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 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 IN SUPPORT OF REVERSAL

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

Counsel for Amicus Curiae

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

In addition, the Court directed the parties to brief and argue the following question: whether petitioners have standing under Article III, §2 of the Constitution in this case?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended traditional American values, including

[1] *Amicus* files this brief with consent by all parties; the parties have lodged blanket letters of consent 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.

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 this litigation attempts 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 and county 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 (the "Proponents") to intervene as defendants. Plaintiffs prevailed in the both lower courts, and the Proponents appealed first to the Ninth Circuit and now to this Court.

"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 (Cal. 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 (Cal. 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 (Cal. 2001) (interior quotations omitted, alteration in original); *Crosby v. Patch,* 18 Cal. 438, 441-42 (Cal. 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 added to California's Constitution 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 (Cal. June 4, 2008).[3] After prevailing 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 (Cal. 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 Jan. 29, 2013).

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 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).

Thirty years ago, this Nation finally rejected the Equal Rights Amendment, H.J.Res. 208, 86 Stat. 1523 (1972) ("ERA"), which proposed to add language

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[4] 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 (petitioners 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.

to the Constitution that *might* have provided a basis for the claims here. *Nat'l Org. for Women, Inc. v. Idaho,* 459 U.S. 809 (1982) (ERA's extended ratification period expired in 1982). Moreover, the American people rejected the ERA in large part because of a well-founded fear that ERA would lead to the very result that Plaintiffs demand. *Amicus* Eagle Forum respectfully submits that the People's rejection of the ERA – the only constitutional text that would have supported Plaintiffs' claims – compels this Court to reject Plaintiffs' claims.

In the intervening years, similar claims were routinely dismissed by federal courts on the authority of *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, two District Courts in the Ninth Circuit recently decided two analogous same-sex marriage cases by faithfully applying *Baker* and

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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), *petition for cert. pending,* No. 12-23 (U.S.); *Massachusetts v. U.S. Dept. of Health & Human Serv.,* 682 F.3d 1, 8 (2012), *petition for cert. pending sub nom Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill,* Nos. 12-13, 12-15, 12-97 (U.S.); *Windsor v. U.S.,* 833 F.Supp.2d 394, 399 (S.D.N.Y.), *aff'd* 699 F.3d 169, 176 (2d Cir. 2012), *on writ of cert.,* No. 12-307 (U.S.); *Dragovich v. U.S. Dept. of Treasury,* 872 F.Supp.2d 944, 951-53 (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, 10-11 (D. Conn. 2012).

Ninth Circuit precedent to uphold Hawaii's and Nevada's husband-wife definitions of marriage.[7] Although the panel majority here attempted to craft its decision to apply to California's unique facts, the Hawaii and Nevada matters will present the same basic issue of whether states can selectively deny marriage to same-sex couples.

STATEMENT OF FACTS

The facts are not materially in dispute, at least insofar as relevant to the Ninth Circuit's decision.[8] 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

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[7] *Jackson v. Abercrombie,* __ F.Supp.2d __, 2012 WL 3255201, 1 (D.Haw. 2012); *Sevcik v. Sandoval,* __ F.Supp.2d __, 2012 WL 5989662, 5 (D.Nev. 2012).

[8] 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.

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. *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. Sections I.C,-I.C.1 *infra.* In addition, Nation's debate over the ERA in the decade after *Baker* focused in large part on same-sex marriage, and the People's rejection of the ERA similarly rejected imposing – or even risking the imposition of – that outcome as a matter of constitutional law, a decision by the ultimate sovereigns that this Court should honor here. Section I.C.2 *infra.*

As Proponents argue (Pet. Br. at 21-27), *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.*

Finally, this litigation seeks to overturn the very fabric of society. While federal litigation should undertake such causes very cautiously when the issues are squarely presented, this litigation is merely a friendly suit between advocates of same-sex marriage and the state and local officials who have long opposed Proposition 8 and its statutory predecessor, Proposition 22. If, contrary to the state-law views of the California Supreme Court, this Court finds that the Proponents lack Article III standing to appeal the District Court's ruling, then this Court should remand with instructions to dismiss the entire litigation, without prejudice to Plaintiffs' filing suit in state court, where the Proponents will have standing and where the doctrine of concurrent jurisdiction allows Plaintiffs to air their claims under the Federal Constitution. 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 panel majority found 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 (*i.e.,* the issue in *Romer*) is inherently less significant a government interest than fostering husband-wife marriage, rational procreation, and responsible childrearing (*i.e.,* the issues here).

