No. 12-144

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL., PETITIONERS

v.

KRISTIN M. PERRY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question presented by this case: whether Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitutions and statutes:

Constitution and statutes—Continued: Page

Miscellaneous: Page

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INTEREST OF THE UNITED STATES

This case presents the question whether California's denial of the right to marry to same-sex couples violates equal protection. The United States has an interest in the Court's resolution of that question, particularly in light of its participation in *United States* v. *Windsor*, No. 12-307 (cert. granted Dec. 7, 2012), now pending before the Court. The President and Attorney General have determined that classifications based on sexual orientation should be subject to heightened scrutiny for equal protection purposes. 12-307 J.A. 183-194 (Letter from Eric H. Holder, Jr., Attorney General of the United States, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011)). This case, like *Windsor*, presents the Court with the opportunity to address the question whether laws that target gay and lesbian people for discriminatory treatment should be subject to

heightened scrutiny. The United States has participated as amicus curiae in other cases to address the level of scrutiny to be applied to a particular classification for equal protection purposes. *E.g.*, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985). Certain interests articulated in support of Proposition 8 in this case also have been raised in *Windsor* in support of Section 3 of the Defense of Marriage Act, and the Court's approach when examining those interests therefore is of significance to the United States.

STATEMENT

1. In May 2008, the Supreme Court of California held that the California Constitution guaranteed to same-sex couples the fundamental right to marry, and invalidated a state statute that had restricted civil marriage to opposite-sex couples. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). Following that decision, approximately 18,000 same-sex couples legally married in California.

Five California citizens, including four of five petitioners here, qualified a ballot initiative to "[c]hange[] the California Constitution to eliminate the right of same-sex couples to marry in California." Pet. App. 26a (brackets in original; citation omitted). Those citizens were designated the official proponents of the ballot initiative, known as Proposition 8. See Cal. Elec. Code § 342. The pro-ballot argument, approved by the official proponents for inclusion in California's voter information guide (Voter Guide), explained that Proposition 8 "does three simple things": (1) "restores the definition of marriage to what * * * human history has understood marriage to be"; (2) "overturns the outrageous decision of four activist Supreme Court judges who ignored the will of the people"; and (3) "protects our children from being taught in public schools that 'same-

sex marriage' is the same as traditional marriage." J.A. Exh. 56 (emphasis omitted). The pro-ballot argument also emphasized that "Proposition 8 doesn't take away any rights or benefits of gay or lesbian domestic partnerships." *Ibid.*[1]

In November 2008, a majority of California voters approved Proposition 8. The California Constitution therefore was amended to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const. art. I, § 7.5. The California Supreme Court subsequently upheld Proposition 8 against a state constitutional challenge. See *Strauss* v. *Horton*, 207 P.3d 48 (Cal. 2009). That court construed Proposition 8 as "carv[ing] out" only a "narrow and limited exception" to the state constitutional rights otherwise guaranteed to same-sex couples, *id.* at 61, and emphasized that such couples "continue to enjoy * * * the constitutional right to enter into an officially recognized and protected family relationship [*i.e.*, domestic partnership] with the person of one's choice and to raise children in that family if the couple so chooses," *id.* at 102. Under California law, domestic partnerships carry all of the substantive rights and obligations of marriage: domestic partners in California have "the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law * * * as are granted to and imposed upon spouses." Cal. Fam. Code § 297.5(a). The court further deter-

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[1] The website of petitioner ProtectMarriage.com, the ballot measure committee formed by four of the five individual proponents of Proposition 8, contains substantially similar arguments in support of the initiative. See ProtectMarriage.com, *Ballot Arguments in Favor of Prop 8*, http://protectmarriage.com/ballot-arguments-in-favor-of-prop-8-2008.

mined that Proposition 8 did not invalidate the 18,000 marriages involving same-sex couples performed before its enactment. *Strauss*, 207 P.3d at 119-122.

2. Private respondents, two same-sex couples who wish to marry, brought suit in federal district court to challenge Proposition 8 under the Fourteenth Amendment to the United States Constitution. Respondent City and County of San Francisco was granted leave to intervene as a plaintiff. The named defendants—California's governor, its attorney general, and several state and county officials involved in the enforcement of state marriage laws—declined to defend Proposition 8, and the California Attorney General conceded that it was unconstitutional. The proponents of Proposition 8, including petitioners here, intervened in order to defend the initiative.

The district court, following trial, held Proposition 8 unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pet. App. 137a-317a. In its equal protection analysis, the court found that gay and lesbian people are "the type of minority strict scrutiny was designed to protect," *id.* at 300a, and that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation," *id.* at 301a. The court ultimately held, however, that Proposition 8 was unconstitutional under any standard of review because proponents had "failed to identify any rational basis Proposition 8 could conceivably advance" in denying the right to marry to same-sex couples. *Id.* at 312a. The court also ruled that Proposition 8 "unconstitutionally burdens the exercise of the fundamental right to marry" under the Due Process Clause. *Id.* at 286a.

The court of appeals stayed the district court's judgment pending appeal.

