No. 12-144

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE LUTHERAN CHURCH-MISSOURI SYNOD; THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA; THE ROMANIAN-AMERICAN EVANGELICAL ALLIANCE OF NORTH AMERICA; AND TRUTH IN ACTION MINISTRIES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Tens of millions of Americans are represented in the diverse group of faith communities that join in this brief. Despite their theological differences, these communities are united in declaring that the traditional institution of marriage is essential to the welfare of the American family and society. This brief is submitted out of a shared conviction that the Fourteenth Amendment does not prohibit the people of each State from choosing for themselves whether to preserve the traditional definition of marriage.[1]

SUMMARY OF ARGUMENT

Marriage defined as the union of one man and one woman is an axiom of Western civilization – not an attack on the civil rights of gays and lesbians. On the day California voters approved Proposition 8, no federal law prohibited them from restoring the ancient definition of marriage that had prevailed in the State for all but five months of its history. Reframing the people's considered decision as an attack on civil rights employs a narrative of majority oppression that is powerful, resonant, and wrong. The true issue

[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

in the democratic debate over Proposition 8 was not oppression but a policy choice between different visions of marriage.

Proposition 8 is a measured response to the California Supreme Court's decision declaring traditional male-female marriage unconstitutional as a matter of State law. It maintains robust legal protections for same-sex couples while restoring the traditional definition of marriage. Its return to the *status quo ante* belies the Ninth Circuit's unfair and inaccurate description of Proposition 8 as a product of anti-gay animus. On the contrary, our members supported Proposition 8 based on sincere beliefs in the value of traditional marriage for children, families, society, and our republican form of government. Only a demeaning view of religion and religious believers could dismiss our advocacy of Proposition 8 as ignorance, prejudice, or animus.

Honest debate among reasonable people of good will explains why California voters adopted Proposition 8. Their reaffirmation of traditional marriage implicates a deep conflict between rival conceptions of marriage: between marriage conceived as a procreative, child-centered institution founded exclusively on the relationship of one man and one woman in which society has a profound stake, and marriage conceived (primarily) as a legal means of affirming intimate adult relationship choices. Support for traditional marriage is a rational position in that debate.

Proposition 8 is not invalid because it attracted support from religious voters and organizations or

because it reflects a moral judgment consistent with certain religious beliefs. Legislation is judged by its purpose, not the lawmakers' motivations, and no law is invalid simply because it happens to coincide with particular religious beliefs. Nor is Proposition 8 questionable because it embodies a moral judgment, since marriage laws fall within a State's police power to regulate public morality.

Finally, Proposition 8 is valid for additional reasons the court of appeals did not consider. Judged by conventional rational-basis review, Proposition 8 reasonably serves the legitimate ends of restoring the definition of marriage congruent with the people's moral sense and protecting the substantial expectation and reliance interests of opposite-sex couples in the traditional institution of marriage. Each of these rationales independently satisfies the Equal Protection Clause.

ARGUMENT

I. PROPOSITION 8 REFLECTS A RATIONAL CHOICE AMONG CONFLICTING VISIONS OF MARRIAGE, NOT PREJUDICE OR IRRATIONALITY.

A. Proposition 8 Is a Measured Response to the California Supreme Court's Redefinition of Marriage.

It is false and overly dramatic to depict the constitutional claim to same-sex marriage as "the

defining civil rights issue of our time." Perry Br. Opp. 2. The familiar narrative of majority oppression unfairly portrays the men and women who braved "widespread harassment and intimidation," *Doe v. Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2823 (2010) (Alito, J., concurring), to stand up for Proposition 8. Only a procrustean determination to force Proposition 8 into the framework of *Romer v. Evans*, 517 U.S. 620 (1996), enabled the Ninth Circuit to conclude that a provision simply restoring one of the axioms of Western civilization had no better justification than "disapproval of gays and lesbians as a class." Pet. App. 87a.

From our perspective as religious organizations, several of which actively supported its adoption, Proposition 8 was a moderate response to the California Supreme Court's decision overturning Proposition 22 – the initiative statute limiting marriage to male-female couples. *See In re Marriage Cases*, 183 P.3d 384, 453 (2008). Before that decision, we and many other religious organizations generally had supported, or at least refrained from opposing, the expansion of legal rights for same-sex couples in California, including their formal recognition as domestic partnerships. *See id.* at 397-398 (describing California's domestic partnership laws). But marriage is different. Issuing marriage licenses to same-sex couples necessarily entails the redefinition of marriage itself. *See* Sherif Girgis et al., *What Is Marriage? Man and Woman: A Defense* 4 (2012). Concerned by the judicial redefinition of marriage and its implications

for ourselves and society, many of our members joined a broad coalition seeking to overturn the *Marriage Cases* by amending the State constitution. *See* Cal. Const. art. II, § 8(a) (electorate may "propose statutes and amendments to the Constitution and to adopt or reject them.").

We supported Proposition 8 because it offered the narrowest available means of recovering the time-tested definition of marriage as the union of a man and a woman. It readopts Proposition 22 word-for-word – nothing more. *Compare Marriage Cases*, 183 P.3d at 409 *with* Cal. Const. art. I, § 7.5. It does not penalize in the least the "private sexual conduct" of same-sex couples. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). It does not bar them from "seek[ing] specific protection from the law." *Romer*, 517 U.S. at 633. It does not even withhold "formal recognition" of their relationships. *Lawrence*, 539 U.S. at 578. Instead, it "leav[es] undisturbed all the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship." *Strauss v. Horton*, 207 P.3d 48, 61 (2009). Proposition 8's sole effect – as definitively construed by California's highest court – is to "carve[ ] out a narrow and limited exception . . . reserving the official *designation* of 'marriage' for the union of opposite-sex couples as a matter of state constitutional law." *Id.*

B. California's Endorsement of Traditional Marriage Takes a Rational Position in a Serious Debate that Divides Reasonable People of Good Will.

