Case Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF CALIFORNIA
En Banc

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

ROBIN TYLER et al., Petitioners,
v.
STATE OF CALIFORNIA et al., Respondents.

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,
v.
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APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS' CHALLENGE TO THE LEGALITY OF PROPOSITION 8; AND AMICUS CURIAE BRIEF

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Beverly Hills Bar Association, California Women Lawyers, Women Lawyers of Sacramento (an affiliate of California Women Lawyers), and Women Lawyers Association of Los Angeles ("Bar Associations") request permission to file the attached Amicus Curiae Brief pursuant to California Rules of Court, rule 8.520(f).

The Bar Associations speak on behalf of organizations that have a collective membership of over 35,000 attorneys licensed to practice law in California. The Bar Associations seek leave to file the attached Amicus Curiae Brief because they believe that lawyer groups should take a stand to protect the integrity of the core guarantees of our Constitution and to prevent them from being unlawfully abrogated.

In *In re Marriage Cases* (2008) 43 Cal.4th 757, this Court held that marriage is a fundamental "inalienable right" guaranteed to "all people" by article I, section 1, of the California Constitution. By enacting Proposition 8, the voters have taken away this "inalienable" right from those who wish to enter into same-sex marriages.

The proponents of Proposition 8 attempt to portray the changes effectuated by Proposition 8 as limited, affecting only the definition of "marriage." That, however, is not the case. If Proposition 8 is valid, it necessarily establishes that the article I, section 1, guarantee of "inalienable rights" to "all people" no longer means what it says. Under Proposition 8, "inalienable" now necessarily means "alienable at the will of the majority,"

and "all people" now means only "some people"—namely, the people whom a majority of voters choose to bless with a given constitutional right.

These changes are enormous. They undermine the foundation of our most basic liberties and destroy the essence of the constitutional compact under which our people could rest assured that their inalienable rights were not subject to majority pleasure.

Under article XVIII of our Constitution, drastic revisions of our most basic guarantees, such as those imposed by Proposition 8, cannot lawfully be accomplished by majority vote on an initiative; any such vote must be preceded either by approval of the measure by a constitutional convention or by a two-thirds vote of each house of the Legislature. That never happened here. For these and the other reasons set forth below, the Bar Associations assert that Proposition 8 is unlawful and must be invalidated.

While the accompanying Amicus Curiae Brief focuses on the arguments just described, the Bar Associations join the arguments that have been made by the Petitioners and, with one exception, by the Attorney General. In particular, the Bar Associations do not agree that the destruction of an "inalienable" right guaranteed to "all people" by article I, section 1, can ever be considered a mere amendment. As we demonstrate in the attached brief, the changes wrought by Proposition 8 to article I, section 1, necessarily constitute invalid revisions of the Constitution.

The Bar Associations have read the briefs submitted by the parties and believe that the arguments set forth in the accompanying Amicus Curiae Brief will assist this Court in deciding the incredibly important issues presented by this case. Accordingly, the Bar Associations respectfully request this Court's leave to file the accompanying brief.

No party or counsel for any party in the pending appeal authored the attached brief or made any monetary contribution to its preparation. (Cal. Rules of Court, rule 8.520(f)(4)(A), (B).)

Dated: January 14, 2009

GREINES, MARTIN, STEIN & RICHLAND LLP
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AMICUS CURIAE BRIEF

INTRODUCTION

The proponents of Proposition 8 would have us believe that the measure's effect is extremely limited—that its sole impact is to eliminate the right of same-sex couples to marry, and that it thus qualifies as a valid constitutional amendment, rather than an unlawful revision.

Nothing could be further from the truth.

The immediate and direct impact of Proposition 8 extends far beyond the issue of marriage and far beyond the terms of the proposition. What Proposition 8 really does (silently, but necessarily) is eviscerate the explicit language and guarantees of article I, section 1, of the California Constitution. This is a radical change affecting *all Californians*, not just those who want to marry someone of the same gender.

Article I, section 1—the premier section of our Constitution's Declaration of Rights—guarantees some of our most precious liberties. It does so in unequivocal terms. It promises not just rights, but "*inalienable* rights" that are guaranteed to "*all* people." Included among these inalienable rights are those which form the explicit foundation for this Court's holding that all people have an inalienable right to marry the person of their choice, regardless of gender. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 820-823.)

By precluding marriages between people of the same gender, Proposition 8 does more than define the word "marriage." It strips some people of their inalienable rights. In so doing, it necessarily and permanently changes the meaning of article I, section 1, by effectively

striking the word "inalienable" and by changing "all people" to mean "some people." If Proposition 8 is lawful, article I, section 1, must now be read to exclude the word "inalienable" as follows:

- The first sentence of article I, section 1, is effectively changed to mean: "All people, *except those whom a majority of voters choose to exclude by initiative*, are by nature free and independent and have ~~*inalienable*~~ rights, *unless such rights are taken away by a majority of voters by initiative.*" (Exact quotation from article I, section 1, with italicized language added or deleted to reveal the changes in constitutional meaning necessarily effectuated by Proposition 8.)
- The second sentence of article I, section 1, is effectively changed to mean: "Among these [~~*inalienable*~~ rights] are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy, *unless such rights are taken away by a majority of voters by initiative.*" (Quotation from article I, section 1, with italicized language added or deleted to reveal the changes in constitutional meaning necessarily effectuated by Proposition 8.)

Small changes? Just a matter of "definition"? It's not even close.

The changes wrought by Proposition 8 go to the very essence of the social compact reached by the people in forming our constitutional government. Since the inception of California as a State, the inalienable rights guaranteed by article 1, section 1, have been recognized as the cornerstone of our free society. (See, e.g., *Billings v. Hall* (1857) 7 Cal. 1, 6 [the principle enunciated in article 1, section 1, "is as old as the Magna

Charta. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions"].)
By definition, these rights are not subject to majority whim. (See, e.g., *In re Marriage Cases, supra,* 43 Cal.4th at p. 852 [quoting from *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 638 (*Barnette*), that "inalienable rights" are "'beyond the reach of majorities,'" "'may not be submitted to vote,'" and cannot "'depend on'" the outcome of elections].)

Because Proposition 8 subjects inalienable rights to majority pleasure, our Constitution no longer stands as a bedrock barrier against the taking of "inalienable" rights by popular will. Now, our most cherished and supposedly immutable rights are up for grabs at any election. That is not how California government has ever operated, nor is it how it is supposed to operate.

