**NOS. 10-16696 & 11-16577**

DECIDED FEBRUARY 7, 2012
(CIRCUIT JUDGES STEPHEN REINHARDT, MICHAEL HAWKINS & N.R. SMITH)

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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KRISTIN PERRY, et al.,
*Plaintiffs-Appellees*,

v.

EDMUND G. BROWN, Jr., et al.,
*Defendants*,

and

DENNIS HOLLINGSWORTH, et al.,
*Defendant-Intervenors-Appellants*.

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On Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James Ware)

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# APPELLANTS' PETITION FOR REHEARING EN BANC

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## STATEMENT

The panel majority's decision conflicts with decisions of the United States Supreme Court and this Court, *see, e.g.*, *Baker v. Nelson*, 409 U.S. 810 (1972); *Crawford v. Board of Education*, 458 U.S. 527 (1982); *Johnson v. Robison*, 415 U.S. 361 (1974); *Adams v. Howerton*, 673 F.3d 1036 (9th Cir. 1982), and consideration by the en banc court is therefore necessary to secure and maintain uniformity of the court's decisions.

This proceeding involves a question of exceptional importance: whether the Fourteenth Amendment to the United States Constitution prohibits a State from limiting marriage to opposite-sex couples. The panel majority's holding that California must recognize same-sex relationships as marriages conflicts not only with the binding authority cited above, but also with the decisions of every other state and federal appellate court to address this question. *See, e.g., Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

This proceeding also involves the exceptionally important questions of whether the district court judge violated 28 U.S.C. § 455 by presiding over this case seeking the redefinition of marriage to include same-sex couples without disclosing the existence of his long-term committed same-sex relationship and

whether vacatur of the district court judge's decision is required to remedy the violation.

## INTRODUCTION

In this case a divided panel struck down California's Proposition 8 on the ground that there was no conceivable rational justification for a majority of the State's voters to have supported restoring the traditional definition of marriage as a union "between a man and a woman." CAL. CONST. art. I, § 7.5. The panel majority held that the question of Proposition 8's constitutionality is directly controlled by *Romer v. Evans*, 517 U.S. 620 (1996), which invalidated a constitutional amendment by which Colorado imposed, as the Supreme Court put it, an "unprecedented" and "comprehensive" ban on all "legislative, executive, or judicial actions at any level of state or local government designed to protect the named class [of] homosexual persons or gays and lesbians," *id*. at 624. The Colorado amendment was so unrelated to any conceivable legitimate state purpose that it could be explained only as a "bare . . . desire to harm" gays and lesbians by making them "stranger[s] to [the] laws." *Id*. at 634-35.

The panel majority's reliance of *Romer*, however, cannot be reconciled with the simple truth, acknowledged by the panel majority itself, that the very issue resolved in California, at least for now, by Proposition 8 is "currently a matter of

great debate in our nation, and an *issue over which people of good will may disagree*, sometimes strongly." Op. 6 (emphasis added). Indeed, the panel majority specifically disavowed any suggestion "that Proposition 8 is the result of ill will on the part of the voters of California." Op. 72. But the panel majority nonetheless insists that Proposition 8 serves no conceivable legitimate state interest and that support for the initiative is inexplicable on any grounds other than "disapproval of gays and lesbians as a class," and of "same-sex couples as a people." Op. 72, 73. The "sole purpose" of the initiative's supporters, according to the panel majority, was to publicly proclaim the "lesser worth" of gays and lesbians as a class and to "dishonor a disfavored group." Op. 73, 76.

This charge is false on its face, and leveling it against the People of California is especially unfair. First, it is difficult to see how the panel majority's charge differs from the one that it was at pains to disavow. Is it even remotely plausible that a person of good will, who bears gays and lesbians no ill will and who has no "desire to harm" them as a class, could nonetheless harbor a bare desire to *dishonor* them as a class? Second, disapproving of the fundamental redefinition of marriage to include same-sex couples is plainly not the same as disapproving same-sex couples as a people. Do President Obama and a host of other prominent champions of equal rights for gays and lesbians support the

traditional definition of marriage solely to disapprove of gays and lesbians as a class and to dishonor same-sex couples as a people? The reality is simply that "[t]here are millions of Americans," as one of the Plaintiffs' own expert witnesses has acknowledged, "who believe in equal rights for gays and lesbians ... but who draw the line at marriage." M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED 175 (2009) (ER 1351)[1] (quoting Rabbi Michael Lerner).

Nowhere is this truer than in California, which has enacted into law some of the Nation's most sweeping and progressive protections of gays and lesbians, including a domestic partnership law that confers on same-sex couples virtually all of the same substantive benefits and protections as marriage. Far from *dishonoring* same-sex couples as a people, California officially recognizes and protects their committed relationships through its domestic partnership laws, which were proposed and championed by the State's leading gay rights advocates and organizations. Californians draw the line at redefining marriage to include same-sex couples not because they disapprove of gays and lesbians as a class, but because they believe that the traditional definition of marriage continues to meaningfully serve society's legitimate interests.

[1] Unless otherwise specified, citations to briefs and excerpts of record refer to materials filed in No. 10-16696.

Thus, there is irony, to say the least, in the panel majority's determination that one of the Nation's most gay-friendly states adopted Proposition 8 for no other reason than to publicly dishonor its gay and lesbian citizens and proclaim them less worthy as a class. But the panel majority takes the point well beyond irony, and common sense, in determining that Proposition 8 is uniquely more vulnerable to constitutional challenge than the 28 other state constitutional amendments reaffirming the traditional opposite-sex definition of marriage, including those that also prohibit any official recognition same-sex relationships at all. Proposition 8 stands apart from all other state marriage amendments, the panel majority emphasized, because of its "relative timing," Op. 42, and because it "changes the law far too little to achieve any of the effects it purportedly was intended to yield," Op. 76-77. Having been adopted a few months *after* the California Supreme Court's decision in the *Marriage Cases* interpreted the State Constitution to extend the right to marry to same-sex couples, Proposition 8's "unique and strictly limited effect" was to "take away" from committed same-sex couples only the right to "the official designation of 'marriage,' ... while leaving in place all of [marriage's] incidents." Op. 6.

But surely California's generous domestic partnership laws do not put Proposition 8 on a *weaker* constitutional footing than the marriage laws of the

federal government and the numerous states that provide little or no recognition or protection to same-sex couples and their families. Indeed, the panel majority's suggestion that these laws uniquely doom California's ability to maintain the traditional definition of marriage creates a regrettable disincentive for those States to adopt civil union or domestic partnership laws and calls into question the constitutionality of the traditional definition of marriage in other States in this Circuit that have adopted such laws, such as Hawaii, *see* HAW. REV. STAT. § 572B, Nevada, *see* NEV. REV. STAT. § 122A, and Oregon, *see* OR. REV. STAT. § 106.300. As a practical matter, then, the panel majority's ruling will "pretermit other responsible solutions" to the complex issues raised by same-sex relationships, *District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2322 (2009), and will force States to make an all or nothing choice between retaining the traditional definition of marriage without any recognition of same-sex relationships and radically redefining an age-old institution that continues to play a vital role in our society.

