Case No.: S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al.
Petitioners,
v.
MARK B. HORTON,
As State Registrar of Vital Statistics, etc., et al.
Respondents,
DENNIS HOLLINGSWORTH, et al.
Interveners

AMICI CURIAE BRIEF OF CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN, NATIONAL ORGANIZATION FOR WOMEN, AND THE FEMINIST MAJORITY FOUNDATION IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTERESTED PARTIES

Amici Curiae California National Organization for Women, National Organization for Women, and the Feminist Majority Foundation know of no entity or person that must be identified under California Rules of Court, Rules 8.208 or 8.490.

DATED: January 12, 2009

Respectfully submitted by:

STEPTOE & JOHNSON LLP

By: Rebecca Edelson

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I. INTRODUCTION AND SUMMARY OF ADDITIONAL OBSERVATIONS FOR THE COURT'S CONSIDERATION

On November 4, 2008, a bare majority of Californians voted to deny the Constitutionally-protected right to marry to same-sex couples. Thus, this Court is called upon to decide whether fundamental rights can be abrogated through an initiative process supported by only a bare majority vote of the people.

Amici Curiae agree with Petitioners that more process and deliberation must be required as a matter of law and public policy before inalienable rights and long-standing constitutional protections can be abrogated. Amici Curiae also agree with the Attorney General's observations that certainly:

- "the initiative power [does not] give the voters an unfettered prerogative to amend the Constitution ...[,]"
- "...[the initiative power] does not encompass a power to abrogate fundamental constitutional rights without a compelling justification[,]
- "...Proposition 8 [] lacks such a [compelling] justification as determined by the Supreme Court in the *In re Marriage Cases* [(2008) 43 Cal. 4th 757] [,]"

- "[f]or the reasons articulated in *In re Marriage Cases*, Proposition 8 should be stricken as inconsistent with the guarantees of individual liberty safeguarded by article I, section 1 of the Constitution." *See* Answer Brief In Response To Petition For Extraordinary Relief filed on December 19, 2008 in Case No. S168078, pp. 5, 76, 90.

Amici Curiae submit that Proposition 8 cannot be permitted to stand for the reasons offered by Petitioners and the Attorney General, as well as the reasons set forth herein. Amici Curiae attempt to refrain from unnecessary repetition of the arguments made by Petitioners, as well as the Attorney General, justifying negation of Proposition 8. Instead, Amici Curiae offer the following new observations as to why Proposition 8 is invalid and, therefore, this Court must declare it null and void:

- In addition to the constitutional rights identified by Petitioners, Proposition 8 is inconsistent with Article I, Section 4 and Article XVI, Section 5 of the California Constitution. Proposition 8 violates those provisions by improperly causing the State to take one side in a religious debate.

- Proposition 8 also violates Article IV, Section 16 of the California Constitution in that Proposition 8's definition of "marriage" does not have uniform operation and instead improperly discriminates against same-sex couples in abrogation of the fundamental right of equal protection.

- Proposition 8 also violates the Separation of Powers doctrine in that it improperly attempts to circumvent the Court's declaration in *In re Marriage Cases* (2008) 43 Cal. 4th 757, that a State definition of marriage that excludes same-sex couples is unconstitutional.

If Proposition 8 is permitted to stand, the sad and undeniable result will be that fundamental *and inalienable* constitutional rights in this State will enjoy no more protection from majorities than ordinary statutory rights: they can be wholly eliminated on the whim of a simple majority. Such result is abhorrent to the purpose, intent, and text of the California Constitution.

II. ARGUMENT

A. Proposition 8 Is Invalid Whether It Is Treated As A Revision Or An Amendment To The California Constitution

If Proposition 8 is an amendment to the California Constitution, it is invalid. As the Attorney General correctly has observed, the initiative power does not permit an amendment to the Constitution which abrogates fundamental constitutional rights without a compelling justification. Proposition 8 constitutes such an impermissible amendment. Interveners' assertion that "The Attorney General is inviting this Court to declare a constitutional revolution"[1] could not be further from the truth. As this

[1] *See* Intervenors' Response To Pages 75-90 Of The Attorney General's Answer Brief filed on January 5, 2009 in Case Nos. S168047,

Court has already recognized, the initiative power is not unfettered and, indeed, enactments resulting from the initiative power are unlawful if they are contrary to existing provisions of the California Constitution. Thus, it is Interveners that are proposing a fundamental change to our system of checks and balances by arguing that the initiative power is unfettered.

