Perry v. Brown, 10-16696; 11-16577

O'SCANNLAIN, Circuit Judge, joined by BYBEE and BEA, Circuit Judges, dissenting from the order denying rehearing en banc:

A few weeks ago, subsequent to oral argument in this case, the President of the United States ignited a media firestorm by announcing that he supports same-sex marriage as a policy matter. Drawing less attention, however, were his comments that the Constitution left this matter to the States and that "one of the things that [he]'d like to see is–that [the] conversation continue in a respectful way."[1]

Today our court has silenced any such respectful conversation. Based on a two-judge majority's gross misapplication of *Romer v. Evans*, 517 U.S. 620 (1996), we have now declared that animus must have been the only *conceivable* motivation for a sovereign State to have remained committed to a definition of marriage that has existed for millennia, *Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012). Even worse, we have overruled the will of seven million California Proposition 8 voters based on a reading of *Romer* that would be unrecognizable to the Justices who joined it, to those who dissented from it, and to the judges from sister circuits who have since interpreted it. We should not have so roundly

[1] Interview by Robin Roberts, ABC News, with Barack Obama, President of the United States, in Washington, D.C. (May 9, 2012).

trumped California's democratic process without at least discussing this unparalleled decision as an en banc court.

For many of the same reasons discussed in Judge N.R. Smith's excellent dissenting opinion in this momentous case, I respectfully dissent from the failure to grant the petition for rehearing en banc.