Nor is there any merit, legal or logical, in the panel majority's theory that "[w]ithdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade." Op. 41-42. To the contrary, under rational basis

review, the "relative timing" of such events is wholly irrelevant. If a person of good will can rationally oppose in good faith the State's redefinition of marriage to include same-sex couples *before* the State has done so, that same person's opposition, for the same reasons, obviously does not somehow become irrational the moment *after* the State has done so. And the panel majority's "relative timing" theory is refuted by, rather than "govern[ed]" by, the Supreme Court's decision in *Romer*. Op. 46-47. True, the Colorado constitutional amendment at issue there effectively repealed a handful of municipal ordinances extending certain antidiscrimination protections to gays and lesbians. But the timing of the amendment's adoption played no role in the Court's analysis: the amendment was held *facially* invalid, and thus was void throughout the State, not just in those cities that had previously passed antidiscrimination ordinances. Nor did the *Romer* Court's decision leave any doubt at all that the amendment would have been struck down regardless where it came from, including a state lacking any preexisting legal protections, state or local, for gays and lesbians. Indeed, the panel majority's reading of *Romer* would bring the case squarely into conflict with *Crawford v. Board of Education*, which expressly "*reject[ed]* the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." 458 U.S. 527, 535 (1982) (emphasis added).

In short, it matters not at all that adoption of Proposition 8 *reversed*, rather that *preempted*, the California Supreme Court's decision in the *Marriage Cases*: the initiative was either rationally related to a legitimate state interest or it was not. And the answer to that dispositive question turns on whether opposite-sex couples "possess distinguishing characteristics relevant to interests the State has authority to implement" in regulating marriage. *Board of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001).

This is not a hard question. Indeed, because of the distinguishing *procreative* characteristics of heterosexual relationships, until quite recently "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). And marriage has existed in virtually all societies, from the ancients to the American states, because it serves a vital and universal societal purpose—a purpose, indeed, that makes marriage, as the Supreme Court has repeatedly emphasized, "fundamental to the very existence and survival of the [human] race." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quotation marks omitted). That existential societal purpose is, and has always been, to channel potentially procreative relationships into

enduring, stable unions for the sake of responsibly producing and raising the next generation.

Before the recent movement to redefine marriage to include same-sex relationships, it was commonly understood and acknowledged by lawmakers, courts, and scholars of all times and places that the institution of marriage owed its very existence to society's vital interest in responsible procreation and childrearing. Indeed, no other purpose can plausibly explain the ubiquity of the institution. Blackstone put it well: the relation "of parent and child ... is consequential to that of marriage, being its principal end and design; and it is by virtue of this relation that infants are protected, maintained, and educated." 1 WILLIAM BLACKSTONE, COMMENTARIES *410. Marriage has served this universal societal purpose throughout history by providing, in the words of sociologist Kingsley Davis, "social recognition and approval ... of a couple's engaging in sexual intercourse and bearing and rearing offspring." *The Meaning & Significance of Marriage in Contemporary Society* 5, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION (Kingsley Davis ed., 1985) (ER 428).

In light of all this, it is hardly surprising that *every* state and federal appellate court decision, including binding decisions of the Supreme Court and this Court, to

address the validity of traditional opposite-sex marriage laws under the Federal Constitution has upheld them as rationally related to the state's interest in responsible procreation and child-rearing. As the Eighth Circuit said in upholding Nebraska's marriage amendment in 2006, the state's interest in " 'steering procreation into marriage' ... justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot." *Citizens for Equal Prot. v. Bruning*, 455 F.3d at 867.

The panel majority erred in breaking with the uniform and binding precedent upholding the constitutionality of laws adopting the traditional definition of marriage, and the Court, sitting en banc, should rehear this profoundly important case.

## ARGUMENT

### I. THE PANEL MAJORITY MISAPPLIED *ROMER V. EVANS*.

The panel majority attempted to decide this case without addressing the central question it presents: whether the United States Constitution requires a State to redefine marriage to include same-sex couples. According to the panel majority, it could address Proposition 8's constitutionality on "narrow grounds" because the amendment's "unique and strictly limited effect" was only to "take away" from

committed same-sex couples "the official designation of 'marriage,' … while leaving in place all of its incidents." Op. 6. The panel majority concluded that the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), directly "governs" and "controls" this case, Op. 45, 46, because it struck down a "remarkably similar" constitutional amendment—Colorado's Amendment 2, Op. 44. This conclusion, however, rests on a patently implausible reading of *Romer*.

1. The root of the panel majority's error is its assertion that *Romer* turned on the *timing* of Colorado's Amendment 2 rather than its substance. This is how the panel majority framed the dispositive issue: "The relevant inquiry in *Romer* was not whether the *state of the law* after Amendment 2 was constitutional …. The question, instead, was whether the *change in the law* that Amendment 2 effected could be justified by some legitimate purpose." *See* Op. 50.

But nothing in the Supreme Court's decision suggests that Amendment 2 would have been valid had it only been enacted before Aspen, Boulder, and Denver passed ordinances banning discrimination on the basis of sexual orientation, or that a constitutional amendment identical to Amendment 2 would be valid in a State that had no preexisting local laws protecting gays and lesbians from discrimination. Indeed, this notion cannot be reconciled with the fact that the Supreme Court struck down Amendment 2 on its face—it was found

unconstitutional as applied to *all* gays and lesbians in Colorado, not merely to those who lived in the handful of jurisdictions that had previously enacted legal protections against discrimination on account of their sexual orientation. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).[2]

The panel majority defends its reading of *Romer* by arguing that "there was no doubt that the Fourteenth Amendment did not require antidiscrimination protections to be afforded to gays and lesbians." Op. 50. Perhaps this argument would have some force if Amendment 2 had simply repealed antidiscrimination laws not required by the Federal Constitution. But as the *Romer* Court emphasized, Amendment 2 "in explicit terms [did] *more* than repeal or rescind [such] provisions." 517 U.S. at 624 (emphasis added). Instead, it imposed a "broad and undifferentiated disability on a single named group" by prohibiting "all legislative, executive, or judicial actions at any level of state or local government designed to protect the named class [of] homosexual persons or gays and lesbians."

[2] The panel majority also cites *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), as another case in which "the Supreme Court forbade … the targeted exclusion of a group of citizens from a right or benefit that they had enjoyed on equal terms with all other citizens." Op. 51. But as in *Romer*, there is no indication in *Moreno* that the timing mattered. To the contrary, it was the "*challenged statutory classification* (households of related persons versus households containing one or more unrelated persons)" in the Food Stamp Act that the Court found irrational, *Moreno*, 413 U.S. at 534 (emphasis added), not that the Act previously treated the two classes equally before withdrawing benefits from one.

*Id.* at 624, 632. This "[s]weeping and comprehensive" provision broadly made "a general announcement that gays and lesbians shall not have *any* particular protections from the law." *Id*. at 627, 635 (emphasis added). It "identifie[d] persons by a single trait and then denie[d] them protection across the board," *id*. at 633, thus "deem[ing] a class of persons a stranger to [the] laws," *id*. at 635. It was these "peculiar," exceptional," "unusual," and indeed "unprecedented" characteristics of Amendment 2 that concerned the Court, *id.* at 632-33, not the fact that it happened to repeal a handful of local antidiscrimination laws.

And although it is irrelevant under *Romer* that a sharply divided California Supreme Court recognized a state constitutional right to same-sex marriage for a very brief period before the adoption of Proposition 8, this short-lived state constitutional right was attributable not to the People of California, who have been steadfast in their support for traditional marriage, but to a 4-to-3 majority of the California Supreme Court, which reversed a state court of appeals decision upholding a statutory initiative measure, Proposition 22, that embraced the traditional definition of marriage in precisely the same terms as Proposition 8. Claiming to give effect to "the people's will," the California Supreme Court expressly overturned the People's will, invalidating Proposition 22, which was adopted in 2000 by 61.4 percent of those People. *See In re Marriage Cases*, 183

P.3d 384, 450 (Cal. 2008); *id*. at 459 (Baxter, J., concurring and dissenting). Certainly nothing in *Romer* so much as hints that the Federal Constitution bars the People of a State from restoring a longstanding law that has been briefly set aside by their courts.