Moreover, the Court should construe Proposition 8 as a revision, rather than an amendment, to the California Constitution. Such a revision required more process and deliberation before it could be enacted and, in the absence thereof, is invalid. [2]

Because Proposition 8 conflicts with multiple core provisions of the California Constitution and changes the nature of our basic governmental plan or structure, it must be treated as a revision of the Constitution rather than a mere amendment. *See Professional Engineers in California v. Kempton* (2007) 40 Cal. 4th 1016, 1046 (a revision may be found where an enactment alters numerous existing provisions of the Constitution or changes our basic governmental plan)(citation omitted); *Legislature of the State of California v. Eu* (1991) 54 Cal. 3d 492, 509 (a

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S168066, S168078, p. 1.

[2] A popular initiative may amend but may not revise the Constitution. *Brosnahan v. Brown* (1982) 32 Cal. 3d 236, 260; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 221. A "revision" of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification, or by legislative submission of the measure to the voters. Cal. Const., art. XVIII, §§1-4.

revision includes one that involves a change in the basic plan of California government, *i.e.*, a change in its fundamental structure)(citation omitted). Among other reasons set forth herein, where Proposition 8 violates the equal protection clause by denying a fundamental right to a suspect class without any compelling justification, Proposition 8 must be treated as an invalid revision of the California Constitution.[3]

Whether deemed an amendment or a revision, under no circumstances should this Court permit a bare majority of California voters to deny to same-sex couples the Constitutionally-protected right to marry.

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[3] Petitioners correctly observe:

> "But there is another reason Proposition 8 falls outside the scope of the amendment power, and it is identified by the Attorney General. That is, regardless of the structural implications of a particular measure, it must be deemed beyond the amendment power if it selectively denies basic, fundamental rights in a way that our constitutional system does not and has never tolerated. The Attorney General contends this issue should be considered apart from the amendment/revision framework. We believe that, in addition, **the argument set forth by the Attorney General shows why Proposition 8 readily falls on the 'revision' side of the line under article XVIII** ."

See Reply filed in Case No. S168078 on January 5, 2009, p. 3 (emphasis added).

In addition to the fundamental rights to equal protection and privacy addressed by Petitioners, Amicus Curiae offer the following *additional* observations as to why Proposition 8 conflicts with *other* rights guaranteed by California's Constitution – including ones which go to the heart of our governmental plan or structure – and Proposition 8, therefore, must be held invalid.

1. Proposition 8 Runs Afoul Of Article I, Section 4 And Article XVI, Section 5 Of The California Constitution

a. The State May Not Promote or Sanction A Particular Religious View

Under Article I, Section 4 of the California Constitution:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion.

Courts have interpreted this provision as prohibiting the government from embracing one religious view over another. *Feminist Women's Health Center, Inc. v. Philibosian* (1984) 157 Cal. App. 3d 1076, 1092. *See also Fox v. City of Los Angeles* (1978) 22 Cal. 3d 792, 796 (observing that this provision of the California Constitution is broader than the federal guarantee).

California's mandate of separation of church and state is not limited to Article I, Section 4. Instead, related rights are guaranteed by

Article XVI, Section 5 of the California Constitution. That section states in relevant part:

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever . . . .

Courts have interpreted this provision as prohibiting any governmental involvement, whatever its form, which has an improper effect of promoting a religious point of view. *Feminist Women's Health Center, supra,* 157 Cal. App. 3d at 1092-93. This provision "was intended to insure the separation of church and state and to guarantee that the power, authority and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purpose." *Id.* at 1093 (citation and quotation marks omitted). "The prohibited aid under this section includes aid 'in the intangible form of [the State's] prestige and power.'" *Id.* at 1093 (citation and quotation marks omitted).

These two provisions of the California Constitution – Article I, Section 4 and Article XVI, Section 5 – are **fundamental to our governmental plan or structure** for California's government to be separate from religion. *See, e.g., Feminist Women's Health Center,* 157 Cal. App. 3d at 1092 ("[T]he Attorney General's office has said: 'It would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion.'")(citation omitted).

b. State Action Showing Preference For A Religious Belief Must Be Invalidated Unless It Is Narrowly Tailored to Achieve A Compelling Governmental Interest

In *Feminist Women's Health Center, supra,* the Court of Appeal considered whether the district attorney's proposed release of aborted fetuses to antiabortion organizations planning a religious burial for the fetuses violated these provisions of the California Constitution. 157 Cal. App. 3d at 1086. The Court of Appeal concluded that the proposed release of the fetuses violated these guarantees of the California Constitution notwithstanding the absence of any activity by the Legislature. *Id.* at 1088.

