No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*
Petitioners,

v.

KRISTIN M. PERRY, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Brief of Indiana, Michigan, Virginia, Alaska, Arizona, Idaho and 9 Other States as Amici Curiae in Support of the Petition

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QUESTION PRESENTED

Whether a State may define marriage as the legal union of one man and one woman.

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INTEREST OF THE *AMICI* STATES[1]

Forty-four states define marriage as the legal union of one man and one woman, consistent with the ancient historical definition of marriage. From the first challenges to traditional marriage laws more than forty years ago, federal courts have refused to interfere with state marriage definitions and policies. Yet the decision below rejects a decision by California voters to reclaim that state's traditional definition of marriage after the California Supreme Court mandated marriage for same-sex couples. The Ninth Circuit's decision undermines the ability of states to define and regulate marriage and uses the *federal* constitution to prevent citizens from overriding a judicial interpretation of a *state* constitution. The *amici* States have interests in (1) protecting their ability to define and regulate marriage, and (2) preserving the integrity of their constitutions and democratic processes.

SUMMARY OF THE ARGUMENT

Certiorari is warranted because the decision below invalidating California's traditional definition of marriage represents about as radical a

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *amici* States' intention to file this brief more than 10 days prior to the due date of this brief. Consent of the parties is not required for the States to file an amicus brief. Sup. Ct. R. 37.4.

departure from deeply ingrained American legal traditions and precedents as one can imagine. Here, a federal appeals court overrode a state citizenry's use of state democratic channels to address a state court's interpretation of a state constitution on a matter of core state responsibility. The result is not merely vitiation of California's co-equal popular sovereignty without a clear constitutional warrant; it is disintegration of perhaps the most fundamental and revered cultural institution of American life: marriage as we know it. There is no avoiding it—the Ninth Circuit has implied the invalidity of *all* traditional marriage laws. Such an expansive and fundamental redefinition of the American family as a matter of constitutional law surely justifies Supreme Court review.

Unsurprisingly, a decision with such red flags also conflicts with key precedents of the Supreme Court and a multitude of lower courts, the vast majority of which have concluded that traditional marriage is entirely legitimate. In particular, the decision conflicts with *Baker v. Nelson*, 409 U.S. 810 (1972), which affirmed on the merits (albeit without opinion) Minnesota's traditional definition of marriage against an equal protection challenge. It also splits with *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), and *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (per curiam), which rejected federal equal protection challenges to traditional marriage laws, and even with *Adams v. Howerton*, 486 F. Supp. 1119, 1124

(C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982), which upheld Colorado's marriage law (though the decision below did not even mention it). The Ninth Circuit's decision also cannot be squared with state appellate decisions that have upheld traditional marriage definitions as rationally related to legitimate government purposes under both federal and state constitutions.

The decision below also is in tension with basic equal protection doctrine. Rather than apply standard rational-basis analysis, the Ninth Circuit declared that "context matters" and focused on Proposition 8 as a retraction of rights already bestowed. In demanding an answer to why it was legitimate to *withdraw* marriage status from same-sex couples, however, the court implicitly presumed a right to same-sex marriage. It should instead have presumed the legitimacy of Proposition 8's classification of opposite-sex couples for special treatment and inquired only whether all legitimate explanations for that classification could be negated.

Legitimate justifications for traditional marriage are long-established, even if sometimes forgotten or deemed old-fashioned. A state may rationally confer civil marriage on one man and one woman in order to encourage the couple to stay together for the sake of any children that their sexual union may create. Traditional marriage focuses on protecting children and creating optimal childrearing environments, not on adult

relationships. The male-female relationship alone enables the married persons—in the ideal—to beget children who have a natural relationship to both parents and to serve as role models of both sexes for those biological children. In this way, a state's decision to ratify the sexual union between a man and a woman confirms a deeply significant understanding of human relationships and encourages such unions as the standard for the human family. Such cultural decisions are not subject to empirical testing or the testimonial opinions of a few experts.

In contrast, the decision below supplies no rationale for civil recognition of same-sex couples. While same-sex couples may do an excellent job raising children, they cannot provide the family structure states seek to encourage with traditional marriage: where those who raise a child combine both legal responsibility for and a biological connection with that child. Instead, the central rationale for same-sex marriage is social approval of the couple's relationship as such. Because that interest bears no link to any characteristic innately limited to same-sex couples, it contains no limiting principle that would preclude similar demands for approval by other groupings of individuals. Ultimately, the decision below supplies no legal argument for same-sex marriage, only an argument against civil marriage as an institution for a limited set of relationships.