Further, the decision in the *Marriage Cases* was issued *after* Proponents had collected the necessary signatures to qualify Proposition 8 for the ballot and did not become final until *after* Proposition 8 had been officially qualified for the ballot. *See Strauss v. Horton*, 46 Cal. 4th 364, 395, 397 (Cal. 2009); Doc. No. 8-1 at 6. Indeed, the California Supreme Court refused to stay its decision pending the People's vote. *See Strauss*, 46 Cal. 4th at 397. But for this refusal, same-sex relationships would have never been recognized as marriages in California.

Thus, in declaring a state constitutional right to same-sex marriage in the *Marriage Cases*, the California Supreme Court not only overturned the *statutory* will of the People in Proposition 22, it also refused to defer its decision until the *constitutional* will of the People could be expressed on Proposition 8 at the ballot. And *that* decision, according to the panel majority in this case, rendered the will of the People irrelevant in any event; for once the California Supreme Court redefined marriage to include same-sex couples, the People of California were powerless, as a matter of federal constitutional law, to exercise their reserved right to "amend

the[ir] Constitution through the initiative process when they conclude that a judicial interpretation or application of a preexisting constitutional provision should be changed." *Strauss*, 46 Cal. 4th at 454.

2. Putting aside the red herring of its timing, it is plain that Proposition 8 differs sharply from Amendment 2 in every material respect. *See* Dissenting Op. 17 ("There are several ways to distinguish *Romer* from the present case.").

*First*, far from being "unprecedented in our jurisprudence," *Romer*, 517 U.S. at 633, or alien to "our constitutional tradition," *id*., it is difficult to think of a law with deeper roots in California's and our Nation's history and practices than one defining marriage as the union of a man and a woman, a definition that endures in the overwhelming majority of the States, most often through constitutional provisions much like Proposition 8. *See* Prop. Br. 49 n.23. Indeed, it is the right claimed by the Plaintiffs—a federal constitutional right to marry a person of the same sex—that is "exceptional," "unusual," and "unprecedented in our jurisprudence." Nor is it in any way "unprecedented" or "unusual" that in restoring the traditional definition of marriage the People of California exercised their reserved right, as they have many times before, to "amend the[ir] Constitution through the initiative process when they conclude that a judicial interpretation or application of a preexisting constitutional provision should be changed." *Strauss*,

46 Cal. 4th at 454. To the contrary, as the California Supreme Court itself recognized, "examples of past state constitutional amendments that diminished state constitutional rights … refut[e] the description of Prop. 8 as unprecedented." *Id*. at 449.

*Second*, far from imposing a "broad and undifferentiated disability on a single named group" or denying that group "protection across the board," *Romer*, 517 U.S. at 632-33, Proposition 8 "simply … restore[d] the traditional definition of marriage as referring to the union between a man and a woman," *Strauss*, 46 Cal. 4th at 409; *see also*, *e.g.*, Op. 6 (acknowledging Proposition 8's "strictly limited effect"). Apart from this, Proposition 8 leaves undisturbed all the numerous state laws that make California, in the words of its "largest statewide lesbian, gay, bisexual, and transgender rights advocacy organization," a State "with some of the most comprehensive civil rights protections in the nation [for LGBT individuals]." About Us – Equality California, *at* http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493. Indeed, through Proposition 8 the People of California achieved their "purpose" of "restor[ing] the traditional definition of marriage," *Strauss*, 46 Cal. 4th at 409, in the narrowest possible manner. Thus, as the California Supreme Court itself recognized in *Strauss*, there is simply no comparison between Proposition 8, with its narrow

purpose and effect, and a law, such as Colorado's Amendment 2, that "sweepingly … leaves [a minority] group vulnerable to public or private discrimination in *all* areas without legal recourse." *Id.* at 446.

The panel majority, however, turns Proposition 8's virtue into its vice, reasoning that its *narrowness* "makes it even more suspect" than Amendment 2. Op. 46. This assertion simply cannot be reconciled with *Romer*. A critical part of the *Romer* Court's reasoning was that Amendment 2's "*sheer breadth* is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects." *Romer*, 517 U.S. at 632 (emphasis added). Proposition 8, by contrast, achieves its "purpose" of "restoring the traditional definition of marriage" in a manner calculated to have the *least possible* impact on the wide array of legal rights that California accords to gays and lesbians through domestic partnerships, antidiscrimination provisions, and other laws. Particularly in this context where a "much more sweeping" option was proposed and available, *see Strauss*, 46 Cal. 4th at 409 n.8, Proposition 8 thus evinces Californians' solicitude for *both* traditional marriage and the rights of committed same-sex couples, not an irrational desire to harm gays and lesbians.

The panel majority's attempt to distinguish *Citizens for Equal Protection v. Bruning* fails for similar reasons. In *Bruning*, the Eighth Circuit rejected a *Romer*-

based challenge to an amendment to the Nebraska Constitution that not only defines marriage as the union of a man and a woman but also forbids recognition of "the uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship." 455 F.3d at 863. The Eighth Circuit specifically "reject[ed] the district court's conclusion that the Colorado enactment at issue in *Romer* is indistinguishable" from Nebraska's marriage amendment and held that the latter's "focus is not so broad as to render Nebraska's reasons for its enactment 'inexplicable by anything but animus' towards same-sex couples." *Id*. at 868.[3] Remarkably, the panel majority implies that Proposition 8 rests on weaker constitutional footing than the Nebraska law because Proposition 8 "left intact California's laws concerning family formation and childrearing by same-sex couples," Op. 57 n.20, an ironic conclusion given *Romer*'s unmistakable focus on Amendment 2's inexplicable *breadth*. *See also infra* Part IV.C.

*Third*, Proposition 8 does not single out a "named class" for disparate treatment. *See Romer*, 517 U.S. at 624. Rather, it simply preserves the definition of marriage that has prevailed throughout human history. Proposition 8's impact

[3] Other decisions have likewise rejected *Romer*-based challenges to laws limiting marriage to opposite-sex couples. *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 680 (Tex. Ct. App. 2010); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *Andersen v. King County*, 138 P.3d 963, 980-81 (Wash. 2006) (plurality) (applying state constitution); *cf. Conaway v. Deane*, 932 A.2d 571, 625-26 (Md. 2007) (same).

on same-sex couples, in other words, is "essentially an unavoidable consequence of a … policy that has in itself always been deemed to be legitimate," *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979), not evidence of animus toward gays and lesbians.

3. To its credit, the panel was unwilling to join the Plaintiffs and the district court in defaming the People of California by attributing their support for traditional marriage to "a bare … desire to harm a politically unpopular group." *Romer*, 517 U.S. at 634. Indeed, the panel majority disclaimed any "suggest[ion] that Proposition 8 is the result of ill will on the part of the voters of California." Op. 72. As Justice O'Connor emphasized, legitimate and nondiscriminatory "reasons exist to promote the institution of marriage" as the union of a man and a woman. *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in judgment). As we discuss more fully below, the animating purpose of marriage is bound up in the uniquely procreative nature of opposite-sex relationships, and it can be and is supported by countless people of good faith who harbor no ill will toward gays and lesbians and their relationships. *See, e.g.*, BARACK OBAMA, THE AUDACITY OF HOPE 222 (2006) ("I believe that American society can choose to carve out a special place for the union of a man and a woman as the unit of child rearing most common to every culture."); *see also* Op. 6 (recognizing that

redefining marriage to include same-sex couples is "an issue over which people of good will may disagree").

