Case Nos. S168047, S168066, S168078

IN THE

Supreme Court of the State of California

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

ROBIN TYLER et al., Petitioners,
v.
STATE OF CALIFORNIA et al., Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,
Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

BRIEF AMICUS CURIAE OF FAMILY RESEARCH COUNCIL IN SUPPORT OF INTERVENERS

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SUMMARY OF ARGUMENT

This case involves matters of utmost concern to citizens in a constitutional republic. To be sure, the future of marriage in California weighs in the balance, but the issues presented herein are much broader than the definition of society's most foundational social institution. Petitioners frame their arguments in terms of the constitutional distinction between a "revision" and an "amendment," and the Attorney General discusses issues of "inalienable" rights. While these arguments present distinct considerations of their own, one fundamental question subsumes them both: What authority lies in the people to alter their constitution? In an effort to best address the underlying issues raised by all Petitioners and the Attorney General, *Amicus* focuses on this overarching, axiomatic issue of the people's role under California's constitutional system of government.

Amicus acknowledges that if the enactment of Proposition 8 did not comply with the requisite procedures for amending the Constitution, this Court's recognition of that *procedural* deficiency would be a valid exercise of its judicial-review power. But Petitioners' arguments, while cloaked in the procedural language of "revisions" and "amendments," go much beyond that; their attacks impugn the people's sovereignty—the foundation of California's system of government. To the extent that Petitioners awkwardly attempt to fit their arguments within the revision-amendment framework, Interveners and the Attorney General have persuasively demonstrated the lack of merit in those altogether clumsy contentions. (*See* Intnr. Opp. Br. at pp. 6-30; Gov. Ans. Br. at pp. 22-53.) Thus, in order to supplement rather than repeat Interveners' arguments, this brief focuses on the history surrounding the people's intrinsic right to change their Constitution.

Amicus explores three primary points in this brief: first, the sovereignty of the people in a constitutional republic, including their

inherent right to alter their founding document in whatever way they choose; second, the Founders' understanding that the people's right to change their Constitution is "inalienable" and cannot legitimately be withheld by any government official (including members of the judiciary); third, the history surrounding the people's creation of the initiative in 1911 as well as the historic understanding of that broad power. In light of these principles, *Amicus* concludes that the voter-initiated enactment of Proposition 8 is a proper exercise of the people's sovereign authority.

ARGUMENT

I. The Sovereign People In A Constitutional Republic Retain The Inherent, Unfettered Right To Alter Their Constitution.

The essence of a constitutional republic—both the one established in California in 1849 and the one devised in Philadelphia in the summer of 1787—includes the right of the sovereign people to alter or abolish their constitution for whatever reasons they see fit (provided, in the case of California's Constitution, that it does not violate principles of that great federal charter). This sweeping authority includes, among countless other things, the people's right to enact Proposition 8.

The Preamble of both the California and federal constitutions demonstrates the people's ultimate sovereignty better than any lengthy legal treatise. Not only the language of the Preamble, but also popular ratification—the act of legitimizing and empowering the governmental system—manifest this foundational concept of the people's sovereignty. (*See Ex parte Zhizhuzza* (1905) 147 Cal. 328, 336 [acknowledging that the people enacted the Constitution "in their sovereign capacity"].) In a

constitutional republic, the people's right to alter their founding document cannot be doubted, questioned, or undermined.[1]

A. The Preamble's Promise of Self-Government Demonstrates The People's Broad Right To Amend The Document They Created.

The California Constitution aptly begins with an acknowledgement of its creator, the sovereign people: "We, the people of California, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution." (Cal. Const. of 1849, preamble.) A constitutional preamble is intended to "distill[] the underlying values that moved the Framers." (Meese, The Heritage Guide to the Constitution (2005) p. 43.) The underlying value expressed in the opening words, "We the people," has a "distinctive emphasis on popular sovereignty." (Amar, America's Constitution, *supra*, at p. 505; *see also Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 28 ["[O]ur state Constitution is the highest expression of the will of the people acting in their sovereign capacity"].) Those words are an enduring "promise of self-government," not a fleeting pledge that would evaporate upon the inauguration of the new government, but a guarantee that the people would carry with them throughout history. (Amar, America's Constitution, *supra*, at p. 5.)