Finally, Proposition 8 is justified as an exercise in popular sovereignty directly checking a state's judiciary. The desire of Californians to determine their own state constitutional fate rather than leave it to their judges represents an entirely separate rationale for Proposition 8. Yet the Ninth Circuit treated this political action as "context" that had to be independently justified. Furthermore, it discounted Petitioners' responsible procreation arguments because California's political solution did not also withdraw legislatively provided same-sex domestic partner benefits. The two-judge majority below thus treated as constitutional vices both the democratic nature of California's approach and the limited impact of its marriage definition. This deeply erroneous conclusion by the Ninth Circuit justifies this Court's review and reversal.

ARGUMENT

I. The Ninth Circuit's Decision Contravenes Key Marriage Law Precedents and Casts Doubt On All Traditional Marriage Laws

A. The decision conflicts with *Baker v. Nelson*, decades of lower-court marriage precedent, equal protection doctrine, and centuries of Western tradition

1. Marriage is ubiquitous in every stage of human history and development, and its function has always been to provide a norm for sexual activity between men and women. Indeed,

marriage is antecedent to the state, not merely in natural law theory, but in fact. Anthropologically, marriage has demonstrated some variations, as with polygamy and polyandrous marriage, but in societies that were foundational for Western Civilization—Jewish, Roman, and Greek—marriage was between one man and one woman. *See, e.g., Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."). Confirming this deeply ingrained heritage, the Court has acknowledged that "[m]arriage is one of the 'basic civil rights' of man, fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

Even before the Founding, Americans saw significant public benefits in recognizing marriage as a civil institution for protecting children. Accordingly, colonies and states have long afforded recognition to, and bestowed rights and benefits on, consenting opposite-sex couples of appropriate age and consanguinity who make a commitment for long-term exclusivity and mutual support. This tradition has held us in good stead for more than two-hundred years.

Over the last two decades, however, citizens—often prompted by judicial rulings—have been debating whether to revisit the reasons for

recognizing and encouraging civil marriage. This debate has led some states to redefine marriage, but citizens and their representatives have mostly decided to stick with traditional marriage. Setting California to one side, only six states (plus the District of Columbia) currently solemnize same-sex marriages, though eleven others recognize domestic partnerships or civil unions, which provide at least some rights and benefits of marriage. *See* App. 1a-7a. In November, citizens of Maryland and Washington will vote on proposals to recognize same-sex marriages. *See* App. 5a.

2. State judicial decisions have played a dramatic role in prompting and shaping recent political debates concerning marriage policies. In 1993, the Hawaii Supreme Court ruled that the state had to show a compelling state interest for limiting marriage to opposite-sex couples. *See Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). Decisions from California, Iowa, Connecticut, and Massachusetts have required those states to solemnize same-sex marriages as a matter of state constitutional law—and have prompted attempts to overturn those decisions by constitutional amendment. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (prompting Proposition 8); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (prompting House Joint Resolution 6); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (prompting an unsuccessful attempt to introduce a constitutional amendment, *see* Pam Belluck, *Massachusetts Gay Marriage to Remain Legal*, N.Y.

Times, June 15, 2007, http://www.nytimes.com/2007/06/15/us/15gay.html?_r=1); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (prompting an unsuccessful attempt to call a constitutional convention, *see* Lisa Foderaro, *A New Day for Marriage in Connecticut*, N.Y. Times, Nov. 11, 2008, http://www.nytimes.com/2008/11/13/nyregion/13marriage.html).

Meanwhile, a few other state supreme courts have mandated—again on state constitutional grounds—extension of all marital rights and benefits to same-sex couples, even if not the status of "marriage" itself. *See, e.g., Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

The vast majority of state appellate courts to consider such matters, however, have rejected legal demands for same-sex marriage recognition or benefits, some on federal grounds as well as state grounds. *See, e.g., Harris*, 908 A.2d at 196 (state); *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003) (state and federal); *Ross v. Denver Dep't of Health & Hosps.*, 883 P.2d 516 (Colo. App. 1994) (state and federal); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005) (state); *Cornell v. Hamilton*, 791 N.E. 2d 214 (Ind. Ct. App. 2003) (state); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (state); *Nat'l Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008) (state); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed,* 409 U.S. 810 (1972) (state and

federal); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) (plurality opinion) (state); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. App. 2010) (state and federal); *Ross v. Goldstein*, 203 S.W.3d 508 (Tex. App. 2006) (state); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc) (state); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (state and federal)

3. Federal courts have long avoided interfering with state marriage definitions and policies. With the exception of the decision below and *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), federal appellate courts have uniformly shielded state and local marriage laws from Fourteenth Amendment challenges for decades. *See*, *e.g.*, *Jackson v. Abercrombie*, No. 11-00734, 2012 WL 3255201 (D. Haw. August 8, 2012) (upholding Hawaii's traditional marriage definition); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (upholding Nebraska's traditional marriage law); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) (upholding Colorado's traditional definition of marriage); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (per curiam) (upholding the District of Columbia's traditional marriage law).