At the outset, it is not clear that restricting marriage to husband and wife even implicates the Equal Protection Clause, given the obvious difference between same-sex and opposite-sex couples with respect to procreation: "an individual's right to equal protection of the laws does not deny … the power to treat different classes of persons in different ways." *Johnson v. Robison,* 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original); *cf. Jenness v. Fortson,* 403 U.S. 431, 442 (1971) ("[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike"). Moreover, the classification is clearly "reasonable, not arbitrary, and … rest[s] upon some ground of difference having a fair and

substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed,* 404 U.S. 71, 75-76 (1971) (*quoting Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)). Under this view, Plaintiffs cannot state an Equal Protection claim on which relief can be granted.

Assuming *arguendo* that Plaintiffs' complaint states a potential claim 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 here.

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 data 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.[9]

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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[9] 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. By way of background, eight of the thirteen states that originally ratified the Fifth Amendment[10] – and all but a few of the thirty-seven states that subsequently joined the Union[11] – have defined marriage as a union between husband and wife. 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.*

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[10] GA. CONST. art. I, §IV, ¶I; S.C. CONST. art. XVII, §15; VA. CONST. art. I, §15-A; DEL. CODE ANN. tit. 13, §101; N.C. CONST. art. XIV, §6; PA. CONS. STAT. §1704; R.I. GEN. LAWS §§15-1-1 to -5; *Chambers v. Ormiston,* 935 A.2d 956, 962 (R.I. 2007); *cf. Quarto v. Adams,* 395 N.J. Super. 502, 511, 929 A.2d 1111, 1116 (N.J. Super.A.D. 2007).

[11] *See* ALA. CONST. art. I, §36.03; ALASKA CONST. art. 1, §25; ARIZ. CONST. art. XXX, §1; ARK. CONST. amend. 83, §§1-3; CAL. CONST. art. I, §7.5; COLO. CONST. art. II, §31; FLA. CONST. art. I §27; IDAHO CONST. art. III, §28; KAN. CONST. art. XV, §16; KY. CONST. §233a; LA. CONST. art. XII, §15; MICH. CONST. art. I, §25; MISS. CONST. art. XIV, §263a; MO. CONST. art. I, §33; MONT. CONST. art. XIII, §7; NEB. CONST. art. I, §29; NEV. CONST. art. I, §21; N.D. CONST. art. XI, §28; OHIO CONST. art. XV, §11; OKLA. CONST. art. II, §35; OR. CONST. art. XV, §5a; S.D. CONST. art. XXI, §9; TENN. CONST. art. XI, §18; TEX. CONST. art. I, §32; UTAH CONST. art. I, §29; WIS. CONST. art. XIII, §13; HAW. REV. STAT. §572-1, -3; 750 ILL. COMP. STAT. 5/212; IND. CODE §31-11-1-1; MINN. STAT. §517.01; W. VA. CODE §48-2-603; WYO. STAT. ANN. §20-1-101; N.M. Stat. §§40-1-1 to -7.

Pennsylvania, 403 U.S. 528, 548 (1971). In ratifying thirty constitutional marriage amendments, States acted with the same solemnity with which they ratified the Fifth and Fourteenth Amendments. To say nothing of what the founding colonies had in mind *in 1787,* the idea of same-sex marriage that this Court easily rejected in 1972 is not "deeply rooted" even *today*.

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, 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 People's Rejection of the ERA Reinforces *Baker*

Amicus Eagle Forum respectfully submits that the history of the Equal Rights Amendment, H.J. Res. 208, 86 Stat. 1523 (1972) ("ERA"), also is relevant to whether the Equal Protection provisions in the Fifth and Fourteenth Amendments require the imposition of same-sex marriage nationwide. This Court should heed the will and wisdom of the People in rejecting that outcome a mere thirty years ago.

