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NEWS RELEASE

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Herrera files City's brief opposing 9th Circuit re-hearing on Proposition 8

City Attorney calls same-sex marriage ban 'peculiarly irrational and inexplicable by anything other than prejudice'

SAN FRANCISCO (March 1, 2012)—City Attorney Dennis Herrera today filed San Francisco's opposition to a move by sponsors of Proposition 8 for a rehearing by a larger, 11-judge panel of the U.S. 9th Circuit Court of Appeals on the constitutionality of the controversial ballot measure that eliminated marriage rights for same-sex couples in California. Prop 8's backers petitioned for the *en banc* review on Feb. 21, two weeks after a 2-to-1 appellate court ruling that the discriminatory measure violated rights guaranteed under the U.S. Constitution's 14th Amendment.

Herrera's 15-page pleading forcefully reiterates the view shared by three federal judges that Prop 8 is unconstitutional, insisting that the Ninth Circuit's Feb. 7 decision fails to merit review by a larger panel because of its focus on California's unique circumstances and its consistency with well-established judicial precedent.

"Proposition 8 is peculiarly irrational and inexplicable by anything other than prejudice," the brief argues. "Because States cannot create arbitrary classes among their citizens, or classify citizens simply to make some less equal to others, Proposition 8 violates the Equal Protection Clause."

Herrera's brief additionally dismisses as "categorically unreasonable" Prop 8 proponents' argument that U.S. District Court Judge Vaughn R. Walker's Aug. 2010 ruling should be vacated because the judge is "gay and…in a committed same-sex relationship."

San Francisco intervened alongside the American Foundation for Equal Rights in its federal challenge to Prop 8 on Aug. 19, 2009 for the purpose of demonstrating the public sector's interest in marriage equality. In 2004, the San Francisco City Attorney's Office became the first government entity ever to litigate against marriage laws that discriminate against same-sex partners, and has played a central role in every case involving the issue in California for the last eight years.

The present case is: *Perry v. Brown*, United States Court of Appeals for the Ninth Circuit, case numbers 10-16696 and 11-16577.

# # #

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor-Appellee,

vs.

EDMUND G. BROWN JR., et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

Nos. 10-16696 & 11-16577

Decided Feb. 7, 2012
Circuit Judges Stephen Reinhardt, Michael Hawkins, and N.R. Smith

U.S. District Court
Case No. 09-cv-02292 JW

PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S RESPONSE TO PETITION FOR REHEARING EN BANC

On Appeal from the United States District Court
for the Northern District of California

The Honorable Chief District Judge Vaughn R. Walker (10-16696)
The Honorable Chief District Judge James Ware (11-16577)

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STATEMENT AND INTRODUCTION

If ever there were a State in which denying the title of marriage to same-sex couples was arbitrary, California is that State. California's constitutional, statutory and decisional law governing families treats gay and lesbian couples and their children precisely the same as it treats opposite-sex couples in all respects save one: the title and stature of their relationships.

The California Supreme Court addressed that difference in 2008 and held that state law providing a different and inferior designation for same-sex couples from the universally understood and cherished title of marriage served no purpose other than to label lesbian and gay relationships as second class and violated state constitutional guarantees of liberty, privacy and equality. Proposition 8 was enacted six months later with the express purpose of reinstating that inferior status for lesbian and gay relationships by carving an exception to the State's constitutional guarantees for them alone. It did not, however, change any of the panoply of other California laws recognizing for both constitutional and statutory purposes that lesbians and gay men are similarly situated to heterosexuals in every respect that concerns their abilities to form committed relationships, create families, and parent children.

It is this historical context, and the California Supreme Court's definitive 2009 ruling on the scope and meaning of Proposition 8, that the panel focused on first in evaluating the measure. By doing so it avoided ruling on grounds that were broader than necessary.