"Preamble-style popular sovereignty [is] an ongoing principle." (Amar, America's Constitution, *supra*, at p. 10.) James Wilson, drafter of the federal preamble, recognized that the people's right to "establish" their constitution, as recognized in both the federal and California preambles,

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[1] The word "republic" derives from "the same etymological roots—*publica*, *poplicus*—as the pivotal Preamble word 'people,' whose Greek counterpart, *demos*, in turn underlay the word 'democracy.'" (Amar, America's Constitution (2005) p. 16.) Thus, it may fairly be said, based on a proper etymological understanding, that a constitutional "republic" focuses on the primacy of the people.

implies their equal right to change, repeal, and annul it. (2 Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution (1888) pp. 434-37 (hereafter "Debates in the Several State Conventions") [statement of James Wilson, federal constitutional delegate from Pennsylvania and United States Supreme Court Justice].) So long as the people comply with the requisite procedural requirements, Wilson acknowledged, they "may change the constitution whenever and however they please. It is a power paramount to every constitution, *inalienable* in its nature." (*Id.* at p. 432 [statement of James Wilson] [emphasis added].)

When discussing the federal preamble in the *Federalist Papers*, Alexander Hamilton noted that "in strictness, the people . . . retain everything [and] have no need of particular reservations" including the power to alter their founding charter. (Hamilton, The Federalist No. 84 (C. Rossiter 1961) p. 512.) Hamilton then went on to describe the preamble as a "recognition of popular rights." (*Ibid.*) "By 'popular rights' [Hamilton] meant rights of the people [as] sovereign, including their right to [change] what they had created." (Amar, America's Constitution, *supra*, at p. 11.)

Given this universal understanding of the people's broad power to alter their Constitution—a power inherent in the structure of a constitutional republic, in the very words "We the people"—it undermines the foundation of California's governmental system to suggest, as Petitioners and the Attorney General do, that the people cannot add Proposition 8 to their founding document. Such arguments grossly miscalculate the people's sovereign authority over California's Constitution and their preeminent role in a constitutional republic.

B. The People's Ratification Of The Constitution Displays Their Enduring Sovereignty Over That Document.

While the Constitution's opening words succinctly demonstrate the people's ongoing sovereignty, mere words sometimes fall short of demonstrating the breadth and depth of foundational political principles. Thus, *Amicus* emphasizes that not only the words of the Preamble, but also the act of ratification displays the preeminence of the people in California's constitutional republic.

Prior to ratification, a constitution is a "mere proposal." (4 Elliot, Debates in the Several State Conventions, *supra*, at p. 23 [statement of William R. Davie, federal constitutional delegate from North Carolina].) Until the people agree to that proposal, it is "of no more consequence than the paper on which it is written." (Madison, The Federalist No. 40, *supra*, at p. 248.) At the California Constitutional Convention of 1849, Mr. Norton, a delegate from San Francisco, aptly recognized that "[t]his Constitution is nothing until ratified by the people; but from the moment it is ratified [it will create] the State of California." (Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution (1850) p. 379 (hereafter "Debates in the Convention of California").) By the people's decree, a constitution becomes "of value and authority"; without the people's approval, however, it never "receive[s] the character of authenticity and power." (2 Elliot, Debates in the Several State Conventions, *supra*, at p. 470 [statement of James Wilson].)

On November 13, 1849, the people of California acting in their sovereign capacity ratified their Constitution by popular vote. (*See* Cal. Const. of 1849, schedule, § 6.) The "most democratic deed" of popular ratification first breathed authority into that lifeless document, demonstrating that both the Constitution and the government it established were at their core inherently democratic. (*See* Amar, America's

Constitution, *supra*, at p. 5.) Indeed, ratification was a tangible manifestation of the government's dependence upon and subjugation to the people. (*See* Madison, The Federalist No. 40, *supra*, at p. 248.)

