No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *ET AL.*, *Petitioners*,
v.
KRISTIN M. PERRY, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of
Public Advocate of the United States,
Joyce Meyer Ministries,
The Lincoln Foundation for Research and Education,
Institute on the Constitution, Abraham Lincoln
Foundation for Public Policy Research, Inc., and
Conservative Legal Defense and Education Fund
in Support of Petitioners

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August 31, 2012

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Public Advocate of the United States (http://www.publicadvocateusa.org/) ("PA"), and Abraham Lincoln Foundation for Public Policy Research, Inc., are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Joyce Meyer Ministries (http://www.joycemeyer.org/), The Lincoln Institute for Research and Education (http://www.lincolnreview.com/) ("Lincoln"), and Conservative Legal Defense and Education Fund (http://www.cldef.org/) ("CLDEF") are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). The Institute on the Constitution (http://www.theamericanview.com/) is an educational organization. In February 2003, PA, Lincoln and CLDEF filed an amicus brief on the merits in this Court in Lawrence v. Texas.[2]

SUMMARY OF ARGUMENT

This case concerns whether homosexuals desiring the benefits of marriage have a constitutional right to compel that marriage be redefined to accommodate their sexual preferences. It is not about whether

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[1] It is hereby certified that counsel for the parties have filed blanket consents with the Court; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] http://lawandfreedom.com/site/constitutional/Lawrence.pdf.

homosexuals have a fundamental right to marry or have been discriminated against because they are a "suspect" class. Indeed, the court of appeals concluded that heightened review was unnecessary, and claimed that Proposition 8 must meet only the test of rationality. In applying the rational basis test, however, the court of appeals shifted the burden of proof away from the complainants on the grounds that Proposition 8 took away an established constitutional right to marry, and did so solely on the basis of public "animus."

Proposition 8 did not withdraw a previous right to same-sex marriage. In passing Proposition 8, the people restored the original definition of marriage that had been misconstrued by a 2008 State Supreme Court decree. Moreover, Romer v. Evans provides no support for the court to have applied a higher standard of "rationality" as the court did below.

There is also no basis for applying the Romer rule of animus. The courts below rejected the myriad of reasons for retention of traditional marriage, leaving them only the imputation of animus to the people. Attributing wrong motives to the people exercising their inherent right to amend their constitution is outside the constitutional jurisdiction of the courts. In fact, in this case, the courts applied a double standard, attributing animus to the people, while claiming impartiality for themselves without regard for salient evidence to the contrary.

Insofar as Romer justifies judicial inquiry into the motives of the people in the exercise of their sovereign

power to amend their own constitutions it is illegitimate and should be reconsidered by this Court and overruled.

INTRODUCTION

This case concerns whether homosexuals, who desire the benefits of marriage, have a constitutional right to redefine marriage to accommodate their sexual preferences. Viewed in this light homosexuals are not being discriminated against. Many heterosexuals are barred from reaping the benefits of state-recognized matrimony. Fathers cannot marry daughters; brothers cannot marry sisters; a married man cannot marry another woman and vice versa; twelve-year-olds cannot marry each other, even though one is male and the other is female. In short, marriage is a discriminate institution. Homosexuals have not been singled out for special discriminatory treatment, and not treated as a "discrete and insular" minority which has been excluded from the benefits of marriage.

Despite the fact that the homosexual claim to marriage cannot be accommodated without changing the very nature of marriage, and despite the further fact that the homosexual claim cannot be based upon homosexuals being a "suspect" class or upon a "fundamental right," the courts below have ripped open the Fourteenth Amendment and deposited an entirely new "constitutional right" into the Constitution without regard for text or history. A careful examination of the opinions of the courts below, however, demonstrates that no matter how diligent their efforts, neither court could provide a

coherent, reasoned basis upon which to rest the claim that homosexuals have a constitutional right to marry.

ARGUMENT

I. THE OPINION OF THE COURT BELOW DEMONSTRATES THE CONFUSION THAT HAS BEEN WROUGHT BY THIS COURT'S JURISPRUDENCE GRANTING SPECIAL STATUS TO HOMOSEXUALS.

