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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 --

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

22 JUSTICE KENNEDY: Well, the Chief -- the  
23 Chief Justice and Justice Kagan have given a proper  
24 hypothetical to test your theory. But in this case the  
25 proponents, number one, must give their official

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

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

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

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

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

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

4 MR. COOPER: Well --

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

8 MR. COOPER: True.

9 JUSTICE SOTOMAYOR: He has a fiduciary  
10 obligation.

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

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

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



1 duty, but I would also suggest --

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

7 MR. COOPER: And Your Honor --

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

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

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

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

4           JUSTICE BREYER: That's -- historically, I  
5 think, 40 States, many States have what was called a  
6 public action. A public action is an action by any  
7 citizen primarily to vindicate the interest in seeing  
8 that the law is enforced. Now, that's the kind of  
9 action I think that this Court has interpreted the  
10 Constitution of the United States, case in controversy,  
11 to say that it does not lie in the Federal system.

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

21           But then you say, but also they are  
22 representing the State. At this point, the Dellinger  
23 brief which takes the other side of it is making a  
24 strong argument, well, they are really no more than a  
25 group of five people who feel really strongly that we

1 should vindicate this public interest, and have good  
2 reason for thinking it.

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

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

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

18           MR. COOPER: Thank you very much, Your  
19 Honor.

20           My -- my -- excuse me. As I was saying, the  
21 accepted truth -- excuse me. The accepted truth that --  
22 that the New York high court observed is one that is  
23 changing and changing rapidly in this country as people  
24 throughout the country engage in an earnest debate over  
25 whether the age-old definition of marriage should be

1 changed to include same-sex couples.

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

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

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

18 MR. COOPER: That is --

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

22 MR. COOPER: Well, Your Honor, certainly I  
23 acknowledge the precedential limitations of a summary  
24 dismissal. But *Baker v. Nelson* also came fairly fast on  
25 the heels of the *Loving* decision. And, Your Honor, I

1 simply make the observation that it seems implausible in  
2 the extreme, frankly, for nine justices to have -- to  
3 have seen no substantial Federal question if it is true,  
4 as the Respondents maintain, that the traditional  
5 definition of marriage insofar as -- insofar as it does  
6 not include same-sex couples, insofar as it is a gender  
7 definition is irrational and can only be explained, can  
8 only be explained, as a result of anti-gay malice and a  
9 bare desire to harm.

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

12 MR. COOPER: Your Honor, I --

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

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

25 But we -- we agree that to the extent that

1 the classification impacts, as it clearly does, same-sex  
2 couples, that -- that classification can be viewed as  
3 being one of sexual orientation rather than --

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

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

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

22 MR. COOPER: No, Your Honor, we certainly  
23 are not. We -- we are saying the interest in marriage  
24 and the -- and the State 's interest and society's  
25 interest in what we have framed as responsible pro --

1 procreation is -- is vital, but at bottom, with respect  
2 to those interests, our submission is that same-sex  
3 couples and opposite-sex couples are simply not  
4 similarly situated.

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

16           Again, the Plaintiffs --

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

21           MR. COOPER: Well, Your Honor, I would think  
22 that -- that -- I think it's a -- it's a very different  
23 question whether or not the Government can proceed  
24 arbitrarily and irrationally with respect to any group  
25 of people, regardless of whether or not they qualify

1 under this Court's traditional test for suspectedness.  
2 And -- and the hypothetical I understood you to be  
3 offering, I would submit would create -- it would --  
4 unless there's something that -- that is not occurring  
5 to me immediately, an arbitrary and capricious  
6 distinction among similarly situated individuals,  
7 that -- that is not what we think is at the -- at the  
8 root of the traditional definition of marriage.

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

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

19 JUSTICE KAGAN: Is -- is there -- so you  
20 have sort of a reason for not including same-sex  
21 couples. Is there any reason that you have for  
22 excluding them? In other words, you're saying, well, if  
23 we allow same-sex couples to marry, it doesn't serve the  
24 State's interest. But do you go further and say that it  
25 harms any State interest?



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

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

11 What harm you see happening and when and how  
12 and -- what -- what harm to the institution of marriage  
13 or to opposite-sex couples, how does this cause and  
14 effect work?

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

21 JUSTICE KENNEDY: Well, then are -- are you  
22 conceding the point that there is no harm or denigration  
23 to traditional opposite-sex marriage couples? So you're  
24 conceding that.

25 MR. COOPER: No, Your Honor, no. I'm not

1 conceding that.

2 JUSTICE KENNEDY: Well, but, then it -- then  
3 it seems to me that you should have to address Justice  
4 Kagan's question.

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

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

14 But consider the California voter, in 2008,  
15 in the ballot booth, with the question before her  
16 whether or not this age-old bedrock social institution  
17 should be fundamentally redefined, and knowing that  
18 there's no way that she or anyone else could possibly  
19 know what the long-term implications of -- of profound  
20 redefinition of a bedrock social institution would be.  
21 That is reason enough, Your Honor, that would hardly be  
22 irrational for that voter to say, I believe that this  
23 experiment, which is now only fairly four years old,  
24 even in Massachusetts, the oldest State that is  
25 conducting it, to say, I think it better for California

1 to hit the pause button and await additional information  
2 from the jurisdictions where this experiment is still  
3 maturing.

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

14 JUSTICE GINSBURG: California -- no,  
15 California does.

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

19 MR. COOPER: No, Your Honor. And there's --  
20 there's --

21 JUSTICE SCALIA: But that's a possible  
22 deleterious effect, isn't it?

23 MR. COOPER: Your Honor, it -- it is  
24 certainly among the --

25 JUSTICE GINSBURG: It wouldn't be in

1 California, Mr. Cooper, because that's not an issue, is  
2 it? In California, you can have same-sex couples  
3 adopting a child.

4 MR. COOPER: That's right, Your Honor. That  
5 is true. And -- but -- but, Your Honor, here's --  
6 here's the point --

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

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

21 JUSTICE GINSBURG: Mr. Cooper, you are  
22 defending -- you are opposing a judgment that applies to  
23 California only, not to all of the States.

24 MR. COOPER: That's true, Your Honor. And  
25 if there were a way to cabin the arguments that are

1 being presented to you to California, then the concerns  
2 about redefining marriage in California could be  
3 confined to California, but they cannot, Your Honor.

4 JUSTICE KENNEDY: I -- I think there's --  
5 there's substantial -- that there's substance to the  
6 point that sociological information is new. We have  
7 five years of information to weigh against 2,000 years  
8 of history or more.

9 On the other hand, there is an immediate  
10 legal injury or legal -- what could be a legal injury,  
11 and that's the voice of these children. There are some  
12 40,000 children in California, according to the Red  
13 Brief, that live with same-sex parents, and they want  
14 their parents to have full recognition and full status.  
15 The voice of those children is important in this case,  
16 don't you think?