Ratification also demonstrated, as the words of the Preamble declared, that the people are the ultimate creators of California's constitutional republic. With creation comes the inherent right to alter the created thing. (4 Elliot, Debates in the Several State Conventions, *supra*, at p. 230 ["[O]ur governments have been clearly created by the people themselves. The same authority that created can destroy; [thus] the people may undoubtedly change the [Constitution]."] [statement of James Iredell, federal constitutional delegate from North Carolina and United States Supreme Court Justice].) "From [the people's] authority the constitution originates: . . . in their hands it is as clay in the hands of the potter." (1 McCloskey, The Works of James Wilson (1967) p. 304.)

The popular sovereignty displayed by ratification is the cornerstone of a constitutional republic. Petitioners and the Attorney General minimize this foundational principle by decrying the so-called "tyranny of the majority" (*see* Gov. Ans. Br. at p. 85), while in the same breath advocating for tyranny of a different sort. In seeking to strike down Proposition 8—and thereby insulate this Court's decision in *Marriage Cases* (2008) 43 Cal.4th 757—they attempt to erode California's constitutional republic and replace it with a judicial oligarchy. They believe this Court sits above the sovereign people, with unfettered authority to evaluate the wisdom of the people's sovereign acts. The premise of many of their arguments strikes directly at the heart of California's system of government, seeking to relegate the people and promote the judiciary. Adopting Petitioners' or the Attorney General's challenges to Proposition 8 will necessarily have that structural effect.

By attacking the essence of California's system of government—the preeminence of the people—Petitioners and the Attorney General urge this Court to do precisely what Petitioners have accused the people of doing—accomplish an unlawful constitutional "revision." A constitutional "revision" occurs when there is a "substantial[]" alteration of "the basic governmental framework set forth in [the California] Constitution." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 510 [emphasis omitted].) To accept Petitioners' or the Attorney General's arguments and shield this Court's *Marriage Cases* decision from the people's sovereign authority would in effect amount to a constitutional "revision." It would transfer the people's authority over a vital public-policy matter to the judiciary and prevent (under the Attorney General's theory) or greatly restrict (under Petitioners' theory) the people from exercising their sovereign right to change the Constitution on that important issue. (*See Marriage Cases*, *supra*, 43 Cal.4th at 865 (dis. opn. of Baxter, J.) [noting that "the People's general right . . . to decide fundamental issues of public policy for themselves" is "our society's most basic shared premise"].) Such a seismic shift in governmental power is the epitome of a constitutional "revision."[2]

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[2] Adopting Petitioners' or the Attorney General's arguments (and thereby accomplishing a judicially imposed constitutional "revision") is a more egregious affront to basic constitutional principles than the harm alleged by Petitioners. Petitioners contend that the people utilized the improper procedure for altering their Constitution, alleging that they should have used the "revision" rather than the "amendment" process. While an improper people-initiated "revision" is an improvident exercise of legitimate authority—*i.e.*, the people's inherent right to change their Constitution—a judicial "revision" is a deliberate usurpation of another's authority.

II. Article II, Section 1 Of The California Constitution Confirms the People's "Inalienable" Right To Change The Constitution By Enacting Proposition 8.

Even though a constitutional republic by nature guarantees the people's ultimate authority to change their supreme charter, Californians made that power explicit by adding Article I, Section 2 to the Constitution of 1849, which is now found in Article II, Section 1. That provision, which will hereafter be referred to as the Sovereignty Provision, states:

> *All political power is inherent in the people.* Government is instituted for the protection, security, and benefit of the people; and they have *the right to alter or reform* the same, whenever the public good may require it.

(Cal. Const. art. II, § 1, former art. I, § 2 [emphasis added].) The Sovereignty Provision expressly encapsulates both the people's complete sovereignty and their encompassed power to "alter or reform" the Constitution.

The Founders affixed the Sovereignty Provision in the original "Declaration of Rights." (Cal. Const. of 1849, art. I, § 2.) To modern legal scholars, the "Declaration of Rights" might seem like a peculiar location for a provision enshrining the ultimate authority of the sovereign people. Contemporary legal theory typically characterizes the protection of "individual rights" in terms of restraining the collective majority, not affirming the paramount power of the masses. (*See* 13 Cal.Jur.3d (2008) Constitutional Law, § 197 [discussing how "securing the rights of individuals" primarily involves "protect[ing] the weak from the strong" and "secur[ing] the rights of feeble minorities"].) Yet, such a narrow view of "individual rights" is not supported by California's Founders.