When this Court decided *Baker,* the Nation had recently begun a ten-year political drama to consider, debate, and ultimately reject a proposal to amend the Constitution to guarantee "equality of rights ... on account of sex" under the ERA. *Id.* Among the ERA's many debatable ramifications was the issue of whether its ratification would have created a federal constitutional right to same-sex marriage, thereby abrogating *Baker*. The founder of *amicus* Eagle Forum was deeply involved in that consideration, debate, and rejection, and Eagle Forum respectfully submits that the People's rejection of the ERA compels this Court to reject the same claims today.

Scholarly opinion and the legislative history both were divided on the ERA's impact on same-sex marriage. One camp – which included both ERA supporters and ERA opponents – focused the inquiry on the individual's choice of a mate, stressing that the traditional definition of marriage undeniably restricts one's choice of a mate "on account of sex." The other camp assumed that the definition of marriage would remain unchanged because laws defining marriage as an opposite-sex union applied equally to both sexes.[12]

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[12] *Loving* rejected Virginia's claim that its miscegenation statute neutrally treated whites and blacks equally. *Loving,* 388 U.S. at 8-9. There, the statute *did not* apply equally to whites and non-whites, had a race-based purpose, and was "designed to maintain White Supremacy." *Loving,* 388 U.S. at 11-12. Accordingly, *Loving* correctly applied heightened scrutiny, *Lawrence,* 539 U.S. at 600 (Scalia, J., dissenting), but that has no bearing on this case.

The first camp included the authors of *The Legality of Homosexual Marriage,* 82 YALE L.J. 573 (1973), who argued passionately that the ERA would provide a firm constitutional basis for homosexual marriage:

> [T]he new Amendment represents an unqualified prohibition – an absolute guarantee [of equality that would be] much less flexible than that of the Fourteenth Amendment.

Id. at 585. Thus, ERA's proponents included those who supported the relief that Plaintiffs seek here.

In addition, ERA *opponents* also argued that the ERA would support same-sex marriage, both in the public debate[13] and in academia and the Congress:

> Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear.

118 Cong. Rec. 4373 (daily ed. March 21, 1972) (Sen. Ervin) (*quoting* the testimony of Harvard Professor Paul A. Freund in *Hearings on H.J. Res. 35, 208*

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[13] Prof. Eugene Volokh's web log excerpts contemporaneous articles under *Phyllis Schlafly said it would be like this:* http://www.volokh.com/2003_11_16_volokh_archive.html#106917664607446885 (Nov. 18, 2003) (last visited Jan. 29, 2013); http://www.volokh.com/2005/03/14/phyllis-schlafly-said-it-would-be-like-this/ (Mar. 14, 2005) (last visited Jan. 29, 2013).

Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. (1971)).

The second camp consisted of ERA supporters – largely feminists – who rejected the suggestion that the ERA would require same-sex marriage. *See, e.g.*, 118 Cong. Rec. 4389 (daily ed. March 21, 1972) (Sen. Bayh). This camp included Yale Law School professor Thomas I. Emerson, co-author of an influential law review article on the proposed ERA. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871 (1971). As the article purported to cover all the amendment's possible consequences – including its effect on marriage – without mentioning the possibility of same-sex marriage, this group of ERA proponents deemed the omission significant and used it to argue against any suggestion that the ERA would allow same-sex marriage.[14]

The People *rejected* the ERA, *Nat'l Org. for Women, Inc. v. Idaho,* 459 U.S. 809 (1982), 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

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[14] Professor Emerson argued *Griswold v. Connecticut,* 381 U.S. 479 (1965), for the prevailing plaintiffs. Speaking in Birmingham, Alabama in 1976, "Emerson said fears by anti-ERA supporters concerning women being drafted into combat, legalized homosexual marriages and rearrangement of family structures are 'fears not based on fact. I don't blame them (for being against ERA),' he said. 'If all that were true I'd be against it too.'" Melanie Jones, *Anti-ERA Forces' Fears Are Not Based on Fact, Proponent Says,* BIRMINGHAM NEWS, Feb. 2, 1976.

and opponents trotted out the *old canards about homosexual marriages...*" Judy Mann, *Obstruction,* WASHINGTON POST, B1, Feb. 19, 1982 (emphasis added). Having failed with the ERA, the canards have returned to try to roost in the Fourteenth Amendment. However they might have fared under the ERA, they cannot survive without it.