Given its "narrow and limited" effect, *id.*, Proposition 8 hardly qualifies as the assault on civil rights depicted by the court of appeals. Honest disagreement among reasonable people of goodwill, not animus, explains why California voters adopted Proposition 8.

1. Rival Conceptions of Marriage Drive This Case.

At the heart of this case is a monumental conflict between rival conceptions of marriage and a demand by the proponents of one conception that this Court declare the other one unconstitutional. On one side, traditional marriage is conceived in terms of a man and a woman bound in a legal union oriented toward the bearing and rearing of children for the benefit of society. On the other is a genderless conception of marriage whose principal focus is on affirming adult relationship choices. The issue before this Court is not which of these conceptions is right, but whether the Fourteenth Amendment ends the controversy by imposing same-sex marriage on every State over the people's practical, moral, and constitutional objections.

Before describing these rival visions further, we pause to deny the Ninth Circuit's mischaracterization of Proposition 8 and the traditional vision of marriage

as an expression of what its opponents often charge as "homophobia." Those among us who campaigned for this law did not do so out of anti-gay animus or a benighted "judgment about the worth and dignity of gays and lesbians as a class." Pet. App. 88a. In fact, our support for Proposition 8 rested on the very supposition brushed aside by the court of appeals – we "intended only to disapprove of same-sex marriage [*i.e.*, affirm traditional marriage], rather than to pass judgment on same-sex couples as people." *Id.* at 88a. We are among the "many religions [that] recognize marriage as having spiritual significance," *Turner v. Safley*, 482 U.S. 78, 96 (1987), indeed as being truly "sacred," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Yet for us and our members, traditional marriage is also indispensable to the material welfare of children, families, society, and our republican form of government. To be sure, these beliefs are nourished by the teachings of our respective religions. But the value we place on traditional marriage is also influenced by rational judgments about human nature, the needs of individuals and society (especially children), and by our collective experience counseling and serving millions of followers over countless years. Our faiths uphold the virtues of marriage and family life through teachings and rituals that seldom mention homosexuality. Only a disparaging view of religion and religious believers can explain the lower court's interpretation of Proposition 8 as the product of "prejudice," "private bias," and "stereotypes." *See* Pet. App. 87a, 90a. That anti-religious gloss is patently false.

1. Far from enshrining ignorance or prejudice, traditional marriage arises from an affirmative vision of family and ordered liberty. It is a social institution deeply rooted in this Nation's history, culture, and diverse religions that gives distinctive recognition and legal protection to male-female couples and their children. It arises from "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885). Sex between men and women presents both an opportunity and a social problem, in that "'an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth." *Morrison v. Sadler*, 821 N.E.2d 15, 25-26 (Ind. Ct. App. 2005) (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting) (citations omitted)). Marriage provides that mechanism. Long experience has taught that children thrive best when cared for by their biological parents, *see Standhardt v. Super. Ct.*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003) (accepting as reasonable that "the children born from such [opposite-sex married] relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children"), and that "children benefit from the presence of both a father and mother in the home." *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). Traditional marriage is therefore the knot tying together a man, a woman,

and their children in an institution the law uniquely supports and protects. *See* Edward Westermarck, *The History of Human Marriage* 22 (1891) ("Marriage and family are thus intimately connected with each other: it is for the benefit of the young that male and female continue to live together.").

This tight connection between the age-old conception of marriage and the welfare of children "makes marriage a public good that the state should recognize and support," Girgis et al., *supra*, at 3, a judgment confirmed by international law. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), Art. 16(1) & (3), U.N. Doc. A/810 (Dec. 10, 1948) (declaring that "[m]en and women of full age . . . have the right to marry and found a family" and "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State"); Convention on the Rights of the Child, G.A. Res. 44/25, Art. 7(1), U.N. Doc. 44/25 (Nov. 20, 1989) ("as far as possible, [a child has] the right to know and be cared for by his or her parents"); *cf. Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (Kennedy, J.) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child."). Traditional marriage rests on the policy judgment that "[a] family headed by two married parents who are the biological mother and father of their children is the optimal arrangement for maintaining a socially stable fertility rate, rearing children, and inculcating in them the two moral powers requisite for politically liberal citizenship." Matthew B. O'Brien, *Why Liberal*

Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family, 1 Br. J. Am. Leg. Stud. 411, 414 (2012). Defenders of traditional marriage are sincerely concerned that "'a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic'" and less civil for all Americans. *Morrison*, 821 N.E.2d at 25 (quoting *Goodridge*, 798 N.E.2d at 996 (Cordy, J., dissenting)).

2. The competing vision of marriage in this debate is comparatively recent. It conceives of marriage primarily as a means of affirming intimate adult relationships – as "the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it." Pet. App. 53a. On this understanding, marriage "signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships." *Id.* at 52a (citation omitted). This conception emphasizes that "[t]he basic rationale for marriage lies in its serving certain legitimate and important interests of married couples." *See* Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. Pol. Phil. 225, 225 (1999). Marriage, so understood, focuses on the two adults in an intimate relationship who seek "the State's authorization of that official status and the societal approval that comes with it." Pet. App. 50a.

