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Case No. S168047
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CLERK SUPREME COURT

Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert,
Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra
North, Celia Carter, Desmond Wu, James Tolen and Equality
California,

Petitioners,

— v.

Mark D. Horton, in his official capacity as State Registrar of Vital
Statistics of the State of California and Director of the California
Department of Public Health; Linette Scott, in her official capacity as
Deputy Director of Health Information & Strategic Planning for the
California Department of Public Health; and Edmund G. Brown, Jr.,
in his official capacity as Attorney General for the State of California,

Respondents.

DENNIS HOLLINGSWORTH, et al

Interveners

**AMICUS CURIAE BRIEF OF CAMPAIGN FOR
CALIFORNIA FAMILIES IN SUPPORT OF INTERVENERS**

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SUPREME COURT
FILED

JAN 16 2009

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Amicus Curiae Campaign for California Families, hereby submits the following Amicus Curiae Brief in Support of Intervener-Respondents.

INTEREST OF AMICUS CURIAE

The Campaign and its constituents have participated in the marriage protection initiative process since 1998 when the Campaign's executive director, Randy Thomasson, filed the text for what became Proposition 22 on behalf of its proponents. The Campaign and its constituents participated in education and advocacy for Proposition 22, which was enacted as Family Code § 308.5 by the voters in 2000. The Campaign participated in the consolidated marriage cases, which challenged the constitutionality of Proposition 22, from their inception in 2004 through this Court's May 15, 2008 decision. *In re Marriage Cases* (2008) 43 Cal.4th 757.

Beginning in 2005 the Campaign and its constituents began drafting and submitting proposed initiatives to add the definition of marriage as the union of one man and woman to the Constitution. While none of the Campaign's proposed initiatives qualified for the ballot, the Campaign earnestly worked in support of Proposition 8 when the Interveners' proposed initiative qualified for the 2008 ballot.

Through their involvement in the initiation and enactment of Proposition 22 (2000) and Proposition 8 (2008), the Campaign and its

members have participated extensively in the formation of California's statutory and constitutional law in the very way envisioned by their predecessors when they reserved to themselves the right of initiative and referendum, Cal. Const., art. 2 §8 and art. 4 §1 and the right to amend the Constitution by initiative, Cal. Const., art. 18 § 3. The Campaign's interests represent the full measure of the constitutional right of amendment by initiative, from drafting proposed constitutional amendments, to soliciting signatures to place amendments on the ballot, supporting Proposition 8 once it qualified, educating voters and voting to approve the amendment. Petitioners now want to overturn those efforts and to undermine the people's right to amend the Constitution by initiative. Petitioners' requested relief would directly and significantly affect the Campaign's, and other California voters' rights. The Campaign, therefore, has a vested interest in ensuring that the right that this Court has called "precious to the people," is preserved "to the fullest tenable measure of spirit as well as letter." *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 [196 P.2d 787]. That includes ensuring that the intent of the voters to invalidate any marriages except those between one man and one woman no matter when or where entered into is effectuated.

SUMMARY OF ARGUMENT

Noticeably absent from Petitioners' analysis of the constitutional

implications of Proposition 8 is the devastating effect its invalidation would have on the constitutional rights of those who exercised the right of initiative and on the bedrock doctrine of separation of powers. Underlying Petitioners' claims that Proposition 8 is an invalid "revision" are subtle yet dangerous propositions: (1) That the people have the right to amend the constitution only if the subject matter is politically popular, and (2) That this Court assumes varying roles of law interpreter, law maker or both as circumstances dictate. Either of these propositions would wreak havoc on the state's constitutional foundation.

