No. 12-144

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

Petitioners,

v.

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, JEFFREY J. ZARRILLO, CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

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

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Petitioners – the Proponents who put California's Proposition 8 before that state's electorate – present the following question to the Court in their petition:

Whether it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment for a State to use the ballot-initiative process to extinguish the state constitutional right of gay men and lesbians to marry a person of the same sex.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; the petitioners and the Perry and San Francisco respondents have lodged blanket letters of consent with the Clerk, and *amicus* has lodged the written consent of the State of California defendants (who potentially are not respondents at this stage) with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. Eagle Forum participated as *amicus curiae* in the Ninth Circuit in this litigation, as well as in other related appellate proceedings on same-sex marriage. Eagle Forum's founder, Phyllis Schlafly, was a leader in the movement to oppose ratification by the states of the proposed Equal Rights Amendment, H.J. Res. 208, 86 Stat. 1523 (1972) ("ERA"), in the 1970s and 1980s, and the history of that effort has a direct bearing on the issues that the plaintiffs here attempt to import into the Fourteenth Amendment. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Four individual plaintiffs – two same-sex couples – (collectively, "Plaintiffs") and plaintiff-intervener City and County of San Francisco ("CCSF") seek to establish the federal right of same-sex couples to call their unions a "marriage." The State defendants declined to defend California law – which provides that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, §7.5 ("Proposition 8"); CAL. FAMILY CODE §308.5 ("Proposition 22") – thereby prompting Proposition 8's ballot proponents to intervene as defendants. Plaintiffs prevailed in the District Court and Ninth Circuit.

"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,* 43 Cal.4th 757, 792-93 (2008) ("*Marriage Cases*"), as borne out by textual references in the first Constitution, *id.* (*citing* art. XI, §12 of the California Constitution of 1849), and the rule against inferring repeal of the common law by implication. *People v. Ceja,* 49 Cal.4th 1, 10 (2010). Over time, these express textual references to husband-wife marriage came out of the Constitution without any indication that California had adopted or allowed same-sex marriage: "[a]ll presumptions are against a repeal by implication." *Merrill v. Navegar, Inc.,* 26 Cal.4th 465, 487 (2001) (interior quotations omitted, alteration in original); *Crosby v. Patch,* 18 Cal. 438, 441-42 (1861); *cf. Fourco Glass Co. v. Transmirra,* 353 U.S. 222, 227 (1957) ("it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed"); *Waterman S.S. Corp. v. U.S.,* 381 U.S. 252, 269 (1965). In *Marriage Cases,* however, a 4-3 majority held that Proposition 22 – which the People enacted in 2000 – violated the generally worded privacy and equal-protection provisions of California's Constitution adopted in the 1970s.[2]

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[2] By way of background, California's Constitution recognizes privacy as an inalienable right. CAL. CONST. art. I, §1. In pertinent part, California's due process and equal protection clauses provide that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." *Id.* art. I, §7(a). With the adoption of Proposition 8, the California Constitution explicitly limits valid and recognized marriages to those between "a man and a woman." *Id.* art. I, §7.5. In addition to the foregoing, the

Before *Marriage Cases* became final, the same 4-3 majority denied a request to stay the court's proceedings to allow the People to vote on Proposition 8, which already had qualified for the November 2008 ballot. *In re Marriage Cases,* No. S147999 (June 4, 2008).[3] After it prevailed in the election, Proposition 8 faced numerous challenges from various non-parties to this litigation and CCSF on a variety of legal theories in original proceedings in the California Supreme Court, which upheld Proposition 8 as nondiscriminatory and procedurally valid. *Strauss v. Horton,* 46 Cal.4th 364 (2009).

Against that backdrop, the panel majority in this litigation analogizes to *Romer v. Evans,* 517 U.S. 620 (1996), in which this Court overturned Colorado's "Amendment 2" on Equal Protection grounds for depriving homosexuals, with no rational basis (and thus apparent animus), the same access to government that all citizens enjoyed under prior law. *Romer* is inapposite for several reasons. First, the

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Constitution's Declaration of Rights also provides that "[t]his declaration of rights may not be construed to impair or deny others retained by the people." *Id.* art. I, §24. With regard to governmental structure, the California Constitution adopts the legislative, executive, and judicial branches of government, *id.* art. III, §3, but places them under the sovereignty of the People by reserving to the People the right to change the Constitution. *Id.* art. XVIII, §3. The Constitution provides that branches "charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." *Id.* art. III, §3.

