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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 --

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.)

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