Those holdings follow from *Baker v. Nelson*, 409 U.S. 810 (1972), which dismissed a challenge to Minnesota's traditional marriage law for want of a substantial federal question—a decision on the merits that precludes courts from "coming to

opposite conclusions on the precise issues presented and necessarily decided" by it. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). The *Baker* Court squarely confronted whether Minnesota's traditional marriage definition had "not been shown to be rationally related to any governmental interest" under the Due Process and Equal Protection Clauses. Jurisdictional Statement 3, 15, *Baker v. Nelson*, No. 71-1027 (S. Ct. Feb. 10, 1972).

While nominally accepting that *Baker* governs "the constitutionality of a state's ban on same-sex marriage," the Ninth Circuit declared *Baker* inapplicable to a *withdrawal* of a pre-existing right to marry. *Perry v. Brown*, 671 F.3d 1052, 1082 n.14 (9th Cir. 2012). The court theorized as follows: "[C]ontext matters . . . . The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is." *Id.* at 1079-80. The "deliberate purpose" the court divined was for the electorate "to impose upon gays and lesbians, through the public law, a majority's private disapproval of them and their relationships." *Id.* at 1095.

4. Even setting aside the Ninth Circuit's unsupported and insulting insinuation that California voters adopted Proposition 8 out of sheer bigotry against homosexuals, the court was wrong to say that "context matters." To the contrary, "a classification 'must be upheld against [an] equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a

rational basis for the classification.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 313 (1993)) (emphasis added). The necessary corollary is that actual contexts, purposes, and motivations do *not* matter.

The Ninth Circuit's fixation on whether Proposition 8 withdrew a non-fundamental right betrays fundamental confusion over equal protection doctrine. First, to the extent that such a thing could ever be known, the framers and ratifiers of the Fourteenth Amendment did not intend to protect a fundamental right to same-sex marriage. Accordingly, Proposition 8 at most withdrew a right not protected as fundamental by the Fourteenth Amendment, and is subject to rational-basis scrutiny only, as the decision below acknowledged. Pet. App. 61a. Second, it follows that rational-basis, equal-protection scrutiny addresses *classifications*, not *rights*. Third, it is manifestly irrelevant whether a state creates a classification by "changing something" or merely leaves a pre-existing classification "as it is." Pet. App. 55a. Otherwise the Court could not have ruled as it did in *Crawford v. Board of Education of City of Los Angeles*, 458 U.S. 527, 535 (1982), where it "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede."

The Ninth Circuit nevertheless used the Equal Protection Clause not to evaluate the classification drawn by Proposition 8, but to question the

political withdrawal of a judicially bestowed right not itself protected by the U.S. Constitution. This was a manifestly improper inquiry under the Fourteenth Amendment, and because Proposition 8 draws the same classification as the traditional marriage law upheld in *Baker*, the decision below cannot be reconciled with *Baker*.

Indeed, if *Baker* may be so artfully distinguished based on the "context" of a traditional marriage law's enactment, it has little, if any, continuing significance. The vast majority of states with traditional marriage laws enacted statutes or constitutional amendments clarifying the definition of marriage in the wake of *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), including Hawaii itself. App. 5a. Some states have even adopted, attempted to adopt, or may yet adopt, constitutional provisions defining marriage in response to judicial decisions mandating same-sex marriage, much like Proposition 8. *See*, *e.g.*, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (prompting House Joint Resolution 6). The Ninth Circuit's "context" rationale could easily be used to distinguish *Baker* in challenges to those marriage laws as well, leaving *Baker* to control only where citizens have not taken steps to protect traditional marriage in the past twenty years.

Whatever else the Fourteenth Amendment requires of state marriage laws, it surely does not impose different standards based on whether a state adopted its definition of marriage amidst a

controversial national debate or merely as a matter of course as part of a rich and durable American tradition. Certiorari is warranted to address the irreconcilable tensions between the decision below on one hand, and this Court's holding in *Baker* and a multitude of state and federal court precedents upholding traditional marriage on the other, not to mention its conflict with one of Western Civilization's most well-established traditions, the institution of traditional civil marriage.

B. The decision below answered the wrong question and ultimately undermined a multitude of state marriage laws

Having avoided the implications of *Baker* by reference to "context," the panel below rejected all legitimate rationales for Proposition 8 and concluded that nothing more than bare disapproval of homosexuals, if not actual animus, was responsible for it. *See Perry*, 671 F.3d at 1093. Allowing that decision to stand would erode constitutional support for all state laws passed to solidify the traditional definition of marriage.

1. The Ninth Circuit held as it did only by virtue of the question it chose to answer, which in turn arose from the court's erroneous view that "context matters." Because the court considered it critical to view Proposition 8 as withdrawing previously vested rights, the question it addressed was, essentially, "how does *withdrawing* the right to same-sex marriage promote responsible

procreation and child rearing by biological parents?" Under the deferential rational-basis test, however, the question it should have addressed was "how does *bestowing* the right to same-sex marriage promote responsible procreation and child rearing by biological parents?" The answer is that it does not, which underscores that the central rationale for traditional civil marriage has nothing whatever to do with same-sex couples.

