No. 12-144

In The Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE LUTHERAN CHURCH-MISSOURI SYNOD IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians.

The Ethics & Religious Liberty Commission is the moral concerns and public policy entity of the Southern Baptist Convention, the Nation's largest Protestant denomination, with over 44,000 churches and 16.3 million members.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with 6 million members in the United States.

The Lutheran Church-Missouri Synod, a religious nonprofit corporation, is the second-largest Lutheran denomination in North America. It has approximately 6,200 member congregations and 2.3 million baptized members.

These *amici curiae* – collectively representing the religious affiliations of tens of millions of Americans –

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk, and counsel of record received at least 10-days' notice of the intent to file this brief. *See* SUP. CT. R. 37.2(a).

are united by their profound commitment to the traditional institution of marriage, understood as the union of one man and one woman.

INTRODUCTION

Our Nation is involved in a profound debate about the nature and purpose of marriage. In numerous forums, the people are discussing and weighing the role of marriage in encouraging responsible procreation, marriage's connection to the welfare of children, the cultural values necessary to sustain marriage, the effects of same-sex parenting, and the equality claims pressed by same-sex couples.

This democratic conversation is robust and fully engaged. Both sides enjoy strong support from influential groups with ample means of making their views known. Public opinion continues to evolve in response.

Our federalist Republic is reacting to this debate in the predictably diverse ways that typify American politics. Most states have enacted constitutional amendments and statutes to uphold the traditional, opposite-sex definition of marriage; some states have granted the full legal status of marriage to same-sex couples; and many other states have created various hybrids (*e.g.*, civil unions/domestic partnerships). Municipalities are also engaged and responding to the extent of their legal powers. In short, the people are talking, debating, and persuading. Legislatures

and electorates are listening, deliberating, and deciding. The will of the people is being refined. Our democracy is working.

The Ninth Circuit's decision striking down Proposition 8 is a misguided incursion into this democratic debate. It misconstrues and misapplies this Court's holding in *Romer v. Evans*, 517 U.S. 620 (1996), to conclude that the millions of Californians who voted for the narrow change effected by Proposition 8 – the preservation of the term "marriage" to designate the union of one man and one woman while leaving same-sex couples all the other rights and benefits of marriage – were irrational, ignorant, and prejudiced. That holding turns *Romer* on its head, opening the door for federal courts to find "anti-gay animus" in any affirmative effort by the people to legally preserve the traditional definition of marriage. It also targets religious support for traditional marriage for unique judicial scrutiny, which this Court's rational basis jurisprudence and the Constitution itself forbid.

The question presented is also an issue of great national importance. The court below implausibly announced that its holding was limited to the narrow context of Proposition 8. It is in fact sweeping. Fairly applied, it would most likely invalidate laws enshrining the opposite-sex definition of marriage in the states subject directly to the Ninth Circuit's jurisdiction and threaten those in many of the 42 States that do not allow marriages between same-sex couples. Indeed, it is hard to see how any law passed in the last 15 years to preserve the opposite-sex definition of

marriage could survive this holding, for they all rest on the very rationales the court below condemned. The decision below also distorts the national marriage debate by declaring in the name of the Constitution that religious understandings of marriage are irrational and illegitimate, even when coupled with nonreligious judgments. The result is to delegitimize and nullify the longstanding and historically-rooted views of millions of American citizens about marriage. Review is necessary to ensure that federal courts hew to their proper role within our constitutional democracy when addressing the vital matter of marriage.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION MISCONSTRUES AND MISAPPLIES *ROMER v. EVANS*.

A. California's Reaffirmation of Traditional Marriage in Proposition 8 Is Fundamentally Unlike the Provision Invalidated in *Romer*.

The Ninth Circuit's decision striking down Proposition 8 – a state constitutional amendment providing that "[o]nly marriage between a man and a woman is valid or recognized in California"[2] – rests on a "gross misapplication of *Romer* . . . that would be

[2] CAL. CONST. art. I, § 7.5 (2008).

unrecognizable to the Justices who joined it, to those who dissented from it, and to the judges of sister circuits who have since interpreted it." App. 445a (O'Scannlain, Bybee, and Bea, JJ., dissenting from denial of rehearing en banc). That stark description by the three judges who dissented from the Ninth Circuit's denial of rehearing en banc comports with the conclusion in Judge Smith's dissenting opinion that "*Romer* is inapposite." *Id.* at 113a (Smith, J., concurring in part and dissenting in part). As a serious misapplication of this Court's precedent, the decision below merits review. *See SEC v. Edwards*, 540 U.S. 389, 392-93 (2004) (granting certiorari to review allegation that court of appeals misconstrued or misapplied Supreme Court precedent); *Elder v. Holloway*, 510 U.S. 510, 515 (1994) (same).

