12-144

No. _____

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, A Project of California Renewal ("ProtectMarriage.com") intervened as defendants in the district court and were the appellants in the court below.

Respondents, plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo and intervening plaintiff City and County of San Francisco, were the appellees below.

Official-capacity defendants Edmund G. Brown, Jr., as Governor of California, Kamala D. Harris, as Attorney General of California, Ron Chapman, as Director of the California Department of Public Health & State Registrar of Vital Statistics, Linette Scott, as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, Patrick O'Connell, as Clerk-Recorder for the County of Alameda, and Dean C. Logan, as Registrar-Recorder/County Clerk for the County of Los Angeles, and intervening defendant Hak-Shing William Tam were not parties to the appeal below.[1]

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[1] The Attorney General of California, although not a party to the appeal, was on the service list and filed documents in the court below and filed an amicus brief addressing the question certified to the California Supreme Court. *See* Dkt. Entries 8, 311, 352. The court below did not, however, certify to the Attorney General of California that the constitutionality of a law of the State of California was drawn into question. *See* 28 U.S.C. § 2403(b).

CORPORATE DISCLOSURE STATEMENT

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock. Petitioner ProtectMarriage.com is a primarily formed ballot committee under California law. *See* CAL. GOV. CODE §§ 82013 & 82047.5. Its "sponsor" under California law is California Renewal, a California nonprofit corporation, recognized as a public welfare organization under 26 U.S.C. § 501(c)(4).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 671 F.3d 1052. App. 1a. The Ninth Circuit's order denying rehearing en banc is reported at 681 F.3d 1065. App. 441a. The district court's findings of fact and conclusions of law are reported at 704 F. Supp.2d 921. App. 137a. The Ninth Circuit's certification order is reported at 628 F.3d 1191. App. 413a. The California Supreme Court's answer is reported at 265 P.3d 1002, 52 Cal.4th 1116. App. 318a.

JURISDICTION

The judgment below was entered on February 7, 2012. The Ninth Circuit denied a timely petition for rehearing en banc on June 5, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[2]

[2] In the event that 28 U.S.C. § 2403(b) may apply, this petition has been served on the Attorney General of California.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Proposition 8, now codified as Article I, Section 7.5 of the California Constitution, provides: "Only marriage between a man and a woman is valid or recognized in California."

INTRODUCTION

The profoundly important question whether the ancient and vital institution of marriage should be fundamentally redefined to include same-sex couples "is currently a matter of great debate in our nation," as the court below acknowledged, "and [is] an issue over which people of good will may disagree." App. 17a. Six States and the District of Columbia now recognize same-sex marriages, and two other States have enacted legislation that would recognize same-sex marriages but will not take effect unless approved by the People in referenda this fall. Many other States, on the other hand, have chosen instead to retain, at least for now, the traditional definition of marriage as the union of a man and a woman. As our Nation's founders envisioned, then, some States have chosen to "serve as a laboratory; and try [this] novel social . . . experiment[ ] without risk to the rest of the country," while others have chosen to continue evaluating the results of the experiment before making

such a profound change to this age-old, civilizing social institution. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Until the decision below, every state and federal appellate court to consider a federal constitutional challenge to state laws defining marriage – including this Court, *see Baker v. Nelson*, 409 U.S. 810 (1972) – had upheld the traditional definition, thus permitting the "earnest and profound debate about the morality, legality, and practicality of [redefining marriage] . . . to continue, as it should in a democratic society." *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

In this case, however, a divided panel of the Ninth Circuit held that the Equal Protection Clause of the Fourteenth Amendment bars the People of the State of California from adopting a constitutional amendment – Proposition 8 – that reinstated the traditional definition of marriage a few months after the California Supreme Court, in a four-to-three decision, had ordered that marriage be redefined to include same-sex couples. Proposition 8 was doomed, the panel majority reasoned, because of its "relative timing," App. 56a, and because it "change[d] the law far too little to achieve any of the effects it purportedly was intended to yield," App. 91a. Having been adopted *after* the California Supreme Court's decision in *In re Marriage Cases* interpreting 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 same-sex couples "the official designation of 'marriage,'" while "leaving in

place all of its incidents" under the State's domestic partnership laws. App. 17a.

The panel majority held that Proposition 8's constitutionality is directly controlled by *Romer v. Evans*, 517 U.S. 620 (1996), even though that case invalidated a Colorado constitutional amendment that, far from having a "unique and strictly limited effect," imposed an "unprecedented" and "comprehensive" ban on all "legislative, executive or judicial action at any level of state or local government designed to protect the named class [of] homosexual persons or gays and lesbians," *id.* at 624. Further, the *timing* of the Colorado amendment's adoption played absolutely no role in the Court's analysis. True, the Colorado amendment operated to repeal a handful of municipal ordinances extending certain antidiscrimination protections to gays and lesbians, but 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 misreading of *Romer* would bring the case squarely into conflict with *Crawford v. Board of Education*, 458 U.S. 527 (1982), which expressly "*reject[ed]* the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede," *id.* at 535 (emphasis added). As Judge O'Scannlain recognized in his dissent from denial of rehearing en banc, the

panel majority's ruling rests on a "gross misapplication of *Romer v. Evans* . . . that would be unrecognizable to the Justices who joined it, to those who dissented from it, and to the Judges from sister circuits who have since interpreted it." App. 445a.