In determining that the district attorney's proposed action was unconstitutional, the Court reasoned that "[it] would, in effect, sponsor and approve [a particular religious] view [*e.g.*, that the aborted fetuses are persons]." 157 Cal. App. 3d at 1088 (brackets added). "It is clear from

the record that [intervener] Catholic League is a religious organization which regards a fetus as a human being and abortion as murder. While this specific belief may well cross sectarian lines, it is a belief not universally held. Consequently, any state action showing a preference for this belief . . . must be invalidated unless it is justified by a compelling governmental interest with which 'it is closely fitted to further [that] interest.'" *Id.* at 1088-89 (citation and internal quotation marks omitted). The Court then concluded that "there is no compelling state interest to dispose of the fetuses in a private cemetery. The fact that [it] would dispose of the fetuses at no cost to the county is not sufficient compelling interest to justify the appearance of state sanction of a particular religious belief." *Id.* at 1089. The Court of Appeal held that the proposed action by the district attorney violated Article I, Section 4 and Article XVI, Section 5 of the California Constitution. 157 Cal. App. 3d at 1092-93.

c. Proposition 8 Embraces A Particular Religious View

Proposition 8 runs afoul of these same provisions of the California Constitution. If permitted, Proposition 8 would, in effect, promote and validate a particular ***religious*** view – *i.e.*, that only a man and a woman may marry. *See* Petition filed by California Council of Churches et al. on November 17, 2008 (Case No. S168332) at p. 15 ("...the campaign to pass Proposition 8 was sponsored and . . . funded by a few religious

groups seeking to limit civil marriage in California to reflect their own religious rites limiting marriage to unions between a man and a woman").[4] There is abundant evidence that Proposition 8 embraces a religious viewpoint:

- Amicus Curiae Letter filed by Kingdom of Heaven in Case No. S168047 on November 17, 2008 at p. 2 ("These 52% of voters obeyed the order of **the Almighty Eternal Creator** of the earth and human race as recorded in **the Holy Bible** in Genesis 1:26-27.").
- California General Election November 4, 2008 Official Voter Information Guide, Arguments and Rebuttals Section reflecting Bishop George McKinney, Director of Coalition of African American **Pastors** as arguing in favor of Proposition 8.
- June 30, 2008 "letter ... from the First Presidency of The Church of Jesus Christ of Latter-day Saints to Church leaders in California to be read to all congregations" urges support of Proposition 8 and asserts "The **Church's teachings and position** on this moral issue are unequivocal. Marriage between a man and a woman is ordained of **God**,

[4] The petition filed in Case No. S168332 addresses at length historical discrimination against religious minorities.

and the formation of families central to the **Creator's** plan for His children." *See* the website http://newsroom.lds.org/ldsnewsroom/eng/commentary/california-and-same-sex-marriage, labeled "an official Web site" of the Church of Jesus Christ of Latter-day Saints.

- http://www.kofc-california.org/, website of the Knights of Columbus in California includes a press release about these Petitions concerning the validity of Proposition 8, which press release asserts, "Marriage is a reality authored by **God** in his very act of creating the human race. According to his irrevocable plan, the marriage relationship is only possible between one man and one woman.... As faithful citizens Catholics are called to bring our laws regarding marriage into conformity with what we know about the nature of marriage."[5]

See Request for Judicial Notice filed herewith, Exs. 3-6.

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[5] Implicit in the statements of both The Church of Jesus Christ of Latter-day Saints and the Knights of Columbus is the notion that marriage should be limited to opposite-sex couples because same-sex couples cannot procreate. This Court, however, explicitly rejected that argument in *In Re Marriage Cases, supra*, 43 Cal. 4th at 825-30. Specifically, this Court concluded that the right to marry "cannot properly be defined by or limited to the state's interest in fostering a favorable environment for the procreation and raising of children." *Id.* at 828. The right to marry has "never been viewed as the sole preserve of individuals who are physically capable of having children." *Id.* at 825.

d. Proposition 8 Is Not Narrowly Tailored to Achieve A Compelling Governmental Interest

Whether same-sex marriage should be permitted is, like abortion, "'a subject upon which ... people can, and do, adhere to vastly divergent convictions and principles.'" *American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 361 (conc. opn. by Kennard, J.). Although the belief that marriage should be between only a man and woman may well cross sectarian lines, it is a belief not universally held. *See, e.g.*, Petition filed by California Council of Churches et al. on November 17, 2008 (Case No. S168332). Consequently, state action – including a purported "amendment" to California's Constitution – showing a preference for this belief must be invalidated unless it is justified by a compelling governmental (non-religious) interest and narrowly tailored to further that interest.