In *Romer*, this Court struck down a Colorado ballot measure (Amendment 2) amending the State constitution to prohibit "legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians." 517 U.S. at 624. This Court found that Amendment 2 imposed a "[s]weeping and comprehensive . . . change in legal status" for gays and lesbians, *id.* at 626, creating "a broad and undifferentiated disability," *id.* at 632, that "identifie[d] persons by a single trait and then denie[d] them protection across the board" – barring them even from "seek[ing] specific protection from the law" on equal terms with other citizens. *Id.* at 633. Repeatedly stressing the amendment's "sheer breadth," *id.* at 632, this Court considered the law "so

far removed from [any] particular justifications" as to "find it impossible to credit them," *id.* at 635, and thus "inexplicable by anything but animus toward the class it affects." *Id.* at 632. Amendment 2, the Court explained, was "exceptional" and "unprecedented in our jurisprudence." *Id.* at 632, 633. Accordingly, this Court struck it down under the Equal Protection Clause as lacking "a rational relationship to legitimate state interests." *Id.* at 632.

Proposition 8 could hardly be more different. As interpreted by the California Supreme Court, it "carves out a narrow and limited exception" to the "extremely significant substantive aspects of a same-sex couple's state constitutional right[s]." *Strauss v. Horton*, 207 P.3d 48, 61 (Cal. 2009). Its "limited effect" is to "reserv[e] the official *designation* of the term 'marriage' for the union of opposite-sex couples." *Id.* at 62, 61. Recognizing that it was "bound" by that "authoritative interpretation," App. 55a, the Ninth Circuit had to agree that Proposition 8 operates "with surgical precision" and "has a less sweeping effect on [gays' and lesbians'] public and private transactions than did Amendment 2." *Id.* at 59a.

Yet the court below insisted that "*Romer* governs our analysis notwithstanding the differences between Amendment 2 and Proposition 8." *Id.* at 60a. The court asserted that "Proposition 8 is *no less problematic* merely because its effect is narrower" and that "the surgical precision with which it excises a right belonging to gay and lesbian couples makes it *even more suspect*." *Id.* (emphasis added). In the Ninth

Circuit's view, "[a] law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful designation is all the more 'unprecedented' and 'unusual' than a law that imposes broader changes."[3] *Id.* at 59a-60a. Based on this reasoning, the court held that Proposition 8 "raises an even stronger 'inference [than Amendment 2] that the disadvantage imposed is born of animosity toward the class of persons affected.'" *Id.* at 60a (quoting *Romer*, 517 U.S. at 633-34).

Despite a decade-and-a-half of court decisions interpreting *Romer*, the court below could not cite a single case supporting this interpretation. On the contrary, the Ninth Circuit's conclusion that Proposition 8 is "even more suspect" than Amendment 2 because it affects same-sex couples with "surgical precision" turns this Court's analysis in *Romer* on its head. *Id. Romer* repeatedly emphasized the Colorado amendment's breadth – not its precision – as the fatal constitutional flaw. 517 U.S. at 632, 633, 635. Amendment 2 failed because, in the Court's view, it excluded gays and lesbians from a broad array of civil and political rights. But nothing in *Romer* even hints that Colorado's then-existing statewide antidiscrimination laws might violate the Fourteenth Amendment

[3] Labeling Proposition 8 "'unprecedented'" contradicts the California Supreme Court's acknowledgment of "past state constitutional amendments that diminished state constitutional rights." *Strauss*, 207 P.3d at 105. And describing Proposition 8 as "'unusual'" is belied by the laws of 40 States that – like California – expressly reserve marriage for opposite-sex couples.

by not including homosexuals as a protected class. The decision below thus inverts *Romer*, condemning Proposition 8 precisely *because* it is "a narrow and limited exception" to the broad range of California rights that vigorously protect same-sex couples to this day. *Strauss*, 207 P.3d at 61. The Ninth Circuit fundamentally misapplied *Romer* by turning the uncommon solicitude of California's citizens for gays and lesbians into the primary reason to invalidate their decision to reserve the name "marriage" for opposite-sex couples. Such all-or-nothing reasoning finds no basis in *Romer* and creates a perverse incentive for States to deny broad protections to homosexuals, lest the reservation of certain privileges to others be declared irrational.

