Case No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Karen L. Strauss, et al.,

Petitioners,

v.

Mark D. Horton, as State Registrar of Vital Statistics, etc., et al.,

Respondents;

Dennis Hollingsworth, et al.,

Interveners.

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS; BRIEF OF AMICI CURIAE INDIVIDUAL CHAPMAN UNIVERSITY ORGANIZATIONS, FACULTY, STAFF, AND STUDENTS, ORANGE COUNTY EQUALITY COALITION, AND OTHER ORANGE COUNTY COMMUNITY MEMBERS INCLUDING LEGALLY MARRIED SAME-SEX COUPLES, IN SUPPORT OF PETITIONERS

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CERTIFICATE OF COMPLIANCE WITH CRC 8.520(f)(4)

Amici curiae hereby certify under the provisions of California Rule of Court 8.520(f)(4)(A) that no party or counsel for any party authored the proposed brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. Amici curiae further certify under California Rule of Court 8.520(f)(4)(B) that no person or entity other than amici curiae and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

Pursuant to California Rules of Court, Rule 8.520, the within-described amici curiae respectfully request leave to file the attached brief of amici curiae in support of the petitioners in *Strauss, et al. v. Horton, et al.* This application is timely made pursuant to the Court's Order of November 19, 2008 permitting such briefs on or before January 15, 2009.

THE APPLICANTS' INTEREST, DESCRIPTION OF AMICI, AND HOW THIS BRIEF WILL ASSIST THE COURT
(Cal. Rules of Court, rule 8.520)

Amici curiae include a broad cross-section of the Orange County, California community including lawyers, professors, students, a community organization, local community leaders, and individuals who are devoted to upholding the fundamental rights of all Californians.

Orange County has long had a reputation of being a conservative county in the state of California, and many may dismiss the fact that the majority of Orange County residents voted for Proposition 8 as an expected result of that conservatism. The amici, who live and/or work or study in Orange County and are deeply invested in this community, stand together to voice their objection to stripping a fundamental right from minority citizens of California, an objection that transcends the differences that exist between conservative and liberal ideologies. They believe Proposition 8 is an illegal revision to our state Constitution, and must be invalidated in order for every citizen of Orange County and California to receive the promise of equal protection under the laws of the state in which they live.

Amici have a particular interest in this Court's enforcement of the protections guaranteed by the California Constitution and the proper use of procedures to change the Constitution because Proposition 8, which we

submit illegally revised the Constitution, negatively affects the livelihoods and personal lives of amici.

Chapman University Organizations[1] include Chapman Outlaw, Chapman Queer-Straight Alliance, Chapman Feminists, and Chapman SPEAK (Students for Peaceful Empowerment, Action, and Knowledge). Each is a collaborative of students, faculty and staff that works toward a more diverse and safe environment for learning and education. Proposition 8 undermines amici's ability to effectively protect their membership and affiliates from discrimination while on the University campus. (See Declaration of Emily Wilkinson, (Amici Appx. ("AA") at Tab 13, pp. 41-42.)[2]

Chapman University Individual Faculty and Staff Members Deepa Badrinarayana (assistant professor of law), Rimvydas Baltaduonis (postdoctoral research associate of economic science institute), Marisa Cianciarulo (assistant professor of law), M. Katherine Baird Darmer (professor of law), Kurt Eggert (professor of law), Kelly Graydon (assistant professor of educational studies), Elizabeth MacDowell (visiting clinical professor of law), Steven Krone (visiting professor of law), Francine Lipman (professor of law), Lynn Mayer (center for academic success), Dale

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1 Chapman affiliations are provided solely for identification purposes. The Chapman organizations, faculty, staff and students identified herein represent themselves as organizations and individuals and do not in any way purport to represent any institutional view of Chapman University or the Chapman University School of Law.

2 The declaration of Emily Wilkinson and the other declarations submitted by Amici (contained in their appendices filed concurrently herewith) may properly be considered by the court in this original writ proceeding. (*See, e.g., McCarthy v. Superior Court* (1987) 181 Cal. App. 3d 1023, 1030 at fn.3.)

A. Merrill (college of performing arts), Nancy Schultz (professor of law), Suzanne Soohoo (professor of educational studies) and Ronald Steiner (associate professor of law) (collectively "the Chapman faculty and staff amici") teach and work at Chapman University in various disciplines. Collectively, they teach many specific subjects that involve the rights of disadvantaged groups. These subjects include criminal procedure, international environmental law, and gender and the law. Professor Cianciarulo, in addition to her doctrinal teaching responsibilities, also teaches in a family violence clinic. Professor Lipman volunteers each tax season to assist low income taxpayers, including unauthorized workers, prepare and file their annual tax returns. Also included are Safe Space Committee Members Sherri Maeda-Akau, Lisa Clark, Sandra L. Hague, Brian Scott Hamilton, Annie Knight, Mark Lawrence, AJ Place, Erin M. Pullin, Demisia Razo, Tara Riker, Christopher J. Roach, and Gloria Rogers. (See Declaration of Mark Lawrence (AA at Tab 9, pp. 25-26).) They and the other Chapman faculty and staff amici are committed to equal protection norms and to sustaining an academic environment that recognizes the importance of fostering diversity by vigorously safeguarding the rights of protected minority groups. Colleagues and students of the faculty and staff amici and they themselves have been personally affected by the passage of Proposition 8. (See Declaration of M. Katherine Baird Darmer (AA at Tab 3, pp. 9-12).)

Chapman University Individual Law and Undergraduate Students Zara Ahmed (senior), Sasha Anderson (senior), Elliot Balsley (freshman), James E. Blalock (3L), Claudia Brena (junior), Anne L. Card (2L) Tiffany Chang (2L), Doug Clark (1L), Kimberlee Cyphers (junior), Alexa Hahn-Dunn (junior), Linnea Esselstrom (senior), Sara Gapasin (2L), Ashley Ann Hanson (senior), Cortney Johnson (junior), Anais Keenon

(freshman), Breanna Kenyon (3L), Samantha Kohler (1L), Timothy Lam (2L), Craig Leets Jr. (senior), David Nungary (junior), Michelle Pascucci (senior), Kitty Porter (senior), Regina Rivera (1L), Brian Rouse (3L), Angela Wilhite (junior), Preston Whitehurst (junior), Emily Wilkinson (2L), and Lauren Jessica Wolf (1L) (collectively "student amici") have great interest in the continued integrity of equal protection as a core constitutional principle. The legal educations, lives, and future livelihoods of student amici have been compromised by the passage of Proposition 8. (See Declaration of Tiffany Chang (AA at Tab 2, pp. 6-8); and Declaration of Samantha Kohler (AA at Tab 8, pp. 23-24).)

Orange County Equality Coalition ("OCEC") was founded four days after the passage of Proposition 8 and has recently filed for status as a mutual benefit (501(c)(4)) corporation. The coalition's mission is to develop and sustain an infrastructure that enables the attainment of equality for all through education, dialogue and advocacy. Specifically, OCEC is dedicated to marriage equality. OCEC is comprised of the lesbian, gay, bisexual, transgender, straight and religious community in Orange County dedicated to ensuring that the fundamental marriage rights of same-sex couples are not eviscerated by a ballot initiative passed by a simple majority. OCEC's membership rolls currently reflect approximately 350 members. (See Declaration of Barbara Jean ("BJ") Davis (AA at Tab 4, pp. 13-14).)

