No. 12-23

In the Supreme Court of the United States

JANICE K. BREWER, GOVERNOR OF ARIZONA, *ET AL.*,

Petitioners,

v.

JOSEPH R. DIAZ, *ET AL.*,

Respondents.

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

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

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QUESTIONS PRESENTED

Arizona has long limited marriage to unions between one man and one woman, but recently extended state employee health benefits to domestic partners, whether same-sex or opposite sex. Then, in response to the worst recession in a generation and Arizona's constitutional duty to balance its budget, Arizona rescinded the extension of benefits to domestic partners. Under controlling precedents of this Court and the Ninth Circuit, Equal Protection claims lie only for actions with a discriminatory purpose and effect, vis-à-vis the injured class, which states can defend if the challenged law serves (or plausibly may serve) a rational basis. Against that background, this litigation presents four questions:

1. Whether Arizona's action was facially neutral with respect to same-sex domestic partners and thus lacks a discriminatory purpose on the basis of homosexuality or same-sex domestic-partner status.

2. Whether preserving the public fisc against a budget deficit (or otherwise) and supporting the institution of husband-wife marriage are rational bases on which Arizona permissibly may act.

3. Whether the Equal Protection Clause allows states to restrict marriage to unions of one man and one woman, as held in *Baker v. Nelson,* 409 U.S. 810 (1972), and *Adams v. Howerton,* 673 F.2d 1036 (9th Cir. 1982).

4. Whether exercise of this Court's supervisory jurisdiction would be appropriate to correct the intra-circuit splits in authority that result from the Ninth Circuit's failure to follow *its own* controlling precedents on the foregoing three questions.

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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 traditional marriage, defined as the union of husband and wife. Eagle Forum participated as *amicus curiae* in the Ninth Circuit in this litigation,

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; the respondents have lodged a blanket letter of consent with the Clerk, and *amicus* has lodged the petitioners' written letter 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.

as well as in other related appellate proceedings on same-sex marriage. Eagle Forum's founder, Phyllis Schlafly, was a leader in the movement to oppose ratification by the states of the proposed Equal Rights Amendment, H.J. Res. 208, 86 Stat. 1523 (1972) ("ERA"), in the 1970s and 1980s, and the history of that effort has a direct bearing on the issues that the plaintiffs here attempt to import into the Fourteenth Amendment. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

The petition asks this Court to decide whether states may ever withdraw – *for any reason* – benefits gratuitously offered to unmarried people (*i.e.,* benefits not federally required in the first place), while continuing those benefits for married people, if the unmarried group's members include *anyone* in a committed same-sex relationship and the state adheres to the traditional, husband-wife definition of marriage. As such, this case directly challenges well-understood Equal Protection Clause jurisprudence with respect to disparate-impact analysis and the rational-basis test and indirectly – but plainly – challenges states' constitutional authority to limit marriage to one man and one woman.

By way of background, a 2008 Arizona regulation extended health benefits to domestic partners, A.A.C. R2-5-101(22), (23) (April 25, 2008), but 2009 legislation – specifically, A.R.S. §38-651(O) ("Section O") – withdrew those benefits in one of more than forty cost-saving measures addressing extreme budgetary deficits. 2009 ARIZ. SESS. LAWS, 3d Spec.

Sess., ch. 10; *see* Pet. at 5. In both 2008 and 2009, Arizona acted without regard to the same-sex versus opposite-sex nature of its employees' domestic partnerships. At all times – both before the 2008 regulation and after the 2009 legislation – Arizona extended health benefits to married employees' spouses.

Arizona's Constitution requires that Arizona balance its budget, ARIZ. CONST. art. IX, §3, and defines marriage as "[o]nly a union of one man and one woman," ARIZ. CONST. art. XXX, §1. Because they cannot marry under Arizona law, the plaintiffs in committed same-sex relationships (collectively, "Plaintiffs") could qualify as domestic partners, but cannot qualify as spouses.