In rejecting the ERA, the People rejected even the *possibility* of a same-sex marriage outcome. This Court should not amend the Constitution in a way that the People rejected in defeating the ERA.

Amicus Eagle Forum respectfully submits that the fate of the ERA – the only constitutional text that *might* have supported Plaintiffs' claims – falls under two canons of statutory construction. First, such 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). Second, "[f]ew 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). Both of these canons weigh against Plaintiffs' attempt to reinterpret Equal Protection to require same-sex marriage.

During the ERA's ratification process, Justice Powell emphasized that this Court must not circumvent the democratic process by constitutionalizing policy issues that the People were then debating:

> democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring in judgment). That same respect for the democratic process counsels this Court to accept the People's decision against enlarging the scope of the Equal Protection Clause to embrace an absolute equality of sexual relationships. This Court should honor the will of the People in rejecting the ERA.

II. THE NINTH-CIRCUIT PANEL MISAPPLIED *ROMER*

The panel majority's misplaced resort to *Romer* fails on several levels. As Proponents argue (Pet. Br. at 21-24), *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. Br. at 21-24. *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.[15] 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 collectively referred to as *'res judicata'*"); *In re Russell,* 12 Cal.3d 229, 233 (Cal. 1972). In general, both California and federal courts recognize non-mutual preclusion. *Bernhard v. Bank of America,* 19 Cal.2d 807, 810 (Cal. 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).

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[15] What Proposition 8 *actually* did was abrogate a court decision, Section II.B, *infra,* which is even farther from *Romer*.

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 (Cal. Ct. App. 1999), and this Court should extend *Mendoza* to protect state government from non-mutual collateral estoppel.[16]

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 (1998); *Vandenberg v. Superior Court,* 21 Cal.4th 815, 828 (Cal. 1999). Similarly, it violates due process for the doctrine of *stare decisis* to apply so conclusively that, in effect, it operates as

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16 While noting that this Court has not reached the issue, the Courts of Appeals have extended *Mendoza* to the states. *See 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); *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.,* 425 F.3d 708, 714 (9th Cir. 2005); *Milton S. Kronheim & Co. v. District of Columbia,* 91 F.3d 193, 205 (D.C. Cir. 1996) (Silberman, J., concurring).

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); *cf. 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 (Cal. 1912); *Southern Service Co. v. Los Angeles County,* 15 Cal.2d 1, 11-12 (Cal. 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).[17] Here, *these* plaintiffs have no *Marriage Cases* 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

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[17] 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.

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 (Cal. 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 (Cal. 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. California's 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 (Cal. 1986); *accord Martin v. California Mut. B. & L. Ass'n,* 18 Cal.2d 478, 484 (Cal. 1941); *Balen v. Peralta Junior College Dist.,* 11 Cal.3d 821, 828 (Cal. 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.[18] Although separation of powers prevents the

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[18] Although California's Legislature may enact legislation to abrogate California 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 Supreme Court has issued a final decision on what the prior law was. *McClung v. Employment Development Dep't,* 34 Cal.4th 467, 473 (Cal. 2004). Unlike the Legislature, however,

Legislature from interfering with final judicial *judgments, People v. Bunn,* 27 Cal.4th 1, 21 (Cal. 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 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

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the People are not a mere co-equal branch of government, and separation-of-powers principles do not apply.

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. IF THE PROPONENTS LACK STANDING, FEDERAL COURTS LACK PRUDENTIAL AND JURISDICTIONAL AUTHORITY TO CHANGE THE VERY FABRIC OF SOCIETY

As established in the Proponents' brief (at 15-18), the Proponents have standing to defend Proposition 8 on behalf of California. Holding otherwise would nullify the Proponents' appeals, *Diamond v. Charles,* 476 U.S. 54, 62-65 (1986), which would present the question of whether the government defendants' failure to defend Proposition 8 requires the dismissal of this litigation on remand to the District Court. For both prudential and jurisdictional reasons, if the Court rejects the Proponents' standing, this Court must remand with instructions to dismiss this case.

