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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. :

- - - - - x

Washington, D.C.

Tuesday, March 26, 2013

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

APPEARANCES:

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

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

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

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P R O C E E D I N G S

(10:07 a.m.)

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

Mr. Cooper?

ORAL ARGUMENT OF CHARLES J. COOPER

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

4 MR. COOPER: -- nor did --

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

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

9 JUSTICE KAGAN: Could the State --

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

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

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

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

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

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

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

4 MR. COOPER: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

5 MR. COOPER: Well --

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

9 MR. COOPER: True. No --

10 JUSTICE SOTOMAYOR: He has a fiduciary
11 obligation.

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

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

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

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

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

8 MR. COOPER: And Your Honor --

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

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

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

1 officials, to take issues out of their hands.

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

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

10 MR. COOPER: In California --

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. COOPER: That is --

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

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

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

17 MR. COOPER: Your Honor, I --

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

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

1 -based in the sense that marriage itself is a gendered
2 institution, a gendered term. And so in the same way
3 that fatherhood is gendered or motherhood is gendered,
4 it's gendered in that sense.

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

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

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

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

1 other interest as they could have?

2 MR. COOPER: No, Your Honor, we certainly
3 are not. We -- we are saying the interest in marriage
4 and the -- and the State's interest and society's
5 interest in what we have framed as responsible pro --
6 procreation is -- is vital, but at bottom, with respect
7 to those interests, our submission is that same-sex
8 couples and opposite-sex couples are simply not
9 similarly situated.

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

22 Again, the Plaintiffs --

23 JUSTICE SOTOMAYOR: So you -- so what -- I
24 don't quite understand it. If you're not dealing with
25 this as a class question, then why would you say that

1 the government is not free to discriminate against them?

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

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

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

25 JUSTICE KAGAN: Is -- is there -- so you

1 have sort of a reason for not including same-sex
2 couples. Is there any reason that you have for
3 excluding them? In other words, you're saying, well, if
4 we allow same-sex couples to marry, it doesn't serve the
5 State's interest. But do you go further and say that it
6 harms any State interest?

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

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

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

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

1 as a --

2 JUSTICE KENNEDY: Well, then are -- are you
3 conceding the point that there is no harm or denigration
4 to traditional opposite-sex marriage couples? So you're
5 conceding that.

6 MR. COOPER: No, Your Honor, no. I'm not
7 conceding that.

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

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

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

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

1 redefinition of a bedrock social institution would be.
2 That is reason enough, Your Honor, that would hardly be
3 irrational for that voter to say, I believe that this
4 experiment, which is now only fairly four years old,
5 even in Massachusetts, the oldest State that is
6 conducting it, to say, I think it better for California
7 to hit the pause button and await additional information
8 from the jurisdictions where this experiment is still
9 maturing.

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

20 JUSTICE GINSBURG: California -- no,
21 California does.

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

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

1 there's --

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

4 MR. COOPER: Your Honor, it -- it is
5 certainly among the --

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

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

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

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

1 be no harm.

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

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

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

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

24 MR. COOPER: Your Honor, I certainly would
25 not dispute the importance of that consideration. That

1 consideration especially in the political process where
2 this issue is being debated and will continue to be
3 debated, certainly, in California. It's being debated
4 elsewhere. But on that -- on that specific question,
5 Your Honor, there -- there simply is no data.

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

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

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

22 MR. COOPER: Oh --

23 JUSTICE BREYER: As long as you are on that,
24 then I would like to ask you this, assume you could
25 distinguish California, suppose we accept your argument

1 or accept Justice Scalia's version of your argument and
2 that distinguishes California. Now, let's look at
3 California. What precisely is the way in which allowing
4 gay couples to marry would interfere with the vision of
5 marriage, as procreation of children, that allowing
6 sterile companies -- couples of different sexes to marry
7 would not?

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

13 MR. COOPER: You're --

14 JUSTICE BREYER: Am I not clear?

15 Look, you said that the problem is marriage
16 as an institution that furthers procreation.

17 MR. COOPER: Yes, Your Honor.

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

1 MR. COOPER: Yes, Your Honor. The concern
2 is that redefining marriage as a genderless institution
3 will sever its abiding connection to its historic
4 traditional procreative purposes and it will refocus,
5 refocus the purpose of marriage and the definition of
6 marriage away from the raising of children and to the
7 emotional needs and desires of adults -- of adult
8 couples.

9 Suppose, in turn --

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

16 MR. COOPER: No, Your Honor, it would not be
17 constitutional.

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

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

1 the traditional --

2 (Laughter.)

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

7 (Laughter.)

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

16 JUSTICE SOTOMAYOR: Actually, I'm not even --

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

21 (Laughter.)