Legally Married Same-Sex Couples James Albright and Thomas J. Peterson, Karla Bland and Laura Kanter, Tiffany Chang and Lindsey Etheridge, John Dumas and James Nowick, Hung Y. Fan and Michael David Feldman, Mary Katherine Holman-Romero and Deborah Ann Romero-Holman, and Jeffrey L. Van Hoosear and Gregory T. McCollum wish to preserve their status as married couples while seeking the full

equality guaranteed to them and other minorities by the state Constitution's Equal Protection Clause. (See Declaration of Thomas J. Peterson, (AA at Tab 11, pp. 32-37); Declaration of Karla Bland (AA at Tab 1, pp. 3-5); Declaration of Tiffany Chang (AA at Tab 2, pp. 6-8); Declaration of John Dumas (AA at Tab 5, pp. 15-18); Declaration of Hung Y. Fan (AA at Tab 6, pp. 19-20); and Declaration of Jeffrey L. Van Hoosear (AA at Tab 12, pp. 38-40).)[3]

Committed Same-Sex Couples and Lesbian or Gay Individuals Heather Ellis and Rosanne Faul, Sharon Nantell and Judy Gordon (committed couples) and Linda J. May wish to preserve their fundamental right to marry in the future while seeking the full equality guaranteed to them and other minorities by the state Constitution's Equal Protection Clause. (See Declaration of Linda J. May (AA at Tab 10, pp. 27-31).)

University of California, Irvine Law School Dean Erwin Chemerinsky is a nationally prominent constitutional law scholar. As someone who has helped shape the development of the law over the course of his career, he has a direct interest in the continued vitality of the Equal Protection Clause in the California Constitution. Moreover, as the dean of a new law school committed to diversity and equal opportunity, he has an

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[3] We note that, in the interest of space, not all amici have filed declarations, but at least one representative amicus has filed a declaration in each of the categories described herein. Each category of amici curiae is somewhat differently situated than each other category, and the representative declarations more fully articulate the unique harms suffered from the various amici as a result of Proposition 8. Because the married same-sex couple amici are aware that the Interveners argue that their marriages should be invalidated retroactively, they face particularly devastating consequences if that argument is accepted and representatives of six amici couples have submitted declarations more fully explaining the unique circumstances of those six couples.

interest in ensuring that future law school faculty, staff and students are given equal protection under the California Constitution. Proposition 8 directly threatens those interests. Finally, as an employee at a public university, Dean Chemerinsky will be expected to swear to "support and defend" the California Constitution. Should Proposition 8 be held to be valid, the oath would be in conflict with his commitment to equal protection norms as he would be swearing to support and defend discrimination.

University of California, Irvine Professors James D. Herbert and Cécile Whiting along with Dean Inada (elected to the Orange County Democratic Central Committee), Emily Samuelsen Quinlan (California licensed attorney) and several previously-listed faculty amici who are lawyers admitted to practice in California, have sworn to "support and defend" or "support" the state Constitution. The passage of Proposition 8 has created a conflict in amici's ability to execute their official oaths in good conscience. (See Declaration of Dean Inada (AA at Tab 7, pp. 21-22).)

Amici are familiar with the issues before this Court and the scope of their presentation, and believe this brief will assist the Court by providing a perspective that is beyond the scope of the parties' briefs. Specifically, this brief details the following five arguments for the Court's consideration: 1) Modern democracy cannot be reduced to mere rule by plebiscite; 2) Revising the constitutional principle of equal protection cannot be diminished to a ballot battle of bare majorities; 3) The Interveners' argument presumes a fundamental revision of equal protection law in California; 4) The federal Defense of Marriage Act does not preempt this Court's authority to render a decision on Proposition 8; and 5) The untenable position of all those who have been or will be asked to swear to

"support and defend" the state Constitution further supports a finding that Proposition 8 was an unlawful revision.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: January 14, 2009

Respectfully submitted,

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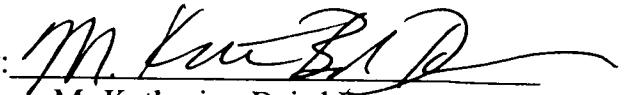
By: 
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amici Curiae hereby certify that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

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INTRODUCTION

Although the amici endorse the arguments made by the *Strauss* petitioners in their entirety and the Attorney General's arguments with respect to the invalidity of Proposition 8, the amici also raise additional arguments for the Court's consideration: 1) Modern democracy cannot be reduced to mere rule by plebiscite; 2) Revising the constitutional principle of equal protection cannot be diminished to a ballot battle of bare majorities; 3) The Interveners' argument presumes a fundamental revision of equal protection law in California; 4) The federal Defense of Marriage Act does not preempt this Court's authority to render a decision on Proposition 8; and 5) The untenable position of all those who have been or will be asked to swear to "support and defend" the state Constitution further supports a finding that Proposition 8 was an unlawful revision. The Interveners misleadingly argue that holding Proposition 8 as a revision would constitute a denial of the right of self-government. However, as important as popular sovereignty is, modern democracy does not require an unbridled, unmediated, and immediate plebiscitocracy in all instances. California and some other states have adopted the progressive innovation of direct initiative, and it is a prerogative that has broad support in this State. However, the Interveners' rhetoric obscures the fact that the initiative is just one tool in democratic governance, and the wrong tool for making a fundamental change to the state Constitution. The amici argue that Proposition 8 is a true revision, as it eviscerates the fundamental principle of equal protection by eliminating a minority class from the right of marriage. As such, it cannot be compared to the facts in *Legislature v. Eu* ((1991) 54 Cal.3d 492 (hereafter *Eu*)), where all parties suffered the same treatment under term limits. The federal DOMA argument made by amicus Center for Constitutional Jurisprudence (hereafter "CCJ") also fails as the

federal DOMA does not purport to preempt state law, but rather allows and expects states to independently define marriage.

A proposed amendment that expressly stated that a fundamental right was being eliminated for members of a protected class would surely be struck down if passed by a bare majority. In essence, Proposition 8 was such an "amendment" and therefore constitutes an illegal revision because of the fundamental change it makes to equal protection norms. A ballot initiative and a simple majority vote cannot be used to revise the Constitution in this manner. Rejecting the constitutionally-mandated mechanism of legislative referral required for revisions would institute an endless cycle of ballot battles. The population is closely divided on the issue of marriage equality. If the counter-proposition wins from one election to the next, how can marriage in California truly be defined? This problem illustrates how the Interveners' position is untenable.

The untenable positions of amici who are required to take loyalty oaths further demonstrate the fundamental problem with the discriminatory language of Proposition 8. Thousands of Californians are required each year to swear to "support" or "support and defend" the state Constitution. Proposition 8 enshrines into the fabric of that document discrimination against a minority group. Such an amendment leaves the Constitution unsupportable and indefensible for many Californians.

ARGUMENT

I. MODERN DEMOCRACY CANNOT BE REDUCED TO MERE RULE BY PLEBISCITE.

The opponents of marriage equality deploy high-flying rhetoric about "the rich and storied history of California" and "the many decades of our state's jurisprudence." (See Interveners' Opposition Brief (hereafter "Inter. Br.") at p. 5.) They claim that "an abiding, unshakable faith in the people" is the "one unifying principle [which] serves as the foundation for our life together in community." (*Ibid.*) Their arguments are potentially misleading by drawing the mantle of Lincoln's "government ultimately not only for the people but by the people" (*ibid.*) over their ahistorical and plainly wrong attempt to equate "government by the people" with the version of plebiscitary majoritarianism embedded in their arguments. Amici herein also revere President Lincoln, but note that the initiative process was completely foreign to the "government by the people" that Lincoln knew and celebrated. The initiative process is indeed an important democratic tool in California. However, fundamental changes are to be made by the more deliberative process of revision.