A. The Opinion Below is Based Solely on the California Supreme Court's Decision that the Original Meaning of the California Constitution Itself is Unconstitutional.

The circuit court below rested its opinion upon the highly misleading claim that, prior to the passage of Proposition 8 on "November 4, 2008, the **California Constitution guaranteed** the right to marry to ... same sex couples...." Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012) (emphasis added). Thus, the court asserts that the "People of California adopted Proposition 8, which **amended** the state constitution to **eliminate** the right of same-sex couples to marry." *Id.* (emphasis added).

To the contrary, "same-sex marriage" has never been "guaranteed" by the California constitution. On May 15, 2008, the Supreme Court of California for the first time decided that such marriages would be

protected by the California Constitution.[3] In re Marriage Cases, 43 Cal. 4th 757 (Cal. 2008). Prior to its decision, and indeed "[f]rom the beginning of California statehood," the court admitted that "the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." *Id.* at 792. Further, the court admitted that "California's first Constitution — provided explicit constitutional protection for a 'wife's separate property' ... and the marriage statute adopted by the California Legislature during its first session clearly assumed that the marriage relationship necessarily involved persons of the opposite sex." *Id.*

However, the California Supreme Court decided to overturn that understanding. In its May 2008 decision, the court held that any state limitation of marriage which excluded homosexuals was unconstitutional under the state's Constitution. Having already admitted that marriage had always been understood to exclude homosexuals, yet ruling that marriage henceforth would include them, the California Supreme Court rendered the **original meaning** of the California Constitution to be **itself unconstitutional**. The court explained that the uncontroverted meaning of the text since 1849 "alone does not provide a justification for interpreting the constitutional right to marry as protecting only"

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[3] Marriages of homosexual couples in California did not begin until June 16, 2008, one month later. "Same-Sex Married Couples," State of California Franchise Tax Board, April 13, 2010, https://www.ftb.ca.gov/individuals/same_sex_marriage/index.shtml.

heterosexual marriage in 2008. *Id.* at 824. In a remarkable display of convoluted reasoning, the California Supreme Court substituted its own meaning for the original meaning of the text.

In doing so, the Court overrode the recently expressed will of the people of California,[4] and the uncontroverted meaning of the California Constitution that had existed since its ratification.[5] It more appropriately could be said that the California Constitution was improperly modified for a time by the California Supreme Court, which by judicial fiat had "granted" homosexuals the right to marry. Even so, that decision was in effect for a scant five months before Proposition 8 was passed, the people of California quickly correcting the California Supreme Court's error by reaffirming that the California Constitution **does not guarantee** a right to same-sex marriage.

The circuit court also freely admits that Proposition 8 is in line with the meaning of the California Constitution from 1849 to 2008, and yet strikes down Proposition 8 because it conflicts with the

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[4] In re Marriage Cases overturned Proposition 22 , passed by the people of California in the year 2000, statutorily defining marriage to exclude homosexual couples. *See* http://www.lao.ca.gov/ballot/2010/22_11_2010.aspx.

[5] When the California Constitution was adopted, "[m]arriage in California was understood ... to be limited to relationships between a man and a woman," and that this understanding continued "well into the twentieth century." Perry, 671 F.3d at 1063.

new "meaning" of the California Constitution from 2008 to 2012, most of which time period was during the pendency of this litigation. The Ninth Circuit has determined that, once gay marriage had been judicially legalized, it must forever be the law, since "Proposition 8's only effect was to take away" same-sex marriage.[6] *Id.* at 1064.

The circuit court contends that because same-sex marriage was "legalized" (rightly or wrongly) for a brief period, that right is now fixed for time and eternity. The circuit court's holding is that it **does not matter what the California Constitution means**, only what the California Supreme Court said it means.

Whipsawed by the courts, the only remedy left to the people of California is the Article V amendment process which requires a national response to initiate the amendment process, either by a two-thirds vote of Congress or a two-thirds vote of 50 state legislatures. Such a burden should not be laid on the people of California unless the Due Process or Equal Protection guarantees of the federal constitution clearly established the claim of right to same-sex marriage. Such is clearly not the case.