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

25 JUSTICE KAGAN: Well, I just asked about

1 age. I didn't ask about anything else. That's not an
2 -- we ask about people's age all the time.

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

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

9 (Laughter.)

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

12 JUSTICE KAGAN: A couple where both people
13 are over the age of 55 --

14 MR. COOPER: I --

15 JUSTICE KAGAN: A couple where both people
16 are over the age of 55.

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

20 JUSTICE SOTOMAYOR: I'm sorry, where is
21 that --

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

24 JUSTICE SOTOMAYOR: I'm sorry.

25 MR. COOPER: -- is designed, Your Honor, to

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

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

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

20 JUSTICE GINSBURG: Yes.

21 MR. COOPER: -- I think that, with due
22 respect, Justice Ginsburg, way over-reads -- way
23 over-reads Turner against Safley. That was a case in
24 which the prison at issue -- and it was decided in the
25 specific context of a particular prison -- where there

1 were both female and male inmates, many of them minimum
2 security inmates. It was dealing with a regulation,
3 Your Honor, that had previously permitted marriage in
4 the case of pregnancy and childbirth.

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

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Cooper.

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

13 CHIEF JUSTICE ROBERTS: Mr. Olson?

14 ORAL ARGUMENT OF THEODORE B. OLSON

15 ON BEHALF OF THE RESPONDENTS

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

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

23 It walls-off gay and lesbians from
24 marriage, the most important relation in life, according
25 to this Court, thus stigmatizing a class of Californians

1 based upon their status and labeling their most
2 cherished relationships as second-rate, different,
3 unequal, and not okay.

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

7 MR. OLSON: I was trying to avoid that, Your
8 Honor.

9 CHIEF JUSTICE ROBERTS: I know --
10 (Laughter.)

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

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

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

1 if -- if the State loses, the State can appeal.

2 So this is a one-way ratchet as it favors
3 the State and allows governors and other constitutional
4 officers in different States to thwart the initiative
5 process.

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

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

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

24 MR. OLSON: I don't -- I don't think it's
25 quite that limited. I think one of your colleagues

1 suggested that there could be an officer appointed.
2 There could be an appointee of the State of California
3 who had responsibility, fiduciary responsibility to the
4 State of California and the citizens of California, to
5 represent the State of California along --

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

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

12 (Laughter.)

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

17 JUSTICE SCALIA: I suppose --

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

21 CHIEF JUSTICE ROBERTS: I suppose there
22 might be people out there with their own personal
23 standing, someone who performs marriages and would like
24 that to remain open to everyone but would prefer not to
25 perform same-sex marriages, or other people. We seem to

1 be addressing the case as if the only options are the
2 proponents here or the State. I'm not sure there aren't
3 other people out there with individual personalized
4 injury that would satisfy Article III.

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

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

18 JUSTICE SOTOMAYOR: Mr. Olson, I think the
19 bottom line --

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

24 So start from the proposition that a State
25 has standing to defend the constitutionality of a State

1 law -- beyond dispute. The question then is, who
2 represents the State?

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

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

17 So how do you get around that?

18 MR. OLSON: The only -- that's exactly what
19 the California Supreme Court thought. The California
20 Supreme Court thought that it could decide that the
21 proponents, whoever they were, and this could be
22 25 years after the election, it could be one of the
23 proponents, it could be four of the proponents. They
24 could have an interest other than the State because they
25 have no fiduciary responsibility to the State. They may

1 be incurring attorneys' fees on behalf of the State or
2 on behalf of themselves, but they haven't been
3 appointed. They have no official responsibility to the
4 State.

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

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

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

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

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

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

2 JUSTICE SOTOMAYOR: That your argument --

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

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

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

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

24 JUSTICE BREYER: Why is it missing here?

25 MR. OLSON: It is -- what is missing here

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

10 CHIEF JUSTICE ROBERTS: You should feel free
11 to move on to the merits.

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

21 In the cases in which you've described the
22 right to get married under the Constitution, you've
23 described it as marriage, procreation, family, other
24 things like that. So the procreation aspect, the
25 responsibility or ability or interest in procreation is

1 not a part of the right to get married. Now, that --

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

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

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

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

24 MR. OLSON: That's right.

25 CHIEF JUSTICE ROBERTS: And don't you think

1 it's more reasonable to view it as a change by the
2 California Supreme Court of this institution that's been
3 around since time immemorial?

