IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Nos. S168047,
S168066, S168078

KAREN L. STRAUSS, *et al.*,
Petitioners,

vs.

MARK B. HORTON, State Registrar of Vital Statistics, *et al.*,
Respondents,

and

DENNIS HOLLINGSWORTH, *et al.*,
Respondents-Interveners.

ORIGINAL PROCEEDING
FOR EXTRAORDINARY WRITS

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF INTERVENERS IN SUPPORT OF DENIAL OF EXTRAORDINARY WRITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, applicant and prospective *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") makes the following disclosures: (1) Eagle Forum ELDF is a non-profit corporation, and no entity or person owns 10 percent or more of Eagle Forum ELDF; (2) Eagle Forum ELDF does not know of any person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding, as defined such interests are defined in Rule 8.208(e); and (3) Eagle Forum ELDF knows of no entity or person that must it must list under Rule 8.208(e)(1)-(2).

Dated: January 14, 2009

Respectfully submitted,

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APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rule of Court 8.520(f), Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") respectfully requests leave to file the attached brief in support of Interveners in support of denying all requested relief. This application is timely made within the period set forth in this Court's order dated November 19, 2008.[1]

Interest of *Amicus Curiae*

Eagle Forum ELDF is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri. For more than twenty-five years it has defended traditional American values, including the rights of parents to control the upbringing and education of their children. Through its affiliates

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[1] No party or counsel for a party in the pending appeal authored the accompanying brief, in whole or in part, or made any monetary contribution intended to fund the costs of preparing and submitting the accompanying brief, which costs where borne solely by the *amicus curiae,* its members, and its counsel.

and their chapters, Eagle Forum ELDF represents an active Eagle Forum chapter in California, which supports Proposition 8.

How this Brief Will Assist the Court

The accompanying brief specifically addresses the four questions included in the Court's orders dated November 19, 2008, and December 22, 2008, on Proposition 8's validity and on its application to pre-election same-sex marriages. The brief also covers this Court's jurisdiction to address those four questions. *Amicus curiae* Eagle Forum ELDF respectfully submits that its brief will assist the Court in determining Proposition 8's application to pre-election same-sex marriages, to which the brief devotes most of its attention. In doing so, the brief considers issues of statutory construction and *res judicata* that the parties' briefs did not address.

Dated: January 14, 2009

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF INTERVENERS IN SUPPORT OF DENIAL OF EXTRAORDINARY WRITS

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BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF INTERVENERS IN SUPPORT OF DENIAL OF EXTRAORDINARY WRITS

INTRODUCTION

For the reasons set forth in the accompanying application, *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") respectfully files this brief in support of Proposition 8's proponents who intervened in the pending actions to defend Proposition 8 (hereinafter, "Interveners"). Before addressing the four questions posed here, Eagle Forum ELDF first outlines the relevant constitutional, legal, and factual background. For the reasons set forth here and in the Interveners' filings with this Court, Eagle Forum ELDF respectfully submits that Proposition 8 is valid and applies to deny validity and recognition to any same-sex marriage, wherever and whenever performed.

CONSTITUTIONAL BACKGROUND

In pertinent part, California's due process and equal protection clauses provide that "[a] person may not be deprived of life, liberty, or

property without due process of law or denied equal protection of the laws." (CAL. CONST. art. I, §7(a).) With further respect to equal protection, the Constitution also provides that "[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." (CAL. CONST. art. I, §8; *accord* CAL. CONST. art. I, §31 [similar protections in education and public contracts on the basis of sex, race, color, or national or ethnic origin], §4 [protections on the basis of religion].) Finally, with the adoption of Proposition 8, the California Constitution explicitly limits valid and recognized marriages to those between "a man and a woman." (CAL. CONST. art. I, §7.5.)

As relevant here, the Constitution also provides two procedures for altering its provisions: (1) a "revision" initiated in the Legislature by a two-thirds majority in both houses, and presented either directly to the voters or first to a constitutional convention and, if ratified, then to the voters; (CAL. CONST. art. XVIII, §§1, 2, 4;) or (2) an "amendment" initiated either by a private proponents' collecting signatures in support of a petition or by legislative proposal with a two-thirds majority in both houses and presented to the voters. (CAL. CONST. art. XVIII, §§1, 3.) However initiated, any change to the Constitution requires ratification by a majority of voters. (CAL. CONST. art. XVIII, §§1, 3, 4.)

LEGAL BACKGROUND

In 2000, Californians adopted Proposition 22, defining marriage as being "between a man and a woman" and providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. FAMILY CODE §§300, 308.5. Notwithstanding this state law, the City and County of San Francisco ("CCSF") began performing same-sex marriages, which this Court subsequently voided as exceeding CCSF's authority. (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1114.)

In doing so, however, the Court reserved the question of whether Proposition 22 violated California's Constitution. (*Id.* at 1069.)

As directed by this Court in *Lockyer,* various parties then challenged Proposition 22 in Superior Court, eventually making their way to this Court consolidated as *In re Marriage Cases* (2008) 43 Cal.4th 757 (hereinafter "*Marriage Cases*"). As relevant here, this Court held that marriage was a fundamental right, (*id.* at 809,) and invalidated Proposition 22's denial of that fundamental right to same-sex couples. (*Id.* at 857.)

Proposition 22's proponents sought rehearing and a stay to allow Californians to vote on Proposition 8, which qualified for this past November's ballot on June 2, 2008. [See, e.g., Respondents' Br. at 7-8; Lisa Leff, *"Gay marriage ban qualifies for Calif. Ballot,"* SAN DIEGO UNION TRIBUNE (June 2, 2008).] The attorneys general of several states also requested this Court to defer the effective date of its *Marriage Cases* decision. By order dated June 4, 2008, however, this Court granted a request for judicial notice of information regarding the Secretary of State's authentication of signatures for Proposition 8, but denied all other relief.

By operation of California Rule of Court 8.532(b)(1) and the Court's order dated June 4, 2008, the *Marriage Cases* decision became final on June 16, 2008. In the interval between June 16, 2008, and Proposition 8's passage by the electorate on November 4, 2008, approximately 18,000 same-sex marriages took place under the *Marriage Cases* decision.

On November 4, 2008, California's voters approved Proposition 8 by a five-percent margin. By operation of Article XVIII, Section 4, Proposition 8 became a part of California's Constitution on November 5, 2008.