So, let's not kid ourselves. Proposition 8 is not some minor amendment. What Proposition 8 really brings is a major structural revision of our Constitution and of our individual liberties—a revision that cannot lawfully be accomplished by majority vote alone. Since Proposition 8 was enacted without being proposed or approved by either a constitutional convention or a two-thirds vote of both houses of our Legislature (Cal. Const., art. XVIII), it is unlawful and should be invalidated.

The sooner, the better.

LEGAL DISCUSSION

I. THE FUNDAMENTAL RIGHT TO MARRY A PERSON OF ONE'S CHOICE, REGARDLESS OF GENDER, IS AN "INALIENABLE" RIGHT GUARANTEED TO "ALL PEOPLE" BY ARTICLE I, SECTION 1, OF THE CALIFORNIA CONSTITUTION.

The starting point for our analysis of Proposition 8 and its impact is the Constitution's first and foundational section—article I, section 1. That section grants certain "inalienable rights" to "all people" as follows:

> 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.

(Cal. Const., art. I, § 1.)

One of these "inalienable rights" is the right to marry the person of one's choice, regardless of gender. That is the express holding of *In re Marriage Cases*, *supra*, 43 Cal.4th 757.[1]

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[1] "[T]he constitutional right to marry" is "one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution" (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 781); "the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution" (*id.* at p. 809); after the addition of "'privacy' to the 'inalienable rights' of all Californians protected by article I, section 1, of the California Constitution," the right to marry "now also clearly falls within the reach of the constitutional protection afforded to an individual's interest in personal autonomy by California's explicit state constitutional privacy clause" (*id.* at p. 810); "the California Constitution properly must be

II. SINCE THE RIGHT TO MARRY A PERSON OF ONE'S CHOICE IS AN "INALIENABLE RIGHT" BELONGING TO "ALL PEOPLE," IT IS, BY DEFINITION, A RIGHT THAT CANNOT BE TAKEN AWAY FROM ANYONE BY MERE MAJORITY VOTE.

A. The Meaning Of The Terms "Inalienable Rights" And "All People" Is Clear And Unambiguous.

Article I, section 1, makes explicit promises. No interpretation is required. (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122 [if constitutional language is clear, "there is no need for construction"].)

- "Inalienable" means "incapable of being alienated, surrendered, or transferred." (Merriam-Webster's Online Dictionary at <http://www.merriam-webster.com/dictionary/inalienable> [as of Jan. 9, 2009].)
- "Inalienable right" means "a right that cannot be taken away, denied, or transferred." (Webster's New Millennium Dictionary of English, Preview Edition, 2003-2009 at <http://dictionary.reference.com/browse/inalienable+right> [as of Jan. 9, 2009].)
- All" means "every," "the whole of" and "the whole number of." (Dictionary.com at <http://dictionary.reference.com/browse/all/> [as of Jan. 13, 2009].)

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interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation. FN 44"; (*id.* at p. 820 & fn. 44 [FN 44: "As this court observed in *Valerie N., supra*, 40 Cal.3d 143, 163, '[a]rticle I, section 1, confirms the right not only to privacy, but to pursue happiness and enjoy liberty'"]).

These words are unqualified. Every person has certain fundamental rights that are incapable of being taken away. (See fn. 3, *infra*.)

B. The Founders Intended "Inalienable Rights" To Be Rights That Could Not Be Taken Away By The Majority.

If there were any conceivable ambiguity regarding what "inalienable rights" for "all people" means, the legislative history of article I, section 1, dispels it. As the historical materials establish, the founders intended the enumeration in article I, section 1, of "inalienable rights" to act as a *restriction* on majority will; it was intended to bar majorities from tampering with a certain set of core liberties.

The adoption of section 1 of article I, was the very first substantive act of the delegates at the 1849 Constitutional Convention. (Browne, Rep. of Debates in Convention of Cal. on Formation of State Const. (1850) pp. 33-34 (Browne, Debates) [article I, section 1 adopted]; see J. Grodin, *Some Reflections on State Constitutions* (1988) 15 Hastings Const. L.Q. 391, 393 [after seating of delegates, Article I was first item of business considered]; see also J. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years* (2004) 31 Hastings Const. L.Q. 141, 142-143 [section 1 was one of two sections added by the delegates to the committee draft of the declaration of rights and it incorporates natural law principles into the Constitution].)

The statements by the delegates convey a uniform understanding of the importance of the inalienable rights that article I, section 1, enumerated. As one delegate explained:

> Here is where the powers of the State Government are limited. This Convention is not called upon to tell the people

> what they shall do, *but what they shall not* do. . . . We are sent here to tell them that because they are a majority *they are not to infringe upon great general rights and great general principles*. What says your bill of rights? It says, in the first place, that the people are the sovereigns. It then goes on to specify certain inalienable rights, and to provide that *those rights shall not be infringed upon.* The people agree, by adopting the Constitution, that so long as they are members of the community *they will not infringe on those special rights*. . . .

(Browne, Debates, *supra*, at p. 53, emphasis added; see also *id.* at p. 22 ["The majority of any community is the party to be governed; the restrictions of law are interposed between them and the weaker party; they are to be restrained from infringing upon the rights of the minority"]; *id.* at p. 52 ["The Constitution of a State is a constitution of restrictions. By accepting it, the people agree not to exercise the powers therein expressly prohibited"].)

No delegate ever voiced any disagreement with these sentiments. Indeed, another delegate argued that because article I, section 1, "secures to the citizens of the State certain privileges, of which this Convention has no power to deprive them," it was unnecessary even to include it in the Constitution. (*Id.* at p. 34.) Those arguing in favor of the inclusion of a section guaranteeing inalienable rights expressed no disagreement with this view, but believed an express listing of inalienable rights in article I, section 1, was important because it set forth an "essential principle to be incorporated in a bill of rights" that "takes precedence of all others, and places those that follow it in a higher point of view." (*Ibid.*)

Thus, the founders knew what "inalienable" meant, as well as the importance of designating certain rights as "inalienable."

C. In *In Re Marriage Cases*, This Court Expressly Declared That The Right To Enter Into Marriage, Regardless Of Gender, Is An "Inalienable" Right That Cannot Be Taken Away By Majority Vote Alone.