As this Court *already* determined, there is no such compelling governmental interest here to justify defining marriage as between only a man and a woman. *In re Marriage Cases, supra*, 43 Cal. 4th at 855 ("...retention of the traditional definition of marriage does not constitute a state interest sufficiently compelling [to justify ... defining marriage as between a man and a woman] ..."). The Court held that this was true notwithstanding the initiative power:

> ...we conclude that, under this state's Constitution, the constitutionally based **right to marry** properly must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individual's liberty and personal autonomy that they **may not be eliminated or abrogated by** the Legislature or by **the electorate through the statutory initiative process**.

43 Cal. 4th at 781 (emphasis added).

Intervenors nevertheless continue to try to rely on "tradition" to justify and mischaracterize Proposition 8's constitutional violations. *See, e.g.,* Petitioners' Reply filed on January 5, 2009 in Case No. S168078, p. 25, fn. 12 ("[Interveners'] characterization of Proposition 8 [as only about restoring and maintaining the traditional definition of marriage] is difficult to swallow. If the voters enacted a measure providing that only males shall vote, would Interveners contend that such a measure merely 'restores the traditional definition of suffrage'? Would they argue it was not intended to deny a certain group inalienable rights?"). Similarly, if the voters enacted a measure providing that women shall no longer be permitted to work outside the home, would Interveners contend that such a measure merely restores the traditional notions of the female role in society? Would they argue it was not intended to deny a certain group inalienable rights? There can be no question that the Court correctly

concluded in *In re Marriage Cases* that "tradition" is not a compelling justification to deny fundamental rights.

In reaching its decision in *In re Marriage Cases* that there is no compelling justification for defining marriage to exclude same-sex couples, the Court relied extensively on *Perez v. Sharp* (1948) 32 Cal. 2d 711, which the Court described as "...a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized." 43 Cal. 4th at 781. The Court in *In Re Marriage Cases* observed that *Perez* found that California's statutory provisions prohibiting interracial marriages were inconsistent with the fundamental constitutional right to marry, "notwithstanding the circumstance that statutory prohibitions on interracial marriage had existed since the founding of the state" and *Perez* "[made] clear that history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee." 43 Cal. 4th at 781.[6] The Court applied the reasoning of *Perez* and other comparable cases to the issue before it:

> ... just as this court recognized in *Perez* that it was not constitutionally permissible to continue to treat racial or ethnic minorities as inferior (*Perez*, supra, 32 Cal.2d at pp. 720-727, 198

[6] *See also* 43 Cal. 4th at 824 ("... history alone does not provide a justification for interpreting the constitutional right to marry as protecting only one's ability to enter into an officially recognized family relationship with a person of the opposite sex").

> P.2d 17), and in *Sail'er Inn, [Inc. v. Kirby* (1971) 5 Cal. 3d 1] that it was not constitutionally acceptable to continue to treat women as less capable than and unequal to men (*Sail'er Inn, supra*, 5 Cal.3d at pp. 17-20 & fn. 15, 95 Cal.Rptr. 329, 485 P.2d 529), we now similarly recognize that an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights.

43 Cal. 4th at 822-823.[7]

Accordingly, Proposition 8 – which embraces the religious view point that marriage should be limited to opposite-sex couples – is invalid. Because it is inconsistent with multiple core provisions of the Constitution, including ones that go to the fundamental nature of our governmental plan or structure (*i.e.*, separation of Church and State), it constitutes a revision which could not be enacted through the initiative process. Moreover, even if Proposition 8 is treated as an amendment to the Constitution, it is still invalid because Proposition 8 abrogates, without

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[7] The Court further observed that *Perez* did not characterize the constitutional right at issue there as "a right to interracial marriage," but rather the right to marry, plain and simple. The Court, thus, concluded that it was improper to characterize the constitutional right at issue in its case as the right to same-sex marriage rather than the right to marry. 43 Cal. 4th at 812. "It is important...that we recognize [plaintiffs] are not seeking to create a new constitutional right - the right to 'same-sex marriage'...[W]e direct our focus to the meaning and substance of the constitutional right to marry, and ... avoid the potentially misleading implications inherent in analyzing the issue in terms of 'same-sex marriage.'" 43 Cal. 4th at 812.

a compelling justification, fundamental constitutional rights (including those set forth in Article I, Section 4 and Article XVI, Section 5 of the California Constitution).