2. Unfortunately, the Ninth Circuit's analysis has far-reaching implications. Most immediately, if a traditional definition of marriage cannot promote any legitimate state interest when same-sex couples obtain benefits anyway, the laws of Hawaii, Nevada, and Oregon may be in immediate peril. App. 4a-5a. *But see Jackson v. Abercrombie*, No. 11-00734, 2012 WL 3255201 (D. Haw. August 8, 2012) (upholding Hawaii's traditional marriage definition). The laws of several states outside the Ninth Circuit that similarly provide same-sex-partner benefits without the marriage label—including Delaware, Illinois, New Jersey, and Rhode Island—will also now exist under a substantial constitutional cloud. App. 5a-6a.

The decision also undercuts traditional marriage laws more generally. All courts that have invalidated traditional marriage laws under their state constitutions have used the same semantic trick as the Ninth Circuit. That is, all have asked whether same-sex marriage *interferes with* the rationales for traditional marriage instead of

whether it *advances* them. *See, e.g., Goodridge*, 798 N.E.2d at 965 (concluding that same-sex marriage "does not disturb the fundamental value of marriage in our society"); *Kerrigan*, 957 A.2d at 474 ("[G]ranting same sex couples the right to marry will not alter the substantive nature of the legal institution of marriage.") (internal quotation omitted).

The decision below extends this flawed analysis to federal doctrine, puts federal courts in position to dictate state marriage policy, and imperils all traditional marriage laws. This radical departure from accepted doctrine cannot be ignored.

II. Proposition 8 Advances Important State Interests in Promoting Responsible Procreation and Optimal Childrearing by Biological Parents

To understand Proposition 8's legitimacy, it is critical to consider why states have traditionally sanctioned marriage in the first place. This is not so much a situation where *exclusion* achieves an objective as one where *inclusion* would itself fail to advance a state interest. As the Court expressly recognized in *Johnson v. Robison*, 415 U.S. 361, 383 (1974), "[w]hen . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." Accordingly, states need not provide marital

recognition to same-sex couples if doing so would not promote the state's reason for recognizing marriages in the first place. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006).

A. Traditional marriage advances state interests in children, not adults

Historically, civil marriage has not advanced a state interest in adult relationships in the abstract. It is instead predicated on the positive, important, and concrete societal interests in the procreative nature of opposite-sex relationships. Marriage is how the State promotes a particular family structure, where biological parents care for their children in one household. Traditional marriage is not about imposing disadvantages on homosexuals, but about promoting behavior exclusive to opposite-sex couples, namely procreation through sexual intercourse where a baseline condition for optimal childrearing—the cohabitation and mutual dedication of the parents—is present.

1. Traditional marriage promotes responsible procreation

The basic rationale for traditional marriage is to encourage biological parents to remain together for the sake of their children. The hope is that the availability of marriage makes it more likely that unintended children, among the weakest members of society, will be cared for. "[M]arriage's vital

purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 47 (2004).

In this regard, traditional marriage creates the norm that potentially procreative sexual activity should occur in a long-term, cohabitative relationship. *See* John Finnis, *Sexual Morality and the Possibility of "Same-sex Marriage,"* 42 Am. J. Juris. 97, 131 (1997) ("[Marriage] is fundamentally shaped by its dynamism towards, appropriateness for, and fulfillment in, the generation, nurture, and education of children who each can only have two parents and who are fittingly the primary responsibility (and the object of devotion) of those two parents"). It provides the greatest likelihood that both biological parents will nurture and raise the children they beget, which is optimal for children and society at large.

Parental rights are an important aspect of traditional marriage, but it does not follow that marriage rights go wherever parental rights lead. The purpose of traditional marriage is not to encourage just any two people to assume parental responsibility for children. It is instead to encourage the two biological parents to care for their children in tandem. Neither same-sex couples nor any other inherently non-procreative grouping of individuals fits that bill.

2. Traditional marriage identifies the ideal of family life for children

A related but analytically distinct point is that only the marriage of one man and one woman reflects the complementarity of the sexes and validates the relationship's unique and natural ability to produce children. This immutable characteristic of the human design by itself suggests the traditional definition of marriage because it promotes parental role models of each respective sex and encourages families where the children enjoy a biological relationship to each parent.[2] These characteristics are unique to traditional marriage.