The role of children in this vision is at most peripheral. What matters most is public endorsement of the adults' chosen relationship, obtaining "official status and the societal approval that comes with it." Pet. App. 50a. Withholding marriage harms same-sex couples, it is said, because of the loss of "status and dignity." *Id.* at 95a. That is why respondents complain that Proposition 8 denies them "the venerated label of 'marriage' and all of the respect, recognition and public acceptance that goes with that institution," Perry Br. Opp. 5, even while conceding that, as a practical matter, "domestic partners are granted nearly all the substantive rights and obligations of a married couple." *Id.*

These competing visions overlap in some respects but are nevertheless in deep tension. One is inherently intergenerational; the other, primarily interpersonal. One is focused on children's and society's needs; the other, on the desires of the couple. The question before this Court is whether the Constitution imposes on the Nation a novel conception of marriage over the one that has endured in all societies for nearly all of human history.

2. Protecting Traditional Marriage from Judicial Redefinition Is a Rational Position in the Debate over Same-Sex Marriage.

Whether to redefine marriage to include same-sex couples is "one of the most basic moral and political

issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology." *Hill v. Colorado*, 530 U.S. 703, 768 (2000) (Kennedy, J., dissenting). Beneath the surface of America's debate over same-sex marriage and its constitutional status lie profound conflicts over the first principles of ordered liberty – including human nature in political society;[2] the range of government authority to regulate morality;[3] the role of religion in American public life;[4] the meaning of sexual intimacy outside of

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[2] *Compare* John Rawls, *A Theory of Justice* 560 (1971) ("For the self is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities.") *with* Michael J. Sandel, *Liberalism and the Limits of Justice* 179 (1982) ("[W]e cannot regard ourselves as independent in this way without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are. . . .").

[3] *Compare* John Stuart Mill, *On Liberty*, *in On Liberty and Other Writings* 13 (Stefan Collini ed., 1989) ("The object of this Essay is to assert one very simple principle . . . [t]hat the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.") *with* James Fitzjames Stephen, *Liberty, Equality, Fraternity and Three Brief Essays* 87 (1991) ("Governments ought to take the responsibility for acting upon such principles, religious, political, and moral, as they may from time to time regard as most likely to be true. . . .").

[4] *Compare* John Dewey, *A Common Faith* 7 (1934) ("there is nothing worth preserving in the notion[ ] of unseen powers, controlling human destiny to which obedience, reverence and worship are due") *with* 1 Alexander de Tocqueville, *The Old Regime and the French Revolution* 206 (François Furet & Françoise Mélonio eds., Alan S. Kahan trans., 1998) ("I stop the

(Continued on following page)

heterosexual marriage;[5] and the power of judicial review as first announced in *Marbury v. Madison*, 1 Cranch 137 (1803).[6]

Few would endorse any of the authors cited in these footnotes without qualification, much less hold a rigidly consistent position at either pole of these

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first American whom I meet . . . and I ask him if he thinks religion is useful for the stability of law and the good order of society; he immediately responds that a civilized society, but above all a free society, cannot subsist without religion.").

[5] *Compare* Norman O. Brown, *Love Against Death* 24 (2d ed. 1985) ("The axiom on which Freud constructed this extension of his basic hypothesis is that the pattern of normal adult sexuality is not a natural (biological) necessity but a cultural phenomenon.") *with* G.E.M. Anscombe, *Contraception and Chastity in Faith in a Hard Ground: Essays on Religion, Philosophy and Ethics* 185 (Mary Geach & Luke Gormally eds., 2008) ("Humanly speaking, the good and the point of a sexual act is marriage. Sexual acts that are not true marriage acts either are mere lasciviousness, or an Ersatz, an attempt to achieve that special unitedness which only a real commitment, marriage, can promise.").

[6] *Compare* Bruce Ackerman, *The Living Constitution*, 120 Harv. L. Rev. 1737, 1805 (2007) ("[T]he Supreme Court's job is neither to defend the original understanding of the constitutional texts inherited from the Founding and Reconstruction, nor to ponder the complexities of the countermajoritarian difficulty raised by the elitist character of common law constitutionalism.") *with* Richard S. Kay, *Original Intention and Public Meaning*, 103 N.W. Univ. L. Rev. 703, 714-715 (2009) ("Constitutional interpretation is an element of the political program of constitutionalism. That program is premised on the idea that the collective institutions of society should act according to, and within, a priori and relatively longterm rules.") (footnotes omitted).

disputes. But these disputes, taken together, map out a field of reasonable discourse within which support for traditional marriage and opposition to same-sex marriage are rational positions. They reflect the judgments of educated, well-informed people and cannot be disparaged as mere ignorance or irrationality.[7]

Indeed, this Court itself has long endorsed traditional marriage, describing it as "the most important relation in life, as having more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). It has extolled marriage as "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), and as "a relationship having its origins entirely apart from the power of the State." *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977). It has held that "[t]he institution of marriage

[7] The genuine philosophical, legal, moral, and religious conflicts animating the debate over same-sex marriage are one of many grounds distinguishing this case from *Loving v. Virginia*, 388 U.S. 1 (1967). By 1967, if not long before, it was pellucidly clear that anti-miscegenation laws were antithetical to both the Fourteenth Amendment's core prohibition on racial discrimination and the Nation's highest moral values. Indeed, by then no credible voice defended such laws, as they were obviously just naked attempts "to maintain White Supremacy." *Id.* at 11. Here, in contrast, there is no clearly established constitutional right to same-sex marriage and there are credible voices in politics, academia, and religion as well as leading members of the bench and bar defending the constitutionality and wisdom of traditional marriage.

has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society." *Lehr v. Robertson*, 463 U.S. 248, 256-257 (1983) (footnotes omitted). Decision after decision affirms "the historic respect – indeed, sanctity would not be too strong a term – traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion) (footnote omitted). And this Court has recognized that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (footnotes omitted).