17 MR. COOPER: Your Honor, I certainly would  
18 not dispute the importance of that consideration. That  
19 consideration especially in the political process, where  
20 this issue is being debated and will continue to be  
21 debated, certainly, in California. It's being debated  
22 elsewhere. But on that -- on that specific question,  
23 Your Honor, there simply is no data.

24 In fact, their expert agreed there is no  
25 data, no study, even, that would examine whether or not

1 there is any incremental beneficial effect from marriage  
2 over and above the domestic partnership laws that were  
3 enacted by the State of California to recognize,  
4 support, and honor same-sex relationships and their  
5 families. There is simply no data at all that would  
6 permit one to draw -- draw that conclusion.

7 I would recall, Justice Kennedy, the point  
8 made in Romer, that under a rational basis of review,  
9 the provision will be sustained even if it operates to  
10 the disadvantage of a group, if it is -- if it otherwise  
11 advances rationally a legitimate State interest.

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

15 MR. COOPER: Oh --

16 JUSTICE BREYER: As long as you are on that,  
17 then I would like to ask you this: Assume you could  
18 distinguish California, suppose we accept your argument  
19 or accept Justice Scalia's version of your argument and  
20 that distinguishes California. Now, let's look at  
21 California. What precisely is the way in which allowing  
22 gay couples to marry would interfere with the vision of  
23 marriage as procreation of children that allowing  
24 sterile couples of different sexes to marry would not?

25 I mean, there are lots of people who get

1 married who can't have children. To take a State that  
2 does allow adoption and say -- there, what is the  
3 justification for saying no gay marriage? Certainly not  
4 the one you said, is it?

5 MR. COOPER: You're --

6 JUSTICE BREYER: Am I not clear?

7 Look, you said that the problem is marriage;  
8 that it is an institution that furthers procreation.

9 MR. COOPER: Yes, Your Honor.

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

18 MR. COOPER: Yes, Your Honor. The concern  
19 is that redefining marriage as a genderless institution  
20 will sever its abiding connection to its historic  
21 traditional procreative purposes, and it will refocus,  
22 refocus the purpose of marriage and the definition of  
23 marriage away from the raising of children and to the  
24 emotional needs and desires of adults, of adult couples.

25 Suppose, in turn --

1 JUSTICE KAGAN: Well, suppose a State said,  
2 Mr. Cooper, suppose a State said that, Because we think  
3 that the focus of marriage really should be on  
4 procreation, we are not going to give marriage licenses  
5 anymore to any couple where both people are over the age  
6 of 55. Would that be constitutional?

7 MR. COOPER: No, Your Honor, it would not be  
8 constitutional.

9 JUSTICE KAGAN: Because that's the same  
10 State interest, I would think, you know. If you are  
11 over the age of 55, you don't help us serve the  
12 Government's interest in regulating procreation through  
13 marriage. So why is that different?

14 MR. COOPER: Your Honor, even with respect  
15 to couples over the age of 55, it is very rare that both  
16 couples -- both parties to the couple are infertile, and  
17 the traditional --

18 (Laughter.)

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

23 (Laughter.)

24 MR. COOPER: Your Honor, society's --  
25 society's interest in responsible procreation isn't just



1 with respect to the procreative capacities of the couple  
2 itself. The marital norm, which imposes the obligations  
3 of fidelity and monogamy, Your Honor, advances the  
4 interests in responsible procreation by making it more  
5 likely that neither party, including the fertile party  
6 to that --

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

8 JUSTICE SCALIA: I suppose we could have a  
9 questionnaire at the marriage desk when people come in  
10 to get the marriage -- you know, Are you fertile or are  
11 you not fertile?

12 (Laughter.)

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

16 JUSTICE KAGAN: Well, I just asked about  
17 age. I didn't ask about anything else. That's not --  
18 we ask about people's age all the time.

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

22 JUSTICE SCALIA: Strom Thurmond was -- was  
23 not the chairman of the Senate committee when Justice  
24 Kagan was confirmed.

25 (Laughter.)

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

3 JUSTICE KAGAN: A couple where both people  
4 are over the age of 55 --

5 MR. COOPER: I --

6 JUSTICE KAGAN: A couple where both people  
7 are over the age of 55.

8 MR. COOPER: And Your Honor, again, the  
9 marital norm which imposes upon that couple the  
10 obligation of fidelity --

11 JUSTICE SOTOMAYOR: I'm sorry, where is  
12 this --

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

15 JUSTICE SOTOMAYOR: I'm sorry.

16 MR. COOPER: It's designed, Your Honor, to  
17 make it less likely that either party to that -- to that  
18 marriage will engage in irresponsible procreative  
19 conduct outside of that marriage. Outside of that  
20 marriage. That's the marital -- that's the marital  
21 norm. Society has an interest in seeing a 55-year-old  
22 couple that is -- just as it has an interest of seeing  
23 any heterosexual couple that intends to engage in a  
24 prolonged period of cohabitation to reserve that until  
25 they have made a marital commitment, a marital

1 commitment. So that, should that union produce any  
2 offspring, it would be more likely that that child or  
3 children will be raised by the mother and father who  
4 brought them into the world.

5 JUSTICE GINSBURG: Mr. Cooper, we said that  
6 somebody who is locked up in prison and who is not going  
7 to get out has a right to marry, has a fundamental right  
8 to marry, no possibility of procreation.

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

11 JUSTICE GINSBURG: Yes.

12 MR. COOPER: -- I think that, with due  
13 respect, Justice Ginsburg, way over-reads -- way  
14 over-reads Turner against Safley. That was a case in  
15 which the prison at issue -- and it was decided in the  
16 specific context of a particular prison where there were  
17 both female and male inmates, many of them minimum  
18 security inmates. It was dealing with a regulation,  
19 Your Honor, that had previously permitted marriage in  
20 the case of pregnancy and childbirth.

21 The Court -- the Court here emphasized that,  
22 among the incidents of marriage that are not destroyed  
23 by that -- at least that prison context, was the  
24 expectation of eventual consummation of the marriage and  
25 legitimation of -- of the children. So that --

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 Mr. Cooper.

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

4 CHIEF JUSTICE ROBERTS: Mr. Olson?

5 ORAL ARGUMENT OF THEODORE B. OLSON

6 ON BEHALF OF THE RESPONDENTS

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

9 I know that you will want me to spend a  
10 moment or two addressing the standing question, but  
11 before I do that, I thought that it would be important  
12 for this Court to have Proposition 8 put in context,  
13 what it does. It walls-off gays and lesbians from  
14 marriage, the most important relation in life, according  
15 to this Court, thus stigmatizing a class of Californians  
16 based upon their status and labeling their most  
17 cherished relationships as second-rate, different,  
18 unequal, and not okay.