A cornerstone of that foundation is the right of initiative reserved to the people, a right that this Court has championed since the right was defined in the Constitution in 1911. Challenges to the people's exercise of the right from legislators, municipalities and corporations have been rejected in deference to the paramount right of the people to amend the Constitution. *See Legislature v. Eu* (1991) 54 Cal.3d 492, [816 P.2d 1309, 286 Cal.Rptr. 283]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246, [149 Cal.Rptr. 239, 583 P.2d 1281]; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814-815, [771 P.2d 1247, 258 Cal.Rptr. 161]. Even when the initiative right has been exercised in direct opposition to a ruling of this Court, the right has been upheld as "one of the most precious

rights of our democratic process.” *Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41, 557 P.2d 473]. Petitioners now ask that the right be disregarded because it has been exercised in a manner with which they disagree. However, the effect of an amendment on particular segments of the population has never been the litmus test for its validity. Adopting such a test now, as Petitioners request, would render the “most precious right” all but meaningless, and the Court should decline Petitioner’s invitation.

Similarly, this Court should not assume the chameleon-like role suggested by Petitioners, but should continue to honor another cornerstone of California’s constitutional foundation—separation of powers. Ironically, Petitioners are asking this Court to do what they accuse Proposition 8 of doing, *i.e.*, fundamentally altering the judiciary’s role. Petitioners seek to transform this Court from the interpreter of the Constitution to a fungible interpreter/lawmaker, which would change its role when the rights at issue are sufficiently controversial. As Interveners said in their opposition brief, to accept such a role would cause this Court to tear away from its constitutional moorings. (Interveners’ Opposition Brief, p. 35).

Indeed, if this Court were to adopt Petitioners’ view of the judiciary, then the Court and the people of California would be set adrift on a sea of

uncertainty. Rather than being anchored to the bedrock principles that have held this state together for more 150 years, the court, legislature and voters would be left standing on shifting sand, to be tossed about by the winds of social and political change. This Court should not let that scenario become a reality.

LEGAL ARGUMENT

I. THE EXTRAORDINARY PROPOSALS BY THE PETITIONERS AND THE ATTORNEY GENERAL, NOT PROPOSITION 8, VIOLATE THE SEPARATION OF POWERS.

Petitioners are rightly concerned about the possible deterioration of the doctrine of separation of powers. However, they have misdirected their concern toward Proposition 8 instead of turning a mirror onto their crusade to invalidate the amendment, which is the true threat to the tripartite system of government in both the United States and California constitutions. For nearly 100 years, this Court has steadfastly upheld the people's right to amend the Constitution by initiative, even when those initiatives have affected fundamental rights or directly overturned a ruling by this Court. *See, e.g. In re Lance W.* (1985) 37 Cal.3d 873, 892 (upholding an initiative amendment that limited the exclusionary rule), *People v. Frierson* (1979) 25 Cal. 3d 142, 184-188 (upholding an initiative amendment that reinstated the death penalty, overturning this Court's holding that capital punishment is cruel and unusual

in *People v. Anderson* (1972) 6 Cal.3d 628, 649). The extent of this Court's protection of the people's initiative right is illustrated by the fact that since the right was added to the Constitution in 1911, this Court has only twice struck down an initiative amendment. *McFadden v. Jordan* (1948) 32 Cal. 2d 330 (Pre-election challenge striking down a proposed initiative that would have added 12 new sections consisting of 21,000 words to the Constitution); *Raven v. Deukmejian* (1990) 52 Cal.3d 336 (Post-election challenge striking down an amendment for its qualitative effect of vesting power over criminal defense rights in the United States Supreme Court). Even while striking down a proposed initiative, the *McFadden* court emphasized the paramount importance of the people's reserved right to amend the Constitution by initiative. "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." *McFadden*, 32 Cal.2d at 332. The rarity of cases striking down initiative amendments reflects this Court's recognition of the people's power to amend the Constitution by initiative as "one of the outstanding achievements of the progressive movement of the early 1900's." *Associated Home Builders*, 18 Cal.3d at 591.

Declaring it "the duty of the courts to jealously guard this right of the people"[citation omitted], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" [citations omitted].

“[I]t 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.”[citation omitted].