The panel faithfully applied *Romer v. Evans*, 517 U.S. 620 (1996), the authority most directly on point with the unique circumstances of California's elimination of marriage rights for a minority of its citizens. The panel decision is consistent with *Romer* and with other Supreme Court authority involving the elimination of rights for minority groups. In concluding that Proposition 8 cannot

meet even the lenient rational basis test, the panel decision is correct. Proposition 8 is peculiarly irrational and inexplicable by anything other than prejudice. Because States cannot create arbitrary classes among their citizens, or classify citizens simply to make some less equal to others, Proposition 8 violates the Equal Protection Clause.

Finally, the panel's rejection of Proponents' claims that a gay judge in a relationship cannot hear a case involving gay people's marriage rights, and instead must be presumed to have ulterior personal motives unless he disavows them, was correct and is consistent with every case in any circuit presenting a similar question. Proponents' petition for rehearing en banc should be denied.

ARGUMENT

I. THE PANEL DECISION DOES NOT MERIT *EN BANC* REVIEW BECAUSE IT FOCUSED ON LAW AND FACTS PARTICULAR TO CALIFORNIA.

The panel properly understood that when a court undertakes to examine the constitutionality of a law it must do so in view of the law's "immediate objective, its ultimate effect, and its historical context and the conditions existing prior to its enactment." *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (internal quotation marks omitted). Where a state supreme court has already decided that "two or more statutes must be taken together, [federal courts] accept that conclusion as if written into the statutes themselves." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-80 (1932).

As the panel decision recognized, Proposition 8 was enacted against the backdrop of a California Supreme Court decision recognizing same-sex couples' right to marry under the state constitution. *In re Marriage Cases*, 183 P.3d 384, 429-30 (Cal. 2008). This includes "the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own—and, if the couple chooses, to raise children within that family." *Id*. at

399. Prior to that ruling, California law already provided registered domestic partners the same rights and responsibilities as those of spouses. *Id*. at 417; *see also* Cal. Fam. Code § 297.5(a).

In the *Marriage Cases*, the Court held that "affording access to this designation [of marriage] exclusively to opposite-sex couples, while providing same-sex couples access to only a novel alternative designation, realistically must be viewed as constituting significantly unequal treatment to same-sex couples." *Id*. at 445. Indeed, when viewed in light of the history of discrimination against lesbians and gay men, the continued distinction in nomenclature would "cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship." *Id*. Ultimately, the Court held that denial of the title and stature of marriage not only impinged on lesbians' and gay men's fundamental right to marry but also violated their rights to equal protection under the California Constitution. *Id*. at 399-402.

Six months after the *Marriage Cases* decision, Proposition 8 was enacted. The California Supreme Court decided its scope and effects in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). *Strauss* held Proposition 8 was limited in scope and did not: (a) apply retroactively to nullify the marriages same-sex couples entered into before Proposition 8 took effect, *id*. at 119-22; or (b) remove from lesbian and gay couples the right recognized in the *Marriage Cases* as flowing from the due process, privacy and equal protection clauses, to enter into officially recognized and protected family relationships with the person of their choice and to raise children in that family. *Id*. at 75, 102.

Proposition 8 is therefore singular in several respects: *first*, it regulates only the title and stature of marriage, leaving unchanged the family law incidents that accompany marriage and parenthood; *second*, it targets lesbians and gay men alone

for the deprivation of the highly favored designation of marriage, relegating them to a lesser stature; and *third*, it does so by carving an exception to the California Constitution's equal protection, due process and privacy clauses for a minority of citizens through a popular majority vote. The panel decision properly evaluated Proposition 8 in light of these unusual attributes, focusing on the "specific history of same-sex marriage in California" and the singular and limited change in California law that Proposition 8 effected. Slip Op. at 8-16, 34-40. This follows *Reitman* and *Romer* and is consistent with the principle of judicial restraint that constitutional rulings should be made on the narrowest ground possible. *Id*. at 34.