19 CHIEF JUSTICE ROBERTS: Mr. Olson, I cut off  
20 your friend before he could get into the merits.

21 MR. OLSON: I was trying to avoid that, Your  
22 Honor.

23 CHIEF JUSTICE ROBERTS: I know --

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Well, I think it's

1 only fair to treat you the same. Perhaps you could  
2 address your jurisdictional argument?

3 MR. OLSON: Yes. I think that our  
4 jurisdictional argument is, as we set forth in the  
5 brief, California cannot create Article III standing by  
6 designating whoever it wants to defend the State of  
7 California in connection with the ballot.

8 JUSTICE KENNEDY: But this is not whoever it  
9 wants. These are five proponents of -- of the measure,  
10 and if we were to accept your argument, it would give  
11 the State a one-way ratchet. The State could go in and  
12 make a defense, maybe a half-hearted defense of the  
13 statute, and -- and then when the statute is held  
14 invalid, simply -- simply leave. On the other hand,  
15 if -- if the State loses, the State can appeal.

16 So this is a one-way ratchet as it favors  
17 the State, and allows governors and other constitutional  
18 officers in different States to thwart the initiative  
19 process.

20 MR. OLSON: That's the -- that's the way the  
21 California Supreme Court saw it with respect to  
22 California law. The governor and the Attorney General  
23 of California are elected to act in the best interests  
24 of the State of California. They made a professional  
25 judgment given their obligations as officers of the

1 State of California.

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

6 JUSTICE ALITO: Well, Mr. Olson, is it your  
7 position that the only people who could defend a ballot,  
8 a law that's adopted in California through the ballot  
9 initiative are the Attorney General and the governor, so  
10 that if the Attorney General and the governor don't like  
11 the ballot initiative, it will go undefended? Is that  
12 your position?

13 MR. OLSON: I don't -- I don't think it's  
14 quite that limited. I think one of your colleagues  
15 suggested that there could be an officer appointed.  
16 There could be an appointee of the State of California  
17 who had responsibility, fiduciary responsibility to the  
18 State of California and the citizens of California, to  
19 represent the State of California along --

20 JUSTICE SCALIA: Who -- who would appoint  
21 him? The same governor that didn't want to defend the  
22 plebiscite?

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

1 (Laughter.)

2 MR. OLSON: The governor -- the government  
3 of the State of California frequently appoints an  
4 attorney where there's a perceived conflict of  
5 interest --

6 JUSTICE SCALIA: I suppose --

7 MR. OLSON: -- and that person would have a  
8 responsibility for the State and might have  
9 responsibility for the attorneys' fees.

10 CHIEF JUSTICE ROBERTS: I suppose there  
11 might be people out there with their own personal  
12 standing, someone who performs marriages and would like  
13 that to remain open to everyone but would prefer not to  
14 perform same-sex marriages, or other people. We seem to  
15 be addressing the case as if the only options are the  
16 proponents here or the State. I'm not sure there aren't  
17 other people out there with individual personalized  
18 injury that would satisfy Article III.

19 MR. OLSON: There might well be in -- in a  
20 different case. I don't know about this case. If there  
21 was, for example, this was an initiative measure that  
22 allocated certain resources of the State of California  
23 and the people -- maybe it was a binary system of people  
24 got resources and other people didn't get resources,  
25 there could be standing. Someone would show actual

1 injury.

2           The point, I guess, at the bottom of this is  
3 the Supreme Court, this Court, decided in *Raines v. Byrd*  
4 that Congress couldn't specify members of Congress in  
5 that context even where the measure depleted or  
6 diminished powers of Congress --

7           JUSTICE SOTOMAYOR: Mr. Olson, I think the  
8 bottom line --

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

13           So start from the proposition that a State  
14 has standing to defend the constitutionality of a State  
15 law un- -- beyond dispute. The question then is, who  
16 represents the State?

17           Now, in a State that has initiative, the  
18 whole process would be defeated if the only people who  
19 could defend the statute are the elected public  
20 officials. The whole point -- you know this better than  
21 I do, because you're from California -- the whole point  
22 of the initiative process was to allow the people to  
23 circumvent public officials about whom they were  
24 suspicious.

25           So if you reject that proposition, what is



1 left is the proposition that the State -- State law can  
2 choose some other person, some other group to defend the  
3 constitutionality of a State law. And the California  
4 Supreme Court has told us that the Plaintiffs in this  
5 case are precisely those people.

6 So how do you get around that?

7 MR. OLSON: The only -- that's exactly what  
8 the California Supreme Court thought. The California  
9 Supreme Court thought that it could decide that the  
10 proponents, whoever they were, and this could be  
11 25 years after the election; it could be one of the  
12 proponents, it could be four of the proponents; they  
13 could have an interest other than the State because they  
14 have no fiduciary responsibility to the State; they may  
15 be incurring attorneys' fees on behalf of the State or  
16 on behalf of themselves, but they haven't been  
17 appointed; they have no official responsibility to the  
18 State.

19 And my only argument, and I know it's a  
20 close one, because California thinks that this is the  
21 system. The California Supreme Court thought that this  
22 was a system that would be a default system. I'm  
23 suggesting from your decisions with respect to Article  
24 III that that takes more than that under --

25 JUSTICE SOTOMAYOR: Mr. Olson, I think that

1 you're not answering the fundamental fear. And so --  
2 and -- and the amici brief that sets forth this test of  
3 fiduciary duty doesn't quite either.

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

8           MR. OLSON: I don't have an answer to that  
9 question unless there's an appointment process either  
10 built into the system where it's an officer of  
11 California or --

12           JUSTICE SOTOMAYOR: So why -- why isn't this  
13 viewed as an appointment process, that the in -- the  
14 ballot initiators have now become that body?

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

16           JUSTICE SOTOMAYOR: Is that your argument --

17           MR. OLSON: That's our -- that's the  
18 argument our opponents make. But it -- but it must be  
19 said that it happens all of the time, that Federal  
20 officials and State officials decide not to enforce a  
21 statute, to enforce a statute in certain ways. We don't  
22 then come in and decide that there's someone else ought  
23 to be in court for every particular --

24           JUSTICE BREYER: What the brief says is, of  
25 course, you can appoint people. It's not just that you

1 appoint them, it's that the State's interest, when it  
2 defends a law, is the interest in executing the law of  
3 the State. So all you have to do is give a person that  
4 interest. But when a person has the interest of  
5 defending this law, as opposed to defending the law of  
6 the State of California, there can be all kinds of  
7 conflicts, all kinds of situations.

8 That's what I got out of the brief. So give  
9 the person that interest. And that, they say, is what's  
10 missing here. And you'll say -- I mean, that's --  
11 that's here, and you say it's missing here.