Id. In keeping with this policy, this Court has limited its review of challenged initiative measures to two issues: (1) Whether the amendment represents a quantitative change to the Constitution, defined as “an enactment which is so extensive in its provisions as to change directly the ‘substantial entirety’ of the Constitution by the deletion or alteration of numerous existing provisions,” *Amador Valley*, 22 Cal.3d at 222; or (2) Whether the amendment represents a qualitative change to the Constitution, defined “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*, 54 Cal.3d at 509. Notably, the qualitative review does not include a review of the substantive nature of the rights or “underlying principles” of the challenged amendment, nor should it if the Court is to uphold the people’s right of initiative and preserve its limited role as interpreter (not creator) of the Constitution.

Petitioners are asking this Court to disregard nearly 100 years of protection of the people’s right of initiative and to create for itself a new role wholly outside of anything contemplated under the Constitution. Petitioners want this court to delve into the substantive nature of this constitutional

amendment and to determine whether it coincides with current political and social viewpoints. This is a slippery slope that could turn the judiciary into little more than judges in a popularity contest – if the substance of an amendment is acceptable under certain societal standards, then it is permitted to stand, but if its is not, then it is overturned. This Court should reject such an unjustified and harmful expansion of its power of judicial review.

A. Petitioners Are Asking This Court To Usurp The Legislative Functions Reserved To The People.

It is well settled in California that “the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated....” *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1074, [95 P.3d 459, 17 Cal.Rptr.3d 225] (citing *McClure v. Donovan* (1949) 33 Cal.717, 728 [205 P.2d 17]). Since the people of California have reserved to themselves the initiative power as to both statutes and constitutional amendments, that power to control the subject of marriage, including its creation, is vested not only in the Assembly and Senate, but in the voters of California acting under their reserved initiative power. *See, generally, Eu*, 54 Cal.3d at 501 (Describing art. IV sec. 1 of the Constitution and the need to interpret enactments liberally to promote the democratic process). Consequently, “[a]s with statutes adopted by the Legislature, all presumptions favor the validity of initiative measures and mere doubts as to

validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.” *Id.* (citing *Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d at 814).

This Court has emphasized that when adjudicating the validity of an initiative amendment such as Proposition 8, “our duty is clear: ‘We do not consider or weigh the economic or social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate [it] legally in the light of established constitutional standards.’” *Calfarm*, 48 Cal.3d at 814.

It is not the province of this court to consider the arguments of social policy which have been urged upon it by each side; these are matters which must be, and no doubt were, addressed to the legislature. We have no authority to question the wisdom or unwisdom of the scheme set up by the statute, and we cannot deliberate upon the social desirability of making benefit payments to groups which are excluded by the statute.

Bodinson Mfg. Co. v. California Employment Commission (1941) 17 Cal.2d 321, 325. The judiciary may be asked to decide whether a statute is arbitrary or unreasonable for constitutional purposes, but no inquiry into the “wisdom” of underlying policy choices is made *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461 [202 P.2d 38]. This Court has consistently followed this rule when reviewing challenges brought to other prominent constitutional amendments. For example, this Court refused to delve into the policy arguments raised by opponents of the Victim’s Bill of Rights, also known as

Proposition 8 on the 1982 ballot. *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 261. The petitioners in *Brosnahan* claimed that the 1982 Proposition 8 would abridge the constitutional right to public education and prevent the judiciary from deciding cases. *Id.* This Court rejected those claims as “dire predictions” of “judicial and educational chaos” that were wholly unsupported by the language and composition of the amendment. *Id.* Similarly, Proposition 13 opponents’ arguments that the amendment would eliminate home rule and convert the state from a republic to a democracy were rejected by this Court as wholly unsupported by the text of the amendment. *Amador Valley*, 22 Cal.3d at 226. Opponents of Proposition 140 argued that the term limits and budget restrictions would mean that the Legislature will be unable to discharge its duties and special interest groups would increase in power, and, as was true in *Brosnahan* and *Amador Valley*, this Court properly held that it was in no position to resolve the social and political policy arguments. *Eu*, 54 Cal.3d at 510.