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[6] Proposition 8 does not undo any homosexual marriages that were performed in the five-month period. *See* Strauss v. Horton, 46 Cal. 4th. 364 (Cal. 2009). *See also* "Same-Sex Married Couples," State of California Franchise Tax Board, April 13, 2010, https://www.ftb.ca.gov/individuals/same_sex_marriage/index.shtml. ("Same-sex couple marriages performed in California on June 16, 2008 and before November 5, 2008 will be treated as valid marriages for California purposes.")

B. While Denying Doing So, the Court Below Effectively Creates a New Suspect Class, as Well as a New Fundamental Right, and Applies a Heightened Standard of Review.

The district court determined that "[t]he trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect...." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). The district court also recognized "[t]he freedom to marry ... as a fundamental right" and that "plaintiffs ask California to recognize their relationships for what they are: marriages." *Id.* at 991, 993.

On appeal, the Ninth Circuit declined to affirm the district court on either point, making no finding of a fundamental right to homosexual marriage, nor determining that homosexuals were a suspect class. Yet, what the district court had done explicitly, the Ninth Circuit did implicitly. Even though the circuit court claimed it was not doing so, its analysis treated homosexuals **as if they were** a "suspect class," and gay marriage **as if it were** a "fundamental right," and the court applied some form of heightened scrutiny to Proposition 8.

1. Fundamental Right.

While not going so far as to declare that homosexual marriage was a fundamental right, the circuit court spends a significant portion of its opinion

discussing the importance of permitting homosexuals to marry. The court identifies the numerous societal benefits that come with the institution of marriage. *Id.* at 1077. The court goes into great detail to explain the "extraordinary significance of the official designation of 'marriage.'" *Id.* at 1078-80. The court relies on Griswold v. Connecticut, 381 U.S. 479, 495 (1965), which declared marriage (but not homosexual marriage) to be a fundamental right. Indeed, the circuit court's opinion mirrors the Griswold discussion of marriage as being "of similar order and magnitude as the fundamental rights specifically protected." *Id.*

Yet the court of appeals below refrained from expressly making any such finding. And for good reason. To claim a fundamental right of the kind protected by either the Due Process or Equal Protection guarantees of the Fourteenth Amendment, the claimant must demonstrate a right deeply embedded in America's political and legal history. *See* Meyer v. Nebraska, 262 U.S. 390 (1923). Even in Roe v. Wade, 410 U.S. 113 (1973), this Court did not find a woman's right to terminate her pregnancy, without initially having established that the common law dating back before America's founding reflected an ambivalent policy of protecting the lives of unborn children.

There is, however, no comparable ambivalence respecting marriage in California. From the earliest days of the California republic, marriage was consistently defined as a union of two persons of the opposite sex. The short history of same-sex marriage in California, on which the court of appeals places

great reliance, could not possibly qualify any claim of right sufficient to qualify as a fundamental right, even under the more expansive finding of this Court in Roe.

2. Suspect Class.

The circuit court declined to officially declare homosexuals to be a suspect class (Perry, 671 F.3d at 1082) as the district court had done (Perry, 704 F. Supp. 2d at 997). Nevertheless, much of the court's opinion is spent conducting the sort of analysis that a court would employ in identifying a suspect class.

The court attempts to portray homosexuals as a discrete minority, arguing that the "'inevitable inference' we must draw in this circumstance is not one of ill will, but rather one of disapproval of **gays and lesbians as a class**." Perry, 671 F.3d at 1093. The court goes on to discuss a history of discrimination against homosexuals, calling them a "disfavored group." *Id.* at 1096. The court favorably cites findings by the district court that "[t]he campaign to pass Proposition 8 relied on **stereotypes** to show that same-sex relationships are **inferior** to opposite-sex relationships," because "gay people and relationships are inferior, that homosexuality is **undesirable** and that children need to be protected from exposure to gay people and their relationships." *Id.* at 1094.

