Case No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al., Petitioners,

v.

MARK D. HORTON, et al., State Registrar of Vital Statistics, etc., Respondents

DENNIS HOLLINGSWORTH, et al., Interveners.

APPLICATION FOR PERMISSION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

And

PROPOSED BRIEF OF AMICI CURIAE OUR FAMILY COALITION AND COLAGE IN SUPPORT OF PETITIONERS CHALLENGING PROPOSITION 8

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for *amici* Our Family Coalition and COLAGE hereby certify that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

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APPLICATION FOR PERMISSION TO FILE AN *AMICI CURIAE* BRIEF

Pursuant to Rule of Court 8.520(f), Our Family Coalition and COLAGE ("Applicants") request leave of the Court to file the attached brief of *amici curiae* in support of the parties challenging Proposition 8's marriage exclusion ("Petitioners"). This application is timely made pursuant to the Court's order of November 19, 2008, permitting such briefs on or before January 15, 2009.

In their opening brief, Interveners have suggested that Proposition 8, by its own operation, requires dissolution of approximately 18,000 same-sex marriages validly formed prior to its adoption. Applicants strongly support the position of both Petitioners and the Attorney General that Proposition 8 is invalid in its entirety, and for that reason alone can have no effect on existing marriages. However, Applicants believe that the Court could benefit from additional briefing on a more narrow question, namely, whether Proposition 8, if constitutional, has any application to existing marriages.

Applicants are two membership organizations committed to representing the Californians who will most directly bear the weight of the Court's resolution of this case, the many same-sex couples that married in reliance on the Court's *In re Marriages Cases* decision, and the children of these married couples. Because of their first-hand familiarity with the concerns and expectations of same-sex spouses and their children, Applicants are uniquely able to recognize the implications of retroactive application of Proposition 8 for their members and all Californians. For these reasons, Applicants respectfully seek leave to file the attached brief as *amici curiae* in support of Petitioners.

A. Interests of Our Family Coalition

Our Family Coalition is an organization dedicated to promoting the civil rights and well-being of families with lesbian, gay, bisexual and transgender ("LGBT") members through education, advocacy, social networking and community organizing. Our Family Coalition has a membership of more than 750 families, representing thousands of individuals and organizations throughout the San Francisco Bay Area. Our Family Coalition is actively involved in challenging the constitutionality of the exclusion of same-sex couples from the right to marry, and was a plaintiff/petitioner in *Woo* v. *Lockyer*, San Francisco Superior Court Case No. CPF-04 504038, which was subsequently consolidated with five other cases to form the *In re Marriages Cases* action. Many members of Our Family Coalition had planned to marry their same-sex partners in California but were prevented from doing so until this Court's *In re Marriages Cases* decision became effective on June 15, 2008. Following this Court's decision, these same members married in reliance on the *In re Marriages Cases* decision. These—and in fact all—members of Our Family Coalition and their children, will be directly affected by the Court's decision on the issue of retroactivity.

B. Interests of COLAGE

COLAGE is a national movement of children, youth, and adults with one or more lesbian, gay, bisexual, transgender and/or queer parents headquartered in San Francisco, California. COLAGE builds communities and works toward achieving social justice through youth empowerment, leadership development, education, and advocacy. Representing and working in partnership with over 10,000 youth and family member contacts and 42 chapters in 28 states (including its largest membership in California), COLAGE possesses over 15 years of expertise in LGBT family matters. COLAGE's membership includes the children of same-sex

couples who married in California between June 2008 and November 2008, in reliance on the Court's *In re Marriages Cases* decision, as well as adult members who married as same-sex spouses during this period. The potential loss of marital status would of course have an impact on all of COLAGE's members, whether children or adults. In particular, COLAGE members who are children of married same-sex spouses are faced with the potential denial of both substantive rights, such as parental custody, as well as the psychological harm inflicted by the forcible dissolution of their parents' marriage.

PROPOSED BRIEF OF *AMICI CURIAE* OUR FAMILY COALITION AND COLAGE IN SUPPORT OF PETITIONERS CHALLENGING PROPOSITION 8

INTRODUCTION

The institution of marriage depends upon an expectation of permanence subject only to voluntary dissolution. Lasting commitment makes possible not only the marital relationship itself, but also the host of familial and financial rights and obligations that the State of California recognizes in married couples. These vested marital rights cannot be subject to retroactive dissolution at the whim of the electorate. Yet Interveners argue that Proposition 8 divests validly married same-sex couples of these basic human rights.

The threshold problem with Interveners' argument, aside from their incorrect statement that a basic human right such as marriage could be destroyed by retroactive proclamation, is their failure to recognize the fact that the text of Proposition 8 does not even begin to call for the annulment of existing marriages.

Proposition 8 makes no mention of existing marriages. It does not use the word "retroactive," and no part of it is framed in the past tense. Interveners' argument is that Proposition 8's atemporal language *implicitly* renders existing same-sex marriages null and void. In making this argument, the self-described champions of traditional marriage not only attack the fundamental precept of marriage—permanence—they run afoul of the basic presumption that existing rights survive new laws absent an *express* statement of retroactivity. Longstanding canons of construction, canons rooted in due process, prohibit the destruction of vested rights absent such an express statement.