This Court should continue to follow these carefully crafted guidelines that preserve the bright line between the judiciary’s role to effectuate the purpose of legislative enactments and the legislature/people’s role of creating the enactments. *See People v. Bunn* (2002) 27 Cal.4th 1, 16-17 [37 P.3d 380, 115 Cal.Rptr.2d 192]. Just as it was not within the province of this Court to

consider the social policy arguments in *Bodinson*, *Brosnahan*, *Amador Valley* and *Eu*, it is not within the province of this Court to consider the arguments of social policy urged upon it by Petitioner and by the Attorney General. This Court has consistently held that it does not have the authority to question the wisdom or social desirability of the subject matter of initiative amendments. Neither Petitioners nor the Attorney General advances any theory that justifies deviating from this long-established rule or upsetting the underlying balance of power that is a cornerstone of the state and federal constitutions. This Court should decline the invitation to take on a new role as a hybrid interpreter/lawmaker.

B. Invalidating Proposition 8 Would Undermine The People's Power As The Authors Of The Constitution And The Rights It Defines.

Petitioners are not only asking this Court to exceed its own granted powers, but also to undermine the role of the people as the authors of the Constitution that grants those powers. Less than ten years after statehood, this Court described the relationship between the people and the courts. *Ex Parte Newman* (1858) 9 Cal.502.

The power to decide what individual right must be conceded to society, originally existed in the sovereign people who made the Constitution. As they possessed this primary and original jurisdiction, their action must be final. If they exercise this power, in whole or in part, in the formation of the Constitution, their action, so far, is conclusive. It must also be conceded that

this power, from its very nature, must be legislative and not judicial. The question is simply one of necessity--of abstract justice. It is a question that naturally enters into the mind of the law-maker, not into that of the law-expounder. The judicial power, from the nature of its functions, can not determine such a question. Judicial justice is but conformity to the law as already made. If these views be correct, the judicial department can not, in any case, go behind the Constitution, and by any original standard judge the justice or legality of any single one or more of its provisions. **The judiciary is but the creature of the Constitution, and can not judge its creator. It can not rise above the source of its own existence. If it could do this, it could annul the Constitution, instead of simply declaring what it means.**

Id. at 511-512 (Burnett, J., concurring)(emphasis added). That is precisely the result that Petitioners are seeking. Petitioners and the Attorney General claim that the action of the people in amending the Constitution should not be conclusive in this case, not because of any procedural infirmity with the ballot measure, but because the people did not give the right answer. Petitioners do not want this Court to merely declare what Proposition 8 means, but to annul the amendment as contrary to what they perceive should be prevailing social policy.

Petitioners are asking this Court to go beyond the Constitution and to second-guess the wisdom of its creators. The potential consequences of such an action would be devastating. Every new constitutional amendment would be filtered through a sieve of current societal trends. If a particular amendment meets with the approval of the guardians of society's norms, then it will be

declared valid; if not, then it will be declared invalid regardless of the extent of approval from the voters. That is the logical outgrowth of Petitioners' request to go beyond the language and intent of Proposition 8 and invalidate it on social policy grounds. Accepting that invitation would render the people's right to amend the Constitution meaningless and would overturn nearly 100 years of precedent aimed at safeguarding that right..

As this Court noted in *Amador Valley*, the *raison d'etre* for the initiative amendment process is the people's desire to have a means of enacting statutes and amendments when "the ordinary machinery of legislation has failed." *Amador Valley*, 22 Cal.3d at 229.