The Ninth Circuit's error, if left uncorrected, will have widespread and immediate negative consequences. As the policy debate progresses in other States (especially, though not exclusively, those in the Ninth Circuit), it will necessarily be skewed by the suggestion that any experiment with the definition of marriage is irrevocable. Similarly, the Ninth Circuit's determination that California's progressive domestic partnership laws uniquely undermine the State's ability to maintain the traditional definition of marriage will have the perverse effect of creating strong disincentives for States to experiment with civil union or domestic partnership laws. Indeed, even on its own terms, the ruling calls into immediate question the constitutionality of the traditional definition of marriage in other States in the Ninth Circuit that have already provided recognition and benefits to same-sex couples, such as Hawaii, Nevada, Oregon, and Washington. If allowed to stand, the decision below thus will as a practical matter "pretermit other responsible solutions" to the emerging and novel social issues raised by same-sex relationships, *District Attorney's Office v. Osborne*, 557 U.S. 52, 73 (2009), and will force States to make an all-or-nothing choice: either to retain the traditional definition of marriage without any recognition of same-sex relationships or to radically

redefine – with no possibility of reconsideration – an age-old institution that continues to play a vital role in our society today.

Even more problematic is the panel majority's conclusion that Proposition 8 serves no conceivable legitimate state interest and that the "sole purpose" of the initiative's supporters was to proclaim publicly the "lesser worth" of gays and lesbians as a class and to "dishonor a disfavored group." App. 88a, 91a. This conclusion conflicts with a host of state and federal appellate decisions upholding the traditional definition of marriage as rationally related to society's vital interest in channeling the unique procreative potential of opposite-sex relationships into enduring, stable unions for the sake of responsibly producing and raising the next generation. Indeed, the Ninth Circuit's sweeping dismissal of the important societal interests served by the traditional definition of marriage is tantamount to a judicial death sentence for traditional marriage laws throughout the Circuit.

In any event, the Ninth Circuit's charge is simply untrue, and leveling it against the People of California is especially unfair, for they have enacted into law some of the Nation's most sweeping and progressive protections of gays and lesbians. Californians of all races, creeds, and walks of life have opted to preserve the traditional definition of marriage not because they seek to dishonor gays and lesbians as a class, but because they believe that the traditional definition of marriage continues to meaningfully serve society's legitimate interests, and they cannot yet know how those interests will be affected by fundamentally

redefining marriage. As President Obama recently recognized, millions of Americans "feel very strongly" about preserving the traditional definition of marriage not "from a mean-spirited perspective," but simply because they "care about families." Robin Roberts ABC News Interview with President Obama, May 9, 2012, *available at* http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043&singlePage=true.

Unique recognition of a unique relationship in no way disapproves or dishonors other relationships that the State has chosen to recognize differently. As the First Circuit recently recognized, "preserv[ing] the heritage of marriage as traditionally defined over centuries of Western civilization . . . is not the same as 'mere moral disapproval of an excluded group.'" *Massachusetts v. United States Dep't of HHS*, 682 F.3d 1, 16 (1st Cir. 2012) (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in judgment)). Thus, while our Constitution does not mandate the traditional definition of marriage, neither does our Constitution condemn it. Rather, it leaves the definition of marriage in the hands of the People, to be resolved through the democratic process in each State.

This Court should review the decision below to resolve the conflicts it creates with the decisions of other appellate tribunals, to correct its manifest errors in disregard of this Court's precedents, and to return to the People themselves this important and sensitive issue.

STATEMENT OF THE CASE

1. "From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." *In re Marriage Cases*, 183 P.3d 384, 407 (Cal. 2008). In 2000, Californians passed Proposition 22, an initiative statute reaffirming that understanding. *See* CAL. FAM. CODE § 308.5. In 2008, the California Supreme Court nevertheless interpreted the State constitution to require that marriage be redefined to include same-sex couples and invalidated Proposition 22. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). Less than six months later, the People of California adopted Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."

2. Respondents, a gay couple and a lesbian couple, filed this suit in the district court against State officials responsible for enforcing California's marriage laws, claiming that Proposition 8 violates the Fourteenth Amendment to the United States Constitution. The district court had subject matter jurisdiction under 28 U.S.C. § 1331. All of the public officials named as defendants informed the court that they would not defend Proposition 8. Petitioners, official proponents of that measure and the primarily formed ballot measure committee designated by the proponents as the official Yes on 8 campaign committee, *see* CAL. ELEC. CODE § 342; CAL. GOV. CODE § 82047.5(b), moved to intervene to defend Proposition 8, and the

district court granted the motion. After a trial, the district court ruled that Proposition 8 violates the Fourteenth Amendment. App. 137a. Petitioners appealed, and the Ninth Circuit stayed the district court's judgment barring enforcement of Proposition 8 pending appeal.