In holding that the right to marry is an "inalienable" right that belongs to "all individuals," regardless of sexual orientation (see quotations in footnote 1, *supra*), this Court made clear that "inalienable" means exactly what it appears to mean—that is, something that cannot be taken away. The Court declared that the right to marry "embodies fundamental interests of an individual *that are protected from abrogation or elimination by the state*." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 818, emphasis added.)

And, relying on United States Supreme Court authority, this Court further declared that "inalienable rights," such as those guaranteed by article I, section 1, are "'beyond the reach of majorities,'" "'may not be submitted to vote,'" and cannot "'depend on'" the outcome elections. (*Id.* at p. 852, quoting from *Barnette*, *supra,* 319 U.S. at p. 638.)

D. Numerous Other Cases And Commentaries Confirm That "Inalienable Rights" Are Rights That Cannot Be Taken Away.

This Court's decision in *In re Marriage Cases* does not stand alone in pronouncing that "inalienable" means exactly what it says. Numerous

other California cases, as well as the United States Supreme Court and various commentaries, say exactly the same thing.

Inalienable rights are the "boundaries set to the exercise of the supreme sovereign power of the State." (*Britton v. Board of Election Commrs. of City and County of San Francisco* (1900) 129 Cal. 337, 345-346 (*Britton*).) They are beyond the control of the State to tamper with or remove. (See *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829 ["Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone"]; *Billings v. Hall, supra,* 7 Cal. at p. 16 (conc. opn. of Burnett, J.) ["there are certain inherent and inalienable rights of human nature that no government can justly take away"]; *Ex Parte Quarg* (1906) 149 Cal. 79, 80 ["These rights (to property and personal liberty) are in fact inherent in every natural person, and do not depend on constitutional grant or guaranty"].)[2]

The United States Supreme Court has repeatedly confirmed this, stating that inalienable rights cannot be taken away or transferred. In its words, "inalienable rights" are not conferred on men "by edicts of emperors, or decrees of parliament, or acts of congress, but 'by their Creator,'" and thus it is not the purpose of government to "*grant* them, but [to] *secure* them." (*Butchers' Union, Etc., Co. v. Crescent City, Etc., Co.* (1884) 111 U.S. 746, 756-757 (*Butchers' Union*), emphasis added.) Thus,

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[2] As Justice Burnett further observed in *Billings v. Hall*, "for the Constitution to declare a right inalienable, and at the same time leave the Legislature unlimited power over it, would be a contradiction in terms, an idle provision, proving that a Constitution was a mere parchment barrier, insufficient to protect the citizen, delusive and visionary, and the practical result of which would be to destroy, not conserve, the rights it vainly presumed to protect." (7 Cal. at p. 17 (conc. opn. of Burnett, J).)

"inalienable rights" are "rights which cannot be bartered away, or given away, or taken away, except in punishment of crime." (*Ibid.*; see also *Citizens' Savings & Loan Ass'n v. City of Topeka* (1874) 87 U.S. 655, 662 (*Citizens' Savings & Loan*) ["It must be conceded that there are such rights in every free government beyond the control of the State"].)

One of the early commentaries observed that when a constitution declares there are "'unalienable and indefeasible'" rights, that means there is "a solemn recognition" that those rights "aris[e] from the law of nature, and the gift of Providence, and [are] incapable of being transferred or surrendered." (J. Story, Commentaries on the Constitution of the United States (1833) § 340, at <http://www.constitution.org/js/js_303.htm> [as of Jan. 12, 2009]; see also J. Kent, Commentaries on American Law (1827) Volume 2, Part IV, Lecture 24: Of the Absolute Rights of Persons, ¶ 2, at <http://www.lonang.com/exlibris/kent/kent-24.htm> [as of Jan. 12, 2009] ["These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable"].)

Or as another commentator explained, "the grand end of civil government, from the very nature of its institution, is for the support, protection, and defence of [inalienable rights]." (S. Adams, The Rights of the Colonists (1772) p. 419, at <http://history/hanover.edu/ texts/adamss.html> [as of Jan. 12, 2009].)

In sum, the rights enumerated in article I, section 1, are rights that, by express constitutional design and mandate, no one can abrogate.[3]

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[3] While the people could, perhaps, choose to abrogate the Constitution in its entirety or to eliminate the "inalienable" nature of the rights guaranteed by article I, section 1, article XVIII wisely commands that such changes receive a greater level of deliberation and scrutiny than simply attaining a

III. THE "INALIENABLE RIGHTS" GUARANTEED TO "ALL PEOPLE" BY ARTICLE 1, SECTION 1, FORM THE STRUCTURAL HEART OF BOTH OUR INDIVIDUAL LIBERTIES AND THE SOCIAL COMPACT BETWEEN THE PEOPLE AND THEIR GOVERNMENT.

Our individual liberties are expressed in article I as our Declaration of Rights. This declaration consists of thirty-one different sections, identifying each of our constitutionally-protected civil liberties. Only one section, however, specifies that certain liberties are "inalienable rights" guaranteed to "all people." That section is article I, section 1.

The rights enumerated in article I, section 1, are more than the cornerstone of our liberties. They constitute the *foundation* of the social compact between the individual and the government. (See authorities cited in AG Brief, pp. 78-90; T. Paine, Rights of Man (1791) Being An Answer to Mr. Burke's Attack on the French Revolution, Part 16, at <http://ushistory.org/Paine/rights/c1-025.htm> [as of Jan. 12, 2009] ["The end of all political associations *is the preservation of the natural and imprescriptible rights of man* . . . ," emphasis added]; *Declaration of Independence* (July 4, 1776) ¶ 2, at <http://www.ushistory.org/Declaration /document/index.htm> [as of Jan. 12, 2009] ["We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness. That *to secure these rights, governments are instituted among men* . . . . ," emphasis added].)

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majority popular vote at an election. (See Section V, *infra*.)

California case law uniformly pronounces that the primary purpose of government and the essential obligation of our society is to preserve the inalienable rights of all people. Over 150 years ago, this Court held that our social compact recognizes that people are born with certain inalienable rights, and consent to be governed only to preserve "their lives, liberty, and fortunes, by stated rules of right and property." (*Billings v. Hall, supra,* 7 Cal. at pp. 11-12 ["men would not quit the freedom of a state of nature, and tie themselves up under a government, were it not to preserve their lives, liberty, and fortunes, by stated rules of right and property," citing John Locke].)