In short, the panel majority's attempt to align this case with *Romer* fails. The fatal flaw in Amendment 2 was its inexplicable breadth, its exceptionally harsh and unprecedented character, and the resulting "inevitable inference" of "animosity" that it raised, *Romer*, 517 U.S. at 634, not the fact that it worked a change in preexisting law.

## II. THE PANEL MAJORITY'S DECISION CONFLICTS WITH *CRAWFORD V. BOARD OF EDUCATION*.

In *Crawford v. Board of Education*, the Supreme Court emphatically "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." 458 U.S. at 535. Not only would such a rule be "destructive of a State's democratic processes and of its ability to experiment," *id*., it would affirmatively "discourage[] the States from providing greater protection" to their citizens than the Fourteenth Amendment requires, *id*. at 539. In particular, the Court refused to "interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Id*. at 540.

*Crawford* essentially was this case: it involved an equal protection challenge to a California constitutional amendment (Proposition 1) that superseded in part a decision of the California Supreme Court interpreting the State Constitution to go beyond the mandates of the Federal Constitution (approving mandatory busing to remedy *de facto* segregation). *See Strauss*, 46 Cal. 4th at 448 (identifying Proposition 1 as a precedent for Proposition 8). Here, as there, "having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." *Crawford*, 458 U.S. at 542. Thus, the fact that the voters promptly withdrew a benefit that had been briefly extended to same-sex couples by a sharply divided California court is utterly irrelevant to Proposition 8's validity under the Federal Constitution.

The panel majority's principal answer to *Crawford* is its insistence that *Romer* controls when a right is "withdrawn" rather than simply not extended in the first instance. Op. 54. But as we have shown, *Romer* lends no support to this argument. And *Crawford* refutes it. The relevant inquiry is whether the repealed law was "required by the Federal Constitution in the first place," 458 U.S. at 538, which is precisely the question the panel majority here labored to avoid.

The panel majority's other attempts to distinguish *Crawford* fare no better. First, the *Crawford* Court's findings that Proposition 1 did not draw a racial classification and was not motivated by race, *see* Op. 53, meant only that it was not subject to strict scrutiny, *see Crawford*, 458 U.S. at 536. These findings are of little moment here, where the panel majority purported to apply rational-basis review.

Second, the panel majority emphasizes that even after Proposition 1, California's Constitution still provided a "more robust 'right to desegregation than exists under the Federal Constitution,' " Op. 53 (quoting *Crawford*, 458 U.S. at 542), and that Proposition 1 simply removed one means of remedying a violation of that right. As an initial matter, this hardly distinguishes *Crawford* from this case. Proposition 8, like Proposition 1, was "*less than* a 'repeal' " of any provision of the California Constitution, *Crawford*, 458 U.S. at 541 (emphasis added), for the California Constitution continues to guarantee a broad range of rights to gays and lesbians, including the right "to establish … an officially recognized and protected family … entitled to the same respect and dignity accorded a union traditionally designated as marriage," *Strauss*, 46 Cal. 4th at 411. More fundamentally, the lesson of *Crawford* is that a state is no less free to withdraw state constitutional rights that exceed federal constitutional requirements than it was to extend them in

the first place. Whether a state withdraws such an extra-constitutional right entirely or only partially is for it to decide. *See Crawford*, 458 U.S. at 542 (California "could have conformed its law to the Federal Constitution in every respect" rather than "pull[ing] back only in part.").

Third, the panel majority notes that Colorado relied on *Crawford* while defending Amendment 2 before the Supreme Court. *See* Op. 54 & n.18. This is true, but it is hardly surprising that the *Romer* Court ignored *Crawford*. For as explained above, Amendment 2 did "*more than* repeal or rescind" antidiscrimination laws that went beyond the requirements of the Federal Constitution. *Romer*, 517 U.S. at 624 (emphasis added). And it is this "more" that clearly distinguished Amendment 2 from Proposition 1, and distinguishes it from Proposition 8. *Crawford*, not *Romer*, is the controlling precedent here.

## III. THE PANEL MAJORITY'S DECISION CONFLICTS WITH BINDING PRECEDENT OF THE SUPREME COURT AND THIS COURT AND WITH THE UNIFORM CONCLUSION OF EVERY OTHER APPELLATE COURT TO ADDRESS A FEDERAL CONSTITUTIONAL CHALLENGE TO THE TRADITIONAL DEFINITION OF MARRIAGE.

The panel majority's ruling that Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment also contravenes binding Supreme Court precedent holding that the traditional definition of marriage *does not* violate that Amendment. In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court

unanimously dismissed, "for want of substantial federal question," an appeal presenting the same question decided by the panel: whether the Equal Protection Clause of the Fourteenth Amendment requires a State to recognize same-sex relationships as marriages. *See* Jurisdictional Statement at 3, *Baker*, No. 71-1027 (Oct. Term 1972) (ER 1606). The Supreme Court's dismissal in *Baker* was a decision on the merits that "extends beyond the facts of the particular case to all similar cases," *Wright v. Lane County Dist. Court*, 647 F.2d 940, 941 (9th Cir. 1981), and constitutes "controlling precedent, unless and until re-examined by [the Supreme] Court," *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *see* Prop. Br. 44-45; Prop. Reply Br. 15-19.

Lower courts are thus foreclosed by *Baker* from holding that the traditional definition of marriage violates the Equal Protection Clause or that it lacks a rational relationship to a legitimate governmental purpose. The panel majority nevertheless dismisses *Baker* in a footnote as "not pertinent here" because this case "is squarely controlled by *Romer*." Op. 47 n.14. As we have shown, however, the panel majority's reliance on *Romer* is misplaced, and it matters not at all under the Fourteenth Amendment whether a State refuses to extend, or withdraws, a state law right that goes beyond federal constitutional requirements. And even apart from the panel majority's misapplication of *Romer*, its decision that there was no

rational basis for Proposition 8 cannot be squared with *Baker*. *Baker* necessarily holds that Minnesota had a rational basis for limiting marriage to opposite-sex couples, and it necessarily follows that the same rational basis or bases support California's restoration of traditional marriage. In short, this case turns entirely on whether the Fourteenth Amendment permits a State to define marriage as the union of a man and a woman. *Baker* squarely controls this question and mandates an affirmative answer.

This Court's decision in *Adams v. Howerton*, 673 F.3d 1036 (9th Cir. 1982), also mandates an affirmative answer to this question. *See* Prop. Br. 46. *Adams*, however, is not cited even once in the panel majority's opinion.

Finally, the panel majority's decision also conflicts with the decisions of every other state or federal appellate court to address the validity of the traditional opposite-sex definition of marriage under the Federal Constitution. *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. Ct. App. 2010); *Bruning*, 455 F.3d 859; *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

## IV. THE PANEL MAJORITY'S HOLDING THAT PROPOSITION 8 DOES NOT REASONABLY RELATE TO THE STATE'S INTEREST IN RESPONSIBLE

**PROCREATION AND CHILDREARING CONFLICTS WITH THE DECISIONS OF OTHER COURTS AND CONTRAVENES BINDING PRINCIPLES OF RATIONAL-BASIS REVIEW.**

The panel majority's holding that Proposition 8 does not bear even a rational relationship with the State's indisputable interest in responsible procreation and childrearing conflicts directly with a decision of the Eighth Circuit and a host of other decisions. The panel majority's reasoning also contravenes numerous Supreme Court decisions defining and applying rational-basis review.

