Case No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al.

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, et al.

Respondents,

DENNIS HOLLINGSWORTH, et al.

Intervenors

APPLICATION TO FILE BRIEF AMICUS CURIAE

and

AMICUS CURIAE BRIEF OF STEVEN MEIERS

IN OPPOSITION TO

AMENDED PETITION FOR EXTRAORDINARY RELIEF

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APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rules of Court 8.520(f), I respectfully request leave to file the accompanying brief, as amicus curiae, in opposition to the Amended Petition for Extraordinary Relief in *Karen L. Strauss, Petitioners, et al. v. Mark B. Horton, et al., Respondents, Dennis Hollingsworth, et al., Intervenors* (S168047) (the "Petition"). The Petition challenges the constitutionality of Proposition 8.

The briefs of the parties are, of course, designed primarily to advance their position on allowing or prohibiting same-sex marriage. I write to provide Your Honors with authority – including important authority not included in the briefs of the Petitioners, Intervenors, or Attorney General – and discussion that, I hope, Your Honors will find both unbiased and helpful, concerning, I respectfully submit, determinative matters.

An example of the authority not contained in those others briefs is contemporaneous statements, highly illuminating on the intent of the initiative in California, by the leader of the Progressive Movement in our State, Governor Hiram Johnson, to the California Senate and Assembly.

My interest – as a 60+ year resident of California, a taxpayer, and a lawyer with 40 years experience and voter who believes in democracy as ingrained in our State's Constitution – is not whether same-sex marriage

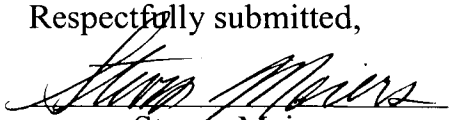
should be allowed, but rather, consistent with this Court's decision in *Raven v. Deukmejian* (1990) 52 Cal.3d 336 ("*Raven*"), only that:

- The sovereign People's constitutional right of initiative, "one of the most precious rights of our democratic process," be preserved against debilitating change, unless and until modified by the People (*Raven*, *supra*, 52 Cal.3d 336, 341); and
- This Court therefore have before it authority and argument directed solely to that point, so it may consider them in "resolv[ing] any reasonable doubts in favor of the exercise of this precious right", a right fundamental to "the nature of our basic governmental plan" (*Raven*, *supra*, 52 Cal.3d 336, 341, 352 (modification in brackets added).

While I write for myself only,[1] this interest, I respectfully submit, is shared by Californians generally.

Dated: January 14, 2009

Respectfully submitted,



Steven Meiers

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[1] Unlike the situation with amicus curiae briefs sometimes submitted, I have not sought, been offered, or received any monetary or other consideration in connection with my amicus brief. I am the sole author of that brief, and no one has reviewed or offered suggestions for it.

Case No. S168047

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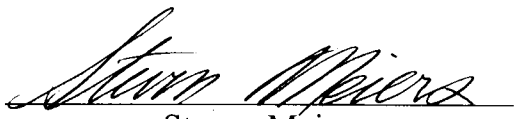
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

I, amicus curiae Steven Meiers, hereby certify that I am not aware of any entity that or person who must be listed in this certificate, in accordance with California Rule of Court 8.208(d), in *Karen L. Strauss, et al., Petitioners, v. Mark B. Horton, et al. Respondents, Dennis Hollingsworth, et al., Intervenors* (S168047).

Dated: January 14, 2009



Steven Meiers

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Amicus curiae Steven Meiers respectfully submits this brief in opposition to the Amended Petition for Extraordinary Relief in *Karen L. Strauss, et al., Petitioners, v. Mark B. Horton, et al., Respondents, Dennis Hollingsworth, et al., Intervenors* (S168047), which challenges the validity of Proposition 8 (the "Petition").

I write for myself only, but believe the interest advocated below – safeguarding, against debilitating change, the right of the People to amend their Constitution by initiative – is shared by Californians generally.

I. SUMMARY OF ARGUMENT

The Petition argues a fundamental right – the right of gay and lesbian couples to marry – is at stake in these proceedings.

The most fundamental right at stake here, however, is the People's right, ingrained in the California Constitution, to amend their Constitution by initiative, a right of which this Court has many times eloquently written:

> ". . . it is our solemn duty jealously to guard the sovereign people's initiative power, 'it being one of the most precious rights of our democratic process.' Consistent with prior precedent, *we are required to resolve any reasonable doubts in favor of the exercise of this precious right.*"

Raven v. Deukmejian (1990) 52 Cal.3d 336, 341 ("*Raven*") (citations and page references omitted; italics in original; quoting *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 ("*Brosnahan*") and *Amador Valley Joint Union*

High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 248 ("*Amador*") and citing *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 ("*Associated Home Builders*")).

Under the California Constitution and an unbroken line of cases decided by this Court (including those just cited) – a line of cases that has been described by this Court as "firmly established precedent" (*Brosnahan*, *supra*, 32 Cal.3d 236, 262): (i) Proposition 8 is valid if it is an amendment to, and invalid if it is a revision of, the Constitution; and (ii) whether an initiative is an amendment or a revision is determined using both a quantitative and a qualitative analysis. Under the quantitative analysis, Proposition 8 is obviously not a revision.

Under the qualitative analysis, even a "relatively simple" initiative enactment can be a revision if it effects "far reaching changes in the nature of our basic governmental plan." Under this Court's "firmly established precedent," it does not matter that a right this Court found fundamental (or inalienable) or the application of equal protection to a group subject to a suspect classification is involved unless, on the face of the initiative (i.e., without speculation as to future events), eliminating the right effects "far reaching changes in the nature of our basic governmental plan."

Proposition 8 does not effect such "far reaching changes in the nature of our basic governmental plan" and, under this Court's "firmly established precedent," is therefore not a revision and not unconstitutional.

Accordingly, even though in the *Marriage Cases* (2008) 43 Cal.4th 757 ("*Marriage Cases*") holds the right of same-sex couples to marry is a fundamental right, if Proposition 8 is invalidated, it will be the fundamental right of the People to amend their Constitution by initiative, "one of the most precious rights of our democratic process," that will be eviscerated.[1]

II. INTRODUCTION – IF PROPOSITION 8 IS AN AMENDMENT TO, NOT A REVISION OF, THE CALIFORNIA CONSTITUTION, DETERMINED USING A QUANTITATIVE AND A QUALITATIVE ANALYSIS, IT IS NOT UNCONSTITUTIONAL

Article II, Section 8, and Article XVIII, Sections 3-4, of the California Constitution provide the People can amend their Constitution by initiative, but revisions of the Constitution require action by: (i) two-thirds of the State Senate and Assembly and a vote of the People; or (ii) a duly convened constitutional convention.

This Court's jurisprudence establishes that: (a) as used in these provisions, the words "amend" and "amendment," one the one hand, and "revise" and "revision," on the other, have different meanings; and (b) Proposition 8 is not unconstitutional if it is an amendment to the California Constitution, but is if it is revision of the Constitution.

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[1] The Petition does not contend, and this brief therefore does not discuss further, that: (i) Proposition 8 does not comply with the single subject requirement (it does); or (ii) there an issue of constitutionality under the United States Constitution (United States Supreme Court authority would not support such an argument, were it made).

This Court's decision in *Raven* summarizes prior cases and reiterates that an initiative purporting to amend the Constitution can be valid as an amendment or invalid as a revision, based on the initiative's quantitative and qualitative effects, both of which must be analyzed. *Raven*, *supra*, 52 Cal.3d 336, 351-353. *Raven* and other Supreme Court cases, decided both before and after *Raven*, constitute uninterrupted and unambiguous "firmly established precedent" on whether, on a quantitative or qualitative analysis, an initiative enactment is an amendment or a revision.

III. PRINCIPLES OF INTERPRETATION STRONGLY FAVOR PROPOSITION 8 BEING FOUND CONSTITUTIONAL

Principles of interpretation strongly favor purported initiative constitutional amendments, which Proposition 8 is, being found constitutional. For example, doubts are required to be resolved in favor of the constitutionality of purported initiative constitutional amendments:

> In *Associated Home Builders* . . . Justice Tobriner . . . wrote: "Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative . . . not as a right granted the people, but as a power reserved by them. . . . [It is] 'the duty of the court to jealously guard this right of the people' . . . 'one of the most precious rights of our democratic process'. '[I]t has long been our judicial policy to apply a liberal construction to this

> power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'
>
> Consistent with our firmly established precedent, we have jealously guarded this precious right, giving the initiative's terms a liberal construction, and resolving reasonable doubts in favor of the people's exercise of their reserved power.

Brosnahan, *supra*, 32 Cal.3d 236, 261-262 (citation references omitted; words in brackets added).

In *Raven*, this Court repeated and reiterated this standard:

> *Brosnahan* succinctly set forth the general principles that must guide the courts in evaluating the validity of initiative measures: . . . "[the] power of initiative must be liberally construed . . . to promote the democratic process." . . . ". . . it is our solemn duty jealously to guard the sovereign people's initiative power, 'it being one of the most precious rights of our democratic process.' Consistent with prior precedent, *we are required to resolve any reasonable doubts in favor of the exercise of this precious right.*"

Raven, *supra*, *52* Cal.3d 336, 341 (italics in original; citations and page references omitted; words in brackets in original), quoting and citing:

Brosnahan, supra, 32 Cal.3d 236, 241; *Amador, supra*, 22 Cal.3d 208, 219-220, 248; and *Associated Home Builders, supra*, 18 Cal.3d 582, 591.