3. One week before oral argument in the Ninth Circuit, the court of appeals announced that the panel would be composed of Circuit Judges Reinhardt, Hawkins, and Smith. Petitioners promptly moved to disqualify Judge Reinhardt primarily on the ground that his wife, Ramona Ripston, in her capacity as Executive Director of the ACLU of Southern California ("ACLU/SC"), not only had provided advice and counsel to the lawyers for Respondents in their decision to bring this challenge to Proposition 8, but had directly *participated* in this case in the district court. 9th Cir. Dkt. Entry ("Dkt. Entry") 282 at 7. Under Ms. Ripston's direct supervision, the ACLU/SC had represented parties who unsuccessfully sought to intervene in the district court as plaintiffs and parties who filed amicus curiae briefs urging the court to strike down Proposition 8. *See* N.D. Cal. Doc. No. ("Doc. No.") 62 at 2, Doc. No. 79 at 2, and Doc. No. 552 at 2. Judge Reinhardt denied the motion. Dkt. Entry 284. Despite Petitioners' focus on the ACLU/SC's *activities*, including its activities in this very case, Judge Reinhardt asserted that "the chief basis for the recusal motion appears to be my wife's *beliefs*." Dkt. Entry 295 at 3 (emphasis added). And despite acknowledging that he had "always recused himself"

when the ACLU/SC had "participated in any way" in a case while it was before the Ninth Circuit, Judge Reinhardt dismissed the significance of the ACLU/SC's having participated in this case while it was before the district court. *Id.* at 10 n.5.

The Ninth Circuit's decision striking down Proposition 8, authored by Judge Reinhardt, tracked the analysis, point-by-point, urged by the ACLU/SC in the district court. *See* Doc. No. 62, Doc. No. 552.

4. After briefing and oral argument, the Ninth Circuit certified to the Supreme Court of California the question whether "under California law, the official proponents of an initiative measure" have standing "to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so." App. 416a. On November 17, 2011, the Supreme Court of California issued a unanimous opinion answering "the question posed by the Ninth Circuit in the affirmative." App. 326a. Based "upon the history and purpose of the initiative provisions of the California Constitution and upon the numerous California decisions that have uniformly permitted the official proponents of initiative measures to appear as parties and defend the validity of measures they have sponsored," App. 397a, the Supreme Court of California held that when the responsible public officials decline to defend an initiative measure,

> under article II, section 8 of the California Constitution and the relevant provisions of the

> Elections Code, the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative.

App. 402a.[3]

5. Relying on the California Supreme Court's response to the certified question, the Ninth Circuit unanimously held that Petitioners had standing to appeal the district court's decision. App. 18a.

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[3] While the case was pending before the California Supreme Court, the district court judge, Judge Vaughn Walker, retired from the bench and shortly thereafter disclosed publicly that he is gay and in a 10-year committed relationship with another man. Petitioners promptly filed a motion to vacate the district court's decision on the grounds that Judge Walker likely had a direct and substantial interest in the outcome of the case and that he therefore, at a minimum, was required to disclose to the parties both the existence of his long-term same-sex relationship and whether he and his partner had any interest in marrying if Proposition 8 was invalidated. *See* Doc. Nos. 768, 787. The district court, Judge James Ware presiding, denied Petitioners' motion, reasoning that Judge Walker had no duty to disclose even a "fervently" held desire to marry his same-sex partner. Doc. No. 797 at 9, 18. Petitioners appealed, and the Ninth Circuit affirmed Judge Ware's ruling "for substantially the reasons set forth in the district court's opinion." App. 19a.

On the merits, a divided panel held that Proposition 8 violates the Equal Protection Clause. The panel majority asserted that "[w]hether under the Constitution same-sex couples may *ever* be denied the right to marry" is "an important and highly controversial question" that it need not decide. App. 17a. The panel majority ruled that Proposition 8 is unconstitutional on the "narrow grounds" that the initiative's effect was to "take away" from same-sex couples "the official designation of 'marriage'" while "leaving in place all of its incidents" through domestic partnerships. *Id.* According to the Ninth Circuit, under this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), this "unique and strictly limited effect of Proposition 8" distinguished it from other State laws defining marriage as the union of a man and a woman, App. 17a, and rendered it wholly unsupported by any conceivable legitimate rational basis. And while the panel majority expressly disavowed any suggestion "that Proposition 8 is the result of ill will on the part of the voters of California," App. 87a, it nonetheless insisted, paradoxically, that the initiative's supporters were motivated only by a desire to "dishonor" and to "disapprove of gays and lesbians as a class," App. 87a, 91a. Judge Smith dissented. App. 95a.