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

13 JUSTICE BREYER: Why is it missing here?

14 MR. OLSON: It is -- what is missing here,  
15 because you're not an officer of the State of  
16 California, you don't have a fiduciary duty to the State  
17 of California, you're not bound by the ethical standards  
18 of an officer of the State of California to represent  
19 the State of California, you could have conflicts of  
20 interest. And as I said, you'd be -- could be incurring  
21 enormous legal fees on behalf of the State when the  
22 State hasn't decided to go that route. I think --

23 CHIEF JUSTICE ROBERTS: You should feel free  
24 to move on to the merits.

25 MR. OLSON: Thank you, Your Honor. As I

1 pointed out at the -- at the outset, this is a measure  
2 that walls off the institution of marriage, which is not  
3 society's right. It's an individual right that this  
4 Court again and again and again has said the right to  
5 get married, the right to have the relationship of  
6 marriage is a personal right. It's a part of the right  
7 of privacy, association, liberty, and the pursuit of  
8 happiness.

9 In the cases in which you've described the  
10 right to get married under the Constitution, you've  
11 described it as marriage, procreation, family, other  
12 things like that. So the procreation aspect, the  
13 responsibility or ability or interest in procreation is  
14 not a part of the right to get married. Now, that --

15 CHIEF JUSTICE ROBERTS: I'm not sure,  
16 counsel, that it makes -- I'm not sure that it's right  
17 to view this as excluding a particular group. When the  
18 institution of marriage developed historically, people  
19 didn't get around and say let's have this institution,  
20 but let's keep out homosexuals. The institution  
21 developed to serve purposes that, by their nature,  
22 didn't include homosexual couples.

23 It is -- yes, you can say that it serves  
24 some of the other interests where it makes sense to  
25 include them, but not all the interests. And it seems

1 to me, your friend argues on the other side, if you have  
2 an institution that pursues additional interests, you  
3 don't have to include everybody just because some other  
4 aspects of it can be applied to them.

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

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

12 MR. OLSON: That's right.

13 CHIEF JUSTICE ROBERTS: And don't you think  
14 it's more reasonable to view it as a change by the  
15 California Supreme Court of this institution that's been  
16 around since time immemorial?

17 MR. OLSON: The California Supreme Court,  
18 like this Supreme Court, decides what the law is. The  
19 California Supreme Court decided that the Equal  
20 Protection and Due Process Clauses of that California  
21 Constitution did not permit excluding gays and lesbians  
22 from the right to get married --

23 JUSTICE SCALIA: You -- you've led me right  
24 into a question I was going to ask. The California  
25 Supreme Court decides what the law is. That's what we

1 decide, right? We don't prescribe law for the future.  
2 We -- we decide what the law is. I'm curious, when --  
3 when did -- when did it become unconstitutional to  
4 exclude homosexual couples from marriage? 1791? 1868,  
5 when the Fourteenth Amendment was adopted?

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

9 MR. OLSON: When -- may I answer this in the  
10 form of a rhetorical question? When did it become  
11 unconstitutional to prohibit interracial marriages?  
12 When did it become unconstitutional to assign children  
13 to separate schools.

14 JUSTICE SCALIA: It's an easy question, I  
15 think, for that one. At -- at the time that the Equal  
16 Protection Clause was adopted. That's absolutely true.

17 But don't give me a question to my question.  
18 (Laughter.)

19 JUSTICE SCALIA: When do you think it became  
20 unconstitutional? Has it always been unconstitutional?

21 MR. OLSON: When the -- when the California  
22 Supreme Court faced the decision, which it had never  
23 faced before, is -- does excluding gay and lesbian  
24 citizens, who are a class based upon their status as  
25 homosexuals -- is it -- is it constitutional --

1 JUSTICE SCALIA: That -- that's not when it  
2 became unconstitutional. That's when they acted in an  
3 unconstitutional matter -- in an unconstitutional  
4 matter. When did it become unconstitutional to prohibit  
5 gays from marrying?

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

9 JUSTICE SCALIA: I'm not talking about the  
10 California Supreme Court. I'm talking about your  
11 argument. You say it is now unconstitutional.

12 MR. OLSON: Yes.

13 JUSTICE SCALIA: Was it always  
14 unconstitutional?

15 MR. OLSON: It was constitutional when we --  
16 as a culture determined that sexual orientation is a  
17 characteristic of individuals that they cannot control,  
18 and that that --

19 JUSTICE SCALIA: I see. When did that  
20 happen? When did that happen?

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

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

25 MR. OLSON: Because the case that's before

1 you --

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

4 MR. OLSON: -- in -- the case that's before  
5 you today, California decided -- the citizens of  
6 California decided, after the California Supreme Court  
7 decided that individuals had a right to get married  
8 irrespective of their sexual orientation in California,  
9 and then the Californians decided in Proposition 8, wait  
10 a minute, we don't want those people to be able to get  
11 married.

12 CHIEF JUSTICE ROBERTS: So -- so your  
13 case -- your case would be different if Proposition 8  
14 was enacted into law prior to the California Supreme  
15 Court decision?

16 MR. OLSON: I would make -- I would make  
17 the -- also would make the -- that distinguishes it in  
18 one respect. But also -- also -- I would also make the  
19 argument, Mr. Chief Justice, that we are -- this --  
20 marriage is a fundamental right and we are making a  
21 classification based upon a status of individuals, which  
22 this Court has repeatedly decided that gays and lesbians  
23 are defined by their status. There is no question about  
24 that.

25 JUSTICE SCALIA: So it would be



1 unconstitutional even in States that did not allow  
2 civil unions?

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

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

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

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

12 MR. OLSON: I -- I submit you've never  
13 required that before. When you decided that -- that  
14 individuals -- after having decided that separate but  
15 equal schools were permissible, a decision by this  
16 Court, when you decided that that was unconstitutional,  
17 when did that become unconstitutional?

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

19 MR. OLSON: I -- I can't answer that  
20 question, and I don't think this Court has ever phrased  
21 the question in that way.

22 JUSTICE SCALIA: I can't either. That's the  
23 problem. That's exactly the problem.

24 MR. OLSON: But what I have before you now,  
25 the case that's before you today, is whether or not

1 California can take a class of individuals based upon  
2 their characteristics, their distinguishing  
3 characteristics, remove from them the right of privacy,  
4 liberty, association, spirituality, and identity that --  
5 that marriage gives them.

6 It -- it is -- it is not an answer to say  
7 procreation or anything of that nature, because  
8 procreation is not a part of the right to get married.

9 JUSTICE KENNEDY: That's really -- that's a  
10 broad argument that you -- that's in this case if the  
11 Court wants to reach it. The rationale of the Ninth  
12 Circuit was much more narrow. It basically said that  
13 California, which has been more generous, more open to  
14 protecting same-sex couples than almost any State in the  
15 Union, just didn't go far enough, and it's being  
16 penalized for not going far enough.