On the other hand, respondents' competing conception of marriage has never received this Court's endorsement. Decisions recognizing marriage as a fundamental right were premised on the traditional understanding of marriage. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967) (describing the complainants as "Mildred Jeter, a Negro woman, and Richard Loving, a white man"); *Zablocki v. Redhail*, 434 U.S. 374, 379 (1978) ("appellee [Redhail] and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time."); *Turner v. Safley*, 482 U.S. 78, 82 (1987) ("generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason" to permit the marriage of inmates affected by the challenged prison regulation).

Leading philosophers, including some who influenced the Founding generation, have noted the prepolitical significance of traditional marriage. Hume identified marriage as "the first and original principle of human society," grounded in "that natural appetite betwixt the sexes, which unites them together, and preserves their union, till a new tye [sic] take place in their concern for their common offspring." David Hume, *A Treatise of Human Nature* 486 (L.A. Selby-Bigge ed., 1975). Locke depicted marriage as a "Conjugal Society . . . which unites Man and Wife in that Society, as far as may consist with Procreation and the bringing up of Children till they could shift for themselves. . . ." John Locke, *Two Treatises of Government* 322 (Peter Laslett ed., 1988). *See also* Giambattista Vico, *The New Science* 7 (Thomas Goddard Bergin & Max Harold Fisch trans., 1948) (3d ed. 1744) (marriage is "the seed-plot of the family, as the family is the seed-plot of the commonwealth"). Nearer our own time, Justice Holmes discerned that marriage – "some form of permanent association between the sexes" – qualified as one of the "necessary elements in any society that may spring from our own and that would seem to us to be civilized." Oliver Wendell Holmes, *Natural Law, in Collected Legal Papers* 312 (1920).

Resisting the redefinition of marriage may be criticized, but it is entirely rational – not the refuge of ignorance or prejudice depicted by the courts below.

II. PROPOSITION 8 IS NOT INVALID BECAUSE IT WAS SUPPORTED BY RELIGIOUS VOTERS OR BECAUSE IT EXPRESSES A VALUES-BASED JUDGMENT.

A. Religious Support for Proposition 8 Does Not Render It Unconstitutional.

The decision below rests on the "'inference' that Proposition 8 was born of disapproval of gays and lesbians," Pet. App. 89a (quotation omitted), and on the conclusion that such disapproval is "the product of longstanding, sincerely held private beliefs." *Id.* at 87a. Read in context, the "private beliefs" held responsible for Proposition 8's supposedly forbidden motivation implicitly refer to religious beliefs. *Id.* Essentially, the court of appeals found Proposition 8 offensive to the Equal Protection Clause because it reflects religious beliefs supposedly hostile to same-sex couples.

Not only did the Ninth Circuit misrepresent our beliefs (and those of most Proposition 8 supporters) by equating them with anti-gay animus – what the court labeled "disapproval of gays and lesbians as a class," *id.*) – but it improperly inferred unconstitutionality from Proposition 8's support by religious voters and organizations. That inference is wholly mistaken.

Most disturbing to us, the decision below falsely insinuates that our support for traditional marriage amounts to hostility toward gays and lesbians. Our deepest convictions and reasoned understandings

about marriage are quite distinct from our beliefs concerning homosexuality. Our faith communities and other religious organizations that supported Proposition 8 have rich religious narratives that extol the personal, familial, and social virtues of traditional marriage while mentioning homosexuality barely, if at all.[8] Indeed, our support for traditional marriage precedes by centuries the very notion of homosexuality as a recognized sexual orientation, not to mention the recent movement for same-sex marriage. And whatever the failings (past or present) of individuals within our faith communities, we are united in condemning hatred and mistreatment of homosexuals. We believe God calls us to love gays and lesbians, even as we steadfastly defend our belief and judgment that traditional marriage is best for families and society.

In judging Proposition 8, "what is relevant is the legislative *purpose* of the [law], not the speculative

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[8] *See*, *e.g.*, Andreas J. Kostenberger, *God, Marriage, and Family: Rebuilding the Biblical Foundation* 272-273 (2004) (Evangelical); *Marriage: Love and Life in the Divine Plan*, U.S. Conference of Catholic Bishops, 7-8 (Nov. 17, 2009), http://www.usccb.org/issues-and-action/marriage-and-family/marriage/love-and-life/upload/pastoral-letter-marriage-love-and-life-in-the-divine-plan.pdf (Catholic); *The Family: A Proclamation to the World*, The Church of Jesus Christ of Latter-day Saints (Sept. 23, 1995) http://www.lds.org/topics/family-proclamation?lang=eng [hereinafter "*Family Proclamation*"] (Mormon); *Genesis* 1:27-28; 2:24 (scripture shared by Jews and Christians holds that God commanded man and woman to "be fruitful" and "become one flesh" in a marital union).

motives of the [people] who enacted the law." *Bd. of Ed. of Westside Cnty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 249 (1990). Moreover, no law is invalid when it "merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Sunday closing laws and restraints on abortion funding have been upheld on this principle, *see id.*; *Harris v. McRae*, 448 U.S. 297, 319-320 (1980), and there is no reason why it should not sustain Proposition 8 as well.