[3] The order is available on the California Supreme Court's website at http://www.courts.ca.gov/documents/NR31-08.PDF (last visited Aug. 31, 2012).

panel majority ignored prior Ninth Circuit precedent that a rational basis indeed supports preferring husband-wife marriage, *Adams v. Howerton,* 673 F.2d 1036, 1042 (9th Cir. 1982), and improperly applied the rational-basis test. Second, the Colorado amendment selectively withdrew from homosexuals broad political rights that both the federal and Colorado constitutions expressly guaranteed to all citizens. Here, by contrast, the prior "law" that Proposition 8 surgically abrogated is a mere non-party judgment that due process precludes the Plaintiffs from pressing, either by *res judicata* or *stare decisis.*[4]

Forty years ago, in *Baker v. Nelson,* 409 U.S. 810 (1972), this Court faced essentially the same question implicitly presented here, namely, whether the federal Constitution provides a right to same-sex marriage. This Court answered that question in the negative by dismissing "for want of a substantial federal question," *id.,* a mandatory appeal under former 28 U.S.C. §1257(2) (1988) from the Minnesota Supreme Court's decision in *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971). In the intervening years, similar claims were routinely dismissed by federal courts on the authority of

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[4] The Plaintiffs here were parties to neither *Marriage Cases* nor *Strauss,* while CCSF and the State defendants were parties to both. The proponents of Proposition 22 were denied leave to intervene in *Marriage Cases,* 43 Cal.4th at 790-9 & n.8, and the proponents of Proposition 8 (appellants here) were granted leave to intervene in *Strauss,* 46 Cal.4th at 398-99. Although CCSF was party to *Marriage Cases, Strauss* bars CCSF under claim preclusion from challenging Proposition 8.

Baker,[5] until a recent spate of decisions either ignored *Baker* or relied on creative legal theories apparently designed to evade *Baker*.[6]

In a reversal of that trend, a District Court in the Ninth Circuit recently decided a same-sex marriage case analogous to this litigation by faithfully applying *Baker* and Ninth Circuit precedent to uphold Hawaii's limiting marriage to husband-wife marriage. *Jackson v. Abercrombie,* __ F.Supp.2d __, 2012 WL 3255201 (D. Hawaii 2012). In addition, in Washington State, voters will face a referendum this November to decide whether to allow a state law that grants same-sex marriage rights should go into effect. Although the panel majority here attempted to craft its decision to apply to California's unique facts, the Hawaii and Washington State matters – assuming *arguendo* that Washington State voters support husband-wife marriage – will present the same basic issue of whether states can selectively withdraw marriage from same-sex couples.

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[5] *See, e.g., Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 870-71 (8th Cir. 2006); *Wilson v. Ake,* 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005); *Adams v. Howerton,* 486 F.Supp. 1119, 1122 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982).

[6] *See, e.g., Diaz v. Brewer,* 656 F.3d 1008 (9th Cir. 2011); *Massachusetts v. U.S. Dept. of Health & Human Serv.,* 682 F.3d 1, 8 (2012); *Windsor v. U.S.,* 833 F.Supp.2d 394, 399 (S.D.N.Y. 2012); *Dragovich v. U.S. Dept. of Treasury,* __ F.Supp.2d __, 2012 WL 1909603, 6 (N.D. Cal. 2012); *Golinski v. U.S. Office of Personnel Management,* 824 F.Supp.2d 968, 983 (N.D. Cal. 2012); *Pedersen v. Office of Personnel Management,* __ F.Supp.2d __, 2012 WL 3113883, 11 (D. Conn. 2012).

STATEMENT OF FACTS

The facts are not materially in dispute, at least insofar as relevant to the Ninth Circuit's decision.[7] Plaintiffs – who were not parties to the *Marriage Cases* litigation – wish to marry someone of the same sex, in violation of California's Constitution. To secure that right in federal Court, Plaintiffs resort to the Equal Protection and Due Process Clauses of the federal Constitution.