Ironically, perhaps, the Interveners are correct when they argue that "[t]his case is about far more than the passionate debate over the definition of marriage," and that it is "about whether the democratic conversation with respect to numerous issues can continue to occur through the official channels ordained by the California Constitution and relied upon for generations by the people." (Inter. Br., *supra*, at p. 29.) But, while this case does "touch profoundly on fundamental principles of popular sovereignty and democratic legitimacy" (*ibid.*), the Interveners do not acknowledge

important, underlying fundamental principles. The people of the State of California have ordained and established a representative republic, full of procedural checks and balances — including a distinction between amendments and revisions and a profound respect for independent courts exercising judicial review.

A. POPULAR SOVEREIGNTY DOES NOT REQUIRE SIMPLE MAJORITARIANISM.

Misleading hyperbole about the fate of democracy suffuses the filings of those opposed to marriage equality. (See, *inter alia*, Inter. Br., *supra*, at pp. 5-6 [claiming that invalidating Proposition 8 would "tear asunder a lavish body of jurisprudence built up over the decades of this Court's service to the people" and "signify a gravely destabilizing constitutional revolution"]; Center for Constitutional Jurisprudence Amicus Letter in Support of Respondents at p. 4 (hereafter "CCJ Letter") [asserting that a Court holding that Proposition 8 is a revision would constitute a "denial of . . . the right to self-government"]; Preliminary Opposition of Proposed Intervener Real Parties in Interest to Amended Petition for Extraordinary Relief, etc. (hereafter "Prelim Opp Br.") at p. 4 [stating that the people "have spoken and their will should be respected"]; Proposed Intervener Campaign for California Families' Preliminary Opposition to Petition for Extraordinary Relief (hereafter "CCF Prelim Opp Br." at p. 4[4] ["overturning Proposition 8 . . . would wreak havoc on the democratic process"]).

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[4] CCF's request to intervene was denied by this Court. We believe it likely, however, that CCF will file an amicus brief in this matter.

Those opposed to marriage equality are trafficking in linguistic imprecision and conceptual confusion. That imprecision and confusion begins to clear by noting that direct democracy can refer to four separate mechanisms: "constitutional referendum (the most widely accepted), legislative referendum, legislative initiative and constitutional initiative (the least widely accepted)." (Fisch, *Constitutional Referendum in the United States of America* (2006) 54 AMERICAN JOURNAL OF COMPARATIVE LAW 485, 485-86.) While California permits constitutional initiative, there are limits on the initiative power.

The Interveners' paeans to democracy obscure the fact that no modern democratic country allows constitutional change by direct initiative — let alone by a simple majority vote in a single election without even prescribed turnout minimums.[5]

Thus, contrary to the principal thrust of the Interveners' arguments, the reality is that democratic government and popular sovereignty are not only possible, but thrive without the sort of unbridled, unmediated, and immediate majoritarianism that is at the core of the Interveners' simplistic

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[5] Constitutional amendments are open to citizens' initiatives in only 20 countries in the world, and in only one country that could be counted among the advanced industrial democracies — Switzerland. The other countries include:

Africa: Cape Verde, Liberia, Uganda
Americas: Colombia, Costa Rica, Ecuador, Uruguay, Venezuela
Asia & Oceania: Philippines, Marshall Islands, Federated States of Micronesia, Palau
Europe: Belarus, Georgia, Hungary, Latvia, Liechtenstein, Lithuania, Republic of Moldova, Slovakia.

(See Beramendi, et al. Direct Democracy: The International IDEA Handbook (2008); Stockholm, Sweden: International Institute for Democracy and Electoral Assistance, 67 (online edition available at <http://www.idea.int/publications/direct_democracy/upload/direct_democracy_handbook_annexA.pdf>).)

conception of democracy. The hyperbolic argument of the Interveners is just wrong: If democracy can exist on the federal level and in most states without any mechanism for direct initiative,[6] it can certainly survive the rather modest procedural provision at issue in this case. Democracy in California requires adherence to the rule of law, including our Constitution's mandate that constitutional revisions cannot be done through direct initiative, but instead must proceed by legislative referral.

B. REVISION BY REFERENDUM AFTER LEGISLATIVE REFERRAL IS NOT INCONSISTENT WITH POPULAR SOVEREIGNTY.

Modern democratic republicanism as practiced in the United States is premised on the essential principle that a bare majority of the people should not always get everything they want at the very moment they want it. As the petitioners have argued, "[t]he premise of equal rights is as essential to our system of government as the premise that all political power ultimately resides in the people." (Corrected Reply in Support of Petition for Extraordinary Relief (hereafter "Pet. Reply") at p. 5).) Since the time of

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[6] Currently, 21 American states have a mechanism for statutory change by legislative initiative, but only 16 allow constitutional change by initiative. (See Initiative & Referendum Institute at the University of Southern California, "State-by-State List of Initiative and Referendum Provisions" available at <http://www.iandrinstitute.org/statewide_i%26r.htm.>) Of the distinct minority of states that do allow for constitutional amendment by direct initiative, they all impose procedural constraints, such as excluding certain subjects from the initiative process. (For a thorough survey of such procedural devices, see Waters, Initiative and Referendum Almanac 15-29 (2003).)

the Federalist Papers, the "science of politics" has recognized that the *sine qua non* of modern constitutional government is a healthy respect for the principles of checks-and-balances, deliberation, and constitutional procedure. (See The Federalist No. 10 (James Madison).)

Under our federal Constitution, popular sovereignty is paramount and nothing ultimately can deny the will of the people. But, by careful and explicit design of the Framers of the United States Constitution, a constitutional amendment supported by a majority of the people over the opposition of the existing political representatives cannot be enacted easily or immediately.[7]

Thus, our suggestion that significant or controversial constitutional change should be made only upon reflection and proper process is not somehow the end of democracy as we know it, as the Interveners suggest. Rather, a legislative referral to a constitutional convention or a popular referendum is the only mechanism for any constitutional change under the U.S. Constitution and most state Constitutions, and the only mechanism

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[7] A little thought experiment demonstrates the point: Imagine that a wildly radical idea for fundamental constitutional change grips the American citizenry. How soon could that change be enacted if the popular passion was resisted by the whole of the existing political establishment? It takes two years to re-populate the House of Representatives, four years to replace the President, and 12 years to replace the two-thirds of the Senate required to overcome filibusters. At that point a constitutional amendment could be proposed, which would have to be supported in the presumably re-populated state legislatures or in constitutional conventions. Alternatively, the Supreme Court could be stacked or replaced (historically, vacancies occur about once every 22 months on average). So the most radical constitutional change imaginable, one opposed by the whole of the existing representative class, could be lawfully made in just over 12 years.

mandated by the California Constitution for substantial change to our state Constitution.