The only other federal circuit to address the issue has rejected the claim that preserving the traditional definition of marriage is comparable to the broad amendment struck down in *Romer*. *See Citizens for Equal Protection v. Bruning*, 455 F.2d 859, 868 (8th Cir. 2006); *see also Lofton v. Sec. of Dep't of Children & Fam. Servs.*, 358 F.3d 804, 826-27 (11th Cir. 2004) (distinguishing *Romer* from Florida's ban on adoption by same-sex couples).

B. The Ninth Circuit's False Analogy Between Proposition 8 and the Law in *Romer* Seriously Distorted Its Application of the Rational Basis Test.

In *Romer*, this Court struck down Amendment 2 under rational basis scrutiny – nothing more. 517

U.S. at 635 ("[A] law must bear a rational relationship to a legitimate governmental purpose . . . and Amendment 2 does not.") (citation omitted). This Court held that even under that highly deferential standard Amendment 2 was "inexplicable by anything but animus," *id.* at 632, because the law's "breadth" rendered the amendment "so far removed from [any] particular justifications" that it was "impossible to credit them." *Id.* at 632, 635.

The Ninth Circuit's false analogy between Proposition 8 and Amendment 2 led it to misapply rational basis review, summarily rejecting every supporting rationale as mere pretexts for the anti-gay animus the court believed it had uncovered. But this case bears no relation to *Romer's* concern with bare prejudice leading to sweeping discriminatory laws against a single group. Proposition 8 simply restored the age-old and nearly ubiquitous definition of marriage that had prevailed during all but six months of California's statehood. Its impact on same-sex couples is "essentially an unavoidable consequence of a . . . policy that has in itself always been deemed to be legitimate." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979).

Properly applied, rational basis review should have sustained Proposition 8 because "it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. The official proponents of Proposition 8 argued that it serves legitimate governmental interests by "furthering California's interest in child-rearing and responsible procreation" and "proceeding

with caution before making significant changes to marriage." App. 69a-70a. These interests have been recognized by this Court as legitimate – indeed, as serious, profound, and far-reaching. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (encouraging marriage and procreation); *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (plurality) (discouraging irresponsible procreation); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (child-rearing); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (incremental lawmaking). And such interests have been held sufficient to uphold the traditional definition of marriage against equal protection claims like the one brought against Proposition 8. *See, e.g.*, *Bruning*, 455 F.3d at 867; *Conaway v. Deane*, 932 A.2d 571, 630 (Md. 2007); *see also Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in judgment) ("preserving the traditional institution of marriage" qualifies as a rational basis for "laws distinguishing between heterosexuals and homosexuals").

The Ninth Circuit denied that these interests, rather than anti-gay sentiment, were behind Proposition 8, applying what amounted to heightened scrutiny. It reasoned that the interest in "funneling more child-rearing into families led by two biological parents" would be rationally furthered by Proposition 8 only if it also "modif[ied] laws" regulating adoption by same-sex couples, *id.* at 72a, ignoring the social importance of reserving the name "marriage" to the legal union of a man and a woman. The court urged that the interest in responsible procreation among heterosexuals could be rationally advanced only if "opposite-sex

couples were *more* likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of 'marriage,'" *id.* at 74a-75a (emphasis added), ignoring the possibility that heterosexual couples might find marriage less compelling if it ceased to be narrowly focused on the specific needs of their relationships. And it denied any "rational connection between the asserted purpose of '*proceeding* with caution' and the enactment of an absolute ban, unlimited in time, on same-sex marriage in the state constitution," *id.* at 79a (footnote omitted), ignoring the fact that the California Constitution is easily and frequently amended. *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").