### A. The Traditional Definition of Marriage Reflected in Proposition 8 Bears a Rational Relationship to Society's Vital Interest in Responsible Procreation and Childrearing.

1. As Proponents have demonstrated, *see* Prop. Br. 51-60, an overriding purpose of marriage in virtually every society is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.

Not only has this understanding of marriage and its animating purpose been uniformly recognized by leading lawyers, philosophers, historians, and social scientists throughout the ages, *see id*. 55-57, it has also prevailed in California

throughout its history, just as it has everywhere else, *see id*. 57-59, 64 n.31. In the words of the California Supreme Court, "the institution of marriage" serves "the public interest" because it "channels biological drives that might otherwise become socially destructive" and "it ensures the care and education of children in a stable environment." *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952).

Indeed, prior to the recent movement to redefine marriage to include same-sex relationships, it was commonly understood, without a hint of controversy, that the institution of marriage owed its very existence to society's vital interest in responsible procreation and childrearing. That is why, no doubt, the Supreme Court has repeatedly recognized marriage as "fundamental to our very existence and survival." *E.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967). And certainly no other purpose can plausibly explain why marriage even exists at all—let alone why it has existed in every civilized society throughout history. Indeed, if "human beings reproduced asexually and … human offspring were self-sufficient[,] … would *any* culture have developed an institution *anything like* what we know as marriage? It seems clear that the answer is no." Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?* 34 HARV. J. L. & PUB. POL'Y 245, 286-87 (Winter 2011); BERTRAND RUSSELL, MARRIAGE & MORALS 77 (Liveright Paperbound ed., 1970) ("But for children, there would be no need of any institution

concerned with sex."); Committee on the Judiciary Report on the Defense of Marriage Act, H.R. Rep. No. 104-664, at 14 (1996) ("Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship.").

2. Because only sexual relationships between men and women can produce children, such relationships have the potential to further—or harm—society's interest in responsible procreation and childrearing in a way, and to an extent, that other types of relationships do not. By providing recognition and encouragement to committed opposite-sex relationships, the traditional definition of marriage seeks to channel potentially procreative conduct into relationships where that conduct is likely to further, rather than harm, this vital interest. The traditional definition of marriage also preserves the abiding link between the institution and its animating purpose, a purpose that still serves vital interests that are uniquely implicated by male-female relationships. Not surprisingly, "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.' " *Bruning*, 455 F.3d at 867-68; *see also Wilson v. Ake*, 354 F.

Supp. 2d 1298, 1308-09 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145-47 (Bankr. W.D. Wash. 2004); *Adams*, 486 F. Supp. at 1124-25; *Baker*, 191 N.W.2d at 186-87; *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 677-78; *Standhardt*, 77 P.3d at 461-64; *Singer*, 522 P.2d at 1195, 1197. This is true not only of *every* appellate court (except the panel majority here) to consider this issue under the Federal Constitution, but the majority of state courts interpreting their own constitutions as well. *See Conaway v. Deane*, 932 A.2d 571, 630-34 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 982-85 (Wash. 2006) (plurality); *Morrison v. Sadler*, 821 N.E.2d 15, 23-31 (Ind. Ct. App. 2005); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 461-64 (Ariz. Ct. App. 2003).

3. In breaking with this large and consistent body of appellate authority, the panel majority reasoned that the traditional definition of marriage as embodied in Proposition 8 cannot survive rational basis review absent evidence that "opposite-sex couples were more likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of 'marriage.' " Op. 60. As Proponents demonstrated, however, there plainly *is* a rational basis for concern that officially embracing an understanding of marriage as nothing more than a loving, committed relationship between consenting adults, severed entirely

from its traditional procreative purposes, would necessarily entail a significant risk of negative consequences over time to the institution of marriage and the interests it has always served. *See* Prop. Br. 93-104; *infra* Part V.

More important still, the panel majority's reasoning clearly contravenes well settled principles of rational-basis review. For Supreme Court precedent makes clear both that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not," *Johnson v. Robison*, 415 U.S. 361, 383 (1974), and, conversely, that the government may make special provision for a group if its activities "threaten legitimate interests … in a way that other [group's activities] would not," *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Thus, the relevant inquiry is not, as the panel majority would in effect have it, whether restoring the traditional definition of marriage was *necessary* to avoid harm to that institution. Rather, the question is whether recognizing opposite-sex relationships as marriages furthers interests that would not be furthered, or would not be furthered to the same degree, by recognizing same-sex relationships as marriages. *See, e.g., Andersen*, 138 P.3d at 984; *Morrison*, 821 N.E.2d at 23, 29; *Standhardt*, 77 P.3d at 463.[4]

[4] Even where intermediate scrutiny applies, the Supreme Court has rejected the argument that a classification may be upheld only if it is *necessary* to achieve the government's purpose. *See Michael M. v. Superior Court*, 450 U.S. 464, 473

The answer to that question is clear. As a general matter, sexual relationships between men and women, and only such relationships, can produce children—often as the unintended result of even casual sexual behavior. And as courts have repeatedly explained, it is the procreative capacity of heterosexual relationships—and the very real threat it can pose to the interests of society and to the welfare of the children conceived unintentionally—that the institution of marriage has always sought to address. *See, e.g.*, *Bruning*, 455 F.3d at 867; *Hernandez*, 855 N.E.2d at 7; *Morrison*, 821 N.E.2d at 24-26. Sexual relationships between individuals of the same sex, by contrast, cannot naturally produce offspring. Accordingly, such relationships neither advance nor threaten society's interest in responsible procreation in the same manner, or to the same degree, that sexual relationships between men and women do.

As even Plaintiffs' lead counsel was forced to acknowledge below, same-sex couples "don't present a threat of irresponsible procreation" but "heterosexual couples who practice sexual behavior outside their marriage are a big threat to irresponsible procreation." ER 355; *see also* ER 1785 (Plaintiffs'

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(1981) (plurality). Certainly rational-basis review requires no such showing. *See Vance v. Bradley*, 440 U.S. 93, 102 n.20 (1979) (holding it "irrelevant … that other alternatives might achieve approximately the same results"). The inquiry posed by the panel majority thus confounds rational-basis review with the strictest judicial scrutiny.

acknowledgement that " 'responsible procreation' may provide a rational basis for the State's recognition of marriages by individuals of the opposite-sex"). Under *Johnson* and *Cleburne*, that is the end of the matter. Given these biological realities, as well as marriage's central concern with responsible procreation and childrearing, the "commonsense distinction," *Heller v. Doe*, 509 U.S. 312, 326 (1995), that our law has always drawn between same-sex couples (who are categorically incapable of natural procreation, on the one hand) and opposite-sex couples (who are in general capable of procreation) "is neither surprising nor troublesome from a constitutional perspective." *Nguyen v. INS*, 533 U.S. 53, 63 (2001); *see also id*. at 73 ("To fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it.").

### B. That Proposition 8 *Restored* the Traditional Definition of Marriage Does Not Render It Irrational.

In rejecting this analysis, the panel majority claimed that "*Johnson* concerns decisions not to *add* to a legislative scheme a group that is unnecessary to the purposes of that scheme" but has no application to decisions to "*subtract*[] a disfavored group from a scheme of which it already was a part." Op. 59.[5]

[5] The panel majority also argues that *Johnson* "concerned only a specific form of government assistance" and "did not involve a dignitary benefit … such as

According to the panel majority, then, while society's interest in responsible procreation and childrearing might justify "a failure to afford the use of the designation of 'marriage' to same-sex couples in the first place[,] it is irrelevant to a measure *withdrawing* from them, and only them, use of that designation." Op. 61.