Nothing in the legislative record indicates that Arizona enacted Section O for any reason other than to save money, as its Constitution required under the circumstances. In defending its husband-wife marriage laws, Arizona has long relied *inter alia* on its "legitimate interest in encouraging procreation and child-rearing within the marital relationship," and Arizona's courts have upheld "limiting marriage to opposite-sex couples [as] rationally related to that interest." *Standhardt v. Superior Court ex rel. County of Maricopa,* 206 Ariz. 276, 289, 77 P.3d 451, 464 (Ariz. Ct. App. 2003) (upholding Arizona's husband-wife marriage statutes).[2]

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[2] As enacted in 1980 ARIZ. SESS. LAWS, ch. 97, §4, the pertinent part of A.R.S. §25-125(A) provided that "[a] valid marriage is contracted by a male person and a female person." As enacted in 1996 ARIZ. LAWS, ch. 348, §1, the pertinent part of

Forty years ago, *Baker v. Nelson,* 409 U.S. 810 (1972), presented this Court with essentially the same question implicitly presented here – namely, whether the federal Constitution provides a right to same-sex marriage – which the Court answered in the negative by dismissing "for want of a substantial federal question" a mandatory appeal under former 28 U.S.C. §1257(2) (1988) from the Minnesota Supreme Court's decision in *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971). In the intervening years, similar claims were routinely dismissed by federal courts on the authority of *Baker,*[3] until a recent spate of decisions either ignored *Baker* or relied on creative legal theories apparently designed to evade *Baker*.[4]

In this litigation, the Ninth Circuit simply ignored *Baker,* choosing instead to rely on a disparate-impact theory, under which the inability of Arizona same-sex domestic partners to marry purportedly renders it discriminatory for Arizona to

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A.R.S. §25-101 provides that "[m]arriage between persons of the same sex is void and prohibited." A.R.S. §25-101(C).

[3] *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).

[4] *See, e.g., Perry v. Brown,* 671 F.3d 1052, 1082 (9th Cir. 2012); *Massachusetts v. U.S. Dept. of Health & Human Serv.,* 682 F.3d 1, 8 (2012); *Windsor v. U.S.,* 833 F.Supp.2d 394, 399 (S.D.N.Y. 2012); *Dragovich v. U.S. Dept. of Treasury,* 2012 WL 1909603, 6 (N.D. Cal. 2012); *Golinski v. U.S. Office of Personnel Management,* 824 F.Supp.2d 968, 983 (N.D. Cal. 2012); *Pedersen v. Office of Personnel Management,* 2012 WL 3113883, 11 (D. Conn. 2012).

cut benefits for domestic partners, even though Arizona had no obligation to provide such benefits in the first place. The Ninth Circuit further ignored *Baker* and prior Ninth Circuit precedent, *Adams v. Howerton,* 673 F.2d 1036, 1042 (9th Cir. 1982), by finding that no rational basis supported Arizona's preferring husband-wife marriage. Arizona sought rehearing *en banc,* which the full Ninth Circuit denied. Judge O'Scannlain dissented from the denial of rehearing *en banc,* with Judge Bea concurring in the dissent.

Against this backdrop, *amicus* Eagle Forum respectfully asks this Court to exercise its supervisory authority over the lower federal courts, to reaffirm the rule of law that was necessarily decided in *Baker,* and to direct the dismissal of this case and any similar pending claims.

STATEMENT OF FACTS

The facts are not materially in dispute. The plaintiffs have domestic partners who would qualify for valuable health benefits under the 2008 regulations, but who are denied those benefits under Section O's repeal of the 2008 regulations. For its part, Arizona is required by its Constitution to balance its budget, and Section O would save more than $4.1 million in its first year (2008-09), rising to $5.5 million in 2009-10. Pet. App. 48a-49a. Plaintiffs did not provide evidence that Arizona enacted Section O because of animus against either homosexuals or same-sex domestic partners.

