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 CURIAE BRIEF OF NATIONAL ORGANIZATION FOR MARRIAGE CALIFORNIA IN SUPPORT OF INTERVENORS DISCUSSING INTERNATIONAL AND NATIONAL CONSENSUS IN FAVOR OF GIVING DEMOCRATIC INSTITUTIONS A ROLE IN MAKING MARRIAGE POLICY

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*Motion for Admission *Pro Hac Vice* Pending

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APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to Rule 8.520(f), California Rules of Court, *amicus curiae* National Organization for Marriage California (NOM California) respectfully requests permission to file the accompanying brief in support of intervenors.

Amicus Curiae NOM California is a California sponsored primarily formed ballot committee, one of the primary ballot committees formed in support of Proposition 8. NOM California was an active participant in the debate over Proposition 8, raising and contributing nearly $2 million in support of the measure. Following the election, NOM California remains a strong advocate for marriage as the union of husband and wife in California.

NOM California is also the California chapter of the National Organization for Marriage, a 501(c)(4) organization dedicated to "protecting marriage and the faith communities that sustain it." As the state chapter of a national organization involved in the marriage debate, NOM California brings a unique perspective to the case, presenting information relative to developments in other states and countries which has not been presented by the parties. In doing so, we seek to complement, and not duplicate, the argument and information already presented to this Court.

DATED: January 13, 2009

Respectfully submitted,

William C. Duncan
Attorney for Amicus Curiae

I.
Introduction

Petitioners and the Attorney General suggest that the approval of Proposition 8 by California's voters is a unique and uniquely dangerous development in California law. Thus they characterize the amendment as "work[ing] a dramatic, substantive change to our Constitution's 'underlying principles' of individual equality," and "effect[ing] a 'far reaching change[] in the nature of our basic governmental plan." *Strauss v. Horton*, Memo of Authorities, at 12.

The experience of many nations as well as California's sister states makes abundantly clear that, in the result sought and the reasoning offered for it, it is the Petitioners and Attorney General who are seeking to introduce a novel, even radical, innovation in the law.

Without repeating much that has already been written in this case, *Amicus Curiae* writes briefly to provide a national and international context for the current controversy over marriage and California's Proposition 8. In doing so, *Amicus* makes three specific observations:

1) In dramatic contrast to the national and international consensus recognizing a central role for democratic institutions in the process of making public policy regarding marriage, Petitioners are seeking to exclude citizens and their representatives. Far from being unprecedented, the public policy endorsed by California voters is entirely in accordance with the policies of the overwhelming majority of nations and States.

2) The relief requested by petitioners is extraordinary, having rarely been sought and never granted in other controversies over the definition of marriage. It too, is entirely unprecedented in the context of state marriage amendments.

3) Precedent from other states to have considered the amendment/revision distinction in other contexts supports the conclusion that Proposition 8 is an amendment and bears no resemblance to a constitutional revision. To construe a narrow amendment like Proposition 8 a "revision" would be a stark departure from established precedent governing constitutional interpretation.

II.

There is widespread national and international consensus that policymaking regarding marriage and the legal recognition of same-sex couples is an appropriate subject for democratic institutions.

Among States and nations that have acted to address same-sex marriage and the recognition of same-sex unions, there is a consensus that the citizens of those jurisdictions have a role to play in family policymaking. This is obviously true in the States enacting amendments to define marriage as the union of a man and a woman or to apportion the responsibility for doing so.[1] It is also true, however, of the States that have adopted another option. The highest courts of Vermont and New Jersey were asked, like this Court, to determine the Constitutional status of laws defining marriage as the union of a man and a woman. Those courts held