3. a. Following briefing and argument, the court of appeals determined that petitioners' standing to appeal might depend on the authority conferred by state law. The court therefore certified to the California Supreme Court the question whether, under California law, "the official proponents of an initiative measure possess * * * the authority to assert the State's interest in the initiative's validity * * * when the public officials charged with th[e] duty [to defend the constitutionality of the initiative] refuse to do so." Pet. App. 416a. The Supreme Court of California answered that, under the circumstances presented in this case, California law entitled petitioners to represent the State and to assert its interest in the validity of Proposition 8. *Id.* at 318a-402a.

b. The court of appeals, after determining that petitioners had Article III standing, affirmed the district court's judgment. Pet. App. 1a-95a. Declining to decide whether classifications based on sexual orientation warrant heightened scrutiny (*id.* at 57a n.13, 70a n.19), the court held that Proposition 8 violated equal protection on the ground that it withdrew from gay and lesbian people the right to marry—a right they had previously enjoyed under California law—without a rational basis for doing so. *Id.* at 47a-92a. The court emphasized that Proposition 8, while denying gay and lesbian couples access to the designation of marriage, left fully intact their access to the legal incidents of marriage through domestic partnerships. *Id.* at 17a, 47a-54a, 57a-58a. The court concluded that the "sole purpose and effect" of Proposition 8 was impermissibly to "singl[e] out a certain class of citizens for disfavored legal status." *Id.* at

57a-58a, 91a (quoting *Romer* v. *Evans*, 517 U.S. 620, 633 (1996)).

Judge N.R. Smith agreed that petitioners had standing to appeal, but dissented on the merits. Pet. App. 95a-136a. Judges O'Scannlain, Bybee, and Bea dissented from the denial of rehearing en banc. *Id.* at 445a-446a. The court of appeals stayed its mandate pending final disposition by this Court. *Id.* at 444a.

SUMMARY OF ARGUMENT

Private respondents, committed gay and lesbian couples, seek the full benefits, obligations, and social recognition conferred by the institution of marriage. California law provides to same-sex couples registered as domestic partners all the legal incidents of marriage, but it nonetheless denies them the designation of marriage allowed to their opposite-sex counterparts. Particularly in those circumstances, the exclusion of gay and lesbian couples from marriage does not substantially further any important governmental interest. Proposition 8 thus violates equal protection.

A. As the government explained in its merits brief (Br. 18-36) in *United States* v. *Windsor*, No. 12-307, classifications based on sexual orientation call for application of heightened scrutiny. Each of the four relevant considerations identified by this Court supports that conclusion: (1) gay and lesbian people have suffered a significant history of discrimination in this country; (2) sexual orientation generally bears no relation to ability to perform or contribute to society; (3) discrimination against gay and lesbian people is based on an immutable or distinguishing characteristic that defines them as a group; and (4) notwithstanding certain progress, gay and lesbian people—as Proposition 8 itself underscores—are a minority group with limited power to

protect themselves from adverse outcomes in the political process. The district court's factual findings in this case reinforce that conclusion, Pet. App. 226a-279a, and the Court's summary dismissal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), does not foreclose it.

Petitioners proffer two reasons for declining to apply heightened scrutiny to classifications based on sexual orientation in the marriage context: (1) the distinction between same-sex couples and opposite-sex couples "reflects biological realities closely related to society's traditional interest in marriage" (Pet. Br. 29 n.1); and (2) the states traditionally possess "predominant" authority over marriage (*id.* at 30). Those considerations, however, relate (at most) to whether a classification based on sexual orientation in the marriage context survives heightened scrutiny (the second step of the analysis), not to the antecedent question whether heightened scrutiny applies to the classification at all.

B. Proposition 8 fails heightened scrutiny. Neither the interests asserted by petitioners nor Proposition 8's "actual purposes" as approved by its official sponsors suffice under that standard.

1. First, petitioners' central argument is that Proposition 8 advances an interest in responsible procreation and child-rearing because only heterosexual couples can produce "unintended pregnancies," and because the "overriding purpose" of marriage is to address that reality by affording a stable institution for procreation and child-rearing. But, as this Court has recognized, marriage is far more than a societal means of dealing with unintended pregnancies. See *Turner* v. *Safley*, 482 U.S. 78, 95-96 (1987); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). Even assuming, counterfactually, that the point of Proposition 8 was to account for accidental offspring

by opposite-sex couples, its denial of the right to marry to same-sex couples does not substantially further that interest.

To the extent the Voter Guide offered a distinct rationale favoring child-rearing by married opposite-sex couples, Proposition 8 neither promotes that interest nor prevents same-sex parenting. The overwhelming expert consensus is that children raised by gay and lesbian parents are as likely to be well adjusted as children raised by heterosexual parents. In any event, notwithstanding Proposition 8, California law continues to grant same-sex domestic partners the full extent of parental rights accorded to married couples. In that context, the exclusion of same-sex couples from marriage bears no substantial relation to any interest in promoting responsible procreation and child-rearing.

Second, petitioners argue that Proposition 8 furthers an interest in proceeding with caution before departing from the traditional understanding of marriage. That was not one of the contemporaneous justifications for Proposition 8 and thus cannot properly be considered under heightened scrutiny. In any event, similar calls to wait have been advanced—and properly rejected—in the context of racial integration, for example. See, *e.g.*, *Watson* v. *City of Memphis*, 373 U.S. 526, 528-529 (1963). Even if proceeding with caution were important enough to deny gay and lesbian people the right to marry in California now, Proposition 8 does not embody such an approach but rather goes to the opposite extreme. It permanently amends the California Constitution to bar any legislative change to the definition of marriage.