Petitioners timely sought rehearing en banc. The Court of Appeals denied the petition but stayed its mandate pending the timely filing and disposition of a petition for writ of certiorari in this Court. App. 444a. Judge O'Scannlain, joined by Judges Bybee and Bea, dissented, explaining that the panel opinion had

declared unconstitutional the "definition of marriage that has existed for millennia" on the basis of a "gross misapplication of *Romer v. Evans* . . . ." App. 445a. Judge Smith also would have granted the petition. App. 443a.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Is Exceedingly Important.

The decision below requires the Nation's largest State to fundamentally redefine marriage, an institution long recognized as "more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), and "the foundation of the family and of society," *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Subject only to the Constitution, a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877)). Whether the Constitution requires California to eliminate the most longstanding, universal, and fundamental of these conditions – that a marriage consists of man and woman – is a question that should be settled by this Court.

Even on its own terms the impact of the decision below is not limited to California. The Ninth Circuit

identified two principal aspects of Proposition 8 that it found fatal: (1) that Proposition 8 overruled a prior judicial redefinition of marriage to include same-sex couples, and (2) that it left in place domestic partnerships offering same-sex couples virtually all of the legal incidents of marriage. *See* App. 17-18a. At a minimum, this reasoning calls into immediate question the marriage laws of Hawaii, Nevada, and Oregon, which extend to same-sex couples the incidents but not the designation of marriage. *See* HAW. REV. STAT. § 572B; NEV. REV. STAT. § 122A; OR. REV. STAT. § 106.300. And the people of Hawaii also amended their constitution to preserve the traditional definition of marriage as an issue for their legislature to address after the State's courts had threatened that definition. *See* HAW. CONST. art. I, § 23. Tellingly, an equal protection challenge relying on the decision below is already pending before a federal district court in Hawaii. *See Jackson v. Abercrombie*, No. 1:11-cv-00734-ACK-KSC, ECF Doc. No. 65-1, at 32-40 (D. Haw. June 15, 2012).

The decision below likewise threatens to short-circuit further democratic deliberation regarding official recognition of same-sex relationships throughout the Circuit. The decision, for example, casts doubt over the State of Washington's decision to submit to popular referendum a recently enacted statute that

would extend the designation of marriage to same-sex couples.[4]

More fundamentally, as demonstrated below, the purportedly "unique" aspects of Proposition 8 highlighted by the panel majority, App. 17a, ultimately fail to distinguish Proposition 8 as a constitutional matter from any other law defining marriage as the union of a man and a woman. *See infra* Part V.A.4-5. It is thus all but certain that the decision below, despite its professed narrowness, will in due course lead to States throughout the Circuit being forced to redefine marriage by judicial decree.

II. The Decision Below Conflicts with *Crawford v. Board of Education.*

The Ninth Circuit's decision cannot be squared with *Crawford v. Board of Education*, 458 U.S. 527 (1982), which emphatically "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." *Id.* at 535. As in this case, *Crawford* involved an equal protection challenge to a California constitutional amendment (there, Proposition 1) that superseded in part a decision of the California Supreme Court interpreting the State Constitution to go beyond the

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[4] Washington, like California, has already extended the rights and responsibilities of marriage to same-sex couples through its domestic partnership laws. *See* WASH. REV. CODE § 26.60.015.

mandates of the Federal Constitution. Upholding Proposition 1, this Court expressly 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. Instead, this Court held, "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." *Id.* at 542. Further, directly contrary to the Ninth Circuit's insistence that a different analysis is required when a state-law right is "withdrawn" than when it is not extended in the first instance, App. 68a, *Crawford* makes clear that when a State repeals a law the relevant inquiry is simply whether that law was "required by the Federal Constitution in the first place," 458 U.S. at 538.

The panel majority's attempts to distinguish *Crawford* fail. First, this Court's findings in *Crawford* that Proposition 1 did not draw a racial classification and was not motivated by race, *see* App. 67-68a, meant only that it was not subject to strict scrutiny, *see Crawford*, 458 U.S. at 536. These findings are of no moment here, where the Ninth Circuit purported to apply rational-basis review. Second, the Ninth Circuit emphasized that even after Proposition 1, California's Constitution still provided a "more robust 'right . . . than exists under the Federal Constitution.'" App. 67a (quoting *Crawford*, 458 U.S. at 542). But this Court left no doubt that California "could have conformed its law to the Federal Constitution in every

respect" rather than "pull[ing] back only in part." *Crawford*, 458 U.S. at 542.

In short, the fundamental 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 (or not) in the first place. This Court should grant review to resolve the conflict between the decision below and *Crawford*.

III. The Decision Below Fundamentally Misapplies *Romer v. Evans* and Conflicts with the Decisions of Other Appellate Courts.