In summary, when, as here, the People's initiative right to amend the Constitution is challenged, each of *Raven, Brosnahan, Amador*, and *Associated Home Builders*, employing the following clear words of mandate, specifies the rules of interpretation to be used:

- These rules of interpretation "must guide the courts";
- "[I]t is our solemn duty jealously to guard the sovereign people's initiative power, 'it being one of the most precious rights of our democratic process'";
- "[A] liberal construction [is to be applied to the initiative] power wherever it is challenged in order that the right be not improperly annulled"; and
- "*[W]e are required to resolve any reasonable doubts in favor of the exercise of this precious right*" (italics in original).

One effect of these rules of interpretation is that, as a purported initiative constitutional amendment, Proposition 8 must be upheld unless its

> . . . unconstitutionality clearly, positively, and unmistakably appears.

Legislature v. Eu (1991) 54 Cal.3d 492, 501 (citations omitted).

IV. PROPOSITION 8 IS NOT UNCONSTITUTIONAL AS A REVISION ON A QUANTITATIVE ANALYSIS

Proposition 8 is not unconstitutional on a quantitative analysis.

A. The Quantitative Analysis Standard – An Enactment So Extensive It Changes The "Substantial Entirety" of the Constitution

The quantitative analysis standard is whether an enactment is so extensive that it changes the "substantial entirety" of the Constitution.

The Petition does not contend Proposition 8 is unconstitutional as a revision on a quantitative analysis. That analysis may be relevant, however, and is briefly discussed below, because an initiative constitutional enactment will be invalid on a qualitative analysis (i.e., the enactment accomplishes such "far reaching changes in our basic governmental plan as to amount to a revision also") if the enactment has a substantive effect similar to an enactment invalid as a revision on a quantitative analysis.

Raven – quoting *Amador* (which upheld Proposition 13, an initiative constitutional amendment limiting real property taxes) – says a purported initiative constitutional amendment will be invalid on a quantitative analysis if the changes it makes are:

> "so extensive . . . as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions . . ." (*Amador*, *supra*, 22

> Cal.3d at p. 223). . . . See *Brosnahan*, *supra*, 32 Cal.3d at p. 260 [upholding measure likewise affecting only Cal. Const., Art. I]; *Amador*, *supra*, at p. 224 [upholding measure affecting only a few articles dealing with taxation]; cf. *McFadden v. Jordan* (1948) 32 Cal.2d 330, 334-335 . . . [invalidating measure adding 21,000 words to Constitution and affecting 15 of its 25 articles].)[2]

Raven, *supra*, 52 Cal.3d 336, 351.

B. Proposition 8 Is Not Unconstitutional As A Revision On A Quantitative Analysis

Proposition 8 added the 14-word Section 7.5 to Article I of the California Constitution:

> Only marriage between a man and a woman is valid or recognized in California.

Proposition 8 affects only the equal protection/due process/privileges and immunities provision of the California Constitution (Article I, Section 7) and does so in one respect only (precluding same-sex marriages). Proposition 8 is unquestionably not "so extensive . . . as to change directly the 'substantial entirety' of the Constitution". *Raven*, *supra*, 52 Cal.3d 336,

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[2] *McFadden v. Jordan* (1948) 32 Cal.2d 330 is the only case where this Court found a purported initiative constitutional amendment invalid as a revision on a quantitative analysis.

351 (quoted at pages 7-8 above). Proposition 8 therefore passes the quantitative analysis.

V. PROPOSITION 8 IS NOT UNCONSTITUTIONAL AS A REVISION ON A QUALITATIVE ANALYSIS

Proposition 8 is not unconstitutional on a qualitative analysis.

A. The Qualitative Analysis Standard – An Enactment, Even If Relatively Simple, That Accomplishes Such "Far Reaching Changes In The Nature Of Our Basic Governmental Plan As To Amount To A Revision Also"

Under numerous cases in this Court's "firmly established precedent," the qualitative analysis standard is whether a purported initiative constitutional amendment, even if relatively simple, accomplishes such "far reaching changes in the nature of our basic governmental plan as to amount to a revision also". See, for example, *Raven*, *supra*, 52 Cal.3d 336, 352.

The words just quoted were obviously carefully crafted, and they have been regularly repeated in this Court's "firmly established precedent." It is therefore obviously important to focus on those words – what this Court has clearly said, and what it equally clearly has not. Specifically, to be invalid on a qualitative analysis, the initiative enactment must:

- Be "far reaching" – the initiative must, in effect, permeate important provisions of the Constitution, not just one or a few provisions;
- Effect "changes in the nature of our basic governmental plan" – under this Court's "firmly established precedent,"

for an initiative to be invalid on a qualitative analysis:

(i) "it must necessarily or inevitably appear from the face of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution";[3] and (ii) the initiative must do this without speculation as to what might occur in the future (which speculation is impermissible); and

- "[A]mount to a revision also" – words reinforcing that the change must permeate and materially alter the Constitutional framework of "our basic governmental plan" (e.g., "the fundamental structure or foundational powers of [the] branches" of our government).[4]

This Court's "firmly established precedent," of which the principal decisions are discussed below in this section and on pages 23-30 below, is

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[3] As explained by this Court, to "substantially alter the basic governmental framework," the initiative enactment must cause "a change in the basic plan of California government . . . in the fundamental structure or foundational powers of its branches" and "substantially alter the basic governmental framework set forth in our Constitution". *Legislature v. Eu*, *supra*, 54 Cal.3d 492, 509.

[4] It seems reasonable an initiative making "far reaching changes in the nature of our basic governmental plan" would be subject to more, perhaps inefficient, formality, discussion, and deliberation by legislative committees or constitutional convention delegates. See *Legislature v. Eu*, *supra*, 54 Cal.3d 492, 506 (quoting *Raven*, *supra*, 52 Cal.3d 336, 349-350).

wholly consistent with these carefully crafted words. Because *Raven* is the only case invalidating any initiative constitutional enactment as a revision on a qualitative analysis, it is discussed first and quoted at some length below.

(1) Decisions Included In This Court's "Firmly Established Precedent"

(i) *Raven* And *Amador*

Raven involved challenges on, among others, "revision not amendment" grounds, to the Proposition 115 initiative, called the "Crime Victims Justice Reform Act," which added numerous provisions to the California Constitution. One of these provisions was held unconstitutional as a revision on a qualitative analysis, this Court explaining:

> . . . "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also . . . *[A]n enactment which purported to vest all judicial power in the Legislature would amount to a revision* without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change." (*Amador*, *supra*, 22 Cal.3d at p. 233, italics added; see also *McFadden v. Jordan*, *supra*, 32 Cal.2d at pp. 347-348 [rejecting

> argument that revision must involve changes affecting all articles of Constitution].

Raven, *supra*, 53 Cal.3d 336, 351-352 (italics and words in brackets in original).

Under *Raven, Amador*, and the cases discussed below, the standard for determining if even a relatively simple initiative Constitutional change is a revision is whether it will "accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also". This is the only standard this Court has ever applied in considering whether an initiative constitutional enactment is a revision on a qualitative analysis.

In *Raven*, using the qualitative analysis, this Court held unconstitutional one provision that Proposition 115 would have added to the Constitution, because that provision would "restrict judicial power . . . in a way which [would] severely limit the independent force of the California Constitution", thereby effecting a far reaching change in the nature of California's basic governmental plan:

> Proposition 115 contemplates a similar qualitative change [to *Amador*'s hypothetical change, vesting all judicial power in the Legislature]. In essence and practical effect . . . [the invalidated provision] would vest all judicial interpretive power, as to fundamental criminal defense rights [under the California Constitution], in the United States Supreme Court.

From a qualitative standpoint, the effect of Proposition 115 is devastating.

* * *

. . . fundamental constitutional rights are implicated, including the rights to due process of law, equal protection of the law, assistance of counsel, and avoidance of cruel and unusual punishment.[5] As to these rights, as well as the other important rights listed in new section 24, California courts in criminal cases would no longer have authority to interpret the state Constitution in a manner more protective of defendants' rights than extended by the federal Constitution, as construed by the United States Supreme Court.

* * *

Thus, Proposition 115 not only unduly restricts judicial power, but it does so in a way which severely limits the independent force and effect of the California Constitution.

* * *

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[5] In *Raven*, this Court explained why the provision it was invalidating made such "far reaching changes in the nature of our basic governmental plan as to amount to a revision", whereas purported initiative constitutional amendments eliminating or severely limiting fundamental rights in other cases did not. That portion of *Raven* and those other cases, *People v. Frierson* and *In re Lance W.*, each of which is also part of this Court's "firmly established precedent" on "amendment vs. revision," are discussed at pages 15-16 and 23-30 below.

> Proposition 115 . . . substantially alters the preexisting constitutional scheme . . . It directly contradicts the well-established jurisprudential principle that, "The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . . " In short, in the words of *Amador*, *supra*, this "relatively simple enactment [accomplishes] . . . far reaching changes in the nature of our basic governmental plan as to amount to a revision . . ."
>
> * * *
>
> [The invalidated provision] more closely resembles *Amador*'s hypothetical provision vesting all judicial power in the Legislature, a provision we deemed would achieve a constitutional revision. . . . the new provision vests a critical portion of state judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan.

Raven, *supra*, 52 Cal.3d 336, 352-355 (word in brackets in original).[6]

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[6] Proposition 8, unlike the provision invalidated in *Raven* and the hypothetical initiative provision in *Amador*, does not unconstitutionally deprive California courts of their powers (see pages 56-57 below).