As succinctly and graphically expressed a number of years ago in a study of the California procedure, ". . . the initiative is in essence a legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end. Virtually every type of interest-group has on occasion used this instrument. It is deficient as a means of legislation in that it permits very little balancing of interests or compromise, but it was designed primarily for use in situations where the ordinary machinery of legislation had utterly failed in this respect. It has served, with varying degrees of efficacy, as a vehicle for the advocacy of action ultimately undertaken by the representative body." (Key & Crouch, *The Initiative and the Referendum in Cal.* (1939) p. 485).

Id. at 228-229. As this Court said with regard to the challenge to Proposition 13, "[t]he foregoing language, written almost 40 years ago, seems remarkably prophetic given the apparent historic origins of article XIII A." *Id.* at 229.

“Indeed, if the foregoing description of the initiative as a ‘legislative battering ram’ is accurate it would seem anomalous to insist, as petitioners in effect do, that the sovereign people cannot themselves act directly to adopt tax relief measures of this kind, but instead must defer to the Legislature, their own representatives.” *Id.*

The language is equally prophetic in light of the history of Proposition 8. The language of Proposition 8 was initially enacted by initiative on March 7, 2000 as Proposition 22, and codified as Family Code §308.5. In 2001 AB 25 granted 15 specific rights previously available only to married couples to domestic partners and in 2003 AB 205 granted to domestic partners all the rights, benefits and obligations available under state law to spouses. The cases which became coordinated as *In re Marriage Cases* were filed in 2004, challenging the constitutionality of Family Code §308.5. On September 27, 2007, as that case was proceeding through the Court of Appeal and this Court, the Legislature approved AB 43, which would have amended Family Code §300 to read: “Marriage is a personal relation arising out of a civil contract between two persons, to which the consent of the parties capable of making that contract is necessary.”¹ The bill was vetoed by Governor Schwarzenegger,

¹.(http://leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_bill_20070927_enrolled.html. (Last visited November 14, 2008)).

but further demonstrated to the electorate that the Legislature was not disposed to memorializing the definition of marriage as one man and one woman either in the Family Code or the Constitution. In the midst of the court challenge to Proposition 22 and the Legislature's efforts to change the definition of marriage what became Proposition 8 was circulated, qualified for the ballot and eventually approved by 52 percent of California voters on November 4, 2008. Proposition 8, therefore, represents the voters exercising the initiative power in the very way their predecessors intended – “for use in situations where the ordinary machinery of legislation had utterly failed in this respect.” *Amador Valley*, 22 Cal.3d at 229. For this Court to now invalidate those efforts and insist that the people seek relief from the Legislature that has refused to implement the will of the people would destroy the very foundation of the initiative power.

As this Court's decision in *Frierson* demonstrates, even if Proposition 8 is viewed as an attempt to overrule this Court's May 15, 2008 ruling, that would not justify its invalidation. In *Frierson*, this Court said that the electorate's enactment of what became art. I sec. 27 of the Constitution was clearly intended to circumvent this Court's 1972 decision, *People v. Anderson* (1972) 6 Cal.3d 628, 656, that declared the death penalty unconstitutional. *Frierson*, 25 Cal.3d at 184. The language of the *Anderson* case and the

language of the constitutional amendment illustrate the depth of the electorate's desire to overrule the decision. In *Anderson*, the Court held that the death penalty was "unnecessary to any legitimate goal of the state and [is] incompatible with the dignity of man and the judicial process." *Anderson*, 6 Cal.3d at 656. A few months later, the voters added the following language to the Constitution: "The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.." *Frierson*, 25 Cal.3d at 184. In upholding the amendment against a challenge similar to Petitioners' challenge here, this Court said, "the adoption of defendant's position might effectively bar the people from ever directly reinstating the death penalty, despite the apparent belief of a very substantial majority of our citizens in the necessity and appropriateness of the ultimate punishment." Similarly, adoption of Petitioners' position in this case would effectively bar the people of California from ever reinstating the definition of marriage as the union of one man and one woman, despite the stated belief, expressed twice in an eight-year period, of a majority of California citizens.

