Nos. 10-16696 & 11-16577

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR., et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
Opinion Filed February 7, 2012
(Reinhardt, Hawkins, N.R. Smith (dissenting))

APPELLEES' RESPONSE TO PETITION FOR REHEARING EN BANC

DAVID BOIES
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
(914) 749-8200

JEREMY M. GOLDMAN
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
(510) 874-1000

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

THEODORE J. BOUTROUS, JR.
CHRISTOPHER D. DUSSEAULT
THEANE EVANGELIS KAPUR
ENRIQUE A. MONAGAS
JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804

Attorneys for Plaintiffs-Appellees
Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

INTRODUCTION

It has been more than three years since Proposition 8 eliminated the right of gay and lesbian Californians to marry, and nearly three years since Plaintiffs first sought vindication of their constitutional rights in federal court. Two federal courts have already found Proposition 8 unconstitutional. As a panel of this Court recognized, the substantial, ongoing injury that Proposition 8 imposes on gay men and lesbians every single day is an expression "through the public law, [of] a majority's disapproval of them and their relationships." Slip op. at 77. Yet Plaintiffs—along with thousands of other gay and lesbian Californians—still suffer the daily indignity and humiliation of having the State designate their relationships as second-class pairings unworthy of the name "marriage." Proponents now ask this Court to hear the case all over again, an unnecessary step where, as here, the panel decision reflects a straightforward application of settled Supreme Court precedent and does not conflict with any decisions from this Court or any other court of appeals. Plaintiffs therefore respectfully request that this Court deny Proponents' petition and issue its mandate forthwith.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are gay and lesbian Californians who are in committed, long-term relationships and who wish to marry. As a direct result of Proposition 8, Plaintiffs were denied this right solely because their prospective spouses are of the same sex.

On May 22, 2009, Plaintiffs filed their complaint alleging that, by denying them the right to marry the person of their choice, Proposition 8 violates their rights to equal protection and due process of law under the Fourteenth Amendment of the United States Constitution.

On August 4, 2010, the district court ruled in Plaintiffs' favor, declaring Proposition 8 unconstitutional under the Fourteenth Amendment and directing that a permanent injunction issue against its enforcement. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003-04 (N.D. Cal. 2010). The district court found that "Proponents' evidentiary presentation was dwarfed by that of plaintiffs" and that Proponents "failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest." *Id.* at 932. The court concluded that "Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license" and "does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples." *Id.* at 1003. Proponents obtained a stay of the judgment pending appeal. Dkt. 14.

A panel of this Court affirmed the district court's decision on February 7, 2012, holding that "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to of-

ficially reclassify their relationships and families as inferior to those of opposite-sex couples." Slip op. at 5. The panel decision focused on the "unprecedented" and "unusual" nature of Proposition 8, which "has no practical effect except to strip" gay men and lesbians of a right that California's Constitution had previously guaranteed. *Id.* at 46; *see also id.* at 40 ("Before Proposition 8, California guaranteed gays and lesbians both the incidents and the status and the dignity of marriage. Proposition 8 left the incidents but took away the status and dignity."). Thus, the question confronting the panel was whether "the People of California ha[d] legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples" the status and dignity state law previously accorded their relationships. *Id.* at 40.

As the panel majority explained, the answer to that question is governed squarely by Supreme Court precedent—specifically, *Romer v. Evans*, 517 U.S. 620 (1996). *See* slip op. at 42 ("This is not the first time the voters of a state have enacted an initiative constitutional amendment that reduces the rights of gays and lesbians under state law."). Because "Proposition 8 is remarkably similar to" the Colorado constitutional amendment struck down by the Supreme Court in *Romer*, the panel held, "*Romer* governs our analysis" and "compels that we affirm the judgment of the district court." *Id.* at 44-46.

The panel did not decide whether heightened scrutiny applies to laws, like Proposition 8, that target gay and lesbian individuals for disfavored treatment. Slip op. at 44 n.13 (citing *Romer*, 517 U.S. at 631-32; *High-Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990)). Nor did the panel decide whether same-sex couples have a fundamental right to marry under the U.S. Constitution. *See* slip op. at 46-47. Rather, just like *Romer*, the panel applied rational basis review, conducting an exhaustive analysis of the various rationales advanced by Proponents and their *amici* in support of Proposition 8. *Id.* at 55-70. After assuming *arguendo* the legitimacy of the governmental interests supposedly animating Proposition 8, the panel found that Proponents had failed to "explain how *rescinding* access to the designation of 'marriage' is rationally related" to any of those interests. *Id.* at 60. "As in *Romer*," the panel therefore concluded that "[Proposition 8] was enacted with only the constitutionally illegitimate basis of 'animus toward the class it affects,'" *id.* at 48 (quoting *Romer*, 517 U.S. at 632), and found "Proposition 8 to be unconstitutional on this ground." *Id.* at 79-80.