The structure of family life promoted by traditional marriage does not denigrate the

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[2] The idea that a child might more easily identify with an adult of the same sex—which is inherently available for children of either sex in a family with a mother and a father—is commonsensical. *See Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."); *In re Marriage of J.B. and H.B.,* 326 S.W.3d 654, 678 (Tex. Ct. App. 2010). The role of the parent of each sex is helpful in the optimal raising of children, without which "the child must cope with the loss of example, counsel, and experience that living with the missing-gender parent would have provided[.]" Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 863 (1997).

capacity of same-sex couples to raise children in a loving and supporting environment. Nor does it disparage the suitability of non-biological parents who have legal responsibility for children. Rather, it encourages the biological and legal to be perfectly joined together so that a child's legal parents may also be the child's natural parents. *See Andersen v. King County,* 138 P.3d 963, 983 (Wash. 2006) (en banc). These joint characteristics can never be present for same-sex couples.

By reserving marriage to opposite-sex couples, a state encourages them and makes a positive statement about the relationship's unique characteristics, not a negative statement about the ability of other relationships to provide a proper setting for raising and nurturing children. It is the combination of the attributes of traditional marriage, and what they mean for the ideal of family life, that makes the relationship unique.

B. Proposition 8 is a legitimate attempt to secure the social benefits of traditional marriage

The majority below concluded that, because California extends nearly all marital rights and benefits to same-sex domestic partners, the state believes there is no difference between same-sex and opposite-sex families with respect to childrearing. *See Perry*, 671 F.3d at 1087. It also declared that withdrawing from same-sex couples access to the marriage label will not encourage

opposite-sex couples to marry or strengthen traditional marriages. *See id.* at 1088-89. Neither conclusion is sound or even relevant.

First, it is within the realm of rational speculation that designating relationships inherently incapable of producing children as "marriages" could alter marital norms that otherwise exist owing to the general procreative capacity of a husband-wife relationship. *See* Lynn D. Wardle, *The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage*, 25 B.Y.U. J. Pub. L. 287, 298-99 (2011). Accordingly, even if analyzed as withdrawal of a right (rather than as restoration of a classification), Proposition 8 is rationally related to the legitimate government purpose of preventing consequences that might follow if citizens no longer associate marriage with responsible procreation.

Second, there is no constitutional requirement that all possible rights and benefits policies must promote responsible procreation in order for the traditional definition of marriage to be legitimate. Legislatures and other politically accountable officials must balance an infinite variety of competing interests and priorities. The result is often incongruent means and ends, but that does not negate the objective of whatever half measures are undertaken. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional.").

Third, even the simple prospect of joining the revered institution of "marriage" promotes responsible procreation among opposite-sex couples. As this and other same-sex marriage lawsuits implicitly concede, marriage, regardless of exclusive concrete benefits, is a desirable status, pure and simple. In *Kerrigan v. Connecticut*, the court invalidated civil unions precisely because they did not provide the "marriage" label. *Kerrigan*, 957 A.2d at 418 ("Although marriage and civil unions do embody the same legal rights under our law, they are by no means 'equal' . . . the former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not."). And in the judicial ruling that precipitated Proposition 8, the California Supreme Court acknowledged "the long and celebrated history of the term 'marriage' and the widespread understanding that this term describes a union unreservedly approved and favored by the community," as well as "a considerable and undeniable symbolic importance to this designation." *In re Marriage Cases,* 183 P.3d 384, 445 (Cal. 2008). *See also Goodridge v. Dep't of Pub. Health,* 798 N.E.2d 941, 955 (Mass. 2003) ("[C]ivil marriage is an esteemed institution.").

California's decision to encourage responsible procreation by offering committed opposite-sex couples exclusive status but not exclusive rights does not negate the State's underlying objective. The Ninth Circuit erred grievously in using California's experimentation with separate civil

recognition of same-sex couples against the majority of California voters who wish to preserve the traditional definition of marriage as such.

C. The decision below supplies no coherent reason for government to recognize same-sex marriages

Equally troubling, the Ninth Circuit rejected the traditional rationale for civil marriage without supplying any coherent alternative, let alone one that extends no further than mandating the recognition of same-sex couples. Its decision essentially deprives states of a justification for affording any *limited* set of relationships special status and thereby opens states to claims from an infinite variety of groups demanding government recognition.

The decision below located the significance of marriage in "intimate," "stable and committed lifelong relationships." *Perry*, 671 F.3d at 1078. This has been the common holding of decisions declaring traditional marriage definitions unconstitutional. For example, in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003) (opinion of Marshall, C.J., joined by Ireland and Cowin, JJ.)—the only other appellate decision to say that the refusal to recognize same-sex marriage constitutes *irrational* discrimination—the plurality likewise focused on

mutual commitment.[3] *Goodridge* equated same-sex and opposite-sex couples because "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Id*. at 961.

