Case Nos. S168047, S168066, S168078

IN THE

Supreme Court of the State of California

KAREN L. STRAUSS et al., Petitioners,

v.

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,
Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

ROBIN TYLER et al., Petitioners,

v.

THE STATE OF CALIFORNIA et al., Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,

v.

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,
Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

INTERVENERS' ANSWER TO AMICUS CURIAE BRIEFS AND SUPPLEMENTAL RESPONSE TO PAGES 75-90 OF THE ATTORNEY GENERAL'S ANSWER BRIEF

KENNETH W. STARR (Bar No. 58382)
24569 Via De Casa
Malibu, CA 90265-3205
Telephone: (310) 506-4621
Facsimile: (310) 506-4266

ANDREW P. PUGNO (Bar No. 206587)
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Dr Ste 100
Folsom, CA 95630-4726
Telephone: (916) 608-3065
Facsimile: (916) 608-3066
Email: andrew@pugnolaw.com

Attorneys for Interveners

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Email: andrew@pugnolaw.com

Attorneys for Interveners

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INTRODUCTION

In an epic outpouring of amicus briefs, both public lawyers and private practitioners have impressively rallied to the petitioners' cause. First, the duly elected Attorney General expressed the decidedly unorthodox view that natural law calls for this Court to tear asunder the judgment of the people. That has never happened in California's long and storied history. Nothing approximates that unprecedented legal epiphany of the State's chief lawyer. Now, a veritable army of amici – from some of the state's most distinguished law firms and numerous attorneys representing some of California's most populous counties – chant in impressive harmony: "Invalidate the duly enacted provision of the Constitution. Ignore the will of the people, even if expressed following an open, fair election."

This is a siren song. The law – especially the higher law of the Constitution – sounds a dramatically different chord. Notwithstanding the impeccable credentials of renowned academics, senior lawyers at highly prestigious law firms, and dutiful public officials representing a great cloud of witnesses, they are – with all respect – profoundly misguided.

We will be blunt. Theirs is a call for a constitutional revolution. Theirs is not, however, the voice of Jefferson or Lincoln or Roosevelt – or certainly Governor Hiram Johnson. Nor is theirs the voice of any of the previous Justices ever to have served on this Court. To the contrary, those eloquent voices are profoundly respectful of the democratic process.

If the iconic Justice Mosk was willing, grudgingly, to abide by the will of the people as to the life or death issue of capital punishment, then this Court should faithfully abide by the will of the people – even in the face of strong emotions swirling around the State's major cities – as to the meaning of marriage. Those sincerely-held emotions should play their way

out in the ongoing democratic conversation about the future of marriage in a democratic society – where we the people govern. Indeed, the next chapter has already begun. Propositions to undo what Proposition 8 has wrought are already circulating in the polity. This Court should not silence that conversation. Let it go forward. The Constitution has now been amended, by the sovereign people who are its creators. That is the beginning and end of this case.

ARGUMENT

I. SUPPLEMENTAL RESPONSE TO PAGES 75-90 OF THE ATTORNEY GENERAL'S ANSWER BRIEF AND RESPONSE TO AMICUS BRIEFS ADDRESSING REVISION/AMENDMENT ISSUES.

This Court's long-standing revision/amendment jurisprudence leaves no doubt that Proposition 8 is a properly-enacted amendment. The major portion of the Attorney General's brief makes that pellucidly clear. In contrast, the Attorney General's idiosyncratic natural rights argument, and amici's and petitioners' variations on that newly-introduced argument, are entirely devoid of precedential support. They should be rejected.

A. Proposition 8 Is a Moderate Measure that Represents the Deeply-Rooted, Multi-Generational Judgment of the People of California About the Definition of Marriage.

A constant theme of the closing 15 pages of the Attorney General's brief, of numerous amicus briefs supporting petitioners, and of petitioners' own submissions is that restoring the traditional definition of marriage constitutes a rash act of democratic excess. That feverish characterization is detached from reality. Simply put, Proposition 8 constitutionalizes California's multi-generational consensus about the definition of civil marriage.

This is by no means an unconsidered default position. It is, rather, the unwavering judgment of the people about how marriage should be defined. This precise issue has been before the people of California in one

form or another for over 30 years – and their judgment has remained constant. Whenever the people have perceived challenges to the basic definition of marriage, they have responded – in a measured way – through the democratic process to preserve it. (See *In Re Marriage Cases* (2008) 43 Cal.4th 757, 792-801 (hereafter *Marriage Cases*); see also Interveners' Opposition Brief, filed 12/19/2008 in *Strauss* (hereafter "Inter. Opp. Brf.") at pp. 1-4.) Proposition 8 embodies the people's longstanding judgment that the traditional definition of marriage should be retained.

In doing so, as the brief of amicus National Organization for Marriage California demonstrates, Proposition 8 places California on what many would deem the progressive side of American and Western law. (See Amicus Curiae Brief of National Organization for Marriage California in Support of Intervenors Discussing International and National Consensus in Favor of Giving Democratic Institutions a Role in Making Marriage Policy (hereafter "Brf. NOM Supp. Inter.") at pp. 2-8.) While at every turn the people of California have insisted that marriage retain its traditional definition, for several decades – through their elected representatives – the people have expanded legal protections for gays and lesbians and same-sex relationships. (See Interveners' Response to Pages 75-90 of the Attorney General's Answer Brief, filed 1/5/2009 (hereafter "Inter. Resp. to AG") at p. 19, fn. 10 [listing numerous statutes protecting homosexuals].)[1]

Far from the distorted portrait painted by various amici (as well as the Attorney General and petitioners), Proposition 8 establishes a substantive result far more liberal than the American consensus. Federal law makes the point powerfully. The Defense of Marriage Act (1 U.S.C. §

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[1] In particular, California's comprehensive domestic partnership legislation creates a legal status for same-sex couples virtually identical to marriage. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 779; see also Fam. Code, §§ 297 et seq. [Domestic Partnership Act].)

7, 28 U.S.C. § 1738) expressly denies federal recognition and marriage benefits to any conjugal union save the time-honored, traditional relationship. (*Ibid.*) Only two states – Massachusetts and Connecticut – allow same-sex couples to marry. (Brf. NOM Supp. Inter., p. 3.) Only 4 states provide domestic partnerships or civil unions with all or substantially all the rights of marriage. (*Ibid.*) A few others provide limited rights to same-sex relationships, whereas many states deny *any* type of official recognition. (*Ibid.*) Indeed, well over half the states have constitutional amendments either substantively identical to or more restrictive than Proposition 8. (*Id.* at p. 4, fn. 1.)

Beyond our own borders, virtually all nations reject same-sex marriage. Among the liberal Western democracies the overwhelming consensus is to retain the traditional definition of marriage while granting broad rights for same-sex couples. (Brf. NOM Supp. Inter., pp. 3-7.) Neither the United Nations Declaration on Rights nor the European Convention on Human Rights has been interpreted to grant same-sex couples the right to marry. (*Id.* at p. 6.)

Significantly, with the exceptions of Canada and South Africa, countries have consistently employed democratic means (ordinary legislation) to reach sustainable compromises in this sensitive area. (Brf. NOM Supp. Inter., p. 5, fn. 5.) Democratic bodies worldwide have thus far concluded that retaining the traditional definition of marriage has merit, even where prevailing social policy and legal norms strongly favor equality for gays and lesbians. In contrast, various arguments against Proposition 8 boil down to the anti-democratic broadside that the people's decision to retain the traditional definition of marriage is irrational. The charge is not only wrong but misplaced. The substantive merit or wisdom of a measure has never been part of this Court's revision/amendment jurisprudence, and it would raise the most worrisome constitutional concerns if it were. That

said, the suggestion that Proposition 8 has somehow departed from the bounds of reason rings entirely hollow. As the international consensus demonstrates, Proposition 8 embodies a reasonable compromise that seeks, through the democratic process, to reconcile the established understanding of marriage with the equality interests of same-sex couples.