As was the case with the claim of a fundamental right, the circuit court recognized that sexual orientation (or sexual preference) was not sufficiently comparable to race to rank as a suspect class, deserving heightened protection under the Equal

Protection clause. While sex and illegitimacy are like race, not a matter of individual choice, the court apparently was not prepared to rule that homosexual orientation was similarly fixed at birth. If it had done so, it would have opened the door to persons with a wide range of sexual practices from claiming they too are a "suspect class."

3. Rational Basis.

Even though claiming to do so, the circuit court did not appear to apply a rational basis test, but some form of heightened scrutiny. Laws that are subject to the rational basis test are "presumed constitutional."[7] Instead, the circuit court here required a showing of "a legitimate interest that suffices to overcome the 'inevitable inference' of animus...." *Id.* at 1085. Stated this way, the burden was put on California to show not only that it had a "legitimate interest," but one that "suffices to overcome" a baseline "inference of animus." Thus, even before the Ninth Circuit considered possible rational bases for Proposition 8, it already had established a threshold hurdle — an "inference of animus" that had to be "overcome" — almost as if

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[7] *See* Armour v. City of Indianapolis, ___ U.S. ___, 132 S.Ct. 2073, 2080-2081 (2012) ("precedent warns us that we are not to 'pronounc[e]' this classification 'unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.' ... Further, because the classification is **presumed constitutional**, the 'burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" Emphasis added.)

Proposition 8 was presumed to be unconstitutional. The court dismissed obviously legitimate interests — requiring a heightened showing of something more, while never revealing what sort of showing would have been sufficient.

As discussed above, Proposition 8 was enacted by the people of California in order to restore the California Constitution to its original, undisputed meaning. And yet not even this purpose was considered to be a rational basis by the circuit court.

C. The Allegation that California Has "Withdrawn" a Right or Benefit Rather Than Failing to Grant One, Has No Relevance to the Level of Scrutiny Applied to Proposition 8, Nor to the Outcome of This Case.

In addition to requiring California to overcome this "inference of animus," the circuit court added that "the Equal Protection Clause requires the state to have a ... rational relation to some legitimate end ... **for withdrawing** a right or benefit from *one group but not others*...." *Id.* at 1083-84, 1101 (italics original, emphasis added). The circuit court claims circumstances are vastly different now than if California had never granted homosexuals the right to marry. *Id.* at 1084. The circuit claims that "our decision to strike down Proposition 8 ... has little to do with the **substance of the right** or benefit from which a group is excluded, and much to do with **the act of exclusion itself**." *Id.* at 1084 (emphasis added). The court relies on Romer, arguing that "[t]he

relevant inquiry in *Romer* was not whether the *state of the law* after Amendment 2 was constitutional [but] whether the *change in the law*" itself was constitutional. *Id.* at 1083 (italics original).

Romer stands for no such proposition. Romer involved a Colorado state constitutional amendment which prohibited the enactment or enforcement of any state or local law which permitted homosexuality as a trait to be used to make out a claim of discrimination. While the Romer opinion did note that the Amendment 2 "withdraws from homosexuals ... specific legal protection" (*id.*, 517 U.S. at 627), Romer never applied a different type of analysis than would have been employed if the protection had never existed in the first place. Nor did Romer indicate that it was focused on the change in the law, rather than the text of Amendment 2. Romer's analysis of Amendment 2, in Section III of that opinion (*id.* at 631, *et seq*.) discusses "**imposing** a broad and undifferentiated disability" on homosexuals, "**den[ying]** them protection," rather than in "**removing**" legal protections that had existed before. *Id.* at 632 (emphasis added).

On the contrary, **all laws** must have a rational basis so long as the Equal Protection clause or Due Process clause is implicated.[8] Contrary to what the court below seems to believe, the rational basis analysis is not applied differently in a case of "not

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[8] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.")

granting" a right or benefit versus a case of "taking away" a right or benefit.