17 That's a very odd rationale on which to  
18 sustain this opinion.

19 MR. OLSON: This Court has always looked  
20 into the context. In, for example, the New Orleans case  
21 involving the gambling casinos and advertising, you look  
22 at the context of what was permitted, what was not  
23 permitted, and does that rationalization for prohibiting  
24 in that case the advertising, in this case prohibiting  
25 the relationship of marriage, does it make any sense in

1 the context of what exists?

2 JUSTICE ALITO: Seriously, Mr. Olson,  
3 if California provides all the substantive benefits of  
4 marriage to same-sex domestic partnerships, are you  
5 seriously arguing that if California -- if the State --  
6 if the case before us now were from a State that doesn't  
7 provide any of those benefits to same-sex couples, this  
8 case would come out differently?

9 MR. OLSON: No, I don't think it would come  
10 out differently, because of the fundamental arguments  
11 we're making with respect to class-based distinctions  
12 with respect to a fundamental right. However, to the  
13 extent that my opponent, in the context of California,  
14 talks about child-rearing or adoptions or -- or of  
15 rights of people to live together and that sort of  
16 thing, those arguments can't be made on behalf of  
17 California, because California's already made a decision  
18 that gay and lesbian individuals are perfectly suitable  
19 as parents, they're perfectly suitable to adopt, they're  
20 raising 37,000 children in California, and the expert on  
21 the other side specifically said and testified that they  
22 would be better off when their parents were allowed to  
23 get married.

24 JUSTICE ALITO: I don't think you can have  
25 it both ways. Either this case is the same, this would

1 be the same if this were Utah or Oklahoma, or it's  
2 different because it's California and California has  
3 provided all these --

4 MR. OLSON: I -- I think that it's not that  
5 we're arguing that those are inconsistent. If the  
6 fundamental thing is that denying gays and lesbians the  
7 right of marriage, which is fundamental under your  
8 decisions, that is unconstitutional, if it is -- if the  
9 State comes forth with certain arguments -- Utah might  
10 come forth with certain justifications. California  
11 might come forth with others. But the fact is that  
12 California can't make the arguments about adoption or  
13 child-rearing or people living together, because they  
14 have already made policy decisions. So that doesn't  
15 make them inconsistent.

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

18 MR. OLSON: The label is --

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

21 MR. OLSON: The label "marriage" means  
22 something. Even our opponents --

23 CHIEF JUSTICE ROBERTS: Sure. If you  
24 tell -- if you tell a child that somebody has to be  
25 their friend, I suppose you can force the child to say,

1 this is my friend, but it changes the definition of what  
2 it means to be a friend.

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

7 MR. OLSON: It is like you were to say you  
8 can vote, you can travel, but you may not be a citizen.  
9 There are certain labels in this country that are very,  
10 very critical. You could have said in the Loving case,  
11 what -- you can't get married, but you can have an  
12 interracial union. Everyone would know that that was  
13 wrong, that the -- marriage has a status, recognition,  
14 support, and you -- if you read the test, you know --

15 CHIEF JUSTICE ROBERTS: How do we know --  
16 how do we know that that's the reason, or a necessary  
17 part of the reason, that we've recognized marriage as a  
18 fundamental right? That's -- you've emphasized that and  
19 you've said, well, it's because of the emotional  
20 commitment. Maybe it is the procreative aspect that  
21 makes it a fundamental right.

22 MR. OLSON: But you have said that marriage  
23 is a fundamental right with respect to procreation and  
24 at the same level getting married, privacy -- you said  
25 that in the Zablocki case, you said that in the Lawrence

1 case, and you said it in other cases, the Skinner case,  
2 for example.

3 Marriage is put on a pro- -- equal footing  
4 with procreational aspects. And your -- this Court is  
5 the one that has said over and over again that marriage  
6 means something to the individual: The privacy,  
7 intimacy, and that it is a matter of status and  
8 recognition in this --

9 JUSTICE SOTOMAYOR: Mr. Olson, the bottom  
10 line that you're being asked -- and -- and it is one  
11 that I'm interested in the answer: If you say that  
12 marriage is a fundamental right, what State restrictions  
13 could ever exist? Meaning, what State restrictions with  
14 respect to the number of people, with respect to -- that  
15 could get married -- the incest laws, the mother and  
16 child, assuming that they are the age -- I can -- I can  
17 accept that the State has probably an overbearing  
18 interest on -- on protecting a child until they're of  
19 age to marry, but what's left?

20 MR. OLSON: Well, you've said -- you've said  
21 in the cases decided by this Court that the polygamy  
22 issue, multiple marriages raises questions about  
23 exploitation, abuse, patriarchy, issues with respect to  
24 taxes, inheritance, child custody, it is an entirely  
25 different thing. And if you -- if a State prohibits

1 polygamy, it's prohibiting conduct.

2           If it prohibits gay and lesbian citizens  
3 from getting married, it is prohibiting their exercise  
4 of a right based upon their status. It's selecting them  
5 as a class, as you described in the Romer case and as  
6 you described in the Lawrence case and in other cases,  
7 you're picking out a group of individuals to deny them  
8 the freedom that you've said is fundamental, important  
9 and vital in this society, and it has status and  
10 stature, as you pointed out in the VMI case. There's  
11 a -- there's a different --

12           JUSTICE SOTOMAYOR: Is there any way to  
13 decide this case in a principled manner that is limited  
14 to California only?

15           MR. OLSON: Yes, the Ninth Circuit did that.  
16 You can decide the standing case that limits it to the  
17 decision of the district court here. You could decide  
18 it as the Ninth Circuit did --

19           JUSTICE KENNEDY: The problem -- the problem  
20 with the case is that you're really asking, particularly  
21 because of the sociological evidence you cite, for us to  
22 go into uncharted waters, and you can play with that  
23 metaphor, there's a wonderful destination, it is a  
24 cliff. Whatever that was.

25           (Laughter.)

1 JUSTICE KENNEDY: But you're -- you're doing  
2 so in a -- in a case where the opinion is very narrow.  
3 Basically that once the State goes halfway, it has to go  
4 all the way or 70 percent of the way, and you're doing  
5 so in a case where there's a substantial question on --  
6 on standing. I just wonder if -- if the case was  
7 properly granted.