There is a fundamental reason for that. The people could rationally conclude that the traditional definition of marriage advances important social policies. Respected jurists on this Court and other courts have found that these and similar policy concerns provide a rational basis for the traditional definition.[2] Surely it could not reasonably be said that these distinguished jurists have somehow succumbed to irrationality.[3]

In brief, Proposition 8 establishes a rational social policy that fits comfortably within the Western democratic consensus. This mainstream provision – preserving generations of social consensus while leaving in place new rights and institutions to deal with contemporary needs – provides no warrant for an unprecedented departure from this Court's jurisprudence.

B. Excessive Suspicion of Democratic Institutions and the People Is Profoundly Inappropriate.

Another preliminary point bears emphasis. Taken to its logical end, the Attorney General's natural rights theory would vest unprecedented authority in the judiciary. (Inter. Resp. to AG, pp.11-14.) The same is true of arguments that judicial enforcement of equality norms is so fundamental

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[2] See *Marriage Cases*, *supra*, 43 Cal.4th at pp. 867, 878 (conc. & dis. opn. of Baxter, J.); *id.* at pp. 881, 883 (conc. & dis. opn. of Corrigan, J.); see also *Lewis v. Harris* (N.J. 2006) 908 A. 2d 196, 222; *Hernandez v. Robles* (2006) 7 N.Y.3d 338; *Goodridge v. Department of Public Health* (2003) 798 N.E. 2d 941, 981 (dis. opn. of Sosman, J.); *id.* at pp. 995-996 (dis. opn. of Cordy, J.).

[3] And rationality, in any event, is not the test of the validity of a constitutional amendment under the revision/amendment analysis.

that it lies beyond the people's amendatory power. (*Id.* at pp. 14-18.) Construing equal protection as petitioners' amici (and petitioners) advocate would grant the judiciary essentially unreviewable authority.

Academic and judicial voices have wisely counseled against transforming important social policy issues into questions of equal protection to be judicially resolved. John Hart Ely explained that "any case, indeed any challenge, can be put in an equal protection framework by competent counsel." (Ely, Democracy and Distrust (1980) at p. 32.) Justice John Harlan warned that an "expansive view of 'equal protection'" carried with it "the seeds of more judicial interference" with the legislative process. (*Shapiro v. Thompson* (1969) 394 U.S. 618, 677 (diss. opn. of Harlan, J.).) The High Court has taught that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." (*San Antonio Indep. Sch. Dist. v. Rodriguez* (1973) 411 U.S. 1, 33.)

Importantly, this Court never laid claim to such unreviewable power. Nor should it. It is one thing for a (largely) insulated judiciary to interpret and declare the fundamental law as received from the people as sovereign in a democratic polity. It is quite another for the judiciary to claim unreviewable interpretive power immune from the people's amendatory power. As long as the people have retained power to amend the Constitution by initiative, any theory of equality that elevates the judiciary above that authority raises profound – and deeply destabilizing – issues of legitimacy. As the brief of amicus Family Research Council makes clear, the people's right to amend their Constitution is itself an inalienable right. (Brief Amicus Curiae of Family Research Council in Support of Interveners (hereafter "FRC Brf.") at p. 9.) Yale's Akhil Amar has stated it even more directly: "No liberty is more central than the people's liberty to govern

themselves under rules of their own choice." (*Ibid.*, quoting Amar, America's Constitution (2005) at p. 10.)

Nowhere is this truer than in California with its venerable tradition of direct democracy. The brief of amicus Family Research Council helpfully adumbrates the historical background of the initiative power, including its intended use to overturn judicial decisions when the people deem it necessary. (FRC Brf., pp. 14-19.) Notably, the people of California understood the potential dangers of that power. In his inaugural address prior to the 1911 amendment, Governor Hiram Johnson candidly acknowledged that "'the initiative . . . depend[s] on our confidence in the people and in their ability to govern.'" (*Id.* at p. 18, citation omitted.) His response to the argument that the people cannot be trusted is as timely today as it was then:

> "The opponents of [the initiative], however they may phrase their opposition, in reality believe the people cannot be trusted. On the other hand, those of use who espouse these measures do so because of our deep-rooted belief in popular government, and not only in the right of the people to govern, but in their ability to govern[.]"

(*Id.* at p. 19, citation omitted.)

As the brief of amici California Catholic Conference et al. demonstrates, decisions based on vigorous democratic debate – such as occurred with Proposition 8 – have inherent legitimacy. "Popular, rather than judicial, deliberation and decision-making is also much more likely to lead to an eventual balancing of the various societal interests at stake in a society as diverse as California's. And the People are more likely to view as legitimate a decision that represents such broad popular participation, and that allows for such necessary compromise, in turn promoting durable acceptance of the decision and social peace." (Amici Curiae Brief of the California Catholic Conference [et al.] in Support of Interveners, at p. 5.)

In all events, no decisional authority supports the sweeping notion that the California judiciary's important role in protecting equality values somehow removes equality-based decisions from the bedrock power of the people to amend the Constitution.[4]

C. The Attorney General's Natural Rights Theory Cannot Be Salvaged by Reconfiguring It as an Additional Reason to Declare Proposition 8 a Revision.

As the Attorney General and Interveners demonstrate, no support is to be found in this Court's jurisprudence for characterizing Proposition 8 as a revision. The guiding principles have been set for decades. They arise from deep judicial respect for the initiative power:

- "It is a fundamental precept of our law that, although the legislative power under our constitutional framework is firmly vested in the Legislature, 'the people reserve to themselves the powers of initiative and referendum.' (Cal. Const., art. IV, § 1.) It follows from this that, '(t)he power of initiative must be liberally construed . . . to promote the democratic process.'"[5]

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[4] Several amici maintain that Proposition 8 will have baleful consequences on various aspects of society. Some amici claim that family relationships will be impacted (see Brief of Amici Curiae Professors of Family Law in Support of Petitioners, at pp. 19-25); others claim that business and economic interests will suffer. (See Brief of Amici Curiae San Francisco Chamber of Commerce [et al.] in Support of Petitioners, at pp. 16-20.) A robust debate could certainly be had on these and numerous other social concerns raised by various amici. But that is not the point. The point is that this debate has already occurred. In an unprecedented campaign, each side made its best appeal to the people. The people considered the advantages and disadvantages of retaining the traditional definition of marriage as opposed to expanding that definition to include same-sex couples. And the people ultimately decided. Under our system of constitutional government, that is the end of the matter.

[5] *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 219 (hereafter *Amador*), citation omitted. As the Brief of Amicus Curiae Steven Meiers sets out (at pp. 4-5), this principle arises out of – and complements – an even more basic principle, long recognized by luminaries on this and other courts:

- "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter."[6]
- "[A]ll presumptions favor the validity of initiative measures and mere doubts as to validity are insu*fficient;* such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears."[7]

Hence, this Court had consistently held that only measures effecting profound structural changes to the Constitution qualify as revisions. The limited office of the judicial check for either quantitative or qualitative changes is fully developed in the case law.[8]

> In *Associated Home Builders* . . . Justice Tobriner . . . wrote: "Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative . . . not as a right granted the people, but as a power reserved by them. . . . [It is] the duty of the court to jealously guard this right of the people . . . one of the most precious rights of our democratic process. It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."

(*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 261-62 (hereafter *Brosnahan*).)

[6]*McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 (hereafter *McFadden*).

[7]*Legislature v. Eu* (1991) 54 Cal.3d 492, 501, citation omitted (hereafter *Eu*).

