERTS: But you also tell me  
2 there has been no harm shown to children of same-sex  
3 couples.

4 GENERAL VERRILLI: California -- there are  
5 37,000 children in same-sex families in California now.  
6 Their parents cannot marry and that has effects on them  
7 in the here and now.

8 A stabilizing effect is not there. When  
9 they go to school, they have to -- you know -- they  
10 don't have parents like everybody else's parents.  
11 That's a real effect, a real cost in the here and now.

12 JUSTICE BREYER: Well, the real cost right  
13 now would be you're asking me to write these words, "a  
14 State that has a pact has to say 'marriage,'" but I'm  
15 not telling you about States that don't. Well, I would  
16 guess there is a real-world effect there, too. That  
17 States that are considering pacts will all say, we won't  
18 do it, or not all, but some would.

19 And that would have a real effect right now.  
20 And at the moment, I'm thinking it's much more harmful  
21 to the gay couple, the latter than the former. But you  
22 won't give me advice as the government as to how to deal  
23 with that.

24 GENERAL VERRILLI: Well, we -- we think  
25 that, as I started my argument, Your Honor, that all the

1 warning flags for exacting equal protection scrutiny are  
2 present here. This is a group that has suffered a  
3 history of terrible discrimination. The Petitioners  
4 don't deny it.

5           Petitioners said at the podium today that  
6 there is no justification for that discrimination in any  
7 realm other than the one posed in this case and the --  
8 and so when those two factors are present, those are  
9 paradigm considerations for the application of  
10 heightened scrutiny, and so I don't want to suggest that  
11 the States that haven't taken those steps --

12           JUSTICE SOTOMAYOR: But they are not the  
13 only ones.

14           GENERAL VERRILLI: -- that States that  
15 haven't taken this step, that they are going to have an  
16 easy time meeting heightened scrutiny, which I think has  
17 to apply --

18           JUSTICE GINSBURG: Suppose -- suppose one of  
19 those States repeals its civil union laws?

20           GENERAL VERRILLI: It would be a different  
21 case. And all I'm saying is that the door ought to  
22 remain open to that case, not that it would be easy for  
23 the State to prevail in that case.

24           CHIEF JUSTICE ROBERTS: Thank you, General.

25           Mr. Cooper, to keep things fair, I think you

1 have 10 minutes.

2 REBUTTAL ARGUMENT OF CHARLES J. COOPER

3 ON BEHALF OF THE PETITIONERS

4 MR. COOPER: Thank you very much.

5 JUSTICE KENNEDY: And you might address why  
6 you think we should take and decide this case.

7 MR. COOPER: Yes, Your Honor, and that is  
8 the one thing on which I wholeheartedly agree with my  
9 friend Mr. Olson. This case was properly -- is now  
10 properly before the Court and was properly granted, even  
11 if, even if, Your Honor, one could defend the -- the  
12 specific judgment below for the Ninth Circuit, a defense  
13 that I haven't heard offered to this Court. Judicial  
14 redefinition of marriage even in -- even if it can be  
15 limited to California, is well worthy of this Court's  
16 attention, particularly, Your Honor, as it come from a  
17 single district court judge in a single jurisdiction.

18 I would also like --

19 JUSTICE SOTOMAYOR: I think that begs  
20 your -- Mr. Olson doesn't really focus on this. If the  
21 issue is letting the States experiment and letting the  
22 society have more time to figure out its direction, why  
23 is taking a case now the answer?

24 MR. COOPER: Because, Your Honor --

25 JUSTICE SOTOMAYOR: We let issues perk and

1 so we let racial segregation perk for 50 years from 1898  
2 to 1954.

3 MR. COOPER: Your Honor, it is hard to --

4 JUSTICE SOTOMAYOR: And now we are only  
5 talking about, at most, four years.

6 MR. COOPER: It is hard to imagine a case  
7 that would be better, or more thoroughly, I should say,  
8 at least, briefed and argued to this Court.

9 JUSTICE SCALIA: It's too late for that, too  
10 late for that now, isn't it? I mean, we granted cert.  
11 I mean, that's essentially asking -- you know, why did  
12 we grant cert. We should let it percolate for  
13 another -- you know, we -- we have crossed that river, I  
14 think.