The Ninth Circuit's demands for a tighter nexus between Proposition 8 and its objectives misconceives the nature of rational basis review. Narrow tailoring of means to ends is a constitutional requirement of heightened scrutiny, not rational basis review. *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (Kennedy, J.). In one breath, the court of appeals said that Proposition 8 was subject to rational basis review. *See* App. 70a n.19. But in the next it rejected this Court's established rule that "[a] statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective,'" *Heller,* 509 U.S. at 324 (quotations and citations omitted), and that once "plausible reasons"

for a legislative classification have been identified, judicial "inquiry is at an end." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Rational basis review compels courts "to accept a legislature's generalizations even when there is an imperfect fit between means and ends," *Heller*, 509 U.S. at 321, and under that lenient standard legislation "may not be condemned simply because it imperfectly effectuates the State's goals." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973).

Proposition 8 satisfies true rational basis review. It cannot be said that reaffirming the traditional definition of marriage is "wholly irrelevant" to marriage's primary objectives of promoting responsible procreation and child-rearing among heterosexual couples, or that proceeding cautiously before adopting same-sex marriage is a pretext for invidious discrimination. *Heller*, 509 U.S. at 324. The Eighth Circuit held, for instance, that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867. Many appellate courts[4] and trial

[4] *See, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *cert. denied for want of substantial federal question*, 409 U.S. 810 (1972) (mem.); *Standhardt v. Superior Court*, 77 P.3d 451, 462-63 (Ariz. Ct. App. 2003); *Andersen v. King Cnty.*, 138 P.3d 963, 982-83 (Wash. 2006); *Conaway*, 932 A.2d at 630-31; *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 680 (Tex. Ct. App. 2010).

courts[5] have reached the same conclusion. And it is entirely rational for the people of California to avoid making fundamental changes to the institution of marriage until there is compelling scientific evidence and a strong popular consensus, or both, that such changes will benefit society. *See Jackson*, Civ. No. 11-007343 ACK-KSC, at 114 ("[T]he state may rationally decide to observe the effect of allowing same-sex marriage in other states before changing its definition of marriage.").[6] The decision below, in demanding a more perfect "fit between means and ends," *Heller*, 509 U.S. at 321, sharply departed from rational basis review as this Court has long defined it, deepening the conflict with *Romer*.

C. The Decision Below Associates Religious Beliefs About Marriage with the Anti-Gay Prejudice Condemned in *Romer*.

1. The district court blamed people of faith and religious organizations for the anti-gay stereotypes allegedly behind Proposition 8. It found that "moral and religious views form the *only* basis for a belief

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[5] *See, e.g.*, *Jackson v. Abercrombie*, Civ. No. 11-007343 ACK-KSC, at 105 (D. Haw. Aug. 8, 2012) (slip op.).

[6] *Accord Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 1003 (Mass. 2003) (Cordy, J., dissenting) (footnote omitted) ("[I]t is eminently rational for the Legislature to postpone making fundamental changes to it until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made.").

that same-sex couples are different from opposite-sex couples," App. 310a (emphasis added), and that "[t]here is a religious component to the bigotry and prejudice against gay and lesbian individuals." *Id.* at 273a. It charged that "religious hostility to homosexuals [plays] an important role in creating a social climate that's conducive to hateful acts," *id.* at 276a, that "religion is the chief obstacle for gay and lesbian political progress," *id.* at 273a, and that "[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians." *Id.* at 272a.

While not openly endorsing this dark portrait of religion, there can be little doubt that religious convictions are among the unspecified beliefs that the court below deemed an illegitimate basis for Proposition 8. The Ninth Circuit condemned Proposition 8 as "the product of longstanding, sincerely held private beliefs." *Id.* at 87a. Although it did not precisely identify those "private beliefs," the court noted that campaign messages focusing on "the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage" were evidence for the district court's broader finding – which *was* based on the portrayal of religious beliefs as anti-gay – that "[t]he campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships." *Id.* at 90a. The decision below thus strongly implies that the "private beliefs" responsible for the "disapproval of gays and lesbians" that was allegedly behind Proposition 8 were the same religious beliefs

that the district court had outright condemned as invidious. *Id.* at 87a, 89a.