[8] A quantitative revision is one that alters the "'substantial entirety' of the Constitution" by the sheer number of changes to the text. (*Amador*, *supra*, 22 Cal.3d at p. 222.) A qualitative revision may make few textual alterations but makes "far reaching changes in the nature of [California's] basic governmental plan." (*Id.* at p. 223.) The sole decision declaring an initiative amendment a qualitative revision involved a measure that "would vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352 (hereafter *Raven*).) Such a change "would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect" (*ibid.*), "unduly restrict[ing] judicial power . . . in a way which severely limits the independent force and effect of the California Constitution." (*Id.* at p. 353.) It would also "vest[] a critical

Under these standards, Proposition 8 readily passes muster. It delimits the legal definition of marriage, but does nothing to make "a fundamental change in our preexisting governmental plan." Since Proposition 8 became law, each branch of government has continued to carry on with its normal legislative, executive, and judicial functions as before. That precisely-focused change in the substantive law pales in comparison with far more sweeping structural modifications upheld in *Amador* and *Eu*. It is, moreover, fully consistent with this Court's decisions upholding initiative-framed amendments that deleted or limited provisions of the Declaration of Rights. (See *Raven*, *supra*, 52 Cal.3d at pp. 342-43, 350 [upholding addition of article I, §§ 14.1, 29, and 30 limiting rights of criminal defendants]; *In re Lance W.* (1985) 37 Cal.3d 873, 891 [upholding addition of article I, § 28(d) limiting state exclusionary rule as remedy for violation of criminal rights]; *Brosnahan*, *supra*, 32 Cal.3d at pp. 260-61 [upholding repeal of article I, § 12 and addition of article I, § 28]; *People v. Frierson* (1979) 25 Cal.3d 142 (hereafter *Frierson*) [upholding addition of article I, § 27 (death penalty), limiting article I, § 6].)

The Attorney General rightly concludes that Proposition 8 is not a revision, but then does an about-face. (See Attorney General's Answer Brief in Response to Petition for Extraordinary Relief (hereafter "AG Brf.") at pp. 75-90; Inter. Resp. to AG, at p. 3.) Amici supporting petitioners (and petitioners in their reply briefs) seek to embrace the Attorney General's argument but reconfigure it as an element in the revision/amendment analysis.

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portion of state judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan." (*Id.* at p. 355.)

Like the Attorney General, petitioners weave a theoretical web akin to a natural or extra-constitutional right that Proposition 8 cannot alter. Quickly retreating to positive law, however, petitioners then characterize those inalienable-rights theories as a sacrosanct "principle of equal protection." (Corrected Reply in Support of Petition for Extraordinary Relief (hereafter "Strauss Reply"), at pp. 13, 20; Corrected Reply of City and County of San Francisco, et al., at pp. 36-40.) They purport to locate that overarching principle in the text and structure of the Constitution. (*Id.* at p. 12.) Their seek-and-find mechanism is, however, profoundly defective in a democratic polity – especially that of California. Nothing in the actual provisions of our Constitution – or its structural plan for state government – hints that the amendment power (initiative or otherwise) cannot be employed to modify judicial interpretations of equal protection rights. Petitioners' and various amici's arguments rest on high political theory and soaring rhetoric fashioned in the law offices of able attorneys.[9]

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[9] Amici in support of petitioners suggest that a "filter" is necessary on the right of the people to change the state Constitution, because without "the benefit of [legislative] deliberation" inalienable rights are subject to an unacceptable risk. (Amicus Curiae Brief of Constitutional and Civil Rights Law Professors, at pp. 41-42.) Other amici in support of petitioners make a similar claim, contending that the interpretation of certain constitutional rights and protections "is the core function of the judicial branch" (Brief of Legislative Amici Curiae in Support of Petitioners Strauss, et al., at p. 26), presumably because amici believe that only the judiciary can adequately understand and weigh these rights. The problem with these arguments is that they expressly contradict the constitutional form of government that exists in California, and they ignore the long-established precedent of this Court. If *Frierson* stands for anything, it stands for the proposition that the people, through the initiative amendment process, have the power and authority to understand and weigh the most important of constitutional protections without the "filter" or state judicial oversight championed by the amici.

But they are utterly ungrounded in the actual text of the Constitution or in this Court's impressive body of precedent.[10]

Let us not be misunderstood. No one denies that equal protection is a profound constitutional value. But that is not the issue. The real issue is whether it takes a full-blown constitutional revision to overturn a judicial decision applying equal protection principles to a particular context. To answer that question, this Court should repair not to political theories or succumb to soaring rhetoric; it should, rather, return to its own richly-developed jurisprudence. The Attorney General and Interveners have already shown that under the Court's decisions the answer is unquestionably *no*. The same holds here with Proposition 8. The amendment power is broad enough to overturn judicial decisions on any subject, including equal protection – provided that the amendment does not effect "a change in the basic plan of California government, *i.e.*, a change in its fundamental structure or the foundational powers of its branches." (*Eu*, *supra*, 54 Cal.3d at p. 509.)

Lacking support in the case law, petitioners retreat to sentence fragments wrenched from context. This is classic lawyerly selectivity in dealing with the warp and woof of an imposing body of jurisprudence. Interveners have already noted that petitioners rest their argument on the broad "underlying principles" language crafted long ago in *Livermore v. Waite* (1894) 102 Cal. 113, 118-19 (hereafter *Livermore*), while ignoring decades of post-*Livermore* jurisprudence teaching that the relevant

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[10] Indeed, as the Brief of Amicus Curiae Issues 4 Life recognizes (at p. 10), petitioners (and now their amici) effectively ask this Court to elevate a previously undiscovered equal protection right recognizing same-sex marriage over the ancient, fundamental right of the people to govern themselves. Proposition 8 does not require that a single word of the California Constitution be stricken or changed – it merely adopts a definition of marriage which the people of California have clearly understood and intended since statehood.

"principles" are those establishing the basic structure of government. (See Inter. Opp. Brf., at p. 18.) Indeed, *Livermore* itself states that appropriate "improvement[s]" (*i.e.*, amendments) to the Constitution include adjustments in the practical application of established constitutional principles:

> *Experience may disclose defects in some of its [i.e., the Constitution's] details, or in the practical application of some of the principles or limitations which it contains.* The changed condition of affairs in different parts of the state, or the changes of society or time, may demand the removal of some of these limitations, or an extended application of its principles.

(*Livermore*, *supra*, 102 Cal. at pp. 118-19 (italics added).) Using an amendment like Proposition 8 to modify a judicial "application" of the "principle[]" of equal protection fits comfortably within *Livermore*'s description of the amendment power.[11] Moreover, Proposition 8 by no means eliminates the equal protection principle for any person or group. Quite the contrary, it merely limits the scope of the principle in one precise area of application, an entirely appropriate use of the amendment power under *Livermore*.

With exquisite selectivity, petitioners and their amici cull snippets from other revision/amendment cases. Their pick-and-choose exercise is to no avail. The Strauss petitioners quote language in *Amador* that even "a relatively simple enactment" can constitute a revision; but then they concede (as they must) that *Amador* limits this language to where a

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[11]Tellingly, petitioners and their amici ignore *Livermore*'s teaching that the Legislature's power to propose amendments is "strictly construed" because it is a "delegated power" (*Livermore*, *supra*, 102 Cal. at pp. 118-19), whereas the people's *initiative* amendment power is a "reserve[d]" power that therefore "must be *liberally construed* . . . to promote the democratic process." (*Amador*, *supra*, 22 Cal.3d at p. 219, italics added, citations omitted; see also Inter. Opp. Brf. at pp. 20-21.)

measure makes "far-reaching changes in the nature of [California's] basic governmental plan." (*Amador*, *supra*, 22 Cal.3d at p. 223; Strauss Reply, at pp. 11-12.)

