No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,
Petitioners,

v.

KRISTIN M. PERRY, et al.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

PETER J. FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
814 Rue Rochelle
Slidell, LA 70458
(703) 582-8466
peterferrara@msn.com

Counsel for Amicus Curiae American Civil Rights Union

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF THE AMICUS CURIAE [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to ensure that the rights of the American people to self-government, and the rights of those who believe in and live in accordance with traditional family values, are fully respected, regardless of political correctness.

STATEMENT OF THE CASE

In 2000, the People of California exercised their rights under the state's laws providing for Initiative and Referendum to enact Proposition 22, which reaffirmed state law as it had been understood since California became a state 162 years ago – marriage in the state involves a relationship between a man and a woman. *In re Marriage Cases*, 183 P.3d 384, 407 (Cal. 2008); CAL. FAM. CODE Section 308.5.

In 2008, the California Supreme Court held Proposition 22 to be unconstitutional under the state's Constitution, which the court held required marriage to be redefined to include same-sex couples. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

Within 6 months, the People of California spoke again, exercising their rights under the states' Initiative and Referendum laws to enact Proposition 8, which adopted an amendment to the California Constitution providing that, "Only marriage between

a man and a woman is valid or recognized in California."

Respondents, a gay couple and a lesbian couple, filed this suit in the Federal District Court for the Northern District of California alleging that Proposition 8 was unconstitutional under the Fourteenth Amendment of the United States Constitution. The District Court ruled that Proposition 8 did violate the Fourteenth Amendment, after a trial. App. 137a.

On appeal, the Ninth Circuit named a panel including Judges Reinhardt, Hawkins, and Smith. Petitioners moved to disqualify Judge Reinhardt because his wife, Ramona Ripston, Executive Director of the ACLU of Southern California (ACLU/SC), had provided advice and counsel to the lawyers for Respondents regarding their decision to bring this suit challenging Proposition 8, and had directly participated in the case in the District Court. 9th Cir. Dkt. Entry ("Dkt. Entry") 282 at 7. Ms. Ripston had directly supervised the ACLU/SC in representing parties who unsuccessfully moved to intervene as plaintiffs and parties who filed *amicus curiae* briefs arguing that the court should strike down Proposition 8 as the plaintiffs sought. *See* N.D. Cal. Doc. No. ("Doc. No.") 62 at 2; Doc. No. 79 at 2; Doc. No. 552 at 2.

Judge Reinhardt acknowledged that he had "always recused himself" when the ACLU/SC had "participated in any way" in a case before the Ninth Circuit. But he refused to recuse himself in this case even though the ACLU/SC and his wife personally

had participated in the case in the District Court, saying that instead "the chief basis for the recusal motion appears to my wife's beliefs." Dkt. Entry 295 at 3, 10 n.5.

The Ninth Circuit panel majority affirming that Proposition 8 violates the Equal Protection Clause was written by Judge Reinhardt, closely tracking the analysis urged by his wife's ACLU/SC in the District Court. *See* Doc. No. 62; Doc. No. 552. The majority below did not follow *Baker v. Nelson*, 409 U.S. 810 (1972), which held unanimously that the traditional definition of marriage excluding same sex couples did not violate the Equal Protection Clause. The Ninth Circuit majority instead ruled that the facts of this case are governed by *Romer v. Evans*, 517 U.S. 620 (1996). On the court's reading of that case, once the California Supreme Court granted the right to gay marriage in 2008, the state could no longer return to the traditional definition of marriage while "leaving in place all of its incidents" through domestic partnerships. App. 17a. The panel majority concluded that there could not be any conceivable rational basis for that except a desire to "dishonor" and to "disapprove of gays and lesbians as a class." App. 91a. Consequently, Proposition 8 violated the Equal Protection Clause, according to the two judge, Ninth Circuit, panel majority below.

Rehearing en banc was denied, with Judge O'Scannlain joined by Judges Bybee and Bea dissenting, stating that the panel opinion had declared unconstitutional the "definition of marriage that has existed for millennia" on the basis of a "gross misapplication of *Romer v. Evans*…." App.

445a. Petitioners filed their Petition for a Writ of Certiorari on July 30, and it was docketed on August 1.