2. To remove any doubt, we emphasize that religious support for the opposite-sex definition of marriage is rooted in our shared understanding that traditional marriage is essential to the welfare of children, family, society, and our republican form of government. That belief is nourished by the teachings of our respective religious traditions and by reflective, rational judgments about human nature and the needs of individuals (especially children) and society. And it is based on the collective experience of counseling and ministering to millions of followers over countless years. Our support for Proposition 8 and its reaffirmation of the traditional definition of marriage follows from positive teachings about the great worth of traditional marriage, family, and childbearing, not from teachings regarding homosexuality or other departures from the traditional marriage model. Indeed, our respective faiths embrace rich narratives that elaborate and extol the personal, familial, and social virtues of traditional marriage while mentioning homosexuality hardly at all. For an array of reasons, therefore, we are in favor of traditional marriage – not against homosexuals. Only invidious stereotyping could reduce religious doctrines and practices cherished by millions of Americans to nothing more than irrational prejudice against gays and lesbians.

* * *

In short, Judge O'Scannlain was correct to say that the Ninth Circuit's decision is a "gross misapplication of *Romer*." App. 445a. It drew an insupportable analogy between Proposition 8 and the Colorado amendment, from which it inferred that California's reaffirmation of traditional marriage had "no apparent purpose but to impose on gays and lesbians . . . a majority's private disapproval of them and their relationships." *Id.* at 92a. It distorted this Court's rational basis jurisprudence by brushing aside reasons for Proposition 8 that every other appellate court has found sufficient to pass rational basis scrutiny. And it associated the supposedly flawed motivations behind Proposition 8 with allegedly invidious religious beliefs that we and the vast majority of religious supporters of traditional marriage do not hold. The resulting conflict between the decision below and this Court's decision in *Romer* merits review.

II. The Question Presented Holds National Importance.

A. Constitutionalizing the Definition of Marriage Profoundly Affects States, Society, and People of Faith and Religious Organizations.

The Ninth Circuit's intrusion into the public debate over the nature and purpose of marriage is unnecessary and unwise. Despite its attempts to cast this as a fact-bound case governed by *Romer*, the Ninth Circuit's decision constitutionalizes the great marriage debate and thus has enormous national

implications. Whether the federal judiciary will preempt the political discussion and choose a winner in a cultural debate with profound national implications is for this Court to decide – not the Ninth Circuit.

1. By striking down Proposition 8, the Ninth Circuit held that the Equal Protection Clause prohibits the people of California from amending their state constitution or laws to reaffirm the only definition of marriage known to this country until a scant nine years ago. The court's reasoning threatens to upend the laws of eight States within the Ninth Circuit and, ultimately, the laws of all 42 States that, like California, do not recognize same-sex marriage. Thirty States – including California – have adopted constitutional amendments preserving marriage as the union of a man and a woman. Ten other States reserve marriage to opposite-sex couples by statute.[7] And although their marriage statutes do not expressly address the issue, New Mexico and Rhode Island do not recognize same-sex marriages performed within their jurisdictions.[8]

Further, the decision below contributes to legal uncertainty in four States where the legal status of same-sex marriage will appear on the ballot in the

[7] Constitutional and statutory provisions of all 40 States that expressly reserve marriage for opposite-sex couples are set forth verbatim in the appendix to show how closely Proposition 8 resembles them.

[8] *See* N.M. STAT. §§ 40-1-1 – 40-1-7 (2012); R.I. GEN. LAWS §§ 15-1-1 – 15-1-5 (2011).

November 2012 election. Legislatures in Maryland and Washington State have enacted statutes adopting same-sex marriage,[9] but enough signatures have been gathered to subject these laws to potential repeal.[10] Voters there will cast their ballots this fall, uncertain, in light of the Ninth Circuit's decision, whether the Fourteenth Amendment precludes them from restoring the traditional definition of marriage. Minnesota will consider a constitutional amendment substantively identical to Proposition 8,[11] and Maine will decide whether to legalize same-sex marriage.[12]

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[9] H.D. 438, 2012 Leg., 426th Sess. (Md. 2012); Sen. 6239, 2012 Reg. Sess. (Wash. 2012).