As this Court said in its May 15, 2008 decision, "the provisions of the

California Constitution itself constitute the ultimate expression of the people's will." *In re Marriage Cases* (2008) 43 Cal.4th 757, 852. As part of the Constitution, Proposition 8 is now part of that expression and should not be subject to the kind of destructive subjective scrutiny suggested by Petitioner and the Attorney General. Proposition 8 is a valid amendment to the state Constitution and must be upheld.

II. THE INTENT OF THE VOTERS WHO ENACTED PROPOSITION 8 IS PARAMOUNT IN DETERMINING THE VALIDITY OF SAME-SEX "MARRIAGES" ENTERED INTO BETWEEN JUNE AND NOVEMBER 2008, AND THAT INTENT CLEARLY PROVIDES THAT THE "MARRIAGES" ARE NOT VALID OR RECOGNIZED IN CALIFORNIA.

The Court's duty to "jealously guard" the people's right to amend the Constitution by initiative, *Associated Home Builders*, 18 Cal.3d at 591, also includes safeguarding the express intent of the voters regarding the effect of the provisions they have enacted. "In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." *In re Lance W.*, 37 Cal.3d at 889. "We are mindful that the goal of statutory construction is ascertainment of legislative intent so that the purpose of the law may be effectuated." *Id.* With regard to constitutional amendments, the terms used are construed in light of existing statutory definitions or judicial interpretations, **in the absence of evidence of a contrary legislative or popular intent.** *Heckendorn v. City*

of San Marino (1986) 42 Cal.3d 481, 486 [723 P.2d 64, 229 Cal.Rptr. 324] (emphasis added). Evidence of the legislative or popular intent of an enactment includes not merely the text of the amendment, but also other “indicia of voters’ intent,” including ballot summaries and arguments. *Eu*, 54 Cal.3d at 504; *Lance W.*, 37 Cal.3d at 888 n.8. In this case, those indicia demonstrate that the intent of the voters was to invalidate marriages other than those between one man and one woman, whenever and wherever they were entered into.

The ballot argument in favor of Proposition 8 states that it “*restores the definition of marriage* to what the vast majority of California voters already approved and human history has understood marriage to be.” (Voter Information Guide, General Election (November 4, 2008), Argument in Favor of Proposition 8, Exhibit 14 to the Attorney General’s Request for Judicial Notice “RJN”) (emphasis in original). More particularly, in response to the argument against Proposition 8 proponents explicitly said, “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.” (Rebuttal to Argument Against Prop. 8, Exhibit 14 to the Attorney General’s RJN).

Rather than creating a new law, the voters declared what the law has always been and continues to be with regard to the definition of marriage.

Therefore, it is not entirely accurate to say that Proposition 8 became “effective” on November 6, 2008 so much as it memorialized existing legal precepts. That being the case, the question of validity of “marriages” between anyone other than one man and one woman is not a question of whether a new law should be applied retroactively to invalidate “marriages.” Instead, it is a question of whether unions of other than one man and one woman entered into between June and November 2008 can be called “marriages.” The text and legislative history of Proposition 8 make it clear that, according to the authors of the Constitution, the answer is “no.”

The terms of Proposition 8 are not to be construed in light of this Court’s May 15, 2008 interpretation of marriage. Instead, the language must be interpreted in accordance with the voters’ clear intent that marriage in California is defined solely as the union of one man and one woman, so that no other union will be recognized or validated in California no matter when or where entered into.

The voters’ declaration that marriage other than that between one man and one woman is not recognized or valid is similar to the declaration against slavery made in the Thirteenth Amendment. Faced with a similar question on the scope and effect of the Thirteenth Amendment on existing rights, the United States Supreme Court noted that the amendment was self-executing and

applied to all existing sets of circumstances. *Civil Rights Cases* (1883) 109 U.S. 3, 20. “By its own unaided force it abolished slavery, and established universal freedom.” *Id.* The Thirteenth Amendment was not merely a prohibition against state laws establishing or upholding slavery, but an absolute declaration that slavery shall not exist anywhere in the United States. *Id.* Similarly, Proposition 8 is an absolute declaration that marriage shall not exist in California except as the union of one man and one woman. Unions of other than one man and one woman entered into prior to November 4, 2008, can not be “grand-fathered in” as “marriages” anymore than existing agreements could be “grand-fathered in” as slavery contracts after the passage of the Thirteenth, Fourteenth and Fifteenth Amendments to the U.S. Constitution.