(ii) *Brosnahan, In re Lance W.,* And *People v. Frierson*

Brosnahan upheld, against a challenge it was a constitutional revision, an initiative that eliminated the exclusionary rule except where required by the United States Constitution (this Court had held the broader California exclusionary rule was necessary to protect criminal defendants and all other citizens against unlawful searches and seizures in California):[7]

> Petitioner's final argument is that . . . [the initiative] is such a "drastic and far-reaching" measure as to constitute a "revision" of the state Constitution rather than a mere "amendment" thereof.
>
> * * *
>
> From a qualitative point of view, while . . . [the initiative] does accomplish substantial changes in our criminal justice system . . . [they] fall considerably short of constituting "such far reaching changes in the nature of our *basic governmental plan* as to amount to a revision . . ."

---

[7] In *In re Lance W.* this Court explained:

> . . . a broader application of the rule [than required by United States Supreme Court precedent] had been thought necessary in this state both to deter unlawful police conduct and to preserve the integrity of the judicial process.

In re Lance W. (1985) 37 Cal.3d 873, 882 (language in brackets added).

Brosnahan, *supra*, 32 Cal.3d 236, 260 (citations to *Amador*, *supra*, 33 Cal.3d 298, 223 and *McFadden*, *supra*, 32 Cal.3d 330, 348 omitted; italics in original; words in brackets added).

In re Lance W., this Court held that, because the People could by initiative constitutional amendment repeal the California Constitution's prohibition on unreasonable searches and seizures in its entirety, without their doing so making such far reaching changes in the nature of our basic governmental plan as to be invalid as a revision, it necessarily followed the People could eliminate the exclusionary rule by initiative constitutional amendment. *In Re Lance W.*, *supra*, 37 Cal.3d 873, 892.

People v. Frierson, in which this Court upheld, against a revision not amendment challenge, an initiative constitutional enactment overruling a decision of this Court involving the most fundamental of rights (the right of a living human being to not be deprived of life in violation of what this Court determined to be his or her constitutional rights), because the enactment did not accomplish far reaching changes in the nature of California's basic governmental plan, is discussed at pages 23-27 below.

(iii) *Legislature v. Eu*

Legislature v. Eu upheld, against a "revision on a qualitative analysis" challenge, an initiative [Proposition 140] adding term limits and budgetary restraints to the California Constitution, stating:

> As indicated in *Raven*, a qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches. *Raven* invalidated a portion of Proposition 115 because it deprived the state judiciary of its foundational power to decide cases by independently interpreting provisions of the state Constitution, and delegated that power to the United States
>
> By contrast, Proposition 140 on its face does not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate. The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished. . . . The relationships between the three governmental branches, and their respective powers, remain untouched.

Legislature v. Eu, *supra*, 54 Cal.3d 492, 509.

(2) <u>Summary – The Qualitative Analysis Standard</u>

Under this Court's "firmly established precedent," to be a revision on a qualitative analysis, an initiative enactment must involve "far reaching changes in the nature of [California's] basic government plan" (i.e., "a

change [the] fundamental structure or the foundational powers of [the] branches" of California's government).[8]

B. Speculation, Including That Future Losses Of Rights Will Occur, Is Impermissible

The Petition and the Reply in Support of Petition for Extraordinary Relief (the "Reply") each speculates that material losses of rights will ensue, including by future initiative amendments, unless Proposition 8 is declared unconstitutional. (See, Petition 26-27 and the first half of the Reply, which is replete with such speculation; see also the Attorney General's Answer Brief in Response to Petition for Extraordinary Relief ("Attorney General's Brief" or "Atty.Gen.Br.") 76-77, 85).

Using speculation to find that an initiative enactment is a revision has been soundly rejected in this Court's "firmly established precedent":

> We are in no position to resolve the controversy . . . regarding the long-term consequences of Proposition 140, for the future effects of that measure on our "basic governmental plan" are simply unfathomable at this time. Indeed, that very uncertainty inhibits us from holding that a constitutional revision has occurred in this case. . . . to find such a revision,

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[8] Justice Moreno's concurring opinion in *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 788, apparently the most recent opinion of a Justice of this Court discussing when an initiative change to the Constitution is an amendment or a revision, is consistent.

> it must *necessarily or inevitably appear from the face* of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236 . . . at pp. 258-259 [rejecting argument that Prop. 8 would improperly cause impairment of essential governmental functions]; *Amador, supra,* 22 Cal.3d at pp. 224-226 [nothing on face of Prop. 13 (see Cal. Const., art. XIII A) "necessarily and inevitably" would result in loss of home rule]; see *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 349 ["nothing on the face of the challenged measures [Prop. 115] 'necessarily or inevitably' compels" dire economic consequences predicted by petitioners in context of single-subject rule challenge].)
>
> In *Amador,* we considered and rejected a similar revision challenge based on the predicted dire economic consequences to home rule in California arising from the property tax limitations of Proposition 13. . . .
>
> Similarly, in *Brosnahan v. Brown, supra,* 32 Cal.3d at page 261, we observed that "petitioners' forecast of judicial and educational chaos is . . . wholly conjectural . . . ."

Legislature v. Eu, supra, 54 Cal.3d 492, 510-511 (italics and words in brackets in original).

Thus, for there to be "a revision, it must *necessarily or inevitably appear from the face* of the challenged provision that it will substantially alter the basic governmental framework set forth in our Constitution." *Legislature v. Eu, supra*, 54 Cal.3d 492, 510 (italics in original).

This firmly established rule is necessary because the exercise by the People of their right to amend the Constitution by initiative – "one of the most precious rights of our" democracy – cannot be thwarted by the creative imagination of those who oppose the initiative change.

Here, for example, those supporting the Petition, employing such creative imagination, claim that, if Proposition 8 is not found unconstitutional, there will ensue an avalanche of initiatives and other changes eroding fundamental rights of gays, lesbians, and other minorities.

But the 14-word Proposition 8 does not do anything but provide that, in California, the only marriage that is valid or recognized is between a man and a woman. "On its face," Proposition 8 leaves untouched all other case law and statutes protecting gay and lesbian individuals and couples, including the California Domestic Partner Rights and Responsibilities Act of 2003 (Family Code §§ 297 et seq.) (the "Domestic Partner Act"), which provides to gay and lesbian couples rights virtually equivalent in all respects to opposite-sex marriages, except only the word "marriage" (see pages 39-40 (including footnote 16) below).

Most importantly, as required by *Legislature v. Eu*, it does not "necessarily or inevitably appear from the face" of Proposition 8 that it will affect any other rights of gays, lesbians, other minorities, or anyone else.

The history of initiative constitutional amendments also shows the dire predictions of "tyranny of the majority" are wrong. When the People used their initiative power, in areas involving a fundamental right, the effect was limited to the specific change and no more. Some examples are:

- An amendment to Article I, Section 7, of the Constitution eliminating mandatory busing, except to the extent required by the United States Constitution, as a way of implementing desegregation;
- The addition of Article I, Section 31, banning affirmative action in education, hiring and contracting; and
- The elimination of the exclusionary rule, which had been held necessary to protect not only criminal defendants, but also California citizens generally, against unreasonable searches and seizures (see *In re Lance W.*, *supra*).

These initiative amendments did not lead to additional changes to the constitutional or other protections afforded racial or ethnic minorities or anyone else, nor did they presage a dramatic increase in racial, ethnic, or other discrimination. To the contrary, in 2008, at the same election they

passed Proposition 8, the People of California voted, by an over 60%, landslide margin, to elect a Black man as President of the United States.

While there is no reason to believe the dire predictions of the Petition's proponents are correct, the barrier they face is much higher. The proponents must show: (i) it "*necessarily or inevitably appear[s] from the face of*" Proposition 8 that it will have the results they claim; and (ii) those results "will substantially alter the basic governmental framework set forth in our Constitution." *Legislature v. Eu, supra*, 54 Cal.3d 492, 510 (italics in original). There is a 100% chance (i.e., it is an absolute certainty) the proponents of the Petition cannot do either.[9]

C. Under This Court's "Firmly Established Precedent," It Is Not Relevant A Right Found By This Court To Be Fundamental, Or The Application Of Equal Protection To A Group Subject To A Suspect Classification, Is Involved

Under this Court's "firmly established precedent," a fundamental right being involved – including equal protection as applied to a group subject to a suspect classification – does not make an initiative constitutional enactment a revision, on a qualitative basis or otherwise, unless the initiative would, on its face, effect "such far reaching changes in

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[9] The time to challenge any changes that might be made in the future is when those changes are made. Then, the actual changes will be known, as opposed to being the subject of speculation, and their constitutionality can be appropriately assessed by the courts.

the nature of [California's] basic governmental plan" as to constitute a revision. Proposition 8 does not do that.

This Court's only decision invalidating an initiative as a revision on a qualitative basis, *Raven*, held unconstitutional one part of an initiative, not because a fundamental right was involved (in fact, several were involved), but because that provision would "substantially alter the substance and integrity of the state Constitution as a document of independent force and effect", since it "vests a critical portion of state judicial power in the United State Supreme Court, certainly a fundamental change in our preexisting governmental plan." *Raven*, *supra*, 52 Cal.3d 336, 353, 355.

In *Raven*, this Court further made clear fundamental rights being involved was not the basis of its decision, but rather causing "far reaching changes in the nature of our basic governmental plan" was,[10] by contrasting *Raven* with its decisions in *In re Lance W.* and *People v. Frierson*. Both of those cases involved fundamental rights (including, in *People v. Frierson*, one of the fundamental rights involved in *Raven*), but neither involved a constitutional revision, because "the isolated provisions at issue [in those cases] achieve no far reaching, fundamental changes in our basic governmental plan":

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[10] That this was basis of decision in *Raven* was reiterated by this Court in *Legislature v. Eu*, *supra*, 54 Cal.3d 492, 509 (quoted at page 17 above).

. . . fundamental constitutional rights are implicated, including the rights to due process of law, equal protection of the law, assistance of counsel, and avoidance of cruel and unusual punishment. . . .