Nor is it legitimate to contend that by defining marriage to include both opposite-sex and same-sex couples, the State has improperly taken a side in a religious debate. To the contrary, such definition promotes and is entirely consistent with the fundamental ideals and rights of equal protection and privacy upon which the California Constitution is based. The State can limit the right to marry if it has a compelling (non-religious) justification to do so. *See, e.g., In re Marriage Cases*, 43 Cal. 4th at 829, n. 52 ("the state continues to have a strong and adequate justification for refusing to officially sanction polygamous or incestuous relationships because of their potentially detrimental effect on a sound family environment")(citations omitted). Here, as the Court has explained at length in *In re Marriages Cases*, there is a compelling governmental (non-religious) interest to justify the State permitting *both* opposite-sex and same-sex couples to marry – *i.e.*, furthering equal protection of the laws and protecting the fundamental right to marry.

Certainly, the Mormon and Catholic Churches and other religions have a constitutionally protected right to express their view that marriage should between only a man and a woman and to refrain from sanctioning same-sex marriage within their religions. *See In re Marriage Cases*, 43

Cal. 4th at 854-855 ("affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious official will be required to solemnize a marriage in contravention of his or her religious beliefs") citing Cal. Const., art. I, § 4. Nevertheless, such religions do *not* have the right to have the State's imprimatur on that belief.

2. Proposition 8 Is Invalid Under Article IV, Section 16 Of The California Constitution

a. The California Constitution Guarantees Equal Protection Of The Laws

It is manifest that, as Petitioners observe, "equal protection is and always has been a central animating principle of the California Constitution."[8] Indeed, equal protection is a fundamental right so inherent in the foundation of the California Constitution that it resonates throughout the Constitution – not merely in one provision. Like the tenet of separation of Church and State (*see supra*), the provisions of the Constitution providing Californians with equal protection are part of another fundamental feature of our governmental plan – all persons are to be afforded equal protection of the laws.

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[8] *See* Petitioners Reply in Support of Petition for Extraordinary Relief filed on January 5, 2009 in Case Nos. S168047, p. 8.

One provision that is part of California's equal protection rubric, is Article IV, Section 16(a), which provides that "all laws of a general nature have uniform operation." Cal. Const. Art. IV, § 16(a) [formerly, Article I, Section 11 of the California Constitution]. Courts refer to Section 16 of Article IV and Section 7 of Article I of the California Constitution as providing Californians equal protection under the laws and apply the same standards to both provisions when evaluating whether a law violates the California Constitution. *See, e.g., Griffiths v. Superior Court* (2002) 96 Cal. App. 4th 757, 775.

As this Court emphasized in *Serrano v. Priest* (1977) 18 Cal. 3d 728, a provision of the California Constitution cannot trump its equal protection provisions (including but not limited to Article IV, Section 16) "unless the intent of the Constitution to exempt it from such [equal protection] requirement plainly appears." 18 Cal. 3d at 773 (brackets added). In invalidating under Section 16 (as well as other constitutional provisions) the school financing system at issue, the Court in *Serrano v. Priest* explained:

> ...we are here confronted with a situation in which the Legislature has been granted [under the Constitution] the power to provide for the financing of schools through the mechanism of county levies of school district taxes. **Nothing in the constitutional provision establishing that power, however, indicates that its exercise is to be freed from general constitutional limitations applicable to all**

> **legislation.** Accordingly the Legislature, in its exercise of the subject power in conjunction with other powers possessed by it, was **obliged to act in a manner consistent with such limitations**. This it has not done. Instead it has undertaken to create a school financing system which, by making the quality of educational opportunity available to a student dependent upon the wealth of the district in which he lives, is **manifestly inconsistent with fundamental constitutional provisions guaranteeing the equal protection of the laws** to all citizens of this state. That system, we hold today, can no longer endure.