SUMMARY OF ARGUMENT

To state a claim under the Equal Protection Clause, Plaintiffs must prove both a discriminatory

effect and a discriminatory purpose. Section I, *infra.* Moreover, the intentional discrimination that the Equal Protection Clause prohibits requires Plaintiffs to establish disparate treatment against the class in question, not mere "disparate impacts" on that class. Section I, *infra.* Here, the record demonstrates that Arizona did not intentionally discriminate against either homosexuals or same-sex domestic partners in employee benefits. Instead, Arizona distinguished between all married couples and all unmarried domestic partners, without regard to homosexual or same-sex status. As such, Plaintiffs have not made – and cannot make – the threshold showing that the Equal Protection Clause requires.

Even if Plaintiffs could make the required threshold showing, Arizona nonetheless could prevail by establishing a rational basis for its actions. Section II, *infra.* Here, Arizona had two rational bases for its actions: (1) conserving the public fisc, and (2) with respect to marriage, fostering responsible procreation and childrearing. Section II, *infra.* Only by upholding the panel's "veiled but unmistakable" (Pet. App. 66a) attack on Arizona's husband-wife definition of marriage can this Court affirm the Ninth Circuit here. As such, this litigation directly questions whether states may limit marriage to husband-wife couples. As explained in Sections II and III, *infra,* husband-wife marriage satisfies the rational-basis test, and this Court should affirm on the basis of *Baker*.

The following four sections elaborate on four significant reasons for the Court to grant the petition for a writ of *certiorari:*

I. The Ninth Circuit's decision is inconsistent with the rulings of this Court and other federal appellate courts on the Equal Protection Clause and its application to intentional discrimination (*i.e.,* disparate treatment), not mere disparate impacts. Section I, *infra.*

II. The Ninth Circuit's decision is inconsistent with the rulings of this Court and other federal appellate courts on when the rational-basis test invalidates state action. Section II, *infra.*

III. 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 v. Evans,* 517 U.S. 620 (1996), or *Lawrence v. Texas,* 539 U.S. 558 (2003), or any of the other tangentially related decisions cited by the Ninth Circuit alters *Baker* with respect to same-sex marriages. Section III, *infra,*

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

Amicus Eagle Forum respectfully submits that each of the foregoing reasons independently justifies a grant of the petition by this Court.

ARGUMENT

I. THE NINTH CIRCUIT MISAPPLIED THE EQUAL PROTECTION CLAUSE TO ALLOW DISPARATE-IMPACT CLAIMS

Nothing in the record demonstrates that Arizona acted to discriminate against homosexuals or same-sex domestic partners *because* they are homosexuals or same-sex domestic partners. Instead, Section O facially distinguishes between married couples and *all* domestic partners (*i.e.,* same-sex *and* opposite sex domestic partners).

"[O]rdinary equal protection standards … require … show[ing] both that the [challenged action] had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. U.S.,* 470 U.S. 598, 608 (1985); *see also, e.g., Baranowski v. Hart,* 486 F.3d 112, 123 (5th Cir. 2007); *David K. v. Lane,* 839 F.2d 1265, 1271-72 (7th Cir. 1988); *Hayden v. Paterson,* 594 F.3d 150, 162-63 (2d Cir. 2010). The required "discriminatory purpose" means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its *adverse* effects upon an identifiable group." *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979) (emphasis added). As indicated, nothing in the record suggests that Arizona acted *because of* homosexual or same-sex domestic partnership status.

Even for higher levels of scrutiny (*e.g.,* strict scrutiny for race-based discrimination or intermediate scrutiny for sex-based discrimination), there must be a purposeful connection between the class affected and the legislative classification. *Washington v. Davis,* 426 U.S. 229, 239, 242-43 (1976); *Feeney,* 442 U.S. at 279. Neither Plaintiffs nor the Ninth Circuit present a plausible theory why the *lower* rational-basis standard of review should lead to a different conclusion here. *See* Section II *infra* (rejecting a heightened rational-basis review). To the contrary, Plaintiffs' claim in essence is that – in treating domestic partners differently than married couples – Arizona did *not make an exception* for domestic partners who cannot marry each other. Even if that would not discriminate against *opposite-sex* domestic partners, nothing in this Court's Equal Protection jurisprudence *requires* it.