Again, this argument finds no support in *Romer*. Op. 60. As demonstrated above, that decision turned not on the *timing* of Colorado's Amendment 2 but on its *substance*. Further, as *Romer* emphasized, equal protection analysis focuses on "the *classification* adopted," requiring only "that the *classification* bear a rational relationship to an independent and legitimate legislative end." 517 U.S. at 632-33 (emphasis added). Obviously the rationality of a *classification* does not turn on the manner in which it was adopted—if it was reasonable for California to draw a line between opposite-sex couples and other types of relationships (including same-sex relationships) *before* the California Supreme Court's ruling in the *Marriage Cases*,

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an official and meaningful state designation that established the societal status of members of the group." Op. 59 n.21. *Johnson* upheld Congress's decision to provide veterans' educational benefits to draftees who served on active duty in the armed forces, but not to conscientious objectors who completed alternative civilian service. *See* 415 U.S. at 362. Contrary to the panel majority's asserted distinction, there can be little doubt that the rationale of *Johnson* likewise permits Congress to afford the "official and meaningful state designation" of "veteran" to those who completed active duty service in the armed forces, but not to conscientious objectors who completed alternative civilian service. *See also infra* Part IV.C.

it is also reasonable for California to draw the same line *after* that short-lived decision. After all, as that court itself recognized, "the purpose of [Proposition 8] was simply to restore the traditional definition of marriage as referring to a union between a man and a woman." *Strauss*, 464 Cal. 4th at 409; *see also* Op. 70 (acknowledging that "[t]his purpose is one that Proposition 8 actually did accomplish"). And if it is reasonable for Congress and 43 other States to distinguish between opposite-sex couples and other types of relationships for purposes of marriage, it is rational for California to do so as well.[6]

Indeed, *Johnson* itself represents only one example of the broader principle, repeatedly affirmed by the Supreme Court, that "[a] statutory classification fails

[6] The panel majority also suggests that "[t]he action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is." Op. 42. But the adoption of Proposition 8 reflected no more a "deliberate purpose" to define marriage as the union of a man and a woman than did its identically worded predecessor, Proposition 22, or the recently adopted constitutional amendments in 28 other States likewise defining marriage as the union of a man and a woman, *see* Prop. Br. 49 n.23, or the similar statutes adopted by Congress and 10 other States, *see* 1 U.S.C. § 7; Prop. Br. 50 n.24 (Delaware, Illinois, Indiana, Maryland, Maine, Minnesota, North Carolina, Pennsylvania, West Virginia, and Wyoming), or the statutes providing an alternative relationship status for same-sex couples in two other states that maintain the traditional definition of marriage, *see* N.J. STAT. § 26:8A; R.I. GEN. LAWS § 15-3-1, or the amendment to Hawaii's constitution ensuring the legislature's power to reserve marriage to opposite-sex couples (adopted after a decision of the Hawaii Supreme Court calling that power into question) together with Hawaii's law providing an alternative relationship status for same-sex couples, *see* HAW. CONST. art. I, § 23; HAW. REV. STAT. § 572B.

rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller*, 509 U.S. at 324 (quotation marks omitted). Thus, it is well settled that the law may make special provision for a group if its activities "threaten legitimate interests … in a way that other [group's activities] would not," *Cleburne*, 473 U.S. at 448, that a law may "dr[aw] a line around those groups ... thought most generally pertinent to its objective," *Vance v. Bradley*, 440 U.S. 93, 109 (1979), that a classification will be upheld if "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups," *Johnson*, 415 U.S. at 378, and, more generally, that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same," *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quotation marks and citations omitted). In short, as the Supreme Court aptly explained in *Board of Trustees v. Garrett*, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." 531 U.S. at 366-67 (quotation marks omitted).

These precedents make clear that because sexual relationships between individuals of the same sex neither advance nor threaten society's interest in responsible procreation and childrearing in the same manner, or to the same

degree, that sexual relationships between men and women do, the line drawn by Proposition 8 between opposite-sex couples and other types of relationships, including same-sex couples, bears a rational relationship to this interest. Indeed, by definition, a line drawn between those who most clearly implicate a government interest and those who do not cannot be said to "rest[] on grounds wholly irrelevant to the achievement of the State's objective." *Heller*, 509 U.S. at 324 (quotation marks omitted). Accordingly, Proposition 8 readily satisfies rational-basis scrutiny. *See id*. In holding otherwise, the panel majority ignored the clear guidance of binding Supreme Court precedent and subjected Proposition 8 to a form of judicial scrutiny that bears no semblance to rational-basis review.

### C. That Proposition 8 Did Not Eliminate Domestic Partnerships Does Not Render It Irrational.

The panel majority also reasons that Proposition 8 lacks any rational relationship to society's interest in responsible procreation and childrearing because it only limits the use of "the designation of 'marriage,' while leaving in place all the substantive rights and responsibilities of same-sex partners." Op. 69-70; *see also* Op. 76-77 (arguing that Proposition 8 "changes the law far too little to have any of the effects it purportedly was intended to yield"). But even the panel majority cannot accept the necessary corollary of this argument, for it elsewhere protests that it "in no way mean[s] to suggest that Proposition 8 would be

constitutional if only it had gone further—for example, by also repealing same-sex couples' equal parental rights or their rights to share community property or enjoy hospital visitation visits." Op. 62. Nor is the majority's diffidence on this point surprising: it is simply inconceivable that California's extraordinary solicitude for gays and lesbians and their families uniquely dooms its ability to retain the traditional definition of marriage, or that Proposition 8 stands on *weaker* constitutional footing than would an amendment that restored the traditional definition of marriage *and* repealed California's generous domestic partnership laws.

1. As discussed above, the central—indeed animating—purpose of marriage, always and everywhere, has been to increase the likelihood that children will be born to and raised by both the mothers and fathers who brought them into the world by seeking to channel potentially procreative conduct into committed, lasting relationships. By reserving the name "marriage" to committed opposite-sex couples, Proposition 8 provides special promotion, encouragement, and support to those relationships most likely to further society's vital interest in responsible procreation and childrearing.

The panel majority's assertion that reserving the designation "marriage," as opposed to the more tangible benefits traditionally associated with this institution,

to opposite-sex couples could not even plausibly "encourage heterosexual couples to enter into matrimony" or "bolster the stability of families headed by one man and one woman," Op. 63, cannot be reconciled with its repeated "emphasi[s]," elsewhere in its opinion, of "the extraordinary significance of the official designation of 'marriage,' " Op. 37. Indeed, the majority elsewhere insists, correctly, that "[t]he official, cherished status of 'marriage' is distinct from the incidents of marriage," and these incidents, "standing alone," do not "convey the same governmental and societal recognition as does the designation of 'marriage.' " Op. 39. The panel majority simply cannot have it both ways.

Further, by retaining the traditional definition of marriage, California preserves the traditional social meaning and public understanding of that institution, as well as the abiding link between marriage and its vital procreative purposes. It is simply impossible to "escape the reality that the shared social meaning of marriage … has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin." *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006). Indeed, Plaintiffs' own expert conceded at trial that redefining marriage by law would "definitely ha[ve] an impact on the social meaning of marriage," and

that changing the public meaning of marriage would "unquestionably [have] real world consequences." ER 229-31*; see also* Prop. Br. 94-100; *infra* Part V.[7]

2. That the traditional definition of marriage confers a symbolic benefit on committed opposite-sex couples does not "dishonor" gays and lesbians as a class or express official "disapproval of them and their relationships." Op. 77.[8] It is simply not true that when the government provides special recognition to one class of individuals, it demeans others *who are not similarly situated* with respect to the central purpose of the recognition.