On November 5, 2008, several parties filed petitions for extraordinary relief in this Court to invalidate Proposition 8 and to enjoin its enforcement. Petitioners here include parties to the *Marriage Cases*

litigation (*e.g.*, petitioner Robin Tyler) and non-parties to that litigation (*e.g.*, petitioner Karen L. Strauss). In addition, petitioners include those who married in reliance on the *Marriage Cases* decision (*e.g.*, Ms. Tyler) and those who have not yet married but wish to do so (*e.g.*, Ms. Strauss). By order dated November 19, 2008, this Court granted motions to intervene by Proposition 8's sponsors – who were not parties to the *Marriage Cases* litigation – in the defense of their ballot initiative.

FACTUAL BACKGROUND

The materials submitted to the voters in support of and opposition to Proposition 8, as well as the public record surrounding the election, are the only facts necessary to decide the purely legal issues presented here. This section summarizes the relevant sections of the voters' pamphlet distributed by the Secretary of State. (See Ballot Pamphlet, Gen. Elec. (Nov. 4, 2008) 54-57 [hereinafter, "Voters' Pamphlet"].)

The Attorney General's official summary indicated that Proposition 8 not only would "eliminate the right of same-sex couples to marry" but also would "[p]rovide[] that only marriage between a man and a woman is valid or recognized in California." (Voters' Pamphlet, at 54.) The Legislative Analyst's analysis similarly provides two prongs: "notwithstanding the California Supreme Court ruling of May 2008, marriage would be limited to individuals of the opposite sex, and individuals of the same sex would not have the right to marry in California." (*Id.*, at 55.)

The proponents argued that "four activist judges ... wrongly overturned the people's vote, [and] we need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman." (*Id.*, at 56 [emphasis in original].) The proponents further argued that Proposition 8 would do "three simple things" if adopted: (1) "*It restores the definition of marriage* to what the

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The proponents argued that "four activist judges ... wrongly overturned the people's vote, [and] we need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman." (*Id.,* at 56 [emphasis in original].) The proponents further argued that Proposition 8 would do "three simple things" if adopted: (1) "*It restores the definition of marriage* to what the

vast majority of California voters already approved and human history has understood marriage to be," (2) "*It overturns the outrageous decision of four activist Supreme Court judges* who ignored the will of the people," and (3) "*It protects our children* from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." (*Id.* [emphasis in original].)[2] In rebuttal, the opponents acknowledged that "Prop. 8 means one class of citizens can enjoy the dignity and responsibility of marriage, and another cannot." (*Id.*)

In their formal argument against Proposition 8, its opponents argued that "Marriage is the institution that conveys dignity and respect to the lifetime commitment of any couple. PROPOSITION 8 WOULD DENY LESBIAN AND GAY COUPLES that same DIGNITY AND RESPECT.... PROPOSITION 8 MANDATES ONE SET OF RULES FOR GAY AND LESBIAN COUPLES AND ANOTHER SET FOR EVERYONE ELSE." (Id. at 57 [emphasis in original].) The opponents closed their argument by imploring voters "[not to] take away the equality, freedom, and fairness that everyone in California—straight, gay, or lesbian—deserves." (*Id.*)

Following on their three-part opening argument, the proponents'

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[2] The concern for indoctrinating schoolchildren with curriculum materials that hold same-sex marriage out as just like traditional marriage arose in part from parents' experience in other states that allow same-sex marriage. (See, e.g., *Parker v. Hurley* (1st Cir. 2008) 514 F.3d 87, 90 ["The Parkers object to their child being presented in kindergarten and first grade with two books that portray diverse families, including families in which both parents are of the same gender. The Wirthlins object to a second-grade teacher's reading to their son's class a book that depicts and celebrates a gay marriage"].) These Massachusetts parents – whose suit was dismissed for failure to state a claim (*id.*) – appeared in advertising by Proposition 8's proponents. (ProtectMarriage.com, *Everything to do with Schools* (Oct. 20, 2008) [available at http://www.protectmarriage.com/video/view/7].)

rebuttal makes the following three points: (1) Proposition 8 "ensures that the will of the people is respected," "overturns the flawed legal reasoning of four judges ... who wrongly disregarded the people's vote," and "ensures that gay marriage can be legalized only through a vote of the people," (2) Proposition 8 "ensures that parents can teach their children about marriage according to their own values and beliefs without conflicting messages being forced on young children in public schools that gay marriage is okay," and (3) "Proposition 8 means that only marriage between a man and a woman will be valid or recognized in California, regardless of when or where performed," without "tak[ing] away any other rights or benefits of gay couples." (*Id.*) In closing their rebuttal, the proponents argued that gays "have the right to live the lifestyle they choose, but they do not have the right to redefine marriage for everyone else" and that "Proposition 8 respects the rights of gays while still reaffirming traditional marriage." (*Id.*)

SUMMARY OF ARGUMENT

These petitions and the questions presented fall within this Court's original jurisdiction under Article VI, Section 10 (Section I, *infra*). None of the arguments to invalidate Proposition 8 have any merit. Proposition 8 plainly amends California's Constitution to abrogate an unsound decision by a one-vote majority of this Court, without effecting *any* change in the structure of California's government (Section II.A, *infra*). The argument that Proposition 8 somehow offends separation of powers is precisely backwards: this Court would violate the separation-of-powers doctrine if it refused to apply Proposition 8 (Section II.B, *infra*). Similarly, the general provisions of Article 1, Section 1 cannot trump the more-specific and later-enacted provisions of Article 1, Sections 7 and 7.5, which means that Proposition 8 does not negate any fundamental rights (Section II.C, *infra*). Finally, Proposition 8 is not retroactive because it applies prospectively to

deny recognition to same-sex marriages, and Proposition 8 lawfully can revoke whatever rights the *Marriage Cases* decisions conferred on parties and non-parties to that litigation (Section III, *infra*).