Notwithstanding *Crawford*, the court below insisted that *Romer v. Evans*, 517 U.S. 620 (1996), required a different result. Noting that *Romer* invalidated Colorado's Amendment 2, "an initiative constitutional amendment that reduce[d] the rights of gays and lesbians under state law," App. 56a, the Ninth Circuit held that *Romer* directly "governs" and "controls" this case because Proposition 8 is "remarkably similar" to Amendment 2. App. 57a, 60a, 68a. This conclusion, however, is a "gross misapplication of *Romer*." App. 445a.

1. Other federal and state appellate courts have expressly rejected *Romer*-based challenges to the traditional definition of marriage. *See, e.g.*, *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 680 (Tex. Ct. App. 2010); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451, 464-65 (Ariz. Ct. App.

2003). In *Bruning*, for example, 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.

2. At the root of the Ninth Circuit's error is its assertion that *Romer* turned on the *timing* of Colorado's Amendment 2 rather than its *substance*. *See* App. 64a. But nothing in *Romer* 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. Nor did *Romer* suggest 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 Court struck down Amendment 2 *on its face*, not merely as applied in the handful of local jurisdictions that had previously enacted antidiscrimination ordinances protecting gays and lesbians. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

The panel majority's reading of *Romer* turned on the fact that Amendment 2 "withdrew" from gays and lesbians "elective" local antidiscrimination protections – that is, antidiscrimination protections "that the Fourteenth Amendment did not require . . . to be afforded to gays and lesbians" in the first place. App. 64a. But Amendment 2 "in explicit terms [did] *more* than repeal or rescind" antidiscrimination laws that were not required by the Federal Constitution. *Romer*, 517 U.S. at 624 (emphasis added). It imposed a "broad and undifferentiated disability on a single named group" by prohibiting "all legislative, executive or judicial action at any level of state or local government designed to protect the named class [of] homosexual persons or gays and lesbians." *Id.* at 624, 632. By "identif[ying] persons by a single trait and then den[ying] them protection across the board," *id.* at 633, Amendment 2 "deem[ed] a class of persons a stranger to [the] laws," *id.* at 635. It was these "exceptional" – indeed "unprecedented" – characteristics of Amendment 2 that concerned the Court, *id.* at 632-33, not the fact that it repealed a handful of local antidiscrimination laws.

In any event, there is no 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." App. 55a. To the

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 continued opposition, for the same reasons, obviously does not somehow become irrational the moment *after* the State has done so.

3. Putting aside the red herring of its timing, it is plain that Proposition 8 differs sharply from Amendment 2 in every material respect. 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. That definition has prevailed for all but 142 *days* of California's 162 *year* history, and it continues to prevail in federal law and in the overwhelming majority of the States, most often through constitutional provisions much like Proposition 8.[5] Nor is it in any way "unprecedented" or even unusual that in restoring the traditional definition of marriage the People of California

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[5] Thirty States have enshrined the traditional definition of marriage in their constitutions, and the Federal Government and nine additional States have expressly codified the traditional definition of marriage by statute. *See* National Conference of State Legislatures, Defining Marriage, *at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx. The statutes of three other States have been interpreted to preserve the traditional definition of marriage.

exercised the "inalienable," "fundamental" right that they have reserved to themselves 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 v. Horton*, 207 P.3d 48, 108, 117 (Cal. 2009) (emphasis omitted). To the contrary, "there have been many instances in the past" in which they have done so. *Id.* at 115. Indeed, "past state constitutional amendments that diminished state constitutional rights . . . refut[e] [the] description of Prop. 8 as 'unprecedented.'" *Id.* at 105.

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*, 207 P.3d at 76. And it achieved this purpose in the narrowest possible manner, leaving undisturbed the numerous other laws – including the expansive domestic partnership laws – that provide gays and lesbians in California "with some of the most comprehensive civil rights protections in the nation." About Us – Equality California, *at* http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493 (conclusion of California's "largest statewide LGBT rights advocacy organization"). Thus, as the California Supreme Court itself recognized, there is simply no comparison between Proposition 8 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." *Strauss*, 207 P.3d at 102.

Finally, though Amendment 2 was so bereft of any conceivable legitimate state purpose that it could be explained only as resulting from "animus toward" and "a bare . . . desire to harm a politically unpopular group," *Romer*, 517 U.S. at 632, 634, the Ninth Circuit correctly disclaimed any "suggest[ion] that Proposition 8 is the result of ill will on the part of the voters of California." App. 87a. 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.

In short, the fatal flaw in Amendment 2 was its exceptionally harsh and unprecedented character, its inexplicable breadth, 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. Any other reading of *Romer* is foreclosed by *Crawford*, a case that *Romer* never questioned, let alone overruled. This Court should review the Ninth Circuit's decision to resolve the conflict created by its "gross misapplication" of *Romer*.

IV. The Decision Below Conflicts with This Court's Decision in *Baker v. Nelson* and with Uniform Appellate Authority Upholding State Marriage Laws.