What if, for example, homosexual couples wishing to marry had brought a federal constitutional challenge to California law as it existed before Proposition 8, and even before In Re Marriage Cases? In 2000, California passed Proposition 22, the state's version of the Defense of Marriage Act of 1996. Proposition 22 enacted into statute the simple proposition that "Only marriage between a man and a woman is valid or recognized in California."[9] As the circuit court itself recognized, Proposition 22 did not change the law, but rather codified the law as "understood ... at the time [the California Constitution was ratified] and well into the twentieth century...." *Id.* at 1065. At the time that Proposition 22 was passed, homosexuals had never been permitted to marry in California. Thus, Proposition 22 did not "withdraw" any right.

Yet, if Proposition 22 had been challenged under the Equal Protection clause of the Fourteenth Amendment, it would have had to withstand a rational basis analysis, just as Proposition 8 has had to. Most certainly having been passed for the same reasons as Proposition 8, Proposition 22 would have been subjected to the same legal scrutiny, and the outcome should have been no different.

Similarly in Romer, had Amendment 2 been

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[9] "Proposition 22: Limit on Marriages," Legislative Analyst's Office, http://www.lao.ca.gov/ballot/2000/22_03_2000.html.

passed before the protective local ordinances existed (such as those in Boulder and Denver, *see id.*, 517 U.S. at 628), there is no indication that any different result would have been reached. The Supreme Court's analysis focused on Amendment 2's "imposition" of a disability on homosexuals, not on the "removal" of a previously granted protection.

Thus, the distinction between "withdrawal" of a right or benefit and "failure to grant" one in the first instance is without any legal basis, being nothing more than a fiction created out of thin air by the Ninth Circuit.

II. THE CIRCUIT COURT'S OPINION IS BASED ON A FALSE AND ILLEGITIMATE INQUIRY INTO THE MOTIVATIONS OF THE PEOPLE.

The court's opinion below consumes 44 pages of the Federal Reporter, casting about for a federal constitutional rationale to invalidate the expressed will of the people of California in the form of Proposition 8. The circuit court affirmed components of an even longer 73-page district court opinion.[10] While the district court based its holding on the novel notion that each Californian had a fundamental right to participate in a homosexual marriage, and that Proposition 8 was to be evaluated under a strict scrutiny standard, the circuit court rejected those

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[10] Similar to Justice Scalia's description of the majority opinion in Romer v. Evans, "the Court's opinion is ... long on emotive utterance and ... short on relevant legal citation." Romer, 517 U.S. 639 (Scalia, J., dissenting).

approaches, finding them unsupportable. However, both courts grounded their decisions in dismissive statements, imputed motives, and second-guessing regarding the People of California. However, since both courts below have sought to discern the motives of the people, it would be fair to apply that same standard to the judges writing those opinions — an inquiry which reveals serious questions about whether this decision before the Court in this case was reached by impartial tribunals and based on the merits.

A. The District Court's Opinion.

Only one month after District Court Judge Vaughn Walker issued his opinion invalidating Proposition 8 on August 4, 2010,[11] he resigned from the bench, and later admitted for the first time that he was a homosexual "in a 10 year relationship with another man."[12] As to the case below, "[h]e said he never considered his sexual orientation a reason to recuse from the case."[13] He never revealed his potential conflict while the case was pending before him. Yet he

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[11] Perry v. Schwarzenegger, 671 F. Supp. 2d 921 (2010).

[12] "U.S. gay judge never thought to drop marriage case," Reuters.com (April 6, 2011). http://www.reuters.com/article/2011/04/06/gaymarriage-judge-idUSN0627343820110406?pageNumber=2.