In consenting to be governed, the individual *does not* surrender his inalienable rights; on the contrary, he preserves them. (*Id.* at p. 14 ["it is a right never ceded to any department of the government by the people when they gave the delegated powers which they have conferred by the Constitution"]; see also *id.* at pp. 11-14.) Any exercise of power to deprive the individual of his inalienable rights would be *antithetical* to the social compact, one of the primary purposes of which is to *protect* such rights. (*Ibid.*)

For these reasons, the guarantee of inalienable rights in article 1, section 1, "lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions." (*Id.* at p. 6.) Article I, section 1, "was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen." (*Ibid.*)

Again and again, California courts have reaffirmed these views. The special class of rights, defined as "inalienable" and belonging to "all people," constitute our most fundamental liberties and the foundation of our governmental structure. (*Britton, supra,* 129 Cal. at pp. 345-346 [inalienable rights are "implied reservations of individual rights, without which the social compact could not exist"]; *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1096 ["privacy, like the other inalienable rights listed first in our Constitution, is . . . fundamental"]; *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 32 (conc. & dis. opn. of Poche, J.) ["What could be more firmly established than the very first section of the first article of the state Constitution? What could be more fundamental than that document's enumeration of inalienable rights? What could be more substantial than 'enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy'?"].)

As this Court said in *Miller v. McKenna* (1944) 23 Cal.2d 774, 783, citing *Billings v. Hall, supra*: "The right of 'acquiring, possessing and protecting property' is anchored in the first section of the first article of our Constitution. This right is as old as Magna Charta. It lies at the foundation of our constitutional government, and 'is necessary to the existence of civil liberty and free institutions.'"

Both the United States Supreme Court and other state courts likewise acknowledge that the foundation of constitutional government lies in the protection of inalienable rights. The United States Supreme Court explained that "certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained." (*Butchers' Union, supra,* 111 U.S. at p. 756.) It declared that an unchecked

ability to eliminate or control these basic rights was equivalent to despotism and antithetical to the concept of free government. (*Citizens' Savings & Loan*, *supra*, 87 U.S. at p. 662 ["It must be conceded that there are such rights in every free government beyond the control of the State.
A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism"].)[4]

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[4] See also *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 370 ["[T]he fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself"]; *U.S. v. Cruikshank* (1875) 92 U.S. 542, 553 ["The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights which they were endowed by their Creator'"]; *Barnette, supra,* 319 U.S. at p. 638 ["The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections"].

Courts across the country uniformly agree. Voluminous decisional law holds that the same types of inalienable rights guaranteed by article 1, section 1, form the foundation and essence of our free society and the social compact between individuals and government.[5]

As one court explained in terms that could easily apply to the rights guaranteed by article I, section 1: "The entire social and political structure of America rests upon the cornerstone that all men have certain rights which

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[5] Here is a sampling of the countless authorities that support this view: *Richmond, F. & P.R. Co. v. City of Richmond* (1926) 145 Va. 225, 238 [133 S.E. 800, 803] ["There are [certain inherent rights], such as the rights of life, liberty and the pursuit of happiness, which are not surrendered by entering into organized society. They existed before society was organized and are not surrendered by entering into the organization"]; *State v. Langley* (1938) 53 Wyo. 332 [84 P.2d 767, 769] ["each man has, as such, and because he is a human being, certain natural, inherent and indefeasible rights of which no government should, or has the right to, deprive him"]; *Allen v. State, Human Rights Com'n* (1984) 174 W.Va. 139, 148 [324 S.E.2d 99, 109] [West Virginia's constitutional guarantee of natural and inherent rights "states the basic principle on which our entire democratic structure is founded . . ."]; *Bednarik v. Bednarik* (Ch. 1940) 18 N.J. Misc. 633, 650 [16 A.2d 80, 89], overruled on other grounds ["Under the English common law and under our American constitutional law, natural rights are such as appertain originally and essentially to each person as a human being, as a member of organized society and as a citizen of a free government. They are rights recognized as inherent in the individual member of the state, personal, absolute and inalienable"]; *People v. Toynbee* (N.Y. Gen. Term 1855) 20 Barb. 168 (dis. opn. in part of Rockwell, J.) ["[The right of personal security, or personal liberty, and private property] are what are termed the absolute rights of individuals, which belong to [the people] independently of all government, and which all governments, which derive their powers from the consent of the governed, were instituted to protect"]; *Dennis v. Moses* (1898) 18 Wash. 537, 571-572 [52 P. 333] ["'The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred,'" citation omitted].

are inherent and inalienable. Among these are the right to be protected in life, liberty, and the pursuit of happiness; the right to acquire, possess, and enjoy property; and the right to establish a home and family relations—all under equal and impartial laws which govern the whole community and each member thereof. . . . 'The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.'" (*Thiede v. Town of Scandia Valley* (1944) 217 Minn. 218, 224-225 [14 N.W.2d 400, 405]; *Davis v. Davis* (Tenn. 1992) 842 S.W.2d 588, 599 [quoting same]; *Cross v. State* (Wyo. 1962) 370 P.2d 371, 376 [quoting same].)

In sum, *a promise* lies at the cornerstone of our governmental system—the promise of "inalienable" individual liberties that belong to all people and that cannot be taken away by majority whim.

Proposition 8 eliminates that promise.

IV. PROPOSITION 8 IS AN UNLAWFUL CONSTITUTIONAL REVISION BECAUSE IT FUNDAMENTALLY AND IRREPARABLY ABROGATES THE MEANING AND TERMS OF ARTICLE I, SECTION 1, AND, IN DOING SO, ILLEGALLY UNDERMINES THE STRUCTURAL FOUNDATION OF OUR SOCIAL COMPACT.

A. The Necessary Effect Of Proposition 8 Is To Abrogate The Meaning And Guarantees Of Article I, Section 1, Thereby Forever Changing Both.

Initially, the proponents of Proposition 8 insisted that the measure "is limited in nature and effect" because "[i]t does nothing more than restore the [traditional] definition of marriage. . . ." (Intervenors' Opp. Br., p. 16.)

They argued the measure "neither deletes nor alters the texts of other constitutional provisions." (*Id.*, p. 15.)

Now they have changed their tune. In their most recent submission, the Intervenors concede Proposition 8 does something more than restore a definition. They admit it deprives some people of inalienable rights. Specifically, they concede the measure "carv[es] out" exceptions to numerous article I rights, including section 1's "inalienable" rights to liberty and privacy as to those who wish to marry someone of the same gender. (Intervenors' Response to AG, p. 5 [Proposition 8 "limit[s] the scope of—or carv[es] out an exception to—more general provisions in the Declaration of Rights protecting liberty, privacy, equality, due process, etc. to the limited extent such provisions grant same-sex couples the right to marry"].)