The Ninth Circuit's decision also conflicts with binding precedent of this Court holding that the traditional definition of marriage does not violate the Fourteenth Amendment. In *Baker v. Nelson*, 409 U.S. 810 (1972), this Court unanimously dismissed, "for want of a substantial federal question," an appeal from the Minnesota Supreme Court squarely presenting the question whether a State's refusal to recognize same-sex relationships as marriages violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.*; *see also Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). This Court's dismissal of the appeal in *Baker* was a decision on the merits that constitutes "controlling precedent unless and until re-examined by this Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

The Ninth Circuit dismissed *Baker* in a footnote, arguing that because Proposition 8 *restored*, rather than simply preserved, the traditional definition of marriage, this case "is squarely controlled by *Romer*" and *Baker* is "not pertinent here." App. 60-61a. As we have demonstrated, however, the Ninth Circuit's reading of *Romer* is misguided and, indeed, brings it into conflict with *Crawford*.

The decision below also conflicts squarely with the Eighth Circuit's decision in *Bruning*, which held that "laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States." 455 F.3d at 871. Likewise, every state appellate court to address a federal constitutional challenge to the traditional definition of marriage – including two within the Ninth Circuit – has upheld the state law at issue. *See In re Marriage of J.B. and H.B.*, 326 S.W.3d 654; *Standhardt*, 77 P.3d 451, *review denied*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App.), *review denied*, 84 Wash.2d 1008 (Wash. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker*, 191 N.W.2d 185.

To be sure, the First Circuit recently invalidated a *federal* statute, the Defense of Marriage Act, defining marriage as the union of a man and a woman for purposes of federal law. *See Massachusetts v. United States Dep't of HHS*, 682 F.3d 1, 5 (1st Cir. 2012) ("Rather than challenging the right of states to define marriage as they see fit, the appeals contest the right of Congress to undercut the choices made by same-sex couples and by individual states in deciding who can be married to whom."). While the First Circuit purported to distinguish *Baker* and relied in part on considerations of federalism and States' traditional role in regulating marriage, *see id.* at 8, 9-10, 12-13, some aspects of its decision are plainly in tension with the precedents discussed above.

This Court should grant review to resolve the conflict created by the Ninth Circuit's decision and to provide clarity in this important area of the law.

V. The Ninth Circuit's Holding That Proposition 8 Serves No Legitimate Governmental Purpose Conflicts with the Decisions of This and Other Appellate Courts.

In keeping with its dispositive focus on the timing of Proposition 8's passage, the Ninth Circuit held that the measure could be upheld only if "a legitimate interest exists that justifies the People of California's action in taking away from same-sex couples the right to use the official designation and enjoy the status of marriage – a legitimate interest that suffices to overcome the 'inevitable inference' of animus to which Proposition 8's discriminatory effects otherwise give rise." App. 69a. The court below then considered, and rejected, four societal purposes served by the traditional definition of marriage: promoting responsible procreation and child rearing; proceeding with caution when considering fundamental change to a vital social institution; protecting religious and other fundamental liberties; and preserving a valued and ancient tradition.

While each of these interests readily satisfies rational basis scrutiny, California's important interests in responsible procreation and proceeding with caution warrant specific mention. In particular, the Ninth Circuit's conclusion that Proposition 8 lacks

even a rational relationship to society's indisputable interest in responsible procreation and childrearing conflicts directly with a host of appellate decisions. And its analysis of both interests contravenes decisions of this Court defining and applying rational basis review. This Court should grant review to resolve these conflicts.

A. The Traditional Definition of Marriage Furthers Society's Vital Interest in Responsible Procreation and Childrearing.

1. The record of human history leaves no doubt that the institution of marriage as the union of man and woman is founded on the simple biological reality that opposite-sex unions – and only such unions – can produce children. Marriage, thus, is "a social institution with a biological foundation." Claude Levi-Strauss, *Introduction*, *in* 1 A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (Andre Burguiere, et al. eds., 1996).

The unique procreative potential of sexual relationships between men and women implicates vital social interests. On the one hand, procreation is necessary to the survival and perpetuation of society and, indeed, the human race; accordingly, the responsible creation, nurture, and socialization of the next generation is a vital – indeed existential – social good. On the other hand, irresponsible procreation and childrearing – the all too frequent result of casual

or transient sexual relationships between men and women – commonly results in hardships, costs, and other ills for children, parents, and society as a whole. A central purpose of marriage in virtually every society, then, is and always has 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.

This understanding of marriage has been uniformly recognized by eminent authorities throughout the ages. 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; *see also id.* *435 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown").[6] And it has prevailed in California

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[6] *See also, e.g.*, JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§ 78-79 (1690); BARON DE MONTESQUIEU, 2 THE SPIRIT OF LAWS 96, 173 (1st American from the 5th London ed.,

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throughout its history, just as it has everywhere else. *See, e.g., De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952) (marriage "channels biological drives that might otherwise become socially destructive" into enduring family units to "ensure[ ] the care and education of children in a stable environment"). 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, this Court has repeatedly recognized marriage as "fundamental to our very existence and survival." *E.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967).