[13] "Prop 8 judge Vaughn Valker" I'm Gay (On Top)," Accessline (April 7, 2011) http://www.accesslineamerica.com/index.php?option=com_content&view=article&id=2065:prop-8-judge-vaughn-walker-im-gay-ontop-marriage&catid=110:national-news&Itemid=74.

later boasted to the press: "I was the ogre of the gay community when I was nominated, and a hero when I leave." Defendant-Intervenors' Motion to Vacate Judgment was denied by Judge James Ware on the theory that it was irrelevant that Judge Vaughn would be affected personally by his own decision if he were to later desire to marry his companion. Judge Ware found Judge Vaughn's personal interest inadequate to meet the test under 28 U.S.C. section 455(b)(4) of having a non-financial "interest that could be substantially affected by the outcome of the proceeding." Perry v. Schwarzenegger, 790 F. Supp. 2d 1119, 1124 (2011).

While not believing he had any need to disclose facts that would lead the people to question his integrity, Judge Walker had no reservation imputing improper motives to those who voted in favor of the proposition based largely on his reading of advertisements run in its support. Judge Walker decided that California voters were motivated solely by "moral and religious views ... that same-sex couples are different from opposite-sex couples [and] these interests do not provide a rational basis supporting Proposition 8." 704 F. Supp. 2d at 1011. Having discounted 5,000 years of religious and moral teaching, Judge Vaughn concluded that the supporters' motivations were: "fear," "unarticulated dislike," not "rational," based on "animus toward gays and lesbians," "irrational," "without reason," and "born of animus." *Id*. at 1002-03.[14] Judge Walker apparently

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[14] *See generally* Petition for Certiorari, p. 11, n.7.

considered religious beliefs to be irrational and thus impermissible as justification for any law governing civil society.

B. The Court of Appeals' Opinion.

The Circuit Court decision was written by Judge Stephen Reinhardt, whose wife serves as Executive Director of the American Civil Liberties Union of Southern California ("ACLU/SC""). When Judge Reinhardt was asked by Defendant-Intervenors to recuse from the panel below,[15] he declined, issuing a self-serving Memorandum Regarding Motion to Disqualify (Jan. 4, 2011).[16] While the Motion to Disqualify was based on several grounds, the central challenge was that, as head of ACLU/SC, the judge's wife had engaged in discussions with plaintiffs' attorneys "before filing this lawsuit" as well as with ACLU/SC representing parties seeking to intervene and serve as *amici*. In his Memorandum, Judge Reinhardt erroneously characterized the basis for the recusal motion as being limited to his "wife's **beliefs**" (emphasis added) and strategically ignored the problem presented by his wife's **active participation** in preparation of the **specific case** challenging

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[15] Appellant's Motion for Disqualification (Dec. 1, 2010). http://www.volokh.com/wp/wp-content/uploads/2010/12/prop8motiontodisqualify.pdf.

[16] http://www.ca9.uscourts.gov/datastore/general/2011/01/04/1016696memo.pdf.

Proposition 8 then before the judge.[17]

Yet, while Judge Reinhardt gave lip service to the proposition that "[w]hether under the Constitution same-sex couples may *ever* be denied the right to marry ... is ... an issue over which people of good will may disagree, sometimes strongly" (italics original), he still had no problem finding "no legitimate reason" for their votes (671 F.3d at 1076), which were "born of animosity" (671 F.3d 1081).

C. The Motives of The People and the Right to Due Process of Law.

In dissenting from the order denying rehearing *en banc*, Circuit Judges O'Scannlain, Bybee and Bea appeared astonished that the Circuit Court has "now declared that animus must have been the only *conceivable* motivation for a sovereign State to have remained committed to a definition of marriage that has existed for millenia...." (italics original) (Jun. 5, 2012).[18] Indeed, they had every reason to be astounded.

Judicial statements such as those of Judges

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[17] *See also* Judge Reinhardt Purports to Explain Himself (Jan 5, 2011). http://www.powerlineblog.com/archives/2011/01/028076.php; Ed Whelan, Reinhardt's Non-Disqualification Memorandum-Part 1, National Review Online (Jan. 5, 2011). http://www.nationalreview.com/bench-memos/256394/reinhardt-s-non-disqualification-memorandum-part-1-ed-whelan.