* * *

Proposition 115 . . . substantially alters the preexisting constitutional scheme . . . extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections. . . . In short, in the words of *Amador, supra*, this "relatively simple enactment [accomplishes] . . . such far reaching changes in the nature of our basic governmental plan as to amount to a revision . . . ." (22 Cal.3d at p. 223, see also *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 [36 P. 424] [revisions involve changes in the "underlying principles" on which the Constitution rests].)

It is true . . . in two earlier cases we rejected revision challenges to initiative measures which included somewhat similar restrictions on judicial power. In *In re Lance W.* (1985) 37 Cal.3d 873, 891, we upheld a provision limiting the state exclusionary remedy for search and seizure violations to the boundaries fixed by the Fourth Amendment to the federal Constitution. In *People v. Frierson* (1979) 25 Cal.3d 142,

184-187, we upheld a provision which in essence required California courts in capital cases to apply the state cruel or unusual punishment clause consistently with the federal Constitution.

Both *Lance W.* and *Frierson* concluded that no constitutional revision was involved because the isolated provisions at issue therein achieved no far reaching, fundamental changes in our governmental plan. But neither case involved a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution. [The new article] . . . more closely resembles *Amador*'s hypothetical provision vesting all judicial power in the Legislature, a provision we deemed would achieve a constitutional revision. . . . the new provision [in effect] vests a critical portion of state judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan.

Raven, *supra*, 52 Cal.3d 336, 352, 354-355 (words in brackets added, except "accomplishes"; citations omitted; portions of *Raven* quoted on pages 13-14 above repeated for context and the convenience of the reader).

In re Lance W. shows a "fundamental right" being involved does not make the initiative eliminating that right a revision, because it holds the

People could have eliminated entirely the fundamental right, under the California Constitution, to be free from unreasonable searches and seizures. *In re Lance W., supra*, 37 Cal.3d 873, 892.

Perhaps, however, no case shows more dramatically than *People v. Frierson* (1979) 25 Cal.3d 142 ("*Frierson*") that, for an initiative change to the Constitution to be an unconstitutional revision, it is (i) not the presence of a right found by this Court to be fundamental, but (ii) instead, in the words of *Raven* explaining why *Frierson* did not involve such a revision, that elimination of that right and whatever else is involved must effect "far reaching, fundamental changes in our governmental plan".

The reason *Frierson* so dramatically shows this is:

- No right is more fundamental than the right of a living human being to not be wrongfully deprived of his or her life (see California Constitution, Article I, Section 1);
- On February 17, 1972, this Court held the death penalty violated the fundamental right, under the California Constitution, to not be subjected to cruel and unusual punishment;
- Similar to the situation here, on November 7 of the same year, 233 days later, "the people responded by adopting, through initiative, a constitutional amendment" providing the death penalty did not constitute "cruel or unusual

punishment" or violate any other provision of California's Constitution. *Frierson*, *supra*, 25 Cal.3d 142, 173;

- In *Frierson* – despite the articulated views of then Justices that the People's decision was wrong as a matter of social policy and morality – this Court upheld, against a "revision not amendment" challenge, an initiative constitutional change reversing this Court's decision a person could not be executed, because execution violated his or her fundamental California constitutional right to not be subjected to cruel and unusual punishment; and
- The basis of this Court's decision was that the initiative (even though involving a fundamental right) did not cause "such far reaching changes in the nature of our basic governmental plan as to amount to a revision." *Frierson*, *supra*, 25 Cal.3d 142, 186-187.[11]

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11 Justice Mosk's concurring opinion, joined in by Justice Newman, expressed anguish at the decision of the People, but recognized the People had the right to make that decision by initiative constitutional amendment and the higher duty of the Court was to respect their decision:

> The day will come when all mankind will deem killing to be immoral, whether committed by one individual or many individuals organized into a state. Unfortunately, morality appears to be a waning rule of conduct today, almost an endangered species, in this uneasy and tortured society of ours: a society in which sadism and violence are

[Footnote continued on next page]

Surely, it cannot be seriously contended the right of gay and lesbian couples to marry, even though found by this Court to be a fundamental right, approaches in importance the right of a living human to not be wrongfully deprived of his or her life. Indeed, that would be true even if gay and lesbian domestic partnerships did not have, except for the word "marriage," "virtually all of the benefits and responsibilities afforded by California law to married opposite sex couples", but they do. *Marriage Cases*, *supra*, 43 Cal.4th 757, 807.[12]

[Footnote continued from previous page]

> highly visible and often accepted commodities, a society in which guns are freely available and energy is scarce, a society in which reason is suspect and emotion is king. Thus with a feeling of futility I recognize the melancholy truth that the anticipated dawn of enlightenment does not seem destined to appear soon.
>
> I am therefore compelled to conclude that the . . . death penalty . . . does not violate the California Constitution.

Frierson, *supra*, 25 Cal.3d 142, 189. Justice Mosk, one of the most revered Justices in the history of this Court, thus acknowledged his "solemn duty" to subordinate his deeply held moral convictions to the right of the People to amend the Constitution by initiative. Respectfully, Justice Mosk did exactly the right thing, since the alternative might be described as substituting "judicial theocracy" for the sovereign People's initiative right.

[12] It also does not matter, as the Petition's proponents complain, that Proposition 8 was adopted by the "bare majority" of 52.3% of those voting, any more than it matters that: (i) the decision of this Court in the *Marriage Cases* was a 4–3 decision; or (ii) President Elect Obama received approximately the same percentage (52.9%) of the national popular vote.

Similarly, it would not matter if the Petition's proponents qualified an initiative amendment legalizing same-sex marriage and it was approved by

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Perhaps because of this, the Petition and, particularly, the Reply, also contends the "revision vs. amendment" result is different than it would otherwise be because, they allege: (i) a group this Court has found to be subject to a suspect classification (homosexuals) is being singled out by Proposition 8 and not receiving equal protection compared to heterosexuals insofar as marriage is concerned; (ii) this means Proposition 8 is invalid as a revision; and (iii) no case holds to the contrary (see Petition 12 and, generally, the first 37 pages of the Reply).

To the contrary: (a) there is no authority for the proposition advanced by the Petition and Reply; and (b) several cases in this Court's "firmly established precedent" stand for precisely the opposite result.

For example, *Frierson* does this by upholding an initiative providing the death penalty does not violate any provision of the California Constitution, necessarily including its equal protection provision. *In re Lance W.* does the same by holding the People could eliminate entirely the fundamental right, under the California Constitution, to be free of unreasonable searches and seizures.

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the same "bare majority" vote they now lament, because Article XVIII, Section 4, of the California Constitution provides an initiative amendment to the Constitution is valid "if approved by a majority of votes thereon".

In each case, the initiative amendment did not discriminate "on its face," just as Proposition 8 "on its face" applies to good friends who desire to have the advantages of marriage, including under health insurance policies and California's inheritance laws, although both are heterosexual.

In each case, however, historically discriminated against minorities could fairly claim they bear a disproportionate impact from the change, a denial of equal protection. For example: (i) African Americans could claim they are significantly more likely to receive the death penalty for equivalent crimes than whites; (ii) African Americans or Arab Americans could claim they are significantly more likely to be subject to unreasonable searches and seizures than whites; and (iii) gay and lesbian individuals could claim they are significantly more likely to engage in same-sex marriages than "straight" same-sex couples. Under *Frierson*, *In re Lance W.*, and, by how it distinguished them, *Raven*, however, none of this matters, because, under the initiative amendments in question, the equal protection clause of the California Constitution does not apply.[13]

The Reply nevertheless repeatedly and at length asserts depriving gay and lesbian couples of equal protection with respect to the right to marry makes Proposition 8 a revision, because depriving an identifiable

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[13] To the extent the People go too far, the United States Constitution's equal protection provisions insure rights of those affected.

group subject to a suspect classification of equal protection with respect to a fundamental right, in and of itself, accomplishes "far reaching changes in the nature of our basic governmental plan" by affecting the most important underpinning of our government, equal protection.

Saying the same thing over and over does not make it so, and that is the situation here. No California case holds what Petition and Reply argue for, nor is this case one of "first impression." Proposition 8 is a true "rifle shot," affecting only one right of one group; it has absolutely nothing to do with the structure of government or "the nature of our basic governmental plan"; and there is no reason to believe the improper speculation Proposition 8 will lead to other equal protection-related changes, whether applicable to group subject to a suspect classification or otherwise.

In addition, if any change in equal protection were a revision, why limit expanding the definition of "revision" to equal protection? Would not due process be of equal importance to society? Ask at a different time, and the most important right could well be habeas corpus. Ask a differently comprised Court and the response might be the right of the unborn to life.

Of course, arguments can be made it would be a preferable if changes to the Constitution involving one or more of these rights were revisions (although it would have to be determined who, and under what standards, would decide which rights were so treated). But that is not is what the Constitution provides or the "firmly established precedent" of this

Court holds, nor, without doubt, is it what was intended when the initiative provisions were added to the Constitution (pages 37-38 below).

Instead, the right of the People to change their Constitution by initiative is limited only by their not being able to revise the Constitution (e.g., to change the "substantial entirety" of the Constitution or to effect "far reaching changes in the nature of [California's] basic governmental plan"). The initiative right of the People is otherwise unlimited and includes the power to eliminate fundamental rights (including of individuals subject to a suspect classification), which fundamental rights are set forth in opinions of this Court with which the People disagree.

An example – and many more could be recited here – will perhaps illustrate why this is not only the result required by this Court's "firmly established precedent," but also the right result as a matter of how the California Constitution is written and intended to work.