Also irrelevant is language drawn from *Raven* to the effect that a portion of Proposition 115 was a revision because it contradicted a "fundamental principle of constitutional jurisprudence" and violated the "preexisting constitutional scheme or framework." (*Raven*, *supra*, 52 Cal.3d at pp. 354-55; Strauss Reply, at p. 12.) Those phrases have nothing to do with the scope of equal protection or fundamental rights. Rather, they address the independence of the state Constitution and the structural impact of stripping this Court of its independent role. (*Raven*, *supra*, 52 Cal.3d at pp. 354-55.) Had Proposition 115 sought to accomplish the identical substantive outcome by placing the specific federal standards for equal protection, due process, etc. in the California Constitution, it would have established a valid amendment. What rendered a portion of it a forbidden revision was *not* that it abridged equal protection (or other constitutional rights) but that it altered the basic institutional function of this Court.[12]

By stark contrast, Proposition 8 changes the substantive law the judiciary applies, but does nothing to alter the role of the judiciary itself. This Court has never claimed a sweeping, anti-democratic power to enforce equal protection or rights independent of the people's power to amend the Constitution. That fact alone is enough to reject petitioners' trumpet calls. Not a word in this Court's revision/amendment jurisprudence or any other area of the law suggests the existence of such a profoundly unmoored – and largely unaccountable – power. At bottom, petitioners' contentions are not

[12] The *Raven* Court readily upheld other provisions in Proposition 115 that overturned criminal rights which this Court had recognized in numerous decisions.

revision/amendment arguments but less forthright versions of the Attorney General's theory of judicial review.

Just as *Frierson* gravely undermines the Attorney General's newly-minted theory, it also exposes a fundamental weakness in petitioners' reformulations of that theory. Although equality is a deeply important constitutional principle, it is no more fundamental than the imperative to protect human dignity – including life itself. Indeed, the basis of the principle of equal protection is the "self-evident" truth that each person has inherent and equal dignity. If ever petitioners' "core principle" argument should have traction, it surely would be in the area of fundamental rights that prevent the state from degrading basic human dignity by the willful taking of life. But *Frierson* squarely rejects that argument.[13]

Brushing aside the widely-held concern that capital punishment is disproportionately imposed on minorities (see Inter. Resp. to AG, at p. 17, citing sources), petitioners argue that *Frierson* is not inconsistent with their theory because everyone is equally subject to the death penalty. (Strauss Reply, at p. 13.) This is formalism at its zenith. (So too, all are subject to the time-honored definition of marriage.) The point is that *Frierson* affirms the use of the initiative amendment power to deny (according to this Court) fundamental human dignity, a constitutional value as foundational as equality.

Theory aside, *Frierson* illustrates the consistency of the qualitative revision/amendment analysis. No matter what the context – human dignity, rights of the accused, power to tax, term limits, budgetary constraints on

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[13] The Court in *People v. Anderson* (1972) 6 Cal. 3d 628, expressly held that capital punishment violates human dignity and is therefore unconstitutional under article I, section 6. (*Id.* at pp. 650-51.) Nevertheless, the *Frierson* Court upheld the people's right to use the initiative amendment power to reinstate the death penalty. (*Frierson*, *supra*, 25 Cal.3d at p. 187.)

legislative offices, etc. – the issue turns on whether the measure would significantly disrupt the basic governmental architecture. That rarely occurs. Over the course of 98 years, it has occurred all of twice. This Court should reject calls to adopt novel theories based on alleged, newly-minted uber-principles – whether derived from outside or inside the Constitution – and instead remain faithful to its long-settled revision/amendment jurisprudence.

II. RESPONSE TO AMICUS BRIEFS ADDRESSING RETROACTIVITY ISSUES.

Proposition 8 precludes current recognition of interim same-sex marriages regardless of when or where performed. At the same time, it does not retroactively void them. The unambiguous language of Proposition 8, the people's unvarying intent on the marriage issue, the fact that Proposition 8 addresses present and future recognition issues, this Court's prior construction of the identical language, and the fact that couples in interim same-sex marriages will retain all the legal rights and incidents of marriage save only the name – all these points support Interveners' position.

A. The Constant Will of the People Is that Only Marriage Between a Man and a Woman Is Legally Valid or Recognized in California.

Amici opposing the petitions emphasize that upholding the will of the people is the primary judicial task in interpreting Proposition 8. (See e.g., Amicus Curiae Brief by Professors of Law Opposing the Petitions Regarding Issue Number Three and Regarding the Issue Set Forth on Pages 75-90 of the Answer Brief Filed by the Attorney General (hereafter "Brf. Fam. Prof. Supp. Inter."), at pp. 7-8.) That point is beyond dispute. This

Court in *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, summarized the relevant analysis:

> In interpreting a constitution's provisions, our paramount task is to ascertain the intent of those who enacted it. To determine that intent, we 'look first to the language of the constitutional text, giving the words their ordinary meaning.' If the language is clear, there is no need for construction. If the language is ambiguous, however, we consider extrinsic evidence of the enacting body's intent."
>
> Similarly, "[i]n interpreting a voter initiative ..., we apply the same principles that govern statutory construction. Thus, 'we turn first to the language of the [initiative], giving the words their ordinary meaning.' The [initiative's] language must also be construed in the context of the statute as a whole and the [initiative's] overall ... scheme." "Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." Where there is ambiguity in the language of the measure, "[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure."

(*Id.* at p. 1037, citation omitted.) Thus, the ordinary meaning of the text of Proposition 8 – the meaning an ordinary voter would have ascribed to it when deciding how to vote – is the most important evidence of intent.

When determining what legal words mean and whether they are ambiguous, understanding the broader context is vitally important. Words do not exist in a vacuum. (See *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 39-40.) The broader historical context of Proposition 8 demonstrates that the will of the people with respect to the definition of marriage has been unwavering and specific. In sum:

- From statehood until the issue of same-sex marriage arose in the mid-1970s, the people and all institutions of government

universally intended marriage to have its traditional definition. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 792-94.)

- In the 1970s, claims that ambiguous statutory language permitted same-sex marriage were specifically rejected by legislation reaffirming the people's will that marriage retain its traditional definition. (*Ibid.*)
- In 2000, the people enacted Proposition 22 to ensure that, notwithstanding lawsuits in other states challenging the traditional definition of marriage and growing support in the Legislature, only traditional marriage would be "valid or recognized in California." (Inter. Opp. Brf., at pp. 1-4.)
- After the *Marriage Cases* reached this Court, *but months before oral argument or decision*, the people sought to constitutionalize the language of Proposition 22. On April 24, 2008, the Official Proponents submitted completed petitions to qualify Proposition 8 for the ballot. (*Ibid.*)
- On May 15, 2008, the Court issued its *Marriage Cases* decision. After denying a request for a stay, the decision took effect on June 16, 2008. (*Ibid.*)
- Ballot materials stated that Proposition 8 would eliminate the right of same-sex couples to marry *and* limit recognition to traditional marriage. They further stated that Proposition 8 would limit marriage to its traditional definition and reverse the *Marriage Cases* decision. (*Ibid.*)
- Ballot arguments included the statement that "only marriage between a man and a woman will be valid or recognized in California, *regardless of when or where performed.*" (*Id.* at p. 4.)
- On November 4, 2008, the people approved Proposition 8.

This chronology demonstrates two things. First, the people's intent has been clear and consistent for more than 150 years. Proposition 8 is only the latest and most definitive restatement of that decades-old, unwavering intent.

Second, the people have done all they reasonably should have to effectuate that intent, and they acted as quickly as the process would allow. At every stage they have reaffirmed their will on this issue. Unlike the

ordinary legislative process, the initiative is an inherently blunt instrument. (See *Amador*, *supra*, 22 Cal.3d at pp. 228-229 [discussing the initiative as a "'legislative battering ram'"], citation omitted.) There are no floor amendments to deal with last-minute contingencies. It is thus odd in the extreme to suggest that the Official Proponents should have been clairvoyant and inserted – prior to oral argument and decision – various contingency statements into the text of Proposition 8. The intent of the sovereign people deserves greater deference and respect.

B. Proposition 8 Is Clear and Unambiguous.

Read in the light of the people's consistent intent, the meaning of Proposition 8 is manifest. As demonstrated by the amicus brief of family law professors supporting Interveners, Proposition 8's brevity produces great clarity. (Brf. Fam. Prof. Supp. Inter., at pp. 8-10.) Its fourteen words mean exactly what they say: "Only marriage between a man and a woman is valid or recognized in California." These words set forth a rule of exclusive legal status and recognition for "marriage between a man and a woman." "Only" establishes that the rule is unequivocal and brooks no exceptions. The verb "is" indicates that the measure addresses the legal status of marriage in California in the present, not the past.[14] (Brf. Fam.