15 MR. COOPER: And in this particular case, to  
16 not grant certiorari is to essentially bless a judicial  
17 decision that there -- that at least in the State of  
18 California, the people have no authority to step back,  
19 hit the pause button, and allow the experiments that are  
20 taking place in this country to further mature. That in  
21 fact, at least in California -- and it's impossible to  
22 limit this ruling, Your Honor, even to California, even  
23 the Solicitor General's argument, he says, applies to at  
24 least eight States.

25 It's impossible to limit these -- these

1 propositions to any particular jurisdiction, so this  
2 Court would be making a very real decision with respect  
3 to same-sex marriage if it should simply decide to  
4 dismiss the writ as improvidently granted,  
5 Justice Kennedy.

6           And let's -- let's just step back and just  
7 consider for a moment the Solicitor General's argument.  
8 He is basically submitting to the Court that essentially  
9 the one compromise that is not available to the States  
10 is the one that the State of California has undertaken.  
11 That is, to go as far as the people possibly can in --  
12 in honoring and recognizing the families and the  
13 relationships of same-sex couples, while still  
14 preserving the existence of traditional marriage as an  
15 institution. That's the one thing that's off the table.

16           JUSTICE GINSBURG: I thought he was saying  
17 -- I thought he was saying, Mr. Cooper, that it's not  
18 before the Court today. And remember Loving against  
19 Virginia was preceded by the McLaughlin case. So first  
20 there was the question of no marriage, and then there  
21 was marriage.

22           So in that sense I understood the Solicitor  
23 General to be telling us that case is not before the  
24 Court today.

25           MR. COOPER: Forgive me, Justice Ginsburg.

1 The case of -- what case isn't before the Court?

2 JUSTICE GINSBURG: I think it was McLaughlin  
3 v. Florida.

4 MR. COOPER: Yes.

5 JUSTICE GINSBURG: It was cohabitation of  
6 people of different races.

7 MR. COOPER: Certainly.

8 JUSTICE GINSBURG: And the Court took that  
9 case and waited to reach the marriage case.

10 MR. COOPER: It's -- yes, Your Honor. And  
11 well, forgive me, Your Honor. I'm not sure -- I'm not  
12 sure I'm following the Court's question.

13 JUSTICE GINSBURG: I may -- my memory may be  
14 wrong, but I think the case was that people of different  
15 races were arrested and charged with the crime of  
16 interracial cohabitation. And the Court said that that  
17 was invalid.

18 MR. COOPER: Yes.

19 JUSTICE GINSBURG: Unlawful.

20 MR. COOPER: Yes. Thank you, Your Honor.

21 Forgive me. And -- you know, I'm glad that counsel for  
22 the Respondents mentioned the Loving case because what  
23 this Court -- what this Court ultimately said was  
24 patently obvious, is that the colors of the skin of the  
25 spouses is irrelevant to any legitimate purpose, no more

1 so than their hair colors, any legitimate purpose of  
2 marriage, that interracial couples and same-race couples  
3 are similarly situated in every respect with respect to  
4 any legitimate purpose of marriage.

5 That's what this question really boils down  
6 here, whether or not it can be said that for every  
7 legitimate purpose of marriage, are opposite-sex couples  
8 and same-sex couples indistinguishable?  
9 Indistinguishable. And with all due respect to counsel  
10 and to the Respondents, that is not a hard question.

11 If, in fact, it is true, as the people of  
12 California believe that it still is true, that the  
13 natural procreative capacity of opposite-sex couples  
14 continues to pose vitally important benefits and risks  
15 to society and that's why marriage itself is the  
16 institution that society has always used to regulate  
17 those heterosexual, procreative -- procreative  
18 relationships.

19 Counsel -- the Solicitor General has said  
20 that -- that the ban that the proposition erects in  
21 California is permanent. Well, it's -- certainly that  
22 is not the view of the Respondents and what we read  
23 every day. This is not an issue that is now at rest in  
24 the State of California, regardless -- well, unless this  
25 Court essentially puts it to rest. That democratic

1 debate, which is roiling throughout this country, will  
2 definitely be coming back to California.

3 It is an agonizingly difficult, for many  
4 people, political question. We would submit to you that  
5 that question is properly decided by the people  
6 themselves.

7 Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel,  
9 counsel.

10 The case is submitted.

11 (Whereupon, at 11:27 a.m., the case in the  
12 above-entitled matter was submitted.)

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<b>A</b>				
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