The Founders understood that Californians' first and most basic political right is their authority, when acting in their collective sovereign

capacity, to control the government by changing the Constitution. (*Cf. Fort v. Civil Serv. Comm'n of Alameda County* (1964) 61 Cal.2d 331, 334 ["The [right] to participate in political activity is a fundamental principle of a democratic society and is the premise upon which our form of government is based."].) Yale Law Professor Akhil Amar has similarly recognized that "[n]o liberty [is] more central than the people's liberty to govern themselves under rules of their own choice." (Amar, America's Constitution, *supra*, at p. 10.) The Founders' placement of the Sovereignty Provision in the "Declaration of Rights" confirms the centrality of this fundamental right. In discussing this placement, Delegate Norton stated:

> [The "Declaration of Rights"] was the proper place for [it]. The declaration of the sovereignty of the people[] emanates from the foundation of our Republic. It has been adhered to ever since, and . . . [will] be adhered to in all time to come.

(Browne, Debates in the Convention of California, *supra*, at p. 34.)

Importantly, the Founders understood that the people's right to alter their Constitution was among those rights considered "inalienable." Mr. Shannon, one of the delegates from Sacramento, introduced the Sovereignty Provision together with Article I, Section 1, which acknowledged that "[a]ll men . . . have certain inalienable rights" (hereafter referred to as the "Inalienable Rights Provision").[3] (Browne, Debates in the Convention of California, *supra*, at pp. 33-34.) The delegates debated those provisions together and eventually decided to enshrine them as the first two sections in the "Declaration of Rights." (*Ibid.*) Tellingly, in the

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[3] The full text of the Inalienable Rights Provision stated:

> All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property: and pursuing and obtaining safety and happiness.

(Cal. Const. of 1849, art. I, § 1.)

"Address to the People of California," which was presented to the people with the first copy of the proposed Constitution, the constitutional delegates recognized that the right to "alter or reform" the Constitution is an "inalienable right" of the people. (*Id.* at p. 474.)

This view mirrors the understanding of most individuals who participated in drafting the federal and other state constitutions. (*See, e.g.*, 2 Elliot, Debates in the Several State Conventions, *supra*, at p. 432 [statement of James Wilson acknowledging that the people "may change the constitution whenever and however they please" because "[i]t is a power paramount to every constitution, *inalienable* in its nature"] [emphasis added].) In fact, many other state constitutions expressly refer to this right as "inalienable," the same way California's Founders understood it. (*See, e.g.*, Md. Const. Decl. of Rts., art. 1 ["inalienable right to alter, reform or abolish"]; Tex. Const. art. I, § 2 [same]; Ky. Const. § 4 ["inalienable and indefeasible right to alter, reform or abolish"]; Pa. Const. art. 1, § 2 [same]; Wyo. Const. art. I, § 1 [same]; Ala. Const. art. I, § 2 ["inalienable and indefeasible right to change"]; Va. Const. art. I, § 3 ["indubitable, inalienable, and indefeasible right to reform, alter, or abolish"]; W. Va. Const. art. III, § 3 [same].

California's Founders also understood that the people's inalienable right to change the Constitution extends over all government officials including the judiciary. After Delegate Shannon introduced the Sovereignty Provision, a delegate from Monterey named Mr. Ord proposed the following language in its place: "That all power is vested in, and consequently derived from the people; that magistrates are their trustees and servants, and at all times amenable to them." (Browne, Debates in the Convention of California, *supra*, at p. 34.) Mr. Shannon replied that the original provision was "more comprehensive" and that Mr. Ord's language "did not . . . add[] to it." (*Ibid.*) This exchange suggests that the

Sovereignty Provision included Mr. Ord's specific concerns regarding the amenability of magistrates—a generic term that included both political and judicial officials. (*See* Black's Law Dict. (8th ed. 2004) pp. 970-71.) Thus, the Sovereignty Provision renders all government officials—political and judicial alike—at all times accountable to the people and thus subject to their supreme authority.