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[14] Certain amici (together with petitioners) rely heavily on *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188. There, this Court refused to apply the Fair Responsibility Act to tort cases where the injury to plaintiff occurred prior to passage of the Act, but where the trial of the matter occurred subsequently. Amici and petitioners cite the case for two propositions: first, for the basic principle that retroactivity issues arise any time a new law is applied to pre-existing rights or conditions; and second, for the specific legal maxim that a law should not be retroactively applied unless there is clear indication of such intent. Both propositions are true as far as they go. The problem for amici, however, is that these propositions are not helpful to their cause. Indeed, *Evangelatos* actually supports Interveners' position.

(Continued to next page.)

Prof. Supp. Inter., at pp. 8-9.) Thus, Proposition 8 does not speak to

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To be sure, *Evangelatos* rejected an argument that the Fair Practice Act was only being applied prospectively in that its application was confined to trials conducted after the effective date of the legislation. (*Evangelatos, supra,* 44 Cal.3d at p. 1205.) But that was specifically because a plaintiff's right to recovery accrues at the time he or she suffers the injury: "Since the industrial injury is the basis for any compensation award, the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery." (*Id.* at p. 1206, citations omitted.) Amici cite to no similar "accrual" principle when it comes to the recognition of marriage. The rule governing marriage recognition turns on the current public policy of the forum state, not accrual or vesting. (See Rest.2d Conflict of Laws § 283(2), comm. "*l*" [local courts may refuse to recognize a marriage that, although valid where entered into, offends a fundamental public policy of the forum state].) Proposition 8 sets that policy for California.

Additionally, the very missing elements that led this Court to its conclusion in *Evangelatos* (that the law should not be retroactively applied) are actually present in the circumstances surrounding the passage of Proposition 8. Thus, while there was nothing in the "brochure materials" in *Evangelatos* to suggest that the *drafters* intended the new law to apply retroactively (*Evangelatos*, *supra*, 44 Cal.3d. at p. 1211), as discussed above there is clear indication that the drafters of Proposition 8 intended its provisions to apply to all, "regardless of when or where performed." Not only did the drafters have that intent, but opponents to Proposition 8 were well aware of it. They sued in an attempt to remove this language because it indicated Proposition 8's rule would be applied to all marriages, including those entered into during the interim period. (See Request For Judicial Notice In Support Of Interveners' Answer To Amicus Curiae Briefs And Supplemental Response To Pages 75-90 Of The Attorney General's Answer Brief, filed herewith, at Exh. 1, pp. 20-22.)

The electorate itself had before it ballot materials speaking to this precise issue. In *Evangelatos*, this Court found that because there was nothing "before the voters in the ballot pamphlet" that "spoke to the retroactivity question," there was "no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all." (*Evangelatos*, *supra*, 44 Cal.3d. at p. 1212.) Exactly the opposite was the case with Proposition 8 – there was specific language in the ballot pamphlet that stated that the measure would apply to all marriages no matter when or where performed, and that statement was the subject of significant publicity and debate.

whether a same-sex marriage was properly contracted in the past or has legal validity in other jurisdictions. Nor does Proposition 8 declare such marriages void *ab initio* or alter their past legal consequences. (*Id.* at pp. 10-13, 19-20.) Rather, it establishes which validly performed marriages (only those "between a man and a woman") can be legally recognized *as marriages* in the present.[15]

Nothing in the text – such as a term stating that the rule will apply only to marriages "contracted after" a certain date – even remotely suggests that Proposition 8 was intended to grandfather in other forms of marriage. (See Brf. Fam. Prof. Supp. Inter., at pp. 14-19.) The Court of Appeal has expressly held that "the language of [Proposition 22] is unambiguous." (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 23, 25; see also *Marriage Cases*, *supra*, 43 Cal.4th at pp. 796-801.) The same holds true of the identical language here. Proposition 8 governs the interim marriages just as it does all others.

"Absent ambiguity, [this Court] presume[s] that the voters intend[ed] the meaning apparent on the face of [Proposition 8] and the court may not add to [it] or rewrite it to conform to an assumed intent that is not apparent in its language." (*Professional Engineers in California Government v. Kempton*, *supra*, 40 Cal.4th at p. 1037, internal citations and quotation marks omitted.)

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[15] Several amici in support of petitioners argue that application of Proposition 8 to the interim marriages would be both unfair and unconstitutional. But as the Brief Amicus Curiae of Eagle Forum Education & Legal Defense Fund persuasively shows (at p. 21): (1) unlike other provisions that have raised retroactivity concerns, Proposition 8 does not impose any liability; it merely denies validity and recognition; (2) Proposition 8 operates prospectively on interim marriages; (3) Proposition 8 does not substantially affect existing rights and obligations; and (4) even if Proposition 8 imposed liabilities retroactively, those who entered interim marriages did so with fair notice; therefore, they lacked both reasonable reliance and settled expectations.

C. The Plain Meaning of Proposition 8 Is Consistent with the Ballot Materials and this Court's Interpretation of Identical Language in the *Marriage Cases*.

Although consideration of extrinsic evidence is unwarranted in light of the crystalline clarity of the operative language itself, that rich body of material fully buttresses the plain meaning. As the amicus brief of Campaign for California Families emphasizes (at pp. 18-19), the ballot materials establish the clear intent of the voters. Indeed, as explained more fully in Interveners' main opposition brief (at pp. 39-41), the ballot materials belie the argument that interim marriages are exempt from Proposition 8. Most powerful is the statement in the ballot arguments that "Proposition 8 means that only marriage between a man and a woman will be valid or recognized in California, *regardless of when or where performed*." (Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Rebuttal to Argument Against Prop. 8, p. 57, italics added; see Request for Judicial Notice in Support of Interveners' Opposition Brief, filed 12/19/2008 (hereafter "Interveners' First RJN"), at Exh. 6.) That language is directly to the point. Petitioners now discount its effect, but the opponents of Proposition 8 presented a very different view to the judiciary prior to the election. In an unsuccessful challenge to this precise language, opponents strenuously argued that it should be deleted from the ballot materials because it unequivocally told voters that Proposition 8 would invalidate *existing* same-sex marriages.[16] Exactly so.

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[16] See Request For Judicial Notice In Support Of Interveners' Answer To Amicus Curiae Briefs And Supplemental Response To Pages 75-90 Of The Attorney General's Answer Brief, filed herewith, at Exh. 1, pp. 20-22. In their pre-election lawsuit, those petitioners argued:

> The statement in the rebuttal argument about retroactivity is not couched in terms of opinion. Instead it presents as an undisputed fact that Proposition 8 "*means*"– not may or could mean, or possibly means, or suggests, but

The ballot arguments in favor of Proposition 8 repeatedly emphasized the issue of marriage status, stating over and over that what was at issue was "the definition" and "meaning" of marriage. (See, e.g., Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Rebuttal to Argument Against Prop. 8, p. 56-57; see Interveners' First RJN at Exh. 6 ["[W]e need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman."; "What Proposition 8 does is restore the meaning of marriage to what human history has understood it to be . . . ."].) Proposition 8 cannot limit "the definition" or "meaning of marriage" to its traditional roots if thousands of marriages with a contrary definition and meaning remain valid and recognized in California. (*Cf.* Strauss Reply, at pp. 60-61.) The arguments also informed voters that Proposition 8 "ensures that gay marriage can be legalized only through a vote of the people." Under petitioners' construction, thousands of gay marriages would remain legal without such a vote. Yet, the Attorney General's summary informed voters that Proposition 8 would have two effects: no new same-sex marriages and no legal recognition as "marriage" for anything but traditional marriages. (Voter Information Guide, Gen. Elec. (Nov. 4, 2008) official title and summary of Prop. 8, p. 54; Interveners' First RJN at Exh. 4.) Petitioners contend that it would have only the first of these effects.

The ballot materials also stated that Proposition 8 would "overturn[] the decision" and the "legal reasoning" of this Court in the *Marriage Cases*.

