Nos. 10-16696 & 11-16577

United States Court of Appeals for the Ninth Circuit

KRISTIN PERRY, ET AL.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR., ET AL.,
Defendants,

and

DENNIS HOLLINGSWORTH, ET AL.,
Defendant-Intervenors-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
CIVIL NO. 09-CV-2292-JW, HON. JAMES WARE

OPINION FILED FEBRUARY 7, 2012
(REINHARDT, HAWKINS, N.R. SMITH (DISSENTING))

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS' PETITION FOR RECONSIDERATION AND REHEARING *EN BANC*

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: March 5, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this brief with the consent of all the parties.[1] Founded in 1981, Eagle Forum has consistently defended federalism and traditional American values, including marriage defined as the union of husband and wife. Through its affiliates and their chapters, Eagle Forum represents an active California chapter that supports Proposition 8. For these 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,

---

[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

§7.5 ("Proposition 8"); CAL. FAMILY CODE §308.5 ("Proposition 22") – thereby prompting Proposition 8's ballot proponents to intervene as defendants. Plaintiffs prevailed below, and the Proponents appealed.

Two California Supreme Court decisions serve as the litigation backdrop to this litigation. First, *In re Marriage Cases,* 43 Cal.4th 757 (2008) ("*Marriage Cases*"), invalidated Proposition 22 – which the People enacted in 2000 – as contrary to the 4-3 majority's interpretation of generally worded privacy and equal-protection provisions of California's Constitution. 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).[2] Second, *Strauss v. Horton,* 46 Cal.4th 364 (2009), upheld Proposition 8 – which the People enacted that November – as abrogating *Marriage Cases* with the marriage-specific constitutional amendment quoted above.

---

[2] The order is available on the California Supreme Court's website at http://www.courts.ca.gov/documents/NR31-08.PDF (last visited Mar. 5, 2012).

Against that backdrop, the panel majority in this litigation analogizes to *Romer v. Evans,* 517 U.S. 620 (1996), in which the U.S. Supreme 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. This analogy is inapposite for two reasons. First, the Colorado amendment selectively withdrew from homosexuals broad political rights expressly guaranteed by both the federal and Colorado constitutions. 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.*[3] Second, unlike the holding in *Romer* for Colorado's Amendment 2, controlling authority establishes a rational basis for Proposition 8.

---

[3] 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.

CALIFORNIA CONSTITUTIONAL BACKGROUND

"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," *Marriage Cases,* 43 Cal.4th at 792-93, 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).

Since 1972, California's Constitution has recognized 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." CAL. CONST. 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." CAL. CONST. art. I, §7.5. Finally, in addition to the foregoing, the 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." CAL. CONST. art. I, §24.

With regard to governmental structure, the California Constitution adopts the familiar three branches of government, but places all three under the sovereignty of the People. First, the Constitution cabins each branch of government to its respective role:

> The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

CAL. CONST. art. III, §3. Second, the People reserved the right to change their Constitution, CAL. CONST. art. XVIII, §3, which they could do by "amendment" (as with Proposition 8), CAL. CONST. art. XVIII, §§1, 3, or

by "revision" CAL. CONST. art. XVIII, §§1, 2, 4; s*ee also Strauss,* 46 Cal.4th at 445.

SUMMARY OF ARGUMENT

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 against Proposition 8 or Proposition 22, which renders *Romer* inapposite. Moreover, claim preclusion bars CCSF from challenging Proposition 8 here, after CCSF's loss in *Strauss*. The panel's decision to the contrary conflicts with Circuit precedent on non-mutual preclusion against sovereign states. *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.,* 425 F.3d 708, 714 (9th Cir. 2005); *see also In re Consolidated U.S. Atmospheric Testing Litig.,* 820 F.2d 982, 988-89 (9th Cir. 1987) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit") (interior quotations omitted). The application of preclusion principles to this litigation and the irrelevance of *Romer* to mere judgments are discussed in Section I, *infra.*

Even if *Romer* applied, Proposition 8 still would survive because society's interest in responsible procreation and childrearing provides a rational basis for preferring traditional marriage over other familial arrangements. The panel's decision to the contrary conflicts with Circuit precedent on the rational basis for statutes that favor traditional marriage. *Adams v. Howerton,* 673 F.2d 1036, 1042 (9th Cir. 1982). Proposition 8's rational basis is discussed in Section II, *infra.*

This Court has the obligation to "avoid[] or resolv[e] intra-circuit conflicts," *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941), which this Court has held to require *en banc* review. *Atonio v. Wards Cove Packing Co., Inc.,* 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc*). Under *Wards Cove,* it falls to the *en banc* Court to resolve the splits in authority identified in this brief and by the Proponents.