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

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

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

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

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

5 But don't give me a question to my question.
6 (Laughter.)

7 JUSTICE SCALIA: When do you think it became
8 unconstitutional? Has it always been unconstitutional?

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

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

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

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

25 MR. OLSON: Yes.

1 JUSTICE SCALIA: Was it always
2 unconstitutional?

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

7 JUSTICE SCALIA: I see. When did that
8 happen? When did that happen?

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

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

13 MR. OLSON: Because the case that's before
14 you --

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

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

25 CHIEF JUSTICE ROBERTS: So -- so your

1 case -- your case would be different if Proposition 8
2 was enacted into law prior to the California Supreme
3 Court decision?

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

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

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

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

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

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

25 MR. OLSON: I -- I submit you've never

1 required that before. When you decided that -- that
2 individuals -- after having decided that separate but
3 equal schools were permissible, a decision by this
4 Court, when you decided that that was unconstitutional,
5 when did that become unconstitutional?

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

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

10 JUSTICE SCALIA: I can't either. That's the
11 problem. That's exactly the problem.

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

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

22 JUSTICE KENNEDY: That's really -- that's a
23 broad argument that you -- that's in this case if the
24 Court wants to reach it. The rationale of the Ninth
25 Circuit was much more narrow. It basically said that

1 California, which has been more generous, more open to
2 protecting same-sex couples than almost any State in the
3 Union, just didn't go far enough and it's being
4 penalized for not going far enough.

5 That's a very odd rationale on which to
6 sustain this opinion.

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

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

22 MR. OLSON: No, I don't think it would come
23 out differently because of the fundamental arguments
24 we're making with respect to class-based distinctions
25 with respect to a fundamental right. However, to the

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

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

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

1 child-rearing or people living together because they
2 have already made policy decisions. So that doesn't
3 make them inconsistent.

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

6 MR. OLSON: The label is like --

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

9 MR. OLSON: The label "marriage" means
10 something. Even our opponents --

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

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

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

1 wrong. That the -- marriage has a status, recognition,
2 support, and you -- if you read the test -- you know --

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

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

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

22 JUSTICE SOTOMAYOR: Mr. Olson, the bottom
23 line that you're being asked -- and -- and it is one
24 that I'm interested in the answer, if you say that
25 marriage is a fundamental right, what State restrictions

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

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

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

25 JUSTICE SOTOMAYOR: Is there any way to

1 decide this case in a principled manner that is limited
2 to California only?

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

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

13 (Laughter.)

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

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

1 JUSTICE KENNEDY: But that's not the issue
2 the Ninth Circuit decided.

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

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

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

20 JUSTICE KENNEDY: So -- so that's not
21 accurate.

22 MR. OLSON: I -- I respectfully submit that
23 we've under -- we've learned to understand more about
24 sexual orientation and what it means to individuals. I
25 guess the -- the language that Justice Ginsburg used at

1 the closing of the VMI case is an important thing, it
2 resonates with me, "A prime part of the history of our
3 Constitution is the story of the extension of
4 constitutional rights to people once ignored or
5 excluded."

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 General Verrilli?

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

11 GENERAL VERRILLI: Mr. Chief Justice, and
12 may it please the Court:

13 Proposition 8 denies gay and lesbian persons
14 the equal protection of the laws --

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

18 (Laughter.)

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

25 We do think that, while it's certainly not

1 free of doubt, that the better argument is that there is
2 not Article III standing here because -- I don't want to
3 go beyond just summarizing our position, but -- because
4 we don't have a formal position.

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

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

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

23 With respect to the merits, two fundamental
24 points lead to the conclusion that there's an equal
25 protection violation here. First, every warning flag

1 that warrants exacting scrutiny is present in this case.
2 And Petitioners' defense of Proposition 8 requires the
3 Court to ignore those warning flags and instead apply
4 highly deferential Lee Optical rational basis review as
5 though Proposition 8 were on a par with the law of
6 treating opticians less favorably than optometrists,
7 when it really is the polar opposite of such a law.

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

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

1 Court's equal protection jurisprudence requires the
2 Court to evaluate the interests that the State puts
3 forward, not in a vacuum, but in the context of the
4 actual substance of California law.

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

13 JUSTICE BREYER: Well, the argument --

14 JUSTICE ALITO: None of the --

15 CHIEF JUSTICE ROBERTS: Justice Breyer.

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

23 They have no benefits, no nothing, no
24 nothing. Okay? And moreover, if -- if you're right,
25 even in California, if they have -- if they're right

1 or -- you know, if a pact is enough, they won't get
2 Federal benefits. Those that are tied to marriage
3 because they're not married. So -- so a State that does
4 nothing hurts them much more, and yet your brief seems
5 to say it's more likely to be justified under the
6 Constitution.

7 I'd like to know with some specificity how
8 that could be.

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

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

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

1 that rational basis applied and they didn't need to show
2 anything and so they didn't try to show anything.