[10] *See* Letter from Linda H. Lamone, Administrator, Maryland State Board of Elections, to Derek A. McCoy, petition sponsor (July 10, 2012), *at* http://www.elections.state.md.us/petitions/Certification_Notice_civil_marriage.pdf (last visited Aug. 15, 2012); *Certification of Referendum No. 74*, Sam Reed, Washington Secretary of State (June 13, 2012), *at* http://www.sos.wa.gov/_assets/elections/R-74-Certification-6-12-12.pdf (last visited Aug. 15, 2012).

[11] Office of the Minnesota Secretary of State, *Proposed Amendment 1*, *at* http://www.sos.state.mn.us/index.aspx?page=1719 (last visited Aug. 30, 2012) (proposing to amend the Minnesota Constitution to provide: "Only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota.").

[12] State of Maine, Department of the Secretary of State, Bureau of Corporations, Elections & Commissions, *Questions for the Referendum Election*, *at* http://www.maine.gov/sos/cec/elec/upcoming.html (last visited Aug. 30, 2012) (Question 1: "Do you want to allow the State of Maine to issue marriage licenses to same-sex couples?").

Because the term "marriage" controls rights and duties under State law, the decision below also affects numerous statutes beyond those purporting to define "marriage" itself. These include laws governing the presumption of paternity, spousal and child support guidelines, and entitlement to State health and tax benefits, to name only a few. Immediately affected are such laws in every State within the Ninth Circuit,[13] but the decision below potentially affects every State law in the Nation whose application depends on the meaning of "marriage."

Given its effect on the marriage laws and related provisions of numerous States, the decision below strongly merits review. *See Smith v. Doe*, 538 U.S. 84, 89-90 (2003).

2. Review is also merited because the decision below discriminates against the beliefs, speech, and votes of people of faith and invites similar discrimination by courts in future cases. As explained, the

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[13] We are aware of no comprehensive study surveying the number of State laws that would be affected by the recognition of same-sex marriage as a matter of federal constitutional law. A GAO study estimates that, as of 2004, 1,138 provisions in the United States Code made marital status "a factor in determining or receiving benefits, rights, and privileges." U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act* 1 (2004). Because States shoulder the primary responsibility in our constitutional order for regulating the legal rights and duties attached to marriage, it is fair to say that the number of State laws affected by the constitutionalization of same-sex marriage would be larger still.

decision below strongly implies that religiously-informed beliefs about marriage were among the "private beliefs" that the court deemed an illegitimate basis for Proposition 8. In so holding, the Ninth Circuit effectively disenfranchised people of faith and religious organizations who support traditional marriage based on a variety of religious and nonreligious reasons. It reduced their speech and advocacy in the public square to little more than unconstitutional "[p]rejudice" and "stereotypes." App. 87a, 90a, 91a (quotation omitted). The Ninth Circuit has in substance declared religiously-informed views favoring same-sex marriage constitutionally permissible and religiously-informed views opposing it constitutionally forbidden. *Cf.* Brief of *Amici Curiae* California Faith for Equality, et al., at 4, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696) (opposing Proposition 8 in the court below).

This holding has national implications for religious supporters of traditional marriage and indeed for the entire marriage debate. By strongly implying that religious belief was a source of unconstitutional intent behind Proposition 8, the court below has skewed the marriage debate. Its decision has the effect of stigmatizing religious proponents of traditional marriage and declaring their views irrational and unconstitutional. Worse, it denies that people of faith and religious communities may participate freely and fully with their "private beliefs" in the processes of self-government.

Such an approach contradicts this Court's decisions, led by the frequently-cited dictum that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citations omitted). It likewise infringes on the nearly absolute right to peacefully advocate a political position during a referendum campaign like the one for Proposition 8. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Religious speech enjoys the same protection with undiminished force, *see Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995), and churches and other religious organizations – including those that organized and supported the campaign for Proposition 8 – merit the same protection as individual citizens. *See Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970).

In short, people of faith and religious communities "no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment). But that protection would be meaningless if laws that result from such "speech, association and political activity" could later be declared unconstitutional precisely because they were supported by religiously-motivated citizens and religious groups.

This bias against traditional religious views and the citizens who hold them flows inevitably from the Ninth Circuit's "gross misapplication of *Romer*."