SUMMARY OF ARGUMENT

Although the Ninth Circuit panel majority did not *expressly* decide otherwise, the U.S. Constitution simply does not provide a right to same-sex marriage. *See* Sections I.A-I.B, *infra.* Significantly, however, the panel majority's *Romer*-based analysis requires finding that Proposition 8 has no rational basis, which *implicitly* undermines any preference for husband-wife marriage. Specifically, California rationally could have believed that limiting marriage to husband-wife marriage would foster responsible procreation and childrearing, and the panel majority's contrary holding conflicts with not only other circuits but also Ninth Circuit precedent. *See* Section I.A, *infra.*

In addition, the Ninth Circuit's decision is inconsistent with *Baker,* which the Ninth Circuit had the obligation to follow because only this Court has the power to overturn this Court's precedents.

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[7] The District Court made various factual findings, which are both hotly contested and wholly irrelevant. *See* Section I.A, *infra.* Because the District Court's views of the facts are not relevant here, *amicus* Eagle Forum does not summarize them.

Agostini v. Felton, 521 U.S. 203, 237 (1997). By their own terms, nothing in either *Romer* or *Lawrence v. Texas,* 539 U.S. 558 (2003), or any of the other tangentially related decisions cited by the Ninth Circuit alters *Baker* with respect to same-sex marriages. Section I.C, *infra.*

As petitioners argue (Pet. at 15-22), *Romer* does not stand for the proposition that states cannot repeal rights or benefits that they were not required to grant. In addition, the panel majority's *Romer* analysis fails because Proposition 8 did not repeal *prior law;* it merely abrogated *Marriage Cases.* Under principles of preclusion, Plaintiffs cannot assert non-mutual preclusion against the sovereign State of California or against the Proponents who defend Proposition 8 in California's shoes. Under the California Constitution as it stands today, Plaintiffs could not possibly prevail in establishing a right to same-sex marriage under California law, which renders *Romer* inapposite. The application of preclusion principles to this litigation and the irrelevance of *Romer* to mere judgments are discussed in Section II, *infra.*

While the foregoing arguments focus primarily on the Ninth Circuit's inconsistency with extra-circuit precedents, the Ninth Circuit also violated *its own* binding precedents to reach this result and denied the *en banc* review that would have resolved the resulting intra-circuit splits. The Ninth Circuit's abdication of its duty to guard against intra-circuit splits requires this Court to exercise its supervisory authority over the lower federal courts. Given the prevalence of litigation and legislative challenges to

state-law restrictions on same sex marriage, the Hawaii and (potentially) Washington State matters likely will not be the last to present similar facts. Particularly for District Courts and future appellate panels in the Ninth Circuit, the panel majority's untenable deviations from not only this Court's precedent in *Baker* but also Ninth Circuit precedent in *Adams* underscores the need for this Court to settle the intra-Circuit split that the Ninth Circuit has allowed to continue. Given the comity owed to the states as independent sovereigns, the review of state laws in federal courts should not depend on the lottery of which judges a case draws. While amicus Eagle Forum respectfully submits that *Jackson* was correctly decided in Hawaii, this Court only this Court can now settle the appropriate path between the *Perry* panel majority on one hand and *Jackson* and the *Perry* dissent on the other. *See* Section III, *infra.*

ARGUMENT

I. THE FEDERAL CONSTITUTION DOES NOT PROVIDE A RIGHT TO SAME-SEX MARRIAGE

Although the Ninth Circuit majority employed *Romer*-based legerdemain to avoid the core question that Plaintiffs ask and the District Court answered – namely, does the federal Constitution provide a right to same-sex marriage – the Ninth Circuit majority's reasoning (if adopted) would nonetheless undermine any law that favors husband-wife marriage. In this section, *amicus* Eagle Forum demonstrates that the Ninth Circuit's reasoning cannot stand on its own;

the following section demonstrates that the majority's reasoning cannot stand under *Romer*.