The panel opinion carefully considered each of the proffered hypothetical justifications for Proposition 8 and found them unrelated to the actual effects of the measure on California law. *See infra* at 8-9. The panel held that the complete discontinuity between the hypothetical purposes and the actual effect of Proposition 8 creates "'the inevitable inference that the disadvantage imposed is born of animosity toward,' or, as is more likely with respect to Californians who voted for the Proposition, mere disapproval of, 'the class of persons affected.'" *Id*. at 72 (quoting *Romer*, 517 U.S. at 634). This inference was further confirmed by evidence and the District Court's finding that the Yes On 8 campaign "'conveyed a message that 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 75 (quoting *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 990 (N.D. Cal. 2010)).

The panel's ruling is indisputably important to lesbian and gay Californians, but it specifically does not resolve whether the federal Constitution required California or any other State to extend the right to marry to lesbians or gay men in the first instance. *See id*. at 40-42, 47, 49-51. Rather, it holds only that Californians had no rational basis for amending the state constitution to withdraw

from lesbian and gay couples the title and stature of marriage without altering marriage for opposite-sex couples, and leaving both same-sex and opposite-sex couples with all the substantive rights and responsibilities of marriage. While aspects of the panel's reasoning may well be persuasive to courts in future cases addressing broader issues, the decision here is focused on the particular facts presented by this case.

II. THE PANEL DECISION PRESENTS NO CONFLICT WITH PRECEDENT WITHIN OR OUTSIDE THIS CIRCUIT.

A. The Panel Decision Is Consistent With Cases Concerning The Elimination Of Minority Rights And Protections.

In *Romer v. Evans*, the Supreme Court struck down Amendment 2, a Colorado initiative constitutional amendment that barred state and local governments from prohibiting discrimination on the basis of sexual orientation or extending any protections to gay men and lesbians. 517 U.S. at 623-24. The Court applied rational basis scrutiny to determine that, regardless of what level of protection Colorado was required to give to its lesbian and gay citizens *ab initio*, it could not withdraw protection from them without a legitimate purpose, and that purpose had to bear some reasonable relationship to Amendment 2. *Id.* at 632-33.

> "The search for the link between classification and objective gives substance to the Equal Protection Clause. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.*

Amendment 2 failed this test. Its relationship to the claimed purposes was so attenuated that those purposes could not be credited. *Id.* at 635. Further, the withdrawal of rights from a narrow class of people was unusual and therefore suspect. *Id.* at 633. Because the Court could find no legitimate justification for Amendment 2, it concluded that its purpose was simply to make lesbians and gay men "unequal to everyone else." *Id.* at 635. The panel decision here recognizes

that Proposition 8 has an effect similar to Amendment 2: both remove from lesbians and gay men, and them alone, an existing right. Slip Op. at 44-48. Just as in *Romer*, the panel opinion carefully considers the justifications Proponents and their *amici* proffered for Proposition 8, not in light of Proponents' universal vision of marriage "always and everywhere," Petition at 37, but in light of the reality of *California's* laws and policies concerning family formation and parenting. As the panel decision holds, Proposition 8 is so discontinuous with the reasons offered for it that, like Amendment 2, it "is a classification of gays and lesbians undertaken for its own sake." Slip Op. at 74.

The panel decision is also consistent with other Supreme Court authority. In *Reitman v. Mulkey*, the Court invalidated a California constitutional amendment that repealed the State's fair housing laws and required the State to permit private actors to discriminate on the basis of race when selling or renting property. 387 U.S. 369. The Court acknowledged that prior to Proposition 14, the State's fair housing laws went beyond what the federal Constitution required. *Id.* at 376. But, as in *Romer*, it relied on the state supreme court's description of the precise change wrought by Proposition 14, along with the "historical context and the conditions existing prior to its enactment," to conclude that Proposition 14 "expressly authorized and constitutionalized the private right to discriminate" and would have the effect of "encourag[ing] … private racial discrimination." *Id*. at 373, 376. The panel decision follows both *Romer* and *Reitman* in considering the context of state law, looking to state supreme court decisions for authoritative interpretations of state law, and recognizing that state laws that affirmatively allow private discrimination encourage that discrimination.