Confirming this understanding of their broad power over the government, Californians have in the past used their sovereign authority to overrule disagreeable judicial acts. The primary example—discussed by Petitioners, Interveners, and the Attorney General—is the enactment of Article I, Section 27, which was upheld by this Court in *People v. Frierson* (1979) 25 Cal.3d 142, 186-87. Prior to the people's enactment of Article I, Section 27, this Court in *People v. Anderson* (1972) 6 Cal.3d 628, 656, decreed that the death penalty "may no longer be exacted in California consistently with article I, section 6, of [the] Constitution" because it is "unnecessary to any legitimate goal of the [S]tate and is incompatible with the dignity of man and the judicial process." (*Ibid.*) In response, the people enacted Article I, Section 27, which stated, in direct opposition to the *Anderson* decision, that "[t]he death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 . . . ." (Cal. Const., art. I, § 27.) By upholding this constitutional amendment in *Frierson*, this Court affirmed the people's power to alter the Constitution for the purpose of reversing a decision of this Court.

Similarly, the people on numerous occasions have used their sovereign authority over the federal constitution as a means of judicial oversight. First, the people enacted the Eleventh Amendment of the federal constitution to reverse the Supreme Court's eradication of states' sovereign immunity in *Chisholm v. Georgia* (1793) 2 U.S. 419. (*See* Amar,

America's Constitution, *supra*, at p. 334 [noting that the Eleventh "[A]mendment [was] designed to overrule the Court"].) Second, the people enacted the Fourteenth Amendment, in part, to renounce Chief Justice Roger B. Taney's denial of the fundamental rights of minorities in *Dred Scott v. Sanford* (1857) 60 U.S. 393. (*See Bell v. Maryland* (1964) 378 U.S. 226, 300-01 [noting that "[t]he first sentence of [Section] 1 of the Fourteenth Amendment . . . was obviously designed to overrule *Dred Scott*"].) Third, the people authorized the Sixteenth Amendment for the sole purpose of reversing the Supreme Court's decision regarding income taxes in *Pollock v. Farmers' Loan & Trust Co.* (1895) 158 U.S. 601. (*See Brushaber v. Union Pacific R.R. Co.* (1916) 240 U.S. 1, 18 ["[I]n light of the . . . decision in the *Pollock* Case . . . , there is no escape from the conclusion that the [Sixteenth] Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* Case was decided"].) Finally, the people approved the Twenty-Sixth Amendment to overturn the Court's voting-rights decision in *Oregon v. Mitchell* (1970) 400 U.S. 112. (*See Seminole Tribe v. Florida* (1996) 517 U.S. 44, 109, fn.7 (dis. opn. of Souter, J.) [noting the "Twenty-Sixth Amendment's rejection of *Oregon v. Mitchell*"].)

The Attorney General's inalienable-rights argument does not account for the inalienable nature of the people's right to change their Constitution.[4] He in essence argues that the people acting in their sovereign capacity cannot define the scope of "inalienable" rights unless this Court finds a compelling reason for doing so. (Gov. Ans. Br. at p. 89.) By making this argument, however, the Attorney General is directly

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[4] *Amicus* readily acknowledges that some legal commentators believe certain "inalienable" rights cannot be altered or defined by either the government or the people in their sovereign capacity. Without expressing an opinion on that issue, *Amicus* emphasizes that California's Founders did not share that view of the "inalienable" rights listed in Article I, Section 1.

encouraging this Court to deny the people's *inalienable* right to alter their Constitution as they see fit. By inviting the Court to bulldoze this precious first right of the people, the Attorney General's theory creates far more problems than it solves.

In addition to asking this Court to infringe an inalienable right, the Attorney General's theory creates other concerns. First, he attempts to give the judiciary a veto over the people's authority to change their Constitution. According to the Attorney General, this veto applies whenever, in the jurists' estimation, the people's decision does not "sufficiently further[] the public health, safety, or welfare." (Gov. Ans. Br. at p. 89.) Yet, the people, when acting in their sovereign capacity, sit above the judiciary. Thus, granting the judiciary a veto over the people inverts the hierarchy of power under California's system of government.