Many modern scholars of democratic theory and practice are generally positive about prospects for initiatives and referenda to promote greater citizen participation and improve the quality of democracy, but they also offer some severe cautions. They have noted the possibility, and often the reality, of referenda, and particularly initiatives, being used by powerful special interest groups to capture the powers of the state in self-interested ways, and more ominously, to threaten the civil rights of vulnerable minorities or exploit and increase racial or ethnic tensions. (See Sartori, *The Theory of Democracy Revisited* (1987).)[8]

Political scientists and legal scholars have documented what reason and history suggest — majorities can tyrannize minorities at the ballot box. (Gamble, *Putting Civil Rights to a Popular Vote* (1997), 41 (1) American Journal of Political Science 245 [examining local and state ballot measures related to AIDS testing, gay rights, language, school desegregation, and housing/public accommodations desegregation].)

These trends are specifically apparent in ballot initiatives that target gays and lesbians.[9] Political scientists Todd Donovan, Jim Wenzel, and

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[8] There is a substantial body of academic literature offering cautions about California's practice of ballot propositions on all of these grounds. (See, inter alia, Ellis, *Democratic Delusions: The Initiative Process In America* 77 (2002); Haskell, *Direct Democracy or Representative Government?* (2001); Sabato, Ernst, and Larson (eds.), *Dangerous Democracy* (2001); Broder, *Democracy Derailed: Initiative Campaigns And The Power Of Money* 43 (2000); Schrag, *Paradise Lost* (1998); Budge, *The New Challenge of Direct Democracy* (1996).)

[9] Ethnic minorities have also been targeted. Across the whole panoply of ballot propositions voted on, ethnic minorities may suffer (cont'd...)

Shaun Bowler point out that "[d]irect and representative democracy have both long been used to constrain the rights and liberties of minorities in America," and "citizen's initiatives that attack gay rights reflect the repetition of earlier cycles of political activity directed at other minorities." (Rimmerman, Wald, and Wilcox (eds.), The Politics of Gay Rights (2000) p. 162.) An exhaustive, though not all encompassing, list of anti-gay initiatives show the overwhelming tendency of the majority to vote against the minority with 30 out of 36 initiatives passing between 1992 and 1995. (See <http://www.lambdalegal.org/our-work/publications/antigay-ballot-initiatives.html>.) Most recently on, November 4, 2008, ballot initiatives Proposition 8 in California, Florida's Proposition 2 (bans any form of legal union for same-sex couples) (passed by required super-majority), Arizona's Proposition 102 (bans marriage between same-sex couples), and Arkansas' Act 1 (bans same-sex couples from the right to adopt or foster children) all passed by a majority vote.

Though these studies and certain recent experiences counsel caution, they cannot and should not change the fact that California is committed to

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(cont'd from previous page...) only a slight disadvantage as compared to whites — after all, most tax breaks or construction bonds are color-blind. (Hajnal, Gerber, and Louch, *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections* (2002), 64(1) The Journal of Politics 154, 157.) However, even in a study sympathetic to the value of the initiative process, Hajnal and his co-authors conceded that "[o]n minority-targeted initiatives, Latinos consistently lose out," and that "Latinos, indeed, have much to worry about when issues that target their rights are decided via direct democracy." (*Id.* at p. 171.) Latinos lost out in the Hajnal study because the ballot propositions in the study that were clearly identified as minority-targeted were aimed at Latinos, but the principle applies just as well to other minorities. Based on a nationwide study, scholar Barbara Gamble has shown that initiatives that restrict civil rights pass more regularly than other types of initiatives.

the progressive era vision of a direct voice for the citizenry. However, that commitment must be respected within its legitimate scope; California's adoption of the progressive institutions of initiative and referendum expressly did not give unlimited scope to the mechanism of a direct initiative.

C. THE CALIFORNIA CONSTITUTION FOLLOWS THE WISDOM OF MODERN DEMOCRATIC THOUGHT BY DISTINGUISHING AMENDMENTS VIA INITIATIVE FROM REVISION VIA LEGISLATIVE REFERRAL.

The misleading arguments of the marriage equality opponents notwithstanding, the essential wisdom of modern democratic thought is enshrined in the California Constitution as well. Though like only a small number of other states it allows for "amendment" via a ballot initiative, our Constitution mandates that substantial changes be made only on the basis of legislative referral to a popular referendum or a constitutional convention and subsequent popular referendum. "Although '[t]he electors may amend the Constitution by initiative' (Cal.Const., art. XVIII, § 3), a 'revision' of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification (*id.*, § 2), or by legislative submission of the measure to the voters (*id.*, § 1)." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 350 (hereafter "*Raven*").) In the very distinction between amendment and revision made in Article 18, the California Constitution plainly requires that substantial constitutional change be accorded the more deliberative and consultative process required by all other modern democracies.

While the Court is obliged to protect the people's right under Article 18, sec. 3 to amend the Constitution by initiative, it cannot ignore the distinction between amendment and revision mandated by Art. 18, sec. 1. Due deference must be shown to any legitimate amendment via initiative, but it is equally imperative that the Court not abdicate its essential and exclusive responsibility to distinguish an amendment from a revision. (See *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 (hereafter *Livermore*).) This Court has "repeatedly affirmed *Livermore*'s seminal holding." (Pet. Reply, *supra*, at p. 10.)

The numerous cases cited by the opposition to the effect that the Court "must" give effect to a legitimate amendment by initiative are thus largely irrelevant. None of those cases alter the fact that this Court has the sole authority and obligation to distinguish between a legitimate amendment and a purported "amendment" that is in fact an illegitimate attempt to revise the Constitution outside the prescribed mechanism of legislative referral.[10] While the "limited check upon the initiative power is likely to be narrow in operation and rarely implicated, its importance cannot be overstated." (Pet. Reply, *supra*, at p. 6.) Where a fundamental change to the Constitution is at stake, the Court plays a vital role in ensuring that the appropriate process is used.

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[10] The opposition papers expressly concede the obvious — the opponents of marriage equality want to avoid the mandate of legislative referral because they know they would lose. (CCF Prelim Opp Br., *supra*, at pp. 12-13.)

II. REVISING THE CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION CANNOT BE REDUCED TO A BALLOT BATTLE OF BARE MAJORITIES.

The Court should reject the Interveners' arguments in favor of disregarding the constitutionally mandated mechanism of legislative referral required for revisions. Ignoring the required constitutional procedure in this case is a literal invitation to reduce serious constitutional protections to an unseemly ping-pong of pro and con ballot propositions.

Those supporting Proposition 8 explicitly admit that their arguments would erect a model of equal protection law under which the fundamental rights of protected minorities are reduced to nothing more than a cycle of ballot battles. So, they blithely suggest, "[i]f Petitioners desire to overturn Proposition 8, their only recourse under state law is to amend the Constitution once again." (See Prelim Opp Br., *supra*, at p. 11; see also CCJ Letter, *supra*, at p. 4.)

The population is closely divided on the issue of marriage equality, and results in future elections could hinge on whether there is a Presidential election on the ballot, whether a proposition appears on a November ballot or at some other time of the year, or on any number of other factors that affect turnout, both in terms of the number and the demographics of voters. This invitation to turn marriage law in California into a ping-pong match of competing ballot propositions suggests just how irrational, impracticable and destructive the opposition's position really is in theory and practice to the institution of marriage.

The situation easily could degenerate into what political scientists half-jokingly call a "neverendum":

> Given that one of the claims of proponents of referendums is that they provide a means of resolving difficult and complex issues, what happens in those instances where an issue is not "resolved"? Can the losing side demand another referendum?. . . What happens to public confidence if the "referendum" becomes a "neverendum"?