This concedes everything.

No exception to article I, section 1, can exist without destroying the meaning of the words "inalienable rights" and "all people." If anyone's "inalienable rights" can be denied by majority vote, then there is no principled reason why all other "inalienable rights" guaranteed to "all people" by article I, section 1, are not equally up for grabs. (See Introduction, *supra.*) Rights that can be taken away from some are neither "inalienable" nor universal.[6]

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[6] The argument we make is not limited to the right of same-sex couples to marry. Any measure that purports to take away an inalienable right from any person or group would have the identical effect of negating the guarantees of article I, section 1. For example, a measure that purported to bar immigrants from owning property would effectively and necessarily revise article I, section 1, in the exact same manner as Proposition 8 does: It would delete the word "inalienable" and subvert the words "all people," forever transforming the meaning of these terms from their present status as bedrock constitutional barriers into a status dependent on majority will.

This effectuates a huge transformation of constitutional liberties. It completely undoes the guarantees of article I, section 1, and, in turn, unlawfully undermines the very basis of the social compact of our government.

B. When Examining An Enactment, A Court Must Consider Not Just Its Words, But Also Its Necessary Effects.

The proponents of Proposition 8 could never have argued that it achieves only a narrow definitional change to the Constitution had they analyzed the effect of the proposition, something they never do.

Courts, however, should never blind themselves to the necessary effects and implications of an enactment. (See, e.g., *In re Darling* (1916) 173 Cal. 221, 223 [deciding case based on the "necessary effects" of the adoption statutes, beyond their seemingly simple language]; *Perkins Mfg. Co. v. Jordan* (1927) 200 Cal. 667, 679 ["The effect upon interstate commerce and upon equal protection of the law to persons in the several states is the test, and neither the name nor the aim of the state tax can suffice to prevent consideration by the supreme court of the United States of the necessary effect and consequences of the state statute"]; *Perry v. Calkins* (1911) 159 Cal. 175, 181 ["We think the court mistook the law upon this subject, or, *what amounts to the same thing*, that it failed to perceive the necessary effect of the diversion of the underground water from a porous stream bed upon the surface-stream below," emphasis added]; *Mansfield v. Chambers* (1915) 26 Cal.App. 499, 505-506 [construing statute based on its "necessary effect"]; *Ungemach v. Ungemach* (1943) 61 Cal.App.2d 29, 36 [examining necessary effects of statute barring divorce decrees upon defaults; "Its effect necessarily is to

make it erroneous for a court to grant a divorce in the absence of some proof, independent of the admissions and statements of the parties, of the facts warranting such action"].)

Thus, in determining the effect of Proposition 8, this Court should assess not just its words, but what it necessarily accomplishes. Once such an assessment is undertaken, the conclusion is inescapable: Proposition 8 is an unlawful constitutional revision.

V. BECAUSE PROPOSITION 8 COMPLETELY DESTROYS THE INVIOLATE GUARANTEES OF ARTICLE I, SECTION 1, AND OUR MOST SACRED SOCIAL COMPACT, IT MUST BE INVALIDATED AS AN UNLAWFUL ATTEMPT TO REVISE THE CONSTITUTION.

Because Proposition 8 permanently subjects the guarantees of article I, section 1, to majority rule, forever altering the meaning of those guarantees, it can only be viewed as an improper attempt to revise the State's Constitution.[7]

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[7] Unlike the Attorney General, we believe that the changes effectuated by Proposition 8 to the meaning of "inalienable" and "all people" and to the social compact that those guarantees serve, necessarily constitute revisions to the Constitution.

A. Overview Of Governing Standards.

The question whether Proposition 8 is valid largely turns on whether the measure effectuates an amendment or a revision.[8] This Court's precedents establish the rules:

An amendment is "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." (*Livermore v. Waite* (1894) 102 Cal. 113, 118-119 (*Livermore*).)

A revision, on the other hand, does the following:

- It is an enactment that "necessarily or inevitably will alter the basic governmental framework set forth in our Constitution." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 261 (*Brosnahan*).)
- It brings about "a fundamental change in our preexisting governmental plan." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 355 (*Raven*).)
- It effectuates a change that affects the "underlying principles upon which [the Constitution] rests." (*Livermore, supra*, 102 Cal. at p. 118.)

Under the law, "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 . . . ." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, (1978) 22 Cal.3d 208, 223 (*Amador Valley*).)

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[8] The Attorney General argues that Proposition 8 is an invalid amendment because it does not serve the public welfare. (See AG Brief, pp. 87-90.) The Bar Associations assert that any constitutional change that takes away an "inalienable" right is necessarily a revision. Either way, Proposition 8 is unlawful.

There have been a number of cases that have applied these rules, some holding the change was an amendment and others holding the change was a revision. (See AG Brief, pp. 28-38.) However, no case has ever addressed facts like ours, where a foundational "inalienable right" guaranteed to belong to "all people" and central to our constitutional compact has been taken away by majority vote on an initiative. No case supports a conclusion that the massive changes effectuated by Proposition 8 would qualify as a mere constitutional amendment; one case (*Raven v. Deukmejian*) establishes that the change must be treated as a revision. (See §§ V.B &VI.A.1, *infra*.)

B. When The Necessary Effects Of Proposition 8 Are Considered, The Measure Unquestionably Accomplishes An Unlawful Constitutional Revision, Not An Amendment.

By abrogating the core constitutional guarantees of "inalienable rights" for "all people," Proposition 8 leaves the social compact between the people and their government in tatters. Californians can no longer rely on the Constitution's promise of "inalienable rights" belonging to "all people." From now on, such rights can be taken away by majority vote. This is unquestionably a revision:

- It "necessarily or inevitably will alter the basic governmental framework set forth in our Constitution." (*Brosnahan, supra,* 32 Cal.3d at p. 261.)
- It "fundamental[ly] change[s] . . .our preexisting governmental plan." (*Raven, supra*, 52 Cal.3d at p. 355.)

- It undoes the "underlying principles upon which [the Constitution] rests." (*Livermore*, *supra*, 102 Cal. at p. 118.)
- It accomplishes "far reaching changes in the nature of our basic governmental plan as to amount to a revision . . . ." (*Amador Valley*, *supra*, 22 Cal.3d at p. 223.)