The presumption against retroactivity takes on a particular importance here because of the fact that marriage depends upon a justifiable

expectation that the relationship will continue indefinitely. That expectation cannot be justified if marriages are subject to implicit nullification by future ballot measures. Accordingly, *Amici* respectfully ask this Court to conclude that Proposition 8, even if constitutional, has no effect on the marriages of same-sex couples performed before its adoption.[1]

ARGUMENT

I. THE PRESUMPTION AGAINST RETROACTIVITY REQUIRES THAT PROPOSITION 8 NOT BE APPLIED RETROACTIVELY

This Court has explained that a "retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." *Aetna Cas. & Surety Co.* v. *Indus. Accident Comm'n*, 30 Cal. 2d 388, 391 (1947) (citation and quotations omitted). If applied to an existing marriage, Proposition 8 would affect not only the existing rights and obligations of the married couple and their children, but also those of third parties who relied on the couple's marriage in interacting with them. It would reverse the performance of the marriage, rescind the couple's married status, and nullify the legal effect of all actions taken in reliance on the marriage. In other words, it would effect "a substantive change in the legal circumstances" in which same-sex married couples have already placed themselves "in direct and reasonable reliance on the previously existing state of the law." *Rosasco* v. *Comm'n on Judicial Performance*, 82 Cal. App. 4th 315, 322 (2000) (emphasis omitted).

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[1] Although *Amici* confine their arguments herein to the question whether Proposition 8 may properly be understood as having any application to existing marriages, they fully support and join in Petitioners' and the Attorney General's arguments as to why Proposition 8 is invalid in its entirety.

This is the result argued by Interveners, who claim that same-sex marriages that were "validly performed" in California "before Proposition 8 was passed" are rendered invalid by Proposition 8. Interveners' Opp. Brief at 35. Vested rights, however, may not be taken away as readily as Interveners would have this Court believe. Under well-established canons of construction, a provision that does not expressly call for retrospective application is presumed to operate only prospectively. Proposition 8 is silent as to its effect on existing marriages, and the record of its passage does not contain the sort of manifest and inflexible statement that might begin to support retroactive application in the face of such silence. Accordingly, and for this reason alone, Proposition 8 can have no effect on existing same-sex marriages.

A. NEW LAWS ARE PRESUMED TO OPERATE PROSPECTIVELY

California courts have long embraced the interpretive rule that, "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." *Evangelatos* v. *Superior Court*, 44 Cal. 3d 1188, 1209 (1988).[2] This "time-honored" rule of construction, rooted in constitutional principles of fair notice and due process, guards against unconsidered abrogation of "rights, obligations, acts, transactions, and conditions" that are in place

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[2] The presumption against retroactivity applies equally to voter-approved initiatives, including those modifying the state Constitution. *See Tapia* v. *Superior Court*, 53 Cal. 3d 282, 305 (1991) ("The presumption [against retroactivity] arises whether the law is constitutional or statutory, and whether the lawgiver is the people or their representative.") (citations omitted); *Armstrong* v. *County of San Mateo*, 146 Cal. App. 3d 597, 608 (1983) ("'[R]ules of construction and interpretation that are applicable when considering statutes are equally applicable in interpreting constitutional provisions.'").

prior to the enactment of a new law. *Id.* at 1206-09 (quoting *Aetna*, 30 Cal. 2d at 391); *see also Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."); *Aetna*, 30 Cal. 2d at 393 ("It is an established canon of interpretation that [new laws] are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."). It is remarkable, therefore, that the Interveners make no mention of this time-honored and fundamental rule in their submission to this Court.

To overcome this presumption, a newly enacted law either must contain an express statement of retroactivity, or its retroactivity must be evident from extrinsic sources. *See Evangelatos*, 44 Cal. 3d at 1208-09 ("in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application").

Proposition 8 cannot, however, overcome the presumption against retroactive application. Both its text and the accompanying ballot materials fail to address the question of retroactivity. There is no "'unequivocal and inflexible'" statement in the proposition itself or its supporting materials that it is the "manifest intention" of the electorate that the initiative should apply retroactively. *Evangelatos*, 44 Cal. 3d at 1207 (quoting *United States* v. *Sec. Indus. Bank*, 459 U.S. 70, 79 (1982). Neither the text nor the ballot materials express an unambiguous intent to nullify existing marriages or otherwise abrogate the existing rights, obligations and other legal consequences flowing from such marriages. Accordingly, this Court must hold that Proposition 8 applies only prospectively and leaves intact the rights, obligations, and marital status of same-sex couples who married prior to its ratification.