(LeDuc, Theoretical and Practical Issues in the Study and Conduct of Initiatives and Referendums, paper presented at the International IDEA workshop on Direct Democracy, London, 13-14 March 2004, p. 4.[11]) Political minorities should not have to await each election cycle to see if their rights have survived. Fundamental changes to the California Constitution do not belong on proposed ballot "amendments." Rather, "the rights of California minorities to equality under the law, particularly with respect to fundamental and inalienable rights, rest on the bedrock of our Constitution, not on the shifting sands of the ballot box." (Pet. Reply, *supra*, at p. 26.) Being in "legal limbo" puts amici in profoundly difficult positions. (See Declaration of John Dumas at ¶ 11 (AA at Tab 5, p. 17).) Amici have suffered profoundly as a result of having rights removed. (See Declaration of Linda J. May at ¶ 18 (AA at Tab 10, p. 30) ["Proposition 8 . . . stings more than the other equal rights struggles because this is a step backward; something has been taken away. Always before we were struggling to gain something, so no matter what happened, we would be no worse off than when we started. With Proposition 8's passage, we experienced a setback. And it is frightening because it means reversal is possible. The next question is where will that reversal stop?"]; See also

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[11] (Available at <http://archive.idea.int/newsletters/2004/Feb_Mar04/direct_democracy.pdf> (as of December 31, 2008).)

Declaration of Thomas J. Peterson at ¶ 13 (AA at Tab 11, pp. 35-36) ["The passage of Proposition 8 stunned Jim and me. We could not believe that California voters could be induced to vote to disrespect our relationship and institutionalize discrimination in the California Constitution by establishing gay people as being unequal in the eyes of the law and undeserving of the same rights as other Californians."].)

III. THE OPPOSITION'S ARGUMENTS PRESUME A FUNDAMENTAL REVISION OF EQUAL PROTECTION LAW IN CALIFORNIA.

The mandate that a revision to the Constitution be made by the prescribed means applies not just to the express terms and provisions of the Constitution, but also to "the underlying principles upon which it rests." (*Livermore, supra*, 102 Cal. at 118; see also *Raven, supra,* 52 Cal.3d at 355.) Because Proposition 8 eviscerates the fundamental principle of equal protection, it cannot be accomplished by a ballot initiative and a simple majority vote.[12]

The precise issue posed in this case is whether a fundamental right should be eliminated for members of a protected class through a constitutional change via a ballot initiative. Obviously, a proposed amendment that expressly provided for such a thing — *i.e.*, that said that

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[12] As such, the change imposed by Proposition 8 would be a true revision. Contrary to the opposition's arguments, Proposition 8 is very different from the amendment upheld in *Eu, supra*, 54 Cal.3d 492, because the term limits at issue merely resulted in having different people do the same tasks. (*Id.* at 509.) Proposition 8, by contrast, alters the "content of [the] laws" and "the process by which they are [adjudicated]," and clearly results in the judicial power being "diminished." (*Ibid.*)

"any fundamental right may be eliminated for members of a protected class by simple majority vote" — would be rejected by this Court out of hand. The fact that Proposition 8 enacts that principle *sub silentio* in a piecemeal fashion makes Court action striking it down no less necessary.

The Interveners claim that Proposition 8 is a proper subject for a simple amendment because it adds only one provision and only 14 words to the Constitution. That "simple" provision, however, is utterly devastating to the guarantee of equal protection. Interveners' papers explicitly concede that their argument hinges on the notion that "[e]qual protection rights are not exempt from the initiative amendment power." (Prelim Opp. Br., *supra*, at p. 9; see also Inter. Br., *supra*, at p. 17.) The Interveners unsuccessfully minimize equal protection jurisprudence and their arguments destroy equal protection rights in California.

First, the Interveners unrealistically assert that the Court's equal protection jurisdiction is not undermined because Proposition 8 does not take away all rights from gay and lesbian Californians, just one fundamental right. (Prelim Opp. Br., *supra*, at pp. 3-4; see also Inter. Br., *supra*, at pp. 16-17.) But the history of invidious discrimination in America tragically shows that an edifice of blatant discrimination can and often is built in piecemeal fashion, brick by brick, rather than all at once.[13] Indeed, the failure of Reconstruction and the implementation of Jim Crow laws followed just such a pattern. *Brown v. Board of Education* struck down a short provision in Kansas law that dealt with just one right — the right to

[13] Though Holocaust analogies should always be used with caution, it seems proper to note that the web of anti-Semitic legislation enacted by Nazi Germany initially began in piecemeal fashion, with one right eliminated at a time. Furthermore, many of these laws were enacted via plebiscite. (See William Lawrence Shirer, THE RISE AND FALL OF THE THIRD REICH (1990) pp. 213, 229-30.)

equal treatment in primary and secondary public education. ((1954) 347 U.S. 483.) The fact that the specific law was limited did not stop the United States Supreme Court from invalidating it. Equal protection can be devastated by short and "simple" laws, as well as by labyrinthine codes,and courts should not wait until discrimination becomes pervasive to intervene.

Second, the Interveners ignore how contrary their equal protection theory is to the constitutional history of this state. Californians have long been proud of trailblazing in cases such as *Serrano v. Priest* ((1976) 18 Cal.3d 728 [holding education to be a fundamental interest such that a discriminatory public school finance system violated state, though not federal, equal protection provision]) and *Sail'er Inn, Inc. v. Kirby* ((1971) 5 Cal.3d 1 [striking down state statute banning women, held to be treated as in a suspect classification, from tending bar because it violated both state and federal equal protection provisions].) But the Interveners' theory of equal protection destroys the notion that California equal protection jurisprudence has been an accomplishment of significance, providing protections independent of and beyond those provided by federal constitutional jurisprudence. Taking the Interveners' position to its logical conclusion, all that the proponents of further discrimination against gays and lesbians would have to do is win a bare majority in support of another constitutional amendment at the next election. If overturning one aspect of the *In re Marriage Cases* (2008) 43 Cal.4th 757 (hereafter *Marriage Cases*) decision by Proposition 8 is a legitimate subject for an amendment by initiative, then why couldn't the majority also pass a constitutional amendment stating that "equal protection no longer applies to gays and lesbians" or to seek to undo other equal protection decisions via "amendment." (See Declaration of John Dumas at ¶ 11 (AA at Tab 5, p. 17) and Declaration of Linda May at ¶ 18 (AA at Tab 10, p. 30) [describing

their fear of the removal of additional fundamental rights from gays and lesbians].)

It is no answer to say that the Supreme Court of the United States would never allow such provisions to go into effect. Such an argument runs afoul of the caution in *Raven* against an initiative-based amendment that "severely limits the independent force and effect of the California Constitution" in favor of the federal Constitution. (*Raven, supra,* 52 Cal.3d at p. 353.) It also contradicts "a basic principle of federalism — that the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens." (*People v. Brisendine* (1975) 13 Cal.3d 528, 551.) "The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials." (*Id.* at 550.) The Constitution of California is supposed to be the basic law for a sovereign state; it provides protections beyond the more limited federal Constitution. (See Pet. Reply, *supra*, at p. 28 ["Specifically with respect to gay and lesbian Californians, this Court has long been an independent voice requiring fair and equal treatment as a matter of state law, even when federal law lagged far behind." (citing cases)].)