A. Proposition 8 Satisfies Equal Protection

As required by its *Romer* gambit, the majority held that no rational basis supports withdrawing the same-sex marriage rights that pre-dated Proposition 8. In doing so, the panel majority failed to consider that selectively withdrawing the political right to petition government is inherently less significant an interest than fostering husband-wife marriage, rational procreation, and responsible childrearing.

To prevail under the rational-basis test, plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462-63 (1988). With respect to husband-wife marriage, it is enough, for example, that California "rationally may have been considered [it] to be true" that marriage has benefits for responsible procreation and childrearing. *Nordlinger v. Hahn,* 505 U.S. 1, 11-12 (1992); *Adar v. Smith,* 639 F.3d 146, 162 (5th Cir. 2011) (*en banc*); *Lofton v. Sec'y of Dept. of Children & Family Services,* 358 F.3d 804, 818-20 (11th Cir. 2004). Numerous other courts – including the Ninth Circuit – have readily recognized the rationality of states' interests in this regard.

Further, because "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or

empirical data," *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993), Plaintiffs cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). Unfortunately for Plaintiffs, the data simply do not exist to *negative* the procreation and childrearing rationale for traditional husband-wife marriage. And yet those data are Plaintiffs' burden to produce.

Nothing that Plaintiffs have produced or could produce undermines the rationality of believing that children raised in a marriage by their biological mother and father may have advantages over children raised under other arrangements:

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

Lofton, 358 F.3d at 820. Although the typical rational-basis plaintiff has a difficult evidentiary burden, Plaintiffs here face an *impossible* burden. Society is *at least* a generation away from the most minimal longitudinal studies that could even purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. While Eagle Forum submits that Plaintiffs *never* will be able to negative the value of traditional husband-wife families for childrearing, Plaintiffs

cannot prevail when the data *required by their theory of the case* do not yet exist.[8]

B. Proposition 8 Satisfies Due Process

Similarly, same-sex marriage is not a fundamental right under the Due Process Clause. Although *husband-wife marriage* unquestionably is a fundamental right, *Turner v. Safley,* 482 U.S. 78, 95 (1987) ("decision to marry is a fundamental right"); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"), the federal Constitution has never recognized the unrestricted right to marry *anyone.*

Instead, the fundamental right recognized by this Court applies only to marriages between one man and one woman: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia,* 388 U.S. 1, 12 (1967). Unlike opposite-sex marriage, same-sex relationships are not fundamental to the existence and survival of the human race. Indeed, as discussed in Section I.C, *infra,* this Court already has held that same-sex couples have no right to marry, much less a fundamental right do so. *Baker,* 409 U.S. at 810. Since *Loving* was extant in 1972 when this Court decided *Baker, Loving* obviously does not relate to this litigation. In that respect, nothing has changed materially since 1972.

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[8] Although this litigation does not present the question, *amicus* Eagle Forum respectfully submits that states could establish rational bases (*e.g.,* procreation and childrearing) for favoring opposite-sex couples over same-sex couples.

Similarly, the widespread opposition to same-sex marriage at the state level further reinforces the lack of a fundamental right. While "not conclusive in a decision as to whether that practice accords with due process," the "fact that a practice is followed by a large number of states is … plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McKeiver v. Pennsylvania,* 403 U.S. 528, 548 (1971). Here, as California's voters affirmed, husband-wife marriage – not same-sex marriage – is "rooted in the traditions and conscience of our people."

C. This Court Should Affirm *Baker*

In *Baker,* this Court considered and rejected the concept that the federal Constitution included a federal right to same-sex marriage. The *Baker* plaintiffs sought the same rights and benefits that Minnesota conveyed to husband-wife marriage, and this Court dismissed the case for want of a substantial federal question. *Baker,* 409 U.S. at 810.

Because it resolved *Baker* summarily and dismissed for want of a substantial federal question, the Ninth Circuit should have reviewed the *Baker* jurisdictional statement filed in this Court in order to ascertain what issues *Baker* "presented and necessarily decided." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977); *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975) ("lower courts are bound by summary decision by this Court 'until such time as the Court informs [them] that [they] are not'") (*quoting Doe v. Hodgson,* 478 F.2d 537, 539 (2d Cir. 1973)). The

Baker jurisdictional statement plainly presented, and *Baker* thus plainly decided, the question whether denying same-sex marriage violates the Constitution's equal-protection and due-process rights that Plaintiffs here assert.