Holding Proposition 8 void because of its religious support would fly in the face of this Court's teaching that the Constitution "does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). Religious Americans and faith communities do not participate in the national debate over same-sex marriage out of official sufferance: "no less than members of any other group, [they] enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel*, 435 U.S. at 641. Subjecting Proposition 8 to unusual constitutional scrutiny because of its support by religious voters or its relation to religious beliefs would raise serious First Amendment concerns. Increased scrutiny could result in the disenfranchisement, or at least dilute the voice, of religious voters. Every American holds the "hard-won right to vote one's conscience

without fear of retaliation," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995), behind which lies "perhaps the most fundamental individual liberty of our people – the right of each [person] to participate in the self-government of his society." *In re Winship*, 397 U.S. 358, 385 (1970) (Black, J., dissenting). That taproot of American citizenship would be cut if votes cast by the religious were evaluated differently than other votes in a court of law.

Finally, increased scrutiny could be regarded as a "religious gerrymander," indirectly "regulat[ing] . . . conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (Kennedy, J.) (citations omitted). By scrutinizing laws reflecting religious values or supported by religious voters and organizations more severely than others, courts would effectively target such beliefs or support for unusual burdens or penalties. This would not only be constitutionally improper but profoundly un-American. Religious institutions and believers have played pivotal roles in virtually all the great political and social movements in American history – from the colonial settlement and Founding, to the ending of slavery, to women's voting rights, to the civil rights movement – and they properly have a voice in the great marriage debate in which our Nation is now engaged. *See McDaniel*, 435 U.S. at 641 n.25 (Brennan, J., concurring in judgment).

In brief, Proposition 8 must be judged on its merits according to settled rules of law – not on a

more demanding standard born of antipathy toward religion or religious believers. That Proposition 8 was supported by some religious voters or is in harmony with some religious views is constitutionally irrelevant.

B. Proposition 8 Does Not Transgress the Fourteenth Amendment By Expressing a Values-Based Judgment in Favor of Traditional Marriage.

Proposition 8 is not invalid merely because it reflects the people's moral judgment – that is, their collective sense of what is right, just, and prudent – about the nature of marriage. This Court has long held that States possess broad authority under the police power to regulate public morality. *See Mugler v. Kansas*, 123 U.S. 623, 659 (1887); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *see also* Ernst Freund, *Police Power: Public Policy and Constitutional Rights* 7 (1904) ("The exercise of the police power for the protection of safety, order, and morals, constitutes the police [power] in the primary or narrower sense of the term.").

The police power entitles States to protect values "spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. 26, 33 (1954). In exercising this power, States are not required to strive for value neutrality. Such a position does not exist, even if it were thought desirable, because "[t]he law is the witness and external deposit of our moral

life," Oliver Wendell Holmes, *The Path of the Law*, 110 Harv. L. Rev. 991, 992 (1997). Nor is demonstrable harm the *sine qua non* of valid State authority. The Fourteenth Amendment no more enacts John Stuart Mill's *On Liberty* than it does "Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 198 U.S. 45, 75 (1906) (Holmes, J., dissenting). *Compare* John Stuart Mill, *On Liberty*, *in On Liberty and Other Writings* 13 (Stefan Collini ed., 1989) (asserting "one very simple principle . . . [t]hat the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.") *with* Herbert Spencer, *Social Statics* 94 (1873) ("[E]very man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man.").

Reading into the Fourteenth Amendment a ban on lawmaking based on value judgments would immediately call into question the validity of numerous State laws, including those punishing gambling[9] and prostitution.[10] Apart from its devastating practical

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[9] *Compare* Cal. Penal Code § 653.26 (West 2012) (making prostitution a criminal offense) *with Hoke v. United States*, 227 U.S. 308, 321 (1913) ("There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime.").

[10] *Compare* Cal. Penal Code § 330 (West 2012) (making gambling a criminal offense) *with Marvin v. Trout*, 199 U.S. 212, 224 (1905) ("The power of the state to enact laws to suppress gambling cannot be doubted. . . .").

consequences, such a doctrine would substantially diminish "the whole, undefined residuum of power," *United States v. Comstock*, 560 U.S. ___, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring in the judgment), constitutionally reserved to the States.

Marriage itself has long been understood as "a social relation subject to the State's police power." *Loving*, 388 U.S. at 7 (citation omitted). State control of marriage law, except for prohibitions on racial discrimination or arbitrary lawmaking, serves critical functions beyond maintaining the principle of federalism. "It is within the States that [the people] live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes." *Boddie v. Connecticut*, 401 U.S. 371, 389-390 (1971) (Black, J., dissenting).