Notably, courts in other jurisdictions have rejected the retroactive application of similarly vague amendments in the marriage context. For example, the Arizona Court of Appeals recently considered whether a legislative amendment providing that marriages between first cousins were "void and prohibited" had any effect on pre-existing first-cousin marriages. *See Cook* v. *Cook*, 104 P.3d 857, 858-59 (Ariz. Ct. App. 2005). Despite this language, which is arguably more suggestive of retrospective application than the text of Proposition 8, the court found that the amendment was not expressly retroactive. *Id.* at 863-64. Because in Arizona, as in California, "'[n]o statute is retroactive unless expressly declared therein,'" the court held that the amendment did not invalidate previously recognized marriages. *Id.* at 866-67 (quoting A.R.S. § 1-244 (2000)).[3]

Similarly, in *Succession of Yoist*, the Louisiana Supreme Court considered a statute that read: "Marriages between white persons and persons of color are prohibited, and the celebration of such marriages is forbidden, and such celebration carries with it no effect, and is null and void." 61 So. 384, 385 (La. 1913). Despite this broad language barring interracial marriages, the court held that the statute did not expressly call for "retroactive effect as to marriages of that kind which had been previously consummated." *Id.* And, on that basis, the court concluded that the children of pre-existing interracial unions could continue to enjoy their rights as lawful heirs.

Here, Proposition 8's language about which marriages are "valid or recognized" is likewise insufficient to divest the rights of previously

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[3] The *Cook* court also held that a purely prospective construction was compelled by the fact that any application to existing marriages would violate the "substantive due process and separation of powers doctrines under the Arizona and United States Constitutions." 104 P.3d at 864 n.7.

married same-sex couples in the State of California. As this Court has stated, the "time-honored presumption against retroactive application . . . would be meaningless if [such] vague phrases . . . were considered sufficient to satisfy the test of a clear manifestation or an unequivocal and inflexible assertion of . . . retroactivity." *Myers* v. *Philip Morris Cos.*, 28 Cal. 4th 828, 843 (2002) (citations and quotations omitted). Indeed, the presumption of prospective application is so strong that any ambiguity about the electorate's intent must be resolved against retroactivity. *See id.* at 841. As discussed below, Proposition 8 simply does not contain an unambiguous statement of retroactive application.

1. Text of Proposition 8 Does Not Explicitly Declare Retroactive Application

The text of Proposition 8 does not provide the "express declaration" or "clear indication" necessary to establish that it was intended to apply retroactively. *Evangelatos*, 44 Cal. 3d at 1214, 1227. The fourteen words of the initiative—"Only marriage between a man and a woman is valid or recognized in California" —do not say that the initiative should have retroactive effect. The proposition uses the present tense and avoids any reference to retroactivity or existing marriages. This language is entirely consistent with prospective-only application, and it contains no guidance regarding retroactive application, much less the "unequivocal and inflexible statement of retroactivity that *Evangelatos* requires." *Myers*, 28 Cal. 4th at 843. As a result, "a fair reading of the proposition as a whole makes it clear that the subject of retroactivity or prospectivity was simply not addressed." *Evangelatos*, 44 Cal. 3d at 1209. Its authors and proponents, having chosen to avoid addressing the status of existing marriages, cannot now infer and apply a retroactive construction.

Proposition 8 prohibits, albeit unconstitutionally, the licensing and registration of same-sex marriages in California, and the recognition of

same-sex marriages solemnized elsewhere, after its enactment. To the extent that Proposition 8 implicitly calls into question the enduring validity of pre-existing same-sex marriages by using absolute, atemporal terms, it nonetheless falls short of explicitly commanding retroactive application as a matter of law. The use of language that is merely susceptible to retroactive construction is not sufficient. *See, e.g., Myers*, 28 Cal. 4th at 842-43.

Had the authors of Proposition 8 intended the law to apply to existing marriages, they could have expressly stated this intent in the text of the measure. Indeed, they could have followed any one of the innumerable examples of existing California statutes that expressly call for their application to prior acts and obligations. *See id.* at 842 (citing Cal. Civ. Code § 1646.5 ("This section applies to contracts . . . entered into before, on, or after its effective date; it shall be fully *retroactive*"); and Cal. Gov. Code § 9355.8 ("This section shall have *retroactive application*").[4] Yet the drafters of Proposition 8 failed to provide the electorate with *any* information regarding the history or purpose in the text of the measure. In fact, of the ten initiatives placed on California's November 2008 ballot by petition signature, only Proposition 8 lacked a separate textual section explaining the purpose or need for the measure. *See* Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Text of Proposed Laws, p. 80-144. As this Court noted in *Evangelatos*, "[s]ince the drafters declined to insert such

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[4] Notably, there are also ready examples of expressly retroactive provisions in prior anti-same-sex marriage initiatives. For example, Oregon Ballot Measure 144(a) (2008), a measure that failed to garner sufficient signatures, would have "retroactively repeal[ed] laws granting state privileges, immunities, rights, benefits, responsibilities of marriage to domestic partners." *Frazzini* v. *Myers*, 189 P.3d 1227, 1230 (Or. 2008). The failure of this and similar measures to garner adequate support may speak to why Proposition 8's authors chose not to include such language in their ballot measure.

a provision in the proposition—perhaps in order to avoid the adverse political consequences that might have flowed from the inclusion of such a provision—it would appear improper for this court to read a retroactivity clause into the enactment at this juncture." 44 Cal. 3d at 1212.