Second, the Attorney General's theory imbues the judiciary with a uniquely legislative power—the authority to assess the "wisdom" of the people's decisions on matters of public policy. But this Court has long recognized that it lacks authority to assess the wisdom of the people's sovereign choices. (*See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 [recognizing that it is inappropriate for the Court to "consider or weigh the social wisdom or general propriety of [an] initiative"]; *see also People v. Bunn* (2002) 27 Cal.4th 1, 17 [acknowledging that the judiciary cannot "inquir[e] into the 'wisdom' of underlying policy choices"].) By encouraging judicial supremacy, the Attorney General presents arguments that are antithetical to California's system of government.

Finally, the Attorney General's inalienable-rights argument derives from a flawed premise: his belief that the people acting in their sovereign capacity cannot remove the "inalienable" rights identified in Article I, Section 1. First, this premise mischaracterizes Proposition 8's effect.

Proposition 8 did not "remove" an "inalienable" right, but merely defined the constitutional right to marriage. The right to marriage has not been removed from any person; it is still alive and well in the State of California, and all persons (over age 18) are free to enter in. Second, even if Proposition 8 is viewed as removing an inalienable right, the debates of California's Founders demonstrate that the "inalienable" rights in Article I, Section 1 can be taken away by the people acting in their sovereign capacity. (Browne, Debates in the Convention of California, *supra*, at pp. 33-34.) To this effect, Mr. Botts, one of the delegates from Monterey, indicated that the people "by their own act . . . can be legally dispossessed of those privileges." (*Id.* at 34.) Thus, the Founders understood that while the government—*i.e.*, legislators or executive officials—cannot eliminate the "inalienable" rights listed in Article I, Section 1 (*see* Hamilton, The Federalist No. 84, *supra*, at p. 512 ["[A] declaration of rights . . . under our constitutions must be intended as limitations of the *power of the government itself*"] [emphasis added]), the people acting in their sovereign capacity can collectively choose to do so.

III. A Proper Historical Understanding Of The People's Broad Initiative Power Supports Its Use To Refine This Court's Decisions Regarding Fundamental Rights And Suspect Classes.

Throughout the years, Californians have fiercely guarded their inalienable right to change their basic governing charter. Since the inception of California's statehood, its people have been able to amend their Constitution through mere majority approval. The California Constitution of 1849 originally provided for amendment through majority legislative approval followed by majority popular vote. (Cal. Const. of 1849, art. X, § 1.) Over time, however, as public distrust of government officials grew, Californians decided that their sovereign power over the Constitution should be more direct. So, in 1911, the people amended their

Constitution to provide for amendment through initiative, thus altogether eradicating the requirement of legislative involvement. (Cal. Const, art. II, § 8, subd. (a); *id.*, art. IV, § 1.)

The 1911 amendment affirmed the people's preeminence under California's constitutional system of government. That amendment was "[d]rafted in light of the theory that all power of government ultimately resides in the people." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) Former California Governor Hiram Johnson—champion of the 1911 amendment—stated that the amendment "buil[t] upon the fundamental idea that this government belongs to all the people and should be [directed by] those to whom it thus belongs." (Dinan, *Framing a People's Government: State Constitution-Making in the Progressive Era* (1999) 30 Rutgers L.J. 933, 946-47 (hereafter *Framing a People's Government*).) It is therefore "well settled that the power of initiative [created in 1911] . . . is the exercise by the people of a power *reserved* to them." (*Blotter v. Farrell* (1954) 42 Cal.2d 804, 809.)

Understanding that the initiative power derives from the people's plenary authority over their government demonstrates why this Court must afford extreme deference when analyzing a judicial challenge to an enacted initiative. (*See* Intnr. Opp. Br. at p. 6 [noting the deferential "standard of review" that Proposition 8 must be upheld unless its impropriety is "clearly, positively, and unmistakably" shown].) Strictly speaking, because the initiative is an act of the people in their sovereign capacity, they are operating in a realm above the judiciary. This Court must therefore show the utmost respect when its creator—the sovereign people—returns to the drawing board.