> *means* – that only marriages of heterosexual couples "*will be*" valid or recognized in California "*regardless of when or where performed.*" In other words, the rebuttal argument asserts as fact that marriages of gay couples *will be invalid* in California even if performed after the issuance of the California Supreme Court's opinion and before the election.

(*Id.* at Exh. 1, p. 20, ln. 10-16, italics in original.)

(Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Rebuttal to Argument Against Prop. 8, pp. 56-57, italics added; see Interveners' First RJN at Exh. 6.) That cannot fully occur if, contrary to Proposition 8's plain language, equal recognition (as marriages) for traditional marriages and interim marriages is the law.

Moreover, as the brief of amici family law professors supporting Interveners discuss (at pp. 27-29), this Court's extensive and unanimous treatment in the *Marriage Cases* of the identical language in Proposition 22 is virtually dispositive as to the meaning of Proposition 8. *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673 ["It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts. [Citation and quotation marks omitted.] The presumption is equally applicable to measures adopted by popular vote. [Citation.]."] That analysis lends strong support to Interveners' interpretation of Proposition 8 as a rule that governs present recognition of already performed marriages. Indeed, it closely parallels Interveners' argument here.

The Court in the *Marriage Cases* held that Proposition 22 precludes recognition of validly "performed" or "entered into" (past tense) same-sex marriages regardless of where solemnized. The plaintiffs had argued "that section 308.5 [Proposition 22] should not be interpreted to apply to or to limit marriages *entered into in California*, but instead to apply only to marriages *entered into in another jurisdiction*." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 796, italics in original.) Rejecting that argument, this Court held that foreign and domestic marriages must be governed by the same rule of recognition: "We conclude that in light of both the language and

purpose of section 308.5, this provision reasonably must be interpreted to apply both to marriages performed in California and those performed in other jurisdictions." (*Id.* at p. 797.) The rule "that California will not legitimize or recognize same-sex marriages from other jurisdictions" even though validly entered into (*id.* at p. 799) applies equally to same-sex marriages in California. (See also *id.* at p. 798 ["Although we agree with plaintiffs that the principal motivating factor underlying Proposition 22 appears to have been to ensure that California would not recognize marriages of same-sex couples that might be validly entered into in another jurisdiction, we conclude the statutory provision proposed by this initiative measure and adopted by the voters . . . cannot properly be interpreted to apply only to marriages performed outside of California."].)

The Court's conclusion was based on the plain language of Proposition 22 and supported by the ballot arguments, including rebuttal arguments. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 797-99.) A different conclusion would have been inconsistent with the "purpose" or public policy informing Proposition 22. (*Id.* at p. 800.) It was also required, the Court held, by the need to avoid "serious constitutional problems" under the federal Constitution. (*Id.* at p. 800.) "[I]t is appropriate to interpret the limitations imposed by section 308.5 as applicable to marriages performed in California as well as to out-of-state marriages, in order to avoid the serious federal constitutional questions that would be posed by a contrary interpretation." (*Ibid.*)

In short, under Proposition 22 as construed in the *Marriage Cases*, neither foreign nor domestic same-sex marriages – even if valid when and where performed – were legally valid or recognized in California and, therefore, such marriages could not be performed in California in the first place. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 799.) That dual effect – no recognition of same-sex marriages performed in-state or out-of-state, and

no right to contract same-sex marriages in California – is exactly what the ballot materials prepared by the Attorney General said would be the effect of Proposition 8.

Likewise, Proposition 8 is a recognition statute. It sets a rule precluding *present* legal recognition of non-traditional marriages. To uphold the now-paramount state interest behind the traditional marriage definition and at the same time avoid "serious federal constitutional questions," that rule should apply equally to all marriages, foreign or domestic. Proposition 8 denies recognition to same-sex (and plural) marriages lawfully contracted in foreign jurisdictions.[17] The same rule applies to non-traditional California marriages whenever contracted. If Proposition 8 is given the reading petitioners advocate (applying only to marriages contracted after November 4, 2008), then as the *Marriage Cases* hold the same rule would necessarily apply to foreign same-sex marriages. But that would deeply undermine the undisputed purpose of Proposition 8.[18] Even an inconsistent interpretation – recognizing interim same-sex marriages while denying recognition of foreign same-sex marriages – would seriously compromise the manifest public policy animating Proposition 8. The only way to uphold the clear intent of the people is to

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[17] At least twenty-eight countries legally allow plural marriage. (See Campbell, "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis," in Polygamy in Canada: Legal and Social Implications for Women and Children (Status of Women Canada, November 2005).)

[18] The ballot arguments linked that purpose with, among other things, the need to teach children a consistent message about the definition and meaning of marriage in California. (Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Rebuttal to Argument Against Prop. 8, p. 57, italics added; see Interveners' First RJN at Exh. 6.)

hold that Proposition 8 means precisely what it says – "Only marriage between a man and a woman is valid or recognized in California."[19]

D. Couples in Interim Same-Sex Marriages Retain Virtually All The Rights of Marriage. Proposition 8 Does Not Retroactively Strip Legal Rights from Same-Sex Couples.

Whereas petitioners' position gravely undermines the constitutional policy of recognizing only monogamous opposite-sex marriages, applying the plain meaning of Proposition 8 leaves couples in interim marriages with access to the full panoply of legal rights and interests of married couples. Legal interests (property rights, contracts, etc.) that vested during the interim period between the parties to an interim marriage – or between the couple and third parties – remain valid. As amici family law professors supporting Interveners demonstrate, the parties to interim marriages would qualify as putative spouses. (Brf. Fam. Prof. Supp. Inter., pp. 21-27; see also *In re Leslie* (1984) 37 Cal.3d 186, 191, fn.4; see also Fam. Code, § 2251.) Putative spouses are afforded a wide array of rights to protect their legal interests and legitimate expectations.[20]

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[19] Petitioners argue that Proposition 8 should be harmonized with other constitutional provisions. (Strauss Reply, pp. 51-68.) But as amicus Center for Constitutional Jurisprudence demonstrates in its brief (at pp. 8-11), harmonizing is not appropriate when a new constitutional provision limits older provisions. The more specific provision controls. (See also *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 45 ["As a means of avoiding conflict, a recent specific provision is deemed to carve out an exception to and thereby limit an older, general provision [of the Constitution]." (citations omitted)].) Proposition 8 cannot be substantively challenged under the state Constitution once its procedural validity under the revision/amendment analysis is established. Nor may petitioners inject what amount to federal constitutional arguments into this wholly state-law challenge. Arguments about whether Proposition 8 advances legitimate state interests are beyond the scope of this action.

[20] See, e.g., *In re Leslie* (1984) 37 Cal.3d 186, 191 n.5 ["Quasi-marital property is property acquired during a putative marriage which would have been community property or quasi-community property had the marriage

Further, interim marriage couples can readily avail themselves of California's comprehensive domestic partnership legislation to secure their interests going forward. Registration requirements consist of filling out and notarizing a simple two-page form and mailing it, with fees, to the Domestic Partners Registry at the Secretary of State's office in Sacramento. (See Fam. Code, §§ 298-298.6; see also website for California Domestic Partners Registry [detailing requirements and providing links to Form NP/SF DP-1, "Declaration of Domestic Partnership"].)[21] The parties'

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been valid."]; *id.* at p. 204 ["[A] surviving putative spouse is entitled to succeed to a share of the decedent's separate property." "[A] surviving putative spouse is entitled to first preference for letters of administration."]; *Sefton v. Sefton* (1955) 45 Cal.2d 872, 875 ["[Putative spouse] is entitled, upon annulment or other termination of the relationship, to have the property acquired during the purported marriage considered the same as community property and treated as such upon the dissolution of the marriage."]; *Estate of DePasse* (2002) 97 Cal.App.4th 92, 108 ["The putative marriage doctrine operates to protect expectations in property acquired through the parties' joint efforts."]; *In re Krone's Estate* (1948) 83 Cal.App.2d 766, 769 [putative spouse in intestacy case "is to take the same share that she would have been entitled as a legal spouse."]; *Kunakoff v. Woods* (1958) 166 Cal.App.2d 59, 67-68 [surviving putative spouse is actual heir of deceased putative spouse and is thus entitled to "bring an action for wrongful death"]; *Adduddell v. Bd. of Admin.* (1970) 8 Cal.App. 3d 243, 247-49 [putative spouse entitled to claim death benefits of deceased spouse]; *Neureither v. Workmen's Comp. App. Bd.* (1971) 15 Cal.App.3d 429, 433 ["putative spouse is a 'surviving widow' under second 4702 of the Labor Code" and thus entitled to workers' compensation death benefits]; *In re Marriage of Vryonis* (1988) 202 Cal.App.3d 712, 717 ["[A] putative spouse may also obtain spousal support."]; *Powell v. Rogers* (9th Cir. 1974) 496 F.2d 1248, 1250 ["An agreement to pool earnings entered into by a putative spouse with the other member of the union has also been accorded the same protection that it would have received had there been a valid marriage," citing *Sancha v. Arnold* (1952) 114 Cal.App.2d 772.).]