ARGUMENT

I. THE PANEL DECISION IS A CORRECT APPLICATION OF SETTLED SUPREME COURT PRECEDENT.

The panel decision reflects a correct and straightforward application of settled Supreme Court precedent. Proponents have never explained how eliminating the ability of gay and lesbian couples to have their relationships designated as marriages—and relegating them to separate and unequal domestic partnerships—advances any legitimate governmental interest. As the panel recognized, doing so achieves nothing except the marginalization of gay and lesbian individuals and their relationships. Long before *Romer*, the Supreme Court held that marginalizing a group of citizens for its own sake violates the Fourteenth Amendment to the U.S. Constitution. The panel decision correctly applies that settled law to hold that Proposition 8 is unconstitutional.

A. The Panel Decision Tracks The Analysis In *Romer* And Reaches The Same Conclusion For The Same Reasons.

Proponents claim that "[t]he root of the panel majority's error is its assertion that *Romer* turned on the *timing* of Colorado's Amendment 2 rather than its substance." Pet. at 11. But *Romer*'s plain language belies Proponents' argument, demonstrating that the timing of the Colorado amendment was an important factor in understanding its substance and effect: Just like Proposition 8, Colorado Amendment 2 *repealed* provisions that previously advanced non-discriminatory

treatment of gay men and lesbians, raising the specter that it was motivated by an improper purpose.

In *Romer*, the Supreme Court began by explaining that "the impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities . . . which banned discrimination." 517 U.S. at 623-24. "Amendment 2 *repeals* these ordinances to the extent they prohibit discrimination on the basis of" sexual orientation. *Id.* at 624 (emphasis added); *see also id.* at 626 ("'The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes . . . that barred discrimination based on sexual orientation.'") (quoting *Evans v. Romer*, 854 P.2d 1270, 1284 (Colo. 1993) (en banc)). As the Court explained, "[t]he amendment *withdraws* from homosexuals, but no others, specific legal protection" and "imposes a special disability upon those persons alone." *Id.* at 627, 631 (emphasis added).

Because "laws of th[is] kind" uniquely *reduce* the status of a minority group by stripping away legal rights and privileges previously accorded, the Court examined the various "rationale[s] the State offer[ed]" to justify the constitutional amendment, which included "other citizens' freedom of association," "the liberties of landlords or employers who have personal or religious objections to homosexuality," and the state's "interest in conserving resources to fight discrimination

against other groups." 517 U.S. at 634-35. After finding that the amendment was "far removed from these particular justifications," such that it was "impossible to credit them," the Court was left with "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* (citing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *see also id.* at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

The panel here performed the same analysis, and because Proposition 8 made gay men and lesbians "unequal to everyone else" with respect to the availability of civil marriage, reached the same conclusion. The fact that Proposition 8 "*rescind[s]* access [of same-sex couples] to the designation of 'marriage,'" slip op. at 60, the panel reasoned, suggests it was motivated by animus against gay men and lesbians rather than some legitimate governmental aim. *Id.* at 42 ("The action of changing something suggests a more deliberate purpose than the inaction of leaving it as it is.").

The panel then examined the fit between Proposition 8 and the purported state interests that Proponents and their *amici* claim it serves: "responsible procreation and childrearing," "encourag[ing] heterosexual couples to enter into matrimony," "bolster[ing] the stability of families headed by one man and one woman,"

"proceeding with caution when considering changes to the definition of marriage," "protecting religious liberty," and "protect[ing] our children from being taught in public schools that same-sex marriage is the same as traditional marriage." Slip op. at 56, 63-64, 66-68 (internal quotation marks omitted). After carefully considering the parties' arguments, the trial court's factual findings, the California Supreme Court's findings and interpretation of Proposition 8, and the campaign literature distributed to voters, *id.* at 55-70, 75-77, the panel concluded there is no "conceivably plausible" relationship between Proposition 8 and the rationales proffered in litigation. *Id.* at 60; *see also id.* at 63 ("[T]he People of California could not reasonably have conceived such an argument to be true.") (internal quotation marks omitted); *id.* (Proponents' argument "lacks any such footing in reality"). The panel was therefore left with the same "'inevitable inference . . . of animosity'" that doomed the amendment in *Romer*. *Id.* at 72 (quoting *Romer*, 517 U.S. at 634).[1]

[1] Proponents repeatedly point to "California's *generous* domestic partnership law[]," which they say "confers on same-sex couples *virtually* all of the same substantive benefits and protections as marriage," as proof that California's "gay-friendly" voters could not have acted with animus in enacting Proposition 8. Pet. at 4-5 (emphasis added). But there is no Virtually Equal Protection Clause in the U.S. Constitution, and minorities need not be satisfied with mere graciousness from the majority. *See United States v. Virginia*, 518 U.S. 515, 554 (1996).