To support their claim, the *Baker* plaintiffs appealed to the same constitutional principles as Plaintiffs here. *Baker v. Nelson,* No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972). *Baker* therefore necessarily decided that there is no basis under federal equal protection or due process analysis to support any claim that a same-sex relationship deserves the same recognition, rights or benefits as husband-wife marriage.

Given that *Baker* is controlling and on point for same-sex marriage issues, the lower federal courts have an obligation to follow that authority:

> "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, 521 U.S. at 237 (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989), alteration in *Agostini*). Even if it elects to revisit the issue of same-sex marriage, this Court should make clear that the Ninth Circuit lacked authority to ignore *Baker*.

1. Neither *Lawrence* Nor *Romer* Overturns *Baker* on Marriage

Although this Court has never undermined *Baker* sufficiently for the lower courts to reject its holding, Pet. App. 102a n.1 (Smith, J., concurring in part and dissenting part), Plaintiffs have argued that *Lawrence* and *Romer* render *Baker* non-controlling. *Lawrence* expressly disavows that result:

> The present case … does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578. As such, the suggestion that *Lawrence* undermines *Baker* cannot be squared with *Lawrence* itself, much less *Baker* and *Agostini.* Moreover, there is an obvious difference between criminalizing consensual and private adult behavior in *Lawrence* and requiring public and societal recognition, including monetary benefits, in *Baker.*

Similarly, the *Romer* majority found Colorado's Amendment 2 unconstitutional for broadly limiting the *political* rights to petition government that homosexuals – *as individuals* – theretofore had shared with all citizens under the federal and state constitutions. *Romer,* 517 U.S. at 632-33. Guaranteeing universal political rights under *Romer* in no way undermines allowing husband-wife definitions of marriage under *Baker.* As such, *Baker* remains good law that the Ninth Circuit had an obligation to follow.

2. The Post-*Baker* Disposition of the ERA Reinforces *Baker*

Ten years after *Baker,* the Nation finally rejected the Equal Rights Amendment, H.J. Res. 208, 86 Stat. 1523 (1972) ("ERA"), which would have added an amendment to ensure "equality of rights ... on account of sex." Had the Nation ratified the ERA, this language *might* have provided a basis for the claims here. *Compare, e.g.,* 118 Cong. Rec. 4389 (daily ed. March 21, 1972) (Sen. Bayh) (ERA would not require homosexual marriage) *with* 118 Cong. Rec. 4373 (daily ed. March 21, 1972) (Sen. Ervin) (ERA would require homosexual marriage) (*quoting* the testimony of Harvard Professor Paul A. Freund in *Hearings on H.J. Res. 35, 208 Before Subcomm. no. 4 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971)).

The People of the United States *rejected* the ERA, in large part because of a well-founded fear that ERA would lead to the very result that Plaintiffs demand here: "The vote in Virginia [against the ERA] came after proponents argued on behalf of civil rights for women and opponents trotted out the *old canards about homosexual marriages*…." Judy Mann, *Obstruction,* WASHINGTON POST, B1, Feb. 19, 1982 (emphasis added). However those "canards" might have fared under the ERA, they plainly cannot survive without it.

Amicus Eagle Forum respectfully submits that the fate of the ERA – the only constitutional text that *might* have supported Plaintiffs' claims – is instructive here. During the ERA's ratification process, Justice Powell counseled against short

circuiting the democratic process to decide ERA-related issues. *Frontiero v. Richardson,* 411 U.S. 677, 692 (1973) (Powell, J., concurring in judgment). By the same token, this Court should respect a decision against enlarging the scope of the equal protection clause to embrace an absolute equality of sexual relationships:

> Few principles of statutory construction are more compelling than the proposition that [a legislative body] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.

INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) (citation omitted). Indeed, post-enactment history – *i.e.,* post-ratification of the Fifth and Fourteenth Amendments – is "entitled to great weight in statutory construction" of the original Amendments. *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 380-81 (1969). This Court should respect the will of the People to reject the ERA, which was widely understood to provide the only possible textual basis for a constitutional right to equal recognition of same-sex relationships.

II. THE NINTH-CIRCUIT PANEL MISAPPLIED *ROMER*

The panel majority's misplaced resort to *Romer* fails on several levels. As petitioners argue (Pet. at 15-22), *Romer* does not stand for the proposition that states can never withdraw gratuitous privileges or benefits (*i.e.,* those not required in the first place). But *amicus* Eagle Forum respectfully submits that additional concerns of federalism and due process

require this Court to reject the panel majority's use of *Romer* to bind California with *Marriage Cases*.

At the outset, this Court should reject the Ninth Circuit majority's use of *Romer* to fashion a rule that, once states grant benefits not required by federal law, states may not withdraw those benefits. *See* Pet. at 15-22. *Romer* nowhere holds that Colorado could not have simply repealed the local ordinances that prompted Colorado's Amendment 2, which would be *essentially* what California has done.[9] Instead, *Romer* held Amendment 2 unconstitutional for going beyond mere repeal and broadly limiting the political rights that homosexual citizens theretofore had shared with all citizens. *Romer,* 517 U.S. at 632-33. In this Section, *amicus* Eagle Forum argues that the panel majority's reliance on *Romer* also fails because these Plaintiffs cannot rely on non-mutual estoppel to invalidate Proposition 8 and *Romer* cannot apply to non-mutual judgments.

A. Preclusion Principles Prevent Reliance on *Marriage Cases*

In civil cases, the doctrine of *res judicata* bars parties or those in privity with them from relitigating a cause of action finally determined by a court of competent jurisdiction (claim preclusion) or any issues actually determined in such a prior proceeding (issue preclusion or collateral estoppel). *Taylor v. Sturgell,* 553 U.S. 880, 892 (2008) ("[t]he preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are

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[9] What California *actually* did was abrogate a court decision, Section II.B, *infra,* which is even farther removed from *Romer*.

collectively referred to as *'res judicata'*"); *In re Russell,* 12 Cal.3d 229, 233 (1972). In general, both California and federal courts recognize non-mutual preclusion. *Bernhard v. Bank of America,* 19 Cal.2d 807, 810 (1942); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 & n.4 (1979). Under *res judicata,* prior holdings are binding on the parties, even if they are wrong. *See, e.g., Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 399 & n.3 (1981). The general rules of *res judicata* have two caveats relevant here.

First, although *mutual* collateral estoppel is available against the government, *Montana v. U.S.,* 440 U.S. 147, 153 (1979), this Court has rejected *non-mutual* estoppel against the *federal* government. *U.S. v. Mendoza,* 464 U.S. 154 (1984). Under *Mendoza,* only parties to the prior litigation against the federal government can assert preclusion against the federal government. California applies *Mendoza* to protect *state* governments from non-mutual preclusion, *Helene Curtis, Inc. v. Assessment Appeals Bd.,* 76 Cal.App.4th 124, 133 (1999), and this Court should extend *Mendoza* to protect state government from non-mutual collateral estoppel.[10]

Second, although non-parties can assert non-mutual collateral estoppel against parties bound by prior litigation, it violates due process to bind *anyone*

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[10] While noting that this Court has not reached the issue, the Courts of Appeals have extended *Mendoza* to state government. *See, e.g., Hercules Carriers, Inc. v. Florida,* 768 F.2d 1558, 1579 (11th Cir.1985); *Chambers v. Ohio Dept. of Human Serv.,* 145 F.3d 793, 801 n.14 (6th Cir. 1998); *Milton S. Kronheim & Co. v. District of Columbia,* 91 F.3d 193, 205 (D.C. Cir. 1996) (Silberman, J., concurring).

to litigation in which the person to be bound did not participate. *Baker v. Gen. Motors Corp.,* 522 U.S. 222, 237-38 & n.11 (1998); *Vandenberg v. Superior Court,* 21 Cal.4th 815, 828 (1999). Similarly, it violates due process for the doctrine of *stare decisis* to apply so conclusively that, in effect, it operates as preclusion against non-parties to the prior litigation. *S. Cent. Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999). It is clear, therefore, that no one – including this Court – can bind the Proposition 8 proponents to the *Marriage Cases* litigation in which they were not parties.