SUMMARY OF ARGUMENT

In the panel majority Ninth Circuit decision below, Judge Reinhardt and Judge Hawkins seized for the two of themselves the power to rewrite the fundamental definition of marriage in California, which otherwise had prevailed for 162 years, since the state's founding, consistent with the practice of thousands of years of civilization. They substituted instead the preferences of the ACLU/SC. Moreover, they did so contrary to the now twice expressed preferences of the People of California, effectively depriving them of their rights to enact their preference by majority vote under state law. Whether the U.S. Constitution does require such a result is a question of such fundamental importance that it now should be examined and determined by this Court.

The Ninth Circuit majority opinion below also involves major and troubling implications for the ongoing debate over gay marriage outside of California. It stands as a precedent now that once a state experiments with policies beyond strictly limiting marriage to the traditional definition of a relationship between a man and a woman, it may not be able to go back. It also condemns progressive civil union or domestic partnership laws as in California as undermining, indeed possibly terminating, the power of the state to maintain the traditional definition of marriage. That creates

strong disincentives for any state to experiment with more liberal laws and policies regarding gay couples. Whether the U.S. Constitution requires these perverse and counterproductive legal principles is an immediately critical question of law in the major national public debate over the most basic institution in our civilization and the foundation of the family and of society. This Court should review this case to decide that question.

The Ninth Circuit majority opinion below also now stands as a dominating precedent threatening the traditional definition of marriage in other states in the Ninth Circuit that have already provided some recognition and benefits to same-sex couples. Indeed, it threatens whether those states and their citizens even have the power to decide the issue any more. This is all the more reason why this case presents critically important questions of law that this Court should decide.

The decision of the panel majority below directly conflicts with this Court's determinative precedents in *Baker* and *Crawford v. Board of Education*, 458 U.S. 527 (1982). This case is governed by these two precedents, not *Romer*. This Court should review this case to resolve the conflict between the decision of the panel majority below and the truly governing precedents of *Baker* and *Crawford*, and clarify for the broad national debate over gay marriage the role of *Romer*.

Until the decision of the two judge Ninth Circuit panel majority below in this case, every state and federal appellate court to consider a federal

constitutional challenge to the traditional definition of marriage under state law had upheld that traditional definition, which excludes same sex couples. Consequently, the Ninth Circuit decision below now conflicts with all of these precedents, and the law in all of the circuits in which they reside. This Court should grant the requested writ of certiorari to resolve these conflicts.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS FUNDAMENTALLY IMPORTANT QUESTIONS OF LAW THAT THIS COURT SHOULD DECIDE.

Marriage has long been recognized as an institution "more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). The court in *Maynard v. Hill*, 125 U.S. 190, 211 (1888) found marriage to be "the foundation of the family and of society." The definition of marriage has long been recognized as within the province of each state. *Sosna v. Iowa*, 419 U.S. 393. 404 (1975)(A state "has absolute right to prescribe the conditions upon which the marriage relations between its own citizens shall be created." Subject to the Constitution, of course.)(quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877). Moreover, in California voters have rights under state law to amend their state Constitution by voter initiative.

But in the panel majority Ninth Circuit decision below, Judge Reinhardt and Judge Hawkins seized

for the two of themselves the power to rewrite the fundamental definition of marriage in California, which otherwise had prevailed for 162 years, since the state's founding, consistent with the practice of thousands of years of civilization. They substituted instead the preferences of the ACLU/SC. Moreover, they did so contrary to the now twice expressed preferences of the People of California, effectively depriving them of their rights to enact their preference by majority vote under state law. Whether the U.S. Constitution does require such a result is a question of such fundamental importance that it now should be examined and determined by this Court.

The question of gay marriage is, of course, a major political issue in all 50 states today. Six states and the District of Columbia now recognize same sex marriages. Two others have enacted legislation to do so upon approval by their citizens in referenda this fall. Ongoing debate and political battle rages in virtually every other state.

The Ninth Circuit majority opinion below involves major and troubling implications for this ongoing debate outside of California. It stands as a precedent now that once a state experiments with policies beyond strictly limiting marriage to the traditional definition of a relationship between a man and a woman, it may not be able to go back. It also condemns progressive civil union or domestic partnership laws as in California as undermining, indeed possibly terminating, the power of the state to maintain the traditional definition of marriage. That creates strong disincentives for any state to

experiment with more liberal laws and policies regarding gay couples. Whether the U.S. Constitution requires these perverse and counterproductive legal principles is an immediately critical question of law in the major national public debate over the most basic institution in our civilization and the foundation of the family and of society. This Court should review this case to decide that question.