With the Proponents removed from this case, Plaintiffs and the government defendants are simply trying to evade the judgment of the California Supreme Court that Proposition 8 is constitutional. Simply put, "there is no Art. III case or controversy when the parties desire precisely the same result." *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,* 445 U.S. 375, 383 (1980) (interior quotations omitted). When the parties agree, "[t]here is, therefore, no case or controversy within the meaning of Art. III." *Moore v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 47, 47-48 (1971) (*per curiam*).

If the Proponents' intervention fails here, this Court should review not only appellate jurisdiction but also the jurisdiction for the underlying litigation.[19]

Even beyond the limits posed by Article III, this Court recognizes that actual adversity *prudentially* limits constitutional adjudication:

> *The policy, however, has not been limited to jurisdictional determinations.* For, in addition, the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. Thus, as those rules were listed in support of the statement quoted, *constitutional issues affecting legislation will not be determined in friendly, non-adversary proceedings[.]*

Rescue Army v. Municipal Court of City of Los Angeles, 331 U.S. 549, 568-69 (1947) (citations, footnotes, and interior quotations omitted, emphasis added); *accord New York City Transit Authority v. Beazer,* 440 U.S. 568, 583 (1979). "It never was the thought that, by means of a friendly suit, a party

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[19] Although this Court has broadly proclaimed that appellate courts have the obligation to review not only their own jurisdiction but also that of the courts from which a case reaches the appellate court, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998), there is a split in authority over whether appellate courts must do so when intervention fails. *Compare, e.g., Am. Lung Ass'n v. Reilly,* 962 F.2d 258, 262-63 (2d Cir. 1992) *with Planned Parenthood of the Heartland v. Heineman,* 664 F.3d 716, 719 n.3 (8th Cir. 2011).

beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & G.T. Ry. Co. v. Wellman,* 143 U.S. 339, 344-45 (1892). Instead, "an honest and actual antagonistic assertion of rights by one individual against another" serves as a prudential prerequisite for "the ultimate and supreme function of courts" to "determine whether [an] act be constitutional or not." *Wellman,* 143 U.S. at 344-45. Accordingly, if the Proponents lack standing, this Court must dismiss this litigation before allowing Plaintiffs and their allies in state and local government to use the federal courts to subvert the laws of California.[20]

Same-sex marriage advocates mischaracterize the issue as one of society cruelly denying loving couples of the joys of matrimony, as if the wedding couple represented the only two people involved. Marriage typically involves others, often including children from other relationships, adoptions, or artificially induced. When present, these children represent society's "very existence and survival." *Loving,* 388 U.S. at 12. With same-sex couples, children also typically involve the rights of another parent outside the same-sex couple, as well as the rights of grandparents. Dissolved marriages then involve custody and visitation issues, as well as employers through pensions that may or may not

[20] Denying a federal forum for this "friendly" suit would not deny all relief, as Plaintiffs could bring their federal claims in state court – where the Proponents would have standing – under the doctrine of concurrent jurisdiction. *Haywood v. Drown,* 556 U.S. 729, 735 (2009).

need division. Many of these issues (*e.g.,* pensions) will require lengthy and difficult proceedings for society to resolve. Some of these issues (*e.g.,* custody and visitation disputes) will involve great personal pain and loss. In short, the consequences at stake here are momentous and profound.

Given the issues and impacts that this litigation would unleash, *amicus* Eagle Forum respectfully submits that this Court should remand with instructions to dismiss this entire case in the event that the Proponents lack standing in federal court. The Proponents have standing in state court, where Plaintiffs can bring their suit. Moreover, such a suit could reach this Court via the state-court system in the event that this Court has not resolved these same-sex marriage issues by then.

CONCLUSION

The Court should reverse the judgment of the lower courts on the merits.

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Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com
Counsel for *Amicus Curiae*