In an effort to understand what the Ninth Circuit may have meant, Arizona posits that, rather than allowing a prohibited disparate-impact claim, the Ninth Circuit may instead have merely inferred discriminatory intent from the fact that same-sex domestic partners cannot marry. Pet. at 12. This charitable suggestion has two fatal flaws.

First, the inference that Arizona posits is simply another way of describing a disparate-impact theory. Courts cannot infer discriminatory intent against same-sex couples simply from Arizona's favoring *married* couples over all unmarried couples, same-sex or opposite sex.

Second, if the Fourteenth Amendment allows Arizona to withhold marriage itself from same-sex

partners, *see* Section III, *infra,* then the Fourteenth Amendment also allows denying marriage-based benefits to same-sex partners. *Feeney,* 442 U.S. at 278-79 ("foreseeable" and "volitional" impact on non-favored class does not qualify as "[d]iscriminatory purpose" where state lawfully may benefit the favored class); *cf. Eisenstadt v. Baird,* 405 U.S. 438, 446-47 (1972) (applying rational-basis test to law that distinguished between married and unmarried people); *Glona v. Am. Guarantee & Liability Ins. Co.,* 391 U.S. 73, 75 (1968) (same). Under the rational-basis test, marriage and health benefits differ in monetary, social, and spiritual value, but pose the same legal question:[5] "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 366-67 (2001) (interior quotations omitted); *Reed v. Reed,* 404 U.S. 71, 75 (1971) (Fourteenth Amendment allows "treat[ing] different classes of persons in different ways"). If Arizona's marriage

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[5] Because Congress eliminated federal-question jurisdiction's amount-in-controversy requirements, Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, §2, 94 Stat. 2369 (1980), federal-court litigants can sue over intangible alleged rights such as marriage just as easily as they can sue over monetarily valuable alleged rights such as health benefits. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 690 n.14 (1973) ("identifiable trifle is enough for standing to fight out a question of principle") (*quoting* Kenneth C. Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601, 613 (1968)).

distinction itself is lawful, *see* Section III, *infra,* courts cannot infer discriminatory intent from treating married employees differently.

II. THE NINTH CIRCUIT MISAPPLIED A HEIGHTENED RATIONAL-BASIS TEST

The Ninth Circuit also allowed a "more searching" form of rational-basis review. Pet. App. 7a. This approach conflicts with the approach that this Court and other circuits use and requires this Court's review.

By way of background, successful rational-basis 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 Arizona's urgent need to control costs, Plaintiffs cannot question that spending cuts save money.

But even for husband-wife marriage, it is enough, for example, that Arizona "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); *see also, e.g., Adar v. Smith,* 639 F.3d 146, 162 (5th Cir. 2011) (*en banc*) ("Louisiana may rationally conclude that having parenthood focused on a married couple or single individual – not on the freely severable relationship of unmarried partners – furthers the interests of adopted children"); *Lofton v. Sec'y of Dept. of Children & Family Services,* 358

F.3d 804, 818-20 (11th Cir. 2004). Other courts have readily recognized the rationality of states' interests.

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); *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.

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.

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 yet exist.[6]

To get past the rational-basis test – under which Plaintiffs cannot prevail – the Ninth Circuit heightened its rational-basis review under Justice O'Connor's *Lawrence* concurrence, which relied on *U.S. Dept. of Agric. v. Moreno,* 413 U.S. 528 (1973), and *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985). To the extent that these cases establish a heightened rational-basis form of review, that review has no application here. Both *Moreno* and *Cleburne Living Center* involved as-applied challenges by plaintiffs who were "collateral damage" to laws that could validly apply to their intended targets. By contrast, the injuries alleged here flow directly from the distinctions that Arizona appropriately drew.