B. *Crawford* Supports The Panel's Analysis.

Proponents say "*Crawford*, not *Romer*, is the controlling precedent here," and that "*Crawford* essentially was this case." Pet. at 21, 23 (citing *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982)). But *Crawford* itself demonstrates that Proponents are wrong.

Crawford involved an amendment to the California Constitution instructing state courts to stop ordering the busing of students—which they had previously required as a means of desegregating schools—unless the Fourteenth Amendment of the U.S. Constitution required it. 458 U.S. at 529. Unlike Proposition 8, the amendment at issue in *Crawford* did not reduce or eliminate the substantive rights of any particular group. The Supreme Court was crystal clear on this point:

> [T]he Proposition simply removes one *means* of achieving the state-created right to desegregated education. School districts retain the obligation to alleviate segregation regardless of cause. And the state courts still may order desegregation measures other than pupil school assignment or pupil transportation.

Id. at 544 (emphasis added). Further, the amendment at issue in *Crawford* could not have violated the U.S. Constitution because, by its own terms, it required state courts to take whatever actions were constitutionally required. *See id.* at 535 ("It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it.").

In fact, *Crawford* supports the panel's approach in this case because it, even before *Romer*, recognized that "if the purpose of repealing legislation is to disadvantage a . . . minority, the repeal is unconstitutional for this reason." 458 U.S. at 539 n.21. *Crawford*, just like *Romer* and the panel decision here, therefore examined the purposes allegedly served by the amendment—for example, "the educational benefits of neighborhood schooling"—by looking at the state court's findings and campaign literature. *Id.* at 543-44. Unlike *Romer* and this case, however, there was ample evidence in *Crawford* to demonstrate that Proposition I was "not motivated by a discriminatory purpose." *Id.* at 545. The panel decision here—based on a different record concerning a different ballot proposition purportedly justified by different interests—does not even implicate, much less contradict, *Crawford*'s case-specific conclusion.[2]

* * *

[2] Proponents claim the panel's decision conflicts with two other Supreme Court decisions: *Baker v. Nelson*, 409 U.S. 810 (1972), and *Johnson v. Robison*, 415 U.S. 361 (1974). *See* Pet. at 1. Both the panel majority and dissent, however, agree that *Baker* does not control: As Judge N.R. Smith explained, "the constitutionality of withdrawing from same-sex couples the right of access to the designation of marriage does not seem to be among the 'specific challenges' raised in *Baker*." Slip op., dissent at 8; *see also* slip op., majority at 47 n.14. And *Johnson*, a Vietnam-era decision involving Congress's decision about which veterans' benefits should be provided to "conscientious objectors" who refused to "serve their country on active duty in the Armed Forces," 415 U.S. at 374, has nothing to do with animus towards a discrete minority group.

The panel decision effectively demonstrates that Proponents' supposed justifications for Proposition 8—including the promotion of "responsible procreation" and the purportedly optimal childbearing environment—make no sense. Stripping gay men and lesbians of the uniquely "cherished status of 'marriage,'" slip op. at 39, obviously does not affect the likelihood that heterosexuals will procreate responsibly or raise their children in Proponents' preferred family structure. It only ensures that gay and lesbian couples will be deprived the "worth and dignity" afforded opposite-sex couples and that their children will be raised by parents who cannot marry. Slip op. at 73. That ruling is fully consistent with *Romer* and the approach taken by the Supreme Court in *Crawford*.

II. THE PANEL DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS.

The panel decision expressly applies Ninth Circuit precedent holding that rational basis review governs laws targeting gay and lesbian individuals. *See* slip op. at 44 n.13 (citing *High-Tech Gays*, 895 F.2d at 574). Proponents argue that the panel decision conflicts with *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982)), but they never explain how. *See* Pet. at 1, 25. Their omission is telling—*Adams* is plainly distinguishable. In *Adams*, the Court held that Congress, acting within its "plenary power to admit or exclude aliens," had a rational basis for declining to *ex-*

tend "preferential [immigration] status . . . [to] the spouses of homosexual marriages." 673 F.2d at 1041-42. *Adams* had no occasion to address whether the justifications proffered there could rationally support stripping gay men and lesbians of an immigration status previously accorded to them and relegating them to a disfavored status. *See* slip op. at 60 ("[I]t is no justification for taking something away to say that there was no need to provide it in the first place."). Nor did *Adams* address laws like Proposition 8 that subject gay and lesbian U.S. *citizens* to disparate treatment. *See* 673 F.2d at 1042 ("[I]n th[e] area of [immigration] law, Congress . . . may enact statutes which, if applied to citizens, would be unconstitutional.").