Suppose a differently composed California Supreme Court decided: (a) life begins at conception; (b) the right to life means all abortions, except those to save the life of the mother, are unconstitutional; and (c) the right to life involved is a fundamental right. Suppose further that one-third plus one of the members of either of the State Senate or Assembly were on the "right to life" side and would block any attempted constitutional revision.

Does that mean the People could not overrule such a decision by an initiative amendment defining life to begin, not "at conception," but at

"viability"? Under the argument advanced by the Petition's supporters – "a fundamental right is involved, as is the equal protection of a group subject to a suspect classification (women who wish to terminate a pregnancy and thus the life of an unborn child), so any change would be unconstitutional as a revision" – the answer would be: "No, the People could not do that."

Under this Court's "firmly established precedent," however, the correct answer is: "Yes, that would be an amendment and not unconstitutional" because: (i) no "far reaching change in the nature of our basic governmental plan" is being made; and (ii) the right to amend the Constitution by initiative is a "precious," "reserved" right of the "sovereign People," which it is the "solemn duty" of this Court "jealously to guard."

It is surely likely, were the issue a woman's right to choose, that most of those supporting the Petition (including organizations comprised of lawyers) would not use the same arguments they now advance in support of an initiative constitutional enactment being a revision. Of course, those supporters, as advocates, have the "right" to "flip" their position on the application of constitutional principles, depending on their view of the "fundamental right" involved.

With respect, however, that is something this Court should not do. Rather, under "the rule of law, not men," the same principles of this Court's "firmly established precedent" should apply, regardless of which "fundamental right" is involved.

D. *Livermore v. Waite*, Relied On By The Petition And Reply, Supports Proposition 8 Being An Amendment, Not A Revision

The Petition six times cites *Livermore v. Waite* (1894) 102 Cal. 113 ("*Waite*"), relying (as does the Reply) on: (a) *Waite* saying the "term 'constitution' implies an instrument of a permanent and abiding nature" (*Waite*, *supra*, 102 Cal. 113, 118); and (b) *McFadden* saying the initiative provisions, although added to the Constitution "long after" *Waite*, were, under "well established law . . . understood to have been drafted in the light of" *Waite* (*McFadden*, *supra*, 32 Cal.2d 330, 334-335).

This reliance is misplaced because: (A) if the statement relied upon by the Petition and Reply is not taken out-of-context, (i) *Waite* supports the People's initiative right being unlimited (save for constitutional revisions) and (ii) Proposition 8 being a valid initiative amendment; (B) *McFadden* does not support limiting the People's initiative right; and (C) the history of the initiative provisions, which were added to the Constitution 15 years after *Waite,* clearly supports the People's initiative right being so unlimited and Proposition 8 being a valid initiative amendment (pages 37-38 below).

Waite, with the statement on which the Petition and Reply rely not taken out-of-context, says:

> The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the

> underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. . . . the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed. Experience may disclose defects in some of its details, or in the practical application of some of the principles or limitations which it contains. . . . the changes of society or time, may demand the removal of some of these limitations, or an extended application of its principles. . . . some popular wave of sociological reform, like the abolition of the death penalty . . . may induce a legislature to submit for enactment . . . a constitutional prohibition [on abolishing the death penalty].

Waite, *supra*, 102 Cal. 113, 118-119 (words in brackets added).

This not out-of-context quotation shows that *Waite* does not say the Constitution is unchangeable, but rather that it may be amended for purposes of improvement, "to better carry out the purpose for which it was framed" or to remedy "defects",[14] because of changes in society, or to

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[14] It is certain, had the question been asked when *Waite* was decided, that the near unanimous (or perhaps unanimous) response would have been that

[Footnote continued on next page]

eliminate a purported sociological reform, such as "abolition of the death penalty".[15] Indeed, being consistent, one could add to *Waite*'s eliminating "abolition of the death penalty," also eliminating the right to same-sex marriage (and, had the matter been thought within the realm of possibility, *Waite* surely would have done so itself (see footnote 14 on pages 35-36).

McFadden, also not taken out-of-context, is consistent. *McFadden* says the initiative provisions should be "understood to have been drafted in light of" *Waite*, because of the principle of interpretation that a "'legislative statute is . . . is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it.'" In its next two sentences, however, *McFadden* explains that, as a result of these principles, the People can amend, but cannot revise, the Constitution by initiative. *McFadden*, *supra*, 32 Cal.3d 330, 333-334 (citations omitted).

All of the cases comprising this Court's "firmly established precedent" hold that the People can amend their Constitution by initiative,

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the "permanent and abiding nature" of the California Constitution did not permit same-sex marriage (in fact, even the polite response would have been much stronger, likely including "criminal" references).

This amicus curiae is not saying the language in parenthesis in the prior paragraph reflects what should have been (he believes it definitely does not), but only that society was beyond doubt that way at the time of *Waite*.

[15] *Waite*'s reference to the death penalty as a subject that could be changed by amendment seems prophetic in light of *Frierson*.

with *Frierson* and *In re Lance W.* holding the People can do so to eliminate a right this Court has found fundamental when the People disagree. *Waite* and *McFadden*, not quoted out-of-context, say nothing different.

E. The History of the Initiative Provisions Establishes The People Have The Right To Amend Their Constitution To Overrule Decisions Of This Court That Specified Rights Exist and Are Fundamental

The initiative provisions were added to the Constitution as a result of the Progressive Movement, including the election of one of its principal leaders, Hiram Johnson, as California's Governor and Progressives of both parties to the State Senate and Assembly.

Governor Hiram Johnson, in his January 11, 1911 Inaugural Address before the California Senate and Assembly, made crystal clear the core premise on which the Progressives had campaigned:

> I most strongly urge, that the first step in our design to preserve and perpetuate popular government shall be the adoption of the initiative, the referendum and the recall. . . . the initiative and the referendum depend on our confidence in the people and their ability to govern. The opponents . . . in reality believe the people can not be trusted. . . . those of us who espouse these measures do so because of our deep-rooted belief in popular government, and not only in the right of the People to govern, but in their ability to govern . . .

Inaugural Address of Hiram Johnson to the Senate and Assembly of the State of California, January 11, 1911 (http://www.californiagovernors.ca.gov/h/documents/inaugural_23.html).

The Progressives had swept into office and, within the same year, by two-thirds vote of the State Senate and Assembly – as then required for amendments to, and now required for revisions of, the Constitution – there was submitted to the People, and the People enacted, the constitutional provisions for initiative, referendum, and recall (including, as Governor Johnson advocated, recall of judicial officers), unmistakably enshrining in California's Constitution the core values of popular government and direct control by the People.

This history shows the intent of the initiative provisions was that the People have the broadest power to amend the Constitution, including to overrule decisions of this Court that specified fundamental rights exist, where the People disagree or believe this Court has gone too far.

F. Proposition 8 Is Not Unconstitutional As A Revision On A Qualitative Analysis

Under this Court's "firmly established precedent," Proposition 8 is not a revision on a qualitative analysis because, to fail that analysis:

- Proposition 8 must work "far reaching changes in the nature of our basic governmental plan" (i.e., it must "necessarily or inevitably" "substantially alter the basic

> governmental framework set forth in our Constitution . . . . 'the fundamental structure or foundational powers of'" the branches of our government);
>
> - That Proposition 8 will do so must be apparent "on its face," without speculation as to future events; and
> - It is not relevant a right found by this Court to be fundamental, or depriving an identifiable group subject to a suspect classification of equal protection with respect to that right, is involved, unless elimination of that right (including of such equal protection with respect to that right) would work such "far reaching changes in the nature of [California's] basic governmental plan."

Proposition 8 does not work "far reaching change nature of our basic governmental plan" or, in fact, any such changes and, therefore, is not unconstitutional as a revision on a qualitative analysis. Proposition 8 also leaves untouched the rights gay and lesbian individuals enjoy under California's Constitution, statutes and case law, excluding marriage, but including:

> . . . the current California statutory provisions [that] generally afford same-sex couples the opportunity to enter into a domestic partnership and thereby obtain virtually all of the

benefits and responsibilities afforded by California law to married opposite-sex couples.

Marriage Cases, *supra*, 43 Cal.4th 757, 807 (word in brackets added).[16]

VI. THE ATTORNEY GENERAL'S INALIENABLE RIGHTS ARGUMENT CONTRAVENES THIS COURT'S "FIRMLY ESTABLISHED PRECEDENT" AND THE PROPER ROLE OF THE JUDICIARY, AND IT IS PROFOUNDLY UNDEMOCRATIC

The Attorney General's Brief, at pages 3 and 75-90 thereof, argues:

- Certain rights are inalienable;
- Inalienable rights, including rights part of "a fundamental human liberty," cannot be affected by initiative constitutional amendments, because "the initiative power could never have been intended to give voters an unfettered prerogative to amend the Constitution for the purpose of depriving a disfavored group of rights determined by the Supreme Court to be part of a fundamental human liberty" (Att.Gen.Br. 76);

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[16] Family Code § 297.5(a), part of the California Domestic Partner Rights and Responsibilities Act of 2003 (Family Code §§ 297 et seq.), provides:

> Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

- "While [the Attorney General] does not suggest that the Framers contemplated that liberty interests included a right to marry that extended to same-sex couples, the scope of liberty interests evolves over time as determined by the Supreme Court" (Atty.Gen.Br. 82);
- The Supreme Court has decided the right to same-sex marriage is a fundamental right and should decide it is an inalienable right (see footnote 14 on pages 35-36 above);
- If the Supreme Court so decides, there will be a conflict between the right of the People to amend the Constitution by initiative and an inalienable right;
- That conflict should be resolved by this Court holding that, absent a compelling state interest (which the *Marriage Cases* determined does not exist), the People's right to amend the Constitution does not extend to rights the Supreme Court has determined are inalienable; and
- This Court should therefore declare Proposition 8 unconstitutional.