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[3] The essential fourth vote to invalidate the Massachusetts law came from Justice Greaney, who wrote a concurring opinion applying strict scrutiny. *Goodridge*, 798 N.E.2d at 970-74. Meanwhile, the Supreme Courts of California, Connecticut, and Iowa invalidated their states' traditional marriage definitions, but only after applying strict or heightened scrutiny. *In re Marriage Cases*, 183 P.3d 384, 441-46 (Cal. 2008); *Kerrigan v. State,* 957 A.2d 407, 476 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 895-96 (Iowa 2009); *see also Baker v. State*, 744 A.2d 864, 878-80 (Vt. 1999) (using heightened scrutiny to require recognition of civil unions). So too, when the First Circuit invalidated Section 3 of DOMA in *Massachusetts*, it did so only under a *sui generis* standard where the responsible procreation theory was legitimate and rational, yet insufficient. *Massachusetts v. U.S. Dept. of Health & Human Services,* 682 F.3d 1, 13-16 (1st Cir. 2012). The court rejected the suggestion that preserving traditional marriage was "mere moral disapproval." *Id.* at 16 (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring)). The New Jersey Supreme Court held in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), that same-sex domestic partners were entitled to all the same benefits as married couples, but that court was never asked to consider the validity of the responsible procreation theory as a justification for traditional marriage.

But having identified mutual dedication as one of the central *incidents* of marriage, neither the *Goodridge* plurality nor the Ninth Circuit explained why the state should care about that commitment between sexual partners any more than it cares about other voluntary relationships of two, or even more, adults. *See Morrison v. Sadler*, 821 N.E.2d 15, 29 (Ind. Ct. App. 2005) (lead opinion). Both opinions rejected the assumption that civil marriage is necessarily limited to opposite-sex couples, yet failed even to question whether marriage is necessarily limited to either (a) a limited set of relationships, or (b) people who engage in sex.

By contrast, appellate courts upholding the traditional definition of marriage routinely examine the underlying rationale for civil marriage and conclude that it turns on the procreative capacity of opposite-sex couples, which in turn supplies the rational basis for distinguishing same-sex couples and other inherently non-reproductive relationships. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.* This analysis remains

dominant in our legal culture, both with regard to federal equal protection doctrine[4] and state constitutional law.[5]

A constitutional theory that requires recognition of same-sex couples in contravention of centuries of human experience must supply a coherent rationale, not simply attack traditional marriage as antiquated or ill-considered. "Until a few decades ago, it was an accepted truth for almost everyone who ever lived . . . that there could be marriages only between participants of different sex. A court

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[4] *See, e.g.*, *Citizens for Equal Prot.*, 455 F.3d at 867; *Lofton v. Sec'y of Dep't of Children & Fam. Servs.,* 358 F.3d 804, 818-19 (11th Cir. 2004); *Jackson v. Abercrombie*, No. 11-00734, 2012 WL 3255201 (D. Haw. August 8, 2012); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (per curiam) (Ferren, J., concurring in part and dissenting in part).

[5] *See, e.g.*, *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) (lead opinion); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Hernandez v. Robles,* 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. Ct. App. 2010); *Anderson v. King County,* 138 P.3d 963, 982-83 (Wash. 2006) (en banc).

should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Hernandez*, 855 N.E.2d at 8 (plurality opinion); *see also Massachusetts*, 682 F.3d at 16 (observing that the desire to promote traditional marriage "is not the same as 'mere moral disapproval of an excluded group'" (quoting *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring))).

The failure of the court below to supply a coherent alternative rationale for marriage, while abnegating one of the most fundamental and enduring civil institutions in American life, justifies this Court's intervention.

III. Judicial Redefinition of Marriage Created a Political Grievance Redressable by Referendum

The mantra of the decision below is that, even using the rational-basis test, "context matters" for state laws being evaluated under the Equal Protection Clause. Yet the Ninth Circuit failed to give full weight to the most salient contextual explanation of Proposition 8: the decision of the Supreme Court of California in *In Re Marriage Cases*, 183 P.3d 384 (Cal. 2008), to redefine marriage under the California Constitution to include same-sex marriages. Proposition 8 can most reasonably be understood as a popular reaction *not* to the extension of rights to homosexuals, but to judicial overreach. The supporters of Proposition 8 might reasonably have

concluded that the wrong branch of government had wrought a fundamental societal change; they might reasonably have concluded that the court did so employing an improper means by treating a word having a fixed meaning with post-modernist insouciance; and they might reasonably have concluded that this judicial activism justified state constitutional correction.

In our tradition, the conviction that the wrong authority has done the wrong thing in the wrong manner is cognizable as a political grievance subject to a political remedy. *Cf. The Declaration of Independence* para. 3 (U.S. 1776) ("He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation: . . . For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments: For suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.").

Judicial reluctance to circumscribe state sovereignty should therefore be at its apex when doing so cuts short vigorous democratic debates and uses of political processes. This principle recognizes that courts disrupt the democratic process and deprive society of the opportunity to reach consensus when they prematurely end valuable public debate over moral issues. Federal courts

should not stultify democratic principles by declaring a winner of the marriage debate.