Core constitutional protections should not be subjected to evisceration by a bare majority. In this regard, Interveners' claim that "[g]iven the openness of Californians to all minority groups, petitioners' dark intimation that Proposition 8 could be a precursor to systematic oppression of homosexuals is extravagant" (Inter. Br., *supra*, at p. 17), is itself extravagant, and verging on bad faith in the light of recent legal

positions argued by named Intervener counsel Andrew Pugno and amici in this and related cases. Andrew Pugno, for example, challenged even California's domestic partnership laws, along with the Alliance Defense Fund ("ADF"). On its website, the ADF touts its efforts to fight against "those engaging in homosexual behavior to have preferences to adopt children and be foster parents."[14] Amicus CCJ fought against the ability of gay men to serve as scoutmasters, and amicus American Center for Law and Justice has fought against not only domestic partnership benefits, but even against the rights of gays to engage in adult consensual sex without fear of criminal prosecution. (See *Lawrence v. Texas* (2003) 538 U.S. 918.)[15]

The concern that those wishing to limit the full participation of gays and lesbians in society might try next to strip gays of adoption or other rights they currently enjoy in California is hardly "extravagant" but based on a keen awareness of the limits on the rights of gays and lesbians throughout the country. Moreover, amici note that the "YES on 8" campaign specifically argued that babies should have the "right to a mommy and a daddy." (See Declaration of Samantha Kohler at ¶ 6 (AA at Tab 8, p. 24).) Moving to strip gays and lesbians of adoption rights might

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[14] ADF is not yet a listed amicus in this case. They have been involved in other litigation. The quotation can be found at <http://www.alliance defensefund.org/issues/traditionalfamily/Default.aspx>.

[15] Andrew Pugno's attempt to prevent gays and lesbians from obtaining the benefits of domestic partnerships in *Knight v. Superior Court* (2005) 128 Cal.App.4th 14 can be found at 2005 WL 2396342 (Cal. June 17, 2005)). The CCJ brief in support of exclusionary policies of the Boy Scouts in *Boy Scouts of America v. Dale* (2000) 530 U.S. 640 can be found at 2000 WL 228580 (U.S. February 28, 2000). The American Center for Law and Justice's brief in *Lawrence v. Texas*, seeking to retain criminal penalties for consensual homosexual adult sex can be found at 2003 WL 367562 (Appellate Brief) (U.S. February 18, 2003).

be a logical next step for this campaign that is consistent with the goals of several amici and a goal that was recently realized in the State of Arkansas. Indeed, the situation is particularly dire when we consider that a bare majority could simply decide that not only should adoption rights be taken away from gay couples prospectively, but that even currently intact families should be broken apart. If Proposition 8 is upheld, what would stop a majority from passing an initiative that reads as follows: "Adoption by same-sex couples is no longer valid or recognized in this state, and this provision is to apply retroactively such that any prior adoptions by same-sex couples are hereby dissolved." Amici Van Hoosear and McCollum must now consistently consider the risk that they may have to fight for their parental rights over their two children they have raised since birth. (See Declaration of Jeffrey L. Van Hoosear at ¶ 10, (AA at Tab 12, p. 40).) The frightening reality is that if Proposition 8 is upheld, gays and lesbians might have absolutely no protections from the majority in California — whether with regard to family rights, employment, or any other state-law rights. (See Pet. Reply, *supra*, at p. 18 ["If Proposition 8 were allowed to stand . . . gay and lesbian Californians would enjoy their remaining 'rights' subject to the whim of a simple majority of the voters, rather than as a matter of secure guarantee under the California Constitution."].)

We note, in addition, that even in relatively progressive California, sexual orientation discrimination has led to the commission of hate crimes. Indeed, the California Department of Justice's Hate Crime in California 2007 statistical report (available at <http://ag.ca.gov>) notes that reported "sexual orientation hate crimes have consistently been the second largest bias motivation of hate crimes since 1998, accounting for at least 18 percent of all hate crime offenses." (*Ibid.*) Moreover, reported hate crimes against the LGBT community increased 77.2% between 2006 and

2007. (See *ibid.*) (See also Declaration of Tiffany Chang at ¶ 9 (AA at Tab 2, p. 8) [expressing concern that unequal status of gays and lesbians reflected in Proposition 8 will embolden some to take more violent actions].)

The Interveners' sanguinity regarding the relative rights enjoyed by gays and lesbians in California betrays a fundamental misunderstanding of the daily continuing struggles of the LGBT community to achieve rights to full participation in modern society. In 1986, gay black civil rights activist Bayard Rustin noted that "twenty-five years ago, the barometer of human rights in the United States were black people. That is no longer true. The barometer for judging the character of people in regard to human rights is now those who consider themselves gay, homosexual, lesbian." (BROTHER OUTSIDER: THE LIFE OF BAYARD RUSTIN (PBS broadcast, Jan. 20, 2003).) Rustin also explained in plain terms why gays and lesbians face unique burdens as a minority group:

> homosexuality remains an identity that is subject to a "we/they" distinction. People who would not say, "I am like this, but black people are like that," or "we are like this, but women are like that" or "we are like this, but Jews are like that," find it extremely simple to say, "homosexuals are like that, we are like this." That's what makes our struggle the central struggle of our time, the central struggle for democracy and the central struggle for human rights. If gay people do not understand this, they do not understand the opportunity before them, nor do they understand the terrifying burdens they carry on their shoulders.

(Carbado and Weise (eds.), *Time on Two Crosses* (2003) 273 [quoting Rustin in 1986]; *see also id.*, p. 289.) (See also Declaration of Karla Bland at ¶ 6 (AA at Tab 1, p. 4) [describing bigotry faced as black lesbian].)

Unfortunately, even 22 years later, there are people in this state and country who do not recognize the rights of gays and lesbians to enjoy fundamental equal rights. In *Marriage Cases*, this Court powerfully demonstrated why gays and lesbians must be extended the protections of a "suspect classification" for equal protection purposes. (*Marriage Cases*, *supra*, 43 Cal. 4th at 822-23, 839-44.) The fact that homophobic taunts are directed at citizens of this state who are or are perceived to be LGBT only demonstrates that LGBTs remain a vulnerable class. (See Declaration of M. Katherine Baird Darmer at ¶ 11 (AA at Tab 3, p. 11) [describing slurs at LGBTs and those perceived to be LGBT on Election Day and thereafter].) Far from "openness" of Californians to all minority groups, the documented evidence unfortunately shows the extent to which gays and lesbians are still singled out today for persecution and abuse, further evidencing the critical importance of the courts in enforcing the equal protection guarantees of the California Constitution.

The sad reality is that amici remain vulnerable to the majority. (See Declarations of Jeffrey L. Van Hoosear at ¶ 10 (AA at Tab 12, p. 40) ["I . . . worry for my and my husband's civil rights, and those of our children, given the discrimination that Proposition 8 placed into the Constitution of the State of California] and Thomas J. Peterson at ¶ 13 (AA at Tab 11, pp. 35-36) ["In our own lives and those of friends, we have observed the scars and real damage, measured in human terms and human lives, that have come in the wake of the passage of Proposition 8."] (referencing institutionalized discrimination).)