The Attorney General does not cite any California case holding a properly adopted amendment to the Constitution may be invalidated by the Supreme Court because that amendment eliminates an inalienable right.

There is no such case, and the Attorney General's inalienable rights argument directly contravenes this Court's "firmly established precedent." The Attorney General's inalienable rights argument also: (i) asks the judiciary to act beyond its proper, constitutionally prescribed role; and (ii) is, at its core, profoundly undemocratic.

The Attorney General's Brief, at page 3, presaged his argument:

> This Court has also stated that, since constitutions are intended to be statements of lasting legal principles, changes should be considered amendments only if they are improvements or elaborations on existing principles.

No support is offered for this statement, and there is none.[17]

The Attorney General's Brief, citing the *Marriage Cases*, says the California Constitution provides certain rights are "'inalienable' . . . to place those rights beyond the power of the Legislature or the Executive to abrogate" (Atty.Gen.Br. 78-79). The portion of *Marriage Cases* cited says:

> . . . the fundamental rights embodied within [the California] Constitution . . . represents restraints that the people have imposed upon the statutory enactments that may be adopted

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[17] *Waite*, albeit mischaracterized, would be closest (see pages 34-36 above), but the Attorney General's Brief does not appear to cite *Waite*.

> either by their elected representatives or by the voters though the initiative process.

Marriage Cases, *supra*, 43 Cal.4th 757, 854 (words in brackets added).

So far, there is no dispute – everyone agrees constitutional rights cannot be abrogated by legislative or initiative statutory enactments. That, however, has nothing to do with initiative constitutional amendments.[18]

The Attorney General's then, without acknowledging he doing so, deftly moves away from statutory enactments, arguing there are inalienable rights "no government can rightfully take away . . . because these rights are retained by the individual and their surrender is not required by the good of the whole." Atty.Gen.Br. 79-81. In support of this proposition, the Attorney General cites two California cases, both decided before the People's initiative power was added to the Constitution, neither of which stands for the proposition the Attorney General advocates:

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[18] The *Marriage Cases*, in invalidating the predecessor initiative statute to Proposition 8 (which is an initiative constitutional amendment), says:

> . . . the constitutional right to marry . . . has been recognized as one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution . . . [and] may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process.

Marriage Cases, *supra*, 43 Cal.4th 757, 701 (word in brackets added).

- *Ex parte Quarg* (1906) 149 Cal. 79, relying on Article 1, Section 1, of the California Constitution,[19] invalidated a penal statute (not a constitutional amendment) prohibiting scalping tickets on the grounds it violated the

> . . . constitutional guarantee securing to every person the right of "acquiring, possessing and protecting property" . . . [which] includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter. Any statute which interferes with this right, except in cases where the public health . . . authorizes . . . is . . . unconstitutional . . .

Ex parte Quarg, *supra*, 149 Cal. 79, 80 (word in brackets added); and

- *Ex parte Newman* (1858) 9 Cal. 502, which vacated a conviction under a criminal statute (not a constitutional

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[19] Article I, Section 1, reads:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

amendment) prohibiting working on Sundays because the California Constitution "forbids discrimination or preference in religion" and the invalidated statute was:

> intended as, and is in effect, a discrimination in favor of one religious profession, and gives it preference over all others.

Ex parte Newman, *supra*, 9 Cal. 502, 506, 510.

Both *Quarg* and *Newman* declared unconstitutional statutes; neither declared unconstitutional an amendment to the Constitution. (Also, *Newman* was not decided on an inalienable right theory and *Quarg* was grounded in the specific language of Article I, Section I.)

The Attorney General, based on his prior, wholly unsupported contentions, then leaps to a conclusion, also wholly unsupported, that does not remotely follow:

> The Framers (and the People in adopting the Constitution) intended article I, section 1 to act as a check on legislative excesses. Given that protective purpose, the Framers (and the People) would not have endowed the Legislature to eliminate a judicially recognized fundamental liberty interest though a constitutional amendment passed by popular votes – at least not without a compelling reason for doing so.

> And if the Framers did not contemplate such broad legislative powers, then they never would have intended to subject the rights of individuals or groups under Article I to abrogation by popular vote-raising the specter of Mills's "tyranny of the majority."

Atty.Gen.Br. 84-85 (citations and footnotes omitted). The Attorney General does not cite any California (or other) case for any of this, except that, after the word "endowed" in the first paragraph, by footnote he cites three cases, each irrelevant:

- *Bautista v. Jones* (1944) 25 Cal.2d 746, 749, finding the "right to work" a "fundamental" right under both the United States and California Constitutions, held unlawful conduct by a labor union precluding milk brokers, with 95% of which the union had contracts, from selling milk to distributors that did not employ solely union members;
- *Ex parte Drexel* (1905) 147 Cal. 763 which, on the basis of Article I, Section 1 (footnote 19 on page 44), found unconstitutional a statute under which two individuals were imprisoned for issuing trading stamps; and
- *In re Quarg, supra* (discussed at pages 44-45 above).

None of these cases held unconstitutional a constitutional amendment, however enacted. None otherwise supports one iota the Attorney General's

assertion that the (unnamed) Framers of the Constitution, or the People in adopting the Constitution, intended that the People – including with concomitant action by the Legislature – would have no right to amend the California Constitution to eliminate whatever the judiciary might recognize as a fundamental liberty.

Nevertheless, returning to confusing initiative statutory enactments with initiative constitutional amendments (pages 42-46 above), the Attorney General next argues that, when the initiative provisions were added to the Constitution in 1911, they "could likewise not have encompassed any" power to adopt amendments eliminating judicially recognized fundamental rights under Article I, Section 1 – at least not "without sufficient justification" – because:

> The point of the initiative power was to *circumvent* the Legislature (see *Amador Valley*, *supra*, 22 Cal.3d at pp. 228-229), not to invest the voters with a power the Legislature itself did not possess.

Atty.Gen.Br. 86 (italics in original). *Amador* upheld Proposition 13 as an initiative amendment to the Constitution, so obviously does not hold the sole purpose of the initiative was to "circumvent" the Legislature (*Amador*, supra, 22 Cal.3d 208, 229). No case so holds. Article XVIII, Section 3, of the Constitution is directly contrary, as is this Court's "firmly established precedent," including *Frierson* and *In re Lance W.*

The Attorney General nevertheless contends Proposition 8 presents a conflict between the People's initiative power to amend the Constitution and the inalienable rights in Article I, Section 1, of the Constitution, the scope of which, he says, "evolves over time as determined by the Supreme Court," apparently even to include as "inalienable" a "right" the "Framers" and the People who voted for the Constitution would, definitively, say did not and would never exist. Atty.Gen.Br. 82, 86-87; see footnote 14 on pages 35-36 above. The Attorney General then concludes by saying this Court should avoid the conflict he claims exists, by determining the initiative power to amend the Constitution does not extend to such inalienable rights.

There is no support in any California decision for the Attorney General's argument that "the sovereign people's initiative power . . . one of the most precious rights of our democratic process", is limited as he claims. The "firmly established precedent" of this Court is directly to the contrary, with *Frierson* and *In re Lance W.* examples of initiative constitutional amendments that eliminated fundamental rights (in *Frierson*, the most fundamental right and one specifically recognized in Article I, Section 1– the right of a living human being not to be deprived of his or her life in violation, as determined by this Court, of the California Constitution).

The Attorney General's argument also runs afoul of this Court's decision that:

> The people may adopt constitutional amendments which define the scope of existing state constitutional protections.

People v. Valentine (1986) 42 Cal.3d 170, 181. This is precisely what Proposition 8 does, and it does nothing more (see pages 20, 39-40, and 57).

The Attorney General's argument is also contrary to the proper role of the judiciary. Almost every right articulated in the Constitution could be argued to fit within the broadly worded Article I, Section 1 (inalienable rights include "enjoying . . . life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy"). What standards could a court use to determine that an initiative constitutional amendment, however limited, violated one of those concepts, when then equally persuasive arguments to the contrary could not be made (see pages 32-33 above)? Respectfully, the answer is "none." Using the Attorney General's inalienable rights argument to find Proposition 8 unconstitutional would also be subject to a fair criticism this Court was: (i) making a constitutional decision "as a matter of policy", which this Court said it should not and would not do (*Marriage Cases, supra*, 43 Cal.4th 757, 780); and (ii) by invoking Article I, Section 1, improperly making that decision invulnerable to an otherwise validly adopted initiative constitutional amendment.

The Attorney General's inalienable rights argument is also historically wrong. That argument reflects, in the words of Governor Hiram

Johnson, that the Attorney General "in reality believe[s] the people can not be trusted",[20] whereas the core premise of the People's initiative power is unmistakably the "deep-rooted belief in popular government, and not only in the right of the People to govern, but in their ability to govern . . ." Inaugural Address of Governor Hiram Johnson (pages 37-38 above).

The Attorney General's argument is not supported by any California case, it is contrary to this Court's "firmly established precedent," the proper role of the judiciary, and the historical record, and it is profoundly undemocratic and deeply disrespectful to the People of California.[21]

Respectfully, this Court should have none of it.

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[20] Incredibly, even though experience is directly to the contrary (pages 21-22 above), the Attorney General even insinuates the use by the People of their initiative power as intended means "the tyranny of a simple majority will soon drive honest men to seek refuge beneath the despotism of a single ruler." Atty.Gen.Br. 85.