Of course, Proposition 8 takes sides in the moral debate over same-sex marriage, but value judgments are unavoidable here because every definition of marriage implies one: there is no values-neutral ground in this area of social policy. *Cf. Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) ("The laws regarding marriage . . . form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis."). Because the Constitution no more demands laissez faire in morals than in economics, *cf. Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) ("Whether the legislature takes for its textbook Adam

Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."), California's endorsement of traditional marriage as a policy preference does not transgress constitutional limits any more than the thoroughly moral judgments expressed in laws regulating obscenity, *see Miller v. California*, 413 U.S. 15, 33-34 (1973), or abortion, *see Gonzales*, 550 U.S. at 157.

This principle was not disturbed by *Lawrence v. Texas*, 539 U.S. at 558. Its central holding that States may not "condemn homosexual conduct as immoral" by punishing it as criminal, *id.* at 571, was qualified by the Court's assurance that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578. The Court's statement that "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,'" *id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)), must be understood in the context of a State law criminalizing a form of private sexual intimacy. The Court gave no indication that it intended this single line to sweep aside all of the States' reserved power – affirmed in dozens of Court decisions – to regulate public morality, especially through noncoercive means. No sensible reading dictates so drastic a rearrangement of constitutionally distributed powers.

In any event, unlike *Lawrence*, this case does not involve protected conduct "made criminal by the law of the State," 539 U.S. at 576, or indeed any restriction on such conduct. Rather, respondents seek "the venerated label of 'marriage' and all of the respect, recognition and public acceptance that goes with that institution." Perry Br. Opp. 5 (citations omitted). To the extent it relies on *Lawrence*, their claim disregards "the basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977) (footnote omitted). And even if same-sex couples have a constitutionally protected right to some type of "formal recognition" of their relationships (something this Court has never held), it does not follow that they are entitled to displace California's "value judgment," *id.* at 474, that it is best to denominate the traditional male-female union as "marriage" while affording same-sex couples robust domestic partnership rights as an "alternative" to marriage. *Id.* at 475.

Also unlike *Lawrence*, this case does not involve "the most private human conduct, sexual behavior, and in the most private of places, the home." 539 U.S. at 567. Several of the leading authorities relied on in *Lawrence* to demonstrate the "emerging awareness" of intimate autonomy as a significant aspect of personal liberty, *id*. at 572, stressed the private character of the conduct whose criminalization they challenged. *See Dudgeon v. United Kingdom*, 45 Eur.

Ct. H. R. (ser. A) ¶61 (1981) (declaring invalid laws "criminalising private homosexual relations"); Model Penal Code § 213.2, cmt. 2 at 372 (1980) (recommending "no criminal penalties for consensual sexual relations conducted in private"); *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* ¶62 (1957) (reprint ed. 1962) (recommending that "homosexual behaviour between consenting adults in private should no longer be a criminal offence").[11] The same cannot be said for marriage, a public legal act requiring a government-issued license, solemnization before witnesses, and other formalities beyond the consent of the parties. *See* Cal. Fam. Code § 300 (West 2012).

Lawrence thus offers no support for interpreting the Fourteenth Amendment to prohibit the people of California – or any other State – from legally protecting the age-old definition of marriage; the fact that Proposition 8 comports with the people's values raises no constitutional impediment. On the contrary, as shown next, harmonizing California's marriage law with the people's traditional values is a further reason Proposition 8 satisfies rational-basis review.

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[11] This same distinction between private and public conduct prompted H.L.A. Hart, in his classic defense of intimate autonomy, to acknowledge the persuasive reasons for continuing to restrict marriage "in a country where deep religious significance is attached to monogamous marriage and to the act of solemnizing it." H.L.A. Hart, *Law, Liberty, and Morality* 41 (1963).

III. PROPOSITION 8 SATISFIES THE EQUAL PROTECTION CLAUSE FOR REASONS THE NINTH CIRCUIT DID NOT CONSIDER.

A. Rational-Basis Review Is the Correct Constitutional Standard.

Respondents' claim that Proposition 8 offends the Fourteenth Amendment's guarantee of equal protection of the laws must be evaluated within the Court's tripartite framework, which assigns "different levels of scrutiny to different types of classifications." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Because sexual orientation does not characterize a suspect class[12] and marrying a person of the same sex is not a fundamental right,[13] "[a] century of Supreme Court adjudication under the Equal Protection Clause

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[12] *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-574 (9th Cir. 1990); *but see United States v. Windsor*, 699 F.3d 169, 185 (2d Cir. 2012) ("homosexuals compose a class that is subject to heightened scrutiny"). The Second Circuit's decision in *Windsor* stands alone: eleven circuits – every other federal court of appeals to address the question – evaluate sexual orientation classifications under rational-basis review. *See High Tech Gays*, 895 F.2d at 573-574; *Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 9-10 (1st Cir. 2012); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing decisions from the Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits).

[13] *See Baker v. Nelson*, 409 U.S. 810, 810 (1972); *see also Reno v. Flores*, 507 U.S. 292, 303 (1992) ("The mere novelty of such a claim [as same-sex marriage] is reason enough to doubt that 'substantive due process' sustains it.").

affirmatively supports the application of the traditional standard of review, which requires only that [Proposition 8] be shown to bear some rational relationship to legitimate state purposes." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

This "conventional and venerable" constitutional standard, *Romer*, 517 U.S. at 635, endows Proposition 8 with "a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (Kennedy, J.) (citations omitted). Proposition 8 "'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification [between opposite-sex and same-sex couples].'" *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (citations omitted). And the fit between Proposition 8 and the ends it serves will suffice if it "has some 'reasonable basis,'" even if "'not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (citation omitted).