Third, petitioners contend that Proposition 8 serves an interest in returning the issue of marriage to the

democratic process. But use of a voter initiative to promote democratic self-governance cannot save a law like Proposition 8 that would otherwise violate equal protection. The point of heightened scrutiny is to protect disfavored minority groups from unjustified targeting in the democratic process.

2. Petitioners do not rely on two of Proposition 8's actual purposes as expressed in the Voter Guide. Those interests fail under heightened scrutiny in any event.

First, preserving a tradition of limiting marriage to heterosexuals is not itself a sufficiently important interest to justify Proposition 8. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 535-536 (1996). Nor do petitioners point to any evidence that permitting same-sex couples to marry will affect the "traditional" marriages of opposite-sex couples.

Second, protecting children from being taught about same-sex marriage is not a permissible interest insofar as it rests on a moral judgment about gay and lesbian people or their intimate relationships. See *Lawrence* v. *Texas*, 539 U.S. 558, 577-578 (2003). Nor does Proposition 8 substantially further any such interest given California's educational policies, which have never required teaching children about same-sex marriage and which prohibit instruction that discriminates based on sexual orientation.

ARGUMENT

PROPOSITION 8 VIOLATES EQUAL PROTECTION

The Court can resolve this case by focusing on the particular circumstances presented by California law and the recognition it gives to committed same-sex relationships, rather than addressing the equal protection issue under circumstances not present here. Under California law, same-sex partners may "enter into an

official, state-recognized relationship," *i.e.*, a domestic partnership. Pet. App. 48a. State law grants domestic partners all of the substantive rights and obligations of a married couple: domestic partners have "the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law * * * as are granted to and imposed upon spouses." Cal. Fam. Code § 297.5(a). Same-sex partners in California may, *inter alia*, raise children with the same rights and obligations as spouses; adopt each other's children; gain a presumption of parentage for a child born to or adopted by one partner; become foster parents; file joint state tax returns; participate in a partner's health-insurance policy; visit their partner when hospitalized; make medical decisions for a partner; and, upon the death of a partner, serve as the conservator of the partner's estate. Pet. App. 49a-50a. California has therefore recognized that same-sex couples form deeply committed relationships that bear the hallmarks of their neighbors' opposite-sex marriages: they establish homes and lives together, support each other financially, share the joys and burdens of raising children, and provide care through illness and comfort at the moment of death.

Proposition 8 nevertheless forbids committed same-sex couples from solemnizing their union in marriage, and instead relegates them to a legal status—domestic partnership—distinct from marriage but identical to it in terms of the substantive rights and obligations under state law. Indeed, Proposition 8 made clear that it left undisturbed California's conferral of the same substantive rights and obligations of marriage on same-sex domestic partners and that its sole purpose was to deny same-sex partners access to marriage. See p. 3, *supra*;

see also *Strauss* v. *Horton*, 207 P.3d 48, 61 (Cal. 2009) (Proposition 8 "leav[es] undisturbed all of the other extremely significant substantive" protections afforded same-sex couples.). California is not alone in this regard. Seven other states provide, through comprehensive domestic partnership or civil union laws, same-sex couples rights substantially similar to those available to married couples, yet still restrict marriage to opposite-sex couples: Delaware (Del. Code Ann. tit. 13, §§ 212, 214), Hawaii (Haw. Rev. Stat. Ann. § 572B-9), Illinois (750 Ill. Comp. Stat. Ann. § 75/20), Nevada (Nev. Rev. Stat. Ann. § 122A.200), New Jersey (N.J. Stat. Ann. §§ 37:1-31, 37:1-32), Oregon (Or. Rev. Stat. § 106.340), and Rhode Island (R.I. Gen. Laws §§ 15-3.1-6, 15-3.1-7). The designation of marriage, however, confers a special validation of the relationship between two individuals and conveys a message to society that domestic partnerships or civil unions cannot match.

Proposition 8's denial of marriage to same-sex couples, particularly where California at the same time grants same-sex partners all the substantive rights of marriage, violates equal protection. The Fourteenth Amendment's guarantee of equal protection embodies a defining constitutional ideal that "all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The object of California's establishment of the legal relationship of domestic partnership is to grant committed same-sex couples rights equivalent to those accorded a married couple. But Proposition 8, by depriving same-sex couples of the right to marry, denies them the "dignity, respect, and stature" accorded similarly situated opposite-sex couples under state law, *Strauss*, 207 P.3d at 72, and does not substantially further any important

governmental interest. It thereby denies them equal protection under the law.

A. Classifications Based On Sexual Orientation Should Be Subject To Heightened Scrutiny

Legislation is generally presumed valid and sustained as long as the "classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. For certain protected classes, however, heightened scrutiny enables courts to ascertain whether the government has employed the classification for a significant and proper purpose, and provides an enhanced measure of protection in circumstances where there is a greater danger that the classification results from impermissible prejudice or stereotypes. See, *e.g.*, *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (*VMI*). Because sexual orientation is a factor that "generally provides no sensible ground for differential treatment," *Cleburne*, 473 U.S. at 440-441, laws that classify based on sexual orientation should be subject to heightened scrutiny.