[18] http://www.ca9.uscourts.gov/datastore/general/2012/06/05/1016696ebofinal.pdf

Walker and Reinhardt reflect a narrow, secular world view, in which religious and moral values have been jettisoned, demonstrating the increasing gap between many members of the federal judiciary and a great swath of the American people. They also demonstrate profound ignorance of the sincerely held views of Californians, including those who embrace the Bible as the Word of God, and our rich heritage as Americans. In our nation's Declaration of Independence, Thomas Jefferson five times referenced God and attributed our rights as gifts of our "Creator." That Creator God created us male and female (*see* Genesis 1:26-28) and enabled male and female couples to procreate offspring in his image (*see* Genesis 5:1-3).

> God's mandate and benediction that the **man and the woman** procreate his image is to be exercised within the confines of monogamy. God institutes marriage by giving Adam his bride, defining them as **husband and wife**, and ordains the man to leave his parents and cling to his wife, forming a new home. By instituting marriage in the Garden of Eden ... God represents marriage as an ideal and holy state, an act of worship. (Heb. 13:4). [B. Waltke, An Old Testament Theology, Zondervan, (2007), p. 237 (emphasis added).]

It is entirely possible for the people of California to join with the rest of the people of the United States, without exhibiting bias, animus or irrationality, to embrace the notion that since God instituted the ordinance of marriage, as created beings we should

defer to His definition of marriage.[19] *See* Ecclesiastes 11:5.

Due process requires that a case be decided by a "fair decision process and an impartial decisionmaker"[20] thereby legitimatizing an inquiry into a judge's personal interests in the outcome of a case, and areas of potential bias, but there is no similar entitlement for a judge to impute bias or otherwise impugn the motives underlying the act of the sovereign people. Indeed, the very inquiry into motives of the people as sovereign would appear to be beyond the role of a judge serving under the authority of the people. Such second-guessing is prohibited in other areas where the sovereign people participate in their own governance. For example, when the people vote for a candidate, they may have many reasons for so voting, but their vote cannot be nullified by a court which finds the basis for their selection of candidate irrational or prejudiced. When members of a petit jury vote to acquit a criminal defendant, in the absence of extraordinary circumstances such as jury tampering, they cannot be required to explain the reason for their

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[19] Petitioners present this Court with a secularized version of a legitimate governmental interest for Proposition 8, described as: "society's vital interest in channeling the unique procreative potential of opposite-sex relationships into enduring, stable unions for the sake of responsibly producing and raising the next generation." Petition for Certiorari, p. 6. *See also id*. pp. 26-27.

[20] J. Nowak, R. Rotunda, and J. Young, Constitutional Law, (3rd edt. 1986), section 13.8.

verdict to the court.[21] And when the sovereign people vote to modify the constitution of their state, it is not for a federal judge to speculate as to the people's motives, as was done by both the district court and the circuit court in this case.[22]

Indeed, the effort to ignore legitimate motives and impute hateful motives to the people reveals that the decisions below can only be understood as establishing a predicate for the court's imposition of its own preferences — an "act not of judicial judgment but of political will"[23] — overriding the expressed wishes of the people. In no way can the decision below be viewed as a legitimate effort to apply the Fourteenth

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[21] *See, e.g.,* United States v. Maylan, 417 F.2d 1002 (4th Cir. 1969) ("We recognize ... the undisputed power of the jury to acquit ... for the courts cannot search the minds of the jurors to find the basis upon which they judge.")

[22] Reasons are distinguishable from motives. Reason is "a basis or cause, as for some belief, action, fact, event, etc." ("Reason." The Random House Dictionary of the English Language. 1966.) A Motive is "something that prompts a person to act in a certain way or that determines volition; incentive." ("Motive." The Random House Dictionary of the English Language. 1966). Even with respect to legislation, while it may be appropriate for courts to inquire into whether legitimate reasons exist for an action, it would not be appropriate to try to psychoanalyze legislators to discern why they voted in a certain way, denigrating certain motives as impermissible so the court can impose its will on the legislature.

[23] Romer v. Evans, 517 U.S. 653 (Scalia, J., dissenting). *See also* A. Hamilton, Federalist Papers (G. Carey & J. McClellan, edts., Liberty Press), No. 78 ("It may truly be said [the Judiciary is] to have neither FORCE nor WILL, but merely judgment....").