App. 445a. Properly applied, rational basis review prevents courts from even inquiring into the religious motivations and beliefs of the electorate – much less condemning them as unconstitutional "animus" – so long as "there is any reasonably conceivable state of facts that could provide a rational basis" for the law. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). By contrast, the Ninth Circuit's misreading of *Romer requires* judicial evaluation of such beliefs. Indeed, it upends rational-basis review, prompting judges to second-guess the rationality of religious beliefs that allegedly motivated the passage or revocation of laws in culturally sensitive areas. It is critical to millions of religious Americans that their participation in the democratic process not be subject to unique judicial scrutiny.

3. The decision below also pits new legal understandings of marriage against ancient ones, causing serious tensions in an area of public policy where church and state have long worked cooperatively for the common good. Adopting conceptions rooted in personal-autonomy theories, the Ninth Circuit declared that "[t]he *name* 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships." App. 50a (citations omitted). Marriage, in this view, centers on the state's conferring "unique recognition," along with the "rights, protections, and benefits" that such recognition entails, on a "relationship with the person of one's choice." *Id.* at 48a-49a (quotations and citations omitted). The focus of such definitions is on the accommodation of adult relationship choices.

In contrast, gender, sexual complementarity, and responsible procreation – *i.e.*, ensuring that every child is known, loved, and cared for by the father and mother who brought her into the world – stand at the center of our religious understandings of marriage. Indeed, until very recently such notions were at the core of the established *secular* understanding of marriage. *See, e.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.").[14]

The Ninth Circuit in substance declared that the religious vision of marriage is unconstitutional (born of "animus") and thus, henceforth, only the personal autonomy vision – with its inevitable embrace of same-sex marriage – shall have legal effect. The court, in the name of the Constitution, thereby inserts a wedge between legal and religious visions of marriage at the definitional level. Where the state and religion once cooperated to support marriage under a common understanding of its essential definition, the decision below ensures profound disagreements over

[14] As one jurist explained in a dissenting opinion, it has long been understood as a sociological matter that an essential purpose of marriage, required by "an orderly society," is to serve as "the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other." *Goodridge*, 798 N.E.2d at 995 (Cordy, J., dissenting).

the very nature and purpose of this vital institution. And with the court below pronouncing that long-recognized rationales for the traditional institution of marriage are irrational, many people of faith and many religious organizations justifiably fear that "legally sanctioned genderless marriage, rather than peacefully coexisting with the contemporary man-woman marriage institution, [will] actually displace[ ] and replace[ ] it." Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313, 319 (2008). Such pronouncements distort the national dialogue on marriage, hardening positions and transforming potential compromises into indicia of unconstitutionality.

B. The Constitutional Validity of the Traditional Definition of Marriage Is a Recurring Issue in Burdensome Litigation Across the Nation.

The question presented also holds national importance because litigation over the constitutionality of state marriage statutes is proliferating. *See Sevcik v. Sandoval*, No. 2:12-CV-00578-RLH-(PAL), at 25 (D. Nev. Apr. 10, 2012); *Garden State Equality v. Dow*, No. MER-L-1729, 2012 WL 540608, at *10 (N.J. Super. Ct. Law Div. Feb. 21, 2012); *Jackson,* Civ. No. 11-007343 ACK-KSC, at 116. Notably, advocates for a full constitutional right to same-sex marriage in those cases are invoking the decision below as strong support for their arguments, belying the Ninth Circuit's attempt to cast the decision as fact-bound. *See*

Garden State Equality, No. MER-L-1729, 2012 WL 540608, at *3 (reinstating a federal equal protection claim based, in part, on the decision below); *Jackson*, Civ. No. 11-007343 ACK-KSC, at 53 (rejecting plaintiffs' argument that the decision below controls). Only review by this Court can settle this important question of constitutional law without burdensome nationwide litigation.

CONCLUSION

For the forgoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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APPENDIX

STATE CONSTITUTIONAL PROVISIONS:

Alabama

Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

ALA. CONST. amend. 774(b) (2006).

Alaska

To be valid or recognized in this State, a marriage may exist only between one man and one woman.

ALASKA CONST. art. I, § 1.25 (1998).

Arizona

Only a union of one man and one woman shall be valid or recognized as a marriage in this state.

ARIZ. CONST. art. XXX, § 1 (2008).

Arkansas

Marriage consists only of the union of one man and one woman.

ARK. CONST. amend. 83, § 1 (2004).