2. 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

1802); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) ("marriage"); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE § 39 (1852); BRONISLAW MALINOWSKI, SEX, CULTURE, AND MYTH 11 (1962); KINGSLEY DAVIS, *The Meaning & Significance of Marriage in Contemporary Society*, *in* CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION 1, 7-8 (Kingsley Davis, ed. 1985); G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988); JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2002); W. BRADFORD WILCOX, ET AL., EDS., WHY MARRIAGE MATTERS 15 (2d ed. 2005).

F.3d at 867; *see also, e.g.*, *Dean*, 653 A.2d at 363; *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. Indeed, the decision below collides directly with the Eighth Circuit's 2006 decision upholding Nebraska's constitutional amendment affirming the traditional definition of marriage. The State's interest in "'steering procreation into marriage,'" the Eighth Circuit held, "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." *Bruning*, 455 F.3d at 867.

3. In breaking with this substantial body of appellate authority, the Ninth Circuit rejected as irrational the concern that "opposite-sex couples were more likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of 'marriage.'" App. 74-75a. But, as noted below, 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 over time of weakening the institution of marriage and its ability to further the important social interests it has always served. *See infra* Part V.B.

More important, however, the Ninth Circuit's reasoning contravenes well-settled principles of rational-basis review. This Court's precedent makes clear that

"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." *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (quotation marks omitted). It follows, then, 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 [groups' activities] would not," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Thus, the relevant inquiry is not, as the Ninth Circuit 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 v. King County*, 138 P.3d 963, 984-85 (Wash. 2006) (plurality); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. Ct. App. 2005); *Standhardt*, 77 P.3d at 463.

The answer to that question is clear. Unlike relationships between men and women, sexual relationships between individuals of the same gender cannot produce children – let alone do so as the unintended

result of even casual sexual behavior. Thus, as Respondents themselves acknowledged below, unlike "heterosexual couples who practice sexual behavior outside their marriage" and thus present "a big threat [of] irresponsible procreation," same-sex couples "don't present a threat of irresponsible procreation." Trial Tr. 3107 (Doc. No. 693 at 155).

Under *Johnson* and *Cleburne*, that is the end of the matter. As other appellate courts have repeatedly recognized, it is the unique procreative capacity of opposite-sex relationships – including the very real threat it can pose to the interests of society and to the welfare of children conceived unintentionally – that the institution of marriage has always sought to address. *See, e.g.*, *Bruning*, 455 F.3d at 867; *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Morrison*, 821 N.E.2d at 24-26. Given this central concern of marriage, the "commonsense distinction," *Heller v. Doe*, 509 U.S. 312, 326 (1995), that marriage has always drawn between same-sex couples and opposite-sex couples "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."). To the contrary, it is plainly reasonable for the People of California, like virtually every society throughout human history, to maintain a unique institution to address the unique challenges posed by the unique

procreative potential of sexual relationships between men and women.

4. The Ninth Circuit claimed that this Court's ruling in "*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." App. 74a. According to the Ninth Circuit, 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," under *Romer* "it is irrelevant to a measure *withdrawing* from them, and only them, use of that designation." App. 75a.

As *Romer* emphasized, however, 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 for 158 years *before* the California Supreme Court's sharply divided ruling in the *Marriage Cases*, it is also reasonable for California to draw the same line *after* that short-lived decision. And if it is reasonable for Congress and at least 41 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. Indeed, this Court has, in the takings context, squarely rejected the proposition that there is a legally material difference between repealing a benefit and declining to extend it in the first instance, emphasizing that *"[f]or legal purposes . . . the two situations are identical."* *Bowen v. Gilliard*, 483 U.S. 587, 604 (1987) (emphasis added). This Court's rational-basis decisions likewise have applied the same mode of analysis to legislation withdrawing legal rights as it has to legislation refusing to extend rights in the first instance. *See, e.g.*, *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 356, 360 n.2 (2009); *Central State Univ. v. American Ass'n of Univ. Professors*, 526 U.S. 124, 127 (1999); *Lyng v. Automobile Workers*, 485 U.S. 360, 371 (1988); *Bowen*, 483 U.S. at 598-601; *Fritz*, 449 U.S. at 176-77; *City of New Orleans v. Dukes*, 427 U.S. 297, 303-05 (1976).

5. The Ninth Circuit also condemned Proposition 8 because it limits the use of "the designation of 'marriage,' while leaving in place all the substantive rights and responsibilities of same-sex partners." App. 84a. The court reasoned that "[i]n order to be rationally related to the purpose of funneling more child-rearing 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. App. 72a.