Significantly, no one has a vested interest in any rule of law that would entitle him to insist that that rule of law remain unchanged. *Hammond v. U.S.,* 786 F.2d 8, 12 (1st Cir. 1986); *New York Central R.R. Co. v. White,* 243 U.S. 188, 198 (1917); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 88 n.32 (1978). Under both federal and California law, such rights vest only when reduced to a final judgment. *Willcox v. Edwards,* 162 Cal. 455, 465 (1912); *Southern Service Co. v. Los Angeles County,* 15 Cal.2d 1, 11-12 (1940); *149 Madison Avenue Corp. v. Asselta,* 331 U.S. 795 (1947), *modifying* 331 U.S. 199 (1947); *The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801).[11] Here, *these* plaintiffs have no *Marriage Cases* judgment to enforce, and they cannot rely on preclusion or *stare decisis.*

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[11] As explained in *Hammond,* 786 F.2d at 12, the *Asselta* plaintiffs prevailed in this Court but Congress amended the relevant statute within the time for petitioning this Court for rehearing, which enabled the defendants to vacate that near-judgment and prevail.

As it exists today, California's Constitution provides that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, §7.5. The equal-protection rationale that guided the *Marriage Cases* majority is unavailable now, because Proposition 8 expressly rejects the notion that a same-sex marriage ban violates equal protection. *Bowens v. Superior Court,* 1 Cal.4th 36, 45 (1991) ("recent, specific provision [of the Constitution] is deemed to carve out an exception to and thereby limit an older, general provision"); *Rose v. State of California,* 19 Cal.2d 713, 723-24 (1942). Under the circumstances, *Marriage Cases* has lost its precedential value for the proposition that the California Constitution requires same-sex marriage rights, and *Strauss* held as much.

When a state or federal court applies the California Constitution as it is written today to the case of parties, such as Plaintiffs, who cannot rely on the *res judicata* effect of *Marriage Cases,* same-sex marriage obviously cannot be a constitutional right. The Constitution itself denies that right.

B. The Panel Majority's *Romer* Rule Does Not Apply to Mere Judgments

Proposition 8 does not repeal any rights that ever existed outside of a judgment secured by non-parties to this litigation. In *Crawford v. Board of Education,* 458 U.S. 527, 540 (1982), this Court *inter alia* 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." *Amicus* Eagle Forum respectfully submits

that this Court recognized in *Crawford* the very distinction drawn here: non-mutual state-court judgments cannot stymie a sovereign state.

Properly understood, Proposition 8 falls within the "exception to the general rule that statutes are not construed to apply retroactively," which arises "when the legislation merely clarifies existing law." *Bowen v. Board of Retirement,* 42 Cal.3d 572, 574 (1986); *accord Martin v. California Mut. B. & L. Ass'n,* 18 Cal.2d 478, 484 (1941); *Balen v. Peralta Junior College Dist.,* 11 Cal.3d 821, 828 (1974). Two factors suggest that Proposition 8 merely clarified pre-existing law.

First, when the text of Proposition 8 qualified for the November ballot, *it was existing law.* Proposition 8's text reflected the law of the State of California from Statehood until the *Marriage Cases* decision, and Proposition 8's text was circulated to and approved by the voters to appear on the November 2008 ballot *before* the *Marriage Cases* decision.

Second, in the voter pamphlet prepared after Proposition 8 qualified for the November ballot, the Proponents argued that *Marriage Cases* was "wrongly" decided, that Proposition 8 would "restore" marriage's definition and "overturns the flawed legal reasoning" of *Marriage Cases. See* Ballot Pamphlet, Gen. Elec., at 55-57 (Nov. 4, 2008) (hereinafter, "Voter Pamphlet"). Taken together these factors suggest that Proposition 8 was intended to abrogate *Marriage Cases* by authoritatively clarifying *existing* law.[12] Although separation of powers prevents the

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[12] Although California's Legislature may enact legislation to abrogate California Supreme Court decisions, separation-of-

Legislature from interfering with final judicial *judgments, People v. Bunn,* 27 Cal.4th 1, 21 (2002), nothing prevents the People from abrogating prior judicial *holdings:*

> [Proposition 115], as enacted by the voters of California, has *abrogated* the holding of [a prior Supreme Court decision] such that an indicted defendant is no longer deemed denied the equal protection of the laws under [California's equal-protection clause] by virtue of the defendant's failure to receive a postindictment preliminary hearing.