IV. THE FEDERAL DEFENSE OF MARRIAGE ACT ("DOMA") ARGUMENT IS UNAVAILING.

The argument raised by at least one amicus, that the federal Defense of Marriage Act (28 U.S.C. §1738C) ("DOMA") preempts California's ability to decide for itself whether Proposition 8 constitutes a revision or an amendment to its Constitution (see CCJ Letter, *supra,* at p. 3-4) is incorrect.

A. FEDERAL PREEMPTION DOCTRINE.

Federal preemption may be express or implied; here, since there is no express preemption, CCJ is evidently relying on the doctrine of implied preemption. There are three types of implied preemption - conflict preemption, preemption due to a state law impeding a federal objective, and field preemption, which occurs when a federal statutory system occupies the field in a given area of law.

There is no conflict between DOMA and the marriage equality position; indeed, DOMA was enacted in 1996 as "a response" to Hawaii contemplating becoming the first state to legalize same-sex marriage, and its stated legislative purpose was to preserve "each State's ability to decide the underlying policy issue however it chooses." (H.R. 104-199, at 2.) This is precisely what the Petitioners seek at this time. Accordingly, there is no conflict preemption.

Field preemption is likewise not at issue here, since there is no detailed federal statutory scheme for marriages analogous to ERISA or similar federal statutes. Thus, CCJ's preemption argument rests entirely upon the proposition that a federal objective is impeded if California courts find that Proposition 8 is more properly considered a revision to the

California Constitution rather than an amendment. For reasons set forth below, this is a specious argument.

B. CCJ'S PREEMPTION ARGUMENT DOES NOT APPLY TO PETITIONERS' PROCEDURAL ARGUMENT THAT PROPOSITION 8 WAS AN UNLAWFUL REVISION.

A critical issue in this case is how certain changes to the California Constitution must be enacted. A decision in the Petitioners' favor would not necessarily result in a finding that the substance of Proposition 8 was illegal; the Court could simply find that the procedure by which Proposition 8's supporters purported to enact changes to the Constitution was procedurally defective. As the Petitioners argue,

> [T]he Constitution's distinction between revisions and amendments provides a narrower constitutional basis for protecting . . . central interests. The selective withdrawal of a fundamental right from a historically disfavored minority necessarily involves such an assault upon the structure of the state's Constitution and its system of government that it can be accomplished, if at all, only through the intentionally more deliberative and multi-tiered process of a constitutional revision.

(Pet. Reply, *supra*, at pp. 1-2.) If this Court accepts Petitioners' narrower grounds for rejecting Proposition 8, Proposition 8's proponents could then attempt to enact the identical provision by a two-thirds majority in both houses of the state legislature, plus a majority vote of California voters.

Thus, CCJ is not really arguing that DOMA preempts the marriage equality position on the substantive provisions of Proposition 8. Instead, it is actually arguing that DOMA preempts California's procedural rules by

which it enacts changes to its own Constitution. This flies in the face of accepted notions of federalism, and it is patently absurd. DOMA does not endorse or proscribe any methods of enacting state law anywhere in its text or its legislative history, nor does it even address such issues. DOMA's very *raison d'être* was concern that a Hawaii court was going to enact a definition of marriage in Hawaii that might have had ramifications throughout the country. If Congress had intended to influence state procedures, then it seems likely that the legislative history of DOMA would have indicated such a purpose with regard to Hawaii's procedures.

C. EVEN IF THE COURT FOUND PROPOSITION 8 SUBSTANTIVELY ILLEGAL, THE FEDERAL DOMA WOULD NOT PREEMPT THAT FINDING.

Even if the California Supreme Court were to find Proposition 8 substantively illegal, *e.g.*, if it accepted the argument made by the Attorney General that certain "inalienable rights" may not be abrogated absent a compelling state interest, there would still be no issue with DOMA. Indeed, the legislative history of DOMA is quite clear: "The determination of who may marry in the United States is uniquely a function of state law. That has always been the rule, and H.R. 3396 [which was passed as the Defense of Marriage Act] in no way changes that fact." (H.R. 104-199, at 3.) Thus, DOMA takes no position whatsoever on the issue of who shall be entitled to marry according to the various state laws. This is clear both from its text (which contemplates a system wherein there are states that allow same-sex marriage and states that do not), and from its legislative history.

Indeed, rather than preempting state laws that allow for marriage equality, DOMA by its very terms allows for them. When DOMA was passed, there were no American jurisdictions that allowed for same-sex marriage. Yet DOMA by its very terms contemplates some states having same-sex marriages while others do not. If anything, this shows an implicit acquiescence in the enactment of these laws.

Thus, the argument that federal law preempts California from finding Proposition 8 defective on either procedural or substantive grounds is without merit.

V. THE UNTENABLE POSITIONS OF AMICI WHOSE JOBS REQUIRE THAT THEY "SUPPORT" OR "SUPPORT AND DEFEND" THE CALIFORNIA CONSTITUTION FURTHER SUPPORT A FINDING THAT PROPOSITION 8 IS AN UNLAWFUL REVISION.

In the State of California, thousands of public officers and employees, including California university employees, are required by statute to take an oath to "support and defend" the state Constitution "without any mental reservation." (See <http://www.leginfo.ca.gov./const/.article20>; <http://www.aaup.org/AAUP/issues/AF/oaths.htm.>[16]) Similarly, all newly-licensed California attorneys are required to take an oath to "support" the state Constitution. (See Cal. Bus. & Prof. Code §6067.) In ceremonial contexts, attorneys – including amicus Emily Samuelsen

[16] At California universities, foreign nationals are not required to take the oath.

Quinlan who swore her oath in 1988 – routinely swear to both "support" and "defend" both the federal and state Constitutions. If Proposition 8 is allowed to stand, thousands will be swearing to "support and defend" a discriminatory provision. For the many public officers, university employees and attorneys who are gay and lesbian, the oath to support the new version of the Constitution is directly adverse to their principles of equal dignity, equality and self-respect. For example, Amicus Hung Y. Fan states:

> The passage of Proposition 8 was a visceral blow . . . . [W]e as a group have been singled out for exclusion from the emotional and legal benefits of a major social institution – marriage. As an employee of the University of California, a condition of employment includes pledging allegiance to the Constitution of the State of California. Pledging allegiance to a Constitution that now specifically excludes the right to marriage for same-sex couples creates a new and significant hardship.

(See Declaration of Hung Y. Fan at ¶ 7-8 (AA at Tab 6, p. 20).) For many others the oath would be repugnant to their commitment to equal protection norms.

Amicus M. Katherine Baird Darmer is an attorney who took the oath in 2005. (See Declaration of M. Katherine Baird Darmer at ¶ 7 (AA at Tab 3, p. 10).) Amicus Dean Inada was required to take an oath in 2006 before assuming a position as an elected member of the Orange County Democratic Central Committee. (Declaration of Dean Inada at ¶ 3 (AA at Tab 7, p. 21).) Amici James D. Herbert and Cécile Whiting are professors at the University of California-Irvine, who both took the oath in 1998. Emily Samuelsen Quinlan swore her oath in 1988. Amicus Dean Erwin Chemerinsky will likewise be expected to take the oath. These amici find

in good conscience that taking or continuing to fulfill their oaths under the revised state Constitution is untenable. Specifically, they are now struggling with how they can without reservation support the provision that "only marriage between a man and a woman is valid and recognized in California," a provision that is fundamentally at odds with settled equal protection norms under the California Constitution.