[21] This amicus curiae also "will not mince words." The Attorney General's argument wilts and dies if exposed to the light of day. It also cannot stand in a room lit, either by electricity or candlelight, or even outside at night with the moon bright. Only on such a night, with a break in covering clouds, might one conceivably "see" the need to "reinvent" California jurisprudence into a system where the Supreme Court, by a "simple majority" of its seven members, interprets "inalienable rights" as they believe correct from time to time to invalidate the People's initiative constitutional amendments, with the People not being able to do anything about it. Respectfully, when one takes a breath and steps back from the individual issue involved, cannot what the Attorney General advocates be fairly criticized as moving from California democracy as practiced for nearly 100 years toward the "judicial theocracy" system as practiced by the Ayatollahs in Iran? (See footnote 11 on pages 27-28.)

VII. PROPOSITION 8 DOES NOT VIOLATE THE CALIFORNIA CONSTITUTION'S SEPARATION-OF-POWERS PROVISION OR CALIFORNIA'S SEPARATION-OF-POWERS DOCTRINE

There are numerous reasons why Proposition 8 cannot violate the California Constitution's separation-of-powers provision or any doctrine of separation-of-powers derived from it.

A. The People's Initiative Right Cannot Violate The Constitution's Separation-of-Powers Provision

Because, respectfully, it is apparent the People's initiative right to amend (but not revise) the Constitution cannot violate Article III, Section 3 (the Constitution's separation-of-powers provision), its full text follows:

> The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

By its terms, Article III, Section 3, limits only the exercise, by each of the legislative, executive, and judicial branches, of the powers vested by Constitution in another branch, except with such exceptions as are "permitted by this Constitution."

It necessarily follows that Article III, Section 3, has nothing to do with the "reserved" power of the People to amend the Constitution by initiative, because that is not a power of the legislative, executive, or

judicial branches, but rather of the People, who are not a branch of government.

Even if this were not the case, however, Article III, Section 3, would still not limit the right of the People to amend their Constitution by initiative. This is because that right is ingrained in numerous provisions of the Constitution[22] and would thus fall within the proviso at the end of Article III, Section 3: "except as otherwise permitted by this Constitution."

Reading Article III, Section 3, to limit the "sovereign People's" initiative power to amend their Constitution would also read out of the Constitution the numerous provisions cited in footnote 22, including Article XVIII, Section 3, which unambiguously provides: "The electors may amend the Constitution by initiative."

The separation-of-powers doctrine is derived from Article III, Section 3 (supported by the fact that other provisions of the Constitution provide for three branches of government, the legislative, executive, and judicial branches). See *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141 ("*Bixby*"); see also *Legislature v. Eu*, *supra* (page 17 above). It necessarily follows that, if Article III, Section 3, does not limit the People's initiative power to

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22 The People's initiative power can be found in, or is supported by, among others, the following provisions of the Constitution: (i) the Preamble; (ii) Article II, Section 1; (iii) Article II, Sections 8(a), (b), and (d); and (iv) Article XVIII, Sections 3 and 4.

amend the Constitution, a judicial doctrine derived from Article III, Section 3, also cannot do so.

B. Principles Of Interpretation Require Proposition 8 Not Be Found To Violate The Separation-of-Powers Provision or Doctrine

Under *Raven, Brosnahan*, *Amador*, and *Associated Home Builders*, the principles of interpretation that "must guide the courts" when the validity of a purported initiative enactment is challenged require the initiative be given a liberal construction and that the courts "*resolve any reasonable doubts in favor of the exercise of this precious right*" (italics in original), with the result that, under *Legislature v. Eu*, the initiative must be upheld unless its "unconstitutionality clearly, positively, and unmistakably appears" (see pages 4-6 above).

Even if these were not words of mandate, but instead guidelines, the result would surely be the same – that the initiative power is not limited by the separation-of-powers doctrine.

The definition of "executive," "legislative," and "judicial," in both Black's Law Dictionary and Miriam-Webster's Online Dictionary, includes each being a "branch of government" (Black's uses "judicial branch"), but their definitions of "people" and "elector(s)" do not define those terms as a "branch of government" (Black's Law Dictionary 558, 610, 862, 919, 1171 (8th ed. 2004); www.miriam-webster.com/dictionary). Common usage is the same.

Applying the principles of interpretation so the People's initiative power does not conflict with the separation-of-powers doctrine does not, however, require "*resolv*[ing] *any reasonable doubts in favor of the exercise of this precious right*" of initiative, as *Raven*, *Brosnahan*, *Amador*, and *Associated Home Builders* each requires. That would be the case if one of the definitions of the word "people" or "electors" was as "branch" of government, but it is not. When the simple, dictionary and common usage definitions are used (i.e., respectfully, when the only reasonable definitions are used), the conclusion is inescapable that the exercise by the People of their initiative power cannot violate Article III, Section 3, or the separation-of-powers doctrine.

This conclusion is also compelled by sections of the Constitution other than the beautiful-in-its-simplicity Article XVIII, Section 3 ("The electors may amend the Constitution by initiative"). For example, if the People proposing and adopting amendments to the Constitution violated the separation-of-powers doctrine, Article II, Section 8(a) ("The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them") would have no meaning. Similarly, Article II, Section 8(b), and Article XVIII, Section 4, each of which also refers to the power of the People to adopt amendments to the Constitution, would also be stripped of meaning. That, of course, would be a nonsense result, writing numerous provisions out of the Constitution.

In addition, these provisions of the Constitution also give the People the power to propose and adopt statutes, a power the legislative branch also has. There is no separation-of-powers conflict, however, because, among other reasons, the People/electors are not a branch of government.

Respectfully, any other interpretation would involve impossibly contortionist "logic," hardly consistent with the mandate of each of *Raven*, *Brosnahan*, *Amador*, and *Associated Home Builders* that "*we are required to resolve any reasonable doubts in favor of the exercise of this precious right*" of initiative. *Raven*, *supra*, *52* Cal.3d 336, 341 (italics in original).

C. The Historical Course Of Conduct And Other Decisions Of This Court Show The People's Right To Amend The Constitution By Initiative Is Not Limited By The Separation-Of-Powers Doctrine

The People, by initiative amendment, have made major changes to the California Constitution that conflict with what the executive, legislative, or judicial branches had done or otherwise had the power to do, and, when challenged, the People's exercise of that initiative power has been upheld by this Court.

These initiative changes include: (i) materially revamping California's tax (including real property tax) system (*Amador*); (ii) mandating term limits and budget limitations (*Legislature v. Eu*); (iii) prohibiting mandatory busing unless required by the United States Constitution and eliminating the ability of California courts to decide

otherwise; (iv) eliminating affirmative action; (v) effectively overruling a decision of this Court that the death penalty violated the California Constitution's prohibition on cruel and unusual punishment, a change in a fundamental right (*Frierson*); and (vi) making other significant changes in California criminal law (*Raven*, *Brosnahan*, and *In re Lance W.).*

No California decision of which this amicus curiae is aware has invalidated any of these or any other initiative amendments as violative of the separation-of-powers doctrine. Were separation-of-powers to apply limit initiative amendments to the Constitution, none of these changes would have been permissible, and each of the cases challenging them would have been decided differently.

This consistent historical course of conduct and the decisions of this Court comprising its "firmly established precedent" are thus another reason the separation-of-powers provision and doctrine cannot limit the Constitutional right of the "sovereign People" to amend their Constitution.

D. Proposition 8 Does Not Unconstitutionally Deprive California Courts Of Their Powers

Any initiative amendment to the Constitution necessarily deprives California courts of their ability to decide cases contrary to that amendment. That does not mean the amendment unconstitutionally violates the separation-of-powers doctrine (or is a constitutional revision), because then all initiative amendments would be invalid, writing numerous

provisions out of the Constitution and rewriting this Court's "firmly established precedent." But, as the hypothetical in *Amador* says and *Raven* holds, an initiative amendment can be invalid if it deprives California courts of their power to decide cases (or a broad category of cases).

Proposition 8, however, does not unconstitutionally deprive the California courts of that power, just as the initiative amendment in *Frierson* did not unconstitutionally limit the power of the courts (*Frierson*, *supra*, 25 Cal. 3d 142, 186-187). This is because, except for same-sex marriage: (i) Proposition 8 does not affect any holdings of the *Marriage Cases*; and (ii) consistent with *Frierson*, *supra*, 25 Cal. 3d 142, 187, after Proposition 8, California courts "retain broad powers of judicial review" concerning all provisions of the California Constitution and statutory laws insofar as they pertain to the rights of gay and lesbian individuals and couples.[23]

E. This Court's Decision In *Bixby v. Pierno* Is Consistent With The Separation-Of-Powers Doctrine Not Limiting The People's Right To Amend Their Constitution By Initiative

That the separation-of-powers doctrine does not limit, and therefore cannot be violated by, the People's use of their initiative power is also

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[23] Proposition 8 also: (a) does not approach the limitation, on the power of the courts, of the initiative amendment provision invalidated in *Raven* or of *Amador*'s hypothetical provision; and (b) affects the power of the courts less than the initiative amendments upheld by this Court in other cases, including *In re Lance W.*, which eliminated the exclusionary rule under California law.

shown by *Bixby*. There, after saying the Constitution "provides for the separation-of-powers among the three branches of state government" and quoting Article III, Section 3, this Court wrote:

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government . . . a system of checks and balances to protect any one branch against the overreaching of any other branch. Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority. . . . the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority.[24]

Bixby, supra, 4 Cal.3d 130, 141 (citations and footnote omitted).