Before making these specific arguments, however, *amicus curiae* Eagle Forum ELDF must respond up front to petitioners' overarching argument that this Court must not allow majorities to tyrannize and discriminate against powerless minorities. Otherwise, petitioners infer, civil rights will vanish, bringing back Jim Crow and internment camps. (See, e.g., Strauss Reply Br., at 26 & n.11.) This hyperbole is simply preposterous: California will remain bound by the U.S. Constitution, which prevents our regressing to those regrettable points in our nation's and this State's history. Moreover, it is gay advocates and their legislative allies who constitute the more powerful political force in California. Fortunately, California's citizens reserved to themselves to the right to exercise their will directly through initiative, which enabled them to reiterate that "marriage" means what it always has meant in California: the union of one man and one woman.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO DECIDE ALL FOUR QUESTIONS PRESENTED

Although the petitioners plainly had alternate remedies in California's Superior Courts, this Court nonetheless has original jurisdiction for writs of mandamus, certiorari, and prohibition. (CAL. CONST. art. VI, §10.) This Court exercises its original jurisdiction in cases "when the issues presented are of great public importance and must be resolved promptly." (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 808 [interior quotations omitted].) When those criteria are met – as the petitioners, respondents, and interveners all agreed that they were – the "existence of an alternative ...

remedy will not preclude this court's original jurisdiction." *Id.* This Court therefore plainly has jurisdiction over claims to *invalidate* Proposition 8.

Equally plainly, the Court has jurisdiction to determine Proposition 8's effect on same-sex marriages that took place between June 16, 2008, and November 5, 2008. Although the petitions arguably do not raise this Court's "question 3" directly,[3] California Rule of Court 8.516(b)(1) provides that the "Court may decide any issues that are raised or fairly included in the petition or answer." Certainly a petition that seeks to enjoin the allegedly *unlawful* enforcement of Proposition 8 fairly includes a decision that Proposition 8 is *entirely lawful* as applied.

II. PROPOSITION 8 SURVIVES THE PETITIONERS' AND ATTORNEY GENERAL'S PROCEDURAL AND SUBSTANTIVE ATTACKS

By orders dated November 19, 2008, and December 22, 2008, this Court has agreed to consider three questions against Proposition 8's procedural or substantive validity. *First,* the petitioners challenge that Proposition 8 qualifies as a revision, rather than an amendment, to California's Constitution and thus was required to originate in the Legislature. *Second,* the petitioners argue that Proposition 8 violates the separation-of-powers doctrine by removing from the judiciary the power to protect minority rights under an equal-protection analysis. *Third,* while

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[3] The last paragraph of this Court's order dated November 19, 2008, suggests a possible argument that these petitions do not present an appropriate action in which to decide this Court's "question 3," which some might consider declaratory relief. (*Greener v. Workers' Comp. Appeals Bd.* (1993), 6 Cal.4th 1028, 1045 ["Although the appellate courts of this state have original jurisdiction over mandamus actions, they do not have original jurisdiction over actions for declaratory relief"]). To avoid any uncertainty, *amicus curiae* Eagle Forum ELDF addresses the Court's jurisdiction.

disagreeing on with the petitioners on the prior two grounds for invalidating Proposition 8, the Attorney General suggests that Proposition 8 violates Article I, Section 1's declaration of inalienable rights. All three of these arguments are baseless.

A. Question 1: Proposition 8 Constitutes a Constitutional Amendment, not a Revision

Before addressing the petitioners' argument that Proposition 8 is so extreme a change as to constitute a revision to the Constitution, *amicus curiae* Eagle Forum ELDF respectfully submits that Proposition 8 simply abrogates this Court's *Marriage Cases* decision because that decision was "wrongly" decided, "outrageous," "flawed [in its] legal reasoning," and "overruled" by Proposition 8. (Voters' Pamphlet, at 56-57; see also Section III.A.2, *infra.*) Although separation of powers may prohibit *the Legislature* from abrogating judicial holdings, this Court does not appear yet to have addressed whether *the voters* have retained that prerogative. (See Section II.B, *infra.*) Assuming *arguendo* that it does not simply correct a flawed decision, nothing in Proposition 8 rises to the level of a revision.

Although it plainly uses the terms "revision" and "amendment," (CAL. CONST. art. XVIII, §§1, 4,) the Constitution does not define the two terms. (*Raven v. Deukmejian,* 52 Cal.3d 336, 350.) Because revisions must originate in the Legislature, this Court's decisions on the amendment-revision distinction usually involve attempts to overturn voter-approved initiatives as revisions. While the revision-amendment analysis looks both to the qualitative and quantitative aspects of a constitutional change, (*id.,*) the fourteen-word change here plainly does not constitute a *quantitative* revision. (Cf. *McFadden v. Jordan* (1948) 32 Cal.2d 330, 345.) Indeed, petitioners press only Proposition 8's qualitative changes.

To qualify as a *qualitative* revision, a change must have "far reaching changes in the nature of our basic governmental plan." (*Amador*

Valley Joint Union High School District v. State Board of Equalization (1978) 22 Cal.3d 208, 223; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 260). Moreover, to qualify as a revision, "it must *necessarily or inevitably appear from the face* of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 510 [emphasis in original].) Leaving aside for a moment the petitioners' claim that removing a suspect class' fundamental right from judicial supervision qualifies as far reaching change, it is plain that Proposition 8 comes nowhere near the tests that this Court has set for revisions that must originate in the Legislature.

Proposition 8 merely restores the definition of marriage that was in effect from before statehood up to the *Marriage Cases* decision. That involves *no* change in governmental framework. As indicated, however, petitioners claim that the contours of this particular amendment make it unlike all past amendments because it removes from the judiciary the ability to protect a suspect class' fundamental right. (See, e.g., Strauss Reply Br. at 10-17.) Their argument has two major problems.

First, this Court already has allowed a voter initiative to remove from the judiciary's protection the even-more fundamental right to life by allowing the voters to reinstate the death penalty, after this Court invalidated it as cruel and unusual punishment. (Compare *People v. Anderson* (1972) 6 Cal.3d 628, 649-50 with *People v. Frierson* (1979) 25 Cal.3d 142, 187.) Thus, this Court already has rejected the fundamental-right aspect of the petitioners' position.