Again, societies throughout human history have uniformly defined marriage as an opposite-sex relationship not because individuals in such relationships are virtuous or morally praiseworthy, but because of the unique potential such relationships have either to harm, or to further, society's vital interest in responsible procreation and childrearing. That is why the right to marry has never been conditioned on an inquiry into the virtues or vices of individuals seeking to

[7] The panel majority's claim that "Proposition 8 in no way alters the state laws that govern childrearing and procreation" and "makes no change with respect to the laws regarding family structure," Op. 61, thus betrays a manifest misunderstanding of the institution of marriage, which in California, as everywhere else, is profoundly concerned with childrearing, procreation, and family structure. By restoring the traditional definition of marriage, the People of California reaffirmed their most fundamental law regarding these matters.

[8] Even then-Attorney General Brown, who embraced nearly every other allegation made by Plaintiffs, denied that "Prop. 8 was driven by moral disapproval of gay and lesbian individuals." ER 1054.

marry. Society cannot stop the immoral or irresponsible from engaging in potentially procreative sexual relationships, but it presumes that even those individuals are more likely to assume the shared responsibility of caring for any children that result from their sexual activity if they are married than if they are not.

Conversely, that same-sex relationships are not recognized as marriages does not reflect a public judgment that individuals in such relationships are "inferior" or "of lesser worth as a class," Op. 73, but simply the fact that such relationships do not implicate society's interest in responsible procreation in the same way that opposite-sex relationships do. It is simply not stigmatic for the law to treat different things differently, *see, e.g., Johnson*, 415 U.S. at 383, or to call different things by different names.

3. The panel majority asserts that "[i]n order to be rationally related to the purpose of funneling more childrearing into families led by two biological parents, Proposition 8 would have had to modify … in some way" California's laws granting same-sex couples the same rights as opposite-sex couples to form families and raise children. Op. 57. But the animating purpose of marriage is not to prevent gays and lesbians from forming families and raising children. Rather, it is to steer potentially procreative conduct into stable and enduring family units in

order to increase the likelihood that children will be raised by the mothers and fathers who brought them into the world.

Despite the widespread availability of legal contraception, sexual relationships between men and women commonly result in unintended pregnancies. And the question in nearly every case of unintended pregnancy is *not* whether the child will be raised by two opposite-sex parents or by two same-sex parents, but rather whether the child will be raised by both its mother and father or by its mother alone, often relying on the assistance of the State. *See, e.g.*, William J. Doherty, *et al*., *Responsible Fathering*, 60 J. MARRIAGE & FAMILY 277, 280 (1998) ("In nearly all cases, children born outside of marriage reside with their mothers."). And there simply can be no dispute that children raised in the former circumstances do better, on average, than children raised in the latter, and that the State has a direct and compelling interest in avoiding the public financial burdens and social costs too often associated with unwed motherhood. *See* Prop. Br. 78-82, 85-87. Thus, regardless of whatever provisions it may make regarding the families of gays and lesbians, it is plainly rational for the State to make special provision through the institution of marriage for the unique social risks posed by potentially procreative sexual relationships between men and women.

4. It may be true that reserving to opposite-sex couples not only the name of marriage, but also the benefits traditionally associated with that institution, would provide additional incentives for individuals to marry and thereby further advance society's interest in "steering procreation into marriage." *Bruning*, 455 F.3d at 867. But the fact that California could do more to advance this interest does not mean that what it has done does not rationally serve this interest. Nor does it mean that this interest is not genuine or legitimate. No principle of law requires the State to advance each of its legitimate interests to the hilt, or not at all. To the contrary, especially where rational-basis review is involved, it is well settled that a law "is not invalid under the Constitution because it might have gone farther than it did." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (quotation marks omitted).

Furthermore, while reserving all of the rights traditionally associated with marriage to opposite-sex couples alone might additionally further the traditional interests served by marriage, it would do so at the expense of the separate interests served by California's domestic partnership laws, which provide official recognition and protection for same-sex couples and their families. Even where heightened scrutiny applies, the Constitution "does not require that a regulatory

regime singlemindedly pursue one objective to the exclusion of all others." *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 610 (9th Cir. 2010).

Simply put, neither the fact that California could do more to promote responsible procreation and childrearing through the institution of marriage nor the fact that California has enacted other laws to help ensure the welfare of all of its children in any way suggests that the institution of marriage in California no longer plays a meaningful role in furthering the vital societal interests it has always served. After all, it would be ironic, to put it kindly, if California's generous domestic partnership laws put Proposition 8 on a weaker constitutional footing than the marriage laws of the federal government and the numerous states that provide little or no recognition or protection to same-sex couples and their families.

## V. THE PANEL MAJORITY ERRED IN HOLDING THAT PROPOSITION 8 IS NOT RATIONALLY RELATED TO ANY OTHER LEGITIMATE STATE INTERESTS.

Although one need look no farther than society's compelling interest in responsible procreation and childrearing to establish Proposition 8's constitutionality, Proposition 8 bears a rational relationship to other legitimate governmental interests as well, and the panel majority erred in rejecting them.[9]

[9] As our amici have demonstrated, these additional legitimate interests include the religious liberty and educational interests discussed by the panel

Foremost among these additional justifications is society's plainly important interest in proceeding cautiously when considering a fundamental change to the very definition of a vitally important social institution. *See* Prop. Br. 93-104; Prop. Reply Br. 67-70. Marriage has long been recognized as "the foundation of the family and of society," *Maynard v. Hill*, 125 U.S. 190, 211 (1888), and it is "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). It is plainly reasonable for the People of California to be concerned that fundamentally redefining marriage in a way that severs its inherent connection with the procreative and childrearing purposes it has always served could *harm* marriage's ability to serve those purposes. Indeed, a large and interdisciplinary group of prominent scholars recently expressed "deep[] concerns about the institutional consequences of same-sex marriage for marriage itself":

> Same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget.

WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD 18-19 (2008); *see also* Robert George, *et al.*, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y at 276 ("[I]f

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majority. *See, e.g.*, Br. Amicus Curiae of the Becket Fund for Religious Liberty 3-24; Br. Amicus Curiae for the Hausvater Project 11-16; Op. 66-69.

marriage is understood as … an essentially emotional union that has no principled connection to organic bodily union and the bearing and rearing of children … then marital norms, especially the norms of permanence, monogamy, and fidelity, will make less sense."). Even prominent supporters of redefining marriage have found it "almost inspirational" that "the public has refused to be rushed" and "has come to understand that we can take our time with this" issue. The Pew Forum on Religion & Public Life, *An Argument for Same-Sex Marriage: An Interview with Jonathan Rauch* (Apr. 24, 2008) (ER872); *see also* M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED 13 (2009) ("Change [in marriage law related to same-sex couples in the United States] is taking place in a sensible and unsurprising way, with more liberal states taking the lead and providing examples that other states might someday follow."). Surely it is not irrational for Californians to decide to continue to observe and assess the results of redefining marriage in other jurisdictions before doing so themselves.