The Ninth Circuit majority opinion below also now stands as a dominating precedent threatening the traditional definition of marriage in other states in the Ninth Circuit that have already provided some recognition and benefits to same-sex couples. Indeed, it threatens whether those states and their citizens even have the power to decide the issue any more. Washington state has now submitted to popular referendum a recently enacted statute that would extend the definition of marriage to include same sex couples. But under the two judge majority below in this case, with the independence of one actually compromised, do the People of Washington state even have the power any more to decide the issue? Note that Washington already has a domestic partnership law for same sex couples as in California. If the people of Washington vote no on the statute, would that not present the exact same facts as in California in this case, which the majority below says violated the Equal Protection Clause?

Moreover, Hawaii, Nevada and Oregon have extended the incidents of marriage to same-sex couples, but not the recognition of marriage. But under the ruling of the panel majority below, is the

traditional definition of marriage even valid law any more in these states? Would there be any more rational basis for extending the incidents of marriage to same sex couples, but not the recognition of marriage, than there was in this case below?

That is all the more reason why this case presents critically important questions of law that this Court should decide.

II. THE MAJORITY DECISION BELOW IS BARRED BY THIS COURT'S PRECEDENTS.

Thirty years ago, in *Baker v. Nelson*, 409 U.S. 810 (1972), this Court held that the traditional definition of marriage as between a man and a woman, excluding same sex couples, does not violate the Equal Protection Clause of the U.S. Constitution. Indeed, the Court unanimously dismissed the appeal from the Supreme Court of Minnesota presenting the issue "for want of a substantial federal question." This dismissal counts as a decision on the merits constituting "controlling precedent unless and until re-examined by this Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

This controlling precedent is binding on the Ninth Circuit. But the two Judge panel majority in this case below dismissed *Baker* as "not pertinent here" in a footnote, App. 60-61a, while marching on to find precisely that California's traditional definition of marriage, which was the law at the time this case was decided, was in violation of the Equal Protection Clause of the Constitution. The decision of the panel

majority below is consequently in conflict with this Court's ruling in *Baker*.

The panel majority below argued that what violated the Equal Protection Clause in this case was the combination of the California Supreme Court already having extended the recognition of traditional marriage to gay couples, and Proposition 8 withdrawing that legal recognition, while leaving in place all of the legal incidents of marriage under the state's domestic partnership law. Judges Reinhardt and Hawkins decided that they could think of no rational basis for upholding the traditional definition of marriage that has prevailed for thousands of years of civilization, while leaving the domestic partnership law in place. They concluded, therefore, that there could be no conceivable legitimate state interest in doing so, and the "sole purpose" of the initiative's supporters must have been to proclaim publicly the "lesser worth" of gays and lesbians as a class and to "dishonor a disfavored group." App. 88a, 91a.

But that reasoning is barred by this Court's decision in *Crawford v. Board of Education*, 458 U.S. 527 (1982). The Court there "reject[ed] the contention that once a state chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." *Id.* at 535. Perfectly analogous to the present case, *Crawford* involved an Equal Protection challenge to a California constitutional amendment (Proposition 1 in that case) superceding a California Supreme Court decision interpreting the State Constitution to go beyond the requirements of the Federal Constitution. The Court upheld the

Proposition in that case, refusing to "interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Id.* at 540. The Court held that, "having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States," *Id.* at 542, which is just what the People of California did in this case.

Moreover, the Court in *Crawford* refused to find a difference in the applicable law and legal analysis when a state law right is withdrawn rather than when it is not extended in the first place. App. 68a. *Crawford* held that when a state repeals a law, the relevant legal standard is simply whether that law was "required by the Federal Constitution in the first place." 458 U.S. at 538. But here even the 9th Circuit majority recognizes that the Equal Protection Clause does not require recognition of same sex marriage, as this Court in fact held in *Baker v. Nelson*, 409 U.S. 810 (1972).

Just as in *Crawford*, the people of California are free to decide to reverse the state Supreme Court's extension of the traditional definition of marriage to cover same sex couples, by popular vote amending the State Constitution, as provided under state law. Indeed, the majority panel below flouted state law by effectively denying the People of California the right to vote on the question as provided under state law. Judge Reinhardt instead substituted his own preference for state law regarding the definition of

marriage in place of a vote of the people, which *Crawford* precisely condemns.