History reveals that the people intended their initiative power to affirm their authority over government officials. Governor Johnson remarked that the newly minted initiative power was necessary to guard

against "governmental aggression." (*Framing a People's Government, supra*, 30 Rutgers L.J. at pp. 946-47.) He argued that it would do so in two ways. First, the initiative "give[s] to the electorate the power of action when desired, and . . . place[s] in the hands of the people the means by which they may protect themselves" from improvident or disagreeable government action. (Hiram Johnson, 23rd Governor of California, Inaugural Address (January 3, 1911) <http://www.californiagovernors.ca.gov/h/documents/inaugural_23.html> [as of January 10, 2009].) Second, the initiative serves as an "admonitory and precautionary measure which will ever be present before [government] officials, and the existence of which will prevent the necessity for its use." (*Ibid.*)

Embracing Petitioners' arguments and placing this Court's *Marriage Cases* decision beyond the people's initiative power defeats both of these acknowledged purposes. First, it wholly removes "the power of action" from "the hands of the people" on an important public-policy issue such as marriage, thus withholding the people's sovereign right to protect themselves from judicial overreaching. Second, it insulates the judiciary from the people's oversight, thereby destroying much of the initiative's "admonitory" purpose.

In contrast to Petitioners' attempts to shield the *Marriage Cases* decision, early twentieth-century history demonstrates that the people can use their initiative power to overturn the acts of the judiciary. A "principal concern" among states adopting the initiative power and other Progressive Era reforms "was that, beginning in the final decades of the nineteenth century, the federal and state courts had begun to exercise judicial review to strike down a number of laws that were [favored by] the public." (*Framing a People's Government, supra*, 30 Rutgers L.J. at p. 949.) The people thus created the initiative as a means to overcome these disfavored judicial decrees. In fact, as previously discussed, this Court has already recognized

that the people's initiative power can be used as a check on the judiciary—to, in effect, reverse a prior decision of this Court. (*See Frierson*, 25 Cal.3d at pp. 186-87.)

Despite these historic underpinnings, Petitioners contend that the people cannot use their initiative power to affect fundamental rights of suspect classes because those issues lie uniquely within the realm of the judiciary, beyond even the sovereign people. In making this argument, Petitioners imply that the People have completely ceded their sovereign authority over admittedly important issues of fundamental rights, leaving the judiciary with *carte blanche* authority. While it is true the people have entrusted the judiciary with the task of securing fundamental rights against unwarranted government intrusion, the sovereign people have reserved the right—through the Preamble, the Sovereignty Provision, and the initiative power—to intervene when the Court's interpretation of constitutional rights conflicts with the public's understanding of *their own document.*

Moreover, this Court's *Frierson* decision further belies Petitioners' attempts to exclude the initiative power from issues involving the fundamental rights of suspect classes. In its *Anderson* decision, this Court found that the "cruel or unusual punishment clause of the California Constitution, like other provisions of the Declaration of Rights, operates to restrain legislative and executive action and to *protect fundamental individual and minority rights* against encroachment by the majority." (*Anderson*, *supra*, 6 Cal.3d at p. 640 [emphasis added].) In response to this judicial decree, the people used their initiative power to overrule the Court's purported "protect[ion] [of] fundamental individual and minority rights," which was affirmed in *Frierson*. This saga shows that the initiative power can be used to dictate this Court's interpretation of "fundamental individual and minority rights," even those involving life—the most fundamental of all individual rights. (*See In re Marriage of Harris* (2004)

34 Cal.4th 210, 237 ["Personal liberty is a fundamental interest, second only to life itself, as an interest protected under . . . the California . . . Constitution[]"] [quotations omitted]; *Maxon v. Superior Court* (1982) 135 Cal.App.3d 626, 634 [noting that the "paramount right to life" transcends the "fundamental right[] to privacy"].)

The people's power to define the constitutional right to marriage is consistent with this Court's understanding of fundamental rights. Fundamental rights, in addition to being grounded in California's history and traditions, are based in "the conscience of our people." (*Dawn D. v. Superior Court (Jerry K.)* (1998) 17 Cal.4th 932, 940.) The people may thus use their initiative power to clarify rights that are admittedly determined by their own "conscience"; that certainly does not conflict with this Court's precedent.