2. The Ballot Materials Do Not Expressly Declare Retroactive Application

The ballot materials that accompanied Proposition 8 are similarly devoid of the express, unequivocal language necessary for the initiative to apply retroactively. *See, e.g., Robert L.* v. *Superior Court*, 30 Cal. 4th 894, 901 (2003) (courts must "'refer to other indicia of the voters' intent . . . contained in the official ballot pamphlet'"). In fact, the "Arguments and Rebuttals" section makes no mention of existing same-sex marriages despite the fact the proponents submitted their initial argument in July 2008, *after* this Court's decision in *In re Marriages Cases.* In their argument, the proponents state that Proposition 8 "does three simple things: It restores the definition of marriage . . . It overturns the outrageous decision of four activist Supreme Court judges . . . [and] It protects our children . . . ." Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Arguments, p. 56. Voiding or circumscribing existing same-sex marriages is not on the list. Rather, all three things on the list are explicitly prospective and in no way support a conclusion that California voters considered and approved any retroactive application to lawfully licensed, solemnized, and registered marriages.

The "Title and Summary" and "Analysis" sections likewise confirm that the question of retroactivity was not presented to the voters. The only description in the Title and Summary (other than a restatement of the text of Proposition 8) is overtly prospective: the bill "[c]hanges the California Constitution to eliminate the right of same sex couples to marry in California." *Id.* at p. 54. The description in the Analysis is also

prospective: "marriage would be limited to individuals of the opposite sex, and individuals of the same sex would not have the right to marry in California." *Id.* at 55. It does not indicate that Proposition 8 would have any effect at all on the rights, obligations, or status of couples who have already married.

The closest the ballot materials come to suggesting that Proposition 8 could be retroactive comes in the third paragraph from the bottom of the proponents' rebuttal section. It states 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." *Id.* at 57. But this language still fails to use the word "retroactive," let alone specifically reference annulment of existing marriages. A single, unelaborated reference that (1) does not expressly describe nullifying marriages, and (2) is hidden in the depths of a pamphlet, is not an adequate basis on which to infer that the electorate considered this issue. A phrase that would be insufficient if placed in the text of the proposition itself cannot suffice when buried in the rebuttal section of the voter pamphlet.

Thus, in contrast to other cases decided by the Court where legislative history or explicit findings specifically indicated that the subject of retroactivity was considered, here there is "nothing in the election brochure materials which provide any comparable confirmation of an actual intention on the part of the drafters or electorate to apply the statute retroactively." *Evangelatos*, 44 Cal. 3d at 1211 (distinguishing *In re Marriage of Bouquet*, 16 Cal. 3d 583 (1976), and *Mannheim* v. *Superior Court*, 3 Cal. 3d 678 (1970).

3. The Context of the Initiative Does Not Support Retroactive Application

Faced with Proposition 8's "brevity" and concomitant failure to include an express call for retroactive application—either in its own text or in the voter pamphlet—Interveners turn to "the context of the initiative, the object in view, the concern at issue, the history of legislation upon the same subject, public policy and contemporaneous construction." Interveners' Opp. Brief at 38. As in *Evangelatos*, none of these categories of extrinsic evidence contain such a manifest and inflexible declaration of intent as to give any confidence that the average voter understood Proposition 8 as calling for the nullification of existing marriages.

First, Proposition 8 was submitted for placement on the ballot on April 24, 2008, during the pendency of this Court's decision in *In re Marriage Cases*. To the extent that its drafters anticipated this Court's invalidation of Proposition 22, they also must have anticipated the same-sex marriages that followed. Nonetheless, they chose to concern themselves not with the retroactive invalidation of such marriages, but with purely prospective aims: "[T]he object in view of Proposition 8 was to . . . ensure that California *will not* legitimize or recognize marriages from other jurisdictions and that California *will not* permit same-sex partners to validly marry within the state." Interveners' Opp. Brief at 40 (quotations omitted and emphasis added). Even after this Court's decision and the ensuing same-sex marriages, the proponents of Proposition 8 made no effort to include any language expressly addressing existing California same-sex marriages in the ballot materials. As a result, the "legislative history reveals the voters' unambiguous intent to enshrine the traditional definition of marriage in the Constitution itself," not to annul existing same-sex marriages validly formed within the state of California. *Id.* at 39.

As established above, the history of legislation on the subject of marriage indicates that the proponents of Proposition 8 could have included an express call for retroactive application, but simply chose to avoid such language. Not only are there many examples of expressly retroactive language among California statutes, there are also numerous examples of cases in California and other states dealing with the question of retroactivity in the context of marital rights. The obvious inference is that the authors made a conscious decision aimed at maximizing the prospects of passage, and Interveners offer nothing in the way of argument or facts to rebut this inference. Whether by design or through inadvertence, their failure to incorporate expressly retroactive language into Proposition 8 prevented the electorate from considering this issue.