There is nothing about the changes necessarily effectuated by Proposition 8 that can be characterized as mere amendments—i.e., as "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." (*Livermore*, *supra*, 102 Cal. at pp. 118-119.) To the contrary, the changes wrought by Proposition 8 are *antithetical* to our original constitutional instrument. They negate the central constitutional compact that guarantees to all people certain rights that cannot be taken away, instead allowing the majority to dictate which previously "inalienable" liberties the minority can enjoy.

This Court's decision in *Raven v. Deukmejian*, *supra*, 52 Cal.3d 336, compels a conclusion that Proposition 8 effectuates a constitutional revision. The initiative measure in *Raven* would have vested in the federal courts all interpretive power regarding certain fundamental rights belonging to criminal defendants under the state Constitution. (*Id.* at pp. 350-352.) The petitioners' revision-based challenge "stress[ed] the formidable impact of the measure on the constitutional rights of criminal defendants." (*Id.* at p. 351.) The Court agreed with these concerns. It struck down the measure on two independent, but closely related, principles: (1) the constitutional right of each person to look to the state Constitution and to California courts as an independent source of their liberty guarantees, and (2) the need to preserve the constitutional function of the California judiciary to interpret

the California Constitution. (*Raven, supra*, 52 Cal.3d at pp. 352-353 ["As an historical matter, article I and its Declaration of Rights was viewed as the only available protection for our citizens charged with crimes, because the federal Constitution and its Bill of Rights was initially deemed to apply only to the conduct of the federal government. . . . 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"].)

Proposition 8 is infected with equivalent constitutional infirmities. By allowing rights guaranteed to "all people" as "inalienable" to be taken away by majority will, the measure diminishes the force and effect of the California Constitution as a font of immutable guarantees to each person, independent of federal law. Just as the California constitutional rights of criminal defendants cannot be made to depend on the will of non-California courts, the "inalienable rights" of "all" our people cannot be made to depend on the will of a majority vote at the ballot box.[9]

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[9] It is no answer to say, as the Intervenors do, that it is really no big deal if the majority of voters take away California constitutional rights because if the voters' decision encroaches on rights protected by the federal constitution, then federal law would still protect minority rights. (See Intervenors' Opp. Br., pp. 29-30 ["the federal Constitution remains a bulwark against the tyranny of the majority"].) The California Constitution has always been viewed as an independent document that gives rights apart from and in addition to those afforded by the federal constitution. (See, e.g., *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 490 ["the California Constitution is now, and has always been, a 'document of independent force and effect particularly in the area of individual liberties'"]; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325 [to same effect].) As a matter of California constitutional law, the Intervenors cannot justify destruction of California liberties on the basis that federal law might someday restore them.

Such massive and far-reaching changes to the independent force of the California Constitution, to the social compact upon which our system of government is premised, and to the nature of our personal liberties cannot be deemed a mere amendment. Proposition 8 affects the rights of every person in the most elemental of ways: Our previously inalienable rights are now subject to majority rule.

To achieve a change of such immense magnitude, article XVIII requires that more than a bare majority vote is necessary: Any vote must be preceded either by a constitutional convention or by a two-thirds vote of each of our legislative houses. That never happened here.

VI. THE PROPONENTS OF PROPOSITION 8 HAVE NOT ADVANCED ANY ARGUMENT THAT DEMONSTRATES ITS LEGALITY.

A. None Of The Primary Cases Relied On By The Proponents Of Proposition 8 Supports A Determination That Proposition 8 Is Lawful.

1. The Intervenors' characterization of the case law is unsupported.

The Intervenors argue that this Court has "never suggested that *any* constitutional right is beyond [the initiative amendment] power" and that "a long, uninterrupted line of . . . decisions have clarified that in the revision analysis the relevant principles are those that pertain to the basic plan of the government and not to particular individual rights." (Intervenors' Opp. Br., pp. 17, 20, original emphasis.)

The *Raven* case refutes both of these contentions. As discussed above, *Raven* holds that an initiative measure that deprives people of their

constitutional right to have California courts interpret their rights under the California Constitution is an unlawful revision, not a lawful amendment. (See § V.B, *supra*.) *Raven* thus stands squarely for the proposition that individual constitutional rights properly *can* trump initiative amendment power.

The Intervenors are also wrong in asserting that changes to individual constitutional rights differ from changes to our "plan of government." The people and their guaranteed individual liberties constitute an integral component of our plan of government. Indeed, they are the foundational components of our constitutional framework, as the government exists not to serve itself or its institutions, but to serve and protect the interests of its people.

While it is true that our constitutional plan of government establishes an institutional framework that includes the legislative (Cal. Const., art. IV), executive (Cal. Const., art. V) and judicial (Cal. Const., art. VI) branches, it cannot be ignored that our governmental plan also includes—as its very *first* article—a Declaration of Rights (Cal. Const., art. I) that sets forth our liberty guarantees. In the very first section of article I, the Constitution recites, as part of our governmental plan, the most cherished of our rights—those that belong to all people and cannot be taken away. (See § III, *supra*.)

Article I, section 1, is every bit as much a part of our plan of government as are the provisions creating our government's branches. (Cf. *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 902-903 (conc. opn. of Lucas, C.J.), cited in *Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300, 331 ["The California Constitution is the supreme law of our state—a seminal document of independent force that

establishes governmental powers *and safeguards individual rights and liberties,*" emphasis added].)

Proposition 8 alters our governmental plan in an unprecedented and very dangerous way. Proposition 8 takes away "inalienable rights" guaranteed to "all people." It subjects those rights to majority vote. This change to our plan of government is fundamental and vast.

In *Raven*, this Court held that a majority vote on an initiative measure could not lawfully alter the independent force of the California Constitution and its courts as separate protectors of individual liberties. The same is true here. Just as in *Raven,* the force of the California Constitution as a guarantee of "inalienable rights" belonging to "all people" cannot be undermined by initiative amendment transferring to the majority all control over that protection.

The threats posed by Proposition 8 to our plan of government are profound, at least equal to (if not greater than) those held illegal in *Raven.*

2. The Intervenors' heavy reliance on *Frierson* is misplaced.

The Intervenors contend this Court's decision in *People v. Frierson* (1979) 25 Cal.3d 142 (*Frierson*), establishes that "rights-stripping" amendments are valid. (See, e.g., Intervenors' Opp. Br., pp. 18-19.)[10] For multiple reasons, *Frierson* offers neither Proposition 8 nor its proponents any comfort.