Proponents also incorrectly claim that the panel decision conflicts with the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). *See* Pet. at 1.[3] The amendment to the Nebraska Constitution at issue in *Bruning* not only declared that same-sex couples could not be designated as "married," but, unlike Proposition 8, also prevented the state from recognizing civil unions, domestic partnerships, or any other same-sex relationship. *See* 455 F.3d at 863. Unlike Proposition 8, it also refused to grant Nebraskan same-sex couples the full "basket of rights and benefits [afforded] to married heterosexual couples."

[3] Proponents point to no other federal appellate decision as conflicting with the panel decision. They cite decisions from various state appellate courts, *see* Pet. at 25, but none of those cases involved the *elimination* or *repeal* of same-sex marriage rights as this case does.

Id. at 867. These important differences do not mean "that Proposition 8 would be constitutional if only it had gone further," slip op. at 62, but they do alter the rational-basis analysis because they create an entirely distinct means-end fit between Nebraska's law and its purported purposes. *Compare* 455 F.3d at 868 ("The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of . . . purposes. The legislature . . . may rationally choose not to expand in wholesale fashion the groups entitled to those benefits."), *with* slip op. at 46 ("A law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful designation is all the more 'unprecedented' and 'unusual' than a law that imposes broader changes, and raises an even stronger inference that the disadvantage imposed is born of animosity toward the class of persons affected.") (internal quotation marks omitted). Thus, there is no conflict between the conclusion reached by the panel and the conclusion the Eighth Circuit reached under different circumstances in *Bruning*.

III. REHEARING MAY REQUIRE THE COURT TO REACH ALTERNATIVE GROUNDS FOR AFFIRMANCE ADDRESSED IN THE DISTRICT COURT OPINION.

This Court should also deny rehearing because any en banc decision rejecting the panel's approach would need to address numerous alternative grounds for affirmance relied upon by the district court, none of which the panel reached.

As an initial matter, this Court sitting en banc would not be bound by *High Tech Gays*' conclusion that rational basis review applies. *See United States v. Washington*, 593 F.3d 790, 798 n.9 (9th Cir. 2010) (en banc). The district court rejected Proponents' argument that *High Tech Gays* requires rational basis review of Plaintiffs' Equal Protection claim because *High Tech Gays* was explicitly premised on the since-overruled decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Further, *High Tech Gays*—which held that sexual orientation is "behavioral," not immutable, 895 F.2d at 573—cannot be reconciled with the Supreme Court's holding in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010), that there is no such cognizable distinction between gay identity and conduct. *See also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (recognizing that "[s]exual orientation and sexual identity are immutable," and that "[h]omosexuality is as deeply ingrained as heterosexuality") (internal quotation marks omitted); *Perry*, 704 F. Supp. 2d at 996. This Court, sitting en banc, would therefore need to decide whether "gays and lesbians are the type of minority strict scrutiny was designed to protect." *Perry*, 704 F. Supp. 2d at 997.

The panel decision also did not address "whether same-sex couples have a fundamental right to marry" under the Due Process Clause. Slip. op. at 47. But if the en banc Court were to hold that Proposition 8 survives under the Equal

Protection Clause, it would be required to decide that question, which the district court answered in the affirmative. As the district court explained, the Supreme Court has characterized the right to marry as one of the most fundamental rights—if not *the* most fundamental right—of an individual. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Because "Plaintiffs do not seek recognition of a new right," but instead simply "ask California to recognize their relationships for what they are: marriages," *Perry*, 704 F. Supp. 2d at 993, the district court concluded that Proposition 8 "unconstitutionally burdens the exercise of the fundamental right to marry." *Id.* at 991. Indeed, the evidence at trial "did not show any historical purpose for excluding same-sex couples from marriage." *Id.* at 993. The potential necessity of reaching this constitutional question counsels against en banc review. *Cf. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

The panel decision also eschewed reliance on the vast majority of the district court's eighty separate findings of fact. *See* slip. op at 31-33; *Perry*, 704 F. Supp. 2d at 953-991. It therefore did not address whether those facts are "adjudicative" or "legislative," or the level of deference they should receive—two additional questions this Court potentially would have to address en banc. Following a three-week trial, the district court in this case engaged in a lengthy, careful, and thorough analysis of the evidence presented, which included the testimony of 19 witnesses

and more than 900 exhibits. Among other things, the district court's findings of fact examine the painful history of discrimination faced by gay men and lesbians, their lack of political power (including the frequent successful targeting of them through ballot initiatives), their ability to contribute equally to society, the immutability of sexual orientation, the history of marriage, and the animus underlying the campaign for Proposition 8. These factual findings support, in part, the district court's determination that "Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation." *Perry*, 704 F. Supp. 2d at 991.