A legitimate political disagreement over ways, means and ends fully repels the notion that Proposition 8 was enacted to harm and denigrate homosexuals. In view of the *Marriage Cases*, voter reaffirmation of the historical meaning of marriage is legitimate and rational in itself.

CONCLUSION

The Court should grant the petition.

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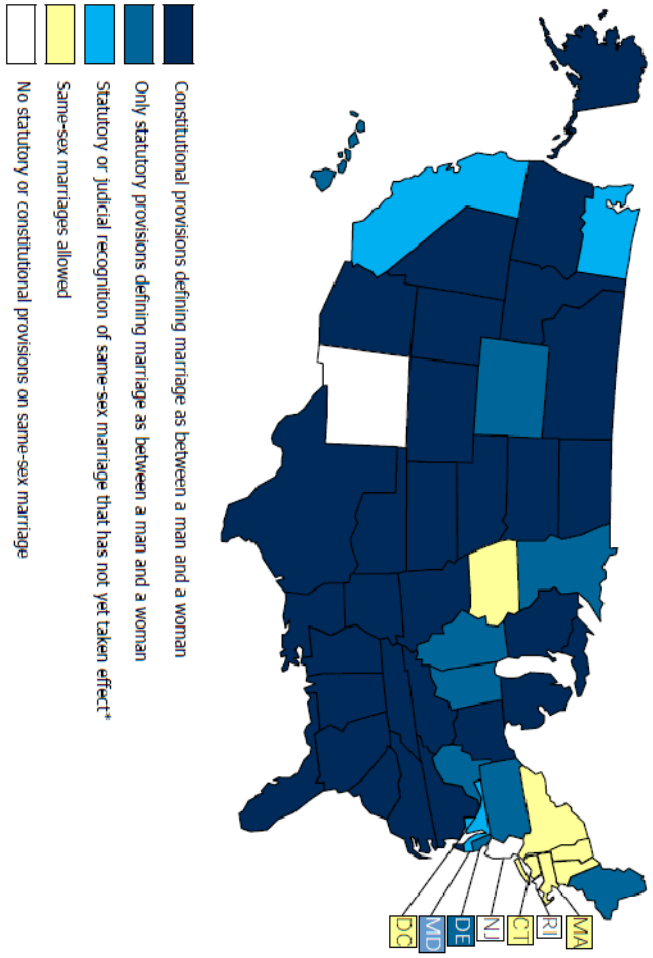
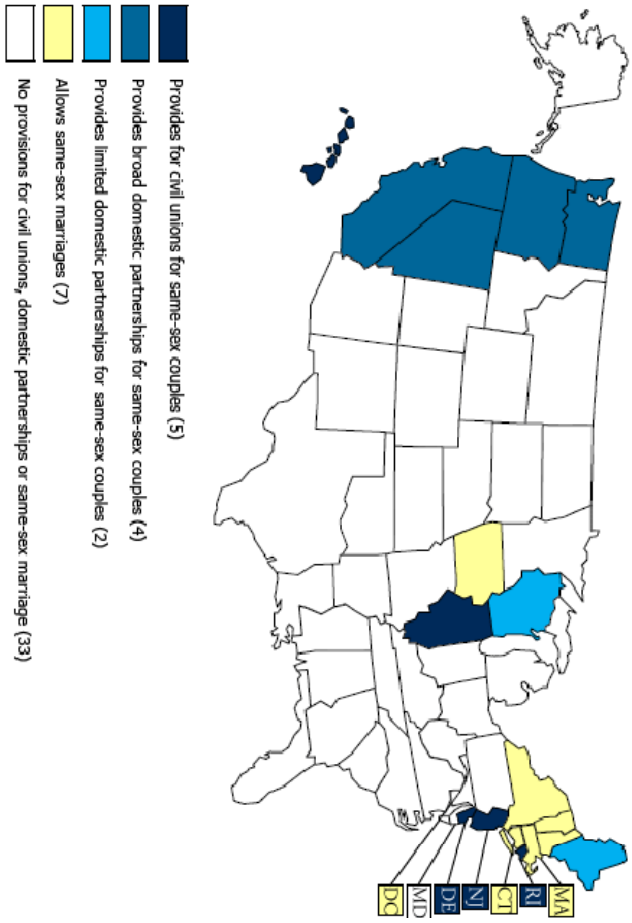
APPENDIX

State Defense of Marriage Acts and Same-Sex Marriage Laws



National Conference of State Legislatures, Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Law, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last updated June 2012).

Civil Unions and Domestic Partnership Statutes



National Conference of State Legislatures, Civil Unions and Domestic Partnership Statutes, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last updated February 2012).