Second, in addition to setting out the rights to privacy and equal protection, the Constitution's Declaration of Rights also provides that "[t]his declaration of rights may not be construed to impair or deny others retained by the people." (CAL. CONST. art. I, §24.) Because the people reserved the right to amend their Constitution, (CAL. CONST. art. XVIII,

§3,) Section 24 prevents the argument that the people cannot abrogate a decision of this Court that interprets another section of the Declaration of Rights. Indeed, if the later-enacted rights of privacy and equal protection could negate the people's reserved right to amend their Constitution, those two initiatives would be far more disruptive of California's "basic government plan" than anything that Proposition 8 does.[4]

Nothing in the 1972 and 1974 initiatives that added the Constitution's privacy and equal-protection clauses informed the voters that their "Yes" vote would restrict their pre-existing constitutional rights under the initiative process. Because the voters did not consider restricting their initiative rights, this Court cannot read that restriction into the 1972 or 1974 initiatives. (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 320 [declining to allow damages remedy for violations of CAL. CONST. art. I, §7(a) where that issue was not discussed in 1974 initiative].) If this Court must invalidate an initiative based on petitioners' novel theory, Proposition 8 is not the one to invalidate.

As it has done with most amendment-revision litigation, this Court should uphold the will of the people, as expressed in a free and fair election. Anything less would upset not only the separation of powers but also the people's reserved right to amend their Constitution.

B. Question 2: Proposition 8 Does Not Violate Separation of Powers

Consistent with our founding principles, the separation-of-powers doctrine applies under both the California and the federal constitutions.

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[4] The people approved the initiative process in 1911, after a constitutional convention, and approved the rights and equal-protection by initiative in 1972 and 1974, respectively.

(*In re Rosenkrantz* (2002) 29 Cal.4th 616, 662; *Loving v. U.S.* (1996) 517 U.S. 748, 756 ["[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny"].) In California, the Constitution makes the separation explicit in Article III, Section 3:

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

(CAL. CONST. art. III, §3.) Significantly, however, the U.S. Constitution does not require the States to include a separation of powers within *state* government. (*Dreyer v. People of State of Illinois* (1902) 187 U.S. 71, 84; *Whalen v. U.S.* (1980) 445 U.S. 684, 689 ["doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States"].) As such, "the separation of powers doctrine embodied in the federal Constitution ... has no application to the states." (*Marine Forests Soc. v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 30.) "Accordingly, the separation of powers issue before us must be decided on the basis of the California Constitution."[5] (*Id.*) The resolution of this Court's "question 2" begins and ends with the California Constitution.

Now that the California Constitution includes Proposition 8, (see CAL. CONST. art. I, §7.5,) it borders on frivolous to argue that separation of

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[5] Although not controlling here, it is significant that the U.S. Supreme Court has issued two decisions since *Marriage Cases* in which the Court held that judges exceed their constitutional role when they substitute their policy views and bend constitutional texts to do what those texts were not designed to do. (*Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.* (June 16, 2008) 128 S.Ct. 2326, 2339; *District of Columbia v. Heller* (June 26, 2008) 128 S.Ct. 2783, 2790 n.3.)

powers is a basis for this Court to *overturn* Proposition 8.[6] To the contrary, this Court has an obligation to enforce Proposition 8 against petitioners' extra-constitutional argument that judges can enforce their own sense of fairness, untethered from the Constitution's text. The "function of this court is only to construe and apply the law so as to carry out the legislative intent which underlies it. [Petitioners'] policy-based arguments must be addressed to Congress and/or the Legislature," or more appropriately here, to the voters. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1046 [footnote omitted].) The justices of this Court cannot accept petitioners' argument and stay true to their duty to uphold the California Constitution.

C. Question 4: Proposition 8 Does Not Deny Inalienable Rights

By order dated December 22, 2008, this Court allowed the Interveners to file a reply to the Attorney General's argument that Proposition 8 violates Article I, Section 1. That section provides *inter alia* that all people have inalienable rights and enumerates some of those rights in general terms:

> 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.) In allowing the Interveners to respond, the Court implicitly has added the Attorney General's new argument as question four.

Despite its grounding in a different section of the Constitution, the Attorney General's new argument is merely a variant of the petitioners'

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[6] The Court of Appeals has rejected a similar argument as without foundation. (*In re Marriage of Potter* (1986) 179 Cal.App.3d 73, 84.)

argument that Proposition 8 violates separation of powers. In essence, both arguments protest that Proposition 8 is unfair to gays and that this Court has an obligation higher than the written Constitution to address such unfairness. As explained in the prior section, courts lack the power to decide constitutional issues on meta-constitutional principles that amount to nothing more than policy preferences.

When the Court applies the Constitution as it is written today to the case of petitioners, such as Ms. Strauss, who cannot assert *res judicata,* same-sex marriage obviously is not an inalienable right. How could it be? The Constitution itself denies that right.[7] (CAL. CONST. art. I, §7.5.) Moreover, the provision denying the right is a more specific, later-enacted provision, which obviously defeats the Attorney General's invocation of Article I, Section 1: "a recent, specific provision [of the Constitution] is deemed to carve out an exception to and thereby limit an older, general provision." (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 45; accord *Rose v. State of California* (1942) 19 Cal.2d 713, 723-24 [when a specific provision conflicts with a general provision, the specific one governs].)

Independently fatal to the Attorney General's argument is Section 24 of the Constitution's Declaration of Rights, which provides that "[t]his declaration of rights may not be construed to impair or deny others retained

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[7] Although *traditional* marriage unquestionably is a fundamental right under the federal Constitution, (*Turner v. Safley* (1987) 482 U.S. 78, 95 ["the decision to marry is a fundamental right"]; *Skinner v. Oklahoma ex rel. Williamson* (1942) 316 U.S. 535, 541 ["[m]arriage and procreation are fundamental"],) the federal Constitution does not prohibit California's denying validity or recognition to same-sex marriage. (*Lawrence v. Texas* (2003) 539 U.S. 558, 578 ["The present case ... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"]; accord 28 U.S.C. §1738C.)

by the people." (CAL. CONST. art. I, §24.) Because the people reserved the right to amend their Constitution, (CAL. CONST. art. XVIII, §3,) Section 24 prevents the Attorney General's attempt to pit Article I, Section 1 against Article I, Section 7.5:

> [The] powers of the State reside primarily in the people; and they, by our Constitution, have delegated ... their ... powers to the three departments – legislative, executive, and judicial – except in those cases where they have themselves exercised these powers, or expressly, or by necessary implication, reserved the same to themselves.