As explained in the government's merits brief (Br. 18-36) in *United States* v. *Windsor*, No. 12-307, all four of the factors relied on by this Court in assessing the applicability of heightened scrutiny to a classification support that conclusion: (1) gay and lesbian people have suffered a significant history of discrimination in this country (*id.* at 22-27); (2) sexual orientation generally bears no relation to ability to perform or contribute to society (*id.* at 27-29); (3) discrimination against gay and lesbian people is based on an immutable or distinguishing characteristic that defines them as a group (*id.* at 29-32); and (4) notwithstanding a measure of recent progress, gay and lesbian people are minorities with

limited power to protect themselves from adverse outcomes in the political process, as Proposition 8 itself indicates (*id.* at 32-35). The district court's extensive factual findings below, based on a trial record replete with expert and other evidence, reinforce each of those determinations. See Pet. App. 227a-234a (immutability/distinguishing characteristic), 234a-236a (capacity to contribute to society), 264a-272a (history of discrimination), 276a-279a (political process). The Court has understandably reserved the application of heightened constitutional scrutiny to a small number of classifications, but it is manifest that sexual orientation falls squarely in the category of classifications for which heightened scrutiny is designed.

Contrary to petitioners' contention (Br. 27-28), this Court's one-line summary dismissal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), in which it dismissed an appeal as of right from a state supreme court decision denying marriage status to a same-sex couple, neither forecloses the application of heightened scrutiny nor dictates the result in this case. Summary dispositions are "not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U.S. 651, 670-671 (1974); see *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 309 n.1 (1976) (per curiam). In any event, neither the underlying state supreme court decision, *Baker* v. *Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), nor the questions presented in the plaintiffs' jurisdictional statement, addressed the applicability of heightened scrutiny to classifications based on sexual orientation, 12-307 J.A. 559; see also *id.* at 570 (describing equal protection challenge as based on the "arbitrary" nature of the state law); *id.* at 574 (stating that "[t]he discrimination in this case is one of gender").

Not surprisingly, the Court's summary order gives no indication that it considered the applicable level of scrutiny. Indeed, this Court had not yet recognized intermediate scrutiny as an equal protection standard. See *United States* v. *Windsor*, 699 F.3d 169, 178-179 (2d Cir.) (noting "manifold changes to the Supreme Court's equal protection jurisprudence" since *Baker*), cert. granted, 133 S. Ct. 786 (2012). *Baker* thus does not govern whether a state law excluding same-sex couples from the right to marry survives heightened scrutiny—much less where, as here (and unlike in *Baker*), the state provides all the substantive rights of marriage but denies access to the designation.

Petitioners alternatively contend that a more deferential standard of review might be applied to laws pertaining to the "traditional definition of marriage" than to "other sorts of laws that classify individuals based on sexual orientation." Pet. Br. 29 n.1. As a general matter,[2] however, this Court has rejected invitations to vary the standard of review applicable to a suspect or quasi-suspect class because of the deference traditionally accorded to the particular regulatory context. See, *e.g.*,

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[2] Alienage, the only example cited by petitioners (Br. 29 n.1), entails distinctive considerations. See, *e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 792-793 (1977) (recognizing a "need for special judicial deference to congressional policy choices in the immigration context"); *Mathews* v. *Diaz*, 426 U.S. 67, 78-85 (1976) (applying deferential review where classification concerns relationship "between aliens and the Federal Government" given its "broad power over naturalization and immigration"); *Bernal* v. *Fainter*, 467 U.S. 216, 220-221 (1984) (applying "narrow exception" to strict scrutiny for citizenship-based classification where law relates to a "political function"). The deference accorded in cases involving management of the military, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986), similarly involves considerations not relevant here.

Johnson v. *California*, 543 U.S. 499, 505 (2005) (observing that Court "ha[s] insisted on strict scrutiny in *every* context, even for so-called 'benign' racial classifications") (emphasis added); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) (holding that intermediate scrutiny applies to "classifications based on sex or illegitimacy" without noting context-dependent exceptions). Petitioners suggest two reasons for a different result here, but neither suffices.

First, petitioners assert (Br. 29 n.1) that the distinction between same-sex couples and opposite-sex couples "reflects biological realities closely related to society's traditional interest in marriage." Even if true, however, that consideration would bear only on whether the distinction withstands heightened scrutiny in this case (the second step of the equal protection analysis), not to whether heightened scrutiny applies at all (the first step). See *Windsor*, 699 F.3d at 183 (relevance of the classification to the specific interests at issue in a particular law "bear[s] upon whether the law withstands scrutiny (the second step of analysis) rather than upon the level of scrutiny to apply") (citing *Clark*, 486 U.S. at 461); see also 12-307 Gov't Merits Br. 29.

Second, petitioners invoke (Br. 30, 59-60) the states' traditionally "predominant" authority over marriage. That authority, however, does not afford state marriage laws that disfavor protected classes an exemption from heightened scrutiny; the regulation of marriage is thus subject to the same equal protection principles applicable in other contexts. See *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (applying the "most rigid scrutiny" under the Equal Protection Clause to state prohibition on interracial marriage) (citation omitted). Because gay and lesbian people meet the criteria for treatment as a

protected class, this Court should apply heightened scrutiny in this case.[3]

B. Proposition 8 Fails Heightened Scrutiny

Because a classification based on sexual orientation calls for the application of heightened scrutiny, petitioners must establish that Proposition 8, at a minimum, is "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. And under heightened scrutiny, a law must be defended by reference to the "actual state purposes" behind it, not "rationaliza-