ARGUMENT

I. *EN BANC* REVIEW IS NECESSARY TO RESOLVE A SPLIT IN AUTHORITY ON NON-MUTUAL JUDGMENTS' BINDING NATURE ON SOVEREIGN STATES

The panel majority's *Romer* gambit seeks to duck the Plaintiffs' core question – and the district court's express holding – that the Fourteenth Amendment requires states to provide same-sex marriage.

This gambit fails both because these Plaintiffs cannot rely on non-mutual estoppel to invalidate Proposition 8 and because *Romer* does not apply to non-mutual judgments.

A. Preclusion Principles Prevent Plaintiffs' and CCSF's 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 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), the U.S. Supreme 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 and this Circuit apply *Mendoza* to protect *state* governments from non-mutual preclusion: "*Mendoza*'s rationale applies with equal force to [an] attempt to assert nonmutual defensive collateral estoppel against … a state agency." *Idaho Potato Comm'n,* 425 F.3d at 714; *Helene Curtis, Inc. v. Assessment Appeals Bd.,* 76 Cal.App.4th 124, 133 (1999). Under the circumstances, Plaintiffs cannot assert the preclusive effect of *Marriage Cases* on the State of California.[4]

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

[4] Because the Proponents stand in the shoes of California, they are not bound any more than California. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 340-341 (1958).

(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.

Moreover, as this Court recognized in *Atmospheric Testing,* 820 F.2d at 988-89, "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit" (*quoting Hammond v. U.S.,* 786 F.2d 8, 12 (1st Cir. 1986) *and 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" become vested 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).[5] Here, Plaintiffs have no judgment to enforce, and they cannot rely on preclusion or *stare decisis*.

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

---

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

cannot rely on *res judicata,* same-sex marriage obviously cannot be a constitutional right. How could it be? The Constitution itself denies that right.[6] CAL. CONST. art. I, §7.5. In essence, Proposition 8 abrogates *Marriage Cases,* making it unavailable for latter-day plaintiffs.

B. The Panel Majority's *Romer* Rule Does Not Apply to Mere Judgments Generally or *Marriage Cases* Specifically

The panel majority's expansive reading of *Romer* would fashion a rule that, once states grant benefits not required by federal law, states may not withdraw those benefits, at least not without submitting themselves to intrusive federal factfinding with regard to motive. While *amicus* Eagle Forum agrees with Proponents' thorough rebuttal of this expansive view, this Section focuses on the nature of the state "law" here – a non-preclusive court judgment – versus that of the state law challenged in *Romer*.

---

[6] Although *traditional* marriage unquestionably is a fundamental right under the federal Constitution, *Turner v. Safley,* 482 U.S. 78, 95 (1987) ("the decision to marry is a fundamental right"); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental"), the federal Constitution does not prohibit California's denying validity or recognition to same-sex marriage. *Lawrence v. Texas,* 539 U.S. 558, 578 (2003) ("The present case … does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

The parties here dispute which Supreme Court precedent should govern this litigation. Like the panel, Plaintiffs and CCSF look to *Romer* as the controlling authority. For their part, the Proponents look to *Crawford v. Board of Education,* 458 U.S. 527 (1982), where the U.S. Supreme 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." *Id.* at 540. *Amicus* Eagle Forum respectfully submits that the U.S. Supreme Court recognized in *Crawford* the very distinction drawn here and in Section I.A, *supra:* non-mutual state-court judgments cannot stymie a sovereign state.

Significantly, *Romer* nowhere holds that Colorado could not have simply repealed the local ordinances that prompted Amendment 2. Instead, the *Romer* majority found 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. Proposition 8 does not repeal any rights that ever existed outside of a non-binding judgment.

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 ballot protectively, *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.[7] Although separation of powers prevents the 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, and because the California Supreme Court's 4-3

---

[7] Although the Legislature may enact legislation to abrogate Supreme Court decisions, separation-of-power principles preclude the *Legislature's* dictating that the "new legislation merely declared what the law always was," once the California 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.

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 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. Nothing in the 1972 and 1974 initiatives that added the California Constitution's privacy and equal-protection clauses informed the People that their "Yes" vote would restrict their pre-existing constitutional rights under the initiative process. Because the voters did not consider restricting their initiative rights, this Court cannot read that restriction into the 1972 or 1974 initiatives. *Katzberg v. Regents of University of California,* 29 Cal.4th 300, 320 (2002) (declining to allow damages remedy for violations of CAL. CONST. art. I, §7(a) where that issue was not discussed in 1974 initiative).

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:

> [The] powers of the State reside primarily in the people; and they, by our Constitution, have delegated … their … powers to the three departments – legislative, executive, and judicial – except in those cases where they have themselves exercised these powers, or expressly, or by necessary implication, reserved the same to themselves.