Citations to Marriage and Civil Union Laws

CONSTITUTIONAL DEFINITION OF TRADITIONAL MARRIAGE (30 STATES)	
Alabama	Ala. Const. art. I, § 36.03
Alaska	Alaska Cont. art. 1, § 25
Arizona	Ariz. Const. art. 30, § 1
Arkansas	Ark. Const. amend. 83, § 1
California	Cal. Const. art. 1, § 7.5
Colorado	Colo. Const. art. 2, §31
Florida	Fla. Const. art. 1, § 27
Georgia	Ga. Const. art. 1, § 4 ¶ 1
Idaho	Idaho Const. art. III, § 28
Kansas	Kan. Const. art. 15, § 16
Kentucky	Ky. Const. § 233A
Louisiana	La. Const. art. XII, § 15
Michigan	Mich. Const. art. I, § 25
Mississippi	Miss. Const. art. 14, § 263A

CONSTITUTIONAL DEFINITION OF TRADITIONAL MARRIAGE (30 STATES)	
Missouri	Mo. Const. art. I, § 33
Montana	Mont. Const. art. XIII, § 7
Nebraska	Neb. Const. art. I, § 29
Nevada	Nev. Const. art. I, § 21
North Carolina	N.C. Const. art. XIV, § 6
North Dakota	N.D. Const. art. XI, § 28
Ohio	Ohio Const. art. XV, § 11
Oklahoma	Okla. Const. art. 2, § 35
Oregon	Or. Const. art. XV, § 5a
South Carolina	S.C. Const. art. XVII, § 15
South Dakota	S.D. Const. art. XXI, § 9
Tennessee	Tenn. Const. art. XI, § 18
Texas	Tex. Const. art. 1, § 32
Utah	Utah Const. art. 1, § 29
Virginia	Va. Const. art. I, § 15-A
Wisconsin	Wisc. Const. art. XIII, § 13

STATUTORY DEFINITION OF TRADITIONAL MARRIAGE (11 STATES)	
Delaware	Del. Code Ann. tit. 13, § 101 (a) & (d)
Hawaii	Haw. Rev. Stat. § 572-1
Illinois	750 Ill. Comp. Stat. 5/201, 212, 213.1
Indiana	Ind. Code § 31-11-1-1
Maine	Me. Rev. Stat. Ann. tit. 19, §§ 650, 701
Maryland*	Md. Code Ann., Family Law § 2-201
Minnesota	Minn. Stat. §§ 517.03; 518.01
Pennsylvania	17 Pa. Cons. Stat. § 1704
Washington*	Wash. Rev. Code § 26.04.010
West Virginia	W. Va. Code § 48-2-603
Wyoming	Wyo. Stat. Ann. § 20-1-101

* The Maryland and Washington legislatures have enacted measures that would allow same-sex marriage, but both are subject to a referendum vote this November. Letter from Linda H. Lamone, Administrator of the Maryland State Board of Elections, to Mr. Dereck A. McCoy, Petitioner (July 10, 2012), *available at* http://www.elections.state.md.us/petitions/Certification_Notice_civil_marriage.pdf; Sam Reed, Washington Secretary of State, Certification of Referendum No. 74 (June 13, 2012), http://www.sos.wa.gov/_assets/elections/R-74-Certification-6-12-12.pdf.

NO EXPRESS DEFINITION OF MARRIAGE (3 STATES)	
New Jersey	*Lewis v Harris*, 908 A.2d 196, 200 (N.J. 2006)
New Mexico	N.M. Stat. §§ 40-1-1 to -7
Rhode Island	R.I. Gen. Laws §§ 15-1-1 to -5

MARRIAGE DEFINED TO INCLUDE SAME-SEX COUPLES (6 STATES and DISTRICT OF COLUMBIA)	
Connecticut	Conn. Gen. Stat. Ann. § 46b-20
District of Columbia	D. C. Code § 46-401
Iowa	*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)
Massachusetts	Mass. Gen. Laws Ann. ch. 207
New Hampshire	N.H. Rev. Stat. Ann. §457:1-a
New York	N.Y. Dom. Rel. §10-a
Vermont	Vt. Stat. Ann. tit 15, §8

CIVIL UNIONS OR DOMESTIC PARTERNSHIPS (11 STATES)	
California	Cal. Fam. Code § 270
Delaware	Del. Code Ann. tit. 13, § 201
Hawaii	Haw. Rev. Stat. § 572-B
Illinois	750 Ill. Comp. Stat. 75/20
Maine	Me. Rev. Stat. Ann. tit. 22, § 2710
Nevada	Nev. Rev. Stat. § 122A.200
New Jersey	N.J. Stat. Ann. § 37:1-28
Oregon	Or. Rev. Stat. § 106.325
Rhode Island	R.I. Gen. Laws § 15-3.1-4
Washington	Wash. Rev. Code § 26.60.010
Wisconsin	Wis. Stat. Ann. § 770.18