18 Cal. 3d at 774 (emphasis added).

The principal of equal protection is so essential to the California Constitution that this Court has moved deliberately to invalidate laws that run afoul of its protections, as it did in *Serrano* and as it must do with respect to Proposition 8. To do otherwise, would be to deprive disfavored minorities of the fundamental security of equality under, and uniform operation of, California's laws.

b. Strict Scrutiny Is The Proper Standard Of Review

In considering a challenge to a law made under Article IV, Section 16(a), **strict scrutiny is the appropriate standard of review for the court to apply**. *See Serrano v. Priest, supra,* 18 Cal. 3d at 769 (invalidating a school financing system based upon district wealth which affected the fundamental interest of education; "[i]n applying our state constitutional provisions guaranteeing equal protection of the laws we

shall continue to apply strict and searching judicial scrutiny to legislative classifications which, because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered fundamental.")(brackets added).

In order to meet the test for strict scrutiny, "*the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." *Hernandez v. City of Hanford* (2007) 41 Cal. 4th 279, 299. The burden under strict scrutiny is a heavy one. As this Court has explained, "the state must demonstrate not simply that there is a rational, constitutionally legitimate interest that supports the differential treatment at issue, but instead that the state interest is a constitutionally compelling one that justifies the disparate treatment prescribed by the statute in question." *In re Marriage Cases*, 43 Cal. 4th at 847-848 citing *Darces v. Woods* (1984) 35 Cal. 3d 871, 893-895.

c. Proposition 8 Fails Strict Scrutiny And, Therefore, Violates The California Constitutional Guarantee of Equal Protection

Proposition 8 cannot stand in light of Section 16(a). Nothing in Proposition 8 or in the initiative power provision of the California Constitution exempts them from any other Constitutional requirements such as Section 16(a) or any other equal protection provisions.

Interveners' argument that Proposition 8 "must ... be *construed* as limiting the scope of – or carving out an exception to – more general provisions in the [California Constitution's] Declaration of Rights protecting liberty, privacy, equality, due process, etc. . ."[9] improperly ignores *Serrano v. Priest*'s holding that Constitutional provisions are *not* to be *construed* to be freed from equal protection limitations of the California Constitution. 18 Cal. 3d at 773.

Moreover, if Proposition 8 were to be construed as limiting the California Constitution's equal protection mandates, it would be have to be treated as a revision (rather than an amendment) to the Constitution since equal protection is at the core of our governmental plan. By reserving marriage only for opposite-sex couples, Proposition 8 turns on its head Section 16's mandate that under our basic governmental plan, laws will have uniform operation. Thus, Proposition 8 must be considered as a revision to the Constitution that was improperly enacted without the procedures required for a revision.

Even if Proposition 8 is treated as an amendment to the Constitution, it still cannot stand under Section 16's equal protection guaranty. Proposition 8 denies – without a compelling justification – a

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[9] *See* Interveners' Response To Pages 75-90 Of The Attorney General's Answer Brief filed on January 5, 2009 in Case Nos. S168047, S168066, S168078, p. 5 (italics and brackets added).

fundamental right (*e.g.*, marriage) to a suspect class – same-sex couples. This Court has espoused a long and significant history in jurisprudence that the right to marry is a fundamental right: "under this state's Constitution, the constitutionally based right to marry . . . ***may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process***." *In re Marriage Cases*, 43 Cal. 4th at 781 (emphasis added). The Court also concluded that "sexual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to ***strict scrutiny*** under this constitutional provision." *Id.* at 840-41 (emphasis added).

Proposition 8 violates Article IV, Section 16 of the California Constitution because it constitutes a law that fails to have uniform operation (*e.g.*, it will permit opposite-sex couples, but not same-sex couples, to marry) and because Proposition 8 does not – and cannot – stand up to the test for strict scrutiny for the reasons set forth by Petitioners, as well as this Court in *In re Marriage Cases*, 43 Cal. 4th at 855-856.

As exemplified in the *In re Marriage Cases*, this Court has not hesitated to invalidate laws enacted by the Legislature or **the electorate** when they run afoul of the California Constitution – including Article IV,

Section 16. *See e.g., In re Marriage Cases*, 43 Cal. 4th at 850-53 (citing numerous cases). *Romer v. Evans* (1996) 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 is instructive. There, the United States Supreme Court invalidated, as violative of the federal equal protection clause, a provision of the Colorado Constitution, adopted in a statewide referendum, that prohibited all legislative, judicial and executive actions intended to protect homosexuals from discrimination. In doing so, the United States Supreme Court explained that, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 634 (citation omitted).