Nougues v. Douglass, 7 Cal. 65, 69 (1857).[8] Accepting *arguendo* that a court judgment under the Declaration of Rights' privacy or equal-protection provisions establishes an un-amendable "law," then two impermissible results flow from that judgment: (1) the California Supreme Court exceeded its powers under CAL. CONST. art. III, §3; and (2) the initiatives that adopted the privacy and equal-protection provisions into the California Constitution were not amendments but revisions of California's "basic governmental plan," *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization,* 22 Cal.3d 208, 223 (1978) ("an enactment which purported to vest all judicial power in the Legislature would amount to a revision"); *Strauss,* 46 Cal4th at 652-53,

[8] Although *Nougues* predates the initiative power recognized in the 1911 Constitution, it correctly provides that the People have delegated their powers to the three branches, subject *inter alia* to the People's reserving the power to amend the Constitution.

thereby rendering those initiatives void *ab initio* for failure to be brought by constitutional convention. If we assume arguendo that Proposition 8 did not abrogate *Marriage Cases,* then *Marriage Cases* rests on authorities that are void. Either way, Plaintiffs lack a valid law to press against Proposition 8.

For the foregoing reasons, *Romer* does not govern this litigation. First, *Romer* does not apply to judgments, as distinct from enacted laws. Second, if *Romer* did apply, *Marriage Cases* could not stand because the authorities on which *Marriage Cases* relies would then be void.

II. *EN BANC* REVIEW IS NECESSARY TO RESOLVE A SPLIT IN AUTHORITY ON THE APPLICATION OF RATIONAL-BASIS REVIEW UNDER EQUAL PROTECTION

The panel failed to follow controlling authority for equal-protection claims under the rational-basis test. In order to strike Proposition 8 under the rational-basis test, a reviewing court must consider and reject all of the rationales on which a state plausibly *may have acted.* Here, the panel majority did not follow binding Circuit precedent upholding a rational basis for statutes that recognize only traditional marriage.

A successful rational-basis plaintiff 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). It is enough, for example, that California voters "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).

Significantly, "a legislative choice" like Proposition 8 "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); *Heller v. Doe,* 509 U.S. 312, 320 (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.

This Court already has held that a legislative "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 v. Howerton,* 673 F.2d 1036, 1042 (9th Cir. 1982).[9] Although *Adams* involved immigration, that does not undermine the fact that this Court found plausible rational bases to support the preference for traditional marriage.

The most widely recognized purpose of marriage is to provide a stable and loving structure for procreation and childrearing. As defined by California, marriage serves that legitimate end. *Loving v. Virginia,* 388 U.S. 1, 12 (1967) (tying marriage to "our very existence and survival"). The fact that other potential legal arrangements exist under California law does not undermine the rationality of believing that children raised in a marriage by their biological mother and father may

---

[9] The Due Process Clause's equal-protection component at issue in *Adams* is equivalent to the Fourteenth Amendment's Equal Protection Clause at issue here. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 570 (9th Cir. 1990).

have advantages over children raised under other arrangements:[10]

> 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 v. Sec'y of Dept. of Children & Family Services, 358 F.3d 804, 820 (11th Cir. 2004). Although the typical rational-basis plaintiff has a difficult evidentiary burden to negative every possible basis on which the legislature may have acted, Plaintiffs here face an *impossible* burden. We are at least a generation away from the longitudinal studies that could 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 exist.

---

[10] The panel majority treats marriage inconsistently. For same-sex couples, marriage conveys "officially conferred and societally recognized status" that same-sex couples demand. Slip Op. at 10. For opposite-sex couples, however, there is no difference between non-marriage civil arrangements and marriage. *Id.* at 57. The majority cannot have it both ways. As this litigation demonstrates, marriage clearly matters.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Dated: March 5, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 4,195 words, including footnotes, but excluding this Brief Form Certificate, the Table of Authorities, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

Dated: March 5, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2012, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I have mailed the foregoing document by Priority U.S. Mail, postage prepaid, on the following participants in the case who are not registered CM/ECF users:

Anthony R. Picarello, Jr.
U.S. Catholic Conference
3211 Fourth Street, N.E.
Washington, DC 20017

Thomas Brejcha
Thomas More Society
29 S. La Salle Street, Suite 440
Chicago, IL 60603

Arthur Bailey, Jr.
Hausfeld LLP
44 Montgomery St, Ste 3400
San Francisco, CA 94104

Anita L. Staver
Mathew D. Staver
Liberty Counsel
1055 Maitland Ctr. Commons
Second Floor
Maitland, FL 32751

Lincoln C. Oliphant
Columbus School of Law
Catholic University
3600 John McCormack Rd, NE
Washington, DC 20064

/s/ Lawrence J. Joseph
Lawrence J. Joseph