(*Nougues v. Douglass* (1857) 7 Cal. 65, 69.[8]) While *amicus curiae* Eagle Forum ELDF respectfully submits that there is no conflict between Proposition 8 and inalienable rights, to the extent such a conflicts exists, Proposition 8 must prevail. (*Bowens, supra; Rose, supra.*)

For the foregoing reasons, it seems inconceivable that this Court would have taken the position of the *Marriage Cases* decision if Proposition 8 already had passed. Now that Proposition 8 *has passed,* the situation is really no different. It is the *Marriage Cases* decision that is constitutionally untenable, not Proposition 8.

III. QUESTION 3: PROPOSITION 8 RENDERS PRE-ADOPTION SAME-SEX MARRIAGES INVALID AND NO LONGER RECOGNIZED IN CALIFORNIA

The third question in this Court's order dated November 19, 2008 – namely, Proposition 8's effect on pre-enactment same-sex marriages – applies only if Proposition 8 survives the procedural and substantive attacks of the questions one, two, and four. Because Proposition 8 readily survives

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[8] Although *Nougues* predates the initiative power recognized in the 1911 Constitution, it correctly provides that the people have delegated their powers to the three branches, subject *inter alia* to the people's reserving the power to amend the Constitution.

those attacks, this Court must then turn to Proposition 8's impact on marriages that predate its adoption into California's Constitution.

Amicus curiae Eagle Forum ELDF respectfully submits that Proposition 8's plain language and the history of its enactment clearly require this Court to deny petitioners' requested relief to enjoin Proposition 8's application. Proposition 8 prospectively denies validity and recognition to same-sex marriages, wherever and whenever they were performed (Section III.C.1, *infra*). In doing so, Proposition 8 does not unlawfully impair vested rights in same-sex marriages (Section III.C.2, *infra*). But even if it does impair vested rights, Proposition 8 could do so only for parties to the *Marriage Cases* litigation who can assert such rights through *res judicata* (Section III.C.3, *infra*). Finally, assuming *arguendo* that it operates retroactively to impair vested rights in same-sex marriages, Proposition 8 does so lawfully as an exercise of the police power (Section III.C.4, *infra*).

A "marriage *prohibited as* incestuous *or illegal and declared to be 'void'* or 'void from the beginning' is a legal nullity, and its invalidity may be asserted or shown in any proceeding in which the fact of marriage may be material." (*In re Gregorson's Estate* (1911) 160 Cal. 21, 26.) This Court cited the foregoing proposition in *Lockyer,* before *Marriage Cases* undercut Proposition 22. (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1114.) Once again, the legal principle applies, now that Proposition 8 has undercut *Marriage Cases:* same-sex marriages, whenever performed, are invalid (*i.e.,* declared void). Such marriages are before this Court now, just as they were in *Lockyer* in 2004. Because Proposition 8 is valid, this Court must find those marriages invalid.

A. Proposition 8 Does Not Apply Retroactively by Denying Prospective Validity and Recognition to Same-Sex Marriages Performed Prior to its Adoption

"[I]nitiative measures are subject to the ordinary rules and canons of statutory construction." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212.) "To determine legislative intent, a court begins with the words of the statute," which "generally provide the most reliable indicator of legislative intent." (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047.) If the statutory text is "clear and unambiguous," that ends the inquiry: "There is no need for judicial construction and a court may not indulge in it." (*Id.* ["If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs" (quoting *People v. Snook* (1997) 16 Cal.4th 1210, 1215)].) If they must proceed beyond the statutory text, courts interpret statutes reasonably, with due regard both for the statutory language and legislative purpose. (*County of Alameda v. Kuchel* (1948) 32 Cal.2d 193, 199.)

In addition to the foregoing general rules of construction, two specific rules are relevant to Proposition 8: (1) the presumptions that later-enacted provisions and specific provisions govern over earlier-enacted provisions and general provisions; and (2) the presumption against retroactive application of statutes. The former rules are discussed throughout this brief, but the next two sections explain why Proposition 8 is not impermissibly retroactive.

1. Proposition 8 Prospectively Denies Validity and Recognition of Same-Sex Marriages

Citing the U.S. Supreme Court's decision in *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 268, this Court has "recognized [that] deciding when a statute operates retroactively is not always a simple or

mechanical task." (*People v. Grant* (1999) 20 Cal.4th 150, 157 [interior quotations omitted].) Instead, that decision "comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." (*Id.* [interior quotations omitted].) Further, the decision involves "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." (*Id.* [interior quotations omitted].)

"Having articulated the presumption against retroactive application, [t]here remains the question of what the terms 'prospective' and 'retroactive' mean." (*Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230 [alteration in original, interior quotations omitted].) "In deciding whether the application of a law is prospective or retroactive, we look to function, not form" and "consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies." (*Id.* at 230-31.) Prohibited retroactivity arises only when the new law alters "the legal consequence of past conduct by imposing new or different liabilities" for that conduct and substantially affects existing rights and obligations. *Id.*

As this Court has coined the terms, "Primary retroactivity obtains when regulations alter[] the *past* legal consequences of past actions," and "Secondary retroactivity occurs when regulations affect[] the *future* legal consequences of past transactions." (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 281-82 [interior quotations omitted, emphasis and alterations in original].) While both primary and secondary retroactivity are "retroactive," only "primary retroactivity" is "deemed impermissibly so." (*Id.*) Most significantly, secondary retroactivity does not subvert "the right to have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred," against which the "presumption of

prospective operation is classically intended to protect." (*Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233.)

Having set forth the standard for what constitutes impermissible retroactivity, it is clear that nothing prevents Proposition 8's application to pre-enactment marriages.

First, Proposition 8 does not impose *any* liability. It merely denies validity and recognition.

Second, Proposition 8 operates *prospectively* to deny validity and recognition to same-sex marriages performed prior to the voters' approval of Proposition 8 into the Constitution. In short, Proposition 8 is not retroactive.

Third, Proposition 8 does not substantially affect existing rights and obligations. As this Court recognized, the underlying public debate over same-sex marriage involves nomenclature more than substance because California's statutes provide marriage-like rights to same-sex couples. (*Marriage Cases,* 43 Cal.4th at 479-80.) Moreover, the people who entered now-invalid same-sex marriages retain the remedy of enforcing their substantive rights in equity. (CCSF Response at 49-50 n.17.).