Nor does the panel decision conflict with *Crawford v. Board of Education of Los Angeles*, 458 U.S. 527 (1982), where the Court considered a state constitutional amendment that barred certain desegregation remedies unless

required by the federal Constitution. *Id.* at 529-30. Again attentive to the historical context, objective, and effect of the amendment, the Court held this provision was valid. *Id.* at 537-38. It was unlike those in *Romer* and *Reitman* because it furthered the legitimate purpose of promoting neighborhood schools, did not single out any group, and did not create a right to discriminate against a minority group. *Id.* *Crawford* cannot stand for the broad proposition that Proponents claim for it, that where a State has gone beyond what is required by the federal constitution in protecting a minority group, it may remove those protections with impunity. Petition at 20-23. If it did, it could not be reconciled with *Romer*, *Reitman*, *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), or *Hunter v. Erickson*, 393 U.S. 385 (1969). By contrast, Proposition 8 advanced no legitimate purpose and had the sole effect of stigmatizing same-sex couples and their children by relegating their families to a second-class status.

B. The Panel Decision Is Consistent With Cases Rejecting "Separate But Equal" Institutions For Similarly Situated Persons.

1. Under California Law, Same-Sex Couples And Opposite-Sex Couples Are Similarly Situated In All Respects Related To Relationships, Parenting And Families.

As the California Supreme Court has explained, same-sex couples in California "enjoy the same substantive core benefits . . . as those enjoyed by opposite-sex couples—including the constitutional right to enter into an officially recognized and protected family relationship with the person of one's choice and to raise children in that family if the couple so chooses." *Strauss*, 207 P.3d at 102; *see also id.* at 74-78. Same-sex and opposite-sex couples share equally, for instance, the rights to have and raise children, *see* Cal. Fam. Code § 297.5(d); to become foster and adoptive parents, *see* Cal. Welf. & Inst. Code § 16013(a); *Sharon S. v. Superior Court*, 73 P.3d 554, 569-70 (Cal. 2003); and to be the presumed parents of children born during the relationship, *see, e.g.*, *Elisa B. v.*

Superior Court, 117 P.3d 660 (Cal. 2005). *See also* Slip Op. at 36 (enumerating additional rights of same-sex couples). Under the "authoritative construction" of the California Supreme Court, *Romer*, 517 U.S. at 626, Proposition 8 repealed none of these rights, but instead stripped away the right of same-sex couples to the honored title of marriage. *See Strauss*, 207 P.3d at 75-77 & n.8.

The broad rights afforded to same-sex couples and the narrow effect of Proposition 8 make it impossible to credit the chief rationale that Proponents have proffered for it: that Proposition 8 was enacted to further California's interest in responsible procreation and childrearing, particularly by biological parents. Whatever sway this argument might have in other States, it cannot be credited in California, which both before and after Proposition 8 recognized same-sex couples as equal parents.

> Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California. As we have explained, Proposition 8 in no way modified the state's laws governing parentage, which are distinct from its laws governing marriage. . . . Similarly Proposition 8 did not alter the California adoption or presumed-parentage laws, which continue to apply equally to same-sex couples. In order to be rationally related to the purpose of funneling more childrearing into families led by two biological parents, Proposition 8 would have had to modify these laws in some way. It did not do so.

Slip Op. at 57 (internal citations omitted). Further, since "California's current policies and conduct . . . recognize that gay individuals are fully capable of . . . responsibly caring for and raising children" and the State's "parentage statutes place a premium on the social relationship, not the biological relationship between a parent and a child," the panel found that "Proponents' [procreation and biological parenting] rationale cannot reasonably be conceived to be true by the governmental decisionmaker." *Id.* at 58 (internal quotation marks omitted). The panel correctly refused to "credit a justification for Proposition 8 that is totally inconsistent with

the measure's actual effect and with the operation of California's family laws both before and after its enactment." *Id.*

In the absence of any conceivable legitimate purpose for denying same-sex couples the dignity of the title marriage, even while continuing to afford them all of the associated rights and responsibilities, the panel concluded Proposition 8 had no purpose but to impose on gays and lesbians a "majority's private disapproval of them and their relationships." Slip Op. at 77. Contrary to Proponents' suggestion, however, the panel decision does not label Proposition 8 supporters as bigots. It specifically recognizes that prejudice need not be based on hatred or spite. *Id.* at 72. Instead,

> [p]rejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.

Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

2. Equal Protection Is Not Satisfied By The Creation Of "Separate But Equal" Institutions For Same-Sex Couples.

At this point in our Nation's history of extending "constitutional rights and protections to people once ignored or excluded," *United States v. Virginia*, 518 U.S. 515, 557 (1996), we have come to understand that offering putatively equivalent, but separate, institutions to minority groups does not provide the equal protection of the laws. Although the panel decision did not expressly rely on cases so holding, they support its result.In the 1950s, a State's decision to create segregated public facilities for racial minorities was subject only to rational basis review. *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 384 (2006). Even under this deferential standard, the Supreme Court held that separate facilities for racial

minorities did not provide them with equal protection of the laws. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950). Segregated university facilities could not provide "those qualities which are incapable of objective measurement but which make for greatness in a law school." *Sweatt*, 339 U.S. at 634.[1] Perhaps more importantly, even where two schools were "substantially equal," *Brown*, 347 U.S. at 488, separation for its own sake did lasting harm to minority children by "generat[ing] a feeling of inferiority as to their status in the community," *id.* at 494. Indeed, the Court concluded that "[s]eparate educational facilities are inherently unequal," *id.* at 495, and it has applied that conclusion to a host of facilities and institutions. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (state military institute segregated by gender); *Watson v. Memphis*, 373 U.S. 526 (1963) (city parks and recreational facilities); *Brown v. Louisiana*, 383 U.S. 131 (1966) (libraries). The principle it fashioned—that separate is not equal—continues to apply today. *See, e.g.*, 42 U.S.C. § 12101(a)(2) (Congressional finding that "historically, society has tended to isolate and segregate individuals with disabilities," and identifying segregation as a "form[] of discrimination").

The parallels to this case are plain. The California Supreme Court determined that domestic partnership, in light of decades of public and private discrimination against same-sex couples, was "a mark of second-class citizenship." *Marriage Cases*, 183 P.3d at 445. Proposition 8's reinstatement of domestic partnership, a separate institution that features all of the responsibilities and incidents of marriage but that lacks the same "reputation," "standing in the community," and "traditions and prestige" as marriage, *Sweatt*, 339 U.S. at 634,

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[1] *See also United States v. Virginia*, 518 U.S. at 551 (describing "myriad respects" in which women's university offered opportunities inferior to Virginia Military Institute, including its "157-year history, the school's prestige, and its influential alumni network").

serves to mark lesbian and gay Californians as second class in the same way that segregated schools did in *Brown* and *Sweatt*. Slip Op. at 39, 73 (designation of "marriage" is "principal manner in which State attaches respect and dignity to the highest form of a committed relationship"; elimination of right to use official designation of "marriage" sends "message that gays and lesbians are of lesser worth as a class—that they enjoy a lesser societal status"). It cannot stand, even under rational basis review.

Nor is it an answer, as Proponents contend, that California's creation of domestic partnerships was intended as a beneficence to same-sex couples and was advocated by gay people and their allies. The same was true of segregated schools for black children in the late nineteenth and early twentieth centuries, which black communities fought for because they were preferable to no schooling at all. *See* Darlene Clark Hine, *The* Briggs v. Elliot *Legacy: Black Culture, Consciousness, and Community Before* Brown*, 1930-1954*, 2004 U. ILL. L. REV. 1059, 1065-66; HENRY ALLEN BULLOCK, A HISTORY OF NEGRO EDUCATION IN THE SOUTH: FROM 1619 TO THE PRESENT 213-14 (1967). The same was true for other public facilities as well. *See, e.g.*, Howard N. Rabinowitz, *From Exclusion to Segregation: Health and Welfare Services for Southern Blacks, 1865-1890*, 48 Soc. Servs. Rev. No. 3 (Sept. 1974) Regardless of the benign reasons for the creation of domestic partnerships, once the State has concluded that lesbian and gay couples are the equal of opposite-sex couples with regard to the responsibilities and rights of marriage, there can be no rational reason to continue to mark them as separate with respect to the title.