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

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

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

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

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

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

24 On a question like that, of such fundamental
25 importance, why should it not be left for the people,

1 either acting through initiatives and referendums or
2 through their elected public officials?

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

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

12 Second --

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

17 GENERAL VERRILLI: But the --

18 JUSTICE ALITO: So it's not exactly like the
19 U.S. Constitution.

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

23 The second point is that, with respect to
24 concerns that Your Honor has raised, California has been
25 anything but cautious. It has given equal parenting

1 rights, equal adoption rights. Those rights are on the
2 books in California now and so the interest of
3 California is -- that Petitioners are articulating, with
4 respect to Proposition 8, has to be measured in that
5 light.

6 JUSTICE SCALIA: Yeah, but the rest of the
7 country has been cautious.

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

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

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

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

23 GENERAL VERRILLI: We are not -- we are not
24 taking the position that it is required throughout the
25 country. We think that that ought to be left open for a

1 future adjudication in other States that don't have the
2 situation California has.

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

6 GENERAL VERRILLI: I -- I see my red light
7 is on.

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

9 GENERAL VERRILLI: Thank you.

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

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

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

25 CHIEF JUSTICE ROBERTS: But you are willing

1 to wait in the rest of the country. You saying it's got
2 to happen right now in California, but you don't even
3 have a position about whether it's required in the rest
4 of the country.

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

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

11 GENERAL VERRILLI: Well, we think --

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

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

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

21 JUSTICE SOTOMAYOR: How would the record be
22 different elsewhere?

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

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

11 CHIEF JUSTICE ROBERTS: Can I ask you a
12 problem about --

13 GENERAL VERRILLI: Sure.

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

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

24 GENERAL VERRILLI: Well, I -- I think what
25 Proposition 8 does is deny the long-term stabilizing

1 effect that marriage brings. That's -- that's the
2 argument for -- for marriage, that --

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

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

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

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

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

1 GENERAL VERRILLI: Well, we -- we think
2 that, as I started my argument, Your Honor, that all the
3 warning flags for exacting equal protection scrutiny are
4 present here. This is a group that has suffered a
5 history of terrible discrimination. The Petitioners
6 don't deny it.

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

14 JUSTICE SOTOMAYOR: But they are not the
15 only ones.

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, General.

2 Mr. Cooper, to keep things fair, I think you
3 have 10 minutes.

4 REBUTTAL ARGUMENT OF CHARLES J. COOPER

5 ON BEHALF OF THE PETITIONERS

6 MR. COOPER: Thank you very much.

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

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

20 I would also like --

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

1 MR. COOPER: Because, Your Honor --

2 JUSTICE SOTOMAYOR: We let issues perk and
3 so we let racial segregation perk for 50 years from 1898
4 to 1954.

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

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

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

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

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

1 least eight States.

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

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

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

24 So in that sense I understood the Solicitor
25 General to be telling us that case is not before the

1 Court today.

2 MR. COOPER: Forgive me, Justice Ginsburg.

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

4 JUSTICE GINSBURG: I think it was McLaughlin
5 v. Florida.

6 MR. COOPER: Yes.

7 JUSTICE GINSBURG: It was cohabitation of
8 people of different races.

9 MR. COOPER: Certainly.

10 JUSTICE GINSBURG: And the Court took that
11 case and waited to reach the marriage case.

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

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

20 MR. COOPER: Yes.

21 JUSTICE GINSBURG: Unlawful.

22 MR. COOPER: Yes. Thank you, Your Honor.
23 Forgive me. And -- you know, I'm glad that counsel for
24 the Respondents mentioned the Loving case because what
25 this Court -- what this Court ultimately said was

1 patently obvious, is that the colors of the skin of the
2 spouses is irrelevant to any legitimate purpose, no more
3 so than their hair colors, any legitimate purpose of
4 marriage, that interracial couples and same-race couples
5 are similarly situated in every respect with respect to
6 any legitimate purpose of marriage.

7 That's what this question really boils down
8 here, whether or not it can be said that for every
9 legitimate purpose of marriage, are opposite-sex couples
10 and same-sex couples indistinguishable?

11 Indistinguishable. And with all due respect to counsel
12 and to the Respondents, that is not a hard question.

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

21 Counsel -- the Solicitor General has said
22 that -- that the ban that the proposition erects in
23 California is permanent. Well, it's -- certainly that
24 is not the view of the Respondents and what we read
25 every day. This is not an issue that is now at rest in

1 the State of California, regardless -- well, unless this
2 Court essentially puts it to rest. That democratic
3 debate, which is roiling throughout this country, will
4 definitely be coming back to California.

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

9 Thank you, Mr. Chief Justice.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel,
11 counsel.

12 The case is submitted.

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

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