CASE NO. S168047

IN THE

Supreme Court of the State of California

KAREN L. STRAUSS, RUTH BORENSTEIN, BRAD JACKLIN, DUSTIN HERGERT, EILEEN MA, SUYAPA PORTILLO, GERARDO MARIN, JAY THOMAS, SIERRA NORTH, CELIA CARTER, DESMUND 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,

AND

DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, MARK A. JANSSON, AND **PROTECTMARRIAGE.COM,** YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

INTERVENORS.

AMICUS BRIEF OF CATHOLIC ANSWERS IN SUPPORT OF PROPONENT INTERVENORS DISCUSSING THE LIMITED EFFECT OF PROPOSITION 8 ON EQUAL PROTECTION

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Introduction

This Court solicited briefing on three topics of interest to it in its November 19, 2008, order. Amicus Catholic Answers will focus on the first of the three questions in this brief. Specifically, this amicus brief will address how Proposition 8 amends, rather than revises, the California Constitution and, as such, has a minimal equal protection ramifications.

Statement of the Issue

I. Whether Proposition 8 is valid because it constitutes an amendment to, rather than a revision of, the California Constitution.

Argument

I. Proposition 8 Amends the California Constitution to Define the Scope of a Fundamental Right.

In California, the right of a man or a woman to enter into a marriage relationship is a fundamental right. *See, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 419 (2008) ("Although our state Constitution does not contain any explicit references to a 'right to marry,' past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution" and listing multiple cases in support of this proposition). By defining marriage as being a relationship between a man and a woman, Proposition 8 serves three important purposes: 1) it defines the marriage relationship as it has

been understood throughout society and the law for all of history; 2) it affords the California courts and legislature the ability to apply and enforce equal protection outside of, and inside of, the marriage relationship consistently and predictably; and 3) it guarantees that all men and all woman are provided equal protection under the laws, without reference to anything but their sex. In serving these purposes, Proposition 8 has no impact on equal protection rights outside of marriage, nor does it discriminate.

A. Marriage Is and Has Always Been Defined As a Relationship Between a Man and a Woman.

Proposition 8 does not revise Californians' fundamental right to marry. Instead, Proposition 8 merely defines the fundamental right in the same way that society and the law have always defined it.

Throughout California's history—and the history of virtually every state, country, and culture throughout time—marriage has been defined as a relationship between a man and a woman.[1] Even in its opinion that invalidated a statutory definition of marriage as being between one man and

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[1]The reasons behind the basis of the male-female marriage relationship are myriad, and include procreation and stability. *See, e.g.*, Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773 (Spring 2002); Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771 (Summer 2001).

one woman, this Court recognized that "[f]rom the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." *In re Marriage Cases*, 183 P.3d 384, 407 (Cal. 2008) (footnote omitted).[2] Although in certain circumstances this right has been limited in ways that were later found to be unconstitutional,[3] equal protection now extends the right to enter into marriage to all men and to all women equally.

Because marriage has always been a relationship between one man and one woman, allowing marriage to be defined otherwise would be a revision to the California Constitution. Defining marriage in the way that it has always been defined, as Proposition 8 does, is effectively no change to the constitution at all, merely serving to expressly affirm the premises upon which the Constitution is based.

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[2]Although the majority opinion in *In re Marriage Cases* recognized the long-standing history of the marriage relationship as being between one man and one woman, one of the non-majority opinions in the case set forth in much greater detail the lack of any historical basis for defining marriage as anything but the relationship between a man and a woman. *In re Marriage Cases*, 183 P.3d at 460 (Baxter, J., concurring in part and dissenting in part).

[3]An example of this would be the miscegenation laws, which are discussed in more detail in Section I.E, *infra.*

B. Proposition 8 Allows California to Apply and Enforce Equal Protection Principles Consistently and Predictably.

Because Proposition 8 is an amendment that effectuates no constitutional change to California's Constitution, its effect on equal protection guarantees of Californians is negligible.

The California Constitution guarantees the citizens of California the right to equal protection. Cal. Const. art. 1 § 7a ("A person may not be . . . denied equal protection of the laws . . . ."). While an in-depth analysis of the history of equal protection in California is beyond the scope of this brief, a short history of equal protection in the context of marriage, particularly with regard to the issue of same sex "marriage," will be helpful to see how this Court finds itself dealing with this issue for the second time in less than a year.