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[1] Alabama Const., amdt. 774; Alaska Const., Art. I, sec. 25; Ariz. Const., art. XXX; Ark. Const., Amdt. 83; Cal. Const., Art. I, sec. 7.5; Col. Const., Art. II, sec. 31; Fla. Const., Art. I, sec 27; Ga. Const., Art I, sec. 4 par. 1; Haw. Const., Art. I, sec. 23; Idaho Const., Art. III, sec. 28; Kansas Const. Art. 15, sec. 16; Ky. Const., Sec. 233A; La. Const., Art. XII, sec. 15; Mich. Const., Art. I, sec. 25; Miss. Const., Sec. 263-A; Mo. Const., Art. I, sec. 33; Mont. Const., Art. Art. 13, sec. 7; Neb. Const., Art. I, sec. 29; Nev. Const., Art. I, sec. 21; N.D. Const., Art. XI, sec. 28; Ohio Const., Art. XV, sec. 11; Okla. Const., Art. 2, sec. 35; Or. Const., Art. XV, sec. 5a; S.C. Const., Art. XVII, sec. 15; S.D. Const., XXI, sec. 9; Tenn. Const., Art. XI, sec. 18; Texas Const., Art. I, sec. 32; Utah Const., Art. I, sec. 29; Va. Const., Art. I, sec. 15-A; Wis. Const., Art. XIII, sec. 13.

that while the respective state constitutions did not necessarily require that the word "marriage" be redefined to include same-sex couples, the states were required to extend to same-sex couples the legal benefits associated with marriage. *Lewis v. Harris* (N.J. 2006) 908 A.2d 196; *Baker v. Vermont* (Vt. 1999) 744 A.2d 864. In both cases, however, the courts were careful to respect the role of their respective State Legislatures in determining how to provide those benefits. Ultimately, it was the Vermont Legislature that first coined the term "civil union" in enacting legislation to extend marital benefits to same-sex couples (15 Vt. Stat. Ann. §1201) and the New Jersey Legislature also provided for a comprehensive civil union status (N.J. Stat. Ann. §26:8A-2). (The New Hampshire Legislature has also enacted such a law (New Hampshire House Bill 437, 2007) making four states, including California with such comprehensive laws providing all or nearly all benefits of marriage to same-sex couples.)

Even the Massachusetts Supreme Judicial Court, the first state Supreme Court to rule that a State's Constitution mandated a redefinition of marriage (*Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E.2d 941), rejected challenges filed against a proposed constitutional amendment, actively protecting the right of the people to substantively amend their Constitution to clarify the definition of marriage effectively reversing a contrary interpretation from the Court. *Schulman v. Attorney General* (Mass. 2006) 850 N.E.2d 505.

Viewed from an international perspective, the consensus in favor of democratic institutions having a role in determining the definition of marriage becomes even clearer. The nations of Europe provide a wide variety of legally recognized statuses available to same-sex couples, ranging from same-sex marriage, to various comprehensive statuses that provide marriage benefits to same-sex couples, to a narrower recognition of cohabiting couples. Notably, nowhere in Europe has the recognition of

same-sex couples come about by judicial means, but only by democratic action. It is not that these countries lack a mechanism for judicial review of legislative enactments touching on important rights. Rather, European nations have recognized the importance of democratic institutions, and the courts have refrained from interfering with policymaking by representative bodies.

Thus, for instance, the Parliament of the United Kingdom has enacted a law creating a civil partnership status, closely analogous to domestic partnerships in California or civil unions in Vermont or New Jersey. Civil Partnership Act 2004.[2] Another group of nations have created legal statuses extending many or most benefits to same-sex couples.[3] Yet more nations provide some kind of status for cohabitation.[4] The

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[2] A Civil Partnership provides a very close approximation to the status of marriage for same-sex couples although it is not a marriage nor registered as one. See Andrew Flagg, *Civil Partnership in the United Kingdom* (2005) ARIZ. J. INT'L & COMP. L. 613.