C. Proponents Fundamentally Misread The Panel Decision In Arguing That It Conflicts With Other Cases, While Ignoring Authority That Is Consistent With The Decision.

Proponents contend the panel decision conflicts with all relevant federal and state appellate authority. Petition at 23, 25. To make this sweeping charge,

Proponents characterize the panel decision as doing what it expressly disavows: deciding the constitutionality of a law that *creates* marriage as an institution for opposite-sex couples. Slip Op. at 79-80. Instead, the panel properly evaluated Proposition 8 for what it is: a law that *changes* the definition of marriage to exclude same-couples, without affecting marriage laws for opposite-sex couples in any way. Because the decision does not address the constitutionality of state laws defining marriage in the first instance, or the constitutionality of marriage laws in States that do not provide same-sex couples any recognition at all, much less treat them as similar to opposite-sex couples in all relevant respects other than the title of marriage, it is not in conflict with *Baker v. Nelson*, 409 U.S. 810 (1972). *Baker* involved a challenge to the marriage law of Minnesota, which did not recognize *any* relationship or family rights for same-sex couples, *see Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), much less hold them equal to opposite-sex couples, as California does.

Proponents also misapprehend the holding of *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), which interpreted the Immigration and Nationality Act to hold that a putative marriage between a citizen and alien in a State that did not recognize same-sex relationships at all was not a "marriage" under the Act. *Id.* at 1041. The decision rested heavily on Congress's plenary power in the field of immigration. *Id.* at 1041-43. Although the Court held the Act's refusal to recognize marriages between same-sex couples was constitutional, the case did not involve a measure like Proposition 8 that stripped same-sex couples of their existing right to marry.

Nor does the panel decision conflict with *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), or any of the state court opinions cited by Proponents. Each of these cases addresses only the constitutionality of a marriage law that fails to include same-sex couples rather than one that affirmatively

withdraws the title of marriage while continuing to grant all the incidents. None of the jurisdictions provided any statutory or constitutional protection for gay couples and their children, much less the full panoply of protections California law affords to gay couples and their families.[2] Further, many of Proponents' cases were decided before *Romer*, 517 U.S. 620, *Lawrence v. Texas*, 539 U.S. 558 (2003) or both, and are thus of little or no value under current jurisprudence.

Proponents also ignore the cases that are most closely on point. The panel decision is consistent with every case to consider state laws that provided the same rights and protections but a separate title and status for same-sex unions. Courts evaluating these laws have consistently held they violate state due process and equal protection guarantees, even under rational basis. *Marriage Cases*, 183 P.3d 384; *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004); *see also Kerrigan v. Comm'r of Pub.c Health*, 957 A.2d 407 (Conn. 2008) (applying heightened rational basis).[3] Also parallel and persuasive is the District of Columbia decision in *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89 (D.C. 2010), which challenged an initiative that, like Proposition 8, stripped same-sex couples of the right to marry. The court held the initiative would authorize discrimination based on sexual orientation. *Id.* at 116-20.