Second, this Court's "contemporaneous construction" of Proposition 22 did not encompass a determination whether that law's identical language supported retroactive application, as Interveners suggest. To the contrary, this Court merely considered whether the statute could "properly be interpreted to apply only to marriages performed outside of California," and found that it could not. *In re Marriage Cases*, 43 Cal. 4th at 798. It then gave Proposition 22 a purely prospective construction, stating that it was intended to ensure that "California will not legitimize or recognize same-sex marriages from other jurisdictions . . . and that California will not permit same-sex partners to validly marry within the state." *Id.* at 799 (citation and quotations omitted). The Court addressed neither the presumption against retroactivity nor the question of retroactive application more generally. The fact that Proposition 8, like Proposition 22, (1) eliminates the right of same-sex couples to marry and (2) prohibits the recognition of future marriages whether formed in California or another state, does not speak to its retroactive application to validly licensed, solemnized, and registered marriages. Interveners' attempt to conflate

questions relating to extra-jurisdictional marriages and retroactive invalidation of existing California marriages is simply unfounded.

Third, Interveners' claim that the average voter was likely to have understood the proposed amendment as applying to existing California marriages is further belied by the abundant confusion in the media over this very subject. *See, e.g.*, Bob Egelko, Prop. 8 Not Retroactive, Jerry Brown Says, S.F. CHRON., Aug. 4, 2008, at B1 ("If voters approve a November ballot measure banning same-sex marriages in California, thousands of gay and lesbian weddings conducted since the state Supreme Court legalized the unions on May 15 will probably remain valid, Attorney General Jerry Brown said Monday."); Phillip Matier & Andrew Ross, S.F. Boosts Weddings in Face of Prop. 8 Fears, S.F. CHRON., Oct. 19, 2008, at B1 (describing a rush to perform marriages "prompted by state Attorney General Jerry Brown's assertion that even if Prop. 8 passes, same-sex marriages performed before the election would still be valid"). These statements are relevant in determining what the electorate believed or understood about the initiative when they approved it on November 4, 2008. They clearly reflect the ambiguity of both the text of Proposition 8 and the voter materials, an ambiguity which itself requires that this Court reject the proposed retroactive construction. *See Myers*, 28 Cal. 4th at 841.

4. Retroactive Application Raises the Specter of Unintended Consequences

There is "nothing in the language of [Proposition 8] which expressly indicates that the [law] is to apply retroactively." *Evangelatos*, 44 Cal. 3d at 1209. Moreover, neither the language of the proposition nor the ballot materials provide any "reliable basis for determining how the electorate would have chosen to resolve . . . *how* retroactively the proposition should apply if it was to apply retroactively." *Id.* at 1217. Under these circumstances, as the Court explained in *Evangelatos*, "the well-established

presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent gives recognition to the fact that retroactive application of a statute often entails . . . unanticipated consequences . . . , and ensures that courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears." *Id.* at 1218. Indeed, the depth and range of just a sample of the questions raised by retroactive application powerfully contradict any claim that either the voters or the authors of the proposition intended retroactive application:

- Would pre-existing marriages be treated as void *ab initio*, or would the couple's married status continue to receive recognition for the period prior to the ratification of Proposition 8?
- Would retroactive application of Proposition 8 mean only loss of access to the term marriage, or would the initiative also abrogate the rights and obligations to which the marriage gave rise?
- Would someone who entered a marriage with a person of the same sex have community property rights with respect to the income earned by a spouse after Proposition 8's passage? What about with respect to the spouse's income that was earned prior to Proposition 8's passage?
- What happens to the rights of third parties—such as lenders, insurers, and employers—who relied on the existence of the marriage prior to the passage of Proposition 8 in entering agreements with or extending benefits to a same-sex couple?

- What happens to parental rights over the children of same-sex marriages? What rights do such children have over their parents' estates?
- Would the effect of retroactive application depend upon whether the same-sex couple wished to enter into a domestic partnership? If so, how would the election be made?

Notably, Interveners make no effort to address this Court's question regarding what effect Proposition 8 would have on existing marriages, other than to assert that it would apply to such marriages generally. In fact, they expressly dodge the question "whether Proposition 8 voids interim marriages *ab initio*," and instead submit that this Court should either (1) answer its own question on an *ad hoc* basis, or (2) leave the issue "to the Legislature for resolution." Interveners' Opp. Brief at 41-42. Their failure to answer this Court's question by identifying what existing marital rights or remedies—in their view—would or would not survive application of Proposition 8, indicates that they themselves have not thought through what retroactive application might actually mean for existing same-sex marriages. Moreover, Interveners' suggestion that such unconsidered questions should either be resolved on an *ad hoc* basis or deferred to the legislature does not remedy the fact that these issues were not placed before the voters. Rather, it underscores the absurdity of Interveners' claim that the voters intended to cause such confusion and upheaval. As in *Evangelatos*, "there is no indication that the voters in approving [Proposition 8] consciously considered the retroactivity question at all." 44 Cal. 3d at 1215. That fact alone precludes retroactive application.