Judge Reinhardt and his wife serving as the long time head of the ACLU/SC may not be able to think of any rational basis for the people to support the traditional definition of marriage, and to favor reversing the extension of that definition to gay couples while keeping the state's domestic partnership law. But Mr. and Mrs. Reinhardt are not known for their familiarity with the pro-family, traditional values movement in California and across the nation, now twice garnering majority support from the People of California on the issue of gay marriage. Their views on the motivations of that movement more nearly reflect their own prejudices rather than informed reality. These Proposition 8 supporters favor the traditional definition of marriage that has served human civilization for thousands of years because they strongly believe it continues to serve society's best interests, not because they want to dishonor and publicly condemn gays and lesbians. President Obama recently publicly recognized as much, saying millions of Americans "feel very strongly" about preserving the traditional definition of marriage not "from a mean-spirited perspective," but because they "care about families." Robin Roberts ABC News Interview with President Obama, May 9, 2012, *available at* http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043&singlePage=true.

The traditional definition of marriage represents unique recognition of a unique relationship.

Maintaining that thousands of years old tradition in no way disapproves or dishonors other relationships that the State has chosen to recognize differently, as through domestic partnership or civil union laws that serve the needs and interests of those involved in those different relationships. What rational people cannot understand is how retaining those liberal domestic partnership laws designed precisely to suit the interests of gay couples while restoring the traditional definition of marriage that has served civilization for thousands of years demonstrates animus towards gays or an intent to publicly dishonor gay couples.

The First Circuit got the point earlier this year in *Massachusetts v. United States Dep't of HHS*, 682 F.3d 1, 16 (1st Cir. 2012)(quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003)(O'Connor, J., concurring in the judgment): "preserv[ing] the heritage of marriage as traditionally defined over centuries of Western Civilization…is not the same as 'mere moral disapproval of an excluded group.'" Even the majority panel below expressly disavowed any suggestion "that Proposition 8 is the result of ill will on the part of the voters of California," App. 87a. But that flatly contradicts its conclusion that passage of Proposition 8 was motivated by desire to dishonor and publicly disapprove of same sex couples.

The Ninth Circuit majority below argued that it was *Romer* that governed this case, rather than *Baker* and *Crawford*. *Romer* involved a Colorado constitutional amendment adopted by initiative labeled Amendment 2. The Ninth Circuit majority ruled that *Romer* "governs" and "controls" this case

because Proposition 8 is "remarkably similar" to Amendment 2. App. 57a, 60a, 68a.

Aspen, Boulder and Denver adopted ordinances banning discrimination on the basis of sexual orientation. Amendment 2 repealed and banned such anti-discrimination laws in regard to gays and lesbians statewide. It was this element of withdrawing protections from gays and lesbians "that the Fourteenth Amendment did not require…to be afforded to gays and lesbians" in the first place, App. 64a, that led the panel majority below to decide that *Romer* was just like and governed this case. For the two Judge majority below found that aspect of *Romer* to be perfectly analogous to this case in the California Supreme Court extending the traditional definition of marriage to same sex couples, and then the People of California in Proposition 8 restoring the traditional definition of marriage to one man and one woman, excluding same sex couples.

For the panel majority below, therefore, the central factor determining the result in *Romer* involved *timing*. First, local ordinances banning discrimination were enacted providing benefits to gays and lesbians. Then Amendment 2 was passed repealing the local ordinances and removing those benefits to gays and lesbians. That *timing* of the enactment of Amendment 2 was the key factor in *Romer* determining that Amendment 2 was unconstitutional, according to the panel majority below.

Similarly, in this case, first the California Supreme Court extended the traditional definition of

marriage to same sex couples. Then, the People of California in Proposition 8 restored the traditional definition of marriage to one man and one woman, excluding same sex couples. Therefore, Proposition 8 must be unconstitutional just like Amendment 2 was, the two judge majority below reasoned.

But this was the fundamental error of the panel majority below, the notion that Amendment 2 in *Romer* was unconstitutional because of the *timing* of the Amendment, rather than its *substance.* Amendment 2 was not unconstitutional because it came after the local anti-discrimination ordinances were adopted, and then repealed them. Indeed, *Crawford* ruled that such repeal alone of provisions not required by the Equal Protection Clause would not violate the Clause. The panel majority's reading of *Romer* consequently would leave it in conflict with *Crawford*. That reading, therefore, is foreclosed by *Crawford*.