8 MR. OLSON: Oh, the case was certainly  
9 properly granted, Your Honor. I mean, there was a full  
10 trial of all of these issues. There was a 12-day trial,  
11 the judge insisted on evidence on all of these  
12 questions. This -- this is a --

13 JUSTICE KENNEDY: But that's not the issue  
14 the Ninth Circuit decided.

15 MR. OLSON: The issue -- yes, the Ninth  
16 Circuit looked at it and decided because of your  
17 decision on the Romer case, this Court's decision on the  
18 Romer case, that it could be decided on the narrower  
19 issue, but it certainly was an appropriate case to  
20 grant. And those issues that I've been describing are  
21 certainly fundamental to the case. And -- and I don't  
22 want to abuse the Court's indulgence, that what I -- you  
23 suggested that this is uncharted waters. It was  
24 uncharted waters when this Court, in 1967, in the Loving  
25 decision said that interracial -- prohibitions



1 on interracial marriages, which still existed in 16  
2 States, were unconstitutional.

3 JUSTICE KENNEDY: It was hundreds of years  
4 old in the common law countries. This was new to the  
5 United States.

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

7 JUSTICE KENNEDY: So -- so that's not  
8 accurate.

9 MR. OLSON: I -- I respectfully submit that  
10 we've under -- we've learned to understand more about  
11 sexual orientation and what it means to individuals. I  
12 guess the -- the language that Justice Ginsburg used at  
13 the closing of the VMI case is an important thing, it  
14 resonates with me, "A prime part of the history of our  
15 Constitution is the story of the extension of  
16 constitutional rights to people once ignored or  
17 excluded."

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 General Verrilli?

20 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

21 FOR UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE RESPONDENTS

23 GENERAL VERRILLI: Mr. Chief Justice, and

24 may it please the Court:

25 Proposition 8 denies gay and lesbian persons

1 the equal protection of the laws --

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

5 (Laughter.)

6 GENERAL VERRILLI: As an amicus, I thought I  
7 might actually, Your Honor. And -- and, of course, we  
8 didn't take a position on standing. We didn't -- we  
9 didn't brief it, we don't have a formal position on  
10 standing. But I will offer this observation based on  
11 the discussion today and the briefing.

12 We do think that while it's certainly not  
13 free of doubt, that the better argument is that there is  
14 not Article III standing here because -- I don't want to  
15 go beyond just summarizing our position, but -- because  
16 we don't have a formal position.

17 But we do think that with respect to  
18 standing, that at this point with the initiative process  
19 over, that Petitioners really have what is more in the  
20 nature of a generalized grievance and because they're  
21 not an agent of the State of California or don't have  
22 any other official tie to the State that would -- would  
23 result in any official control of their litigation, that  
24 the better conclusion is that there's not Article III  
25 standing here.

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

5 GENERAL VERRILLI: Well, we said this was  
6 a -- we said this was a close question, and -- and our  
7 interests are, Justice Alito, in tomorrow's issues where  
8 we have briefed the matter thoroughly and will be  
9 prepared to discuss it with the Court tomorrow.

10 With respect to the merits, two fundamental  
11 points lead to the conclusion that there's an equal  
12 protection violation here. First, every warning flag  
13 that warrants exacting scrutiny is present in this case.  
14 And Petitioners' defense of Proposition 8 requires the  
15 Court to ignore those warning flags and instead apply  
16 highly deferential Lee Optical rational basis review as  
17 though Proposition 8 were on a par with the law of  
18 treating opticians less favorably than optometrists,  
19 when it really is the polar opposite of such a law.

20 JUSTICE GINSBURG: General Verrilli, I could  
21 understand your argument if you were talking about the  
22 entire United States, but you -- your brief says it's  
23 only eight or nine States, the States that permit civil  
24 unions, and that's -- brings up a question that was  
25 asked before. So a State that has made considerable

1 progress has to go all the way, but at least the  
2 Government's position is, if it has done -- the State  
3 has done absolutely nothing at all, then it's -- it can  
4 do -- do as it will.

5           GENERAL VERRILLI: That gets to my second  
6 point, Your Honor, which is that I do think the problem  
7 here with the arguments that Petitioners are advancing  
8 is that California's own laws do cut the legs out from  
9 under all of the justifications that Petitioners have  
10 offered in defense of Proposition 8, and I understand  
11 Your Honor's point and the point that Justice Kennedy  
12 raised earlier, but I do think this Court's equal  
13 protection jurisprudence requires the Court to evaluate  
14 the interests that the State puts forward, not in a  
15 vacuum, but in the context of the actual substance of  
16 California law.

17           And here, with respect to California law,  
18 gay and lesbian couples do have the legal rights and  
19 benefits of marriage, full equality and adoption, full  
20 access to assistive reproduction, and therefore, the  
21 argument about the State's interests that -- that  
22 Petitioners advance have to be tested against that  
23 reality, and -- and they just don't measure up. None of  
24 the --

25           JUSTICE BREYER: Well, the argument --

1 JUSTICE ALITO: None of the --

2 CHIEF JUSTICE ROBERTS: Justice Breyer.

3 JUSTICE BREYER: What is the one -- look, a  
4 State that does nothing for gay couples hurts them much  
5 more than a State that does something. And, of course,  
6 it's true that it does hurt their argument that they do  
7 quite a lot, but which are their good arguments, in your  
8 opinion? I mean, take a State that really does nothing  
9 whatsoever.

10 They have no benefits, no nothing, no  
11 nothing. Okay? And moreover, if -- if you're right,  
12 even in California, if they have -- if they're right or,  
13 you know, if a pact is enough, they won't get Federal  
14 benefits, those that are tied to marriage, because  
15 they're not married. So -- so a State that does nothing  
16 hurts them much more, and yet your brief seems to say  
17 it's more likely to be justified under the Constitution.

18 I'd like to know with some specificity how  
19 that could be.

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

23 JUSTICE BREYER: I know the principle, but  
24 I'm saying which are their good arguments, in your  
25 opinion, that would be good enough to overcome for the

1 State that does nothing, but not good enough to overcome  
2 California where they do a lot?

3 GENERAL VERRILLI: Well, we -- what we're --  
4 what we're saying about that is that we're not prepared  
5 to close the door to an argument in another State where  
6 the State's interests haven't cut the legs out from  
7 under the arguments. And I think -- I suppose the  
8 caution rationale that Mr. Cooper identified with  
9 respect to the effects on children, if it came up in a  
10 different case with a different record, after all here,  
11 this case was litigated by Petitioners on the theory  
12 that rational basis applied and they didn't need to show  
13 anything, and so they didn't try to show anything.

14 Our view is that heightened scrutiny should  
15 apply, and so I don't want to -- I don't want to kid  
16 about this, we understand, that would be a very heavy  
17 burden for a State to meet. All we're suggesting is  
18 that in a situation in which the -- the State interests  
19 aren't cut out from under it, as they -- as they are  
20 here, that that issue ought to remain open for a future  
21 case. And I -- and I think the caution rationale would  
22 be the one place where we might leave it open. Because  
23 you can't leave it open in this case.

24 JUSTICE SOTOMAYOR: General, there is an  
25 irony in that, which is the States that do more have

1 less rights.