Fourth, even if Proposition 8 imposed liabilities retroactively, those who entered same-sex marriages in the uncertain period between Marriage Cases becoming final on June 16, 2008, and the election on November 4, 2008, did so knowing that their marriage might be denied validity and recognition. In other words, they had "fair notice" and lacked both "reasonable reliance" and "settled expectations." (*Grant,* 20 Cal.4th at 157; see also note 11, *infra.*) This Court has expressly declined to "consider reliance upon Court of Appeal decisions when ... called upon to determine for the first time whether those decisions were correct." (*Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 963; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 689, n 28.) Although this litigation

presents a case of reliance on a decision of *this Court,* the passage of Proposition 8 plainly overrules *Marriage Cases.* When the same-sex marriages were performed, the possibility of Proposition 8's adoption was no less likely than the possibility of this Court's reversing a Court of Appeals decision.

For all the foregoing reasons, Proposition 8 is not impermissibly retroactive. As such, nothing precludes its application to marriages performed between the *Marriage Cases* decision becoming final in June and the election in November.[9]

2. Proposition 8 Abrogates *Marriage Cases*

Even if Proposition 8 could be interpreted as retroactive, it should qualify for the "exception to the general rule that statutes are not construed to apply retroactively," which arises "when the legislation merely clarifies existing law." (*Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 574; *accord Martin v. California Mut. B. & L. Ass'n* (1941) 18 Cal.2d 478, 484; *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828.) Two factors suggest that Proposition 8 merely clarifies existing law.

First, when the text of Proposition 8 qualified for the November ballot, *it was the existing law.* This explains the lack of a retroactivity clause and a crucial distinction between Proposition 8 and other ballot initiatives that abrogated judicial decisions. Proposition 8's text reflected the law of the State of California from Statehood until the *Marriage Cases*

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[9] The petitioners filed this litigation, and they bear the burden of establishing standing. *Amicus curiae* Eagle Forum ELDF is not aware of anything in the record that would establish the petitioners' separate standing for a determination of whether Proposition 8 invalidates same-sex marriages *ab initio* (*e.g.,* back to the wedding day), as opposed to merely withholding validity and recognition prospectively from November 5, 2008.

decision, and Proposition 8's text was circulated to and approved by the voters to appear on the November ballot protectively, before the *Marriage Cases* decision.

Second, the proponents argued in the Voter Pamphlet that *Marriage Cases* was "wrongly" decided, that Proposition 8 would "restore" marriage's definition and "overturns the flawed legal reasoning" of *Marriage Cases,* and "ensures that gay marriage can be legalized only through a vote of the people." (Voter Pamphlet, at 55-57.) Taken together these factors suggest that Proposition 8 was intended to abrogate *Marriage Cases* by authoritatively declaring existing law.

Although the Legislature may enact legislation to abrogate decisions of this Court, separation of powers precludes the *Legislature's* dictating that the "new legislation merely declared what the law always was," once this Court had issued a final decision on what the prior law was. (*McClung v. Employment Development Dep't* (2004) 34 Cal.4th 467, 473; see Attorney General's Br., at 65-66 [collecting cases].) As indicated in Section II.B, *supra,* however, the separation-of-powers doctrine does not bind the voters. Unlike the Legislature, the voters are not a mere co-equal branch of government.

Similarly, although separation of powers prevents the Legislature from interfering with final judicial *judgments,* (*People v. Bunn* (2002) 27 Cal.4th 1, 21,) nothing prevents the voters from abrogating prior judicial holdings. (See, e.g., *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 46 ["[Proposition 115], as enacted by the voters of California, has abrogated the holding of [a prior Supreme Court decision] such that an indicted defendant is no longer deemed denied the equal protection of the laws under [California's equal-protection clause] by virtue of the defendant's failure to receive a postindictment preliminary hearing"]). At least with respect to non-parties to the *Marriage Cases* judgment, (Section III.C,

infra,) this Court should recognize that the voters abrogated *Marriage Cases* and declared existing law. As such, Proposition 8 presents no question of retroactivity.

B. Neither Parties nor Non-Parties to *Marriage Cases* Have a Vested Right in Continued Recognition of Same-Sex Marriage Performed prior to Proposition 8's Adoption

Even if Proposition 8 is retroactive as applied to same-sex marriages performed prior to November 5, 2008, that does not make it *impermissibly* retroactive. To be impermissibly retroactive, a statute must constitute an *ex post facto* law or impair vested rights or contracts. (*San Bernardino County v. State Indus. Acc. Comm'n* (1933) 217 Cal. 618, 628-29.) Because Proposition 8 does not involve criminal law, only vested rights (this Section and Section III.D, *infra*) and impaired contracts (Section III.D, *infra*) apply. As with the initial determination that a statute is impermissibly retroactive, the determination of a vested right requires reasonable reliance, and settled expectations. (See Section III.A, *supra.*) All are lacking here.

As the CCSF petitioners make clear, the issue of retroactive application was discussed inconclusively during the election. (CCSF Response, at 64-66 [citing press accounts].) Reliance on *Marriage Cases* in that environment was not reasonable. (*Grafton Partners L.P.* 36 Cal.4th at 963; *Interactive Data Corp.* 47 Cal.3d at 689, n.28.) Under the circumstances, it would have been far more reasonable to wait less than five months for the results of the election. (Indeed, many weddings take more than five months *to plan,* which suggests a haste that also negatives reasonable reliance.)[10]

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[10] At least for non-parties to the *Marriage Cases* litigation (*i.e.,* those who could not rely on its preclusive effect), a prudent person with significant interests hanging in the balance could have secured negative

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Although petitioners and the Attorney General would put the burden of establishing Proposition 8's application to existing same-sex marriages on the Interveners, it is petitioners who bear the burden of establishing the reasonableness of their reliance. Two additional factors weigh against finding reliance reasonable. *First,* while Proposition 8 did not have an express clause to address its application to existing same-sex marriages, it also did not have a "grandfather clause" for such marriages. (See, e.g., CAL. GOV'T CODE §66499.30(d).) *Second,* unlike a statute, which might include ambiguities about its prospective application to pre-existing actions, "the provisions of [California's] Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (CAL. CONST. art. I, §26.) "Under that provision, all branches of government are required to comply with constitutional directives ... [and each] constitutional provision is self-executing to this extent, that everything done in violation of it is void." (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 306-07 (interior quotations omitted); *Zumwalt v. Superior Court* (1989) 49 Cal.3d 167, 179 [Article I, Section 26 "commands obedience to all provisions of the Constitution"].) Both factors suggest that Proposition 8 makes petitioners' reliance unreasonable.