Here, there is no question that, if allowed to stand, Proposition 8 will eliminate the fundamental right of same-sex couples to marry in California – in violation of Article IV, Section 16(a) of the California Constitution. Again, there is *no* "constitutionally compelling [interest] that justifies the disparate treatment prescribed by" Proposition 8. *In re Marriage Cases*, *supra*, 43 Cal. 4th at 847-848 citing *Darces v. Woods* (1984) 35 Cal. 3d 871, 893-895.

Accordingly, Proposition 8 – which discriminates against gay couples and denies them the right of marriage enjoyed by heterosexual couples without justification – is invalid. Proposition 8 is inconsistent with multiple provisions of the Constitution that go to the fundamental

nature of our governmental plan or structure (*i.e.*, equal protection of the laws), and, therefore, Proposition 8 constitutes a revision that could not be enacted through the initiative process. Moreover, even if Proposition 8 is treated as an amendment to the Constitution, it is still invalid because Proposition 8 abrogates without a compelling justification fundamental constitutional rights, including the right to privacy, the right to marry, and the right of equal protection of the law.

B. Proposition 8 Violates The Separation Of Powers Doctrine Under The California Constitution.

There can be no doubt that Proposition 8 violates the Separation of Powers doctrine (Article III, Section 3 of the California Constitution). Under that doctrine, the Court is to serve in a "watchdog" role to ensure that fundamental rights are not abrogated or denied without a sufficiently compelling justification.

Interveners are simply wrong that this Court must "bow to" the will of the people. *See* Interveners' Opposition Brief filed on December 19, 2008 in Case No. S168047, p. 5. Amici Curiae submit that the Attorney General is correct that the initiative power does not give the voters an unfettered prerogative to amend the Constitution and it does not encompass a power to abrogate fundamental constitutional rights without a compelling justification. Popular opinion – which is inherently in flux and affected by the circumstances of the day – cannot be permitted to

trump the Court's *steadfast* duty to protect *inalienable* rights.[10] *In re Marriage Cases* 43 Cal. 4th at 860 (conc. opn. of Kennard, J.)("[t]he architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection") citing, among other authorities, *Bixby v. Pierno* (1971) 4 Cal. 3d 130, 141 (under our constitutional system of checks and balances, "probably the most fundamental [protection] 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").

As this Court correctly recognized in *In re Marriage Cases*:

> Although California decisions consistently and vigorously have safeguarded the right of voters to exercise the authority afforded by the initiative process ([citation], our past cases at the same time uniformly establish that **initiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the Legislature, and our**

[10] Inalienable rights are those "that cannot be transferred or surrendered." Black's Law Dict. (7th ed. 1999), p. 1323, col. 1.

> **courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution**.

43 Cal. 4th at 851 (emphases added and citing, among other authorities, *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 ("[f]undamental rights may not be submitted to vote; they depend on the outcome of no elections")).

The Court continued:

> **[T]he circumstance that the electorate voted in favor of retaining the traditional definition of marriage does not exempt the ... limitation from constitutional review**, nor does it demonstrate that the voters' objective represents a constitutionally compelling state interest for purposes of equal protection principles.

43 Cal.4th at 761 (emphasis added and relying on *United States Supreme Court in Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, 295, 102 S.Ct. 434, 70 L.Ed.2d 492 ("[i]t is irrelevant that the voters rather than a legislative body enacted [the challenged law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation")).

Interveners' position that "... 'there is no inalienable right ... which ... [is] above the California Constitution[]'"[11] ignores that the inalienable rights are part of the California Constitution. Thus, it is meaningless to assert inalienable rights are not above the Constitution when they are part of the Constitution.

The issue here is what happens when two provisions of the California Constitution clash. Interveners' argument that the people's will always trumps "fails to take into account the very basic point that the provisions of the California Constitution itself constitute the ultimate expression of the people's will, and that the fundamental rights embodied within that Constitution for the protection of all persons represent restraints that the people themselves have imposed upon the statutory enactments that may be adopted either by their elected representatives or by the voters through the initiative process." 43 Cal. 4th at 852. *See also Serrano v. Priest, supra,* 18 Cal. 3d at 774 (constitutional powers must be used in a manner consistent with equal protection limitations of the California Constitution).

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[11] *See* Intervenors' Response To Pages 75-90 Of The Attorney General's Answer Brief filed on January 5, 2009 in Case Nos. S168047, S168066, S168078, p. 10.