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[10] In *Frierson*, a plurality of this Court upheld the use of an initiative amendment to reinstate the death penalty and to abrogate this Court's holding in *People v. Anderson* (1972) 6 Cal.3d 628, declaring capital punishment was cruel and unusual.

First, *Frierson* has no authoritative impact on this case since it did not involve the stripping of "inalienable rights" guaranteed under article I, section 1.

Second, contrary to the Intervenors' assertions (Intervenors' Opp. Br., pp. 18-19), the *Frierson* defendant did not raise, and the plurality of the court did not consider (let alone reject), any challenge based on any assertion that the equal-protection guarantee or any other individual liberty right would be eliminated. Rather, what this Court addressed was whether the definition of cruel and unusual punishment could be changed by initiative amendment.

Third, the constitutional standard at issue in *Frierson* is particularly suited to majority vote. This is so because the right to be free of cruel and unusual punishment is, by its very nature, determined by assessing contemporary community standards—that is, by "'evolving standards of decency'" (*People v. Clark* (1970) 3 Cal.3d 97, 99; *Kennedy v. Louisiana* (2008) ___ U.S. ___, ___ [128 S.Ct. 2641, 2649] (*Kennedy*) [same]).[11] Thus, the constitutional standard "must change as the basic mores of society change." (See, e.g., *Kennedy*, *supra,* ___ U.S. at p. ___ [128 S.Ct. at p. 2649], citation omitted.)

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[11] Resolution of capital punishment challenges hinges on the court's evaluation of "'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'" (*Kennedy*, *supra*, ___ U.S. at p. ___ [128 S.Ct. at p. 2650]; see also *id.* at p. ___ [128 S.Ct. at p. 2658] ["objective evidence of contemporary values as it relates to punishment for child rape is entitled to great weight"]; *id.* at p.__ [128 S.Ct. at p. 2653] ["The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it"].)

While courts must bring their own judgment to bear, that judgment must take community consensus into account. As the United State Supreme Court explained: "[I]n cases involving a [community] consensus, our own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (*Atkins v. Virginia* (2002) 536 U.S. 304, 311.) This Court agrees: In striking down the death penalty in *People v. Anderson*, *supra*, 6 Cal.3d 628, this Court relied on its belief that capital punishment no longer had "public acceptance." (See *id.* at pp. 648-649.)[12] By reinstating the death penalty several years later, California voters effectively told this Court that it *had misread public opinion*—i.e., that capital punishment did, in fact, have "public acceptance" and was consistent with contemporary sensibilities.

Obviously, the legitimacy of a public vote on a constitutional issue that is imbued with and dependent on an assessment of popular sensibilities

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[12] The *Anderson* opinion is replete with examples of the Court's efforts to divine public opinion. (See, e.g., *ibid.* [concluding that capital punishment no longer had "public acceptance"; result turned on "whether the punishment affronts contemporary standards of decency"]; *ibid.* ["the infrequency of [death penalty's] actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency"]; *id.* at pp. 650-651 ["It is being increasingly rejected by society and is now almost wholly repudiated by those most familiar with its processes"]; *id.* at p. 654 ["Not only have nine states, Puerto Rico and the Virgin Islands totally abolished capital punishment, but New Mexico, New York, North Dakota, Rhode Island and Vermont have limited its application to exceptional circumstances"]; *id.* at p. 655 ["The observation of the National Crime Commission that the infrequency of its application is the most salient characteristic of capital punishment in the United States is echoed in the report of the Secretary General of the United Nations on the world-wide status of capital punishment. 'There is still a clear trend toward total abolition'"].)

is far different than the legitimacy of a public vote to take away an inalienable right. By definition, "inalienable rights" are supposed to stand as a bulwark against the tyranny of the majority, while the cruel-and-unusual punishment standard is dependent on majority values.

Fourth, *Frierson* is not authority on the amendment/revision issue because its words on that issue were dicta. Before addressing that issue, the Court had determined to reverse the conviction because Frierson did not receive adequate assistance of counsel. (*Frierson*, *supra*, 25 Cal.3d at p. 172; see *id.* at pp. 188, 196, 199; *Legislature of the State of California v. Eu*, (1991) 54 Cal.3d 492, 541 (dis. opn. of Mosk, J.) [in *Frierson*, "a plurality of the court considered in dictum whether a 1972 initiative measure was amendatory or revisory"].)

Fifth, even if the *Frierson* discussion were not dictum, it is of little use, as its three short paragraphs are virtually devoid of analysis or reasoning. (See *Frierson, supra*, 25 Cal.3d at pp. 186-187.)

In sum, *Frierson* sheds no light on the issues presented by the instant case. In no way does it support a conclusion that Proposition 8 is lawful.

3. *In re Lance W.* does not help the Intervenors.

The Intervernors contend that *In re Lance W.* (1985) 37 Cal.3d 873 (*Lance W.*), supports their case because the Court rejected a "fundamental-rights and structurally-based challenge" to a measure limiting the state's exclusionary remedy for unreasonable searches and seizures. (See, e.g., Intervenors' Opp. Br., pp. 12-13, 18). The case does not support the Intervenors.

First, like *Frierson, Lance W.* is not dispositive or even instructive here because it did not involve the stripping of "inalienable rights" under article I, section 1.

Second, in *Lance W.*, no substantive right was eliminated. As this Court held, "the new constitutional provision did *not affect the substantive scope* of the state Constitution's search and seizure prohibitions, but merely abrogated the 'judicially created *remedy* for violations of the search and seizure provisions . . . .'" (*Bowen v. Superior Court* (1991) 1 Cal.4th 36, 47, quoting *Lance W., supra*, 37 Cal.3d at pp. 886-887, first emphasis added, second emphasis in *Lance W.*) Because the amendment at issue in *Lance W.* simply "prescribe[d] rules of evidence and procedure" for courts to follow in criminal cases—a legislative power that the court noted was already wielded by the Legislature under its law-making authority—*Lance W.* never dealt with whether a constitutional amendment could strip away fundamental rights. (37 Cal.3d at p. 891.) In our case, unlike *Lance W.*, a substantive and "inalienable" right was taken away.[13]

B. The "Inalienable" Privacy Right Upon Which The Right To Marry Is Premised Is Of Equal Dignity To The Other "Inalienable" Rights Enumerated In Article I, Section 1.