[21] See Request For Judicial Notice In Support Of Interveners' Answer To Amicus Curiae Briefs And Supplemental Response To Pages 75-90 Of The Attorney General's Answer Brief, filed herewith, at Exhibit 2.

registration responsibilities can be completed in under an hour. The domestic partnership appears to become effective upon filing. (*Ibid.*)

Once registered under California's comprehensive domestic partnership legislation, domestic partners enjoy essentially all the legal rights, privileges, benefits, and duties of marriage. (*Marriage Cases, supra*, 43 Cal.4th at p. 779; Fam. Code, § 297.5.) As this Court explained:

> The Legislature further specified that the provisions of the Domestic Partner Act "shall be construed liberally in order to secure to eligible couples who register as domestic partners *the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses.*"

(*Id.* at p. 802-03, quoting Stats. 2003, ch. 421, § 15, italics added by Court.)

Accordingly, the legal interests of same-sex couples are either already protected by the putative spouse doctrine or can be quickly and easily secured by registering as domestic partners. As suggested in Interveners' opposition brief, the Legislature can obviously provide additional protections, including automatic conversion of interim marriages to domestic partnership with an option to opt-out.[22] This Court also has various legal and equitable tools to protect legitimate interests. (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 684 ["the courts may look to a variety of other remedies in order to protect the parties' lawful expectations"]; *Whorton v. Dillingham* (1988) 202 Cal.App.3d 447, 453, fn. 1 [*Marvin* applies to same-sex partners as well as opposite-sex partners].)

To be sure, interim spouses would lose the *legal* recognition of their union as a "marriage." In legal matters, Proposition 8 reserves the title and

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[22] The amicus briefs eloquently attest to the eager willingness of the people's representatives to respond to such interests with decisive alacrity. (See Brief of Legislative Amici Curiae in Support of Petitioners Strauss, et al., at pp. 2-5.)

status of "marriage" for opposite-sex couples. But with comprehensive marriage rights available through domestic partnerships, the loss of that title is symbolic – it need not affect any legal rights. Although the symbolism and meaning of the term "marriage" have deep significance, the prospective loss of the legal use of that title does not raise retroactivity problems. Unlike a typical contract, the rights and obligations of marriage have always been subject to legislative control and change. As held by the Court of Appeal:

> Marriage is much more than a civil contract; it is a relationship that may be created and terminated only with consent of the state and in which the state has a vital interest.... [Marriage] has always been subject to the control of the legislature. . . . *[Marriage] is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws* for the public good and in pursuance of public policy, and such legislative amendments or enactments do not constitute an unconstitutional impairment of contractual obligations.

(*In re Walton* (1972) 28 Cal.App.3d 108, 112, citations omitted, italics added.)

The on-going democratic conversation reveals deeply held opinions about the meaning of marriage and how it should be defined to advance the interests of society. But the legal definition, meaning, symbolism, and status of marriage were precisely what Proposition 8 was intended to address. The people's sovereign intent should be respected.

CONCLUSION

The Court has now been favored with the analysis of numerous amici, who through able lawyers have given careful thought and reflection to the issues at hand. The names of literally scores of lawyers adorn the various well-crafted briefs on both sides. But for all the briefing and argumentation, and for all the drama surrounding Proposition 8, the

answers to the questions posed by the Court are to be found in the state's elaborate constitutional traditions, captured and embodied in this Court's well-established jurisprudence. The abiding message is this: The voice of the people should be respected. The democratic conversation should be allowed to continue. The petitions should be denied.

Dated: January 21, 2009

Respectfully submitted,

KENNETH W. STARR

LAW OFFICES OF ANDREW P. PUGNO
ANDREW P. PUGNO

RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for Interveners hereby certifies that this

INTERVENERS' ANSWER TO AMICUS CURIAE BRIEFS AND SUPPLEMENTAL RESPONSE TO PAGES 75-90 OF THE ATTORNEY GENERAL'S ANSWER BRIEF

is proportionately spaced, has a typeface of 13 points or more, and contains 9,716 words, including footnotes but excluding the Table of Contents, Table of Authorities and Certificate of Compliance, as calculated by using the word count feature in Microsoft Word.

Andrew P. Pugno

Andrew P. Pugno

Attorney for Interveners

PROOF OF SERVICE

I, Andrew P. Pugno, declare: I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 101 Parkshore Drive, Suite 100, Folsom, CA 95630.

On January 21, 2009, I served the following document(s):

1. **INTERVENERS' ANSWER TO AMICUS CURIAE BRIEFS AND SUPPLEMENTAL RESPONSE TO PAGES 75-90 OF THE ATTORNEY GENERAL'S ANSWER BRIEF**

on the interested parties in this action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

and served the document(s) in the manner indicated below:

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Folsom, California addressed as set forth below.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct. Executed on January 21, 2009, at Folsom, California.

Andrew P. Pugno

ANDREW P. PUGNO

Service List

Counsel for Parties in Supreme Court
Case Nos. S168047, S168066 and S168078:

SHANNON MINTER National Center for Lesbian Rights 870 Market Street, Suite 370 San Francisco, CA 94102 Tel 415-392-6257 *Attorneys for Petitioners KAREN L. STRAUSS et al.* (S168047)	GLORIA ALLRED Allred, Maroko & Goldberg 6300 Wilshire Blvd, Ste 1500 Los Angeles, CA 90048 323-653-6530 *Attorneys for Petitioners ROBIN TYLER et al.* (S168066)
DENNIS J. HERRERA City Attorney THERESE M. STEWART Deputy City Attorney City Hall, Room 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94012-4682 Telephone: (415) 554-4708 Facsimile: (415) 554-4699 *Attorneys for Petitioner CITY AND COUNTY OF SAN FRANCISCO* (S168078)	JEROME B. FALK, JR HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN A Professional Corporation Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4024 Telephone: (415) 434-1600 Facsimile: (415) 217-5910 *Attorneys for Petitioners City and County of San Francisco, Helen Zia, Lia Shigemura, Edward Swanson, Paul Herman, Zoe Dunning, Pam Grey, Marian Martino, Joanna Cusenza, Bradley Akin, Paul Hill, Emily Griffen, Sage Andersen, Suwanna Kerdkaew and Tina M. Yun* (S168078)
ANN MILLER RAVEL County Counsel Office of The County Counsel 70 West Hedding Street East Wing, Ninth Floor San Jose, CA 95110-1770 Telephone: (408) 299-5900 Facsimile: (408) 292-7240 *Attorneys for Petitioner COUNTY OF SANTA CLARA* (S168078)	ROCKARD J. DELGADILLO City Attorney Office of the Los Angeles City Attorney 200 N. Main Street City Hall East, Room 800 Los Angeles, CA 90012 Telephone: (213) 978-8100 Facsimile: (213) 978-8312 *Attorneys for Petitioner CITY OF LOS ANGELES* (S168078)