[3] In the five Nordic countries, the status is only available to same-sex couples and approximates closely the benefits of marriage, although with some significant exceptions: Denmark Registered Partnership Act, Act No. 372, June 1, 1989 (partners can only adopt the children of one another); Finland Registered Partnership Act 950/2001 (partners cannot adopt a common surname and partners cannot jointly adopt children); Iceland Registered Partnership Law 1996 (partners can only adopt the children of one another); Norway Law on Registered Partnerships, Act No. 40, April 20, 1993 (partners can only adopt the children of one another); Sweden Registered Partnership Act, SFS 1994:1117. *See* Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries* (2004) 38 NEW ENGLAND L. REV. 569. *See also* Switzerland Bundesgesetz über die eingetragene Partnerschaft gleichgeschlechtlicher Paare 2004.

[4] *See* Germany Life Partnerships Act 2000 (provides a limited set of benefits to registering same-sex couples); Luxembourg Registered partnership 4946-12 May 2004 (limited benefits to same and opposite sex cohabitants); Slovenia Law on Registered Same Sex Partnership 2005 (limited financial benefits); Croatia Law on same sex civil union 2003 (some benefits for cohabitants who have lived together for three years);

Netherlands (Act on the Opening Up of Marriage, 2001), Belgium (Law of 30 January 2003) and Spain (Boletin Oficial del Estado, July 3, 2005) have all legislatively defined marriage as the union of two adults irrespective of the sex of the spouses.

Despite the variation in the kind of status extended to same-sex couples, there is a commonality among all of these nations. Each has provided the legal recognition through a process that involved, in fact originated with, the representative bodies of the countries.[5]

The experience of these jurisdictions strongly suggests that among nations that have a commitment to respect for constitutional guarantees and human rights, reasonable people may come to different conclusions about how to deal with public policy considerations of marriage, family and same-sex relationships. In the Netherlands, the Parliament decided to redefine marriage. In the United Kingdom, Parliament opted to retain the

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Portugal Lei No. 7/2001 de 11 de Maio, Adopta medidas de protecção das uniões de facto, 109 (I-A) Diário da República 2797 2001 (property rights and some benefits for cohabiting couples). *See* Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries* (2004) 38 NEW ENGLAND L. REV. 569; Elizabeth Kukura, *Finding Family: Considering the Recognition of Same-Sex Families in International Human Rights Law and the European Court of Human Rights* (Winter 2006) 13 HUMAN RTS. BRIEF 17; Robert Wintemute, *Same-Sex Marriage: When Will it Reach Utah?* (2006) 20 BYU J. PUB. L. 527.

[5] Even in Canada and South Africa, where the marriage debate originated in the courts, it was ultimately the legislature that determined the precise contours of the law in response to the broad guidance given by the court. Both Canada and South Africa have redefined marriage to include same-sex couples through parliamentary action (Civil Marriage Act, S.C. 2005, c. 33; South African Civil Union Act, Act 17 of 2006), albeit after initial judicial involvement (*Halpern v. Toronto* (Ont. Ct. App. 2003) 225 DLR (4th) 528; *Minister of Public Health v. Fourie* (S. Afr. Const. Ct. Dec. 1, 2005) CCT 60/04). The experience of both of these countries supports the idea that the strong consensus is in favor of the involvement of democratic institutions in family policymaking.

longstanding understanding of marriage as the union of a man and a woman but also created a civil partnership status that extended marriage benefits to same-sex couples. In France, a Parliamentary committee found that "the sex-difference condition constitutes an essential component of marriage with regard to marriage's filiation aspects" so that "it is the interests of the child that lead a majority of the Mission to refuse to change the parameters of marriage." French National Assembly, Report Submitted on Behalf of the Mission of Inquiry on the Family and Rights of Children No. 2832 (English translation at http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf and original at http://www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf). France has a separate legal status for unmarried couples, the Civil Solidarity Pacts. Loi no. 99-944 du 15 Novembre 1999, Relative au Pacte Civil de Solidarité.[6]