The enactment of the 1911 amendment provides insight into another important issue underlying Petitioners' and the Attorney General's arguments—the level of trust to afford the people. Petitioners and the Attorney General both express a profound mistrust of the people. Yet, that concern regarding the good faith of the people is inherent in nearly all components of a constitutional republic; indeed, as cogently stated by Interveners, "the democratic experiment rests entirely on trust in the people." including trust in jurists to adhere to their solemn oath to uphold the Constitution. (Intnr. Resp. to AG Ans. Br. at p. 19.) Furthermore, to the extent that mistrust of the people is a valid judicial concern, that issue has already been decided—by the people, in their sovereign capacity, when they enacted the 1911 amendment. Prior to that amendment, Governor Johnson candidly acknowledged that "the initiative . . . depend[s] on our confidence in the people and in their ability to govern." (Hiram Johnson, 23rd Governor of California, Inaugural Address (January 3, 1911)

<http://www.californiagovernors.ca.gov/h/documents/inaugural_23.html> [as of January 10, 2009].) He then went on to state:

> The opponents of [the initiative], however they may phrase their opposition, in reality believe the people cannot be trusted. On the other hand, those of us who espouse these measures do so because of our deep-rooted belief in popular government, and not only in the right of the people to govern, but in their ability to govern[.]

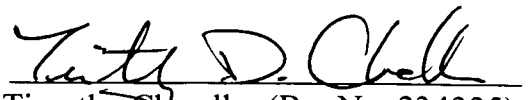
(*Ibid.*) By adopting the 1911 amendment, Californians demonstrated a profound and reverent trust among themselves and in their ability to govern. Petitioners' and the Attorney General's attempts to assail this inherent trust do not advance their respective arguments. In short, none of their legal theories demonstrates that Proposition 8 was an unlawful exercise of the people's initiative power.

CONCLUSION

The novel legal theories presented by Petitioners and the Attorney General threaten to undermine California's basic form of government. They seek to erode the sovereignty of the people—the authors and ultimate arbiters of the Constitution—and transfer that authority to the judiciary. *Amicus* asks this Court to exercise the judiciary's greatest strength in a republic—the exercise of self-restraint.

For the foregoing reasons, *Amicus* respectfully requests that this Court reject Petitioners' and the Attorney General's invented theories, affirm the enactment of Proposition 8, and uphold the people's preeminence in California's constitutional republic.

Respectfully submitted,

By: 

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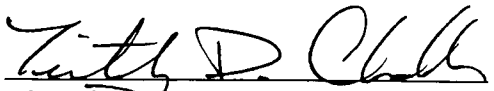
CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that this Brief has been prepared using proportionately spaced Times New Romans font in 13-point typeface, including footnotes. Counsel also certifies that, according to the word-count feature in Microsoft Word, this brief contains 5,652 words, including footnotes but excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Application to File.



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PROOF OF SERVICE

I, Joshua Tijerina, declare: I am a resident of the State of Arizona and over the age of eighteen years, and not a party to the within action; my business address is 15100 North 90th Street, Scottsdale, Arizona 85260.

On January 14, 2009, I served the following document(s):

1. **BRIEF AMICUS CURIAE OF FAMILY RESEARCH COUNCIL IN SUPPORT OF INTERVENERS**

on the interested parties in this action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

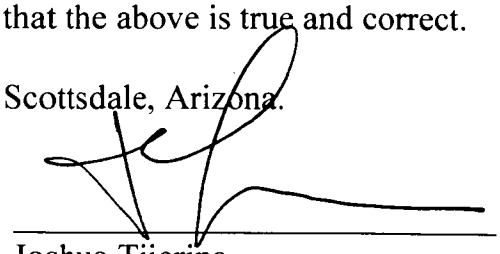
PLEASE SEE ATTACHED SERVICE LIST

and served the document(s) in the manner indicated below:

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Scottsdale, Arizona addressed as set forth below.

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 Scottsdale, Arizona.



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