The problem is particularly acute with respect to amici Hung Y. Fan and James Nowick, professors at the University of California, Irvine who are married to same-sex partners. Effectively, continuing to fulfill an oath to "support and defend" the state Constitution means that they are being asked to repudiate the rights of other gays and lesbians to marry. (See Declaration of Hung Y. Fan at ¶ 8 (AA at Tab 6, p. 20).)

Several amici represented on this brief are both required to take a loyalty oath and are also members of the Orange County Equality Coalition ("OCEC"), an organization committed to equality for all persons, including marriage equality. (See Declaration of Barbara Jean ("BJ") Davis (AA at Tab 4, pp. 13-14) [describing mission of Orange County Equality Coalition]; see also Declarations of M. Katherine Baird Darmer at ¶¶ 8, 12 (AA at Tab 3, pp. 10-11) and Dean Inada at ¶ 4 (AA at Tab 7, p. 22) [describing membership in OCEC].) Is membership in this advocacy group inconsistent with an oath to "support" the California Constitution? Surely a requirement that no public employee or attorney subscribe to tenets of marriage equality is untenable. Taking seriously the oath to "support" or "support and defend" the Constitution, however, appears to require acquiescence and even active support for discrimination. This is unacceptable in a modern democracy.

The attempted change to our Constitution wrought by Proposition 8 is unique and peculiarly insidious in its textual mandate of discrimination,

which makes this purported "amendment" to the Constitution wholly unlike any other provision of our state Constitution. The unambiguously discriminatory content of Proposition 8 is inconsistent with equality norms that motivated many public employees, university professors and attorneys to take on their positions in the first place. (See Declaration of M. Katherine Baird Darmer at ¶ 8 (AA at Tab 3, p. 10) [referencing "important role of lawyers in fighting for social justice"].) This Court has already found that gays and lesbians are deserving of the highest level of protection under the Equal Protection Clause. To require attorneys and public employees – including those who are gay and lesbian – to take an oath to a new Constitution that embodies discrimination is untenable.

Words matter. Oaths matter, and we rightfully encourage public officials to take their oaths seriously and with somber reflection. Indeed, oaths are frequently administered with much ceremonial fanfare. (*See id.* at ¶ 7 (AA at Tab 3, p. 10).) California's many new gay and lesbian public employees and attorneys will now be forced to give up their employment, or to swear to uphold a Constitution that has enshrined second class citizenship *for themselves* into the very fabric of the document they are being asked to support.

In a post-Proposition 8 World, the specter of future generations of lawyers and state employees swearing the oath looms large for many Californians who find the discriminatory provision enshrined into the Constitution by Proposition 8 to be insupportable and indefensible. (See Declaration of Emily Wilkinson at ¶ 5 (AA at Tab 13, p. 42).)

Amicus Tiffany Chang is a second year law student, married and deeply committed to her wife Lindsey. She will take the bar exam in 2010 and contemplates being admitted to the bar later that year. She, like the thousands of other attorneys admitted to practice each year, will be

expected to take the oath. The day of a lawyer's admission to the bar should be a celebratory, joyous occasion. In her case it will not be. Rather, when she is asked to raise her right hand and swear to "support" the Constitution it will serve as a painful reminder that her Constitution does not recognize her full equality; worse yet, she will be asked to "support" discrimination targeted pointedly at her. (See Declaration of Tiffany Chang at ¶ 10 (AA at Tab 2, p. 8).) Ms. Chang and her wife were devastated by Proposition 8. As stated in her declaration:

> On November 4, 2008, Lindsey and I walked to our polling station at 6:15 a.m. and waited to vote no on stripping a minority group of their equal rights--to vote no on Proposition 8. That night, our eyes were glued to our computer and my finger was continuously hitting refresh to see the poll numbers come in for Proposition 8. The next morning, we awoke to the most shocking and reprehensible news that Proposition 8 had passed.
>
> I felt like someone punched me in the stomach and knocked the wind right out of me. I did not go to class that day. In fact, I barely got out of bed. . . . For a week or so after the election, both Lindsey and I found ourselves unable to look at people, especially strangers, in the eye. I would literally look down at the ground if I was passing someone on the sidewalk. Part of it was anger, but the other part was feeling ashamed and embarrassed. I felt like people might be thinking, "see, you were wrong, you are less than me," or maybe they would actually say it to my face.

(*Id.* at ¶¶ 7, 8 (AA at Tab 2, pp. 7-8).)

Proposition 8 was an invalid attempt to enshrine this "lesser" status, this second class citizenship, into our state Constitution in a way that demeans all gays and lesbians asked to support and defend their Constitution. Should all future gay and lesbian lawyers and other subject to the oath be forced into a demeaning position? Or be forced to choose

between their livelihoods, which require the oath, and their right to marriage equality and full equal protection under the law, which are repudiated by those oaths? No one should be expected to "support and defend" the insupportable and indefensible. Proposition 8 was an unlawful revision of a Constitution otherwise premised on equality. That underlying premise cannot be voted away by a bare majority.

CONCLUSION

For the foregoing reasons, amici curiae urge this Court to issue a writ of mandate as requested in the Petitioners' Amended Petition for Extraordinary Relief and issue an order declaring that Proposition 8 is null and void in its entirety.

Dated: January 14, 2009

Respectfully submitted,

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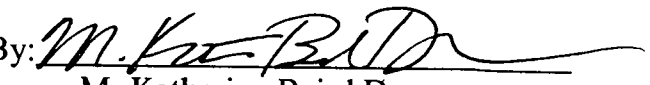
By: 
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* Substantial contributions to this brief were made by Chapman University School of Law professor Nancy Schultz; Chapman University School of Law students Tiffany Chang and Aalia Sonawalla; and Orange County Equality Coalition members Karla Bland and Heather Ellis.

CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.204(c)(1)

Pursuant to California Rule of Court 8.204(c)(1), counsel for amici curiae hereby certifies that the number of words contained in this Application For Leave to File Amicus Brief in Support of Petitioners; Brief of Amici Curiae Individual Chapman University Organizations, Faculty, Staff, and Students, Orange County Equality Coalition, and Other Orange County Community Members Including Legally Married Same-Sex Couples, In Support Of Petitioners, includiong footnotes, but excluding the Table of Contents, Table of Authorities, and this Certificate is 14,617 words as calculated using the word count feature of the computer program used to prepare the brief.

By: _____

Deborah E. Arbabi

IR4179189.1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Orange, State of California. My business address is 3 Park Plaza, 20th Floor, Irvine, California 92614-8505.

On January 14, 2009, I served true copies of the following document(s) described as

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS; BRIEF OF AMICI CURIAE INDIVIDUAL CHAPMAN UNIVERSITY ORGANIZATIONS, FACULTY, STAFF, AND STUDENTS, ORANGE COUNTY EQUALITY COALITION, AND OTHER ORANGE COUNTY COMMUNITY MEMBERS INCLUDING LEGALLY MARRIED SAME-SEX COUPLES, IN SUPPORT OF PETITIONERS

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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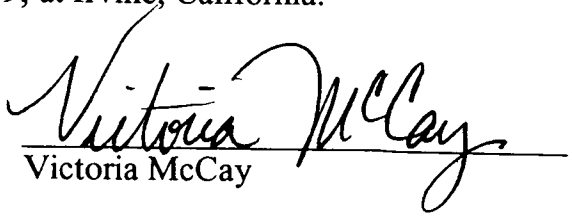
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on January 14, 2009, at Irvine, California.



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Case No. S168047

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