Perhaps it is for this reason that the European Convention on Human Rights and the United Nations Declaration on Human Rights have not been interpreted as requiring member state to redefine marriage to include same-sex couples. In 2002, the United Nation's Human Rights Committee affirmed that the internationally recognized civil right of marriage created by the International Covenant on Civil and Political Rights confers the obligation on states "to recognize as marriage only the union between a man and a woman wishing to marry each other," establishing this as the baseline and leaving the various member states to legislatively determine

[6] The Pacs law applies to both same and opposite-sex cohabitating couples and creates a contract between the partners. While some marriage-like benefits are extended to couples in Pacs, there are significant differences in treatment including a much different process for entrance and a very simple dissolution procedure. As another example, marriage creates a post-dissolution maintenance obligation but Pacs does not. *See* Joelle Godard, *Pacs Seven Years On: Is It Moving Towards Marriage?* (2007) 21 INT'L J.L. POL'Y & FAM. 310.

the recognition to be given other domestic relationships. *Joslin, et al. v. New Zealand* (U.N. Hum. Rts. Comm. 2002), Communication No. 902/1999, U.N. Doc. A/57/40, 214. Similarly, the European Court of Human Rights held that the right to marry, as protected by the European Convention on Human Rights, applies only to "traditional marriage," leaving the individual states free to individually determine the nature and degree of recognition to extend other relationships. *Rees v. United Kingdom* (Eur. Ct. Hum. Rts. 1986) 9 EHHR 56.

In fact, the experience of these States and nations shows that with very few exceptions, the issue of whether and how best to legally recognize same-sex relationships has been considered a matter for democratic institutions, rather than courts, to decide. In other words, it has been treated as a matter of social policy. In addition, the overwhelming consensus in the United States and Western democracies is that marriage is the union of a man and a woman, even as some of these jurisdictions also grant some of the benefits of marriage to same-sex couples. Proposition 8 keeps California squarely on the more permissive side of the spectrum on this issue—retaining the historical understanding of marriage while creating an alternative legal status for same-sex couples.

The petitioners in this case and the Attorney General are advancing an argument that would put California at odds with the national and international consensus about popular involvement in the matter of marriage and legal recognition of same-sex unions. Whether through a novel and greatly expanded understanding of the amendment/revision distinction or through the recognition of some kind of extra-constitutional mandate preventing a vote on marriage, the result would be the removal of an issue from public debate that is widely recognized as being a fit subject for that debate in nearly every State or nation that had addressed it.

This consensus recognizes that legal questions surrounding marriage and same-sex unions are public policy matters about which reasonable people can hold a variety of opinions. The theories of Petitioners and the Attorney General endorse an opposite notion—that Californians should not be able to make decisions about some matters even when the Constitution would otherwise allow them to do so. This, in turn, denies to certain legitimate points of view access to the normal political process.

As strongly as same-sex marriage is favored by many jurisdictions, none have been willing to endorse this more radical notion.

III.
The Relief Requested by Petitioners has Rarely Been Sought, and Never Granted, in Other Controversies over the Definition of Marriage.

Petitioners offer no legal authority sufficient to support the extraordinary assertions underlying their revision claim. Proposition 8 is fourteen words long, establishes a substantive rule relating to the definition of marriage, and says nothing about the legal rights, benefits and responsibilities associated with marriage. Far from "jealously guard[ing] the precious initiative power, and [resolving] any reasonable doubts in favor of its exercise" (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501, 286 Cal. Rptr. 283, 16 P.2d 1309), Petitioners offer a novel test of the amendment/revision distinction, asking this Court to rule any subject related to fundamental rights "off limits" for the amendment process. This test has no support in California case law and has been specifically rejected by the Oregon Court of Appeals – the only other court to have considered the specific arguments made by petitioners here.