The real reason Amendment 2 was unconstitutional in *Romer* is that the Amendment imposed a "broad and undifferentiated disability on a single named group" by prohibiting "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." *Romer*, 517 U.S. at 624. Amendment 2 "identified persons by a single trait and then denied them protection across the board," *id.* at 633. The result of Amendment 2, therefore, was to "deem a class of persons a stranger to [the] laws,"*id.* at 635. This is what the Court found "exceptional" and "unprecedented," leading it

to find the Amendment unconstitutional, *id.* at 632-33, not that it repealed a couple of local antidiscrimination laws that were not required by the Equal Protection Clause.

A little thought would make the result-oriented, illogical misreading of *Romer* by Reinhardt and company even more clear. Suppose Amendment 2 had been passed *before* Aspen, Boulder, and Denver enacted their anti-discrimination ordinances. Would it have been constitutional then? Assuredly not, for the real basis for finding it so as above would still be present.

Or suppose an identical Amendment 2 was passed in another state with no pre-existing anti-discrimination laws to repeal. That would have clearly been unconstitutional too for the same reason, because the defect in Amendment 2 was not its timing, but its substance. That was further demonstrated by the fact that the Court in *Romer* struck down Amendment 2 on its face throughout the entire state, and not just as applied in the three towns where it would repeal an anti-discrimination ordinance protecting gays.

The two judge, result-oriented, Ninth Circuit majority below tries to tell us that the foundation of *Romer* is that "Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade." App. 55a. But again *Crawford* stands for just the opposite, and for good reason. If redefining traditional marriage to include same-sex

couples can be opposed in good faith on a rational basis without a resulting Equal Protection Clause violation *before* the state acts to make the change, then as a logical matter it can continue to be opposed in good faith on the same rational basis *after* the state makes the change. That continued opposition does not suddenly become irrational the moment after the state makes the change, resulting in an Equal Protection violation if the opposition leads to restoration of the original, traditional definition of marriage.

Quite clearly, Proposition 8 differs sharply from Amendment 2 in all legally material respects. *Romer* rightly found Amendment 2 "unprecedented in our jurisprudence," and alien to "our constitutional tradition, 517 U.S. at 633. But there is no law with deeper roots in the history of California and our Nation than the traditional definition of marriage as restored by Proposition 8. That definition has been the law in California for all but 142 *days* of the 162 *years* of the history of the state, and it continues to be the law in the overwhelming majority of states, and in federal law.

Moreover, *Romer* rightly recognized that Amendment 2 imposed a "broad and undifferentiated disability on a single named group" and denied that group "protection across the board." 517 U.S. at 623-33. But Proposition 8 "simply…restored the traditional definition of marriage as referring to the union between a man and a woman." *Strauss v. Horton*, 207 P.3d 48, 76 (Cal. 2009).

Indeed, Proposition 8 did so as narrowly as possible, without disturbing the numerous other laws, including the expansive domestic partnership laws, that provide gays and lesbians in California "with some of the most comprehensive civil rights protections in the nation." About Us – Equality California, *at* http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493 (California's "largest state-wide LGBT rights advocacy organization").[2] The California Supreme Court itself has recognized that there can be no comparison between Proposition 8 and a law like Colorado's Amendment 2 that "sweepingly… leaves [a minority] group vulnerable to public or private discrimination in *all* areas without legal recourse." *Strauss*, 207 P.3d at 102.

Finally, Amendment 2 shows what real hostility to a disfavored group looks like in its broad disenfranchisement of the group. But even the panel majority below disclaimed any "suggest[ion] that Proposition 8 is the result of ill will on the part of the voters of California." App. 87a. Numerous precedents and authorities recognize the rational basis without any ill will for supporting the traditional definition of marriage.

The reality is Proposition 8 is more nearly the opposite of Amendment 2 in all legally relevant

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[2] Reinhardt and company viewed this careful, narrow tailoring of the restoration as indicating no rational basis for the change, which only indicates that Reinhardt and crew have no understanding of the rational basis for the pro-family, traditional values movement's motivations for maintaining the traditional definition of marriage.

respects. That is why *Romer* really has nothing to do with this case, and it is governed instead by *Baker* and *Crawford*. In emphasizing *Romer* so much, Reinhardt and crew were simply grasping at straws in their crusade to overturn traditional marriage.

This Court should review this case to resolve the conflict between the decision of the panel majority below and the truly governing precedents of *Baker* and *Crawford*, clarifying for the broad national debate over gay marriage the role of *Romer* versus *Baker* and *Crawford* in resolving the legal issues.