B. APPLYING PROPOSITION 8 TO DIVEST EXISTING MARITAL RIGHTS WOULD CONSTITUTE AN UNLAWFUL RETROACTIVE APPLICATION

Although Proposition 8 does not mention existing marriages, Interveners claim that it renders existing same-sex marriages empty and meaningless in the eyes of the law. This is an argument for *implied* retroactivity, plain and simple. Any use of Proposition 8 to force the dissolution, whether in part or in whole, of existing same-sex marriages would constitute unlawful retroactive application. The fact that the Interveners frame their arguments in terms of the prospective implications of such retrospective invalidation is meaningless—it does not avoid the fact that they are using Proposition 8's general statements as to which marriages California can recognize going forward to void marriages that California has recognized in the past. This they cannot do.

As this Court explained in *Myers*, every new law "'which takes away or impairs vested rights acquired under existing laws, . . . or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'" 28 Cal. 4th at 839 (quoting *Landgraf*, 511 U.S. at 269); *see also Aetna*, 30 Cal. 2d at 391. Proposition 8 plainly meets this standard.[5]

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[5] Although the right to have one's marriage recognized "has ramifications for property rights, it is undeniably of broader scope." *Cook*, 104 P.3d at 865. Because of this broader scope, marital rights do not fit neatly within the language used by this Court and others in analyzing whether a "transaction" has occurred in the past or the present or whether a given right has "vested." *See id.* at 864-65. Nonetheless, as discussed herein, application of Proposition 8 to invalidate existing marriages would change the legal consequences of past marriages and would therefore be retroactive under any standard. In addition, marriage's unique dependence upon an expectation of permanence supports reading the law's aversion to retroactive invalidation of existing rights as broadly as possible.

First, if applied to existing marriages, Proposition 8 would attach new disabilities with respect to "past" marital "transactions," at the very least by refusing to allow such existing marriages to continue to exercise the rights ordinarily available to married couples under California law. This alone would constitute retroactive application. The presumption of prospectivity "does not depend on the existence of some sort of vested property or civil right which would be threatened by a retrospective application." *Rosasco*, 82 Cal. App. 4th at 321. Rather, a proposed application of Proposition 8 to existing marriages is retroactive if it "change[s] the legal consequences of the parties' past conduct." *Tapia*, 53 Cal. at 289 (1991); *see also INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001) (quoting *Landgraf*, 511 U.S. at 265-66). Using Proposition 8 to deny any future exercise of marital rights by existing same-sex marriages would work a substantive change in the legal circumstances in which those couples placed themselves. Such an application is retroactive under California law.

Second, marital rights recognized by the State of California must be understood as vesting upon formation of the marriage itself. *See Cook*, 104 P.3d at 864-65. A "vested" right is "an immediate right of present enjoyment, or a present, fixed right of future enjoyment." *Pearsall* v. *Great N. Ry. Co.*, 161 U.S. 646, 673 (1896) (quotations omitted). Marriages are neither "contingent" in the sense that they "only [] come into existence on an event or condition which may not happen or be performed," nor are they "expectant" in that they do not depend on any continued condition other than their own existence, which of course is expected to be permanent. *Id.* Forced dissolution by the state is not the "expectation" of any marriage. As a result, the marriage itself and the rights conferred on such marriages must be understood as having vested at inception. As the Supreme Court explained in *Pearsall*, "rights are vested, in contradistinction to being

expectant or contingent . . . when the right to enjoyment, *present or prospective*, has become the property of some particular person or persons as a present interest." *Id.* (quotations omitted and emphasis added); *see also INS*, 533 U.S. at 321-23. Thus, applying Proposition 8 to pre-existing marriages would be retroactive: it would change the legal consequences of those marriages by stripping away vested rights.

Third, because all marital rights flow from pre-existing marital status, any attempt to use Proposition 8 to deny the future exercise of a marital right would logically depend upon the invalidation of the pre-existing marriage. Such a denial of marital status can only be understood as retroactive. Likewise, if California were to recognize some new right enjoyed by married couples, denial of that right on the basis of Proposition 8 would again depend upon reading Proposition 8 as invalidating the pre-existing marriage, and would therefore be retroactive. Accordingly, any application of Proposition 8 to pre-existing marriages, whether *ab initio* or in some more limited form, would divest pre-existing marital rights and therefore constitute an impermissible retroactive application.

Moreover, there can be no doubt that the rights vested in existing same-sex marriages are both numerous and substantive. In fact, this Court's decision in *In re Marriage Cases*, catalogued the extensive rights and obligations that would be destroyed, or at least altered and undermined, by the proposed retroactive application of Proposition 8:

1. The Right to Marry

As important as the specific rights that flow from marriage are, the simple status of being married is itself a central benefit and a substantial right. The benefit and right of marriage has long been recognized by American courts, including most recently by this Court in *In re Marriage Cases*. As this Court held, "one of the core elements of this fundamental

right [to be married] is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships." 43 Cal. 4th at 830. Denial of enduring access to that term would "pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry." *Id.* at 830-31. As a result, "the exclusion of same-sex couples from the designation of marriage [would] work[] a real and appreciable harm upon same sex-couples and their children." *Id.* at 855.

In addition, revoking the status and designation of "marriage" would deprive same-sex couples who have already married and their children of their expressive and associational rights. As this Court noted in *In re Marriage Cases*, the right to marry encompasses "the opportunity to publicly and officially express one's love for and long-term commitment to another person by establishing a family together with that person also is an important element of self-expression that can give special meaning to one's life." *Id.* at 817. These substantive rights guarantee "the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage." *Id.* at 781 (emphasis omitted).