We respectfully submit that the panel majority misunderstands how Proposition 8 relates to society's obvious interest in proceeding with great care when considering fundamental social changes. *See* Op. 64. In passing Proposition 8, California's voters used the democratic process to return the issue of the definition of marriage to the People, following the California Supreme Court's

decision in the *Marriage Cases*. After Proposition 8, California remains free to continue its experiment with domestic partnerships and to observe the effects of redefining marriage in the handful of jurisdictions that have chosen to do so. By adopting Proposition 8, however, the People of California demonstrated that they are not yet ready to take that seismic step for their own State, let alone allow unelected judges to impose that result. This is the genius of our federal system at work.

The panel majority protests that enshrining the traditional definition of marriage in the State Constitution is incompatible with the rationale of proceeding with caution. *See* Op. 64-65. But the California Supreme Court's decision in the *Marriage Cases*, of course, left the People of California with no choice *but* to amend their Constitution if they were to retain control over whether and when marriage would be redefined in their State. And at any rate, the issue remains vitally important to large numbers of Californians on both sides, and the notion that placing the traditional definition of marriage in the California Constitution forever shields that issue from democratic deliberation has no basis in fact. *See Strauss*, 46 Cal. 4th at 386 ("more than 500 amendments to the California Constitution have been adopted since ratification of California's current Constitution in 1879").

The panel majority identifies ways in which Californians purportedly could have designed Proposition 8 to more closely track this cautionary interest, such as by including a sunset provision requiring the People to "vote again" to protect the traditional definition of marriage after a certain period of time. Op. 65. Whether any such alternatives would serve Californians' cautionary interest as effectively as Proposition 8 was for the voters to decide; narrow tailoring arguments such as those urged by the panel majority plainly have no place in rational basis review. *See, e.g., Heller v. Doe*, 509 U.S. at 321; *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980).

Also irrelevant under rational basis review is the panel majority's assertion that proceeding with caution was not "the reason the voters adopted" Proposition 8 or their "avowed purpose" for doing so. Op. 66. Indeed, "it is entirely irrelevant for constitutional purposes whether" an interest in proceeding with caution "actually motivated" the People of California; what matters is that such an interest is a "*conceivable* rational basis" for Proposition 8. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (emphasis added). Among other things, this fundamental precept of rational-basis review is a concession to the reality that it simply is not possible to psychoanalyze the electorate and to determine which legitimate

justification for a ballot measure actually motivated which voter. *See, e.g.*, *SASSO v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970).

At any rate, to determine that an interest in proceeding with caution is consistent with Proposition 8's stated aims, one need only look to the argument in favor of Proposition 8 printed in the official Voter Information Guide, which articulates (a) that marriage is "an essential institution of society"; (b) that its importance is tied to promoting "the best situation for a child"; and (c) that any "redefin[ition]" of marriage should be accomplished by the People of California through "the ballot," not by "four activist judges." Official Voter Information Guide 56 (ER 1032).[10]

## VI. THE PANEL ERRED IN AFFIRMING THE DENIAL OF PROPONENTS' MOTION TO VACATE.

This appeal ought to be resolved without reaching the merits of the constitutional questions it presents, because the district court judge whose

[10] Because "there are plausible reasons"—indeed compelling reasons—for California's adherence to the traditional definition of marriage, judicial "inquiry is at an end." *Fritz*, 449 U.S. at 179. Proposition 8 simply "cannot run afoul" of the Fourteenth Amendment, *Heller*, 509 U.S. at 320, for "[i]t is a familiar practice of constitutional law that [a] court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," *Michael M.*, 450 U.S. at 472 n.7; *see also Romer*, 517 U.S. at 634-36 (drawing "inference" of animus only because Amendment 2 was not "directed to any identifiable legitimate purpose or discrete objective"). Accordingly, the panel majority's speculation regarding the subjective motivations of the voters who adopted Proposition 8 was neither necessary nor appropriate.

judgment is under review was disqualified from presiding. His judgment thus must be vacated and the case remanded to the district court for decision by a new judge. *See generally* Prop. Recusal Br.; Prop. Recusal Reply Br.

Unbeknownst to the parties, at all times while presiding over and entering judgment in this case, former Judge Walker, like Plaintiffs, was a "resident[] of California … involved in [a] long-term … relationship with [an] individual[] of the same sex." Doc. No. 1-1 at 8. By entering an injunction that he clearly understood to be effective throughout the State of California, *see* Doc. No. 709 at 9, Judge Walker effectively conferred upon himself and his partner the right to marry. It was only after he had entered judgment in this case and retired from the bench that Judge Walker revealed to the press that he has been in a relationship with another man for ten years. *See* Dan Levine, *Gay Judge Never Thought to Drop Marriage Case*, REUTERS, Apr. 6, 2011, *at* http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406. There is no public record of his ever having disclosed, to the parties, to the press, or to anyone else, whether he and his partner are interested in marrying.

These facts, together with Judge Walker's own findings about marriage and same-sex relationships, testimony by Plaintiffs' expert about the likelihood of same-sex couples in California to marry if given the opportunity, and Judge

Walker's unprecedented and irregular rulings and actions in this case demonstrate that his participation and his refusal to disclose his long-term same-sex relationship was contrary to fundamental maxims of judicial propriety. *See* Prop. Recusal Br. 25-34. At a minimum, these facts inexorably lead to the conclusion that Judge Walker's impartiality "might reasonably [have been] questioned," 28 U.S.C. § 455(a), thus making his presiding over this case unlawful.

The panel reasoned, however, that it could not "possibly be 'reasonable to presume,' for the purposes of § 455(a), 'that a judge is incapable of making an impartial decision about the constitutionality of a law, solely because, as a citizen, the judge could be affected by the proceeding.' " Op. 78. As an initial matter, the notion that to be disqualified from a proceeding under Section 455(a) a judge must be "incapable of making an impartial decision" is patently erroneous. Again, the plain text of Section 455(a) makes clear that a judge is disqualified from any proceeding in which his "impartiality *might reasonably be questioned.*" *See also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860, 865 (1988). Indeed, "[t]he *very purpose* of § 455(a) is to promote confidence in the judiciary by avoiding *even the appearance* of impartiality whenever possible." *Id.* at 865 (emphasis added).

The panel's reasoning suffers from an even more fundamental flaw, however, for it contravenes the ancient principle that "[n]o man is allowed to be a judge in his own cause," THE FEDERALIST NO. 10, at 74 (Clinton Rossiter ed., 2003). Thus, far from being irrelevant, the potential impact of the proceeding on the personal interests of the judge as a citizen is the *sine qua non* of the disqualification inquiry.[11] *See* Prop. Recusal Br. 20-25, 36-37, 39-40; Prop. Recusal Reply Br. 6-8.

## CONCLUSION

For these reasons, the Court should rehear this case en banc and reverse the district court's decision.

[11] The cases cited by the panel merely hold that a "remote, contingent, and speculative" connection between a judge's personal interests and a proceeding does not merit disqualification, not that a judge can sit on a case in which the judge has a direct personal interest. *See United States v. Alabama*, 828 F.2d 1532, 1641 (11th Cir. 1987); *In re City of Houston*, 745 F.2d 925, 931 (5th Cir. 1984). Indeed, the district court judges in both *Alabama* and *Houston* honored their obligation to disclose personal facts relevant to their potential personal interest in the proceedings, facts that demonstrated they had no such interest. *See United States v. Alabama*, 571 F. Supp. 958, 962 (N.D. Ala. 1983); *United States v. Alabama*, 574 F. Supp. 762, 764 n.1 (N.D. Ala. 1983); *Leroy v. City of Houston*, 592 F. Supp. 415, 418 & n.5 (S.D. Tex. 1984); *see also* Prop. Recusal Br. 40-43.

Dated: February 21, 2012

Respectfully submitted,

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