Furthermore, if licenses issued to same-sex couples, or any group other than one man and one woman, prior to November 4, 2008, were somehow “grand-fathered,” then the state could not recognize those licenses and fail to recognize others without violation equal protection and the privileges and immunities clause. This would be particularly true with regard to people moving into California from others states that recognized same-sex marriage. *See, generally, Hague v. C.I.O.* (1939) 307 U.S. 496, 511 (The Privileges and Immunities Clause means “that in any State every citizen of any other State is

to have the same privileges and immunities which the citizens of that State enjoy.”). Failing to recognize or validate their “marriage” entered into between June and November 2008 (or any other time) but recognizing a similar “marriage” entered into in California would raise privileges and immunities claims. *See, id.* The simple answer is and must be that no same-sex marriage license is valid or recognized after the passage of Proposition 8.

CONCLUSION

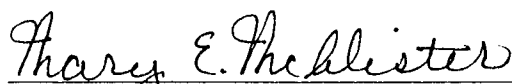
The pre-eminent role accorded to the people as the authors of the Constitution has been recognized and safeguarded by this Court for nearly 100 years. In carrying out its duty to “jealously guard” that “most precious” right of the electorate, this Court has consistently rejected challenges to the validity of initiative amendments, even when the amendments have expressly overturned prior rulings by the Court or affected fundamental rights. This Court has strictly limited its review of initiative constitutional amendments and thereby protected both the people’s right to amend the Constitution and its role as interpreter of the law. Petitioners are asking this Court to walk away from the bedrock concept of separation of powers and embark on a new journey of selective and subjective validation of only those amendments that pass a social policy approval test. That is an invitation that this Court should reject.

Similarly, this Court should reject the Petitioners’ and Attorney

General's position that Proposition 8 cannot be "applied retroactively" to invalidate "marriages" between same-sex couples entered into between June and November 2008. Proponents and the voters who approved Proposition 8 clearly stated that the measure did not create a new law, but declared the existing law. Therefore, any unions between anyone other than a man and a woman are not recognized as valid marriages regardless of when or where they were obtained.

On these bases, the Campaign respectfully requests that this Court deny the relief requested by Plaintiffs and declare that any unions between same-sex couples solemnized between June and November 2008 are not "marriages."

Respectfully submitted this 14th day of January, 2009.



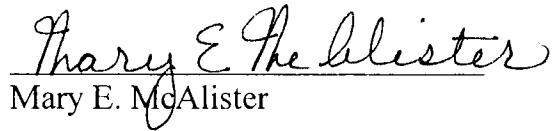
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Amicus Brief has been prepared using proportionately double-spaced 13 point Times New Roman font. According to the “word count” feature of WordPerfect, which was used to prepare this document, the total number of words including footnotes but excluding the Table of Contents and Table of Authorities, is 5,345 words.

I declare under penalty of perjury under the laws of the State of California that this statement is true and correct.

Executed on January 14, 2009 at Lynchburg, Virginia.


Mary E. McAlister

DECLARATION OF SERVICE BY FIRST CLASS MAIL

I, Mary E. McAlister, declare:


I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the above-entitled cause. My business address is 100 Mountain View Road, Suite 2775, Lynchburg, VA 24502.

I served the Amicus Curiae Brief by depositing a copy of the document in a box or other facility regularly maintained by First Class Mail, with postage pre-paid, addressed to:

See Attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 14, 2009.



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