III. THE MAJORITY DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

Until the decision of the two judge Ninth Circuit panel majority below in this case, every state and federal appellate court to consider a federal constitutional challenge to the traditional definition of marriage under state law had upheld that traditional definition, which excludes same sex couples. Moreover, all of these decisions found that traditional definition of marriage to be rationally related to vital interests in channeling opposite sex relationships into enduring, stable unions that can best raise and nurture the next generation. Consequently, the Ninth Circuit decision below now conflicts with all of these precedents, and the law in all of the circuits in which they reside.

Perhaps the most directly conflicting is the Eighth Circuit's *Citizens for Equal Prot. v. Bruning*,

455 F.3d 859 (8th Cir. 2006). The court in that case considered a challenge to an amendment to the Nebraska Constitution that not only defined marriage as the union of a man and a woman but also prohibited recognition of "the uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship." 455 F.3d at 863. That court recognized that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Id.* at 867. The Eighth Circuit specifically "reject[ed] the district court's conclusion that the Colorado enactment at issue in *Romer* is indistinguishable" from the Nebraska Amendment. The court concluded that the Nebraska Amendment's "focus is not so broad as to render Nebraska's reasons for its enactment 'inexplicable by anything but animus towards same-sex couples.'" *Id.* at 868.

Similar decisions rejecting challenges to the traditional definition of marriage as only between one man and one woman include *In re Marriage of J.B. and H.B.*, 326 S.W. 3d 654 (Tex. Ct. App. 2010); *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003), *review denied*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App.), *review denied*, 84 Wash. 2d 1008 (Wash. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky.1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

Moreover, the California Supreme Court itself has recognized the legitimate state interest in channeling opposite sex relationships into marriage for the purpose of producing and raising children. *DeBurgh v. DeBurgh*, 250 P.2d 598 (Cal. 1952). *See also*, 1 WILLIAM BLACKSTONE, COMMENTARIES 410 (the relation "of parent and child…is consequential to that of marriage, being its principle end and design; and it is by virtue of this relation that infants are protected, maintained, and educated."); *id.* at 435 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown."); *Introduction in* 1 A HISTORY OF THE FAMILY: DISTANT WORLDS, ANCIENT WORLDS 5 (Andre Burguiere, et al. eds., 1996)(Marriage is "a social institution with a biological foundation," as recorded human history shows that the institution of marriage as the union of man and woman is founded on the simple biological reality that only opposite sex unions can produce children.)[3]

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[3] Other authorities similarly recognizing this critical state interest in the traditional definition of marriage include, JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, Sections 78-79 (1690); BARON DE MONTESQUIEU, 2 THE SPIRIT OF LAWS 96, 173 (1802); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828)("marriage"); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE, Section 39 (1852); BRONISLAW MALINOWSKI, SEX, CULTURE AND MYTH 11 (1962); KINGSLEY DAVIS, *The Meaning & Significance of Marriage in Contemporary Society*,

The above cases all followed traditional rational basis review, unlike the Ninth Circuit panel majority below. This Court has established that "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." *Board of Trs. of the Univ. of Ala. V.Garrett*, 531 U.S. 356, 366-67 (2001). Consequently, a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not," *Johnson v. Robison*, 451 U.S. 361, 383 (1974). The government may make special provision for a group if its activities, such as possibly bearing children outside of marriage "threaten legitimate interests …in a way that other [groups' activities] would not," *City of Cleburne v. Cleburne Living Ctr.* 473 U.S. 432, 448 (1985). Under these precedents, the proper question in this case is whether recognizing opposite-sex relationships as marriages furthers interests that would not be furthered by recognizing same sex relationships as marriages. If the state interest served by marriage is providing a stable, long term environment for procreation and raising and nurturing the next generation, the answer is yes, and so the traditional definition of marriage as between a man and a

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in CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION 1, 7-8; (Kingsley Davis, ed. 1985); G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2(1988); JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2002); W. BRADFORD WILCOX, ET AL. EDS. WHY MARRIAGE MATTERS 15 (2d ed. 2005).

woman does not violate the Equal Protection Clause. Since only opposite sex couples can produce children, and same sex couples cannot, limiting marriage to that group is rationally related to that vital interest.

This Court should review this case to resolve these conflicts between the Ninth Circuit panel majority in this case, and all these other federal and state appellate court precedents.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

PETER J. FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
814 Rue Rochelle
Slidell, LA 70458
(703) 582-8466
peterferrara@msn.com

Counsel for Amicus Curiae
American Civil Rights Union

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