Under all of the foregoing circumstances, no one can establish reasonable reliance on *Marriage Cases* when Proposition 8 qualified for the

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declaratory relief on the lawfulness of their planned actions: "'the action for a so called negative declaration is simply a broadening of the equitable action for the removal of a cloud from title to cover the removal of clouds from legal relations generally.'" *Luckenbach S. S. Co. v. U.S.* (2d Cir. 1963) 312 F.2d 545, 551-52 (*quoting* EDWIN BORCHARD, DECLARATORY JUDGMENTS, 21 (2nd ed. 1941)).

November ballot on June 2, 2008, two days before this Court denied the requested stay and two weeks before *Marriage Cases* became final.

C. Under Principles of *Res Judicata*, neither Parties nor Non-Parties to *Marriage Cases* Have a Right to Continued Recognition of Same-Sex Marriage

In civil cases, the doctrine of *res judicata* bars parties or those in privity with them from relitigating a cause of action finally determined by a court of competent jurisdiction (claim preclusion) or any issues actually determined in such a prior proceeding (issue preclusion or collateral estoppel). (*In re Russell* (1972) 12 Cal.3d 229, 233.) Following this Court's lead, (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810,) the U.S. Supreme Court also has allowed non-mutual collateral estoppel, where a *non-party* to the prior litigation asserts collateral estoppel against a party that previously lost on an issue. (*Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 326 & n.4.) *Res judicata* makes a prior decision binding, even if that decision is wrong. (See, e.g., *Federated Dept. Stores, Inc. v. Moitie* (1981) 452 U.S. 394, 399 & n.3) The general rules of *res judicata* have two caveats relevant here.

First, although *mutual* collateral estoppel is available against the government, (*Montana v. U.S.* (1979) 440 U.S. 147, 153,) the U.S. Supreme has rejected nonmutual estoppel against the federal government. (*U.S. v. Mendoza* (1984) 464 U.S. 154.) Under *Mendoza,* only parties to the prior litigation against the federal government can assert preclusion against the federal government. (*Id.*) Although this Court does not appear to have addressed the issue, a California Court of Appeals and the Ninth Circuit have extended *Mendoza* to state government. (*Helene Curtis, Inc. v. Assessment Appeals Bd.* (1999) 76 Cal.App.4th 124, 133 [citing *Mendoza*]; *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.* (9th Cir. 2005) 425 F.3d 708, 714 ["*Mendoza*'s rationale applies with equal force to

[an] attempt to assert nonmutual defensive collateral estoppel against ... a state agency"].) It seems *apparent,* therefore, that non-parties to *Marriage Cases* cannot bind government officials to *Marriage Cases.*

Second, although non-parties can assert non-mutual collateral estoppel against parties bound by prior litigation, it violates due process to bind anyone to litigation in which the person to be bound did not participate. (*Baker v. Gen. Motors Corp.* (1998) 522 U.S. 222, 237-38 & n.11; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828 ["Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding"] [emphasis in original].) Similarly, it violates due process for the doctrine of *stare decisis* to apply so conclusively that, in effect, it operates as preclusion against non-parties to the prior litigation. (*S. Cent. Bell Tel. Co. v. Alabama* (1999) 526 U.S. 160, 167-68.) It is clear, therefore, that no one – including this Court – can bind the Interveners to the *Marriage Cases* litigation in which they did not participate.

With that background on the law of preclusion and due process, *amicus curiae* Eagle Forum ELDF now assesses the application of preclusion to four permutations of petitioners: unmarried non-parties, married non-parties, unmarried parties, and married parties.

1. Unmarried Non-Parties Cannot Rely on *Marriage Cases* and Have No Right to Marry

Unmarried non-parties to the *Marriage Cases* litigation have the weakest case of all petitioners here. As explained above, these petitioners cannot assert non-mutual collateral estoppel against the State, much less against the non-party Interveners who championed Proposition 8.

Moreover, their legal position is untenable. If Proposition 22 originally had amended the *California Constitution* instead of the Family Code, this Court could not have credibly found the ban on same-sex marriage *unconstitutional.* Now that Proposition 8 has become part of the

California Constitution, it is simply too late for same-sex marriages in California under the rationale of *Marriage Cases.*

2. Married Non-Parties Cannot Rely on *Marriage Cases* and Have No Right to Continued Recognition of their Marriage

Non-parties who married in reliance on the *Marriage Cases* decision do not fare much better than those who did not marry. They cannot assert non-mutual collateral estoppel against the government to compel recognition of their marriage under *Marriage Cases,* and they *a fortiorari* cannot assert any form of estoppel against the Interveners who were not party to the *Marriage Cases* litigation. Instead, these petitioners need to defend their right to continued recognition of their marriage under the Constitution as it exists today.

As it exists today, the Constitution provides that "[o]nly marriage between a man and a woman is valid or recognized in California." (CAL. CONST. art. I, §7.5.) The equal-protection rationale that guided the *Marriage Cases* majority is unavailable now, because Proposition 8 expressly rejects the notion that a same-sex marriage ban violates equal protection. (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 45 ["recent, specific provision [of the Constitution] is deemed to carve out an exception to and thereby limit an older, general provision"]; *Rose v. State of California* (1942) 19 Cal.2d 713, 723-24 [specific statute governs over general statute].) Under the circumstances, *Marriage Cases* has lost its precedential value for the proposition that the Equal Protection Clause requires same-sex marriage rights.

3. Unmarried Parties Can Rely on *Marriage Cases,* but Have No Right to Marry

For any parties to the *Marriage Cases* litigation who deferred their same-sex marriage until after the November election, *res judicata* cannot compel recognition of their right to marry now that Proposition 8 has

passed. Even setting aside their inability to bind the Interveners to the *Marriage Cases* decision, the *mutual* collateral estoppel that they can assert against the government is not enough to overcome Proposition 8's passage.

Working from general legal principles, this Court found California's Equal Protection Clause to guarantee the right to same-sex marriage. The *Marriage Cases* decision has been abrogated by a constitutional amendment that finds same-sex marriage prospectively invalid. Under the circumstances, this Court must give prospective effect to the abrogating constitutional amendment. (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 45.) Thus *Marriage Cases* parties who have not yet married have lost their right to marry prospectively.