Proponents also ignore federal decisions addressing Section 3 of the federal Defense of Marriage Act (DOMA), 1 U.S.C. § 7. DOMA changed the

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[2] *See Standhart v. Sup. Court*, 77 P.3d 451, 463 & n.17 (Ariz. 2003); *Dean v. Dist. of Columbia*, 653 A.2d 307, 362 (D.C. 1995), *superseded by statute and overruled in part by Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 116-19 (D.C. 2010). *Dean* addressed a marriage law that had been on the books for a very long time, not one that specifically targeted same-sex couples. The same is true of the cases Proponents cite from the 1970s, when many states still criminalized same-sex sexual intimacy and none provided recognition of gay relationships. *See Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones v. Hallanan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

[3] The Supreme Court of New Jersey held that denial of the rights and benefits of marriage violated gay citizens' right to equal protection, reserving the issue of whether providing a parallel civil union scheme would violate that state's constitution. *See Lewis v. Harris*, 908 A.2d 196, 221-222 (N.J. 2006).

longstanding deference federal law had accorded States to define and regulate marriage, and did so to exclude to lesbian and gay couples alone, just as Proposition 8 up-ended existing law to carve out a special disfavored treatment for lesbians and gay men. The trend and weight of authority among courts considering equal protection and due process challenges to Section 3 of DOMA is that denying recognition to same-sex marriages solemnized in States where they are permitted cannot be justified by any legitimate or rational basis, much less survive any higher level of scrutiny. *Golinski v. U.S. Office of Personnel Mgmt.*, 2012 U.S. Dist. LEXIS 22071 (N.D. Cal. Feb. 22, 2012) (DOMA, applied to deny health benefits to same-sex spouse, violates equal protection under heightened scrutiny or rational basis); *Dragovich v. U.S. Dept. of Treasury*, 2011 U.S. Dist. LEXIS 4859 (N.D. Cal. Jan. 18, 2011) and 2012 U.S. Dist. LEXIS 9197 (N.D. Cal. Jan. 26, 2012) (denying motions to dismiss equal protection and due process challenge to DOMA and IRS regulations, applied to deny long-term health care insurance to same-sex domestic partners and spouses of state employees for lack of rational basis for exclusion); *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (DOMA, applied to deny married same-sex couples benefits that federal law provides other married couples, violates equal protection even under rational basis); *In re Gene Douglas Balas & Carlos A. Morales*, No. 2:11-bk-17831 (Bankr. C.D. Cal. June 13, 2011) (opinion by 20 Bankruptcy Judges holding DOMA violates equal protection, as applied to prevent individual debtors married under California law from petitioning jointly for bankruptcy); *In re Levenson I*, 560 F.3d 1145, 1149-51 (2009) & *In re Levenson II*, 587 F.3d 925, 931-33 (9th Cir. Orders of Circuit Judge Reinhardt 2009) (holding government's exclusion of same-sex spouse of public defender from health plan provided to spouses of government employees constituted sexual orientation discrimination and lacked even a rational basis). These cases, too, are consistent with the panel decision.

III. THE PANEL'S CONCLUSION THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PROPONENTS' VACATUR MOTION DOES NOT MERIT EN BANC REVIEW.

Proponents also seek *en banc* rehearing to repeat their unreasonable argument questioning Judge Walker's decision below because he is "gay and … in a committed same-sex relationship." Proponents' Opening Brief, ECF Doc. 9, No. 11-16577. But as the panel noted, it could not "possibly be reasonable to presume, for the purposes of 28 U.S.C. § 455(a), that a judge is incapable of making an impartial decision about the constitutionality of a law, solely because, as a citizen, the judge could be affected by the proceeding." Slip Op. at 78 (internal quotation marks omitted). It is categorically unreasonable to question a judge's impartiality simply because he is a member of a minority group whose rights are implicated in a case before the court. *See, e.g.*, *United States v. Alabama*, 828 F.2d 1532, 1542 (11th Cir. 1987); *In re City of Houston*, 745 F.2d 925, 930 (5th Cir. 1984). Nor is it reasonable for Proponents to insist a judge must be presumed to have a conflict unless he disavows one. The denial of vacatur by the unanimous panel creates no conflicts with the decisions of any other courts and has no recurring importance for this or any other Circuit.

CONCLUSION

For the foregoing reasons, this Court should deny Proponents' petition.

Dated: March 1, 2012

Respectfully submitted,
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