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[3] As petitioners recognize (Br. 28), although Proposition 8 does not expressly refer to "sexual orientation," it nonetheless classifies on that basis. Proposition 8 denies recognition of a class of marriages into which, as a practical matter, only gay and lesbian people are likely to enter. See Pet. App. 239a-240a ("Marrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals."); J.A. Exh. 56-57 (Voter Guide's pro-Proposition 8 argument: urging voters to ban "gay marriage" and stating that "[g]ays and lesbians * * * do not have the right to redefine marriage for everyone else"). This Court has squarely rejected any distinction between the status and conduct of gay and lesbian people. See *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2990 (2010) (rejecting contention that the organization "does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong'" because the Court's "decisions have declined to distinguish between status and conduct in this context"); *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

tions for actions in fact differently grounded." *VMI*, 518 U.S. at 535-536; see also *id.* at 533 ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

The Voter Guide, which included the state's compilation of the arguments in favor of Proposition 8 as authorized by its official proponents (Pet. App. 357a; Cal. Elec. Code § 9065(d)), sets forth the specific governmental interests purportedly advanced by Proposition 8:

> YES on Proposition 8 does three simple things:
>
> *It restores the definition of marriage* to what the vast majority of California voters already approved and human history has understood marriage to be.
>
> *It overturns the outrageous decision of four activist Supreme Court judges* who ignored the will of the people.
>
> *It protects our children* from being taught in public schools that "same-sex marriage" is the same as traditional marriage.

J.A. Exh. 56. The Voter Guide further states that "the best situation for a child is to be raised by a married mother and father." *Ibid.*; see, *e.g.*, *Strauss*, 207 P.3d at 120-121 ("When an initiative measure is at issue, the most potentially informative extrinsic source is usually the material contained in the ballot pamphlet that is mailed to each voter."); *Professional Eng'rs in Cal. Gov't* v. *Kempton*, 155 P.3d 226, 239 (Cal. 2007) ("[B]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.") (internal quotation marks and citation omitted).

Because petitioners contend that rational-basis review, rather than heightened scrutiny, applies in this

case (Br. 29-31), petitioners make little effort to justify Proposition 8 under heightened scrutiny. Petitioners do assert (Br. 28, 36), though, that the central justification they advance in support of Proposition 8—*viz.*, that the initiative furthers society's interest in responsible procreation and child-rearing—would satisfy "any level of equal protection scrutiny." The interest in promoting responsible procreation and child-rearing fails to justify Proposition 8 under heightened scrutiny, particularly in light of California's grant of all the substantive rights of marriage to same-sex domestic partners. The additional justifications advanced by petitioners, as well as the remaining purposes that actually gave rise to Proposition 8, likewise fail heightened scrutiny.

1. The interests asserted by petitioners in defense of Proposition 8 fail heightened scrutiny

Petitioners defend the constitutionality of Proposition 8 on the basis of three governmental interests purportedly served by the initiative: (i) an interest in promoting responsible procreation and child-rearing; (ii) an interest in proceeding with caution before recognizing same-sex marriage; and (iii) an interest in restoring democratic authority over an issue of significance to the state's citizens. None of those interests satisfies heightened scrutiny.

a. Responsible procreation and child-rearing

i. Petitioners contend (Br. 33) that the "overriding purpose of marriage" is "to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society." Based upon that premise, petitioners centrally defend Proposition 8 on the ground that "traditional" marriage serves to address the problem of "unin-

tended pregnancies." *Id.* at 47; see, *e.g.*, *id.* at 33 (describing "irresponsible procreation and child-rearing" as "the all-too-frequent result of casual or transient sexual relationships between men and women"); *id.* at 41 ("Sexual relationships between men and women, and only such relationships, can produce children—*often unintentionally*.") (emphasis added).

As this Court has recognized, marriage is much more than a means to deal with accidental offspring. See, *e.g.*, *Turner* v. *Safley*, 482 U.S. 78, 95-96 (1987) (recognizing that marriage constitutes an "expression[] of emotional support and public commitment" and that "[t]hese elements are an important and significant aspect of the marital relationship"); *Loving*, 388 U.S. at 12 (recognizing that marriage is a "vital personal right[] essential to the orderly pursuit of happiness"); see also *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) (recognizing the liberty interests of "married persons" in the privacy of their sexual conduct "even when not intended to produce offspring") (citation omitted); *Goodridge* v. *Department of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) ("[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.") (footnote omitted). The district court in this case accordingly found that civil marriage, *inter alia*, enhances public order by organizing individuals into stable and cohesive households; assigns individuals to care for one another and thereby limits the public's liability to care for the vulnerable; facilitates the accumulation, management, and transmission of property; and enables individuals to increase productivity through the division of household and other labor. Pet. App. 221a-226a. Petitioners' un-

duly narrow conception of the institution of marriage would hardly be recognizable to most of its participants.

But even assuming that creating a safety net for "unintended pregnancies" was an actual and adequate justification, Proposition 8 does not advance—much less bear a substantial relation to—that interest. Petitioners (unsurprisingly) cite no evidence that denying same-sex couples the designation of marriage operates in any way to encourage opposite-sex couples to marry and procreate responsibly; it is difficult to conceive of any logical connection, let alone a substantial one, between that interest and Proposition 8. See Pet. App. 75a ("We are aware of no basis on which this argument would be even conceivably plausible."); cf. *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (rejecting "encouragement of procreation" as a basis for prohibiting same-sex marriage "since the sterile and the elderly are allowed to marry").