In *Gay Law Students Association v. Pacific Telephone and Telegraph Comp.*, 595 P.2d 592, 612 (Cal. 1979), this Court found that "prohibition of discrimination on the basis of sex should not be construed to encompass discrimination on the basis of sexual orientation." *See also In re Marriage Cases*, 183 P.3d at 437-38. This analysis had not changed nearly three decades later, when this Court decided in *In re Marriage Cases*. *Id.* at 439 ("For purposes of determining the applicable standard of judicial review under the California equal protection clause, we conclude that

discrimination on the basis of sexual orientation cannot appropriately be viewed as a subset of, or subsumed within, discrimination on the basis of sex"). One effect of this distinction was that statutes that discriminated on the basis of sexual orientation were not subject to strict scrutiny review, as such statutes would have been had they discriminated on the basis of sex.

This Court's recent decision in *In re Marriage Cases*, unlike the cases that had come before it, did not limit itself to this analysis of equal protection in the realm of sexual orientation. Instead, this Court found that

> [b]ecause sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification. The strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation.

Id. at 444.

Proposition 8 does not affect this Court's ability to apply and enforce equal protection outside of and inside of the marriage relationship. Indeed, Proposition 8 does not affect equal protection jurisprudence regarding marriage at all. Because the term marriage has always been defined exactly as it is defined in Proposition 8—as a relationship between a man and a woman—all of California's equal protection history is based on the definition of marriage contained in Proposition 8.

Moreover, by providing a clear definition of marriage in the California Constitution, Proposition 8 gives some stability to the courts and the legislature when they make decisions regarding marriage, both in and out of the realm of equal protection. The validity of court opinions, contracts, and other legal documents will not be thrown into disarray, and on a go-forward basis, the meaning of marriage will be known when it is used in a legal setting, ensuring a measure of stability and predictability.

C. Proposition 8 Provides Equal Protection to All Men and Women.

Proposition 8 continues to afford all Californians—men and women alike—with an equal opportunity to enter into the marriage relationship. In doing so, it also places parameters on who can marry whom. Although a man who wishes to "marry" another man is prevented from doing so by the definition of marriage provided for in Proposition 8, so too is a man who wishes to "marry" anyone other than one woman.[4] Proposition 8 is not the first legal provision to articulate the scope of marriage. Other marriage laws prevent close relatives from entering into marriage, Cal. Fam. Code § 2200

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[4]Thus, while homosexual men and women who wish to have their domestic partnerships called "marriages" are undoubtedly affected by the Proposition 8 definition of marriage, so are others who wish to enter into other non-marriage relationships who would wish those relationships to be called "marriages."

(2008), and still others prevent a man or woman from marrying a child, Cal. Fam. Code § 301 (2008). All such provisions apply equally to everyone.

That some desire to enter into a relationship that the State will not recognize while others do, does not in itself create equal protection concerns. One of the basic premises recognized by equal protection is that all laws have a disparate impact on some groups of people; one reason equal protection exists to make sure that this disparate impact does not have a discriminatory intent. *In re Marriage Cases*, 183 P.3d at 465 (Baxter, J., concurring in part and dissenting in part). However, this does not mean that every person who falls into the group on whom the law has a disparate impact on has a legitimate equal protection claim.[5]

If it did, then every law would present equal protection claims for those who wished to engage in conduct contrary to that law. Homicide statutes would present equal protection claims for those who desired to take the life of another. Even a simple regulation of speed limits would create equal protection claims for those wishing to violate such limits. That Proposition 8, by defining the marriage relationship as it has always been defined, includes certain relationships in the definition and excludes others

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[5]One of the functions of the various levels of scrutiny applied in equal protection analysis is to weed out the claims that would have no legitimate equal protection claim.

in the definition, does not raise equal protection concerns. Because it recognizes a relationship between any one male and any one female, Proposition 8 has minimal impact on Californians' enjoyment of equal protection of the law.

Moreover, retaining the traditional definition of marriage serves an important purpose in classification. Because federal law only extends certain benefits to men and women in traditional marriage relationships and not to those who are in same sex relationships, California must make some distinction between marriage and same sex relationships to comply with federal law.

D. The California Courts Will Be Able to Enforce Equal Protection Principles in All Contexts Outside Marriage.

Nothing in Proposition 8 prevents this Court—or any other California Court—from enforcing equal protection broadly and in all situations. Equal protection in the context of marriage will not be limited by Proposition 8, because the same concerns of equal protection and marriage that have always been of concern to equal protection will still exist, in the same manner they have always existed.

Indeed, the concerns of equal protection for homosexual men and women would not be infringed, as they would be subject to the same equal

protection of the laws that heterosexual men and women are. All protections of the law are afforded to homosexuals as they are applied to heterosexuals.