By its explicit terms, Article III, Section 3, relates solely to the legislative, executive, and judicial branches of our government. Consistent

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[24] No form of government is perfect. Even long-effective decisions of the highest Court can abrogate human rights. See, for example, *Dred Scott v. Sandford* (1857) 60 U.S. (19 How.) 393, *Plessey v. Ferguson* (1896) 163 U.S. 537, and *Korematsu v. United States* (1944) 323 U.S. 214

with Article III, Section 3, *Bixby* speaks only of the same three branches of government ("the judiciary . . . [and] the other two branches").[25]

The People are not named as a branch of government in *Bixby*. It necessarily follows that, under *Bixby*, the separation-of-powers doctrine, which limits only the three branches of government *Bixby* names, does not affect the People's right to amend the Constitution by initiative.[26]

F. There Is No Limitation The Right Of The "Sovereign People" To Amend Their Constitution By Initiative

The People's right to amend (as opposed to revise) their California Constitution by initiative is not limited by California law. For example:

- Decisions of this Court, even as to the most fundamental right it could have found – the right to not be deprived of

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25 *Bixby* explained that, when referring to "obliteration by the majority" of vested fundamental rights, it was referring to "the will of the majority as expressed by the Legislature . . ." and that

> . . . powerful economic forces can obtain substantial representation in the halls of the Legislature and in the departments of the executive branch and thus do not impel the same kind of judicial protection as do the minorities: the unpopular religions, the racial sub-groups, the criminal defendants, the politically weak and underrepresented.

Bixby, *supra*, 4 Cal.3d 130, 142-143 (citations omitted).

26 In this regard, *Bixby*, in the portion of that case quoted on page 58 above), recognizes the courts' protection of constitutional rights is against "legislative and executive acts," not "against" the "reserved" right of the "sovereign People" to, in the words of Article XVIII, Section 3, "amend the Constitution by initiative."

life, because doing so would violation the Constitution's prohibition on cruel and unusual punishment – can be overturned by the People though use of their initiative power to amend the Constitution, as *Frierson* holds (see pages 23-27 above); and

- The People could eliminate the prohibition on unreasonable searches and seizures altogether, as *In re Lance W.* holds (see page 16 above).

Regardless of how individual Justices may feel about the wisdom or morality of what was enacted (see footnote 11 on pages 27-28), as a matter of California constitutional law, the People amending, as opposed to revising, the Constitution by initiative should be the end of the inquiry, as was the clear intent of the initiative provision (see pages 37-38 above).

G. If The Separation-Of-Powers Doctrine Is Implicated, It Is Proposition 8 That Is Valid

Assuming for the sake of argument that the separation-of-powers doctrine is implicated by the adoption of Proposition 8, it is Proposition 8, as an initiative amendment to the Constitution, which would be valid.

This is because, by virtue of Article II, Section 1, of the Constitution: "All political power is inherent in the people" and "they have the right to alter or reform" the government. Therefore, if by virtue of the separation-of-powers doctrine, were there a conflict between the "sovereign

People's" use of their fundamental, reserved initiative power to amend (as opposed to revise) the Constitution (including by Proposition 8) and the power of another branch of government, it is the power of that other branch of government, not of the People, that would be modified.

H. Summary – The Separation-Of-Powers Doctrine Cannot Limit The People's Right To Amend Their Constitution By Initiative

For all of these reasons, respectfully, this Court should hold Proposition 8 cannot violate Article III, Section 3, of the Constitution or the separation-of-powers doctrine.

VIII. NO POSITION ON THE EFFECT OF PROPOSITION 8 ON SAME-SEX MARRIAGES ENTERED INTO AFTER THIS COURT'S DECISION IN THE *MARRIAGE CASES*

This brief addresses only the constitutionality the People's right to amend their California Constitution by initiative.

Accordingly, because the question posed by this Court with respect same-sex marriages entered into after its decision in the *Marriage Cases* posits that Proposition 8 is not unconstitutional, this brief takes no position on the effect of Proposition 8 on those same-sex marriages.

IX. SUMMARY AND CONCLUSION

Under this Court's "firmly established jurisprudence," Proposition 8 is not unconstitutional, as a revision or otherwise:

- On a quantitative analysis, which is obvious;

- On a qualitative analysis, because Proposition 8 does not accomplish "such far reaching changes in the nature of our basic governmental plan as to amount to a revision also" (i.e., it does not "necessarily or inevitably" "substantially alter the basic governmental framework set forth in our Constitution . . . . 'the fundamental structure or foundational powers of'" the branches of California's government)[27] and, in fact, does not even remotely approach doing so;
- Because Proposition 8 does not violate the single subject rule or the United States Constitution (the Petition, as to the latter, reflecting the legal strategy of its proponents, does not contend otherwise);
- Because speculation of future losses of rights is not permissible, nor, as is required, are the results predicted by the Petition apparent "on the face" of Proposition 8;
- Because Proposition 8 involves a right found by this Court to be "fundamental," since that is irrelevant to the

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[27] This is the qualitative analysis standard consistently used throughout this Court's "firmly established precedent" for determining if an initiative enactment is a revision or amendment. It is also the only such qualitative analysis standard this Court has ever used.

qualitative analysis unless elimination of the right accomplishes "far reaching changes in the nature of our basic governmental plan," which Proposition 8 does not;

- Because the equal protection clause, including insofar as it relates to a group subject to a suspect classification, is involved, because that does not make Proposition 8 a constitutional revision or otherwise invalid;
- Because there is no inalienable right the People cannot change or, even if there is, there is either no inalienable right to same-sex marriage or no inalienable right to same-sex marriage that cannot be changed by the People by initiative amendment to their Constitution;
- Because Proposition 8 does not violates California Constitution's separation-of-powers provision or the separation-of-powers doctrine; or
- For any other reason.

Accordingly, this Court can decide against the will of the People by their approval of Proposition 8, as an initiative amendment to the Constitution, only by overruling or effectively disregarding a long, consistent line of cases, correctly described by this Court as "firmly established precedent," with this Court proudly adding it had "jealously guarded this precious right". *Brosnahan*, *supra*, 32 Cal.3d 236, 262.

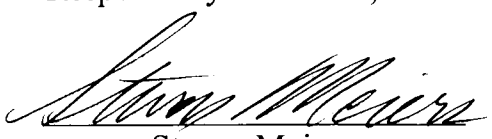
Were this Court to nevertheless overturn the now twice-expressed will of the People by finding Proposition 8 unconstitutional, it would establish highly unfortunate result-oriented precedent, usurping and eviscerating the People's "precious," fundamental right to "amend the Constitution by initiative," including to in effect overrule decisions of this Court when the People believe it is incorrect or has gone too far.

Yet, that is precisely what those supporting the Petition are asking this Court to do. Thus, what is at stake here is nothing less than the interest of the People – as well as of this Court as an essential, enduring institution – in this Court fulfilling its "solemn duty jealously to guard the sovereign people's initiative power". *Raven*, *supra*, 52 Cal.3d 336, 341.

This Court, I respectfully submit, should not do what those supporting the Petition ask. Even though it is a decision of this Court the People are effectively overruling, this Court should instead hold that, under its "firmly established precedent," Proposition 8 is not unconstitutional, thereby continuing to fulfill this Court's "solemn duty" to diligently protect the "sovereign People's" right to amend the Constitution by initiative, "one of the most precious rights of our democratic process."

Dated: January 14, 2009

Respectfully submitted,

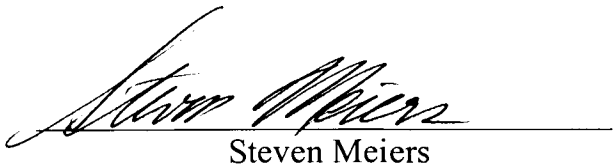


Steven Meiers

CERTIFICATE OF COMPLIANCE

I certify that this Amicus Curiae Brief of Steven Meiers in Opposition to the Amended Petition for Extraordinary Relief in *Karen L. Strauss, et al., Petitioners, v. Mark B. Horton, et al., Dennis Hollingsworth, etc., et al., Intervenors* (S168047) is proportionately spaced, has a typeface of 13 points, is on recycled paper, and, based on the computer program used to prepare this brief, contains 13,984 words, including footnotes but excluding the Cover Page, Application for Leave to File Brief Amicus Curiae, Certificate of Interested Entities or Persons, Tables of Contents and Authorities, and this Certificate of Compliance.

Dated: January 14, 2009



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PROOF OF SERVICE

I declare that I am, and was at the time of service below, at least 18 years of age and not a party to the action known as *Karen L. Strauss, et al. v. Mark B. Horton, et al., Dennis Hollingsworth, et al.* (S168047). My business address is 333 South Grand Avenue, Los Angeles, California 90071. On January 14, 2009, at the direction of Steven Meiers, a member of the bar of this Court, I caused the following document(s) to be served

APPLICATION TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF OF STEVEN MEIERS IN OPPOSITION TO AMENDED PETITION FOR EXTRAORDINARY RELIEF IN KAREN L. STRAUSS, ET AL. v. MARK B. HORTON, ET AL., DENNIS HOLLINGSWORTH, ET AL., INTERVENORS (S168047)

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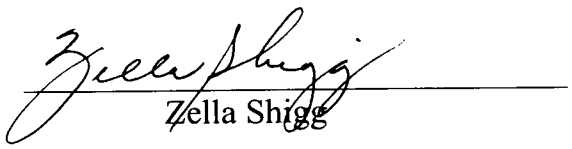
I am "readily familiar" with the practice of collection and processing correspondence for mailing of the firm where I am employed. Under that practice, in the ordinary course of business, these envelopes, which I placed for mailing at that firm on January 14, 2009, would be deposited with the U.S. postal service on that same day and with postage thereon fully prepaid, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were on recycled paper, and that

this Declaration of Service was executed by me on January 14, 2009 in Los Angeles, California.



Zella Shigg