4. Married Parties Can Rely on *Marriage Cases*, but Have No Right to Continued Recognition of their Marriage

Under issue preclusion, only *Marriage Cases* parties who entered same-sex marriages in reliance on *Marriage Cases* between June 16, 2008, and November 5, 2008, have even a credible claim to a vested right. (Section III.B, *supra.*) But even they cannot assert *res judicata* against the non-party Interveners here, without violating the Interveners' due-process rights. (*Baker v. Gen. Motors Corp.* (1998) 522 U.S. 222, 237-38 & n.11; *S. Cent. Bell Tel. Co. v. Alabama* (1999) 526 U.S. 160, 167-68.) Because the later-enacted and more-specific amendment undermines the *Marriage Cases* holding on which they rely, (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 45,) married *Marriage Cases* parties cannot claim continued recognition of their same-sex marriages. (CAL. CONST. art. I, §7.5.)

D. Even If Same-Sex Marriages Qualify as Vested Rights or Contracts, Proposition 8 Lawfully Denies their Validity and Recognition under California Law

Even if *Marriage Cases* creates a vested right in an existing same-sex marriage, that does not end the inquiry. Government retains the police

power to "impair such rights when considered reasonably necessary to protect the health, safety, morals and general welfare of the people." (*In re Marriage of Buol* (1985) 39 Cal.3d 751,760-61.) Because it is "settled that the government may not contract away its right to exercise the police power in the future," (*Avco Community Developers, Inc. v. South Coast Regional Comm'n* (1976) 17 Cal.3d 785, 800,) "[v]ested rights are not immutable." (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592.) As explained below, the voters of California reasonably exercised their police power to protect the general welfare.

To determine whether a retroactive law violates due process by impairing vested rights, courts consider a variety of factors:

> [T]he significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.

(*Id.*) With respect to these factors, *amicus curiae* Eagle Forum ELDF submits that: (1) California has important interests, including protection of parents' rights to manage the upbringing of their children; (2) Proposition 8's retroactive effect (if it were impermissibly retroactive) would be necessary to avoid the moral relativism from which parents sought to protect their children; (3) reliance on the *Marriage Cases* holding was short (less than five months) and occurred entirely during the period after Proposition 8 qualified for the November ballot; (4) for the reasons stated here, reliance on *Marriage Cases* was not legitimate; (5) actions taken in reliance on *Marriage Cases* were generally of a personal nature, which Proposition 8 does not undo; and (6) denying those same-sex marriages official validity and recognition leaves intact the personal relationships, the church (if any) ceremonies, and wedding memories.

Significantly, and as this Court recognized in *Marriage Cases,* this litigation and the underlying public debate involve nomenclature more than substance because same-sex couples have marriage-like rights under California's *statutory* laws. (*Marriage Cases,* 43 Cal.4th at 779-80.) Moreover, the parties to a now-invalid same-sex marriage retain the remedy of enforcing their substantive rights in equity. (CCSF Reply at 49-50 n.17.) As such, Proposition 8's retroactive application (if impermissible under the presumption against retroactive application) would not disrupt much and would be an entirely valid exercise of the police power. In sum, even if Proposition 8 were retroactive (it is not), and even if *Marriage Cases* created vested rights (it did not), Proposition 8 nonetheless would permissibly apply retroactively.

To the extent that the petitioners or Attorney General raise the federal or California contract clauses, (U.S. CONST., art. I, §10; CAL. CONST., art. I, §9,) neither provides a separate basis on which petitioners can prevail. Although "[t]he language of these clauses appears unambiguously absolute ... it has long been settled that the proscription is not an absolute one and is not to be read with literal exactness." (*City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 376.) "Whether a contract is impaired in the constitutional sense depends upon the public interest in, and the reasonableness and necessity of, the legislative action. Thus, the analysis is similar to that involved in the determination of whether a retroactive statute violates due process by impermissibly impairing vested rights." (*In re Marriage of Barnes* (1987)

43 Cal.3d 1371, 1377.) As such, the federal and state contract clauses do not provide an independent basis on which to invalidate Proposition 8.[11]

CONCLUSION

For the foregoing reasons, those cited by the Interveners on all questions, and those cited by the Attorney General on the first two questions, *amicus curiae* Eagle Forum Education & Legal Defense Fund respectfully submits that the Court must deny the requested writs for mandamus and prohibition. Proposition 8 is entirely lawful, and petitioners are not entitled to any relief against its application here.

Dated: January 14, 2009

Respectfully submitted,

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[11] Because the parties to a now-invalid same-sex marriage can enforce their substantive rights in equity, (CCSF Response at 49-50 n.17,) Proposition 8's invalidating the "marriage contract" while leaving adequate remedies intact would not violate the contract clause. (*Funkhouser v. J.B. Preston Co.* (1933) 290 U.S. 163, 167 ["statute in question concerns the remedy and does not disturb the obligations of the contract"].)

RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(l) of the California Rules of Court, counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund hereby certifies that the foregoing "Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund in Support of Interveners in Support of Denial of Extraordinary Writs" is proportionately spaced, has a typeface of 13 points or more, and contains 8,456 words, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate of Compliance, as calculated by using the word count feature in Microsoft Word 2007.

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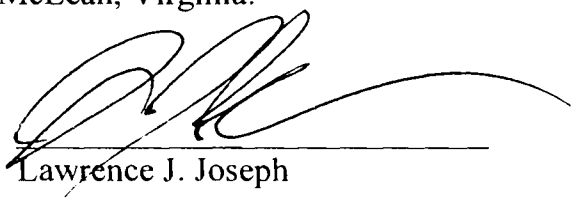
PROOF OF SERVICE

I, Lawrence J. Joseph, hereby declare: I am a resident of the Commonwealth of Virginia, over the age of eighteen, and not a party to this action; my business address is 1250 Connecticut Avenue, NW, Suite 200, Washington, DC 20036.

On January 14, 2008, I caused one copy of the foregoing "Application for Leave to File Brief *Amicus Curiae*" and the accompanying "Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund in Support of Interveners in Support of Denial of Extraordinary Writs" to be served by priority U.S. mail, postage prepaid, on the interested parties in this action, by placing a true copy thereof in sealed envelopes addressed as indicated on the attached service list.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on January 14, 2009, at McLean, Virginia.



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