2                   GENERAL VERRILLI: Well -- well, I  
3 understand that, Your Honor, but I do think that you  
4 have to think about the claim of right on the other side  
5 of the equation here. And in this situation,  
6 California -- the argument here that -- that gay and  
7 lesbian couples can be denied access to marriage on the  
8 ground of an interest in responsible procreation and  
9 child rearing just can't stand up given that the parents  
10 have full equality, the gay and lesbian parents have  
11 full equality apart from --

12                   JUSTICE ALITO: You want us to assess the  
13 effects of same-sex marriage, the potential effects  
14 on -- of same-sex marriage, the potential -- the effects  
15 of Proposition 8. But what is your response to the  
16 argument which has already been mentioned about the need  
17 to be cautious in light of the newness of the -- the  
18 concept of -- of same-sex marriage.

19                   The one thing that the parties in this case  
20 seem to agree on is that marriage is very important.  
21 It's thought to be a fundamental building block of  
22 society and its preservation essential for the  
23 preservation of society. Traditional marriage has been  
24 around for thousands of years. Same-sex marriage is  
25 very new. I think it was first adopted in The

1 Netherlands in 2000. So there isn't a lot of data about  
2 its effect. And it may turn out to be a -- a good  
3 thing; it may turn out not to be a good thing, as the  
4 supporters of Proposition 8 apparently believe.

5 But you want us to step in and render a  
6 decision based on an assessment of the effects of this  
7 institution which is newer than cell phones or the  
8 Internet? I mean we -- we are not -- we do not have the  
9 ability to see the future.

10 On a question like that, of such fundamental  
11 importance, why should it not be left for the people,  
12 either acting through initiatives and referendums or  
13 through their elected public officials?

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

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

23 Second --

24 JUSTICE ALITO: Well, just in response to  
25 that, of course the Constitution could be amended,



1 and -- and I think I read that the California  
2 Constitution has been amended 500 times.

3 GENERAL VERRILLI: But the --

4 JUSTICE ALITO: So it's not exactly like the  
5 U.S. Constitution.

6 GENERAL VERRILLI: But it does -- of course  
7 not. But it is -- but the aim of this is to take it out  
8 of the normal legislative process.

9 The second point is that, with respect to  
10 concerns that Your Honor has raised, California has been  
11 anything but cautious. It has given equal parenting  
12 rights, equal adoption rights. Those rights are on the  
13 books in California now, and so the interest of  
14 California is -- that Petitioners are articulating with  
15 respect to Proposition 8, has to be measured in that  
16 light.

17 JUSTICE SCALIA: Yeah, but the rest of the  
18 country has been cautious.

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

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

23 GENERAL VERRILLI: No, respectfully  
24 Justice Scalia, we are not. Our position is narrower  
25 than that. Our position -- the position we have taken,

1 is about States, it applies to States that have, like  
2 California and perhaps other States, that have granted  
3 these rights short of marriage, but --

4 CHIEF JUSTICE ROBERTS: I don't want to -- I  
5 want you to get back to Justice Alito's other points,  
6 but is it the position of the United States that  
7 same-sex marriage is not required throughout the  
8 country?

9 GENERAL VERRILLI: We are not -- we are not  
10 taking the position that it is required throughout the  
11 country. We think that that ought to be left open for a  
12 future adjudication in other States that don't have the  
13 situation California has.

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

17 GENERAL VERRILLI: I -- I see my red light  
18 is on.

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

20 GENERAL VERRILLI: Thank you.

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

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

3                   The argument here about caution is an  
4                   argument that, well, we need to wait. We understand  
5                   that. We take it seriously. But waiting is not a  
6                   neutral act. Waiting imposes real costs in the here and  
7                   now. It denies to the -- to the parents who want to  
8                   marry the ability to marry, and it denies to the  
9                   children, ironically, the very thing that Petitioners  
10                  focus on is at the heart of the marriage relationship.

11                  CHIEF JUSTICE ROBERTS: But you are willing  
12                  to wait in the rest of the country. You saying it's got  
13                  to happen right now in California, but you don't even  
14                  have a position about whether it's required in the rest  
15                  of the country.

16                  GENERAL VERRILLI: If -- with respect to a  
17                  State that allows gay couples to have children and to  
18                  have families and then denies the stabilizing effect --

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

22                  GENERAL VERRILLI: Well, we think --

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

25                  GENERAL VERRILLI: What i said is it's an

1 open question with respect to those States and the Court  
2 should wait and see what kind of a record a State could  
3 make. But in California you can't make the record to  
4 justify the exclusion.

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

7 JUSTICE SOTOMAYOR: How would the record be  
8 different elsewhere?

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

12 And the fourth point I would make, and I do  
13 think this is significant, is that the principal  
14 argument in 1967 with respect to Loving and that the  
15 Commonwealth of Virginia advanced was: Well, the social  
16 science is still uncertain about how biracial children  
17 will fare in this world, and so you ought to apply  
18 rational basis scrutiny and wait. And I think the Court  
19 recognized that there is a cost to waiting and that that  
20 has got to be part of the equal protection calculus.  
21 And so -- so I do think that's quite fundamental.

22 CHIEF JUSTICE ROBERTS: Can I ask you a  
23 problem about --

24 GENERAL VERRILLI: Sure.

25 CHIEF JUSTICE ROBERTS: -- I -- it seems to

1 me that your position that you are supporting is  
2 somewhat internally inconsistent. We see the argument  
3 made that there is no problem with extending marriage to  
4 same-sex couples because children raised by same-sex  
5 couples are doing just fine and there is no evidence  
6 that they are being harmed. And the other argument is  
7 Proposition 8 harms children by not allowing same-sex  
8 couples to marriage. Which is it?

9 GENERAL VERRILLI: Well, I -- I think what  
10 Proposition 8 does is deny the long-term stabilizing  
11 effect that marriage brings. That's -- that's the  
12 argument for -- for marriage, that --

13 CHIEF JUSTICE ROBERTS: But you also tell me  
14 there has been no harm shown to children of same-sex  
15 couples.

16 GENERAL VERRILLI: California -- there are  
17 37,000 children in same-sex families in California now.  
18 Their parents cannot marry and that has effects on them  
19 in the here and now. A stabilizing effect is not there.  
20 When they go to school, they have to, you know -- they  
21 don't have parents like everybody else's parents.  
22 That's a real effect, a real cost in the here and now.

23 JUSTICE BREYER: Well, the real cost right  
24 now would be you're asking me to write these words: "A  
25 State that has a pact has to say 'marriage,'" but I'm

1 not telling you about States that don't. Well, I would  
2 guess there is a real-world effect there, too. That  
3 States that are considering pacts will all say "we won't  
4 do it," or not all, but some would. And that would have  
5 a real effect right now. And at the moment, I'm  
6 thinking it's much more harmful to the gay couple, the  
7 latter than the former. But you won't give me advice as  
8 the Government as to how to deal with that.