As noted above, over the past decade, the people of thirty states have considered and approved amendments to their state constitutions which

would clearly define marriage as the union of a husband and wife. At least eighteen of these state constitutions also distinguish between "amendments" and "revisions" in a manner similar to that contained in Article VIII of the California Constitution.[7] In only two cases, however, have opponents of a state marriage amendment sought to disqualify the amendment on the grounds that it represents such a fundamental or widespread change to the state's system of government as to constitute a revision. Both of these cases were unanimously rejected by the respective state courts.

In the first of these cases, the Alaska Supreme Court specifically relied upon California case law in concluding that Alaska's definition of marriage clearly operated as an amendment and not a revision. *Bess v. Ulmer* (Alaska 1999) 985 P.2d 979, 984-987. The Alaska Court traced the development of California authority on the topic case by case, adopting the qualitative/quantitative analysis first set forth in *Amador Valley v. State* (1978) 22 Cal.3d. 208, 149 Cal. Rptr. 239, 583 P.2d 1281. *Bess* at 987. The Court's analysis pointed to two factors – the number of sections affected (quantitative) and the impact the amendment would necessarily have upon the state's basic governmental framework (qualitative). The Court held:

> [The marriage amendment[8]] is sufficiently limited in both quantity and effect of change as to be a proper subject for a constitutional amendment. Few sections of the Constitution are directly affected, and nothing in the proposal will 'necessarily or inevitably alter the basic governmental framework' of the Constitution.

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[7] Gerald Benjamin, *Constitutional Amendment and Revision* in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY (G. Alan Tarr, et al., eds. 2006) page 204 note 3 (noting state constitutions allowing for both amendments and revisions).

[8] "To be valid or recognized in this State, a marriage may exist only between one man and one woman." Alaska Const., Art. I, sec. 25.

Id. at 988, quoting *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 186 Cal. Rptr. 30, 651 P.2d, 274 at 289.

Just two years ago, the Oregon Court of Appeals was likewise faced with the amendment/revision question following the adoption of the Oregon marriage amendment. Ore. Const. Art. XV, sec. 5a[9]. In challenging the Oregon amendment, plaintiffs there argued that a measure is a revision if it "substantially derogate[s] from fundamental principles of the Constitution in a way that works a particular, cognizable injustice to a discrete class of citizens." *Martinez v. Kulongoski* (Or. App. 2008) 185 P.3d 498, 502. In this way, plaintiffs introduced a new element of the revision test, suggesting that a measure may be found to constitute a revision—even if it does not alter a state's basic governmental framework—if it can be said to impact the fundamental rights of a discrete class of citizens.

This sort of unsupported result-driven analysis, and proposed expansion of the revision/amendment test, was flat rejected by the Oregon court. Id. at 500-505. The Oregon court also turned to California case law for guidance. Id.

Having learned from the Oregon experience, petitioners here do not explicitly seek to change the revision/amendment test, but rather assert that any measure touching on fundamental rights does in fact necessarily alter the state's system of government. Although the framing is different, the substance is the same.

Thus, although the question whether Proposition 8 constitutes a revision is a matter of first impression in California, at least two other state courts in recent years have considered precisely this same question – and in

[9] "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

answering it have relied heavily upon an analysis of California case law. In both cases, the courts have unanimously concluded that a measure defining marriage as the union of a husband and wife is not so broad or fundamental a change as to constitute a revision to the constitution.

IV.
In other contexts also, precedent from other states confirms that a proposal will rarely be disallowed under the revision/amendment distinction, and only in extreme cases.

Petitioners argue that Proposition 8 modifies the equal protection clause and separation of powers provisions of the California Constitution to such an extent as to substantially revise the nature of government under the California Constitution, and thus requires the more deliberative process provided for adoption of a revision under Article VIII.

This position is without support.

Courts in other states to have considered the amendment/revision distinction, rely heavily on California case law, and clearly illustrate the deference shown by courts to the people's power to amend their constitution. The test adopted in every state reflects that qualitative/quantitative analysis set forth by this Court in *Amador. Amador Valley v. State* (1978) 22 Cal.3d. 208, 149 Cal. Rptr. 239, 583 P.2d 1281.