IV. ANY FURTHER DELAY IRREPARABLY HARMS GAY AND LESBIAN CALIFORNIANS.

Finally, this Court should deny Proponents' petition because rehearing would only cause further delay and prolong the substantial and irreparable deprivation of Plaintiffs' constitutional rights. Two federal courts—the district court and a panel of this Court—have now held that Proposition 8 is unconstitutional and that same-sex couples in California must be afforded the right to marry as they were before Proposition 8 was enacted. Each day that right is denied to Plaintiffs is a day that can never be returned to them—a wrong that can never be remedied. For that reason, this Court repeatedly has held that the denial of a constitutional right is an irreparable injury. *See, e.g., Associated Gen. Contractors of Cal., Inc. v. Coal.*

for Econ. Equity, 950 F.2d 1401, 1412 (9th Cir. 1991); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984).

Plaintiffs recognize that this case presents exceedingly important constitutional issues, but en banc rehearing by this Court is not warranted and would only extend the state-sanctioned discrimination being perpetrated on hundreds of thousands of gay and lesbian Californians, and prolong the emotional distress and public indignity being inflicted on them and their families each day as a result of the deprivation of their rights. Further, because "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated," *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005), rehearing would delay the vindication of the shared interest of *all* Californians in enforcing the Constitution's guarantees and reinforcing this "Nation's basic commitment . . . to foster the dignity and well-being of all persons within its borders." *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).[4]

[4] In the event the judges of this Court vote to rehear this case en banc, Plaintiffs respectfully request that this Court expedite rehearing to the greatest extent possible. Expedited treatment would be warranted because Plaintiffs will continue to suffer irreparable harm each day that Proposition 8 remains in force. Therefore, if rehearing en banc is granted, Plaintiffs request that this Court forgo any further briefing and instead schedule en banc oral argument on the earliest possible date.

CONCLUSION

Appellants' petition for rehearing en banc should be denied.[5]

Dated: March 1, 2012

/s/ Theodore B. Olson

DAVID BOIES
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504

JEREMY M. GOLDMAN
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

THEODORE J. BOUTROUS, JR.
CHRISTOPHER D. DUSSEAULT
THEANE EVANGELIS KAPUR
ENRIQUE A. MONAGAS
JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

[5] This Court should also deny Proponents' petition for en banc rehearing of Case No. 11-16577, in which the panel unanimously affirmed the district court's denial of Proponents' motion to vacate District Judge Walker's decision. *See* Pet. at 48-51. Proponents argue that the panel's decision is "erroneous" and "flaw[ed]," *id.* at 50-51, but they do not explain why it is worthy of en banc review under Fed. R. App. P. 35. As the panel correctly held, the district court's "resolution of the issue on the basis of the facts was not illogical, implausible, or without support in inferences that may be drawn from the facts in the record." Slip op. at 79.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rules 35-4 and 40-1 the attached response to Appellants' petition for rehearing en banc is proportionately spaced, has a type-face of 14 points, and contains 4,089 words.

/s/ Theodore B. Olson

Dated: March 1, 2012

9th Circuit Case Number(s) Nos. 10-16696 & 11-16577

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [ ].

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) [ ]

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [Mar 1, 2012] .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

[Please see attached service list.]

Signature (use "s/" format) [/s/ Theodore B. Olson]

SERVICE LIST

Anthony R. Picarello, Jr.
UNITED STATES CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, DC 20017

Lincoln C. Oliphant
COLUMBUS SCHOOL OF LAW
The Catholic University of America
3600 John McCormack Road, NE
Washington, DC 20064

Arthur Bailey, Jr.
HAUSFELD LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104

Anita L. Staver
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

Mathew D. Staver
LIBERTY COUNSEL
1055 Maitland Ctr. Commons, 2nd Fl.
Maitland, FL 32751

Thomas Brejcha
THOMAS MORE SOCIETY
29 S. La Salle Street, Suite 440
Chicago, IL 60603