Further, rational-basis review – the "most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause," *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989) – must be applied even more deferentially here. This Court has said that equal protection "'scrutiny will not be so demanding where [it] deal[s] with matters resting firmly within a State's constitutional prerogatives.'" *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973)). The regulation of State-created rights and duties regarding marriage "has

long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Deference to State policymaking in this area vindicates both federalism and separation of powers.[14] *See Dandridge*, 397 U.S. at 486 ("[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.").

Finally, nothing special about Proposition 8 alters the applicability of conventional rational-basis review. That standard applies broadly to "areas of social and economic policy," *Beach Commc'ns*, 508 U.S. at 313, and has been the rule of decision in numerous cases with controversial implications. *See*, *e.g.*, *Vacco v. Quill*, 521 U.S. 793, 809 (1997) (assisted suicide); *Dandridge*, 397 U.S. at 487 (welfare benefits); *Rodriguez*, 411 U.S. at 55 (public school funding). Neither modifying the standard nor applying a form of heightened scrutiny to Proposition 8 is justified.

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[14] Federalism denotes fidelity to the Constitution's distribution of powers between the national government and the States, not a simplistic gauge of whether federal power rises or falls. It follows that deference to California's adoption of Proposition 8 as an exercise of the States' reserved power over family law is consistent with deference to Congress's adoption of the Defense of Marriage Act as an exercise of its enumerated power to make rules for the interpretation of federal law.

B. Proposition 8 Satisfies Rational-Basis Review for Reasons the Ninth Circuit Did Not Consider.

The Court may uphold a law subject to rational-basis review on any ground it finds reasonable, even if the party defending the law has not raised it and "whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 319, 320-321; *accord Beach Commc'ns*, 508 U.S. at 319. The following are two additional rationales, supplementing those already raised by petitioners, that make Proposition 8 reasonable.

1. Proposition 8 Recovers a Definition of Marriage That Is Congruent with the Values of California Voters and Thus More Likely to Sustain the Institution of Marriage.

Enacting Proposition 8 recovered the meaning of marriage that is most consistent with the value choices or moral sense of California voters. By "moral sense" we refer to the "sense that is formed out of the interaction of [people's] innate dispositions with their earliest familial experiences," a sense that "shapes human behavior and the judgments people make of the behavior of others." James Q. Wilson, *The Moral Sense* 2 (1993). As directed to questions of public policy, moral sense helps people judge among "[c]onflicting claims of morality and intelligence" and, specifically, resolve for themselves "the intractable economic, social, and even philosophical problems" raised by the judicial redefinition of marriage.

Dandridge, 397 U.S. at 487. We do not mean to suggest that the voters who approved Proposition 8 necessarily agreed on the understanding of marriage taught by any particular moral tradition or faith community.

Adopting Proposition 8 recovered a definition of marriage more congruent with voters' moral sense than the relatively recent and highly individualistic conception imposed by the California Supreme Court in the *Marriage Cases*. Specifically, Proposition 8 expresses the people's sense that society should continue preserving marriage as the institutional bond joining together and protecting a husband, a wife, and their children. That complex judgment was no doubt influenced by traditional marriage's roots in California's history, culture, laws, and diverse religions and by the public goods the people understand it provides in erecting an orderly social mechanism to cope with natural reproduction, *see Morrison*, 821 N.E.2d at 25-26, and in protecting the family setting where children thrive best, *see Standhardt*, 77 P.3d at 463; *Lofton*, 358 F.3d at 819, and best acquire the "moral powers requisite for politically liberal citizenship." O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage*, *supra*, at 414. That judgment was likely further nourished by the familiarity of man-woman marriage as an ancient but still valued way of life, a living tradition with a profound yet practical relevance to the lives of millions of Californians.

Admittedly, there is an active debate within the social sciences over whether some of these common

sense judgments are empirically sound.[15] But "[n]othing in the Constitution requires California to accept as truth the most advanced and sophisticated [scientific] opinion." *Alberts v. California*, 354 U.S. 475, 501 (1957) (Harlan, J., concurring in the result). Lawmakers – including the people of California – are entitled to "act[ ] on various unprovable assumptions," including those that in "[t]he sum of [their] experience" lead them to conclude that traditional marriage and the family structure it supports deserve distinctive legal protection. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 63 (1973). "Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Id.* at 63. The common sense judgments of the people – deeply rooted in their history, traditions, laws, practices, common experiences, and sense of identity – that mark traditional marriage for distinctive protection furnish a "reasonably conceivable state of facts that could provide a rational basis" for distinguishing between opposite-sex and same-sex couples. *Beach Commc'ns*, 508 U.S. at 313. The Equal Protection Clause requires no more.

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[15] *Compare* Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships?*, 41 Soc. Sci. Res. 752, 766 (2012) *and* Loren Marks, *Same-Sex Parenting and Children's Outcomes*, 41 Soc. Sci. Res. 735, 748 (2012) *with* Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 Applied Dev. Sci. 98, 104 (2012).

Proposition 8 is entitled to a "strong presumption of validity." *Heller*, 509 U.S. at 319 (citations omitted); s*ee also Stenberg v. Carhart*, 530 U.S. 914, 977 (2000) (Kennedy, J., dissenting) (charging the majority with neglecting its "obligation to interpret the law in a manner to validate it, not render it void."). Given that presumption, the Court should construe Proposition 8 as a rational preference for the tried and familiar over the untried and novel, rather than accept the baseless assertion that it was an effort to harm gays and lesbians. *See* Robert F. Nagel, *Playing Defense*, 6 Wm. & Mary Bill Rts. J. 167, 188 (1997) ("[T]here is nothing necessarily unenlightened about attempting to protect what has been of value in the past.").