E. Proposition 8 Is Not Similar to Miscegenation Laws or Exercise of Religion.

Petitioners suggest that the equal protection concerns of homosexual men and women who wish to enter into a "marriage" relationship are analogous to the equal protection concerns that ended the miscegenation laws that prevented interracial marriages in earlier times of U.S. history:

> [I]t is apparent that if an initiative tried to pass a constitutional amendment that barred African-Americans from marriage or that excluded women from public schools, the resulting interference with the courts' authority to enforce equal protection by constitutionalizing the discrimination would be an invalid revision of the California Constitution, because it would strike so directly at a core judicial function. The same is true here.

Strauss Petition at 42.

First, laws that banned interracial marriage had nothing to do with the purposes of marriage. Rather, they are specifically and overtly designed to keep two different races separate so that one race could continue to oppress the other. Marriage, by contrast, is about bringing two different sexes together. It strains credulity to believe that marriage was created as a means of expressing animus towards gays and lesbians or any other group. *See* Maggie Gallagher, *The Case for a Marriage Amendment*, Testimony Before the U.S. Senate Subcommittee on the Constitution, Civil

Rights, and Property Rights Hearing: "*Judicial Activism Vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?*" (March 3, 2004), *available at* http://www.marriagedebate.com/pdf/SenateMar32004.pdf.

Second, Proposition 8 is not discriminatory, because it applies to all men and all women equally. In this way it is immediately different than the constitutional amendments raised by Petitioners, which are discriminatory on their face because they are directed explicitly at one group of people.[6] Third, unlike either of the suggested analogous situations, defining marriage does not have much, if any, effect on equal protection. Rather, as demonstrated above, providing a definition of marriage clarifies the law with regard to marriage and domestic partnership. Instead of

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[6]Even though in *In re Marriage Cases*, this Court found that sexual orientation constitutes a protected class, sexual orientation is not implicated here, where the amendment applies to *all* men and *all* women, without regard to their race or sexual orientation. Indeed, allowing a definition of marriage in the Constitution with language that would allow homosexual individuals to get married would arguably provide *less* equal protection than the language of Proposition 8, because such a change to the California Constitution could require men and women to identify themselves as homosexual to engage in the marriage relationship. For example, a change reading, "Marriage shall be a right extended to all men and women regardless of sexual orientation" would immediately single out homosexual men and women as somehow separate from those who are not, because of their sexual orientation.

revolutionizing the understanding of equal protection in the context of marriage—which would be the case if marriage were to be defined to include same sex relationships— Proposition 8 merely affirms this Court's equal protection jurisprudence with regard to marriage. Without this definition, this Court's entire history of marriage jurisprudence is thrown into potential disarray. And finally, unlike a classification based on race or sex, which has a disparate effect on a group of people with an indisputably immutable characteristic, even if the definition of Proposition 8 could somehow be read to have a disparate effect only on homosexual men and women, and only because of their sexual orientation, the characteristic of sexual orientation is not indisputably immutable, unlike race or sex.[7]

Petitioners also suggest that the situation of homosexual men and women would be similar to an attempt of a government to prevent the free exercise of religion by certain religions. Specifically, Petitioners state that "[t]here is a profound difference between a decision by the electorate, for example, to limit the right to the free exercise of religion for all and a decision to limit it only for Muslims or Catholics." *Strauss* Petition at 30.

There is a "profound difference" between the equal protection concerns of religion and the equal protection concerns implicated by

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[7] Even this Court in *In re Marriage Cases* did not go so far as to call homosexuality an immutable characteristic. 183 P.3d at 442-43.

Proposition 8. However, that profound difference is not what Petitioners suggest. First, unlike a law that would limit the free exercise of religion for Muslims and Catholics, Proposition 8 applies equally to all men and all women. Second, the prevention of the free exercise of religion does not solely implicate equal protection concerns, but implicates First Amendment concerns with regard to the U.S. Constitution and Article 1 of the California Constitution. These additional concerns complicate the legal analysis in ways not applicable here. Third, when the free exercise of religion does implicate equal protection concerns, the free exercise of religion often bows to the laws and regulations of the United States and the states. For example, people who belong to religions that would allow polygamy are not legally allowed to practice polygamy in California, despite their religious beliefs that would allow them to do so. Cal. Fam. Code § 2201 (2008). Similarly, religions are not allowed to engage in activities that are considered illegal under the laws of the United States, even if their religion would otherwise allow them to do so—or even require them to do so. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 594 (1940) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."); *see also Employment Division, Dept. of*

Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990).[8] These restrictions can range from the seemingly small (i.e., the church cannot build a church building on a piece of land for which it is not zoned, even if that piece of land holds religious importance, *see Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991); *City of Boernes v. Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting)), to the large (i.e., an individual cannot allow children to work in support of their religion if this violates child labor laws, *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944)). The free exercise of religion, like equal protection in the realm of marriage, is often regulated and does not allow people the absolute freedom to engage in whatever behavior they wish to engage in as part of their exercise of that constitutional right.