We anticipate the proponents of Proposition 8 might attempt to diminish the importance of the inalienable right of privacy guaranteed by article I, section 1, by arguing that that right should be easier to eliminate

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[13] The Intervenors also rely on a laundry list of initiative-amendments that have not "met with successful revision challenge[s]." (See Intervenors' Opp. Br., p. 14, fn. 3.) This proves nothing. Not one of those initiative-amendments effected any change to article I, section 1.

because it was not expressly set forth in the original version of article I, section 1, but rather was added in 1972. (Cf. Intervenors' Opp. Br., p. 22 [making similar argument about equal protection clause].) Any such argument would be irrational and meritless.

An "inalienable" constitutional right is an "inalienable" constitutional right, regardless of when the right is afforded; if the right is defined to be "inalienable," then it cannot be taken away. That is the very essence of inalienability. There is nothing in the law to suggest that later-conferred inalienable rights have less importance or dignity than the original expression of such rights.

But even if there were a some rational basis for ranking the importance of inalienable rights according to the date of their enactment, doing so here would be impermissible. This is so because the right of privacy has long been recognized as a core fundamental constitutional right, even though not explicitly expressed in article I, section 1, until 1972. (See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479, 486 [speaking specifically of the marriage right, "[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system"].)

All that the 1972 amendment of article I, section 1, did was to give explicit recognition to a right that had always existed. As this Court explained, by "explicitly adding 'privacy' to the 'inalienable rights' of all Californians protected by article I, section 1 of the California Constitution," the people of California "intended, among other purposes, to encompass the federal constitutional right of privacy, 'particularly as it developed beginning with *Griswold v. Connecticut*.'" (*In re Marriage Cases, supra*,

43 Cal.4th at p. 810, quoting *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 28.)

C. The Intervenors' Insistence That The People's Will Be Honored Compels But One Conclusion: Proposition 8 Must Be Invalidated.

The proponents of Proposition 8 insist that the majority vote in favor of Proposition 8 must be honored, no matter what. They assert that "[a]ny other result" will betray the "first principles of governmental theory" and will institute "a gravely destabilizing constitutional revolution." (Intervenors' Opp. Br., p. 6; see also Intervenors' Response to AG, p. 1 [there should be no "judicial hegemony" or "judicial truimphalism"].)

The Intervenors are wrong. There is only one result that will honor the people's *constitutionally*-expressed will. That result, compelled by article XVIII, is to invalidate Proposition 8.

True, the people voted in favor of Proposition 8. However, more than 160 years ago, the people, in forming our government, expressed their preeminent will by enacting the specific processes to be followed to alter the Constitution. (See 1849 Cal. Const., art. X, now Cal. Const., art. XVIII.) Although these processes have been changed through the years, the people have *never* reserved to themselves *unbridled* power to change the Constitution by majority vote.[14] To the contrary, the people expressly

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[14] Originally, the Constitution did not provide for any circumstances under which the people could alter it by majority vote alone. (1849 Cal. Const., art. X.) Later, in 1911, the people reserved to themselves the initiative power to *amend* the Constitution, but not to *revise* it, by majority vote. (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 333-334.)

placed limits on their own power to effectuate constitutional change. The goal in this case is to effectuate the people's will, as expressed in article XVIII.

In invalidating an amendment that did not follow the mode specifically "established and ordained" in the Constitution for its amendment, this Court over 100 years ago explained in words equally applicable to a revision that fails to comply with article XVIII:

> The majority of the people, according to law, having adopted the constitution with a mode of [revision] in it, we must regard it as a solemn declaration to the minority in the state, as binding as a compact with such minority, that the majority, however large or overwhelming, will never exercise its irresistible power . . . to change the law of its organization as a government in any other way. We hold it to be sound law that a constitution, adopted as was the present constitution of the state of California, is not lawfully changed by the votes of every elector in the state, unless in the mode provided in it.

(*Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 489 [invalidating amendment ratified by voters 20-to-1].)

As demonstrated by this brief and numerous others, the changes effectuated by Proposition 8 are revisions. Thus, a lawless result in this case would be one that upholds Proposition 8. (*Ibid.* [changing the constitution in a manner contrary to its provisions "would be lawless, revolutionary, and unconstitutional, and it would be the duty of this court, in obedience to the oath which its members have taken, so to declare it"].)

CONCLUSION

Proposition 8 takes away from some people an "inalienable" constitutional right guaranteed to belong to "all people." If a majority of voters can lawfully accomplish this by initiative vote, then the impact of Proposition 8 on our system of government is devastating and permanent: It allows the majority at any election to choose to trump the promise that the government will hold certain core rights as "inalienable" and sacrosanct for "all people." A change of this magnitude must occur by revision, not amendment. Proposition 8 should be invalidated.

DATED: January 14, 2009

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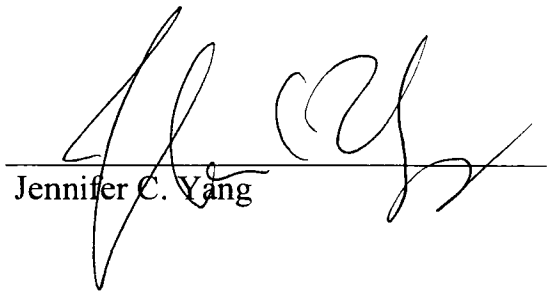
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I certify that this AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS' CHALLENGE TO THE LEGALITY OF PROPOSITION 8 is 13 point font proportionately spaced. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains 9741 words.

DATED: January 14, 2009



Jennifer C. Yang

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 14, 2009, I served the foregoing document described as **APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS' CHALLENGE TO THE LEGALITY OF PROPOSITION 8; AND AMICUS CURIAE BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes as stated on the *attached Service List.*

_X_ **BY MAIL** I caused such envelope to be deposited in the mail at Beverly Hills, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

_X_ **BY FEDERAL EXPRESS** I caused such envelope to be delivered by the Federal Express delivery service to the offices of the addressee.

__ **BY PERSONAL SERVICE** I delivered such envelope by hand to the offices of the addressee.

Executed on **January 14, 2009**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

I declare that I am employed by the office of a member of the bar of this court at whose direction the service was made.

Leanna Sun Borys

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CALIFORNIA SUPREME COURT CASES S168047, S168066, and S168078

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