Interveners' position that the initiative power is subject to only federal constitutional constraints[12] is contrary to these observations by the Court in *In re Marriage Cases.* Nor do Interveners justify their contention that the other provisions of the California Constitution should no longer be a "check and balance" to its initiative power.

In its role as protector of our inalienable rights, the Court already declared in *In Re Marriage Cases* that a State definition of marriage that excludes same-sex couples is unconstitutional because it violates the right of equal protection:

> ...**we conclude that retention of the traditional definition of marriage does not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples.** Accordingly, insofar as [the State] draw[s] a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage, we conclude these statutes are **unconstitutional**.

43 Cal.4th at 855-56 (emphasis and brackets added). The proponents of Proposition 8 improperly believe that they can ignore that declaration by the Court. They are wrong.[13]

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[12] *See* Intervenors' Response To Pages 75-90 Of The Attorney General's Answer Brief filed on January 5, 2009 in Case Nos. S168047, S168066, S168078, p. 14.

[13]Contrary to Interveners' suggestion (Intervenors' Response To

This Court already correctly concluded that a State definition of marriage which excludes same-sex couples violates equal protection without sufficient justification, and the voters cannot avoid that rule of law simply by taking another vote. *See Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 53 (under Separation of Powers doctrine, "the Legislature may not undertake to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment"); *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal. 4th 220, 253 (power of the electorate to pass initiative "is generally coextensive with power of Legislature to enact statutes"). But that is exactly what happened here with respect to Proposition 8. *See* Ballot Pamp. Gen. Elec. (Nov. 4, 2008), Argument in Favor of Proposition 8 (the initiative "*overturns the outrageous court decision of ... Supreme Court judges* [sic] ..."), Ex. 4 to Request for Judicial Notice filed herewith.

Nor can the voters avoid that declaration of unconstitutionality simply by labeling their initiative measure an amendment to the State Constitution. *See In re Marriage Cases*, 43 Cal. 4th at 851 (observing that

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Pages 75-90 Of The Attorney General's Answer Brief filed on January 5, 2009 in Case Nos. S168047, S168066, S168078, p. 19), the Court is not determining the definition of marriage. Rather, the Court is merely determining whether Proposition 8's definition of marriage is lawful. That is consistent with its traditional role to scrutinize for constitutionality the laws of the State.

"our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution") citing to *Romer v. Evans* (1996) 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 ([**invalidating**, as violative of the federal equal protection clause, **a provision of the Colorado Constitution, adopted in a statewide referendum** that barred any municipality from enacting or enforcing any policy prohibiting discrimination on the basis of sexual orientation])(emphasis added). Purported changes to the State Constitution must comply with other provisions of the Constitution. Proposition 8 constitutes a violation of the Separation of Powers doctrine because this Court has already declared that a State definition of marriage which excludes same-sex couples is an unconstitutional violation of equal protection.

In sum, laws enacted through the initiative process cannot be permitted to be immune from constitutional scrutiny. Just because a voting majority embraces a law, does not mean the courts must, or even should, construe it as passing constitutional muster. Indeed, under the structure of our governmental plan, the courts are charged with keeping the majority in check with the Constitution and not permitting a tyrannical majority to improperly abrogate or even chip away at our *inalienable rights guaranteed to all persons* under the Constitution. The Constitution

was not intended to be up for grabs each election. Allowing the voters to cut back at whim the fundamental rights guaranteed by the Constitution tragically would reduce the Constitution to the status of mere legislation, rather than a lasting charter for the structure of our government.

III. CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the Court declare Proposition 8 is invalid and null and void in its entirety.

Dated: January 12, 2009

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE/WORD COUNT

(Rule 8.204(c)(1))

Pursuant to California Rules of Court Rules 8.204(c)(1) and 8.490(a)(1), I hereby certify that this brief contains 6,799 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to generate the brief, Microsoft Word.

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PROOF OF SERVICE
F.R.C.P. 5 / C.C.P. § 1013a(3)/ Cal. R. Ct. R. 2.260

I am a resident of, or employed in, the County of Los Angeles. I am over the age of 18 and not a party to this action. My business address is: Steptoe & Johnson LLP, 2121 Avenue of the Stars, Suite 2800, Los Angeles, California 90067.

On **January 13, 2009,** I served the following listed document(s), by method indicated below, on the parties in this action: **AMICI CURIAE BRIEF OF CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN, NATIONAL ORGANIZATION FOR WOMEN, AND THE FEMINIST MAJORITY FOUNDATION IN SUPPORT OF PETITIONERS**

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