California

Only marriage between a man and a woman is valid or recognized in California.

CAL. CONST. art. I, § 7.5 (2008).

Colorado

Only a union of one man and one woman shall be valid or recognized as a marriage in this state.

COLO. CONST. art. II, § 31 (2006).

Florida

Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.

FLA. CONST. art. I, § 27 (2008).

Georgia

This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.

GA. CONST. art. I, § IV, ¶ I(a) (2004).

Idaho

A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.

IDAHO CONST. art. III, § 28 (2006).

Kansas

(a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.

(b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.

KAN. CONST. art. XV, § 16 (2005).

Kentucky

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

KY. CONST. § 233A (2004).

Louisiana

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

LA. CONST. art. XII, § 15 (2004).

Michigan

To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

MICH. CONST. art. I, § 25 (2004).

Mississippi

Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized

in this State and is void and unenforceable under the laws of this State.

MISS. CONST. art. XIV, § 263A (2004).

Missouri

That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.

MO. CONST. art. I, § 33 (2004).

Montana

Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

MONT. CONST. art. XIII, § 7 (2004).

Nebraska

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

NEB. CONST. art. I, § 29 (2000).

Nevada

Only a marriage between a male and female person shall be recognized and given effect in this state.

NEV. CONST. art. I, § 21 (2002).

North Carolina

Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.

N.C. CONST. art. XIV, § 6 (2012).

North Dakota

Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

N.D. CONST. art. XI, § 28 (2004).

Ohio

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

OHIO CONST. art. XV, § 11 (2004).

Oklahoma

Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

OKLA. CONST. art. II, § 35(A) (2004).

Oregon

It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.

OR. CONST. art. XV, § 5a (2004).

South Carolina

A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a

domestic union that is not valid or recognized in this State. This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments.

S.C. CONST. art. XVII, § 15 (2007).

South Dakota

Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.

S.D. CONST. art. XXI, § 9 (2006).

Tennessee

The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

TENN. CONST. art. XI, § 18 (2006).

Texas

(a) Marriage in this state shall consist only of the union of one man and one woman.

(b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

TEX. CONST. art. I, § 32 (2005).

Utah

Marriage consists only of the legal union between a man and a woman.

UTAH CONST. art. I, § 29(1) (2004).

Virginia

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

VA. CONST. art. I, § 15-A (2006).

Wisconsin

Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

WIS. CONST. art. XIII, § 13 (2006).

STATE STATUTES:

Delaware

A marriage is prohibited and void between a person and his or her ancestor, descendant, brother, sister, half brother, half sister, uncle, aunt, niece, nephew, first cousin or between persons of the same gender.

DEL. CODE ANN. tit. 13, § 101(a) (2011).

Hawaii

In order to make valid the marriage contract, which shall be only between a man and a woman. . . .

HAW. REV. STAT. § 572-1 (2012).

Illinois

(a) The following marriages are prohibited: . . .

(5) a marriage between 2 individuals of the same sex.

750 ILL. COMP. STAT. 5/212(a)(5) (2011).

Indiana

(a) Only a female may marry a male. Only a male may marry a female.

(b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

IND. CODE § 31-11-1-1 (2012).

Maine

Persons of the same sex may not contract marriage.

ME. REV. STAT. tit. 19-A, § 701.5 (2012).

Minnesota

Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted only between persons of the opposite sex and only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one

authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. . . .

MINN. STAT. § 517.01 (2012).

New Jersey

The Legislature, however, discerns a clear and rational basis for making certain health and pension benefits available to dependent domestic partners only in the case of domestic partnerships in which both persons are of the same sex and are therefore unable to enter into a marriage with each other that is recognized by New Jersey law, unlike persons of the opposite sex who are in a domestic partnership but have the right to enter into a marriage that is recognized by State law and thereby have access to these health and pension benefits. . . .

N.J. STAT. ANN. § 26:8A-2(e) (2012).

Pennsylvania

It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.

23 PA. CONS. STAT. § 1704 (2011).

West Virginia

Every application for a marriage license must contain the following statement: "Marriage is designed to be a loving and lifelong union between a woman and a man. . . ."

W. VA. CODE § 48-2-104(c) (2012).

Wyoming

Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.

WYO. STAT. ANN. § 20-1-101 (2012).