II. As an Amendment to California's Constitution, Proposition 8 Is the Ultimate Expression of the People's Will.

As was stated in *In re Marriage Cases*, "the provisions of the California Constitution itself constitute the ultimate expression of the people's will, and that the fundamental rights embodied within that Constitution for the protection of all persons represent restraints that the people themselves have imposed upon the statutory enactments that may be

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[8]California "treat[s] the state and federal free exercise clauses as interchangeable." *Smith v. Fair Employment & Housing Com.*, 913 P.2d 909, 930 (Cal. 1996).

adopted either by their elected representatives or by the voters through the initiative process." 183 P.3d 384, 450 (Cal. 2008).

By adopting Proposition 8 as an amendment to the California constitution, the people of California have made the ultimate expression of their will: they wish to define marriage as a relationship between a man and a woman in the California Constitution, and they wish to prevent any change from being made to this long-understood definition of marriage.

By defining marriage as a relationship between a man and a woman, the California voters have made only a minor amendment to the California Constitution, reinforcing the definition of marriage as it has been understood to be defined in the California Constitution throughout California history, as this Court and all other California courts have defined the term throughout all but their most recent history, and as the businesses and individuals of California have understood the term as they go about making contracts and conducting their business. Failure to define marriage as between a man and a woman—unlike extending the term to encompass a meaning (i.e., a meaning that would allow homosexual "marriage") that defeats the purposes behind marriage and in a way that it has never been understood previously, contrary to the expressed will of the people of California—would have a greater constitutional effect than the Proposition

8 amendment, which merely preserves the status quo of marriage throughout California's history.

Using California's initiative process to define the scope of a constitutional right is not a new concept in California. In *People v. Frierson*, 599 P.2d 587 (Cal. 1979), the California Supreme Court allowed an initiative to stand that overruled a previous decision of the California Supreme Court which found the death penalty to be in violation of the California Constitution's cruel and unusual punishment clause. Through the initiative process, the California voters expressed their will, and chose to define the scope of cruel and unusual punishment as excluding the death penalty, contrary to the previous decision of the California Supreme Court. The California Supreme Court found this to be a proper amendment to the California Constitution.

Petitioners acknowledge that defining a fundamental right is allowed via a voter initiative, and cite to *Frierson*: "For example, in *People v. Frierson*, the voters were permitted to define the substantive scope of an important right under the state Constitution . . . through the initiative process." *Strauss* Brief at 29-30.

The application of *Frierson* to Proposition 8 is the subject of another *amicus* brief; as such, it does not merit an in-depth discussion here. However, for purposes of equal protection, it is important to note two things

about the *Frierson* decision. First, defining the parameters of a fundamental Constitutional right via voter initiative—even when that definition would allow the taking of a life—is a proper use of the initiative process, and amounts only a Constitutional amendment. It is *not* an impermissible revision to the California Constitution. Second, like the initiative in *Frierson*, Proposition 8 applies to all Californians equally, regardless of anything but their sex, even though a certain group of people, including but not limited to homosexual men and women, may be disproportionately affected by the definition. This Court's decision in *Frierson* underscores Proposition 8 as a permissible amendment to the California Constitution.

Conclusion

California history has provided us with one definition of marriage: that of a relationship of one man and one woman. Through Proposition 8, the California voters chose to express their will and amend the California Constitution to reflect this long understood definition of marriage. This definition not only iterates that which has been understood throughout California's history, but provides a solid basis for all future decisions regarding marriage.

Further, Proposition 8 reinforces the equal protection understanding of California courts throughout history, without infringing on the equal

protection rights of homosexual men and women. We urge this Court to hold that Proposition 8 is a proper amendment to the California constitution, and does not make nor change the equal protection jurisprudence of California and this Court.

WORD COUNT CERTIFICATION

I, Sarah E. Troupis, verify that the foregoing brief contains 3,734 words, including footnotes, as counted using the WordPerfect word count function.

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