Petitioners instead defend their "responsible procreation" rationale exclusively on the basis that a classification may be upheld under rational-basis review when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." Pet. Br. 8, 40 (quoting *Johnson* v. *Robison*, 415 U.S. 361, 383 (1974)). Because opposite-sex couples pose a risk of unintended offspring but same-sex couples do not, petitioners argue, marriage can rationally be limited to the former. *Id.* at 38-43. That logic would suggest that a state could deny—at least consistent with equal protection—a sterile or elderly opposite-sex couple the right to marry. In any event, petitioners' contention cannot satisfy heightened scrutiny, under which petitioners must provide some important reason for

excluding gay and lesbian people from the right to marry. Petitioners offer none.

ii. The Voter Guide arguably offered a distinct but related child-rearing justification for Proposition 8: "the best situation for a child is to be raised by a married mother and father." J.A. Exh. 56. Petitioners here do not appear to invoke that interest, which at any rate also fails heightened scrutiny.

As an initial matter, no sound basis exists for concluding that same-sex couples who have committed to marriage are anything other than fully capable of responsible parenting and child-rearing. To the contrary, many leading medical, psychological, and social-welfare organizations have issued policy statements opposing restrictions on gay and lesbian parenting based on their conclusion, supported by numerous scientific studies,[4] that children raised by gay and lesbian parents are as likely to be well adjusted as children raised by heterosexual parents.[5]

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[4] The weight of the scientific literature strongly supports the view that same-sex parents are just as capable as opposite-sex parents. See, *e.g.*, Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. Marriage & Family 3 (2010); see also APA Amicus Br. 5-6, 15-23, *Windsor* v. *United States*, 699 F.3d 169 (2d Cir. 2012) (No. 12-2335) (concluding, based on a rigorous review of the literature, that "there is no scientific basis for concluding that gay and lesbian parents are any less fit or capable than heterosexual parents, or that their children are any less psychologically healthy and well adjusted").

[5] See, *e.g.*, Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, Feb. 2002, http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339; Am. Psychological Ass'n, *Sexual Orientation, Parents, & Children*, July 2004, http://www.apa.org/about/governance/council/policy/parenting.aspx; Am. Acad. of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement*, 2009,

Moreover, as the court of appeals determined (Pet. App. 71a), "Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California." As explained (p. 3, *supra*), California law, both before and after Proposition 8, grants registered domestic partners the same parental rights and benefits accorded to married couples. See, *e.g.*, Cal. Fam. Code § 297.5(d); see also Resp. S.F. Br. 43-48. And Proposition 8 does not alter California's adoption, fostering, or presumed-parentage laws, which "continue to apply equally to same-sex couples." Pet. App. 71a-72a; cf. *Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012) ("DOMA cannot preclude same-sex couples in Massachusetts from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners."), petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012). In light of California's conferral of full rights of parenting and child-rearing on same-sex couples, Proposition 8's denial to same-sex couples of the right to marry bears no cognizable relation, let alone a substantial one, to any interest in responsible procreation and child-rearing (however defined). Indeed, because a substantial number of California children are raised in households headed by same-sex couples, see Pet. App. 237a, Proposition 8

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http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; Am. Med. Ass'n, *AMA Policies on GLBT Issues*, http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of Am., *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, http://www.cwla.org/programs/culture/glbtqposition.htm.

actually disserves the goal of improving child welfare by denying families access to the added stability and social acceptance provided by marriage. See, *e.g.*, *id.* at 247a ("[C]hildren * * * benefit when their parents can marry."); cf. *Goodridge*, 798 N.E.2d at 964 ("It cannot be rational * * * to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.").

Petitioners' principal rejoinder (Br. 44-46) is that California's election to grant gay and lesbian domestic partners "all the substantive rights and responsibilities" of marriage should not "doom" Proposition 8's denial of marriage. Under heightened scrutiny, however, a court evaluates the fit between a proffered interest and the challenged classification not in isolation or in the abstract, but in the context of the regulatory regime as it actually exists. See, *e.g.*, *Nyquist* v. *Mauclet*, 432 U.S. 1, 9-12 (1977) (evaluating New York's exclusion of resident aliens from tuition assistance program in light of program as a whole and other laws governing resident aliens); see also *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 192-193 (1999) (speech restriction "had to be evaluated in the context of the entire regulatory scheme" and "invalidated * * * based on the overall irrationality of the Government's regulatory scheme") (internal quotations marks omitted). Petitioners cite no precedent requiring (or even permitting) a court to shut its eyes to the actual operation and effect of the law in context.

To the contrary, a number of this Court's decisions recognize that, in certain circumstances, the conferral by the government of certain rights to some individuals precludes the denial of those same rights to others—even if there was no obligation to confer any rights in

the first place. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984) ("[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.") (quoting *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931)); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-395 (1993) (although "the District need not have permitted after-hours use of its property for any of the uses permitted by [New York law]," once it did so, it had created a limited public forum and could not discriminate on the basis of speaker identity).