In *Moreno,* Congress amended the criteria for food-stamp eligibility to exclude households of unrelated people in an effort to avoid supporting "hippie communes" (*i.e.,* educated young adults, with access to family money, who had simply "tuned out,"

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[6] 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.

and could remain eligible for food stamps by altering their living arrangements) and thereby injured the poor who relied most heavily on food stamps. 413 U.S. at 537-38. Similarly, the *Cleburne Living Center* group-home residents did not pose any of the dangers that more profoundly disabled patients would pose and thus did not negate the need for zoning approvals for facilities for those with more profound disabilities. 473 U.S. at 442 n.9, 449. To the extent that *Moreno* or *Cleburne Living Center* establishes a heightened level of review, that review is available only to those collaterally impacted by a valid form of government regulation, not to those who represent the precise distinction that the regulation appropriately seeks to advance. Here, Arizona seeks permissibly to advantage husband-wife marriage, which makes domestic partnerships (whether same-sex or opposite-sex) the disadvantaged alternative.

III. *BAKER* REMAINS BINDING PRECEDENT, AND THIS COURT SHOULD ASSERT ITS JURISDICTION TO 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, duties, and benefits that Minnesota conveyed to husband-wife marriages, and this Court dismissed the case for want of a substantial federal question. *Baker,* 409 U.S. at 810.[7]

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[7] While *husband-wife marriage* is a fundamental right under the federal Constitution, *Turner v. Safley,* 482 U.S. 78, 95 (1987); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"), the

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, due-process, and privacy 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

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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 "very existence and survival" of the human race. This Court's holding in *Baker,* five years after *Loving,* necessarily decided that there is no fundamental right to same-sex marriage.

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*.

A. Neither *Lawrence* Nor *Romer* Overturns *Baker*

Although no Supreme Court decision undermines *Baker* sufficiently for the lower courts to reject its holding, Plaintiffs and the Ninth Circuit suggest 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.

B. Post-*Baker* Legislative Developments Reinforce the *Baker* Holding

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

The divergent results for same-sex marriage under state law in states that adopted "state ERAs"

underscore the ERA's ambiguity. *Compare, e.g., Andersen v. King County,* 158 Wash. 2d 1, 138 P.3d 963 (Wash. 2006) *with Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44 (Haw. 1993). As demonstrated by these split decisions, the People of the states that adopted the ERA have had to accept its indeterminacy *as a matter of state law*.[8]

By contrast, the People of the United States *rejected* the ERA, in large part because of a well-founded fear that ERA would lead to the very result demanded by Plaintiffs here: "The vote in Virginia [against the ERA] came after proponents argued on behalf of civil rights for women and opponents trotted out the *old canards about homosexual marriages*…." Judy Mann, *Obstruction,* WASHINGTON POST, B1, Feb. 19, 1982 (emphasis added). Having failed with the ERA, the "canards" have returned to try to roost in the Fourteenth Amendment.

Amicus Eagle Forum respectfully submits that the fate of the ERA – the only constitutional text that *might* have supported Plaintiffs' claims – is instructive here. During the ERA's ratification process, Justice Powell counseled against circumventing the democratic process to decide issues raised by the ERA:

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[8] Similarly, Alaska's Constitution has been held to support same-sex domestic partners' rights to equal benefits (*i.e.,* the very relief that Plaintiffs seek here). *See Alaska Civil Liberties Union v. Alaska,* 122 P.3d 781, 787 (Alaska 2005). Because Alaska's Constitution "protects [the] right to non-discriminatory treatment more robustly than does the federal equal protection clause," *id.,* this decision is irrelevant here.

> 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 respect for the democratic process also 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.

Amicus Eagle Forum respectfully submits that "[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), and that 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). This Court should not ignore the will of the People in rejecting the ERA, which was widely understood to provide the only possible textual basis for a constitutional right to equal recognition of same-sex relationships.

As Arizona points out, most states have either constitutionally or statutorily limited marriage to husband-wife marriage. Pet. at 29 n.13 (collecting state laws); *see also Chambers v. Ormiston,* 935 A.2d

956, 962 (R.I. 2007); *Quarto v. Adams,* 395 N.J. Super. 502, 511, 929 A.2d 1111, 1116 (N.J. Super.A.D. 2007). Similarly, Congress took action in the Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996), to enact not only similar federal provisions, 1 U.S.C. §7, but also a defense of state marriage laws under the Full Faith and Credit Clause. 28 U.S.C. §1738C; U.S. CONST. art. IV, §1 ("Congress may by general laws prescribe the manner in which [State acts] shall be proved, and the effect thereof"). While "not conclusive in a decision as to whether that practice accords with due process," the "fact that a practice is followed by a large number of states is … plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McKeiver v. Pennsylvania,* 403 U.S. 528, 548 (1971). This Court should therefore recognize that the Equal Protection Clause does not prohibit husband-wife definitions of marriage or benefits that flow from (or accrue to) that status.