While there is no bright-line test to show whether a measure produces such comprehensive change as to constitute a revision, the law of other states is helpful in demonstrating just how extraordinary a remedy petitioners are seeking. The substance of the amendment/revision distinction is essentially the same across state lines, as other states have consistently looked to California for guidance. Yet California jealously protects the right of the initiative, and the people of California have intentionally retained greater control over their Constitution than exists for the people of many other states. In California, an amendment may be

proposed by initiative, and a revision by the legislature, while in many states amendments must be proposed by the legislature and a revision may require a constitutional convention. See, e.g., Alaska Const. art. XIII, § 4. Mich. Const. art. XII, § 3.

Thus, petitioners here are arguing that Proposition 8 is the type of change that would in some states require a constitutional convention. This is indeed an extraordinary claim.

A survey of the various measures found by other courts to be a constitutional revision clearly indicates that a measure will be found to constitute a revision only in extreme circumstances involving changes to the very structure of state government.

And while every constitutional amendment can in some way be construed to limit the power of one or more branches of government, courts in other states have affirmed amendments limiting legislative powers related to property tax assessments (*School Dist. Of City of Pontiac v. City of Pontiac* (Mich. 1933) 247 N.W. 474), removing redistricting power from the executive branch (*Bess v. Ulmer* (Alaska 1999) 985 P.2d 979), precluding judicial finding of "minority status" based on sexual orientation (*Lowe v. Keisling* (Or. App. 1994) 882 P.2d 91), denying the extension of spousal benefits to same-sex couples by either legislative or judicial means (Id.), and defining marriage as the union of a man and a woman in limitation of both legislative and judicial authority (*Bess v. Ulmer* (Alaska 1999) 985 P.2d 979; *Martinez v. Kulongoski* (Or. App. 2008) 185 P.3d 498).

By contrast, cases in which a court has found the measure to constitute a revision have all involved a significant structural change to the basic governmental framework of the state, and not merely a substantive answer to one particular question. Even in *Bess v. Ulmer*, where the Alaska Supreme Court struck a measure tying prisoners' rights to the jurisprudence

of the U.S. Supreme Court (as this Court did in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 276 Cal. Rptr. 326, 801 P.2d 1077), the concern was that the measure delegated to a third party (the federal courts) the constitutional authority that had previously belonged to the state courts. Petitioners here claim that Proposition 8 presents an analogous situation, limiting the ability of California courts to impose same-sex marriage. But some limitation is necessarily the case with respect to any measure imposing a substantive rule – the courts are bound to adhere to it. Moreover, Proposition 8 does not delegate authority over marriage to a third party but rather reserves it to the people of California. A better application of the *Bess/Raven* analogy would be to a provision tying California family law to the domestic relations decisions of Nevada courts. Certainly Proposition 8 does nothing of the sort, and the impact of Prop 8 is no different than that of any other amendment – it imposes a substantive rule which the courts are bound to apply. *This is not a comprehensive restructuring of the state government, but merely a clarification of the substantive law which the courts are to apply.*

This distinction is further clarified by a look at the measures found by other state courts to constitute a constitutional revision, and thus not be eligible for adoption through the amendment process. These measures include:

- A Florida proposal to replace the existing bicameral legislature structure with a unicameral system. *Adams v. Gunter* (Fla. 1970) 238 So.2d 824 ("It would be difficult to visualize a more revolutionary change. . . . It would not only radically change the whole pattern of government in this state and tear apart the whole fabric of the Constitution, but would even affect the physical facilities necessary to carry on government.").
- A Michigan petition to "Reform Michigan Government Now" (RMGN) proposing to modify four articles and 24 sections of the Michigan

Constitution, while also adding 4 new sections, and "touch[ing] on a wide and diverse range of subjects, from the number of executive departments, legislators and judges, to absentee ballots, to jury lists, to lobbying activities, to public disclosure of records, to retirement and pension benefits, to legislative districting, to standing to bring lawsuits." *Citizens Protecting Michigan's Constitution v. Secretary of State* (Mich. App. 2008) 280 Mich. App. 273.