Amendment's Equal Protection Clause to Proposition 8 in a way that resembles the intention of its framers. Nor can it be said that the decision constitutes a legitimate exercise of power of judicial review. Certiorari should be granted to bring order to the federal judiciary and to re-establish fixed bounds within which federal courts may operate.

III. THIS COURT'S DECISION IN ROMER V. EVANS HAS DEPARTED FROM THE CONSTITUTIONAL TEXT, HAS SOWN CONFUSION, AND SHOULD BE RECONSIDERED AND OVERTURNED.

The Circuit Court determined that its decision was governed by Romer v. Evans, 517 U.S. 620 (1996). *See* Perry, 671 F.3d at 1063-64, 1081. At the same time, the Petition for Certiorari seeks to distinguish Romer, quoting Romer's description of Colorado Amendment 2 as having: "imposed an 'unprecedented' and 'comprehensive' ban on all 'legislative, executive or judicial action at any level of state or local government designed to protect the named class [of] homosexual persons or gays and lesbians.' *Id.*, 517 U.S. 624." Petition, p. 4. Petitioners believe that California Proposition 8 was quite different, having a "unique and strictly limited effect." *Id.* Additionally, Petitioners believe "the timing of the Colorado amendment's adoption played absolutely no role in the Court's analysis [although it] operated to repeal a handful of municipal ordinances extending certain antidiscrimination protections to gays and lesbians." *Id.*

While it is true that Romer is distinguishable in certain ways from the instant case, the Circuit Court strived mightily to craft its opinion to fall under what it perceived the Romer holding to be —

> to **take away** from same-sex couples the right to be granted marriage licenses [serving] no other purpose but to lessen the status and human dignity of gays and lesbians [something] [t]he Constitution simply does not allow [citing Romer]. [671 F.3d, 1063 (emphasis added).]

Indeed, on at least 17 occasions the Circuit Court referred to Proposition 8, employing terms such as "take away," "strip away," "deprivation of an existing right," etc. Further, the court below explained that, while differences between Amendment 2 and Proposition 8 were not significant, the:

> surgical precision [of the Romer language] raises an even stronger 'inference that the disadvantage imposed is born of animus [than in the case on appeal]. In short, *Romer* governs our analysis, notwithstanding the differences between Amendment 2 and Proposition 8. [671 F.3d at 1081.]

In light of these perceived parallels between Romer and this case, the writ also should be granted to re-examine Romer. Indeed, this Court's decision in Romer spawned, and shares many of the same flaws with, the circuit court decision and opinion below.

The Court erred in Romer, by imputing both "animus" and "a bare ... desire to harm a politically unpopular group" to the supporters of Colorado Amendment 2, just as Judges Vaughn and Reinhardt did below. *See* Section II, *supra*. In dissent, Justice Scalia thoroughly refuted such an imputation when he explained that Amendment 2:

> is not the manifestation of a "bare ... desire to harm" homosexuals ... but rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. [Romer, 517 U.S. at 636.]

As in the opinion below, no effort was made by the court in Romer to examine the textual meaning of the "equal protection of the laws" in the Fourteenth Amendment. As Justice Scalia pointed out, the Romer majority had embraced the position that "opposition to homosexuality is as reprehensible as racial or religious bias [even though] the Constitution of the United States says nothing about the subject [and] it is left to be resolved by normal democratic means...." *Id.*

Romer stands as one of the premier contemporary illustrations of the degradation of our founder's understanding of a written Constitution in which authorial intent[24] is jettisoned in favor of an evolving

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[24] *See* E.D. Hirsch, Jr., Validity in Interpretation (Yale Univ. Press 1967), p. viii, 1, 5, 212-13.

Constitution based on the policy preferences of the Justices.

CONCLUSION

For the reason set forth above, certiorari should be granted to correct the badly flawed opinions below, and to reconsider this Court's decision in Romer,

Respectfully submitted,

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