Annulment of existing same-sex marriages also would deny the children of such marriages the same dignity and status afforded to the children of married opposite-sex couples.[6] *In re Marriage Cases*, 43 Cal. 4th at 855. "[T]he institution of civil marriage affords official

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[6] In 2000, 28.4 percent of all same-sex couples in California were raising children. *See In re Marriage Cases*, 43 Cal. 4th at 741 n.50.

governmental sanction and sanctuary to the family unit," granting a child "the substantial benefits that flow from a stable two-parent family environment," and "a ready and public means of establishing to others the legal basis" of the child's relationship to his or her parents. *Id.* at 817-18. And, as this Court has also recognized, "a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples." *Id.* at 828. Yet, as Interveners would have it, Proposition 8 would forcibly annul existing marriages between same-sex couples and illegitimatize their children.

Thus, aside and apart from the various overlapping or distinct rights that may accompany marriage or domestic partnership, there is an independent "core substantive right" to the "historic and highly respected designation of marriage." *Id.* at 828, 831. And, as this Court previously held, potential access to domestic partnership does not compensate for denial of these fundamental rights to same-sex couples and their children, which can only be obtained through marriage. *Id.* at 845 ("[P]roviding same-sex couples access to only a novel alternative designation, realistically must be viewed as constituting significantly unequal treatment.").

2. Marital Rights Specifically Recognized by State Law

Applying Proposition 8 to existing same-sex marriages would deprive affected couples of the many rights that accompany marriage under California law. The rights and privileges recognized by California's marriage laws are numerous and substantial. They include, among others, the privilege to visit a spouse in the hospital, the right to receive health benefits for the spouses of public employees, the right to have access to certain types of affordable housing, the right to sue for wrongful death of a

spouse, the right to use employee sick leave to care for an ill child or spouse, the right to make medical decisions on behalf of a spouse, the right to adopt children, the right to acquire community property, the right to receive the automatic inheritance of a spouse, and the privilege of filing joint returns for state taxes. *In re Marriage Cases*, 43 Cal. 4th at 801-04.

The mere fact that *some* same-sex couples, having suffered forcible annulment, may be able enter into a domestic partnership on a going-forward basis would not provide a remedy. First, even assuming that the institution of domestic partnership were a perfect substitute for marriage (and, as this Court has established it is not), the availability of domestic partnership does not mean that the rights of married same-sex couples would not be substantially affected if Proposition 8 is applied retroactively. Although some couples may have had a domestic partnership prior to marriage, others waited to marry without having had this prior relationship. (*See* App. for Permission to File an *Amici Curiae* Brief at 2.) While some of those married couples may register for domestic partnerships if Proposition 8 is applied retroactively, others may choose not to do so for religious or other reasons. Even more problematic is the fact that certain married couples may not even be ineligible for domestic partnership. *See In Marriage Cases*, 43 Cal. 4th at 805 n.24 (noting that certain individuals, including partners who do not share a common residence, can marry but cannot enter into a domestic partnership).

Second, Proposition 8 contains no formula or guidance for rescuing or preserving the rights uniquely encompassed by the bond of marriage, whether through "conversion" into a domestic partnership—which would not provide a couple with all the rights it had when married—or otherwise. As this Court explained in *Evangelatos*, while addressing a measure that was similarly silent as to whether and how the measure would apply retroactively, when there is uncertainty as to how to apply a law

retrospectively, a court has "no reliable basis for determining . . . whether [the electorate intended that] the measure should be applied prospectively or retroactively." 44 Cal. 3d at 1217.

In the absence of explicit guidance about this complex endeavor, this Court would be left to invent such a process, with uncertain effects on the rights of pre-existing same-sex marriages. At a minimum, individuals in a pre-existing same-sex marriage will be deprived of their marriage rights during the period from the ratification of Proposition 8 until they are able to register for a domestic partnership. That interim period, even if short, would potentially affect the continuing rights that accrue with marriage, such as adoption proceedings or a previously filed wrongful death suit.

Third, as this Court has recognized, there remain several rights that are unique to the institution of marriage and do not exist in domestic partnerships as currently defined by California law. *See In Marriage Cases*, 43 Cal. 4th at 805 n.24 (describing nine differences between the institutions of marriage and domestic partnership, as reflected in "statutory and other constitutional provisions"). Retroactive application of Proposition 8 would eliminate for same-sex couples the protections and benefits available through marriage but not domestic partnership.

3. Contractual Rights Accrued During the Marriage

Numerous contractual rights and obligations ordinarily accrue in the course of a marriage and would be eliminated by retroactive application of Proposition 8. For instance, a person who is covered by their spouse's employer-health insurance may lose coverage. That person may have passed up or resigned from a job based on the expectation of continued coverage. Similarly, a person may have secured financing such as a mortgage based his or her marital assets, financing that could be lost as a result of an involuntary dissolution of the marriage and division of the

marital assets—exactly the type of "settled expectations" that the presumption against retroactivity is designed to preserve.