- An Oregon measure proposing adoption of a 56-page document representing "a thorough overhauling of the present constitution and a complete constitution . . . including many and important substantive changes to Oregon's constitutional structure. *Holmes v. Appling* (Or. 1964) 392 P.2d 636.
- An Alaska measure limiting the rights of prisoners to those rights guaranteed under the United States Constitution. *Bess v. Ulmer* (Alaska 1999) 985 P.2d 979.

The Michigan Supreme Court has provided perhaps the most extensive analysis of the amendment/revision distinction. In *Kelly v. Laing*, the Michigan Court laid out the general framework:

> Revision implies a re-examination of the whole law and a redraft without obligation to maintain the form, scheme, or structure of the old. As applied to fundamental law, such as a constitution or charter, it suggests a convention to examine the whole subject and to prepare and submit a new instrument, whether the desired changes from the old be few or many. Amendment implies continuance of the general plan and purport of the law, with corrections to accomplish its purpose.

Kelly v. Laing (Mich. 1932) 242 N.W. 891, quoted in *Citizens Protecting Michigan's Constitution v. Secretary of State* (Mich. App. 2008) 280 Mich. App. 273.

A year later, the Michigan court considered a challenge to a measure limiting powers of taxation, focusing on whether the measure "so interfere[d] with or modif[ied] the operation of governmental agencies as to

render it other than an amendment by way of an addition to the Constitution." *School Dist. of City of Pontiac v. City of Pontiac* (Mich. 1933) 247 N.W. 474, 477. This test, involving both qualitative and quantitative elements, was reiterated in *Citizens*, where the Court explained: "the analysis does not turn solely on whether the proposal offers a wholly new Constitution, but must take into account the degree to which the proposal interferes with, or modifies, the operation of government. The clear implication is that the greater the degree of interference with, or modification of, government, the more likely the proposal amounts to a 'general revision.'" *Citizens Protecting Michigan's Constitution v. Secretary of State* (Mich. App. 2008) 280 Mich. App. 273, 298.

While, as the Michigan Court also noted, "it is not possible to 'define with nicety the line of demarcation' between an 'amendment' and a 'general revision,'" cases finding a revision have uniformly concluded with the Michigan court that the "proposal plainly falls within the realm of a 'general revision' of the Constitution." Id. at 305. In close cases, given the presumption of validity and jealousy with which the Court guards the right of the people to propose an initiative amendment, deference must be given to the people to determine their own system of government.

The Delaware Court similarly concluded: "[A revision] makes substantial, basic, fundamental changes in the plan of government; it makes extensive alterations in the basic plan and substance of the existing document; it attains objectives and purposes beyond the lines of the present Constitution. A 'revision' is more than a mere reorganization, restatement, modernization, abbreviation, consolidation, simplification, or clarification of the existing document." *Opinion of the Justices* (Del. 1970) 264 A.2d 342, 346.

Proposition 8 is nothing more than a clarification of the definition of marriage in the California Constitution – reinstating the definition which

has been uniformly understood and applied by courts and legislatures alike up until May 2008.

V.
Conclusion

For these reasons, *amicus curiae* National Organization for Marriage California respectfully urges this Court to reject the request of Petitioners and the Attorney General to exclude California's citizens from the family policymaking process by invalidating Proposition 8.

Dated: January 13, 2009

By: _____
William C. Duncan
Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief, from page 1 through and including the signature lines that follow the brief's conclusion, contains 4,744 words. I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 13, 2009.

By: _____
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Attorney for Amici Curiae

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I, declare that I am over the age of 18 years and not a party to the within action. My business address is 1868 N 800 E, Lehi, UT 84043.

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DATE: January 13, 2009.

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