9           GENERAL VERRILLI: Well, we -- we think  
10 that, as I started my argument, Your Honor, that all the  
11 warning flags for exacting equal protection scrutiny are  
12 present here. This is a group that has suffered a  
13 history of terrible discrimination. The Petitioners  
14 don't deny it.

15           Petitioners said at the podium today that  
16 there is no justification for that discrimination in any  
17 realm other than the one posed in this case, and the --  
18 and so when those two factors are present, those are  
19 paradigm considerations for the application of  
20 heightened scrutiny, and so I don't want to suggest that  
21 the States that haven't taken those steps --

22           JUSTICE SOTOMAYOR: But they are not the  
23 only ones.

24           GENERAL VERRILLI: -- that States that  
25 haven't taken this step, that they are going to have an

1 easy time meeting heightened scrutiny, which I think has  
2 to apply --

3 JUSTICE GINSBURG: Suppose one of those  
4 States repeals its civil union laws?

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

9 CHIEF JUSTICE ROBERTS: Thank you, General.  
10 Mr. Cooper, to keep things fair, I think you  
11 have 10 minutes.

12 REBUTTAL ARGUMENT OF CHARLES J. COOPER

13 ON BEHALF OF THE PETITIONERS

14 MR. COOPER: Thank you very much.

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

17 MR. COOPER: Yes, Your Honor, and that is  
18 the one thing on which I wholeheartedly agree with my  
19 friend Mr. Olson. This case was properly -- is now  
20 properly before the Court and was properly granted, even  
21 if, even if, Your Honor, one could defend the -- the  
22 specific judgment below for the Ninth Circuit, a defense  
23 that I haven't heard offered to this Court. Judicial  
24 redefinition of marriage even in -- even if it can be  
25 limited to California, is well worthy of this Court's

1 attention, particularly, Your Honor, as it come from a  
2 single district court judge in a single jurisdiction.

3 I would also like --

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

9 MR. COOPER: Because, Your Honor --

10 JUSTICE SOTOMAYOR: We let issues perk, and  
11 so we let racial segregation perk for 50 years from 1898  
12 to 1954.

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

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

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

19 JUSTICE SCALIA: It's too late for that, too  
20 late for that now, isn't it? I mean, we granted cert.  
21 I mean, that's essentially asking, you know, why did we  
22 grant cert. We should let it percolate for another --  
23 you know, we -- we have crossed that river, I think.

24 MR. COOPER: And in this particular case, to  
25 not grant certiorari is to essentially bless a judicial



1 decision that there -- that at least in the State of  
2 California, the people have no authority to step back,  
3 hit the pause button, and allow the experiments that are  
4 taking place in this country to further mature; that in  
5 fact, at least in California -- and it's impossible to  
6 limit this ruling, Your Honor, even to California, even  
7 the Solicitor General's argument, he says, applies to at  
8 least eight States.

9           It's impossible to limit these propositions  
10 to any particular jurisdiction, so this Court would be  
11 making a very real decision with respect to same-sex  
12 marriage if it should simply decide to dismiss the writ  
13 as improvidently granted, Justice Kennedy.

14           And let's just step back and just consider  
15 for a moment the Solicitor General's argument. He is  
16 basically submitting to the Court that essentially the  
17 one compromise that is not available to the States is  
18 the one that the State of California has undertaken;  
19 that is, to go as far as the people possibly can in  
20 honoring and recognizing the families and the  
21 relationships of same-sex couples, while still  
22 preserving the existence of traditional marriage as an  
23 institution. That's the one thing that's off the table.

24           JUSTICE GINSBURG: I thought he was saying,  
25 Mr. Cooper, that it's not before the Court today. And

1 remember Loving against Virginia was preceded by the  
2 McLaughlin case. So first there was the question of no  
3 marriage, and then there was marriage.

4 So, in that sense I understood the Solicitor  
5 General to be telling us that case is not before the  
6 Court today.

7 MR. COOPER: Forgive me, Justice Ginsburg.  
8 The case of -- what case isn't before the Court?

9 JUSTICE GINSBURG: I think it was McLaughlin  
10 against Florida.

11 MR. COOPER: Yes.

12 JUSTICE GINSBURG: It was cohabitation of  
13 people of different races.

14 MR. COOPER: Certainly.

15 JUSTICE GINSBURG: And the Court took that  
16 case and waited to reach the merits case.

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

20 JUSTICE GINSBURG: I may -- my memory may be  
21 wrong, but I think the case was that people of different  
22 races were arrested and charged with the crime of  
23 interracial cohabitation. And the Court said that that  
24 was invalid.

25 MR. COOPER: Yes.

1 JUSTICE GINSBURG: Unlawful.

2 MR. COOPER: Yes. Thank you, Your Honor.  
3 Forgive me. And, you know, I'm glad that counsel for  
4 the Respondents mentioned the Loving case, because what  
5 this Court -- what this Court ultimately said was  
6 patently obvious, is that the colors of the skin of the  
7 spouses is irrelevant to any legitimate purpose, no more  
8 so than their hair colors, any legitimate purpose of  
9 marriage, that interracial couples and same-race couples  
10 are similarly situated in every respect with respect to  
11 any legitimate purpose of marriage.

12 That's what this question really boils down  
13 here, whether or not it can be said that for every  
14 legitimate purpose of marriage, are opposite-sex couples  
15 and same-sex couples indistinguishable,  
16 indistinguishable. And with all due respect to counsel  
17 and to the Respondents, that is not a hard question.

18 If, in fact, it is true, as the people of  
19 California believe that it still is true, that the  
20 natural procreative capacity of opposite-sex couples  
21 continues to pose vitally important benefits and risks  
22 to society, and that's why marriage itself is the  
23 institution that society has always used to regulate  
24 those heterosexual, procreative -- procreative  
25 relationships.

1                   Counsel -- the Solicitor General has said  
2                   that the ban that the proposition erects in California  
3                   is permanent. Well, it's -- certainly that is not the  
4                   view of the Respondents and what we read every day.  
5                   This is not an issue that is now at rest in the State of  
6                   California, regardless -- well, unless this Court  
7                   essentially puts it to rest. That democratic debate,  
8                   which is roiling throughout this country, will  
9                   definitely be coming back to California.

10                   It is an agonizingly difficult, for many  
11                   people, political question. We would submit to you that  
12                   that question is properly decided by the people  
13                   themselves.

14                   Thank you, Mr. Chief Justice.

15                   CHIEF JUSTICE ROBERTS: Thank you, counsel,  
16                   counsel.

17                   The case is submitted.

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

20  
21  
22  
23  
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25

<b>A</b>				
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