Bowens, 1 Cal.4th at 46 (emphasis added). At least with respect to non-parties to the *Marriage Cases* judgment, the People abrogated *Marriage Cases* and clarified existing law because *Marriage Cases* was "wrongly" decided, "outrageous," "flawed [in its] legal reasoning," and "overruled" by Proposition 8. Voters' Pamphlet, at 56-57. The People set out to clarify existing law; because the California Supreme Court's 4-3 majority elected to proceed undemocratically rather than await the People's decision, the People abrogated the resulting decision.

Finally, the Declaration of Rights itself prevents the argument that *Marriage* Cases could freeze the People into a judgment that applied some of the

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power principles preclude the *Legislature's* dictating that the "new legislation merely declared what the law always was," once the Supreme Court has issued a final decision on what the prior law was. *McClung v. Employment Development Dep't,* 34 Cal.4th 467, 473 (2004). Unlike the Legislature, however, the People are not a mere co-equal branch of government, and separation-of-power principles do not apply.

Declaration's provisions. Section 24 provides that "[t]his declaration of rights may not be construed to impair or deny others retained by the people." CAL. CONST. art. I, §24. As such, Section 24 is independently fatal to the panel's reasoning. Because the People reserved the right to amend their Constitution, CAL. CONST. art. XVIII, §3, Section 24 prevents any attempt to pit provisions of Article I, Sections 1 and 7 against Article I, Section 7.5.

III. THE NINTH CIRCUIT'S INTRA-CIRCUIT SPLIT COMPELS THIS COURT'S REVIEW

The prior sections explain conflicts between the Ninth Circuit panel decision and the decisions of this Court and other appellate courts. The Ninth Circuit panel also failed to follow *Ninth Circuit* precedent, which justifies this Court's exercising its supervisory jurisdiction over the lower federal courts.

Specifically, the Ninth Circuit already has held that "Congress's decision to confer spouse status ... only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements." *Adams,* 673 F.2d at 1042. That should have been dispositive of Plaintiffs' claims,[13] if prior panels bind subsequent panels. *See, e.g., Jones v. Bock,* 549 U.S. 199, 220 n.9 (2007); *Textile Mills Securities Corp. v. Commissioner,* 314 U.S. 326, 335

[13] The Fifth Amendment Due Process Clause's equal-protection component is equivalent to the Fourteenth Amendment's Equal Protection Clause. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). As such, decisions under the Fifth Amendment apply to the states under the Fourteenth Amendment.

(1943). The Ninth Circuit could have adopted "[a]ny procedure … which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts," *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941), but did nothing here. In abdicating its obligation to address intra-circuit splits in the first instance, the Ninth Circuit has now left it to this Court's "general power to supervise the administration of justice in the federal courts," where "the responsibility lies with this Court to define [the] requirements and insure their observance." *Western Pacific,* 345 U.S. at 260 (interior quotations omitted).

The issue is not merely academic because District Courts and future panels in the Ninth Circuit will need to address the effect of this litigation on the binding precedents that the panel majority ignored in this case. For example, the likely appeal in *Jackson* from the District Court for the District of Hawaii will imminently raise the question whether to follow prior precedents or this litigation, as will litigation in Washington State if its voters reject same-sex marriage in the referendum on that state's ballot this November. In both states, proponents of same-sex marriage will argue (as the panel majority did here) that these states withdrew a right to same-sex marriage that pre-dated the vote to restrict same-sex marriage. As such, this litigation is not as California-specific as the panel majority sets out. To the contrary, this litigation raises crucial questions that apply to numerous states.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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Respectfully submitted,

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