But it is simply inconceivable 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. In any event, the animating purpose of marriage is not to prevent gays and lesbians from forming families and raising children. Rather, it is to help steer potentially procreative conduct into stable and enduring family units by providing recognition, encouragement, and support to committed opposite-sex relationships. For the overwhelming majority of pregnancies – especially unintended pregnancies – the question 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). And there simply can be no dispute that children raised by their mother and father do better, on average, than children raised solely by their mother, and that the State has a direct and compelling interest in avoiding the public financial burdens and social costs too often associated with single motherhood. *See, e.g.*, SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 1 (1994); KRISTEN ANDERSON MOORE, ET AL., MARRIAGE FROM A CHILD'S PERSPECTIVE, CHILD TRENDS RESEARCH BRIEF 6 (June 2002). Thus, regardless of whatever provisions the State 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 to address the unique social risks

posed by potentially procreative sexual relationships between men and women.

B. Proposition 8 Serves California's Legitimate Interest in Proceeding Cautiously When Considering Redefining the Institution of Marriage.

It is simply not possible to foresee with certainty the long-term consequences of fundamentally redefining marriage in a way that severs its inherent connection with the procreative and childrearing purposes it has always served. Indeed, Respondents' own expert conceded as much at trial. Trial Tr. 254 (Doc. No. 453 at 41) (admitting that "[t]he consequences of same-sex marriage is an impossible question to answer"). But there is very little doubt, as Respondents' expert also conceded, that redefining marriage by law would "definitely [have] an impact on the social meaning of marriage" and that changing the public meaning of marriage would "unquestionably [have] real world consequences." Trial Tr. 311-13 (Doc. No. 453 at 98-100). And it is plainly reasonable for the voters of California to be concerned that redefining marriage could, over time, weaken the institution of marriage and its ability to serve its vital purposes. Indeed, a diverse group of 70 prominent scholars from all relevant academic fields 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* Trial Tr. 2776-77, 2780-82 (Doc. No. 530 at 193-94, 197-99) (testimony of David Blankenhorn). Surely it is not irrational for Californians to proceed cautiously on this sensitive and controversial social issue by continuing to observe and assess the results of redefining marriage in other jurisdictions before doing so themselves and putting at risk the key interests served by this fundamental, civilizing social institution. By adopting Proposition 8, the People of California demonstrated that they are not yet ready to take that step, nor to allow unelected judges to impose that result. This is the genius of our federal system at work.

The Ninth Circuit identified ways in which Californians purportedly could have designed Proposition 8 to track this cautionary interest more closely, such as by including a sunset provision requiring the People to "vote again" to preserve the traditional definition of marriage after a certain period of time. App. 80a. Of course, the People are free to "vote again" whenever they so choose, just as they did in enacting Proposition 8. Thus 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*, 207 P.3d at 60 ("more than 500 amendments to the California Constitution have been adopted since ratification of California's current Constitution in 1879"). In any event, the question whether there were alternatives that 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 Ninth Circuit plainly have no place in rational basis review. *See, e.g.*, *Heller*, 509 U.S. at 321; *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980).

C. The Purpose of Proposition 8 Is Not To "Dishonor" Gays and Lesbians.

Because "there are plausible reasons" for California's adherence to the traditional definition of marriage, judicial "inquiry is at an end." *Fritz*, 449 U.S. at 179. *See, e.g.*, *Heller*, 509 U.S. at 320; *Romer*, 517 U.S. at 631-36. At any rate, there is no truth to the panel majority's charge that Proposition 8 is nothing more than an effort to "dishonor a disfavored group" and to proclaim the "lesser worth" of gays and lesbians as a class. App. 88a, 91a. This charge makes sense *only* if marriage is itself nothing more than, as the panel majority would have it, *see* App. 91a, an honorific bestowed by society on relationships it approves and withheld from relationships it disapproves. But support for the traditional definition of marriage is rooted precisely in *resisting* this reductive view of marriage in favor of one that maintains the

inherent link between the institution and its traditional procreative purposes. And this traditional view of marriage has nothing to do with disapproval of gays and lesbians.

The Ninth Circuit's charge of anti-gay animus is, moreover, at war with its own acknowledgment that the question whether marriage should be redefined to include same-sex couples is one "over which people of good will may disagree." App. 17a. A person who seeks only to dishonor gays and lesbians and to proclaim their lesser worth as a class is not, obviously, a person of good will who has no "desire to harm" gays and lesbians as a class. The Ninth Circuit's charge thus defames over seven million California voters and countless other Americans who believe that traditional marriage continues to serve society's legitimate interests, including the citizens and lawmakers of at least 41 other States, the Members of Congress and President who supported enactment of the federal Defense of Marriage Act, the large majority of state and federal judges who have addressed the issue, and until very recently President Obama.

In sum, as one of Respondents' own expert witnesses acknowledges, there are "millions of Americans . . . 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) (quoting Rabbi Michael Lerner). Because "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group," maintaining "the traditional institution of marriage"

is a "legitimate state interest." *Lawrence v. Texas*, 539 U.S. 558, 585-86 (2003) (O'Connor, J., concurring in judgment).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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