Notably, in the commercial-speech context, in which the Court applies a form of heightened scrutiny, the Court has cited the lack of adequate fit between a challenged speech restriction and the asserted governmental interests by pointing to speech or speakers *not* restricted by the government. That line of cases thus relies on the fact that the government *allowed* speech under laws *more permissive* than constitutionally required. See, *e.g.*, *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011) (while state could have adopted a "more coherent policy" through greater restrictions, because it "made prescriber-identifying information available to an almost limitless audience," "the State's asserted interest in physician confidentiality d[id] not justify the burden"); *Greater New Orleans*, 527 U.S. at 191-193 (finding "'little chance' that the speech restriction could have directly and materially advanced [the government's] aim" in part because government's failure to impose greater restrictions on casino advertising "undermine[d] the asserted justifications for the restriction"); *City of*

Cincinnati v. *Discovery Network, Inc.*, 507 U.S. 410, 427-428 (1993) (while city arguably could have banned newsracks entirely, "the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted" because of the "absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city"). So too, here, California's extension of parental and other rights to gay and lesbian couples particularly undermines any contention that Proposition 8 furthers an interest in responsible child-rearing.

b. Proceeding with caution

Petitioners argue (Br. 48) that Proposition 8 "serves California's interest in proceeding with caution before fundamentally redefining a bedrock social institution." "[C]hanging the public meaning of marriage," they submit (Br. 51), "would necessarily entail a significant risk of adverse consequences over time." The asserted interest in proceeding slowly cannot justify Proposition 8 under heightened scrutiny because it was not a justification for the initiative identified by its official sponsors in the Voter Guide. See pp. 16-17, *supra*. In any event, it fails heightened scrutiny.

Petitioners cite no law for the proposition that "proceeding with caution" is sufficiently important to deny a protected class the ability to participate in something as important as marriage. Similar calls to wait were made—and properly rejected—with respect to racial integration, for example. See, *e.g.*, *Watson* v. *City of Memphis*, 373 U.S. 526, 528 (1963) (rejecting city's attempt to "justify its further delay in conforming fully and at once to constitutional mandates by urging the need and wisdom of proceeding slowly and gradually in its desegregation efforts").

In any event, Proposition 8 does not substantially further that interest. Nothing about Proposition 8 suggests that it was intended as a temporary measure pending the results of state experimentation. It amends the California Constitution and permanently bars the legislature from altering the definition of marriage.[6] See Pet. App. 80a ("The purpose and effect of Proposition 8 was 'to *eliminate* the right of same-sex couples to marry in California'" rather than "to 'suspend' or 'study' that right.") (quoting J.A. Exh. 56). Nor can Proposition 8 be justified on the theory that administrative processes for recognition of same-sex marriage would be difficult or time-consuming to implement; before Proposition 8 was enacted, California had sanctioned 18,000 marriages between same-sex couples. *Id.* at 78a-79a. As the court of appeals thus concluded, no connection exists between the "asserted purpose of 'proceeding with caution' and the enactment of an absolute ban, unlimited in time, on same-sex marriage in the state constitution.'" *Ibid.*; cf. *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969) (rejecting argument that city charter amendment could be "justif[ied]" as a "public decision to move slowly in the delicate area of race relations" where amendment was "unnecessary" to achieving that purpose).

c. Democratic self-governance

The proponents of Proposition 8 stated an interest in reserving to the "will of the people" of California—and withdrawing from the California courts—ultimate authority over the definition of marriage. J.A. Exh. 56. Although the interest in promoting democratic self-

[6] Eleven states that do not permit same-sex couples to marry lack a state constitutional bar requiring that result. See 12-307 *Windsor*, Gov't Merits Br. 34 & n.8.

governance was not pressed or passed upon as an independent argument justifying Proposition 8 below, petitioners now advance it before this Court (Pet. Br. 55-61).

Promoting democratic self-governance and accountability is a laudable governmental interest, but it is not one that can justify a law that would otherwise violate the Constitution. "The sovereignty of the people is itself subject to * * * constitutional limitations." *Hunter*, 393 U.S. at 392. The very premise of heightened scrutiny is that certain classifications are "seldom relevant to the achievement of any legitimate state interest," but that they burden classes that are unlikely to acquire protection through the democratic process. *Cleburne*, 473 U.S. at 440. The judiciary plays a "special role in safeguarding" those protected classes. *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982).

Marriage hardly stands alone among issues implicating equal protection or due process that may involve "various important but potentially conflicting interests, as well as competing values and understandings of the public good that are strongly and sincerely held by both supporters and opponents of such change." Pet. Br. 56. That such issues engender active public debate does not insulate them from constitutional scrutiny. If use of a voter initiative could itself provide a sufficient justification (*i.e.*, democratic self-governance) for a suspect classification, it would render the Equal Protection Clause nugatory in that context. Just as a state could not rely on an interest in democratic self-governance to prohibit marriage between individuals of a different race (cf. *Loving*, *supra*), it cannot rely on such an interest to prohibit marriage between individuals of the same sex—at least to the extent that exclusion would violate equal protection. Petitioners' reliance on the state interest in

democratic self-governance thus ultimately begs the question presented by this case.[7]

2. The remaining, actual purposes of Proposition 8 also fail heightened scrutiny

a. Traditional definition of marriage

The Voter Guide asserts in favor of Proposition 8 an interest in adopting the definition of marriage as between a man and a woman, consistent with what "human history has understood marriage to be." J.A. Exh. 56. Although petitioners state that Proposition 8 "pre-