IV. THE FAILURE EITHER TO FOLLOW BINDING NINTH CIRCUIT PRECEDENTS OR TO CONVENE AN *EN BANC* PANEL COMPELS THIS COURT'S REVIEW

The prior three sections demonstrate conflicts between the Ninth Circuit panel decision and the decisions of this Court and other appellate courts. From the perspective of public confidence in the court system, it is perhaps even worse that the Ninth Circuit failed to follow *its own* precedents.

First, the Equal Protection Clause does not allow disparate-impact claims: "[m]ere indifference to the effects of a decision on a particular class does not give rise to an equal protection claim." *Thornton v. City of St. Helens,* 425 F.3d 1158, 1167 (9th Cir. 2005); *see also McLean v. Crabtree,* 173 F.3d 1176, 1185 (9th Cir. 1999) (proof of discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause); *Lee v. City of Los Angeles,* 250 F.3d 668, 686 (9th Cir. 2001) ("a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class") (citations omitted); *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate,* 470 F.3d 827, 839 (9th Cir. 2006) (*en banc*) ("Equal Protection Clause … prohibits only purposeful discrimination and therefore does not permit claims of disparate impact"). That should have been dispositive of Plaintiffs' claims.

Second, "[t]he first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies, Inc. v. State of Mont., Dept. of Commerce Milk Control Bureau,* 847 F.2d 593, 596 (9th Cir. 1988). Put another way, "[i]n order to subject a law to any form of review under the equal protection guarantee, one must be able to demonstrate that the law classifies persons in some manner." *Christy v. Hodel,* 857 F.2d 1324, 1331 (9th Cir. 1988) (*quoting* 2 R. Rotunda, J. Nowak & J. Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §18.4, at 343-44 (1986)). The "groups" identified in the first step "must be

comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton,* 425 F.3d at 1167. Plaintiffs cannot state "[a]n equal protection claim … by conflating all persons not injured into a preferred class receiving better treatment than the plaintiff." *Id.* (interior quotations omitted). Thus, Arizona's classification is not married couples and opposite-sex domestic partners versus same-sex domestic partners. Instead, Section O distinguishes between married couples and *all* domestic partners, with no demonstrated connection to animus against either homosexuals or same-sex domestic partners. That too should have been dispositive of Plaintiffs' claims.

Third, the Ninth Circuit already has held that "Congress's decision to confer spouse status ... only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements." *Adams,* 673 F.2d at 1042. That too should have been dispositive of Plaintiffs' claims.[9]

On several occasions, this Court has assumed that prior panels bind subsequent panels. *See, e.g., Jones v. Bock,* 549 U.S. 199, 220 n.9 (2007); *Textile Mills Securities Corp. v. Commissioner,* 314 U.S. 326, 335 (1943). In addition, this Court has *held* flexibly that the courts of appeals may adopt "[a]ny

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

procedure … which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts." *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941). But the Court has never held that the courts of appeals may simply ignore intra-circuit conflicts.

Arizona petitioned for rehearing *en banc,* and Judges O'Scannlain and Bea dissented from the Ninth Circuit's "regrettable failure" to provide "considered reflection by a larger cohort of [that] court." Pet. App. 59a. Having failed to ratify the panel's deviation from binding precedent, the full Ninth Circuit abdicated its authority to address intra-circuit splits in the first instance. Under *Western Pacific,* 345 U.S. at 260 (interior quotations omitted), this case now falls under this Court's "general power to supervise the administration of justice in the federal courts," and "the responsibility lies with this Court to define [the] requirements and insure their observance."

CONCLUSION

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

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