RAYMOND G. FORTNER, JR County Counsel 648 Kenneth Hahn Hall of Admin. 500 West Temple Street Los Angeles, CA 90012-2713 Telephone: (213) 974-1845 Facsimile: (213) 617-7182 *Attorneys for Petitioner COUNTY OF LOS ANGELES* (S168078)	RICHARD E. WINNIE County Counsel Office of County Counsel County of Alameda 1221 Oak Street, Suite 450 Oakland, CA 94612 Telephone: (510) 272-6700 *Attorneys for Petitioner COUNTY OF ALAMEDA* (S168078)
PATRICK K. FAULKNER County Counsel 3501 Civic Center Drive, Room 275 San Rafael, CA 94903 Telephone: (415) 499-6117 Facsimile: (415) 499-3796 *Attorneys for Petitioner COUNTY OF MARIN* (S168078)	MICHAEL P. MURPHY County Counsel Hall of Justice and Records 400 County Center, 6th Floor Redwood City, CA 94063 Telephone: (650) 363-1965 Facsimile: (650) 363-4034 *Attorneys for Petitioner COUNTY OF SAN MATEO* (S168078)
DANA MCRAE County Counsel, County of Santa Cruz 701 Ocean Street, Room 505 Santa Cruz, CA 95060 Telephone: (831) 454-2040 Facsimile: (831) 454-2115 *Attorneys for Petitioner COUNTY OF SANTA CRUZ* (S168078)	HARVEY E. LEVINE City Attorney 3300 Capitol Avenue Fremont, CA 94538 Telephone: (510) 284-4030 Facsimile: (510) 284-4031 *Attorneys for Petitioner CITY OF FREMONT* (S168078)
RUTAN & TUCKER, LLP PHILIP D. KOHN City Attorney, City of Laguna Beach 611 Anton Boulevard, Fourteenth Floor Costa Mesa, CA 92626-1931 Telephone: (714) 641-5100 Facsimile: (714) 546-9035 *Attorneys for Petitioner CITY OF LAGUNA BEACH* (S168078)	JOHN RUSSO City Attorney Oakland City Attorney City Hall, 6th Floor 1 Frank Ogawa Plaza Oakland, CA 94612 Telephone: (510) 238-3601 Facsimile: (510) 238-6500 *Attorneys for Petitioner CITY OF OAKLAND* (S168078)

MICHAEL J. AGUIRRE City Attorney Office of the City Attorney, City of San Diego Civil Division 1200 Third Avenue, Suite 1620 San Diego, CA 92101-4178 Telephone: (619) 236-6220 Facsimile: (619) 236-7215 *Attorneys for Petitioner CITY OF SAN DIEGO* (S168078)	ATCHISON, BARISONE, CONDOTTI & KOVACEVICH JOHN G. BARISONE City Attorney Santa Cruz City Attorney 333 Church Street Santa Cruz, CA 95060 Telephone: (831) 423-8383 Facsimile: (831) 423-9401 *Attorneys for Petitioner CITY OF SANTA CRUZ* (S168078)
MARSHA JONES MOUTRIE City Attorney Santa Monica City Attorney's Office City Hall 1685 Main Street, 3rd Floor Santa Monica, CA 90401 Telephone: (310) 458-8336 Telephone: (310) 395-6727 *Attorneys for Petitioner CITY OF SANTA MONICA* (S168078)	LAWRENCE W. MCLAUGHLIN City Attorney City of Sebastopol 7120 Bodega Avenue Sebastopol, CA 95472 Telephone: (707) 579-4523 Facsimile: (707) 577-0169 *Attorneys for Petitioner CITY OF SEBASTOPOL* (S168078)
EDMUND G. BROWN JR. CHRISTOPHER E. KRUEGER MARK R. BECKINGTON Office of the Attorney General 1300 I St Ste 125 Sacramento, CA 95814-2951 (916) 445-7385 *Attorneys for Respondent EDMUND G. BROWN JR.* (S168047, S168066, S168078) *and for Respondent STATE OF CALIFORNIA* (S168066)	KENNETH C. MENNEMEIER MENNEMEIER, GLASSMAN & STROUD LLP 980 9th Street, Suite 1700 Sacramento, CA 95814-2736 Telephone: (916) 553-4000 Facsimile: (916-553-4011 *Attorneys for Respondents MARK B. HORTON and LINETTE SCOTT* (S168047, S168078)

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Counsel for those of Amici Curiae answered by Interveners (Rule 8.520(f)(7)):

WILLIAM C. DUNCAN MARRIAGE LAW FOUNDATION 1868 N 800 E Lehi, UT 84043 Telephone: 801-367-4570 *Attorneys for Amicus Curiae National Organization for Marriage California*	TIMOTHY CHANDLER ALLIANCE DEFENSE FUND 101 Parkshore Drive, Ste 100 Folsom, CA 95630 Telephone: 916-932-2850 Facsimile: 916-932-2851 *Attorneys for Amicus Curiae Family Research Council*
JAMES F. SWEENEY SWEENEY & GREENE 9381 East Stockton Blvd, Ste 218 Elk Grove, CA 95624 Telephone: 916-753-1300 Facsimile: 916-753-1333 *Attorneys for Amici Curiae California Catholic Conference et al.*	COURTNEY G. JOSLIN University of California, Davis School of Law 400 Mrak Hall Drive Davis, CA 95616 Telephone: 530-752-8325 Facsimile: 530-752-4704 *Attorneys for Amici Curiae Professors of Family Law in Support of Petitioners*
ALEXANDRA M. SNYDER Issues 4 Life Foundation 8615 Fair Oaks Blvd, Ste 38 Carmichael, CA 95608 Telephone: 916-223-8990 *Attorneys for Amicus Curiae Issues 4 Life*	STEVEN MEIERS 161 South Woodburn Drive Los Angeles, CA 90049-3027 Telephone: 310-476-2530 *Amicus Curiae Pro Per*
DONNA M. RYU HASTINGS CIVIL JUSTICE CLINIC 100 McAllister St., Ste. 300 San Francisco, CA 94102 Telephone: 415-557-7887 Facsimile: 415-557-7895 *Attorneys for Amici Curiae Constitutional and Civil Rights Law Professors*	ETHAN DETTMER GIBSON, DUNN & CRUTCHER LLP 555 Mission Street, Suite 3000 San Francisco, CA 94105 Telephone: 415-393-8200 Facsimile: 415-393-8306 *Attorneys for Legislative Amici Curiae in Support of Petitioners Strauss, et al.*

DEAN HANSELL DEWEY & LeBOEUF, LLP 333 South Grand Avenue, Ste 2600 Los Angeles, CA 90071 Telephone: 213-621-6000 Facsimile: 213-621-6100 *Attorneys for Amici Curiae San Francisco Chamber of Commerce et al. in Support of Petitioners*	STEPHEN KENT EHAT Attorney at Law 167 North 1150 East Lindon, Utah 84042-2527 Telephone: 877-342-8529 Facsimile: 877-342-8329 *Attorneys for Amici Curiae Professors of Law Opposing the Petitions Regarding Issue Number Three and Regarding the Issue Set Forth on Pages 75-90 of the Answer Brief Filed by the Attorney General*
LAWRENCE J. JOSEPH 1250 Connecticut Ave., NW, Suite 200 Washington, DC 20036 Telephone: (202) 669-5135 Telecopier: (202) 318-2254 *Attorneys for Amicus Curiae Eagle Forum Education & Legal Defense Fund*	LIBERTY COUNSEL Mary E. McAlister SBN 148570 Post Office Box 11108 Lynchburg, VA 24506 Telephone: (434) 592-7000 Facsimile: (434) 592-7700 *Attorneys for Amicus Curiae Campaign for California Families*
DAVID L. LLEWELLYN, JR. JOHN EASTMAN CENTER FOR CONSTITUTIONAL JURISPRUDENCE c/o Chapman University School of Law One University Drive Orange, California 92866 Telephone: (714) 628-2500 *Attorneys for Amicus Curiae Center for Constitutional Jurisprudence*	