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[7] Petitioners assert in passing, in a footnote (Br. 31 n.2), that Proposition 8 advances an "important" interest in "accommodating the First Amendment and other fundamental rights of institutions and individuals who support the traditional definition of marriage on religious or moral grounds." Even if the Court were to consider that post hoc rationalization, it would fail heightened scrutiny. Before Proposition 8, "no religion [was] required to change its religious policies or practices with regard to same-sex couples, and no religious officiant [was] required to solemnize a marriage in contravention of his or her religious beliefs." *In re Marriage Cases*, 183 P.3d 384, 451-452 (Cal. 2008); see Cal. Fam. Code § 400(a). Proposition 8 therefore does not affect, let alone substantially further, the liberty of people of faith who object to same-sex marriage on religious grounds. To the extent the asserted interest aims to ensure that civil law reflects religious views concerning the sacrament of marriage or the morality of same-sex relationships, it could not justify Proposition 8 either. See p. 31, *infra* (citing *Lawrence*); *Romer* v. *Evans*, 517 U.S. 620, 635 (1996) (rejecting proffered justification grounded in "personal or religious objections to homosexuality"); *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); cf. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648-649 (2002) ("The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion.").

serve[s] the traditional definition of marriage" (Br. 2), they do not raise that interest as an independent justification for Proposition 8. Rather, petitioners rely on what they describe as "plausible reasons" for California's adherence to the traditional definition of marriage (Br. 61 (citation omitted)), including the interests in responsible procreation and child-rearing (Br. 36) and proceeding cautiously (Br. 48), that indirectly implicate an interest in the traditional definition.

That is for good reason: reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles. See *VMI*, 518 U.S. at 535-536 (invalidating longstanding tradition of single-sex education at Virginia Military Institute); see also *Lawrence*, 539 U.S. at 577-578 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Bowers* v. *Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 143 n.15 (1994) ("Many of 'our people's traditions,' such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause.") (citation omitted); *Heller* v. *Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis."). Indeed, marriage has changed in certain significant ways over time—such as the demise of coverture and the elimination of racial restrictions on marital partners—that could have been characterized as traditional or fundamental to the institution. See Pet. App. 212a-213a. As this Court has observed, "laws once thought necessary and proper" may in fact "serve only to oppress," and, "[a]s the Constitution endures, persons

in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 579.

The state therefore must explain what interests support continuing a "tradition," especially when that tradition is defined by a classification burdening a minority group. See, *e.g.*, *Varnum* v. *Brien*, 763 N.W.2d 862, 898 (Iowa 2009) ("When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification * * * maintain[s] the classification."); *Kerrigan* v. *Commissioner of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008) ("[T]he classification * * * must advance a state interest that is separate from the classification itself. * * * [T]he justification of 'tradition' does not explain the classification; it merely repeats it."). Here, the central interest supporting the traditional definition of marriage identified by petitioners is the interest in promoting responsible procreation and child-rearing. But that interest, as explained (pp. 18-25, *supra*), fails to support maintaining the traditional definition under heightened scrutiny, particularly in light of California's conferral of full parental rights on same-sex domestic partners.

Nor does Proposition 8 substantially further any purported interest in strengthening the institution (as opposed to preserving a definition) of "traditional" marriage. Petitioners give no reason to believe Proposition 8's denial of the right to marry to same-sex couples makes heterosexual marriages more widespread, more stable, or more enduring. To the contrary, the best available evidence suggests that "[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children

outside of marriage or otherwise affect the stability of opposite-sex marriages." Pet. App. 245a.

b. Protecting children from being taught about same-sex marriage

The Voter Guide expressed in favor of Proposition 8 an interest in ensuring that children will not be taught that same-sex marriage is "okay." J.A. Exh. 56; see *ibid.* ("*[Proposition 8] protects our children* from being taught in public schools that 'same-sex marriage' is the same as traditional marriage."). Notably, petitioners abandoned that interest below and do not advance it in this Court.

Any such "educational" interest cannot sustain Proposition 8. Insofar as the asserted interest in insulating children from any lesson that same-sex marriage is "okay" is founded on a moral judgment, that interest is inadequate under this Court's precedents. See *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)); *id.* at 582-583 (O'Connor, J., concurring in judgment) ("Moral disapproval of [gay and lesbian people], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.").

In any event, Proposition 8 does not substantially further such an interest given California educational practices. As the court of appeals explained, "[b]oth before and after Proposition 8, schools have not been required to teach anything about same-sex marriage"; "[b]oth before and after Proposition 8, schools have retained control over the content of [any sexual-health

education] lessons"; and "both before and after Proposition 8, schools and individual teachers have been prohibited from giving any instruction that discriminates on the basis of sexual orientation." Pet. App. 82a-83a (citing Cal. Educ. Code §§ 51500, 51933). That California law authorizes domestic partnerships for gay and lesbian couples and expressly grants them the incidents of marriage—a fact about California's legal regime that could be taught just like any other fact relevant to a class—makes this interest all the more tenuous as a purported justification for Proposition 8.

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California's extension of all of the substantive rights and responsibilities of marriage to gay and lesbian domestic partners particularly undermines the justifications for Proposition 8. It indicates that Proposition 8's withholding of the designation of marriage is not based on an interest in promoting responsible procreation and child-rearing—petitioners' central claimed justification for the initiative—but instead on impermissible prejudice. As the court of appeals observed (Pet. App. 87a), that is not necessarily to say "that Proposition 8 is the result of ill will on the part of the voters of California." "Prejudice, 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." *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Prejudice may not, however, be the basis for differential treatment under the law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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