4. Property Rights Accrued During the Marriage

Retroactive application of Proposition 8 to existing marriage rights would operate to deprive the members of such marriages of vested rights in community property. If same-sex marriages are annulled, and vested interests in community property terminated, members of same-sex marriages would be prejudiced by the resulting loss of property rights. It is well-established that a law which impairs community property rights acquired before the effective date of the law operates retroactively. *See In re Marriage of Buol*, 39 Cal. 3d 751, 757 & n.6 (1985) ("We use the word vested here to describe property rights that are not subject to a condition precedent. . . . The status of property as community or separate is normally determined at the time of its acquisition."); *In re Marriage of Bouquet*, 16 Cal. 3d 583, 591 (1976) ("[T]he wife gained vested property rights when, prior to the effective date of [the] amended [statute], her husband earned income.").

In sum, retroactive application of Proposition 8 would abrogate all the rights and obligations that this Court has identified as unique to marriage and would relegate California's married same-sex couples to the premarital status quo. In other words, Proposition 8 would "change the legal consequences of the [same-sex spouses'] past conduct." *Tapia*, 53 Cal. 3d at 289. It would do so by applying "the new law of today to the [marriages] of yesterday." *Elsner* v. *Uveges*, 34 Cal. 4th 915, 938 (2004) (quotations omitted). And in so doing it would void rights that vested upon the formation of these prior marriages. *See Cook*, 104 P.3d at 866; *Armijo* v. *Miles*, 127 Cal. App. 4th 1405, 1417 (2005). Such an application inarguably "interferes with [the] antecedent rights" that inhered in same-sex couples' marriages prior to the passage of Proposition 8. *Evangelatos*, 44

Cal. 3d at 1207. Thus, under any formulation of the concept of retroactivity, Interveners' attempted application of Proposition 8 to existing same-sex marriages would constitute a prohibited retroactive application of the law.

CONCLUSION

There can be no doubt that marriage is a human right of singular importance, worthy of guarding against capricious denial:

> The right to marry whoever one wishes is an elementary human right compared to which [other rights] are minor indeed. Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to "life, liberty and the pursuit of happiness" proclaimed in the Declaration of Independence; and to this category the right to home and marriage unquestionably belongs.

Hannah Arendt, "Reflections on Little Rock," *Dissent, no. 1* (1959), p. 59. Such a right does not emanate from the state, but resides inalienably within every human being. The denial of such a right cannot be constitutional. But even if it could be, it must at the very least be expressly stated. Proposition 8 can have no effect on existing marriages.

Dated:

By _____
JASON DE BRETTEVILLE

Counsel for *Amici Curiae* Our Family Coalition and COLAGE

CERTIFICATE OF COMPLIANCE
CALIFORNIA RULES OF COURT, APPELLATE RULE 8.520(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), I certify that the foregoing Proposed Brief of *Amici Curiae* Our Family Coalition and COLAGE in Support of Petitioners Challenging Proposition 8 is one-and-a-half-spaced and printed in proportionally spaced 13-point Times New Roman type. Exclusive of those portions not subject to the type-volume limitations, it contains 7,804 words. In completing this word count, I relied on the "word count" function of the Microsoft Word 2002 word processing program.

Dated: 4/15/11

By _____
JASON DE BRETTEVILLE

Counsel for *Amici Curiae* Our Family Coalition and COLAGE

PROOF OF SERVICE

I, Jennifer A. Thorn, declare:

I am employed in the City of Palo Alto, State of California. I am over the age of eighteen years and am not a party to this action. My business address is Sullivan & Cromwell LLP, 1870 Embarcadero Road, Palo Alto, California 94303. On January 15, 2009, I served the following documents:

- **APPLICATION FOR PERMISSION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS**
- **PROPOSED BRIEF OF AMICI CURIAE OUR FAMILY COALITION AND COLAGE IN SUPPORT OF PETITIONERS CHALLENGING PROPOSITION 8**

☐ by transmitting via electronic mail the document(s) listed above to the electronic address(es) set forth below on this date.

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

☐ by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

☐ by delivering the document(s) listed above by hand to the person(s) at the address(es) set forth below.

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For all envelopes sent by First Class Mail, I placed each such envelope with postage thereon fully prepaid for the deposit in the United States. I am familiar with the firm's practice, which practice is that when correspondence is deposited with the personnel responsible for delivering

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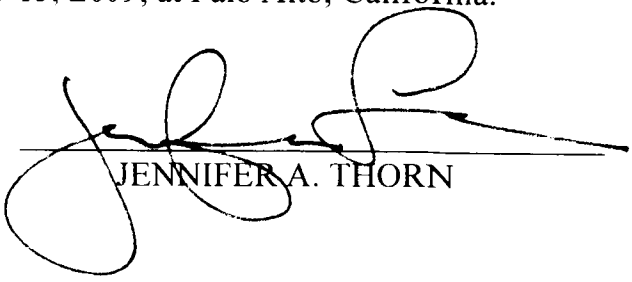
I declare under penalty of perjury that the foregoing is true and correct. Executed on January 15, 2009, at Palo Alto, California.



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