California has an "undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people." *Zablocki*, 434 U.S. at 399 (Powell, J., concurring in the judgment). The stability and health of marriage – matters of critical social importance – are determined not just by law but by the depth and intensity of the social consensus that marriage is indeed worth sustaining. Proposition 8 advances the State's foundational interest in unifying legal and long-held cultural and religious understandings of marriage in order to continue marshalling all of society's forces in support of this vital institution.

While the people of California are entitled to chart their own course in such values-laden areas of the law, it is nevertheless noteworthy that their choice to affirm traditional marriage is consistent not

only with America's history of marriage but also with the recent choices of the people in the overwhelming majority of other States. Ensuring democratic pluralism, the Fourteenth Amendment leaves each State free to establish a definition of marriage in keeping with the evolving values of its people. *See Gregg v. Georgia*, 428 U.S. 153, 175-176 (1976) ("'[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'") (quotation omitted).

2. Proposition 8 Protects the Substantial Expectation and Reliance Interests of Married Couples.

Proposition 8 also protects the substantial expectation and reliance interests of married couples and their families. "This Court previously has acknowledged that classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws." *Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992) (footnote omitted). In fact, "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective: it provides *an exceedingly persuasive justification*." *Id.* (quotation omitted) (emphasis added). *Nordlinger* rejected an equal protection challenge to Proposition 13, a ballot initiative approved by California voters that restricted the imposition of property taxes. *See id.* at 3-4. Discriminating between new and existing owners in calculating relative property tax burdens was legitimate, the Court explained, because "an existing owner rationally

may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase." *Id.* at 12-13. Similar reasoning has prompted the Court to uphold laws exempting reorganized school districts from user fees otherwise charged for bus service, *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 465 (1988); exempting paperboard milk containers from a ban imposed on nonreturnable plastic milk containers, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 468 (1981); granting windfall retirement benefits to former railroad workers who acquired such benefits while still employed, *United States RR Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980); and exempting established street vendors from a ban on street vendor operations. *New Orleans v. Dukes*, 427 U.S. 297, 305 (1976).

Married couples and their children have no less substantial reliance and expectation interests in preserving the core meaning of the traditional institution of marriage. Those interests include "supporting a child's right to know and be reared by his mother and father" and "furnishing the status and identity of 'husband' or 'wife.'" Monte Neil Stewart, *Marriage Facts*, 31 Harv. J.L. & Pub. Pol'y 313, 337 (2008). Each of these interests represents not only public goods, seen from the perspective of society, but individual goods for which men and women have made life-altering investments of money, time, and the subsuming of selfish desires. Most deeply, they are matters of personal identity that would be adversely affected by changing the definition of marriage.

Because "a society can have only one social institution denominated 'marriage,'" *id.*, a decision holding that Proposition 8 violates the Equal Protection Clause would deprive married couples and their children of reliance interests in an institution whose former meaning defined their relationships and lives. A child would no longer have the full support of the social norm embodied in traditional marriage that every child has "a right to know and be reared by his mother and father," *id.*; *cf.* Convention on the Rights of the Child, G.A. Res. 44/25, Art. 7(1), U.N. Doc. 44/25 (Nov. 20, 1989) ("as far as possible, [a child has] the right to know and be cared for by his or her parents"), because the very concepts of "mother" and "father" would be replaced by genderless conceptions of marriage and parenthood, where the connection between marriage, procreation, and child-rearing would be legally severed. The "status and identity," Stewart, *Marriage Facts*, *supra*, at 337, of being a "husband" or a "wife" – with the best of what those terms can imply within a male-female union – would likewise be replaced by a genderless meaning, a change that would mean the loss of the core personal and social identity that attend those gender-specific words.

We do not mean to be overly abstract; these reliance interests may be subtle and difficult to describe, but they are very real and run very deep. How the law defines and regulates marital and parental relationships powerfully reinforces or diminishes existing personal and social interests, including identity interests. To illustrate, imagine a new law

declaring that parents have no legal duty to support a child beyond his fourteenth birthday. Would that legal change also change the nature and meaning of the parent-child relationship, even prior to the child's fourteenth birthday? Certainly. The child's sense of security and belonging and the parents' sense of protection and care would be altered. The unique ties that bind parent to child would be different – perhaps subtly, perhaps profoundly, but assuredly different. In sum, people have relied on what the law says – and what it has said for centuries – about the nature and meaning of marriage, not just for legal rights and benefits but for their own identities. That, indeed, is the very reason respondents so earnestly seek to redefine marriage. If *Nordlinger* and related decisions permit States to protect the comparatively trivial expectation and reliance interests of a milk container producer or a street vendor without offending the Equal Protection Clause, the same principle surely sustains a measured decision by the people of California to uphold the traditional definition of marriage.

Under either of these rationales – restoring a definition of marriage congruent with the voters' moral sense or protecting the substantial expectation and reliance interests of married couples in the traditional institution of marriage – Proposition 8 satisfies rational-basis review.

CONCLUSION

The people of California violated no one's civil rights when they adopted Proposition 8. Their twice-expressed preference for the traditional definition of marriage over an untested rival conception was thoroughly rational. It is therefore thoroughly constitutional.

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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